A Simple Legacy: "To My Children"

The First of Two Parts

by Daniel N. Mettarlin *

Legacies to "children" and "issue" are common; yet few terms can create more difficulties for the unwary draftsman. In this two-part article Mr. Mettarlin analyses the legal meaning of these terms and of such common companion expressions as "by roots" and "in equal shares". From history, doctrine, and jurisprudence he distills two conflicting theories, and underlines their irreconcilability. Their warring co-existence, he shows, renders uncertain traditional and apparently clear testamentary dispositions. In conclusion the author advocates certain rules of construction for judicial use, and suggests drafting aids to minimize costly and unnecessary litigation.

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INTRODUCTION

A legacy to "my son John Smith" is clear and in need of little interpretation.[1] However, in few cases can the testator so clearly define the object of his bounty. A youthful testator may have other children before he dies and so not wish to limit his bequest to named persons. A testator who bequeaths his property to his son's children cannot name such grandchildren for fear that some may die and others may be born prior to his son's death. Thus it is customary and wise to leave property by a generic term, to a class of persons, such as to one's "children" or issue" without naming any members of the class. Unfortunately a class legacy to "children" or "issue" creates numerous problems of interpretation and definition.

Whether a gift to "children" will include adopted children,[2] or children in gestation (especially if the testator uses an expression such as "children *born of* my marriage", or "children living at the time of my death") or children of a second marriage, the first having ended in a foreign divorce not recognised in Quebec, are questions beyond the scope of this essay. What I intend to discuss are the problems resulting from the following and similar situations. Suppose a testator has left his property to his "children", but that upon the testator's death several of his children have died leaving descendants. Will such descendants [3] be able to inherit the legacy to "children" and if so in what proportions? Would the results differ had the testator left the property to his "issue" or ordered that the property be divided "by roots" or "in equal shares" ? Would the results be the same if the

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[1] Should "John Smith" not be the testator's son, the question will arise whether the testator left him the property because he was John Smith, or because he was his son. There are a number of cases in which the testator left property to a named person, described also as the testator's wife, who in fact was not his wife: see *Russell* v. *Lefrançois* (1884) 8 S.C.R. 335 where the testator was ignorant of his wife's previous valid marriage (the problem of whether the rule for a son would be different is discussed); see *Trudeau* v. *Plouffe* [1944] S.C. 201 where the testatrix knew her marriage was invalid. The problem sometimes occurs that a person has named his wife beneficiary and is then divorced without changing his will; *Dunbar* v. *Murray* (1940) 78 S.C. 458; *Hubert* v. *Martin* [1951] S.C. 309 (dealing with an insurance policy); *Winer* v. *Great West Life Assuranee Co.* (1941) 79 S.C. 262 (also concerned with insurance.) See also R. Comtois, *Traité Théorique et Pratique de la Communauté de Biens* (Montréal, 1964). No. 238, p. 234.

[2] Albert Mayrand, "Adoption et successibilité", (1959) 19 R. du B. 409 pp. et seq.

[3] Assuming, of course, that we have decided whether such descendants are to include adopted children, children in gestation, and the like.

property was left not to the testator's "children" but to the "children" of a son, or brother or blood stranger? What will be the meaning of "children" or "issue" in such legacies as to "my **surviving** children" or "usufruct to my children, ownership to charity" or "to my **three** children", or "income to my **children** until the **youngest child** is 21 years when the principal shall belong to **my issue** by roots"?

Unfortunately the equivocal wording of the civil code and the uncertain state of the jurisprudence give few answers to these questions. Who will share a legacy to "children" or "issue" and in what manner it will be divided, are among the most troublesome questions of our legal system.

Chapter I

THE FAILURE OF THE CIVIL CODE

1. The conflict between articles 937 and 980.

Article 937 expounds a simple rule,

> "In substitutions, as in other legacies, representation does not take place, unless the testator has ordained that the property shall pass in the order of legitimate successions, or his intention to that effect is otherwise manifest".

However, article 980 offers an apparent contradiction,

> "In the prohibition to alienate, as in substitutions, and in gifts and legacies in general, the terms *children* or *grandchildren*, made use of without qualification either in the disposition or in the condition, apply to all the descendants, with or without the effect of extending to more than one degree according to the terms of the act".

These two articles are in evident need of interpretation and reconciliation. Are they complementary or independent? Are descendants more remote than children in the first degree permitted to inherit in virtue of article 980 because of the principles of representation or in virtue of other principles? If the term "children" does permit representation, are *all* the rules associated with representation to apply to art. 980, such as a by root division, limited representation among the "children" of collaterals (article 622 C.C.), etc., or will only some of these rules be applicable ? If article 980 does not introduce representation to wills, upon what principles is the article based; which descendants other than those in the first degree will be included in a legacy to "children" in virtue of these principles; how will a legacy to "children" be divided among them ?

Logic alone will not answer these questions. In such matters, as Justice Holmes once wrote, "a page of history is worth a volume of logic". In this respect common and civil law do not differ. Our civil code, as Walton has pointed out,[4]

> "is saturated with history, and in many parts is so extremely condensed, and expressed in such an abstract form, as to be hardly intelligible to anyone unfamiliar with the sources from which it is drawn... And, in some cases, words, which at the first glance might seem to be clear, may be shown to be equally susceptible of another meaning which is ... consonant ... with the old law".

Articles 937 and 980 are not the elegant products of some master logician. They are the organic and hence untidy results of centuries of experience; they are the particular solutions to particular problems which once plagued our legal system. Only when we understand the legal questions which concerned the theorists and practitioners of the past, will we know why the codifiers enacted these articles, which questions they were intended to settle, and which problems they left untouched. Only then will we know where history binds us, and where logic and social policy leave us free to interpret, develop and even innovate.

2. A look into the past.

Past experience, then, does not leave us free to roam at large in our interpretation of articles 937 and 980. If we would resolve the conflict between these articles, and understand the meaning of a legacy to "children", it is incumbent upon us to turn to the history of representation in wills, and the corollary history of the meaning of the term "children".

A) The law prior to 1747 — representation accepted.

Representation is a legal institution which enables the descendants of an ancestor deprived of his rightful inheritance by untimely death, to inherit what their ancestor would have taken had he been alive. It prevents one branch of an ancestor's family from being impoverished and prejudiced by an untimely demise, and it ensures the desire of most of us that our grandchildren not be disinherited should a child of ours predecease us.

Many legal systems have refused to admit representation to wills without the testator's express direction. They argue that since the

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[4] F. P. Walton, *The Scope and Interpretation of the Civil Code of Lower Canada* (Montreal, 1907), p. 93.

testator can easily provide for the descendants of a deceased beneficiary, a failure to do so should be interpreted as a rejection of representation and a desire to benefit the legatee personally, without regard to his family.

Roman law rejected testamentary representation.[5] However, the resulting exclusion of whole branches of the testator's family led the praetor to develop certain legal institutions which insured the inheritance of a deceased child's children.[6] Whether or not the term "liberi" *per se* ensured this result is uncertain, but most authors believe that it did.[7]

The various French customs diverged on the question of testamentary representation. Some customs, based on Roman precedent, rejected representation unless the testator expressly requested it.[8] However, many customs, including that of Paris did permit testamentary representation in certain cases, even without express testamentary command.

All customs agreed that where a beneficiary was named or otherwise clearly individualized only an express command would permit representation. However, the customs that permitted representation held that in a legacy to a class of persons "par nom collectif", such as to "ma famille" or "mes enfants" or "mes descendants" where the class members were not individually designated, representation would occur automatically.

Thus Bourjon[9] wrote,

> "La représentation n'a pas lieu dans les substitutions... à moins que la substitution ne soit en nom collectif, ou faite... en faveur des enfans du grevé"

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[5] Furgole, *Commentaire de l'ordonnance de Louis XV sur les substitutions* (Paris, 1767), p. 108; Lalonde, *Traité de Droit civil du Québec* (Montréal 1958), v. 6, p. 143; Thevenot d'Essaule, *Traité des substitutions fidéicommissaires*, ed. le juge Mathieu (Montréal, 1889), No. 990, p. 310.

[6] Thus in a substitution where the testator's child was the institute, and the substitutes persons other than that child's children, the praetor wrote into the will a condition that the property would pass to the substitutes only if the testator's child died without children. If the testator's child died leaving children the property was to pass to such children. See *Galliers* v. *Rycroft* [1901] A.C. 130.

[7] Under Roman law, if property was left to "liberi" the children of a predeceased child would inherit the legacy. By the term "liberi" the testator was deemed to include children *and* the children of a predeceased child.

[8] D'Aguesseau, *Questions concernant les substitutions avec les réponses de tous les parlemens et cours souveraines* (Toulouse, 1770), pp. 296, 297, 310.

[9] F. Bourjon, *Le droit commun de la France et la Coutume de Paris* (Paris, 1770), V. 2, No. 19, p. 174.

Similarly Guyné [10] indicated,

"Lorsque le testateur a laissé ses biens à sa famille *nomine collective*, tous les Auteurs conviennent, qu'il faut présumer, que son intention a été ... d'y admettre la représentation jusques aux enfans des frères".

And Ricard [11] stated that collective legacies included,

"Toutes les personnes qui jouissent, par la loi du pays, du droit de représentation".

The basis of such representation was that in using these collective nouns the testator was deemed to have intended his property to pass in the same manner as if he died intestate. The same persons who would have inherited had he died intestate would inherit a legacy to "descendants" or "famille" or "enfants", including those who could inherit a predeceased parent's share by representation.

"lorsque le fidéicommis est fait en termes généraux et collectifs... sans désignation particulière des personnes... la représentation devoit avoir lieu... savoir, que le testateur étoit présumé, en pareilles occasions, s'être voulu conformer à la Coutume" [12]

Bourjon [13] writes that a

"substitution... faite en général au profit des enfans du grevé..., la présomption étant que le testateur a modelé sa disposition sur la loi"

And Despeisses [14] writes:

"Mais le fidéicommis fait en faveur de plusieurs désignés par un nom collectif, comme d'enfans,... doit être réglé suiv. l'ordre des successions ab-intestat; ensorte que tous ... soient ... appellés ... suivant le même ordre qu'ils seroient appellés s'il étoit question de succéder ab-instestat... parce qu'on interprète... la volonté du défunt, ensorte qu'il ne se départe pas du droit commun".

Thus, by bequesthing his property to persons whom he described collectively, the testator was deemed to wish such bequest to devolve and be interpreted in the same manner as if he had died intestate, and hence permit representation to occur to the extent to which it was permitted in abintestate successions.

Not all collective nouns would permit representation. Only a specific few would have this result: "famille", "descendants", "siens",

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[10] Guyné, *Traité de la Représentation* (Paris, 1727), p. 177.

[11] Ricard, *Traité des Donations entre-vifs et testamentaires, traité III*, "Des substitutions", ed. Bergier (Riom, 1783) V. 2, No. 575, p. 347. See also Bourjon, *op. cit.*, V. 2, No 20, p. 175, who states: "La substitution étant faite en faveur des enfans du grevé, elle s'ouvre par son décès en faveur de tous les enfans... et même en faveur des petits enfans quoiqu'ils soient dans un subséquent degré... ainsi, en ce cas, la représentation y a lieu".

[12] Ricard, *op. cit.*, No. 676, p. 389.

[13] Bourjon, *op. cit.*, V. 2, No. 22, p. 175.

[14] Despeisses, *Oeuvres* (Toulouse, 1778), V. 2, p. 140.

"parents", "hoirs", "enfants".[15] Others collective nouns such as "fils"[16] "frères", "cousins" and the like were not deemed indicative of a desire to bequeath the property as on intestary and hence did not lead to representation. However, no theory was evolved to determine which words permitted representation, and which did not; some expressions remained in doubt.

The view that terms such as "children" should introduce representation to wills led to certain inequities and illogicalities to be discussed later in this essay. Thus towards the middle of the 18th century, certain commentators wishing to ensure that the family of a predeceased child would not be excluded from a legacy to "children", yet unhappy with the odd results of the admission of the rules of intestacy and representation to wills, suggested a new theory for benefiting a predeceased child's family. In fact, they rediscovered Roman law. They argued that the term "children" should enable descendants of a predeceased child to inherit the latter's share not because of representation, but because the term children had a technical legal meaning which enabled them to do so, as did the term "liberi" in Roman law. Unhappy with the theory that the term "children" introduced the rules of intestacy and representation to wills they rejected this notion and developed similar but not identical results on the basis of this "new" theory. However, the consequences of this "new" theory in

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[15] The view that the term *"enfants"* permitted representation was not unanimous. Ricard, *op. cit.*, No. 583, p. 349, and Bourjon, *op. cit.*, V. 2, No. 20, p. 175, believed that the term did permit representation. However, the *Procureur de Paris*, while admitting that such terms as "famille" and "descendants" resulted in representation, was more uncertain about the term "enfants". Legacies, he stated,

> "faites seulement aux enfans pourroient souffrir plus de doute, parce qu'on pourroit dire que sous ces termes les petits-enfants n'étant pas disertement compris, ils ne paroissent pas, suivant la volonté du substituant, capables de représenter leur père décédé". D'Aguesseau, *Questions concernant les substitutions avec les réponses de tous les parlements et cours souveraines*, (Toulouse, 1770), p. 303.

However, the *Procureur's* view is definitely a minority one; thus, see Ferrière, *Dictionnaire de droit et de pratique*, (Paris, 1740), Vol. 1, p. 792.

> "Dans les Testamens, le mot d'enfans comprend souvent les petits-enfans, parce qu'en fait de dernieres volontez, on leur donne une interprétation favorable, pour peu que l'intention du Testateur n'y paroisse pas contraire."

[16] While an occasional author suggested that the term "fils" would include "grand-fils" the best opinion was that the term meant only sons in the first degree, based on the reasoning that in Roman law "filii" did not have the same extended meaning that "liberi" did; c.f. Furgole, *Traité des Testaments* (Paris, 1779), V. 2, No. 125 p. p. 410; Ricard, *op. cit.*, No. 507, p. 335; Pothier, ed. Buguet, *Oeuvres* (Paris, 1861), V. 8, No. 72, p. 478; Caroli Molinaei [Charles Dumoulin], *Opera* (Paris, 1681), Vol. 1, No 15, Glosse 1, p. 259.

substitutions, and legacies to collaterals and strangers, differed from those of the previous theory. This newer view was championed particularly by Furgole and Guyot.[17]

However, this "new" view was not widely held, and there was little doubt that before 1747, if a predeceased child's children were to inherit his share in virtue of a legacy to "children" the basis of such inheritance was the importation of the rules of intestacy to wills. This was the rule of Paris.[18]

B) **The Innovations of 1747 — Representation rejected.**

In 1747 the *Ordonnance des Substitutions* changed the law completely. Representation was banished from wills throughout France, even in class legacies, so that bequests to "children", "family" and "descendants" were given a new meaning.

By 1747, the French law of substitutions was quickly approaching chaos. Whereas the testator might clearly indicate who was to inherit his property, there was usually some often misunderstood Roman rule, some ancient custom, or some opinion of a commentator which would lead some family member the testator never intended to claim the property. Certainty, a special necessity to the law of wills, was quickly disappearing to be replaced by a kaleidoscope of constantly shifting interpretations of Roman law, endless disputes between the commentators, continual unresolved conflicts between customary and Roman law, and a host of contradictory decisions unanchored by precedent, but based on the transitory sentiments of each individual judge as to what seemed logical or fair.

The *Ordonnance* not only attempted to unify the law of substitutions but to develop a law of testamentary interpretation based on order and certainty. In the words of the preamble it hoped to "prévenir les interprétations arbitraires par des règles fixes et uniformes" and so diminish "la foule de procès" which had plagued the previous system.

The method of the *Ordonnance* was to adopt a literal approach to will interpretation. The host of equitable, but uncertain rules of pre-

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[17] Furgole, *Traité des Testaments* (Paris, 1779) v. 2, No. 125, pp. 410 et seq. Guyot, *Répertoire Universel et Raisonné de Jurisprudence.* (Paris, 1784), v. 6, p. 720 et seq.

[18] We have seen the doubts of the *Procureur de Paris, supra* p. 73, note 15; however, as already observed, his view is in the minority; c.f. Bourjon, *op. cit.*, V. 2, No. 20, p. 175; Ricard, *op. cit.*, Nos. 503 *et seq.*, p. 335, and Nos. 663 *et seq.*, p. 387: *Lee* v. *Martin* (1857), 7 L.C.R. 351 at p. 358.

sumption and construction which had hitherto dominated will interpretation were discarded. The draftsman was obliged to indicate expressly and clearly who would inherit. He could no longer rely on court-made presumptions to achieve equitable results among the testator's family or to cover his drafting lacunae. He was obliged to express himself "d'une manière plus expresse".

Among the presumptions the *Ordonnance* abolished, was the rule that collective nouns such as "famille", "enfants", and "descendants" would introduce the rules of intestacy and so permit representation. The *Procureur de Paris* in his comments to the draftsmen of the Ordonnance had indicated the confusion which this rule had led to,

> "la difficulté de distinguer exactement les dispositions ou les expressions collectives, qui feroient présumer que le substituant a voulu se conformer à la Loi des successions ab intestat, et de celles au contraire où il a eu en vue des personnes fixes et certaines".[19]

He strongly recommended its abolition and at his suggestion article 21 of the *Ordonnance* forbade all presumptions of representation in wills, even in class legacies. A testator who wished representation to occur in the future would have to demand it expressly. Article 21 stated,

> "La représentation n'aura point lieu dans les substitutions, soit en directe ou en collatérale, et soit que ceux en faveur de qui la substitution aura été faite *y aient été appelés collectivement*, ou qu'ils aient été désignés en particulier, et nommés suivant l'ordre de la parenté qu'ils avoient avec l'auteur de la substitution, le tout, à moins qu'il n'ait ordonné par une disposition expresse que la représentation y auroit lieu, ou que la substitution seroit déférée suivant l'ordre des successions légitimes." [20]

The *Ordonnance* did not, however, put an end to all the problems of interpretation. Much like the man who in 1857 suggested closing the American Patent Office "because nothing was left to be done" the draftsman of the *Ordonnance* would have been surprised how much was left to do.

A meaning had to be attributed to terms such as "issue" and "family". Such terms could no longer mean "such beneficiaries as took upon an intestacy". However, it was evident that these terms

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[19] D'Aguesseau, *op. cit.*, p. 304.

