SEIZIN IN THE QUEBEC LAW OF SUCCESSIONS

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"Le mort saisit le vif, son hoir plus proche et habile à lui succéder", stated article 318 of the Coutume de Paris. This maxim forms the basis of article 607 of the Quebec Civil Code, which reads:

"The lawful heirs, when they inherit, are seized by law alone of the property, rights and actions of the deceased, subject to the obligations of discharging all the liabilities of the succession; but the Crown requires to be judicially put in possession in the manner set forth in the Code of Civil Procedure."

Seizin has received many definitions during the past. Simmonet calls it:

" . . . une fiction de la loi qui suppose que le de cujus, à l'article de la mort, a remis à son successible, la masse héréditaire. La saisine, dans son acceptation le plus général, est le charactère légal sous lequel se manifeste la possession."[1] Mignault defines it as:

" . . . l'anticipation légale de la possession et des avantages qui en résultent."[2]

And Beaudant expresses it in this manner: "La saisine héréditaire, c'est la transmission à l'héritier, par le fait de l'ouverture de la succession, de la possession des droits et biens qui appartenaient au défunt."[3]

For present purposes, let us call seizin a legal fiction, by virtue of which the successor is deemed, from the moment of the deceased's death, to be in possession of the property and rights of the succession without the necessity of material apprehension or judicial proceeding. Seizin therefore, in this article, connotes the immediate transmission of possession, or, the state of legal possession resulting from such transmission.

Origin of the Maxim

"L'origine de la saisine est restée très obscure, et les travaux les plus récents n'ont pas réussi à l'élucider."[4] The first appearance of the concept of seizin in the old French law, was during the thirteenth century. We find mention of it in an arrêt of the Parlement de Paris in 1259, and in 1270, les Etablissements de Saint-Louis said: "Et li usages d'Orlénois si est que li morz saisit le vif."[5] As to where it began, three theories have been expressed. Some say that the notion of seizin came from the Roman law. Others trace it to

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[1]Simmonet, *Histoire et Théorie de la Saisine*, p. 4.

[2]Mignault, *Droit Civil Canadien*, vol. 3, p. 274.

[3]Beaudant, *Droit Civil Français*, 2nd. ed., vol. 5, No. 421.

[4]Baudry-Lacantinerie et Wahl, *Successions*, 2nd ed., vol. 1, no. 139.

[5]Livre 2, Ch. 4.

the Germanic tradition. And a third group sees it as a creation of the medieval jurists.

The theory of Roman law origin, as espoused by Planiol, is difficult to uphold. The normal mode of succession in Rome was testamentary, and testamentary heirs fell into two categories, necessary and voluntary. The necessary heir acquired the succession from the moment of its opening, since by a fiction of the law, he was deemed to continue the person of the deceased. Since the law conceived of this continuation of the deceased's person by the necessary heir, to be a religious duty, he could not refuse the succession, and his investiture was instantaneous. The voluntary heir, to the contrary, could refuse, and thus did not acquire the succession until he made an *aditio hereditatis,* a formal manifestation of his will to accept.[6] Until this was accomplished the *hereditatis* remained *iacens,* that is, vacant.

However the investiture of the necessary heir by fiction of law, and the *aditio* of the voluntary heir, dealt only with the ownership of the succession. Possession, in Roman law, required two essential factors: the material apprehension of the property, and the intention to hold it as proprietor.[7] A possession divorced from reality was a legal impossibility. Neither heir became invested by law alone with the possession of the property; both were still required to fulfill the two requisites of Roman possession.

Therefore since material apprehension was required of the heir, and since fictitious possession was unknown, we must agree with Pothier's statement: "Cette règle soit diamétralement opposée aux principes du droit romain."[8], and seek the origin of seizin elsewhere.

The proponents of the Germanic theory see the word seizin coming from the old Gothic verb *"sasjan"* and claim with some justification that the feudal law, as Montesquieu phrased it: " . . . plonge ses racines dans les forêts de la Germanie." What could be more logical they contend than that the principle of seizin, so akin to the transfer of property in Germanic successions should have come to the customary law from the barbarian codes. However this explanation also must fall.

The early Germanic tribes lived in a very tight family society, in which the family, as a unit, owned all the property acquired by its individual members. Thus upon the death of the head of the clan, there could be no hiatus in the ownership or possession. The property continued to vest in the family as represented by its new head. There was a complete continuity of ownership and possession from generation to generation. There was no transfer of property involved when the head of the family died; indeed the idea of transmission was meaningless, for the heirs merely continued an ownership and possession which they had shared all their lives, and which

[6]Buckland, *A Text-Book of Roman Law,* 2nd ed., p. 305.

[7]Buckland, *op. cit.,* p. 199.

[8]Pothier, *Successions,* ed. M. Bugnet, 2nd ed., ch. 3, sect. 2.

would continue to be shared, unbroken, by successive generations. This was the essence of the Germanic condominium. It was therefore unnecessary to have any theory of succession or seizin as we know it, for as Baudry says: "Bien que Tacite dit qu'après le décès du chef de famille, les biens appartenaient au proximus gradus in possessione, évidemment il entendait seulement par là, que les personnes ayant une jouissance commune avec le défunt, recueillant ces biens, sans trancher la question de savoir si une appréhension était ou non nécessaire."[9]

It must be concluded that the continuing condominium of Germanic law, by its nature, could not have been the source of the notion of seizin, for it was a system wherein the essential characteristic of seizin, the instantaneous transmission of possession, could have no meaning.

Therefore the origin of the principle of seizin must be found in the customary law of old France, as it was under the feudal system during the thirteenth century. However, a principle such as this does not merely spring into being. There must be a raison d'être, and it is in the abuses of the feudal system that this generating cause is found.[10]

All the land in his fief belonged to the seigneur. He granted certain parcels of it to his vassals, who received only a title known as *domaine utile,* an imperfect form of ownership, and a legal possession, subject always to the overriding ownership of the seigneur, the *domaine direct.* The feudal system of land tenure is somewhat difficult to appreciate in an age of absolute private ownership, because no one, under the system, owned land in our sense of the term except the seigneur. What he granted to his vassal was primarily a possession for use, which may perhaps be best described as an ownership in law, but not in fact.

When a vassal died, he was deemed to *dessaisir* himself, that is, to have divested himself of his *domaine utile,* which returned to the seigneur. The term seizin was first used to denote this process of transfer from vassal to lord. The Grand Coutumier of Charles VI said: *"Servus mortuus saisit dominum vivum,"* and Laurière says: " . . . toute personne qui mourait était censée se dessaisir de ses biens entre les mains de son seigneur."[11]

As a result of this process, the heir did not receive the succession until formally invested by his lord. Although in fact he was possessor under the same title as his predecessor, he lacked the recognition of his status in regard to the property until *ensaisiné* by the seigneur. Consequently the heir was not protected against tiers détenteurs during the interval between the opening of the succession, and his *ensaisinement,* since in the eyes of the law, he had no official status.

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[9]Baudry-Lacantinerie et Wahl, *op. cit.,* no. 141.

[10]Huc. *Code Civil,* Vol. 5, no. 28; Laurent, *Principes de Droit Civil,* Vol. 9, no. 221.

[11]Laurière, *Institutes Coutumiers,* liv. 2, tit. 5, règle 1.

