The Early Sources of Forced Heirship; Its History in Texas and Louisiana

Joseph Dainow
The Early Sources of Forced Heirship;  
Its History in Texas and Louisiana

JOSEPH DAINOW*

“There are certain provisions of the Civil Code of Louisiana that are something more than mere laws; they may be said to rise to the dignity of institutions. Among these are the articles of the Code providing for what is known as the doctrine of forced heirship.”

The question of forced heirship is one which has received extensive and continued attention in practically all developed legal systems. Strong public policies are always involved and a great variety of conclusions have been reached. Furthermore, the policies and rules within certain countries have changed from one extreme to the other.2

Forced heirship has always been a part of the law of Louisiana and as recently as 1921 it was given constitutional sanctification and protection.3 In Texas, the influences worked in the opposite direction. Forced heirship was a recognized institution of the original law, but within a comparatively short time after the entry of Texas into the Union it was abolished.4

It is proposed here to examine some relevant aspects of the early sources of this institution in the Roman, Germanic and Spanish laws. Of course, a civil law study of forced heirship is not complete without the law of France, but that part of the subject has been published elsewhere.5 Against this historical back-

*Assistant Professor of Law, Louisiana State University.
5. Dainow, Forced Heirship in French Law (1940) 2 LOUISIANA LAW REVIEW 669.
ground will be described briefly the developmental processes that have taken place in Texas and Louisiana.

EARLY SOURCES

Roman Law

To follow the developments in Roman law which culminated in the limitation of a parent's testamentary freedom, it is necessary to understand two early institutions. One is the organization of the family, which was the basic unit of society and which vested extensive power (patria potestas) in the head of that family (paterfamilias). The other is the custom of continuing the care and worship of the sacra, the family cult to the individual household gods, from one generation to the next by the successive heirs. The familia and the sacra were so constituted and they functioned in such a manner that their influence was reflected in many phases of the legal system.

Familia

The early Roman family consisted of the paterfamilias and all those who by an agnatic (male) relationship were under his power. All rights and property vested only in the pater, even those newly acquired by other members of the family. During the very early period of Roman legal history, the powers of the pater extended even to the extreme limit of life and death. Under such a social order with such legal institutions there could be no room for any concept of testamentary restrictions on the parent. The children were called sui heredes, which is sometimes defined as heirs to themselves and implies co-ownership with the pater, but this definition may refer back to a much more primitive period. If the pater died intestate the children were first in line to inherit, but his absolute power of disposition gave him unrestricted freedom to distribute his estate in legacies.

Sacra

The continuance of the family sacra was a major consideration with the Romans and they organized their other institutions with a view to insuring it. If a man had no child, he was permitted for this reason to adopt one (arrocatio), and the rights of inheritance which were bestowed incidentally upon the adopted

---

6. Cf. Maine, Early Law and Custom (1907) 78, 120.
7. Buckland, A Manual of Roman Private Law (1925) 60 et seq., 212; Buckland, A Text-Book of Roman Law (1921) 102 et seq.
child constituted their earliest method of performing the dispositive function of a will.8

Testation

Early Will

In the light of the foregoing, the purpose of the first wills was the institution of an heir to carry on the family tradition rather than the disposition of property. It was regarded as a great misfortune for a man to die without an heir who would continue his familia and carry on the sacra.

Some writers believe that complete freedom of testation and the power of disinherintance existed right from the Twelve Tables;9 on the other hand, some are of the opinion that although there was power of disposition by legacy, testation consisted of the institution of an heir and came into existence as late as the second century B.C.10 For the present purpose, this is not an important issue, because in either case there was no restriction on a parent's power of disposition and the whole estate could be given away.

There is no doubt that the institution of an heir was not only the primary function of the will but furthermore that without it no will was valid.11 And to anticipate the possibility that the instituted heir might not enter, there were often named one or more substitutes (substitutio vulgaris). Likewise, a father was permitted in his will to provide an heir for his minor son, to take effect in the event of the child's death under the age at which he could legally make his own will (substitutio pupillaris).

Restrictions on Legacies and Bequests

Despite these precautions, there must have resulted many unfortunate instances, as it were, of a succession devolving intestate because there was no means of assuring entry by the instituted heir. In view of the obligations to pay debts and to carry out the testamentary instructions, the heir often refused to enter because where the testator had consumed most or all of the assets

10. 1 Cuq, Les Institutions Juridiques chez les Romains (1904) 258; Cuq, Manuel des Institutions Juridiques des Romains (1917) 681, 682, 706.
11. The institution of an heir by the early comitial will served the same purpose as procuring an heir by arrogatio (adoption). Thus the pontiffs, who never tolerated an arrogatio by a man who had sons of his own, similarly opposed (at first) the making of a comitial will by a paterfamilias who had sui heredes. Cornil, Ancien Droit Romain (1930) 106. Cornil also states that the testament served the additional purpose of keeping ancestral property in the family by preventing parcellation. Id. at 71.
of his estate in legacies the remaining burden was undesirable. This inference seems to be borne out by the repeated efforts to curtail excessive legacies.

An early law (lex Furia Testamentaria) set a limit to individual legacies by imposing a serious penalty on any person who accepted a larger amount, but there was no limitation on the number of legacies; and in 168 B.C. the lex Voconia guaranteed to the heir at least as much as any other beneficiary. However, these measures were ineffective to assure entry by the heir. The problem was solved only when the famous lex Falcidia, in 40 B.C., finally reserved a minimum of one-fourth (falcidian portion) of the estate for the heir; excessive legacies were reduced proportionately. The heir may have been any person capable of inheriting but it can be presumed safely that one or more of the testator's children were named in most cases. The determining purpose of perpetuating the family sacra obviously implies a preference for the real instead of artificial family successors.

After the establishment of fideicommissa early in the Empire, a testator could place charges or trusts upon his heirs and upon other beneficiaries under the will and it became customary to use this means for the purpose of making bequests to persons who were not legally capable of benefiting directly under the will. Since children (sui heredes) were always the most qualified for heirship they found themselves overburdened with these extratextamentary bequests which at first were not subjected to any rules or limitations. As a result the nominal heir was often only an intermediary for the person who really received the succession. To cover up the gaps, a senatusconsultum Trebellianum (56 A.D.) provided that actions (litigation) concerning the estate could also be transferred by the heir to the real beneficiary. The heir was thus protected against undue personal liability but there was still no inducement to assure his entry. It therefore became necessary to impose upon fideicommissa the same restrictions as for legacies, and the senatusconsultum Pegasianum (73 A.D.) provided a reser-
vation of one-fourth of the estate for the heir.\textsuperscript{16} If the heir still refused, he could be compelled by a magistrate to enter, taking no profit and incurring no risk. In the sixth century, Justinian assimilated legacies and \textit{fideicommissa}, and the same rules were made applicable to both.

Whereas the original purpose of the will had been to perpetuate the \textit{sacra}, the relationship changed to the other extreme when, in order to keep up the \textit{sacra}, restrictions had to be placed upon the very testation which it had helped bring into existence. By way of inverse return, the increasing importance of testamentary bequests may have had some bearing upon the gradual decrease in importance of the family \textit{sacra}.

