PRETERITION — PROVENANCE, PROBLEMS, AND PROPOSALS

RUBEN F. BALANE*

Article 854 of the Civil Code of the Philippines is the subject of this study. For the purpose of situating it within the structure of the Code, we may note that the article is found in Book III, Title IV, Chapter 2, Section 2. Thus, Article 854 is found in the book on "Different Modes of Acquiring Ownership," the title on "Succession," the chapter on "Testamentary Succession," and the section on "Institution of Heir."

The article reads *in toto*:

"The preterition or omission of one, some, or all of the compulsory heirs in the direct line, whether living at the time of the execution of the will or born after the death of the testator, shall annul the institution of heir; but the devises and legacies shall be valid insofar as they are not inofficious.

"If the omitted compulsory heirs should die before the testator, the institution shall be effectual, without prejudice to the right of representation."

Preterition, then, at least for our preliminary purposes, can be defined in Manresa's terms, thus:[1] "Preterition consists in the omission of an heir in the will, either because he is not named, or, although he is named as a father, son, etc., he is neither instituted as an heir nor expressly disinherited, nor assigned any part of the estate, thus being tacitly deprived of his right to the legitime."[2]

Or, as Castán puts it: "By preterition is meant the omission in the will of any of the compulsory heirs, without their being expressly dis-

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*_Associate Professor_, College of Law, University of the Philippines, and _Faculty Editor_, Philippine Law Journal (July, 1972 — February, 1975).

[1]For convenience and textual continuity, passages from non-English works are, except in two or three instances, quoted in English translation — albeit bad English translations — in the body of the article. The Spanish or Latin originals are, however, reproduced in the corresponding footnotes.

To those readers — proficient in Spanish or Latin or both — who would have preferred, justifiably, the original passages to be quoted in the article itself, my profound apologies.

[2]6 MANRESA, COMENTARIOS AL CODIGO CIVIL ESPANOL, 424 (7th ed., 1951).

"La preterición consiste en omitir al heredero en el testamento. O no se le nombra siquiera, o aún nombrándole como padre, hijo, etc., no se le instituye heredero ni se le deshereda expresamente, ni se le asigna parte alguna de los bienes, resultando privado de un modo tácito de su derecho a legítima."

inherited. It is thus a tacit deprivation of the legitime, as distinguished from disinheritance, which is an express deprivation."[3]

IN HISTORY

The antecedents of Article 854 go deep in the history of Western law, that is to say, of the civil law tradition. Moreover the antecedents there are many, although the chief ones are three: the Institutes of Justinian, the Siete Partidas and the Civil Code of Spain.

The Institutes itself is a relativeiy late and more sophisticated expression of very old practices and very ancient beliefs. The Roman law of succession, for instance, of which the concept of preterition was but a small part, was as old as the earliest settlements upon the Seven Hills. And the Roman law of succession, like all law, derived its first underlying principles from religion and culture. The first such principle was this: that when a person dies, something of him does not perish — doubtless one of the very early manifestations of the *"Non omnis moriar"* theme so recurrent in Latin literature. This imperishable something came to be known as one's status or legal personality; this lived on, assumed by a successor. Another underpinning was religious: the family was a unit upon which devolved the sacred obligation of worship of the ancestral spirits and the *lares* and *penates*, the household gods. This worship was to be perpetuated by the family as a corporate unit and so also the *patrimonium*, or family property, without which the worship could not be properly rendered. Certain items of the *patrimonium* especially, like the *sacra*, were, "regarded as a permanent adjunct to the family organization, to be administered by the one who possessed the *potestas*, and to be assumed by the person or persons upon whom the paternal power descended."[4]

On the one hand, therefore, there was the personal element in succession, that one's personality lived on beyond death. On the other hand, there was the social, or familial, or corporate — that property was in a strong sense a collective thing. These two countervailing aspects are important things to bear in mind in studying the source and development of the law of succession and, therefore, of preterition.

As manifested above, the concept of preterition was well-settled in the classical Roman law long before Justinian. The rule was that if the

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[3]CASTAN, DERECHO CIVIL ESPANOL, COMUN Y FORAL, 576 (6th ed., 1944).
"Se entiende por preterición la omisión de alguno de los herederos forzosos en el testamento, sin deseheredarlo expressmente. Es, pues, una privación de la legítima hecha tácitamente, a diferencia de la deseheredación que es una privación por modo expreso."

[4]MOREY, OUTLINES OF ROMAN LAW, 314 (1902).

omitted heir was a son, the will was formally void and the succession was governed either by a prior will or, in default of that, by the rules of intestacy. If, however, the omitted heir was a daughter or a more distant descendant, the will was only *pro tanto* invalidated, that is to say, the omitted heir concurred in the succession with the instituted heir.[5]

The codification of the law under the Emperor Justinian in the sixth century of the Christian era constitutes the first major antecedent of our law on preterition. Title XIII of the Second Book of Justinian's Institutes, entitled "De Exheredatione Liberorum" — "On the Disinheriting of Children," explains in clear and certain terms the law on preterition then in force.

It states:

"The formalities which we have explained above are not, however, sufficient to make a testament perfectly valid. But he who has a son under his *potestas* must take care either to appoint him heir or to disinherit him by name. Otherwise, if he pass him over in silence, the testament will be void: so that even if the son die in the lifetime of his father, no one can be heir under such testament, for the plain reason that the testament was invalid from the very beginning. But the ancient rule was not the same as to daughters, or as to other descendants of either sex tracing through the male line: but supposing such were not appointed heirs or disinherited, the testament was not invalidated, but a right of attaching themselves for a specified portion was allowed to them. Neither were the parents obliged to disinherit these persons by name, but it was allowable to do so in a general clause.

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"These, however, were the rules introduced by the ancients: whereas one of our constitutions, maintaining that there ought to be no difference in this matter of right between males and females, since each sex fulfills equally its natural part in the procreation of mankind, and since by an ancient law of the Twelve Tables all were called alike to the succession on an intestacy, (a principle which the Praetors seem at a later period to have adopted), has introduced a simple and uniform rule both for sons and daughters and other descendants through the male line, whether born at the time or after-born, namely, that all, whether they be *sui heredes* or emancipated, must either be appointed heirs or disinherited by name; and (if omitted) shall have the same effect as to invalidating the testaments of their ascendants and defeating the inheritance, which

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[5] PUIG PEÑA, 2 TRATADO DE DERECHO CIVIL ESPANOL, 380-381 (1963).

sons have, whether *sui heredes* or emancipated, and whether already born or conceived at the time and born afterwards."[6]

The one major change in the law of preterition which the Institutes effected was the abolition of the distinction, as to form and as to effect, between the disinheritance of males and that of females. The rule, however, that an heir should either be instituted or disinherited, otherwise there was preterition and the will was annulled, was not only preserved but strengthened.

Why this requirement either to institute or disinherit? And why the consequence of preterition? Leage explains it thus: "On the death of a person intestate those persons (called 'sui heredes') succeeded to him who were in his power at his death, and who by his death became *sui juris*. But traces of the old conception, that the property belonged to the family and not to the *paterfamilias*, remained even in the developed law, and Gaius tells us that *sui heredes* were regarded, even in their parents' lifetime, as in a sense owners of the family property ('sed sui quidem heredes ideo appellantur quia domestici heredes sunt et vivo quoque parente quodammodo domini existimantur," G. ii. 157). This conception gave rise to the rule that the first duty of a testator at Rome was, not to appoint a successor, but to disinherit those persons who but for the will would have taken the property. If not so disinherited they were known as 'praeteriti', and the whole will might fall to the ground, in which case, of course, they took the property as on an intestacy."[7]

In Burdick's famous work on Roman law, a similar explanation is given: "The rule requiring the express mention of a testator's *sui here-*

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[6]"Non tamen, ut omnimodo valeat testamentum, sufficit haec observatio quam supra exposuimus. Sed qui filium in potestate habet curare debet, ut eum heredem instituat, vel exheredem nominatim faciat. Alioquim si eum silentio praeterierit, inutiliter testabitur, adeo quidem, ut etsi vivo patre filius mortuus sit, nemo heres ex eo testamento existere possit, quia scilicet ab initio non constiterit testamentum. Sed non ita de filiabus, vel aliis per virilem sexum descendentibus liberis utriusque sexus fuerat antiquitati observatum: sed si non fuerant heredes scripti scriptaeve, vel exheredati exheredataeve, testamentum quidem non infirmabatur, ius autem accrescendi eis ad certam portionem praestabatur. Sed nec nominatim eas personas exheredare parentibus necesse erat, sed licebat et inter ceteros hoc facere.

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"Sed haec quidem vetustas introducebat. nostra vero constitutio inter masculos et feminas in hoc iure nihil interesse existimans, quia utraque persona in hominum procreatione similiter naturae officio fungitur, et lege antiqua duodecim tabularum omne similiter ad successiones ab intestato vocabantur, quod et Praetores postea secuti esse videntur, ideo simplex ac simile ius et in filiis et in filiabus et in ceteris descendentium per virilem sexum personis, non solum natis, sed etiam postumis, introduxit, ut omnes, sive sui sive emancipati sunt, aut heredes instituantur aut nominatim exheredentur, et eundem habeant effectum circa testamenta parentum suorum infirmanda et hereditatem auferendam, quem filii sui vel emancipati habent, sive iam nati sunt sive adhuc in utero constituti postea nati sunt."

(Abdy and Walker, transl.)

[7]LEAGE, ROMAN PRIVATE LAW, 180 (1906).

des, either in terms of institution as heirs or of disherison was founded, probably, upon the primitive doctrine of the Roman family. From ancient times the family was the basis of the whole system of the *jus civile*, and in the early period of this law the family property was regarded as the joint property of the *paterfamilias* and his *sui heredes*, the latter being looked upon as co-owners even during the lifetime of the *paterfamilias*. The manager and controller of the property was the *paterfamilias* and by his will he could still exercise this right of control by allotting this property to whom he would, provided he expressly excluded from it those persons who would be entitled to it in case he died intestate."[8]

Be that the reason or not for preterition, however, under the Roman law of Justinian, a testament in which a *suus heres* was preterited was void. It was *injustum* and therefore *nullius momenti*, and inheritance passed *ab intestato*.

It is interesting to note — and this will be relevant when we discuss our own law — that preterition, a rule devised for the protection of the heirs, was in the later Roman law not deemed sufficient. "It had . . . no application to a woman's will, and even in the case of a man's testament, his heirs, provided he took care to disinherit them properly, had no legal ground of complaint. Soon after the time of Cicero, however, a new protection was devised, based less upon the ancient idea of family ownership than upon the more modern conception, that a testator is under a duty to provide after his death for those related to him by near kinship. This protection received the name *'querela inofficiosi testamenti'*, 'the plaint of an unduteous will'; the will being attacked on the supposition that a testator who, without any ground, failed to provide for his relatives must be presumed to be more or less insane, and his will, accordingly, invalid (*quasi non sanae mentis*)."[9]

Actually, by Justinian's time, the law of disinheritance had become very specific and the grounds therefore expressly provided, so that a disinheritance made improperly — as to form or as to substance — made the will *inofficiosum* (undutiful) and voidable in an *actio de inofficioso testamento*, also called a *querela inofficiosi testamenti*. Once annulled, the testament became void, and, as in cases of preterition, the inheritance passed *ab intestato*.

If there was neither preterition nor improper disinheritance, but the *portio legitima*, or reserved portion, as established by the Lex Falcidia of 40 BC, was impaired, the law allowed an *actio ad supplemdam legiti-*

[8]BURDICK, THE PRINCIPLES OF ROMAN LAW AND THEIR RELATION TO MODERN LAW, 606, (1938).

[9]LEAGE, *op. cit., supra*, note 7 at 187.

mam, also called *actio in supplementum legitimae,* which was a demand for completion of the legitime — an action well known in Philippine successional law.

These concepts will be treated further, *infra.*

To the west, in Spain, a little over a century and a half after Justinian, the Visigoths enacted a general code called the Forum Judicum — a term later corrupted into Fuero Juzgo. The Code was written in Latin and bore some influence of Roman law. A kind of preterition was dealt with by the Fuero Juzgo, found in the fourth book, second title, twentieth law, which established a legitimary share for posthumous children and prescribed that, in such a case, if the father had disposed of his estate, the posthumous child was to receive three-fourths of the succession, the remaining one-fourth to go to whomsoever the testator instituted.[10]

The second major antecedent was the Siete Partidas, enacted in the thirteenth century, and given that name in the fourteenth. The Sixth Partida, Title VII, Law X, governs preterition. It states:

"Praeteritio, en latin, tanto quiere dezir en romance, como pasamiento que es fecho calladamente, non faziendo el testador mencion en el testamento, de los que auian de heredar lo suyo por derecho. E esto seria, como si el padre establesciesse algund estraño, o otro su pariente por su heredero, non faziendo enmiente de su fijo, heredandolo, nin desheredandolo. Pero el testamento que fuesse fecho en esta manera non valdria."[11]

Under the Partidas, as clearly appears from the above quoted passage, the whole will was void, no exception being established. This rather radical nullificatory provision of the Partidas, however, was softened somewhat by the Leyes de Toro, enacted in the early sixteenth century, which, in its Ley 24, limited the effects of preterition to the nullity of the institution of heir, upholding the efficacy of other testamentary dispositions.

Very similar to the Leyes de Toro — and the third major antecedent of our law — is the Spanish Civil Code provision on preterition. It is Article 814 of the Spanish Code, providing:

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[10] 6 MANRESA, *op. cit., supra,* note 2 at 423.

[11] "The Latin term 'praeteritio' means an omission that is made tacitly, the testator not mentioning in the will those who have a right to inherit from him. This would be if the father institutes a stranger or another relative as his heir, not being mindful of his son, either by instituting him or by disinheriting him. Such a will is not valid."

"La preterición de alguno y de todos los herederos forzosos en línea recta, sea que vivan al otorgarse el testamento ó sea que nazcan después de muerto el testador, anulará la institución de heredero; pero valdrán las mandas y mejoras en cuanto no sean inoficiosas.

"La preterición del viudo ó viuda no anula la institución; pero el preterido conservará los derechos que le conceden los arts. 834, 835, 836, y 837 de este Código.