Why, asked the medieval jurists, should the intervention of the lord be necessary, thereby temporarily depriving the heir of his lawful possession? They assumed that the last wish of the deceased was to invest his heir with the possession of the property which he himself had enjoyed during his lifetime, not to renounce it and return it to the lord. Therefore they reversed the maxim, eliminating the seigneur in the process of transmission. As Mourlon says: " . . . le vassal décédé était censé lui-même, au moment de sa mort, mis ses héritiers en possession de sa succession, ce qui les dispensait de l'obligation d'en demander la délivrance au seigneur."[12] Des Mares most succinctly expresses the same idea when he says: "Mor saisit son hoir vif, combien que particulièrement il y ait coutume locale où il faut necessairement saisine du seigneur."[13]

The maxim, *le mort saisit le vif,* was then a fiction of the law, conceived by the medieval jurist, by virtue of which the *de cujus* was presumed to have transferred the possession of his property, at the moment of his death, to his closest blood heir. The purpose was to obviate the seizin of the lord and protect the heir against third persons. By doing away with the formality of investiture, the dangerous hiatus between the opening of the succession, and the heir's recognition as legal possessor was avoided. As Dufourmantelle says: "La cause originaire de la maxime ce fut de rendre l'héritier possesseur de plein droit, à l'encontre des tiers détenteurs de la succession."[14]

It has been contended the seizin of the vassal was originally conceived to avoid payment of the relief and rachat, due to the seigneur upon a transmission of land to the heir of a deceased vassal. However the authorities do not support this. The Droit de Breton, although declaring the heirs in the direct line seized, did not dispense them from paying the relief. And the Coutume de Paris, along with many others while declaring the heirs seized, still required them to pay the relief. It is reasonable to believe that the seigneurs would forego the formality of investiture in the interests of protecting their vassals, but to imagine that they would as readily surrender a source of revenue, stretches the imagination. As centuries passed, however, the maxim was invoked to avoid the relief, but this was not until the sixteenth century when the distinction between fiefs and rotures disappeared, and, perhaps more important, the individual barons had lost a great deal of their power. One must therefore be careful not to confuse an ultimate result of the maxim with its originating force.[15]

The principle of seizin therefore was of neither Roman nor Germanic origin. The legal thinkers of the middle ages were faced with a problem, and to solve it, they conceived the notion of the seizin of the heir. No idea, of course, is entirely new. The influences of the Roman and Germanic traditions,

[12]Mourlon, *Répétitions Ecrites sur le Code Civil,* 12th ed. vol. 2, p. 18.

[13]Des Mares, *Décisions,* no. 234.

[14]Dufourmantelle, *Origines de la Saisine,* Revue Critique, 1891, p. 607.

[15]See Huc, *Commentaire Théorique et Pratique du Code Civil,* 1893 vol. 5, no. 28.

being in the minds of the men of the age, did undoubtedly affect medieval thought to some degree. However, despite the fact that the notion of seizin does, at first appearance, seem to reflect these influences, its juridical essence is completely different, and must be appreciated as having its true origin in feudal France.

The Juridical Essence of the Notion of Seizin

It must always be kept in mind that seizin has no relation to ownership. It relates exclusively to possession, that is legal possession as distinguished from possession in fact. From its earliest use as a maxim of French law it had this meaning, and only this meaning. In 1768, Pocquet de Livonière said: "La saisine de droit est distincte de celle de fait: c'est-à-dire que l'héritier peut prendre possession sans permission de justice, en vertu de la loi.[16]

However even now, some fail to make the distinction, and believe that seizin comprised also the transfer of the ownership of the property. One of the principal reasons for this continuing error lies in the failure to appreciate the vassal's tenure under feudal law, where the concept originated. If one failed to understand that the vassal was not owner of the property he held, the impression would be that his heir was seized of both the ownership and the possession, whereas in fact, the ownership always remained with the seigneur, and it was only the status as legal possessor which was instantaneously transmitted.

Yet, whatever the reason, the confusion did, and to a degree still does exist, and the school which related seizin to ownership by failing properly to distinguish between it and possession numbered among its adherents such eminent jurists as Pothier, Demolombe, Mourlon and even Mignault. These men used the term seizin to represent both the transfer of ownership, and the transmission of possession, Mourlon going so far as to postulate two distinct seizins, one for each process. But this is not the case, for as Huc says: " . . . la saisine n'a trait qu'à la possession; la question d'acquisition de la propriété lui demeure étrangère."[17] This is reiterated by Laurent and Baudry. The former states: "Donc la saisine concerne la possession: partant il faut réserver cette expression pour marquer la transmission de la possession."[18] And Baudry expresses the same thought: "On voit que la maxime, le mort saisit le vif est relative à la possession, et non à la propriété des biens héréditaires".[19]

There can be little doubt that this is the correct view. While the transmission of both ownership and possession do, generally speaking, occur simultaneously, they occur by reason of distinct principles of law. The ownership

[16]Pocquet de Livonière, *Règles du Droit Français*, 1768, no. 4.

[17]Huc, *op. cit.*, nos. 28, 29.

[18]Laurent, *Principes de Droit Civil*, 4th ed., vol. 9, no. 213.

[19]Baudry-Lacantinerie et Wahl, *op. cit.*, no. 151.

passes to the heir in virtue of the principle of succession itself. As article 596 of the Quebec Civil Code states: "Succession is the transmission by law or by the will of man, to one or more persons, of the property and the transmissible rights and obligations of a deceased person." All succesors are immediately owners, even the irregular heir, but on the other hand all successors are not immediately legal possessors, for article 607 of the Code expressly requires that the irregular heir be judicially put in possession. Seizin, then, is essentially synonymous with possession, a distinction emphasized by our law in allowing it to the testamentary executor, who unless he is also a legatee, is never owner of the property which he administrates. Jaubert has said: "Autre chose est la propriété, autre chose est la saisine,"[20] and he is supported by many others, with whom this writer readily agrees.[21]

The Principal Effects of Seizin

Seizin produces two principal effects. The first of these is that the heir (and in this section the word heir comprises the legatee in so far as applicable) can immediately put himself in effective possession of the property of the succession without the need of any authorization. The second, and more important effect, flows from the first, for as a result of his seizin, the heir may immediately exercise all the rights which his predecessor could have exercised, that is: " . . . toutes les actions, personnelles ou réelles, mobilières ou immobilières, pétitoires ou possessoires."[22] A succession comprises many forms of property, amongst which are to be found rights and actions, which are also acquired by the heir. As Laurent says: "Il est incontestable que l'héritier a les actions du défunt; il en a la propriété comme propriétaire de l'hérédité."[23] However the acquisition of these rights is a question of ownership, flowing from the devolution of the succession, not from the heir's seizin.

One is thus prompted to ask what purpose is served by seizin if the heir has the rights and actions in virtue of the succession itself. Yet it must be remembered that if these actions are capable of being owned they are equally capable of being possessed. Mignault says: " . . . lorsqu'on jouit d'un droit, on peut dire qu'on possède ce droit."[24] Possession is no more than enjoyment, so the result of the seizin is that the heir receives the status to exercise these rights and actions which he owns. Laurent says: " . . . propriétaire de l'hérédité . . . mais cela ne suffit pas pour qu'il puisse les exercer. En effet, exercer

[20]Jaubert, c.f. Locré, tit. 2, p. 490.

[21]*Pandectes Françaises,* vol 54, Nos. 1676, 1684; Bonnecasse, *Précis de Droit Civil,* vol. 3, no. 625; Laurent, *op. cit.,* no. 213; Ferrière *Commentaire,* tit. 4, no. 2; Toullier. *Droit Civil Français,* vol. 4, no. 80; Baudouin, *Le Droit Civil de la Province de Québec,* p. 1115; *Jean* v. *Gagnon,* [1944] S.C.R. 175.

[22]Mignault, *op. cit.,* vol. 3, p. 271.

[23]Laurent, *op. cit.,* vol. 9, no. 224.