At first, it had been the testator's greatest concern to provide for the perpetuation of the family \textit{sacra}. Later, it was the state which had to protect this institution in spite of the testator's indifference. Did the state consider that the need for the \textit{sacra} was strong enough to warrant the creation of new safeguards for its assured continuance? Or were these measures taken merely to obtain effect as far as possible for the testator's wishes, which would be upset if the will should lapse for want of entry by the heir? The former would seem to be the more probable inference, because while the state might have an interest in the stability of the family as the basic unit of its social and political organization, it would not have any interest in giving effect to the excessive legacies of a testator. In any event it is fairly obvious, from the nature and sequence of these developments, that the interest least considered was that of the heir. And to the children, as such, no consideration at all was given.

\textit{Direct Restrictions in Favor of Children}

At the same time, there were also two direct restrictions upon the powers of testation, more specifically in favor of children and exclusively in their interest. The first was in the rules of \textit{exheredatio} which subjected disinherison to extremely strict formalities,\textsuperscript{17} the second was in the \textit{querela inofficiosi testamenti} which went a step further and directly limited the testator's power of disinheritance.\textsuperscript{18}

\textit{Exheredatio}. A man's right to dispose of his property as he pleased was at least as old as the Twelve Tables, and it was im-

\textsuperscript{16} Buckland, Text-Book, 352; Girard, op. cit. supra note 9, at 990.
\textsuperscript{17} Buckland, Text-Book, 318 et seq.; Girard, op. cit. supra note 9, at 903.
\textsuperscript{18} Buckland, Text-Book, 324 et seq.; Girard, op. cit. supra note 9, at 913 et seq.
possible to change or contradict the *jus civile*. However, from the rules which followed, it can be inferred without doubt that the Romans disfavored the unjustified disinherison of children. The early jurists contrived to introduce the legal fiction\(^\text{19}\) of leaving the *jus civile* unchanged while a very severe formality was imposed for the institution or disinherison of *sui heredes*. Failure to comply with these rules caused the nullity or the ineffectiveness of the will. The general disapproval of disinherison found expression in this attempt to discourage it.

The reason for this disapproval lies in some phase of the concept that the children (and other *sui heredes*) were so closely connected with the inheritance (*hereditas*) in a sort of dormant ownership,\(^\text{20}\) or a more primitive condition of common ownership of group property,\(^\text{21}\) that while the *paterfamilias* did have the power to disinherit he could exercise it only with absolute explicitness.\(^\text{22}\)

A more equitable procedure for the omitted heir to make his claim was established by the praetors in the *bonorum possessio contra tabulas*.\(^\text{23}\) Further simplification by Justinian\(^\text{24}\) made no substantial change in the general principles or in the rules of formality for the disinherison of children. Although strictly a matter of form, the rules of *exheredatio* directly affected the testamentary devolution of property; however, there was still no general assurance that provision would always be made for the children.

It is of interest to note that, as the logical consequence of requiring a *suus heres* to be specifically instituted or disinherited, the birth of a child after the making of the will or after the death of the testator caused the will to fail. At first, it was impossible to institute or disinherit a person not in existence, so that the will inevitably had to fail.\(^\text{25}\) Although subsequently it became permiss-

\(^{19}\) A "legal fiction" signifies "any assumption which conceals, or effects to conceal, the fact that a rule of law has undergone alteration, its letter remaining unchanged, its operation being modified." Maine, op. cit. supra note 8, at 32.

\(^{20}\) Jolowicz, Historical Introduction to Roman Law (1932) 252.

\(^{21}\) Girard, op. cit. supra note 9, at 904.

\(^{22}\) The conclusion that the rules of disinherison must have existed from the earliest times is reached by Girard, op. cit. supra note 9, at 905, but this is strongly contested by Cuq, loc. cit. supra note 8, at 242-243.

\(^{23}\) Buckland, Text-Book, 321 et seq.; Girard, op. cit. supra note 9, at 909 et seq.

\(^{24}\) Buckland, Text-Book, 323; Girard, op. cit. supra note 9, at 912.

\(^{25}\) Buckland, Text-Book, 309 et seq.; Girard, op. cit. supra note 9, at 907 et seq.; Sandars, The Institutes of Justinian (1905) 2.13.1.2.
sible to institute or disinherit these *postumi* in anticipation, it
nevertheless remains of particular interest that the first reserva-
tion beyond the power of the testator was in favor of the after-
born or posthumous pretermitted child.  

Querela inofficiosi testamenti. This institution did establish
a direct limitation on the testator's freedom; it assured a provi-
sion for the children and for other members of the immediate
family despite proper but unjust disinherit in the will. The
querela was a later development which became established to-
wards the end of the Republic (probably during the second cen-
tury B.C.) and came as a result of an increasingly progressive
social attitude. The growing disapproval of unjust disinherit
on of children called for some protection against such eventualities;
the hardship and injustice must have accumulated a tremendous
force to overcome the immobility of the *jus civile*. Although this
was not changed, there was developed a new praetorian equity based on the principle that a man had a moral duty toward cer-
tain close relatives, most of all toward his children: if he disin-
herited them without cause it was contrary to natural duty and
sentiment of affection (*officium pietatis*). The *praetor* therefore
took it upon himself to carry out that duty for the testator, and
since this proceeding brought unfavorable reflection upon the
latter it may be inferred that he tried to prevent it by making a
more judicious will.

The *querela* consisted of a complaint made by the heir un-

27. "The next instrumentality by which the adaptation of law to social
wants is carried on I call Equity, meaning by that word any body of rules
existing by the side of the original civil law, founded on distinct principles
and claiming incidentally to supersede the civil law in virtue of a superior san-
city inherent in those principles. The Equity, whether of the Roman
Praetors or of the English Chancellors, differs from the Fictions which in
each case preceded it, in that the interference with law is open and avowed." Maine, op. cit. supra note 8, at 34.
28. A suggested fiction of the testator's insanity may have come from
the Greek law. Sohm, The Institutes (transl. by Ledlie 1907) 555, n. 6.
The old idea of common ownership of the family estate has been indicated
as an additional underlying principle of the *querela* by Buckland (Text-Book,
325), but this has been denied by Girard, op. cit. supra note 9, at 913.
29. Cf. 3 Jhering, Etudes Complémentaires de L'Esprit du Droit Romain
(transl. by deMeulenaire 1886) 188.
30. There is no complete agreement as to the exact nature and form of
the proceeding. The *querela* may have been the basis for a *petitio hereditatis*
or a preliminary investigation which preceded it, or may have been an inde-
pendent action. See Buckland, Text-Book, 324, n. 6; Cuq, Manuel des Insti-
tutions Juridiques des Romains, 712, n. 1; Girard, op. cit. supra note 9, at
913 et seq.; 3 Jhering, op. cit. supra note 29, at 344; Jobbe-Duval, 28 Nouvelle
Revue Historique (1904) 576; 31 Id. (1907) 755 et seq.
justly disinherited or (in the later law) inadequately provided for in the will, and was permitted only as a last resort in cases where the complainant had no other means of redress. At first, a single complainant would totally displace a single instituted heir as a result of the will being declared void, but in due course it was established that a proper complainant should get a reasonable share of the estate without completely upsetting the will. It was probably after the lex Falcidia that the complainant's portion under the querela was definitely fixed at one quarter of what he would have received on intestacy, and if the will gave him less or nothing at all the court would see that he received his due share.

