PROHIBITION OF FIDEICOMMISSUM IN FRENCH AND ITALIAN LAW. *

I have chosen as the theme for my contribution to the work of the Journée du Droit Civil Français, the question, under French and Italian law, whether testamentary provisions obligating the beneficiary to turn over the property to a third person upon the happening of a specified condition constitute a trust or *fideicommissum*. As is well known such provisions are usually dependent on the condition that the beneficiary dies without children (*si sine liberis decesserit*) or on the conditions, less frequent but not at all rare, that the beneficiary dies prior to contracting a marriage or attaining majority or the like.

The subject appears to me of special interest for several reasons.

In the first place there is a striking similarity, a startling coincidence, in the jurisprudence of the two countries as to this problem, notwithstanding the diversity of the fundamental rules embodied in the two Civil Codes—Art. 896 of the French Code, and Articles 899 and 900 of the Italian Code. This similarity has persisted in the varying and at times contradictory jurisprudence respecting the problem in the course of time. By jurisprudence it is hardly necessary to tell this audience I mean the decisions of the courts. The stages of the evolution of this jurisprudence and the initial causes of the general tendency from which it took its origin and of the successive changes have been alike in both countries.

Then there has been one characteristic in common in these court decisions of the two countries, more particularly accentuated recently in Italy, namely, on the one hand, a vigorous dissent from the most authoritative and prevalent doctrine of the commentators, and on the other, as it seems to me, a failure to follow the statutory enactments.

Again, a thorough examination of the problem induces one to abandon a rather dry and difficult technical consideration of the limited field, for the far broader aspects of the extent to which the courts should limit their action if they are not to invade the field of the Legislature, and of the still larger problem of reforming the code provisions in the two countries as to trust or *fideicommissum*.

And finally, the question is one which shows clearly the importance of research in comparative law for the study of

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questions of the *internal* law of the various countries, by reason of the contribution, sometimes decisive, which comparative law can render in the solution of the identical questions both *de jure conditio* and in legislative reforms.

In view of the limitations of time on this occasion, I shall confine myself to a statement in summary form of the results of my research, making a rapid survey of the essence of the problem, then of its principal critical aspects, and finally of the orientation for an eventful reform of the two bodies of legislation. The full text of my article I shall be glad to present in the event the proceedings of this meeting are to be published.

As is well known and as I have already remarked, while the prohibition of a trust (*fideicommissum*) is common to the statutory law of both countries, nevertheless there is a divergence between them as to the sanctions imposed upon a breach of the prohibition. Under the French Code such a breach produces an absolute nullity of the testamentary disposition (Art. 896), but under the Italian Code (Art. 900), the testamentary disposition is only void as to the institution of the residuary beneficiary, but is valid as to the institution of the first beneficiary. There is a difference also in the treatment accorded by the two codes as to provisions in favour of unconceived children. Such provisions are absolutely void by the French Code (Art. 906); but under certain conditions, they are valid under the Italian Code (Art. 764).

These differences naturally are of importance in the discipline of the *fideicommissum* in the two legislations. But they do not prevent a statement in identical terms of our problem in both. In both, in fact, the question to be determined is whether the testamentary dispositions under consideration are or are not of a trust or fideicommissary character, whether therefore they are subject to the prohibition of a trust and to the corresponding sanctions.

As I have said, the tendency of the jurisprudence, in facing this problem, has been identical in both countries. It was earlier and more decisive in France, because of the greater severity of the French Code, but in both countries the courts have had the same objective. They have sought for and put into action all appropriate means to save the testamentary provisions in question from nullity and to withdraw them from the sphere of application of the rules prohibiting trusts.

The longer the time that elapsed after the promulgation of the two codes, the more evident became the hardships of such

rules in so far as these particular testamentary provisions were concerned. The rules themselves seemed to fit only cases of a long series of substitutions, one following the other, protracted over a lengthy period. Their very rigour seemed entirely out of proportion and deprived of any reasonable basis when applied to the dispositions we are examining, which are absolutely free from the dangers which it was the intention of the codes to prevent.

Accordingly the methods adopted by the courts to attain the ends they sought, were almost the same in both countries.

So in France, at first, the possibility was suggested that these provisions constituted merely an ordinary substitution—which as is well known, is valid—or the will was interpreted as being a mere recommendation or prayer on the part of the testator, or as giving merely a residuary legacy (*de residuo*).

Successively, resort was had to the expedient of interpreting the will to the effect that it was the intention of the testator to give to the first beneficiary only the usufruct of the hereditary property, and the naked property thereof under a condition to one or the other of the beneficiaries, according to whether the condition did or did not happen.