[24]Mignault, *op. cit.,* vol. 9, p. 358.

une action, c'est faire acte de possession; donc il faut être possesseur pour agir en justice. C'est dire que l'héritier a l'exercice des actions en vertu de la saisine . . . l'article 724 (607 Que. C.C.) comprend expressément les actions parmi les choses dont la possession passe de plein droit à l'héritier; et il eût été inutile de les mentionner si l'héritier en avait l'exercise comme propriétaire, puisque l'article 711 (596 Que. C.C.) règle la transmission de la propriété, tandis que l'article 724 est uniquement relatif à la possession."[25]

The above quotation illustrates the subtle difference between the ownership of property, and the rights inherent in it. The status given by seizin is therefore the legally recognized capacity to exercise the rights and actions attached to the property. Upon the opening of the succession, the heir has all the rights attached to the property, but he cannot exercise them. This capacity comes from his seizin, for as Josserand says: " . . . sans saisine, l'héritier a bien la jouissance de ce titre, il n'en a pas l'exercice; la mise en œuvre lui en est refusée."[26] And Huc says: "La saisine moderne n'aurait trait qu'à l'exercice des droits actifs et passifs du défunt . . ."[27] This distinction is well evidenced in the case of the irregular heir. It cannot be denied that he becomes owner, de plein droit, from the moment of the *de cujus'* demise, but until legally put in possession, he cannot exercise the rights which form part of such ownership. Toullier says: "La différence entre le successeur saisi et celui qui ne l'est pas consiste donc en ce que les droits transmis à l'un, comme à l'autre par la seule force de la loi, peuvent être immédiatement exercés par l'un sans aucune intervention de la justice ou d'un tiers, tandis que l'autre ne peut les exercer qu'après avoir obtenu l'investiture de la justice."[28]

It cannot therefore be strictly said that the heirs are seized of the rights and actions, but instead, of the exercise of them. Since the exercise of a right is an act of possession, seizin conserves its definite meaning, the instantaneous transmission of the possession of the property of the succession, the possession of the rights and actions being but a segment of the universality, and their exercise but an effect of the legal possession.

The importance of the distinction between the transmission of the ownership of the succession, and the seizin is evident when one considers certain rights of the heir, which have been attributed to the latter concept. The right of transmission has been listed as an effect of seizin. By this is meant that the heir, even if he dies immediately following the decease of his author, transmits the latter's succession in his own. That this process occurs is undeniable; that it is a result of seizin is untenable. The heir acquires his ownership by law alone, independently of his seizin, and it is this ownership

[25]Laurent, *op. cit.*, no. 224.

[26]Josserand, *Cours de Droit Civil Positif Français*, 2nd ed., vol. 3, no. 826.

[27]Huc, *op. cit.*, vol. 5, no. 33.

[28]Toullier, *op. cit.*, vol. 4, no. 91.

which is transmitted to his own heirs. As Huc says: "Il faut donc pas confondre l'acquisition du droit successif lui-même avec la saisine.[29] It has also been contended, that it is as a result of his seizin that the heir has the right to the fruits of the succession from the moment of his predecessor's death. Again this is not so, for his right is a result of ownership, not possession, which is made clear by article 408 C.C., which states: "Ownership in a thing, whether moveable or immoveable, gives the right to all it produces and to all that is joined to it as an accessory whether naturally or artificially." Without seizin the heir would not be in a position to go before justice to demand these fruits, to exercise his right, but it cannot be doubted that the right itself would be his, whether seized or not.

Therefore, in any consideration of the effects of seizin, it must always be kept in mind that since it is no more than a continuation of the possession of the deceased, it can have no other effect, nor give any other rights than those attached to possession.

Those Successors to Whom Seizin is Given

In Quebec, the lawful heirs, when they inherit, and the legatees, by whatever title, are seized upon the death of their predecessor. Seizin is also given to the testamentary executor, whose position shall be dealt with later.

In old France, only the closest blood heir was seized, great stress being laid upon blood ties, and the preservation of family estates. Testamentary successions were discouraged, the belief being, as some medieval Joyce Kilmer put it: *Deus solus heredem facit.* The eldest son was considered the only successor to his father's estate in virtue of the right of primogeniture. He was looked upon as having not merely an expectant, but an actual right in the property of his father. Thus the law presumed, in an intestate succession, that not only had the deceased wished his property to devolve to his eldest son, but that he had an obligation to see to it.[30] As the Coutume de Poitou, Article 273 said: "L'on ne peut faire par testament ou legs, quelque peine qui y soit apposée, que l'héritier ne soit saisi des choses que le défunt tenait au temps de son trépas." Gradually the notion of primogeniture disappeared, and all the children were placed in the same preferred category. However the familial concept prevailed, in the form of a reserve for the children and the parent was forbidden by law to exclude them from the reserved segment of his succession. Even to-day French law allows seizin to the universal legatee only when there are no reserved heirs.

Quebec law, to the contrary, gives seizin to all but the irregular heir by virtue of the abolition of the reserve and the introduction of the English concept of freedom of willing. The seizin of the Quebec heir is the same as that of his French counterpart, both being instantaneously seized under a

[29]Huc, *op. cit.*, vol. 5, no. 27.

[30]See Simmonet, *Histoire et Théorie de la Saisine Héréditaire*, p. 110.

resolutive condition. If the heir accepts the succession, he has been seized from the moment of its opening; if he renounces it he is deemed never to have been seized. However the basis of the seizin in each case is different. The French law looks upon the heir as continuing the juridical person of the deceased,[31] but this is not so in Quebec. The statutes of 1774 and 1801, which abolished the legitime of the legal heir, and introduced freedom of willing, greatly altered the concept of successions in this Province. Testamentary succession became, in a sense, the rule instead of the exception, since persons were free to leave their property to whomever they wished. Seizin was therefore extended to the legatee, as fully as it had been to the legal heir. As Baudouin says: " . . . le Code de Québec a considéré la succession, qu'elle soit ab intestat ou testamentaire, moins comme une continuation de la personne juridique du défunt, que comme une sorte de succession aux biens devolue dans le premier cas par la loi, dans le second en fonction de la volonté du testateur".[32]

The Crown, since 1915 the only irregular heir, is expressly denied the seizin, and must be judically put in possession, although, like all heirs, it is owner of the succession from the moment of its opening. Laurent says: "Quoique les successeurs irréguliers n'aient pas la saisine, ils ont la propriété des biens héréditaires de plein droit, dès l'instant de l'ouverture de l'hérédité. Ils sont donc propriétaires sans être posseseurs."[33] However once put in possession, the irregular heir is in the same position as the other successors who have been seized. Planiol says: "Quand l'envoi en possession a été prononcé, le successeur irrégulier se trouve dans la même situation que s'il était héritier légitime."[34] The position of the irregular heir serves to point out the exact nature of seizin, and the fact that it has no connection with ownership.

Seizin then is a legal fiction, given to all successors save the irregular heir, by virtue of which the successor is deemed, from the moment of the opening of the succession, to be in legal possession of all the property rights and actions which it comprises, without any act of material apprehension on his part, and even if he is completely unaware of his inheritance. The seized heir is, by reason of his seizin, capable of suing and being sued, and in short, enjoys the same possession as did his author.

The Testamentary Seizin

The legatee in Quebec is granted a seizin as full and plenary as the legal heir by article 891 of the Civil Code, which states: "Legatees, by whatever title, are, by the death of the testator, or by the event which gives effect to

[31]Toullier, *op. cit.*, no. 92; Planiol et Ripert, *op. cit.*, no. 2215; Bonnecasse, *op. cit.*, no. 603.

[32]Baudouin, *op. cit.*, p. 1160.

[33]Laurent, *op. cit.*, no. 237.

[34]Planiol et Ripert, *op. cit.*, no. 215.

the legacy, seized of the right to the thing bequeathed, in the condition in which it then is, together with all its necessary dependencies, and with the right to obtain payment, and to prosecute all claims resulting from the legacy, without being obliged to obtain legal delivery." The seizin of the legatee is unique to Quebec and flows from the new law introduced into the Province by the statutes of 1774 and 1801, and therefore to appreciate it, we must understand the law as it was prior to the cession, that is, the law of old France.