[20] *Recueil Général des anciennes lois Françaises* (Paris, 1830), v. 22, p. 198. Emphasis added. It should be noted that the *Ordonnance* deals only with substitutions, and while the general rule was that the rules governing substitutions and legacies were to be the same, there is some doubt whether the *Ordonnance* applied to legacies other than those contained in substitutions. However, this problem does not exist in our law since both articles 937 and 980 apply to all substitutions and to all legacies.

could not be limited to descendants in the first degree. The commentators decided such terms should mean "that generation of descendants who were closest in degree to the testator".[21]

Descendants more remote in degree were to be excluded even if their father had predeceased the testator.[22]

Thus if a testator left his property to his "issue" and was survived by two children, and one grandchild (the latter being the child of a predeceased child of the testator), the estate would devolve in equal shares to the two children only. Similarly, if the testator was survived by three grandchildren (all his children having predeceased him) and one greatgrandchild (the child of a predeceased grandchild), the three grandchildren would be the sole beneficiaries. Moreover, since representation was rejected, the grandchildren would inherit in their own right and by heads; they would not share by roots as under the rules of representation and intestacy.

Oddly, the commentators extended this same meaning to the term "children". A legacy to children would now be limited to descendants in the first degree, but if no children survived the testator at all, it would enable the next generation to inherit under its aegis, to the exclusion of the descendants of any deceased member of such generation,

> "[dans un legs aux enfants] ... observez que les petits-enfants ne sont censés appelés qu'autant qu'il n'y a point d'enfants au premier degré" [23]

Thus, after 1747, representation was rejected in wills, and the meaning of such terms as "issue", "family" and "children" was narrowed to mean that generation of descendants closest in degree. This

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[21] This was the meaning that the customs which rejected representation before 1747 had given to these terms. These customs had never limited these terms to descendants in the first degree, but allowed grandchildren to inherit under their aegis provided no children in the first degree at all were surviving. D'Agueseau, *op. cit.*, p. 302 (discussing the custom of Toulouse).

[22] In the case of the term "family", of course if these were no surviving descendants in any degree, the term would mean surviving collaterals of the generation closest in degree to the testator.

[23] Thevenot d'Essaule, *op. cit.*, p. 298, No 945, footn. a. D'Essaule suggested that the terms "children" and "descendants" should be distinguished. He argues at pp. 302-303 that the term "descendants" should continue to have its old meaning and that grandchildren of the testator should be entitled to inherit their deceased parent's share even though other children of the testator were surviving; however Bergier (the editor of Ricard's works) disagreed with D'Essaule as to the extended meaning of "descendants". In view of the express wording of the Ordonnance, Bergier's opinion seems to be the better one; Ricard, *op. cit.*, p. 373, (ed. Bergier).

new rule became the maxim "en testaments les plus proches en degré excluent les plus éloignés". [24]

3. The Law of Quebec.

A. The Failure of the Codifiers.

The *Ordonnance des substitutions* was never registered by the Sovereign Council of Quebec, and so never formed part of our law.[25] The old custom of Paris continued in force until the codification. This does not mean that the legal system of Quebec, could not have adopted the law of the Ordonnance as part of its customary law. However, the pre-codification jurisprudence indicates that under the old law of Quebec the term "enfants" would introduce the rules of intestacy to wills and so permit testamentary representation [26] as under the law of Paris prior to 1747.

i) The problem of article 937

In 1866 the codifiers were faced with the problem of the extent to which to permit representation to wills, and the meaning to give to the terms "children", "issue" and "family". The codifiers had three choices. They could permit representation in legacies to "children"; they could follow the principles of the *Ordonnance des Substitutions* which rejected representation and limited the term "children" according to the maxim "les plus proches excluent les plus éloignés"; or they could adopt the theory suggested by Furgole and Guyot [27] which

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[24] Article 621 of the Civil Code of Quebec has a similar concept, *"La représentation n'a pas lieu en faveur des ascendants;* le plus proche dans chaque ligne exclut le plus éloigné." Emphasis added.

[25] *Barclay's Bank Ltd.* v. *Paton* (1934) 56 B.R. 481. P.-B. Mignault, *Le Droit Civil Canadien* (Montreal, 1895), v. 1, pp. 20 *et seq.*

[26] In *Dumont* v. *Dumont* (1862) 7 L.C.J. 12, the Court discussed but did not decide whether the term "children" would permit representation. However in the case of *Glackemeyer* v. *Cité de Québec* (1860) 11 L.C.R. 18, it was held that the term did allow representation. In the case of *Lee* v. *Martin,* the Superior Court, (1857) 7 L.C.R. 351, and the Court of Appeal, sub. nom. *Martin* v. *Lee* (1858) 9 L.C.R. 376, both held that the term did introduce representation. The case was ultimately appealed to the Privy Council, (1861) 11 L.C.R. 84, 4 Can. Rep. App. Cas. 46, which disposed of the case on another point, and so did not discuss at all the question of representation. However, the Privy Council did impicitly reject the view that the term "children" was to be interpreted according to post-1747 law.

[27] See *supra* pp. 73-74, and particularly *infra* pp. 97 and ff.

rejected representation but extended the meaning of the term "children".

Article 937 dealing with representation states,

> "In substitutions, as in other legacies, representation does not take place, unless the testator has ordained that the property shall pass in the order of legitimate successions, or his intention to that effect is otherwise manifest".

Unfortunately what the codifiers intended to achieve by article 937 is not quite clear. At first blush the article seems inspired by article 21 of the *Ordonnance*; the wording of the two articles is almost identical, and the Codifiers [28] quote article 21 as one of the principal [29] "authorities" [30] consulted in drafting article 937.

However, while article 937 is extremely similar to article 21 there are two important differences in wording which suggest that article 21 may not be the source of article 937.

Whereas article 21 demands that the testator's intention to permit representation be "*express*", article 937 asks only that his intention

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[28] *Reports of the Codifiers*, Fifth Report (Quebec, 1865), Article 191, p. 384. Lalonde, *Traité de Droit Civil du Québec* (Montreal, 1958) v. 6, p. 155, gives different sources, but he seems to be in error. C.f. McCord, *The Civil Code of Lower Canada* (Montreal, 1867), p. 151.

[29] The codifiers quote Ricard as the other principal "authority" of Article 937. Ricard admitted representation in legacies to children. However, the codifiers state that they have consulted him "avec modification". (Noto, however, that McCord does not state that Ricard is being used "avec modification"; McCord claims that his annotated Code is correct in regard to the citation of authorities quoted by the codifiers; McCord, *op. cit.*, "Preface to the First Edition", pp. iii-iv.) This cryptic phrase "avec modification" (if indeed it was used by the codifiers) is not explained, but it would appear that the codifiers are referring to the modification brought to Ricard's views by the editor of his works, namely, Bergier. Bergier wrote after 1747, and rejected representation in class legacies since this was the law after 1747; Ricard, *op. cit.*, ed. Bergier, pp. 370 *et seq.*

[30] The "authorities" for the articles in the Civil Code, namely the cases and authors referred to by the codifiers, are not really the *sources* of the articles. They are simply "the authorities consulted by the Commissioners, and nothing more"; McCord, *op. cit.*, Preface, p. iv. Indeed, some of the so called "sources" even oppose the views finally adopted by the codifiers. Moreover, these authorities are definitely not part of the article to which they refer; "the marginal notes and the references to existing laws or authorities at the foot of the several articles of the said Code, shall form no part thereof, and shall be held to have been inserted for convenience of reference only"; 29 Vic. c.41 s.1 *(Province of Canada)*; Walton, *op. cit.*, p. 77. However, if all the authorities consulted by the codifiers support the same view, as they apparently do in the case of article 937, this unanimity should be given some weight. Thus Walton notes that in cases of doubt "the references of the Commissioners are of the utmost value..." although "At the same time the references require to be used with judgment": *op. cit.*, p. 126.

be *"manifest"*.[31] Moreover whereas article 21 specifically states that class gifts will not permit representation, ("soit que ceux en faveur de qui la substitution aura été faite y aient été appellés collectivement"), article 937 does not expressly prohibit representation in class gifts. As the major purpose in enacting article 21 was to break with the old law and prohibit automatic representation in class legacies, the codifiers omission to follow the *Ordonnance's* explicit rejection of representation in class legacies seems significant, especially in view of the pre-codification Quebec jurisprudence admitting representation in legacies to "children" and the failure of the Sovereign Council to register the *Ordonnance* in Quebec.

Thus the wording of article 937, especially when viewed in the light of history, raises a difficult question. What exactly will be sufficient "manifest intent" to permit representation in wills? Will a class legacy to "children" be adequate evidence of such "manifest intent" as under the law prior to 1747, and as suggested by the pre-codification Quebec jurisprudence, or is some more explicit evidence demanded? Unfortunately the article gives no hint as to what the codifiers meant by "manifest intent" or what their purposes were in drafting article 937.

ii) The Conudrum of article 980.

Evidently the codifiers did realize that in drafting article 937 they did not settle the meaning of legacies to "children" or "family", for in articles 979 and 980 they attempt to define these terms, although for some reason they do not deal with legacies to "issue".

Whatever arguments may be raised to suggest that article 937 enables the term "family" to permit representation are quickly refuted by article 979. That article clearly states that the term will not permit representation in wills.[32] It adopts the law after 1747,

> "The term family when it is not limited, applies to all the relatives in the direct or collateral line belonging to the family, who come by successive

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[31] The French version of article 937 suggests more positive indicia of intent to permit representation than does the English version. In French, the article reads that representation will not occur unless a contrary intent is "manifestée". If the English "manifest" is read *eiusdem generis* with the expression, "ordained that the property pass in the order of legitimate successions", the English and French versions become more consistent, and article 937 may be considered more closely related to article 21 than a quick reading of the English version would suggest.

[32] The sources quoted by the codifiers make this completely clear; *Fifth Report*, pp. 397-8; art. 233-235.

> degrees according to law or to the order indicated, without however representation being allowed otherwise than in the case of legacies".

However, article 980 is not as clear. The article states,

> "In the prohibition to alienate, as in substitutions, and in gifts and legacies in general, the terms children or grandchildren... apply to all the descendants".

The codifiers do not state whether the descendants are to take by representation, or in virtue of the maxim "les plus proches excluent les plus éloignés" or according to the system advocated by Furgole and Guyot.[33] We can only guess at their intention. A strong argument may be made that article 980, like 979, adopts post 1747 law. The codifiers in their comments on article 829 c.c. strongly suggest this is the case,

> "In matters of inheritance the law calls to the succession certain persons in the place of others who are deceased. This right, known as representation,... [is based] upon the presumed affection of the deceased... it has not been extended to testamentary dispositions, as the same presumption no longer exists, even in the direct line, when the testator might have called the grand children or descendants in a clear manner to share in his succession, and has not thought proper to do so. Representation therefore does not take place in the matter of legacies".[34]

These comments are almost a direct translation of article 21 of the *Ordonnance.*

Moreover throughout history the import and theoretical basis of the terms "family" and "children" have been the same. Before 1747 both terms permitted representation; after 1747 neither did. It would seem doubtful that the codifiers would suddenly decide to innovate and differentiate the terms without comment, basing the definition of one term on the *Ordonnance,* and the other on the law it changed.

Moreover, article 979 states that the term family "applies to all the relatives ... *without however representation being allowed otherwise than in the case of legacies*". The emphasized phrase strongly suggests that the general principle applicable to all legacies whether to classes or individuals is that representation is not applicable, and that article 980 should not be interpreted as derogating from this universal rule without express language. This argument suggests that articles 937, 979 and 980 are based on the post 1747 system, or at the very least that article 980 rejects representation and either is based on post 1747 law or on the system suggested by Furgole and Guyot.

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[33] C.f., *supra* pp. 73-74, and particularly *infra* pp. 97 and ff.

[34] *Reports of the Codifiers,* Fifth Report (Quebec, 1865), art. 80, p. 167.

However, a strong argument can be made that article 980 is based on representation.

Article 979 states that the term family is to apply to all the relatives, *"without however representation being allowed otherwise than in the case of legacies"*. The emphasized phrase is not repeated in article 980. Does this not suggest that article 980, unlike article 979, does permit representation, and that the codifiers did intend to follow the old law of Paris in enacting articles 937 and 980, making specific and express exception in the case of a legacy to "family" ? Indeed the codifiers were aware of and indeed cite as a source of the article pre-codification jurisprudence which suggests that prior to 1866 a legacy to "children" would cause representation: and in commenting on article 980 the codifiers state, that,

> « Les règles adoptées sont regardées par les Commissaires comme étant celles du droit actuel. » [35]

In view of their knowledge of pre-codification jurisprudence, and in view of their comments that article 980 does not change pre-codification law, it would appear that the codifiers intended a legacy to "children" to permit representation. Certainly if they had intended otherwise they should have rejected representation more clearly. Any doubt as to their intention, in view of the foregoing, should be resolved in favour of the theory of representation.

A further argument may be made that the codifiers intended to reject the law introduced by the *Ordonnance*.

While the codifiers quote, as authorities for article 979, article 21 of the *Ordonnance* and those authors who adopt its views, the authorities given for article 980, namely, Ricard, Guyot, [36] and

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[35] *The Reports of the Codifiers*. Fifth Report, arts. 233-236, p. 198; *Martin* v. *Lee* (1857) 7 L.C.R. 351; (1858) 9 L.C.R. 376, is cited by the codifiers and favours the view that art. 980 introduces testamentary representation. Article 980 itself bears some similarity to a phrase of Ricard's, "Un fideicommis fait sous ce nom collectif *d'enfans* ... a autant d'effet que si le testateur s'étoit servi du mot *descendans*"; Ricard, *op. cit.*, p. 349, No. 583; and we have seen that Ricard adopts the position that the term "children" permits representation.

[36] *The Reports of the Codifiers*, Fifth Report (Quebec, 1865), p. 398, art. 236. The codifiers also refer to Pothier, *op. cit.*, v. 8, p. 509, and to Thevenot d'Essaule, *op. cit.*, Nos. 367 *et seq.* However, the sections of these authors referred to by the codifiers do not deal with the problem of representation; rather the sections quoted deal with other aspects of art. 980 to be discussed later. Pothier and d'Essaule, in other sections of their works, *which sections are not referred to by the codifiers*, do discuss whether the term "children" would introduce representation to wills. D'Essaule, who wrote after the enactment of the *Ordonnance*, of course adopts the position that the term "children" is to be interpreted according to the maxim "les plus proches excluent les plus éloignés" (*op. cit.*, No. 945, p. 298). Pothier also writing after the *Ordonnance*, suggests that the term

the case of *Martin* v. *Lee*[37] all favour the law prior to 1747. In striking contrast to article 979 the *Ordonnance des Substitutions* is not mentioned. This last argument, while it strongly suggests that the maxim « les plus proches excluent les plus éloignés » should be rejected, does not, however, show whether the codifiers approved the views of Ricard or Guyot, which, as we have seen, differ.

B. The jurisprudence.

What the codifiers really intended by articles 937 and 980 will always be impossible to answer definitively. However, the process of adjudication demands, as Justice Brandeis once stated, "that some questions be decided even if not answered".

The Quebec courts have decided that article 980 is not based on post-1747 law; however, they have as yet failed to decide whether a legacy to "children" introduces the principles of intestacy and representation to wills, or is based on the views rejecting representation advocated by Guyot. Since each theory has differing consequences; the failure of the jurisprudence to decide means that legacies to "children" raise many questions to which there are as yet no answers.

"children" means only children in the first degree, so that, if no children in the first degree were to survive the testator but grandchildren did survive him, according to Pothier such grandchildren would not be able to inherit in virtue of the term. This last view is clearly erroneous and does not represent a correct view of the law either before or after 1747; Pothier, *op. cit.*, v. 8, p. 477, No. 66. Des Rivières Beaubien, *Traité sur les lois civiles du Bas-Canada* (Montreal, 1832) v. 2, p. 160, agrees with Pothier, but he is generally believed to have copied Pothier's views rather than to have seriously examined the law. Thus it would appear that the only authorities cited by the codifiers on the question of whether the term "children" permits representation are Guyot and Ricard, both of whom favour pre-1747 law, and the case of *Martin* v. *Lee*, where the Privy Council implicitly accepted the pre-1747 law and the lower courts definitely accepted it. The codifiers' citation of this case is important in the author's opinion, for, as Walton observes "Sometimes the Commissioners cite a case in their note... When it appears that they cite it in support of the article this will give to the case a high degree of authority." *Op. cit.*, p. 129.

[37] *Lee* v. *Martin*; *Martin* v. *Lee*, (1857) 7 L.C.R. 351; (1858) 9 L.C.R. 376; (1861) 11 L.C.R. 84. This case was appealed as far as the Privy Council; the Privy Council did not deal with the question but implicitly accepted the view that pre-1747 law would be admitted to Quebec. The lower courts all accepted the view that representation would occur in a legacy to children and the Privy Council did not disagree with this view of the law prior to 1747. The codifiers quote all three decisions; namely, those in the lower courts and that of the Privy Council; c.f. McCord, *op. cit.*, p. 159.

i) The rejection of post 1747 law.

While a few early decisions [38] have adopted the view that articles 937 and 980 are based on article 21 of the *Ordonnance des Substitutions*, these decisions have now been over-ruled by modern Quebec jurisprudence [39] and unanimously rejected by Quebec doctrine.[40] Since the Supreme Court decision of *Bernard* v. *Amyot-Forget* [41] there is no doubt that our law has rejected the maxim « les plus proches excluent les plus éloignés », and that it is settled law that if a testator leaves his property to his "children" and is survived by children in the first degree, and by grandchildren who are the descendants of predeceased children in the first degree, such grandchildren will inherit in virtue of the term "children".

ii) The failure to decide if article 980 is based on representation.

Unfortunately, while the courts have definitively rejected post 1747 law they have failed to indicate which of the two theories advocated prior to 1747 is gain currency; that of Ricard admitting representation and the rules of intestacy to wills, or that of Guyot rejecting them. In other words, the courts have failed to properly reconcile articles 937 and 980, and decide whether article 980 permits representation in wills.

