CHAPTER 20

Civil Law Solutions

The civil law approach is too mechanical for our purposes. Nevertheless, the comprehensive rules of the civil law form a treasure house of useful ideas.

It is possible that the main regulatory pattern was set by the Romans.[1] At any rate, their rules are similar to the modern civil-law provisions. This is not surprising. Covering a period longer than the life of the Anglo-American legal system, Roman law dealt with many of the problems that now concern us. These problems were occasioned by familiar circumstances: failure to provide for the surviving family; democratic notions on freedom of alienation; marital disharmony; and changes in the status of women.[2] The solutions start with the early rule that the next of kin had to be mentioned in the will in order to be disinherited; and they conclude with the "legitim" of Justinian, by which the favored members of the family were assured a designated portion of the decedent's property.

1. QUERELA INOFFICIOSI TESTAMENTI

If a testator failed to make a specified provision for his children and nearest heirs [3] the disappointed heirs could have

[1] *But cf.* LAWSON, A COMMON LAWYER LOOKS AT THE CIVIL LAW, 185 (1955).

[2] For an analysis of the "family" in Roman history, see ZIMMERMAN, OUTLINE OF THE FUTURE OF THE FAMILY, 18–38 (1947).

[3] The *querela* could be brought by three groups of relatives: descendants, ascendants, and brothers and sisters. The two latter groups could attack the will only in the event of no attack by the prior group or groups. The last group (brothers and sisters) could bring the *querela* only if *turpes personae*—persons of infamy, bad character, etc.—had been preferred to them. LEE, ELEMENTS OF ROMAN LAW, 208 (1946 ed.). Critical of the view that parents were eligible is SCHULZ, HISTORY OF ROMAN LEGAL SCIENCE, 235 (1946); also see Schulz' stric-

the *querela inofficiosi testamenti,* or "plaint of an unduteous will." This remedy, which became available in the early Empire, was based upon the supposed insanity of the testator in not providing for his heirs. The fiction of insanity is said to have been derived from Greek law.[4] The fiction was later dropped for a rationale emphasizing the rights of the disappointed heir.[5] We are told that the *querela* was from the beginning "based upon the ancient idea of family ownership than upon the more modern conception, that a testator is under a duty to provide after his death for those related to him by near kinship." [6] The amount [7] that could be obtained was at first discretionary, but eventually was fixed by statute at one fourth of what the claimant would have received as his intestate share. Justinian later increased this amount in the case of children to one third, if there were not more than four children, and one half if there were more than four children.

Acceptance of benefits under the will would bar the *querela.* In certain instances the claimant had to make allowance for anything that he had received by inter vivos gift from the testator.[8] Moreover, the claimant had to show

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tures on the terminology of the *querela* in his CLASSICAL ROMAN LAW, 275–79 (1951).

[4] Sohm, INSTITUTES OF ROMAN LAW, 556, note 6 (3rd ed. 1907). *Cf.* Maine, ANCIENT LAW, 209, (1912 ed.). For an account of the influence of Greek and Roman institutions on the ancient Egyptian law of inheritance, in particular with respect to the rights of forced heirs, see Taubenschlag, THE LAW OF GRECO-ROMAN EGYPT IN THE LIGHT OF THE PAPYRI, 158–59, (1st ed. 1944).

[5] Lee, ELEMENTS OF ROMAN LAW, 454, note 92 (1946 ed.).

[6] Leage, ROMAN PRIVATE LAW, 187 (3rd ed. 1924). Muirhead ascribes the advent of the *querela* to a general slackening in religious and moral scruples. Muirhead, HISTORICAL INTRODUCTION TO THE LAW OF ROME, 244 (3rd ed. 1916); also see Buckland, THE MAIN INSTITUTIONS OF ROMAN PRIVATE LAW, 195–96 (1931); Cooper, THE INSTITUTES OF JUSTINIAN, 518 (3rd ed. 1852) (comparing the custom of London with the *querela.*)

[7] "In connection with the *querela* it was known as the *portio legibus debita* or the *legitima portio* (the statutory portion) and in modern usage is termed 'the legitim'." Lee, *op. cit. supra,* note 5, at 208. *But cf.* Schulz, CLASSICAL ROMAN LAW, 276 (1951).

