Problems in the Law of Succession: Creditors' Rights

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When a person dies, there should be a winding up of affairs in which the assets owned are identified and gathered together, debts and taxes paid, and the decedent’s property delivered to properly identified successors. Such is the function of probate proceedings in the law. In Louisiana law, a discussion of creditors’ rights in the succession must begin with the concept of universal succession which our law implements.

Universal Succession and its Consequences

Universal succession is the distinctive feature of Louisiana probate law. On the death of the ancestor, the heirs immediately succeed to the entire patrimony of the decedent. The maxim “le mort saisit le vivant” is a shorthand exposition of the entire doctrine of universal succession.

Under universal succession, there is no interruption of ownership, but the law may require an administration of the ancestor’s patrimony for the benefit of creditors before the heirs are judicially placed in possession and permitted to exercise the ordinary attributes of owner-
ship. In many instances, however, the heirs may be placed into possession by an unconditional acceptance of the succession without any sort of administration. In this respect, Louisiana law diverges from common law jurisdictions where an administration for the benefit of creditors is typical. The Louisiana procedures achieve substantial economies in expenses, time, and judicial energy. Historically, these economies have been possible because universal successions protect creditors. The heirs may obtain possession of the ancestor’s property with an unconditional acceptance (in lieu of an administration); by an unconditional acceptance, the heirs became personally liable to creditors for the decedent’s debts.

The consequences of an unconditional acceptance can be disastrous if the decedent is heavily indebted or insolvent. Consequently, Louisiana law always has allowed two other options: the heirs may renounce the succession entirely or accept “with benefit of inventory” and avoid personal liability for the decedent’s debts. This phrase “with benefit of inventory” is a term of legal art which is subject to a misunderstanding which may be illustrated by the following scenario.


By the fiction of the law, “le mort saisit le vif,” the heir is seised of right, but not in fact, until he accepts the succession and is sent into or takes possession according to law. As long as the property is under administration it remains in the custody of the law, and the rights of heirs and legatees are in abeyance until the administration is closed.

4. Over the years the shopworn phrase “purely, simply, and unconditionally” has become the standard language in petitions for possession to describe this sort of acceptance.


6. 31 Am. Jur. 2d Executors and Administrators § 8 (1967) states, “Theoretically, administration on a decedent’s estate is necessary in all cases, because title to the personality does not descend to the next of kin . . . .” Instead, personal property descends to the personal representative, i.e., the executor or administrator. The source notes certain exceptions. The same source, in § 9 states, “Each creditor has the right to compel administration and, through administration, to subject the debtor’s estate, real and personal, to the payment of debts against the estate.” See also Haskell, Preface to Wills, Trusts and Administration 164 (1987). The Model Probate Code, adopted in some states, makes a theoretical change from classic common law by having all property, real or personal, descend to the successors, but such property is subject to the administration of the decedent’s estate for the payment of creditors.


Assume that decedent discovered a man dating his estranged wife and thereupon shot and killed him. Decedent then committed suicide and his estranged wife had herself placed in possession as universal legatee based on an unconditional acceptance of the succession. The victim's survivors then sue decedent's widow for the wrongful death of their father. The suit asserts no wrongful act by decedent's widow; rather it merely asserts her personal liability, due to her unconditional acceptance of the succession, for the wrongful acts of decedent. The widow will argue vehemently that because there was a detailed descriptive list in the succession proceedings, she accepted "with benefit of inventory" and thus has no personal liability for decedent's death. The argument is utterly unsound and the widow loses.

Louisiana Civil Code article 1423 states the basic rule that heirs, by accepting a succession without benefit of inventory, "contract the obligation to discharge all the debts of such succession," regardless of the amount and even if the debts "far exceed the value of the effects composing it." Universal legatees incur the same obligation to pay the debts as the universal heir, and this obligation results in personal liability. The creditor may sue the accepting heir or legatee directly for the debt. The filing of an inventory or detailed descriptive list, as such, is not an acceptance "with benefit of inventory." Such has been the law of Louisiana for many years.

**Louisiana Revised Statutes 9:1421**

By 1986 La. Acts No. 602, the legislature adopted Louisiana Revised Statutes 9:1421 which declares that:

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11. La. Code Civ. P. art. 3136 permits a detailed descriptive list to be used instead of a formal inventory by a notary.

12. But see La. R.S. 9:1421 (Supp. 1987) adopted by 1986 La. Acts No. 602. The facts of the hypothetical are similar to an actual case in which the author was counsel. The trial court held that since the widow "accepted" before the wrongful death suit was filed, the "debt" did not then exist and she had no personal liability. The court of appeal reversed, but unfortunately the opinion is unpublished and may not be cited. There is no doubt, however, that accepting heirs or universal legatees are liable for the delictual obligations of a decedent. See La. Code Civ. P. art. 427 comment (b); Ruiz v. Clancy, 182 La. 935, 162 So. 734 (1935); Parish v. Minvielle, 217 So. 2d 684 (La. App. 3d Cir. 1969).


Notwithstanding any provision in the law to the contrary, including but not limited to Civil Code Articles 976 through 1013 and Civil Code Articles 1415 through 1466, every successor is presumed and is deemed to have accepted a succession under benefit of inventory even though the acceptance is unconditional, and where an inventory or descriptive list has been executed. In such case, every heir or legatee, whether particular or under universal title, shall not in any manner become personally liable for any debt or obligation of the decedent or his estate, except to the extent and value or amount of his inheritance; however, any such heir or legatee may, in the petition for possession or by a separate instrument in writing, personally obligate himself for any or all of such debts or obligations.\footnote{16. La. R.S. 9:1421 (Supp. 1987). Perhaps coincidentally, this Act was adopted when the unreported opinion mentioned in note 12 was pending in the court of appeal.}

If this amendment is interpreted to mean that the heirs have no personal liability for the decedent’s debts whenever there is a detailed descriptive list in the succession proceedings, even if the heirs are put into possession without an administration—and that appears to be the intent—it will cause a revolution in the handling of creditors’ claims against the succession and is likely to lead creditors to demand security or an administration\footnote{17. La. Code Civ. P. arts. 3007-3008.} in every succession. In that event, Louisiana will lose the probate economy it has previously enjoyed.

There seems to be a fundamental misapprehension about the provisions of the Louisiana Civil Code and the Louisiana Code of Civil Procedure. The phrase “with benefit of inventory” signals that there will be an administration of the succession. Louisiana Civil Code article 1032 uses this legal shorthand to describe the conditions under which the heir avoids personal liability for the decedent’s debts and receives only the residuum after creditors are paid.\footnote{18. La. Civ. Code art. 1032.} In fact, the formal steps to be followed are contained in Louisiana Code of Civil Procedure, Book 6, Title 3, which deals with administration of successions, rather than in the Louisiana Civil Code. \textit{It is the administration of the succession and the payment of creditors in that administration which relieves the heirs of personal liability for the decedent’s debts, not the ritual incantation that they accept “with benefit of inventory”}.\footnote{19. This statement appears to be true even for a minor who is “considered” to accept a succession per La. Civ. Code art. 337 (formerly La. Civ. Code art. 352 (1870)) with benefit of inventory.}
personal liability is most readily seen in cases in which an administration is started, but the heirs are placed into possession without a complete administration. A heir is entitled to be sent into possession "with benefit of inventory" only after the succession has been fully administered. As explained in Kelly v. Kelly:

The benefit of inventory, therefore, does not give an heir the right to take possession, unconditionally, or as owner, of any of the property of the succession, without making himself liable personally for the debts or obligations of the succession. When the succession is accepted under benefit of inventory, the estate must be administered and liquidated—even though the beneficiary heir himself should be the administrator for the benefit of the creditors primarily; the rights of the beneficiary heir being only residuary. Therefore, any other putting into possession, including possession with incomplete administration, is an unconditional acceptance which leaves the heir personally liable for the decedent’s debts.

It is useful to consider the position of a minor heir. Under Louisiana Civil Code article 337, a minor does not have to make a formal acceptance of a succession, but "shall be considered" to accept it with benefit of inventory. Does this mean that a minor cannot be liable for the decedent’s debts if there is no administration of the succession?

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20. See, e.g. Pacific Land Title Corp. v. Executive Office Centers, Inc., 420 So. 2d 1021 (La. App. 5th Cir. 1982). La. Code Civ. P. arts. 3362 and 3372 expressly authorize the heirs to abort an administration and be placed in possession, but it must be by an unconditional acceptance. The jurisprudence allows a surviving spouse to abort an administration and be sent into possession of the community, as owner of one half and as usufructuary of the other half. See Succession of Pyle, 434 So. 2d 523 (La. App. 2d Cir. 1983); Succession of Caffarel, 378 So. 2d 202 (La. App. 4th Cir. 1979), writ denied, 381 So. 2d 509 (1980). The problems created by these decisions are discussed in Cavanaugh, Problems in the Law of Succession: Succession Representatives, Surviving Spouses, and Usufructuaries, 47 La. L. Rev. 21 (1986).


22. Pacific Land Title Corp. v. Executive Office Centers, Inc., 420 So. 2d 1021, 1024 (La. App. 5th Cir. 1982): "If the succession was fully administered the heir was entitled to possession under benefit of inventory, otherwise, the heir was entitled to possession only on an 'unconditional acceptance.'" The court held the succession was not fully administered and the heir was liable for the decedent's debts. See also Bradley v. Union Nat'l Life Ins. Co., 359 So. 2d 663 (La. App. 1st Cir. 1978), for a consistent decision regarding the personal liability of a person who was a minor at the time of death of the decedent but who remained in possession of succession assets, without judicial proceedings, after reaching majority.

