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4

AUBRY & RAU

DROIT CIVIL FRANÇAIS

(Vol. IX §§ 588–614, Vol. X §§ 615–642; 6th Ed.)

Intestate Successions

An English Translation with Louisiana Annotations

Prepared by

Carlos E. Lazarus

Under the auspices of

The Louisiana State Law Institute

and

The Institute of Civil Law Studies,

Louisiana State University

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Of Intestate Successions
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by Paul Esmein
Professor of the Faculty of Law of Paris

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CARLOS E. LAZARUS
Professor of Law, Louisiana State University

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FOREWORD

This volume completes the translation of those portions of Aubry & Rau's *Cours de Droit Civil Français* dealing with successions and gratuitous dispositions. Volume 3 of the *Civil Law Translations* series, which, with the concurrence of the Louisiana State Law Institute, has been published as a part of *Louisiana Statutes Annotated*, contains the portions of the treatise dealing with donations inter vivos and testamentary dispositions. The present volume contains a translation of the last half of Volume IX and the first half of Volume X of the Aubry & Rau treatise, which treat of intestate successions. The mentioned volumes were edited by M. Paul Esmein, who not only brought the original work up-to-date but incorporated also his own critical views of the texts of the law and jurisprudence. Volumes 3 and 4 of the *Civil Law Translations* series thus comprise two and one-half volumes of the original French treatise and cover the entire subject matter of successions inter vivos and mortis causa. Looking back, it might have been better to have translated the material included in Volume 4 prior to that included in Volume 3. It is not believed, however, that any appreciable degree of confusion will result.

Following the procedure adopted in the preparation of Volume 3, there are incorporated in Volume 4 references prepared by the translator to the Louisiana law and jurisprudence.

The translator is Carlos E. Lazarus, Professor of Law at Louisiana State University. He has degrees from the Municipal College of Commerce, Manchester, England, and from the Loyola University Law School, New Orleans. Prior to joining the LSU law faculty in 1961, he served for several years as Coordinator of Research and Statutory Revisor for the Louisiana State Law Institute.

The Institute again expresses its gratitude to Librairies Techniques, Paris, France, and, in memory of M. Paul Esmein, its indebtedness for being given the opportunity to translate without cost additional portions of the outstanding treatise by Aubry & Rau.

Likewise, the Institute acknowledges its indebtedness to the West Publishing Company for assisting it to discharge its statutory responsibility to provide translations of civil law materials.

J. DENSON SMITH
Professor of Law, Louisiana State University
Director, Louisiana State Law Institute

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TABLE OF CONTENTS

TITLE I. OF INTESTATE SUCCESSIONS

CHAPTER I

Of Incapacity and Unworthiness in Matters of Succession

CHAPTER II

Of the Order of Successions

I. Of the Order in which Heirs are Called to the Regular Succession

TABLE OF CONTENTS

CHAPTER III

Of the Transmission of the Inheritance to the Heirs

CHAPTER IV

Of the Rights and Obligations of the Heir

I. Rights of the Heir

II. Obligations of the Heir

III. Benefit of Inventory and Separation of Patrimony

CHAPTER V

Of the Rights and Obligations of the Heirs when there are Several

TABLE OF CONTENTS

I. Partition of the Hereditary Assets

TABLE OF CONTENTS

II. Collation

TABLE OF CONTENTS

CHAPTER VII

Of Unclaimed Successions and of Vacant Successions

FRENCH CIVIL LAW

SECOND DIVISION
OF SUCCESSIONS AND OF GRATUITOUS DISPOSITIONS

TITLE I
OF INTESTATE SUCCESSIONS [1]

§ 588

Historical Background [2]

In the regions of Written Law and those of Customary Law wherein the feudal succession (*succession aux fiefs*) was regulated by special rules identical in both, there were also other succession systems resting entirely on different bases.

