2 Donation mortis causa

a General principles

1) Mode (CC art. 1570)

a) Definition of testament

What is a testament? See CC art. 1570 cmt. (c).

b) Significance of statement

What is the significance of the rule, stated in CC art. 1570, that donations mortis causa can be made only in the “form of a testament”?

2) Permanence

A donation inter vivos, as we have seen, cannot be revoked at will (in other words, can be revoked only for cause). What about a donation mortis causa? See CC arts. 1469 & 1606.

b Special requirements

1) Formal

a) Enumeration thereof

1] Requirements common to all types of testaments

a] Written act (CC arts. 1574, 1575, 1576 & art. 1574 cmt. (e))

b] Personal act

1) Not by proxy (CC art. 1571)

DH 88α. At Pascal’s direction, Capuchon, Pascal’s attorney, draws up a notarial testament for Pascal. As he’s on his way to Capuchon’s office to sign the testament, he is involved in an automobile accident, as a result of which he requires immediate medical attention. Just as he’s being loaded into the ambulance, Pascal tells Jean Sot, his friend, who has since arrived at the scene, to “go on down there to Capuchon’s office and sign my testament for me.” Jean Sot then shows up at Capuchon’s office. There, in the presence of Capuchon and two witnesses, Jean Sot declares that the testament is “Pascal’s” and then signs the testament, at the end and on each separate page, this way: “Jean Sot for Pascal.” Capuchon and the witnesses then sign the attestation clause. See CC art. 1577. A few hours later, Pascal dies. Is the testament in valid form? Why or why not?
2) Not with another (CC art. 1571)

DH 88β. At the direction of Pascal and his wife Julie, Capuchon draws up a notarial testament that reads in part as follows: “Inasmuch as we, the undersigned, are so much in love, each of us desires that, in the event he or she should die, his or her property belong to the survivor. Wherefore, each of us, by this testament, leaves all of his property to the other.” In the presence of Capuchon and two witnesses, Pascal and Julie sign the testament, both at the end and on each separate page. Capuchon and the witnesses then sign the attestation clause. Is the testament in proper form? Why or why not?

2] Requirements unique to diverse types of testaments (CC 1574)

a] Olographic testament (CC art. 1575)

1} Persons required: testator only (1575)

2} Process: must be "entirely written, dated and signed in the handwriting of the testator" (1575)

Cynthia Samuel, Katherine Spaht, & Cynthia Picou, Successions & Donations: Cases & Readings 447 (Fall 2000)

The olographic will is the simplest to make. . . . It is imperative, however, that it be entirely written, dated, and signed by the testator; otherwise it is void.

Additions and deletions on the testament may be given effect only if made by the hand of the testator. Words added by another with the consent of the testator have been held to cause the will to be a nullity. The testament would not, in such a case, be the exclusive work of the testator. Such is the law in France and Louisiana. See, to this effect, Succession of Walsh, 166 La. 685, 117 So. 777 (1928).

Similarly, the testament will be null if someone holds and guides the hand of the testator while writing the testament. The testament in that case would be the work of the assistant and not that of the testator. Succession of Walsh. In that case the court said: "The contention is that one O’Brien not only held the hand of Mrs. Walsh, but that he controlled its every movement. * * * If this were true as a matter of fact, then there would be no valid will. But the district judge found the truth to be otherwise."

a} In the testator’s handwriting: testator must write instrument in his own handwriting

1/ Mechanical production excluded
DH 89a. T types up a testament, dates it by hand, and signs it. Is the testament in proper form? Why or why not?

DH 89b. T “fills in” a standard form will that he downloads from amjurlaw-forms.com. The form includes this line, “Except as hereinafter provided, I leave all of the property of which I die possessed to ____________.” In the space provided, T, in his own handwriting, writes in “X,” the name of his girlfriend. At the end, in his own handwriting, he writes out a few bequests to his siblings, A and B. Then he dates and signs the testament in his own hand. Is the testament in proper form? Why or why not? *See Succession of Burke (4th 78), cited in CC art. 1575 cmt. (b).*

DH 90. T suffers a stroke, which leaves his writing hand totally paralyzed. So he asks X, his friend, to put a pen in his hand and then to clasp his hand and move it, making it write out the instrument as T dictates it. Though T does not (because he cannot) contribute to the movement of his hand, he sees the writing as it's produced and is satisfied that it accurately reflects what he dictated. Is the testament in proper form? Why or why not?

DH 91. The same as before (DH 90), except that, now, the stroke has left T only partly paralyzed. T can still move his hand and even write, but his handwriting is shaky, so shaky, in fact, that it's almost completely illegible. So T asks his friend, X, to support and stabilize his hand as he, T, writes out his testament. What result now? Why?

b} Entirely written by hand of testator

1/ If made without testator's consent

DH 92. Olide makes out a testament, complete with date and signature, in his own hand. Sometime later, someone—precisely who is unknown—writes in an additional bequest between the lines of the original testament. The handwriting of the addition does not match that of the original testament. Is the testament in proper form? Why or why not?

2/ If made with testator's consent

a/ General rule

DH 93a. The same as before (DH 92), except that it is known that the addition was written by T’s girlfriend, Clodice, at T’s request. What result now?

b/ Exceptions (?)

property to my wife, Kendra. John Randall Trahan.” Does the presence of the pre-printed “letterhead” compromise the form of this purported testament? Why or why not? See Succession of Heinemann, 172 La. 1057, 1061, 136 So. 51, 71 (1931) (because the place of drafting is not part of the “date” or any other required part of an olographic testament, references thereto “may be disregarded without affecting the validity of [such a ] will”).

DH 93γ. With his wife, Jolie, and his daughter, Lil-Fille, looking on, Pascal makes out a testament, complete with date and signature, in his own hand. As soon as he finishes signing it and with Pascal looking on, Jolie and Lil-Fille then sign the document as follows: (i) Jolie: “Jolie, witness”; Lil-Fille, “Lil-Fille, witness.” Does the presence of the signatures of these “witnesses” compromise the form of the testament? Why or why not? See the jurisprudence that follows:

Heirs of Andrews v. Executors of Andrews,
12 Mart.(o.s.) 713 (1823)

PORTER, J. delivered the opinion of the court.

This appeal has been taken from a decision of the court of probates, relative to the last will and testament of Arthur Andrews deceased. The judge, conceiving the instrument presented to him to be clothed with all necessary requisites to render it valid as an olographic will, admitted it to probate.

The paper produced as the testament of the deceased, is proved to have been written, signed, and dated by him. At the foot, however, three persons have affixed their names, "as witnesses present."

The appellants contend, that the writing of the will in presence of three witnesses, together with their signatures, render it void as an olographic testament. The appellees insist, that the names of the witnesses are only surplusage.

The most serious question which the cause presents is, whether the signatures of the witnesses do not render void an act which the law requires the testator to write entirely in his own hand.

We have been referred, by the counsel of both parties, to decisions rendered by tribunals in France on a law expressed in nearly the same words as our own. . . . Making every allowance, however, for the difference in the facts, it is impossible to reconcile them [the French decisions]. . . .

Leaving them however aside, and considering the point as if it was now presented for the first time, we are of opinion that this will is valid as an olographic one. The great principle which governs courts in cases of this kind is, to give effect, if possible, to the intention of the parties. . . . The will here is entirely written, signed and dated with the hand of the testator; there is no writing in the body of the testament by any other person. Toullier, Droit Civil Francais, liv. 3, tit. 2, 357. The witnesses sign[ed] at the bottom, and their signatures make no part of it.

We are therefore of opinion, that the judgment of the parish court be affirmed. . . .
DH 93δ. Jean Sot makes out a testament, complete with date and signature, in his own hand. In it, he purports to leave (i) his house and lot, which he (mis)describes as the "residence at 123 Rue de St. Louis," to his brother, Deaux and (ii) $1000 to his church, which he (mis)describes as "my parish, St. Theresa of Avila Catholic Church." Sometime later, Jean Sot loses his "good arm" during a wrestling match with a cocodrie (gator). One day, while his friend, Pascal, is over for a visit, Jean Sot shows Pascal the testament. Upon reading it, Pascal says, "This is nice, but I see a few problems. First, your residence, which you really should have called 'house and lot,' is located at 132, not 123, Rue de St. Louis, and the name of your parish is St. Theresa of Lisieux, not St. Theresa of Avila." At that, Jean Sot directs Pascal to "make the corrections." Pascal does so, i.e., draws a line through "residence" and writes "house and lot" above it; draws a line through "123" and writes "132" above it; and draws a line through "Avila" and writes "Lisieux" above it. Is the testament in proper form? Why or why not?

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McMichael v. Heirs of Bankston,
24 La. Ann. 451 (1872)

HOWELL, J.

The plaintiffs, who are heirs of G.P. McMichael, deceased, sue to annul the holographic will of their father on the ground that it was not wholly written by him.

The four plaintiffs as witnesses state that the will was entirely written, dated and signed by the hand of the testator, except the word "to" in the sixth line from the top, and the word "acres" in the eighth line, which are in a different hand. Another witness and two experts express the same opinion. The original will is before us, and it is evident that there is some difference in the appearance of those two words from the balance of the writings. But it is very manifest that the presence or absence of the two words can have no material effect upon the meaning or contents of the will. Without them the sense is the same as with them - the whole will showing that the testator bequeathed to his wife a certain number of acres of land. In another place there is a connected and rational repetition of this bequest in which the same two words are written by the testator.

Admitting, therefore, that the two words in question were added by the hand of another, we may safely, under the first clause of Art. 1589 Revised Civil Code consider them as not written, and not impair the validity or effect of the will.

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DH 94.1. T writes out testament in his own hand, but fails to date it. Even so, it's clear from extrinsic evidence what that date was, namely, a videotape of himself while he was writing the testament. The videotape is electronically dated and, in the background, one can hear an NPR anchor person state the date. Is the testament in proper form? Why or why not?
DH 94.2. T, who has recently learned that he suffers from inoperable cancer, makes out a testament in his own hand. At the beginning of the testament, T writes these words: "In view of what I've just learned about my medical condition, I've decided to end it all. But first, I want to provide for the disposition of my property . . . ." Several bequests follow. Then, at the very end, T adds, "Now that that's done, I'll say 'Adieu'". After setting the testament down, T kills himself. The date of the suicide, it can be shown, was the same as that on which T received news of his medical condition. There is no date on the testament. Is the testament in proper form? Why or why not?

2/ Method of redaction

DH 95. T writes out testament in his own hand, then uses a mechanical date stamper to stamp the date on it. Is the testament in proper form? Why or why not?

3/ Place of redaction

Does it matter where on the instrument the date is placed? Is it okay at the top? At the end? What about in the middle?

4/ Degree of specificity

DH 96. T writes out a testament in his own hand and, at the end, writes "Mardi Gras, 2000." Is the testament in proper form? Why or why not?

5/ Degree of completion

DH 97.1. T writes out testament in his own hand and, at end, writes "March 2000." Is the testament in proper form? Why or why not?

DH 97.2. The same as before (#97.1), except that it's clear that (i) T was competent throughout March 2000 and (ii) T did not, during that month, execute another testament or an act of revocation. What result now? Why?

DH 97.3. The same as DH 94.2 (the 5th hypo back), except that (i) the testament contained no language hinting at suicide, (ii) three days elapsed between the date on which T received news of his condition (May 1, 2000) and the date on which he departed this life (May 3, 2000), and (iii) the testament bears this date "May 2000." There's no indication that T was incompetent during the three-day period or that, after executing the testament, he executed another testament or an act of revocation. What result now? Why?

6/ Degree of accuracy

Frederick Wm. Swaim, Jr. & Kathryn Venturatos Lorio,
. . . [T]he actual construction of the date was the center of much controversy. Because the date is an essential part of the testament, a date which leaves room for doubt or speculation as to its certainty may be fatal to the testament. Some courts view an uncertain date as the equivalent of "no date at all" and have declared the testament null for lack of form. Because such reasoning renders the uncertain date a defect in form, extrinsic evidence is not admissible to establish the requisite certainty.

The Louisiana Supreme Court reviewed the uncertain date controversy in *Succession of Boyd* [306 So.2d 687 (La. 1975)]. The court was confronted with an abbreviated date, 2-8-72, but upheld the use of extrinsic evidence to supply certainty. The court noted the early decision in *Succession of Lefort* [71 So. 215 (1916)], which approved the use of extrinsic evidence to cure an uncertain date. The *Lefort* court differentiated between an uncertain date, which could be cured with additional evidence, and the absence of a complete date written entirely by the hand of the testator. In noting that extrinsic evidence is available to cure ambiguity regarding a legatee or the object of a disposition, the *Lefort* court concluded that extrinsic evidence should be available to cure the uncertain date, but not the absent date.

The *Boyd* court noted that recent cases had held that the language in *Lefort* was "pure obiter dicta" and that public policy in upholding the testator's last will was frustrated by the continued application of the harsh uncertain date rule. The *Boyd* court overruled cases which held that extrinsic evidence was not available. The *Boyd* decision reflected the *Lefort* distinction between an uncertain date and an absent date. The uncertain date may be cured by the use of extrinsic evidence, while the absent date cannot be cured and remains fatal to the testament.

The olographic date must include the month, day and year. If extrinsic evidence cannot supply the certain date, the testament will fall. Certainty as to the year alone has been held insufficient. In *Succession of Raiford* [404 So.2d 251, 253 (La. 1981)], the court found the date written as Monday 8 1968 to be an uncertain date, and evidence was similarly ambiguous; therefore, the testament fell. . . .

DH 98.1. T writes out testament in his own hand. On the instrument, he writes "3/9/00." Is the testament in proper form? Why or why not?

DH 98.2. T writes out testament in his own hand. At the beginning of it, he writes "March 19, 2000" but at the end of it, "March 25, 2000." Is the testament in proper form? Why or why not?

d) Signed by the hand of testator

1/ Presence

a/ Ad initio

b/ A posteriori

DH 99.1. T, unmarried and without children but with several siblings and other collaterals, makes out an olographic testament in which he leaves all of his estate to N, one of his nephews. After his death, T’s siblings, pursuant to a conspiracy to nullify the testament, cut off the part of the instrument on which the signature appears and then destroy that part of it and hide away the rest of it. Years later N finds it and files it for probate. Two of his aunts testify that they saw the testament before it had been altered and recognized T’s signature on it. Is the testament in proper form? Why or why not?

DH 99.2. The same as before (#99.1), except that there’s only one witness who verifies that the testament was signed and that the signature was that of the testator. What result now? Why?

Hamilton v. Kelley, 641 So.2d 981 (La. 2d Cir. 1994)

BROWN, J.

Plaintiff, Tom R. Hamilton, was ten years old when his uncle, W.H. Hamilton, died. The five brothers and sisters of Hamilton, including plaintiff's father, claimed that he died intestate and obtained a judgment placing themselves in possession of decedent's property. Twenty-five years later, plaintiff's father, Boyce Hamilton, died. Plaintiff found among his father's effects an olographic testament written by his uncle, W.H. Hamilton, bequeathing all of his property to plaintiff. The testament was entirely written and dated by W.H. Hamilton; however, the signature was obviously and purposely cut off the document. Within one year of discovering the testament, plaintiff filed this action to annul the judgment of possession because of fraud and ill practices and to probate the olographic testament. . . . Although finding that the testament was entirely written and dated by W.H. Hamilton and that it had been signed, the trial court "reluctantly" found that plaintiff did not prove the authenticity of the missing signature and dismissed plaintiff's action "based on a strict and narrow interpretation of the law." For the following reasons, we reverse and render judgment in plaintiff's favor.

FACTS/PROCEDURAL HISTORY

W.H. Hamilton was never married and died without ascendants or descendants . . . . His brothers and sisters, asserting that W.H. Hamilton died intestate, obtained a judgment giving them possession of his estate on September 11, 1964. . . .

. . . . The intact portion of [W.H. Hamilton’s] testament [, which was later found by Tom R. Hamilton, his nephew and the plaintiff herein,] read as follows:
“To:  Whom it may concern;

I, William Henry Hamilton, being of sound mind, declares this as my last
and only will. In the event and at the time of my death, I bequest and will
everything I own to my brother's son, Tom Hamilton.

Signed this 4th day of
March 1962.”

On May 3, 1991, Tom R. Hamilton filed this action to annul the 1964 judgment of
possession and to probate the holographic will. . . . Plaintiff's petition alleged that W.H.
Hamilton's brothers and sisters cut off the signature of the instrument to defraud plaintiff
of his inheritance. . . .

. . .

Viola Hamilton testified that when W.H. Hamilton died, her husband, Alton, who
was in bad health, was concerned about dissension among his siblings caused by the will.
Viola testified that she was present during a conversation between Boyce and Alton
concerning the testament and heard Boyce's statement to Alton that he would invalidate
the will by cutting off the signature. She witnessed Boyce cut the signature off the will
and give it to Alton. She saw Boyce fold the remaining testament and put it in his pocket.
She observed Alton place the signature part in his "business drawer" and state that he
"didn't have the heart to destroy it." Viola further testified that Hazel Kelley came over
the next day and got the signature part out of the drawer. . . . Viola testified that she saw
the document and that it was entirely written, dated and signed by W.H. Hamilton.

. . .

Hazel Kelley stated that she saw the will and the signature. At trial, she testified that
the handwriting on the exhibit was "too neat" to be that of W.H. Hamilton, "but it looks
like his--." Hazel Kelley testified that she thought the writing on the will was that of W.H.
Hamilton's, but that the signature she saw was not. She admitted that the document had
a signature purporting to be W.H. Hamilton's, but that she knew his writing as well as her
own and that it was not his signature. She denied seeing the document again after it was
first shown to her by Boyce. Hazel Kelley testified that she signed the affidavit of heirship
stating that W.H. Hamilton died intestate because their lawyer stated that the signature
was not W.H. Hamilton's.

Aubrey Ray, a good friend and lifelong neighbor of W.H. Hamilton, testified that one
day at W.H. Hamilton's home, he observed W.H. Hamilton writing on a blue piece of
paper and was told that it was his will. Hamilton further told Ray that he was leaving
everything to Boyce's boy, Tom, because Tom was the only grandchild with the Hamilton
surname.

James Marvin Simpson testified that he and W.H. Hamilton were like brothers and
that Hamilton told him that he wrote a will leaving everything to his nephew, Tom,
because Tom was the only grandchild with the Hamilton surname. Simpson admitted that
he never saw the will.

Robert Foley, a forensic document examiner, did not testify because the parties
stipulated that he would testify in accordance with his written report and addendum.
Foley, who holds master's degrees in chemistry and criminal justice, as well as a juris
docotor degree in law, is widely recognized as a questioned document examiner. Foley
concluded, from known samples, that W.H. Hamilton was the writer of the testament (minus the signature) at issue.

After considering all the testimony, the trial court found:

In this case, there is not a question of the testator's intent. Most significant is that the will which reflects the intent of the testator was written by him. This fact was uncontradicted.

... 

... [T]he court is firmly convinced that the testator's intent was to give his property to his nephew, Tom Hamilton. The court is further convinced that a testament was written and dated in the testator's hand, directed toward that end. The only question which remains then, is whether the testament was signed by the hand of the testator.

The trial court then determined that:

In this case, there was no disagreement that the testament was originally intact and was signed with a handwritten signature. Viola testified that she saw the document in its original form and that it was entirely written, dated and signed in the handwriting of W.H. Hamilton. However, no testimony was elicited in regard to her familiarity with the handwriting of W.H. Hamilton. Hazel testified that she, too, had seen the document in its original form. She said that there was a handwritten signature but that it was not the signature of W.H. Hamilton. She stated that she cared for her younger brother for many years and was very familiar with his handwriting. There was no other evidence or testimony regarding the authenticity of the signature.

As is evident from the above excerpts, the trial court found the testament to be authentic, that the handwriting was that of W.H. Hamilton and that it contained a signature purporting to be W.H. Hamilton's. It found, however, that the missing signature had not been proven to be that of W.H. Hamilton.

... 

Tom R. Hamilton produced three witnesses... Viola Hamilton testified that... the signature which, before it was cut off the paper, appeared at the end of the testament, was that of W.H. Hamilton. Furthermore, Viola Hamilton testified that she overheard Alton and Boyce Hamilton talking about the will and discussing W.H. Hamilton's signature. In her testimony, the following was revealed:

Q. What do you remember they said?
A. ... [W]hat was said was that Boyce talked to Alton about that he had talked to a lawyer and the lawyer had told him if he cut the name off--the signature off of that will it would be invalid.

Plaintiff argues that although Boyce was not alive to testify at trial, his actions, specifically his wanting to remove the signature, apparently believing it to be authentic, prove the authenticity of W.H. Hamilton's signature. Plaintiff argues that the conversation between Alton and Boyce Hamilton should have been considered as recognition that the will had been signed by W.H. Hamilton. Plaintiff argues that the testimony of Viola Hamilton as to what Alton and Boyce said and did are exceptions to the hearsay
exclusions. See LSA-C.E. art. 804(B)(3) & (6). Plaintiff concludes that the testimony of Viola, Alton and Boyce establishes that W.H. Hamilton did indeed sign the will.

We find that the testimony of Viola Hamilton, Aubrey Ray and James Marvin Simpson, coupled with the report of Mr. Foley, the handwriting expert, and all the other evidence presented, specifically the letter sent to Boyce Hamilton from Opal Murray postmarked December 22, 1963, sufficiently establishes the authenticity of the will. This is in agreement with the trial court's finding that the writing on the will was that of W.H. Hamilton.

The fact that a third party removed the testator's signature does not, ipso facto, render the will invalid. In the absence of a showing that the signature was removed pursuant to the testator's request to revoke the will, the removal of the signature is ineffective in law. The removal of a testator's signature by a third party cannot operate to invalidate the holographic testament. See Rivette v. Moreau, 341 So.2d 459 (La. App. 3d Cir. 1976).

At trial, Hazel Kelley testified that she knew W.H. Hamilton's writing like her own and that while the document shown to her in 1963 contained a signature purporting to be W.H. Hamilton's, she knew it was not his. In a motion for new trial, plaintiff argued that the trial court erred in finding credible the testimony of Hazel Kelley. In support of the motion for new trial, the pre-trial deposition of Hazel Kelly was submitted, which in part contradicted her trial testimony.

The trial court ruled that, "assuming that Mrs. Kelley's testimony at trial was untrue, the court cannot state that its inability to find Mrs. Kelley a credible witness will affirmatively establish the signature of W.H. Hamilton at the end of the holographic testament in accordance Louisiana Code of Civil Procedure article 2883." . . .

Code of Civil Procedure article 2883 dictates that an holographic testament be proven by the testimony of two credible witnesses. In the instant case, the testimony of Viola Hamilton, Robert Foley, Aubrey Ray, James Simpson, and Hazel Kelley and the submitted documents adequately established that an holographic testament in valid form was made by W.H. Hamilton. Only Hazel Kelley's testimony questioned whether W.H. Hamilton actually signed the document and that testimony was discredited by her complicity in the removal of the signature at the bottom of the document and the concealment of the testament. . . . Thus, the circumstantial evidence convincingly showed that W.H. Hamilton wrote, dated and signed the holographic testament.

Further, the law clearly imposed on the brothers and sisters of W.H. Hamilton the duty to present the holographic testament to the court. LSA-C.C.P. Art. 2853. If it was in fact invalid, the court could have so found. Rather than presenting the testament to the court, they concealed it and excised the signature from the document. Their obvious intent was to deny plaintiff the ability to prove the testator's signature.

Thus, by their acts, the brothers and sisters of W.H. Hamilton attempted to circumvent his clear intent and deprive plaintiff of the inheritance. Their actions speak louder than words that the testament was entirely written, dated and signed by W.H. Hamilton. We should not allow these siblings to profit by their wrongful deeds. See Standard Life & Accident Insurance Co. v. Pylant, 424 So.2d 377 (La. App. 2d Cir.1982,) writ denied, 427 So.2d 1212 (La. 1983). Because plaintiff clearly proved the testator's
intent and the execution of a will to achieve that desire, it should fall upon those who acted to remove the signature for their personal gain to prove that the excised signature was not the testator's. Hazel Kelly's testimony at trial, in light of her participation in the scheme to destroy and hide the will, is insufficient to carry that burden of proof.

HIGHTOWER, Judge, dissenting.

Have we come to the point where the writing of laws is completely in vain?

Shrouding itself under the banner of circumstantial evidence, the majority simply ignores the express requirement of LSA-C.C.P. Art. 2883 that an olographic will "must be proved by the testimony of two credible witnesses that the testament was . . . signed in the testator's handwriting..." Such wording is plain as day and can be understood by the average high-schooler!

Insofar as our record, seven individuals (at most) saw the subject document intact: Boyce; Alton; Gordie; Armand Rabun, the attorney; Opal; Viola Hamilton, the sister-in-law; and Hazel. The first four are deceased and, apparently unnoticed by the majority, cannot present their "testimony" as "witnesses."

Viola, without any determination of her familiarity with the decedent's handwriting, testified that the instrument bore William Henry Hamilton's signature. Hazel, who stated she cared for her younger brother for several years and "knew his handwriting as well as I do my own," repeatedly and categorically testified that the handwritten name on the document was not that of W.H. Hamilton. Opal, who has a broken hip and lives in New York, did not testify.

In short, we are left with only one witness identifying the signature. Furthermore, even that individual's familiarity with W.H.'s handwriting and signature is questionable. This, quite obviously, does not conform to the requirements of Article 2883.

