

ADMINISTRATION OF THE ESTATE OF AGRIPINO NERI Y CHAVEZ. ELEUTERIO NERI ET AL., PETITIONERS, VS. IGNACIA AKUTIN AND HER CHILDREN, RESPONDENTS

G.R. No. 47799, May 21, 1943

Ponente: MORAN, J.

Read online (full-text search, related cases, audio case brief): <https://batas.org/library/g-r-no-47799/>

MORAN, J.:

This is where the testator in his will left all his property by universal to the children by his second marriage, the herein respondents, with preterition of the children by his first marriage, the herein petitioners. This Court annulled the institution of heirs and declared a total intestacy.

A motion for reconsideration has been filed by the respondents on the ground (1) that there is no preterition as to the children of the first marriage who have received their shares in the property left by the testator, and (2) that, even assuming that there has been a preterition, the effect would not be the annulment of the institution of heirs but simply the reduction of the bequest made to them.

1. The findings of the trial court and those of the Court of Appeals are contrary to respondents' first contention. The children of the first marriage are Eleuterio, Agripino, Agapita, Getulia (who died a little less than eight years before the death of her father Agripino Neri, leaving seven children), Rosario and Celerina.

As to Eleuterio, the trial court said that "it is not, therefore, clear that Eleuterio has received his share out of the properties left by his father." It is true that Eleuterio appears to have received, as a donation from his father, parcel of land No. 4, but the question of whether there has been a donation or not is apparently left for decision in an independent action, and to that effect Ignacia Akutin has been appointed special administratrix for the purpose of instituting such action.

With respect to Agripino and Agapita the parcels of land which they have occupied, according to the trial Court, "are a part of public land which had been occupied by Agripino Neri Chaves, and, therefore, were not a part of the estate of the latter.

Concerning Getulia who died about eight years before the death of her father Agripino Neri, the trial Court found that "neither Getulia nor her heirs received any share of the properties.

And with respect to Rosario and Celerina, the trial Court said that "it does not appear clear, therefore that Celerina and Rosario received their shares in the estate left by their father Agripino Neri Chaves."

This is in connection with the property, real or personal, left by the deceased. As to money advances, the trial Court found:

"It is contended, furthermore, that the children of Agripino Neri Chaves in his first marriage received money from their father. It appears that Nemesio Chaves is indebted in the amount of P1,000; Agripino, in the amount P500 as appears in Exhibits 14 and 15. Getulia, in the amount of P155 as appears in Exhibits 16, 17, and 18;

Celerina in the amount of P120 as appears in Exhibits 19, 19-A and 19-B"

From these findings of the trial Court it is clear that Agapita, Rosario and the children of Getulia had received from the, children of Getulia had received from the testator no property whatsoever, personal, real or in cash.

But clause 8 of the will is invoked wherein the testator made the statement that the children by his first marriage had already received their shares in his property excluding what he had given them as aid during their financial troubles and the money they had borrowed from him which he condoned in the will. Since, however, this is an issue of fact tried by the Court of First Instance, and we are reviewing the decision of the Court of Appeals upon a question of law regarding that issue, we can rely only upon the findings of fact made by the latter Court, which are as follows:

"Since all the parcels that corresponded to Agripino Neri y Chaves are now in the administrator's possession, as appears in the inventory filed in court, it is clear that the property of the deceased has remained intact and that no portion thereof has been given to the children of the first marriage.

"* * * * *

"It is stated by the court and practically admitted by the appellants that a child of the first marriage named Getulia, or her heirs after her death, did not receive any share of the property of her father."

It is true that in the decision of the Court of Appeals there is also the following paragraph:

"As regards that large parcel of land adjoining parcel No. 1, it is contended that after the court had denied the registration thereof, Agripino Neri y Chaves abandoned the said land and that later on some of the children of the first marriage possessed it, thereby acquiring title and interest therein by virtue of occupation. It is not true that this parcel containing 182.6373 hectares is now assessed in the names of some of the children of the first marriage, for as shown on Tax Declaration No. 9395, Exhibit 11-g, the owners of the property are Agapita Neri de Chaves, y Hermanos. Apparently, the said land is still claimed to be the property not only of the children of the first marriage but also of those of the second marriage."

This paragraph is but a corroboration of the finding made by the Court of Appeals that no property has ever been advanced by the testator to the children by his first marriage. The large parcel of land adjoining parcel No. 1 was alleged by the children of the second marriage to have been advanced by the testator to the children by his first marriage; but the Court of Appeals belied this claim. "It is not true," says that Court, "that this parcel containing 182.6373 hectares is now assessed in the names of some of the children of the first marriage, for as shown on Tax Declaration No. 9395, Exhibit 11-g, the owners of the property are Agapita Neri de Chaves y Hermanos, that is, the children of both marriages. And the Court of Appeals added that "apparently, the said land is still claimed to be the property not only of the children of the first marriage but also of those of the second marriage, which is another way of stating that the property could not have been advanced by the testator to the children by the first marriage for otherwise the children by the second marriage would not lay a claim on it.

We conclude, therefore, that according to the findings of fact made by the Court of Appeals, the testator left all his property by universal title to the children by his second marriage, and that without expressly disinheriting the children by his first marriage, he left nothing to them or, at least, some of them. This is, accordingly, a case of preterition governed by article 814 of the Civil Code, which provides that the institution of heirs shall be annulled and intestate succession should be declared open.

2. Upon the second question propounded in the motion for reconsideration, respondents seem to agree that article 814 of the Civil Code is the law applicable but, in their discussion as to the effect of preterition, they confuse article 814 with articles 817 and 851 and other articles of the Civil Code. These three articles read:

"ART. 814. The preterition of one or of all the forced heirs in the direct line, whether living at the execution of the will or born after death of the testator, shall annul the institution of heirs; but the legacies and betterments shall be valid in so far as they are not inofficious.

"The preterition of the widower or widow does not annul the institution; but the person omitted shall retain all the rights granted to him by articles 834, 835, 836, and 837 of this Code.

"If the forced heirs omitted die before the testator, the institution shall become operative."

"ART. 817. Testamentary dispositions which diminish the legitime of the forced heirs shall be reduced on petition of the same in so far as they are inofficious or excessive."

"ART. 851. Disinheritance made without a statement of the cause, or for a cause the truth of which, if contested, is not shown, or which is not one of those stated in the four following articles, shall annul the institution of heirs in so far as it is prejudicial to the disinherited person; but the legacies, betterment, and other testamentary dispositions shall be valid in so far as they are not prejudicial to said legitime."

The following example will make the question clearer: The testator has two legitimate sons, A and B, and in his will he leaves all his property to A with total preterition of B. Upon these facts, shall we annul entirely the institution of heir in favor of A and declare a total intestacy, or shall we merely refuse the bequest left to A, giving him two-thirds, that is, one third of free disposal and one-third of betterments, plus one-half of the other third as strict legitime, and awarding B only the remaining one-half of the strict legitime? If we do the first, we apply article 814; if the second, we apply articles 851 or 817. But article 851 applies only in cases of unfounded disinheritance, and all are agreed that the present case is not one of disinheritance but of preterition. Article 817 is merely a general rule inapplicable to specific cases provided by law, such as that of preterition or disinheritance. The meaning of articles 814 and 851, their difference and philosophy, and their relation to article 817, are lucidly explained by Manresa in the following manner:

"Cuando la legitima no es usufructuaria, como ocurre en los demás casos, la preterición no puede menos de alterar esencialmente la institución de heredero. Esta ha de anularse, pero en todo o en parte, esto es, solo en cuanto perjudique el derecho del legitimario preterido? El artículo 814 opta por la primera solución, ya que hemos de atenernos estrictamente al texto de la ley; mientras que el artículo 851, en casos análogos, opta por la segunda.

"En efecto; la desheredación sin justa causa no produce el efecto de desheredar. El heredero conserva derecho a su legítima, pero nada más que a su legítima. Los legados, las mejoras, si las hay, y aun la institución de heredero, son válidas en cuanto no perjudiquen al heredero forzoso.

"La diferencia se notará perfectamente con un ejemplo. Un soltero, sin descendientes ni ascendientes legítimos, hace testamento instituyendo por heredero a un pariente lejano. Después reconoce un hijo natural, o se casa y tiene descendencia, y muere sin modificar su disposición testamentaria. A su muerte, el hijo natural, o los legítimos, fundándose en la nulidad total de la institución, con arreglo al artículo 814, piden toda la herencia. En caso del artículo 851 solo podrían pedir su legítima. Preteridos, adquieren derecho a todo; desheredados, solo les corresponde un tercio o dos tercios, según el caso.

"En el fondo la cuestión es idéntica. El testador puede siempre disponer a su arbitrio de la parte libre. El legitimario, contra la voluntad expresa del testador, solo tiene derecho a su legítima. Preterido o desheredado sin justa causa la legítima es suya. Desheredado o preterido, la porción libre no le corresponde, cuando el testador la asigna a otro. Lógicamente no cabe que el legitimario, en caso de preterición, reciba todos los bienes cuando el testador haya dispuesto de ellos a título de herencia, y no cuando haya dispuesto del tercio libre a título de legado.