If there were several claimants, each one's share was so little that the institution hardly served its purpose. Consequently, more consideration was given to this numerical aspect of the problem and Justinian's reforms increased the legal portion to one-third of the estate if there were four or fewer children and to one-half of the estate if there were five or more. This share was called the pars legitima, and the rules governing it constituted a material basis for the development of the légitime in mediaeval laws and customs and of the forced heirship in modern codes.

**Germanic Law**

The background of the Germanic inheritance system is likewise linked to certain fundamental institutions: the family group which developed from a primitive social organization, and the concept of private property which emerged from the earlier collective group ownership.

*Sib (Sippe): Family*

Within the period of recorded Germanic history, the oldest known type of association was the sib. This grouping was based on blood relationship and presumably developed out of an extensive patriarchal household community. Membership or kinship may have been determined originally on the agnatic principle of descent from a common tribal male ancestor, but the cognatic (blood) relationship was recognized in very early times.

---

31. Supra note 13.
33. The material for this section on Germanic law is taken mostly from Huebner, A History of Germanic Private Law, 4 Continental Legal History Series (1918) and the citations are therefore minimized.
34. Id. at 114 et seq.
The *sib* was the germ of all associational life—group personateness. As a unit it constituted an association of equal family heads together with the members of their individual households. Each household was composed of the two generations of parents and children, and within it the family head (*Hausherr*) enjoyed very extensive authority. Thus, while the *sib* formed an agrarian union and was important in the military and judicial organizations, it was also the centre of all social and legal relations. In contrast to the Roman family, which it otherwise resembled, there was no patriarchal head but only a union in which all adult male members, heads of households, were equal fellows.

During the Middle Ages the *sib* evolved in different places through various forms of village community, and was always organized on a principle of collective ownership. This continued until the nineteenth century.

**Ownership**

The concept of absolute ownership was known from the very earliest times, but this was collective ownership vested in the group which alone enjoyed legal personateness. In turn, the collective ownership of land inevitably tended to perpetuate group organization as the basis of society. Under these circumstances, there could have been no real system of inheritance because the death of one member of a group caused no change in the collective ownership; the association had the perpetual personateness of a modern corporation.

Regardless of the differences in environmental conditions, private property eventually emerged in practically all legal systems. But as incident to the process, there remained traces of the distinctive features of their respective historical backgrounds. In the Germanic law, this background included the *sib* and the other group organizations, and it accounted for the numerous and continued restrictions on private property.

The private ownership of chattels evolved earlier than that of land, because chattels were the subject of a more exclusive personal interest. Although private ownership of both chattels and land was derived from the collective ownership of the *sib* through the intermediate stages of the manorial and feudal village communities of the Middle Ages, it was difficult to conceive of a complete freedom of ownership of land. Thus there always persisted

35. Id. at 225 et seq. (land), 425 et seq. (chattels), 694 et seq. (inheritance).
numerous restrictions on the ownership of land: by reason of vicinage or of lordship, in the interest of the state, and in favor of other individuals or groups.

Restrictions on Ownership

Of more particular interest for the present inquiry are the restrictions upon private property derived from the collective ownership of the group and existing in favor of other members of the family.

(a) The most important of these restrictions was the one which prevented alienation because of the co-rights of certain relatives or members of the same group. These "rights of expectancy" applied both to land and to chattels, and being derived from the community of collective hand (Gesamte Hand) they made it impossible for the head of the household to dispose of anything by individual act. Later, when he did acquire some rights of independent disposition (Freitheilsrechte), he could not prejudice the rights of expectancy of the other members who were entitled to rely upon inheriting the indisposible portion of the estate, the fraction varying in different systems.

(b) By the "right of co-alienation" the next heir was entitled to cooperate formally in any act of disposition made by the owner. An inter vivos alienation of land without his consent was invalid because he had a real right of expectancy with regard to the property. In the Hansa cities, the right of co-alienation led almost directly to the heir's compulsory portion, or Pflichttheil; in other places, it weakened into the right of pre-emption.

(c) The rights of expectancy and of co-alienation excluded consideration of the interests of the owner and worked harsh results; and even when these rights became relaxed, the heirs were still given primary consideration by the "right of retractive purchase," a pre-emption in preference to an outsider. However, such right could be exercised only in the case of a sale and subject to the payment of the price offered (or the refund to the purchaser of the price paid).

This deference to the co-rights of heirs kept property intact and in the family. When the solidary character of landed estates was threatened by the inclination to take advantage of the newer economic interests at the end of the Middle Ages, the numerous

36. Id. at 259 et seq.
37. Id. at 304-312, 393 et seq.
kinds of pre-emption rights still manifested the extensive and continuing influence of the original collective ownership.

(d) After the thirteenth century a very important restraint on ownership—usually in favor of children—consisted of the various systems of "entails," statutory and consensual, which prohibited both alienation inter vivos and disposition mortis causa. Very often the whole estate devolved upon the eldest male and thereby remained intact, because the determining interests were to keep the property in the family and to retain the strength of the nobility. Although an advantage was conferred upon the children, in effect they were only the incidental beneficiaries of a life interest because this benefit was the means toward the end and not the end itself.

In the eighteenth and particularly in the nineteenth centuries, the restrictions on ownership were generally regarded as burdensome to commerce and many of them were abolished. But those in favor of certain close relatives stood their ground firmly.

The Development of Testation and its Limits

Collective Ownership—Adoption

The early succession laws, based on blood kinship and fresh from collective ownership, excluded all testamentary disposition. And when a man had no natural heir to succeed him, the appointment of an artificial heir was more accurately a matter of adoption in which the popular assembly had to cooperate.

This was similar to the Roman institution of arrogatio despite the fact that the Roman and Germanic developments came from the totally different bases of freedom and absence of testation respectively. In one case, adoption was a means of serving the interests of the family, the inheritance being incidental; and in the other, adoption into the family was a method of selecting a beneficiary.

Private Property

In the old Germanic law, after the evolution of private property in personal chattels, such as clothes, weapons, horses, food-stuffs and so forth, the religious belief of another life in the next

---

38. Some jurists (referred to id. at 309) considered that the ownership of property was vested in the family as a perpetual legal entity, but Huebner follows the view of a restricted ownership in each holder (id. at 310).
world gave rise to the custom of burying or cremating these objects with the dead man so that they could serve his needs in the beyond. The objects so given to the decedent in farewell came to be identified as the “dead's part” (Todtentheil). In those communities which had progressed beyond the larger group organization and had established the two generation family as the social unit, the other two thirds of the decedent's property devolved upon the widow and the children respectively.

In time, the dead's part came to be regarded not only as those personal objects used to provide for the material needs of the decedent in the next world, but also as the share of his estate in which he had an exclusive interest. As such, the institution was found in many parts of the continent during the Middle Ages, and this led to the right of disposition in anticipation of death. Under the influence of the widespread Christian custom of utilizing the dead's part as a gift to the Church pro salute animae, this spiritual provision for the next world replaced the material provision of the older system. Thus, the Church exerted a powerful and universal influence in establishing and extending the power of testamentary disposition. Many legal historians suspect that the use of the dead's part pro salute animae contained the germs of the mediaeval will throughout Europe.