Prior to the Napoleonic codification, France was divided into the *pays coutumiers* and the *pays de droit écrit,* successors to the Roman law. In the customary provinces, the natural mode of succession was ab intestat, while in the written law provinces the testament took precedence as it had in Rome. As Maleville says: "Il faut savoir que dans les pays de droit écrit, la succession légitime n'avait lieu qu'à défaut de la succession testamentaire, et que l'héritier institué était seul, par son titre, investi de l'hérédité; que dans les pays coutumiers, c'était toujours l'hériter légitime qui était saisi de la succession, et l'héritier institué, qu'on n'appelait aussi que légataire universel, était obligé de lui demander la délivrance de l'objet de son legs.[35]

The customary provinces, which protected the blood heirs by law, were the source of the Quebec law before the cession, not the written law provinces where the Roman practice of instituting an heir by testament was followed. In the former the law provided for a legitime, composed of four-fifths of the propres, which were reserved for the blood heir, and could not be disposed of by testament. Pocquet the Livonniere says: "En pays coutumiers, institution d'héritier n'a lieu, c'est-à-dire, les successions y sont déférées par la Loi municipale, selon l'ordre du sang et de la parenté; il n'y est pas permis de se choisir un héritier, au préjudice de ceux qui sont appelés par la Coutume."[36] Seizin, therefore, was given only to the blood heir, and it comprised all the property of the succession. Thus where particular legacies were given, it was necessary for the legatee to go to the seized heir and demand delivery of his legacy. This does not mean that the legatee was not owner, but he was an owner without legal possession or the capacity to exercise the rights stemming from his ownership. Denisart says: "La nécessité de la demande en délivrance de legs, soit universels, soit particuliers, est fondée en pays coutumiers sur ce qu'en vertu de la maxime, le mort saisit le vif, les héritiers du sang sont saisis de tous les biens de la succession."[37] If a legatee attempted to put himself in possession the heir could bring an action to have his legacy declared null.[38] In short the law in this

[35]Maleville, *Discussion de Code Civil,* 3rd ed., vol. 2, p. 170.

[36]Pocquet de Livonnière, *op. cit.,* p. 195. The maxim *institution d'héritier n'a lieu,* may be found in Coutume de Paris, art. 299; Coutume d'Anjou, art. 271; Coutume de Maine, art. 237; and Coutume de Touraine, art. 258.

[37]Denisart, *Délivrance de Legs,* 161, no. 2.

[38]Prudhon, *Traité de L'Usufruit,* vol. 1, p. 481.

Province, prior to the Quebec Act of 1774 was, as Mignault explains it: "Même lorsque le défunt avait laissé un testament, la saisine appartenait encore à l'héritier. Le légataire bien qu'il devint propriétaire, sans aucun fait ni tradition, du jour du décès du testateur . . . n'acquérait pas la possession de la chose léguée; il devait en demander la délivrance à l'héritier . . . S'il se mettait de lui-même en possession de cette chose, il se rendait coupable d'une voie de fait à l'égard de l'héritier."[39]

These new concepts, freedom of willing, abolition of the legitime, and the change from an absolute seizin given only to the heir, to a co-existant and equally plenary testamentary seizin, were not immediately fully appreciated by the courts. Despite the statutes, they continued to accord the full seizin to the legal heir, requiring the legatee to obtain delivery from him. In an early case it was held: "Le mort saisit le vif. A common legacy therefore vests in the heir at law and he is not divested of the same until a délivrance de legs has been obtained."[40] A year later, in *Duclos* v. *Dupont,* it was held that the want of a délivrance de legs to a universal legatee is an exception in the mouth of the heir.[41] And in 1854, a court stated: "The doctrine is incontrovertible, that the legatee is not vested with the legacy prior to delivrance."[42]

However the jurisprudence gradually shook off the shackles of the old law, and in *Robert* v. *Dorion,* it was held that in the event of a universal legacy, a demand in delivrance is unnecessary. Mr. Justice Smith expressed the feeling of the Court, saying: "On the principle therefore that *cessat ratione cessat ipse lex,* a demand for delivrance should no longer be considered necessary for a universal legatee."[43] Finally, in *Blanchet* v. *Blanchet,* the Court of Appeal held, reversing the lower court, that since 41 Geo. III, C. 4, the délivrance de legs had ceased to be necessary. The court found that this field of law in Lower Canada had fallen within the scope of the written law, and thus the universal legatee was seized immediately in virtue of the will. Mr. Justice Badgley clearly pointed out that this seizin is the same legal fiction applied to the heir, and that the universal legatee, from the moment of the testator's death, was deemed to be possessor of the property of the succession.[44]

This was the interpretation of the new law when the Codifiers began their task, and they, appreciating the novel aspects, sought their authorities, not in the French authors, but in the Quebec jurisprudence. In their notes on what is now article 891 of the code, they state: "Le projet présente cette règle comme expression du droit existant suivant l'opinion alors récente de la

[39] Mignault, *op. cit.,* vol. 4, p. 337.

[40] *Campbell* v. *Sheperd,* [1819] Stuart's Reports, 138.

[41] *Duclos* v. *Dupont,* B.R.Q. [1820] no. 495, Stuart's Reports, p. 236.

[42] *Holland* v. *Thibaudeau,* [1854] Décisions du Bas-Canada, t. 4, p. 121.

[43] *Robert* v. *Dorion,* (1857) 3 L.C.J. 12.

[44] *Blanchet* v. *Blanchet,* (1861) (Q.B.) 11 L.C.R. 204.

Cour d'Appel dans l'affaire Blanchet."[45] They recognized that the legatee now stood on an equal footing, stating: "Les Commissaires, en présentant comme un point encore plus ou moins douteux, l'opinion qu'ils adoptent, savoir celle qui repousse la nécessité d'obtenir délivrance, ont cru qu'elle était plus en harmonie avec le principe nouveau qui régit la matière. Ils ont aussi tâché de rendre le sujet plus complet, en mettant l'héritier et le légataire sur ce même pied."[46]

The Codifiers clearly thought that they were merely stating the existing law. However it has been contended that they introduced new law by including the particular legatee in the article, whereas the jurisprudence from which they drew had dealt only with the universal legatee. Yet is was necessary to extend seizin to the particular legatee in view of the changes in the old law, for when a principle of law is altered, all those other aspects of it, whose existence depends upon the principle must also alter. It cannot be said, as each of these corrolaries is replaced, that the replacement is new law. The statutes of 1774 and 1801 introduced a new principle of law, and abrogated an old one. The principle of the old law lost its force, and to fill the vacuum left by its disappearance, along with the many other laws which found their being in it, a new body logically sprang into being as a result of the new principle. Therefore the extension of seizin to the particular legatee was a logical necessity, and the Codifiers merely articulated this fact, they did not thereby create new law.

Thus as our law now stands both types of legatee are seized, and the seizin of each is unique and complete. There exists no conflict between the two, for each operates within its own sphere, and as such, is exclusive, for they do not deal with the same property of the succession. Mr. Justice Mathieu pointed this out, saying: "Au décès du testateur, ses légataires particuliers sont saisis de plein droit, de leur legs, sans qu'il soit besoin d'en demander délivrance au légataire universel, qui n'a la saisine d'aucun des legs particuliers, mais au contraire, n'a que celle du legs universel, abstraction faite des legs particuliers."[47] The effects of the legatee's seizin are identical to those in the case of the heir, and he may therefore sue and be sued from the moment the succession opens, or from the event which gives effect to his legacy. In the latter case, where a legacy is made under a suspensive condition, the legatee is not seized until the condition is fulfilled. In the interval, the heir, or universal legatee, as the case may be, is seized under a resolutive condition. When the condition upon which the legacy depends is fulfilled, the heir is deemed never to have been seized, and the legatee to have been seized from the moment of the testator's death.