"Si los herederos forzosos preteridos mueren antes que el testador, la institución surtirá efecto."[12]

The article is substantially identical to Article 854 of our own Code. Thus, the provenance of our law on preterition can be traced directly to the Institutes and not indirectly, that is, not through the Code Napoleon, like most of our civil law, which is derived from the French Code. In the Code Napoleon, the sole right given to the omitted heir is to claim his legitime, which means that the testamentary dispositions will simply be reduced to the extent necessary to fill the legitime.[13]

WHAT IS PRETERITION

Etymologically, preterition is derived from two Latin terms: *praeter* — beyond or by; and *ire* — to go or to pass. *Praeterire* therefore means to go by, to pass by, or to bypass. It connotes an ignoring, an omitting, and, in fact, Article 854 makes it synonymous with omission. Unfortunately, however, neither the Spanish nor the Philippine Code is clear on the meaning, nature, or extent, of this omission. We may well agree with the dissatisfaction of a Spanish commentator complaining that: "What preterition is the Code does not say, it merely points out the effects of preterition, presuming that the concept is known."[14]

Both Manresa and Castán, in their definitions translated above, suggest that preterition consists in the omission of a compulsory heir *in the will.* Manresa further states as one of the requisites of preterition under

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[12]"The preterition of one or all of the compulsory heirs in the direct line, whether living at the time of the execution of the will or born after the testator's death, shall annul the institution of heir; however the bequests and betterments shall be valid insofar as they are not inofficious.

"The preterition of the widower or widow does not invalidate the institution; but the preterited one shall preserve the rights granted to him or her by articles 834, 835, 836 and 837 of this Code.

"If the preterited compulsory heirs predecease the testator, the institution shall take effect."

[13]*Cf.* Articles 913, 914, 915, and 920 of the FRENCH CIVIL CODE.

[14]AUÑON, *Un Caso Frecuente de Preterición*, in 3 ANALES DE LA ACADEMIA MATRITENSE DEL NOTARIADO, 545-546 (1946).

Qué sea la preterición no lo dice el Código, que se limita a señalar sus efectos, presuponiendo conocido el concepto."

Article 814 of the Spanish Code that the compulsory heir should receive nothing *from the will.*[15] Scaevola is in substantial agreement with his two illustrous countrymen, saying: "Preterition consists in the silence of the testator with respect to the compulsory heir, in not leaving him anything *in the will.*"[16] Valverde says: "Preterition is the omission of the legitimary heirs which the testator makes *in the will.*"[17] Sánchez Román defines preterition as "the omission which consists in the testator's forgetting or not attending *in his testament* to the satisfaction of the compulsory heir's right to the legitime . . ."[18]

It is interesting that all the above-cited Spanish commentators equate preterition — at least in their definition of it — with omission in the will.

In at least three decisions of the Philippine Supreme Court on preterition,[19] Manresa's definition has been quoted with approval.

It seems, by necessary implication, that if a person who has compulsory heirs decides to make a will, he is obliged to institute them to some portion, or at least some item, in his estate, or if he will not institute them, he must disinherit them. He is not indeed obliged to make a will at all, but if he decides to make one he is placed under this alternative duty. Neither alternative being done, there is preterition.[20]

A very simple illustrative example would be:

X is a widower with two legitimate children, A and B.

Instance A: If X leaves a will instituting A and B jointly to one-half of the estate, and the other half to a stranger, Y, there would certainly be no preterition, A and B having been given in the will an amount which is equal to their respective legitimes.

Instance B: If X leaves a will instituting A to one-fourth of the estate and a stranger, Y, to the remaining three fourths, there would certainly be preterition, B having been completely omitted.

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[15]6 MANRESA, *op. cit., supra,* note 2 at 424.

[16]14 SCAEVOLA, CODIGO CIVIL, 420 (4th ed., 1944).
"Consiste la preterición en el silencio del testador respecto al heredero forzoso, en no dejarle nada en el testamento x x x"

[17]5 VALVERDE, TRATADO DE DERECHO CIVIL ESPANOL, (4th ed., 1939), 307.
"...la preterición, que es la omisión que hace el testador en el testamento de los herederos legitimarios."

[18]6 SANCHEZ ROMAN, 2ESTUDIOS DE DERECHO CIVIL, 1131, (2nd ed., 1910).
"...la omisión en que consiste, en cuanto olvida ó no atiende el testador en su testamento á la satisfacción del derecho á la legítima del heredero forzoso preterido..."

[19]Neri v. Akutin, 72 Phil. 322 (1941); Nuguid v. Nuguid, 17 SCRA 449 (1966); Aznar v. Duncan, 17 SCRA 590 (1966).

[20]AUNON, *op. cit., supra,* note 14 at 550.

The foregoing example (both instances of it) is a simple and clear illustration of preterition and the absence of it. Being simple, it is therefore extreme, uncontroversial, over-simplified. In Instance A, the heirs' legitimes are completely satisfied by the will. In Instance B, the legitime of one of them is completely denied. Between Instance A and Instance B, however, there is an exceedingly wide area, open to controversy and illustrative of the extreme uncertainty of the term "omission from the will" as a definition of preterition.

Some problems in the intermediate area are:

Suppose, for example, the testator instituted the compulsory heir to a portion less than the legitime. This would be Instance C of our example, as follows:

Instance C: X leaves a will instituting A to one-eighth of the estate, B to one-fourth, and a stranger Y to five-eighths. Clearly, A is given less than his legitime (which in this problem is one-fourth of the estate).

Is this preterition? First of all we note that A is not omitted in the will; he is both mentioned and instituted as an heir. At the same time, his legitime has been impaired.

The answer is furnished by relating Article 854 to Articles 906 and 907 which provide:

"Art. 906. Any compulsory heir to whom the testator has left by any title less than the legitime belonging to him may demand that the same be fully satisfied."

"Art. 907. Testamentary dispositions that impair or diminish the legitime of the compulsory heirs shall be reduced on petition of the same, insofar as they may be inofficious or excessive."

Articles 906 and 907, unlike Article 854, do not annul the institution of heir. They merely grant to the prejudiced heir the satisfaction or completion of his legitime. Thus, these articles are offspring of the Roman *actio ad supplendam legitimam,* and not precisely of *praeteritio.* Instance C therefore is governed by Articles 906 and 907 which refer to a case when the compulsory heir received something from the testator, and not by Article 854, which assumes that the heir received nothing. In Instance C, son A does receive something expressly from the will, albeit less than the legitime of one-fourth to which he is entitled. The solution would be not to annul the institution but to reduce stranger Y's testamentary portion by one-eighth and that part reduced should be

given to son A. The four-eighths remaining after the reduction should be retained by Y.

Castán, Valverde, and Puig Peña support this solution.

Castán: "...the Civil Code [provides] that 'the compulsory heir to whom the testator has left by whatever title an amount less that the legitime which pertains to him, is entitled to demand a completion of the same.' It is immaterial whether the compulsory heir has been instituted *by universal title* or by particular title, but it is essential, in order that an action for completion of legitime may proceed, that there be a disposition in the will in favor of the one bringing the action..."[21]

Valverde: "The omission must be complete or total — the article (i.e., Article 814 of the Spanish Civil Code) does not state this clearly, but it can be inferred from Article 815 (Article 906 of the Civil Code of the Philippines) since, according to its terms, if the compulsory heir has been left a portion less than the legitime, he can demand the completion of his legitime."[22]

Puig Peña: "It is not necessary that there be an allotment to the heir of the entire legitime, if the testator leaves him less, there is no preterition but an action for completion under Article 815."[23]

The Philippine Supreme Court has ruled on this matter, removing it from the realm of controversy. In *Reyes v. Barretto-Datu*,[24] the following facts appeared: One Bibiano Barretto died on 18 February 1936, leaving a will instituting Salud and Milagros Barretto as his heirs, except for a small legacy to certain collateral relatives and the usufruct of a fishpond for the widow, María Gerardo. The litigation arose from a claim, filed by Salud, upon Maria's death, for one-half of the fishpond held by María in usufruct. Milagros resisted the claim, countering that all the properties received by Salud from Bibiano should be returned because Salud was a spurious heir, not being a daughter of Bibiano and

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[21] 4 CASTAN, *op. cit., supra*, note 3 at 581.
"...el Código civil [dice] que 'el heredero forzoso a quien el testador haya dejado por cualquier título menos de la legítima que le corresponda, podrá pedir el complemento de la misma.' Es, pues, indiferente que el heredero forzoso haya sido instituído a título universal (herencia) o a título particular (legado), pero es esencial, para que proceda la acción de suplemento de legítima, que exista disposición en el testamento a favor del que la ejercite..."

[22] 5 VALVERDE, *op. cit., supra*, note 17, at 309.
"La omisión debe ser completa o total — No lo dice el artículo que comentamos de un modo claro; pero se infiere del art. 815, puesto que, según él, si se ha dejado al heredero forzoso menos de la legítima, podrá pedir el complemento de la misma."

[23] 5 PUIG PENA, *op. cit., supra*, note 5, at 376.
"Ahora bien, no es necesario tampoco, como decimos, que exista la asignación de toda la *portio* legitima; si el testador *le deja menos* o él se cree perjudicado, entonces no actúa la preterición, sino la *acción de complemento* que describe el art. 815..."

[24] 19 SCRA 85 (1967).

María (a contention of fact that was duly established). Milagros' theory, *inter alia,* was that, inasmuch as Salud was not a compulsory heir, she (Milagros) was allotted in Bibiano's will a share less than her legitime, resulting in an invalid institution of Salud.

The Supreme Court, speaking through Mr. Justice J. B. L. Reyes, brushed aside this theory and refused to set aside the institution, stating briefly: "Nor does the fact that Milagros was allotted in her father's will a share smaller than her legitime invalidate the institution of Salud as heir, since there was here no preterition, or total omission, of a forced heir."

We notice in the *Reyes* case: Firstly, that there was a compulsory heir in the direct line; secondly, that such heir was instituted in the will; and thirdly, that the heir was given a share less than her legitime. On the basis of these findings, the Supreme Court held that there was no preterition.

The problem, thus, in Instance C can be settled and resolved in this manner: If the testator institutes a compulsory heir in the direct line to an aliquot part of the inheritance, which part, however, is less than the heir's legitime, there is no preterition, but only a case for completion of legitime.

Suppose the testator did not institute the compulsory heir as an heir in the will, but gave him a legacy or devise? This would be Instance D.

Instance D: X leaves a will bequeathing to A some specified shares of stock worth ₱10,000, and B as his universal heir. The net estate is worth ₱100,000.

We note here that A was not instituted as an heir; B is the universal heir. Nevertheless, A is given a legacy, the value of which, however, is much less than his legitime.

Again, there is here no preterition. And the reason is the same as in Instance C, that the case would fall under Article 906, inasmuch as the legacy (or devise) passes from the testator to the heir by gratuitous title, and if its value is less than the legitime, the prejudiced heir may demand only a completion, not the annulment of the institution of heir.

Several commentators support this conclusion:

Puig Peña: "...even though the testator mentions the compulsory heir in the will and remembers him, entrusting him with duties of the highest confidence, there will be preterition if he does not institute him

as heir, *or does not give him a legacy or bequest,* or does not make any disposition which will cover, if only in part, his legitime."

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"To be borne in mind is a ruling of 23 April 1932, according to which there is no preterition when the testator, far from omitting the compulsory heir, mentions him in the will, not instituting him but giving him a specific bequest less than the legitime to which he is entitled."[25] (Underscoring supplied).

Scaevola: "There is no preterition when the testator mentions the compulsory heir in his will, even though he does not institute him as heir, but leaves him a special bequest less than his legitime; in such a case, in accordance with articles 815, 817, and 842 of the Civil Code, as interpreted by the decision of 25 May 1917, the prejudiced heir only has a right to demand completion of his legitime, not the annulment of the institution of heir."[26]

Sánchez Román: "...if it (i.e. the omission) is partial and something is left to the compulsory heir *by whatever title,* even though it may not be sufficient for the legitime, there would not be preterition, governed by article 814, but completion, governed by 815, and the institution of heir would not be annulled, but modified or diminished to the extent necessary for such completion..."[27] (Underscoring supplied).

This problem in Instance D has, like Instance C above, been the subject matter of a definitive ruling by the Philippine Supreme Court

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[25]5 PUIG PENA, *op. cit., supra,* note 5, at 376.

"...aun cuando el causante mencione al legitimario en el testamento y se acuerde de él incluso para conferirle misiones de la mejor confianzá, habra preterición si luego no le instituye heredero, ó no le asigna legado, manda ó no ordena, en definitiva, ninguna disposición por cuya virtud cubra, aunque solo sea en parte, su porción legitimaria.

"Conviene tener en cuenta, a este respecto, la doctrina que representa la sentencia de 23 de abril de 1932, conforme a la cual no existe preterición cuando el testador, lejos de omitir al heredero forzoso, lo menciona en su testamento, aunque no lo instituye, dejandole manda especial e inferior a lo que por legítima le correspondería."

[26]14 SCAEVOLA, *op. cit., supra,* note 16, at 407, citing Sentencia de 23 de abril de 1932.

"No existe preterición cuando el testador menciona en su última voluntad a la person del heredero forzoso, aunque no le instituya, dejándole manda especial inferior a su legítima; pues en tal caso, conforme a los artículos 815, 817 y 842 del Código civil, interpretados por la sentencia de 25 de mayo de 1917, sólo tiene el perjudicado derecho a pedir el conplemento de la legítima; pero no la nulidad de la institución de heredero."

[27]6 SANCHEZ ROMAN, *op. cit., supra,* note 18, at 1140.

"...pues si fuera parcial y se le dejara algo al heredero forzoso por cualquier título, aunque ese algo no fuere suficiente al pago de sus derechos de legitima, no sería caso de preterición, regulado por el art. 814, sino de complemento, regido por el 815, y la institución no se anularía, sino que se modificariá o disminuiría en lo necesario para dicho complemento..."

in the case of *Aznar v. Duncan*.[28] In that case, one Edward Christensen died testate. His will declared, *inter alia*, that: (1) he had only one child, by name María Lucy Christensen; (2) he had no loving ascendants and no other descendants; (3) he was bequeathing the amount of ₱3,600 to one María Helen Christensen, who was not related to him; and (4) he was giving to María Lucy all his estate. After Edward Christensen's death, María Helen was judicially declared to be his natural daughter.