"Cuál es la razón de esta diferencia? En la generalidad de los casos puede fundarse el precepto en la presunta

voluntad del testador Este, al desherectar, revela que existe alguna razon o motivo que le impulsa a obrar asi; podra no ser bastante para privar al here dero de su legitima, pero siempre ha de estimarse sufitiente para privarle del resto de la herencia, pues sobre esta no puede pretender ningun derecho el desheredado. El heredero pretendo no ha sido privado expresamente de nada; el testador, en los casos normales, obra si por descuido o por error. Hemos visto un testamento en el que no se instituia heredera a una hija monja, por creer la testadora que no podia heredar. En otros casos se ignora la existance de un descendiente o de un ascendiente. Cuando el preterido es una persona que ha nacido despues de muerto el testador o despues de hecho el testamento, la razon es aun mis clara; la omision ha de presumirse involuntaria; el testador debe suponerse que hubiera instituido heredero a esa persona si hubiera existido al otorgarse el testamento, y no solo en cuanto a la legitima, sino en toda la nerencia, caso de no haber otros herederos forzosos, y en iguales terminos que los demas herederos no mejorados de un modo expreso.

"La opinion contraria puede tambien defenderse suponiendo que la ley ariula el titulo de heredero, mas no en absolute la participacion en el caudal; que aso como al exceptuar la mejora se refiere a la parte libre de que haya dispuesto el mismo testador, considerando como un simple legatano de esa porcion a la Persona a quien el testador designo como herederos Abonaria esta Solucion el articulo 817, al declarar que las disposiciones testamentarias que menguan la legitima de los herederos forzosos han de reducirse en cuanto fueren inoficiosas, pues amparado en este articulo el heredero voluntano, puede pretender que la disposicion a su favor sea respetada cuanto no perjudxque a las legitimas.

"La junsprudencia no ha resuelto de frente este cuestion, porque no se le ha presentado en lo? terminoa propuestos; pero ha demostrado su cnteno.

"Hemos citado las Resoluciones de la Direccion de 30 de octubre de 1896 y de 20 de mayo de 1898. En la primera se decide con valentia, con arreglo al texto expreso del articulo 814; la institution de heredero se anula en absoluto, y se abre para toda la herencia la sucesion intestada. En la segunda se rehuye la cuestion, fundandose en circunstancias secundanas. En el articulo siguiente examinaremos la sentencia de 16 de enero de 1895.

"La interpretacion que rectamente se desprende del art. 814, es la de que solo valen, y eso en cuanto no sean inoficiosas, las disposiciones kechas a titulo de legado o mejora. En cuanto a la institucidn de heredero, se anula. Lo que se anula deja de existir, en todo, o en parte? No se añade iimitacion alguna, como en el articulo 851, en el que se expresa que se anulara la institution de heredero en cuanto perjudique a la legitima del desheredado. Debe, pues. entenderse que la antilacwSn es completa o total, y que este arttculo, como especial en el caso que le motiva, rige con preferencia at 817." (6 Manresa, 3.[a] ed., pags. 351-353.)(Italics supplied).

The following opinion of Sanchez Roman is to the same effect and dispels all possible doubt on the matter:

"La consecuencia de la anulacion o nulidad de la institution de heredero por pretericion de uno, varies o todos los forzosos en linea recta, es la apertura de la sucesion intestada, total o parcial. Sera total, cuando el testador que comete la pretericion, hubiere dispuesto de todos los bienes por titulo universal de herencia en favor de los herederos instituidos, cuya institucion se anula, porque asi lo exige la generalidad del precepto legal del articulo 814, al determinar, como efecto de la pretericion, el de que 'anulara la institucion de heredero'. Ciertamente es que la pretericion esta introducida, como remedio juridico, por sus efectos, en nombre y para garantia de la integridad de la legitima de los herederos forzosos y como consecuencia del precepto del 813, de que 'el testador no podra privar a los herederos de su legitima, sino en los casos expresamente determinados por la ley', que son los de desheredacion con justa causa.

"Ciertamente es, tambien, que en la desheredacion es muy otro el criterio delCodigo y que su formula legal, en cuanto a sus efectos, es de alcance mas limitado, puesto que, conforme al articulo 851, la desheredacion hecha sin condiciones de validez, 'anulara la institucion de heredero', lo mismo que la pretericion, pero solo 'en cuanto perjudique la desheredado': es decir, nada mas que en lo que menoscabe o desconozca sus derechos a la legitima, y, por tanto en la parte cuota o cantidad que represente en el caudal hereditario, atendida la condicion

de legitimario del desheredado de modo ilegal e ineficaz; salvedad o limitation de los efectos de nulidad de la institucion hecha en el testamento, que no existe, segun se ha visto en el 814, por el que se declara, en forma general e indistinta, que anulara la institucion de heredero sin ninguna atenuacion respecto de que perjudique o no, total o parcialmente, la cuantia de la legitima del heredero forzoso en linea recta, preterido.

"El resultado de ambos criterios y formulas legales, manifestamente distintas, tiene que ser muy diverso. En el caso de la pretericion, propiamente tal o total—pues si fuera parcial y se la dejara algo al heredero forzoso por cualquier titulo, aunque ese algo no fuere suficiente al pago de sus derechos de legitima, no seria caso de pretericion, regulado por el articulo 814, sino de complemento, regido por el 815 y la institucion no se anularia sino que se modificaria o disminuiria en lo necesario para dicho complemento—o de institucion de heredero en toda la herencia, al anularse la institucion, por efecto de la pretericion, se abre la intestada en favor del preterido o preteridos, respecto de toda la herencia, tambien; mientras que en la caso de desheredacion y de institucion en ia totalidad de la herencia a favor de otra persona, solo se anulara en la parte precisa para no Perjudicar la legitima del desheredado, que aun siendo en este caso la lata, si no hubo mejoras, porque no se establecieron p porque los instituidos eran herederos voluntaries, dejaria subsistence la institucion en la parte correspondieite al tercio de libre dispostcion Asi es que los preteridos, en el supuesto mdicado, suceden abintestato en todo, en concurrence con los demas herederos forzosos o llamados por la ley al abintestato; los desheredados, unicamente en dos tercios o en uno tan solo, en la hipotesis de haberse ordenado mejoras.

"En cambio, ni por la desheredacion ni por la preterición pierde su fuerza el testamento, en cuanto a dicho tercio libre, si se trata descendientes; o la mitad, si se trata de ascendientes, ya desheredados, ya preteridos, porque, ni por el uno ni por el otro medio, se anula mas que la institucion de heredero, en general, y totalmente por la preterieion, y solo en cuanto perjudique a la legitima del desheredado por la desheredacion; pero subsistiendo, en ambos casos, todas aquellas otras disposiciones que no se refieren a la institucion de heredero y se hallen dentro del limite cuantitativo del tercio o mitad de libre disposition, segun que se trate de descendientes o ascendientes, preteridos o desheredados.

"La invocation del articulo 817 para modificar estos efectos de la pretericion, procurando limitar la anulacion de la institucion de heredero solo en cuanto perjudique a la legitima, fundandose en que dicho articulo establece que 'las disposiciones testamentarias que menguan la legitima de los herederos forzosos se reduzcan, a petition de estos, en lo que fueren inoficiosas o excesivas,' no es aceptable ni puede variar aquellos resultados, porque es un precepto de caracter general en toda otra clase de disposiciones testamentarias que produzcan el efecto de menguar la legitima, que no puede anteponerse, en su aplicacion, a las de indole especial para senalar los efectos de la pretericion o de la desheredacion, regulados privativa y respectivamerite por los articulos 814 y 851.

"No obstante la pretericion, 'valdran las man das y legados en cuanto no sean inoficiosas.' El texto es terminante y no necesita mayor explicacion, despues de lo dicho, que su propia letra, a no ser para observar que constituye una confirmation indudable de los efectos de la pretericion, en cuanto alcanzan solo, pero totalmente, a la anulacion de la institucion de heredero, pero no a la de las mandas y mejoras en cuanto no sean inoficiosas o perjudiquen a la legitima de los preteridos; calificativo de tales, como sinonimo legal de excesivas, que en otros articulos, como el 817, establece la ley." (6 Sanchez Roman, Volumen 2.o pags. 1140-1141)

These comments should be read with care if we are to avoid misunderstanding, Manresa, for instance, starts expounding the meaning of the law with an illustration. He says that in case of preterition (article 814), the nullity of the institution of heirs is total, whereas in case of disinheritance (article 851), the nullity is partial, that is, in so far as the institution affects the legitime of the disinherited heirs. "Preteridos, adquieren derecho a todo; desheredados solo les corresponde un tercio o dos tercios, segtin el caso." He then proceeds to comment upon the wisdom of the distinction made by law, giving two views thereon. He first lays the view contrary to the distinction made by law, then the arguments in support of the distinction, and lastly a possible defense against said

arguments. And after stating that the Spanish jurisprudence has not as yet decided squarely the question, with an allusion to two resolutions of the Spanish Administrative Direction, one in favor of article 814 and another evasive, he concludes that the construction which may rightly be given to article 814 is that in case of preterition, the institution of heirs is null in toto whereas in case of disinheritance the nullity is limited to that portion of the legitime of which the disinherited heirs have been illegally deprived. He further makes it clear that in cases of preterition, the property bequeathed by universal title to the instituted heirs should not be merely reduced according to article 817, but instead, intestate succession should be opened in connection therewith under article 814, the reason being that article 814, "como especial en el caso que le motiva, rige con preferencia al 817." Sanchez Roman is of the same opinion when he said: "La invocacion del articulo 817 para modificar estos efectos de la pretericion, procurando limitar la anulacion de la institucion de heredero solo en cuanto Perjudique a la legitima, fundandose en que dicho articulo establece que 'las disposiciones testamentarias que menguan la legitima de los herederos forzosos se reduzcan, a peticion de estos, en lo que fueren inoficiosas o excesivas,' no es aceptable ni puede variar aquellos resultados, porque es un precepto de caracter general en toda otra clase de disposiciones testamentarias que produzcan el efecto de menguar la legitima, que no puede anteponerse, en su aplicacion, a las de indole especial para senalar los efectos de la pretericion o de la desheredacion, regulados privativa y respectivamente por los articulos 814 y 851."