The legatee therefore, in Quebec, is a testamentary heir and like the legal heir is, by fiction of the law, immediately seized of the possession of his

[45] 5ième Rapport, p. 182.

[46] 5ième Rapport, p. 168.

[47] *Archambault* v. *Viger*, (1889) 18 R.L. 349.

legacy at the moment of the succession's opening, a radical departure from the old law, wherein our laws originally found their source. It is a unique position and demonstrates another example of the successful combination of principles drawn originally from conflicting sources which characterizes many aspects of the law of the Province of Quebec.

The Seizin of the Testamentary Executor

The executor, although not a successor is also granted by law, seizin of the moveable property of the succession by the terms of article 918 C.C. which states, in part: "Testamentary executors, for the purpose of the execution of the will, are seized as legal depositaries of the moveable property of the succession, and may claim possession of it even against the heir or legatee.

This seizin lasts for a year and a day reckoning from the death of the testator, or from the time when the executor was no longer prevented from taking possession."

The seizin of the testamentary executor originated in the law of the *pays de droit coutumier,* to protect legatees. Since seizin was given only to the heir, he was in a position to ignore the legacies granted by his predecessor. The practice therefore arose of appointing an executor to see to the fulfillment of the testator's wishes. Lamoignon states: "C'est une règle fondamentale en matière de succession que la mort saisit le vif. La propriété et la possession de tous les effets de l'hérédité passent donc, sans aucune intervalle de temps, sur la tête et dans les mains de l'héritier. Ainsi, il est souvent le maître de rendre les dispositions du testateur auquel il succède, illusoires . . . quand personne n'a qualité apparente pour l'en empêcher par l'apposition des scellés.

On a remédié, en partie, à cet inconvénient en France en établissant l'usage des exécuteurs testamentaires que les testateurs peuvent choisir, et qui sont saisis par cette seule qualité de la possession de tous les biens de l'hérédité, et du pouvoir de les administrer au désir du testament qui les a établis."[48]

The office is: " . . . un mandat, mais un mandat soumis à des règles toutes spéciales."[49] For example it begins with the death of the principal, while ordinary mandate ceases at such time. The executor is the agent of the *de cujus*, not of the heirs or legatees, and they cannot prevent him from fulfilling his charge. However he must, as must all agents, remain within the bounds of his mandate, whether they are imposed by law or determined by the will of the testator. His mandate is to execute the wishes imposed by the will and it is to do so that the seizin is given him, the same seizin as given the heir or legatee, for as Me. Aimé Geoffrion, pleading before the Court of

[48]Lamoignon, vol. 2, T. 49, p. 429.

[49]Colin et Capitant, *op. cit.*, vol. 3, p. 902.

Appeal said: "La saisine établie par l'article 918 C.C. est une fiction de la loi, et la saisine, dans son sens légal, c'est la possession d'une chose."[50]

The executor is therefore deemed to be possessor of the moveable property of the succession from the moment of the testator's death, to enable him successfully to carry out his mandate. In other civil jurisdictions such as France, Louisiana or Haiti, the codes provide for the seizin of the executor only when it has been expressly given him by the testator in the will; the seizin does not flow from the law alone. However in Quebec we may distinguish two types of seizin, the legal and the testamentary. The former comes from the law and cannot be revoked. The latter comes from the will of the testator, who, by article 921 C.C. may modify, restrict or extend, the powers, the obligations, and the seizin of the executor. As Baudouin says: "Alors que le droit français ne donne la saisine à l'exécuteur testamentaire que si le testateur lui-même y a pourvu, le droit québecois connait deux sortes de saisine: la saisine légale conférée à tout exécuteur du simple fait de sa nomination, et la saisine testamentaire par laquelle le testateur peut modifier la première, soit en augmentant, soit en diminuant les pouvoirs normaux et légaux de l'exécuteur."[51] These two seizins, while distinct in origin, do not, however, have a co-equality of position; a certain precedence must be given to the legal for it cannot be prevented by the testator who may only modify it. The legal seizin may exist without the testamentary, but the latter cannot stand alone.

The principal question is, what is the relation between the seizin of the executor, and that of the heir or legatee. At first glance there appears to be a contradiction for it seems impossible that two persons should be legal possessors of the same thing at the same time. However no incompatibility exists for the natures of the two possessions are different. The heir, or legatee, has possession as owner, while the executor possesses only as a depositary and administrator, with no real right in the property he holds.[52] The two operate concurrently, for the executor possesses for and in the name of the heir or legatee, who are the owners of the property he detains, by virtue of the will of the testator, for the purposes of the execution of his mandate. Toullier says: "Cette saisine n'empêche point celle de l'héritier . . . c'est toujours l'héritier qui est le véritable possesseur; lui seul est saisi comme propriétaire."[53] However, in one aspect, the executor's seizin takes precedence for he is empowered, in virtue of it, to claim possession of the moveable property even against the heir or legatee.[54]

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[50]*Marchessault* v. *Durand*, (M.L.R.) 5 Q.B. 364.

[51]Baudouin, *op. cit.*, p. 1167.

[52]Aubry et Rau, *Droit Civil Français*, vol. 7, no. 711; Troplong, *Du Dépôt*, no. 245, Ricard, *Don.* part. 2, no. 71; *Marchessault* v. *Durand*, *supra.*

[53]Toullier, *op. cit.*, no. 212.

[54]*Cook* v. *La Banque de Québec*, (1893) 2 Q.B. 172; *Normandeu* v. *McDonnel*, 30 L.C.J. 120.

His seizin extends only to the moveable property, unless explicitly extended by the will to include the immoveable also, and moveables comprise only those actually in existence at the testator's death, thus excluding the revenues accruing from the immoveables during the executor's term of office.[55] The law limits his seizin to a year and a day from the death of the testator or from the time he was no longer prevented from taking possession, but again this may be altered or extended by the testator. It has been decided that it begins from the moment of the testator's death, and the taking of inventory is not a prerequisite to the seizin. It is automatic and instantaneous, and the executor needs no authorization to take possession. As Pothier says: "Les effets de la saisine de l'exécuteur testamentaire sont que l'exécuteur peut se mettre lui-même en possession des biens de la succession."[56]

As a result of his seizin, the executor may sue the debtors of the estate, and be sued by its creditors. This raises the question as to whether a judgment against the executor constitutes *chose jugée* against the heirs or legatees. The better view is that it does not, for the executor does not represent the succession, he only administers it. Baudry says: "Pas plus comme demandeur que comme défendeur, l'exécuteur testamentaire ne peut représenter la succession en justice. Aucun texte n'en fait le représentant des héritiers. Or, du jour du décès du testateur, ses héritiers sont les seuls représentants de la succession . . . Si néanmoins, il s'agissait, le jugement qui serait rendu contre lui ne serait certainement point opposable aux héritiers."[57] And Baudouin says: "S'il y a contestation on admet qu'il n'y a pas d'autorité de chose jugée à la décision rendue entre le tiers et l'exécuteur testamentaire au regard de l'héritier."[58]

The executor is therefore an administrator, who is given the same seizin, the possession by fiction of law, as is given the heir or legatee, although, except when so stated, he is neither owner of, nor successor to the property he possesses. The seizin is given him to permit him to execute the mandate imposed upon him by the testator, and may be invoked even against the heir or legatee. It is but another example of the melding of two laws, for although its origin lies in old France, it has not the rigidity of its modern French counterpart, being modified by the notion of freedom of willing which came to this Province with the English.