Bradley v. Union National Life Insurance Company24 presented that question, for the minor heir took possession without judicial proceedings for the succession. After the heir attained majority, she continued to possess the succession assets. Her continued possession was held to be a tacit acceptance which rendered her personally liable to the decedent’s creditors.

Two old cases, Hall v. Parks25 and Parks v. Patten,26 appear to say that there must be an administration whenever there is a minor heir, as they accept with benefit of inventory. If the language in Louisiana Civil Code article 337 indicating that a minor “shall be considered” an acceptance with benefit of inventory, does not relieve the minor heir of personal liability when there is no administration of the succession, can the language of Louisiana Revised Statutes 9:1421 indicating that every successor “is presumed and is deemed” to accept with benefit of inventory relieve an heir of personal liability if there is no administration of the succession?27

The essential irrelevance of the filing of an inventory or detailed descriptive list28 to the discharging of the heirs from personal liability for the decedent’s debts is obvious. What if the inventory is inaccurate and a debt is omitted so that the succession is closed with a judgment of possession? Under Louisiana Code of Civil Procedure article 3393, it may be possible to reopen the succession to deal with the creditor’s claim.29 In any event, if the succession was fully administered, the heirs

24. 359 So. 2d 663 (La. App. 1st Cir. 1978).
25. 9 Rob. 138 (La. 1844).
26. 9 Rob. 167 (La. 1844).
27. The result of the cases cited in the text appears to be that a minor is relieved of liability only if there is an administration. La. Code Civ. P. art. 732 and the tutorship articles, La. Code Civ. P. arts. 4261-4275, clearly contemplate that a minor’s obligations may be enforced, although an unemancipated minor has no procedural capacity to stand in judgment.
28. Such a document is, of course, a practical necessity for an administration, but it has no logical relationship to relief of the heirs from personal liability.
29. La. Code Civ. P. art. 3393. There is substantial doubt whether the succession can be so reopened in these circumstances. The statute permits a reopening to deal with omitted assets “or for any other proper cause.” See Succession of Lasseigne, 488 So. 2d 1303 (La. App. 3d Cir.), writ denied, 494 So. 2d 327 (1986); In Re Richardson’s Estate, 214 So. 2d 185 (La. App. 4th Cir.), writ denied, 253 La. 66, 216 So. 2d 309 (1968). Both cases refused to reopen the succession, but both suggested reopening is possible to deal with a creditor’s claim. See also Succession of Anderson, 323 So. 2d 827 (La. App. 4th Cir. 1975), in which the court pretermitted consideration of La. Civ. Code art. 3393 and ordered the trial court to allow the alleged creditor to sue to annul the judgment of possession for fraud and ill practices under La. Civ. Code art. 2004. There has been considerable reluctance on the part of courts to reopen successions for reasons other than omitted assets. It would be desirable to amend the Louisiana Code of Civil Procedure to authorize expressly reopening the succession to deal with creditors’ claims.
will have no personal liability, but the property of the former succession will still be liable for the debt.\textsuperscript{30} Death does not cancel debt; cancellation occurs only by prescription.\textsuperscript{31} On the other hand, if the heirs were placed into possession before the succession was fully administered, they will be personally liable for the debt.\textsuperscript{32}

Since under universal succession the heirs succeed to the entire patrimony of the deceased, the patrimony may well include obligations other than "debts" which require payment in money.\textsuperscript{33} A few types of "debts" usually are not reflected on an inventory or detailed descriptive list because they are not present obligations to pay money. Contingent liabilities (such as the potential and secondary liability of the indorser of a negotiable note) rarely appear, and warranty obligations never appear in succession documents. Nevertheless, the heirs who make an unconditional acceptance are bound by the warranty obligations of the decedent.\textsuperscript{34} Title examiners regularly rely on such estoppel by deed cases. If the succession is fully administered before the heirs are placed in possession, they are not bound by the decedent's warranties even though these warranties are never disclosed in the inventory or detailed descriptive list.\textsuperscript{35}

\textsuperscript{30}. See, e.g., La. R.S. 9:5011 to 5016 (1983). Where the heirs accept with benefit of inventory and the succession is administered so that creditors are paid, the proceeding has a strong analogy to a bankruptcy proceeding. Both reflect the basic idea of requiring all claims against certain assets to be asserted in a single proceeding.

\textsuperscript{31}. Note that Louisiana, unlike many states, does not have a bar claim statute under which there is a published notice of a date after which no claim can be asserted against a succession.

\textsuperscript{32}. Pacific Land Title Corp. v. Executive Office Centers, Inc., 420 So. 2d 1021 (La. App. 5th Cir. 1982). The old cases collected in official comment (c) to La. Code Civ. P. art. 3001 illustrate that the omitted creditor's remedy is to sue the heirs for their virile share of the debt.

\textsuperscript{33}. All heritable obligations are transmitted to the heirs; purely personal obligations are not. See La. Civ. Code arts. 1765-1766 (former La. Civ. Code arts. 1997-2009 (1870)) for the distinction between heritable and purely personal obligations.

\textsuperscript{34}. Boyet v. Perryman, 240 La. 339, 123 So. 2d 79 (1960); Louisiana Canal Co. v. Leger, 237 La. 936, 112 So. 2d 667 (1959); Arnett v. Marshall, 210 La. 932, 28 So. 2d 665 (1946); White v. Hodges, 201 La. 1, 9 So. 2d 433 (1942); Jackson v. United Gas Pub. Serv. Co., 196 La. 1, 198 So. 633 (1940), cert. denied, 311 U.S. 686, 61 S. Ct. 63 (1940); Mims v. Sample, 191 La. 677, 186 So. 66 (1938); James Harvey Ramsey Estate, Inc. v. Pace, 467 So. 2d 1202 (La. App. 2d Cir. 1985); Pacific Land Title Corp. v. Executive Office Centers, Inc., 420 So. 2d 1021 (La. App. 5th Cir. 1982); Butler v. Butler, 212 So. 2d 213 (La. App. 2d Cir.), writ denied, 252 La. 877, 214 So. 2d 548 (1968); Cattle Farms, Inc. v. Abercrombie, 211 So. 2d 354 (La. App. 4th Cir. 1968). Every sale of immovable property under standard warranties includes warranty of title. The cited cases show the importance of these heritable obligations.

\textsuperscript{35}. This conclusion is the converse of the propositions established by the cases cited in the previous note. Compare Little v. Barbe, 195 La. 1071, 198 So. 368 (1940), which shows that where the heir never accepts the ancestor's succession, the heir is not bound by the ancestor's warranties.
With this background, Louisiana Revised Statutes 9:1421 appears to attempt a radical change in Louisiana law which is quite in conflict with the doctrine of universal succession. Apparently, the legislature intended to overrule such cases as *Kelly v. Kelly* and *Pacific Land Title Corp. v. Executive Office Centers, Inc.* so that the accepting heirs who are placed in possession without an administration of the succession have no liability for the decedent's debts if a detailed descriptive list or inventory is filed in the succession proceedings. Whether the attempt was successful is not clear. Since the meaning of "with benefit of inventory" has been, heretofore, that the heirs consent to an administration of the succession, an administration may still be required to achieve the limited liability of the heirs. Assuming that the statute relieves heirs of personal liability even if there is no administration, some creditor left without a remedy by this interpretation may persuade the courts that Louisiana Revised Statutes 9:1421 is unconstitutional under the doctrine of substantive due process. Under this view of the statute, title examiners will have to note that heirs will not be liable on the warranties owed by the decedent.

Louisiana Revised Statutes 9:1421 should inspire caution in attorneys. Until there is an authoritative interpretation of the statute by the Louisiana Supreme Court, prudent attorneys representing heirs should not assume that heirs can be relieved of personal liability for the decedent's debts, without an administration of the succession, merely by filing a detailed descriptive list or inventory. On the other hand, prudent attorneys representing creditors should assume that heirs can be relieved of personal liability for the decedent's debts, without an administration of the succession, merely by filing a detailed descriptive list or inventory, and act accordingly.

In any succession pursued to a judgment of possession, there will be a detailed descriptive list or inventory filed. If Louisiana Revised

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36. 198 La. 338, 3 So. 2d 641 (1941).
37. 420 So. 2d 1021 (La. App. 5th Cir. 1982).
38. The additional language of La. R.S. 9:1421 (Supp. 1987) reflects that the legislature intended limited liability of the heirs any time a detailed descriptive list is filed. On the other hand, to comply with the statute, counsel for the heirs has to watch his language in the petition for possession; the traditional language in such documents imports acceptance of personal liability by the heirs. See, e.g., McMahon & Rubin, La. Code Civ. P., vol. 11, form 802(a).
39. Consider the case in which the heirs file a detailed descriptive list, immediately are sent into possession without an administration, and then promptly sell the assets received to a third party in good faith. It appears that a creditor of the decedent would have no remedy unless he can follow the assets into the hands of a third party. See La. R.S. 9:5011 to 5016 (1983).
40. The heirs may not be placed into possession until inheritance taxes are paid or
Statutes 9:1421 is held to mean the heirs can be relieved of personal liability merely by filing this document in the succession proceedings—and that appears to be the intent—then the basic Louisiana law on the liability of heirs for debts of the decedent has been changed radically so that such liability will exist only in the case of a tacit acceptance of the succession without judicial proceedings. This result might give vitality to the privileges adopted when the Louisiana Code of Civil Procedure abolished the ancient action for separation of patrimony.