Of course, the annulment of the institution of heirs in cases of preterition does not always carry with it the ineffectiveness of the whole will. Neither Manresa nor Sanchez Roman nor this Court has ever said so. If, aside from the institution of heirs, there are in the will provisions leaving to the heirs so instituted or to other persons some specific properties in the form of legacies or mejoras, such testamentary provisions shall be effective and the legacies and mejoras shall be respected in so far as they are not inofficious or excessive, according to article 814. In the instant case, however, no legacies or mejoras are provided in the will, the whole property of the deceased having been left by universal title to the children of the second marriage. The effect, therefore, of annulling the institution of heirs will be necessarily the opening of a total intestacy.

But the theory is advanced that the bequest made by universal title in favor of 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 betterment. 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. The first is also different from a betterment which should be made expressly as such (article 828). The only instance of implied betterment recognized by law is where legacies are made which cannot be included in the free portion (article 828). But again an institution of heirs cannot be taken as a legacy.

It is clear, therefore, that article 814 refers to two different things which are the two different objects of its two different provisions. One of these objects cannot be made to merge in the other without mutilating the whole article with all its multifarious connections with a great number of provisions spread throughout the Civil Code on the matter of succession. It should be borne in mind, further, that although article 814 contains two different provisions, its special purpose is to establish a specific rule concerning a specific testamentary provision, namely, the institution of heirs in a case of preterition. Its other provision regarding the validity of legacies and betterments if not inofficious is a mere reiteration of the general rule contained in other provisions (articles 815 and 817) and signifies merely that it also applies in cases of preterition. As regards testamentary dispositions in general, the general rule is that all "testamentary dispositions which diminish the legitime of the forced heirs shall be reduced on petition of the same in so far as they are inofficious or excessive" (article 817). But this general rule does not apply to the specific instance of a testamentary disposition containing an institution of heirs in a case of preterition, which is made the main and specific subject of article 814. In such instance, according to article 814, the testamentary disposition containing the institution of heirs should be not only reduced, but annulled in its entirety and all the forced heirs, including the omitted ones, are entitled to inherit in accordance with the law of intestate succession. It is thus evident that, if, in construing article 814, the institution of heirs therein dealt with is to be treated as legacies or betterments, the special object of said article would be destroyed, its specific purpose completely defeated, and in that wise the special rule therein established would be rendered nugatory. And this is contrary to the most elementary rule of statutory construction. In construing several provisions of a particular statute, such construction shall be adopted as will give effect to all, and when general and particular provisions are inconsistent, the latter shall prevail over the former. (Act No. 190, sees. 287 and 288.)

The question herein propounded has been squarely decided by the Supreme Court of Spain in a case wherein a bequest by universal title was made with preterition of heirs and the theory was advanced that the instituted heirs should be treated as legatarios. The Supreme Court of Spain said:

"El artículo 814 que precepta en tales casos de preterición la nulidad de la institución de heredero, no consiente interpretación alguna favorable a la persona instituida en el sentido antes expuesto, aun cuando parezca, y en algún caso pudiera ser, mas o menos equitativa, 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 todos los casos, como habría que llamar a los de otra clase, cuando el testador no hubiese distribuido todos sus bienes en legados, siendo tanto mas obligada esta consecuencia legal cuanto que, en materia de testamentos, sabido es, segun 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 valido y eficaz, por lo que constituiria 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 aun cuando asi fuese, sera esto razon para modificar la ley, pero que no autoriza a una interpretación contraria a sus terminos y a los principios que informan la testamentación, pues no porque parezca mejor una cosa en el terreno del Derecho constituyente, hay razon para convertir este Juicio en regla de interpretación, desvirtuando y anulando por este procedimiento lo que el legislador quiere establecer." (6 Sanchez Roman, Volumen 2.o, p. 1138.)

It is maintained that the word "heredero" under the Civil Code, is not synonymous with the term "heir" under the Code of Civil Procedure, and that the "heir" under the latter Code is no longer personally liable for the debts of the deceased as was the "heredero" under the Civil Code, should his acceptance be pure and simple, and from all these the conclusion is drawn that the provisions of article 814 of the Civil Code regarding the total nullity of the institution of heirs has become obsolete. This conclusion is erroneous. It confuses form with substance. It must be observed, in this connection, that in construing and applying a provision of the Civil Code, such meaning of its

words and phrases as has been intended by the framers thereof shall be adopted. If thus construed it is inconsistent with the provisions of the Code of Civil Procedure, then it shall be deemed repealed; otherwise it is in force. Repeals by implication are not favored by the courts and when there are two acts upon the same subject, effect should be given to both if possible (*Posadas vs. National City Bank*, 296 U. S., 497). The word "heir" as used in article 814 of the Civil Code may not have the meaning that it has under the Code of Civil Procedure, but this in no wise can prevent a bequest from being made by universal title as is in substance the subject-matter of article 814 of the Civil Code. Again, it may also be true that heirs under the Code of Civil Procedure may receive the bequest only after payment of debts left by the deceased and not before as under the Civil Code but this may have a bearing only upon the question as to when succession becomes effective and can in no way destroy the fact that succession may still be by universal or Special title. Since a bequest may still be made by universal title and with preterition of forced heirs, its nullity as provided in article 814 still applied there being nothing inconsistent with it in the Code of Civil Procedure. What is important and is the basis for its nullity is the nature and effect of the bequest and not its possible name nor the moment of its effectiveness under the Code of Civil Procedure.

Furthermore, there were in the Code of Civil Procedure sections Nos. 755 and 756 which read:

"SEC. 755. Share of child born after making will.—When a child of a testator is born after the making of a will, and no provision is therein made for him, such child shall have the same share in the estate of the testator as if he had died intestate; and the share of such child shall be assigned to him as in cases of intestate estates, unless it is apparent from the will that it was the intention of the testator that no provision should be made for such child."

"SEC 756. Share of child or issue of child omitted from will.—When a testator omits to provide in his will for any of his children, or for issue of a deceased child, and it appears that such omission was made by mistake, or accident, such child, or the issue of such child, shall have the same share in the estate of the testator as if he had died intestate, to be assigned to him as in the case of intestate estates."

It is these provisions of the Code of Civil Procedure that have affected substantially articles 814 and 851 of the Civil Code, but they have been expressly repealed by Act No. 2141, section 1 of which reads as follows :

"Sections seven hundred and fifty-five, seven hundred and fifty-six, seven hundred and fifty-seven, seven hundred and fifty-eight, and seven hundred and sixty of Act Numbered One hundred and ninety, entitled 'An Act providing a Code of Procedure in Civil Actions and Special Proceedings in the Philippine Islands are hereby repealed and such, provisions of the Civil Code as may have been amended or repealed by said sections: are hereby restored to full force and effect.'" (Italics ours.)

Among the provisions of the Civil Code which are thus expressly restored to full force are undoubtedly articles 814 and 851. There can be no possible doubt, therefore, that those two articles are in force.

Article 1080 of the Civil Code that is also invoked deserves no consideration except for the observation that it has no relevancy in the instant case.

Our attention is directed to the case of *Escuin vs. Escuin* (11 Phil., 332). We have never lost sight of the ruling laid down in that case which has been reiterated in *Elzeazar vs. Eleazer* (37 Off. Gaz., p. 1782). In the *Escuin* case, the deceased left all his property to his natural father (not a forced heir) and his wife Ozaeta, with total preterition of an acknowledged natural child; and, in the *Eleazar* case the deceased left all his property to a friend with total preterition of his father and wife. Without reconsidering the correctness of the ruling laid down in these two cases, we will note that the doctrine stands on facts which are different from the facts in the present case. There is certainly a difference between a case of preterition in which the whole property is left to a mere friend and a case of preterition in which the whole property is left to one or some forced heirs. If the testamentary

disposition be annulled totally in the first case, the effect would be a total deprivation of the friend of his share in the inheritance. And this is contrary to the manifest intention of the testator. It may fairly be presumed that, under such circumstances, the testator would at least give his friend the portion of free disposal. In the second case, the total nullity of the testamentary disposition would have the effect, not of depriving totally the instituted heir of his share in the inheritance, but of placing him and the other forced heir of his the basis of equality. This is also in consonance with the presumptive intention of the testator. Preterition, generally speaking, is due merely to mistake or inadvertence without which the testator may be presumed to treat alike all his children.

And speciany is this true in the instant case where the testator omitted the children by his first marriage upon the erroneous belief that he had given them already more shares in his property than those given to the children by his second marriage. It was therefore, the thought of the testator that the children by his first marriage should not receive less than the children by his second marriage, and to that effect is the decision of this Court sought to be reconsidered. Motion for reconsideration is hereby denied.

Yulo, C.J., I concur in the result.

Generoso, J., concur.

CONCURRING

OZAETA, J.:

I concur in the majority opinion after mature reflection on the two points discussed in Justice Bocobo's dissent.

Whether or not there was preterition of the testator's surviving children by his first marriage, may not be entirely beyond dispute, because it is not altogether improbable that, before the testator made his will, said children of his had received cash advances from him, as stated in clause 8 of the will. But, to my mind, there can be no doubt that there was preterition of the testator's grandchildren by his daughter Getulia, who died long before the testator made his will. These lineal descendants of the testator, who are also forced heirs' of his, were completely ignored and omitted in the will. In clauses 7 and 8 of his will, the testator declared:

"Seventh. I declare that the children by my first wife have no longer any participation in the property described above, as they already received their corresponding shares in my exclusive property as stated above, for if a proper partition is made, what I have given out of my own property to each of my children by my first wife must exceed what will correspond to each of my children by my second wife.