The Legislature and the Law

The question of seizin was looked upon as a reasonably cut and dried aspect of our law until 1892, when the first of a series of succession duties acts was introduced. These taxing measures once again brought the notion

[55]Ricard, *op. cit.*, no. 77; Mignault, *op. cit.* p. 461; Roch, *Traité de Droit Civil Canadien*, vol. 5, p. 517.

[56]Pothier, *op. cit.*, no. 218; also Toullier, *op. cit.*, no. 585.

[57]Baudry-Lacantinerie et Colin, *op. cit.*, p. 336.

[58]Baudouin, *op. cit.*, p. 1167; also *Morency* v. *Mercier*, (1928) 31 P.R. 134.

of seizin to the attention of the lawyers of this Province, posing the problem as to whether or not certain provisions of these acts have partially nullified or suspended the maxim, *le mort saisit le vif*. The question has been before our courts many times in the intervening 65 years, and to many observers it remains unsolved, or only partially answered.

The original statute, 55-56 Vict. c. 17, put into force June 24, 1892 became articles 1191b to 1191i of the Revised Statutes of 1888. The provision which has proved so contentious was article 1191d which read: "Nul transport des biens d'une succession n'est valide et ne constitue un titre, si les droits payables en vertu de cette loi n'ont pas été payés, et aucun exécuteur, fidéicommissaire, administrateur, curateur, héritier ou légataire ne peut consentir à un transport, ni au paiement des legs à moins que ces droits n'aient été payés ou à moins qu'un certificat n'ait été délivré par le percepteur du revenu de la province à l'effet qu'aucun droit n'est exigible."

The text was altered gradually and finally appeared as article 14, paragraph 7 R.S.Q. 1925, C. 29 reading in part: "Sujet aux dispositions de l'article 13, nul transport des biens d'une succession n'est valide et ne constitue un titre, si les droits payables en vertu de la présente section n'ont pas été payés; et, aucun exécuteur, fidéicommissaire, administrateur, curateur, fidéicommissaire, administrateur, curateur, héritier, légataire ou donataire, comme susdit, ne peut consentir à un transport, ni au paiement des legs, et aucune personne ou corporation ou aucun agent de transferts pour une corporation ne peut accepter ou enregistrer un transfert d'actions dans ses livres, et aucun assureur ne peut payer valablement les sommes dues à raison d'un décs, à moins que les droits exigibles n'aient été complètement payés et à moins qu'un certificat attestant que ces droits ont été payés ou qu'il n'y en a pas d'exigibles n'ait été délivré par le percepteur du revenu . . ."

In 1930, by Geo. V c. 28, a significant alteration appeared, and the section was amended to read, in part, as follows: "Subordonnément aux dispositions de l'article 13, nulle transmission de biens appartenant, lors de son décès, à une personne décédée, ne peut se faire, et un transport de ces biens n'est valide ou ne constitue un titre à ou pour ces biens, tant que le droits exigibles en vertu de la présente section n'ont pas été complètement payés et qu'un certificat, contenant une description des biens et attestant que ces droits ont été payés, ou qu'il n'y en a pas d'exigibles, n'a pas été délivré par le percepteur du revenu . . ." This is the version we now find as section 44 of the present act. The prohibitions to executors and other administrators or holders has now become section 45 and is too lengthy to recite herein. Suffice it to say that it prohibits executors, trustees, curators, heirs, legatees, donees, corporations, transfer agents, depositaries, banks and insurers to pay out sums in their hands until the succession duties have been paid.

These two sections appear under the heading *Mesures de Contrôle*, and by their terms impose severe restrictions upon the rights of the heirs or legatees

for the purpose of safeguarding the payment of the duties. Seizin we have defined as that legal possession which permits the heir or legatee full and free exercise of the rights inherent in the succession. Have these provisions abolished the legal seizin, and placed the heirs and legatees in a position analagous to the irregular heir requiring them to be put in possession in virtue of a certificate issued by a government official? Have the provisions of articles 607 and 891 been made meaningless? In short, is the heir or legatee still seized, or has this act made the payment of the duties a prerequisite of their seizin. We are faced with a valid statutory provision on one hand, and on the other, an established maxim of civil law. Are these two then irreconcilable, and if not, how is the reconciliation to be effected?

The Law and the Courts

Few questions have received as many and varying interpretations by our courts. An attempt will now be made to trace the interpretation of this section through the jurisprudence marking off three broad periods: First the decisions up to the amendment of 1930, then from that date to 1944 and 1945 in which years the cases of *Jean* v. *Gagnon*[59] and *Sokoloff* v. *Iron Fireman*[60] were decided, and finally from those decisions to the present date. In this pursuit three main questions must be kept in mind. Does section 44 prevent the immediate devolution of the ownership of the property of the succession; second, does it suspend the seizin; and third, does it, in fact, interfere with neither of these processes.

The section, as it stood prior to 1930 in no way interfered with the immediate devolution of property to the heirs or legatees. In *Thievierge* v. *Cinqmars,* it was held: "La loi qui dit que nul transport des biens d'une succession n'est valide et ne constitue un titre si les droits voulus n'ont pas été payés ne comprend pas la simple transmission ou dévolution des biens du défunt à ses héritiers ou légataires . . . ."[61] And Sirois says: "Cette disposition s'applique-t-elle aussi à la simple transmission des biens par le décès? On l'a prétendu, mais à tort."[62] And in 1928, it was held: "La nullité du transport de biens d'une succession dont les droits n'ont pas été acquittés, ne s'applique qu'à une aliénation par l'héritier; elle n'affecte aucunement la transmission du patrimoine du *de cujus.*"[63]

The prevailing interpretation of this section was that it only applied to subsequent transfers of the property, and did not affect the transmission, by death, of either the property or the seizin thereof. It did not prohibit an heir or legatee from taking possession himself, it only prevented certain persons

[59] *Jean* v. *Gagnon,* [1944] S.C.R. 175.

[60] *Sokoloff* v. *The Iron Firemans Co.,* [1945] K.B. 201.

[61] *Thievierge* v. *Cinqmars,* (1897) 13 S.C. 398.

[62] Sirois, *Des Droits Sur les Successions,* 4 R.L. n.s. p. 553.

[63] *Viau* v. *Viau,* (1928) 48 K.B. 177.

already in possession from transfering that possession to another. This is evidenced by the use of the word *transport,* which means a giving over. Therefore the section, prior to 1930 did not affect the seizin of the heir or legatee who still was instantaneously invested with the legal possession of his bequest, it only meant that he was "frozen" in his possession, as a guarantee of payment, until the duties exigible were acquitted. However in 1930, an attempt was made to extend the section to cover even the transmission by death, by amending the section, as set out above, and inserting for the first time, the word *transmission.*

The amendment law came before the Court of Appeal in 1935, in the case of *Cardinal* v. *Langevin.*[64] This case dealt with a petition in continuance by the universal legatee. The petition was dismissed, the Court holding that in view of the amendment, the property was not effectively transmitted until the duties were paid, and until such time, the legatee did not have the necessary quality to continue the action. Mr. Justice Hall said: "It is obvious that this amendment was made with the definite purpose of meeting Cannon's objection, and giving effect to Fitzpatrick's obiter, that the payment of the duties should be a condition precedent to the devolution of the property of the estate. It may be doubted whether it was the intention, or that it was within the competence of the legislature to repeal the common law that heirs, when they inherit, are seized by law alone of the property, rights and action of the deceased . . . . Transmission can have no other meaning than the devolution of the property and rights." Although the learned judge seems to confuse ownership and seizin, it appears clear, that in his view, the property did not pass to the heirs or legatees until the duties were paid.