The issue that was raised for judicial determination was whether or not Helen had been preterited under Article 854. The Supreme Court, speaking through Mr. Justice Querube Makalintal, held that there was no preterition because something had been left to Helen, namely the legacy of ₱3,600.

Discussing the issue of preterition at length, the Supreme Court declared:

> "The trial court ruled, and appellee now maintains, that there has been preterition of Helen Garcia, a compulsory heir in the direct line, resulting in the annulment of the institution of heir pursuant to Article 854 of the Civil Code, which provides:
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> "'ART. 854. The preterition or omission of one, some, or all of the compulsory heirs in the direct line, whether living at the time of the execution of the will or born after the death of the testator, shall annul the institution of heir; but the devises and legacies shall be valid insofar as they are not inofficious.'
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> "On the other hand, appellant contends that this is not a case of preterition, but is governed by Article 906 of the Civil Code, which says: 'Any compulsory heir to whom the testator has left by any title less than the legitime belonging to him may demand that the same be fully satisfied.' Appellant also suggests that considering the provisions of the will whereby the testator expressly denied his relationship with Helen Garcia, but left to her a legacy nevertheless, although less than the amount of her legitime, she was in effect defectively disinherited within the meaning of Article 918 which reads:
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> "'ART. 918. Disinheritance without a specification of the cause, or for a cause the truth of which, if contradicted, is not proved, or which is not one of those set forth in this Code, shall annul the institution of heirs insofar as it may prejudice the person disinherited; but the devises and legacies and other testamentary dispositions shall be valid to such extent as will not impair the legitime.'
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> "Thus, according to appellant, under both Articles 906 and 918, Helen Garcia is entitled only to her legitime, and not to a share of the estate equal that of Lucy Duncan as if the succession were intestate.
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> "Article 854 is a reproduction of Article 814 of the Spanish Civil Code; and Article 906, of Article 815. Commenting on Article 815, Manresa explains:

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[28] *Supra*, note 19.

" 'Como dice Goyena, en el caso de preterición puede presumirse ignorancia o falta de memoria en el testador; en el de dejar algo al heredero forzoso, no. *Este se encuentra privado totalmente de su legítima: ha recibido por cualquier título una porción de los bienes hereditarios, porción que no alcanza a completar la legítima,* pero que influeye poderosamente en el ánimo del legislador para decidirle a adoptar una solución bien diferente de la señalada para el caso de preterición.

" 'El testador no ha olvidado por completo al heredero forzoso; le ha dejado bienes; pero haciendo un cálculo equivocado, ha repartido en favor de extraños o en favor de otros legitimarios por vía de legado, donación o mejora mayor cantidad de la que la ley le consentía disponer. El heredero forzoso no puede perder su legítima, pero tampoco puede pedir más que la misma. De aquí su derecho a reclamar solamente lo que le falta; al complemento de la porción que forzosamente la corresponde.

" 'x x x Dejar el testador por cualquier título, equivale a disponer en testamento por título de herencia, legado o mejora, y en favor de legitimarios, de alguna cantidad o porción de bienes menos que la legítima o igual a la misma. Tal sentido, que es el más propio en el artículo 815, no pugna tampoco con la doctrina de la ley. *Cuando en el testamento se deja algo al heredero forzoso, la preterición es incompleta: es más formularia que real. Cuando en el testamento nada deja el legitimario, hay verdadera preterición.*' (6 Manresa, 7th Ed., 1951, p. 437).

"On the difference between preterition of a compulsory heir and the right to ask for completion of his legitime, Sánchez Román says:

" 'La desheredación, como expresa, es siempre voluntaria; la preterición puede serlo, pero se presume involuntaria la omisión en que consiste, en cuanto olvida o no atiende el testador en su testamento a la satisfacción del derecho a la legítima del heredero forzoso preterido, prescindiendo absoluta y totalmente de él y *no mencionándole en ninguna de sus disposiciones testamentarias, o no instituyéndole en parte alguna de la herencia, ni por titulo de heredero ni por el de legatar o aunque le mencionara* o nombrara sin dejarle más o menos bienes. Si le dejara algunos, *por pocos que sean e insuficientes para cubrir su legítima, ya no sería caso de preterición, sino de complemento* de aquella. El primer supuesto o de preterición se regula por el artículo 814, y produce acción de nulidad de la institución de heredero; y el segundo, o de complemento de legítima por el 815 y solo origina la acción *ad suplementum* (sic), para completar la legítima.' (Sánchez Román, Tomo VI, Vol. 2, p. 1131).

"Manresa defines preterition as the omission of the heir in the will, either by not naming him at all or, while mentioning him as father, son, etc., by not instituting him as heir without disinheriting him expressly, nor *assigning to him some part of the properties.* Manresa continues:

"'Se necesita, pues: (a) Que la omisión se refiera a un heredero forzoso; (b) Que la omisíon sea completa; que el heredero forzoso nada reciba en el testamento.

x x x x x x x x x

"B. *Que la omisión sea completa* — Esta condición se deduce del mismo Artículo 814 y resulta con evidencia al relacionar este artículo con el 815. El heredero forzoso a quien el testador deja algo por cualquier título en su testamento, no se halla propiamente omitido, pues se le nombra y se le reconoce participación en los bienes hereditarios. Podría discutirse en el Artículo 814 si era o no necesario que se reconociese el derecho del heredero como tal heredero, pero el artículo 815 desvanece esta duda. Aquél se ocupa de privación completa o total, tácita; éste, de la privación parcial.

"'Los efectos deben ser y son, como veremos, completamente distintos. (6 Manresa, p. 428).

"'La privación de la legítima puede ser total o parcial.

"'Privar totalmente de la legítima es negarla en absoluto al legitimario, despojarle de ella por completo. A este caso se refiere el artículo 814. Privar parcialmente de la legítima, es menguarla o reducirla, dejar al legitimario una porción menor que la que le corresponde. A este caso se refiere el artículo 815. El 813 sienta, pues, una regla general, y las consecuencias del que brantamiento de esta regla se determina en los artículos 814 y 815,' (6 Manresa, p. 418).

"Again Sánchez Román:

"'QUE LA OMISIÓN SEA TOTAL. — Aunque el artículo 814 no consigna de modo expreso esta circunstancia de que la preterición o falta de mención e institución o disposición testamentaria a su favor, sea total, completa y absoluta,, así se deduce de no hacer distinción o salvedad alguna empleándola en términos generales; pero sirve a confirmalo de un modo indudable el siguiente artículo 815, al decir que el heredero forzoso a quien el testador haya dejado, por cualquier título, menos de la legítima que la corresponda, podría pedir el complemento de la misma, lo cual ya *no son el caso ni los efectos de la preterición, que anula la institución, sino simplemente los del suplemento necesario* para cubrir su legitima." (Sanchez Roman — Tomo VI, Vol. 2.0 p. 1133).'

"The question may be posed: In order that the right of a forced heir may be limited only to the completion of his legitime (instead of the annulment of the institution of heirs) is it necessary that what has been left to him in the will 'by any title,' as by legacy, be granted to him in his capacity as heir, that is, a *titulo de heredero?* In other words, should he be recognized or referred to in the will as heir? This question is pertinent because in the will of the deceased Edward E. Christensen Helen Garcia is not mentioned as an heir — indeed her status as such is denied — but is given a legacy of ₱3,600.00.

While the classical view, pursuant to the Roman law, gave an affirmative answer to the question, according to both Manresa (6 Manresa 7th 3rd. 436) and Sanchez Roman (Tomo VI, Vol. 2.0 — p. 937), that view was changed by Article 645 of the "Proyecto de Código de 1851,' later on copied in Article 906 of our own Code. Sánchez Roman, in the citation given above, comments as follows:

> " 'RESPECTO DEL COMPLEMENTO DE LA LEGÍTIMA. — Se inspira el Código en esta materia en la doctrina clásica del Derecho romano y patrio (2); pero con alguna racional modificación. Concedían aquellos precedentes legales al heredero forzoso, a quien no se le dejaba por título de tal el completo de su legítima, la acción para invalidar la institución hecha en el testamento y reclamar y obtener aquella mediante el ejercicio de la *querella de inoficioso*, y aun cuando resultara favorecido como donatario, por otro titulo que no fuera el de heredero, *sino al honor de que se le privaba no dándole este carácter, y solo cuando era instituído heredero en parte o cantidad inferior a lo que le correspondiera por legítima, era cuando bastaba el ejercicio de la acción ad suplementum (sic) para completarla, sin necesidad de anular las otras instituciones de heredero o demás disposiciones contenidas en el testamento.*
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> " 'El Artículo 851 se aparta de este criterio estricto y se ajusta a la única necesidad que le inspira, cual es la de que se complete la legítima del heredero forzoso, a quien *por cualquier* título se haya dejado menos de lo que le corresponda, y se le otorga tan solo el derecho de pedir el *complemento* de la misma sin necesidad de que se anulen las disposiciones testamentarias, que se reducirán en lo que sean inoficiosas, conforme al artículo 817, cuya interpretación y sentido tienen ya en su apoyo la sanción de la jurisprudencia (3); siendo condición precisa que lo que se hubiere dejado de menos de al legítima al heredero forzoso, lo haya sido *en el testamento, o* sea por disposición del testador, según lo revela el texto del artículo, 'el heredero forzoso a quien el *testador haya* dejado, etc., esto es, por título de legado o donación *mortis causa* en el testamento y no fuera de el.' (Sánchez Román, Tomo VI, Vol. 2.0 — p. 937).".
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> "Manresa cites particularly three decisions of the Supreme Court of Spain dated January 16, 1895, May 25, 1917, and April 23, 1932, respectively. In each one of those cases the testator left to one who was a forced heir a legacy worth less than the legitime, but without referring to the legatee as an heir or even as a relative, and willed the rest of the estate to other persons. It was held that Article 815 applied, and the heir could not ask that the institution of heirs be annulled entirely, but only that the legitime be completed. (6 Manresa, pp. 438, 441)."

The dispositive portion of the decision ordered that Maria Helen Christensen be given no more than her legitime — meaning that the institution of Maria Lucy as universal heir was not annulled.

Instances C and D are similar in that in both cases, the compulsory heir is mentioned in the will and is given something, either an aliquot

portion of the estate or some specific item or items in it. For this reason, it is rather clear that there is no preterition. The following case, however, is not as clear.

Instance E: Using the same basic context used in the foregoing instances, let us now suppose that X has left a will instituting A as heir to the whole estate, completely omitting B. However, some years before his death X made a donation *inter vivos to* B.

This is now essentially different from Instances C and D, because here B, a compulsory heir in the direct line, is totally omitted from the will. Omitted from the will but, at the same time, a donee. Is this now a case of preterition which would, under Article 854, annul the institution of A?

This writer is not aware of any decision of the Philippine Supreme Court on the matter. The definitions of preterition by various Spanish commentators, quoted above, suggest that this would be a case of preterition under Article 854 of our Code and Article 814 of theirs. There would be preterition because the compulsory heir is totally omitted from the will; under the terms of the above-quoted definitions, the will is the only point of reference in determining whether or not there is preterition. A donation *inter vivos* would be immaterial and should not be taken into account. Such, in fact, was the conclusion reached by the Supreme Court of Spain in its decision of 17 June 1908. As cited by Cástán: "...the Supreme Court [declared] that, given the terms of article 814 of the Code the mention or omission should be in the will, and it is not correct to relate it to an act *inter vivos*, like a donation *propter nuptias* or a dowry, made by the testator."[29]

The better view, however, to this writer's mind, is that a compulsory heir, completely omitted in the will, cannot be said to have been preterited under Article 854 if he was the recipient of a donation *inter vivos* from the testator. A correlation of Article 854 with other articles supports this. In the first place, Article 906, already cited above, uses the very general term "by any title," which is broad enough to cover any acquisition by gratuitous title. Secondly, there are Articles 909 and 910[30]

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[29] 4 CASTAN, *op. cit., supra*, note 3, at 578.
"Pero el Tribunal Supremo lo entendió de otro modo en su sentencia de 17 de junio de 1908, declaratoria de que, dados los términos del art. 814 del Codigo, la mención o preterición tiene que resultar en el testamento, y no es legal relacionarla con acto alguno *inter vivos*, como donación *propter nupcias* o dote, realizado por el testador."

[30] ART. 909. Donations given to children shall be charged to their legitime.
Donations made to strangers shall be charged to that part of the estate of which the testator could have disposed by his last will.
Insofar as they may be inofficious or may exceed the disposable portion, they shall be reduced according to the rules established by this Code."

which provide that donations made to children are to be charged against their legitime. And then there is Article 1062[31] which states by implication that donations made to compulsory heirs by the decedent should be collated, that is to say, charged against the legitime. The import of all these articles is clear: that donations *inter vivos* to compulsory heirs are considered advances upon their legitime and shall be deducted therefrom, upon the donor's death. In other words, the compulsory heir who received a donation *inter vivos* from the testator is deemed to have received a part of his legitime already. Since that is the case, such heir cannot be said to have been omitted or preterited. True, what he received did not come to him by virtue of the will, but that does not matter. He has received at least part of his legitime, and under the law, he is only entitled to demand the difference.

The very commentators who defined preterition as an omission *in the will* agree that if there is a donation *inter vivos*, there will be no preterition.

Castán: "Should an heir be considered preterited to whom a donation *inter vivos* was made, and who is not mentioned in the will? I am persuaded by the opinion of Manresa, Valverde, and other authors who, correlating article 814 with 815[32] and with 819[33] (according to which the donations made to children which do not partake of the nature of betterments are charged to the legitime), reach the conclusion that the compulsory heir to whom was given a donation *inter vivos* should not be considered preterited and is only entitled to claim a completion of his legitime."[34]

Manresa: "The express terms of the article [*i.e.* 815], although especially applicable to testamentary dispositions, do not bar its application to every disposition by the testator by lucrative title. And, furthermore, the first paragraph of article 819, providing that donations made

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"ART. 910. Donations which an illegitimate child may have received during the lifetime of his father or mother, shall be charged to his legitime.

Should they exceed the portion that can be freely disposed of, they shall be reduced in the manner prescribed by this Code."

[31]"ART. 1062. Collation shall not take place among compulsory heirs if the donor should have so expressly provided, or if the donee should repudiate the inheritance, unless the donation should be reduced as inofficious."