[8] Moyle, IMPERATORIS IUSTINIANI INSTITUTIONES, 283 note 6, (2nd ed.

that he had no other means of attacking the will; for example, the *querela* was not available to an emancipated son, since he could get another remedy from the praetor.[9] It was also denied to a claimant who had been disinherited for just cause, e.g., because of an attempt on the testator's life. Justinian specified fourteen grounds for disinheriting children, with fewer grounds for disinheriting parents, brothers, and sisters.[10] These grounds related to breach of family duty.

Originally a successful attack would void the will in toto.[11] Under Justinian, however, the will would be set aside only to the extent necessary to provide for the claimant. If anything at all had been left him in the will, he was given an action to supplement it up to the statutory share.[12] Significantly, protection was afforded against excessive inter vivos gifts.[13] The *querela inofficiosae donationis* and the *querela inofficiosae dotis* were developed to protect the claimant whose share was diminished by an immoderate inter vivos gift, or *dos,* as the case may be. The gift or *dos* would be rescinded and used, so far as necessary, to make up the claimant's full statutory share.[14]

2. The Légitime

The thoroughgoing protection afforded by the Roman legitim is reechoed in the modern légitime. This powerful institution has endured despite changing times, changing ideas. In Louisiana, for example, it has if anything grown in strength, as indicated by its "sanctification" in the Louisiana

1890), and references therein cited; Radin, Handbook of Roman Law, 442, (1927).

[9] Lee, *op. cit. supra,* note 5, 204–07.

[10] Buckland, A Text-book of Roman Law, 331 (1950).

[11] However, if there had been two "instituted heirs" it was possible in a given case that only partial intestacy would result. Lee, *op. cit. supra,* note 5, 209. Also see Buckland, A Text-book of Roman Law, 330 (1950).

[12] Sandars, The Institutes of Justinian, 543 (1941 ed.).

[13] *But cf.* Buckland & McNair, Roman Law and Common Law, 168 (Lawson ed., 1952).

[14] Sohm, Institutes of Roman Law, 558 (3rd ed. 1907).

Constitution of 1921.[15] In the Louisiana community the values implicit in freedom of property transmission have long been mortgaged to the communal concern for the welfare of the surviving family. In the case of land, not even the purchaser for value without notice can shake off the family claim. In a sense, we have in the légitime a modern manifestation of the original group-ownership of wealth, in which no individual transmission was permitted.[16] Under the légitime, however, the group is the family. The family property is charged with family support. "It is the family's means of life from which no member can be shut out except for positive misconduct." [17]

The légitime applies only to the gratuitous dispositions of the deceased. As to these transactions,

> "the law divides the estate of every person into two parts, of which one is called the *disposable* portion, of which he may dispose gratuitously according to his pleasure; the other is called the *reserve* or *forced portion,* of which he is not permitted to dispose gratuitously to the prejudice of his legitimate descendants or ascendants, to whom the law *reserves* it and *forces* the person to leave it, and who are, therefore, called *forced* heirs." [18]

The Louisiana Civil Code states that "Donations *inter vivos* or *mortis causa* cannot exceed two thirds of the property of the disposer, if he leaves, at his decease, a legitimate child; one half, if he leaves two children; and one third, if he leaves three or a greater number." [19] Similarly these dona-

[15] La. Const. of 1921, Art. IV, Section 16. "No law shall be passed abolishing forced heirship. . . ."

[16] *Cf.* G. D. H. Cole, "Inheritance," 8 ENCY. SOCIAL SCIENCES, 35 (1932); also see Cairns, "The Explanatory Process in the Field of Inheritance," 20 IOWA L. REV. 266 (1934).

[17] Cole, *supra,* note 16, 36. On protection of the children of the first marriage in early French law, see Brissaud, A HISTORY OF FRENCH PRIVATE LAW, 156–7 (1912) (3 Continental Legal History Series).

[18] Tessier v. Rousell, 41 La. Ann. Rep. 474, 477, 6 So. 542, 543 (1889). A forced heir may waive his right to claim the légitime, Succession of Fertel, 208 La. 614, 635, 23 So.2d 234, (1945).

[19] La. Civ. Code Ann. art. 1493 (West 1952). Art. 1493 also states that

tions "cannot exceed two thirds of the property, if the disposer, having no children, leaves a father, mother, or both." [20] These forced heirs [21] cannot be deprived of their reserved portion by the decedent, "except in cases where he has a just cause to disinherit them." [22] A decedent cannot make a donation inter vivos which divests himself of all his property. If he does not reserve to himself enough for subsistence, the transaction is "null for the whole." [23] Aside from this exceptional case, however, the rule is that "any disposal of property, whether *inter vivos* or *mortis causa,* exceeding the *quantum* of which a person may legally dispose to the preju-

"Under the name of *children* are included descendants of whatever degree they be, it being understood that they are only counted for the child they represent."

