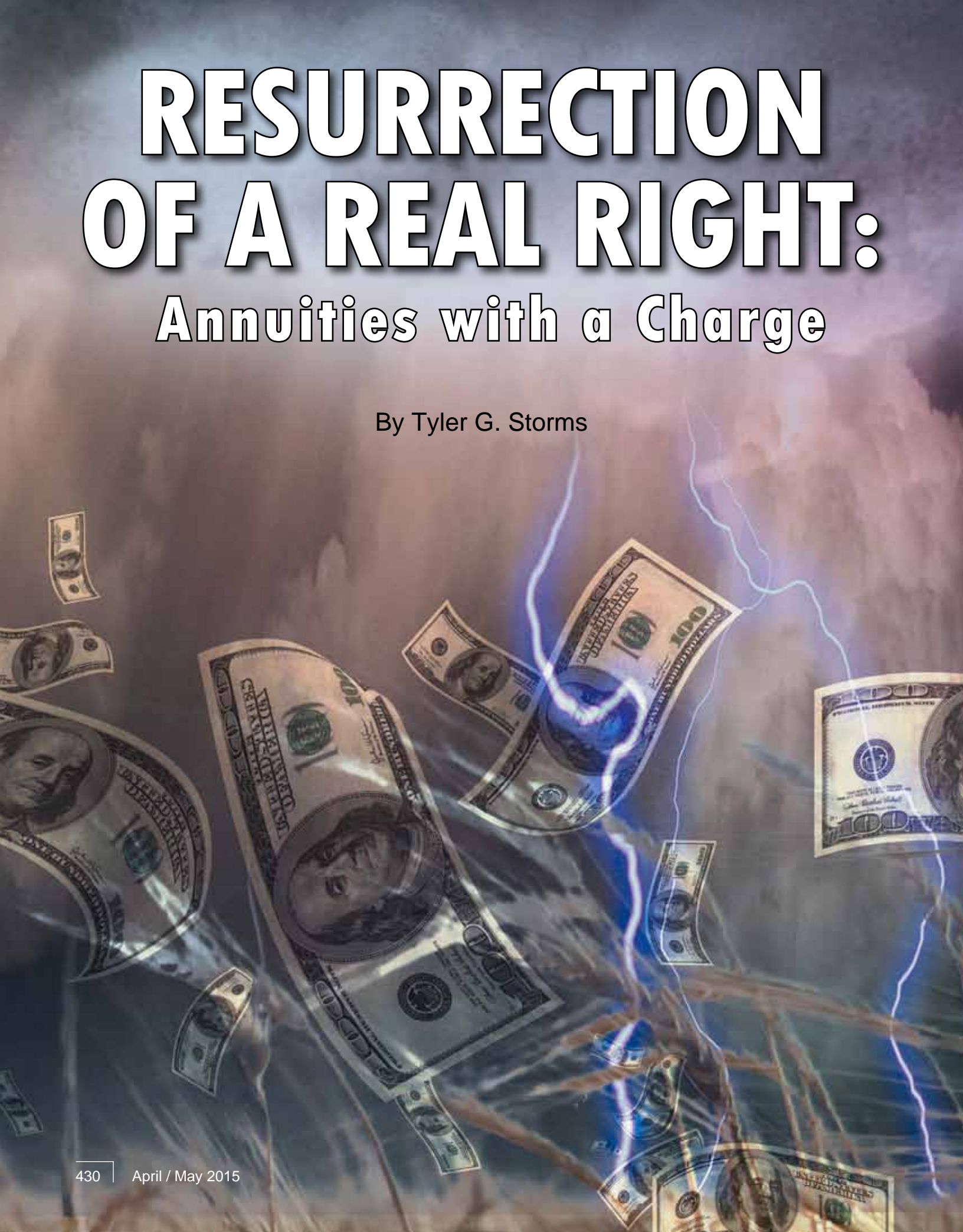


RESURRECTION OF A REAL RIGHT: Annuities with a Charge

By Tyler G. Storms



Thanks to the Louisiana State Law Institute,¹ we now have a workable and modern real right which is available to you as a practitioner. Before analyzing this new right, we should, however, first look back to what it replaced.