Mediaeval Will: Freitheil, Pflichttheil

The evolution of this mediaeval testament in Germany was not free from the limitations within which it had come into existence. Some of the old restrictions on alienation still remained, and the testator acquired rights of disposition mortis causa only over his Freitheil or free portion. With the aid of the Church this was

43. Huebner, op. cit. supra note 33, at 742, 746, 750; Brissaud, op. cit. supra note 39, at 625; 2 Pollock and Maitland, op. cit. supra note 42, at 314. Brunner's view (supra note 40) that the testamentary Freitheil developed from the Todtentheil is not accepted by Rietseel, Der Todtentheil in Germanischen Rechten (1911) 32 Zeitschrift der Savigny Stiftung, Germ. Abt. p. 297. However, the latter opinion is in turn refuted by the most authoritative writers. See Gardner, The Origin and Nature of the Legal Rights of Spouses and Children in the Scottish Law of Succession (1927) 39 Juridical Rev. 209, 313, 339.
increased at the expense of the heir's rights in expectancy. The
indisposable part of the estate was called Pflichttheil, or the com-
pulsory portion which was reserved for children and other close
relatives, and over this the testator had no power of disposition.  

Reception of Roman Law; Comparisons

Culminating a gradual movement of three or four centuries,
the final step in the "Reception" of the Roman law took place at
the close of the fifteenth century, when the Imperial Chamber
of Justice was established and its judges were instructed to
recognize Roman law as the common law of the Empire. 45 This
reception of Justinian's Corpus Juris was a matter of historical
necessity; "... it was the best means of providing the innumer-
able political bodies of the so-called Empire with a common law
which was abreast of the requirements of a modern capitalistic
economy, of extensive trade relations, and of the growing power
of territorial sovereigns." 46

With all this, the Germanic laws of inheritance remained the
expression of the general conditions and views of a primitive and
unindividualistic society. Consequently, in contrast to the Roman
law, legal succession was given precedence over testamentary
succession, and intestacy was the rule rather than the exception. 47
From the two widest extremes, and necessarily developing in
opposite directions under totally different environmental condi-
tions, the Roman law and the Germanic law reached similar re-
sults regarding the limitations of a parent's testamentary free-
dom.

Spanish Law

The history of Spanish law is long and involved and reflects
the Roman, Visigothic, Mohammedan and Christian influences
which determined the political history of the country. Codes and
compilations were relatively numerous but uncoordinated. Only
a few of the main points relating directly to the subject of forced
heirship will be mentioned here.

In Spain, 48 the history of forced heirship presents an interest-

44. Cf. Huebner, op. cit. supra note 33, at 305-308, 749-753.
45. A General Survey of Events, Sources, Persons and Movements in
Continental Legal History, 1 Continental Legal History Series (1912) 366;
Huebner, op. cit. supra note 33, at 16 et seq.
46. Vinogradoff, Introduction to Huebner, op. cit. supra note 33, at xxxiii.
47. Huebner, op. cit. supra note 33, at 697.
48. General Survey, op. cit. supra note 45, at 587, 594 et seq., 617 et seq.;
1 Alcubilla, Codigos Antiguos de Espagna (1885) 33, 123, 575, 722, 723; 8
ing development as a result of the Germanic and Roman traditions meeting again, as they did in France, in the same field. The Visigothic concept of exclusive family ownership left no room for any dispositions to the prejudice of presumptive heirs. The first general code, the Fuero Juzgo, was compiled during the latter part of the seventh century (654-694 A.D.) and was based largely on Germanic traditions. However, the social and religious influences procured for a testator the faculty of disposing of one-fifth of his estate in favor of the Church or other pious works, and it was further provided that the father could dispose of as much as one-third if such excess was for the betterment (mejores) of some of his children.

The Fuero Real (1254 A.D.) retained the same rules. But Las Siete Partidas (1256-1265 A.D.) was compiled under much stronger Roman influences, which were then spreading throughout the continent, and the testator’s freedom of disposition was greatly increased. Adopting Justinian’s scheme, four or fewer children were entitled to a legítime of one-third of the estate, five or more to one-half.

The later compilations of the Laws of Estilo (1295-1312 A.D.), Laws of Toro (1505 A.D.), Nueva Recopiacion (1567 A.D.), and Novisima Recopiacion (1805 A.D.), seem to have chosen the system of the Fuero Juzgo and the Fuero Real, so that the legítime of children was usually four-fifths of the estate, with the possibility of the testator’s freedom being increased to one-third for betterment purposes.

In the Civil Code of Spain there is a combination and compromise of the various older elements. Thus, the legítime of

Barrachina, Derecho Foral Espagnol (1912) 492, 496; Esriche, Diccionario Razonado de Legislacion y Jurisprudencia (1868) verbo Legítima, 1196, 1197; Gregorio Lopez, Las Siete Partidas (1789) 6.1.17, n. 10, and 4.36.8, n. 5; 6 Manresa, Comentarios al Codigo Civil Espanol (6 ed. 1932) 227 et seq.; 6 Roman, Estudios de Derecho Civil (2 ed. 1910) vol. 2, 753 et seq.; Scott, Las Siete Partidas (Eng. transl. 1931) 5.4.8, 6.1.17, 6.2.1, 6.7.10, 6.8.1.5; 5 Valverde, Tratado de Derecho Civil Espanol (3 ed. 1926) 208 et seq. See also in general: Vance, The Background of Hispanic-American Law; Legal Sources and Juridical Literature of Spain (1937); Walton, The Civil Law of Spain and Spanish America (1900).

50. Fuero Juzgo, 4.5.1.
51. Fuero Real, 3.5.10.
53. Las Leyes del Estilo, 214; Leyes de Toro, 17 et seq., 26, 28; Novisima Recopiacion, 10.6.1-10, 10.20.8.9.
54. Arts. 806-810, Civil Code of Spain (1889).
children consists of two-thirds of the estate, leaving the father free to dispose of one-third in any way he wishes. But he may further dispose of another third "in order to apply it as a betterment" to some of the children.

TEXAS

The background of the legal history of Texas was Spanish. Forced heirship was in operation as a matter of course. As part of the Spanish law which was originally in effect, a parent had the right to dispose (inter vivos or mortis causa) of only one-fifth of his estate to strangers, and of one-third if such dispositions were made in favor of some of his children. Parents as forced heirs received two-thirds of the estate; brothers and sisters were not so favored unless the testator had instituted an infamous person as heir to their prejudice.

It may be that Texas was more of a pioneer state than Louisiana, and that the roots of the civil law were not as strongly imbedded in its traditions. As long as it remained a Spanish settlement (1682-1827) or a part of the Mexican federation (1827-1836) there was no change in this law. But with the establishment of the Republic a new phase began. In the meeting between the civil law and the adjacent common law influences, the pervasive effects of the latter seemed to spread quickly.