It never ceases to amaze, in the vernacular, "when push comes to shove," how otherwise assumed logicians can be convinced, and will indeed announce, that Night is Day, Empty is Full, and, in the present case, One is Two. Such legerdemains at the hands of the law somehow always trouble those outside our professional ranks. If we are simply intent upon producing a certain outcome irrespective of existing statutes, can that fact not at least be forthrightly so stated?

The whole framework of the law, its certainty and reliability, suffer when judicially fashioned results disregard the written word, and spring merely from a desire of judges to "do good."

The Code makes no provision as to how or where the olographic testament must be signed. In France it is generally agreed that any signature which identifies the testator is sufficient on the theory that the object or purpose of the signature is the identification of the testator. French jurisprudence is to the effect that the signature must be at the end of the testament, following the last testamentary disposition, and that words which follow the signature may be disregarded as surplusage, except perhaps as to the date, which according to some of the commentators, may be placed after the signature. "La signature doit être à la fin de l’act, parcequ’elle est le complement et la perfection; c'est pourquoi un post scriptum après signatures est nul, s'il n'est pas aussi signé."\(^{76}\) [Robert] Pothier, Donations et Testaments, Chap. 1, Art. 2, § 2.

Similarly, in Louisiana, it is sufficient if the testator signs in his usual manner, for the purpose of the signature is, [as] in France, to identify the testator. In Ripoll v. Morina, 12 Rob. 552 (1846,) the testator’s name was Sebastian Ripoll, but for political purposes, when he came to Louisiana, he adopted a name of Francisco Ballesta by which he was generally known, and under which he signed his last will in olographic form. The court said: "Under the circumstances disclosed, we are not prepared to say that the testator's signature of an assumed name is sufficient in itself to vitiate the will; it is at least a sufficient descripto personae, and perhaps more so here, than if he had signed it under his real name."

Also, as in France, the Louisiana rule is that the signature must be at the end of the testamentary dispositions. Succession of D’Armant, 43 La. Ann. 310, 9 So. 50 (1891). In that case the testament began as follows: "Testament d’Aglae Arman," but it was not signed by the testatrix at the end thereof. The court held the instrument void because: (1) the name "Aglae Armain" was not intended as a signature and, (2) if so intended, it was not at the end of the testamentary disposition.

To the same effect is Succession of Fitzhugh, 170 La. 122, 127 So. 386 (1930). In that case decedent wrote certain testamentary dispositions on a sheet of paper, dated them, but failed to sign them. She enclosed the paper in an envelope which she sealed, and wrote upon it: "My last will - Mary Fitzhugh, April 23, 1926." The court held the signature on the envelope was insufficient; it should have been at the end of the testamentary disposition and on the same paper. The signature was the act which completed the testament.\(^{77}\)

For the same reason, testamentary dispositions following the signature are void, unless they are also followed by the signature of the testator. Succession of Dyer, 155 La. 265, 99 So. 214 (1924).

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### NOTE

\(^{76}\) Translation: “The signature must be at the end of the act, because it is the complement and the perfection thereof; that is why a post-script after the signature is null unless it is also signed.”

\(^{77}\) But see Succession of Barnett, 245 So.2d 418 (La. App. 1971) (finding that the date was sufficient even though it was written only on the reverse side of the testament).
“Deletions” of provisions of an olographic testament are effective “only if made by the hand of the testator.” CC art. 1575(B) (rev. 1999). What, precisely, does the phrase “made by the hand of the testator” mean as applied to a “deletion”? Does it mean (i) merely that the deletion, whether it be a strikeout (lines drawn through the provision) or an erasure, must have been done by the testator himself (i.e., he must have drawn the lines or rubbed the eraser, as the case might be) or (ii) that, in addition to what’s required in (i), the testator must indicate in writing, be it on the testament or elsewhere, his intent to delete the struckout or erased provision (e.g., write “revoked” out beside the provision)?

Prior to the revision of CC art. 1575 in 1999, the jurisprudence had endorsed the first alternative. See, e.g., Succession of Butterworth, 196 So. 39 (La. 1940) (finding that it is sufficient that the testator himself make the strikeout and that it is not necessary that the testator indicate his approval of the strikeout in writing); Succession of Muh, 35 La. Ann. 394, 399 (1883) (“No particular method of approval is specified, nor does it seem essential that approval shall be indicated by writing . . . .”)

Should the revised article receive the same interpretation? What does comment (a) to the revised article suggest? How about revised CC art. 1608(4), which took effect simultaneously with revised CC art. 1575?

a/ On the instrument

DH 100. T writes out a testament in his own hand and dates it, but does not sign it. But then he folds it, puts it in an envelope, seals envelope, and then signs envelope. Is the testament in proper form? Why or why not?

b/ After the dispositions (?)

DH 101. Jean Sot writes out a testament, complete with date and signature, in his own hand. Just as he’s about to put the testament away in his strong box, he realizes that he left out a bequest he’d intended to make. And so he adds, just below his signature, the following: “I leave my pet racoon, Chaouis, to Pascal.” Is the testament in proper form? Why or why not? First, see the jurisprudence that follows; then read revised CC art. 1575 (rev. 2001) & the 2001 revision comment.

Succession of King, 595 So. 2d 805 (La. App. 2d Cir. 1992)

LINDSEY, Judge.

This appeal presents the issue of whether an olographic will, written and dated in the handwriting of the testatrix, must be signed at the end in order to be valid . . . . Legatees under the will appeal a trial court judgment which found the will to be invalid for want of form. For the following reasons, we affirm.

FACTS

The testatrix, Eleanor Maxwell King, died on January 23, 1991. . . .
On March 13, 1991, Ralph B. Bell, a second cousin of Mrs. King, submitted a two-page document for probate. . . . The document is dated, and although it commences by declaring that it is Mrs. King's will, it is not signed at the end. At the top of the first page the following was handwritten:

“Will of Eleanor Maxwell King
(Mrs. Charles Solon King)”

The first page of the document contained a list of particular legacies. It read, in pertinent part:

“Subject to change, but as I see it now, August 23, 1987
2. The 132 + acres and house in Jackson Parish at Eros to the [illegible] Experiment Station, Calhoun
2.A. CAR
7. Furniture to (Same as no. 1) ...
...

The second page contained a provision for the disbursement of funds from several specified bank accounts to seven named individuals.

. . .

At the conclusion of the hearing, the trial court ruled that the document was not in proper form for an olographic will because, although the testatrix's name was written at the beginning of the list of bequests, there was no signature at the end. . . .

PLACEMENT OF SIGNATURE ON AN OLOGOGRAPHIC WILL

Although LSA-C.C. Art. 1588 does not specify that the testament must be signed at the end of the document, the jurisprudence of this state has firmly established that principle. See In re Armant's Will, 43 La.Ann. 310, 9 So. 50 (1891); In re Poland's Estate, 137 La. 219, 68 So. 415 (1915); Succession of Dyer, 155 La. 265, 99 So. 214 (1924); Succession of Fitzhugh, 170 La. 122, 127 So. 386 (1930); Succession of Bechtel, 99 So.2d 495 (La.App. Orleans 1958). See and compare McGuffin v. Jones, 157 So.2d 256 (La.App. 3d Cir.1963), writ refused, 245 La. 573, 159 So.2d 286 (1964), and Succession of Robinson, 225 So.2d 149 (La.App. 4th Cir.1969), writ refused, 254 La. 851, 227 So.2d 594 (1969).

. . . The commentaries have likewise accepted the requirement that the signature must be affixed to the end of an olographic will. . . . Comment, Formalities of the Olographic Will, 2 L OY.L.REV. 164, at 177 (1944) . . . See also 3 M. Planiol, Treatise on the Civil Law, § 2689 at 318 (11th ed. La.St.L.Inst. trans.1959); Oppenheim, The Testate Succession, 36 Tul.L.Rev. 1, 8 (1961); 10 L. Oppenheim, Louisiana Civil Law Treatise, "Successions and Donations," § 109, at 198 (1973); and Comment, Donations Mortis Causa, 22 Loy.L.Rev. 768, 778 (1976).

. . . [T]he requirement that the testatrix's signature be affixed to the end of an
olographic will has not been relaxed by the Louisiana Supreme Court. The purpose of this rule is to show that the provisions preceding the signature are approved by the testatrix. Furthermore, the placement of the signature at the end conclusively demonstrates that there are no other provisions. Under the circumstances of the present case, we can only speculate as to whether or not there were any other provisions in Mrs. King's will. The second page ends with a list of seven legatees (one of whom has been struck out). It is entirely possible that yet another page listing other legatees could have originally been in the spiral notebook. Due to the absence of Mrs. King's signature, we cannot say that the document is complete.

b] Notarial testaments

  1} Varieties

  2} Requirements

   a} Common requirements

   1/ Persons required

      a/ Testator (CC arts. 1577 - 1580.1)

      b/ Notary (CC arts. 1577 - 1580.1)

      c/ Witnesses

      1° Number (CC arts. 1577 - 1580.1)

      2° Qualifications

         a° Physical qualifications: sane, sighted, over 15, & able to sign name (CC art. 1581)

         b° Juristic qualifications (CC art. 1582)

             i General rule: neither a witness nor the notary
DH 101α. Beaux Sot, a single man, makes out a notarial testament in which he leaves 1/3 of his estate to each of three persons: his brother Meaux, his sister Seaux, and his cousin Ti-Boy. The witness are Meaux and Ti-Boy. Then Beaux dies. He leaves behind no descendants or ascendants, only his brother, sister, and cousin. Is the testament valid in form? What about all the legacies in the testament? Explain. See CC art. 892, par. 1.

2/ Process required (CC arts. 1577 - 1580.1)

a/ Redaction

b/ Dating

c/ Presentation & declaration / signification

What’s required for the “declaration” or “signification” by the testator that the instrument he’s signing is “his testament”? Need this declaration / signification be express? If not, under what circumstances may it be implied? Can it ever be inferred from the “mere fact” that the testator signed the instrument? If so, then why is the “declaration / signification requirement” set out separately from the “signature requirement” in CC arts. 1577 et seq.? On the “mere fact” theory, wouldn’t the “declaration / signification requirement” be redundant of the “signature requirement” and, for that reason, superfluous?

Succession of Morgan,
230 So. 2d 323 (La. App. 4th Cir. 1970),
rev’d on other grounds,
257 La. 380, 242 So.2d 551 (1971)

REDMANN, Judge.

Robert A. Morgan appeals from a judgment dismissing his opposition to and ordering the probate of a will made by his wife.

Appellant contends the will is invalid in form. We so hold, and therefore do not discuss appellant's alternate attacks.

The will purports to be in the additional form authorized by LSA-R .S. 9:2442 [now CC art. 1577] . . . .

The attestation clause here reads: “This will has been signed on each page by the Testatrix CLARICE VEAL MORGAN, after due reading of the whole, in our presence, to be her last will and testament, and in the presence of the Testatrix and each other, we the undersigned Notary Public and witnesses and the Testatrix have hereunto subscribed our names on this the 14th day of June, 1967 at New Orleans, Louisiana.”
Appellant argues this clause does not evidence that the testatrix signified to notary and witnesses that the instrument was her will.

The statute states two distinct requirements, signify and evidence, with distinct though related purposes. The purpose of requiring the testator to signify to the notary and witnesses the document is his will is to avoid the possibility of fraud upon, or mistake by, a testator who might believe himself to be signing some other kind of document. The further purpose of requiring the attestation clause to evidence this publication by the testator is to deny effectiveness to the initial fraud or error by further fraud or error in oral testimony of publication which in fact did not occur. Thus the statute denies validity to a statutory will (1) where the testator does not signify to notary and witnesses it is his will (even if the proces verbal falsely says he did); or (2) where the proces verbal does not evidence that he has so signified (even if he did).

Nevertheless the statute's words are 'signify' the instrument is testator's will, and this must be 'evidenced' in the attestation clause. Each of these words is very broad in meaning.

One may “signify” by merely nodding his head, Succession of Guidry, 160 So.2d 759 (La.App.1964), or presumably by any other action, perhaps even the signing itself, if under the circumstances the action imports the required signification.

Still the signifying must both occur and be evidenced in the attestation clause. Here the clause recites only the signing by the testatrix, and it does not recite any circumstances which might arguably allow the signing itself to be considered a signifying. ‘Due reading of the whole’ does not signify reading in the presence of the witnesses (which in fact did not occur) because no reading is ‘due’ under the statute. So even assuming the statute’s dual requirement of ‘signify *** And *** sign’ might be met by signing in certain circumstances, and assuming that signing might signify if done after a reading (in presence of notary and witnesses) of a document which plainly purports to be the will of the testator, the clause here does not evidence such circumstances and thus does not evidence the required signifying.

In Succession of Saarela, 151 So.2d 144 (La.App.1963), cert. denied, 244 La. 466, 152 So.2d 562, the attestation clause itself purported to be a recital by the testator that ‘I have signed this my last will’. While we recognize that a testator able to read (LSA-R.S. 9:2443), who in fact does read, could no more be misled by our clause than by the Saarela clause, the difference is that in Saarela the clause itself purports to be a signifying by the testator and ours does not. Thus in Saarela the signifying is ‘evidenced’, and ours is not.

In Succession of Pickett, 189 So.2d 670 (La.App.1960), the clause read ‘Signed and declared by *** testatrix’ without reciting ‘to be her will’. The will was held valid. But there at least a declaration was recited, which is some evidencing (however incomplete) of a signifying.

Appellee argues from Saarela, Pickett and other cases what the statute itself provides, namely that the attestation clause may be “substantially similar” to the statutory sample. But the statute requires both signifying and signing, and evidencing both as the sample clause does; and we believe that some recital similar to “declared”, etc., which evidences the required signifying, is essential to substantial similarity and to formal validity.
Some folks might think that *Morgan*, insofar as it addresses the requirement that the testator declare / signify that the instrument is his testament (as opposed to requirement that the attestation clause make reference to this declaration / signification, a requirement we’ll study later), stands for the proposition that the testator’s mere signing of a purported notarial testament, without more, constitutes a tacit declaration / signification that the instrument is his testament. Such folks are cognitively challenged. No, *Morgan*, instead, stands only for the proposition that the testator’s signing of a purported notarial testament, when done under “certain circumstances”, *may* constitute a tacit declaration / signification that the instrument is his testament. But what are these “certain circumstances”?

**Succession of Thibodeaux,**
527 So. 2d 559 (La. App. 3d Cir. 1988)

This is an action to annul the Last Will and Testament of C. Dulva Thibodeaux. The decedent executed the statutory will in question on September 19, 1985. He subsequently died on April 21, 1986. The will was probated on April 23, 1986. On October 22, 1986 the plaintiff-appellant herein, Namaze Thibodeaux, filed the action to nullify her father's will in the succession proceeding. The plaintiff alleges . . . that no declaration was made by the testator, in the presence of the witness, that the document was his last will and testament.

After a hearing on the rule, the trial court found that the plaintiff-mover failed to meet her burden of proving the invalidity of the will pursuant to LSA-C.C.P. art. 2932 and denied the action of nullity. A judgment was rendered in accordance with the trial court's findings. It is from this judgment that plaintiff appeals.

. . .

**FACTS**

On September 19, 1985 C. Dulva Thibodeaux executed a last will and testament, in statutory form, which was prepared and notarized by Michael J. Herpin. The witnesses who signed the document were Gaulman Abshire, M.D., a friend of the testator, and Brenda Fuselier, the testator's sitter. At the time that the will was executed, Mr. Thibodeaux was suffering from numerous health problems and was living at the home of his deceased daughter, Zita Thibodeaux Broussard. . . .

. . .

WERE THE FORMALITIES REQUIRED BY LSA-R.S. 9:2442 OBSERVED?

. . . The only issue before us for review is whether the will was properly executed in accordance with LSA-R.S. 9:2442 [now CC art. 1577].

. . .

The plaintiff herein has alleged that (1) the testator did not declare the document to be his last will and testament in the presence of Brenda Fuselier and (2) Brenda Fuselier did not observe the testator, notary and other witness sign the document. The plaintiff admits in brief that an actual verbal declaration by the testator is not required. See
Succession of Guidry, 160 So.2d 759 (La.App. 3d Cir.1964). However, plaintiff maintains that some form of acknowledgment or indication by the testator must be made in addition to the declaration in the attestation clause.

The first mandatory requirement of LSA-R.S. 9:2442 is that the testator shall declare or signify to the notary and witnesses that the instrument is his last will. The Fourth Circuit Court of Appeal discussed this requirement in Succession of Morgan, 230 So.2d 323 (La.App. 4th Cir.1970), reversed, 257 La. 380, 242 So.2d 551 (1971). Citing Succession of Guidry, supra, the court said, "One may 'signify' by merely nodding his head ... or presumably by any other action, perhaps even the signing itself, if under the circumstances the action imports the required signification." Succession of Morgan at 325. The Supreme Court in its opinion on reversal went on to discuss the fact that this requirement is the common law requirement of "publication," but that LSA-R.S. 9:2442, while requiring publication, does not particularize its manner or method. 242 So.2d at 553.

Dr. Gaulman Abshire testified at the trial on the rule that he was asked to witness the signing of the will by Mr. Herpin, in the event any question of Mr. Thibodeaux's testamentary capacity arose. Dr. Abshire arrived at the Thibodeaux residence at approximately the same time as Mr. Herpin. Mrs. Fuselier was already at the house. Dr. Abshire testified that Mr. Thibodeaux was seated in an "easy chair" on one side of the den area when he arrived. Dr. Abshire and Mr. Thibodeaux conversed briefly before Mr. Herpin instructed him and Mrs. Fuselier that they were needed to witness the signing of the will. Dr. Abshire testified that Mr. Herpin spoke with Mr. Thibodeaux, explaining to him that this was the will he had prepared with the corrections. Dr. Abshire said that Mr. Thibodeaux did not declare the document to be his last will and testament, but that he signed the documents presented to him by Mr. Herpin.

Mr. Herpin testified to substantially the same scenario, except that he testified that Mr. Thibodeaux answered yes to his question concerning whether the will reflected what he wanted it to. Mr. Thibodeaux then signed the will.

Clearly the evidence preponderates that no verbal declaration was made, and apparently there was no other action except signing of the will itself. We must therefore decide if, under the circumstances herein, the trial court was manifestly in error in finding that the action of signing alone imported the required signification. . . .

The testimony of Dr. Abshire and Mr. Herpin is consistent with respect to the fact that some discussion concerning the contents of the document was had with Mr. Thibodeaux prior to him signing the will. . . . We cannot say that the trial court was clearly wrong in its factual determination. This argument is therefore without merit.

Some folks might think that Thibodeaux stands for the proposition that the testator’s mere signing of a purported notarial testament, without more, constitutes a tacit declaration / signification that the instrument is his testament. These folks, too, are cognitively challenged. No, Thibodeaux, instead, stands only for the proposition that the testator’s signing of a purported notarial testament,
when done under ‘certain circumstances’, \textit{may} constitute a tacit declaration / signification that the instrument is his testament. But what are these ‘certain circumstances’? 

\textbf{d/ Signature or mark of testator}

\textbf{1° Location}

Must the testator sign or mark \textit{every} page?

What if the last page has nothing on it but the ‘second half’ of a witness-attestation clause (‘We, the undersigned, do solemnly swear that we saw the testator sign this document, etc.’) that “starts” at the bottom of the penultimate page? Need the testator sign that, too? \textit{See CC art. 1577 & cmt. (b) & the jurisprudence that follows:}

\textit{Succession of Guezurga},
512 So.2d 366 (La. 1987)

\textbf{CALOGERO, J.}

The Louisiana Wills Act requires that a testator "sign his name at the end of the will and on each separate page of the instrument." The issue in this case is whether a statutory will is valid if the testatrix signs the page containing all dispositive portions and the beginning of the attestation clause, but fails to sign the page containing only the conclusion of the attestation clause.

The executrix filed a petition to probate the will. The trial judge ordered the will probated over the opposition of the testatrix's two adopted children. The Fourth Circuit Court of Appeal reversed, holding that "[t]he failure of the testator to sign each sheet is fatal to the validity of the will." . . . For the reasons discussed below, we reverse.

. . .

Louisiana Revised Statutes Annotated § 9:2442(B)(1) requires the testator to declares to the notary and witnesses that the "instrument" is his last "will" and to sign his name at the end of the "will" and on one separate page of the instrument." A plausible conclusion, and one in keeping with the principles of liberality established by the jurisprudence discussed below is that the legislature intended to and did use the terms "will" and "instrument" interchangeably, and the reference in each instance was only to the entirety of the testator's dispositions or recitations. Therefore, when the testatrix in this case signed the page containing all of the dispositive provisions, she fulfilled the statutory requirement to sign her name at the end of the "will" and on each separate page of the "instrument." This is our conclusion in this case, for the reasons recited below.

The only argument to the contrary is prompted by a strict reading of this statutory provision. Opponents argue that while "will" may refer only to the dispositive provisions, the "instrument" (as to which the testator must sign his name on each page) is the full document, including the attestation clause.

But we are not required to give the statutory will a strict interpretation. The
legislature adopted the statutory will from the common law in order to avoid the rigid formal requirements of the Louisiana Civil Code. . . . In accordance with this legislative intent, courts liberally construe and apply the statute, maintaining the validity of the will if at all possible, as long as it is in substantial compliance with the statute. Note, Louisiana's Statutory Will: The Role of Formal requirements, 32 La. L. Rev. 452, 453 (1972). In deciding what constitutes substantial compliance, the courts look to the purpose of the formal requirements-to guard against fraud. “Where the departure from form has nothing whatsoever to do with fraud ordinary common sense dictates that such departure should not produce nullity. . . .

It is now clear that the testator need not sign after the attestation clause. Johnson, Successions and Donations, 43 La. L. Rev. 585, 595 & n. 43 (1982).

The dispositive provisions of the testament are what primarily concern the testator; and as to which we require the testator's affirmance by a signature... This is our assurance that the testament is an accurate reflection of the testator's wishes. So long as the signature is located beneath the dispositive provisions and affixed in time after they are written, we are permitted to infer the testator's approval. It makes absolutely no difference that the testator's signature is also beneath the attestation clause. The latter clause is of no particular concern to the testator, and indeed we are not interested in his assertion as to the procedure followed in confection of the testament. The attestation clause is for the witnesses and notaries to affirm what has been place in their presence...Barring other problems with a disposition, it is valid if it appears above the signature of the testator...

Id. at 595-96.

This interpretation is also consistent with the common law, from which Louisiana's statutory will was adopted. "In most jurisdictions the attestation clause is not regarded as a part of the will, but rather as a certificate to the will; and, accordingly, the signature of the testator may either precede or follow such clause and yet be at the end of the will." The testator does not have to sign again following the attestation clause.

2° Form

Must the testator write his full signature on every page? See the jurisprudence that follows:

Succession of Squires, 640 So.2d 813 (La. App. 3rd Cir. 1994)

WILLIAM A. CULPEPPER, J., Pro Tem.

The appellants, children of George Herbert Squires, brought this action to annul his probated testament for failure to conform to the requirements of a statutory will. The trial court upheld the validity of the will despite the failure of the testator to sign his name on each page and the failure of the attestation to conform to LSA-R.S. 9:2442.
GENERAL FACTS

Having borrowed some pages from a law book owned by Gerald P. Begnaud, Jr., George Squires typed his own statutory will. . . .

The will was executed before a notary, Begnaud, and two witnesses in the proper form for an authentic act. However, instead of signing his name on all the pages in the three page statutory will, George Squires only initialed the first page at the bottom. Additionally, the attestation clause in Mr. Squires' will does not follow the language prescribed in LSA-R.S. 9:2442B.(2).

The attestation clause of Mr. Squires' will reads as follows:

"We hereby declare that GEORGE HERBERT SQUIRES signed the foregoing instrument in our presence and in the presence of each other, declaring to us that the foregoing instrument is his Last Will and Testament, and he requests us to sign the same as subscribing witnesses thereto which we now do in the presence of each other and of the Testator on this the 23rd day of September, 1990."

. . .

Appellants argue first that the mere initialing of the first page does not satisfy the requirement of LSA-R.S. 9:2442 B.(1) that the testator "shall sign his name" at the end of the will and on each separate page. They contend the use of the word "shall" makes the requirement mandatory, and that mere initialing does not comply with the requirement to "sign his name." Appellants argue the purpose of signing the testator's name to each separate page is to prevent fraud by substitution of one page for another after the will has been signed at the end, citing Succession of Hoyt, 303 So.2d 189 (La. App. 1st Cir. 1974) in which the will was annulled for lack of a signature on one page.

Next, appellants argue the attestation clause is deficient because it does not state that the testator signed his name or even his initials in the presence of the notary and the two witnesses.

In Succession of Guezuraga, 512 So.2d 366 (La. 1987) the testatrix failed to sign her name on the last page, which contained only the last part of the attestation clause. In holding the statutory will valid, the court stated the rule as follows:

"But we are not required to give the statutory will a strict interpretation. The Legislature adopted the statutory will from the common law in order to avoid the rigid formal requirements of the Louisiana Civil Code. "The minimal formal requirements of the statutory will are only designed to provide a simplified means for a testator to express his testamentary intent and to assure, through his signification and his signing in the presence of a notary and two witnesses, that the instrument was intended to be his last will." Succession of Porche v. Mouch, 288 So.2d 27, 30 (La. 1973). In accordance with this legislative intent, courts liberally construe and apply the statute, maintaining the validity of the will if at all possible, as long as it is in substantial compliance with the statute. Note, Louisiana's Statutory Will: The Role of Formal Requirements, 32 La.L.Rev. 452, 453."