In the course of time a further step was taken and the will was construed as vesting the full estate, but subject to a resolutory condition as to the first beneficiary and a suspensory condition as to the second beneficiary. This interpretation not only was approved by the Court of Cassation in its judgment of June 18, 1873, but became the general ruling principle on the subject and was extended to all testamentary provisions of the kind we are dealing with, and these provisions were declared *a priori* to be valid.

But this advanced position, representing the climax of the jurisprudential evolution in France, was in turn abandoned. The concept was then adopted that the determination of the legal validity of these dispositions was a question merely of interpretation of the intent of the testator and hence merely a question of fact and not of law; on the solution of which depended whether the dispositions were of fideicommissary character and void, or whether they were valid. This new orientation naturally caused great diversities of opinion among the judges and created a situation of legal uncertainty which was very serious for the interested parties.

The courts only receded from this position at the beginning of the present century and turned in the following new direction,

which is practically a reversion to the state of affairs previously affirmed which culminated in the 1873 judgment.

While still staying in the field of a mere interpretation of the will of the testator, the courts admitted that in cases where the disposition is not subject to the happening of any particular condition and it is only required for the second institution that the beneficiary thereof survive the first beneficiary, such a disposition is fideicommissary and therefore prohibited. But on the other hand when the second institution is subject to a similar condition, including among others the conditions we are examining, it must be held to be valid. In such case, we have the constitution of two alternative conditional institutions, only one of which will finally take effect (according to whether or not the condition happens). In this fashion, there is lacking the double or multiple institution and the successive order (*ordo successivus*) which is the main characteristic of the *fideicommissum*, and accordingly there is no possibility of applying the prohibition and the sanctions which penalize it.

As I pointed out before, the Italian jurisprudence evolved along the same lines. After a great deal of uncertainty which arose almost immediately after our Code became effective, the theory was adopted toward the end of the last century and during the early years of the present century, that the dispositions under examination were *fideicommissa* The Court of Cassation of Rome in its decision of September 23, 1902, citing the uniformity of the jurisprudence of the other Courts of Cassation of the Kingdom to the same effect, followed this theory.

But later, more uncertainty arose and this theory was completely abandoned by the same Court of Rome in its judgment of July 12, 1923, which decision was supported later by the United Court of Cassation of the Kingdom. Under this trend the same conception prevailed upon which is based the distinction commonly found in the French jurisprudence to the effect that there can be no *fideicommissum* where the testamentary provision is subject to a condition. The decisions of the Italian Court of Cassation on the other hand regard this conception as a general principle of law so that, from a formal point of view, they approach more closely the decision of the French Court of Cassation of 1873.

But even this new trend was not to remain unchanged for even though it may still, to some extent, be deemed to prevail, yet during the past few years it has been severely shaken by

two very recent decisions of the same Court of Cassation which reverted to the theory that the main issue in solving the questions under examination is to ascertain the testamentary intent—a question of fact which must be decided in each individual case.

This evolution of the jurisprudence both in Italy and in France brings to mind, as I see it, a number of important questions of a general character.

In the first place this evolution illustrates the irresistible tendency of the courts,as is probably true of those of every country, to attenuate or to eliminate entirely the harshness of rules of statutory law, when such harshness seems excessive or to be entirely devoid of any reason for existing. In such cases the jurisprudence is ready to use any expedient even when such expedient results, in fact, in an open violation of the statute; and, in my modest opinion, the jurisprudence referred to above is contrary to the provisions of both the French Civil Code and the Italian Civil Code. Briefly, the following are the principal reasons for my conclusion:

(1) In the first place there is no basis for the conception that a *fidcicommissum* cannot result solely from the testamentary provisions which place the obligation on the first beneficiary to turn the property over to others upon the happening of a specified condition. Under that conception there would be no possibility for *fideicommissa* which as a matter of fact do exist. A conditional *fideicommissum* is not only possible, but is both expressly and generally recognized by the laws in effect in several countries, and after careful consideration it seems to me to be the only possible form of *fideicommissum*. The conditional *fideicommissum* is recognized in the following Codes:—

The Maximillian Civil Code of Bavaria, the Code of Frederic and the Prussian, Austrian, Saxon and German Codes; in the Codes of the Cantons of Ticino, Solothurn, Valais and Freiburg; the Swiss Code and in the Codes of Chile, Colombia and Brazil, in the Codes and Laws of the former Italian States and expressly in the "constitutions" of Modena; in the Civil laws for the Island of Sardinia and in the Codes of the Duchies of Parma and Este, and in the Kingdom of Sardinia.