Louisiana Civil Code Articles 2778-2800 were, possibly, the section of the Civil Code most direly in need of revision. Prior to the revision² of Book III, Title X, very few lawyers even contemplated, and rarely if ever used, the contract known as “Rent of Lands.” The entire body of jurisprudence regarding “Rent of Lands” is scarce, and there were no reported cases involving “Rent of Lands” in the past 50 years.³

The concept of “Rent of Lands” made sense in a primarily agrarian society in that a party would convey a tract of land but reserve an annual rent to be paid in money or fruits. The charge for the annual payment of money or fruits was perpetual and remained with the land even after a sale.⁴ What distinguished the “Rent of Lands” contract from a lease was the nature of its perpetual charge on the land in question.⁵

The charge on the “Rent of Lands” contract was removed via “redemption.”⁶

The revision at issue concerns the replacement of something antiquated and unused with a modern law that is the first of its kind in the entire civil law world.⁷ The annuity contract secured by the annuity charge provides a tool for the acquisition of income *inter vivos* through periodic payments. The very statutory scheme of the annuity contract itself provides for these types of rights. Parties have contractual freedom to obligate themselves to pay whatever sums they choose. One might imagine a situation where a party obligates himself to pay small amounts of money in an annuity contract based on a relatively healthy and young person’s life; however, an older person who exchanges a highly valuable house might be able to negotiate a rather large periodic payment for the remainder of his life.

The annuity contract considered with the annuity charge can, furthermore, provide an alternative to the reverse mortgage. Louisiana is particularly well positioned to benefit from this type of arrangement because our homestead exemption has made home ownership status relatively easier for people to obtain. The annuity contract, moreover, is much simpler and more elegant than a reverse mortgage. The annuity contract can actually be combined with a retention of the usufruct over the thing exchanged. This would allow the previous homeowner to avoid the risk associated with the possible loss of a home in a reverse mortgage situation.

Many reverse mortgages, furthermore, require that the owner actually live in the house.⁸ The annuity contract does not.

The annuity contract and annuity charge can possibly provide shelter in a bankruptcy filing.⁹ A person filing a petition in bankruptcy may attempt to rely on an exemption contained in state law.¹⁰ Annuity contracts may be claimed as exempted property.¹¹

The annuity contract and annuity charge can, furthermore, provide protection in a medical estate recovery program when dealing with Louisiana long-term Medicaid eligibility.¹² For someone in need of long-term nursing home care, the annuity contract with its annuity charge could help a potential Medicaid beneficiary from

having to spend down countable assets.¹³

Regardless, immovable property that is subject to the annuity charge should be deemed to have been alienated from the beneficiary’s estate. Additionally, there are no cumbersome federal regulations. For example, there is no restriction that the immovable exchanged in an annuity contract be a dwelling. The immovable could be pasture land or a commercial building. The beauty of this revision is that it provides a workable body of suppletive law for annuities in general, and it more importantly allows for an annuity charge over an immovable that functions as a real right.¹⁴

Real Rights

A “real right” is distinguishable from a “personal right.” A “personal” right is the legal power that an obligee has to demand from an obligor in terms of giving, doing or not doing a thing.¹⁵ “Real” rights have to do with ownership — rights that may be declared against the entire world.¹⁶ While it is beyond the scope of this article to provide an analysis that perfectly distinguishes “real” versus “personal” rights, “real” rights confer absolute authority over a thing, such as the right of ownership.

Annuities

Before discussing the annuity charge, which is the true teeth of the revision, it is important to look at the suppletive law regarding the annuity contract itself. “An annuity contract is an agreement by which a party delivers a thing to another who binds himself to make periodic payment to a designated recipient.”¹⁷

The type of “thing” that may be delivered is virtually anything. The only limitation on what could be exchanged would be a restriction against things that are not privately owned — that is, “common things,” such as air or the high seas.¹⁸ The annuity can be for the life of a natural person or for a specified period of time.¹⁹ If no time is stated, an annuity in favor of a natural person is presumed to be for the life of that natural person, but an annuity in favor of a juridical person must be for a specified period of time.²⁰ An annuity in favor of a



juridical person will be ineffective without a specified period of time.²¹

Annuities may be in favor of several natural persons in divided shares or in indivision.²² If the annuity is established in indivision and is based on the lifetimes of natural persons, the amount of the annuity does not change because it inures to the benefit of the survivors.²³