In deciding what constitutes substantial compliance, the courts look to the purpose of the formal requirements--to guard against fraud.
Where the departure from form has nothing whatsoever to do with fraud, ordinary common sense dictates that such departure should not produce nullity. It was the intent of the legislature to reduce form to the minimum necessary to prevent fraud. It is submitted that in keeping with this intent, slight departures from form should be viewed in the light of their probable cause. If they indicate an increased likelihood that fraud may have been perpetrated they would be considered substantial and thus a cause to nullify the will. If not, they should be disregarded. Thus testators and estate planners will have the security that the legislature intended to give them.


In the present case, as in Guezuraga, there were no allegations of fraud. Moreover, here the testimony of the notary and one of the witnesses is that they saw the testator initial the first page and sign his name to the last two pages. There is no evidence to the contrary. Clearly the testator intended this to be his Last Will and Testament.

Counsel have not cited, nor do we find any case involving either of the two precise issues presented, i.e. (1) initials, instead of signing, or (2) failure of the attestation clause to state that the notary and witnesses saw the testator sign each page. However, under the rule quoted above from Guezuraga, we find these are minor departures from and have nothing to do with any attempted fraud. Common sense dictates that they should not nullify the clear intent of the testator.

e/ Attestation clause (declaration)

Is it necessary that attestation clause recite that the notary and witnesses saw the testator sign or mark every page? Why or why not? See Squires (above).

b} Requirements unique to different kinds of notarial testaments

1/ Standard notarial testament

* Special requirements for testator: he must know how to read and to sign his name and must be physically able to do both

2/ Non-standard notarial testaments

a/ For testators who are literate and sighted, but physically unable to sign (CC art. 1578)
1° **Special declaration / signification requirement**

2° **Special signature requirement**

3° **Special attestation requirement**

b/ For testators who cannot read (CC art. 1579)

1° **Additional requirements**

   a° Reading

   b° Witnesses (CC art. 1581, sent. 2)

2° **Special requirements**

   a° For declaration / signification

   b° For signature

   c° For attestation

c/ For testators who can read braille (CC art. 1580)

   * Special requirement for redaction

d/ For testators who have been declared deaf, but can read sign language, braille, or English written in Latin characters (CC art. 1580.1)

   * Special requirement for witnesses

† Each must know how to read and to sign his
PART I: DONATIONS

name and must be physically able to do both

† At least one must be a certified interpreter for the deaf

b) Sanction for non-compliance: absolute nullity (CC art. 1573)

2) Substantive

a) Those applicable to all juridical acts

1] Capacity

We studied the requirements for capacity to donate mortis causa earlier in the course under the heading “common regime.” You may wish to review that material now.

2] Consent

a] Real

DH 102. T makes a statutory testament in which she leaves a universal legacy to X. Later, she gets together with her attorney to make out a new statutory testament, one in which she plans to leave a universal legacy to Y. After their consultation, she goes home, writes out a draft of the testament in her own hand, and then mails it to the attorney with instructions that he draft the statutory testament and have it ready for her to sign "next week." But before next week arrives, T dies. Y then retrieves the handwritten draft of the second testament and, noting that it meets requirements for holographic testament, files it for probate. Is the handwritten draft a valid testament? Why or why not? See the jurisprudence that follows:

Hendry v. Succession of Helms,
557 So.2d 427 (La. App. 3rd Cir. 1990)

GUIDRY, J.

Ms. Marguerite Ryan Helms executed a statutory will on July 1, 1985. On April 20, 1988, Ms. Helms met with her attorney, Charles Viccellio, and delivered to him a six page handwritten document (hereafter “the Document”) which was written, dated and signed by her on April 13, 1988 . . . . Ms. Helms died April 21, 1988 and thereafter, the July 1985 statutory will was probated.

. . . Joann Hendry, the only surviving relative of Ms. Helms, instituted this suit seeking to have the probate of the July 1985 will set aside and to have the Document
declared a valid olographic testament. The trial court dismissed [her] petition concluding that, although written dated and signed by the decedent, the Document did not, within its four corners, evidence testamentary intent on the part of the preparer. In making this determination, the trial judge, in oral reasons for judgment, stated:

"... [I]t is not clear to the Court that this is a document which was intended to be the last will and testament of the decedent. That is seen in the Document itself when it appears that this document contains information which is intended to be furnished to someone else. There's all kinds of things in here, like how the telephone bill is paid, how the gas bill is paid, and where some insurance policies are, and where a gravesite is located and that its prepaid, and various other things, which is not usually found in wills or testaments. The Court concludes that this is merely a list, something that was being furnished to her attorney as information . . ."

Charles Viciello, Ms. Helms' attorney, was the only witness to testify. Mr. Viciello, as Notary Public, prepared the 1985 statutory will and officiated at its execution. He testified that on April 20, 1988, which was one week after preparation of the Document, Ms. Helms appeared at his office to deliver the Document and discuss with him the preparation of another statutory will. She was to return the following week to execute the new statutory will which Mr. Viciello was to draft, pursuant to their discussion and the Document which she left with Viciello. Ms. Helms died the following day.

In brief to this court, [Hendry], in effect, concedes that the Document was not intended by the decedent to be her last will but urges that since it is in valid form and expresses decedent's last wishes, it is entitled to probate. In argument, appellant states:

"There is no question that her last intentions were as found on the olographic will. There is probably not much question either that she wanted Mr. Viciello to transform her wishes from that will to a statutory testament. She apparently died before that could be done. Are her last wishes to be frustrated because of the fact that she died before her lawyer could complete the simple task of typing up her demands into a statutory form? . . . Thus the trial court erred in finding that this particular paper had to be the paper intended by Mrs. Helms to be her last will."

We discern no error in the trial court's conclusion that the Document dated April 13, 1988 is not the olographic last will and testament of Ms. Marguerite Ryan Helms.

There are two essential requirements for a valid will, i.e., the act must be in valid form and the clauses it contains, or the manner in which it is made must clearly establish that it is a disposition of last will. The Document is in valid form . . . . However, in our view, the Document fails as a valid will because it lacks the necessary animus testandi. Despite the fact that the Document contains terms which arguably reflect an animus testandi (use of the words "bequest" and "bequests;" "to Mrs. Carl W. Hendry (Joann); "Trust Fund and divided among-equally"), the record makes crystal clear that the decedent did not intend the Document to be her last will and testament. As found by the trial court,
the Document, considering the manner and the circumstances prompting its confection, was obviously intended as a listing of information to be used by Mr. Viccellio in the preparation of a statutory will for Ms. Helms. The testimony of Mr. Viccellio, introduced without objection, is unequivocal on this point. Further, there is no contrary evidence, i.e., supporting the conclusion that Ms. Helms intended the Document as her holographic last will.

In Succession of Patterson, 188 La. 635, 177 So. 692, 694 (1937,) our Supreme Court quoted approvingly from 28 Ruling Case Law, § 3, p. 59 as follows:

"In the interpretation of acts of last will, the intention of the testator must principally be endeavored to be ascertained, without departing, however, from the proper signification of the terms of the testament." Article 1712. But " * * * in the absence of a testamentary intent, there can be no will. Furthermore, the animus testandi must exist when the instrument is executed or acknowledged, and the intent must apply to the particular instrument produced as a will. A paper is not established as a man's will merely by proving that he intended to make a disposition of his property similar to or even identically the same as that contained in the paper. It must satisfactorily appear that he intended the very paper to be his will * * * " (Emphasis ours)

Appellant suggests that the quoted language in Succession of Patterson, supra, is dicta and is not found in our Civil Code. We do not agree. La.C.C. art. 1570 clearly requires that the particular document presented for probate must reflect an animus testandi since it provides that "... a testament and the clauses it contains, or the manner in which it is made, clearly establish that it is a disposition of last will."

b] Free

We studied the vices of consent in donations mortis causa earlier in the course under the heading “common regime.” You may wish to review that material now.

3] Cause: real, present, and lawful

We studied the cause requirements for donations mortis causa earlier in the course under the heading “common regime.” You may wish to review that material now.

4] Object: possible, determinable, and lawful

We studied the object requirements for donations mortis causa earlier in the course under the heading “common regime.” You may wish to review that material now.

b) Those applicable only to donations mortis causa: rules on “delegation” (CC art. 1572)

a] General rule: delegation prohibited (¶ 1)
PART I: DONATIONS

b) Exceptions (¶ 2)

1} Power to allocate assets to satisfy legacies of value or quantum

2} Power to award “charitable legacies”

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Excursus:
Probate Procedure

1] Prescription
   a] For the action to probate a testament (9:5643)
   b] For the action to annul a probated testament (CC art. 3497)

2] BOP
   a] In an action to probate a testament (Code Civ. Proc. art. 2903)
   b] In an action to annul a probated testament (Code Civ. Proc. art. 2932)
      1} If action to annul is brought within 3 months of the date of probate: the burden is on
         the defendant (the proponent of the probated testament) to prove the authenticity and
         validity of testament
      2} If action to annul is brought after 3 months of the date of probate: the burden is on
         the plaintiff (the antagonist of the probated testament) to prove its inauthenticity and
         / or invalidity

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c. Legacies

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Cynthia Samuel, Katherine S. Spaht & Cynthia Picou,
SUCCESSIONS & DONATIONS: CASES & READINGS 475-76 (Fall 2000)

Events subsequent to the execution of the will can affect the ultimate destination of the testator’s property. First, recall that in order to have capacity to take a legacy the legatee must be in existence when the testator dies. Civ. Code. Art. 1472-75. If the legatee predeceases the testator or is for some other reason without capacity to receive, and the will does not provide an alternate taker or otherwise provide for this situation, the code supplies a solution. Similarly, if the legatee has capacity but renounces the legacy and there is no provision in the will covering this situation, the code supplies a solution. New article 1589 treats all situations where the legatee fails to take his or her legacy as one of “lapsed legacies.” The suppletive rules (now, through the influence of computer language, spoken of as “default rules”) that provide the solutions are now called the rules of “accretion.” They are found in new articles 1590-1596, and 965 (renunciation). The new articles make significant changes to the concept of accretion found in the old code articles that were derived from the French Civil Code. One must, therefore, be careful to avoid confusion in studying old cases.
Additionally, the property bequeathed can be lost or destroyed prior to the testator’s death, or there can be insufficient property at the testator’s death to satisfy fully all of the legacies that he has made. The suppletive rules for these problems are found in articles 1597 and 1599-1601.

Finally, after the testator’s death the property bequeathed may produce fruits or products, and there may be debts and expenses in connection with certain bequeathed property and with the estate as a whole. Articles 1598, and 1420-1429 contain the suppletive rules for these problems.

All of these suppletive rules depend on the category of legacy involved. Like the old articles, the new articles have three kinds of legacies. They are now called the universal legacy, the general legacy, and the particular legacy. Articles 1584-1587. Formerly, the general legacy was called the “legacy under universal title.” In addition, each kind of legacy may be made as a “joint legacy” (formerly called the “conjoint” legacy) to more than one legatee. Article 1588.

1) Classification

a) Classification by number of legatees

1] Singular

2] Multiple

a] Definition

b] Subclassification based on accretion (CC art. 1588)

1} Classes: joint & separate

When is a legacy to multiple legatees “joint”? When is it (it would be more accurate to say “are they”) “separate”? What does it mean for the testator to “assign shares”? Read the following jurisprudential and doctrinal material:

Hopson v. Ratliff, 426 So.2d 1377
(La. App. 3d Cir. 1983)

DOUCET, J.

Petitioners herein appeal the district judge's interpretation of an olographic will whereby lapsed particular and residual legacies were granted to respondents, legal heirs of legatee who predeceased the testatrix, rather than the named surviving legatees. We affirm.

The issues presented on appeal are: (1) whether the residuary clause of decedent's will was distributive rather than conjoint, thereby precluding accretion in favor of the surviving legatees; and (2) whether property subject to a particular legacy should devolve upon the heirs at law rather than fall into the residuum of the estate for distribution to the
surviving residuary legatee.

[The court of appeal hereafter quotes extensively from the district court’s opinion, adopting that opinion as its own:]

"The contest is between the testamentary heirs and the legal heirs."

"The deceased had no forced heirs. At the time she made her will, her kin consisted of a sister, Katherine F. Maxfield, four nieces, Helen F. Ratliff, Lucille F. Kincannon, Elaine F. Valentine and Wilma Lee Hopson, and one grand-niece, Marianne Bell Tweel. At the time of her death her sister, Katherine F. Maxfield, was predeceased.

"In her will, deceased provided for her sister and three of her nieces. She made no mention of her fourth niece, Helen F. Ratliff, or her grand-niece, Marianne Bell Tweel.

"The dispute is over what happens to the lapsed bequests to the testatrix' sister. Does this property go to the surviving legatees, exclusively, or do the two legal heirs unnamed in the will get a share?"

"The will itself made a specific bequest to each of the four legatees, and then left the remainder to the same four, 'To be divided equally among them'. . . . The . . . legacy of the residuum [reads], 'To my sister Katherine F. Maxfield and to my three nieces... I give... all... (with the exception of separate bequeaths). To be divided equally among them', is either a universal legacy or a legacy under a universal title. Arts. 1606 and 1612. What it is depends on whether this was a conjoint or a distributive legacy.

"Whether the legacy of the residuum is conjoint or distributive determines whether or not the right of accretion subsists, as provided by Arts. 1706 and 1707.

"Of these issues, we will first determine whether the residuum was conjoint or distributive.

"The testatrix here used the language "To be equally divided among them." These were the identical words of the will in the case of Parkinson v. McDonough, 4 Mart., N.S. 246 (1826). The court in that case said that was a conjoint legacy. In LeBeau v. Trudeau, 1855, 10 La. Ann. 164, similar language: "Shall be divided, in equal portions, among the persons hereinafter named", was held to constitute the beneficiaries conjoint universal legatees. Succession of Wilcox, 165 La. 803, 116 So. 192 (1928,) and Succession of Maus, 177 La. 822, 149 So. 466 (1933) picked up on Parkinson and LeBeau and held that the words "share and share alike" imported conjointness.

"Then things changed. Succession of Lambert, 210 La. 636, 28 So.2d 1 (1946,) dealing with language "share and share alike" overruled Wilcox and Maus, saying that the phrase "share and share alike" is distributive, not conjoint, pretty much as a matter of law. Lambert emphasized that its result comported with the testator's clear intent. Lambert quietly apologized for the earlier cases by explaining that all of them were simply striving to carry out the clear intent
of the testator.

"Next came Succession of McCarron, 172 So.2d 63 (La. 1965). The Supreme Court said:

"'If we are correct in our appreciation of Parkinson v. McDonough and LeBeau v. Trudeau, both supra, which is that they simply held that the language 'to be divided' may, in some cases, be interpreted as relating to the future disposition, and not to the bequest itself, when such an interpretation will effectuate the obvious intention of the testator (as expressed elsewhere in the will that the co-legatees should benefit by any lapse as to the part of one,) then those holdings need not be disturbed. Because a giving effect to the true intention of the testator has always been of paramount concern to this court in construing testaments..."

"But if the discussed early decisions mean that, in the absence of any showing of intent, the phrase "to be divided equally" does not constitute an assignment of parts, and differs from the phrases "in equal portions" and "share and share alike," then we do not choose to follow them. We consider a distinction of that kind, as a hard and fast rule of testamentary construction, is entirely too 'subtle and refined' to stand as the basis for the interpretation of wills which in many, if not most, cases are composed by persons of ordinary understanding and not by judicial writers."

"Thus, the state of the law appears to be that the phrase "share and share alike" is incapable of creating a conjoint legacy, while the phrase "to be equally divided among them" may, under some circumstances, be conjoint, but only if such interpretation will effectuate the obvious intention of the testator.

"On the question of intent, counsel have presented the court with excellent arguments. Counsel for the heirs say the intent sought is the narrow one of whether the testatrix wanted to distribute the residuum of her estate conjointly among the named legatees, or distribute it equally among the named legatees. The argument of the legatees, on the other hand, is that the intent element we are trying to determine is the underlying question of where the testatrix wanted her property to go. I have concluded that the latter is the intent we are trying to determine.

"The Code article which instructs us on this subject is Art. 1712: 'In the interpretation of acts of last will, the intention of the testator must principally be endeavored to be ascertained, without departing, however, from the proper signification of the terms of the testament.'

"Helen Farquhar Ratliff and Marianne Bell Tweel were the only two of deceased's kin that she did not provide for in her will. These two were descendants of one of the testatrix' brothers, Benjamin H. Farquhar. Their absence from the will surely was not an oversight. Deceased made particular legacies to her sister and three nieces and then named the same four as her residuary legatees. Since she named each of those four legatees twice, and
failed to make any provision for the other two persons, it is arguable that she wanted to exclude Helen Farquhar Ratliff and Marianne Bell Tweel from sharing in her estate. Viewed this way, one may be inclined to interpret her language as creating a conjoint legacy, because only by such an interpretation can the intent of the testatrix to exclude the (arguably) unfavorably heirs be carried out.

"But was it her intent to exclude the two unnamed heirs absolutely? She does not say so in the will. Also, we can only guess what she would have done had she known at the time of the making of the will that her sister would predecease her. All we know for certain, based on the will itself, is that her intent when her sister Katherine was alive was to leave everything to her sister Katherine and her then three favored nieces. It is quite possible that had she anticipated her sister's predecease, she might have provided for her other niece and her grandniece.

"For these reasons, I cannot say that it was the 'obvious intention' of the testatrix to exclude the other two nieces from sharing in her estate. Only by finding that it was her obvious intention can the court be justified in interpreting the words 'to be shared equally among them' to be a conjoint legacy. To paraphrase from an ancient case, quod voluit must depend ultimately on quod dixit. I conclude that the legacy was distributive, and the remaining legatees do not benefit from the lapse of Katherine's share of the residuary legacy.


For situations where the new antilapse rule does not apply (because the legatee was not the specified relation of the testator or the legatee had no descendants), the successions revision retains the familiar rules for lapsed legacies. The disposition of a lapsed legacy depends first on whether the lapsed legacy was conjoint. The conjoint legacy, renamed "joint legacy," is one in which the testator has not assigned shares. CC art. 1588. If the legacy is joint and a legatee predeceases the testator, the legacy accretes to the surviving joint legatee or legatees. CC art. 1592. No attempt was made to refine the definition of conjoint legacy to overrule the “share and share alike” jurisprudence of Succession of Lambert, 28 So. 2d 1, 30 (La. 1946) (holding that “share and share alike” assigns parts and does not create a conjoint legacy).

Now that the antilapse provision will protect the descendants of a predeceased joint legatee who was a descendant, sibling, or descendant of a sibling of the testator, it would seem safe to overrule Lambert. The 1995 version of the definition of joint legacy, which was identical to that of the new article, received criticism for its failure to overrule Lambert, but the criticism went unheeded. The new definition could have easily overruled Lambert by adding: “Language addressed to the execution, enjoyment, or partition of the legacy and not intended to restrict the legatees to a determinate part or share of the thing bequeathed does not assign shares.” See 3 Aubry & Rau, Droit Civil Français, in 4 Civil

DH 102.1α. T makes out a testament that reads as follows: “I leave my farm to A and B, one half to each.” Is this legacy joint or separate? Why?

DH 102.1β. T makes out a testament that reads as follows: “I leave my immovables to A and B, share and share alike.” Is this legacy joint or separate? Why?

DH 102.1γ. T makes out a testament that reads as follows: “I leave my farm to A and B, in equal portions.” Is this legacy joint or separate? Why?

DH 102.1δ. T makes out a testament that reads as follows: “I leave my immovables to A and B, to be divided between them equally.” Is this legacy joint or separate? Why?

DH 102.1γ. T makes out a testament that reads as follows: “I leave my farm to A and B.” Is this legacy joint or separate? Why?

2) Significance: accretion

DH 108.1. Pascal makes out a testament in which, after naming Julie, his wife, as his “universal legatee,” he leaves his farm, Belle Terre, to his children (both over age 24 and in perfect health), Ti-Boy and Lil-Fille, without further qualification. Then Ti-Boy dies (without children). And after him, Pascal. Who is entitled to Belle Terre? Why? See CC arts. 1591-1593.

DH 108.2. The same as before (DH 108.1), except that the bequest to Ti-Boy and Lil-Fille includes the words “to be divided between them equally, share and share alike.” What result now? Why? See CC arts. 1591-1593.

b) Classifications based on the magnitude / scope of the bequest (CC art. 1584)

1] Classes

a] Universal legacy (CC art. 1585)

1] Definition

a} Statutory

1/ Statement

2/ Critique
Is anything wrong with the legislative definition? If so, what? See infra the “statement” of the “doctrinal/jurisprudential” definition.

b) Doctrinal/jurisprudential:

1/ Statement

NOTE

According to the doctrine and jurisprudence of both France and Louisiana, the essence of a universal legacy is that it gives the legatee a "contingent vocation" to the whole of the testator's property. The "touchstone" for determining whether a legacy contains such a vocation is this question: "Given the description of the legatee's right in the testament, is there any possible scenario under which the legatee might possibly have the right to claim the totality (qua totality) of the testator's property either at the time of the testator's death or at any time thereafter?" If and only if the answer is "yes" should and may the legacy be classified as "universal."

3-1 C.-B.-M. Toullier, LE DROIT CIVIL FRANÇAIS n° 506, at 148 (nouv. éd. 1837)

It is, then, the original or even the possible right to the universality of the goods of the testator that forms the true character of the universal legacy. The legacy retains that character notwithstanding that it may be subject to reductions or charges, even when these charges exhaust the totality of the goods. That can happen when the testator, after having instituted an heir or a universal legatee, exhausts his fortune with particular legacies or legacies under universal title.

4 Victor Marcadé, EXPLICATION THÉORIQUE ET PRATIQUE DE CODE CIVIL n°s 94-95, at 69-71, & 97, at 71-72 (7th éd. 1873)

94. The universal legacy, differently from the legacy under universal title, is easy to define in few words: it is the attribution, made by the testator, of the right--at least possible--to the universality of the testator's goods.

Thus, when I declare that I bequeath, or give, or attribute (the expressions is not important) to Pierre all the goods that I will leave at my death, it is clear that there is a universal legacy. If I declare that I give him all the goods “that turn out to be disposable at my death,” it is still a universal legacy, for it can be that all my goods without exception will turn out to be disposable and, as a result, there is a vocation to the whole. It is clearly the same if I have given my “disposable portion,” since that which is disposable can
embrace the entire patrimony . . . .

In the same way and for the same reason, the legatee who has the right to the entire fortune, but whose right turns out to be restrained in its application thanks to the presence and the concurrence of a forced heir, is nonetheless a universal legatee, since he has a vocation to the universality.

If, with a fortune that consists altogether of three houses, I bequeath "all my goods" to Pierre and then this or that house to Paul and one other to Jacques, it is certainly true that, if all three legatees come to the succession, Pierre will have only one house, just like each of the two others. But that does not stop him from having the right to the whole; because the entire fortune was bequeathed to him, he will have it all if, for whatsoever cause, Paul and Jacques do not come to the succession. Thus, he has possibly a right to the whole and his legacy, for that reason, is universal. It would be the same, and Pierre's legacy would still be universal, even if I had disposed of the third house in favor of a fourth legatee. It is true that Pierre would then be exposed to [the possibility] of getting absolutely nothing and that he would receive something only upon the default of one of the other legatees. But because this default is possible--and possible for all three particular legatees--and because, for that reason, it is possible for Pierre to end up with the universality--that he will have a right to this universality--his legacy is therefore universal.

95. In conformity with this principle, one must understand there is quite simply a question of intention, appreciable according to the facts, in the determination of whether there is or is not a universal legacy when the testator has declared that he bequeaths his "disposable portion" or rather the "surplus" or "residue" of the goods that he has bequeathed to others.

If the testator, by saying "I bequeath to Pierre the disposable portion of my goods," meant to say "all that which will turn out to be disposable when I die"--if, as often happens to the jurisconsults themselves, he has taken the words "my disposable portion" to be synonymous with "my disposable goods"--it is clear that, despite the presence of the word "portion," which is employed imprecisely, there is a universal legacy . . . . But if he wanted to say only "the part of the my goods that is disposable today," it is then clear that he intended to give only a fraction and that the legacy is not universal. There is, then, a question of intention that must be evaluated by the ensemble of the circumstances and especially by the rapprochement of the diverse dispositions. If, for example, the testator, after having said "I bequeath to Pierre my disposable portion," had added "And if my son does not receive the half that is reserved to him, I bequeath it to Paul," it is perfectly clear that he would have intended to attribute to Pierre only [three-quarters] of his goods and that there would therefore be no universal legacy, for even when it [the son's legitime] passed neither to the sone nor to Paul, it would never belong to Pierre and would remain in the succession ab intestato.

In the same way, when the testator, upon bequeathing a certain house to Paul and a certain farm to Jacques, bequeaths "the rest" of his goods to Pierre, it is necessary to discern his thoughts. If the house and the farm were attributed to others rather than to Pierre because the testator did not want him to have then in any case, then the legacy is not universal. But it is a universal legacy, on the contrary, if these two immovables, in the
mind of the testator, were subtracted from the mass that he had attributed to Pierre and should return to him in the event that Paul and Jacques do not receive them.