Louisiana Revised Statutes 9:5011 to 9:5016 actually provide for three separate privileges. One privilege is in favor of creditors of the deceased and another in favor of a particular legatee. The third privilege

the Department of Revenue has indicated that no such taxes are due. La. R.S. 47:2407 to 2413 (1952 & Supp. 1987); La. Code Civ. P. arts. 2951-2954. To get approval on the taxes owed or not owed, it is necessary to furnish a copy of the detailed descriptive list or inventory. Such a document is also required by La. Code Civ. P. art. 3001 to show that the succession is relatively free from debt.

41. See La. Civ. Code arts. 988 and 990 on tacit acceptance. There are numerous cases on the subject. A suit to partition or to be declared owner of a succession asset constitutes tacit acceptance. Smith v. Smith, 230 La. 509, 89 So. 2d 55 (1956); Mitcham v. Mitcham, 186 La. 641, 173 So. 132 (1937). Likewise, exercise of dominion over a succession asset, as by mortgaging or selling it, constitutes a tacit acceptance. Barnsdall Oil Co. v. Appelgate, 218 La. 572, 50 So. 2d 197 (1950); Parish v. Minvielle, 217 So. 2d 684 (La. App. 3d Cir. 1969); Butler v. Butler, 212 So. 2d 213 (La. App. 2d Cir.), writ denied, 252 La. 877, 171 So. 2d 548 (1968); Southern Natural Gas Co. v. Naquin, 167 So. 2d 434 (La. App. 1st Cir.), writ denied, 246 La. 884, 168 So. 2d 268 (1964). Acts that go beyond conservatory measures, such as managing the property of the decedent, drawing revenues from it, etc., constitute a tacit acceptance. Succession of Breeland, 383 So. 2d 423 (La. App. 4th Cir. 1980); Bradley v. Union Nat'l Life Ins. Co., 359 So. 2d 663 (La. App. 1st Cir. 1978). However, merely conservatory acts or payment of the decedent's funeral expenses do not result in a tacit acceptance. Pelican Well Tool & Supply Co. v. Sebastian, 212 La. 217, 31 So. 2d 745 (1947); McClelland v. Clay, 444 So. 2d 639 (La. App. 5th Cir. 1983).


43. La. R.S. 9:5011 (1983) provides:

A creditor of the succession of a deceased person has a privilege on all of the property left by the deceased, if the heirs or legatees have accepted the succession without an administration thereof. The creditor enjoys this privilege whether his claim is demandable or not, and whether it is liquidated or not.

A particular legatee who has not received the delivery of his legacy has a privilege on all of the property left by the deceased, if the residuary heirs or legatees have accepted the succession without an administration thereof.

The privileges provided by this section entitle the succession creditor to be paid out of the proceeds of the judicial sale of the property left by the deceased, and the particular legatee to compel the delivery of his legacy, with preference over the creditors of the heirs or legatees.

Note that the privilege exists when the heirs accept the succession "without an administration thereof"; acceptance "with benefit of inventory" but without an administration does not defeat the privilege. La. R.S. 9:1421 (Supp. 1987) does not appear to alter this statute.
is in favor of creditors of the heirs, that is, not succession creditors.\textsuperscript{44} The key provision is Louisiana Revised Statutes 9:5013 which provides:

A. The privilege provided by R.S. 9:5011 or R.S. 9:5012, for a period of three months after the death of the deceased and whether recorded or not, shall affect the movables owned by the heirs or legatees at, but shall be subordinate to any mortgage granted or other privilege existing thereon prior to, the time the privilege to effect a separation of patrimony is sought to be enforced.

B. If the succession creditor, particular legatee, or creditor of the heir or legatee, as the case may be, files an affidavit of his claim for recordation in the mortgage office of the parish where immovable property is situated within three months of the death of the deceased:

(1) The privileges provided by R.S. 9:5011 shall affect all immovables left by the deceased, including those alienated by the heirs or legatees, as provided by R.S. 9:5014; and

(2) The privilege provided by R.S. 9:5012 shall affect immovables not acquired through the succession and owned by the heir or legatee at, but shall be subordinate to any mortgage granted or other privilege existing thereon prior to, the time the privilege to effect a separation of patrimony is sought to be enforced.

This statute makes it clear that if the succession creditor acts promptly and jumps through the proper procedural hoops, he can enforce his claim against succession immovables even though the heirs alienate them. Under Louisiana Revised Statutes 9:5014 and 9:5015, the creditor must file suit to enforce the privilege within three months from the rendition of a judgment of possession in the succession proceeding.\textsuperscript{45} With respect

\textsuperscript{44} La. R.S. 9:5012 (1983) provides:

A creditor of an heir or residuary legatee who has accepted the succession of a deceased person without an administration thereof has a privilege on all of the property owned by the heir or legatee which was not acquired through the succession. The creditor enjoys this privilege whether his claim is demandable or not, and whether it is liquidated or not.

The privilege provided by this section entitles the creditor of the heir or residuary legatee to be paid out of the proceeds of the judicial sale of the property affected thereby, with preference over the succession creditors.

The purpose of the former action for separation of patrimony was to prevent the assets of the succession from being confounded with those of the heirs before creditors could be paid. Washington v. Washington, 116 So. 2d 125 (La. App. 1st Cir. 1959), amended and aff'd, 241 La. 35, 127 So. 2d 491 (1961). The privileges created when the action for separation of patrimony was abolished can achieve the same result.

\textsuperscript{45} La. R.S. 9:5014 to 9:5015 (1983). For this creditor's remedy to be of any value, the creditor must receive notice of the death and the succession proceedings. Problems relating to notice are discussed infra text accompanying notes 88-99.
to succession creditors, Louisiana Revised Statutes 9:5013 appears to give the succession creditor a privilege which primes prior mortgages on immovable property under Louisiana Civil Code article 3186, but remains inferior to prior mortgages on movables. There are no reported decisions on the statutes which create privileges to effect a separation of patrimony and, heretofore, they appear to have been used little in practice. Louisiana Revised Statutes 9:1421 may lead to their more frequent use in practice.

Actually, Louisiana Code of Civil Procedure article 3007 may provide the unsecured creditor a simpler remedy than the privileges just discussed. Under that article, a succession creditor may file a demand for security in the succession proceeding within three months of the rendition of a judgement of possession. If the heirs do not furnish the security ordered, there must be an administration of the succession. These provisions clearly contemplate that the heirs (who are required to give security) are personally liable to the creditor by virtue of their unconditional acceptance. What effect Louisiana Revised Statutes 9:1421 will have on this remedy is unknown at this time. It would be unfortunate if the amendment deprives the creditors of such an effective remedy.

UNSECURED CREDITORS

At the time the Louisiana Code of Civil Procedure was adopted, unsecured creditors generally held small claims. That is still true with the important exception of funeral expenses and uninsured medical expenses. Due to inflation, such claims can be substantial. Some

47. Official comment (e) indicates that a partially secured creditor is also covered by the article to the extent that he is unsecured. La. Code Civ. P. art. 3007 comment (e).
48. There appears to be no reason why the creditor cannot pursue both remedies.
49. La. Code Civ. P. art. 3008. If the creditor's claim is substantial, the heirs may not be able to provide security. Commercial bonds are virtually unavailable for this purpose (usually procurable only upon deposit with the bonding company of cash collateral equal to the penal sum of the bond); thus the availability of unencumbered immovable property may determine whether the heirs can give security. If the court refuses to order security, that action is not appealable. Succession of Ciruti, 428 So. 2d 1013 (La. App. 1st Cir. 1983).
50. The official comments under La. Code Civ. P. arts. 3007 and 3008 refer back to the official comments under La. Code Civ. P. art. 3001, where this assumption is made express in comment (c).
51. Technically, both funeral expenses and medical expenses related to the last illness are entitled to statutory privileges. See La. Civ. Code arts. 3191-3204. However, it is useful for present purposes to treat all debts as unsecured if there is no consensual security
creditors, such as utility companies, have reasonably effective self-help remedies, but most creditors will need to take prompt action of some sort to procure payment. What that action is depends on whether the succession is opened, and whether the heirs institute administration.

A. Succession Not Opened Judicially

If the succession is not opened judicially, unsecured creditors usually present their invoices to the surviving spouse or to such heirs as the creditor knows. If payment is not forthcoming, the creditor has legal remedies. If there has been a tacit acceptance, and that is usually the result where no succession is opened judicially, the creditor may sue the accepting heirs for the debt as they become personally liable to him by their unconditional acceptance. If the creditor acts promptly, he may secure and enforce the privilege to achieve a separation of patrimony. Act 963 of 1987 amended Louisiana Code of Civil Procedure article 3245 to permit the creditor to file a formal proof claim with the clerk of court in the parish in which the decedent

given for it, since the only secured creditors for whom special provision is made by the Louisiana Code of Civil Procedure are those holding mortgages or pledges.

52. The uninsured liability in tort from an automobile accident or workmen's compensation, for instance, can also be a substantial claim, but these are not frequently encountered. For example, see Parish v. Minvielle, 217 So. 2d 684 (La. App. 3d Cir. 1969). Succession of Isgitt, 297 So. 2d 231 (La. App. 3d Cir. 1974), presented an interesting problem. An alleged employee of the decedent filed suit against him during his lifetime for workmen's compensation. There was apparently no insurance. After the decedent's death, the alleged employee substituted the administratrix of decedent's succession into the suit. The alleged employee also opposed the tableau of distribution in the succession proceeding because it failed to list him as a creditor; at the time, the workmen's compensation suit had not been brought to trial. The court of appeal fashioned a remedy not provided for in the Louisiana Code of Civil Procedure. It ordered the trial court to suspend homologation of the tableau of distribution until the outcome of the workmen's compensation suit was known.