"Eighth. I supplicated my children by my first wife that they should not contest this my last will, as they have already received their shares in my own property, much more than what I now give to the children by my second wife, excluding yet what I have given to them as aid during their financial troubles and what they have owed, which they have not yet paid me and which I now condone to them."

Both the trial court and the Court of Appeals found in effect that these declarations turned out to be unfounded in fact, at least insofar as they referred to properties other than money alleged to have been received by the children of the first marriage. Be that as it may, I believe the deceased Getulia was not comprehended in said declaration anyway. When the testator said, "I declare that the children by my first wife have no longer any participation in the property described above," he referred only to his children who were living at that time and who, he evidently expected, would claim some participation in the property left by him; he could not have referred to Getulia also because she, having passed away, could no longer have or claim any participation in his property. Neither did he refer to Getulia's children, for he did not mention them at all. Again, when the testator said, "I supplicated my children by my first wife that they should not contest this my last will," he could not have had Getulia in mind,

because he knew the deceased could not contest his will; and if he had intended to include Getulia's children, he would have mentioned them as his grandchildren. The condonation of debts made by the testator in clause 8 of his will referred to the debts of those children of his whom he entreated to refrain from contesting his will; and since Getulia could not have been entreated by him, it is logical to conclude that her petty debt of P155 was not graced within that condonation. Getulia having passed away long before her father made his will, he had evidently forgotten her as well as her petty debt.

The conclusion that Getulia and her children were not included in the above-quoted declarations and that, therefore, they were entirely omitted in the will, is further strengthened by the undisputed fact that aside from the small sum of P155 borrowed by her from him during her lifetime, he had not given her or her children any portion of his property. Therefore, when the testator solemnly declared in clause 7 of his will that his children by his first wife had already received their corresponding share in his exclusive property in excess even of what would correspond to each of his children by his second wife, he could not have had Getulia or her children in mind, for it is indisputable that he had not given her any property whatsoever. He could not have had the P155 in mind (1) because it had not been given but only loaned to her, and (2) because it was so relatively trivial an amount that he could not have considered it equal to the share he left to each of his children by his second wife. His estate was assessed by the committee on appraisals at P18,000, with a claim against it of only P480.

In urging that the children of the first marriage be given only a share in the short legitime, the minority opinion says that the testator has made "a clear and explicit declaration in his will that the children of the second marriage shall be preferred." On the other hand, the majority opinion maintains that the testator omitted the children of the first marriage upon the erroneous belief on his part that he had given them a greater share in his property than that left to the children of the second marriage. From this the majority infer that the testator did not intend to discriminate against his children by his first marriage by giving them less than what he left to his children by his second marriage. The majority view assumes that the declarations of the testator in clauses 7 and 8 of his will, altho erroneous, were made in good faith. On the other hand, the minority view supposes that the testator intended to prefer his children by his second wife by leaving to them all his property so that the children by the first marriage are entitled only to their share in the short legitime which by law the decedent could not withhold from them. I think the minority view is untenable. In the absence of proof it cannot be presumed that the testator made the above-quoted declarations in bad faith—that he made them knowing that it was not true that he had given each of his surviving children by his first wife at least an equal if not a greater share in his inheritance than what he left to each of his children by his second wife. But if he had made those declarations in bad faith or as a subterfuge to deprive his children and grandchildren by his first marriage of their legal share in his inheritance he could only have done so with the intention to frustrate their right. In that case the preterition would only assume a different form, voluntary instead of involuntary. But the result would be the same. As stated by the Supreme Court of Spain in its decision of June 17, 1908, the preterition of a forced heir "puede se debida a ignorancia de que existiera, u olvido o proposito de buslar los derechos que la ley les reconce, supuestos todos que desvirtuan la fuerza y eficacia moral de aquella voluntad y que justifican la anulacion de su expresion."

DISSENTING

BOCOBO, J.,

After a careful study of this case, I am constrained to dissent from the resolution of the majority denying the motion for reconsideration. I believe the judgment of the Court of Appeals should be affirmed because:

First, there has been no preterition under article 814, Civil Code.

Second even supposing that there has been preterition, the children of the second marriage are, however, entitled to the third for free disposal and to the third for mejora, in addition to their shares in the strict or short legitime.

I

There Is No Preterition

There is no preterition because the findings of the Court of First Instance and of the Court of Appeals show that all the children of the first marriage have received, in property and in cash, a part of their short legitime. One of the requisites of preterition is that one or some of the heirs of the direct line be totally deprived of their legitime. As Manresa says (Vol. 6, pages 356-357, 4th Ed.):

"Que la omission sea completa.—Esta condicion se deduce del mismo articulo 814. u resulta con evidencia al relacionar este articulo con el 815 El heredero forzoso a quien el testador deja algo por cualquier titulo en su testamento, no se halla propiamente omitido pues se le nombra y se le reconoce participacion en los bienes hereditarios. Podria discutirse en el articulo 814, si era o no necesario que se reconociese el derecho del heredero como tal heredero, pero el articulo 815 desvanece esta duda. Aquel se ocupa de la privacion parcial. Los efectos deben ser y son, como veremos completamente distintos."

As to property, Eleuterio received parcel No. 4 by way of donation. The trial court found that said parcel "appears to have been donated by Agripino Neri to his son Eleuterio, and which may be brought to the common mass." In the judgment of the Court of First Instance, it is ordered that said parcel No. 4 "should be brought to the common mass."

Moreover, there is a large parcel of land containing 182.6373 hectares which, according to a finding of the Court of Appeals, "is still claimed to be the property not only of the children of the first marriage but also of those of the second marriage " The decision of the Court of Appeals makes these findings of fact:

"As regards that large parcel of land adjoining parcel No. 1, it is contended that after the court had denied the registration thereof, Agripino Neri y Chaves abandoned the said land and that later on some of the children of the first marriage possessed it, thereby acquiring title and interest therein by virtue of occupation and not through inheritance. It is not true that this parcel containing 182.6373 hectares is now assessed in the names of some of the children of the first marriage, for as shown on Tax Declaration No. 9395, Exhibit 11-g, the owners of the property are Agapita Neri de Chaves y Hermanos, Apparently, the said land is still claimed to be the property not only of the children of the first marriage but also of those of the second marriage."(Italics from their father. In the absence of ours.)

It is true that according to the Court of Appeals, Getulia or her heirs did not receive any share of the property of her father, but the trial court found that Getulia was indebted to her father in the amount of P155 which debt is condoned in clause 8 of the will.

Furthermore, it is unquestioned that all the children of the first marriage (except Getulia whose debt of P155 has been condoned in the will) had certain parcels in their names for tax purposes. The fact that said parcels were either public land occupied and developed by the testator, or did not belong to him, cannot support the theory of preterition because the essence of preterition is the omission of any descendant or ascendant. If his right as an heir is recognized in anyway, there is no preterition, and his remedy is that provided in article 815, which is to have his share completed in case he received less than his legitime. In this case, the testator admits that his children of the first marriage are also his lawful heirs but states they have already received their respective shares.

As for the cash advances, the trial court found that of the six children, three—Agripino, Getuha and Celenna—were indebted to the testator in the amounts of P500, P155 and P120, respectively. With regard to the other children,

Eleuterio. Agapita and Rosario, clause 8 of the will says:

"Eighth. I supplicated my children by my first wife that they should not contest this my last will, as they have already received their shares in my own property, much more than what I now give to the children by my second wife, excluding yet what I have given to them as aid during their financial troubles and what they have borrowed, which they have not yet paid me and which I now condone to them." (Italics ours.)

It will be noticed that the testator in the above clause speaks of two kinds of cash advances to his children: (1) aid from their father during their financial troubles; and (2) amounts borrowed by them from their father. In the absence of proof to the contrary, it may be presumed that the testator was referring to all his children of the first marriage when he stated; excluding yet what I have given to them as aid during their financial troubles., It is hard to that that during the whole lifetime of the testator, who was well-to-do, and lived to the advanced age of 86 and of his children of the first marriage did not receive even a small financial aid from the father.

All the children of the first marriage having received a part of their short legitime, either in property or cash or both, there is no preterition. The law applicable is not article 814 but articles 815 and 817, Civil Code which Provide:

"ART. 815. El heredero forzoso a quien el testador haya dejado por cualquier titulo menos de la legitima que le corresponda, podra pedir el complemento de la misma."

"Art 817. Las disposiciones testamentarias que menguen la legitima de los herederos forzosos. se reduzcan, a peticion de estos, en lo que fueren inoficiosas o excesivas."

These articles govern where the heir has received, either in the will or by donation inter vivos a part of his legitime. Commenting on article 815, Manresa says (Vol. 6, page 366):

"El espíritu del artículo 815 resulta evidente: cuando el heredero forzoso no ha sido olvidado por el testador, cuando ha tornado algo de los bienes hereditarios, solo puede reclamar que se le complete su legitima. La letra del artículo, aunque aplicable especialmente a las disposiciones testamentarias, no repugna a su extension a todo acto de disposicion del testador por titulo lucrativo. Y ademas, el parrafo 1.º del artículo 819, al decir que las donaciones hechas a los hijos imputan a su legitima, demuestra que lo que los herederos forzosos reciben en vida del testador de este, se entiende como recibido por su legitima en el momento de su muerte, y, por consiguiente, como dejado por el testador a titulo de herencia."

The children of the first marriage not having been entirely forgotten, the will should be respected and carried out but the children of the first marriage should have their respective shares in the strict legitime completed after taking into account the amounts already received by them from their father.