As one can see, here there are questions of fact, appreciations of circumstances and of intention, that are given over to the wisdom of the judges.

. . .

97. It is always necessary, then, to return to this general rule: there is a universal legacy when the disposition explicitly or virtually, purely or possibly, gives the right to the universality of the goods, and the legacy ceases to be universal outside of this circumstance.

98. It is to the "universality" of goods--to the totality of goods in right, not to the totality in fact--that it is necessary to be called in order for there to be a universal legacy. And by "universality" must be understood the goods considered in their very totality, in their ensemble, as a unity and en masse. Thus, a person whose entire fortune is composed of two houses, a farm, some furniture, and a little money declares that he bequeaths to Pierre his "two houses, farm, movables, and money"; the goods to which Pierre will have the right will be, in fact, all the goods of the testator; but inasmuch as they are attributed to him separately, each considered in particular rather all considered together in their ensemble, the legacy there will be particular and not universal; in this case, the object of his right is not, to be precise, the totality, but rather this or that good, then some other goods, then still another good. In truth there is no vocation to the totality here, for if the testator, after the confection of the testament, had acquired a third house and had then left it at his death, Pierre would have had only the money, the movables, the farm and the [first] two houses; the third would not belong to him; his right, then, when one describes the idea of it precisely, is to "such and such goods" but not to "all the goods"; and for that reason, it is not a universal legacy.

2 Gabriel Baudry-Lacantinerie & Maurice Colin, DES DONATIONS ENTRE VIFS n° 2289, at 193-94, in 10 TRAITÉ THÉORIQUE ET PRATIQUE DE DROIT CIVIL (2d éd. 1905)

Let us note that the universal legatee need not, in fact, always receive the totality of the goods that have been left by the deceased. First of all, if there are forced heirs, then his legacy will undergo a reduction. In addition, he often will see his gift diminished by the charges that the testator has imposed under the form of particular legacies. It can even happen that these charges will absorb all of the active mass of the succession and, as a result, that the universal legatee will receive nothing.

. . .

In fact, in order to appreciate the nature of a legacy, one should not concern oneself with determining what the legatee will receive in fact at the time of the death of the testator. [Rather,] it is necessary to look for what he is called to receive possibly, that is to say, if one were to suppose that all of the chance events that would be the most favorable to him were to be realized. Every legatee who, on this supposition, is called to receive all the goods left by the testator at the time of his death is a universal legatee, and the disposition made for his benefit is a universal legacy.
One can, then, understand without difficulty that neither the existence of particular legacies made by the deceased nor the presence of forced heirs at the time of disposition [i.e., death] can prevent him to whom the universality of the testator’s goods has been bequeathed from being a universal legatee. In fact, it can happen that the forced heirs will have died before the testator or will renounce the succession if they have survived him. It can likewise happen that the legacies lapse, for example, due to the legatees' having predeceased the testator or to the legatees' repudiation of the legacies if they have survived him. Here, then, are some eventualities in which the right of the universal legatee no longer encounters any obstacle and therefore can be exercised fully and will be extended to all the goods of the testator.

Like the jurisprudence, the authors are in agreement in making of this vocation to the universality of the estate, provided that it is at least possible, the distinctive and essential characteristic of the universal legacy.

5 Marcel Planiol & Georges Ripert, Traité Pratique de Droit Civil Français n° 611, at 765-66, & 614, at 768-70 (André Trasbot & Yvon Loussouarn revs., 2d éd. 1957)

611. Definition. -- The universal legacy is that which gives to the legatee an possible vocation to the totality of the goods of the testator. ** In order to recognize the universal character of the legacy, it is necessary to consider not the benefit [actually] received by the legatee, but rather his possible vocation to the totality of the goods according to the interpretation of the will of the deceased.

614. Formulae equivalent to universal institution. -- There are no sacramental terms in which the testator is obligated to express his will. Rather, he may not have employed any of the traditional expressions, such as "instituted heir" or "universal legatee," and nevertheless have made a universal disposition. Thus, the following are considered to be universal legacies:

1 The designation of a person as "heir" or "legatee" without any other qualification, when it results from the testament that the testator has wanted to make a universal legacy.

2 The legacy of "all movables and all immovables," for all goods are necessarily included in this classification. It would be the same with analogous expressions, such as a legacy of "all my money" or "all my fortune." But a legacy of "all my movables" would not be a universal legacy, not even if there were no immovables in the estate.

3 The legacy formulated in "negative" form by the exclusion of certain heirs. The other heirs are considered to be universal legatees.78

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78 Consider this example. A, a man who has two children, X and Y, both of whom are in their thirties and in perfect health, makes out a valid testament in which he says only this, "I leave nothing to X." The effect of this testamentary provision, thanks to the law of intestacy, is to award all of A's estate to Y. Y, then, is a universal legatee.
4 The legacy of the naked ownership of all the goods, because the naked owner is called, by the very nature of his title, to recover the usufruct [and, therefore,] to receive [full ownership] one day. . . .

5 The legacy of all the disposable goods. This legacy contains within itself an possible vocation to the whole, for it is possible that the testator will not leave a forced heir: those who exist today may die before him, in which case the disposable goods will be equal to the totality of the goods. Nevertheless, it is possible that the testator, by bequeathing all the disposable goods, intended to fix the amount of the legacy at the figure that the disposable portion had on the day one which he made the testament, in which case the legacy would only be a legacy under universal title. It is a question of intention that judges must resolve.

6 The legacy of the "remainder" or the "surplus" of the goods. The result is the same as if the testator, after having instituted a universal legatee, had imposed different charges or different legacies on him: all that which does not form the object of the other legacies or charges is necessarily included in the broad legacy. Nevertheless, the jurisprudence seems to make a distinction depending on whether the other legacies are by particular title or by universal title: if they are particular, the legacy of the surplus is then universal . . .

7 The legacy that is presented as universal and that follows the enumeration of all the goods possessed by the testator, even when this enumeration is incomplete.

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4-2 Henri & Léon Mazeaud et al., LEÇONS DE DROIT CIVIL: SUCCESSIONS - LIBÉRALITÉS n°s 1018-1019, at 342-43 (Laurent Leveneur & Sabine Mazeaud-Leveneur, 5th éd. 1999)

1018. -- The universal legacy is that which gives a vocation to the universality. -- By sticking to the letter of Code Civil article 1003 ("The universal legacy is the disposition whereby the testator gives . . . the universality of the goods that he leaves at his death."), one would get an inexact idea of the universal legacy. The universal legacy is characterized, in fact, not by its effective benefit to the legatee, by its vocation to the universality. It does not matter if he receives the totality; what counts is that he has the possibility of receiving it. Thus, the Commission for the Reform of the Code Civil defined the universal legacy accurately: "that which gives . . . a possible vocation to receive the totality of the estate" (Avant-Projet, Code Civil art. 942). A universal legacy may receive only part of an estate--it will be so when he finds himself in the presence of forced heirs or particular legatees--or may even receive nothing at all--that is what will happen when the particular legacies absorb the entire estate. He nonetheless has a vocation to receive all the estate, and he will receive it in fact in the event of the default of the forced heirs or the particular legatees. . . .

One can, then, see the importance of the interpretation of the will of the testator for the determination of the nature of the legacy. If the testator desires that the goods of the defaulting successors increase the benefit of the legatee, then the legacy is universal. . . .

1019. -- Application. -- A legacy of the disposable portion is, in principle, a universal
legacy, for the disposable portion will represent the totality of the succession in the event of the default of the forced heirs. But it is otherwise when the de cujus intended to bequeath only a fraction of his goods, for example, [three-quarters] if he had one child, and to leave to the lower-ranking heirs the benefit of any possible renunciation or unworthiness of that forced heir.

The solution is the same for the "legacy of the surplus" whereby the testator, after having made some particular legacies, attributes to a legatee all that which he has not disposed of. In the absence of a contrary will of the testator, one that would limit the legacy to the surplus as it stood at the time of the making of the testament, one is in the presence of a universal legacy.

The legacy of the naked ownership of all the estate is certainly a universal legacy, for the legatee (or his successors) will necessarily become the owner of the universality.

K.A. Cross, TREATISE ON SUCCESSIONS § 140, at 204-05 (1891)

The universal legacy is a testamentary disposition, by which a person gives to one person, or to several persons conjointly, the whole of the property which he may leave at his decease, either in actual or eventual right (C.C. 1589, C. N. 1003). This is not the definition of the two Codes; for two elements are necessarily added to make it conform to the legacy as it is established by the positive provisions of both systems of law.

2. The legacy is universal, though the totality of the estate is not actually given, but only eventually. For example; when there is a forced heir, for he may renounce, and then the whole succession goes to the legatee; or when there are particular legacies, for then only the totality of the residuum goes to the universal legatee. C.C. 1600 recognizes the concurrence of a forced heir with the universal legatee; and this would be impossible, if according to the definition in the Codes, the universal legatee must needs take the whole of the property. Marcadé illustrates as follows: “If a person having three houses leaves all his property to Peter, then such a house to Paul, and such a house to James, the legacy to Peter is universal. James and Paul may not accept, and Peter has the eventual right to all. And it would be the same if the third house was bequeathed to John. Peter would be exposed to the chance of getting nothing, and he would take only in default of the other legatees; but the default is possible, and the legacy is, therefore, universal. There is a universal legacy only when the disposition explicitly or virtually, purely or eventually, gives right to a universality of property, to the totality of right, and not the totality of fact; so, if a person, whose entire fortune consists of a house and farm, gives the house and farm to Peter, the legacy is not universal in particular.”


Article 1606 defines the universal legacy in terms of leaving “the whole of the
property” to one or more legatees. Actually this definition is somewhat misleading. Cross redefines the universal legacy as a “testamentary disposition, by which a person gives to one person, or to several persons conjointly, the whole of the property which he may leave at his decease, either in actual or eventual right.” The legacy may be of an eventual right; for instance, in the case of a residuary legacy. For example, where the deceased leaves a house and an automobile, and bequeaths the house to John and the balance of the estate to Henry, or bequeaths all of his property to Henry, then the house to John, the legacy to Henry is universal in nature. This is so because John may not accept, or be unable to accept, and since Henry was bequeathed all, he has an eventual right to all. Thus, the universal legatee may actually take all of the property, only a portion of the property, or in fact, he may ultimately receive none of the property. The latter would be the case if the deceased had two houses as his entire estate and he bequeathed everything to Henry and one house to John and the other to Carol. This would be a universal legacy to Henry because, since John and Carol may not take for some reason, henry has an eventual right to the whole. But if john and Carol do take their respective houses, the universal legatee will get nothing. Henry would take only upon the default of the two particular legatees, “but the default is possible, and the legacy is, therefore, universal.” As Cross indicates, here there is a totality of right even though there is not a totality of fact.

As indicated above, the common form of this situation of the eventual right arises when other legacies are followed by a residuary legacy. For instance, the testator leaves his automobile to Mary and the balance of his property to Jane. Here the residuary legacy does not appear to fit the definition of any of the three types of legacies. It does not appear to be a legacy of the whole estate (universal), or of a proportionate share of the property or of all the movables or immovables of or a proportion of them (universal title), or a legacy of a particular object (particular). Yet, this most common type of legacy must fit into one of these categories to be valid. This is where the eventual right, or the vocation to the whole, idea comes in. If the intention of the testator will bear the interpretation that he intended to leave to the residuary legatee everything not otherwise validly disposed of (as the residuum), then this disposition may be placed, with a bit of pushing, into the definition of the universal legacy under Article 1606. Without the eventual right concept, the residuary disposition would be nonentity.79

2/ Significance

a/ Forced portion

b/ Particular legacies

79 The perceptive reader, noting that I’ve devoted a tremendous (some would say inordinate) amount of material to this issue (i.e., what, precisely, is a universal legacy?), might infer that I consider the issue to be important. Such an inference would be a gross understatement. The ability to distinguish universal legacies from legacies of other kinds is a sine qua non for success on the exam.
c/ Empty estate

d/ Usufruct

2) Illustrations

DH 103.1. T leaves to U "all of the property of which I die possessed." Is this a universal legacy? Why or why not?

DH 103.2. T makes a testament in which he simply says, "U is my heir" or "U is my legatee." Is this a universal legacy? Why or why not?

DH 103.3. T leaves U "all of my immovables and all of my movables" or "all of my corporeals and all of my incorporeals." Is this a universal legacy? Why or why not?

DH 103.4. T leaves U "my disposable portion." Is this a universal legacy? Why or why not?

DH 103.5. T leaves U "naked ownership of all of the property of which I die possessed." Is this a universal legacy? Why or why not?

DH 103.6. T makes a testament in which he sets out several particular legacies and, after that, leaves the "residue" or "remainder" of his property to U. Is this a universal legacy? Why or why not?

DH 103.7. T makes out a testament in favor of U that reads as follows: “I leave to U my house and its contents, my truck, my bateau, and my shotgun.” Then T dies. In the ensuing probate proceedings, it is proven that, both at the time at which T made out the testament and at the time of his death, his entire estate consisted of nothing but his house and its contents, his truck, his bateau, and his shotgun. In other words, both the “intent” and the effect of the testament were to give U everything T had. Was T’s legacy to U “universal”? Why or why not?

DH 103.8. T leaves "all the property of which I die possessed to A and B" without further qualification. Is T’s legacy to A and B “universal”? Why or why not? See CC art. 1585, sent. 2.

b] General legacy (CC art. 1586)

1] Definition (CC art. 1586, sents. 1 & 2)

2] Illustrations

a] Of the whole estate

DH 104.1. T leaves "1/4 of all my property" to A and "3/4 of all my property" to B. Are these general legacies? Why or why not?
DH 104.2. T makes out a testament in which he leaves "1/2 of all my property" to A & B and "the other 1/2 to X, Y & Z." Are these general legacies? Why or why not?

DH 104.3. T makes out a testament in which he leaves "1/2 of all my property" to A and "the residue" to "C" Is the legacy to C a general legacy? Why or why not? See, in this order, CC art. 1585 cmt. (a), ¶ 2; CC art. 1595, ¶ 2; CC art. 1595 cmt. (e).

b} Of classes of property

DH 104.4. T leaves "all my movable effects" to A. Is this a general legacy? Why or why not?

DH 104.5. T leaves his "land and other immovables" to A, B, and C, 1/3 to each. Are these general legacies? Why or why not?

DH 104.6. T leaves his "separate property" and his "incorporeal property" to A. Are these general legacies? Why or why not? Would the result have been the same prior to the revision (i.e., before July 1, 1999)? See CC art. 1586 comment (a).

DH 104.7. T leaves his "consumable property" to A and his "nonconsumable property to B." Are these general legacies? Why or why not? See CC art. 1586, sent. 3.

DH 104.8. T leaves his "corporeal movables" to A. Is this a general legacy? Why or why not? See CC art. 1586 cmt. (f).

DH 104.9. T leaves "½ of my immovable property" to A. Is this a general legacy? Why or why not? See CC art. 1586, sent. 2 & cmt. (b)

3} Doubtful cases: gifts of the whole to multiple legatees

a} Statement of the problem: Is the legacy “universal” or is it “general”?

b} Characteristics of the problematic cases

1/ Multiple legatees

2/ Apparent disposition of the whole estate

c} The criterion of distinction: Is the legacy joint or separate?

To determine whether a legacy of the whole to multiple legatees is universal or general, one must first determine whether that legacy is “joint” and “separate.” For that distinction, see (again)
CC art. 1588 and CC art. 1585 cmt. (b).

\textbf{d} \ Application

DH 105.1. T leaves "all of the property of which I die possessed" to A and B, "share and share alike." Can we say for sure whether this is a universal legacy or a general legacy? Why or why not?

DH 105.2. T leaves "all of the property of which I die possessed" to A and B, "in equal portions." Can we say for sure whether this is a universal legacy or a general legacy? Why or why not?

DH 105.3. T leaves "all of the property of which I die possessed" to A and B, "to be divided between them equally." Can we say for sure whether this is a universal legacy or a general legacy? Why or why not? \textit{See} the jurisprudence and the doctrine that follow:

\textbf{c} \ Particular legacy (CC art. 1587)

\textit{1} \ Definition (CC art. 1587)

\textit{2} \ Prerequisites

\textit{a} \ Testator must own the thing

\textit{b} \ Thing must be determinate or at least determinable

\textit{3} \ Scope

\textit{4} \ Illustrations

DH 106.1. T leaves "my car" to P. T has only one car. Is this a particular legacy? Why or why not? Is it problematic in any way?

DH 106.2. T leaves "my car" to P. T has three car. Is this a particular legacy? Why or why not? Is it problematic in any way? If so, what way and why?

DH 106.3. T leaves "my cars" to P. T has three cars. Is this a particular legacy? Why or why not? Is it problematic in any way? If so, what way and why?

DH 106.4. T leaves P "part of the revenue that my mineral interest on Tract X shall generate during her lifetime." Is this a particular legacy? Why or why not? Is it problematic in any way? If so, what way and why?

DH 106.5. T, who has property in Louisiana, Québec, and France, leaves "all my immovables
in Louisiana" to P. Is this a particular legacy? Why or why not? Is it problematic in any way? If so, what way and why?

2] Significance

Why does it matter whether this or that legacy is universal, under universal title, or particular? There are several reasons.

a] Seizin (CC art. 935-936)

1} Explication of the possibilities
   a} Possession (CC art. 936)
   b} Representation (CC art. 935, ¶ 2)

2} Statement of the difference
   a} Universal legatees & general legatees (CC art. 936, ¶ 2; CC art. 935, ¶ 2)
   b} Particular legatees (CC art. 936, ¶ 3; CC art. 935, ¶ 2)

b] Liability (CC art. 1416)

1} Explication of the possibilities (CC art. 1416; CC arts. 1602-03)

2} Statement of the difference
   a} Universal & general legatees

1/ Payment of estate debts (CC art. 1416)

DH 107.1a. De cujus makes out a testament in which he leaves “½ of my estate to A and the other ½ of my estate to B.” At his death, de cujus leaves assets worth $240,000 (a house worth $100,000, two cars worth $20,000, and $120,000 in cash) and debts (all unsecured) worth $60,000. A and B both accept the succession and, in due course, a judgment is rendered putting them into possession of the estate. A takes the house and $20,000 cash; B takes the cars and $100,000 cash. Is A or B liable for the debts of the estate? Why or why not? If so, for how much and why?

DH 107.1b. The same as before, except that, this time, the de cujus’ debts come to $300,000.
What result now?

2/ Payment of particular legacies (CC arts. 1602 & 1604)

DH 107.2. The same as DH 107.1, except that (i) the estate is debt free and (ii) the testament includes this additional bequest: “I leave $40,000 cash to C.” Is A or B liable for paying off this legacy? Why or why not? If so, for how much?

b} Particular legatee (CC art. 1416 cmt. (a))

DH 107.3a. The same as DH 107.1a, except that (i) the testament includes this additional bequest: “I leave my bass boat [worth $10,000] to C” and (ii) $10,000 of the total $60,000 estate debt is attributable to the purchase of the bass boat, in other words, de cujus bought the boat on credit and, at the time of his death, $10,000 of the purchase price remained to be paid. Is C liable for any of the estate debt? Why or why not?

DH 107.3β. The same as before, but with these additional facts. In addition to the house and the cash that he inherited from the de cujus, A owns a tract of land (acquired through his own efforts) worth $50,000. In addition to the cars and the cash he inherited from the de cujus, B owns some stock (acquired through his own efforts) worth $40,000. In addition to the boat that he inherited from the de cujus, C owns a race horse worth $30,000. The seller of the bass boat, who has still not been paid, now wants to collects the $10,000 he’s owed. Upon what property can he foreclose? Why? Upon what property can he not foreclose? Why? In answering this question, be sure to consider each and every item of property mentioned in the hypothetical, including those that A, B, or C acquired otherwise than through inheritance from the de cujus.

c} Preference of payment (CC art. 1599)

1} Explication of the possibilities

2} Statement of the differences

a} Particular legacies discharged first (CC art. 1600)

b} As among particular legacies (CC art. 1601)

1/ Those of particular objects first

2/ Then those of groups of things second

3/ Then those of money
a/ Those expressly declared to be remunerative

b/ All others ratably

2) Lapse of legacies (CC arts. 1589-1596 & 965)

a) Definition

What does it mean for a legacy to “lapse”? See CC art. 1589 & cmt. (b).

b) Causes

For what reasons will a legacy “lapse”? See CC arts. 1589.

1] Incapacity to receive (CC art. 1589(1) & (2))

a] Legatee no longer in existence (CC art. 1589(1))

b] Legatee not yet in existence (CC art. 1589(2))

DH 109.1α. Pascal and Julie, who've had difficulty conceiving a child, enlist the assistance of the Gueydan Fertility Clinic. In due course the clinic produces several embryos from reproductive material contributed by the couple. Pascal, looking to the future, then makes out a testament in which he leaves Mr. Nutty, his pet nutria, to "my first born child." Before the first embryo is implanted, Pascal is killed in a traffic accident. Julie, desiring to have a living reminder of her beloved, goes ahead with the implantation procedure, even though Pascal did not, before his death, give her permission in writing to do so. The first procedure bears no fruit. Nor does the second or the third. But Julie does not give up. And in the course of time, some five years after Pascal’s death, Julie finally gives birth to a son, whom she names Ti-Boy. May Ti-Boy now claim the legacy of Mr. Nutty (who is still alive and kicking)? Why or why not? See CC arts. 1472-1475.

DH 109.1β. The same as before (DH 109.1α), except that, this time, (i) Pascal gives Julie permission, in writing, to implant their embryos in her uterus after his death and (ii) the Ti-Boy is born 1 ½ years after Pascal’s death. What result now? Why? See La. Rev. Stat. 9:391.1 (eff. 2001).

2] Failure of – or death of legatee before fulfillment of – suspensive condition (CC art. 1589(3))

DH 109.2. T, the father of two children, A and B, makes out a testament in which he leaves $10,000 to A on the condition that B should get married within two years of his death. Then T dies. Then A dies 1 year later. Then B gets married 6 months after that (18 months from testator’s death). What happens to A's legacy? Why?
3] Unworthiness (CC art. 1589(4))

DH 109.3. T makes out a testament in which he leaves $10,000 to X. X poisons T, killing him. T's son and sole heir then brings an action against X, seeking to have him declared unworthy. The action is successful. What happens to X's legacy? Why? See CC arts. 941 & 945(1).

4] Renunciation (CC art. 1589(5))

DH 109.4. The same as before (DH 109.3), except that (i) T dies of natural causes and (ii) X then "renounces" T's succession in writing. What happens to X's legacy? Why? See CC art. 947, 963 & 965.

5] Nullity (CC art. 1589(6) & (7))

a] Absolute nullity (CC art. 1589(6))

DH 109.5. T makes out a testament in which he leaves (i) his house, in full ownership, to A, and upon A's death, to B, and (ii) all the rest of his property to C. What happens to the legacy to A and B? Why? See CC art. 1520.

b] Relative nullity (CC art. 1589(7))

DH 109.6. Olide, who has discovered the mayor in a "compromising position" with one of his aides, makes this proposal to the mayor: "Make out a testament leaving me $10,000 and I'll just forget what I saw." The mayor then writes up the testament, which Olide takes with him for "safekeeping." Then the mayor dies. Before long, news of Olide's "proposal" to the mayor gets out. What happens to the legacy to Olide? Why? See CC art. 1478.

c) Effects

1] Inefficacity

2] Accretion (CC arts. 1590-1596 & 965)

a] By will (CC art. 1590, ¶ 2)

DH 110.1. T makes out a testament in which he names X as his "universal legatee" and grants these particular legacies: to A, his boat; to B, his car; to C, his tractor. The testament further provides that, in the event that any of the particular legatees should predecease him, the object of the particular legacy "shall be given to the Salvation Army." Then A dies. And then T dies. What happens to the boat that was left (at least initially) to A? Why? See CC arts. 1589(1), 1591, & 1590, ¶ 2, & 1595, ¶ 1.

b] By law (suppletive rules) (CC arts. 1590-1596 & 965)
1/ Principal rules (CC arts. 1591-1593, 1595, ¶ 2, & 965)

a) In general (CC arts. 1591-1592, 1595, ¶ 2)

1/ Particular & general legacies (CC art. 1591 & 1595, ¶ 2)

DH 110.2. Théophile, a bachelor without children, parents, or siblings, executes a testament in which he makes the following bequests: (i) “to my friend, Pascal, my cattle”; (ii) “to my friend, Olide, all my corporeal movables”; (iii) “to my cousin Constance, whatever remains of my estate.” Before Théophile dies, Pascal dies. Pascal is survived by his two children, Ti-Boy and Lil-Fille. When Théophile dies, who will get the cattle that were intended for Pascal? Why?

DH 110.3. The same as before (DH 110.2), except that (i) Olide, not Pascal, predeceases Théophile and (ii) Théophile leaves Olide all of his corporeals, not just those that are movable. Olide is survived by his child, Lapin. Who gets the corporeals that were intended for Olide? Why? See CC art. 1591 cmt. & art. 1595, ¶ 2.

2/ Joint legacies (CC art. 1592)

DH 110.4. Théophile, a bachelor without children, parents, or siblings, executes a testament in which he makes the following bequests: (i) “to my friends, Pascal, and his wife, Julie, my cattle”; (ii) “to my friend, Olide, all my corporeal movables”; (iii) “to my cousin Constance, whatever remains of my estate.” Before Théophile dies, Pascal dies. Pascal is survived by his two children, Ti-Boy and Lil-Fille. When Théophile dies, who will get the cattle that were intended for Pascal? Why?