[32]CIVIL CODE, Art. 906.

[33]CIVIL CODE, Art. 909.

[34]4 CASTAN, *op. cit., supra*, note 3 at 578.

"Debe entenderse preterido el heredero a quien se hubiera hecho en vida alguna donación, aun cuando no se le mencione en el testamento? Nos parece racional la opinión de Manresa, Valverde, y otros autores, que, poniendo en relación el art. 814 con el 815 y con el 819 (según el cual, las donaciones hechas a los hijos que no tengan concepto de mejoras se imputan en su legítima), concluyen que el heredero forzoso a quien se haya hecho en vida alguna donación no debe considerarse preterido, y sólo puede reclamar que se le complete la legítima."

to children are charged against their legitime, shows that whatever has been received by the compulsory heirs during the testator's lifetime is considered to have been received as legitime at the testator's death and, consequently, as having been left by the testator by title of succession."[35]

Scoevola: "The rule [*i.e.* that if the compulsory heir receives something from the testator, there is no preterition] presupposes a disposition *mortis causa*, by will. Nevertheless, I believe that the same rule applies to a case of a donation *inter vivos*, because whatever is given to the compulsory heirs is, in accordance with article 819, to be regarded as an advance on the legitime or betterment."[36]

Valverde: "In order that there be preterition, the compulsory heir should have been given nothing, and when the code provides that the compulsory heir who received by any title a portion less than the legitime shall only have a right to the completion of the same, it is indubitable that if, prior to the will, he received collationable donations, even though made *inter vivos*, he cannot be considered to have been preterited, although he may not have been mentioned in the will."[37]

It is more accurate, then, to define preterition as a total omission or exclusion, not from the will, but *from the inheritance*. A donation *inter vivos*, though not made in a will, is computed as part of the inheritance, under the articles above cited, and will therefore exclude the possibility of preterition. It is only when the compulsory heir receives nothing from the hereditary estate that he can be said to have been preterited.

And that brings us to the next situation.

Instance F: Supposing X leaves a will instituting A as heir to three-

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[35]6 MANRESA, *op. cit., supra*, note 2 at 437-438.

"La letra del artículo, aunque aplicable especialmente a las disposiciones testamentarias, no repugna su extensión a todo acto de disposición del testador por título lucrativo. Y además, el párrafo primero del artículo 819, al decir que las donaciones hechas a los hijos se imputan a su legítima, demuestra que lo que los herederos forzosos reciben en vida del testador de éste, se entiende como recibido por su legítima en el momento de su muerte, y, por consiguiente, como dejado por el testador a titulo de herencia."

[36]14 SCAEVOLA, *op. cit., supra*, note 16, at 430.

"El precepto supone una disposicion *mortiscausa* del que deje al heredero bienes; refiérese, pues al testamento. No obstante, entendemos que regirá lo mismo en el caso de una donación *inter vivos*, porque las hechas a los herederos forzosos a tenor del articulo 819 han de reputarse como anticipo de legítima o de mejora."

[37]5 VALVERDE, *op. cit., supra*, note 17, at 311.

"Para que se produzca la preterición, no ha de dejársele nada al heredero legitimario, y al decir el código que solo tendrá derecho al complemento de legitima el heredero forzoso a quien por cualquier titulo se deje menos, es incuestionable que si ha recibido con anterioridad al testamento donaciones colacionables, aún por acto *inter vivos*, no se puede considerar preterido a tal heredero, aunque en el testamento no se le mencionara."

fourths of his estate, but omitting to mention B at all. Or supposing X institutes a stranger, Y, to one-half of the estate, failing to mention A and B? Are these cases of preterition?

We notice here two things: first, a compulsory heir or heirs are not mentioned at all, and second, there is an undisposed portion equivalent to the compulsory heirs' legitime.

Castán suggests, because of the Spanish Supreme Court ruling of 17 June 1908, to which attention has already been invited *supra*, that if no *testamentary* disposition is made in favor of the compulsory heir, there will be preterition — a position that, as we have seen, does not seem warranted, especially in view of the less than universal acceptance of the decision on which it is based.

It is rational to conclude, rather, that if a part of the estate is left undisposed of, which is equal to the legitime of the compulsory heir who is passed over in silence, there is no preterition as contemplated by Article 854, for the reason that the untouched portion goes to that heir by intestate succession. The presumption here must be that the testator precisely left such portion undisposed of so as to keep it in reserve for the heir. It cannot be truly said here, after all, that the heir in question has received nothing, or that he has been excluded from the estate. The part left undisposed of is his; his legitime is not even impaired. To hold that Article 854 applies and that the institution of heir is void is to construe the law against, and not in favor of, testamentary succession.

A fortiori will the foregoing be applicable if the testator has left untouched a portion greater than the legitime owing to any compulsory heir or heirs.

This opinion finds favor with a number of commentators:

Valverde: "If the testator disposes solely of the free portion, giving it to strangers, he does a valid act, and the compulsory heirs receive their legitime by intestate succession."[38]

Manresa: "The testator cannot deprive the compulsory heirs of their legitime. The law disposes of that portion, and its provisions must be complied with. From this the following can be deduced: 1) that if the testator confines himself to disposing of the free portion, he is only exercising a right... Consequently, what is really void and anomalous is not precisely the omission of a compulsory heir, if he is not de-

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[38]5 VALVERDE, *op. cit.*, *supra*, note 17, at 309.
"Si el testador dispone sólo de su parte libre y lo hace en favor de extraños, realiza un acto válido, y los herederos forzosos, por la sucesión abintestato, recibirán su legítima..."

prived of anything that the law grants him, but depriving him of his legitime, attempting to give it to a stranger, or even to other forced heirs."[39]

Goytisolo: "The testator is not obliged to institute his compulsory heirs. This is the intent of the law, according to the authors of the rule contained in article 815. The testator is only required to respect the portion of the inheritance which the law reserves for the legitimary heirs. A requirement that the testator may comply with by means of bequests or donations or by allowing the law of intestacy to operate in favor of the said compulsory heir at least to the extent of the portion reserved by law."[40]

A variation of this problem would be: supposing what is left undisposed of is a portion *less than the legitime of one or more of the compulsory heirs in the direct line?* The solution, it is submitted, is the same — there is no preterition, because the "omitted" heir would still receive something, by intestacy, leaving him with the right, not to demand the annulment of the institution of heir, but to have his legitime completed. To support this conclusion, we may again cite Articles 906 and 907 of our Code. The part undisposed of, be it less than the legitime of the unmentioned heir, would go to him by intestacy, or, more properly, as part of his legitime. The title would be gratuitous, *i.e.* by intestate succession. "Any compulsory heir to whom the testator has left *by any title* less than the legitime belonging to him may demand *that the same be full satisfied.*"[41] Therefore, an actio *ad supplendam legitimam*, not *praeteritio*. Or, looking at it another way, if a part *less than* the legitime is all that is left undisposed of, *per necessitatem* there must have been testamentary dispositions (either institutions of heir, or legacies, or devises) that exceeded the free portion. Otherwise staed, there must have been testamentary dispositions that impaired the legitime. That being the case, Article

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[39]6 MANRESA, *op. cit., supra*, note 2 at 428-429.
"El testador no puede privar de su legítima a los herederos forzosos. La ley dispone de esa porción, y su precepto ha de cumplirse. Dedúcese de aqui: 1°, que si el testador se limita a disponer de la porción libre, hace uso de un derecho; 20, que si dispone de la porción legítima en favor de tercero, realiza un acto nulo. Y como consecuencia de todo que lo verdaderamente nulo y anómalo no es precisamente al omitir al heredero forzoso, si por otra parte no se le priva de nada de lo que la ley le concede, sino quitarle su legítima, pretendiendo darla a otra persona extraña, o sólo a otros herederos forzosos."

[40]GOYTISOLO, *Apuntes de Derecho Sucesorio*, in 1 ESTUDIOS MONOGRAFICOS, 479.
"Hoy no se obliga al testador a instituir herederos a sus legítimarios. Así resulta de la *mens legis*, según los autores de la norma actualmente contenida en el artículo 815. Sólo se ordena a aquél que les respete el *quantum* de bienes hereditarios que la Ley les reserva. Cosa que el testador puede cumplir atribuyéndola bien a título de herencia, por legados o por donaciones (en este último caso con tal de que en su testamento no incurra en preterición) o bien dejando paso franco a la vocación hereditaria *ab intestato* a favor del mismo legítimario por lo menos en cuanto a aquel mínimo cuantitativo que la Ley le reserva."

[41]CIVIL CODE, Art. 906.

907 operates, and such testamentary dispositions "that impair or diminish the legitime of the compulsory heirs shall be reduced on petition of the same, *insofar as they may be inofficious or excessive.*" Hence, a *pro tanto* reduction only, to the amount necessary to complete the legitime, and not an annulment of the institution of heir.

At this juncture, we must finally discard the definition of preterition above which we provisionally accepted. It is inaccurate, and misleading, to define preterition under Article 854 as a total omission *in the will.* The concept is stricter than that — it contemplates a total omission or exclusion from the inheritance (understanding by this term, the "property, rights and obligations of a person which are not extinguished by his death").[42] In order that an heir may be properly said to have been preterited in the contemplation of Article 854, he must have been totally excluded, that is to say, he must have received nothing, from the hereditary estate. He must not have received any donation *inter vivos* from the testator; he must not have been instituted in the will as an heir; he must not have been left any legacy or devise; AND he must have received not a thing by intestacy. This means that the testator *must have disposed of his entire estate,* left nothing undisposed of to pass by intestacy, and left nothing for the heir in question. This interpretation of preterition under Article 854 accords with other articles of the Code — chiefly Articles 906 and 907 — and thus obviates conflict, and gives effect to the principle of construction that all doubts must, as far as is reasonably possible, be resolved in favor of the validity and efficacy of testamentary dispositions.

WHO CAN BE PRETERITED

It is obvious that only the preterition of a compulsory heir merits the law's concern. An ordinary intestate heir not a compulsory heir may be completely excluded from the inheritance, if the testator so wishes. This the testator may do by the simple expedient of making a will assigning to strangers what the intestate heirs may otherwise inherit through legal succession. This is so because the ordinary intestate heir — as, for instance, a collateral relative within the fifth degree, or the State — has no right of expectancy to the inheritance. He inherits only "in default of testamentary heirs,"[43] that is, if the testator has not distributed his state among appointed heirs. A compulsory heir, however, is in a different situation. Our legitimary system gives compulsory heirs an expectancy to a share in the inheritance, and of this share the testator

[42]CIVIL CODE, Art. 776.
[43]CIVIL CODE, Art. 961.

may not dispose because the law has reserved it.[44] The rule of preterition is therefore a part or an aspect of the system of legitimes which we have acquired from the civil law tradition.

Article 854, however, limits its operation to the preterition of compulsory heirs in the direct line. A direct line is that constituted by the series of degrees among ascendants and descendants.[45] The qualification is not tautological, because not every compulsory heir is in the direct line — the surviving spouse is a compulsory heir *not* in the direct line, a compulsory heir *sui generis* (The effects of the preterition or total exclusion of the surviving spouse will be considered *infra*). For the moment, then, we confine ourselves to the preterition of compulsory heirs in the direct line, as specified by 854.

Legitimate children and, in proper cases, legitimate descendants other than children would, of course, fall under the purview of Article 854, if totally omitted in the inheritance. Legitimate children are always entitled to a legitime;[46] other legitimate descendants in certain instances, either *per capita* or *per stirpes*. At least one Philippine case — *Neri v. Akutin*,[47] decided in 1941 — deals with the preterition of legitimate children. Although this writer is not aware of a Philippine decision involving the preterition of other legitimate descendants, surely such a case presents no problem. As long as under the circumstances, the descendant is at the testator's death entitled to a legitime, and he is completely deprived thereof, Article 854 will be applicable.

The problem here that is raised by every commentator worth the name arises from the rather evident *hiatus* in Article 854. The article expressly includes within its coverage all compulsory heirs in the direct line, whether living at the time of the execution of the will or born after the death of the testator.[48] The lawmaker obviously forgot that it is quite possible for a compulsory heir in the direct line to be born after the will but before the testator's death. The problem is really quite unnecessary and so much printer's ink could have been saved by a more careful drafting of the provision. Our fault in the Philippines is an aggravated one, considering that we could have corrected the mistake in the Spanish Code instead of naturalizing it as part of our own Code. Be that as it may, there seems to be no doubt that the article did not intend to "preterit" these heirs, born after the will but before the testator's death, called, per-

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[44]CIVIL CODE, Art. 886.
[45]CIVIL CODE, Art. 964.
[46]That is, barring unworthiness or valid disinheritance.
[47]*Supra*, note 19.
[48]In the Spanish Code: "sea que vivan al otorgarse el testamento ó sea que nazcan después de muerto el testador."

haps not too imaginatively, "quasiposthumous" children or descendants. These quasi-posthumous children or descendants, if completely excluded from the inheritance would bring into operation the provisions of Article 854, without serious dissent from any self-respecting jurisconsult. As Manresa states: "This is the case of those called *quasi-posthumous* (born during the period intermediate between the will and death); in the opinion of the majority of commentators (Sánchez Román, Castán, Bonet, De Buen, Scaevola, etc.), the tacit deprivation of their legitime, since it involves compulsory heirs, should produce the same effects."[49]

Señor Manresa surmises that this unfortunate mistake arose from a faulty copying by the Spanish Code of the proposed code of 1851 in which the wording was "la preterición de alguno o de todos los herederos forzosos en línea recta, sea que vivan al otorgarse el testamento, o nazcan después, *aun muerto el testador*, etc."[50] And the learned commentator brushes the matter aside with just the barest hint of disdain: "Podrá haber una errata en el artículo 814, y nada más."[51]

The preterition of compulsory heirs in the direct ascending line is the subject matter of at least two Philippine decisions: *Eleazar v. Eleazar*,[52] decided in 1939; and *Nuguid v. Nuguid*,[53] decided in 1966. In the *Nuguid* case, the decedent — Rosario Nuguid by name —, single and without descendants, left a will instituting Remedios Nuguid, a sister, as her universal heir, thereby omitting her legitimate parents. The Supreme Court, through Mr. Justice Conrado Sánchez, observed: "The deceased Rosario Nuguid left no descendants, legitimate or illegitimate. But she left forced heirs in the direct ascending line — her parents, now oppositors Felix Nuguid and Paz Salonga Nuguid. And the will completely omits both of them: They thus received nothing by the testament; tacitly, they were deprived of their legitime; neither were they expressly disinherited. This is a clear case of preterition."[54]

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[49] 6 MANRESA, *op. cit., supra*, note 2, at 426.
"Este es el caso de los llamados *cuasi póstumos* (nacidos en el tiempo intermedio entre el testamento y la muerte), opinando la generalidad de los tratadistas (Sánchez Román, Castán, Bonet, De Buen, Scaevola, etc.) que, como son herederos forzosos, debe producir iguales efectos la tácita privación de su legítima."