Some cases [42] and virtually all the Quebec authors [43] have suggested that a legacy to "children" should introduce the rules of

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[38] *Castonguay* v. *Beaudry* (1869) 1 R.L. 93: *Joubert* v. *Walsh* (1885) M.L.R. 1 S.C. 85 (where however the court held that the result would have been the same had it allowed representation, since in this case the testator was survived by only one grandson); *Laferrière v. Lavallée* (1904) 10 R. de J. 128; in *Lebeau* v. *Benoit* (1920) 57 S.C. 123 in an *obiter* it was suggested that the *Ordonnance des Substitutions* did not change the law of Quebec; this latter view has some foundation if one accepts the doubts of the *Procureur de Paris* that the collective term "children" did not lead to representation; c.f. d'Aguesseau, *op. cit.*, p. 303.

[39] *Brunette* v. *Peloquin* (1871) 3 R.L. 52; *Marcotte* v. *Noël* (1880) 6 Q.L.R. 245; *Beaudin* v. *Beaudin* (1927) 65 S.C. 517; *Deguire* v. *Groulx* (1910) 38 S.C. 158; *Plouffe* v. *Lapierre* (1917) 52 S.C. 151; *Préfontaine* v. *Dillon* (1922) 33 K.B. 314; *Fredette* v. *Begnoche* [1957] S.C. 473; *David et Autres* [1963] S.C. 305; c.f. also *Meincke* v. *Brown* [1958] S.C. 293 where the court by way of *obiter dictum* agreed with this view of art. 980 C.C.

[40] Mignault, *op. cit.*, v. 5, pp. 25 *et seq.*; Langelier, *Cours de Droit Civil* (Montreal, 1907) v. 3, pp. 262 and 329; Lalonde, *op. cit.*, v. 6, p. 153; Billette, *Traité théorique et pratique de Droit Civil Canadien* (Montréal, 1933), No. 765, p. 663; R. Comtois, *"Le sens du terme "enfants" dans les dispositions à titre gratuit"* (1964), 14 *Thémis* 36.

[41] [1953] 1 S.C.R. 82.

[42] See the cases referred to below at p. 87, note 51[a].

[43] See the authors referred to below at page 87.

intestacy to wills and hence permit representation.* They argue that a legacy to "children" is a sufficient manifest intention of the testator's desire that the property pass in the order of legitimate successions, as demanded by article 937, to permit representation. According to this view articles 937 and 980 are to be read together as forming one continuous concept, such that, when article 937 states that representation will not be admitted to wills unless,

a) The testator expressly ordains that the property is to pass in the same manner as on intestacy, or,

b) indicates a manifest intention to that effect,

Article 980 adds a third exception

c) or, unless the term *children* is used. [44]

However, other cases have adopted the views of Furgole and Guyot that a legacy to "children" is not introductive of the rules of intestacy

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* *Throughout this essay I will sometimes state that article 980 is based on the rules of representation; when this is done the reader should always bear in mind that this is a shorthand device by which is meant that the term "children" permits representation to occur among the recipients because the term "children" is deemed introductory of all the rules of intestacy and all its consequences.*

[44] Article 21 of the *Ordonnace des Substitutions* stated that representation would occur if there was an express desire

a) to permit representation, or

b) to follow the order of abintestate successions.

Article 937, however, states that representation will occur if there is an express *or* a manifest desire.

a) to follow the order of intestate successions.

Thus article 937 much more than article 21 of the *Ordonnance* clearly demonstrates that the occurence of testamentary representation is a *consequence* of the introduction of the rules of intestacy to wills, rather than a separate and distinct institution which might occur in wills apart from the other consequences of an intestate succession. The French version of the article makes this quite clear,

> "La représentation n'a pas lieu... à moins que le testateur n'ait ordonné que les biens seraient déférés suivant l'ordre des successions légitimes, ou que son intention *au même effet* ne soit autrement manifestée" (italics added).

Therefore, if the term "children" permits representation to occur as a third exception to the prohibition against testamentary representation laid down in 937 C.C., it is only because the term "children" introduces the rules of intestacy to wills, and not because the term "children" introduces the institution of representation without the other effects of the abintestate succession (such as a "by root" division in certain circumstances). Of course, the history of the problem of testamentary representation makes this point quite clear without any need of indirect support from article 937. There is no doubt historically that the term "children" introduced *all* the rules of intestacy to wills, and that representation was simply one of these rules, albeit the most important one.

and representation to wills.[45] Since these cases accept the law prior to 1747 as the basis of 980, they agree that if a testator is survived by children, and by grandchildren who are the children of predeceased children of the testator, that such grandchildren can inherit their deceased parent's share in virtue of a legacy to "children". However they argue that the reason such grandchildren inherit is not because they represent their parents as on intestacy, but because the term "children" includes them under its aegis by definition; in other words, they are "children" within the technical legal meaning of that term. According to this view articles 937 and 980 are separate and distinct. Article 937 alone deals with representation and rejects it. The purpose of article 980 is to simply define the term "children" without regard to representation, which article 937 has already rejected. Thus when article 980 gives to the term children a meaning broader than "descendants in the first degree" and broader than "the generation of descendants closest in degree to the testator" it enables the descendants of a predeceased child to inherit their father's share not by representation, but simply because the children of a predeceased child are deemed to be included in the technical legal term "children". According to this view grandchildren or more remote descendants inherit not by representation and according to the rules of intestacy, but in their own right, because they are "children" and according to the special rules and principles particular to the legal institution which article 980 creates and which has nothing to do with representation or the rules and principles of intestacy.

While at first blush the theoretical basis of 980 C.C. seems of interest only to pedants, it is evident that it will be extremely important to decide whether or not article 980 introduces the rules of intestacy and representation to wills. The answer will have practical importance in many areas.

First, it will decide whether in a legacy to the "children" of a person who is related to the testator in the collateral line or in any way other than by being a direct descendant, or in a legacy to the "children" of a person not related to the testator at all, grandchildren not permitted to inherit under the rules of intestacy will be included as "descendants" in virtue of the term "children".

Second, it will decide whether in such legacies as "to my grandchildren" or "to my issue" the legacy is to be divided by roots according to the rules of abintestate succession or by heads according to the rules of ordinary legacies.

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[45] See the cases referred to on pages 101-102, below.

Third, such common expressions as "with representation in favour of", "by roots", "in equal shares", and "my issue" and other similar expressions will take on very different meanings depending on which view of 980 C.C. is adopted.

To these problems we will now turn.

Chapter II

PROBLEMS IN LEGACIES TO COLLATERALS AND STRANGERS AND IN THE SUBSTITUTION

Suppose that a testator leaves his property to "the children of my brother". If several children of the brother survive the testator, but a child of the brother has predeceased the testator, leaving children surviving him, will such brother's grandchildren inherit the legacy ? Similarly if the testator had left his property "to the children of my friend John" could John's grandchildren inherit the share of their deceased parent even though some of John's children have survived the testator ?

The answer to these questions depends on the theoretical basis of article 980.

If a testator who uses the term "children" is deemed to include grandchildren only because he is presumed to follow the rules of abintestate successions then the above described grandchildren should be excluded.

If, on the other hand, article 980 allows grandchildren to inherit their deceased parent's share in their own right and not according to the rules of intestacy and representation then such grand-nephews of the testator and such grandchildren of the testator's friend will be able to inherit in virtue of the term "children".

1. The view adopting representation.

A) The historical and jurisprudential basis of the view.

We have seen that most French authors who wrote prior to 1747 believed that the term "children" would permit representation in wills because the term was deemed introductive of *all* the rules of intestacy to wills.

Thus Ricard writes,

> « lorsque le fidéicommis est fait en termes généraux et collectifs... sans désignation particulière des personnes... la représentation devoit avoir lieu... savoir, que le testateur étoit présumé, en pareilles occasions, s'être voulu conformer à la Coutume.» [46]

and numerous authors agree with him. [47]

This view of the ancient French authors has been unanimously adopted by modern Quebec doctrine. Thus Mignault indicates,

> «... les articles 937 et 980 n'offrent rien de contradictoire;... Le législateur définit le mot *enfants*. Il s'applique à tous les descendants, dit-il; c'est tout comme si le testateur s'était servi du mot *descendants*... Il me semble qu'on ne saurait manifester d'une manière plus évidente sa volonté de déférer ses biens suivant l'ordre des successions légitimes, que d'y appeler des descendants.» [48]

and Lalonde, [49] Comtois, [50] and Faribault [51] all agree with him.

There has also been much jurisprudential support for this position; [51a] however this jurisprudential support is far from conclusive.

Firstly, the jurisprudential acceptance of this position has only been by way of *obiter dicta*. All the cases favouring the adoption of testamentary representation as on intestacy concerned only legacies to direct descendants of the testator. In such legacies the results would have been exactly the same had the court rejected the importation of the rules of intestacy to wills and based article 980 on the theories advocated by Furgole.

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[46] Ricard, *op. cit.*, No. 676, p. 389.

[47] C.f. Despeisses, *op. cit.*, v. 2 p. 140 *et seq.*; Bourjon. *op. cit.*, v. 2 No. 20 p. 175; c.f. also Ricard, *op. cit.*, No. 575, p. 347. At first sight Ricard appears to be restricting his comments to the terms "family" and "descendants"; however, it is clear from the examples given that these terms are only examples of the general principle that numerous collective terms including "children" lead to representation. C.f. also Ricard, *op. cit.* No. 512 p. 336. In the case of *Martin* v. *Lee* (1857) 7 L.C.R. 351 at p. 358, the Court, after a lengthy analysis of ancient law, states that "the general unanimity of authority applicable to the principle of representation is equally strong in its application to the general or collective term *all my children* used in the bequest".

[48] Mignault, *Le Droit Civil Canadien* (Montreal, 1901) v. 5, p. 28.

[49] Lalonde, *op. cit.*, vol. 6 p. 153.

[50] Comtois, (1964) 14 *Thémis* 37 at p. 43, writes, "nous estimons préférable l'opinion de la majorité des auteurs suivant laquelle les petits-enfants d'un enfant prédécédé prennent... par l'effet de la représentation."

[51] M. Faribault, *Traité théorique et pratique de la Fiducie* (Montreal, 1936), p. 255.

[51a] *Fredette v. Begnoche* [1957] SC 473; *Plouffe v. Lapierre* (1917) 52 SC 151, especially the views of Archambault, C.J.; *Brunette v. Peloquin* (1871) 3 RL 52; *Bernard v. Amyot-Forget* [1952] BR 89 at 99 (the views of Barclay, J.); *Drouin v. Hénault* (1939) 57 BR 101 at pp. 112-3; *David et Autres* [1963] SC 305.

Secondly, as we will see later in this chapter, there is much jurisprudence which support Furgole's views.

Thus, while it is evident that there is strong support for the view that a legacy to "children" should be interpreted according to the rules of intestacy, this support is neither unanimous nor conclusive. We still await a definitive answer from the courts.

B) Consequeuces in the direct line.

The consequences of the view that article 980 permits the testator's descendants, other than those in the first degree, to inherit a legacy to the testator's "children" according to the rules of intestacy and representation are obvious.

Article 620 states,

> "Representation takes place without limit in the direct line descending; it is allowed whether the children of the deceased compete with the descendants of a predeceased child, or whether all the children of the deceased having died before him, descendants of these children happen to be in equal or unequal degrees amongst themselves."

If article 980 is deemed to introduce the rules of intestacy to wills, representation will take place indefinitely and unrestrictedly in a legacy to "children" in the direct line, the whole as provided in article 620.

The rules of article 620 will be applicable to all legacies to "children" in the direct line whether such children are left property as absolute owners, usufructuaries, naked owners, institutes or beneficiaries under a trust. The only exception will be in some legacies to "children" of the testator who are the substitutes in a fiduciary substitution. We will discuss this exception at length in another section.

C) Consequences in the collateral and non-related lines

In legacies in the testator's collateral line, such as "to my brother's children", the view that the term "children" is introductory of representation to the extent that it would occur in abintestate successions will severely restrict the descendants of a collateral's deceased child who can inherit in virtue of the term "children".

Article 622 states,

> "In the collateral line representation is admitted only where nephews and nieces succeed to their uncle and aunt concurrently with the brother and sister of the deceased."

If then, in a legacy to "my brother's children", one of the brother's children predeceased the testator, leaving children of his who survive the testator, article 622 C.C. would prevent such grandchildren from inheriting the legacy to "children". Indeed, the grandchildren of a brother would be able to inherit a legacy to "children" in the collateral line only if all the brother's children had predeceased the testator. In such a case they would be called in accordance with the laws of intestacy, in their own right and by heads, and not by representation and by roots.

Thus, in a legacy to "children" of any relative other than a direct descendant, the term "children" will be limited to descendants in the first degree, unless no descendants in the first degree are surviving, in which case the next surviving generation will be included under its aegis and inherit by head. [52]

This, of course, was the view of ancient law,

> « Et si la substitution est faite par un collatéral ou étranger, les enfans en premier degré sont préférés aux descendans des enfans prédécédés... parce qu'en succession des collatéraux, il n'y a pas lieu de représentation, outre les enfans des frères.»[53]

and there is little doubt that it will be our law if article 980 is based on representation as permitted on intestacy. The rule restricting the meaning of a legacy to "children" who are not direct descendants of a testator will apply to all legacies except a substitution in which the "children" of the institute are fiduciary substitutes. In this latter case, although the "children" are collaterals of the testator, the above principles will not apply; such children will inherit in virtue of a special rule to be discussed in the next section.

There are as yet no Quebec cases deciding to what extent descendants of a predeceased child can inherit a legacy to the "children" of collaterals. However, the case of *Meredith* v. *Meredith* [54] is most instructive of the courts' probable attitude (assuming of course that

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[52] Of course, this analysis assumes that the rules of intestacy are to be followed as if the *testator died* intestate; this was the ancient law as we will see below. In a legacy "to my brother's children", it may be argued that the rules of intestacy should be considered as if the *brother* died intestate and, therefore, grandchildren could inhert by representation since they can be considered as *descendants of the brother*. This interpretation, while logical, was rejected by ancient law and should not form part of our law. In all legacies to the "children" of any person including the testator, such legacies must be interpreted as if the *testator* had died intestate and representation will only be permitted if it would have been permitted on the *testator's* intestacy.

[53] Despeisses, *op. cit.*, v. 2 p. 141; c.f. also Montvalon, *op. cit.* v. 2 p. 180; Ricard, *op. cit.*, No. 690 p. 391; d'Aguesseau, *op. cit.* p. 294-95.

[54] *Meredith* v. *Meredith* (1939) 66 B.R. 572 (P.C.).

article 980 is based on representation to the extent permitted by articles 620-623 C.C.). The case concerned a legacy to "my husband's nephews and nieces (immediate heirs)". Since the court was not interpreting a legacy to "children" or even to "heirs" the decision is not too relevant to our problem. However, it does indicate to this author the only reasoning a court could adopt in interpreting a legacy to the "children" of collaterals, assuming of course that article 980 is based on representation to the extent permitted by the rules of intestacy,

> "... *inasmuch* as the descendants of nephews and nieces cannot represent their fathers or mothers in an inheritance from their great-uncle or great-aunt (art. 622). It would seem, as is pointed out in Mignault Vol. 3, p. 309, that in the view of the Civil Code, the affection of an uncle or aunt is not supposed to extend further than his or her nephews and nieces..." [55]

As for a legacy to the "children" of a person not related to the testator such as "to my friend's children" there is no doubt that in such a legacy even if all the descendants in the first degree predeceased the testator leaving children who survived him the legacy would not pass to such grandchildren but would lapse. If remoter descendants are permitted to inherit a legacy to "children" only because the term introduces the rules of intestacy to wills it is obvious that in legacies to the "children" of strangers the term must be restricted to descendants in the first degree only. Again this rule would suffer one exception; namely, the case of the fiduciary substitution in which the substitutes are "children" of a friend of the testator and that friend is the institute.

D) Consequences in the substitution.

We have seen the various meanings of the term "children" in legacies in the direct, collateral and non-related lines, assuming that article 980 introduces the rules of intestacy to wills. However the above meanings suffer one exception, namely, the fiduciary substitution in which the substitutes are described as "children". In such legacies, again assuming article 980 is based on the rules of intestacy, the grandchildren of collaterals and strangers will sometimes be permitted to inherit a legacy to children by representation even though in other legacies the ordinary rules of intestacy would bar them. In certain cases the testator's direct descendants not in the first degree who would normally inherit by representation may be excluded entirely from the inheritance. Thus in substitutions the meaning of

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[55] *Ibid.* p. 575, per Lord Maugham, L.C.

the term "children" often differs from its meaning in ordinary legacies.

This exceptional meaning of "children" in substitutions is not based on a refusal to apply the rules of intestacy and representation to the substitution. On the contrary all authors agree that, once the term "children" is deemed introductory of the principles of intestacy, the rules of representation should apply to *all* legacies, including the substitution, and article 980 admits to no other interpretation. The exceptional rule is based on the theory that in a substitution the rules of representation and intestacy are to be considered as if the *institute* died intestate, and not the testator.

This exception is grounded in ancient law. If we accept the rule of ancient law that the term "children" permits representation, then we must take the exception along with the rule, and admit that in substitutions, representation is to be considered from the point of view of the institute and not the testator.

aa) The substitution in ancient law.

i) The Collateral and nonrelated lines.

If a testator left his property to his brother (or to his friend) and then to the latter's "children", several authors, such as Ricard,[56] suggested that the testator really intended to benefit his brother's family as his brother would have done had the brother made the will and left the property to his own children. While not denying that the term "children" introduced the laws of intestacy, Ricard suggested that the laws of intestacy should be considered as if the brother had died without a will and not the testator. If the brother was considered as dying intestate, the brother's grandchildren from the brother's viewpoint were *descendants* and hence allowed to take by representation, even though from the testators point of view they were collaterals and excluded from representing.

Ricard moulded these views into a rule; namely, that in a substitution the relationship was to be considered from the institute's point of view and not the testator's.

Thus in a substitution in which the institutes were friends or collaterals of the testator, and the "children" of such friends or collaterals the substitutes, representation would take place without limit among the "children of the institutes", owing to the application of

[56] Ricard, *op. cit.*, p. 391, Nos. 690 *et seq.*

the rules of representation as if the institute died intestate and not the testator.[57]

However, this exception to the general rule (namely that in substitutions to "children" the rules of intestacy were to be considered as if the institute died intestate and not the testator) applied only to substitutions. In all other legacies, including usufructs, the general rule still applied, and the rules of intestacy were considered from the testator's viewpoint.