53. If an heir or the surviving spouse remains on the premises of the deceased, the power to cut off utility services is sufficient to extract payment. An interesting query is whether payment of utility bills creates a tacit acceptance of the succession of the decedent.

54. A serious argument can be made that in any instance in which there was a régime of community property, the surviving spouse, rather than a succession representative, is the person who has authority to pay debts. For an inquiry into this argument, see Cavanaugh, Problems in the Law of Succession: Succession Representatives, Surviving Spouses, and Usufructuaries, 47 La. L. Rev. 21, 30-33 (1986).


56. Since a tacit acceptance cannot be "with benefit of inventory," such an acceptance is necessarily an unconditional acceptance. The heir's liability is set by La. Civ. Code art. 1423, and La. Civ. Code art. 1426 authorizes a direct suit against the heir for that heir's virile share of the liability.


was domiciled. By so filing a formal proof of claim, the creditor suspends prescription until a judgment of possession is rendered.\footnote{59}

\section*{B. Succession Opened Judicially Without Administration}

Heretofore, it was clear that where the succession was opened judicially and the heirs were placed in possession without an administration, the heirs had made an unconditional acceptance and were personally liable for the decedent’s debts. Thus, the creditor could sue them directly. It is uncertain that such is still the law of Louisiana since Louisiana Revised Statutes 9:1421 declares that the acceptance is deemed to be with “benefit of inventory” if an inventory or detailed descriptive list is filed in the succession.\footnote{60} The unsecured creditor’s only remedies may be to take prompt action to preserve and enforce the privilege granted by Louisiana Revised Statutes 9:5011 to 9:5016 or demand security pursuant to Louisiana Code of Civil Procedure article 3007.\footnote{61} In the circumstances envisioned, Louisiana Revised Statutes 9:1421 may make it wholly impossible for the creditor whose claim is not based on a written document to collect by complying with Louisiana Revised Statutes 13:3721.\footnote{62} Since there never was a succession representative or any administration, the only option Louisiana Revised Statutes 13:3721 leaves

\footnote{59} The prescription on the debt itself is suspended; filing a proof of claim does not affect the prescription on the privilege granted by La. R.S. 9:5011 (1987).

\footnote{60} La. R.S. 9:1421 (Supp. 1987).

\footnote{61} La. R.S. 9:5011 to 5016 (1983); La. Code Civ. P. art. 3007. As noted above, La. R.S. 9:1421 (Supp. 1987) may make this remedy unavailable, as the remedy assumes personal liability of the accepting heirs.

\footnote{62} This “dead man” statute provides:

Parol evidence shall not be received to prove any debt or liability of a deceased person against his succession representative, heirs, or legatees when no suit to enforce it has been brought against the deceased prior to his death, unless within one year of the death the deceased:

1. A suit to enforce the debt or liability is brought against the succession representative, heirs, or legatees of the deceased;

2. The debt or liability is acknowledged by the succession representative as provided in Article 3242 of the Code of Civil Procedure, or by his placing it on a tableau of distribution, or petitioning for authority to pay it;

3. The claimant has opposed a petition for authority to pay debts, or a tableau of distribution, filed by the succession representative on the ground that it did not include the debt or liability in question; or

4. The claimant has submitted to the succession representative a formal proof of his claim against the succession, as provided in Article 3245 of the Code of Civil Procedure.

The provisions of this section cannot be waived impliedly through the failure of a litigant to object to the admission of evidence which is inadmissible thereunder.

is for the creditor to sue the heirs or legatees of the deceased. If Louisiana Revised Statutes 9:1421 relieves the heirs and legatees of personal liability, it is unclear that the creditor whose claim is founded on parol evidence (as certain medical expense claims are) has any remedy at all.63

C. Succession Opened Judicially With Administration

Where the succession is opened judicially and there is an administration, the unsecured creditor's remedies are clear-cut: he presents his claim to the succession representative for acknowledgement and payment in due course,64 and for reasons explored later, he should file a petition for notice as allowed by Louisiana Code of Civil Procedure article 3305.65 If the succession representative refuses to acknowledge the debt, the creditor may sue the succession representative immediately on the debt,66 although once he obtains judgment he cannot execute against the succession property.67 He can, of course, then compel the representative to list his debt on the tableau. He can file a formal proof of claim68 and can preserve and enforce the privilege granted by Louisiana Revised Statutes 9:5011.69 An administration contemplates payment of creditors; where there is an administration, unsecured creditors usually get paid without great difficulty. It should be noted, however, that death acts as a three-month moratorium on payment of debts in these circumstances, as the succession representative cannot be authorized to pay debts until three months after the decedent's death.70

63. The courts might hold that filing a formal proof of claim with the Clerk of Court complies with the statute. Likewise, the courts might hold that a suit to enforce the privilege granted by La. R.S. 9:5011 to 5016 (1983) satisfies the statute. It should be noted that the "dead man" statute is not congruent with La. R.S. 9:5011 to 5016 (1983). The privilege appears to be available to all creditors, even if the claim is unliquidated or founded on parole evidence. To give effect to the "dead man" statute, its provisions would have to be applicable to proceedings to enforce the privilege.

64. La. Code Civ. P. art. 3241. In Guaranty Bank & Trust Co. v. Quad Drilling Corp., 284 So. 2d 351, 354 (La. App. 1st Cir.), writ denied, 284 So. 2d 767 (1973), the court held that a creditor is required to make this claim against the succession as a condition precedent to enforcing his claim if a succession representative has been appointed. See also Matherne v. Matherne's Estate, 341 So. 2d 1254 (La. App. 1st Cir. 1976), writ denied, 343 So. 2d 1072 (1977).


70. La. Code Civ. P. art. 3302. Under the terms of the article, the succession representative can be authorized to pay urgent debts before the end of the statutory moratorium. There is another important exception. If the succession representative has
Secured Creditors

Louisiana Code of Civil Procedure article 3248 expressly allows the holder of a conventional mortgage or pledge of movable or immovable property to enforce his rights in a separate suit outside the succession proceedings.\(^7\) Apparently, all other creditors, even the holder of a judicial mortgage resulting from recordation of a final, unappealable judgment, are deemed unsecured creditors. Thus, the creditor whose claim is secured by a statutory lien pursuant to Louisiana Revised Statutes 9:4801 to 9:4855 apparently must act as an unsecured creditor to enforce his rights.\(^7\) There are no reported decisions on how a creditor whose claim is secured by an assignment of accounts receivable should be treated.\(^7\) Once again Louisiana Revised Statutes 9:1421 may be significant. If that statute is held to allow the heirs to absolve themselves from personal liability for the decedent’s debts by filing an inventory or detailed descriptive list, the creditor secured by an assignment of

\(^{71}\) La. Code Civ. P. art. 3248.

\(^{72}\) La. R.S. 9:4801 to 4855 (1983 & Supp. 1987). The Private Works Act, 1981 La. Acts No. 724, provides for liens in favor of contractors, subcontractors, employees and materialmen. Their lien would not be lost by the death of the landowner, but the enforcement of their claim appears to be governed by Louisiana Code of Civil Procedure provisions for unsecured creditors. Query how a laborer could meet the requirements of the “dead man” statute, La. R.S. 13:3721 (1968), if the heirs are placed into possession without an administration. Since the Louisiana Code of Civil Procedure is not substantive law, and La. R.S. 9:4801 to 4855 (1983 & Supp. 1987) is substantive law, a good argument can be made that the lien holder should be permitted to pursue his normal remedy to enforce the lien simply by naming the succession representative, if any, or heirs and legatees if there is none, as defendant.

\(^{73}\) A problem arises because La. Code Civ. P. art. 3191 gives the succession representative full control of the property of the decedent. Presumably, however, his rights are no greater than those of the decedent, so that if there is a valid assignment of accounts receivable, this secured creditor may continue to receive payment on the assigned accounts. A more difficult question arises if the creditor gives notice to the account debtors and starts physically receiving payment only after appointment of a succession representative. In the case of pledged property, it is clear that the pledgee is entitled to possession against the succession representative until the debt is paid. Guaranty Bank & Trust Co. v. Canal Land & Live Stock Co., 161 La. 253, 108 So. 472 (1926); Deposit Guar. Nat’l Bank v. Shipp, 205 So. 2d 101 (La. App. 2d Cir.), amended and aff’d, 252 La. 745, 214 So. 2d 129 (1968); Motors Sec. Co. v. Aetna Ins. Co., 17 So. 2d 316 (La. App. 2d Cir. 1944). But again, the Louisiana Code of Civil Procedure expressly recognizes the pledgee’s rights; it does not mention the assignee of accounts receivable.
receivables may have to preserve and enforce timely the lien granted by Louisiana Revised Statutes 9:5011 to continue enjoying his security. Such cases are likely to be rare in practice as receivables are most commonly accepted as collateral from incorporated businesses rather than sole proprietorships. Likewise, there are no recent decisions on whether a bank can exercise a contractual right of offset after the death of a customer. In any event, if the creditor is only partially secured, he must proceed as an unsecured creditor with respect to that part of the debt that is not secured.