[50] "The preterition of any or all of the compulsory heirs in the direct line, whether living at the time of the execution of the will or born subsequently, *even after the testator's death...*"

[51] "There could have been a mistake in article 814, nothing more."
VI Manresa 425-428 is actually an excellent treatment of this problem of quasi-posthumous heirs."

[52] 67 Phil. 497 (1939) (which case raises a problem as to the effects of preterition; *cf. infra*).

[53] *Supra*, note 19.

[54] At 454.

Preterition of Illegitimates

One of the most serious problems in the law on preterition is whether the total exclusion of a compulsory heir in the illegitimate line falls under the operation of Article 854.

There is no question that such a compulsory heir is entitled to a legitime — if a descendant, he is a concurring compulsory heir; if an ascendant, he is a compulsory heir in default of any kind of descendant. At least, such a compulsory heir, if totally omitted, is entitled to his legitime under Article 907. Is he, however, also entitled to invoke the provisions of Article 854? The question can be a thorny one and, in the Philippines, not categorically settled by any Supreme Court decision. True, three Philippine cases deal with the total omission of illegitimate children but all three are disappointingly inconclusive and fall short of giving a definitive ruling on the question.

The first is the 1908 case of *Escuin v. Escuin*,[55] arising from the following facts: On 19 January 1899, Emilio Escuin executed a will stating that he had no lawful descendants; that in case he had a duly registered[56] successor, his child would be his sole and universal heir; but that, as probably would be the case, there should be no such heir, he named his natural father, Francisco, and his wife, Maria Teresa, his universal heirs in equal parts. Emilio died on 20 January 1899, and it turned out that there was a recognized natural child, also named Emilio. The project of partition divided the estate into three: one part to Emilio *fils;* another part to Maria Teresa; and the third part to Francisco in naked ownership, the usufruct thereover pertaining to Maria Teresa.

The issue was this: Did the complete omission of Emilio *fils* bring about total intestacy, in which case he would succeed to the entire estate under article 939 of the Spanish Civil Code; or was Emilio *fils* entitled only to his legitime, the free portion going to the instituted heirs?

Mr. Justice Florentino Torres, speaking for the Court, wrote:

> "... for the reason that the minor was ignored by his natural father in his will, the designation of heirs made therein was, as a matter of fact annulled by force of law, *in so far as the legal portion of the said minor was thereby impaired.* Legacies and betterments shall be valid, in so far as they are not illegal, for the reason that a testator can not deprive the heirs of legal portions, except in the cases expressly indicated by law.
>
> "... for the reason that he (the testator) exceeded his rights, the said designation of heirs became void in so far as it impaired the right

[55]11 Phil. 332 (1908).
[56]The meaning of this term in this context is not perfectly clear to this writer.

of his general heir and deprived him of his legal portion; the will, however, is valid with respect to the two-thirds of the property which the testator could dispose of. (Citing Arts. 763, 764, 806, 813, 842, Civil Code).

"... it is not proper to assert that the late Emilio Escuin de los Santos died intestate in order to establish the conclusion that his said natural recognized child is entitled to succeed to the entire state under the provisions of article 939 of the Civil Code, inasmuch as in accordance with the law a citizen may die partly testate and partly intestate (article 764 of the Civil Code). It is clear and unquestionable that it was the wish of the testator to favor his natural father and his wife with certain portions of his property which, under the law, he had a right to dispose of by will, as he has done, provided the legal portion of his general heir was not thereby impaired, the two former persons being considered as legatees under the will.

"The above-mentioned will is neither null, void, nor illegal in so far as the testator leaves two-thirds of his property to his father and wife; testamentary provisions impairing the legal portion of a general heir shall be reduced in so far as they are illegal or excessive. (Art. 817, Civil Code)."[57]

It will be readily seen from the above excerpt that the ruling is ambiguous. Why was Emilio *fils* given only his legitime, the will being given effect insofar as the free portion was concerned? Was it because the Court believed that the effect of preterition under Article 854 is only the *pro tanto* — and not the total — annulment of the institution of heir? Or was it because the excluded heir was a natural child, who was not entitled to the benefits of Article 854? Would the holding have been the same had the omitted heir been a legitimate child? We do not know for sure. A divination of the Court's frame of mind as to this very troublesome question would fall far short of the certainty required.

Not more helpful is the later case of *Ramirez v. Gmur*,[58] decided ten years after *Escuin*: Samuel Bischoff Werthmuller died on 29 June 1913, leaving a will making his wife, Ana Ramirez, his universal heir, except for a piece of real property in Switzerland, which he devised to his brothers and sisters. The will stated that the testator had no forced heirs. As a matter of fact, however, the testator had a predeceased recognized natural daughter, Leona, who had left three legitimate children. The Supreme Court, through Mr. Justice Thomas Street, declared that "the forced heirs cannot be prejudiced by the failure of the testator to provide for them in his will; and regardless of the intention of the testator to leave all his property, or practically all of it, to his wife, the will is intrinsically invalid *so far as it would operate to cut off their rights.*"[59] (Underscoring supplied). As a result, the omitted grand-

[57]At 338-339.
[58]42 Phil. 855 (1918).
[59]At 868.

children were given their legitime of one-third of the estate and the widow, the remainder.

Ramírez is as inconclusive as *Escuin* (not once in *Ramírez* did the Court use the term "preterition"), for the purpose of providing an answer to the question, and the same queries raised above in connection with *Escuin* can be raised in *Ramírez*, without much success.

Lajom v. Leuterio,[60] decided in 1960, is even less enlightening: Máximo Viola died intestate on 3 September 1933, his will instituting his three legitimate children as his universal heirs. After the decedent's estate had been partitioned among the three, one Donato Lajom filed a complaint claiming natural filiation to Máximo and, therefore, a share in the estate. The main issue involved in the case, unfortunately for our purposes, was the collation and redistribution of Máximo's property. On the issue of preterition, the lower court's decision is cited: "...the will having completely omitted the plaintiff who is a compulsory heir, and having disposed of all the properties in favor of the defendants, it naturally encroached upon the legitime of the plaintiff. Such testamentary dispositions may not impair the legitime. In another sense, the plaintiff being a compulsory heir, in the direct line, and having been preterited, the institution is annulled in its entirety." And the reader-critic-legal student will understandably feel exasperated and ask: Which is it? Is it preterition or not? But the lower court was not sure, and so it hedged. The Supreme Court, on the other hand, did not consider it necessary, or proper, to make a ruling on this question:

> "It is next alleged that petitioner having been the victim of preterition, the institution of heirs, made by the deceased Dr. Maximo Viola became ineffective, and that Civil Case No. 8077 [i.e. the complaint filed by Lajom for a share in the estate as a natural child] was thereby converted into an intestate proceedings (sic) for the settlement of his estate. This contention is clearly untenable. These might have been merit therein if we were dealing with a special proceedings (sic) for the settlement of the testate estate of a deceased person, which, in consequence of said preterition, would thereby acquire the character of a proceeding for the settlement of an intestate state, with jurisdiction over any and all properties of the deceased. But, Civil Case No. 8077 is an ordinary civil action, and the authority of the court having jurisdiction over the same is limited to the properties described in the pleadings..."

Thus, *Escuin*, *Rámirez*, and *Lajom* leave ultimately unanswered this question: Is the total exclusion of a compulsory heir in the direct illegitimate line preterition under Article 854?

The commentators are less reticent:

Manresa: "A commentator states that the article [*i.e.* 814] does

[60]107 Phil. 651 (1960).

not cover cases of preterition of natural children or parents. The lawmaker could not have been guilty of such inadequacy. The law does not speak of relatives, which would be the case in which, in not adding the qualification 'natural', it would be deemed solely to refer to the *legitimate family*: it speaks of forced *heirs*, prescinding from the class of relationship, and it is evident that the natural father and son are forced heirs in the direct line, since the term *line* is not exclusive property of the legitimate ascendants and descendants;... thus it is absurd that the lawmaker, in dealing with preterition, would forget the natural child or parent.

"It is a matter of indifference, according to the terms of the article, that preterition refers to all the forced heirs, some of them, or only one of them. There will be preterition in any case and it will produce the same effects."[61]

Díaz-Martínez: "There has been much discussion on whether the effects of preterition are applicable to illegitimate children or parents. The opinions of commentators are divided, some sustaining the view that the article [*i.e.* 814] refers exclusively to legitimate ascendants and descendants, and others averring that it is applicable to omissions of a natural father or children. We believe that, since the testator cannot deprive the compulsory heirs of their legitime, under article 813, and natural children and parents being of the category of compulsory heirs, it is evident that he cannot preterit them either."[62]

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[61] 6 MANRESA, *op. cit., supra*, note 2, at 425.

"Se dice por algún comentarista que el artículo no prevé el caso de preterición de los hijos o padres naturales. El legislador no incurre en tan gran falta. No habla de parientes, que sería el caso en que, por no añadirse el calificativo de naturales, cabría afirmar que sólo se refería a la *familia legítima*: habla de herederos forzosos, prescindiendo de su clase de parentesco, y es evidente, que el padre y el hijo natural son herederos forzosos en línea recta, pues la palabra *línea* no es patrimonio de los ascendientes y descendientes legítimos; podrá limitarse en aquellos al lazo entre hijos y padres, sin subir ni bajar más; pero aplicada a los herederos forzosos tiene una significación tan clara, que no cabe duda alguna en esta cuestión. Asi lo prueba la contraposición de esos herederos en línea recta (descendiente o ascendiente) al cónyuge y a la consideración de ser absurdo que el legislador, al tratar de la preterición, se olvidase del hijo y del padre natural. Quiere pretenderse que la sentencia de 16 de enero de 1895 sirve de apoyo a la referida opinión, y precisamente al resolver la cuestión ventilada estudia los artículos 814, 815 y 817, como relacionados con el caso que la motivó, y como aplicables, por tanto, a los hijos naturales, como veremos en su lugar.

Tratándose de herederos forzosos es indiferente, como dice el artículo, que la preterición se refiera a todos los herederos forzosos, a varios o a uno solo de ellos. La preterición existe siempre y produce identicos efectos.

[62] 5 DIAZ & MARTINEZ, EL CODIGO CIVIL, 361 (1908).

"Mucho se ha discutido acerca de si los efectos de la preterición son aplicables á los hijos ó padres naturales. Divididas están las opiniones de los comentaristas, sosteniendo unos que el artículo se refiere exclusivamente á los ascendientes y descendientes legítimos, y afirmando otros que es aplicable á las pretericiones del padre ó del hijo natural. Nosotros creemos que, no pudiendo el testador privar de su legítima a los herederos forzosos, según el artículo 813, y siendo de este el 807, resulta evidente que menos puede preterirlos; . . ."

Valverde: "It has been argued whether the recognized natural child is included among the forced heirs in the direct line under article 814; and Manresa believed that the preterition of the natural child produced the same effect as that of legitimate descendants and ascendants. Scaevola, on the other hand, believed that such an omission should be treated like that of a surviving spouse, that is to say, that it did not invalidate the institution of heir, and thus was the Decision of the Supreme Court of 16 January 1895; but subsequent clear, categorical, and definitive judicial decisions have established that the preterition of natural children produces the same effect as that of legitimates; according to the Supreme Court, we should not understand the phrase in article 814, 'compulsory heirs in the direct line', to refer exclusively to legitimate ascendants and descendants, to the exclusion of recognized natural children."[63]

Scaevola's contrary opinion, cited by Valverde, is expressed as follows: "More important is the study of the article [815] from the point of view of the quality of the heirs. The article refers to the 'forced heirs in the direct line', and the question arises whether or not the provision includes recognized natural children. It is undeniable that these are, by nature, in the direct descending line in relation to their parents and ascendants; but in legal contemplation, there is no doubt that the said phrase is limited to legitimate ascendants and descendants. This can be inferred from the section 'Of Relationship' in legitimate succession, articles 915 to 923, especially from 917 and 918, and from the chapter 'Of the Order of Succession, According to the Diversity of Lines,' in which is mentioned the direct descending and ascending line solely in relation to children and grandchildren and parents and grandparents, and in the separate section, 'Of Recognized Natural Children'. And when natural children are dealt with, the law does not speak of lines, which apply only to legitimate relationships. On the basis, then, of these considerations, the natural child seems to be excluded from the coverage of the first paragraph of article 814.

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"As we understand it, the reason for the foregoing opinion can be

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[63]5 VALVERDE, *op. cit., supra*, note 17, at 310.

"Se ha discutido por la doctrina, si el hijo natural reconocido está comprendido entre los herederos forzosos en línea recta, de que habla el art. 814; y si Manresa entendió que la preterición de aquéllos producía el mismo efecto que la de los descendientes y ascendientes legítimos, Scaevola, por el contrario, estimó que su preterición debía equipararse a la del cónyuge viudo, esto es, que no anulaba la institución de heredero, y así lo deducía de la Sentencia del Supremo de 16 de enero de 1895; pero resoluciones judiciales posteriores, claras, concretas y terminantes, han establecido que la preterición de los hijos naturales produce el mismo efecto que la de los legítimos, pues dice el Supremo, que no puede entenderse que la frase del art. 814 'herederos forzosos en línea recta' se refiera especialmente a los ascendientes y décendientes legítimos, con exclusión de los hijos naturales reconocidos."

easily discerned; it is found in the restrictive character of the successional rights of the natural child. These rights, being merely a concession, a grace bestowed by the lawmaker, snatched from the legitimate family in its juridical battle with the natural family, should be confined to what is established by law, without being extended in any manner. The Code assigns to the natural child a hereditary portion, variable, depending on what heirs he concurs with; the said natural child has a right to that portion alone, and he must respect the testator's will."[64]

Manresa's opinion — which seems to be the more generally accepted — is based on the fact that the law merely refers to the "direct line," without qualifying it as the "legitimate direct line." *Ubi lex non distinguit, nec nos distinguere debemus.*[65] Scaevola's view, on the other hand, takes into account the long-standing distinction between the legitimates and the illegitimates and the lingering attitude that the illegitimates have only such rights as are expressly granted to them by law. If Scaevola's opinion is more classical, Manresa's certainly is more liberal. Most will agree that the pendulum is swinging Manresa's way.