Ricard gives an example of a usufruct to the testator's sister with naked ownership to her children. He pointed out that in such a case, the rules of intestacy are to be followed from the testator's point of view so that the grandchildren of the sister (grandnephews of the testator) could not inherit with his sister's children (nephews of the testator).[58]

Ricard's position was widely adopted,[59] but never unanimously.[60] The various customs adopted differing positions, but Paris adopted the Ricardian system. The ordonnance of 1747 also apparently adopted his views.[61]

However, even among the authors who accepted Ricard's views there were refinements. Bourjon [62] stated that in a substitution the exception would only apply if the substitutes were not related to the testator; otherwise the relationship was to be considered from the testator's viewpoint.

> « il faut distinguer si le légataire est parent ou étranger au testateur; ... S'il est étranger, la substitution est au profit du plus prochain parent

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[57] The principle of considering relationship from the institute's point of view was a general principle in ancient law; c.f. d'Aguesseau *op. cit.*, questions 31-2, pps. 325 *et seq.*, at p. 326: "le fidéicommis doit être recueilli par le plus proche de l'héritier grevé, et non pas par le plus proche du testateur", c.f. also Article 22 of the *Ordonnance des substitutions;* « Dans les substitutions auxquelles les filles sont appelées au défaut des mâles, elles recueilleront les biens substitués dans l'ordre qui aura été réglé entre elles par l'auteur de la substitution; et s'il n'a pas marqué expressément ledit ordre, celles qui se trouveront les plus *proches du dernier possesseur* desdits biens, les recueilleront en quelque degré de parenté qu'elles se trouvent, à l'égard de l'auteur de la substitution ». See also *Ricard op. cit.* no. 690, p. 391; d'Essaule, *op. cit.*, pp. 308-309, nos. 983-988.

[58] Ricard, *op. cit.*, p. 391, Nos. 690 *et seq.*

[59] Ricard, *op. cit.*, ed. Bergier, pp. 370 *et seq.*; Montvalon, *Traité des Successions*, Vol. 2, pps. 179 et seq., (Paris), éd. 1786).

[60] Ricard, *op. cit.*, p. 391, No. 691; and p. 343, No. 551. Bergier, *Ricard's* editor, points out that a controversy existed, and Furgole, a century later, indicates that it was not resolved: Furgole, *Traité des Testaments* No. 125, p. 413. D'Aguesseau, *op. cit.*, pps. 294 *et seq.*, indicates the varying views of the customs.

[61] Ricard, *op. cit.*, pps. 371 *et seq.* (Bergier's views.)

[62] Bourjon, *op. cit.*, v. 2, pp. 166-7, Nos. 66-68.

> grevé; c'est ce qu'il faut conclure d'une telle substitution, dont le testateur a chargé un homme qui n'a aucun lien de sang avec lui; ainsi en ce cas le mot de *famille*, doit se rapporter, non à lui testateur, mais à celui qu'il a honoré... Mais s'il est parent du testateur, elle appartient au parent du grevé, plus prochain du côté et ligne du testateur; ...» [63]

However, Bourjon's views appear isolated; his views moreover should be rejected, since logically there is no good reason why the children of strangers should be treated more favourably than children of collaterals and on a par with those of descendants.

ii) The direct line.

The attempt to allow descendants of a brother to inherit a substitution by formulating the rule that in substitutions the relationship was to be considered from the institute's point of view led to a further complication. Suppose a testator left his property to his son, with provision that should his son die without children the property would pass to all the testator's grandchildren by way of substitution. Suppose the son enjoyed the property for several years, and then died without children, survived by several nephews (grandchildren of the testator), and the children of a predeceased nephew. The children of the predeceased nephew of the testator's son although the descendants of the testator (that is, his great grandchildren) would be grandnephews of the institute, (the son). Since the laws of intestacy in a substitution would be considered from the institute's point of view, the children of the predeceased nephew, although the great grandchildren of the testator, would be unable to inherit since they were collaterals of the institute beyond the heritable degree in this respect. Ricard followed his rule (of considering relationships from the institute's viewpoint) to its logical conclusion. He stated that the great grandchildren of the testator who were collaterals of the intitute would be unable to inherit by representation.[64]

This solution, while logical seems odd; it is perhaps the result of logic running away with itself, rather than the result of any attempt to approximate the rules of will interpretation to the desires of the testator.

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[63] Bourjon quotes Ricard as the authority for this theory. Actually Bourjon appears to misunderstand Ricard. The passage of Ricard that Bourjon cites deals with a problem other than that discussed above. Bourjon has taken a phrase out of context; c.f. Ricard, *op. cit.*, No. 554 sq., pp. 343-344; and No. 691 p. 391; c.f. also Pothier, *op. cit.*, v. 8 Nos. 75 & 76, pps. 479-80, who further indicates the real sense of the phrase of Ricard that Bourjon has taken out of context.

[64] Ricard, *op. cit.*, No. 688 sq., p. 391.

We have seen Bourjon's attempt to circumvent this untoward result.[65] He maintained that only if the substitutes were not related to the testator would the laws of intestacy be considered from the institute's point of view. However, it appears that his views were rejected by ancient law, and the author believes they should be rejected by our law.

Furgole, although dealing with a different but related problem,[66] suggests a more logical method of *circumvention*. The rule that in a substitution the rules of intestacy are to be considered from the institute's point of view but in all other legacies from the testator's point of view is not an inflexible law of public order, but a simple rule of presumption of the testator's intention. The testator is free to indicate a contrary desire either expressly or tacitly. If the testator in a legacy of absolute ownership to A's children were to order that the property be divided as if A had died intestate he would have expressly abrogated the rule. Furgole argued that if a testator were to leave his property to "my son and after his death to my grandchildren" the expression *"my grandchildren"* would indicate an intention to follow the testator's rules of intestacy and not the institute's. In other words, once the testator indicated by some expression that he was concerned with the family of the testator, the relationship and the rules of intestacy and hence of representation should be considered as flowing from the testator and not the institute; only if there was no strong indication to the contrary would the inflexible rules of the Ricardian system apply.[67]

The Furgolian system is certainly consistent with the general theory of will interpretation; while it is true that the earlier authors adopt a more inflexible position as to the rules to be followed, given the inherent logic of the system and its consistency with their views it is quite possible a court might consider its adoption in Quebec.

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[65] *Supra*, pp. 92-93 of this article.

[66] This section is based on the assumption that the term "children" introduces representation into wills. Furgole did not accept this view. However, the problem of whether beneficiaries were to be considered as related to the testator or the institute arose in many areas of ancient law aside from the field of representation. It was a general problem, of which the question, to whom persons would be related so as to permit representation, was but one aspect. Furgole is, of course discussing the general problem; his solution, although for another problem, is however very relevant to our discussion.

[67] This suggested rule of presumption applies only to the problem of indicating in a *substitution* from whose point of view the intestacy is to be considered. Thus in a simple legacy "to the children of my sister", the fact that the children are indicated as being related to the sister does not mean that the sister's grandchildren could take in virtue of the term "children".

iii) The substitution to persons both in the direct and collateral lines.

One problem not discussed in ancient law is a substitution in which the institutes are several persons, and the substitutes *all* the "children" of *all* the institutes.

Suppose a substitution "to my children in the first degree, and on the death of the last child in the first degree, *to all their children*". Further suppose that the testator left three children, A, B, C, and that when the last child, C, died, there were surviving two children of A and one grandchild of A (the child of a predeceased child of A), three children of B, one child of C and one grandchild of C (the child of a predeceased child of C). Thus on C's death the substitutes are two descendants of C, five nephews of C, and one grandnephew of C. How will these persons share ? Will they be considered from C's point of view in which case the grandnephew would be excluded as being a collateral not permitted to inherit on intestacy, or should they be considered from the viewpoint of all the institutes as a class of ancestors, such that all the substitutes will be considered descendants and permitted to inherit ? The last view seems preferable. However ancient law did not discuss this question at all.

bb). The substitution in Quebec law.

As far as Quebec jurisprudence is concerned there are only two cases which refer to the problem of from whose point of view the intestacy is to be considered; both cases do so in a cursory manner.

Joubert v. *Walsh* suggests by way of *obiter dictum* that the rules are to be considered from the testator's viewpoint only, even in a substitution; but the basis of its reasoning appears erroneous.[68] In *Armand* v. *Armand* [69] Sir Alexandre Lacoste for the Court of Appeal made passing reference to the problem in the following manner.

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[68] *Joubert* v. *Walsh* (1885) M.L.R. 1 S.C. 85; it is argued that the rule formulated by Ricard applied only when the testator used the term "family", and did not apply when the term "children" was used. The argument is based on the fact that in discussing the problem Ricard gave examples where only the term "family" was used. However, if one reads Ricard carefully, it becomes apparent that the terms "descendants", « famille », and « enfants » are used interchangeably as examples of the legacy *nomine collectivo*, to avoid repeating a long list of terms. Ricard's views apply to *children* as well. This becomes clear specially at Ricard, *op. cit.*, No. 674 p. 389, and No. 690 p. 391; also, p. 399 No. 526 and p. 349 No. 583.

[69] *Armand* v. *Armand* (1898) 7 B.R. 356 at pp. 360-361.

« Soit que l'on envisage le legs en rapport avec la succession *du testateur* ou en rapport avec celle *du grevé.* » (Emphasis added)

The codifiers might have rid us of the troublesome and metaphysical distinctions to which French law prior to 1747 was falling prey. Unfortunately they did not. Indeed they do not even allude to these problems. In enacting article 937 they stated with deceptive simplicity that representation would occur if the testator ordered property to pass "in the order of legitimate successions". They did not indicate whose order of legitimate succession was to be considered, nor did they lay down any rules for determining whether the testator intended his order of legitimate successions, the institute's or any other person's. In the absence of any specific intention on their part to the contrary, it would seem that the ancient French law prior to 1747 should prevail, and that the metaphysics of the Ricardian system are part of our law.

If we then adopt the viewpoint of the majority of French authors and cases prior to 1747 that the term "children" introduces representation into wills, we must conclude that in all legacies (including usufructs), other than substitutions the rules of intestacy are to be considered from the testator's point of view and that descendants of the "children" of collaterals and strangers of the testator will be unable to take by representation. However, in the substitution (including trusts which create substitutions) [70] the rules of intestacy are to be considered *from the institute's* point of view and hence descendants of the "children" of collaterals and strangers will be able to take by representation provided they are descendants of the institute. Moreover in the substitution, descendants of the testator who are remote collaterals of the institute will be excluded from representing. However, it is possible that in a substitution when the testator uses terms clearly relating the substitutes to his family, the exception will not apply and the testator will be deemed to intend that the property pass as if *he* died without a will.

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[70] Since most testators avoid creating substitutions, the long discussion of the substitution may seem of academic rather than practical interest. However, a trust can and often does include a substitution, and since trusts are becoming widespread the discussion of the substitution is not without practical importance.

There are some *obiter dicta* to the effect that trusts and substitutions are mutually exclusive institutions. However, it is the author's view that a trust can contain a substitution. C.f. *Drouin* v. *Hénault* (1939) 67 B.R. 101 at p. 106 (St-Germain, J.); *Préfontaine* v. *Dillon* (1922) 33 B.R. 314 at pp. 319 sq., where the question is raised by Lamothe, C.J.

2. The view rejecting representation.

A) The basis of this view in Ancient Law.

By the middle of the 18th century the interpretation of a legacy to "children" had become an involved and complex affair. The term's meaning varied from legacy to legacy dependent on whether the property was bequeathed to the testator's "children" or to those of his cousins, or his brothers or his friends. A substitution to "my brother's children" would be interpreted differently from a simple legacy to the same children; and a substitution to a stranger's "children" could, in many cases, be interpreted more favourably than a substitution to the testator's own "children". Moreover, the rules of interpretation applicable to each legacy were always subject to change dependent on whether the rules of intestacy to be applied were those of the testator, the institute or another person. This chaos was further augmented by the efforts of authors to formulate rules which would end these illogicalities and inequities, rules which unfortunately only compounded the difficulties, and whose transparent casuistry lent a ludicrous aura to the whole problem.

Perhaps it was these endless and growing complexities brought about solely by the adoption of the theory that the term "children" introduced the rules of intestacy and representation to wills, that led Furgole to reject this theory completely and evolve a new theory to explain why the descendants of a deceased child could inherit a legacy to "children".[71] His views were supported by Guyot[72] and

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[71] Actually there is some doubt whether Furgole did advocate the theory attributed to him. The language he used is subject to many interpretations; and although Merlin and Guyot both state that he did advocate the theory discussed in this section, it is possible that this theory may be attributed to him erroneously. If this doubt is justified, it would make the historical antecedents of this theory almost non-existent, since its other proponents, Merlin and Guyot, were merely compliers of ancient law, and both wrote *after 1747* when the law had been completely changed.

However, in view of the support for this theory in the jurisprudence of Quebec, and in view of the strong arguments that the codifiers may have intended to follow the theory (whether historically valid or not), it is doubtful whether at this late date historical scruples as to its legitimacy will have any influence in deciding its ultimate acceptance.

I have for the purposes of less awkward nomenclature called the theory the "Furgolian system", but this may well be the attribution of an invention to a person who never heard of it and who would have denied its validity had he been informed of it.

[72] Guyot, *Répertoire universel et raisonné de Jurisprudence*, (Paris, 1784), v. 6 p. 720 *et seq.*

Merlin [73] both of whom argued strenuously for their adoption. However, it should be realized that the views of Furgole, Guyot and Merlin do not represent the generally accepted view of the law prior to 1747.[74]

Drawing support from Roman Law, Furgole states that the term, "children" like the term "liberi" has a special legal meaning of its own which includes not only children in the first degree, but the descendants of the deceased children in the first degree. These descendants inherit the share their deceased ancestor would have taken had he been alive. However, they inherit not by representation, but

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[73] Merlin, *Répertoire universel et raisonné de Jurisprudence*, (Paris, 1827) v. 6, pps. 4 *et seq.*

[74] There are good reasons for asking how historically valid the Furgolian system really is. First, as indicated, there is doubt whether Furgole himself supported it; secondly, even if he favoured the theory, his views and those of Merlin and Guyot can in no sense be considered as representing the established view of pre-1747 law. At best their theory is a proposed innovation, rather than an accepted theory.

As we have pointed out earlier, prior to 1747 there was a serious and unresolved dispute amongst the authors and amongst the various customs as to whether a legacy to "children" should be interpreted according to the maxim, « en testaments les plus proches excluent les plus éloignés » or whether the term would permit concurrent inheritance among descendants in differing degrees. Furgole's book *Des Testaments*, was published before the *Ordonnance des Substitutions* settled the dispute. Yet oddly, it makes no reference at all to the controversy.

It may be argued that as a lawyer who practised in Toulouse, Furgole would obviously favour the rule « les plus proches excluent les plus éloigués » which was the position adopted by the custom of Toulouse. However, Furgole was writing more than a book for Toulouse advocates. He was writing a work which he hoped would have validity for all of France. Thus he quotes much jurisprudence from other customs, and cites authors who often disagreed with the view current in Toulouse. In his discussion on "children" many of the cases and authors cited are from Paris and reject the view that « les plus proches excluent les plus éloignés »; these cases support concurrent taking. It is quite probable that Furgole supports this latter view, and his language:

« Le mot enfans comprend... *tous* les descendans... lorsqu'ils sont *à la place de ceux du* premier degré de génération, qui sont décédés sans avoir recueilli » (*op. cit.*, 1. 2 No. 125 p. 413; italics added) suggests that Merlin and Guyot are correct when they attributed this view to him.

However, in the same work, *Des Testaments*, albeit in another section dealing with another problem, he expressly states that a class gift, such as, to "children" would be divided on the principle that « les plus proches en degré doivent être admis, à l'exclusion de ceux qui sont plus éloignés » (Furgole, *op. cit.*, v. 2 No. 136, p. 578). Moreover in his book on the *Ordonnance des Substitutions*, which was written after his work on wills and which commented on the new law introduced by the *Ordonnance*, he states that certain authors prior to 1747 *wrongly* intimated that representation was introduced to wills and that the

in their own right as being "children" within the special legal meaning of that term.

> « le mot enfans comprend, *par son énergie, et par la signification que la loi et l'usage lui ont attribuée*... tous les descendans, à quelque degré qu'ils soient, lorsqu'ils sont à la place de ceux du premier degré de génération, qui sont décédés sans avoir recueilli. »[75]

Furgole maintained that the term "children" did not introduce any of the rules of intestacy to wills, and particulary rejected the notion that the term permitted representation. He argued that the descendants of a deceased child inherited their ancestor's share of a

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Ordonnance intended to put an end to this discussion and definitely to adopt the correct view of ancient law. He then states that the *Ordonnance* introduced the maximum « les plus proches excluent les plus éloignés ». This seems to suggest that his view was that the ancient law also adopted this maxim and perhaps the equivocal writing of his earlier work really favours the view finally adopted by the *Ordonnance*. Guyot and Merlin who perhaps misunderstood Furgole were not, of course, creative writers, but compliers of the ancient law, although in this case they may have been more creative than they knew. The basis for their arguments are not strong; we have seen that the only author they quote, namely Furgole, is unclear. Moreover the cases they cite to support their position lend little weight and indeed favour the opposing view namely that ancient law adopted the theory of representation.

It would thus appear that the historical basis of the view that descendants in varying degrees can take concurrently, not by representation, but in their own right by definition is very weak. This view appears to have no support in the ancient jurisprudence; the only authors who favour it are apparently Furgole, whose support is uncertain and Guyot and Merlin both of whom wrote after the *Ordonnance* and quote Furgole as their sole authority in ancient law.

Moreover even if Furgole did advance the views suggested by Guyot and Merlin, this would still not strengthen the position that there was substantial support in ancient law for the theory that article 980 is to be based on definition. Furgole's view would not represent the mainstream of the law prior to 1747. It would at best be a proposed innovation at variance with the views of the major authors who wrote prior to 1747. Moreover, this theory was put forth only one year before the law was irrevocably changed by the *Ordonnance*. Certainly, even if his view was logical it had no time to gain acceptance. One would have to say that prior to 1747 the principle that was accepted was *reprcsentation* and not *definition*.