The regions of Written Law adopted, with certain modifications,[3] the system of succession established by Roman law, which

1. *Bibliography.* (1) Ancient law. Lebrun *Traité des successions*, with comments by d'Espiard, 1743 and 1775; Pothier, *Traité des successions.* (2) Intermediate Law. *Sur le régime actuel des successions*, by Guichard, 1797; *Code des successions, suivi d'une explication de la loi du 17 nivôse an II et autres subséquentes*, Paris, *an III*; Tisandier, *Traité complet sur les dispositions gratuites et les successions ab intestat conformément à la loi du 4 germinal an* VIII, 1801. (3) Law of the Civil Code. Chabot, *Commentaire sur la loi des successions*, 6th ed. 1831; two new editions in 1839, one by Belost-Jolimon, the other by Mazerat; Vaseille, *Résumé et commentaires du code civil sur les successions*, 1825, supplement 1829; Poujol, *Traité des successions*, 1837; Baudry-Lacantinerie et Wahl, *Des successions*, 3rd ed. 1905; Planiol et Ripert, *Traité pratique de droit civil*, IV, by Maury et Vialleton; Beudant et Lerebours-Pigeonnière, *Cours de droit civil, Les successions*, V and V bis, by LeBalle; Vallier, *Le Fondement du droit successoral en droit français*, Thesis, Paris, 1902; A. Colin, *Le droit de succession dans le Code civil, Livre du centenaire*, I, 295.

2. Toullier, IV, 130–150; Ch. Lefebvre, *L'ancien droit des successions*, 1912.

3. Thus, for example, the rule of the Customary Law, *Le mort saisit le vif,*

was based on the concept that the right of ownership of every person over his patrimony extended beyond the existence of such persons, and naturally imported the faculty of disposing in contemplation of death. The following notions are characteristic of this system of succession:

1. The testator enjoyed unlimited power, so to speak, regarding the disposition of his property.[4]

2. The succession devolved primarily on those whom the deceased had instituted as his heirs; and it was only in default of a testament, that it devolved on those who by law had the quality of heirs.

3. The legal succession was itself testamentary by its spirit, in the sense that the legislation, assuming the place and stead of the intestate, followed principally the presumed intention of the deceased in order to regulate the transmission of his property.

4. Accordingly, the 118th Novel called first the descendants of the deceased, secondly the ascendants, and finally the collaterals. However, this order was modified with regard to brothers and sisters and their children in the first degree. German brothers and sisters and their children concurred with the ascendants,[5] and excluded all other collaterals.[6] In default of ascendants, of german brothers and sisters and of children from these last, half-brothers and sisters on the father's or the mother's side and their children took the succession, to the exclusion of all other collaterals. In each class, the heir closest in degree excluded the more remote; and those who were in the same degree succeeded by heads, except in cases of representation which was admitted ad infinitum in the direct descending line and, in the collateral line, in favor of the children in the first degree, of german brothers and sisters or of the half-blood on the father's or the mother's side.

5. The succession constituted a single mass which was transmitted to the heirs without regard to the nature or the origin of the property.[7]

was also followed in the regions of Written Law; it applied not only to the heirs ab intestato, but also to the heirs instituted by testament or by contract. Merlin, *Rép.* Vo. *Héritier*, Sec. I, § 1, Nos. 4–6.

4. *Pater familias uti legassit super pecunia tutelave rei suae, ita jus esto.* L. XII Tab., tab. V, fr. 3; *Ulpiani Reg. lib. sing.*, Tit. XI, fr. 14.

5. The right to concur with the ascendants was given to the children of german brothers and sisters by the 127th Novel.

6. They excluded particularly the brothers and sisters of the half-blood on the side of the father or of the mother. This is what was called the "*privilège du double lien.*"

7. *Non unius duo patrimonia.* L. 30, § 1, D. de excus. (27, 1).

In the regions of Customary Law, the rules relative to the transmission of property of a person deceased were principally based on the concept of family co-ownership which had passed into the Customs from the ancient Germanic law. The various members of a single family were considered as co-proprietors in solidum of all the immovables that each one of them had received from the successions of their common parents, subject to the restriction, however, that this right of co-ownership became completely effective only by the death of the member of the family on whom these immovables devolved by succession, and then only in favor of those who, in conformity with the legal order of succession, were called to the inheritance of the latter.[8] The following are the characteristics of the succession system established by the Customary Law:

1. The right to dispose in contemplation of death was generally confined within narrow limits.

2. The legitimate relations of the deceased, to the exclusion of other persons, enjoyed the title of heirs or representatives of the latter, even where he had made a testament.[9] They became, by operation of law, owners and possessors of the property included in his succession [10] which, however, they had the faculty of renouncing.[11] The legatees were required to demand the delivery of their legacies from the heirs of the blood.