**Contingent Liabilities**

Unmatured and contingent liabilities present a special problem. Contrary to the assertion of official comment (b) to Louisiana Code of Civil Procedure article 3001, most mortgages now make the death of any mortgagor a default which gives the mortgagee the option of accelerating the debt. Generally, it is possible for the surviving spouse and heirs to come to an understanding with the mortgage holder without paying the entire balance or refinancing it. The acceleration option, however, does have a bearing on whether the succession is relatively free of debt within the meaning of article 3001. It should be noted that Louisiana Revised Statutes 9:1421 probably does not alter the requirement that the succession be relatively free of debt for the heirs to be sent into possession without an administration.

The serious problem arises if there is an unliquidated obligation, one which is disputed and perhaps is being litigated at the time the decedent dies. The Louisiana Code of Civil Procedure distinctly envisions that a succession representative will be substituted as a party in the litigation in place of the decedent. But what is to be done in the succession in this instance? The Louisiana Code of Civil Procedure gives little guidance.

Since the Louisiana Code of Civil Procedure clearly contemplates that the heirs will have personal liability for the decedent's debts if they accept unconditionally, Louisiana Revised Statutes 9:1421 may be sig-

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74. There are two arguments to be made. It can be argued that although the heirs have no personal liability, the succession property is still liable for the debt, but that liability can be enforced only by preserving and enforcing the lien pursuant to La. R.S. 9:5011 (1983). To the contrary, it can be argued that the assignment of the receivables is a sale and the creditor is an owner of them; as such, the succession has no interest in the assigned receivables so that the creditor need do nothing except collect his receivables. The latter argument seems fallacious. Once the assignee's debt is paid, he has no further interest in the receivables.

75. La. Code Civ. P. art. 3001 comment (b).

nificant here. Suppose the decedent were sued for breach of contract and, there being no succession representative appointed, the heirs themselves are substituted as defendants. The heirs then open the succession judicially, file a detailed descriptive list, and are placed in possession without an administration. Are they now entitled to be dismissed from the breach of contract suit on the ground that they can have no personal liability? If Louisiana Revised Statutes 9:1421 is interpreted to mean that the heirs avoid personal liability by filing a detailed descriptive list in the succession proceedings, then it seems they should be dismissed from the lawsuit. It would follow that the plaintiff in it would have to comply with Louisiana Revised Statutes 9:5011 to 9:5016 to preserve his claim against the property of the decedent rather than merely continuing the litigation.

Even if the heirs provoke an administration, it is not clear what the succession representative should do. In Succession of Isgitt the court suspended the homologation of a tableau of distribution until the outcome of the litigation (in which the succession representative was substituted as defendant) was known. The court noted, however, that the succession representative could be authorized to pay other creditors whose claims clearly primed any judgment the litigant might procure. This is less than a perfect answer: if there are a substantial number of unsecured creditors of the succession who will participate at parity with the litigant if he is successful, their payment will be delayed until completion of the lawsuit. Otherwise, the funds available to pay the successful litigant might be exhausted before he procures judgment.

In another succession, the succession representative appeared to have delayed payment voluntarily until contingent liabilities could be resolved. In this instance, the court ordered the succession representative to place the successful litigant on the tableau of distribution as a judgment creditor with a liquidated claim. These cases are notable for holding

78. La. R.S. 9:5011 to 5016 (1983). See Bologna Brothers v. Morrissey, 154 So. 2d 455 (La. App. 2d Cir.), writ denied, 245 La. 56, 156 So. 2d 601 (1963), for a decision under prior law. Because there was no indication before the court that the heirs' acceptance was limited in any way, the court found them personally liable for the decedent's debt. Since this was a Mississippi succession, with Mississippi heirs sued in Louisiana, the decision is questionable as to its use of Louisiana law to determine the heirs' liability.
79. 297 So. 2d 231 (La. App. 3d Cir. 1974). See supra note 52 for a discussion of this case.
80. For these purposes, holders of statutory liens such as those for funeral expenses and expenses of the last illness, should be considered secured creditors, as they will be ranked ahead of unsecured creditors on the tableau of distribution.
that the creditor who started litigation during the decedent's lifetime is entitled to substitute the succession representative as a party and continue the litigation rather than being relegated to remedies of succession creditors offered by the Louisiana Code of Civil Procedure.\(^\text{82}\)

Succession representatives may not always be so accommodating. They may proceed to administer the succession and put the heirs into possession after the administration and payment of all liquidated creditors' claims. The holder of a contingent claim, especially if it is in litigation, then has a Succession of Isgitt\(^\text{83}\) problem. In Re Richardson's Estate\(^\text{84}\) is a grim warning to holders of unliquidated claims of what may happen if the succession is closed by a judgment of possession: the court may refuse to reopen the succession.\(^\text{85}\) Possibly, if the claim asserted deals intimately with immovable property, the court will allow its prosecution even against a nondomiciliary succession representative who has been discharged.\(^\text{86}\) But where the claim is essentially an unliquidated claim for money, it appears the creditor must take some step

\(^{82}\) Deposit Guar., 205 So. 2d 101; Commercial Credit, 220 So. 2d 735.

\(^{83}\) 297 So. 2d 231 (La. App. 3d Cir. 1974). See supra note 52.

\(^{84}\) 214 So. 2d 185 (La. App. 4th Cir.), writ denied, 253 La. 66, 216 So. 2d 309 (1968). The litigation actually started with Molero v. Bass, 190 So. 2d 141 (La. App. 4th Cir. 1966), writ denied, 250 La. 2, 193 So. 2d 523 (1967). Sid W. Richardson, a Texas domiciliary, owned vast mineral interests in Louisiana. After his death, ancillary succession proceedings were opened in Louisiana in the course of which the net Louisiana estate, nearly $20,000,000, was paid in cash by the ancillary succession representative to the Texas succession representative. Mrs. Molero alleged an assignment of mineral interests by Richardson to her late husband and breach of that assignment. The court refused, in both instances, to reopen the ancillary succession proceedings so that Mrs. Molero could assert her claim against it. Finally in Molero v. Bass, 322 So. 2d 452 (La. App. 4th Cir. 1975), writ denied, 325 So. 2d 609 (1976), Mrs. Molero appeared to have found some viable defendants to sue on her claim.

\(^{85}\) In Succession of Nunez ex rel. First Nat'l Bank of Abbeville v. Pickett, 335 So. 2d 778 (La. App. 3d Cir. 1976), the succession representative was not a Louisiana domiciliary and therefore had appointed an agent for service of process. The bank paid over to the succession representative a bank account which belonged to a person other than the decedent. The succession was closed by a judgment of possession which discharged the succession representative. The agent appointed for service of process resigned. When the bank discovered the error and sued, the court would not reopen the succession. The problem, in part, was a perceived lack of personal jurisdiction. See also Succession of Yancovich, 289 So. 2d 855 (La. App. 4th Cir. 1974) and Danos v. Waterford Oil Co., 225 So. 2d 708 (La. App. 1st Cir.), writ denied, 254 La. 856, 227 So. 2d 596 (1969).

\(^{86}\) Middle Tenn. Council, Inc., Boy Scouts of Am. v. Ford, 205 So. 2d 867 (La. App. 1st Cir. 1967), further opinions on the merits of the claim asserted, 256 So. 2d 658 (La. App. 1st Cir. 1971), aff'd, 274 So. 2d 173 (1973). The heirs urged that a sale made in the succession proceedings was lesionary. Although the nondomiciliary succession representative had been discharged and the succession closed, the court allowed the suit predicated on the property's location in Louisiana. Technically, this decision can be reconciled with the decisions cited supra note 85, but this court seems to be of a more liberal mind about allowing claims asserted after the succession is closed.
in the succession to preserve his rights. To date, *Succession of Isgitt* \(^{87}\) is the best model for the creditor to follow. That case indicates that the creditor with an unliquidated claim should take action in the succession by opposing a tableau and appealing any adverse action.

**NOTICE, TABLEAUS, OPPOSITIONS, AND HOMOLOGATION**

A succession representative may not pay debts without prior court approval. \(^{88}\) The succession representative typically files a petition for authority to pay debts and annexes to it a tableau of distribution itemizing the debts he seeks to pay. \(^{89}\) The Louisiana Code of Civil Procedure allows notice by publication to bring the filing of a tableau of distribution to the creditors' attention, \(^{90}\) unless the creditor had filed a petition for notice. \(^{91}\) The authorized procedure is dubious and may even fail to comport with due process. \(^{92}\)

The efficacy of notice by publication may be doubted, and the dispensation of personal notice is to be deplored. Important creditors' rights depend on opposing a tableau of distribution, \(^{93}\) and others are timed by the filing of a judgment of possession. \(^{94}\) Interstate creditors

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87. 297 So. 2d 231 (La. App. 3d Cir. 1974). See supra note 52.
89. See Succession of Tagliafure, 490 So. 2d 538 (La. App. 4th Cir. 1986), for an example where the tableau was filed and homologated without a petition for authority filed simultaneously. Writs were granted to deal with other issues, and the case was affirmed at 500 So. 2d 393 (La. 1987) without discussion of this point. Note that if the succession representative lacks funds to pay all creditors, or if the succession is insolvent, he must carefully rank all creditors according to their lawful privileges and mortgages. Otherwise, the tableau cannot be homologated. Succession of Kilpatrick, 422 So. 2d 483 (La. App. 2d Cir. 1982).
91. La. Code Civ. P. art. 3305. If the creditor filed such a notice, service of the tableau on him may be accomplished by mail.
94. The prescription for privileges under La. R.S. 9:5011 to 5016 (1983) commences to run with the filing of a judgment of possession. The filing of a tableau of distribution, particularly a final tableau, alerts the creditor that a judgment of possession may be rendered shortly.
domiciled in other states are now common due to the mass marketing of credit cards. It is doubtful that a credit card issuer domiciled in New York, Massachusetts, or South Dakota will know what newspaper serves as the official journal at the decedent's domicile in Louisiana; such creditors indeed may learn of the death itself quite late. The creditor's only protection is to file a petition for notice, and to do so, the creditor must learn of the death.