In the case of *Desrochers* v. *Desrochers,*[65] the Court of Appeal allowed a petition in continuance, holding that such a petition was merely a request for judicial recognition of status, and as such was not prohibited by section 44. However the interpretation that the section prevented the immediate devolution of ownership prevailed, Mr. Justice Bond saying: "All the act says is, that no transmission of any property, or transfer thereof shall be valid. It does not purport to deprive the heirs, legal or testamentary, of their status or quality as such. There is a suspensive condition as respects the vesting of ownership or rights of ownership in the heir or any other beneficiary." The Quebec courts continued to so hold in subsequent cases, among which are *Findlay* v. *Lusk,*[66] *Lauterman* v. *Eisenberg*[67] and *Plamondon* v. *Plamondon.*[68]

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[64]*Cardinal* v. *Langevin,* (1935) 59 K.B. 351.

[65]*Desrochers* v. *Desrochers,* (1937) 63 K.B. 352.

[66]*Findlay* v. *Lusk,* (1941) 79 S.C. 350.

[67]*Lauterman* v. *Eisenberg,* (1941) 79 S.C. 109.

[68]*Plamondon* v. *Plamondon,* [1942] S.C. 237.

All these decisions stated that the law suspended the devolution of ownership, and seizin, when mentioned at all, was treated in only a cursory fashion, and confused with ownership.

Then, in 1944, the Supreme Court was called upon to decide the question.[69] Here, at last, the proper distinction between the transfer of ownership, and seizin was made. Having so differentiated, the court went on to say that the prohibition of section 44 did not conflict with the recognized principle of the civil law, that the heir inherits *operatione legis,* the estate of the deceased. The transmission of the property, from the moment of death, is not subordinated to the payment of the succession duties. This decision was followed by the Court of Appeal in 1945.[70] Mr. Justice St. Germain said: " . . . il semble impossible d'admettre que ce texte de la loi ait ainsi révolutionné les dispositions du code civil, et que l'on ait voulu que tant que les droits successoraux ne sont pas payés, la propriété des biens demeure suspendue."

This is the correct view. If we are to interpret this section to mean that the right of ownership itself is suspended until the duties are paid, then every succession is automatically vacant, for who would own the property in the interim? Certainly not the Crown, for then the heir would be using Crown money in many cases, to pay the duties, and furthermore, such an intrusion into the domain of private ownership would smack of a collective spirit undreamt of by even the most radical socialist. To conceive of the succession owning itself during the interval would be a return to the Roman *hereditas iacens,* a concept alien to our law. And finally, one of the oldest maxims of the civil law is that a succession cannot remain in suspense, so we must therefore conclude that the legislature did not intend to introduce any of these alternatives. It must be remembered that section 44 is but one provision of a fiscal statute; and to hold that it could, as such, amend the civil law, is to give it a force beyond all bounds of normal legal interpretation. The terms of articles 583 C.C. and 596 C.C. have lost none of their effect, and from the moment of decease, the successor is owner of that property to which he succeeds, even though the entire estate be gift wrapped in Succession Duties Acts.

Le Mort ne Saisit-Il Plus le Vif?

In *Jean* v. *Gagnon,* the Supreme Court interpreted the word *transmission* to mean the seizin of the heir. Does this therefore mean that section 44 suspends the immediate legal possession of the heir? In other words has the heir or legatee no capacity to act as such until the duties are paid, and a certificate from the collector produced. This question must be discussed in reference to specific cases, which are divided into two main groups, those prior to the amendment of 1930, and those since that date.

[69] *Jean* v. *Gagnon,* [1944] S.C.R. 175.
[70] *Sokoloff* v. *Iron Fireman Company,* [1945] K.B. 201.

The prevailing view taken by the Courts, during the former period, was that the heir or legatee was only prevented from alienating or transferring the property he had inherited. In 1897, the Superior Court allowed an heir to sue upon a note, prior to the payment of duties.[71] Two years later, it was held that a petition from an order awarding certain shares held by a deceased person in trust, should be allowed, on the ground that the non-payment of the duties did not prevent the heir or executors from taking possession of the estate.[72] The Appeal Court, in 1921, allowed recognition of a right of servitude prior to payment of the succession duties.[73] In *Lafrance* v. *Thiffeault,* it was held that the universal legatee was entitled to take up the instance whether the succession duties had been paid or not. It was further held that the seizin was in no way suspended or interfered with.[74] Again, the Superior Court held that the omission to pay the duties and produce the certificate, did not deprive an heir of the recourse provided him by law, to recover debts due to the succession.[75] Finally, in 1930, it was decided that the failure to pay the duties did not prevent an heir from seeking the recovery of a debt due to the succession, by continuing a suit instituted by the deceased.[76] It is clear from these decisions that the Courts believed the heirs or legatees to still be seized, but once seized they were frozen in their possession until the duties were paid. In other words the civil law immediately put them in possession, while the fiscal law prohibited them from relinquishing it, once received.

With the addition of the word *transmission* in 1930, a stricter interpretation was given this section. The word *transmission* was interpreted by many to mean seizin, and thus our courts, in numerous cases, denied the heir or legatee any capacity to act until the duties were paid. Mr. Justice Surveyer held that a universal legatee cannot perform any acts resulting from his status and attempt to recover debts due the succession prior to paying the duties.[77] That same year, the Appeal Court decided that particular legatees could not demand that the beneficiary heir be declared insolvent, until the duties were paid.[78] In *Cloutier* v. *Cloutier* it was held, that since the section in question prohibits any transmission of property to the heirs, an action in partition cannot be instituted until the duties are paid.[79] In another case Mr. Justice Forest held, that a petition in continuance of suit cannot be instituted

[71]*Thivierge* v. *Cingmars, (supra).*

[72]*In Re Denoon and The Taylor Hydraulic Air Co.,* (1899) 15 S.C. 567.

[73]*Roberval* v. *Simard,* (1921) 31 K.B. 328.

[74]*Lafrance* v. *Thiffeault,* (1924) 37 K.B. 278.

[75]*Lemay* v. *Boissoneault,* (1925) 63 S.C. 266.

[76]*Leduc* v. *C.N.R.,* (1930) 33 P.R. 383.

[77]*Meunier* v. *L'Heureux,* (1935) 74 S.C. 360; also *Turner* v. *Leavit,* (1935) 73 S.C. 521; *Taillon* v. *Brouillard,* [1943] S.C. 140; *Brosseau* v. *Cornfield,* (1940) 43 P.R. 417; *Bernier* v. *Blais* (1941) 45 P.R. 45; *Labrie* v. *Thievierge,* (1941) 45 P.R. 393; *Lavoie* v. *Bouchard,* [1947] S.C. 493.

[78]*Héritiers de Dame Chateau* v. *Richot,* (1935) 59 K.B. 1.

[79]*Cloutier* v. *Cloutier,* (1938) 76 S.C. 59.

until the duties are paid.[80] Yet again it was held: "Un héritier ne peut se pourvoir devant les cours de justice de cette province, pour réclamer une part d'une succession ou d'un héritage sans établir au préalable que les droits successoraux ont été acquittés."[81] And in 1954 an action by an executor claiming money due the estate was dismissed on inscription in law due to the fact that the duties were not paid.[82]

However this interpretation was not unanimous, and certain judges felt that it imposed an undue hardship on successors. Consequently many decisions were tempered by considerations of equity, as the courts introduced subtle distinctions to escape the apparent rigidity of section 44. In *Desrochers* v. *Desrochers,* an heir presented a petition in continuance of suit. The Court of Appeal allowed it, before payment of the duties, since nothing in the Act precluded an heir from judicially establishing his title as such, and since it involved no transfer to or by him.[83] This distinction was preserved in *Paradis* v. *Brunet,* where it was held: "L'action en rediition de compte et partage peut être intentée par un héritier sans le payement préalable des droits de succession. Il ne s'agit là que d'une demande judiciaire pour faire établir la qualité d'héritière de la demanderesse."[84]

To further lighten the restrictions of the act, another distinction was drawn, between the right to demand payment, and the payment itself. In an Appeal Court decision it was held: "Le bénéficiaire d'une assurance n'est pas empêché de réclamer en justice l'indemnité convenue dans la police, par le motif qu'il n'aurait pas acquitté les taxes de succession; il ne peut, néanmoins, obliger la compagnie à verser la somme due avant de se conformer aux dispositions de la loi à cet égard."[85] And in 1952 it was held: "Aux termes de la loi des droits sur les successions, ce n'est pas l'action, mais le payement qui est prohibé, avant que ces droits ne soient acquittés. Un héritier peut donc poursuivre et être poursuivi sans qu'il soit allégué ni prouvé, que les droits successoraux ont été payés."[86] Consequently a successor could institute action and obtain judgment, prior to the payment of the duties. In this series of judgments may be seen a return to the pre-amendment interpretation, which denied that seizin was suspended, holding that the section prohibited only subsequent transfers of the property, not actions.[87]

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[80]*Casavant* v. *Dr. X.,* (1939) 77 S.C. 447.