[75] Furgole, *Traité des Testaments*, v. 2. No. 125 p. 413 [italics added]. The descendants who could inherit in the place of a deceased child did not include every descendant who survived him, but only those who would inherit the intestate estate of such child. In other words, if a testator left his property to his "children" and a child in the first degree preseceased the testator, the children of such deceased child would take his place in the succession; if one of such predeceased child's children also predeceased the testator, then the testator's great grandchildren (who were descended from such grandchild) would take the place of such deceased grandchild, and so on; the whole such that no branch of the family would be deprived of a share.

legacy to "children" not because the term "children" permitted representation, but because the term "children" by definition included the descendants of a deceased child.

Having rejected the view of Ricard that the term "children" introduced the rules of intestacy and representation to wills, and having adopted the view that the term "children" had a uniform meaning wherever used, Furgole concluded that the term did not differ in meaning, dependent on whether it described collaterals, strangers or descendants of the testator or of the institute or of another person. The term could have only one meaning, independent of the nature of the legacy, and of the relationship of the beneficiary to the testator or any other person.

> « Il ne faut pas même examiner s'il s'agit d'une disposition faite par un ascendant en faveur de ses descendans, ou par un collatéral,... vu que la disposition se trouve dans la valeur et la signification du mot enfans, qui est collectif de tous les degrés de génération;... qu'ainsi il ne faut pas recourir à la qualité du testateur pour y prendre une conjecture de sa volonté. » [76]

Furgole's views were accepted in their entirety by Guyot,[77] and Merlin [78] both of whom quoted him extensively. Thus Merlin indicated,

> « On sent, en effet, combien il serait déraisonnable de distinguer sur ce point, entre les dispositions faites par un ascendant et les dispositions faites par un collatéral. » [79]

B) The basis of this view in Quebec law.

Strong arguments can be made that article 980 introduces the Furgolian system to Quebec.

The codifiers quote Guyot as one of the authors consulted in drafting article 980. However, more important, the wording of article 980 seems to indicate that they adopted his views.

An article based on representation should have distinguished between the meaning of the term "children" in ordinary legacies and in substitutions. Article 980 draws no such distinctions,

> "in substitutions *and* in gifts and legacies in general, the terms children or grandchildren... apply to all the descendants."

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[76] Furgole, *Traité des Testaments*, No. 125 p. 413.

[77] Guyot, *Répertoire universel et raisonné de Jurisprudence*, (Paris, 1784) v. 6 p. 720 *et seq.*

[78] Merlin, *Répertoire universel et raisonné de Jurisprudence*, (Paris, 1827) v. 6 p. 4 *et seq.*

[79] Merlin *op. cit.* v. 6 p. 5.

An article based on representation and the rules of intestacy should have indicated that the meaning of the term "children" will differ depending on whether it describes descendants, collaterals or strangers. However, article 980 draws no distinctions between descendants, collaterals and strangers.

> "... in gifts and legacies *in general,* the terms children or grandchildren ... apply to all the descendants."

Thus the wording of article 980 suggests that the term "children" is to have one uniform meaning, no matter what the nature of the legacy, no matter what the relationship of the beneficiary to the testator or institute. It appears to adopt the views of Furgole.

There is much jurisprudence to support this interpretation. In *Beaudin* v. *Beaudin* [80] the court permitted the descendants of a deceased child to inherit a legacy to "children", but held, although by way of *obiter dictum,* [81] that such descendants did not inherit on the basis of representation,

> « les petits-enfants ne recueillent pas les biens par représentation, mais parce qu'ils sont compris dans la désignation « d'enfants. » »

Similar views were suggested by St-Germain, J.[82] and Walsh, J.[83] in *Drouin* v. *Hénault,* but these views were *obiter dicta.* The recent case of *Meincke* v. *Brown* [84] also suggested that article 937 rejected representation in all legacies, including those to "children" and that the purpose of article 980 was to enable the descendants of a deceased child to inherit a legacy to "children" on the basis of definition. But, again, this suggestion was not necessary to the decision.

However, in the case of *Armand* v. *Armand,* [85] the court rejected the view that article 980 introduced the principles of intestacy and representation, and did so *by way of ratio decidendi.* Since all the jurisprudence supporting the view that article 980 is based on intestacy and representation does so only by way of *obiter dicta,* this case assumes a certain importance as a precedent.

The case concerned the division among grandchildren of a legacy to the "children" of the testator's children. If it were decided that article 980 was based on the rules of intestacy the legacy would be divided by roots; if it was held that the article followed the Furgolian

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[80] (1927) 65 S.C. 517.

[81] It was by way of *obiter dictum* since the court could have reached the same result if it had applied the principles of representation.

[82] (1939) 67 B.R. 101 at p. 107.

[83] *Ibid,* at p. 109.

[84] [1958] S.C. 293; c.f. also *Rhéaume* v. *Cardinal* (1930) 68 S.C. 333 at 336.

[85] (1898) 7 B.R. 356; (Sir Alexandre Lacoste, C.J.).

system, the beneficiaries would inherit by heads; the Court adopted a by head division and expressly stated that article 980 is not based on representation [applying that term here loosely].[85a]

> « Dans les successions et dans les legs, les biens se partagent par tête entre les héritiers et les légataires nommés, excepté dans les cas où il y a représentation... La représentation n'a pas lieu dans les substitutions, non plus que dans les autres legs... » [85b]

In view of the above jurisprudence, and the jurisprudence supporting the theory of representation as on intestacy, the Superior Court in the recent case of *David et Autres* [86] could quite correctly state that Quebec case law reflected two conflicting theories in regard to article 980; one accepting representation, the other rejecting it. The latter cases, the court stated,[87]

> « n'ont pas admis la représentation lorsque le testateur ou donateur se servait du mots 'enfants'... [et] ont décidé... que le mot 'enfants' comprenait les petits-enfants ou descendants... sinon que les petits-enfants ou descendants des enfants décédés venaient à la substitution, concurremment avec les enfants vivants. »

There is then a strong basis for the view that article 980 permits the descendants of a deceased child to inherit a legacy to "children" not by representation but by definition. If this latter view is adopted, the beneficiaries who will share a legacy to "children" will differ greatly from those who would share the bequest if the article was based on the principles of intestacy and representation.

C) The Consequences of this view

i) The consequences in the direct, collateral and non-related lines and in the substitution.

If article 980 introduces the rules of intestacy to wills, the meaning of the term "children" will vary from legacy to legacy. However, if the Furgolian system is adopted, the term will have a single meaning, uniform to all legacies, whether it describes descendants, collaterals

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[85a] The court should have said that article 980 is not based on the rules of *intestacy*, since in this case the grandchildren did not *represent* anyone but took in their own right; the word "representation" is apparently used as a rough equivalent for the expression "inheritance in the same manner as on intestacy".

[85b] *Ibid.*, p. 360.

[86] [1963] S.C. 305.

[87] [1963] S.C. p. 305 at p. 342; c.f. also Dorion J. who in *Préfontaine* v. *Dillon* also indicates that both views exist, (1922) 33 B.R. 314, at 327 « Leurs descendants ne peuvent donc pas recueillir ce legs à leur place, ou par représentation... »

or strangers; whether it is used in substitutions or in ordinary legacies.

The meaning which the term will always have is as follows:

a) All descendants in the first degree of the person whose descendants they are.

AND

b) Those descendants of a deceased descendant in the first degree who would have inherited the abintestate estate of the deceased descendant in the first degree.

If this definition is applied in legacies to the "children" of the testator or to the "children" of the institute, it is evident that the beneficiaries who will share such legacies will be exactly the same as those who would share such legacies if article 980 were based on the rules of intestacy. In virtue of both theories the descendants of a deceased descendant will always be able to step into the latter's shoes and inherit his share, in the one case because they represent him, in the other case because the term "children" includes them by definition.

However, in all other legacies, the meaning of the term "children" will differ depending on which theory is adopted. Thus in a legacy to "the children of my brother John" or to "the children of my friend John" or in the case of a substitution "to my brother John and on his death to my children", applying the above (Furgolian) definition uniformly the term "children" will always include the descendants of a deceased child, whereas if article 980 was based on representation only children in the first degree would be able to inherit these legacies.

By way of example, if at the time of ultimate distribution of the above legacies to the "children" of my brother or friend John there were surviving,

a) 3 children in the first degree of John,

b) 3 grandchildren of John, 2 of whom are children of a deceased child of John and one of whom is a child of one of John's living children,

c) 4 great-grandchildren of John, all of whom are children of a deceased grandchild of John, (the father of which grandchild was one of John's predeceased sons),

all these descendants, except the grandchild whose parent is living would inherit the legacies. If article 980 were based on representation however, only the three children in the first degree could inherit.

3. General Conclusion.

Thus there are two theories upon which article 980 may be based. Each view has strong support. While the theory advocated by Furgole does seem superior in that it would rid us of the metaphysical distinctions of the opposing theory one cannot say with certainty which theory will ultimately prevail.

In view of this uncertainty, to what extent the descendants of collaterals or strangers of the testator can inherit a legacy to "children", and to what extent descendants of the testator's descendants or collaterals or strangers can inherit a substitution to "children" are unsettled questions.

Chapter III.

THE DIVISION OF A LEGACY TO CHILDREN

In the previous chapter we discussed who might share a legacy or a substitution to "children". In this chapter we will determine what portion of the bequest each recipient of a legacy to "children" may claim. We will consider especially whether the division will be by root or by head, and whether the answer will differ dependent on which theoretical basis of article 980 is adopted.

1. Descendants in the primary degree [88]

Suppose a testator leaves his property to trustees to pay the income to "my two children in the first degree" and then on their death to divide the capital among *their children*".[89]

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[88] By primary degree the author means those recipients who would have inherited the legacy had no descendant predeceased the testator. Thus in a legacy to "children", the descendants in the primary degree would be descendants in the first degree. In a legacy to "grandchildren" or to the "children of my children" they would be descendants in the second degree; in a legacy to "issue" they would be descendants in the first degree.

[89] For this discussion it is assumed that the court will find that on the death of a child in the first degree, the trustees are to hand over the principal of his share to all the testator's grandchildren and not only the children of the deceased child, C.f. *Robin* v. *Duguay* (1897) 27 S.C.R. 347; if the court, however, finds the expression "their children" to mean that the trustees are to deliver over the share of a deceased child only to such child's children as in *Roy* v. *Gauvin* (1871) 3 R.L. 443 the problem will not arise. When the court will find an expression such as "their children" to mean all the children of several persons or only the children of each child respectively, is an important

Suppose one child in the first degree dies leaving one child and the other child in the first degree dies leaving nine children. Will the grandchildren take by heads, such that each grandchild will inherit a one-tenth share, or will the division be by roots, such that one grandchild will inherit one-half and the others one-ninth each ?

It is a general principle of wills, that,

> « lorsqu'un testateur institue plusieurs légataires... sans assignation de parts, il y a institution conjointe... ils ont tous des droits égaux et prennent des parts égales.» [90]

If article 980 is based on the Furgolian system, this rule should apply and the legacy to the grandchildren should be divided into ten equal shares.

If, however, legacies to "children" and "grandchildren" are introductive of all the rules of intestacy, then this principle of equal division will not apply and legacies such as "income to my children, ownership to my grandchildren" should be divided by roots among the grandchildren and not equally.[91]

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question but one beyond the scope of this essay; c.f. d'Essaule, *op. cit.*, pp. 314 *et seq.* Nos. 1003 *et seq.*

[90] *Juris-Classeur Civil* (Paris, 1962), art. 1002, No. 65; also. *Cour de Nancy, D.*, 1949, 140.

[91] One metaphysical problem does arise. Article 623 of the Civil Code states, "In all cases where representation is admitted the partition is effected according to roots..." It could be argued that grandchildren will share a legacy unequally when they represent a deceased ancestor but not when they inherit in their own right as primary recipients as in the case of a legacy directly to "grandchildren". In such a case it can be argued that they should inherit equally by heads.

However, as indicated earlier, if article 980 is to be considered as permitting representation, it is because a legacy to "children" or "grandchildren" should introduce *all the rules* of intestacy to wills and not only the institution of representation. Therefore, a legacy such as "to my grandchildren" or "to my son's children" should devolve and be divided in the same manner as if the testator had died intestate, namely, by roots. Such a by root division seems consonant with the desires of most people to divide their property equally among the branches of their family rather than equally among its individual members.

Similarly, legacies such as "to my brother's grandchildren" should be divided as if the testator had died intestate, namely, by heads (article 632 C.C.) as should a legacy "to my friend's grandchildren". In the case of a legacy to "my friend's grandchildren" it seems strange to reason that the legacy is to be divided by heads because of the application of the testator's rules of intestacy, when strangers can never inherit an intestate succession. Perhaps a better way to put the same concept and thus explain why such "friend's grandchildren" inherit by heads is to state that all legacies to "grandchildren" will be divided equally among the primary recipients unless such recipients would have inherited the testator's abintstate succession unequally; since strangers cannot inherit on abintestate succession they share equally according to the general principles of wills.

A) The law prior to 1747

Under French law prior to 1747 the division would probably have been by roots. Ricard makes it quite clear that a gift to the testator's children meant "toutes les personnes qui jouissent, par la loi du pays, du droit de représentation . . . , et . . . ils partagent le fidéicommis *par souches, et non par têtes*".[92] And Bourjon states, "le cas d'une substitution faite en général au profit des enfans du grevé, . . . les biens . . . se partagent par souches".[93]

B) The law of Quebec

Quebec jurisprudence, however, has not followed the ancient law in this regard, but has opted for a by head division among descendants in the primary degree. The Quebec courts have refused to divide legacies to "my grandchildren" by roots as the rules of intestacy would dictate; thus they seemingly reject the concept that the terms "children" and "grandchildren" introduce the rules of intestacy to wills.

In *Remillard* v. *Chabot* the testator left his property to his children and then to *their children in equal shares.* The Superior Court held that since article 937 banished representation, the property would be divided among the grandchildren by heads.[94] The Supreme Court affirmed this view,[95] but did not discuss articles 937 and 980; their position was based on the direction to divide the property equally.

This case can, of course, easily be distinguished on the grounds that the legacy to the grandchildren *in equal shares* precluded a divi-

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[92] Ricard, *op. cit.*, No. 575, p. 347. (Emphasis added)

[93] Bourjon, *op. cit.*, v. 2., No 22, p. 175. However there is one point that should be raised. Bourjon speaks of a substitution to the children of the institute being divided by roots. This would be so only in the rarest of circumstances. In substitutions the rules of intestacy are to be considered as if the institute died intestate. Thus in a substitution to "my children in the first degree and then to their children" if there were two children in the first degree, one of whom died leaving three children, and the other of whom died leaving two children, the legacy would be divided into five equal shares since the rules of intestacy would be considered from the institute's point of view. ". . . In all cases children or their descendants . . . inherit in equal portions and by heads when they are all in the same degree and in their own right . . ." (article 625 C.C.). In legacies other than substitutions, such as "usufruct to my children, ownership to their children" the legacy should be divided unequally and by roots. In such a case the rules of intestacy will be determined as if the testator had died intestate.

[94] (1905) 11 R. de J. 409.

[95] (1903) 33 S.C.R. 328.

sion by roots, and that the remarks on article 937 C.C. were superfluous. However, in *Armand* v. *Armand* [96] the testator did not order an equal division; yet the same by head division resulted.

In *Armand* v. *Armand* the testator left his property to his children and then to their children "suivant l'ordre des successions"; the testator further provided that if a child in the first degree died without children his share was to belong to the testator's grandchildren but no provision was made as to what share each grandchild would take. One child did die without children, and the question arose, how were the grandchildren to divide the property? The court held that since 937 C.C. rejected representation and the rules of intestacy in wills, the division among the grandchildren would be by heads.

> « Dans les successions et dans les legs, les biens se partagent par tête entre les héritiers et les légataires nommés, excepté dans les cas où il y a représentation... La représentation n'a pas lieu dans les substitutions, non plus que dans les autres legs... (C.C. Art. 937). » [97]

While it might have been possible to distinguish the case of *Armand* v. *Armand* on two grounds, the court expressly rejected both possible distinctions; [98] the case is strong and clear authority

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[96] (1898) 7 B.R. 356.

[97] (1898) 7 B.R. 356 at 360.

The court stated that since article 937 rejects *representation*, the division among grandchildren should be by heads in accordance with the ordinary principles of legacies. The court would have been technically more correct to have stated that since the term "children" does not introduce the rules of *intestacy* to wills (*among them* the right to inherit by representation) a legacy to "grandchildren" would be divided equally and not by roots. The possible right of the "grandchildren" to inherit by roots sprang *not* from their right to *represent* but from their right to *take as on intestacy*.

[98] The will created a substitution of which the institute was the testator's son and the substitutes, the son's nephews; we have noted the view of Ricard that in a substitution the institute is to be considered as having died and the rules of intestacy followed from his point of view. Thus in this case the nephews, being collaterals of the institute, would according to the rules of the intestacy have taken by heads and not by roots. However, the court expressly rejected this view pointing out, at pp. 360-361:

« Soit que l'on envisage le legs en rapport avec la succession du testateur ou en rapport avec celle du grevé, on voit que les biens n'ont pas été déférés suivant l'ordre des successions... »

It also could have been argued that since it was provided that, if a child died with children the division was to be made among the grandchildren "suivant l'ordre des successions", but that in the case of a child dying without children no provision was made how the property was to be divided, there was an implicit direction to divide the property by heads; however, the court rejected this view, treating the second legacy as being subject to the general law.

for the proposition that a legacy to the children of several persons will be divided by heads.

The case of *Armand* v. *Armand* was followed in *Rhéaume v. Cardinal*[99] where the court ordered a legacy to the children of the testator's children to be divided by heads although no provision was made as to how the property was to be divided. The court stated that article 937 excluded a division by roots:

> « Il y a donc... quatre ouvertures de substitution. Chacun ne rend que sa part. Il la rend non à ses enfants, mais aux petits-enfants par tête; il n'y a pas de représentation dans les legs, 937 C.C.... Les petits-enfants vivants à la mort d'un des enfants ont donc droit à cette part, par tête et non par souche.» [99a]

Support has been given to the views of *Armand* v. *Armand* in the case of *Duguay* v. *Robin* where it was stated,[100]
and in the case of *Meincke* v. *Brown*[101] where the court suggested that Art. 980 C.C. was not based on an introduction of the rules of intestacy to wills, and that a division among the testator's grandchildren should be by heads. However, the case of *Duguay* v. *Robin* is distinguishable on the grounds that the legacy (in this case not a substitution) was to the children of the testator's sisters, who, according to the rules of intestacy could only take by heads; and the case of *Meincke* v. *Brown* is also distinguishable since the testator did order an equal division among his grandchildren.[102]

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[99] [1930] S.C. 333. Actually this case is distinguishable. The institute was a son of the testator, and the substitutes were the son's children and the son's brothers' children. Assuming that article 980 is based on the rules of intestacy, and assuming that the rules of intestacy are to be considered as if the institute had died intestate, the divsion among his children in the first degree would have to be equal, as would that among the children of his brothers. Thus the result would have been the same no matter what theoretical basis of article 980 the court adopted.