Since postage is not expensive, the law might reasonably require the succession representative to mail a tableau of distribution to all creditors and heirs by certified mail, return receipt requested. Such a requirement would miss giving notice to a creditor who had not filed a claim, and it would create some aggravations in those cases in which the postal service failed to make delivery. On the whole, however, such mailings seem a cheaper, more effective method of giving notice to interested parties than publication.

If the creditor is not listed on the tableau of distribution, he should file an opposition to it. The opposition is tried by summary procedure, and it is not entirely clear what relief the court may order. Under Louisiana law, claims on open account, promissory notes, other contracts, etc., ordinarily cannot be resolved by summary process but require a trial by ordinary proceedings. There are some old cases which indicate

95. The mass marketing of credit cards is a phenomenon which developed subsequent to the adoption of the Louisiana Code of Civil Procedure. At the time of its adoption, interstate creditors were quite uncommon and that circumstance may have influenced the notice by publication provisions. In addition to interstate creditors created by credit cards, numerous home mortgages are now held by interstate creditors.

96. Such knowledge is necessary for the creditor to know which newspaper he should search for notice. Are such limited circulation newspapers as the Denham Springs News, the sometimes official journal of Livingston Parish, even available in distant states? Metropolitan newspapers present another problem. Even if it is known that the notice is there, it can be a serious chore to find notice of filing of a tableau of distribution in the legal advertisement section of the newspaper in a major metropolitan area.

97. If, for instance, the surviving spouse has always written the check to pay the credit card installment due and makes post mortem payments, there is nothing to alert the creditor of the death until payments cease.


99. The soundest argument for requiring a publication of the notice is the possibility that it will come to the attention of a creditor not known to the succession representative. Particularly if the claim is founded on parole evidence, the creditor should do so. See La. R.S. 13:3721 (1968).

100. La. Code Civ. P. art. 2592 sets out the authority to use summary process. An opposition to a tableau of distribution is expressly included. Yet in the case of disputed debts, as in the Succession of Isgitt, 297 So. 2d 231 (La. App. 3d Cir. 1974), approach, requiring a separate suit by ordinary process on disputed debts seems sounder. Note also
that on trial of the opposition, the creditor must make out his claim, and that the court can order it placed on the tableau\textsuperscript{102}; as we shall see, there are also decisions that the homologation of a tableau of distribution is res judicata as to the validity and amount of the debts shown on it. In practice, some courts are willing to order a succession representative to place the objecting creditor on the tableau once the creditor presents a prima facie case. If the debt is disputed, however, it seems sounder to refuse to homologate the tableau; rather the creditor should be required to sue the succession representative by ordinary process.\textsuperscript{103} If there is no dispute and the debt was merely overlooked, the succession representative ordinarily will amend the tableau to include it upon receipt of the opposition. The court reached essentially these conclusions in \textit{Succession of Griffith}\.\textsuperscript{104}

It must be kept in mind that not all oppositions to a tableau will be filed by creditors whose claims are not listed. Frequently, the heirs or surviving spouse will file an opposition to a creditor’s claim that is listed. What the court is willing to do after a hearing on the opposition may depend on whether a creditor or an heir or surviving spouse files the opposition. On an opposition by a surviving spouse or heir, the court may order the challenged creditor’s claim removed from the tableau\textsuperscript{105} In \textit{Succession of Rosenthal},\textsuperscript{106} the court appears to have adjudicated the merits of an alleged creditor’s claims which were asserted

\begin{footnotesize}
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\item See, e.g., Succession of Gayle, 27 La. Ann. 547 (1875); Succession of Kerley, 18 La. Ann. 583 (1866); Pargoud v. Griffing, 10 La. 358 (1836). Of more recent vintage, in Matter of Successions of Freeman, 322 So. 2d 254 (La. App. 1st Cir.), writ denied, 325 So. 2d 277 (1975), the merits of a claim not included on a tableau appear to have been decided in some sort of summary proceeding. In Landry v. Weber, 345 So. 2d 11 (La. 1977), however, the succession representative rejected a claim, and the creditor sued the succession representative. This procedure is expressly contemplated by the Louisiana Code of Civil Procedure, and the merits of the claim were determined after trial by ordinary process.
\item See, e.g., In re Prejean, 234 So. 2d 757 (La. App. 3d Cir. 1970). The court of appeal restored the creditor’s claim to the tableau. The decision seems apt, as the claim arose during the administration of the succession.
\item 369 So. 2d 166 (La. App. 4th Cir.), writ denied, 371 So. 2d 1345 (1979).
\end{enumerate}
\end{footnotesize}
by the succession representative in her individual capacity at the summary hearing on the heir's opposition to the tableau. The court's action seems logical, given the intimate relationship of the parties to the succession, but in the instance of a third party creditor there might be merit in denying homologation and relegating the parties to litigation by ordinary process.

The Louisiana Code of Civil Procedure, however, clearly contemplates litigation by summary process in this instance. If the creditor files a claim under article 3241\(^{107}\) and it is acknowledged by the succession representative, or if the succession representative places the claim on the tableau,\(^{108}\) under article 3243\(^{109}\) there is a prima facie presumption of the validity of the creditor's claim. The comment points out that article 3243 overrules the doctrine of *In re Romero*,\(^{110}\) under which the creditor had to prove his claim, even if included on the tableau, when the heirs filed an opposition to the tableau. Under article 3243, the heirs have the rather daunting prospect of carrying the burden of proof to disclaim the debt in a summary proceeding.\(^{111}\) The innovations in article 3243 reflect the Louisiana Code of Civil Procedure principle that resolution of disputes, by litigation if necessary, should be the decision of the succession representative. As long as the succession representative acts strictly as a fiduciary, this approach has merit. It provokes skepticism, however, where the succession representative has a conflict of interest and seeks payment to himself.

If the succession is doubtfully solvent, or insolvent, a creditor may become seriously concerned about claims filed by other creditors. The claims most likely to attract suspicion are those of "insider creditors," that is, creditor claims by heirs or the surviving spouse. The accounting and reimbursement concepts in the current law on matrimonial regimes\(^{112}\) make it increasingly likely that the surviving spouse will have claims to

\(^{107}\) La. Code Civ. P. art. 3241.
\(^{108}\) Succession of Richmond, 35 La. Ann. 858 (1883).
\(^{111}\) In Succession of Martin, 335 So. 2d 494 (La. App. 2d Cir.), writ denied, 337 So. 2d 516 (1976), the court considered La. Code Civ. P. art. 3244 on burden of proof. This Article of the Code of Civil Procedure is directly applicable to the situation in this litigation. The two claims in dispute were included in the executrix's petition for authority to pay debts. The claims are prima facie presumed to be valid and the burden of proving the invalidity of the claims was on opponent-appellant.
\(^{112}\) La. Civ. Code arts. 2358, 2369.
make against the succession.\textsuperscript{113} \textit{Succession of Hoffpauir}\textsuperscript{114} stands for two important propositions: (a) where the succession is under administration, the surviving spouse has no cause of action against the heirs for accounting and reimbursement claims, as the cause of action is against the succession; and (b) such claims are properly presented by the succession representative in the tableau of distribution.

The court's reasoning can hardly be faulted, but the facts of \textit{Succession of Hoffpauir} portend a possibly serious problem. In that instance, the surviving spouse (decedent's second wife) was the succession representative, and the opposition was entered by the heirs (children of decedent's first marriage). If the surviving spouse is the succession representative, can the surviving spouse by complying with Louisiana Code of Civil Procedure article 3241, or by placing the spousal claims on the tableau, obtain the prima facie presumption of validity against all other persons?\textsuperscript{115} Can a creditor oppose such a claim? One old case,\textsuperscript{116} which seems sound, held that a creditor could not oppose other creditors' claims where the succession was thoroughly solvent. By implication, the creditor can file such an opposition if the succession is insolvent or dubiously solvent, and, presumably, a creditor would be motivated to file an opposition only in such circumstances. Louisiana Code of Civil Procedure article 3243 still appears to leave the creditor with an insurmountable burden of proof to make the opposition succeed.\textsuperscript{117}

If the claims of the surviving spouse threaten to exhaust the assets available to pay third-party creditors,\textsuperscript{118} the protection of third party