On December 18, 1837, a statute was passed providing that only legitimate descendants should be forced heirs. About two years later, the Wills Act of January 28, 1840, increased the parent's disposable portion to one-fourth, and listed a number of legal causes for disinherition. However, this was only a testamentary restriction; the liberty of disposition inter vivos was untrammelled.

In one case, the court lamented the dearth of positive law on this subject, but reached the same just and equitable result as the civil law rule that if a child received benefits during the

55. Hagerty v. Hagerty's Exe'rs, 12 Tex. 456 (1854); Crain v. Crain, 17 Tex. 81 (1856). Cf. La. Civil Code of 1808, III.2.19, p. 212, infra note 75. For direct references to the old Spanish law, see text supported by notes 48-54, supra; see also note 76, infra.
56. 1 Gammel, Laws of Texas (1898) 1448; Hartley, Digest of the Laws of Texas (1850) § 3251.
57. 2 Gammel, Laws of Texas (1898) 341; Hartley, A Digest of the Laws of Texas (1850) §§ 3263, 3265.
59. Parker v. Parker, 10 Tex. 83 (1853).
lifetime of the testator, he must collate them in order to claim the legitimate share as a forced heir. An excessive disposition was not null but merely reducible,\(^6\) and the legitimate share was received free from any testamentary charges or encumbrances.\(^6\) However, the claim was personal to the forced heir, and it could be lost by express or implied renunciation.\(^6\)

**The Rejection of Forced Heirship in Texas**

In 1840 the great body of Spanish law was repealed,\(^6\) and after Texas entered the Union in 1846 the invading common law influence became stronger and more expansive. There does not seem to have been any open conflict between the two legal systems because these adjustments were taking place without resistance. The institution of forced heirship did manage to survive for a while, but its fate was sealed and on July 24, 1856, it was finally abolished.\(^6\)

Why forced heirship disappeared while the civil law institution of community property remained cannot be answered with certainty. However, it would appear that whereas the active part played by the wife of the pioneer was certainly in keeping with the concept of their acquisitions becoming community property,\(^6\) the individualistic spirit of a pioneer country was not in sympathy with restrictions on the rights of ownership.\(^6\) This victory in Texas of the common law principle of testamentary freedom\(^6\) was similar to the result reached in almost all the other instances where this conflict arose, as indicated later.\(^6\)

---

60. Charle v. Saffold, 13 Tex. 94 (1854).
63. Crain v. Crain, 17 Tex. 61, 91 (1856).
64. An Act Supplementary to the Act of January 28, 1840, concerning Wills, and authorizing Persons to dispose of their Estate by Will, Act of July 24, 1856, chap. lxxxv. 4 Gammel, Laws of Texas (1898) 423; Paschal's Digest of the Laws of Texas (2 ed. 1870) Art. 3868. (Probably as a result of an error in Paschal's Digest [1 ed. 1866] this act is sometimes cited as of January 24, 1856). See also Connecticut v. Davis, 33 Tex. 203 (1870).
66. Because of its “supposed thraldom and oppression” it was the intention of the legislature “to cut forced heirship up by the roots.” Hamilton v. Flinn, 21 Tex. 713, 718 (1858).
68. See infra at text supported by notes 123-130.
LOUISIANA

Louisiana was first colonized in about 1700 and the original settlers came from France. From the very start the country was governed under royal charters which extended the Laws and the Custom of Paris to the new territory, and there can be no doubt about the origin of forced heirship in Louisiana.

For over half a century these conditions continued without interference, and the traditions of the French law were as much a part of these people as of their cousins back in France. When Louisiana was ceded to Spain in 1763 the inhabitants forcibly ejected the Spaniards who came to establish the new government. It was only by means of a military entry some six years later that Spain actually asserted control over the country.

The debatable question of whether the French laws were abolished de jure or de facto by O'Reilly's Ordinances of 1769 is not of serious concern to the present inquiry because forced heirship was equally emphasized in both French and Spanish laws. For the details of the institution in the subsequent Louisiana codifications, both French and Spanish sources were drawn upon.

In 1801 Spain agreed to return Louisiana to France, but even prior to the formal delivery on November 30, 1803, France had secretly conveyed the territory to the United States. The three weeks of Laussat's efforts to restore French dominion could only have been a still-born gesture into which no breath of life had been imparted. For the historical development of forced heirship, this short interval may be disregarded.


70. E.g., the charter granted to Anthony Crozat in 1712 and the one granted to the Western Company in 1718. Howe, op. cit. supra note 69, at 264 et seq.


72. E.g., Las Siete Partidas, at 5.4.8, 6.1.17, 6.2.1, 6.7.10, 6.8.1.5. See text supra pp. 54-56, supported by notes 48-54, and see also note 78, infra.

73. It has sometimes been considered as the re-entering wedge which permitted the first Louisiana codifiers to use the French Civil Code as their model. B. W. Dart, op. cit. supra note 69, at iv. But see Lislet and Carleton, Las Siete Partidas (Eng. transl. 1929) xxi, preface.
Under American dominion, the conflict between the invading common law and the entrenched civil law broke into open battle almost at once. Governor Claiborne and the new common law lawyers recommended and tried to establish the common law as it was known to the other states, but the stubborn adherence to the civil law proved to have more than sufficient resistance. The common law never really had an appreciable chance of displacing it. The few newcomers made no showing against the large numbers of established inhabitants, and even in some of the prominent jurists who came from the east there must have been traces of the strong sympathy for the civil law which was then prevalent along the Atlantic seacoast.\textsuperscript{7}

The shock of the impact between the two rival systems of law was rather severe but the real struggle was short-lived and decisive. The powerful insistence on the civil law was sufficiently general to retain in effect the laws which were in existence at the time of the delivery to United States. It was left to the Territory to straighten out the details and adjustments.

**Codification and Revision**

In 1806, the first legislature appointed commissioners to codify the existing laws. Although they made use of a draft, and perhaps a copy of the final text, of the French Civil Code, they naturally included a considerable amount of Spanish law. In this compilation of 1808,\textsuperscript{75} the codifiers reiterated the old Spanish rules\textsuperscript{76} regarding the ligitime. A parent's donations either inter vivos or mortis causa could not exceed one-fifth of his property to the prejudice of his children, and those of a child could not exceed one-third to the prejudice of the parents. The rules and causes for disinheriting\textsuperscript{77} were also adopted from Spanish sources.\textsuperscript{78}

However, when this first Code was revised in 1825, there

\textsuperscript{74} Pound, The Influence of French Law in America (1909) 3 III. L. Rev. 354; Pound, Pioneers and the Common Law (1920) 27 W. Va. L. Rev. 1, 5, 6; Pound, Revival of Comparative Law (1930) 5 Tulane L. Rev. 1, 8, 9.

\textsuperscript{75} A Digest of the Civil Laws now in force in the Territory of Orleans, with alterations and amendments adapted to its present system of government (La. Civil Code of 1808) III.2.19, p. 212. White v. Holsten, 4 Mart. (O.S.) 471, 475 (La. 1816).