[99a] *Ibid.*, p. 336.

[100] (1896) 5 B.R. 277 at p. 290; approved (1897) 27 S.C.R. 347.
"le legs... fait sous un nom collectif à tous les enfants sans limitation de parts... les légataires n'ont chacun qu'une part égale. »

[101] [1958] S.C. 293.

[102] In *Gelinas* v. *Paquin* (1922) 32 B.R. 431 the court adopted a "by root" division; however, the basis for the decision was not that article 980 brings the rules of intestacy to wills but that the particular wording of the will showed the testator's special intention to divide his property by roots; in other words, he showed the "manifest intention" demanded by article 937 that the property should be so divided.

C) Conclusion

i) Assuming article 980 is not based on the rules of intestacy.

The above cases are strong authority for the proposition that a legacy to "grandchildren" or to "the children of my children" will be divided equally among descendants in the primary degree.

This, of course, does not mean that the testator cannot order otherwise. The testator may leave his property to his "grandchildren by roots"; or he may bequeath his property "to the children of my children to be divided as if I had died intestate". But barring such express direction the division among descendants in the same primary degree should be by heads.

Legacies to "my grandchildren by roots" or to "my grandchildren as if I had died intestate" raise interesting questions. Assuming article 980 is not based on the rules of intestacy does the direction that the property be divided "by roots" or "as on intestacy" indicate that not only is the property to be *divided* as on an intestate succession but that the property is to accrue only to these persons who could inherit upon intestacy ? In other words, by employing such expressions is there not a "manifest intention" to have the legacy governed by *all* the rules of intestacy and representation, and not by any of the rules of 980 C.C. (assuming that article 980 rejects those rules).

In the case of a legacy to "my brother's grandchildren as if I had died intestate", there is no doubt that the rules of article 980 are not applicable. In leaving the legacy in these terms, the testator has ensured that the legacy will be interpreted in accordance with article 937 (which states that representation will apply to wills if the testator so orders).

In the case of a legacy to "my brother's grandchildren as if I had died intestate" not only would the division be by roots, but great-grandchildren would be excluded if grandchildren were surviving.[103]

However, a legacy to "my brother's grandchildren by roots" [104] should not introduce all the rules of intestacy to wills. The expression "by roots" deals only with the manner in which the property is to be

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[103] In the case of a legacy where the testator has ordered that the property pass according to the rules of intestacy (as in a legacy "to my brother's grandchildren to be divided as in an abintestate succession") without indicating according to *whose* rules, the presumptions discussed earlier should apply. In the substitution, the presumption should be that the institute's rules of intestacy are to the followed; however, in all other types of legacies the rules of intestacy should be followed from the testator's point of view.

[104] Cf. pp. 122 et seq. of this article for a discussion of other difficulties inherent in the term "by roots".

divided. It does not indicate an unequivocal desire that the property pass in the order of legitimate successions; nor does it show that the testator wished the term "children" to have a meaning different than that bestowed upon it by article 980. The term should do no more than ensure a by root division among descendants in the primary degree; it should not prevent great-grandchildren from stepping into their deceased parent's shoes. A legacy to "my brother's grandchildren by roots" should be interpreted in accordance with article 980 and not according to article 937. However, to alleviate any doubts, a draftsman who orders a "by roots" division should be especially certain to define the terms "children" and "grandchildren".

ii) Assuming article 980 is based on the rules of intestacy.

The cases of *Armand* v. *Armand,* and *Rhéaume* v. *Cardinal* hold that a legacy to "children" or "grandchildren" is to be divided equally among descendants in the primary degree, on the assumption that article 980 is based on definition and not on the rules of intestacy.

However, in view of the strong authority that article 980 is based on the rules of intestacy it would be well to consider the consequences of such a theory should the above cases be over-ruled.

If the courts do decide that article 980 is introductive of the rules of intestacy, then a legacy to "grandchildren" or "children of my children" will be divided by roots, except in certain substitutions.[105]

Thus if a testator were to leave his property to his "grandchildren" and was survived by two children of one child called John, and three children of another child called George, John's children would each take one-quarter of the legacy, while George's children would each inherit only one-sixth.

Of course, a testator could order otherwise. He might leave the property to his "grandchildren in equal shares", or to the "children of his children, by heads". In such a case all grandchildren would share equally; as Laurent, who favours the view that the term "children" is introductive of the rules of intestacy points out:

> « ... par égale portion, ou une expression analogue ... indique que le testateur a voulu avantager individuellement et à titre égal chacun des descendants. » [106]

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[105] Of course, in a substitution the legacy will be divided by heads if the grandchildren are descendants of the institute.

[106] F. Laurent, *Principes de Droit Civil,* 4th ed. (Paris, 1887) v. 13, p. 544, No. 492. Most French authors favour the view that a legacy to "children" is to be interpreted according to the rules of intestacy. Cf. also Juris-Classeur Civil (Paris, 1962) Art. 1002, No. 67. However, the Code Napoléon has no article similar to article 980.

Assuming that article 980 introduces the rules of intestacy and representation, will the direction that the property is to be divided "in equal shares" or "by heads" prevent all the rules of intestacy from being applied? Thus in a legacy "to my grandchildren in equal shares" would the legacy be limited to descendants in the second degree only?

The author feels that a direction as to how the property is to be divided should not prevent the other rules of intestacy from applying.

This was the opinion of Montvalon;[107] it is also the opinion of the court in *Plouffe* v. *Lapierre*[108] and most recently in *David et Autres*:[109]

> « Or, il semble qu'en se servant du mot « descendants », le donateur a voulu que les biens soient déférés suivant l'ordre de la succession légitime. Et ce n'est pas parce qu'il se sert, à la fin de la clause, des mots « par tête » pour la division, que ceci empêcherait la représentation, vu que l'article 623 C.C. stipule que dans le cas de représentation, le partage doit se faire par souche, car on verra, à l'étude de la jurisprudence qui sera citée plus loin, que nombre de causes ont été interprétées par les tribunaux comme donnant lieu à la représentation, malgré que le partage devait être fait par tête. »
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> * * *
>
> « Et en indiquant que les descendants vivants seraient appelés à la substitution par parts égales et par tête, le donateur n'a pas voulu nécessairement enlever la représentation s'il a ordonné, comme dans le cas présent, que les biens soient déférés suivant l'ordre de la succession légitime, car le donateur, en employant le mot « descendants », ordonnait que les biens soient déférés suivant l'ordre de la succession légitime.»[110]

2. Descendants other than those in the primary degree.[111]

We have hitherto discussed how a legacy to "children" will be divided among descendants in the primary degree only. However, in

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[107] *Op. cit.*, v. 2, 180, but only for a direction to divide the property "in equal shares"; however, he suggests that in a legacy to "my children by heads", the expression *by heads* would prevent representation. In such a legacy the term children would be limited to descendants in the first degree only. This is contrary to the view expressed in *David et Autres* where it is suggested that the request for a "by head" division would not prevent representation.

[108] (1917) 52 S.C. 151.

[109] [1963] S.C. 305, p. 313.

[110] *Ibid.*, pp. 313-314. For some of the other problems inherent in the use of the expression "is equal shares" see pp. 120 et seq. of this article.

[111] This section envisages a legacy to "children" in which the testator is survived by children and grandchildren, or by grandchildren alone, all the children having predeceased him. For a definition of who are considered descendants in the primary degree, c.f. footnote 88, page 104 of this article.

many cases the testator will be survived not only by descendants in the primary degree, but by those in other degrees as well. Indeed in some cases where all the descendants in the primary degree are deceased he may only be survived by descendants in the secondary or more remote degrees. How will such legacies be divided?

Suppose a testator leaves his property to his "children" and is survived by three children in the first degree, and eight grandchildren, five of whom are the children of the three living children in the first degree, and three of whom are the children of a deceased child in the first degree.

How will this legacy be divided? What shares will the children in the first degree take; what shares will accrue to the grandchildren?

A) The Principles of Division.

i) Rule 1 — Living descendants exclude their own descendants.

In the above example the five grandchildren of the testator whose parents are living will be excluded from the legacy. Only the three living children in the first degree and the three children of the deceased child in the first degree, will be able to inherit.

While this rule seems somewhat at variance with the language of article 980 which states that "the term children ... applies to *all* the descendants" there is no doubt as to its validity. If one accepts the view that article 980 is based on representation, then article 624 c.c. is quite clear on this point.

> "Living persons cannot be represented, but only those who are naturally dead."

If, however, the contrary views of Furgole and Guyot are taken as the basis of 980, then the statement of Furgole that grandchildren and remoter descendants inherit only,

> « lorsqu'ils sont à la place de ceux du premier degré de génération, qui sont décédés sans avoir recueilli.» [112]

should be conclusive.

This obvious rule was upheld in *David et Autres*.[113] Whether the division is by heads or by roots, in each branch of a family,

> « le plus proche en degré exclut le plus éloigné » [114]

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[112] Furgole, *Traité des Testaments*, v. 2. No. 125 p. 413.

[113] [1963] S.C. 305; R. Comtois, *loc. cit.*, (1964) 14 *Themis* 37, at 43, also agrees.

[114] What if a descendant is surviving but renounces his share? Will his children inherit his share? According to the rules of intestacy no representation

ii) Rule 2 — Descendants inherit only their deceased parent's share.

The second rule of interpretation is that the descendants of a deceased ancestor can never take more than the share their ancestor would have taken had he been alive; thus in the example given above the 3 children in the first degree would take a quarter share each, and the 3 children of a predeceased child in the first degree would only take his share, such that they would inherit 1/12th each.

For those who maintain that representation is the basis of 980 this proposition is self-evident,

> « les descendants qui viennent par représentation... ne peuvent avoir, à eux tous collectivement, quel que soit leur nombre, que la part virile, ni plus ni moins, que le représenté aurait eue.»[115]

However, for those who maintain that article 980 is not based on representation, but on the right of descendants in varying degrees to take in their own right, there is some doubt. It has been suggested in *Meincke* v. *Brown* that since the division is to be made.

> « non pas par souches mais par têtes... que chacun des petits-enfants et autres descendants — quel qu'en pût être le nombre — eût droit de recevoir une part égale à celle des enfants du premier degré... La raison en est que le partage par souches s'opère dans le cas seulement où la représentation est admise (art. 623 C.C.). »[116]

Other cases nowhere suggest that legacies inherited in part or in whole by descendants not in the primary degree should be divided equally among descendants of differing generations (as in a legacy to "grandchildren" shared by grandchildren and great-grandchildren) or should be divided equally among descendants in the *same degree* who are not primary descendants (as in a legacy to "grandchildren" in which all the beneficiaries are great-grandchildren, the grandchildren being all deceased).

When *Armand* v. *Armand*[117] and *Rhéaume* v. *Cardinal*[118] suggest that legacies to "children" or "grandchildren" be divided equally

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can occur (624 C.C.). His children could only inherit if all the other children in the first degree renounced or were unworthy. If representation is not the basis of art. 980 then the answer is more uncertain, but it would appear that such children should be excluded on the argument that the share of the renouncing parent would either accrue to the other co-legatees in virtue of 868 C.C. or would lapse; moreover, if all the children in the first degree had renounced, their children should be unable to take, since in such a case there would be a lapse of the whole legacy, the property passing on intestacy or if the legacy was a particular legacy, in favour of the universal legatees.

115 Demolombe, *Cours de Code Napoléon* (Paris, 1864) v. 19, p. 165, No. 76.

116 *Meincke* v. *Brown* [1958] S.C. 293 at p. 303.

117 *Armand* v. *Armand* (1898) 7 B.R. 356.

118 *Rhéaume* v. *Cardinal* [1930] S.C. 333.

they refer only to the division among descendants in the primary degree; these cases do not mean that every descendant who inherits in virtue of the terms "children", "grandchildren" or "issue", should take an equal share. This jurisprudence simply affirms the general principle of will interpretation that a legacy to several co-legatees will be divided equally among them if no contrary provision is made. However, if a testator provides that if a legatee die before inheriting, various persons are to take in default of the original legatee this general principle would not allow such persons to take more than the original legatee's share. Article 980 by allowing grandchildren to share with children will only permit them to take the share their parent would have taken had he been alive. The article cannot be interpreted as allowing them to receive more than their parent would have taken had he been alive, and so diminish the shares of the other children. There is no reason to interpret article 980 in the illogical and unnatural manner suggested in *Meincke* v. *Brown,* and so enable those who take in default to take more than the person in whose default they are taking, especially when a family is concerned. Furgole and Guyot both reject the view suggested in *Meincke* v. *Brown.* They point out that grandchildren only inherit, "lorsqu'ils *sont à la place* de ceux du premier degré de génération qui sont décédés". The development of the ancient French law in regard to the term "children" and the cases quoted by Guyot suggest no other possible view.

Chapter IV.

COMMON EXPRESSIONS TO AVOID THE PROBLEMS OF DIVISION AND INCLUSION

1. Terms which attempt to provide for the death of a child.

It is evident that a legacy to "children" leaves uncertainty as to which descendants will be included under its aegis, and in what proportions they will share.

The draftsman cannot await the ultimate decisions of the courts, but must attempt to avoid these difficulties by express provision as to whom such a legacy includes, and express direction as to how it shall be divided.

There are several expressions of common use which attempt to accomplish this result. A testator wishing to ensure that the descen-

dants of a deceased child take such child's share, may leave his property to 'issue" instead of to "children", or he may state that the property is to pass to "children with representation in favour of the issue of a deceased child". Many a draftsman hoping to avoid the difficulties of division will direct that the property be divided among the "children" or "issue" "by roots" or "in equal shares", as is his wont.

However, such expressions, while they do solve some of the problems that a simple legacy to "children" does not, are in themselves the source of difficult problems. It is suggested that if the above analysis of articles 937 and 980 is focused upon such terms as "issue", "with representation in favour of", or "by roots" "by heads" and "in equal shares", such phrases reveal themselves inadequate in many cases to determine definitively who will share the legacy and in what proportions. Such terms will often only frustrate the testator's true wishes and diminish his patrimony through costly and unnecessary litigation. In some cases a simple legacy to "children" will cause less difficulty.

A) The term "issue"

We have seen that a legacy to "children" raises certain difficulties as to how it will be divided, and who will be included under its aegis. Some draftsmen, to avoid these problems, leave property to "issue" instead of to "children". Unfortunately the term "issue" is as uncertain in result as the term "children".

The difficulties of a legacy to "children" stem from our legal system's failure to decide whether the legacy is to be governed by the principles of abintestate successions or by the Furgolian system. The term "children" may have various meanings and divisions dependent on which system is finally adopted. Unfortunately a legacy to "issue" is plagued by the same difficulties. A legacy to "issue" *may* be governed by the rules of intestacy, or it *may* be governed by the rules advocated by Furgole. But again the term will differ in meaning and in consequences of division, dependent on which system is finally adopted, and as yet the courts have indicated no preference. The testator by using the term "issue" instead of the term "children" has simply replaced one uncertain term with another.

The term "issue" may be interpreted in accordance with article 937, as indicating an intention on the part of the testator to leave his property as on intestacy, or the term "issue" may fall within article 980, as being analagous to the expression "children".

If the term falls within article 937, or if the term is governed by article 980 and it is decided that that article is based on the rules of intestacy, then a legacy to "issue" will be governed by the rules of intestacy.

If it is decided that article 980 is based on the rules of intestacy, then whether the term "issue" falls within article 937 or within article 980, the term "children" and "issue" will both have exactly the same meaning. Both terms will mean "those descendants who inherit upon intestacy". It will make no difference whether the testator leaves his property to "children" or to "issue". The results will be the same. Thus a legacy to "my sister's issue" will be divided by heads, and the descendants of a predeceased child in the first degree should be excluded from representing. While it may be argued that the term "issue" should have a meaning different from "children", the history of the meaning of these terms indicates conclusively that if certain collective legacies permit representation, then the term "issue" is to be interpreted according to the rules of abintestate succession.

If article 980 is not based on the rules of intestacy, then the meaning of "children" and "issue" may diverge depending on whether the term "issue" falls within article 937 or within article 980.

If the term "issue" is governed by article 980, then of course the effect of a legacy to "issue" and a legacy to "children" will be identical. Both terms will be governed by the principles laid down on pages 102-104 of this article.

If, however, the term "issue" falls within article 937, and article 980 is based on the Furgolian system, legacies to "children" and to "issue" will differ in result. In such circumstances, a legacy to "children" will be governed by the Furgolian system, whereas a legacy to "issue" will be interpreted in accordance with the rules of abintestate successions.

In the case of *David et Autres* [119] the court suggested that even if article 980 were based on the Furgolian system, the term "issue" should still be interpreted under article 937. The court argued that terms such as "issue" or "descendants", like the expression "heirs" but unlike the expression "children", indicate a manifest intention to follow the rules of intestacy, and hence argued that the terms "issue" and "descendants" should be interpreted in accordance with article 937 and not in accordance with article 980, which latter article dealt only with the definition of "children", not with that of "issue".

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[119] [1963] S.C. 305.

However, this author disagrees strongly with the position suggested in *David et Autres*. If article 980 is based on the Furgolian system the term "issue" *must* fall within article 980. To suggest otherwise,, and state that the term "children" is governed by the Furgolian system, and the term "issue" by the rules of intestacy is to state that the term "children" has a more extensive meaning than the term "issue". This appears contrary to common sense. Moreover, the language of article 980 suggests that the term "issue" falls within its confines. The article states that the term "children" applies to "all the descendants". To interpret the term "issue" within article 937 and not within article 980 is to state that the term "children" is to be interpreted as if the legacy was bequeathed to "all the descendants", but the term "issue" is not to be interpreted as if the property were left to "all the descendants".