As for the concurring opinion, I find it difficult to believe that the testator did not have in mind Getulia or her children in clauses 7 and 8 of the will. My reasons are the following:

- The testator clearly intended that his will should not be contested. When he said "I supplicated my children by my first wife that they should not contest this my last will," it is not venturesome to presume that he also referred to the children of Getulia because they, as the testator's grandchildren, were also his heirs by right of representation of their mother. It is most unlikely that the testator would frown upon a contest by his children of the first marriage but not upon a contest by said grandchildren.

- In his condonation of the money advances to his children of the first marriage in clause 8, it is improbable that he had forgotten his daughter Getulia although she had been dead for several years. Is the memory of a deceased daughter blotted out in the father's mind precisely at the moment when he is searching his own conscience as he makes his will? Moreover, did not the presence of Getulia's children serve to remind the testator of their mother?

Getulia's debt of P155 having been condoned in clause 8, it follows that articles 815 and 817 of the Civil Code, *supra*, are applicable. The children of Getulia are, therefore, entitled to have their short legitime completed according to the articles aforesaid, but they must return to the estate, by way of collation, the amount of P155 under article 1038, paragraph 1 of the Civil Code which provides thus:

"ART. 1038. Cuando los nietos sucedan al abuelo en representation del padre, concurriendo con sus tios o primos, colacionaran todo lo que debiera colacionar el padre si viviera, aunque no lo hayan heredado."

II

The Mandas and Mejoras Are Valid

But granting that there was a preterition because one or some of the children of the first marriage never received, by donation *inter vivos* or by will, anything from their father, it is clear from the will in question that the children of the second marriage are entitled to the third for free disposal and to the third for mejora (in addition to their share in the strict legitime). That is to say, I think we should apply in this case this provision of article 814 on preterition: "pero valdran las mandas y mejoras en cuanto no sean inoficiosas."

The majority resolution relies upon quotations from Manresa and Sanchez Roman to support the proposition that the annulment of the "institucion de heredero" entirely annuls the will. However, the majority is laboring under a misunderstanding of the "institucion de heredero" under the Spanish law. It is that misconception which had led the majority into a wrong interpretation of what those two Spanish jurists mean when they say that the annulment of the "institucion de heredero" is total. It is to be noted, at this juncture, that both authors, while stating that preterition entirely annuls the "institucion de heredero," nevertheless admit that "mandas" and "mejoras" which are not inofficious are valid. Says Manresa (Vol. 6, pages 359, 360, 4th Ed.):

"En el fondo la cuestion es identica. El testador puede siempre disponer a su arbitrio de la Parte libre El legitimario, contra la voluntad expresa del testador, solo tiene derecho a su legitima. Preterido o desheredado sin justa causa, la legitima es suya. Desheredado o preterido, la porcion libre no le corresponds, cuando el testador la asigna a otro. (Italics ours.)

"La interpretacion que rectamente se desprende del articulo 814, es ka de que solo valen y eso m cuanto no sean inoficiosas, las disposiciones hechas o titulo de legado o mejora. En cuanto a la instituci6n de heredero, se anula. Lo que se anula deja de existir, ¿en todo, o en parte? No se anade limitacion alguna, como en el artlculo 851, en el que se expresa que se anulara la institucion de heredero en cuanto perjudique a la legitima del desheredado. Debe, pues, entenderse que la anulacion es completa o total, y que este articulo, como especial en el caso que le motiva, rige con preferencia al 817.

"Todas las demds dispošieiones testamentarias referentes a los bienes, como los legados y las mejoras, en su caso, conlinuarn subsistentes, no obstante la pretericion, siempre que no sean inoficiosas, esto es, siempre que las mejoras no excedan del tercio, y los legados con las donaciones por causa de muerte, y las donaciones colacionables, no excedan de la parte de herencia de libre disposicion. Si excedieren, se reducirán por las reglas del Codigo, hasta dejar a salvo la legitima." (Italics ours.)

Further on (p. 363) Manresa adds:

"Estimada la accion, y anulada la institucion de heredero, se abre la sucesion intestada respecto a la parte de bienes de que el testador, dentro de la porcion libre no hubiese dispuesto en virtud de legado, mejora o donacion."

Sanchez Roman also states:

"En cambio, ni por la desheredacion ni por la pretericion pierde su juerza el testamento, en cuanto a dicho

tercio libre, si se trata de descendientes; o la mitad, si se trata de ascendientes, ya desheredados, ya preteridos, porque, ni por el uno ni por el otro medio, se anula mis que la institucion de heredero, en general, y totalmente por la pretericion, y solo en cuanto perjudique a la legitima del desheredado por la desheredacion; pero subsistiendo, en ambos casos, todas aquellas otras disposiciones que no se refieren a la institucion de heredero y se hallen dentro del limite cuantitativo del tercio o mitad de libre disposicion, segun que se trate de descendientes o ascendientes, preteridos o desheredados. (*Italics ours.*)

* * * * *

"No obstante la pretericion, 'valdran las mandas y legados en cuanto no sean inoficiosas'. El texto es terminante y no necesita mayor explicacion, despues de lo dicho, que su propia letra, a no ser para observar que constituye una confirmacion indudable de los efectos de la pretericion, en cuanto alcanzan solo, pero totalmente, a la anulacion de la institucion de heredero, pero no a lade las mandas y mejoras en cuanto no sean inofieiosas o perjudiquen a la legitima de los preteridos; calificativo de tales, como sinonimo legal de excesivas, que en otros articulos, como el 817, establece la ley." (6 Sanchez Roman, Volumen 2.o, 1140-1141.)

The seemingly self-contradictory statements of each of these two eminent jurists are confusing,—as they have confused the majority,—unless one examines the historic background of the "institucion de heredero" in the Spanish Civil Code

Article 764 of the Civil Code provides:

"El testamento sera valido aunque no contenga institucion de heredero, o esta no com prenda la totalidad de los bienes, y aunque el nombrado no acepte la herencia o sea incapaz de heredar.

"En estos casos se cumpliran las dispošieiones testamentarias hechas con arreglo a las leyes, y remanente de los bienes pasara a los here deros legitimos."

Manresa explains the development of the "institucion de heredero" thus (vol. 6, pages 85-86 4th Ed):

"La institucion de heredero es el acto en virtud del cual el testador designa la persona o personas que han de sucederle en sus derechos, acciones y obligaciones; y su importance en la testamentifaccion es indiscutible, puesto que de ella surge la continuacion de la personalidad del testador, si bien con las limitaciones im puestas por el mismo. En efecto, por virtud de dicha institucion, la persona o personas instituidas por herederas suceden al causante en la universahdad de sus derechos y obligaciones, en los terminos que expusimos al comentar los articulo 659 y 660.

"Hoy esa imporatancia ha cedido algun tanto, aunque no ha desaparecido por completo, puesto que no es necesaria la institucion de herederos para la validez de la disposicion mortis cause; pero en lo antiguo llego a ser considerada como la cabeza y raiz del testamento, dando lugar su falta a la nulidad e ineficacia del mismo.

"En las secciones precedentes hemos venido refiriendonos con repeticion a dos sistemas sucesorios distintos: uno formalista y rituario, mantenido constantemente por el derecho romano aun en los tiempos de mayor laxitud del mismo y otro mas libre y expansivo, cuya genuina representacion se halla en el Ordenamiento de Alcala. Y ese dualismo profundo que entonces observamos entre la legislacion romana y la germana, hubo de manifestarse tambien claramente en la materia relativa a la institucion de herederos.

"No hemos de repetir aqui ideas expuestas ya en la reseña historica con que encabezamos la introduccion al estudio del tratado de sucesiones, pero conviene recordar, para la mejor inteligencia de la reforma Hevada a cabo en nuestras antiguas leyes, que la naturaleza de los primitivos testamentos romanos. asi como la organizacion de la familia en aquella potente nacion, y sub caracteres de universalidad y perpetuidad, impusieron la necesidad la necesidad de un heredero que continuase la personalidad juridica del causante, revistiendo a su vez a dicha institucion de las mismas condiciones de necesidad, universalidad y perpetuidad. Era necesaria la institucion como cabeza y solemnidad interna del testamento: era universal, puesto que tenia

que ser hecha sobre todo el patrimonio, no permitiéndose testar sobre una parte de el y no sobre el resto; y era, por ultimo, perpetua, porque siendo el medio de la contitimpio, y el heredero, una vez aceptada la herencia, no podia dejar de serlo.

"Por el contrario, ni en la legislacion castellana, ni en el Fuero Juzgo, encarnacion del elemento godo; ni en los Fueros municipales, inspirados en el mismo espiritu; ni en el Fuero Viejo de Castilla, ni aun en el Fuero Real, se encuentra disposici6n alguna que le atribuya dicho caracter, acusando en ellos la institucion de herederos un concepto completamente diverso, hasta que las Partidas, sin tener en cuenta los elementos distintos de nuestro derecho y la diferente organizacion de la familia española, importo de piano la doctrina romana, y con ella todo el complicado organismo de su sistema sucesorio. Segun tenemos dicho ya, el Ordenamiento de Alcalá hizo desaparecer ese regimen tan en oposicion con el derecho patrio, asignando a la institucion los caracteres de libertad e independencia que ha conservado hasta la publicacion del Código, puesto que las leyes posteriores a dicho Ordenamiento no introdujeron modificación alguna, manteniendo la libertad de la institucion de herederos, sin mas limitaciones que el respeto a la moral y a los derechos legitimarios, asi como mantuvo la independencia absoluta entre dicha institucion y el testamento, hasta el punto de ser valido este, aunque no haya heredero o no se haya dispuesto en el de la totalidad de la herencia, lo cual permitfa que el causante muriese parte testado y parte intestado." (Italics ours.)