\textsuperscript{76} 3 Barrachina, op. cit. supra note 48, at 496; Esriche, loc. cit. supra note 48; Fuero Juzgo, 4.5.1; Fuero Real, 3.5.10, 3.12.7. See Gregorio Lopez, loc. cit. supra note 48; Schmidt, The Civil Law of Spain and Mexico (1851) 207. See also the discussion of Spanish law at text supported by notes 48-54, supra. Cf. the original rules of forced heirship in Texas, note 55, supra.

\textsuperscript{77} La. Civil Code of 1808, III.2.127, p. 296.

\textsuperscript{78} Las Siete Partidas 6.17.1-11.
were adopted the amendments proposed by the commissioners\(^9\) that the disposable portion be increased and that—in keeping with the French Civil Code\(^8\)—it be graduated in accordance with the number of children. It was thus enacted that:

"Donations inter vivos or mortis causa cannot exceed two-thirds of the property of the disposer, if he leaves at his decease, a legitimate child; one-half, if he leaves two children; and one-third, if he leaves a greater number.\(^8\)

At the same time, the original Spanish rules of disinheritance were retained.\(^8\)

These provisions were carried over into the Revised Civil Code of 1870,\(^8\) and now form part of the current law of the state.

**Forced Heirship in Operation**

Many of the issues which have to be dealt with in the application of the principles of forced heirship were anticipated and provided for by the Civil Code, and the courts have worked out solutions for the others. A few of these will be briefly indicated.

As in both French and Spanish law, excessive dispositions are not null, but are reducible to the disposable quantum.\(^8\) However, where a donor legally revokes a gift and then sells the property, the vendee cannot be sued for any reduction because through revocation the gift is deemed never to have been made.\(^8\) And since a remunerative donation is really a *dation en paiement* for services rendered, it is assimilated to a sale and is not subject to reduction either.\(^8\)

The child's cause of action for the collation\(^7\) of benefits
received by other heirs, and for the reduction88 of excessive disposition arises only after the death of the ancestor, and is subject to a prescription of five years.89 This right is personal to the forced heir, his heirs and assigns; his creditors cannot avail themselves of it.90 However, anything amounting to confirmation or ratification of the ancestor's acts must preclude the forced heir from contesting them.91 The heir's right can also be exercised to attack simulated or fraudulent contracts of the ancestor.92 A rather interesting question arose when the court had to determine whether the action for reduction could be exercised against a gift which the parent had made before his marriage, but since the texts make no exception for the gifts of an unmarried person it was held that they must be subject to reduction just as any others.93

One of the problems which gave rise to some controversy in France was eliminated neatly by the codal provision—incorporating the view which ultimately prevailed in the interpretation of the French Civil Code—that "the part of those who renounce goes to those who accept."94

The Louisiana Civil Code has also provided that an adopted child is entitled to the délitime but he cannot interfere with the rights of other forced heirs (legitimate children and parents of the adopter).95 The illegitimate child is not a forced heir and, especially in the presence of other surviving close relatives, is

95. Art 214, La. Civil Code of 1870. Succession of Hawkins, 139 La. 228, 71 So. 492 (1916); Succession of Dielman, 155 La. 496, 99 So. 416 (1924). See also Comment (1933) 1 Louisiana Law Review 196, 199-201. In Alexander v. Gray, 181 So. 639, 644 (La. App. 1938), there is dictum to the effect that in the presence of other forced heirs an adopted child is also entitled to a délitime but that it must be taken from the disposable portion.
even under an incapacity to receive, in any manner, more than a small part of the parent's estate. 96

Closely related to the present problem is the codal provision which causes the revocation of a will by the subsequent birth of a legitimate child. A recent judgment concluded that, in the light of its historical development in Louisiana, the rule did not apply to the case of an adoption. 97 Furthermore, the court justly criticized an earlier liberal interpretation 98 which had applied the article where a child born prior to the making of the will had subsequently thereto been legitimated by the marriage of its parents.

In the matter of inheritance by ascendants, there is a glaring inconsistency between the rule of forced heirship 99 which assures one-third of the estate to a surviving parent in default of descendants, and the rule of intestate succession 100 which entitles a single surviving parent to only one-fourth of the estate in the presence of decedent’s brothers or sisters. Considering that the forced heir’s right to demand a reduction should not exceed the amount of prejudice caused by such liberalities to the rights he would have had in their absence, the parent’s claim has been limited to the intestate share of one-fourth.101

The surviving spouse is not a forced heir, but is provided for in other ways. There are the rights to one-half of the com-

97. Succession of McRacken, 162 La. 443, 110 So. 645 (1926), interpreting Art. 1705, La. Civil Code of 1870, which is not found in the French Civil Code but which was taken from Spanish sources (Las Siete Partidas, 6.1.20).
100. Art. 911 (par. 2), La. Civil Code of 1870.
101. Succession of Greenlaw, 148 La. 255, 86 So. 786 (1920), containing a review of prior conflicting decisions, and approved in Succession of Dielman, 155 La. 496, 99 So. 416 (1924); Succession of Bush, 158 La. 1000, 105 So. 42 (1925); Shimshak v. Cox, 166 La. 102, 116 So. 714 (1928). The concurring opinion of Judge Dawkins (86 So. at 797) that the rules of forced heirship should come into operation only when liberalities have exceeded the disposable portion seems to be rather sound, and a solution to the problem could be worked out on the basis of this principle without any modification of the texts.

For a discussion of the details of this problem, See Comment (1933) 7 Tulane L. Rev. 259. For a proposed amendment to Article 1494 fixing the fractions in accord with Article 911, see Lazarus, The Disposable Portion and the Legitime (1941) 1 Loyola L. Rev. 69, 73.
munity property,¹⁰² the needy spouse's marital portion (one-fourth) of a rich estate,¹⁰³ and the widow's (and children's) privileged claim to one thousand dollars from an insolvent estate.¹⁰⁴

A forced heir may be deprived of his légitime by a judicial pronouncement of unworthiness to inherit (for recognized reasons),¹⁰⁵ or by the testator's formal exercise of the power of disinheritance (for the "just causes" specified).¹⁰⁶ To be effective, a disinheritance must satisfy a number of requirements: it must be nominatim and specifically expressed by the testator in his will, and the just cause alleged by him must be proved after his death by the other heirs. Evidently, disinheritance is not at all favored.¹⁰⁷ Furthermore, wherever possible the courts have been inclined to render ineffective the testator's attempts to disinherit his children.¹⁰⁸ The public policy of forced heirship is so strong¹⁰⁹ that even an agreement by the forced heir to relinquish his claim for the légitime is not binding upon him.¹¹⁰

Another indication of the solicitous attitude towards forced heirship is found in Article 1710 which provides that "no charges or conditions can be imposed by the testator on the legitimate portion of forced heirs."¹¹¹ By reason of this article, the court has ruled that the légitime cannot be subjected to a usufruct,¹¹² except of course the usufruct of the surviving spouse on the decedent's half of the community under Article 916.¹¹³