Thus it is evident that the term "issue" produces no more certainty in result than the term "children". How a legacy to "issue" will be divided, what will be its meaning when used in a substitution, and to what extent descendants, collaterals or strangers of the testator can inherit under its aegis, are yet unsettled questions. The answers will depend on whether the term is to be governed by the rules of intestacy or by the Furgolian system.

To avoid all these problems, the draftsman must define who are meant by "issue" and indicate how the legacy is to be divided among them. To do otherwise is to court litigation.

B. The phrase "with representation in favour of"

It is customary in many legacies to leave property to a person "with representation in favour of his children, or his issue". Such a legacy raises complications.

Suppose a legacy "to my brother with representation in favour of his children". Further suppose that both the brother and one of his children have predeceased the testator, but that the predeceased child has left children who survive the testator. Will the brother's grandchildren inherit in virtue of the expression "with representation in favour of his children"?

i) Assuming article 980 rejects representation.

Let us firstly assume that article 980 is not based upon representation, but is based upon the Furgolian system. The term "children" would then normally include the children of a predeceased

child, no matter what the relationship to the testator. Does the expression "with representation" prevent such a result ? If the expression is regarded as a synonym for "failing my brother" the grandchildren should inherit. The legacy would be interpreted as reading "to my brother and *failing him* to his children". However, it might be argued that the expression "with representation in favour of" manifests a desire to introduce the rules of intestacy to wills. In this case the expression "with representation in favour of his children" would be interpreted according to article 937.

ii) **Assuming article 980 adopts representation.**

How will this expression be interpreted if it causes the legacy to fall within article 937, or if article 980 is deemed to introduce the rules of representation to wills ?

Let us assume the testator leaves his property to his "friend with representation in favour of his children". The children of a friend cannot "represent" him. Yet the legacy states they are to do so. What meaning is to be given to this contradiction?

On the one hand it can be argued that the fact that the testator has ordered that the friend's children are to represent the friend, does not mean that the friend's children are in turn to be represented by their children. The rules of representation and intestacy should (on this view) be rigorously followed, and any derogation therefrom strictly interpreted. The fact that representation is permitted in one case where the law does not admit of it does not allow it to be permitted in a second case where it is not expressly ordered. Such a view would therefore interpret the legacy as meaning "to my friend and failing him to his children in the first degree."

On the other hand it can be argued that the expression is evidence of an intention to derogate from the rules of intestacy; or, put another way, it is evidence of an intention to consider the person who is to be represented as having died intestate. Since the term "representation" is a technical term, it should (on this view) be given its technical meaning. If the testator had wished to use the term "failing" he would have done so; his use of the expression "representation" shows (according to this argument) a desire to consider the friend as having died intestate.

A legacy to "my brothers with representation in favour of the issue of a deceased brother" creates problems which militate against this latter solution. If several brothers survive the testator but one brother predeceases the testator leaving children, there would be no

problem; in such a case the laws of intestacy would allow representation. However, if one of the predeceased brother's children predeceased the testator leaving children, or if all the brothers predeceased the testator leaving varying numbers of children, the laws of intestacy will in the first case exclude the brother's grandchildren and in the second case divide the property by heads and not by roots.

In such a case does the testator intend to allow representation without limit or only as permitted by law ? The natural presumption would be, only as permitted by law.

However, if the expression "with representation" is allowed to introduce representation unqualifiedly among strangers it seems odd not to allow it for relatives of the testator. Thus it would appear that consistency demands either that the expression "with representation" permit unlimited representation even in non-related and collateral lines, as if the person represented had died intestate, or that the term be considered a simple synonym for "failing". Which interpretation is better can only be decided by the courts.

Until the courts give a definite meaning to the expression the draftsman would be wise to avoid it.

C) The need for definition.

It is evident that the testator who leaves his property to "children" or "issue" in many cases has created an uncertain legacy.

The draftsman should attempt to avoid the problems inherent in these terms by indicating exactly which descendants will inherit in virtue of such legacies and which descendants will be excluded. In other words, he should define the terms.

For the draftsman's convenience the author would like to provide suggested definitions although reminding the reader that many of the questions raised in such definitions will only be discussed in the Second Article.

Whenever the terms "children" or "issue" are used in a will, the draftsman would be wise to include a general definitional section to the following effect:

1.1 The terms "child" or "children" wherever used in this my will shall mean:

i) All lawful blood descendants in the first degree;

ii) All adopted descendants in the first degree, notwithstanding the Adoption Act of Quebec, or any other future or present legislative provision inconsistent herewith.

1.2 The term "issue" wherever used in this my will shall mean:

i) All lawful blood descendants in the first and more remote degrees;

ii) All lawfully adopted descendants in the first and more remote degrees, notwithstanding the Adoption Act of Quebec, or any other future or present legislative provision inconsistent herewith;

iii) Provided, however, that a descendant who is surviving at the time he is called upon to benefit shall exclude his own descendants.

2. Terms that provide for division.

We have seen that a legacy to "children", or to "issue" with no provision as to how the legacy is to be divided, creates uncertainty as to what share each "child" or "issue" will inherit.

Evidently a wise draftsman should make express provision as to what portion of the legacy each beneficiary will take. The terms of most widespread use are "in equal shares" and "by roots". However, such expressions while common and simple are uncertain in result. Only in limited circumstances can they be used without fear of litigation.

A) "In equal shares".

In the case of a legacy to "children" or "issue" where no primary [120] descendants die before the legacy is finally distributed, a direction to divide the legacy into "equal shares" or "by heads" will create no problems in meaning. Whether one adopts the Furgolian system, or argues that article 980 introduces the rules of intestacy, legacies to "my grandchildren in equal shares" will obviously be divided equally among the grandchildren, and legacies "to my issue by heads" in which only children in the first degree inherit will be divided equally among

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[120] C.f. footnote 88 of p. 104 of this article for a definition of the term "primary descendant".

the children. Under such circumstances the terms "in equal shares" or "by heads" produce no litigious issues.

However, in cases where one or more descendants have died before the legacy is to be divided, leaving descendants entitled to inherit, a direction to divide the property "into equal shares" will lead to uncertainty. Since the testator cannot be sure a child or grandchild will not die unexpectedly, a direction to divide a legacy "in equal shares" without further amplification is dangerous.

Suppose a legacy to "my children" to be divided "equally" among them or to "be divided by heads and not by roots". Further suppose that the testator is survived by two children in the first degree and three grandchildren, the children of a deceased child in the first degree. Will the direction that the property is to be divided "by heads" or "equally" mean that the legacy will be divided into five equal shares, and that child and grandchild alike will inherit one-fifth; or will the legacy be divided as common sense dictates into three equal shares, such that each child will inherit one-third, and each grandchild one-ninth ? Similarly in a legacy to "my issue to be divided equally among them" in which the testator is survived by only three grandchildren, one of whom is the child of one predeceased child, and the other two, the children of another predeceased child, the question will arise whether the legacy is to be divided into three equal shares, or only into two equal portions.

Arguments may be made supporting both interpretations.

In many cases (and indeed in all cases if article 980 is based on the Furgolian system) legacies to "children" or "issue" or "grandchildren" will be divided in equal shares among descendants in the primary degree, even if the testator has remained silent as to how he wishes his property to be divided. In such legacies, a direction to divide the property "into equal shares" if it is to have any effective meaning must (it can be argued) refer to those descendants who would have inherited unequally, namely those descendants other than those in the primary degree. Thus in legacies "to my children in equal shares" or to "my brother's children in equal shares" where children in the first degree will share equally according to the general principles of law, and without express provision, the expression "in equal shares" should (on this view) mean that descendants of a deceased child are to share equally with surviving children in the first degree; otherwise the term will have no effective meaning. This interpretation was suggested by way of *obiter dictum* in *Meincke* v. *Brown*,[121] where

[121] *Meincke* v. *Brown* [1958] S.C. 293 at p. 303.

the court suggested that a legacy "to be equally divided amongst my children" should be divided into equal shares among children and grandchildren alike.

However, a contrary decision was reached in *Plouffe* v. *Lapierre* [122] and by way of *ratio decidendi*. In that case the testator left his property to be divided « par égales parts entre mes huit enfants ». Seven of the testator's eight children survived him. However, one child predeceased the testator leaving six grandchildren. The court did not divide the property into thirteen equal shares, as suggested in *Meincke* v. *Brown,* but divided the property into eight equal shares, each child inheriting one-seventh of the legacy, and each grandchild, one-forty-eight (i.e. one sixth of the one-eight share apportioned to that branch of the family).

The interpretation of *Plouffe* v. *Lapierre* seems more consonant with common sense and the desires of most testators than the view suggested in *Meincke* v. *Brown*. Expressions such as "in equal shares" are too common both in home-made and professionally drawn wills to be given the unnatural meaning of applying to each descendant who inherits a legacy to "children", "grandchildren" or "issue". The term should enable only an equal division between primary branches of the family. It should not enable those who inherit the share of another in his stead, to inherit a larger share than the person in whose stead they inherit would have taken had he lived. This is the view of *Montvalon* [123] and of *Ricard* [123a] and our law should accept it.

In any event it is evident that the expression "in equal shares" must be used with great care. It is the author's contention that the expression should never be used unless it only applies to descendants in the same primary degree. Thus legacies to "children in the first degree in equal shares" or to "my descendants in the second degree to be divided equally" offer no problems of interpretation. However, a legacy to "my issue in equal shares" or to "my children to be divided by heads" only raises unnecessary questions as to what share the descendants of a deceased descendant are to inherit.

B) "By roots"

A term common to many wills is the expression "by roots". Unfortunately this expression possesses a certain intrinsic ambiguity which makes its use dangerous in many cases.

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[122] *Plouffe* v. *Lapierre* (1917) 52 S.C. 151.

[123] *Montvalon, op. cit.*, v. 2, pp. 180-181.

[123a] Ricard, *op. cit.*, p. 348 Nos. 576 *et seq.; supra* p. 111.

At first blush it is difficult to understand why the term should create any difficulties. Many legacies such as a substitution "to my children, and then to my grandchildren" or a legacy to "my brothers' children" will be divided equally among the primary recipients if no contrary provision is made. It would seem that a testator who wishes to divide the property unequally among such children and grandchildren according to the family or branch from which they spring need only state that the property is to pass to such children or grandchildren "by roots". It is difficult to see how the testator could make his intention any clearer.

However, an examination of the jurisprudence will reveal how such legacies as to "my brothers' children by roots" or to "my grandchildren by roots" can raise litigious questions.

In the case of *Gurd* v. *Gurd*[124] the testator left his property,

> "in equal proportions *by roots*, between those of my nephews and my nieces who may survive me, and the lawful issue then living as representing their parent, of any of my nephews and my nieces who may predecease me." (Emphasis added)

The testator was survived by eight nephews who were the children of three brothers. The plaintiffs argued that the property was to be divided into eight equal shares among the nephews. They suggested that the nephews should take equally because it was the nephews who should be considered as being, "the root without reference back to the family branch" from which the nephews sprung. The defendants, however, argued that the division should be in three equal shares; the term "root", they suggested, referred to the branches or families from which the nephews sprang. The question facing the court, then, was, did the term "by roots" refer to the division among the nephews themselves or only to the division among their descendants ?

The court upheld the defendants and divided the legacy into three shares,

> "The word, in my opinion, applies to the case of the primary recipients who are to take as their share by roots and not individually by heads."[124a]

However, in the case of *Desbarats* v. *Desbarats*[125] the court reached the opposite conclusion. In that case the property was left to the testator's executors to,

> "partition in ownership ... my property ... *equally by roots* between those of the said twelve nephews and nieces who may be then living ... and the

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[124] *Gurd* v. *Gurd* [1944] S.C. 89; disposition quoted at p. 90:

[124a] *Ibid.*, at p. 91.

[125] *Desbarats* v. *Desbarats* [1955] B.R. 765.

lawful issue then living of any of them who may have died." (Emphasis added)

The testator was survived by twelve nephews and nieces who were the children of three brothers of the testator. The plaintiff asked for a division into twelve equal shares; the defendant for a division into three equal shares. The court unanimously divided the property into twelve parts.

Rinfret, J., stated,[126]

« Il me semble bien évident que l'emploi du mot *root*, souche, à cet endroit précis du testament, ne peut que référer à la souche dont la tête est chacun des neveux et nièces, enfants des trois frères... »

and Pratte, J., held,[127]

« les mots *by roots* ont été employés en prévision de l'hypothèse où l'un ou l'autre de ces neveux ou nièces ne survivrait pas au testateur, pour indiquer que les enfants d'une nièce ou d'un neveu décédé auraient droit collectivement à la part de leur père ou mère, selon le cas.»

Great emphasis was placed by Rinfret, J. on the particular wording of the will; however, Pratte, J. concentrated on the intrinsic meaning of the expression "by roots".

Evidently these cases suggest that the expression "by roots" is a much more litigious phrase than most draftsmen contemplate.

Of course, in certain circumstances the phrase will raise no doubts. Such is the case of a legacy to the "issue" of one person such as "to John's issue by roots" or to "my issue by roots". In such a case the phrase can only refer to the division among descendants other than those in the first degree. However, in any legacy to the "children" or "issue" of several persons and even to the "grandchildren" of one person the term can only be used at the peril of litigation.

Of course, a strong argument can be made that a legacy to the "children" or "issue" of several persons, or to the "grandchildren" of one person, "to be divided by roots", is to be divided unequally among the recipients in the primary degree, and that the term "by roots" refers not only to the descendants of deceased descendants in the primary degree, but to the descendants in the primary degree as well. A legacy to "my grandchildren by roots" (no matter which theoretical basis of article 980 is finally adopted) will be divided by root among the *descendants* of a deceased grandchild even had the testator remained *silent* as to what division he desired. In such legacies the *direction* to divide the property "by roots", if it is to have any effective meaning, must refer to those descendants who

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[126] [1955] B.R. 765 at p. 768.
[127] [1955] B.R. 765 at p. 770.

would have inherited *equally*, namely the *grandchildren* (assuming, of course, article 980 to be based on the Furgolian system).

Thus Bond, C.J. in *Gurd* v. *Gurd*[128] states,

> "The word, in my opinion, applies to the case of the primary recipients who are to take as their share by roots and not individually by heads. Art. 1014 C.C. provides that when a clause is susceptible of two meanings it must be understood in that in which it may have some effect rather than in that in which it can produce none. Here, to partition the estate individually amongst the nephews would be to ignore the express words "by roots", and indeed, to replace these words in effect with the words "by heads"."

However, it is evident that this argument has not assumed the force of law. Even in the same case Bond, C.J., had already observed that it was not a question of applying the general law,

> "but rather one of ascertaining the intention of the testatrix... It becomes necessary therefore to scrutinize the wording of the clause in question..."

and went on to say that

> "the words occur in this clause directly in connection with the word 'nephews', that is, the primary beneficiaries, and both logically and grammatically should be so applied, rather than to pass over the intervening words and apply it to the children of predeceased nephews only, where indeed it would be superfluous."[129]

And Rinfret, J. in *Desbarats* v. *Desbarats* placed particular emphasis upon the special wording of the will rather than bestowing any intrinsic meaning upon the expression "by root".

Thus in view of the above jurisprudence, and especially in view of the fact that every will and especially a long will, will contain its own contradictions, the draftsman should use the expression "by roots" with great care. The author would suggest that the phrase may be used with complete safety only when it refers to the "issue" of only one person. Certainly the draftsman should relegate to the ranks of the inherently contradictory the sometimes used expression "by roots and in equal shares."

C) Suggested clauses for the draftsman.

The cases of *Meincke* v. *Brown*,[130] *Gurd* v. *Gurd*[131] and *Desbarats* v. *Desbarats*[132] indicate the great care that must be taken in the use of such expressions as "in equal shares" and "by roots".

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[128] *Gurd* v. *Gurd* [1944] S.C. 89 at p. 91.
[129] *Gurd* v. *Gurd* [1944] S.C. 89 at p. 91.
[130] *Meincke* v. *Brown* [1958] S.C. 293.
[131] *Gurd* v. *Gurd* [1944] S.C. 89.
[132] *Desbarats* v. *Desbarats* [1955] B.R. 765.

The author has suggested that the expression "in equal shares" should only be used to describe a division among descendants in the primary degree, and that the expression "by roots" should only be used to describe the partition among the "issue" of one person.

The draftsman should attempt to construct the legacy to "children" or "issue" so that this is possible. The best method of achieving this result is to divide the property into shares, as in the following manner,

"I give all my property to be divided into as many equal shares as there are children [133] of mine who are living at the time of my death, and children of mine who are not living at the time of my death (whether or not they have died before or after the execution of this will)[134] who have left issue [135] of theirs who are living at the time of my death. One of such equal shares shall belong to each child of mine who is living at the time of my death, and one of such equal shares shall belong to the issue who are living at the time of my death of each child of mine who is not living at the time of my death, such issue to divide such equal share among themselves by roots."[136]

It is suggested that this type of legacy will avoid the pitfalls engendered by the use of the terms "in equal shares", "by roots" and "by roots and in equal shares".

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[133] The testator should, of course, define whom he means by children; c.f. pp. 119-120 of this article.

[134] It has been questioned whether the children of a child who is dead at the time the will is drawn can inherit in virtue of the term "children"; c.f. *Gervais* v. *Gervais* [1950] B.R. 749; *Martin* v. *Lee* (1861) 11 L.C.R. 84; c.f. also *Galliers* v. *Rycroft* [1901] A.C. 130 at 131.

[135] See page 120 of this article for a definition of the term "issue".

[136] However, where the testator leaves his property to several generations before he finally vests it in ownership, the draftsman must take great care to avoid the "three generation" rule of article 932 C.C. and endeavour to ensure that the shares are not considered as separate legacies, but are part of one mass. For the effect of a division into shares upon the "three generation" rule c.f. *Masson* v. *Masson* (1913) 47 S.C.R. 42.

Chapter V

SPECIAL PROBLEMS

1. The meaning of "children" in the prohibition to alienate.

A testator may leave his property to his son, and then prohibit his son from alienating the property to anyone except the son's "children". What is the meaning of the term "children" under such circumstances ? Is the prohibition to alienate except to "children" violated if the son alienates the property to the children of a deceased child of his ? Could the son alienate the property to the children of a living child ? Would the term "children" in a prohibition to alienate "except to the children" of the testator's brother have the same meaning ?