Moreover, the conditional *fideicommissum* was continually employed during the intermediate period up to the time of the modern European codifications. This is conclusively proven by De Luca in "Dottor Volgare" and by the writers cited by him.

(2) Moreover, both history and the study of comparative law demonstrate that the testamentary provisions dependent

upon the clause *"si sine liberis decesserit"* were *fideicommissa* It appears further that this clause was presumed to be included in all such testamentary provisions even though, in fact, the will did not so provide.

(3) History and the study of comparative law show, further, that every *fideicommissum* is conditional, because every *fideicommissum* presupposes the condition that the second beneficiary will survive the first one. This was already stated by De Luca, who added that the most common and general type of *fideicommissum* is the so called *fideicommissum* of restitution, i.e., the *fideicommissum* whereby the first beneficiary was obliged merely to turn over the property to the remainderman. The Code of Chile follows this in Article 738, which reads: "A *fideicommissum* always presupposes the express or implied condition that the remainderman be in being at the time when the property is to be turned over to him. To this condition of the remainderman being in existence there may be added other conditions, joint or several."

Now in the testamentary provisions under consideration the condition "if the first beneficiary shall die (meaning before the death of the remainderman) without children" is simply the usual condition "if the first beneficiary shall die before the remainderman" to which is added the further condition of his so predeceasing without leaving children.

(4) The French and Italian legislation is limited to forbidding *fideicommissa* and to setting forth the consequences arising from the violation of the prohibition. The legislators never considered that there might be a different theory in regard to *fideicommissa*. It is clear that they retained unchanged the traditional theory. Now, as I see it, the old theory which prevailed immediately preceding the two codifications shows that the testamentary dispositions under examination were all regarded as of a fideicommissary nature. They fall, therefore, under the general prohibition provided for by the two Codes.

For the reasons set forth above and for other reasons that I am compelled to omit for the sake of brevity, it appears that the French and Italian decisions on this point lack any basis and are therefore contrary to the written law of both countries.

In another work of mine written in connection with Italian law I stated what I consider the better view in this matter. I also believe that this view of mine is in accord even with the French law.

My theory may be briefly expressed as follows:—

Generally speaking it is simply a question of interpretation to determine as the occasion arises what was the testator's intent in using the testamentary provisions under consideration. If his intent as set forth in the will was simply to appoint an heir or a legatee subject to an alternative condition, the provision is valid; if it be for some other purpose it is a *fideicommissum.*

But one need not fear any legal uncertainty because of this. We must not forget, however, that the testamentary dispositions under consideration are usually of a fideicommissary nature. Both legal history and the analysis of the will of the testator show that in most cases—I would say in 99%—this conclusion is sound. Consequently only in extremely rare cases can any doubt arise as to the nature of similar testamentary dispositions.

I know that this theory of mine is contrary to the jurisprudence of the two countries and especially opposed to the goal of equity which their decisions pursue. If I am not mistaken, this is the only theory that harmonizes the laws of both countries; but the interpreter of the law—whether judge or student—must ascertain and observe the law as it is and not as he would wish it.

Now I must consider a second general problem. In my opinion, jurisprudence must never modify or violate the written law merely in order to adapt it to the exigencies of equity or of different social conditions. I have little sympathy for the so-called progressive interpretation of law. I believe, that at least in the countries where a written law governs, the principal source of legal certainty is the law itself as it was intended at the time of its enactment. In case of discrepancy between the law and the necessities of life, juristically speaking, there is but one remedy: to enact the needed legislative reforms.

There is another consideration, closely connected with those set forth above. The long and laborious evolution of the jurisprudence in Italy and France with respect to our problem is the most certain sign of the necessity for reform of the two sets of laws in the matter of *fiideicommissum.* The doubts and disagreements which appear in Italy are, if I am not wrong, the result of too little thought given to the teachings of history and comparative law, and, I dare say, of the panic which affected the Italian and French legislators in matters of *fideicommissum.*

This ill-treated institution (*fideicommissum*), together with the damage it certainly caused, rendered some service of importance to the economic life of many countries.

It is necessary to free it from its real defects and not from its imaginary ones and to hold it within limits to enable it to give effect to expressed testamentary intent on the one hand, and on the other to safeguard public policy. But even with respect to this point if anything useful is to be learned—and, I would say, if any basic principles are to be followed—they must be derived from legal history and from comparative law.

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