[20] La. Civ. Code Ann. art. 1194 (West 1952).

[21] As in the typical civil law jurisdiction, the widow in Louisiana is not a forced heir, *i.e.,* she is not protected by the légitime. Nevertheless, other devices exist for her benefit; and the over-all trend is to better her position. She has community property; she has the homestead if she is "in necessitous circumstances"; and she has the "marital fourth": if the decedent spouse "died rich," the survivor may be awarded a fourth of the succession, with provision for temporary allowances.

Ordinarily in community property states the community property stands in the husband's name, and he has power to manage, sell, transfer, and encumber. Has the wife any remedy if the husband gives away the community property? It all depends. The cases on this point look very much like the cases in the common law states on "evasions" of the statutory share. There is considerable stress on "intent to defraud," particularly in California, Nevada and Texas. In the main, however, the decisive criterion appears to be the comparative size of the transfer. The cases are analysed in a carefully-written article: Huie, "Community Property Laws as Applied to Life Insurance," 18 TEXAS L. REV. 121 (1940); also see de Funiak, 1 PRINCIPLES OF COMMUNITY PROPERTY, s. 122, (1943); Succession of Geagan, 33 So.2d 118 (La. 1947), discussed in Chap. 15, note 30, *supra.* As to transfers of life insurance in "fraud" of the community, see Chap. 15, note 77, *supra.*

[22] La. Civ. Code Ann. art. 1495 (West. 1952). On disinherison see *id.* arts. 1617–24; Cahn, "Disinherison as It Developed Historically," 10 LOYOLA L. J. 41 (1929); Oppenheim, "The Revocation of a Testamentary Disinherison," 16 TUL. L. REV. 97 (1941).

[23] La. Civ. Code Ann. art. 1497 (West. 1952). This rule has some curious inconsistencies, Comment, 6 LA. L. REV. 98 (1944). The article apparently can be invoked only by the donor; the forced heirs may not act until the donor's death. La. Civ. Code Ann. art. 1503 states that "A donation inter vivos, exceeding the disposable *quantum,* retains all its effect during the life of the donor."

dice of the forced heirs, is not null, but only reducible to that quantum." [24] The latter doctrine also contrasts favorably with the disposition on the part of some courts in common-law states to effect a total defeasance of the inter vivos disposition in order to give the surviving spouse a fractional share.[25]

The strength of the légitime lies in the power of the forced heirs to reach inter vivos transfers.[26] Articles 1505 states:

> "To determine the reduction to which the donations, either *inter vivos* or *mortis causa* are liable, an aggregate is formed of all the property belonging to the donor or testator at the time of his decease; to that is fictitiously added the property disposed of by donation inter vivos, according to its value at the time of the donor's decease, in the state in which it was at the period of the donation.
>
> The sums due by the estate are deducted from this aggregate amount, and the disposable quantum is calculated on the balance, taking into consideration the number of heirs and their qualities of ascendant or descendant, so as to regulate their legitimate portion by the rules above established." [27]

Donations mortis causa are, naturally, exhausted first, and then donations inter vivos in reverse chronological order, the last being appropriated first.[28] Immovable property may

[24] *Id.* art. 1502; also see *id.* art. 1503, *supra,* at note 23.

[25] See discussion, Chap. 9:2.

[26] La. Civ. Code Ann. art. 1504 (West. 1952).

[27] La. Rev. Stat. §22:647 (1950) (Acts 1948, No. 195, Section 14.37) provides that the proceeds of life insurance, endowment and annuity contracts are not subject to the rules of forced heirship; see discussion p. 240, *supra.* The language of art. 1505 is broad enough to include donations made while the donor was a bachelor with no living parents. Dicta to the contrary are examined in Fenner, "An Example of Homeric Nodding in Relation to the Reduction of Donations Inter Vivos," 1 SOUTHERN L. Q. 129, 137–38 (1916). He concludes that the prudent practitioner would decline to prove a title based on such a donation "unless it can be shown that the donor has died leaving no forced heirs, or in the event that he left forced heirs, that the said donation did not exceed the disposable portion of the estate, whether at the time the donation was made the donor was married or unmarried."