Article 979 defines the term "family" for all purposes except when used in the prohibition to alienate. In the prohibition to alienate the term is given a special meaning by article 978,

> "The prohibition to alienate out of the family, when no dispositions require the following of the legitimate order of succession, or any other order, does not prevent the alienation, by gratitious or onerous title, made in favour *of the more distant members of the family.*"

However, article 980, which defines the term "children", makes no distinction between the meaning of the term when used in a prohibition to alienate or when used otherwise. Article 980 states,

> "In the prohibition to alienate, as in substitution, and in gifts and legacies in general, the terms *"children"* or *"grandchildren"*... apply to all the descendants."

Thus the term "children" should have the same meaning in a prohibition to alienate as in a legacy. Just as a legacy to "my son's *children*" will enable the children of a deceased child of the testator's son to inherit, so an alienation to the children of a deceased child of the testator's son should not violate the prohibition to alienate "except to my son's *children*". However, an alienation to the children of a living child of the testator's son would violate the prohibition to alienate.

Whether a prohibition to alienate "except to the children of my brother" or "except to the children of my friend" would be violated by an alienation to the children of a deceased child would depend on whether article 980 is based on the Furgolian system or on the rules of intestacy.

If the Furgolian system is adopted, then the prohibition will not be violated if the property is alienated to the child of a deceased child of a brother or friend; the term "children" in such a case will include the children of a deceased child.

If article 980 is based on the rules of intestacy then the answer will depend on whether the rules of intestacy are violated by such an alienation. The question arises, whole rules of intestacy are to be followed; those of the testator or those of the person prohibited from alienation. Thus in a legacy to "my brother with no right to alienate except to his children" if the testator's rules of intestacy are to be followed the brother will be able to alienate only to his children in the first degree; however, if the brother's rules are applied then he will be able to alienate the property to the children of a deceased child in the first degree.

There is also one further problem. If a child in the first degree dies leaving three children, could the person prohibited from alienating "except to children" alienate to *one* of these three grandchildren, and not to the others; or does the prohibition to alienate mean that the alienation must be made equally in favour of all those who step into the deceased child's share ? The author believes that an alienation to one descendant would be valid. The spirit of the prohibition to alienate is to prevent alienation outside the family rather than a positive desire that the property be divided in a particular way. This spirit is evident in article 979, and there is no reason not to apply it to article 980.

2. The meaning of "children" in the power to appoint.

A power to appoint among "children" or "issue" also raises certain questions. Can the donee [137] of a power to appoint to "children" appoint to the children of a deceased child or of a living child, and, if so, in what proportions can he appoint among such grandchildren ? Does the term "children" when used in a power to appoint among the *testator's "children"* differ from its meaning when used in a power to appoint among the "children" of *collaterals* or *friends* of the testator ? If the "children" to whom the donee of the power can appoint are substitutes, will the answers to the above questions differ?

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[137] In discussing the power to appoint I am using the terminology of the English Common Law. Thus I refer to the person given the power to appoint as the "Donee of the power", and I refer to the persons to whom the Donee of the power may appoint as the "Objects of the power".

The prohibition to alienate and the power to appoint are differing legal institutions. In the prohibition to alienate, the person prohibited from alienating *owns the property;* [138] if he dies without alienating it, the property will pass to his heirs; if he does alienate it the property will be deemed to come from his patrimony.[139] However the person given a power to appoint does not own the property; he is simply a mandatory carrying out the testator's wishes. When he does appoint the property, it is deemed to come not from his patrimony but from the testator's. The objects of the power are *legatees of the testator,* and subject to the same rules concerning the devolution of legacies as all other legatees.

The power to appoint is merely a method of ascertaining the *testator's legatees;* the testator may leave the property to "such of my children as are 21 years of age on my death" or he may leave the property "to such of my children as my wife feels are deserving". In both cases the "children" are legatees of the testator.

Thus in a legacy to "such of my children as my wife shall appoint" the class of beneficiaries among whom the wife can appoint should include the children of a deceased child, just as a legacy to "my children" would include them.

Unfortunately there is a basis for doubting this position on historical grounds. The *Ordonnance des Testaments* of 1735 *clearly* stated that the children of a testator among whom property was to be appointed would only include "children in the first degree". Article 62 reads,

> « celui qui aura été institué héritier à la charge d'élire un des *Enfans* du testateur, ne pourra élire un des petits-Enfans ou descendans, encore que celui des enfants dont ils sont issus fût mort avant que le choix eût été fait. Et que, si les Enfans du premier degré décèdent avant que le choix ait été fait, le droit d'élire demeurera caduc et éteint, à moins que le testateur n'en eût autrement ordonné, »

and Bourjon [140] states,

> « Lorsque le choix doit se faire entre les enfans du testateur, il ne peut tomber sur les enfans d'un des enfans décédés... »

This ordonnance was never registered in Quebec; therefore, one must ask whether it created new law or simply reaffirmed the law

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[138] *St-Aubin* v. *St-Aubin* [1952] B.R. 364.

[139] It would seem that the person prohibited from alienating, except to his children, who does benefit them, has made a "disposition" within the meaning of S. 21 of the Quebec Succession Duties Act, R.S.Q. 1964, C. 70, whereas a person who elects under a power to appoint in favour of his children has not made such a disposition.

[140] Bourjon, *op. cit.*, v. 2, No 28, p. 176.

after 1735.[141] Montvalon, commenting on the custom of Provence which admitted representation to wills, states that whether a power to appoint among children included grandchildren was controverted and that the Ordonnance settled this point.[142] However, both Guyot and Thevenot d'Essaule suggest that it *changed* the old law.[143]

Thus while it is most probable that in virtue of article 980 the power to appoint among children includes the power to appoint the descendants of a deceased child, the matter is not free from doubt.[144]

However, assuming that article 62 of the *Ordonnance des Testaments* does not apply and that the donee of the power to appoint is free to appoint to the objects of the power, according to the principles enunciated earlier for ordinary beneficiaries (since, of course, objects of the power are ordinary beneficiaries), the meaning of the term "children" when used to describe the objects of the power of appointment will depend on whether article 980 is based on the Furgolian system or whether it is based on the principles of intestacy and, if the latter case, whether the "children" are descendants, collaterals or strangers of the testator or institute.

The same two conflicting theories which render uncertain the exact meaning of a legacy to "children" render unclear to what extent descendants of a deceased child can be benefitted in virtue of a power to appoint to "children".

Thus by way of example, in a legacy of "income to my wife, and on her death to such of my brother's children as she shall appoint by will", if the term "children" is to be interpreted according to the Furgolian system the wife will be able to appoint to the children of a deceased child of the brother; on the other hand if the term "children" is to include only those descendants who can inherit upon the testator's intestacy, the grandchildren will be excluded.

In a power to appoint to "children" in which grandchildren may be benefitted, the question arises, what shares of the inheritance can the grandchildren take ? The Donee of a power to appoint among "children" can appoint the whole of the property to one child in the first degree to the exclusion of all other descendants.[145] It would

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141 One might also ask whether or not the *Ordonnance* was followed in Quebec even though not registered; but on this point there appears to be no information.

142 Montvalon, *Traité des Successions*, v. 2. p. 195.

143 Guyot, *op. cit.*, p. 721; Thevenot d'Essaule, *op. cit.*, pps. 293-95 No. 944.

144 It should also be noted that article 62 of the *Ordonnance des Testaments* raises questions of interpretation. The article speaks only of the donee of the power being an heir, and the objects of the power being children of the testator; what if the objects are children of the heir or of another person ? Would the article apply ? Similarly would it apply to donees other than heirs ? What does the term "heir" mean ?

seem then most probable that the Donee of the power could appoint all the property to the children of a deceased child in the first degree to the exclusion of all other descendants, excluding even living children in the first degree.

However, can the Donee of the power benefit one of the children of a deceasd child to the entire exclusion of the other children of such deceased child, or must the Donee appoint equally among them all ?

Arguments can be raised on both sides; it does seem odd to state that once the donee of the power decides to give a share or indeed all the property to the children of a deceased child that the division must be made equally among such children even though the donee could exclude those closer in degree to the testator.

However, since powers of appointment are restrictively interpreted [146] it is more probable that the courts will deny the donee the power to elect further among the descendants of a deceased child, since it might be argued that while the testator did wish the donee of the power to have discretion among his own children he would not wish him to have the same discretionary power in regard to a child's family and so interfere in the latter's affairs.

Of course, one cannot be dogmatic on this question. It is possible that the courts may formulate a rule to the effect that if the objects of the power are descendants of the person who is to appoint among them, he may have the power to exclude all but one of the descendants of a deceased descendant, but that if the donee of the power is not an ascendant of the beneficiaries (objects of the power) he will not have this right.

However, while American law gives wide effect to the purposes of the power to appoint, namely to mitigate the uncertainties of life by giving a trusted person wide discretion (such that under American law powers to appoint are largely discretionary unless limited) it is doubtful whether Quebec law will give much leeway to the donee of the power to appoint. Under old French law and under Quebec law the powers of the donee are deemed limited unless expressly broadened.

It would thus seem that a power to appoint among children does not give the right to exclude one or more children of a deceased child or to appoint among such children of a deceased child unequally.

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[145] The power to appoint among several persons includes the power to exclude all but one of the Objects of the power: *McGibbon* v. *Abbott* (1884-5) A.C. 653.

[146] *Lussier* v. *Tremblay* [1952] 1 S.C.R. 389.

3. Does the term "children" include children of a child deceased at the time the will is executed ?

The terms "children" and "issue" raise one last question. If property is left to "children" or "issue", and at the time the will is executed one of the testators children is dead, do the children of such deceased child who survive the testator inherit his share ? The answer appears to be that they do.[147]

4. The meaning of Collective Expressions other than "children".

This article has only concerned class legacies to "children", "issue", "grandchildren" and the like. However, the testator may use the mechanism of the class gift to describe other relatives. While this essay is not concerned with such legacies, a few comments might be in order.

There is no doubt that legacies to "nephews", "cousins", "sisters", "brothers" and the like would neither under ancient law nor under modern law include the descendants of a predeceased class member. The jurisprudence on this point is quite clear.[148] However, doubt might arise in such legacies as "to my nephews, that is to say the children of my brother" as to whether the term "children" would broaden the expression "nephews" to include the children of a deceased nephew.[149]

A legacy to "sons" under ancient law occasioned some doubt as to whether the term included grandsons.[150] However, the strict term-

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[147] *Leclère* v. *Beaudry* (1873) 5 R.L. 626 (Privy Council); however, in *Gervais* v. *Gervais* [1950] B.R. 749 it was suggested by Hyde, J. in an *obiter* that "A testator cannot be supposed to have intended to benefit a person whom he knows to be dead at the date of his will" [1950] B.R. 749 at p. 753; cf. also the views of the dissenting judges on this point especially Bertrand J. at 765; cf. also *Martin* v. *Lee* (1861) 11 L.C.R. 84 at 88; cf. *Galliers* v. *Rycroft* 19 Natal L.R. 221 quoted in [1901] A.C. 130 at 131: "The case before the Privy Council of *Martin* v. *Lee* dealing with French law, referred to the issue of children known by the testator to be dead at the time of the will. It is in accordance with Voet, though many of the Roman-Dutch commentators contest his opinion."

[148] *Dame Meredith* v. *Meredith* (1939) 66 K.B. 572; *Bissonette* v. *Bisonette* [1944] S.C. 159, agrees with this general proposition but allowed representation in view of an obvious intention on the part of the testator to have it; for an interesting discussion of various problems concerned with these terms, c.f. Laurent, *op. cit.*, v. 13 nos. 494 *et seq.*, pps. 545 *et seq.*

[149] *Meredith* v. *Meredith, loc. cit.*

[150] Ricard, *op. cit.*, No. 507 *et seq.*, p. 335; Furgole, *Traité des Testaments* No. 125 p. 410; Montvalon, *op. cit.*, v. 2. p. 179; also Pothier, *op. cit.*, Vol. 8, No. 72 p. 478. However, even those authors who gave the expression a restricted meaning

inology of article 937 and 980 make it quite clear that the expression "son" should not include the children of a predeceased son, under our law.

The term "male descendants" led to some difficulty in ancient law, and the question arose whether male descendants of female descendants would be included; the authors arrived at a rare unanimity stating that their exclusion depended on whether an intention of the testator to perpetuate his name could be found.[151]

The expressions "heirs" or "estate" are dangerous to use without explanation. If property is left to the testator's heirs or those of a third person, the question arises as to whether abintestate or testamentary heirs are meant.[152]

However, even if the court does decide that the expression means abintestate heirs the problems of such a legacy will be legion;[153] does the expression refer to the intestacy laws at the time the will was made or at the time of the testator's death or at the time the property vests in the heirs; if the property concerned is immoveable property situated in another jurisdiction, are the intestacy laws to be followed those of the testator's domicile or those of the *situs* of the immoveable property; what meaning will foreign courts give to the expression "heirs" for property located within their jurisdiction ? If a testator in addition to leaving property to his heirs also leaves a particular bequest to one of his heirs, will such heir be excluded from the general legacy to heirs ? Thus, in a will in which the testator's house is left to his son and all the rest of his property to his heirs, will his son, who is an heir, share in the residuary bequest ? [154]

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in a disposition stated if the term son was used in a condition it would include grandsons; i.e. if the testator left his property to X, and if X died without sons to Y: if X had a grandson the property would not pass to "Y", "son" in such a case having an extended meaning.

[151] Pothier, *op. cit.* Vol. 8 p. 479 No. 73.

[152] *Allan* v. *Evans* (1900) 30 S.C.R. 416 where it was held that the expression meant testamentary heirs; *Frenette* v. *Cimon* (1922) 32 K.B. 110 where the contrary result was reached; c.f. also *Jack* v. *Jack* [1943] K.B. 165 where the expression "nearest heirs" was considered; and also *Meredith* v. *Meredith, loc. cit.*

[153] For an excellent article see Casner, (1939-40) 53 *Harvard L.R.* 207; Casner provides clauses defining the expression "heirs", at pp. 249-250.

[154] In *Carter* v. *Goldstein* (1922) 63 S.C.R. 207, the testator left income from a particular fund to his wife and stated that the capital of the fund was to fall into his residuary estate upon certain events; the residuary estate was given to the wife. The court held that she took the principal of the capital fund as well as the income. Thus, one is entitled to ask in a will where the usufruct is left to the wife and the ownership to the heirs, will the wife be a part owner of the property as an "heir" although she has been specially provided for in

The term "estate" is also a potentially litigious phrase. It is sometimes stated that if a legacy lapses, the property is to return to the testator's "estate". Does this term mean the residuary testamentary estate of the testator, or his abintestate estate ?[155] If it means the abintestate estate, then all the questions raised above with regard to the meaning of the term "heirs" may be posed with regard to the meaning of the term "estate".

It is evident that class gifts to persons other than children or issue can create difficult problems. In all cases the testator should clearly define his terms.

CONCLUSION

It is evident that legacies to "children" and "issue" are uncertain in result. Whom such legacies will include, and how they will be divided, even in the face of such phrases as "by roots" and "in equal shares" are unsettled questions.

The author has avoided stating a position on many of the problems raised. This lack of dogmatism has been intentional. Its purpose stems from a strong conviction that the problems raised lead to no obvious conclusion. If one leans on history and the unanimous weight of Quebec doctrine the theory that the term "children" is introductive of the rules of intestacy should be followed; if one emphasizes social policy and the opinions of some courts the Furgolian system should be adopted. In these circumstances it is more important that the draftsman be made aware of the *possible* problems than the *possible* answers. This article has been written with the draftsman in mind. To the author it is more important that he emphasize the uncertainties and difficulties inherent in the use of the terms "children", "issue", "by roots", "in equal shares" and the all too common "by roots, and in equal shares", so that the draftsman recognize the pressing need for definition and precision than that he lull the draftsman to false security by misleading facile solutions to intractable problems.

The author also had a purpose in writing this article, other than a strong desire to impress upon the draftsman the need to rigorously define his terms.

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the legacy of the usufruct. C.f. *Desrosiers* v. *Paradis* [1963] S.C.R. 52 and [1962] B.R. 27 (*sub nomine Desrosiers* v. *Piché*) where apparently the wife was not included in the expression "heirs" who were left the principal, in virtue of the fact that she had been left a legacy of income.

[155] C.f. *Carter* v. *Goldstein* (1922) 63 S.C.R. 207; *Meincke* v. *Brown* [1958] S.C. 293.

There is in Quebec too large a tendency to dwell only on the language of the Code and determine what is the law from what seems linguistically logical. This method distorts the law. In some cases the Code gives expression to an underlying philosophy which the express wording of the article does not reveal. In other instances the article was intended to deal only with a specific problem, and a purely linguistic approach endows the article with a generality it was never intended to possess. In other cases the article does not realize the unending subtlety of many of the problems relating to it, and only a study of history will demonstrate that it was inadequately conceived.

In all these cases a study of history will reveal to the courts that it is not bound to some unjust or socially unhappy result because of the first impression given by the language of the article; in many cases a true analysis of history will reveal a number of interpretive choices, all equally valid, and some more consonant with modern needs, or with justice between the parties, than an unreflective grammarian would imagine.

Only if we bring to our interpretation of the Civil Code a greater sense of the history and purpose of its articles will we truly understand our law and apply it to modern times with wisdom. Moreover strangely, only then will we realize how free our courts remain to adapt our law to modern times. For to dwell upon the ancient laws of Quebec and France is not to confine our law to a legal system enacted in the eighteenth century. On the contrary when we truly understand our past, we will realize how many of the problems we face today were not conceived of by those legal systems, and how many questions remained unsettled; we will also realize that our courts are extremely free to launch new initiatives based on new needs and a deeper understanding of ancient problems.

History has liberating effect, not a confining one. Only by understanding our past will we realise how free our courts are to develop a viable system of law for the twentieth century based on orderly continuity with the past and just adoption to the needs of the present.

The present linguistic and unhistorical approach does not do justice to the genius of our Code; in many cases it opens up fields of uncertainty which have been settled in the past; in other areas it confines our law to unjust and restrictive principles which were never intended by our codifiers. The Civil Code is not a tyranny of words; it is a flexible and orderly compendium of past experience and tentative generalizations. It is unfortunate after the revelations of Holmes, Cardoza and Geny that modern Quebec law has not attempted to understand its roots more fully.