Commenting on article 764, Manresa says (Vol. 6, page 93):

"Si a virtud de el no es necesaria ya para la validez de los testamentos que en ellos conste la institucion de herederos, logica deducción de dicho principio es que el testamento no se invalide aunque no contenga dicha institucion o no comprenda la totalidad de los bienes, o no resulte eficaz la institucion, hecha, ya por no aceptar la herencia el instituido, o por ser este incapaz."

The only purpose, therefore, of the "institucion de heredero" is to have someone continue the personality of the testator, so that there may be someone who should be personally liable for all the obligation of the testator and who succeeds to all the rights of the decedent. But such "institucion de heredero" is no longer essential, so that there may be a valid will, according to article 764, although there is no "institucion de heredero. As Manresa says, since the Ordenamiento de Alcalá there is an absolute independence between the "institucion de heredero" and the will. (Vol. 6, pages 86.)

Therefore, in the case under consideration, the annulment of the "institucion de heredero" on account of preterition does not render the will ineffective.

That the pretention under article 814 does not entirely invalidate the will is unanimously maintained by the authors.

Sanchez Roman, supra, says that the effects of preterition, alcanzan solo, pero totalmente, a la anulacion de la institucion de heredero, pero no a la de las mandas y mejoras en cuanto no s6n inoficiosos o perjudiquen a la legitima de los preteridos."

Manresa states (Vol. 6, pages 362-363):

"Para pedir la anulacion corresponde al heredero preterido una accion, que siempre se ha llamado querella de inoficioso testamento.

* * * * *

Estimada la accion y anulada la institucion de heredero, se abre la sucesion intestada respecto a la parte de bienes de que el testador, dentro de la porcion libre no hubiese dispuesto en virtud de legado, mejora o donacion. (Italics ours)

Scaevola in Vol. XIV, page 383 of his work *On the Spanish Civil Code* has this to say.

Acciones defensivas de iegitima—Prescripcion de las mismas.—En nuestro entender, no convive con el Codigo en materia de pretericion la tradicional querella de inoficioso testamento. Apoyamos nuestra opinion en dos razones: primera, no nombrarla asi el Codigo, ni contener doctrina equivalente, tanto en la seccion de legitimas, como en la de prescripcion; segunda, sostener doctrina contraria a aquella de que derivaba la sobredicha accion.

"La querella se encaminaba a destruir el testamento, en caso de pretericion; el Codigo con conocimiento de causa, con conciencia de la doctrina, precisamente en oposicion a ella, no autoriza tal destruccion en cuanto consigna la nulidad de la institucion hereditaria, pero la validez de las mandas y mejoras. No existiendo el antecedente no puede existir el consiguiente; derogado el principio doctrinal que daba vida a la querella de inoficioso testamento, desaparece esta con el. Ha muerto al sucumbir la legislacion de la que era elemento integrante, de cuyo cuerpo formaba parte.

"Hoy la accion se encamina a la nulidad de la institucion hereditaria como media para adjuviciar el heredero forzoso la porcion que le señala la ley. Tratase sencillamente de una accion real, comun u ordinario de vida legal de treinta años. (*Italics ours.*)

Goyena in his book on the Project of 1851, commenting on article 644 of the same which provides that preterition "anula la institucion de heredero; pero valdran las mandas y mejoras en cuanto no sean inoficiosas" (the exact wording of article 814 of the present Spanish Civil Code) observes (Vol. 2, pages 94-95):

"La ley 24 de Toro, u 8, titulo 6, libro 10, Novisima Recopilacion, dice: 'Cuando el testamento se rompiere o anulare por causa de pretericion o exheredacion. etc., no por eso deje de valer la mejoría del tercio y quinto.' Ex causa exheredationis vel praeteritionis irritum est testamentum quantum ad institutiones, caetera namque firma permanent. Autentica, titulo 28, libro 6 del Codigo.

"El articulo de mayor claridad y latitud, o por lo menos fijeza, a estas disposiciones Patria y Romana.

"A pesar de la ley de Toro, se nos ha enseñado en las escuelas, que la pretericion anulaba enteramente el testamento. y que no estaban corregidas por ella las leyes 3, titulo 7, y 1, titulo 8, Partida 6. que asi lo declaraban: en Derecho Romano hemos aprendido como inconcuso lo contrario de la autentica en el caso de pretension de un heredero suyo; y esto era lo cierto, por que la autentica fue tomada de la Novela 115. capitulos 3 y 4, en la que de intento se trata de la desheredacion y de sus causas, y de la rescision del testamento, por la querella de inoficioso; de consiguiente, la desheredacion hace referencia al padre; la pretericion a la madre, pues respecto de ella constituye una desheredacion tacita.

"Sala en sus Instituciones Romano-Hispanas, parrafo 5, titulo 13, libro 2. esta por las leyes de Partida; y en su Ilustracion, numero 3, titulo 5, libro 2, sostiene lo contrario, y en apoyo de la ley de Toro cita la autentica. 'Lo establecieron asi (dice) las leyes Romanas, y lo persuade la equidad, que no permite tenga lugar la pena mas alta del particular en que ocurrio la indignidad o sin razon que la motivo.'

"Prescindiendo de todo esto, el articulo hace sencillo y claro lo que hasta ahora ha sido embrollado y dudoso."

Finally, Prof. Nicasio Lopez R. Gomez of the University of Valladolid says in his "Tratado Teorico Legal del Derecho de Sucesion," Vol. I, pages 316-319:

"En Roma, la validez o nulidad de la institucion de heredero, envolvia la determinacion de los efectos juridico-legales del testamento, o su negacion puesto que si era la solemnidad interna y necesaria del testamento, y por consecuencia su cabeza y fundamento, aquel no podia subsistir cuando en su esencia concurriera un vicio de nulidad, o esta hubiera sido omitida—et sine illa non est testamentum. . . . Reconocido el principio de las legitimas y desenvuelto con arreglo a la clasificacion de los herederos suyos, suyos y necesarios y voluntarios, los dos primeros habian de ser necesariamente instituidos o justamente desheredados

dos; y por ultimo la desheredacion justa con cause lagal y expresa privaba de la legitima al herederos a quien se imponia. La desheredacion injusta sin causa o con causa falsa no podia producir este efecto, dejando completamente a salvo el derecho de legitima, y otorgaba al desheredado la accion extraordinaria para reclamar contra la institucion por inoficiosa, con el efecto absolute de no referirse solamente a la porcion legftima, sino que anulada la institucion quedaban nulas todas las demas disposiciones del testamento.

"La pretericion de un heredero forzoso tambien producia el mis mo efecto de nulidad.

"Las Leyes de Partida al reproducir la doctrina romana con todo su rigorismo y enca denamiento de las instituciones sucesorias, importaron en nuestra legislacion todas las disposiciones referentes a la queja de inoficioso testamento, su naturaleza, extension, personas que podian ejercitarla en la linea recta ascendente y descendente y en la colateral cuando la institucion recayera en persona torpe postergando a los hermanos y por ultimo en cuanto al tiempo o plazo de su ejercicio.

"La L. del titulo 19 del Ordenamiento de Alcala, con su espiritu de transicion regenerador del primitivo Derecho Español, llevo a cabo una transformacion completa e importantisima, pues al declarar la independence absolute entre los efectos de la institucion de heredero y los del testamento. la extension de la queja de la inoficiosa de este, quedo limitada estrictamente a reclainar contra la institucion en cuanto fuera inoficiosa, percibiendo el desheredado o preterido la porcion legitima que le correspondiera, subsistiendo la misma institucion en cuanto a los bienes que tuvieran el concepto de tibres, asi como todas las demas clausulas del testamento.

"Consecuencia de esto y de la declaracion de la L. 9, de Toro, los descendientes y ascendientes, injustamente desheredados o preteridos, podian entablar la accion or querella de inoficioso testamento como herederos forzosos de su causante, con el solo efecto de percepcion de su legitima, sin anular el testamento ni aun la institucion de heredero que unicamente se rescindia en cuanto a aquella porcion; y con respecto a los colaterales o hermanos, perdieron el derecho de ejercitar la citada accion desde el momento que iueron privados del concepto de herederos forzosos, que tenian en el unico caso de ser postergados a persona torpe, por haber quedado sin efecto este calificativo y las distinciones que hicieron las leyes romanas y de Partidas.

"Con estos brevisimos anteedentes historicos podemos pasar a fijar el verdadero concepto de la queja de inoficioso testamento para despues exponer la doctrina vigente acerca de ella.

"Se entiende por queja o querella de inoncioso testamento, la accion que compete a los herederos forzosos preteridos o injustamente desheredados sin causa o con expresion de ella siendo falsa, para rectamar la porcion de bienes que como legitima les corresponde.

* * * * *

"La impugnacion de la institucion hecha en testamento, por el heredero desheredado o preterido, puede efectuarse de dos maneras; por el ejercicto directo de la accion contra el instituido para que reconozca y abone la legitima; o por excepcion, cuando el desheredado se hallare en posesion de la herencia y el instituido interpusiera la accion correspondiente para percibirla.

"El efecto inmediato de la queja de inoficioso testamento es anular la institucion de heredero en cuanto perjudique los derechos legitimarios del actor." (*Italics ours.*)

Applying the above citations, what is the effect of preterition in this case? Does it render the will of Agripino Neri y Chavez entirely void, so that an intestate succession must be declared as to all his property? The negative answer is inescapable because of the true meaning of "institucion de heredero" as already set forth, and the scope of the "queja de inoficioso testamento" as explained by the writers above quoted.