---

¹⁰⁵. Art. 964 et seq., La. Civil Code of 1870. It is necessary to have the quality of heir in order to claim the légitime. Cross, op. cit. supra note 91, at 137, § 90.
¹⁰⁷. Succession of Reems, 134 La. 1033, 64 So. 898 (1914).
¹¹³. Art. 916, La. Civil Code of 1870: "In all cases, when the predeceased husband or wife shall have left issue of the marriage with the survivor, and shall not have disposed by last will and testament, of his or her share in the community property, the survivor shall hold a usufruct, during his or her natural life, so much of the share of the deceased in such community property as may be inherited by such issue. This usufruct shall cease, however, whenever the survivor shall enter into a second marriage."
The rules which govern the question of subjecting the légitime to a condition of indivision are a little involved. The general rule of Article 1710 is modified by Article 1301 which expressly provides that it is permissible to impose a condition of indivision during minority. But it has been held that Article 1300 cannot be interpreted to permit imposing such a condition on the forced portions of major heirs. In *Succession of Turnell* the court maintained that such a condition was improper and therefore permitted the forced heirs to obtain immediate possession of their légitime. The recent trust acts of 1920 and 1938 added another facet to this question. Act 107 of 1920 provided specifically that a settler could subject the légitime to a trust in favor of the forced heir, and this was upheld in *Wilbert v. Wilbert*. Although this statute was repealed in 1935, the same position was embodied in a new trust estates act of 1938 and is really a direct departure from Article 1710.

*The Sanctification of Forced Heirship in Louisiana*

In view of the French and Spanish background, it is obvious that forced heirship should have been among the original basic institutions of Louisiana civil law. It is much less obvious however that—during many generations and throughout tremendous social, economic and political changes—the institution of forced heirship should have retained its place of importance in the legal system. To the people of Louisiana, this seemed perfectly natural. But in the light of an extensive comparative perspective, the phenomenon appears exceptional. In several legal systems the civil law principle of forced heirship had come into contact with the common law principle of testamentary freedom. With the

114. Art. 1300, La. Civil Code of 1870: "But a donor or testator can order that the effects given or bequeathed by him, be not divided for a certain time, or until the happening of a certain condition. "But if the time fixed exceed five years, or if the condition do not happen within that term, from the day of the donation or of the opening of the succession, the judge, at the expiration of this term of five years, may order that partition, if it is proved to him that the coheirs can not agree among themselves, or differ as to the administration of the common effects."

115. Succession of Manion, 143 La. 799, 79 So. 409 (1918); Succession of Manson, 168 La. 236, 121 So. 868 (1929).


118. 155 La. 197, 99 So. 65 (1923); followed in Succession of Manthey, 159 La. 743, 106 So. 289 (1925).

119. Act 7 of 1935 (3 E.S.).

exception of Louisiana and Scotland, the freedom of disposition had prevailed even where some or most of the other basic civil law institutions had stood their ground.

The steps in this process as it happened in Texas have been described above: forced heirship was abolished while the civil law institution of community property was retained.

In Quebec the struggle between the two modern systems of law was a very bitter one. The result was a complete victory for the civil law. However, on one main issue the common law prevailed! and that was in the abolition of forced heirship by the introduction of full and absolute freedom of testamentary disposition.

Likewise, in the further flung instances of conflict between the civil law and the common law, this issue was finally resolved in favor of the liberty of testation.

In South Africa, the Roman-Dutch law contained the rules of the later Roman codifications on the subjects of disinserion, the legitimate portion, the querela inofficiosi testamenti, the falcidian and trebellian portions. Thus, four or fewer children were entitled to one-third, and five or more to one-half, of what they

121. "In Scottish law the legal rights of the surviving spouse and children still conform to the tripartite principle which operated under the mediaeval law of England. According to this principle, one third of a man's free movable estate goes to the surviving children (legitim) and one third to the widow (jus relictae); if only one or the other survives, the fraction is fixed at one half. In 1881 the woman's estate was likewise subjected to these claims in favor of the surviving children and widower (jus relict). In addition, the widow enjoys the right of terce, which is a life-rent on one-third of the husband's heritable estate, and is based on the obligation of a landed proprietor to provide for his widow in keeping with his circumstances and condition in life. The husband's counterpart of this right is called courtesy, and extends over the whole of the wife's heritable estate." Dainow, Limitations on Testamentary Freedom in England (1940) 25 Corn. L. Q. 337, 344, n. 44. See Encyclopedia of the Laws of Scotland (Green, 1930) vo. Legitim, vol. 9, p. 133 et seq.; vo. Terce, vol. 14, p. 386 et seq.; vo. Courtesy, vol. 5, p. 44; vo. Collation, vol. 2, p. 476 et seq.; Gloag and Henderson, Introduction to the Law of Scotland (2 ed. 1933 39, p. 480 et seq.; 1 McLaren, The Law of Scotland in Relation to Wills and Successions (1868) 117 et seq.; Bell, Principles of the Law of Scotland (10 ed. 1899) 615 et seq.

122. See discussion supra at pp. 56-57.

123. Although the Quebec Civil Code did retain the dower rights of children as a counter balance to the loss of their legitime, the practice has been to nullify dower so that testamentary freedom is really complete and absolute. For full discussion see Dainow, Unrestricted Testation in Quebec (1936) 10 Tulane L. Rev. 401.

would otherwise have inherited on intestacy. For more than half a century after the English acquisition of this territory (1814) these laws remained unchanged, but under English influences “the pull toward the despotic authority of the property owner”\textsuperscript{122} was so strong that all restrictions on testamentary disposition—not only the légitime of children, but also the falcidian and trebellian portions of the instituted heir—were completely abolished by legislation. Natal was the first to make the departure in 1863; the Cape followed in 1874; Orange Free State (Orange River Colony) and Transvaal withstood the change until 1901 and 1902 respectively.\textsuperscript{126}

In Ceylon, there was no express abolition but it is interesting to note that the restrictions on testation simply dropped out of existence by implication from non-use.\textsuperscript{127}

In British Guiana, a rather determined effort to save the legitimate portion of children was made by a law of 1909, but it was impossible to keep this curb on the individual’s rights of ownership, and the freedom of testation received legislative sanction in 1916.\textsuperscript{128}

From these indications of the same reaction in various parts of the British Empire,\textsuperscript{129} it might appear that—even where the general system of the civil law survived the conflict—there was some irresistible relationship between modern economic and social progress and the assertion of property rights to the ultimate degree.\textsuperscript{123} In comparison with what happened to forced heir-

\textsuperscript{125}McMurray, vo. Successions, 14 Encyclopedia of the Social Sciences (1934) 436, 438.

\textsuperscript{126}Natal, Law 22 of 1863, § 3; Law 7 of 1885, §§ 1, 2. Cape, Act 23 of 1874, § 2; Act 26 of 1873, § 1 (falcidian and trebellian portions). Orange Free State, Law Book of 1901, c. 92, §§ 2, 3. Transvaal, Proclamation 28 of 1902, §§ 126, 128. 3 Manfred Nathan, op. cit. supra note 124, at 1848, 1860, 1916; Lee, op. cit. supra note 124, at 364; Hoeck, Die Testierfreiheit und ihre Beschränkungen im Britischen Reich (1933) 38.

\textsuperscript{127}Lee, op. cit. supra note 124, at 364; Hoeck, op. cit. supra note 126, at 38; both citing 2 Thompson, Institutes of the Laws of Ceylon, 208.