DH 110.5. Théophile, a bachelor without children, parents, or siblings, executes a testament in which he makes the following bequests: (i) “to my friend, Pascal, my cattle”; (ii) “to my friends, Olide, and his girlfriend, Clodice, all my corporeals”; (iii) “to my cousin Constance, whatever remains of my estate.” Olide, not Pascal, predeceases Théophile. Olide is survived by his child, Lapin. Who gets the corporeals that were intended for Olide? Why?

DH 110.6. Théophile, a bachelor without children, parents, or siblings, executes a testament in which he makes the following bequests: (i) “to my friend, Pascal, my cattle”; (ii) “to my friend, Olide, all my corporeal movables”; (iii) “to my cousins Constance and Cecile, whatever remains of my estate.” Before Théophile dies, Constance dies. Constance is survived by her child, Renard. When Théophile dies, who will get the share of the “remains” that was intended for Constance? What result now?

b) Exception (CC art. 1593)
NOTE

Under Act No. 1421 of 1997 (effective July 1, 1999), through with the Louisiana Legislature, on the recommendation of the Louisiana State Law Institute (LSLI), comprehensively revised the law of testate successions, the “general” rules for the accretion of lapsed legacies set out in new CC arts. 1591 & 1592 were subjected to two exceptions. One exception, which was set out in new CC art. 965, applied to instances in which the legacy had lapsed because of “renunciation” (see CC art. 1589(5)). The other exception, which was set out in new CC art. 1593, applied to instances in which (i) the legacy had lapsed for some cause other than renunciation or invalidity / nullity, (ii) the legatee under the lapsed legacy was a descendant or a privileged collateral of the testator, and (iii) that legatee had descendants of his own. Two years later, the Louisiana Legislature, again on the recommendation of the LSLI, suppressed the first of these exceptions (that for instances of renunciation). See Act No. 824 of 2001. As the law now stands, then, there is only one exception to the general rules (the exception of CC art. 1593), and legacies that lapse due to renunciation now accrete according to those general rules and that single exception.

1/ Prerequisites

a/ Cause of lapse: some cause other than invalidity / nullity

b/ Legatee leaves descendants

2/ Explication

3/ Illustrations

DH 110.7. Théophile, a bachelor without children, parents, or siblings, executes a testament in which he makes the following bequests: (i) “to my brother, Pascal, my cattle”; (ii) “to my friend, Olide, all my corporeal movables”; (iii) “to my cousin Constance, whatever remains of my estate.” Before Théophile dies, Pascal dies. Pascal is survived by his two children, Ti-Boy and Lil-Fille. When Théophile dies, who will get the cattle that were intended for Pascal? Why? Note: In this hypothetical, unlike in DH 110.2 (its template), Pascal is Théophile’s brother, not merely his friend.

DH 110.8. Théophile, a bachelor without children, parents, or siblings, executes a testament in which he makes the following bequests: (i) “to my brother, Pascal, my cattle”; (ii) “to my friend, Olide, all my corporeals”; (iii) “to my cousin Constance, whatever remains of my estate.” Olide, not Pascal, predeceases Théophile. Olide is survived by his child, Lapin. Who gets the corporeals that were intended for Olide? Why? Note: In this hypothetical, unlike in DH 110.3 (its template), Olide is Théophile’s brother, not merely his friend.
DH 110.9. Théophile, a bachelor without children, parents, or siblings, executes a testament in which he makes the following bequests: (i) “to my brother, Pascal, and his wife, Julie, my cattle”; (ii) “to my friend, Olide, all my corporeal movables”; (iii) “to my cousin Constance, whatever remains of my estate.” Before Théophile dies, Pascal dies. Pascal is survived by his two children, Ti-Boy and Lil-Fille. When Théophile dies, who will get the cattle that were intended for Pascal? Why? Note: In this hypothetical, unlike in DH 110.4 (its template), Pascal is Théophile’s brother, not merely his friend.

DH 110.10. Théophile, a bachelor without children, parents, or siblings, executes a testament in which he makes the following bequests: (i) “to my friend, Pascal, my cattle”; (ii) “to my brother, Olide, and his girlfriend, Clodice, all my corporeals”; (iii) “to my cousin Constance, whatever remains of my estate.” Olide, not Pascal, predeceases Théophile. Olide is survived by his child, Lapin. Who gets the corporeals that were intended for Olide? Why? Note: In this hypothetical, unlike in DH 110.5 (its template), Olide is Théophile’s brother, not merely his friend.

DH 110.11. Théophile, a bachelor without children, parents, or siblings, executes a testament in which he makes the following bequests: (i) “to my friend, Pascal, my cattle”; (ii) “to my friend, Olide, all my corporeal movables”; (iii) “to my daughter Constance and my cousin Cecile, whatever remains of my estate.” Before Théophile dies, Constance dies. Constance is survived by her child, Renard. When Théophile dies, who will get the share of the “remains” that was intended for Constance? Why? Note: In this hypothetical, unlike in DH 110.6 (its template), Constance is Théophile’s daughter, not his cousin.

DH 110.12. By testament, Jean Sot leaves his pirogue to his three sons, Beau, Meau, and Seau. Then Beau, who has no children, dies. Next, Meau, who has two children, Larry and Curly, dies. And then Jean Sot dies, survived by Seau, Larry, and Curly. To whom does the pirogue belong and in what proportions? Why?

2) Residual rule (CC arts. 1596)

DH 110.13. Théophile, a bachelor without children, parents, or siblings, executes a testament in which he makes the following bequests: (i) “to my friend, Pascal, my cattle” and (ii) “to my friend, Olide, all my corporeal movables.” Unlike in DH 110.2 (the template for this hypothetical), here there’s no residual legacy to Constance. Before Théophile dies, Pascal dies. Pascal is survived by his two children, Ti-Boy and Lil-Fille. When Théophile dies, who will get the cattle that were intended for Pascal? Why?

DH 110.14. Théophile, a bachelor without children, parents, or siblings, executes a testament in which he makes the following bequests: (i) “to my friend, Pascal, my cattle” and (ii) “to my friend, Olide, all my corporeals.” Unlike in DH 110.5 (the template for this hypothetical, here there’s no residual legacy to Constance. Olide, not Pascal, predeceases Théophile. Olide is survived by his child, Lapin. Who gets the corporeals that were intended for Olide? Why?
DH 110.15. Théophile, a bachelor without children, parents, or siblings, executes a testament in which he makes the following bequests: (i) “to my friend, Pascal, my cattle”; (ii) “to my friend, Olide, all my corporeal movables”; and (iii) “to my cousins Constance and Cecile, whatever remains of my estate.” Before Théophile dies, Constance and Cecile both die. Constance is survived by her child, Renard. When Théophile dies, who will get the share of the “remains” that was intended for Constance? Why? Note: In DH 110.6 (the template for this hypothetical), Constance alone predeceased Pascal and Cecile survived him.

DH 110.16. Théophile, a bachelor without children, parents, or siblings, executes a testament in which he makes the following bequests: (i) “to my friend, Pascal, my cattle” and (ii) “to my friends, Olide, and his girlfriend, Clodice, all my corporeals, to be divided between them equally, share and share alike.” Unlike in DH 110.5 (the template for this hypothetical), here there’s no residual legacy to Constance. Olide predeceases Théophile. Olide is survived by his child, Lapin. Who gets the corporeals that were intended for Olide? Why?

DH 110.17. Théophile, a bachelor without children, parents, or siblings, executes a testament in which he makes the following bequests: (i) “to my friend, Pascal, my cattle” and (ii) “to my brother, Olide, all my corporeals.” Olide, not Pascal, predeceases Théophile. Olide dies without descendants. Who gets the corporeals that were intended for Olide? Why? Note: In this hypothetical, unlike in DH 110.3 (its template), Olide is Théophile’s brother, not merely his friend.

3) Extinction of legacies (CC art. 1597)

a) Explication

What is meant by the “extinction” of legacies? See CC art. 1597. How does “extinction” differ from “lapse”?

b) Causes

c) Effects

d) Illustrations

DH 111.1. By testament dated September 21, 2000, Pascal leaves Mr. Nutty, his pet nutria, to Jean Sot, and “all my incorporeal rights” to Julie, his wife. At the time, those incorporeal rights include the right to collect $10,000 from Olide, the sum that Pascal had loaned Olide, interest free, back on June 1, 2000. On May 31, 2003, Mr. Nutty dies of natural causes. On June 14, 2003, Pascal dies from grief. What now becomes of the legacies to Jean Sot and Julie? Why? In connection with Julie’s legacy, see CC art. 3494(3).

DH 111.2. The same as before (DH 111.1), except that (i) the cause of Mr. Nutty’s death was his having been deliberately poisoned by Clodice and (ii) prior to Mr. Nutty’s death, Pascal had taken out a property insurance policy on Mr. Nutty from Cajun Assurance, Inc. What result now? Why?
DH 111.3. By testament, Pascal leaves a certain tract of land, which he had previously mortgaged to Mamou Mortgage Co., to his son, Ti-Boy. Before Pascal dies, he defaults on his loan from MMC, at which point MMC forecloses on the mortgage. At the sheriff’s sale, the land fetches a price of $100,000, which is $20,000 in excess of the mortgage. Before MMC can disgorge the excess $20,000 to Pascal, he dies. What now becomes of the legacy to Ti-Boy? Why?

e) Critique


The new law concerning extinction of a legacy leaves something to be desired. New article 1643 extinguishes any legacy, not just a legacy of a certain object as old article 1643 provided, if the property forming all or part of the legacy is “lost, extinguished, or destroyed” before the death of the testator.[ CC art. 1643.] Perhaps the reference to “the property” will prevent the mistaken application of the article to a legacy of a sum of money when there is no cash in the estate at death. Legatees of cash are more like creditors of the universal successors than like legatees of property. If there is no cash in the estate at death, the universal successors or the succession representative must sell some property from the residue to pay the legatee. No change is intended; however, the new article is not as precise as the old one.

A more serious criticism concerns the new article’s effect on situations where the bequeathed property changes form without any act of the testator. For example, the testator bequeaths to his friend “my stock in XYZ, Inc.” Prior to his death, XYZ merges with ABC, Inc., and the testator receives stock in ABC in exchange for his stock in XYZ. Will the friend get the ABC stock? Another example would be the expropriation of the bequeathed property prior to the testator’s death. If payment for the expropriation of Blackacre is pending at the testator’s death will the legatee of Blackacre receive it? In both examples there was no action by the testator that implied a change of intent with respect to the legacy. Thus, there is no evidence of revocation of the legacy by the testator. Because old article 1643 pertained to loss or destruction in the physical sense, it arguably would not have applied. Consequently, it was possible to argue under the old law that the legatee should receive the ABC stock and the proceeds of the expropriation. This result is similar to the law of usufruct, where a change in form without an act of the usufructuary does not extinguish the usufruct; instead, the principle of real subrogation allows the usufruct to continue over the new form of the property, even over expropriation proceeds. CC art. 615.

The comment to new article 1597 says that under the new law, however, it is not possible to argue that the legatee should receive the converted property. CC art. 1597 cmt. (b). Presumably that is because the new article has added the word “extinguished” to “lost or destroyed.” Contrary to the old law, the new rule would give the result of the traditional common-law rule of “ademption.” Under this rule, known as Lord Thurlow’s Rule or the “identity rule,” if the exact property bequeathed cannot be found in the estate,
the legacy is “adeemed.” But many cases in other states make an exception to the common-law rule when they find that the property has merely changed form. The Uniform Probate Code discards the traditional common-law rule in favor of one based on the testator’s intention and presumptively permits the legatee to receive the converted property. If the U.P.C. is evidence of progress, Louisiana’s old rule was more progressive than its new rule will be. Oddly, the revision itself recognizes two instances of real subrogation: The legatee is allowed to receive insurance proceeds unpaid at the testator’s death, and the legatee is given the right of action against the person liable for the loss of the thing bequeathed. CC art. 1597 cmts. (a) & (d). Why should real subrogation apply to legacies in these two situations but not in others?

d. Revocation (CC art. 1606)

1) Definition

What is meant by “revocation” in this context? Does the term have the same meaning here that it has in the context of donations inter vivos?

2) Classification

a) By source

1] By operation of law

a] Definition

b] Instance: divorce (CC art. 1608(5))

2] By operation of will

a] Definition

1} Express

a} Definition (CC art. 1691, ¶ 2 (1870))

b} Instances (CC arts. 1607(2), 1607(3), 1608(1), 1608(4))

2} Tacit

a} Definition (CC art. 1691, ¶ 3 (1870))
b} Instances (CC arts. 1607(1), 1608(2), 1608(3))

b) By scope

1) General

a) Definition (CC art. 1691, ¶ 4 (1870))

b) Instances (CC art. 1607)

1) Destruction of testament (CC art. 1607(1))

DH 112.1. T makes out a notarial testament. Sometime later, at T's direction and in T's presence, T's attorney tears up testament & throws the pieces into a trash can. Has the testament been revoked? Why or why not? See the jurisprudence that follows:

Smith v. Shaw,
221 La. 896, 60 So.2d 865 (1952)

FOURNET, J.

The defendants are appealing from the judgment of the District Court decreeing the plaintiffs to be the owners of four certain parcels of real property . . ., and rejecting the demands in reconvention filed by the defendants in which the latter sought to be recognized as owners of an undivided interest therein.

The proceeding arose as a slander of title suit, the plaintiffs, Mrs. Catherine S. Smith and Mrs. Sue Belle J. Boutchee, alleging actual possession of the property and ownership thereof by virtue of a judgment of court in the Succession of Mrs. Myra D. Jones, deceased, wherein they were recognized as the sole and only heirs at law of Mrs. Jones (their aunt) and put into possession of her estate, consisting solely of the four pieces of real property, in the proportion of one-half to each. The defendants, Mrs. Ethel Galvin and Mrs. Allen Shaw (legal heirs of Mrs. Jones' deceased husband,) in answer, admitted that they claim an interest in the property, and assuming the position of plaintiffs in reconvention, alleged that they became owners of a one-fourth interest each as testamentary legatees under a valid olographic will executed by the deceased in January, 1947, which they assert should be given legal effect and secondary proof thereof allowed in view of the fact that said will was destroyed on October 10, 1948, when the testatrix executed a nuncupative will by public act, the latter will in turn having been destroyed some ten days later (October 20, 1948) upon execution of another nuncupative will by public act, and this last will having been declared null and void upon being presented for probate in the succession proceedings. . . .

There is no dispute as to the execution of the olographic will, its formal validity, and its actual destruction through mutilation, the document having been torn in pieces and discarded by decedent's attorney, Mr. Lincove, at her suggestion and in her presence, after
he had completed the first nuncupative will by public act. The defendants (appellants) contend, however, that the olographic will was destroyed through error of both fact and law, induced by belief in Mr. Lincove's representation that the document prepared by him was a valid instrument; but, because it was defective, a second nuncupative will by public act was drawn (by another attorney, Mr. Woodley) to replace it, and since the latter was subsequently declared null for want of proper form, the olographic will was not revoked and should be admitted to probate. Relying on a so-called "Doctrine of Dependent Relative Revocation," said to be supported by decisions from numerous states and widely recognized in England and Canada, the defendants argue that the revocation of the olographic will was conditioned on the validity of the new testament; and with the intention of the testatrix so clearly manifested in three wills executed within a short time of her death, each containing the same provision relative to disposition of the residue of her estate, it would be wholly unreasonable to assume that she wished to die intestate rather than to have her property distributed according to the provisions of her olographic will.

Under our system of law there is no such doctrine as "Dependent Relative Revocation," Art. 1691 of the LSA-Civil Code providing that "The revocation of testaments by the act of the testator is express or tacit" -- express when the testator has formally declared in writing that he revokes the testament, tacit "when it results *** from some act which supposes a change of will," and while the Code does not specify that the destruction of a testament constitutes a revocation thereof, the fact of intentional destruction by the testator as constituting the most effective method of invalidation has been recognized by this Court on many occasions.

DH 112.2. T makes out a notarial testament in multiple originals. Later T tears up one original and throws the pieces into a trash can. After T’s death, the other original is found in T’s safe. Has the testament been revoked? Why or why not? See the jurisprudence that follows:

Succession of Talbot,
530 So.2d 1132 (La. 1988)

DENNIS, J.

The question presented is whether a testator's intentional destruction of one of the multiple originals of his will creates a presumption that he intended to revoke all of the other copies of the testament, and, if so, whether in the present case the presumption was rebutted by evidence to the contrary. . . . A testator's intentional destruction of his will gives rise to a rebuttable presumption that he intended to revoke his testament and all copies thereof. Thus each copy of the will is revoked unless the presumption is overcome by sufficient proof establishing the lack of an intention to destroy or to revoke. In the present case, in which the testator died suddenly and unexpectedly about twelve hours after he, in his attorney's presence, had expressed his intention to revoke his will and had destroyed a multiple original of it, the presumption of revocation by destruction was not
rebutted by evidence that an undamaged original copy of the will was found in a safe at the testator's condominium.

FACTS

Robert Mirkil Talbot, the testator in this case, was married twice. In 1981 during his first marriage to Miriam Talbot, he executed a will in multiple originals which bequeathed his entire estate to Miriam, or, if she should predecease him, to his friend J. Barker Kilgore as contingent legatee. Miriam Talbot died in 1983.

After his first wife's death, Robert Talbot moved into a small condominium . . . . After dating Lois McClen Mills for several months, Robert Talbot married her in November, 1984. The couple moved into Lois's apartment, but soon decided to purchase a new home on East Sheraton Boulevard. Neither of the Talbots' separately owned residences had been sold prior to purchase of the East Sheraton residence. . . .

. . . [T]he Talbots determined by consulting a Louisiana intestacy chart that, if Robert Talbot died intestate, Lois would receive Robert's entire estate under the laws of intestacy, as he had neither descendants, nor surviving parents or siblings. These concerns and their understanding of the law prompted them to consult the attorney who had prepared Mr. Talbot's 1981 will about drafting a will for their current situation.

. . .

Mr. Talbot asked the attorney if a will was necessary in his case. The attorney advised Mr. Talbot to execute a reciprocal will. Nevertheless, he also advised Mr. Talbot that his entire estate would go to Lois, if he died intestate. The attorney assumed that Mr. Talbot's 1981 will had been voided by his first wife's death, although he had not recently checked the provisions of that will. Based upon his false impression that his wife would inherit his entire estate under the law of intestacy, Mr. Talbot rejected the attorney's advice to make a new will in order to save the $75 fee the new will would cost.

Some time prior to a later meeting with the Talbots, the attorney reviewed the duplicate original 1981 will which had been retained in his files. He discovered that although Mr. Talbot's late wife was the primary beneficiary of the will, a contingent beneficiary in the person of J. Barker Killgore had been created.

Upon the Talbots arrival at the attorney's office for the execution of Mrs. Talbot's will, the lawyer discretely steered Mr. Talbot to one side of the conference room to discuss the matter of the previous will. Speaking softly so as not to be heard by Mrs. Talbot, the attorney informed Mr. Talbot of the content of his 1981 will, showing him the attorney's office copy, and asked him if he wanted his present wife, Lois, to inherit his separate property, rather than Mr. Kilgore.

Mr. Talbot said "yes" and "seemed surprised" by either the existence or the content of the 1981 multiple original will. The attorney told Mr. Talbot that if he wanted to leave everything to his wife he had to destroy that will Mr. Talbot said he would destroy the will, and before he left the attorney's conference room he tore the will in two in the attorney's presence. Before Mr. Talbot left, the attorney reminded him that there was another multiple original copy of the will in Mr. Talbot's possession. The lawyer testified that he made certain that Mr. Talbot understood that he should destroy that will and that he intended to do so. The lawyer did not discuss with Mr. Talbot what the consequences would be if he failed to "take care of" the other copy.
After the execution of Mrs. Talbot's will, the Talbots left the attorney's office at around 11:00 a.m., and went to a local truck sale to search for furnishings for their new home. After the sale, they went to lunch, and then on to K-Mart to purchase a set of lawn sprinklers for their East Sheraton home. Upon returning to the East Sheraton home at about 2:30 p.m. to unload the sprinklers, Mr. Talbot began to feel a pain in his chest. Sitting down for a while at the kitchen table, he took some medicine for what he believed to be indigestion. Mrs. Talbot testified that the Talbots remained at the East Sheraton residence until 5 p.m., at which point Mr. Talbot began to feel somewhat better, allowing them to return to their existing residence in Lois' townhouse. Around 9 p.m., Mr. Talbot became extremely short of breath, and was taken to the Medical Center for treatment. He died at 10:25 that evening.

Mrs. Talbot could not recall visiting Mr. Talbot's former residence [the condominium] at any time after leaving the lawyer's office on July 12, 1985. She only recalled visiting the condominium earlier in the week to move some of Mr. Talbot's things to the East Sheraton residence. Two residents of Mr. Talbot's former complex, Nellie Prestridge and Annette Morris, testified that they saw Mr. and Mrs. Talbot carrying boxes out of the condominium on the afternoon of Friday, July 12, 1985.

On the Saturday after Mr Talbot's death, Barker Killgore accompanied Mrs. Talbot to Mr. Talbot's condominium to look up the name of Mr. Talbot's mother and father opening the safe, the two parties went through several papers before finding the information they needed. Mr. Killgore, who was aware of the 1981 will, and his status as a contingent beneficiary, was unable to find the will in this initial search of the condominium. Not to be denied, he returned, on two separate occasions to the residence, to search for the will, each time without Mrs. Talbot's knowledge or consent. On his third search, he was finally able to locate the 1981 will. He removed the will and employed an attorney to probate the instrument.

Mrs. Talbot filed an opposition to probate. After a trial on the merits, the trial judge declared the testament of 1981 to have been tacitly revoked. In his finding of facts, the trial judge found "beyond a shadow of a doubt" that decedent desired that all of his possessions be inherited by his widow, Lois Talbot. He also found that the physical destruction of his testament by Mr. Talbot in the presence of his attorney was done with specific intent to revoke the will.

Mr. Killgore appealed. The court of appeal reversed. 516 So.2d 431 (La. App. 1st Cir. 1987). Acknowledging the correctness of the trial court's findings of fact, it nonetheless determined that decedent did not succeed in revoking his will because he did not destroy all of the copies. . . .

PRECEPTS OF LAW

The Civil Code provides that a will may be revoked by act of the testator either expressly (in which event the revocation must be in one of the forms prescribed for testaments, and clothed with the same formalities) or tacitly, resulting from some other disposition of the testator (as indicated by the subsequent incompatible testamentary dispositions, or the sale or donation inter vivos of the subject of the legacy,) or some other act which supposes a change of will. La. Civil Code arts. 1691-95. In re Succession of Nunley, 224 La. 251, 69 So.2d 33, 34-35 (1954).
Although the Code does not specify that the destruction of a testament constitutes a revocation thereof, the fact of intentional destruction by the testator as constituting the most effective method of invalidation has been recognized by this court on many occasions. Further, this court has adopted the uniformly adhered to rule that the failure to find a will which was duly executed and in the possession of, or readily accessible to, the testator, gives rise to a legal presumption of revocation by destruction; however, this presumption is a rebuttable one and so may be overcome by sufficient evidence. Moreover, in Jones v. Mason, 234 La. 116, 99 So.2d 46 (1958) this court applied that presumption of revocation in a case in which a testator executed his will in multiple copies, one original and several carbon copies. After the testator's death, the original was missing and only two of the carbon copies were found. This court recognized that these facts gave rise to a presumption of destruction and revocation but ultimately concluded that the presumption was a weak one which had been overcome by the testator's preservation of one of the duplicate originals of his will in his possession.

The legal question raised in the present case is whether a presumption of revocation arises from the intentional destruction of one multiple original of a will, as well as from a failure to find one after the testator's death. We conclude that such a presumption should be adopted because of the probabilities of the situation and because a failure to do so would be inconsistent with our recognition of a similar presumption based on the failure to find a will subsequent to the testator's death.

One frequently significant consideration in the fixing of the burdens of proof is the judicial estimate of the probabilities of the situation: the risk of failure of proof is often placed upon the party who contends that the more unusual event has occurred. In the present case, we conclude that this consideration is predominant and that the proponent of the will should bear the burden of proving that a testator, who intentionally destroyed a copy of his will under circumstances consistent with his having an aim to revoke, either did not in fact intentionally authorize or commit the destructive act or else did not do so with an intention to revoke. The presumption may be weak or strong, and more or less easily rebuttable, depending on the clarity of the evidence as to whether the testator was the author of the will's destruction, whether he expressed an intention to revoke the will, whether he had access to other originals of the will prior to his death, whether he treated any extant copy of the will as not having been revoked, and as to any other issue bearing upon the testator's intention with respect to the destruction and revocation of the will.

If the mere absence of a multiple original of a will after the testator's death tends to increase the probability of its destruction by him so as to justify a presumption of his revocation of the testament by destruction, certainly proof that the testator in fact destroyed his will before his death ought to give rise to a similar presumption. Furthermore, when the testator, in the presence of a credible witness, declares his intention to revoke his will and in fact destroys an original thereof, as in the present case, the presumption should not be rebuttable except upon clear proof of a contrary contention.