The Annuity Charge

It is important to remember that an annuity may be set up simply by the delivery of “a thing.”²⁴ When the “thing” which has been transferred is an immovable, that immovable property may be transferred subject to an “annuity charge” for the periodic payment due under the annuity contract.²⁵ This annuity charge must be established expressly and in writing.²⁶ The annuity charge is without effect as to third persons unless it is recorded in the conveyance records of the parish in which the immovable is located.²⁷ An annuity charge may not exceed 30 years, unless the charge is for the life of a natural person.²⁸

If the recipient does not receive payment of the amounts due under the annuity contract subject to the annuity charge, he or she may obtain a judgment for the amounts due, and execute that judgment in accordance with law.²⁹ This adjudication extinguishes not only the annuity charge for all amounts for which judgment was rendered, but also extinguishes “all charges and encumbrances on the immovable

inferior to the annuity charge,”³⁰ however, this adjudication does not extinguish the annuity charge for amounts thereafter becoming due under the annuity contract.³¹ This means, in effect, that a buyer of the immovable burdened with an annuity charge will be responsible to continue making future annuity payments after, for example, a sheriff’s sale. If the recipient is the one who buys the immovable subject to the annuity charge, though, the annuity charge is of no further effect because of the principle of confusion.³²

The annuity charge also can serve as an estate planning tool, as an onerous donation. For example, an owner may donate an immovable to a loved one. If the immovable is worth \$1 million, the owner could retain an annuity charge worth \$400,000, reducing the donation to \$600,000. If properly performed and accounted for, the annuity charge could be used to offset what could be subject to the unified gift tax credit.

Conclusion

The revision of the law of annuities, combined with the creation of the annuity charge, can serve the needs of those planning for retirement. Ideally, the annuity charge would, for example, allow an elderly person to sell his home to his child and relocate to a more suitable venue with the benefit of secure income. This contract also provides shrewd investors with a simple way to acquire property without having

to put money down. The possibilities are limitless for the creative practitioner, and this new law stands as a tremendous improvement over the antiquated “Rent of Lands.”

FOOTNOTES

1. Particular recognition goes to A.N. Yiannopoulos, reporter and chair of the Rents and Annuities Committee, which was also the last committee to include the late Saül Litvinoff. In the interest of full disclosure, the author of this article serves on the same committee.

2. La. Acts 2012, No. 258, eff. Jan. 1, 2013, authorized the revision of Book III, Title X, of the Louisiana Civil Code of 1870, “Of Rents and Annuities,” consisting of Articles 2778 to 2800.

3. Bradley Schwab, “The Birth of a Real Right: An Overview and Analysis of the Recent Revision of Book III, Title X of the Civil Code,” 73 La. L. Rev. 821 (2013) (hereinafter, “Schwab”).

4. La. Civ.C. arts. 2780 and 2786 were articles of the Louisiana Civil Code of 1870.

5. *Id.*

6. La. Civ.C. art. 2799 (1870).

7. Schwab at 847.

8. *Id.* at 846.

9. *Id.* at 844-845.

10. 11 U.S.C. § 522(b)(2); *see also*, Schwab at 845.

11. La. R.S. 22:912 B(1); *see also*, Schwab at 845.

12. *Id.* at 846-847.

13. *Id.*

14. A.N. Yiannopoulos, 2 La. Civ. L. Treatise, Property, § 203 (4 ed. 2001).

15. *Id.*

16. *Id.*

17. La. Civ.C. art. 2778.

18. Schwab, fn. 9.

19. La. Civ.C. art. 2781.

20. La. Civ.C. art. 2782.

21. *Id.*

22. La. Civ.C. art. 2785.

23. *Id.*

24. La. Civ.C. art. 2778.

25. La. Civ.C. art. 2787.

26. *Id.*

27. La. Civ.C. art. 2788.

28. La. Civ.C. art. 2790.

29. La. Civ.C. art. 2791.

30. *Id.*

31. *Id.*

32. *See*, comment (c) to La. Civ.C. art. 2791.

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