\textsuperscript{128}British Guiana, Deceased Persons Estates Ordinance, no. 9 of 1909, § 4; abolished by the Civil Law of British Guiana Ordinance, no. 15 of 1916, § 7. Lee, op. cit. supra note 124, at 364; Hoeck, op. cit. supra note 126, at 38.

\textsuperscript{129}The Channel Islands of Jersey, Guernsey, Alderney and Sark seem to have remained a part of the old world unto themselves, unaffected by the newer English influences. Thus, they retained the traditions of the Custom of Normandy with slight modification: that a testator who leaves surviving children (and a widow) can dispose of only one-third of his movable property. See Lee, The Civil Law and the Common Law (1915) 14 Mich. L. Rev. 89, 92; 1 Le Geyt, Manuscrits Sur La Constitution, les Lois et les Usages de l’île de Jersey (1846) 131, 134; Escarra, La Succession aux Biens Réels dans les coutumes Anglo-Normandes (1903) 337 et seq.

\textsuperscript{130}It is very interesting and significant that in many parts of the British empire there has been expressed very recently the phenomenon of
ship in the other instances of conflict with the common law principle of testamentary freedom, it would have been unexpected that in only one or two jurisdictions it should survive. It may be somewhat surprising therefore, that the institution should have commanded such continued respect in Louisiana.

Much more to be marvelled at, however, is the coup de grace that came in 1921—more than a century after the first codification of Louisiana civil law. The attachment to this legal system and the appreciation of it resulted in making almost sacred certain institutions which were characteristic and symbolic of the civil law.

In the constitutional convention of 1921, there was introduced "An ordinance relative to the limitation of legislative powers."\(^{131}\) The sponsors of this proposal represented the deep-rooted and widespread sentiment that looked with disfavor upon the infiltration of common law doctrines and the displacement of civil law principles. The fact that trusts had just been introduced into Louisiana law\(^{132}\) was regarded as demonstrating a lack of appreciation of the fundamental social and economic values of the long standing tradition which prohibited substitutions and fideicommissa.\(^{133}\) That such notions were even harbored by some people was a matter of serious concern to others who felt that something had to be done. Thus the main part of the proposed Ordinance related to the prohibition against trusts, and to this was linked a provision safeguarding forced heirship. The combination would continue to prevent the accumulation of excessively large fortunes, and that is how the two things came to be together in the a new and totally opposite development returning to limitations of testamentary freedom. See Dainow, Limitations on Testamentary Freedom in England (1940) 25 Corn. L. Q. 337; Dainow, Restricted Testation in New Zealand, Australia and Canada (1938) 36 Mich. L. Rev. 1107.

131. Ordinance No. 305, "An Ordinance relative to the limitation of legislative powers" introduced by Mr. Sidney Herold and worded as follows in the original proposal: "No law shall be passed abolishing the principle of forced heirship or legalizing substitutions or fidei commissa or trusts affecting immovable property. Note. This is intended as a new article, there being none on the subject in the present constitution." Official Journal of the Proceedings of the Constitutional Convention of the State of Louisiana (1921) 274.

132. La. Act 107 of 1920 had introduced a limited trust.

same proposal.\textsuperscript{134} The original text of the Ordinance\textsuperscript{135} would have barred trusts altogether, but in the end a compromise was reached approving a specially limited use of the trust device.\textsuperscript{136} How-

\textsuperscript{134} A direct and interesting light is thrown upon this matter in a personal communication to the writer from the sponsor of the proposal, Mr. Sidney L. Herold. With his permission the following excerpt is reproduced:

"Many years ago, I read a lecture by Charles E. Fenner. . . . The general subject was the danger in a democracy of the accumulation of tremendous fortunes. The remedy which he pointed out was two-fold: the abolition of trusts, and the institution of the principles of forced heirship and the equality of heirs. All of these, he pointed out, were necessary to break up tremendous family fortunes."

The philosophy of the matter was more fully discussed by Mr. Herold in a recent address as follows:

"The most remarkable of the economic principles enunciated in the Civil Code, however, deals with the very current problem of the maldistribution of wealth and its unhealthy accumulation. Mindful of the evils inherent in great wealth, of the inconsistency of plutocratic power in a democracy, one of the great purposes of the Code is the prevention of this disease. The strict provisions of the Code governing the right of testamentary disposition, in the institution of the doctrine of forced heirship and its elaborate provisions insuring equality of heirs, all flow from the same desire of obviating the possibility of the passing of great estates into single hands. The provision of the Code prohibiting fidei commissa and substitutions—that is to say, the prohibition of trust estates—was likewise designed to keep in commerce the flow of wealth incident on death.

"So primogeniture, entailment, trust, and every other form through which fortunes might be held intact despite death are interdicted by the Civil Code of Louisiana. The agency of death thus performs its normal function—it releases the grasp of the possessor over worldly accumulation. It distributes, vests ownership and right of untrammeled disposition, breaks up the estate, and thus gives full play to the natural rule expressed in the homely proverb that it is but three generations from shirt-sleeves to shirt-sleeves. Thus the law does not stilt the natural instinct of acquisition nor interfere with the normal desire to accumulate for one's own posterity. It does not seek to confiscate nor to destroy. It simply says to the individual: 'You have no natural right to retain the dead hand on your fortune. You must distribute and distribute in full ownership.'

"Manifold provisions occur in the law to prevent the defeat of this end by subterfuge. Simulated transfers may be defeated by parol evidence. And most elaborate provisions with respect to collation (hotchpot) are provided, by which the heir may demand and secure equal distribution of the ancestor's estate.

"These three—forced heirship, equality of heirs, prevention of trusts—together form a system of protection of democracy from too powerful wealth, which, if they had been in effect in the nation from the period of the intensive industrial development since the Civil War, would have obviated the evils now sought to be remedied by more drastic means by national authority." (Handbook of the Association of American Law Schools for 1935, \textsuperscript{84} 88-89.)

\textsuperscript{135} See note \textsuperscript{131}, supra.

\textsuperscript{136} As amended, the Ordinance approved the principle of the 1920 trust act and reads as follows: "No law shall be passed abolishing the principle of forced heirship or legalizing substitutions or fidei commissa or trust estates; except that the legislature may authorize the creation of trusts
ever, on the other issue no concession was made, and as finally adopted\textsuperscript{137} the new constitutional provision\textsuperscript{138} declared that "no law shall be passed abolishing forced heirship." The importance of this institution was thereby recognized and its continuance assured in the life of the people.

\textsuperscript{137}For the detailed outline of the legislative history of this ordinance in the constitutional convention of 1921, see Official Journal, Index to Ordinances, at 66-67.

\textsuperscript{138}La Const. of 1921, Art. IV, § 16. "No law shall be passed abolishing forced heirship or authorizing the creation of substitutions, fidei commissa or trust estates; except that the Legislature may authorize the creation of trust estates for a period not exceeding ten years after the death of the donor; provided that where a natural person is the direct beneficiary said period may be made to extend until ten years after his majority; and provided further, that this prohibition as to trust estates or fidei commissa shall not apply to donations strictly for educational, charitable or religious purposes."