Adopted Children

What of legally adopted children? Are they in the direct line in the contemplation of Article 854? This is not a settled question. On the one hand it could be claimed that an adopted child cannot be said to belong to the direct line, for the reason that he bears no blood relationship to the adopter. This view would give to the terms "line" and "degree" in Arti-

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[64]14 SCAEVOLA, *op. cit., supra*, note 16, at 420-422.

"Más importante es el estudio del artículo desde el punto de vista de la *cualidad* de los herederos. Se refiere aquél a los *'herederos forzosos en línea recta'* y occurre desde luego preguntar si la disposición comprende o no a los *hijos naturales reconocidos.* Es indudable que éstos, por naturaleza, están en *línea recta* descendiente respecto a sus padres y ascendientes; pero en el terreno legal no cabe duda que dicha frase se limita a los ascendientes y descendientes legítimos. Se infiere así de la sección "Del parentesco" en la sucesión legítima, artículos 915 a 923, y especialmente del 917 y del 918, y del capítulo "Del orden de suceder, según la diversidad de líneas", dentro del cual se habla de línea recta descendiente y ascendiente con relación sólo a los hijos y nietos y a los padres y abuelos, y en sección aparte: "De los hijos naturales reconocidos." Y así es: cuando de éstos se trata no se habla de línea, concepto que se aplica al parentesco legítimo. Conforme, pues, a estas consideracions, el hijo natural parece excluído del precepto del párrafo primero del artículo 814.

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"En nuestro entender, el por qué de la doctrina expuesta es de fácil determinación: consiste en el carácter restrictivo de los derechos hereditarios del hijo natural. Siendo éstos una concesión, una gracia que el legislador le otorga, arrebatada a la familia legítima en la lucha jurídica con la natural, debe limitarse a lo establecido por aquél, sin poderla ampliar en modo alguno. El Código asigna al hijo natural una porción hereditaria, variable, según los herederos con quienes concurra; el hijo tiene sólo derecho a sacar libre dicha porción, debiendo respetar en lo demás la voluntad del testador."

[65]*Cf.* 6 MANRESA, *op. cit., supra*, note 2, at 433.

cles 963 to 969 a meaning according to nature, arising out of a natural, biologic generation, a bond *ex sanguine* only, not *ex lege*. On the other hand, there are those who would assert that, by fiction and mandate of law, an adopted child acquires a relationship of legitimate filiation to his adopter and that, therefore, "line" in Article 854, must include blood or legal relationship. This second view — more persuasive to this writer — finds support in Article 39, paragraph (1) of the Child and Youth Welfare Code,[66] which was taken from Article 341 of the Civil Code.

The last word on the matter of adopted children should come from Justinian's Institutes, for if the concept of preterition itself is derived therefrom, might not that imperial legislation help furnish the answer? "Adoptivi liberi, quamdiu sunt in potestate patris adoptivi, euisdem iuris habentur cuius sunt iustis nuptiis quaesiti: itaque heredes instituendi vel exheredandi sunt, secundum ea quae de naturalibus exposuimus."[67]

Determination of Heirs Who are Preterited — The Second Paragraph

The moment of the testator's death is the crucial moment. It is at that time the determination is made of the persons who have the right to succeed. Thus, if a compulsory heir is the direct line, completely excluded from the inheritance, predeceases the testator there will be no preterition as to him — since, being dead, he has no successional rights. It is the heir who is living and qualified at the moment of the testator's death that must be taken into account: Was he preterited?

In this connection, some commentators make some interesting observations. Basically the situation they present is one of two kinds:

(1) Supposing the testator institutes his child, who predeceases him but leaves children of his own; or

(2) Supposing the testator institutes a child, who predeceases him, so that at the testator's death, the lone heir is an ascendant.

The first kind is the subject of an interesting monograph by Alfonso Cruz Auñón[68] — a frequent case, according to him, where a child of the testator is instituted as heir and the said child predeceases the

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[66]Presidential Decree No. 603. The article provides in part:
"ART. 39. *Effects of Adoption.* — The adoption shall:
(1) Give to the adopted person the same rights and duties as if he were a legitimate child of the adopter: *Provided,* That an adopted child cannot acquire Philippine citizenship by virtue of such adoption;..."

[67]INSTITUTES, Book II, Title XII.
"Adopted children, so long as they are under the *potestas* of the adopting father, are considered to be under the same rule as those sprung from lawful marriage: and therefore they must be appointed heirs or disinherited, according to the principles we have laid down regarding actual children."

[68]*Supra,* note 14.

testator, leaving one or more descendants (the testator's grandchildren), without any disposition being made in the testator's will to govern the situation.[69] Thus, suppose that X has two children — A and B. X institutes A and B in his will as his heirs. B predeceases X and is survived by two children, B-1 and B-2. Are B-1 and B-2 considered preterited under Article 854? Auñón's conclusion is that there is preterition under 854: "It is a case of preterition; within the purview of art. 814 of the Civil Code is a case where the testator does not call to the inheritance (neither directly nor suppletorily through substitution) the children of a child who was instituted heir but died before the testator... The way to forestall preterition is to name as the substitutes of the instituted children, in case of inability to succeed (and also in case of renunciation, although this not necessary), the descendants of said children."[70]

Señor Auñón's theory is provocative, but this writer disagrees with it. There is no preterition there, for the reason that B's death left a vacant portion in X's estate, which portion perforce will pass according to the rules of intestacy and will go, at least in part, to B's children. Necessarily, therefore, there will be no total exclusion, no preterition. Reference is made to what was proposed, *supra,* that preterition can occur only if the whole estate was disposed of, nothing going to the excluded heir, by intestacy or otherwise.

In the second case, the illustration would be thus: X makes a will instituting his only son A as his universal heir. A predeceases X and so, at X's death, the nearest relative is X's father, B. Is B considered preterited?

Manresa thinks so: "...if the sole descendant dies and in the will the ascendant is omitted — which ascendant becomes a compulsory heir — there is preterition with all its effects. This shows that preterition should be determined in relation to the persons who are forced heirs at the time of the testator's death, not in relation to those who do not become forced heirs."[71]

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[69] AUÑON, at 545.

[70] AUÑON, at 568.
"Es un caso de preterición, incurso en el art. 814 del Código civil el no llamar a la herencia (ni directa ni supletoriamente por vía de sustitución) a los hijos de un hijo instituído heredero que premuere al testador.
"*Segunda*: La manera de evitar incidir en la preterición, es nombrar sustituto de los instituído, para caso de no poder (y si se quiere tambien para caso de no querer, aunque ello no es necesario) heredar, a los descendientes de éstos."

[71] 6 MANRESA, *op. cit., supra,* note 2 at 435.
"Asi, si el omitido es un hijo legítimo y al morir dejó descendientes, éstos adquieren su derecho á legítima, y si fueron preteridos, se anulará la institución. Del mismo modo, si muere el descendiente único y en el testamento se omite el ascendiente, que queda como heredero forzoso, hay preterición y surte efecto. Esto prueba que la preterición siempre ha de apreciarse con relación a las personas que resultan ser herederos forzosos al tiempo de morir el testador, no con relación a las que no llegaron a serlo."

Puig Peña thinks the same way: "We refer to a case where there is a lone descendant who is instituted, without issue, who dies before the testator. In this case, if the ascendants have not been instituted, they will turn out to be preterited and all the effects of preterition will arise. Hence, as one author says, preterition should always be determined in relation to the persons who are forced heirs at the time of the testator's death, not in relation to those who do not become forced heirs."[72]

Without meaning to the contentious, this writer again disagrees on this second case, and for essentially the same reason. If the descendant dies or all the descendants die, of necessity there will be intestacy since the testamentary disposition in their favor becomes inoperative by predecease.[73] Since intestacy sets in, the share left vacant goes to the ascendant as intestate heir. Thus, it cannot at all be said that the ascendant was completely excluded from the inheritance. Of course, if the predeceased descendant had been given the entire estate, the question would be moot, since his death would give rise to total intestacy anyway. The problem arises if aside from the predeceased deceased descendant, a stranger was also instituted as heir.

It is Scaevola who gives an excellent example of a case of preterition where the preterited heirs were not compulsory heirs when the will was executed but were such when the testator died. Incidentally, Scaevola's example is also a good illustration of the second paragraph of Article 854.

Scaevola's example: A has three legitimate children — B, C, and D. D is married, with children. A executes a will in which D is preterited (assuming, therefore, that B and C are named universal heirs): D predeceases A and leaves his children as survivors. Is there preterition? Scaevola answers, quite logically, that there is — not because D has been preterited, for D has predeceased A anyway, but because D's children, who are A's compulsory heirs by representation when A dies, are preterited. It will be noted that, by the terms of the will, D's children will get nothing and, provided they have not received any donation *inter vivos,* legacy, or devise, we have a clear case of preterition. This then is the meaning of the rather ambiguous phrase in the second paragraph of 854: "Without prejudice to the right of representation."

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[72] 5 PUIG PENA, *op. cit., supra,* note 5, at 379.
Nos referimos al caso de que exista un solo descendiente instituído sin posteridad y que muera con anticipación a la muerte del causante. En este caso si no está prevista la institución de los ascendientes éstos resultan preteridos y, por tanto, cabrá todos sus efectos esta institución. Pues, como dice un autor, la preterición siempre ha de apreciarse en relación a las personas que resulten ser herederos forzosos al tiempo de morir el testador, no en relación a los que no llegaron a serlo."

[73] CIVIL CODE, Art. 960, Par. 3.

The Surviving Spouse

The surviving spouse, though a compulsory heir, is not in the direct line — the only compulsory heir not in the direct line, hence a compulsory heir *sui generis*. The preterition or total omission of the surviving spouse does not fall under Article 854 — this is implicit because of the limitation of the article to compulsory heirs in the direct line. Article 814 of the Spanish Code is explicit: The preterition of the widower or widow does not annul the institution of heir; but the one preterited preserves his usufructuary rights under the Code. Valverde explains that "if the preterition is of the surviving spouse, the institution of heir is not annulled; but the said spouse will retain his or her legitimary rights recognized in the Code, that is to say, he or she will have to be paid the legitimary portion due him or her."[74]

The reason why the surviving spouse is set apart from the other compulsory heirs is, according to Manresa, "founded solely on the special nature of the surviving spouse's legitime, which is always assigned *in usufruct*. The law considers that the spouse's right does not essentially alter the institution of heirs, although said heirs immediately acquire the naked ownership of only a part and suffer the temporary limitation of the widow's usufruct."[75]

Manresa's reason is cogent — for the Spanish Code. Under Philippine law, the surviving spouse's legitime is not a usufruct, but full ownership — this is one of the changes introduced by the new Code in the law of succession. Philippine law needs a reason for treating the surviving spouse differently from the other compulsory heirs.

EFFECT OF PRETERITION

In the 115th Novel, it was provided by Justinian that an ascendant was bound to institute as heirs those descendants who would have taken on an intestacy, unless one or other of the definite enumerated legal grounds to justify the disinheritance was stated in the will and this could be proved. If a testator failed without due cause to institute a person who had a claim to be instituted, the actual institution was void and the

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[74] 5 VALVERDE, *op. cit., supra*, note 17 at 310.
Si la preterición es del viudo o viuda, entonces no se anula la institución; pero el preterido conservará sus derechos legitimarios reconocidos en el código, es decir, habrá que pagarle su cuota legitimaria."

[75] 6 MANRESA, *op. cit., supra*, note 2, at 429.
La distinción hecha entre los efectos de la preterición del cónyuge y los efectos de la preterición de los demás legitimarios obedece solamente a la naturaleza especial de la legítima del viudo, que siempre se asigna *en usufructo*. El derecho del cónyuge estima la ley que no altera esencialmente la institución de herederos, aunque éstos en parte solo adquieran por de pronto la nuda propiedad o reciban en su derecho la temporal limitación del usufructo del viudo."

praeteritus inherited as on an intestacy; the will, however, was not wholly avoided, but only to the extent of the institution of heir, such testamentary provisions as legacies, fideicommissa and appointments of guardians remained valid.[76]

The effect of preterition, as well as the qualification of the effect, was faithfully retained in Article 814: *"anulará la institución de heredero; pero valdrán las mandas y mejoras en cuanto no sean inoficiosas."*

Similarly in our Article 854: " . shall annul the institution of heir; but the devises and legacies shall be valid insofar as they are not inofficious."

Implied in the provision is the distinction between an institution of heir on the one hand, and an establishment of a legacy or devise, on the other — a distinction which we shall not consider at length, that being an appropriate subject for another paper. Let it be sufficient for our purposes here to borrow Castán's distinction that an heir is given an aliquot part of the inheritance whereas a legatee or devisee is given specific or individualized personalty or realty respectively.

It is unfortunate that decisions of the Philippine Supreme Court on the matter have not instructed us consistently on the precise effect of preterition. What, in the Court's interpretation, is the meaning of the annulment of the institution of heirs?

The case of *Escuin v. Escuin*,[77] above cited involved the preterition of an acknowledged natural child. As a result of the preterition, the court stated, "the designation of heirs made therein [*i.e.* in the will] was, as a matter of fact annulled by force of law, *in so far as the legal portion of the said minor was thereby impaired.* . . The said designation of heirs became void in so far as it impaired the right of his general heir and deprived him of his legal portion; the will, however, is valid with respect to the two-thirds of the property which the testator could freely dispose of."

In other words, what the Court did in *Escuin* was not to annul the institution of heir but to reduce it to the extent that the preterited heir's legitime was impaired. To complicate the matter further, the two persons (the testator's father and wife) who were appointed universal heirs were, according to the Court, to be considered as legatees under the will, — an assertion which, to say the least, is not compellingly persuasive. Thus we have in *Escuin* not an annulment, but a reduction.

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[76] LEAGE, *supra*, note 7, at 189.
[77] *Supra*, note 55.