Among Anglo-American jurisdictions which have confronted the issue, it is the general rule that the intentional destruction or cancellation by the testator of the copy of his duplicate will retained in his possession raises the presumption of an intention to
revoke all copies and the whole will, in the absence of proof to the contrary.

According to Aubry and Rau, however, a different view prevailed in France in the 1800's. Aubry et Rau, Droit Civil Francais Vol. 11 § 725 pp. 508-510 (6th ed.) (La.St.L.Inst. trans. 1969). The destruction, laceration or cancellation of an olographic testament made knowingly and intentionally by the testator himself, imported the revocation of the testament when there was only one original. Id., p.508. However, relying on nineteenth century jurists and commentators, Aubry and Rau reported that the testator was not, as a general rule, presumed to have intended the revocation of his disposition unless he had destroyed, lacerated or cancelled all the originals of his testament; the fact that he had destroyed, lacerated or cancelled one of them only would not constitute proof of his intention to revoke his testament in this manner. Id., pp. 508-509.

Nevertheless, we are persuaded by our own judicial estimate of the probabilities of the situation to recognize the presumption of revocation by destruction in cases involving multiple original wills. Aubry and Rau do not give the reasoning of the nineteenth century jurists and commentators for not recognizing the presumption in such cases, but it may have been their opinion that the practices and circumstances of that time in France made a testator's failure to destroy all originals of his will probably incompatible with an intention to revoke. In modern Louisiana practice and usage, however, the ease and frequency with which attorneys have clients execute multiple originals both increases the chances of lost or forgotten wills and diminishes the significance of a testator's failure to destroy each original in revoking his will. Furthermore, we are unable to assess the quality of the jurisprudence summarized by Aubry and Rau or to determine whether it was modified subsequent to the 1800's because the texts and translations of the underlying authorities are not readily available and there appears to be no other French commentary on the subject. Finally, since the commentary by Aubry and Rau related merely to the failure of the jurisprudence to recognize the presumption in nineteenth century multiple original will cases, their view in this respect is less influential than it might have been if it had pertained to codal interpretation or methodology or to more modern jurisprudential developments.

APPLICATION OF LAW TO THE FACTS

Because the evidence presented by Mrs. Talbot established that the testator declared his intention to revoke his will and contemporaneously destroyed an original thereof, a presumption arose shifting to the proponent of the will the burdens of producing evidence and persuading the trial court of contrary essential facts. . . .

Mr. Kilgore, the proponent of the will, sought to prove that the testator acted and spoke inconsistently with his true intention when he destroyed the original of the will in his lawyer's office. The proponent relied mainly on the testimony of two neighbors who said Mr. and Mrs. Talbot visited the condominium the day he died and Mr. Kilgore's own testimony that he discovered an undamaged original of the testator's will there after Mr. Talbot's death. This evidence is insufficient, however, to persuade a reasonable trier of fact of the highly unusual events posited by Mr. Kilgore's theory of the case, viz., that the testator intended to leave his entire estate to Mr. Kilgore under an unrevoked will at his condominium, that the testator tore up his will with a revocatory statement merely to
deceive his lawyer, that the testator misled his wife into bequeathing property to him because she believed that she reciprocally stood to inherit his entire estate, and that the testator purposefully refrained from destroying the other original copy of the will in order to leave everything to Mr. Killgore.

The proponent's evidence is weakened considerably by the testimony of Mrs. Talbot who said that she and her husband did not visit the testator's condominium after leaving the lawyer's office. Even if the Talbots visited the condominium after leaving the lawyer's office, Mr. Talbot's failure to destroy the original of the will located there does not have much tendency, if any, to show that he earlier had employed subterfuges to deceive his wife and his lawyer. There are other more plausible explanations of his failure to destroy the will at the condominium. There was no evidence that he knew his end was near at the time the neighbors said he visited the condominium; he did not become ill until later in the day at another location. While at the condominium he simply could have forgotten about destroying the will or decided to put off the chore until another time. He could have misunderstood his lawyer's advice and thought he had already revoked the will. It is possible that he was unable to find the will readily among his papers and belongings and intended to return for a more thorough search later. Moreover, there is no actual evidence, as opposed to speculations, that Mr. Talbot intended to deprive his wife of her inheritance or to deceive her and his own attorney. Instead, the evidence as a whole, overwhelmingly supports the trial court's findings that Mr. Talbot intended to revoke his will and to leave his entire estate to his wife under the laws of intestacy.

...The opponent to the probate of the remaining duplicate original had the burden of proving the testator's intent to revoke his will by a preponderance of the evidence. Intent, being a state of mind, generally must be proved by circumstantial evidence. The testator's act of destroying one duplicate original was direct evidence of his intent to revoke that copy, as well as circumstantial evidence which raised an inference of his intent to revoke all copies. Other evidence was introduced by both sides bearing of the ultimate question of the testator's intent for tacit revocation. At the conclusion of the case, the judge's task was to weigh the evidence to determine the preponderance on the ultimate question, unaided by a presumption. The overall evidence preponderated in favor of tacit revocation.

DH 112.3. T makes out a notarial testament. Sometime later, he takes out the testament and then, in ink, draws lines through his signature and through all of the legacies. Has the testament been revoked? Why or why not? Has the testament been “destroyed”? See the jurisprudence that follows:

Succession of Muh,
35 La. Ann. 394 (1883)

MANNING, J.
On May 4, 1875, Louis Muh made his olographic will in due form, and died November 13, 1882. A notary placed seals upon his [Muh’s] effects on the day of his death, and put a guardian over them. A few days after, this officer in the presence of witnesses removed the seals, and made search for a will. A bureau secretary, and some trunks were searched without success. A table stood in the bed chamber of the deceased, the drawer of which was locked. This drawer had also been sealed by the notary. . . . In the drawer was found an envelope, superscribed "Ceci est mon testament olograph pour être ouvert après mon décès,"\textsuperscript{80} underneath which was his signature with a paraph. This envelope had once been sealed with three wax seals. They had been broken.

The paper within was presented for probate as the will of the deceased. The \textit{proces verbal} of the notary recites all the particulars with lengthy detail; and among them that in the drawer were "memorandums which indicate the making of a later will by said deceased."

The will is written on a sheet of legal cap, the writing covering three pages end nearly half of the fourth. It commences thus: "Ceci est mon Testament Olograph. Je soussigné Louis Muh sain de Corps et D'Esprit,"\textsuperscript{81} etc. Then follows over twenty legacies, and a final distribution of the residuum of his estate among these legatees.

All of these legacies, except four, had been erased by drawing a line of ink through them, but the words can be read. The clause in which his executors are named is erased in like manner, and their names are more obliterated than the other parts of that clause, the pen evidently being pressed harder and with a more copious flow of ink. The paper had been signed, and the signature is covered with ink, the erasing pen having been moved in several ways, and with various end different strokes, which extend over the paraph. A minute inspection reveals the name to those who know what it was already. Experts state on the trial they can see both the signature and the paraph through the super imposed ink. It would be difficult to blotch it more, but portions of the capital letters of the name appear when the eye has rested some time upon them. The ink of the erasures is blacker than the writing. . . .

That his intention was to annul the will, make it void and of no effect cannot reasonably be doubted. The painstaking and elaborate defacing out the signature was the act which, to his apprehension, destroyed it as a will. The obliteration of the names of the executors was almost [?]. . . . the legacies that were not intended to be repeated had simply an ink line drawn through them, and the sentences that were untouched received marginal additions as memoranda, or were left entire for use in copying.

It is contended that, whatever may have been the intention of the testator in making these erasures and obliterations, conceding they were made by himself yet they do not revoke the will because the Code has provided the several modes of revocation, of which this is not one, and the erasures must be considered as not made, because they were not approved by the testator. And the argument is elaborated and extended until it culminates in this extraordinary proposition, that the destruction of a will by the hands of the testator

\textsuperscript{80} Translation: “This is my olographic testament to be opened after my death.”

\textsuperscript{81} Translation: “This is my olographic testament. I, the undersigned, Louis Muh, healthy in body and mind, . . . .”
animo revocandi"\(^{82}\) is not a legal revocation. Says the brief on behalf of Epps: "It is simply making it impossible to produce and probate the destroyed or suppressed instrument, unless perchance parties in interest should procure secondary proof, sufficient for the purpose. Hence, testators usually resort to this mode of getting rid of not of legally revoking their will." . . .

The Code declares that a revocation of a testament by the act of the testator may be express or tacit, general or particular. It is express when the testator has formally declared in writing that he revokes his will, or a particular disposition in it. It is tacit when it results from some other disposition of the testator, or from some act which supposes a change of will. R.C.C. Art. 1691 (1684).

The meaning is plain. If the testator has made another disposition, repugnant to and inconsistent with the previous one, although nothing is said about revoking the former, a tacit revocation will thereby be made. So also if he has done any act which supposes a change of will, let that act be what it may, provided always the intention to revoke is fairly and legally deducible from it, a tacit revocation will result from the act.

With language so unambiguous as the text of the Code before us, the argument upon it is startling. It can be epitomized thus: The word “act “does not mean act in the sense of something done, a deed, or such like, but an act, that is to say, a testamentary instrument. It is defined in the next article which reads, the act, by which a testamentary disposition is revoked, must be made in one of the forms prescribed for testaments and clothed with the same formalities. In the words of the brief: “That is the general rule both as regards express end tacit revocation. There must be a writing, and the instrument must have all the elements of a valid will."

By this reasoning it follows when the Code enacts that a revocation of a will may be express or tacit, it means by express, a formal declaration in writing to that effect; and by tacit, a declaration still more formal, viz., a testamentary act.

A similar perversion of Art. 1589 (1582) is urged. By that article erasures not approved by the testator are considered as not made, and it is insisted that this applies to the erased signature equally as to erased legacies. No particular method of approval is specified, nor does it seem essential that the approval shall be indicated by writing, in which respect our Code differs from the English Statute of Wills. There is no indication of the testator's approval of the erasures other than the approval which erasure by his hand manifests. But it is apparent the article is not treating of the erasure of a signature to a will. The erasures which are considered not made if not approved, are those which change or strike out parts or clauses of a paper recognized as an existing will, not that part, the erasure of which would destroy it as a will. Erasures of clauses in the body of the will affect only the dispositions erased. Erasure of the signature strikes at the existence of the instrument as a will.

The same article further provides: if the erasures are so made as to render it impossible to distinguish the words covered by them, it shall be left to the discretion of the judge to declare if he considers them important, and in this case only to decree the nullity of the testament. * * *

\(^{82}\) Translation: “With the intent to revoke.”
It is not the words that the judge must consider important, but the erasures, as is evident when we observe that only in the case of their being important can he decree the nullity of the will. The article can be paraphrased thus: if the erasures so obliterate the words that it is impossible to distinguish them, and the judge considers the erasures important, that is to say, of material words, he shall pronounce the nullity of the will, but if he considers these erasures unimportant, he cannot decree nullity.

And thus erasures are recognized as one of the acts which will operate are revocation of a will. This might have been expected, since it is the law both in England and France, the two countries whose legislation end jurisprudence have molded our own. * * *

This is what logicians call petitio principii. The Code has provided for the tacit revocation of wills, and that provision is of the most enlarged and comprehensive kind, viz., by any act that denotes a change of intention. Of course, the acts are not specified. They could not be. They are as numerous and as varying as the different circumstances under which men act on such occasions. The compiles of our Code were careful to omit even the classification of these kinds of acts into erasure, laceration, suppression, destruction, etc. Those clashing commentaries, in which jurisconsults had invented the most subtle distinctions, were before them, and they therefore formulated a general rule, leaving "to courts, of necessity, to apply it to each particular case that fell within its scope."

How could it be otherwise? How could any community or people get on with a law that declared the perpetuity of a will, unless revoked by an act as solemn as that by which it was made? That although a will is ambulatory and has no effect until death, yet when once made it is irrevocable by any act of destruction, or defacing, or cancellation. That is the contention of the attorneys for the will.

The French authorities are full to repletion with discussions upon the revocation of wills by different acts, such as those heretofore mentioned. . . .

NOTE

It is important to remember that Muh is a case of “general” rather than “particular” revocation, that is, one in which the testator intended and purported to revoke the testament as a whole rather than just this or that provision of the testament and, that the revocation was accomplished “tacitly” through the “destruction” of the testament, albeit a destruction of a peculiar kind, namely, by means of hand-written marks and lines that obliterated the key provisions of the testament, including, most importantly, the signature. Under these circumstances (i.e., where his objective is to destroy the testament as a whole), it is not necessary that the testator sign and date or even just sign his mark-outs or line-outs. All he need do is to make them.

In a case of particular destruction, by contrast, where the testator wants to revoke only this or that provision of the testament, but, in so doing, to leave the rest of the testament intact, it is not enough that he merely “line through” or “mark out” the provisions that he wants to eliminate. In addition, he must sign the mark-outs or line-outs.
See CC art. 1608(4) & cmt. (b).\textsuperscript{83}

One can certainly question whether this distinction makes any sense at all. Be that as it may, the law nevertheless makes the distinction.

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2) Revocation in testamentary form (CC art. 1607(2))

a) Valid testamentary form

DH 113.1. T makes a valid olographic testament. Then he executes a nuncupative testament by private act in which he purports to revoke the prior testament. Unfortunately, this new testament, which was written outside the presence of the witnesses, was never read in their presence, as the CC then required. Has the first testament been revoked? Why or why not? See the jurisprudence that follows:

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Hollingshead v. Sturgis,
21 La. Ann. 450 (1869)

WYLY, J.

Mary Kelper, wife of the defendant, Louis Sturgis, died without issue, . . . leaving her olographic will made in 1851 . . . . In this will, after making certain special legacies, she devised the mass of her estate to John A. Sturgis, the son of her husband by a former marriage, reserving, however, to the latter the usufruct, use and habitation thereof during his life time and making him executor of the will.

The plaintiff, E. Hollingshead, the mother and forced heir\textsuperscript{84} of the deceased, claims her property on the ground that the olographic will has been revoked by a posterior will, in nuncupative form, under private act, made in 1859, and also by a letter of the testatrix to her mother after the confection of the second will, informing her of the change in her testamentary disposition and that John R. Sturgis, her universal legatee in the olographic will, should not have one cent of her property.

The nuncupative will by private act was contested by Sturgis and adjudged to be null and void on the ground that the necessary formalities for a valid testament had not been complied with . . . .

Plaintiff seeks to have the olographic will annulled and to receive the property as sole

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\textsuperscript{83} To be sure, \textit{Muh} indicates, albeit in dicta, that no signature would be needed even for a \textit{particular} revocation by means of lining through or marking out. Though that may have been true under the law as it stood when \textit{Muh} was decided (120 years ago), it is no longer true under the law as it stands today (after the 1999 revision). \textit{See} CC art. 1608(4) & cmt. (b).

\textsuperscript{84} In the good old days, ascendants of the deceased, too, had forced heirship rights (though, as you would expect, only when the deceased died without descendants or his descendants defaulted on their rights). In many civil law jurisdictions, that is still the law even today.
surviving forced heir of her deceased daughter on the ground that the letter which was
dated, written and signed by the deceased, and the posterior will, in nuncupative form, by
private act, although invalid as testaments, are sufficiently formal, as revocatory acts, to
set aside the olographic will. She demands, however, that if the olographic will be not
annulled, that the legacies thereof be reduced to the disposable portion, and that she have
judgment against the executor for the amount due her as forced heir.

This demand is denied by the defendants who declare that the nuncupative will under
private act being declared illegal and invalid for want of proper formalities, cannot revoke
a valid will, and also that the letter of the twenty-ninth of September, 1859, cannot revoke
the last will and testament of the deceased.

The court below rejected the prayer for the revocation of the olographic will,
decreeing that the legacies thereof be reduced to the disposable portion and that plaintiff
have judgment only for the amount due her as forced heir. Plaintiff has appealed.

It is not pretended that the letter and nuncupative will are valid testaments, but it is
urged that they are acts clothed with sufficient formalities to revoke the olographic will
under which the defendant, John R. Sturgis, claims the property of the deceased as
universal legatee.

What are the formalities of acts of revocation? Art. 1685 [R.C.C. Art. 1692] of the
Civil Code declares that "The act by which a testamentary disposition is revoked must be
made in one of the forms prescribed for testaments, and clothed with the same
formalities."

The nuncupative will by private act was not clothed with the necessary formalities
prescribed by Art. 1575, not having been read by the testatrix to the witnesses, nor by one
of them to the rest in her presence. It was a nullity under Art. 1588, which declares that
the formalities to which testaments are subject "must be observed," otherwise they are null
and void.

If the nuncupative will upon which plaintiff relies in this suit to establish the
revocation be invalid, as a will, for want of proper formalities, as has been decreed, it
cannot be valid as a revocatory act, because the law prescribes for the latter the same
formalities. C.C. 1685 [R.C.C. Art. 1692]. The revocation of testaments mentioned in
Art. 1684 [R.C.C. Art. 1691] of the Civil Code is explained by Arts. 1685, 1686, 1687,
1688 and 1689 [R.C.C. Arts. 1692 et seq.], from all of which we collect that there are two
modes of revoking a valid testament, the one by a written instrument intended as a
testament or last will, and the other by an act intended to take effect in the life time of the
testator which is contrary to the disposition of the testament, such as a donation in ter vivos
or a sale of the property bequeathed.

If the testator elects the former he must pursue the rule laid down by Art. 1685 and
clothe the instrument intended to take effect in the future with all the formalities of a
solemn act. If, however, he desires the revocation to be effective in his life time he must
conform to the mode indicated by Arts. 1688 and 1689.

The pretended nuncupative will does not conform to either of the modes indicated
by law, and therefore produces no revocation whatever. . . .

The letter written by the testatrix to the plaintiff on twenty-ninth September, 1859,
was not a testamentary disposition. It was not a solemn act, although written, dated and
signed by her. It evidently was not intended as such. It contained no institution of heir, no dispositions mortis causa, or any expressions indicating a last will. C.C. 1564.

It was merely an ordinary letter to her mother in which she expressed dissatisfaction with her universal legatee, saying, "I told John if he went back to his wife I would not give him one cent of my property. I have changed my will and he shant have one cent of it. I am satisfied with him," etc.

This letter does not furnish evidence of that formal and solemn character necessary to establish the revocation of a will. C.C. 1564, 1563, 1453, 1455,-and 1685.

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b} Intent to revoke

DH 113.2. T makes a valid notarial testament in favor of X. Sometime later, he takes out a sheet of paper and, in his own handwriting, writes a letter to his sister, stating "That bonrien X. He's gone back to his wife. I'm gonna revoke my will and not leave him a cent." T signs the letter and sends it off. Has the testament been revoked? Why or why not? See the part of Hollingshead that concerns the effect of the testatrix’s letter to the plaintiff.

c} Identity of form (?)

Is identity of form required, i.e., if the testament was holographic must the revocation be holographic or if the testament was notarial must the revocation be notarial? Why or why not?

d} Dispositive content (?)

DH 113.3. T makes a valid notarial testament. Sometime later, he takes out a sheet of paper and, in his own handwriting, dates it, writes "I hereby revoke my prior testament.," and signs it. Has the testament been revoked? Why or why not?

e} Probate (?)

If the revocatory act is in “one of the forms prescribed for testaments (CC art. 1607(2)), is it necessary that the revocatory act become operative as a testament, i.e., that it be filed for probate and then approved as a testament? Why or why not? See the jurisprudence that follows:

Succession of Dambly,
191 La. 500, 186 So. 7 (1939)

[A posterior testament in which a prior testament was "revoked" by the testator, was destroyed by the testator. It was admitted that the destruction of the second testament had the effect of revoking it, and thus, the only question presented was as to the effect of this
revocation on the prior testament.\[^{85}\]

ODOM, J.

. . . The contention in this case is that the revocation of the first will was "express," by an "act" of the testatrix in which she formally declared in writing that she revoked it. The revocatory act referred to is the second will. The form of that revocatory act met the requirements of Art. 1692 of the Code. It was "made in one of the forms prescribed for testaments, and clothed with the same formalities." In fact, it was an instrument intended to be, and was, a testament *mortis causa*, in which was written a clause expressly revoking all prior wills.

But that testament never went into effect. Mrs. Dambly destroyed it. Dispositions mortis causa (in prospect of death) do not take effect during the life of the testator. Art. 1469 of the Revised Civil Code provides that: "A donation mortis cause (in prospect of death) is an act to take effect, when the donor shall no longer exist, by which he disposes of the whole or a part of his property, and which is revocable." Art. 1644 provides that a testament can have no effect until probated. **Art. 1645 provides that "The execution of a testament shall not be ordered until the decease of the testator has been sufficiently proved to the judge to whom the testament is presented."**

These articles make it clear: (1) That a testament *mortis causa* -- such was the second will of Mrs. Dambly by which it is argued that the first will was revoked -- is an act which takes effect "when the donor shall no longer exist;" (2) that such an act has no effect until it is probated, and (3) that it cannot be probated "until the decease of the testator has been sufficiently proved to the judge to whom the testament is presented."

It has been repeatedly held by this court that a will has no effect until probated and ordered to be executed by a competent court. *See: Vidal's Heirs v. Duplantier, 7 La. 37;***

The reason why a disposition *mortis causa* has no effect until the death of the testator is that it is revocable. The first paragraph of Art. 1690 of the Revised Civil Code provides that "Testaments are revocable at the will of the testator until his decease," and the second paragraph of that article provides that: [quotation omitted] **Art. 1645 provides that "The execution of a testament shall not be ordered until the decease of the testator has been sufficiently proved to the judge to whom the testament is presented."**

The second will made by Mrs. Dambly did not, and could not, go into effect, for the reason that she destroyed it by mutilation. It follows that her first will, dated August 27, 1927, was never revoked and must stand as her last will.

Counsel for appellees have devoted a considerable portion of their brief to a discussion of the question whether a will which is revoked by a subsequent will is revived when the second, or revoking, will is itself revoked. Their theory is that the first will is not revived, and they cite, in support of their argument, French authorities and English cases which follow the Ecclesiastical Law of England. They say that the French authorities are divided on the question. Naturally, counsel approve those which support their theory. But these authorities cannot be considered as even persuasive in determining the question here involved. The reason is that in this state the method of revoking wills and the question as to when a will takes effect are purely statutory. It seems that under the

\[^{85}\] This statement of the facts comes to us compliments of Professors Samuel, Spaht, & Picou.
French law a testator may revoke a former will by making a notarial declaration declaring that it is his intention to revoke it. But that is not the law in this state. R.C.C. Art. 1692.

Much is said by counsel regarding the "revival" of a will in case the revoking will is itself revoked. They not only concede, but argue, that in the case at bar the revoking will was revoked. The question in this case is not whether the first will was revived when the revoking will was revoked, but whether the first will was ever revoked. Our opinion is, and we hold, that the first will was never revoked. * * *

Whatever may have been the merits of Dambly when it was decided, does it represent a sound interpretation of current law? Look closely at the text of CC art. 1607(2). What, precisely, does it require for revocation? Is it (i) a full-fledged new “testament,” properly so called, or (ii) a declaration in the “form” of a testament? Isn’t it the latter?

f) Substantive validity (?)

DH 113.4. T makes a notarial testament in which he leaves everything to X. Then he makes an olographic testament in which he leaves everything "to A in full ownership and, at A's death, to B, in full ownership." Has the first testament been revoked? Why or why not? See CC art. 1520.

g) Not itself revoked (?)

DH 113.5. T makes out an olographic testament in which he leaves everything to X. Later T makes out another testament in which he declares “all my prior testaments are revoked.” But still later, T destroys the second testament. Has the first testament been revoked? Why or why not? See CC art. 1609; then see Dambly (again); then see the doctrine re “withdrawal of revocation” that is reproduced below at pp. 321-26.

3} Revocation by authentic act (CC art. 1607(2))

DH 114. T makes out an olographic testament in which he leaves everything to X. Sometime later, T executes an act before a notary and two witnesses that provides as follows: “I revoke my prior testament.” Has the testament been revoked? Why or why not? Would the result have been the same under the old law? Why or why not? See CC art. 1607 cmt.

4} Revocation handwritten & signed (CC art. 1607(3))

DH 115. T makes out an olographic testament in which he leaves everything to X. Sometime later, T writes up the following note in his own handwriting: “I hereby revoke my prior testament.” T signs the note at the end. Has the testament been revoked? Why or why not? Would the result have been the same under the old law? Why or why not? See CC art. 1607 cmt.

2] Particular (CC art. 1608)
a) Definition (CC art. 1691, ¶ 5 (1870); CC art. 1608)

b) Instances

1) Declaration in testamentary form (CC art. 1608(1))

2) Subsequent incompatible testamentary disposition (CC art. 1608(2))

a) Incompatibility

DH 116.1. First testament makes universal legacy to X. Next makes particular legacy to Y. Is the universal legacy revoked? Why or why not? See the jurisprudence that follows:

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*Sarce v. Dunoyer's Executor,*

11 La. 220 (1837)

BULLARD, J.

In the year 1833, the late R. L. Dunoyer made his last will or testament by public act; by which, among other dispositions, he bequeathed to the present plaintiffs, his grand nephews and grand nieces, certain specific legacies in money; appointed Louis Pillie his testamentary executor, and instituted several slaves, whom he emancipates by the same act, his universal legatees. In 1835 he made another testament, also by public act, by which he also emancipates his slaves, and leaves them each a small legacy; appoints R. Cazeaux, the present defendant, his universal legatee and testamentary executor, and makes no mention of his nephews and nieces, or of their legacies by the former will. This testament contains no express revocation of any previous one, and the present action is instituted to recover of the executor and universal legatee, the specific legacies under the former will. The only question, therefore, which this case presents for our solution is, whether the first testament has been tacitly revoked, so far as it concerns the particular legacies to the plaintiffs.