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\item \textsuperscript{113} La. Code Civ. P. art. 3098 makes it likely that the surviving spouse, if any, will be the succession representative.
\item \textsuperscript{114} 411 So. 2d 714 (La. App. 3d Cir. 1982).
\item \textsuperscript{115} La. Code Civ. P. art. 3243 seems to have that effect. In Succession of Smith, 232 So. 2d 569 (La. App. 4th Cir. 1970) the surviving spouse/succession representative proposed several payments to herself. Heirs filed an opposition. The court rejected most of the proposed payments to the surviving spouse/succession representative without any discussion of La. Code Civ. P. art. 3243 or burden of proof. The opinion reads as if the court considered that the surviving spouse/succession representative had the burden of proving the validity of her claims. That allocation of the burden of proof appears to be contrary to La. Code Civ. P. art. 3243, but the appearance of self-dealing by a fiduciary in this sort of case favors the result reached.
\item \textsuperscript{116} Succession of Gohs, 37 La. Ann. 428 (1885). If there are sufficient funds to pay the objecting creditor, it is none of his business who else gets paid.
\item \textsuperscript{117} La. Code Civ. P. art. 3243.
\item \textsuperscript{118} What rank as a creditor does a surviving spouse attain? Apparently, a surviving spouse is an unsecured creditor to share pro rata with other unsecured creditors. Before the 1980 legislation on matrimonial regimes, however, there was a substantial body of decisions which held that the spouses' interest in the community, on its termination, was residual and that community creditors were entitled to be paid before there was any distribution to the spouses. In Demoruelle v. Allen, 218 La. 603, 617, 50 So. 2d 208,
creditors from imposition\textsuperscript{119} seems to require some caution on the part

\textsuperscript{119} See also Succession of Keppel, 113 La. 246, 36 So. 955 (1904); Thompson v. Vance, 110 La. 26, 34 So. 112 (1903); Pior v. Giddens, 50 La. Ann. 216, 23 So. 337 (1897); Healey v. Ashby, 47 La. Ann. 636, 17 So. 195 (1895); Newman v. Cooper, 46 La. Ann. 1485, 16 So. 481 (1894); Rawlins v. Giddens, 46 La. Ann. 1136, 15 So. 501 (1894); Webre v. Lorio, 42 La. Ann. 178, 7 So. 460 (1890); Landreneau v. Cesar, 153 So. 2d 145 (La. App. 3d Cir., writ denied, 154 So. 2d 769 (1963). These concepts, however, may not have survived the 1980 legislation on matrimonial regimes.
of the courts in accepting such claims. A succession representative is a fiduciary.\textsuperscript{120} It is very doubtful whether a serious creditor of a succession of questionable solvency should or even lawfully can act as its fiduciary.\textsuperscript{121} Where the claims of the surviving spouse threaten the ultimate payment of third-party creditors, the assertion of these claims (no matter how valid they are) may be a breach of the fiduciary duty on the part of the succession representative to champion, unswervingly, the rights of his principals. Certainly the surviving spouse who acts as succession representative in these circumstances has a serious conflict of interest. In such instances, it seems dubious to allow the surviving spouse, in the capacity of succession representative, to obtain a prima facie presumption of validity of the spousal claims merely by listing the spousal claims on the tableau of distribution.\textsuperscript{122}

The law on this subject could be clarified in several ways. A clear determination that spousal claims are subordinate to or that such claims are on a parity with third-party creditors would allow third party creditors to know if spousal claims were a threat to ultimate payment. If spousal claims are to be on a parity with third-party unsecured creditors, it would be useful to have legislation addressing the special problems of proving or disproving the validity of such claims.

plaintiff clearly had no obligation to prove the extent of consideration by offering evidence of the value of the services rendered, because the consideration simply does not have to be equivalent to the face amount of a note. But the opinion probably is not a decision on the law of bills and notes. Rather, it is an example of judicial skepticism about succession creditors' claims presented by insiders.\textsuperscript{120} La. Code Civ. P. art. 3191.

\textsuperscript{121} Succession of Robinson, 393 So. 2d 268 (La. App. 1st Cir. 1980), illustrates an analogous problem. As a product of matrimonial litigation, the decedent wife obtained a money judgment against her spouse. She died before the judgment became executory. The judgment debtor, her husband, promptly had himself appointed administrator of the succession. On application of the decedent's mother, the court removed him as succession representative on the stated ground that it was misadministration of succession assets for him to use his divorce court lawyer to file pleadings in the succession! Surely, the stated ground is a fiction; the real problem is that the principal debtor of a succession should not act as its fiduciary. Succession of Elrod, 362 So. 2d 1191 (La. App. 4th Cir.), writ granted, 371 So. 2d 796 (1978) (remanded without decision on the merits; held that a succession representative could not make adverse claims against the heirs or the succession). If this decision is good law, a surviving spouse with serious accounting or reimbursement claims cannot lawfully act as succession representative without waiving those claims. But La. Code Civ. P. art. 3098 expressly contemplates and authorizes a creditor of the decedent to act as succession representative. However much \textit{Succession of Elrod} may comport with the general law of fiduciaries, the result seems contrary to the Louisiana Code of Civil Procedure.\textsuperscript{122} Although accounting claims are not exigible by a spouse until termination of the community, they may be based on facts which occurred years before. Nobody but the surviving spouse and the decedent may have any personal knowledge of these facts. These circumstances suggest the need for special legislation dealing with proof of spousal claims.
If there is no opposition to a filed tableau of distribution, or possibly after a hearing on an opposition, the court will render a judgment homologating the tableau. Such a judgment may be more than just a grant of permission to the succession representative to pay claims. Under some old cases, the judgment of homologation is equivalent to an in personam judgment, so that if the succession representative does not pay the claims on the tableau homologated, any creditor listed on the tableau can obtain a writ of fieri facias and execute on the judgment.\textsuperscript{123} Furthermore, the judgment of homologation is res judicata as to the validity and amount of the debts listed on the tableau.\textsuperscript{124} If these old cases are still good law after the adoption of the Louisiana Code of Civil Procedure, and they may be, they are a salutary warning to creditors to keep abreast of succession proceedings and to timely file an opposition to the tableau when necessary.\textsuperscript{125} The point is worth emphasis because it seems to be the practice in some courts to file such oppositions to the final account rather than to the tableau of distribution.\textsuperscript{126} In such cases, if challenged, the opposing creditor may find the judgment of homologation makes the figure given in the tableau res judicata.\textsuperscript{127}

\textsuperscript{123} See, e.g., Lobit v. Castille, 14 La. Ann. 779 (1859); Ray v. Tatum, 23 La. Ann. 592 (1871). There are decisions to the contrary, however.


\textsuperscript{125} Such cases add extra weight to the significance of notice to creditors.

\textsuperscript{126} Succession of Smith, 232 So. 2d 569 (La. App. 4th Cir. 1970), for example, is a case in which the opponent waited until an account had been filed and then opposed the account. The opinion has no discussion of any tableau of distribution.

\textsuperscript{127} Logically, an opposition to a final account should deal with matters such as mathematical errors or claims that the succession representative did not in fact pay the sums stated in the final account. Where the succession representative has paid according to a duly homologated tableau of distribution, it seems that the judgment of homologation should protect the succession representative and his bond, so that the validity of such payments could not be challenged by opposition to the final account because the succession representative has paid according to an order of the court. Contra Succession of Irving, 436 So. 2d 1263 (La. App. 1st Cir.), writ denied, 442 So. 2d 452 (1983). In Irving, a succession representative petitioned the court for authority to sell a succession asset to his niece. No opposition was filed, and in due course the sale was concluded. Later, after an unopposed petition for authority, the succession representative sold another succession asset to a relative. Several years later, on suit of heirs, the succession representative was held personally liable for the difference between the alleged "true value" of the assets and their court approved sale prices. It is not clear from the opinion whether the succession representative made the argument that the court order authorizing the sale protected him. It certainly seems it should have; if the heirs felt the price was unsatisfactory, they should have opposed the petition for authority to sell. Likewise, it seems that a homologated tableau of distribution should protect the succession representative against belated claims that the debt was not owed. But Irving does cast doubt on these propositions.
In common law jurisdictions, there is a problem which universal succession avoids in Louisiana. Because of the common law rule that personal property does not descend to the next of kin, a depositary such as a bank runs serious risks if it transfers the deposit to the successors or anybody other than the succession representative. If a creditor provokes an administration after a depositary makes the transfer, the depositary may have to pay again to the succession representative. Because Louisiana implements universal succession, the theoretical problem of the common law does not arise. It has always been felt that judgments of possession and special statutes satisfactorily protected depositaries in Louisiana probate procedure.

These plausible propositions have not been rigorously tested by litigation in recent years. There is authority, prior to the adoption of the Louisiana Code of Civil Procedure, that a judgment of possession protects a depositary bank against claims of the heirs. More recently, in Williams v. Bank of Louisiana in New Orleans, the court glossed the statute by holding that the special statute afforded the bank no protection where the decedent did not in fact own the account. Two later cases considered the bank to be protected by the various statutes applicable in the circumstances of those cases.

128. See the hypothetical discussed by P. Haskell, Preface to Wills, Trusts and Administration 165-66 (1987). The transfer agent for corporate stock could encounter the same problem.


130. See Succession of Fachan, 170 La. 333, 154 So. 15 (1934), in which the bank transferred the funds to the surviving spouse in reliance on a judgment of possession. The bank was not liable to the heirs even though the funds were not community property. See also Dixon v. Commercial Nat'l Bank, 13 La. App. 204, 127 So. 428 (1930). The bank was not liable to heirs not named in the judgment of possession.


133. The bank had paid pursuant to a judgment of possession. The decedent did not own the account; it was owned by another person with a similar name. The bank was held liable for conversion.