To the same effect was the ruling in *Ramírez v. Gmur*,[78] also mentioned above. The grandchildrenn in that case who were preterited were given only their legitime, the institution of heir being allowed to stand to the extent of the free portion.

The case of *Eleazar v. Eleazar*,[79] decided in 1939, simply follows the *Escuin* ruling. An extremely short decision, *Eleazar* is here quoted *in toto*:

> "The deceased, Francisco Eleazar, omitted in his last will and testament, his legitimate father, the appellant Eusebio Eleazar, expressly disinherited his lawful wife, Eulalia Nagar, and instituted the appellee herein, Miguela Eleazar, as his universal heir. The lower court admitted the will to probate and adjudged appellant and appellee each entitled to one-half of the estate.
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> "Appellant maintains in this appeal that the institution of the appellee as universal heir should be annulled and that he be declared entitled to all the estate of the deceased.
>
> "The will, in so far as it deprives the appellant, as legitimate father of the deceased, of his legal portion, is null and void, but is valid with respect to the other half which the testator could freely dispose of and which should be considered as a legacy. (citing *Escuin v. Escuin*)."

As in *Escuin*, the Court in *Eleazar* chose to consider the disposition of the property (clearly an institution of heir, to this writter's mind) as a legacy, and therefore reduced the disposition merely, in order to make good the preterited heir's legitime.

In 1941 came *Neri v. Akutin*,[80] based on the following facts: Agapito Neri had, in all, eleven legitimate children — six by a first marriage and five by a second. At his death he left a will declaring that his children by his first marriage were not to have any participation in his estate, as they allegedly had already received their corresponding shares during his lifetime. It was established, however, that, except for the eldest, none of the children of the first marriage had received any advance on the legitime.

The lower court declared an intestacy, giving the estate to all the children equally. The Court of Appeals modified this, choosing to give effect to the will as far as the disposable two-thirds were concerned.

The Supreme Court, through Mr. Justice Manuel Morán, pointed out that this was a case preterition under Article 814 (old) and not of ineffective disinheritance under Article 851 (now 918). "Preterition." it said, "consists in the omission in the testator's will of the forced heirs

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[78] *Supra*, note 58.
[79] *Supra*, note 52.
[80] *Supra*, note 19.

or anyone of them, either because they are not mentioned therein, or, though mentioned, they are neither instituted as heirs nor are expressly disinherited.[81] In the instant case, while the children of the first marriage were mentioned in the will, they were not accorded any share in the hereditary property, without expressly being disinherited. It is, therefore, a clear case of preterition as contended by appellants. The omission of the forced heirs or anyone of them, whether voluntary or invountary is a preterition if the purpose to disinherit is not expressly made or is not at least manifest.

"Except as to 'legacies and betterments' which 'shall be valid in so far as they are not inofficious' (Art. 814 of the Civil Code), preterition avoids the institution of heirs and gives rise to intestate succession."

As a result, the Supreme Court affirmed the lower court's decision declaring a total intestacy. We note here two things: first, that the Court did not consider the implicit institution of the children of the second marriage to the whole estate as a legacy or devise; and second, that the Court did not merely reduce the institution insofar as the legitimes of the preterited heirs were concerned; rather the whole institution was annulled, not *pro tanto* but *in toto* and a total intestacy declared. Hence the preterited heirs got not only their legitimes but also a part of the intestate estate.

Prescinding from the wisdom — or lack of it — of this provision of annulment (which is after all a matter for the lawmaker to determine), we find it exceedingly difficult to accept the rulings in the earlier cases above cited that preterition results only in the reduction of the testamentary dispositions to the extent necessary to cover the legitime of the preterited heir.

Manresa cites several judicial decisions holding that in cases of preterition, the whole inheritance is opened for intestate succession.[82] And then he explains further: "The interpretation that is correctly deduced from article 814 is this: that the only things that stay valid are dispositions made in the title of bequests or betterments, insofar as they are not inofficious. *As far as the institution of heir is concerned, it is annulled. That which is annulled ceases to exist — in whole or in part? There is no qualification* at all [*i.e.* in article 814], *unlike in article 851 in which it is provided that the institution of heir is annulled insofar as the legitime of the disinherited heir is concerned. It should therefore be understood that the annulment is complete or total,* and that *this article* [*i.e.*

[81] Citing 6 MANRESA, *op. cit., supra,* note 2, at 346.
[82] 6 MANRESA, *op. cit., supra,* note 2, at 431.

article 814], *being a special provision, prevails over article 817*[83]."[84] (Underscoring supplied).

Not disdainful of an occasional tautology to drive home a point, Manresa stresses that the annulment of the institution of heir in cases of preterition is "completa o total."

Sánchez Román agrees: "In case of preterition . . . upon the annulment of the institution of heir, as a result of the preterition, intestate succession is opened in favor of the preterited heir or heirs, with respect to the entire inheritance . . Thus, the preterited heirs succeed *ab intestato* to all the estate, in concurrence with the other compulsory heirs called by law *ab intestato* . ."[85]

Valverde is even more explicit: ". . .regarding the extent of the nullity of the institution, we must note an important difference between disinheritance and preterition; disinheritance, according to article 851, that is made without the requirements of law, annuls the institution of heir, *but only insofar* as it prejudices the disinherited heir, that is to say, the disinherited heir preserves his right to the legitime, but to nothing more than the legitime; in preterition, since article 814 says merely that the institution of heirs is annulled, without the qualification of article 851, it is believed by the most eminent authors — among them the learned Sánchez Román and the distinguished commentator, Manresa — that the nullity of the institution is total and absolute, so that if the testator, upon disinheriting a forced heir, institutes another person and leaves him all his property, this institution would be annulled to the extent of the legitime that would pertain to the heir unjustly disinherited, and the instituted heir would receive the rest of the inheritance; while if a person is named universal heir and a compulsory heir in the direct line is preterited, the institution would be annulled and the entire inhe-

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[83]Article 817 of the SPANISH CIVIL CODE is Article 907 of ours:
"Testamentary dispositions that impair or diminish the legitime of the compulsory heirs shall be reduced on petition of the same, insofar as they may be inofficious or excessive."

[84]6 MANRESA, *op. cit., supra,* note 2, at 431-432.
La interpretación que rectamente se desprende del artículo 814 es la de que sólo valen, y eso en cuanto no sean inoficiosas, la disposiciones hechas a título de legado o de mejora. En cuanto a la institución de heredero, se anula. Lo que se anula deja de existir, en todo o en parte? No se añade limitación alguna, como en el artículo 851, en el que se expresa que se anulará la institución de heredero en cuanto perjudique a la legitima del desheredado. Debe, pues, entenderse que la anulación es completa o total, y que este artículo como especial en el caso que le motiva, rige con preferencia al 817."

[85]6 SANCHEZ ROMAN, *op. cit., supra,* note 18, at 1140-1141.
"En el caso de la preterición,... al anularse la institución, por efecto de la preterición, se abre la intestada en favor del preterido ó preteridos, respecto de toda la herencia,...Así es que los preteridos, en el supuesto indicado, suceden *abintestato* en todo, en concurrencia con los demás herederos forzosos ó llamados por la ley al abintestato; ..."

ritance would pass by intestacy to the preterited heir — this a doctrine that I believe has already been confirmed by an important decision of the Supreme Court."[86]

Finally, Castán: "Its effect [*i.e.* of preterition] is to annul the institution of heir, leaving in effect legacies and betterments insofar as they are not inofficious. Unlike disinheritance without cause which only annuls the institution insofar as it prejudices the disinherited heir, preterition gives rise to the total and absolute nullity of the institution of heir... In conclusion, the consequence of the preterition of one, some, or all of the forced heirs in the direct line is, as Sánchez Román says, the opening of total or partial intestacy. Total, when the testator has disposed of his entire estate by universal title of succession in favor of instituted heirs, — this institution is annulled. Partial, when the testator has made dispositions by singular title — these disposition will subsist to the extent that they can be contained within the free portion."[87]

The most recent — and most definitive — ruling of the Philippine Supreme Court on this question is the 1966 case of *Nuguid v. Nuguid*,[88]

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[86]5 VALVERDE, *op. cit., supra*, note 17 at 310-311.

"...pero por lo que respecta a la extensión que debe darse a la nulidad de la institución, es de advertir una importante diferencia entre la desheredación y la preterición; tratándose de la desheredación, según el artículo 851, la hecha sin condiciones de ley anula la institución de heredero, *pero solo en cuanto* perjudique al desheredado, es decir, que el desheredado conserva el derecho a su legítima, pero nada más que a su legítima; y en la preterición, como en el art. 814 se dice solamente que anulará la institución, sin la adición y aclaración del art. 851, se cree por autores muy autorizados, entre otros por el docto Sánchez Román y el ilustrado comentarista señor Manresa, que la nulidad de la institución es total y absoluta, de modo que si un testador al desheredar a un legítimo instituyera a un heredero dejándole todos sus bienes, se anularía esta institución en la parte de legítima que correspondía al desheredado injustamente, y el nombrado heredero seguiría siéndolo del resto de la herencia, mientras que nombrado heredero universal persona, si resultaba preterido un forzoso en línea recta, se anularía aquella institución y toda la herencia pasaría abintestato al heredero preterido; doctrina esta, que creo yo está confirmada por una importante sentencia del Supremo (1)."

The important decision referred to by Valverde is cited by him in a footnote; it is the decision of 17 June 1908, in which it was held that preterition annuls the institution of heir and that the annulment ipso facto (natural y forzosamente) produces intestate succession.

[87]4 CASTAN, *op. cit., supra*, note 3, at 579.

"Su efecto es anular la institución de heredero, quedando subsistentes las mandas y mejoras en cuanto no sean inoficiosas (artículo 814, apartado 1.º). A diferencia, pues, de la desheredación sin causa, que solo anula la institución *en cuanto perjudique al desheredado* (art. 851), la preterición produce la nulidad total y absoluta de la institución de heredero...

"En conclusión, la consecuencia de la preterición de uno, varios o todos los herederos forzosos en línea recta será, como dice Sánchez Román, la apertura de la sucesión intestada *todo* o *parcial*. Total, cuando el textador que comete la preterición hubiere dispuesto de todos los bienes por título universal de herencia en favor de los herederos instituídos, cuya institución se anula. Parcial, cuando el testador hubiere hecho disposiciones a título singular, las cuales han de subsistir en cuanto se hallen dentro de la porción libre."

[88]*Supra*, note 19.

in which the testatrix, Rosario Nuguid by name, died unmarried and without descendants. She was survived by her legitimate parents. The testatrix's will instituted as universal heir one of the decedent's sisters. Claiming preterition and therefore the nullity of the institution, Rosario's parents instituted this action.

Holding that before it was a "clear case of preterition," the Supreme Court, through Mr. Justice Conrado Sánchez, explained:

> "It may now appear trite but nonetheless helpful in giving us a clear perspective of the problem before us, to have on hand a clear-cut definition of the word *annul*:
>
> > "To 'annul' means to abrogate, to make void; x x x *In re* Morrow's Estate, 54 A. 342, 343, 204 Pa. 484."
> >
> > "The word 'annul' as used in statute requiring court to annul alimony provisions of divorce decree upon wife's remarriage means to reduce to nothing; to annihilate; obliterate; blot out; to make void or of no effect; to nullify; to abolish. N.J.S.A. 2:50 — 38 (now N.J.S. 2A:34-35). Madden v. Madden. 40 A. 2d 611, 614, 136 N. J. Eq. 132."
> >
> > "ANNUL. To reduce to nothing; annihilate; obliterate; to make void or of no effect; to nullify; to abolish; to do away with. *Ex parte* Mitchell, 123 W. Va. 283, 14 S.E. 2d 771, 774."
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> Continued the Court:
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> "Such preterition in the words of Manresa *'anulará' siempre la institución de heredero*, dando carácter absoluto a este ordenamiento', referring to the mandate of Article 814, now 854 of the Civil Code. The one-sentence will here institutes petitioner as the sole, universal heir — nothing more. No specific legacies or bequests are therein provided for. It is in this posture that we say that the nullity is complete. Perforce, Rosario Nuguid died intestate."
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> "Really, as we analyze the word *annul* employed in the statute, there is no escaping the conclusion that the universal institution of petitioner to the entire inheritance results in *totally abrogating* the will. Because, the nullification of such institution of universal heir — without any other testamentary disposition in the will — amounts to a declaration that nothing at all was written. Carefully worded in clear terms, Article 854 offers no leeway for inferential interpretation. Giving it an expansive meaning will tear up by the roots the fabric of the statute. On this point, Sánchez Román cites the 'Memoria anual del Tribunal Supremo, correspondiente a 1908,' which in our opinion expresses the rule of interpretation, *viz*:
>
> > "'x x x El art. 814, que preceptua en tales casos de preterición la nulidad de la institución de heredero, no consiente interpretacíon alguna favorable a la persona instituida en el sentido antes expuesto, aún cuando parezca, y en algun caso pudiera ser, más o menos equi-

> tativa, porque una nulidad no significa en Derecho sino la suposición de que el hecho o el acto no se ha realizado, debiendo, por lo tanto, procederse sobre tal base o supuesto, y consiguientemente, en un testamento donde falte la institución, es obligado llamar a los herederos forzosos en todo caso, como habría que llamar a los de otra clase, cuando el testador no hubiese distribuido todos sus bienes en legados, siendo tanto más obligada esta consecuencia legal cuanto que, en materia de testamentos, sabido es, según tiene declarado la jurisprudencia, con repetición, que no basta que sea conocida la voluntad de quien testa si esta voluntad no aparece en la forma y en las condiciones que la ley ha exigido para que sea válido y eficaz, por lo que constituiría una interpretación arbitraria, dentro del derecho positivo, reputar como legatario a un heredero cuya institución fuese anulada con pretexto de que esto se acomodaba mejor a la voluntad del testador, pues aún cuando así fuese, será esto razón para modificar la ley, pero no autoriza a una intepretación contraria a sus términos y a los principios que informan la testamentifacción, pues no porque parezca mejor una cosa en el terreno del Derecho constituyente, hay razon para convereste (sic) juicio en regla de interpretación, desvirtuando y anulando por este procedimiento lo que el legislador quiere establecer.' "

We should not be led astray by the statement in Article 854 that, annulment notwithstanding, 'the devises and legacies shall be valid insofar as they are not inofficious'. Legacies and devises merit consideration only when they are so expressly given as such in a will. Nothing in Article 854 suggests that the *mere* institution of a universal heir in a will — void because of preterition — would give the heir so instituted a share in the inheritance. As to him, the will is inexistent. There must be, in addition to such institution, a testamentary disposition granting him bequests or legacies apart and separate from the nullified institution of heir. Sánchez Román, speaking of the two component parts of Article 814, states that preterition annuls the institution of the heir 'totalmente por la preterición'; but added (in reference to legacies and bequests), 'pero subsistiendo, x x x todas aquellas otras disposiciones que no se refieren a la institución de heredero x x x.' As Manresa puts it, annulment throws open to intestate succession the entire inheritance including 'la porción (que) no hubiese en virtud de legado, mejora o donación.'