[28] La. Civ. Code Ann. arts. 1507–08 (West. 1952). Legacies are reduced pro rata (*id.* art. 1511) unless the testator expressly states that a legacy is to be preferred (*id.* art. 1512).

be brought into the succession "without any charge of debts or mortgages created by the donee." [29] As far as immovable property is concerned, the action may be brought against transferees from the donee "in the same manner and order that it may be brought against the donee himself, but after discussion [30] of the property of the donee." [31] Notice that the forced heir's rights with reference to third parties apply only to immovables. The légitime in this respect is no harsher than common-law dower; in fact, it is not as severe: it does not catch genuine sales.

The Louisiana courts have evolved the action *en declaration de simulation* by which forced heirs are given the power to recover property transferred by a simulated sale of the decedent.[32] This action probably cannot be brought against a good-faith purchaser, even to enforce the légitime.[33]

3. The "Reserved Portion": Continental Examples

Variations of the "reserved portion" may be found in the individual civil-law jurisdictions. By way of example we shall glance at the German and Swiss provisions.

(a) *Germany.* The German Civil Code has complicated rules for augmentation of the compulsory portion (*Ergänzung des Pflichtteils*). These rules (as well as the Swiss provisions) are set out in Appendix B.[34] The mechanics of the German scheme are similar in rigidity and complexity to that of the légitime. Some points, however, are of special interest. Con-

[29] *Id.* art. 1516. "If the donee has successively sold several objects of real estate, liable to the action of revindication, that action must be brought against third persons holding the property, according to the order of their purchases, beginning with the last, and ascending from the last to the first," *id.* art. 1518; also see *id.* arts. 1281–82. The vendee from a donee can repel the demand by offering to pay the heirs their money, Stockwell v. Perrin, 112 La. 643, 36 So. 635, (1904).

[30] *I.e.*, using up, appropriating.

[31] La. Civ. Code Ann. arts. 1517–18 (West 1952); Comment, 2 La. L. Rev. 387, 389, note 20 (1940).

[32] See cases mentioned in Comment, 2 La. L. Rev. 387, 389, note 18 (1940).

[33] *Id.* at 389–90.

[34] *Infra,* p. 333, at pp. 347, 351.

sumables are valued as of the date of the gift. "Other matters" are valued as of the time of the accrual of the inheritance, but not to exceed the value as of the date of the gift.[35] There is a ten year cut-off point on the liability of donees; [36] and no liability exists if the gift was made "in compliance with a moral duty or the rules of social propriety," [37] e.g., a gift made to an indigent blood relative, or a "reward for voluntary service." [38] The donee may refuse to return the gift upon payment of its value.[39] Among several donees a prior donee is liable only in so far as a subsequent donee is not liable.[40] And, finally, the claim of the "compulsory beneficiary" against the donee is barred in three years.[41]

(b) *Switzerland.* The Swiss Civil Code has a more moderate approach.[42] Reduction of gifts to persons other than heirs is restricted to the following: ". . .

> 3. Gifts which the donor had full liberty to revoke and those which he made within the five years preceding his death, with the exception of presents made on occasions when they are customary;
> 4. Alienations made by the deceased with the evident intention of evading the rules restricting his freedom of disposition. [43]

And a measure of flexibility is provided: a child who is an invalid or who has not received his education is entitled to preferential benefits, payable either in a lump sum or as an annuity.[44] Moreover, the surviving spouse may not take her compulsory share if she has been bequeathed a usufruct in the whole of the share of the common descendants. We have

[35] German Civil Code (*Bürgerliches Gesetzbuch,* cited hereafter as G.C.C.) §2325. For a definition of consumables see §92.
[36] G.C.C. §2325.
[37] G.C.C. §2330.
[38] *Id.,* note (f).
[39] G.C.C. §2329.
[40] *Ibid.*
[41] G.C.C. §2332.
[42] For detailed provisions see Appendix B, *infra.*
[43] Swiss Civil Code, (cited hereafter as S.C.C.) §527 (1907).
[44] See *id.* art. 631 par. 2; arts. 14, 273–74.

already encountered this notion in New York.[45] The Swiss also have a practicable approach to the problem of the decedent's life insurance. When the policy is payable to a person other than a compulsory heir the redemption value as of the date of death is "added to the value of the estate" [46] and is subject to reduction.[47] The permissible period for bringing the reduction action seems overly long (10 years after death), but this is to cover the contingency that the "evasion" may not be immediately discernible at the time of death. Once discovered, action must be brought within one year.[48]

4. Some Ideas from the Civil Law

The basic civil-law approach seems too inflexible. Stress on blood relationship — regardless of dependence — is foreign to the maintenance and contribution formula. Nevertheless, the civil-law experience may help us to solve some of the problems involved in legislative implementation of the formula.