[81]*Connolly* v. *Estate Michael Connolly,* (1938) 40 P.R. 36.

[82]*Guarantee Trust* v. *Barnabé,* [1954] S.C. 411.

[83]*Desrochers* v. *Desrochers, supra;* also *Sokoloff* v. *Iron Fireman Co., supra; Repington* v. *Vaillancourt,* [1946] K.B. 482.

[84]*Paradis* v. *Brunet,* [1947] S.C. 156; *De Lottinville* v. *Whiteford,* (1941) 79 S.C. 212.

[85]*London Life Insurance Co.* v. *Sequin,* (1933) 55 K.B. 332; also *Butler* v. *Archambault,* (1944) 11 I.L.R. 140.

[86]*Gregoire* v. *Gaudreault,* [1952], S.C. 156.

[87]*Kack* v. *Savard,* (1937) 41 P.R. 238; *Desruisseaux* v. *Lafleur,* (1937) 41 P.R. 371; *Capital Trust* v. *Connolly,* (1940) 79 S.C. 39; *Lazure* v. *Eden,* [1952] P.R. 147.

In the jurisprudential history, two cases stand out, the first of these being *Jean* v. *Gagnon*. In this case, the Supreme Court, clearly distinguishing between seizin, and the transfer of ownership, held that section 44 of the Act suspended the legal seizin, making the payment of the duties a statutory suspensive condition, failing which the heir has no capacity to act. However, in deciding that a sale entered into before the duties were paid by the seller was valid, upon subsequent production of a certificate, they gave to the payment of the duties a retroactive effect. Consequently the nullity imposed upon such a transfer is only relative. The Court compared the position of the heir, who has not complied with the law, to that of the irregular heir, stating that the act merely creates specific incapacities to deal with the property effectively. In this last statement is hidden the germ of the correct interpretation of the section.

This judgment was carried a step further in the case of *Sokoloff* v. *The Iron Fireman Company*. The Court of Appeal held that a widow could continue an action for damages instituted by her deceased husband, without alleging or proving that duties had been paid. Mr. Justice St. Germain, however, took the case beyond the particular circumstances. Citing the reasoning used by the Supreme Court in *Jean* v. *Gagnon* to decide that the section did not suspend the transmission of ownership, he states that the same reasoning must apply to the transmission of seizin, which in his view, is a question of public order, and cannot remain in suspense. He says: "Il est bien évident, que le mot *transmission,* que nous rencontrons dans les articles de cette section II intitulée *Mesures de Contrôle,* se rapporte à tout acte de transmission, subséquent à la transmission par décès aussi bien de la saisine légale, que de la propriété. Il s'agit, dans cette section, de transmission et transport que le législateur défend à l'héritier de faire aux fins de protéger les droits du fisc, et nullement de la transmission par décès et de la propriété et de la saisine légale."

I do not doubt that the learned judge is perfectly correct in stating that section 44 of the Act does not subject the seizin of the heir or legatee to the prerequisite condition of payment of the duties. However although his discussion is the most astute to be found in the jurisprudence, it is humbly submitted that it needs to be carried slightly further to its logical conclusion. As the question stands now, after its evolution through the Courts, the provisions of section 44 and 45 suspend neither the transmission of ownership nor the transmission of seizin, per se, but do prevent subsequent transfers. However this does not fully clarify the real relationship between the meaning of section 44 and the concept of seizin.

This statute is not an act regulating the devolution of successions, or altering the civil law. It is a fiscal measure taxing the property of a succession, or the transmission of that property. The Legislature having decreed that such a tax shall be levied, is naturally desirous that it shall be paid, and this

has provided measures to ensure that payment, and thus we have sections 44 and 45. However it must be remembered that these provisions are designed solely to protect the interests of the treasury and must be interpreted as such. They were never intended to be used by private citizens as a method of avoiding contracts, or as a defence against a valid claim by a creditor. We have a law of successions that was old when modern successions duties were still unthought of. One of the principles of this law is that the legal possession of the property of a deceased person is deemed to pass to his successors from the moment of his death. To maintain that the legislature intended to impede or repudiate this process requires a substantially more explicit provision than the mere insertion of a word *transmission* in one regulatory section of a taxing statute.

Consequently the provisions of sections 44 and 45 hinder neither the transmission of the ownership of the succession, nor the legal possession. We must remember that this tax is but a consequence of the rights conferred upon a successor by the law, and to deny him these rights, is to destroy the basis of the tax. The legislature merely wished to put every obstacle possible in the way of an evasion of this tax to protect their security, and thus they forbade the successor to alienate or otherwise dispose of his property in such a way as to diminish their chances of collecting the tax. However this is not to say that the heir is intrinsically incapable of exercising his rights. Although it may be true that many citizens spend a good deal of time and effort devising methods whereby they can evade tax payments, it is not the position of the legislature to statutorily endow all citizens with such nefarious motives. Their taxing laws must assume that the duties will be paid, and provisions such as sections 44 and 45 become operative only when a successor fails to fulfill his obligations to the state. Sanctions are post-operative, and to interpret this law to mean that all successors are automatically deprived of certain of their rights, before they even have the opportunity to disobey the law, is a reversal of our system of justice.

The government is the creditor of every heir or legatee and by this Act has done no more than constitute itself a privileged creditor of prime rank. The purpose of section 44 being to protect the treasury's rights, it is perfectly entitled to protect them in as unassailable a manner as it wishes. Our code presents several instances in which a creditor is protected against fraudulent alienations or payments made by his debtor, as in articles 1031, 1032 and 1033 C.C. The government has chosen perhaps the most effective protection possible, by freezing the assets of a succession in its owners hands.

But this must not be interpreted to mean that the successor is not seized, for he still has full capacity to exercise his rights and actions, and such exercise is perfectly valid; it is the effect of the exercise which is limited by the act. A clear distinction exists between not possessing a right and possessing a right but being prohibited from effectively exercising it. Seizin has been

defined as that legal possession by virtue of which the heir gains the capacity to exercise the actions and rights inherent in it. The Act in no way deprives the successor of this capacity, it merely gives the actions themselves no effect until the payment of the duties.

We must therefore conclude that the notion of seizin, that fictitious legal possession by which the successor instantaneously acquires the status necessary to exercise the rights and actions of the succession, is left unsullied in all its implications. He who is seized can act; and conversely, he who can act is seized; that is the criterion. It is therefore submitted that the provisions of the Act do not interfere with the seizin, not do they suspend it for, as Mr. Justice Jean said, "Dans ce cas, la loi contient-elle des dispositions qui défendent à l'héritier d'actionner ou d'être actionné avant d'avoir payé les droits successoraux ou obtenu un certificat qu'il n'y a aucun droit exigible? Je ne le crois pas."[88]

[88]*Roy* v. *Coupal*, [1950] S.C. 156.