"As aforesaid, there is no *other provision* in the will before us except the institution of petitioner as universal heir. That institution, by itself, is null and void. And, intestate succession ensues.

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"Petitioner insists that the compulsory heirs ineffectively disinherited are entitled to receive their legitimes, but that the institution of heir 'is not validated,' although the inheritance of the heir so instituted is reduced to the extent of said legitimes.

This is best answered by a reference to the opinion of Mr. Chief Justice Moran in the *Neri* case heretofore cited, *viz*:

> 'But the theory is advanced that the bequest made by universal title in favor the children by the second marriage should be treated as *legado* and *mejora* and, accordingly, it must not be entirely annulled but merely reduced. This theory, if adopted, will result in a complete abrogation of Articles 814 and 851 of the Civil Code. If every case of institution of heirs may be made to fall into the concept of legacies and betterments reducing the bequest accordingly, then the provisions of Articles 814 and 851 regarding total or partial nullity of the institution, would be absolutely meaningless and will never have any application at all. And the remaining provisions contained in said article concerning the reduction of inofficious legacies or betterments would be a surplusage because they would be absorbed by Article 817. Thus, instead of construing, we would be destroying integral provisions of the Civil Code.
>
> The destructive effect of the theory thus advanced is due mainly to a failure to distinguish institution of heirs from legacies and betterments, and a general from a special provision. With reference to Article 814, which is the only provision material to the disposition of this case, it must be observed that the institution of heirs is therein dealt with as a thing separate and distinct from legacies or betterments. And they are separate and distinct not only because they are distinctly and separately treated in said article but because they are in themselves different. Institution of heirs is a bequest by universal title of property that is undetermined. Legacy refers to specific property bequeathed by a particular or special title. x x x But again an institution of heirs cannot be taken as a legacy.'
>
> The disputed order, we observe, declares the will in question 'a complete nullity'. Article 854 of the Civil Code in turn merely nullifies 'the institution of heir.' Considering, however, that the will before us solely provides for the institution of petitioner as universal heir, and nothing more, the result is the same. The entire will is null."

It is inescapable. And if one can be redundant: the effect of preterition is total intestacy — the preterited heir gets not only his legitime but also whatever intestate portion he would receive if the will had never been made. There is one — and only one — qualification to this: legacies and devises are to be honored insofar as they do not impair the legitimes. *And a legacy or devise is not to be confused or equated with a disposition in favor of an heir.*

Well many some civilists criticize this rigorous rule in Article 854. Well may one be persuaded that the effect of preterition should be limited to an annulment *pro tanto,* that is, only to the extent that the preterited heir has been deprived of his legitime. This writer, too, is of that mind. However, it is one thing to wish what the law might be; it is quite another thing to discern what the law actually is. To torture the terms and syntax of Article 854 to arrive at a less drastic effect of preterition, to

twist meaning and the clear denotation of the law — is, what ever else one may call it, thoroughly bad legal hermeneutics.

By contrast, when the law intends an effect less drastic than annulment, it states its intention clearly. We refer to the case of ineffective disinheritance — already mentioned in various passages quoted above — provided for in Article 918:

> "Disinheritance without a specification of the cause, or for a cause the truth of which, if contradicted, is not proved, or which is not one of those set forth in this Code, shall annul the institution of heirs insofar as it may prejudice the person disinherited; but the devises and legacies and other testamentary dispositions shall be valid to such extent as will not impair the legitime."

The difference in the wording is significant:

Article 854: "...shall annul the institution of heir..."

Article 918: "...shall annul the institution of heirs insofar as it may prejudice the person disinherited..."

Clearly, in cases of ineffective disinheritance, the institution will stand if the legitime of the disinherited heir is not impaired; if it is impaired, then the institution will be reduced to the extent necessary to give the prejudiced heir his legitime. Parenthetically, Article 918 defines what ineffective disinheritance is, and, supplementarily, the concept is adequately discussed in the *Nuguid* case as follows:

> Petitioner's mainstay is that the present is "a case of ineffective disinheritance rather than one of preterition." From this, petitioner draws the conclusion that Article 854 "does not apply to the case at bar." This argument fails to appreciate the distinction between preterition and disinheritance.
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> Preterition "consists in the omission in the testator's will of the forced heirs or anyone of them, either because they are not mentioned therein, or, though mentioned, they are neither instituted as heirs nor are expressly disinherited." Disinheritance, in turn, "is a *testamentary* disposition depriving any compulsory heir of his share in the *legitime* for a cause authorized by law." In Manresa's own words: "La privación expresa de la legítima constituye la *desheredación*. La privación tácita de la misma se denomina preterición." Sanchez Roman emphasizes the distinction by stating that disinheritance "es siempre *voluntaria*"; preterition, upon the other hand, is presumed to be "*involuntaria*". Express as disinheritance should be, the same must be supported by a legal cause specified in the will itself."[89]

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[89] *Supra* note 19 at 457.

Commentators have asked why preterition and ineffective disinheritance should produce different effects. This difference has been explained by Manresa thus:

"What is the reason for this difference? In the majority of cases, it can be found in the presumed will of the testator, who, by disinheriting, reveals that there exists some reason or motive which drives him thus to act; his reason is perhaps not sufficient to deprive the heir of his legitime, but it should be considered sufficient to deprive him of the rest of the inheritance, to which the disinherited heir cannot claim any right. The preterited heir, on the other hand, was not expressly deprived of anything; the testator normally acted through carelessness or mistake . . in other cases he is not aware of the existence of a descendant or an ascendant. When the preterited heir is a person born after the testator's death or after the execution of the testament, the reason is even clearer: the omission should be presumed involuntary; it should be supposed that the testator would have instituted this person if he had existed at the time of the making of the will, and not to the legitime, but to the whole inheritance . ."[90]

TOWARDS AMENDMENT — SOME SUGGESTIONS

All the foregoing has been a discussion of what the law on preterition is. While Article 854 stands, now, as worded, it should be interpreted and applied as its terms mandate, despite highly audible criticisms from some very able quarters. The changes advocated by them in the enforcement and application of the provision is — at least this writer insists — impermissible without doing violence to its express words. At the same time, this is not to say that amendments are not in order, for they are — and very much so. It is suggested that our law on preterition has largely become an anachronism, founded still on concepts and principles that have long gone the way of all things human, carry-overs of ancient, discarded Roman or Spanish theories of succession.

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[90] MANRESA, *op. cit., supra*, note 2 at 430.
"Cual es la razón de esta diferencia? En la generalidad de los casos puede fundarse el precepto en la presenta voluntad del testador. Este, al desheredar, revela que existe alguna razón o motivo que le impulsa a obrar así; podrá no ser bastante para privar al heredero de su legítima, pero siempre ha de estimarse suficiente para privarle del resto de la herencia, pues sobre ésta no puede pretender ningún derecho el desheredado. El heredero preterido no ha sido privado expresamente de nada; el testador, en los casos normales, obra así por descuido o por error... En otros casos se ignora la existencia de un descendiente o de un ascendiente. Cuando el preterido es una persona que ha nacido después de muerto el testador o después de hecho el testamento, la razón es aún más clara: la omisión ha de presumirse involuntaria; el testador debe suponerse que hubiera instituído heredero a esa persona si hubiera existido al otorgarse el testamento, y no solo en cuanto a la legítima, sino en toda la herencia..."

Fortunately, there has been a move of late to get together a group of persons learned in the civil law tradition to propose changes in the Civil Code of the Philippines — to recodify Philippine civil law, if necessary. This is therefore a good time to give these things a good, long, hard second look.

As far as the law on preterition is concerned, we would do well to re-examine the following aspects:

1. The effect of preterition. The annulment of the institution of heir is now too radical an effect, although under the Roman law such an effect was, if severe, at least perfectly consistent with the rest of their law on succession, in which it was not possible for an estate to be partly testate and partly intestate.[91] The will was either totally efficacious or totally inoperative. Thus if flawed by an act or disposition which made it *injustum* or *inofficiosum*, the will could not be anything but juridically inexistent.[92] Under our law, however, this underlying concept does not exist, inasmuch as there is no legal impediment whatsoever to succession that is partly testate and partly intestate — the law expressly recognizes it, calling it "mixed succession"[93] and defining it in Article 780.

It is thus possible, and highly desirable to mitigate the severity of the effect of preterition, consistent with the law's policy to favor testacy over intestacy and hence to resolve all doubts in favor of testamentary succession.[94] This purpose would be served if the effect of preterition were to be limited to restoring the omitted heir to his legitime, reducing the testamentary dispositions to the extent necessary, but not annulling them. This moreover would seem to be a sufficient protection for the prejudiced heir who, after all, has no right to the free portion of his predecessor's estate if that portion has been given by will to somebody else. If the predecessor wanted the disposable portion to go to a stranger and so stated in his will, then his wishes should be followed.

A possible objection to this proposal may be Manresa's comment[95] that if the testator had been aware of the preterited heir's existence he would have instituted him not only to the legiime but to the rest of the inheritance. This pre-empts two premises: first, that the testator was unaware of the heir's existence; and, second, that the testator *would have* instituted such heir to more than his legitime. This double surmise makes the justification for the annulment of the institution very tenuous indeed. To make the law more consistent with policy, the presumption

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[91] BURDICK, *supra*, note 8 at 603.

[92] It will be noted that, under the Roman law, preterition and improper disinheritance had the same effect — intestacy.

[93] CIVIL CODE, Art. 778.

[94] CIVIL CODE, Arts. 788, 791, and 792.

[95] *Supra*, note 90.

should be reversed — instead of presuming that the testator would not have made the institution if he had known of the heir's existence, it should be rather be presumed that: a) the testator knew of the heir's existence and made the institution anyway, or b) in cases where the testator obviously did not know of the heir's existence (as in cases of posthumous children), even if he had known of the heir's existence, he would have made the institution anyway. Under the law as we have it now, the presumption is conclusive. Under the proposal the opposite presumption would be rebuttable and would be overthrown by proof positive — preferably, on the face of the will itself — that the testator would not have instituted the heir had he known of the preterited heir's existence. It is when the presumption is sufficiently rebutted that intestacy should set in. *Mutatis mutandis,* this is the same kind of presumption that is created in Article 850, regarding the statement of a cause for the institution of heir.[96]

2. The distinction between devisees and legatees. and heirs. If the first proposal is adopted, necessarily the present distinction between an instituted heir on the one hand, and a legatee or devisee on the other, will be abolished. Otherwise the distinction will remain. Why should the institution of heir be totally annulled but the institution of legatees and devisees be upheld, at worst only to be reduced if inofficious? The answer in ancient law was clear: the heir is a continuation of the testator's personality whereas the legatee or the devisee was not. The category of heir was quite dissimilar to that of legatee or devisee, these latter two being merely recipients or beneficiaries of specific properties without being subrogated to the testator's judical position. Thus, if by some irregularity the heir was barred from inheriting,there was no legal reason why the legatee or devisee had to suffer the same fate. This underlying reason is, in the present Philippine law on succession, nothing but fictitious. Neither an heir nor a legatee or devisee is a continuation of the decedent's personality. None of them assumes the decedent's obligations, which are paid first, before the estate is partitioned among the successors. We have in our law, as a result, a distinction without basis, purely arbitrary, artificial, unrealistic.

In fact, the claim may be made that the heir is higher in the testator's affection than the legatees and devisees and it is anomalous that the instituion of the first should be annulled and that of the latter two should

[96]ART. 850. The statement of a false cause for the institution of an heir shall be considered as not written, unless it appears from the will that the testator would not have made such institution if he had known the falsity of such cause.

remain.[97] This claim may perhaps be excessive, but at least it shows that the logic of the rule is not self-evident.

If, then we must retain the nullificatory effect of preterition, we should annul all dispositions without distinction — those made to heirs, as well as to legatees and devisees.

3. The surviving spouse. We saw earlier[98] why in Spanish law the preterition of the surviving spouse does not produce the same nullifying effect as that of the compulsory heirs in the direct line; the reason sprang from the usufructuary nature of the spouse's legitimary right. Under Philippine law, the surviving spouse has been given a legitime in full ownership. There is no distinction, therefore, as far the scope of legitimary rights is concerned, between the spouse and the other compulsory heirs. Neither should there be any distinction as to the effect of their preterition.

If the proposal is accepted that the effect of preterition should be limited to a *pro tanto* reduction of *all* the testamentary dispositions — including legacies and devises — necessarily the present distinction between the widow or widower and the other forced heirs will disappear. If, on the other hand, such proposal is not followed, at the very least, old and now meaningless distinctions — between heir and legatee, between spouse and child and parent — in the law on preterition should be finally, decisively, and totally discarded.

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[97] 5 DIAZ & MARTINEZ, *op. cit., supra*, note 62, at 358.

"Hay quien opina que, en el caso que acabamos de exponer, debe anularse todo el testamento, en razón á que fué hecho cuando el testador, no sospechando siquiera la posible existencia del nacimiento de los hijos, tal vez por ser entonces soltero, y apreciando sus relaciones jurídicas, libres de todo heredero forzoso, distribuyó sus bienes como le plugo, instituyendo heredero, como es lógico, a la persona de su mayor aprecio, la cual precisamente, aplicando el articulo 814, viene á ser la única privada de la sucesión, quedando en vigor mandas y legados en los cuales tenía menor interés el testador; y de todo ello deducen que la anulación de la institución de heredero y la subsistencia de las mandas, supone ir contra la evidente voluntad del que testó."

[98] *Supra*, note 75.