Take the question of valuation, for instance. The experience under the légitime indicates that no rule on this question will be completely satisfactory, but that *some* rule must be adopted. Article 1505 of the Louisiana Civil Code states that in computing the value of the mass any inter vivos donation is fictitiously added "according to its value at the time of the donor's decease, in the state in which it was at the period of the donation." "Value" apparently means the market value of articles of like nature, not the inventory value nor the value stated on the assessment rolls. Article 1506 says that "In the fictitious collation of effects given by act *inter vivos* by the deceased, those which have perished by accident

[45] N.Y. Deced. Est. Law, §18(d), discussed p. 74, *supra*.
[46] S.C.C. §476.
[47] *Id.*, §529.
[48] *Id.*, §533. For references to the Swedish system (reserved portion, subject to the child's right of maintenance) and to maintenance for children in Russia, see Yadin, "The Proposed Law of Succession for Israel," 2 Amer. J. Comp. Law, 152 (1953).

in the hands of the donee, are not included; those which have perished through his fault only are to be included." Presumably this means that the loss is borne by the succession if the property deteriorates through natural causes. The donee is credited with any increase in value attributable to his improvements; but increase due to natural causes or a rise in the market enures to the succession.[49] As has already been mentioned,[50] the Germans distinguish between consumables and non-consumables. Consumables are valued as of the date of the gift (which seems harsh on the donee); and non-consumables are valued as of the time of the accrual of the inheritance, but not to exceed the value as of the date of the gift. In the model statute suggested in the next chapter [51] I borrowed in part from the following Swiss provision: "A donee who has acted bona fide is liable to restore only the amount by which he is still enriched by the gift at the date of the opening of the succession." [52]

Consider also the civil-law rules relating to the order of reduction or "abatement," of inter vivos gifts, and to the "cut-off" point. As to reduction, under the civil law the inter vivos gifts usually are affected in reverse chronological order, the last in point of time being exhausted first.[53] This method has the great advantage of certainty, thus enhancing predictability. Moreover, the donee who takes last in point of time — particularly when the gift was made close to the donor's

[49] See a well-written comment by J. E. Pierson, in 12 TUL. L. REV. 262, 270 (1938). "Suppose, for example," states Pierson, "that in 1920, *A* donated to *B* an automobile worth $900. In 1935, *B* sold the car to a second-hand dealer for $100. *A* died in 1937. Applying Article 1505, the amount which should be computed in the mass of the succession is the value of the 1920 car in 1937 in the "state" in which it was in 1920. In such a case, the natural deteriorations would probably be borne by the succession."

It may be seen that too literal a reading of Article 1505 involves complications. The Suggested Model Decedent's Family Maintenance Statute §9(b), *infra,* Chap. 22, attempts to simplify the problem.

[50] See text at note 34, *supra.*

[51] *Infra,* p. 301.

[52] S.C.C. §528; see Appendix B, *infra.*

[53] *E.g.,* S.C.C. §532.

death – is less likely to have a strong "reliance interest." In the suggested model statute, however, I thought it best to give the court a discretion in this matter,[54] in keeping with its discretion in other matters under the statute. The reliance interest of the individual donees would, of course, influence the court's decision. The civil law "cut-off" provision furthers the reliance interest of *all* donees. The German Civil Code states: "The gift is not taken into consideration if, at the time of the accrual of the inheritance, ten years have elapsed since delivery of the object given. . . ." [55] The Swiss scheme affects gifts only when they were made within five years of death, unless they were revocable or made "with the evident intention of evading the rules restricting . . . freedom of disposition." [56] The "cut-off" idea appears in the model statute.[57]

[54] Suggested Model Decedent's Family Maintenance Statute, § 9, *infra,* Chap. 22.

[55] G.C.C. §2325.

[56] S.C.C. §527(3) and (4).

[57] Suggested Model Decedent's Family Maintenance Statute, § 8, *infra,* Chap. 22.