According to Art. 1686 of our Code: "Posterior testaments, which do not in an express manner revoke the prior ones, annul in the latter only such of the dispositions therein contained as are incompatible with the new ones, or contrary to them, or entirely different."

If there be any part of the second testament incompatible with the particular legacies contained in the first, it must be that part which constitutes the defendant the universal legatee. But when it is considered that the universal legatee is bound to discharge the particular legacies, and is in fact entitled only to the residuum after the payment of legacies and debts, the apparent inconsistency vanished. The opinion of Duranton is the other way, but the reasoning of that learned professor is not satisfactory to our minds. His argument seems to lose sight of the essential quality of a universal legacy, to wit: the
obligation on the part of the legatee to comply with the wishes of the testator as it relates to particular legacies; and we do not see how, according to his argument, the particular legacies contained in the same testament would be compatible with the institution of a universal legatee, for he who gives all to one has nothing left to bestow on others. The mere substitution of Cazeaux in the place of the manumitted slaves of the testator as residuary legatee, and of Pillie as executor, does not in a legal sense evince a change of will, as it relates to his nephews and nieces. We are sensible, that to the great mass of the citizens it will appear absurd, that a man can leave two last wills in force. But we are to ascertain the probable intentions of testator, not by reference to the common received notions on these subjects, but according to the provisions of law, and must presume, however gross the fiction, that the testator knew the law and even its subtleties as well as, if not better, than a professor of the faculty of Paris.

Our view of the question is fortified by repeated decisions in France, under a similar provision in the Code Napoleon. Several of the Royal Courts concur in causes identically the same with this, in adopting the principles which we assume as the basis of our judgment. These are the highest courts which, according to the peculiar judicial organization in that country, could take cognizance of such a question, inasmuch as the Court of Cassation never received the judgments of the inferior tribunals upon the merits of the controversy, as between the parties, any further than the judgment complained of, violates any textual provision of the codes. Merlin, verbo Cassation, Section 2.

DH 116.2. First testament leaves tract of land to X in full ownership; new testament, which says nothing about first testament, leaves same tract of land to X and his children in trust until X and children die. No specification of what's to become of trust corpus after that. Has the legacy in the first testament been revoked? Why or why not? See the jurisprudence that follows:

Succession of Reeves,
393 So.2d 166 (La. App. 1st Cir. 1980)

EDWARDS, J.

Irma Wilson Reeves died in Baton Rouge on April 30, 1976, leaving no forced heirs. By olographic will dated December 14, 1962, she bequeathed an estate worth $799,065.93 to Julius Wilson Cole and Charles Julius Cole, Jr., nephews; Catherine Cole Petty, niece; and Cathline S. (Kitty) Cole, great niece.

Three particular legacies constitute eighty-four percent of the estate's bulk: . . . Certain other property located in St. Helena Parish and worth $311,562 was left to Charles Julius Cole, Jr. The dispositive provision leaving St. Helena Parish property to Charles Julius Cole, Jr., reads as follows:

“2. I give and bequeath to my nephew, Charles Julius Cole, the following to wit: Eleven hundred acres of land, more or less situated principally in ward 2, St. Helena Parish, Louisiana, being my part of the T.D. Lindsey place and
what is known as the Charles C. Reeves pasture place on the highway between Greensburg and Liverpool."
The three particular legatees favored by the above large bequests were also named residuary legatees: "All of the rest of my property, real and personal, of which I may die possessed, I give and bequeath to Charles Julius Cole, Catherine Cole Petty and Julius Wilson Cole, share and share alike."

By codicil dated December 1, 1967, decedent modified her prior will as follows in pertinent part:
"I bequeath all of that land bequeathed to Charles Julius Cole to the Fidelity National Bank of Baton Rouge, La., but in trust. Charles Julius Cole shall be the income beneficiary of the trust and his children shall be the income beneficiaries of that trust after his death. The trust shall continue as to the interest of each of his children throughout the life of each child."
The codicil contains no provision indicating decedent's dispositive intentions regarding the property in trust at the conclusion of that trust.

...Julius Wilson Cole, a residuary legatee, ... urged that, as a residuary legatee, he, his heirs or assigns should be declared principal beneficiary of a one-third interest in the property composing the trust. The gravamen of intervenor's claim was that by the codicil of December 1, 1967, decedent revoked dispositive provision "2" of her will which had devised the St. Helena Parish property to Charles Julius Cole, Jr. Intervenor, as a residuary legatee, would be due a one-third interest in the thus undisposed of property.

...Appellant specifies that the trial court erred in 1) finding that the codicil did not revoke provision "2" of the will ...

In brief, appellant stresses that decedent's placing the St. Helena property in trust was a disposition of less than full ownership. Counsel argues that as a lesser disposition of the same thing, there is a presumed revocation of the former testament. Succession of Mercer, 28 La. Ann. 564 (1876,) is cited as authority. We do not agree.

LSA-Civil Code Art. 1693 states the conditions under which a posterior testament tacitly revokes prior ones. "Posterior testaments, which do not, in an express manner, revoke the prior ones, annul in the latter only such of the dispositions therein contained as are incompatible with the new ones, or contrary to them, or entirely different."
In the instant case, the only real question is whether decedent's codicil is "incompatible with," "contrary to" or "entirely different" from the original disposition.

Contrary to the contention of appellant's counsel, there is no presumption that the establishment of a spendthrift trust necessarily revokes a prior bequest of the principal. In fact, there is a presumption, subject always to the testator's intent, that a second bequest of the same thing is to be cumulated with the original bequest.

Succession of Mercer, supra, did hold that a certain legacy of 1000 pounds sterling was revoked by a later codicil leaving 500 pounds to the same legatee. Mercer also held that a legatee left the same legacy twice could not cumulate the bequests. Giving no explanation as to how it had divined decedent's revocatory intent, the court simply opined: "there was a confliction between the provisions of the two wills in regard to the amount
of the legacy; the provision by the last will showing the intention to bestow upon the legatee five hundred pounds and not one thousand pounds."

The Mercer court ignored prior jurisprudence and, without stating any cogent reasons, found a revocation. Mercer is not a correct statement of the law. Furthermore, the case has been both criticized and flatly overruled in part.

In Lyon v. Fisk, 1 La. Ann. 444 (1846,) two successive wills made bequests of $5000 and $2500, respectively, to Joseph H. Lyon. Lyon was allowed to cumulate the bequests because decedent's last words were "Keep both" and because "the law does not favor a repeal by implication, unless the repugnance be quite plain."

In Succession of Stallings, 197 La. 449, 1 So.2d 690 (1941,) repeated bequests of $5000 were made to Miss Martina Davey. Citing Lyon v. Fisk with approval, the court allowed cumulation. That the second bequest in Lyon was lesser than the first while the legacies in Stallings were of equal size was of no moment . . . .

In Succession of Homan, 202 La. 591, 12 So.2d 649 (1943,) the effect of two codicils was at issue. The earlier codicil bequeathed thirty shares of homestead stock to Dell Sadler and twenty shares to Edna K. Gaudet. A later codicil bequeathed thirty shares of Security Homestead stock to Sadler and twenty shares in Guaranty Homestead to Gaudet. Citing Succession of Stallings with approval and overruling . . . Succession of Mercer, at least as to the question of single or double legacies of the same amounts to the same legatees, the court permitted cumulation.

Appellant contends that Succession of Homan overruled Succession of Mercer only on the issue of identical legacies and that Mercer is still viable where, as in the present case, the second bequest is smaller than the first. As a technical matter, counsel is correct. It is clear, however, that Homan overruled Mercer to the limited extent it did because only the question of identical bequests had been raised. A complete overruling of Mercer would have involved mere dictum.

Even though part of Mercer has not yet been formally overruled, it is subject to the same criticism that resulted in a partial overruling. Essentially, no sound reasons were provided to justify the court's finding of a revocatory intent on the testator's part. In addition, the court in Mercer erroneously stated:

"Upon no sound principle of reasoning do we see, can it be maintained that where anterior or preceding testaments are not expressly and entirely revoked by subsequent ones all the provisions of all the testaments have effect, and that in such cases there is a cumulation of the legacies, as contended for by the opponents in this case."

Such language flies directly in the face of Art. 1693.

We believe the jurisprudence of Lyon v. Fisk, Succession of Stallings and Succession of Homan to be correct statements of the rule that cumulation is presumed. We have no doubt that Succession of Mercer is entirely unsound. Until the Supreme Court overrules Mercer in its entirety, it can be narrowly restricted to the facts of the case.

Our conclusion that there is a presumption of cumulation even where the second bequest is lesser is squarely in agreement with doctrine and the jurisprudence of other jurisdictions, some of which is noted below. Page on Wills, Bowe-Parker Revision, 1960, section 58.3 states:
"If legacies are given by different instruments, as by a will and a
codicil, or by two or more different codicils, and there is nothing in the will or
codicils to indicate that one gift is a repetition of the other, it will be presumed
that such gifts are cumulative. This presumption exists even where the legacies
are of the same amount, or where the legacies are similar though not the same,
and is strengthened where the amount given in the second instrument is
different from that given in the first. Such presumption is said to be based on
the theory that the testator must have known of the first gift and would have
provided for its revocation if he had desired such result, and the presumption
is strengthened by language in the second instrument which shows that testator
had in mind the gifts made in the first will." (Footnotes omitted emphasis
supplied)

Thompson on Wills, 3d Ed., Section 486 states:
"Where the same amount or sum of money is given twice to the same legatee
by the same instrument, only one gift is presumed to have been intended; but
two or more gifts are presumed to be cumulative where given by the same
instrument if the amounts are different, or where the amounts are the same if
given by different instruments; and where the amounts are different and given
in different instruments, the presumption is stronger that they are cumulative.
The general rule is that, when two legacies are bequeathed to the same person,
one by the will and other by the codicil, and the testator has given both the
legacies simpliciter, the courts in such cases, in the absence of extrinsic
evidence, consider that, as the testator has given twice, he must prima facie be
intended to mean two gifts; and it seems to be immaterial whether the legacies
are of equal or unequal amounts, or whether they are of the same or different
natures." (Footnotes omitted emphasis supplied).

In Dewitt v. Yates, 10 Johns. (N.Y.) 156 (1813,) the court stated that cumulation was
presumed and that the burden of rebutting the presumption fell on the party opposing
same.

A will in Stultz v. Kiser, 37 N.C. 538 (1843,) made residuary legatees of the heirs.
A later codicil bequeathed $700 each to certain heirs. Cumulation was permitted.

In Appeal of Manifold, 126 Pa. 508, 19 A. 42 (1889,) fifty pounds per year was
bequeathed by will. A subsequent codicil gave to the same legatee $100 per year, a lesser
sum than fifty pounds. Finding no evidence that the codicil's bequest was of a
substitutionary nature, cumulation was allowed.

In Kemp v. Hutchinson, 110 S.W.2d 1126 (Kansas City Ct. of App., Mo. 1937,) testator, by will, left fifty percent of his estate in trust for a brother-in-law. A later codicil
giving $500 and some furniture to the brother-in-law was held cumulative and not
substitutionary.

In re Cole's Will, Sur., 215 N.Y.S.2d 796 (1961,) involved a will bequeathing $1500
and a third codicil leaving $10,000. Citing Dewitt v. Yates, supra, the court found the
bequests cumulative and noted that the presumption of cumulation was not overcome
simply because the codicillary bequest was greater.

The court, in In re Estate of Heppe, 440 Pa. 328, 269 A.2d 687 (1970,) cited Appeal
of Manifold, supra, and found two codicils, each for $5000, to be cumulative. Appellant urges that LSA-Civil Code Art. 1717 ("If it can not be ascertained whether a greater or less quantity has been bequeathed, it must be decided for the least.") mandates a finding of revocation. We disagree. Art. 1717 only applies when the quantity bequeathed is uncertain. Such is not the case here since the presumption of cumulation helps make certain the amount bequeathed.

Though a presumption of cumulation exists, that presumption, like all other rules for the interpretation of wills, is only a means to the end. Principally, courts must endeavor to ascertain the testator's intentions and all rules of construction must give way in the face of proven intent. Carter v. Succession of Carter, La., 332 So.2d 439 (1976); Succession of LaBarre, 179 La. 45, 153 So. 15 (1934); Succession of Blakemore, 43 La. Ann. 845, 9 So. 496 (1891).

The testator's intention must be ascertained from the whole will, and effect must be given to every part of the will as far as the law will permit. No part of a will should be rejected, except what the law makes it necessary to reject. Where there is a choice of interpretations, one of which will effectuate, and the other defeat, a testator's intention, the court should interpret so as to carry out the testator's wishes. Succession of LaBarre, supra.

These general principles, together with the rule of Civil Code Art. 1693, mandate that we interpret both the will and the codicil of decedent so as to effectuate both, unless the codicil is incompatible with, contrary to, or entirely different from the original bequest to Charles J. Cole, Jr., in which case the codicil would control.

In the original will, decedent carefully arranged for the distribution of her entire estate. Two nephews and a niece were the primary beneficiaries while one small legacy was left to a great niece. There is no doubt that decedent intended to give the eleven hundred acres of St. Helena Parish land to Charles J. Cole, Jr.

Dedecent's codicil created a spendthrift trust. That property, previously bequeathed to Charles J. Cole, Jr., was placed in a trust scheduled to last throughout the lives of Charles J. Cole, Jr., and his children.

There is not one shred of evidence in the codicil that decedent intended to entirely revoke her prior donation to Charles J. Cole, Jr. Since the codicil pointedly refers to the initial bequest, decedent's continuing awareness of it is certain. Under those circumstances, her decision to create a trust while not expressly revoking the first donation can only be viewed as showing testatrix' intent not to revoke the initial bequest but only to modify same. Page on Wills, supra.

The trust, established by codicil, merely prevented waste of the St. Helena property for two generations. Charles J. Cole, Jr., and his children were to receive all income benefits from the trust. Because the trust was to last for a specific period, it only is contrary to the original will for that period. LSA-C.C. Art. 1693.

Counsel for appellant urges that because the codicil limited plaintiffs' rights at all, decedent intended to give less and therefore the original bequest must be considered revoked. Counsel erroneously ignores the trust's limited time of existence which obviously curtails the degree to which the codicil is incompatible with the original bequest.
A disposition must be understood in the sense in which it can have effect, rather than that in which it can have none. LSA-C.C. Art. 1713. The original disposition to Charles J. Cole, Jr., was of property worth $311,562. Were appellant's position adopted, some $207,708 in property would be redistributed to Julius Wilson Cole and Catherine Cole Petty.

The original bequest will be given far more effect by permitting the trust to expire and by delivering the corpus to whom it was originally bequeathed.

Appellant urges that Succession of McCrary, 246 So.2d 899 (La. App. 2d Cir. 1971,) writs refused 258 La. 770, 247 So.2d 866 (1971,) and 258 La. 777, 247 So.2d 869 (1971,) controls. McCrary is simply not applicable. In that case, testator bequeathed all his property to his wife for "so long as she does live." The appellate court held that the wife was due only a usufruct and that at her death, the estate was to be distributed by operation of law to her husband's collateral heirs rather than to the wife's descendants.

In the present case, the property at issue was bequeathed prior to formation of the trust. At the trust's expiration, the property will be distributed as per the original bequest. The property is accounted for and is therefore not available to the residuary legatees.

DH 116.3α. By his first testament, T leaves "$5,000 to X, my boat to Y, my house to Z, and the rest of my things to U"; new testament, which says nothing about first testament, says simply, "I leave $2,000 to X." Is the first legacy revoked? Why or why not? See Reeves again.

DH 116.3β. The same as before (DH 116.3α), except that the second testament reads as follows: "I leave $2,500 to X, $2,500 to Y, a boat to Y, a house to Z, and the rest to U." Hmm . . . . What now? Should we conclude that the legacies to X should be cumulated, so that he’s entitled to claim a total of $7,500 or should we conclude, instead, that the legacy in the second testament revokes and replaces that in the first? See Reeves again and then the jurisprudence that follows:

Succession of Rolling,
229 La. 727, 86 So2d 687 (1956)

HAMITER, Justice.

Mrs. Julia Bonnabel Rolling, widow of Charles W. Rolling, died . . . on September 13, 1946. Surviving were a daughter, Miss Bonnie W. Rolling, and four sons, Erle W., Laurance, Alfred and Julian Emanuel Rolling.

Shortly after her death an olographic last will and testament made by the decedent on May 4, 1946 was located . . . . On the petition of all of the children the court probated it . . . .

Some months later . . . Miss Bonnie W. Rolling unexpectedly discovered among the effects of the decedent in the premises where she resided another olographic will and an attached codicil, these having been dated June 14, 1941 and July 29, 1941, respectively. They, on the petition of the daughter, were also probated.
In the will of June 14, 1941 the decedent first described herself as 'Mrs. Charles Rolling, nee Julia Bonnabel, of the Parish of Jefferson, State of Louisiana', and she then made the following bequests: 1. To her husband the usufruct of $10,000 in bonds (no specific ones named) and to her four sons equally the naked ownership thereof. 2. To her daughter certain particularly described real estate (apparently her home) in Brockenbrough Court, Metairie Ridge, Jefferson Parish, and 'personal effects and belongings including furniture, jewelry, household effects and all other effects' in her home, all of these having been bequeathed as an extra portion and not subject to collation. 3. To her daughter one-half of the double tomb in Metairie Cemetery and to the sons the other half. 4. To the sons, to be shared and shared alike, her real estate located in Metairieville, Jefferson Parish. 5. To her daughter '$10,000 in bonds; the remainder of my stock and bonds to be equally divided between my four sons.' In conclusion, the testatrix named her daughter and John Rau as executors of her estate.

In the codicil of July 29, 1941 she merely gave instructions concerning payment of the usufruct bequeathed to her husband and designated her daughter trustee for the share left to one of the sons (evidently a minor then).

Following the death of her husband Mrs. Rolling made the second will involved herein, of date May 4, 1946, which (with the numerous misspelled words corrected) recited:

'I, Mrs. Chas. W. Rolling, nee Julia Bonnabel of the Parish of Jefferson, State of Louisiana do make and constitute this my last will and testament. I will and bequeath to my daughter Bonnie W. Rolling all my personal effects and belongings including furniture, jewelry, household effects and all other effects in our home.

'I will and bequeath to my daughter Bonnie W. Rolling one half of my double tomb in Metairie Cemetery, the half in which her father is buried the other half I leave to my four sons Alfred, Erle, Laurance and Julian Emanuel, I will and bequeath to my daughter Bonnie W. Rolling my stock in Swift and Company and my stock in Atlas Corporation, I will and bequeath to my four sons Alfred, Erle, Laurance and Julian Emanuel.

'The remainder of my estate consisting of stock, Bonds and real estate, to share and share alike.

'I hereby appoint my daughter Bonnie W. Rolling and Rev. Felix Miller as executors of my estate, or either of them, should any one of them be unable or unwilling to act, the said executors or either of them to have full seizin of my estate and to serve without bond.'

It is the contention of appellants (the four sons) that the document of May 4, 1946 constituted decedent's last will and testament, and that by it she tacitly revoked the prior will (together with the attached codicil) in its entirety.

On the other hand appellee, the daughter, urges (as the trial court held) that the posterior document effected only a particular revocation of specific dispositions of the prior one; and that the provisions of both wills, except where conflicting, must be carried out. In their brief her counsel state: '* * * In her will of 1946, she repeated two particular
legacies given to her daughter in her 1941 will and disposed of the $10,000.00 in bonds previously left to her husband, and gave the jewelry, household effects, and so forth, to her daughter, but not as an extra portion as she did in the 1941 will, thereby making a change of this particular legacy.'

Viewing the documents presently under consideration in the light of the above announced principles we find that the one dated May 4, 1946 disposed of the entire estate of decedent and contained dispositions which for the most part were incompatible with those previously made; and we therefore conclude that it was intended as her last and only will and testament.

Thus, in the posterior instrument the testatrix bequeathed to the daughter her personal effects without reciting that they were to be an extra portion as she had stated in the former one. Again, the testatrix initially made particular bequests of all of the real estate that she owned (two separate parcels, as revealed by the inventory) and of certain bonds, and she directed that the remainder of her stock and bonds were to be equally divided among her four sons; whereas, subsequently, she made no particular bequests of her mentioned real estate and bonds but, on the contrary, included them in a residual clause reciting that 'The remainder of my estate consisting of stock, bonds, and real estate, to share and share alike.' Also, incompatibility is noticed between the provisions of the two instruments respecting the appointment of executors, John Rau formerly having been named along with Miss Bonnie W. Rolling, and Reverend Felix Miller later having been selected to so serve.

Moreover, had the testatrix not intended the document of May 4, 1946 to be her last and only will it seems that she would have omitted therefrom the description of herself and the bequest respecting the tomb in Metairie Cemetery, both of which were substantially identical with those contained in the first document. Particularly appropriate in this connection is the following observation contained in Succession of Pizzati: "each of the wills carries a complete disposition of the entire estate, and contains recitals which would have been entirely superfluous in a will intended to be merely additional, supplementary to, or designed to be read in connection with, another, and not to stand independently by itself as the sole and only will. We refer to the clause wherein the testator gives information about himself."

Additionally, we are impressed by the fact that this testatrix had amended her first will by a codicil. She, therefore, was apparently aware of that method of changing particular portions of a testament without affecting the remainder of the bequests. However, in 1946, rather than 'amending' by a codicil as she had formerly done, the testatrix made a new will declaring that 'I * * * do make and constitute this my last will and testament.' Having said this she then proceeded to dispose of her whole estate, through bequests entirely different from those previously made, thereby indicating that she intended to and did tacitly revoke the prior testament.

b) Substantively valid (?)
Is it necessary that the new testament be substantively valid? Why or why not? See the jurisprudence that follows:

Succession of Ryan,
228 La. 447, 82 So.2d 759 (1955) (on rehearing)

HAMITER, Justice.

Under date of April 17, 1946, Mrs. Lurl Pipes Carter, then the widow of Richard M. Carter, made an olographic will in which she stated: “I, Lurl Pipes Carter realizing the uncertainty of life, do hereby make this my last will and testament. I will and bequeath unto my niece, Ruth Johnson, all of the property that I die possessed of. . . .”

Later Mrs. Carter married A. J. Bob Ryan and, during their marriage, she executed another olographic will reading as follows: “I, Lurl Pipes Ryan realizing the uncertainty of life do hereby make this last will and testament. I will and bequeath unto my husband A. J. Bob Ryan, all the property that I die possessed of. . . . And at the death of my husband A. J. Bob Ryan, if she be living I will and bequeath unto my niece Ruth Johnson all the property I died possessed of and left to my husband, A. J. Bob Ryan.”

The testatrix died on March 30, 1953 . . . .

. . . Ruth Johnson [plaintiff], referred to by decedent in both wills as her niece, instituted this suit in the succession proceedings against Ryan, individually and as executor, seeking a judgment declaring null and void the will of September 29, 1951, . . . . recognizing the instrument dated April 17, 1946, as decedent's last will and testament, and ordering the first will probated and executed according to law. Plaintiff charged “* * * that the purported last will and testament . . . was and is null and void for the reason that it contains a substitution . . . contrary to the provisions of the Civil Code and law, and cannot be legally enforced.”

Ryan excepted [arguing that] . . . even if the bequeathing clauses thereof contain a prohibited substitution and cannot be given effect (which defendant denies) they, nevertheless, accomplish a tacit revocation of the anterior testament which is the sole basis for plaintiff's claim to decedent's estate.

. . .

Admittedly, this decedent's posterior will is regular as to its form, and it contains no express revocation clause. Hence, the only issue created by the exception [urged by Ryan] . . . is whether as a result of the provisions of such will the decedent tacitly revoked her earlier testament. And that issue poses these questions: 1. Are the terms and bequests of the two wills so incompatible or conflicting as to justify the inference that the testatrix intended a revocation of the anterior testament? 2. If a conflict of that nature exists, and assuming for the sake of argument that the bequests of the posterior will contain a prohibited substitution and are null as plaintiff contends, is the prior testament tacitly revoked by the later ineffectual bequeathing clauses?

The provisions of the two wills, in our opinion, are palpably incompatible and conflicting. In the first place each instrument is referred to by the testatrix as her last will and testament. Secondly, a change in the appointment of a testamentary executor is noticed,
the originally designated niece having been replaced by the husband. And, finally, the bequeathing clauses are entirely different. Thus, initially, she left to her niece 'all of the property that I die possessed of'; whereas, later she bequeathed the same property to her husband.

But would a prohibited substitution in the posterior testament (assuming arguendo that one exists), rendering the bequests therein null and void and unenforceable, prevent the resulting of a tacit revocation of the conflicting disposition made in the first will? This is the second question to be determined herein, and its correct answer seems to depend on an interpretation of . . . Article 1694. The provisions thereof read: 'A revocation made in a posterior testament has its entire effect, even though this new act remains without execution, either through the incapacity of the person instituted, or of the legatee, or through his refusal to accept it, provided it is regular as to its form.'