3. The order of the legal succession was based principally on the classification of property of the deceased into ancestral (*propres*) and acquired property (*acquêts*).

4. Although this order varied considerably in the various regions of Customary Law, most customs nevertheless agreed on the following points: The succession devolved, in the first place, upon descendants who partitioned it among themselves by heads or by roots, subject to the restrictions resulting from sex and primogeniture in those customs in which these privileges existed. In default of descendants, the immovables that the deceased had acquired by succession devolved upon the collaterals of the line and of the root from which these immovables came.[12] In some Customs, the remainder of the succession,

8. Of course, we are speaking only of the succession of freely alienable property and not of the succession of property under feudal tenure. Nevertheless, it will be noted that the feudal succession must have been analogous to the allodial succession in many respects for the principles that governed this last greatly influenced the development of the rules relative to the first.

9. *Institution d'héritier n'a point de lieu.* Loisel, *Institutes coutumières*, Book II, Tit. IV, reg. 5. *Cf.* Merlin, *Rép.*, Vo. *Héritiers*, Sec. I, § 1, No. 7.

10. *Le mort saisit le vif, son plus prochain héritier, habile à lui succeder.* Loisel, *op. cit.*, Book II, Tit. V, reg. 1.

11. *Il n'est héritier qui ne veut.* Loisel, op. cit., Book II, Tit. V, reg. 2.

12. Ancestral property does not return, but devolves upon the closest relations on the side of those from whom the de-

that is, the movables and the acquired property, was divided equally between the paternal and the maternal line. There were even some customs that divided ad-infinitum among the different branches of each line, the one-half of the movables and of the acquired property attributed to each line. In other Customs, the movables and the acquired property was not divided equally between the two lines. Among these Customs there was the Custom of Paris, the rules of which with respect to the succession of movables and of acquired property were, to a great extent, copied from the Roman law.

The purpose of the succession laws enacted after the revolution of 1789 was, on the one hand, to substitute a uniform legislation for the various legislations theretofore regulating the subject matter and, on the other, to harmonize the legal provisions relative to the right of succession with the principles of a democratic constitution.[13]

These laws abrogated the distinctions drawn from the origin and the nature of the property that, according to Customary law, formed the basis of the order of succession. They abolished all the privileges previously admitted in this matter, especially those relative to sex and primogeniture.

As to the order of succession, the law of 18 *Nivôse An II* admitted three classes of heirs: descendants, ascendants, and collaterals. It conferred the succession first upon the descendants, who succeeded by heads or by roots; secondly on the ascendants, who succeeded always by heads, and thirdly, on the collaterals. It preferred these last to the ascendants from whom they descended or who were in the same degree as the ascendants from whom they descended. Finally, this law provided that the succession of every person dying without heirs in the direct line would be divided equally among the paternal and maternal lines, and admitted representation ad-infinitum in the collateral line.[14]

The principal tendency of the intermediate legislation was to bring about, by democratic means, a more equitable distribution of the wealth. Nevertheless, the laws passed during the revolutionary period did not create an entirely new system of succession. In addi-

ceased received it, by which is meant: *Paterna paternis, materna maternis.* Loisel, op. cit., Book II, Tit. V, reg. 16.

13. *Cf.* in particular: Law of 15–28 March, 1790, Tit. I, Art. 11; Law of 8–15 April, 1791; Law of 18 *Vendémiaire An II*; Law of 5 *Brumaire An II*; Law of 17 *Nivôse An II*; Law of 23 *Ventôse An II*; Law of 9 *Fructidor An II*; *Arrêté* of 12 *Pluviôse An VI*; Law of 4 *Germinal An VIII.*

14. At one time, the admission of representation ad-infinitum in the collateral line was regarded as the adoption of a subdivision system whereby the one-half going to each line would have to be subdivided anew among the different branches in each line. After some vascillation, the jurisprudence definitely rejected this proposition. *Cf.* Merlin, Quest., Vo. Succession, § 8.