"Anulara la institucion de heredero" does not mean that the whole will is of no effect. It merely nullifies the clause designating the children of the second marriage as the only "herederos" or continuers of the testator's personality

and in the place of such clause, article 814 orders that all the children, of both marriages, shall be such continuers of Agapito Neri's personality. This does not mean that all the children shall divide the whole estate equally, by the rules of intestacy. It simply signifies that the children of both marriages become continuers of Neri's personality, and as such liable personally for all of Neri's obligations, so that, under the system of the Spanish Civil Code, which distinguishes "herederos" from "legatarios," all the children are liable personally for the debts of their father, even beyond and in excess of the property received by each of them. They are also entitled to all his rights, but the extent of such rights is determined by the will. They are all "residuary legatees" under the Code of Civil Procedure, so that if there is any property undisposed of by his will, all the children shall divide it equally.

With regard to the Spanish remedy of "queja de inoficioso testamento," the authorities already cited limit the effect of the same, in case of preterition, under the Civil Code to the recovery of the legitime pertaining to the heir who has been omitted. This is in conformity with article 814 which says that the mandas and mejoras are valid insofar as they are not inofficious.

Have mandas and mejoras been given to the children of the second marriage? It is plain that the intention of the testator is to give to the children of the second marriage all that remains of his property; the children of the first marriage having already received from him their shares, in addition to sums of money by way of aid and loan. This being so, and inasmuch as the greater includes the less, his disposition in favor of his younger children should be upheld as to the two-thirds of his remaining property, viz.: the one-third for free disposal and the one-third for mejora (in addition to their share in the short legitime).

First, as to the third for free disposal. The decision of this Court says there is no "legacy expressly made in their behalf consisting of the third available for free disposal." I believe it is illogical to require in this case that the will should expressly make a legacy from the third for free disposal. It is enough that the testator gives all his remaining property to his children of the second marriage; from that it should not be hard to declare that it was his intention to give them at least the third for free disposal. In legal concept anything given from the third available for free disposal is a "manda" or legado," whether it is so named or not.

Second, as for the third available for mejora, I agree with the decision that there is no express mejora. But I think there is a tacit mejora. Now, a tacit mejora is created when the testator gives something to any of his children which cannot be contained in the third available for free disposal. Article 828 provides:

"ART. 828. La manda o legado hecho por el testador a uno de los hijos o descendientes no se reputara mejora sino cuando el testador haya declarado expresamente ser esta su voluntad, o cuando no quepa en la parte libre."

Here again, we should not require that this portion should be expressly called by the testator a "mejora" or a "manda" because it would have been illogical and improper to speak of "mejora" or "manda" when he was giving the whole of his remaining property to his children of the second marriage. Article 814 simply means that in case of preterition, all testamentary provisions are valid in so far as they do not impair the legitime. The effect of the decision in this case is to declare an intestate succession as to the entire estate whenever there is no express mejora and express legacy. Thus, there would be total intestacy, in spite of the testamentary provisions to the contrary, in the preterition under the following circumstances:

- Where there is a tacit mejora, under article 828; or
- When there can properly be no mejora, express or implied, because a child or descendant is instituted as the sole heir to the whole estate; or
- When there can properly be neither express mejora nor express legacy because two or more children or descendants are instituted to take the whole estate equally or without express designation of shares.

Such could not have been the intention of the legislator, because the whole scheme of the Civil Code as to successions is to respect testamentary provisions so long as the legitime is not diminished. (Arts 763, 764, 767, 777, 782, 792, 798, 813, 814, 815, 817, 820, 828, 1036 and '1037' Civil Code.)

Furthermore, it would appear to be violative of the law to throw the entire will to the scrap heap and declare a total intestate succession, when such will can and should be enforced in so far as the short legitime of the children of the first marriage is not lessened. True, to some it might seem more equitable to divide the estate equally among all the children of both marriages. But so long as the short legitime is not impaired, the testator in this case was free to distribute his property among his children as he saw fit and fair. This is why even in case of preterition (article 814), mandas and mejoras are valid to the extent that they are not inofficious. If this minimum and obligatory portion (short legitime) of each child is kept intact in the partition under the will, the law does not admit of any interference with the testator's wishes. He is the sole Judge as to which children should get more than the others. To hold that there shall be an equal division of the whole estate—applying the rules of intestacy—when the testator positively and TMmistakably stated that there shall be a different distribution of the remaining estate is contrary to law. Moreover, intestate succession is based upon the Presumed intention of the deceased. Saving of course, the short legitime of the children of the first marriage, we should not resort to that presumed intention in the face of a clear and explicit declaration in his will that the children of the second marriage shall be preferred.

But granting, arguendo, that strictly speaking there are no "mandas" and "mejoras" for the children of the second marriage, yet by the principle of construction by analogy, the provision in article 814 that mandas and mejoras shall be valid should be applied because the testator clearly intended to give at least two-thirds of his estate to such children, inasmuch as he was giving all of it to them. And he could dispose freely of said two-thirds in favor of said children of the second marriage, that is, one-third from the portion for free disposal, and one-third from the portion assigned by law to mejora. In other words, granting for the sake of argument that there was neither a manda nor a mejora in this case, nevertheless the present situation offers a gap, not specifically foreseen by the lawmaker, which should be filled by applying the words, "valdran las mandas y mejoras" through the principle of analogy in order not to defeat the manifest intention of the testator.

The majority resolution lays stress on the supposed difference between the effect of article 814 (preterition) and of article 851 ("disinheritance"). Whatever may be the distinction between the two articles in theory, the practical result is, however, the same because both articles contain a saving clause in regard to the mandas and mejoras which do not impair the legitime. Article 814 says: "pero valdran las mandas y mejoras en cuanto no sean inoficiosas," and article 851 also provides, "pero valdran los legados, mejoras y demas disposiciones testamentarias en lo que no perjudiquen a dicha legitima." The identity of ideas is plain. True, article 851 (disinheritance) annuls the "institucion de heredero" in so far as it prejudices the person disinherited, where article 814 simply says that the preterition "shall annul the institution de heredero." However, the lack in article 814 of the qualifying words "in so far as the omitted person is prejudiced is filled and supplied by the words "pero valdran las mandas y mejoras en cuanto no sean inoficiosas," which immediately follow. In fact, the words "en cuanto perjudique al desheredado" in article 851 are superfluous and unnecessary because the very same thought is conveyed by the words "pero valdran los legados, mejoras y demas disposiciones testamentarias en lo que no perjudiquen a dicha legitima."

Up to this point I have discussed article 814, Civil Code, purely from the standpoint of that code, without reference to the Code of Civil Procedure. This latter code, however, has abolished the distinction between "heredero" and "legatario" under the Civil Code, and has changed the basis of liability of persons,—whether related or not to the deceased,—who receive any property from the estate. As stated by this Court in the case of *Suiliong & Co. v. Chio Taysan*, 12 Phil. 13 (year 1908):

"An examination more especially of sections 597, 644, 695, 727, 729, 731, 733, and 749 of the Code of Civil Procedure, read together with the remaining provisions for the administration the estates of deceased persons clearly indicates that the provisions of articles 660 and 661 of the Civil Code have been abrogated.

"These provisions of the new code clearly demonstrate that the terms *heredero* and *legatario*, as defined in the Civil Code (article 660), are not synonymous with the words 'heir' and heir in the new code being technically applicable only to a relative taking property of an intestate by virtue of the laws of descent, devisee and legatee being reserved for all persons whether relatives or not, taking respectively real or personal property by virtue of a will; while *heredero* in the Civil Code as applicable not only to one who would be called an 'heir,' under the provisions of the new code, but also to one, whether relative or not, who took what might be called 'a residuary estate under a will (*el que sucede a titulo universal*).

"It appears also from an examination of these provisions that the legislature has provided no machinery whereby an absolute right on the part of the heir to succeed by the mere fact of death to all the rights and property of the deceased may be enforced without previous payment or provision for the payment of the debts; and on the other hand, it has provided machinery for the enforcement of the debts and other obligations of the deceased, not as debts or obligations of the heir, but as debts or obligations of the deceased, to the payment of which the property of the deceased may be subjected wherever it be found. Thus section 597 expressly provides that, in those cases where settlement of an intestate estate may be made without legal proceedings, either by a family council, as known under the Spanish law, or by an agreement in writing executed by all the heirs, the real estate of the deceased remain charged with liability to creditors of the deceased for two years after the settlement, notwithstanding any transfer thereof that may have been made; and we think the inference is clear that the legislator in this section recognizes and affirms the doctrine that, prior to the date of such settlement, the real estate at least was charged in like manner with the debts of the deceased. So it will be found that, where legal proceedings are had looking to the settlement of testate or intestate estates, provision is made for the recovery of claims against the deceased, not by proceedings directed against the heirs but by proceedings looking directly to the subjection of the property of the deceased to the payment of such claims; the property both real and personal being, in express terms, made chargeable with the payment of these debts, the executor or administrator having the right to the possession of the real as well as the personal property, to the exclusion of the heirs, so long as may be necessary for that purpose (secs. 727 and 729).