In keeping with the proviso contained in that article, . . . this court has held that a revoking clause of a will irregular as to form, and hence a nullity, is without effect. See Succession of Feitel . . . . But here we are not concerned with a revocation invalid for want of proper form. The later bequests of the testatrix, which disclose a change of will, are regular as to form; they are unenforceable only because they contain a prohibited substitution (assumedly). This being true, according to the provisions of Article 1694, they have resulted in a tacit revocation of the previous disposition to the niece, unless it be held that the examples contained therein are exclusive or limiting, rather than illustrative.

These codal provisions had their origin in Article 1037 of the Code Napoleon which provided: 'A revocation made in a posterior testament has its entire effect, even though this new act remains without execution through the incapacity of the instituted heir or of the legatee, or through his refusal to accept it.' Our Civil Code of 1808, in Article 186, contained substantially the same language.

With reference to such article of the Napoleonic Code, Dalloz, in his annotations (Codes Annotes, Nouveau Code Civil, Volume II, page 761, Note 1) stated: 'The provisions of Article 1037 are not to be considered as limiting. They are to be applied to cases of inexecution of a testament other than the incapacity or the refusal of the legatee.' And in Notes 14 and 15, particularly with respect to prohibited substitutions, he said:

'Likewise, the tacit revocation of legacies contained in a testament stands, as a general rule, even though the new testamentary dispositions giving rise to it are stricken with nullity as including a prohibited substitution.

'It has thus been adjudged that a testament which is null as containing a prohibited substitution nevertheless effects revocation of a prior testament whose dispositions are incompatible with the dispositions of the nullified testament, so long as the last testament has been drawn up according to the formalities required for its validity.'

And Dalloz noted that the views entertained by Pothier, Duvergier, Demolombe, and by Aubrey and Rau were similar to his; while those of Merlin, and of Baudry-Lacantinerie and Colin were different.

Likewise, there was a conflict among the French writers as to whether a tacit
revocation was effected when the later bequest was irregular as to form. This is pointed out in an opinion of this court in Fuselier v. Masse, 1832, 4 La. 423.

Upon the revision of the Louisiana Civil Code in 1825 presumably the framers thereof, who were men learned in the law and familiar with the interpretations that had been placed on various provisions of the Napoleonic Code, were well aware of the conflict among the French authorities as to the construction of Code Napoleon Article 1037, the provisions of which were carried into our Civil Code. Accordingly, it is important to note that in the 1825 Code (Article 1687) the redactors added the proviso reciting that a revocation to be effective must be regular as to form, but they did not in any manner amend the article so as to require that it be valid as to substance. From this it can be deduced that the intention was not to require that the later conflicting bequest be valid in substance in order to have its effect as a revocation. If it had been, the proviso, seemingly, would have read: 'Provided it is regular as to its substance and form.'

Interesting also is that in the Project of the Code of 1825 (French version) there were numerous articles proposing amendments to the provisions under consideration relative to the effect of a null disposition; but all of them dealt only with defects of form, and evidently were ultimately grouped and placed as one in the amending proviso. In view of the conflicting views of the French authors, pointed out above, it appears certain that had the redactors deemed it proper to also provide that substantive defects should prevent the revocation from having its full effect such defects would have been included and listed in such proposals.

That it was not the intent of the drafters of the Louisiana Civil Code to require that acts be substantively valid in order to effect a revocation, and also that they did not intend the examples contained in Article 1694 of our present Code to be exclusive or limiting, are further indicated by Article 1695 which provides: 'A donation inter vivos, or a sale made by the testator of the whole or a part of the thing bequeathed as a legacy, amounts to a revocation of the testamentary disposition, for all that has been sold or given, even though the sale or donation be null, and the thing have returned into the possession of the testator, whether by the effects of that nullity, or by any other means.'

For these reasons we conclude that the bequeathing of decedent's property to her husband tacitly revoked the former disposition to her niece, even if the later bequest contains a prohibited substitution and is unenforceable. And it follows that the niece can take nothing under the first will on which her claim to decedent's estate is solely predicated. Accordingly, she is without interest and has no right to have the posterior testament nullified.

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DH 116.4. T makes out a valid notarial testament in which he sets out a number of particular legacies, including a legacy of "all my books" to X. Sometime later, he makes out a new olographic testament in which he leaves "all my books" to Y. But after that he makes out an act in olographic form expressly revoking the second testament (the one that benefitted Y). Is the first testament (the one that benefitted X) revoked? Why or why not? Would the result be the same under both the new
law and the old law? See CC art. 1609; then see Dambly (again), reproduced above at pp. ______ {304-05}; then see (again) the doctrine reproduced below at pp. ______ {321-25}.

3} Alienation of thing earmarked for legacy (CC art. 1608(3))

DH 117.1. T makes a valid olographic will in which she leaves a 10-acre tract of land to her grandson, G. Two years later, she sells 100 acres, including that same 10, to D, her daughter and the mother of G, for $25,000, its fair market value. The act of sale is in writing. D pays the money. Has the legacy been revoked? Why or why not? See the jurisprudence that follows:

Succession of Price,
606 So.2d 70 (La. App. 3rd Cir. 1992)

SALOOM, J., Pro Tem.

This appeal arises from a succession proceeding in which the trial court ruled that an olographic will, containing a legacy of immovable property, was tacitly revoked by a subsequent sale of the bequeathed property.

On July 28, 1983, Jessie Clinton Price executed an olographic will bequeathing ten acres of land to her grandson, Stephen Baum ... .

On November 13, 1985, Ms. Price sold twenty acres, including the ten acres mentioned in the will, to Polly Laborde, her only child and sole forced heir. Polly Laborde is the mother of Stephen Baum.

Following the death of Ms. Price on May 31, 1989, Ms. Laborde contested the probate proceedings, contending that the testamentary disposition to Stephen Baum was tacitly revoked by the subsequent sale on November 13, 1985, by which Ms. Price sold twenty acres, including the ten acres described in the will, to Ms. Laborde for $25,000.00.

The trial court ruled that the olographic will was tacitly revoked by the subsequent sale. The trial court ruled on Civil Code article 1695 which states:

A donation inter vivos, or a sale made by the testator of the whole or a part of the thing bequeathed as a legacy, amounts to a revocation of the testamentary disposition, for all that has been sold or given, even though the sale or donation be null, and the thing have returned into the possession of the testator, whether by the effects of that nullity, or by any other means.

Appellant lists four assignments of error. First, appellant alleges that the trial court erred by refusing to allow parole evidence to be introduced to prove that the sale was an absolute simulation. We find no reversible error in the trial court's ruling. The issue before the trial court was whether the act of sale constituted a tacit revocation of the olographic will. According to C.C. art. 1695, supra, a donation or sale of a legacy amount to a revocation "even though the sale or donation be null ..." Therefore, it is irrelevant whether the sale was simulated or not. The fact that an attempt was made to sell or donate this land whether valid or invalid, established the testator's intent to revoke the previous will. The commentators of French Civil Code art. 1038 and the leading authorities
interpreting our C.C. art. 1695 are of the opinion that the attempt to alienate, not its legal validity, is enough to revoke the disposition contained in the will. See Aubry and Rau, Civil Law Translations, Volume 3, Section 725; Planiol, Civil Law Treatise, Volume 3, Part 2, No. 2843; and Oppenheim, Successions and Donations, 10 Louisiana Civil Law Treatise, Section 141 (1973).

QUESTIONS

(1) The “simulation” that allegedly occurred in Shaw was a relative simulation, to be precise, a donation disguised as a sale. See CC art. 2027. Would -- should -- the result have been the same or different if the alleged simulation had been absolute, see CC art. 2026, in other words, had the parties intended that the sale have no effect whatsoever, whether as a sale, a donation, or otherwise? Why or why not? See CC art. 2028.

(2) Suppose that the cause of the supposed nullity of the sale at issue in Shaw had been not that it was a disguised donation in improper form, but that Ms. Price, the seller, had been under full interdiction at the time of the sale. Would -- should -- the result have been the same? Why or why not? See CC arts. 1918 & 1919.

(3) Shaw was decided under the provisions of the Code of 1870. Would it be decided the same way under current law? Why or why not? See CC art. 1608(3) & cmt. c. Does that make any sense to you?

DH 117.4. T makes a valid olographic will in which she leaves a 10-acre tract of land to her grandson, G. Two years later, she donates 100 acres, including that same 10, to D, her daughter and the mother of G, for $25,000, its fair market value. Though the act of donation, which both parties sign, is in writing, the writing is not in authentic form. The next day T dies. G seeks to probate the will and, in connection therewith, sues D to annul the donation inter vivos on the ground that it lacked proper form. In her answer, D asserts that, even if the donation inter vivos was invalid, she’s still entitled to the land because (i) T’s legacy to G of the land was tacitly revoked when T tried to donate that land to her (D), (ii) the land therefore falls intestate, and (iii) she (D) is T’s highest-ranking intestate heir. At the probate hearing, it is proved that T, who had spent all but the last two years of her life in New York City (where donations of “real property” don’t have to be in authentic form), knew nothing of the requirements of CC art. 1536 at the time of her attempted donation inter vivos to D. Is D right about the revocation? Why or why not? The result would have been different under the old law, would it not? Why or why not? Which result seems more sensible to you -- that dictated by the old law or that dictated by the new law? Why?

4) Revocation by signed writing on testament (CC art. 1608(4))

DH 118.1. T makes out a notarial testament in which he leaves his house and lot to X, his car to Y, and the “rest of my estate” to Z. Sometime later, T takes out the testament and, with an ink pen, first draws a line through the bequest to Y and then signs the testament right next to the hand-
drawn lines. Has the legacy to Z been revoked? Why or why not? Would the result have been the same under the old law? Why or why not? See CC art. 1608 cmt. (b).

DH 118.2. The same as DH 118.1, except that, this time, T merely circles the bequest to Y (using the ink pen), writes the word “revoked” inside the circle, and then signs his name inside the circle. What result now (under the new law)? Why?

DH 118.3. The same as DH 118.1 or DH 118.2, except that T does not sign the strike-through or the circle, as the case might be. What result under the new law? Why?

5) Post-testamentary divorce (CC art. 1608(5))

DH 119. T makes out an olographic testament in which he leaves “all my property” to his wife, X. A few years later, X divorces T. Not long after that, T dies without having changed his testament. Is the legacy to X still valid? Why or why not?

6) Grounds for revocation of a donation inter vivos (CC art. 1610.1)

DH 120α. Shortly before his death, which occurred on June 1, 2004, Pascal made out a testament in which he left two particular legacies: a gift of a tract of land to A; a gift of some cattle to B. Between the time at which he made these acts and that of his death, both of Pascal’s donees were, well, “naughty.” First, on April 1, 2004, A together tried to kill Pascal in his sleep. His effort was foiled by Pascal’s children, Ti-Boy and Lil-Fille, who rescued Pascal at the last minute. Though Pascal knew what A had done, he took no action against her. Then, on May 1, 2004, B falsely accused Pascal of a serious “sex crime.” Though Pascal did not learn of these accusations before his death, Ti-Boy and Lil-Fille learned of them one month after his death, i.e., on July 1, 2004. Ti-Boy and Lil-Fille now want to sue A and B to revoke the legacies that Pascal made to them. With respect to each legacy, answer the following questions: (i) Can Ti-Boy and Lil-Fille bring such an action? (ii) If so, how long do they have within which to bring it?

DH 120β. The same as before, except that, this time, A and B die the day after Pascal dies and, consequently, what Ti-Boy and Lil-Fille want to know is whether there’s anything they can do to prevent A’s daughter, Desiree, from getting the land and / or B’s son, Canard, from the getting the cattle. What will you say now? Why?

3) Withdrawal (of revocation) (CC art. 1609)

Few problems in the law of donations mortis causa have attracted greater scholarly attention than the effect of the withdrawal (retraction) of a revocation. As might be excepted, the scholars who have addressed the problem have proposed divergent solutions. As you read through the materials that follow -- excerpts from the writings of these scholars --, ask yourself these questions: (i) Does any (even a single one!) of the
scholars support the rigid, all-or-nothing solution that CC art. 1609 appears to establish?

(ii) Which solution do you suppose will most often lead to a result that is consonant with what the testator-revoker-retractor most probably wants? (iii) If your answer to question (ii) is some solution other than that enshrined in CC art. 1609 (as would be my answer), do you suppose that the article might be interpreted restrictively so as to leave the courts room to adopt other solutions in at least some cases? If so, how? Cf. CC art. 1611(A), sent. 1, & CC art. 9.

Solution No. 1: Rebuttable Presumption of Non-Revival

5 Charles Demolombe, Traité des Donations Entre Vifs et des Testaments
nn° 159-162, at 159-132, in
22 Cours de Code Napoléon (1876-78)

159. -- That the express revocation of a testament can itself be retracted by another express revocation . . . is evident . . .

160. -- But at this point there arises an important hypothetical question, namely, does the act whereby the testator retracts the revocation that he has made of his testament have the consequence of causing that testament to revive as of right? This hypothetical question appears to us to present two distinct questions: the one, principally of fact and of interpretation . . .

a. -- In fact, when a person has made a first testament and, after having revoked it, he retracts his revocation, should one necessarily presume that he has wanted to cause his first testament to revive? Does the retraction of the revocation itself suffice to prove his intention in this regard? Or is it necessary, on the contrary, that there be some other proof?

. . . a. -- First of all, is the intention of the revoker to cause his first testament to revive sufficiently proved by the very act whereby he retracts his revocation?

There is a case in which the affirmative is not doubtful. It is that in which the testament has been revoked only by an act before a notary that bears a declaration of a change of will [e.g., "I revoke"] or by a later testament that does not entail new dispositions. Evidently the retraction of this pure and simple revocation, by itself, causes the testament to revive of right.

With what other intention, in fact, could it have been made? The revocation had turned over the goods of the testator to the heir [intestate successor]. And it is clear that the retraction of this revocation can have for its end only to turn them over to the legatee. Thus, the will of the revoker--to revive his testament--is then very certain! Either that is what he wanted to do or, one must say, he wanted to do nothing and he didn't know what he was doing!

162. -- But is it the same, as well, in the case in which the first testament was revoked by a second testament that entailed new dispositions?

[Suppose that] by a first testament I have instituted Paul as my universal legatee. By a second testament, I have instituted Pierre as my universal legatee, while declaring that
I revoke my first testament. And, finally, I have then revoked my second testament . . . without saying anything about the first. Does my first testament revive as of right?

Some have sustained the affirmative, even in this case.

This doctrine, nevertheless, has not been admitted. And we think that it cannot be.

Indeed, from the mere fact that testator has revoked his second testament, it would be presumptuous to conclude that he has necessarily wanted to cause the first to revive! This revocation, no doubt, certainly proves that he has not persevered in his second testament. But has he wanted to return to the first, about which he has said nothing? One does not know.

It can very well be true, moreover, that the testator, in revoking the testament, did not intend to cause the first to revive. If the first testament was already old, it is possible that he lost sight of it and forgot it! It may also be . . . that his will to revoke it [the first] has always been as persistent as it has been firm, as [for example] if he revoked it because of his discontentment with an unworthy legatee whom he had at first instituted, motives that have not ceased to exist.

There is no doubt that it would be impossible to restore life to a testament when it is uncertain if the testator intended to revive it. It is necessary, in all cases, that the testamentary will not be equivocal!

This is enough, we believe, to justify concluding that an act which revokes a second testament, by means of which a first testament had itself been revoked, does not always suffice to prove that the intention of the revoker was to cause the first to revive. What may be true is merely this: the question of knowing if the revoker had the intention to cause his first testament to revive could be determined by particular circumstances of fact, circumstances of which the judges are the [proper] evaluators. But, in default of such circumstances, it is necessary that the revoker manifest in fact the intention to cause his first testament to revive.


2726. Because the will of the testator is susceptible of being changed up until his death, he can, after having revoked a testament, retract his revocation. . . .

2727. Supposing that the revocation has been retracted, what will be the effect of this retraction? Will the revoked testament revive?

That will certainly be the intention of the testator when the revocation that he retracts was pure and simple, that is to say, not accompanied by any legacies. Otherwise the retraction would make no sense, for it would leave things in the state in which they had been beforehand: the revocation pure and simple of the testament had the result of causing the succession to return to the heirs [intestate successors] of the testator. Now, that is what would still be produced after the retraction if the retraction did not cause the first testament to revive. It is necessary, then, to say that the revoked testament will revive.
There's nothing [legally] impossible about that, for this testament has had a legal existence. It was merely paralyzed by an obstacle [i.e., the revocation], which the testator has caused to disappear.

2728. But the question becomes much more delicate if the revocation that is retracted was accompanied by new dispositions, in other words, if one supposes that the testator, after having made the first testament, has revoked it by means of another testament in which, besides, he has again disposed of his goods. What should one decide if the testator then retracts his new work purely and simply, that is to say, retracts the revocation and the legacies that accompany it? Then, in fact, one cannot know without doubt if the testator, in retracting the testament that contained the revocation, wanted to return to [revive] his first testament or wanted to abandon both testaments at the same time and to return to an intestate succession.

[In such a case] it is up to the trier of fact to seek out what was the intention of the testator. In [the face of] absolute doubt, the judge should perhaps decide in favor of the intestate successors, who cannot be deprived [of their rights] except by virtue of a will on the part of the de cujus that is certain.


The total or partial revocation of a testament may itself be rescinded either by the destruction, laceration, or cancellation of the second testament containing the revocation of the first, or by a declaration made in one of the forms above indicated.

When the revocation thus rescinded is contained in a notarial act, or in an act in testamentary form, which does not contain new disposition[s], the rescission of the revocation revives the initial dispositions of the testator by operation of law independently of any declaration to this effect. If the revocation is contained in a second testament containing new dispositions, the rescission of this testament does not revive the dispositions of the first unless the testator has manifested a contrary intention.

The declaration of a desire to revive a testament that has been revoked is in itself sufficient to produce this effect without it being necessary to transcribe the dispositions of the first testament in the act containing the revocation of the second. Such a declaration may be made either in a third testament or in a notarial act containing the revocation of the second testament.

Solution No. 2: No Presumption Either Way

4 Victor Marcadé, EXPLICATION THÉORIQUE ET PRATIQUE DU CODE CIVIL n° 175, at 133 (7th ed. 1873)

We just said that dispositions that have been revoked can revive by a new [act of]
will of the testator. Thus, it is not doubtful that if a person, after having accomplished the revocation of his testament, then revokes this revocation while declaring positively [that he wants to] return to the original testament, that testament will retake all its force. But would it be the same if the testator withdrew the revocatory disposition in this way without expressing that he intends to cause the revoked testament to revive? Here the authors are divided: the majority decide that the first testament has no value; others, on the contrary, say that it revives by virtue of the withdrawal of the revocation alone. We think that one cannot give an absolute rule in either one sense or the other and that the solution depends on the circumstances.

If the testator, for example, has revoked his testament, not by means of a later testament, but by means of a simple notarial declaration, it is evident that the withdrawal of the revocation signifies that he returns to his testament. There is no other possible interpretation. But if, after having made a first testament for the benefit of Paul, he has tacitly revoked it by means of a second testament for the benefit of Pierre and he then declares that he revokes the latter, there are two possible senses to this new declaration: "I withdraw my second testament in order to return to the first" or . . . "I no longer want the second any more than the first and I return to intestate succession." Most often, the terms of the revocation will enable one to understand the thought of the testator. But every time that this thought remains doubtful, it is clear that there will then be a question of intention, which is to be decided as a matter of fact according to the circumstances.

14 François Laurent, Principes de Droit Civil Français nn° 199-200, at 217-18 (2d ed. 1876)

199. The testator retracts the revocatory act. Does that suffice for the revoked testament to revive? Or is it necessary that the testator declare formal that his will is to cause the first testament to revive? It is a question of intention and, therefore, it is within the domain of the trier of act, who will decide it according the circumstances of the case. The authors love to pose general rules designed to resolve all the particular cases that will be presented. This schoolhouse method has some inconveniences, [for] it [involves] imposing an absolute rule on hypotheses that can vary in character from one case to the other. In this way, one risks misunderstanding the will of the testator. It would be better, it seems to us, to tie oneself to the prudence of the judge, who can take into account the diversity of circumstances in such a fashion as always to follow the will of the testator.

The authors distinguish. There is one case on which everyone is in accord. The revocatory act is a simple revocation; it contains no new disposition. If this revocation is retracted, the retraction, it is said, causes the revoked testament to revive as of right. . . Now, if the will of man is ambulatory up until his death, it is also infinitely capricious, in such a fashion that it is always chancy to affirm that the testator, in retracting his revocation, could not have had any other intention than to cause the first testament to revive. Let us abandon to the judge that which is, in essence, his domain--the evaluation of the will.

When the revocatory act is found in a new testament, some decide that the retraction
of this testament causes the dispositions of the first to revive only so long as the testator has expressed that such was his intention. Other authors think that the retraction suffices, as much in the second case as in the first, without the necessity for a declaration of will. We reject this latter opinion, which we have just contested. As to that which requires a formal declaration of the will of the testator, it, too, appears to us to be contrary to true principles. Can the interpreter impose on the testator a condition that the legislation does not know? Since the code is not occupied with the retraction of the revocation, the question of knowing what the testator wanted in retracting the revocation is a question of fact that the judge will decide according to the circumstances. Why require a formal declaration of will when, according to the general principles of the law, the will can be expressed by acts?

200. The jurisprudence, more wise than the doctrine, has this sense. It has been judged by the Cour de Cassation that it belongs to the trier of fact to decide, in his discretion, if a testator who has retracted a revocation that he had made of a testament has intended to cause this testament to revive. In that case the Court of Caen had judged that a third testament, which revoked the second, contained nothing that expressed or led one to presume that the testator had had the intention to cause his first testamentary dispositions to revive and that, on the contrary, it resulted from the circumstances that the testator had not intended to restore to his first testament the effect that it had lost by virtue of the revocation contained in the second. There is a judgment that admits that the retraction of the revocation of a testament causes that testament to revive as of right. But this judgment had no authority, because it is poorly reasoned.

3 Marcel Planiol & Georges Ripert, Traité Élémentaire de Droit Civil n° 2845, at 388-89 (11th ed. 1938; La. Law Inst. tr. 1959)

When the revocation of a testament is withdrawn, the old will comes back in force as if it had never been revoked, provided that it still materially exists. It would not regain its force if it had been torn up or burned.

Doubts arise in practice when the revocation is made in a new will which in turn contains express dispositions. Did the testator in such a case intend to revive the first will and abolish the second; or keep both in force as much as they are not incompatible; or simply fall back on intestate succession by abolishing both wills? The question is one of intention and it has to be decided according to the circumstances of each individual case.

DH 120.1. T makes out a testament in which he leaves everything to X. Sometime later, T executes an act in authentic form that says simply, “I revoke my prior testament.” Still later, T takes out the act of revocation and, in his own handwriting, jots down and signs this note: “This act of revocation is hereby revoked.” Has the testament been revoked? Why or why not?

DH 120.2. T, who is unmarried and at the time has just one child, A, makes out a testament in which she leaves “all of my property to A.” A few years later, after her second child, B, is born,
T makes out a second testament in which she (i) revokes her prior testament and (ii) leaves “all of my property to A and B.” A few years after that, after her third child is born, T goes to see her lawyer, L. After informing L of her prior testaments, she tells him that she wants to “leave everything to my children equally” and, further, that she’s tired of making out a new testament every time she has another child. “What can I do?” she asks. L answers, “Stop making testaments. The law of intestacy gives you precisely what you want.” And so, T tears up the second testament. Not long thereafter, T dies. Has the first testament been revoked? Why or why not? Cf. CC art. 888.

DH 120.3α. T, a bachelor without children, makes out a testament in which he leaves everything to his then favorite cousin, C. But then T and C have a falling out. And so, T makes out a testament in which he (i) revokes his prior testament and (ii) leaves everything to his new favorite cousin, K. But then T and K have a falling out. And so, T revokes the second testament. Then T dies, unreconciled with (indeed, still hostile toward) both C and K. T is survived not only by C and K, but also by his younger sister, S, with whom he was on good terms. Has the first testament been revoked? Why or why not? Cf. CC art. 892, ¶ 1.

DH 120.3β. T, a bachelor without children, makes out a testament in which he leaves everything to his brother, B. But then T and B have a falling out. And so, T makes out a testament in which he (i) revokes his prior testament and (ii) leaves everything to his sister, S. But then T and S have a falling out. And so, T revokes the second testament. Then T dies, unreconciled with (indeed, still hostile toward) both B and S. Has the first testament been revoked? Why or why not? Cf. CC art. 892, ¶ 1.

DH 120.3γ. T, a bachelor without children, makes out a testament in which he leaves everything to his brother, B. But then T and B have a falling out. And so, T makes out a testament in which he (i) revokes his prior testament and (ii) leaves everything to his sister, S. But then T and B reconcile and, not long thereafter, T and S have a falling out. And so, T revokes the second testament. Then T dies. Has the first testament been revoked? Why or why not? Cf. CC art. 892, ¶ 1.

DH 120.4. T makes out a testament in which he leaves everything to his friend, X. For reasons that are not clear, T later makes out a new testament in which he (i) revokes his prior testament and (ii) leaves everything to X and to Y, another friend, together. Still later, again for reasons that are not clear, T revokes the second testament. T’s closest relative is his nephew, N. Has the first testament been revoked? Why or why not? Cf. CC art. 896.