134. In Thorn v. Whitney Nat'l Bank of New Orleans, 326 So. 2d 606 (La. App. 4th Cir. 1976), a succession representative sought possession of a savings account, but one of decedent's relatives had possession of the passbook. The bank refused to surrender the funds without the passbook. The court ordered the bank to deliver the funds, without the passbook, to the succession representative on the theory that former La. R.S. 6:66 (1950) (now La. R.S. 6:325 (1986)) protected the bank absolutely. In Succession of Prutzman, 209 So. 2d 303 (La. App. 4th Cir. 1968), the heirs recognized in the judgment of possession were all minors. The bank demanded that a tutor be appointed for the minors and give a receipt for the contents of a bank box. Since the surviving spouse was...
It is important to note that Louisiana Code of Civil Procedure article 3062 makes the judgment of possession *prima facie*, but not conclusive, proof of the relationship of the deceased to the persons named in it and of their right to possession of the estate. In *Quiett v. Estate of Moore*, the court stated:

A judgment of possession is *prima facie* evidence of the right of the heirs in whose favor it was rendered to take possession of the decedent's estate; however, it is not a basis for a plea of res judicata or conclusive evidence against persons having an adverse interest in or claim against the estate, such as heirs or creditors of the estate.

*Succession of Feist* is a dramatic case. Mr. and Mrs. Feist were killed in an automobile accident. A life insurance policy on Mr. Feist named Mrs. Feist as the beneficiary. Mrs. Feist's mother had herself placed in possession of her daughter's estate and collected the insurance proceeds from the insurer. Thereafter, the collateral heirs of Mr. Feist sued and the lower court, in a summary proceeding, annulled the judgment of possession in part and ordered the insurer to pay the policy proceeds and penalties to the succession of Mr. Feist. The court of appeal affirmed, but the Louisiana Supreme Court reversed without discussing the effect of the insurer's payment in reliance on a judgment of possession. The court of appeal felt that Louisiana Code of Civil Procedure article 3062 did not protect the insurer.

Louisiana Revised Statutes 9:1421 may reawaken creditor interest in the conclusiveness of judgments of possession. If the heirs utilize this statute to gain immediate possession of the estate, while repudiating liability for debts, a creditor may be tempted to pursue a depository who has delivered a substantial bank account to the heirs. The quoted language in *Quiett* seems to raise that possibility. In addition, if the recognized as usufructuary in the judgment of possession, the court felt that La. Code Civ. P. art. 3062 adequately protected the bank and ordered it to deliver the contents to the surviving spouse.


138. The case presented the problem of correlating the comorientes provisions of then La. Civ. Code art. 939 and the seemingly conflicting La. R.S. 22:645 (1978). Under one statute, Mrs. Feist was deemed the survivor of Mr. Feist; under the other, Mr. Feist was deemed the survivor.

139. The Louisiana Supreme Court decision turned on the proper coordination of the seemingly conflicting statutes referred to in the preceding note.

depositary pays over the account within three months of death, the privilege granted by Louisiana Revised Statutes 9:5011 may offer further support to the creditor's argument.

CREDITORS' RIGHTS AFTER LOUISIANA REVISED STATUTES 9:1421

Louisiana Revised Statutes 9:1421 seriously prejudices creditors' rights if it is held to mean that heirs may obtain possession of and dispose of the decedent's assets, without administration, and avoid personal liability to creditors merely by filing a detailed descriptive list or inventory in succession proceedings. It will make Louisiana probate law unique in the nation in an unpleasant manner. In all other states, an administration of the decedent's estate, and the payment of creditors in the administration, is a condition precedent to the heirs obtaining possession of the assets. Heretofore, Louisiana was able to use a more expeditious, less expensive procedure by implementing principles of universal succession: the heirs could obtain possession of the assets without an administration, but at the price of personal liability for the decedent's debts. Louisiana Revised Statutes 9:1421 appears to make it possible for the heirs to obtain possession of the assets, even dispose of them, without suffering either an administration of the succession or personal liability for the decedent's debts.

The remedies available to succession creditors after Louisiana Revised Statutes 9:1421 may be cold comfort to them. It is possible that the statute saps Louisiana Code of Civil Procedure article 3007 of all vitality so that the creditor cannot demand security because the heirs have no personal liability for the debt. In such event, the unsecured creditor is relegated to the privileges created by Louisiana Revised Statutes 9:5011 to 9:5016 (1983). Use of the privilege requires the creditor to know the date of decedent's death and take proper procedural steps within three months of the death. The efficacy of the privilege, once it is properly preserved, largely depends on whether it primes prior mortgages. Louisiana Civil Code article 3186 seems to grant the privilege such priority, but *Home Savings & Loan Association v. Tri-Parish Ventures, Ltd. No. 1* casts serious doubt on it. That case holds that a vendor's privilege on immovable property has priority only from the

145. 505 So. 2d 165 (La. App. 4th Cir. 1987).
date of its recordation and is junior to prior recorded mortgages.\textsuperscript{146} Thus, the brave new world of Louisiana Revised Statutes 9:1421 casts creditors into legal limbo by forcing them to resort to a body of law which has never received an authoritative interpretation from the courts and where the nature and extent of their remedies is unclear.

If all other remedies fail him, a creditor may have to resort to an attempt to annul a judgment of possession for fraud or ill practices under Louisiana Code of Civil Procedure article 2004.\textsuperscript{147} In \textit{Succession of Anderson},\textsuperscript{148} the court preferred this approach to reopening a succession under article 3393. The heirs had waived a final tableau of distribution and final account in order to be put into possession. The court felt that this, under the facts of the case,\textsuperscript{149} authorized the objecting creditor to amend his pleadings to seek nullity of the judgment of possession under article 2004. It remains to be seen how many succession creditors can find facts which would authorize an action for nullity of judgment where the heirs are placed in possession without an administration on their ex parte petition.\textsuperscript{150}

Under the terms of Louisiana Revised Statutes 9:1421, the filing of a detailed descriptive list or inventory appears to have the practical effect of a post mortem discharge in bankruptcy:\textsuperscript{151} the secured creditors can enforce their security (if they have a mortgage or pledge) but not personal liability; unsecured creditors may, if they timely learn of the death and jump through all the procedural hoops, divide the rest of the non-exempt assets but without personal liability of the successors.

\textsuperscript{146} The cited case turned in part on the language creating the privilege in favor of a homestead association. However, the court seemed convinced that “first in time, first in right” is the rule in Louisiana to determine priority between a privilege and a mortgage. In that respect the decision is in conflict with \textit{Home Owners’ Loan Corp. v. Succession of Brooks}, 180 So. 170 (La. App. Orl. 1938) and \textit{Succession of Hardy}, 122 So. 154 (La. App. Orl. 1929), both of which held that privileges for funeral charges prime pre-existing mortgages.

\textsuperscript{147} \textit{La. Code Civ. P. art. 2004}.

\textsuperscript{148} 323 So. 2d 827 (La. App. 4th Cir. 1975).

\textsuperscript{149} The essence of the problem lay in the detailed descriptive list. The plaintiff was a community creditor; the detailed descriptive list presented an assetless community and a separate estate of some magnitude. The objecting creditor claimed that many of the allegedly “separate” assets in reality belonged to the community and that the surviving spouse/succession representative had misled him into believing he would be paid without intervening in the succession proceedings. Current matrimonial regimes legislation avoids this problem, as the spouse who incurs the debt is always liable personally for it.

\textsuperscript{150} \textit{La. Code Civ. P. art. 3007} was undoubtedly devised to make it unnecessary for an objecting creditor to resort to a nullity of judgment action in these circumstances. But, as previously noted, \textit{La. R.S. 9:1421} (Supp. 1987) may undercut the effectiveness of \textit{La. Code Civ. P. art. 3007} by absolving the heirs from personal liability.

\textsuperscript{151} \textit{La. R.S. 9:1421} (Supp. 1987).
When the bland notice provisions of the Louisiana Code of Civil Procedure are also taken into account, the fairness and wisdom of Louisiana Revised Statutes 9:1421 must be doubted.

Will lenders be willing to extend credit to senior citizens or to workmen whose occupations involve high mortality risk? Will interstate creditors be willing to extend credit to Louisiana citizens once they become aware of the radical change Louisiana Revised Statutes 9:1421 makes in Louisiana law? If creditors are still able to force an administration after Louisiana Revised Statutes 9:1421, is it as desirable that successions which formerly would have been disposed of by a simple acceptance are now forced into an administration? If it is desirable, should not our law be revised to require an administration for the protection of creditors in all instances? Louisiana Revised Statutes 9:1421 provokes questions about policy as well as questions about the state of the law.

**CONCLUSION**

Universal succession is highly desirable as it allows efficient protection of creditors while simultaneously allowing quick, inexpensive probate proceedings. Louisiana should preserve universal succession. Louisiana Revised Statutes 9:1421, which obscures the consequences of universal succession, is to be regretted and is a fit candidate for repeal. The problems posed by that statute are unresolved, and they do not offer any easy solution. The Louisiana Law Institute is presently working on a revision of the Louisiana Civil Code sections on successions. Hopefully, the revision will resolve the problems created by Louisiana Revised Statutes 9:1421 and will make it crystal clear that only an administration and payment of creditors relieves the heirs of personal liability for the debts of the decedent.\(^{152}\)

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\(^{152}\) It also may be hoped that if the revised articles make significant changes in the substantive law, the Louisiana Code of Civil Procedure will be revised to implement the substantive law. As originally adopted, the Louisiana Code of Civil Procedure was well designed to implement the substantive law of that date. There have been changes in the substantive law of successions (such as the rights of illegitimates) since then, and the Louisiana Code of Civil Procedure has not always been updated to assure that it properly implements current substantive law.