"For practical purposes it may well be said that in the eye of the law, where there is no remedy to enforce an alleged right when it is invaded, the existence of the right may safely be denied; and where the law furnishes a remedy whereby one may enforce a claim, that claim is a right recognized and established by the law. The new Code of Procedure furnishing no remedy whereby the provisions of article 661 of the Civil Code may be enforced, in so far as they impose upon the *heredero* (heir) the duty of assuming as a personal obligation all the debts of the deceased, at least to the extent of the value of the property received from the estate; or in so far as they give to the *heredero* the reciprocal right to receive the property of the deceased, without such property being specifically subjected to the payment of the debts of the deceased by the very fact of his decease, these provisions of article 661 may properly be held to have been abrogated; and the new code having provided a remedy whereby the property of the deceased may always be subjected to the payment of his debts in whatever hands it may be found, the right of a creditor to a lien upon the property of the deceased, for the payment of the debts of the deceased, created by the mere fact of his death, may be said to be recognized and created by the provisions of the new code." (*Pavia vs. De la Rosa*, 8 Phil Rep., 70.)

The effect of such abolition between "*heredero*" and "*legatario*" under the Spanish law is to render obsolete the words "*anulara la institucion de heredero*" in article 814 of the Civil Code, because at present all devisees and legatees, whether designated as "*herederos*", "*legatarios*", "*devisees*," "*legatees*," or any other name are to be treated alike in the sense that none of them is personally liable for the obligations of the testator, but the property assigned to each of them is burdened with a lien in favor of the creditors of the deceased. In other words, the "*institucion de heredero*" under the Spanish law, whereby the "*heredero*" continues the personality of the deceased

and is personally liable for all the obligations of the latter has disappeared from the juridical scene. That being so, the words "anulara la institucion de heredero" in article 814 have become useless anomalous and anachronistic, and should be absolutely disregarded. The result in the instant case is that the children of the first marriage should be merely added as coparticipants in the short legitime, and the will shall be in all other respects enforced. Therefore, the snort legitime should be divided equally among the children of both marriages, while the children of the second marriase shall, in addition, have the mejora and the one-third set aside by law for free disposal

There is another provision of law which should not be overlooked. It is article 1080 of fae Civil Code, which provides:

"La particion hecha con pretericion de alguno de los herederos no se rescinding a no ser que se pruebe que hubo mala fe o dolo por parte de los otros int eresados; pero estos tencfran la obligacion de papar al pretendo la parte que proporcionalmente le corresponda."

It is true that the above article express;y refers to partition among the heirs, but the intention of the legislater is clear that in a preterition, the partition should not be rescinded but the omitted heir should get his lawful share. By analogy, the distribution made in the will by the testator in the present case should not be disturbed, though the children of the first marriage should get their portion from the short legitime.

Finally, the principle which I herein maintain has been established by this court in two decisions: Escuin vs. Escuin, 11 Phil, 332 (year 1908), and Eleaiar vs. Eleazar. 37 Off. Gaz., 1782 (year 1939). In the Escuin case, Emilio Antonio Escuin de los Santos who had no legitimate children, made a will instituting his natural father, Francisco Escuin, and his (testator's) wife, Maria Teresa Ponce de Leon as his universal heirs, who should divide the estate in equal shares. After the testator's death, his acknowledged natural son, Emilio Escuin y Batac, claimed the entire estate. However, this Court held that he, the acknowledged natural child, was only entitled to his legitime of one-third of the estate under article 842, and that the will was "valid with respect to the two-thirds of the property which the testator could freely dispose of." I quote from the decision in that case, which was penned by Mr. Justice Torres:

"With respect to the questions which form the basis of this litigation and refer to the second assignment of errors, it should be noted that the late testator did not leave any legitimate descendants or ascendants, but did leave a recognized natural child, the appellant minor, and a widow; that the said minor, Emilio Escuin y Batac, is the general heir of his natural father, the said testator, who recognized him while living (article 807, Civil Code), and in the present case is entitled to one-third of his estate, which amount constitutes the legal portion of a natural child (article 842 of the said code); and 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 cannot deprive the heirs of their legal portions, except in the cases expressly indicated by law. (Arts, 763. K13. R14, Civil Code.)

"As has been seen, the testator wished to dispose of his property in his will, designating as heirs his natural father, Francisco Escuin, and his wife, Maria Teresa Ponce de Leon, altogether ignoring his recognized natural child who is his general heir. In view thereof, and for the reason that he exceeded his rights, the said designation of heirs become 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. (Arts. 763, 764, 806, 813, 842, Civil Code.)

"Notwithstanding the fact that tile designation of heirs is annulled and that the law recognizes the title of the minor, Escuin y Batac, to one-third of the property of his natural father, as his lawful and general heir, 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 recognteed child is entitled to succeed to the entire estate 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, 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.) (Italics ours.)

The above decision is controlling authority for the proposition that preterition of an heir annuls the institution of heirs only in so far as the legitime of the omitted heir is impaired, and that, therefore, the will is valid with that limitation and no more. The decision and resolution in the instant case which set aside the entire will and divide the estate equally among all the children on the basis of intestacy is contrary to the doctrine of *Escuin vs. Escuin*.

It will be noted that in said case of *Escuin vs. Escuin*, this Court had in mind the intention of the testator, and upheld the will in so far as the natural child's legitime was not curtailed, and this Court did not require that there should be any express mejora or express legacy, as was done in the decision and resolution in the instant case.

In the *Eleazar* case, the testator, Francisco Eleazar, omitted in his will his father, Eusebio Eleazar, disinherited his wife, Eulalia Nagar, and instituted Miguela Eleazar as his universal heir. The father contended that the institution of Miguela Eleazar as universal heir should be annulled and that he, the father, should be entitled to all the estate of the deceased. But this court rejected the father's theory, saying:

"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.

"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." (*Escuin vs. Escuin*, 11 Phil., 332; Arts. 814, 817, and 809, Civil Code.) (Italics ours.)

It will be noted that in the *Eleazar* case, the free half was considered by this court "as a legacy" in favor of Miguela Eleazar although it had not been so expressly designated in the will because the whole estate had been given to her. This is precisely my view in the present case, but the majority now state, deviating from the ruling in the *Eleazar* case, that as the whole property is bequeathed by universal title to the children of the second marriage, "this is inconsistent with the idea of legacy which essentially refers to a specific property bequeathed by a particular or special title."

But the majority tries to distinguish the present case from the two cases above cited, by saying that there is a difference between a case where the whole estate is given to a mere friend, and a case where the whole property is left to one or some forced heirs. This attempt to lay down a distinction fails when it is considered:

- That the law makes no difference between the two kinds of preterition. In both instances of preterition, therefore, on the authority of *Escuin vs. Escuin*, and *Eleazar vs. Eleazar*, the will should be avoided only in part.
- It is true that in the case of a friend, total annulment of the will would entirely deprive him of a share in the

inheritance, and that in the case of some forced heirs being the sole beneficiaries in the will, they would participate equally, with the omitted forced heirs and would not be totally excluded. But in this case, it was the evident intention of the testator to give preference to his children of the second marriage. Moreover, I can not subscribe to the majority's reasoning when it believes that the testator would be presumed to give the entire free third as a legacy to a friend but not to some of his children. If we are to indulge in any presumption at all, it should be that the father would be at least as disposed to give the whole free third as a legacy to some of his children—who are his own flesh and blood—as to a friend.

- Granting for the sake of argument that the basis of such preference was the mistaken belief that the testator had already given the children of the first marriage more than the share given in the will to the children of the second marriage, what solution would be warranted by law? Certainly, not the scrapping of the entire will, because article 814 positively ordains that "mandas" and "mejoras" which are not inofficious shall be valid. It is too far-fetched to assume that had not the testator made a mistake, he would have divided his whole property equally among all his children. What supernatural powers does any court have to divine the inward sentiments of the testator toward each and every one of his children? Indeed, would not a so-called equal distribution produce real and actual inequality on account of the different conditions of the various children in respect to fortune, age, mental capacity, moral character, attitude toward the father, and so forth? This is the very reason why the law allows the testator ample discretion to divide his estate among his children, provided the law on the short legitime is observed, I, for one, am not ready to violate the sanctuary of the testator's conscience, except to safeguard the short legitime. So long as this portion is respected, the testator may dispose of the mejora and the free third in favor of any of his children.

In view of the foregoing, I believe the motion for reconsideration should be granted, and the will should be disregarded only in part, so that the children of both marriages should divide the short legitime equally, but the rest of the estate should go, in equal shares, to the children of the second marriage, in accordance with the intention of the testator expressed in the will.

ABOUT BATAS.ORG

Study smarter at BATAS.org

The Philippine bar review and law-school companion built around how your brain actually remembers.

The complete Philippine law library - free for everyone.

More than 100,000 Supreme Court decisions, Republic Acts, and executive issuances - full-text searchable, browsable by category and year, and always free. No paywall, no login. This PDF came from it.

Audio case-brief lectures.

Any decision becomes a podcast-style lecture - facts, issues, ruling, and doctrine - with read-along highlighting and a hands-free presentation mode. Study while commuting, working out, or resting your eyes.

Bar review built on the science of memory.

Complete, sequenced courses for all eight bar subjects, narrated like podcasts and reinforced with retrieval practice and spaced review - the study techniques with the strongest evidence behind them.

The full law-school curriculum.

One subscription unlocks the entire J.D. curriculum - every subject, every lesson, with your progress tracked down to the paragraph so you can pick up exactly where you left off, on any device.

Mock exams that tell you where you stand.

Timed multiple-choice exams graded instantly, with per-subject score breakdowns and focus suggestions that point you at your weakest topics first.

A study planner that keeps you on pace.

Set your schedule and BATAS tells you every day whether you are on track for bar day - and exactly which lesson to take next.

Start free at <https://batas.org>

The law library is free forever - and your first lesson is one click away.

The text of this document is an official public record and remains in the public domain. Formatting, presentation, and compilation © 2026 batas.org.

Downloaded free from the batas.org Law Library. Share it freely - the library is free for every law student, bar reviewee, and practitioner.