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What Was Property: The Legal and Social Question in France, 1789-1848.

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My commentary upon the papers of [Donald R.] Kelley and [Bonnie] Smith, as agreed when we planned this session, would take as its base the changes in the notion of patrimony wrought by the Code Civil. Patrimony is not a good legal term in French law--I shall use the more precise terms later on--but it is the best para-legal term to describe the transmission of property *caussa mortis,* which has been the principal subject of my research in recent years.

Legal systems which permit great testamentary freedom in the transmission of the patrimony from one generation usually specify just procedural matters that do not throw great light upon the legal-philosophical nature of property or of possession. But France has always been a land of intestate succession! Not completely so during the old regime, when the southern third of the country utilized Roman law testamentary practices, but in the rest of France then, ruled by scores of customary laws, the law declared who must receive the majority of the property when a person died. Only one--fifth of the immovables--which in those days constituted overwhelmingly the total worth of any estate--could be freely bequeathed by testament.
And since the time of the Code Civil, all successions in France are governed by rules of what is called "forced heirship", which dictate the disposition of the largest part of the estate when their are direct heirs. In effect, only celibates and childless widows or widowers have great testamentary freedom. So, today in France, most successions are accomplished without a testament. In many cases we may assume that the estate is too small to be worth the trouble of a testament; just as often however, if my perceptions are correct, testaments are avoided because the estate is too large to risk making it known publicly--i.e., fiscally.

In any event, if the law--that is, the legislator, the *legislateur* as the French always say, or the general will in an idealistic sense--if the law prescribes the substance of successions, then there must in that implied be some philosophical notions of the relationship between property and society. Thus the Civil Code should provide concrete evidence of how the French at least in one limited respect--succession--have resolved the questions of possession and property which troubled their jurists and legal historians during and after the French revolution as Kelley and Smith have shown us. So, I shall speak about the old and the new of property as patrimony that passes transgenerational and then try to relate them the issues which have concerned Kelley and Smith.

In all the customary laws of prerevolutionary France there was one word used to describe what we would call the patrimony, and in the Code Civil that word is also used to describe a certain kind of property within the family nexus, but now used very differently than before--in some ways in a reverse sense--and revealing one of the major changes in the concept of property wrought by the revolution. That word is *propre*. The common adjectival use of the word in French, as in its equivalent English "proper", when meaning "proper to", conveys the sense of ownership or proprietary right. In French customary law, however, *propres* was used

nominatively, usually in the plural, to designate the bloc of real property, the immovable--*immeubles* in French--with which one or the other spouses had been endowed at the time of marriage by their respective families, or by subsequent gifts to them by relatives. Besides immovables by nature, land and houses, *propres* included immovables by fiction, such as royal offices which were legally transferable by inheritance, and perpetual annuities based on earlier transfers of land or capital sum of money by the family to another family (or perhaps the state), the annual return from which knew no term of years but was indefinite unless or until that land or capital was returned.

These are the *rentes* of the old regime, a very often misunderstood economic instrument, which I mention here only because they were perpetual and thus very important in inheritances. Now, the *propres* owned by the respective spouses--land, houses, royal offices and *rentes*--comprised the bulk, if not the totality, of a new family's property, and they were subject to three restrictions that show they truly were not individual property: 1) the *propres* of each spouse had to be kept separate during the entire course of the marriage, so that if there were no offspring, or if none survived, the *propres* of each spouse would return to the families whence they came; 2) the *propres* were quasi-inalienable in the sense that if they were bartered or sold they had to be replaced in kind; and 3) at least four-fifths of the *propres* had to devolve to direct heirs, whether that occur as lifetime gifts or as inheritance upon death.

Now if you draw the consequences of these restrictions for the theory of property, it is clear that the possessor of the *propres;* the individual spouse, does not have clear proprietorship but rather shares it with his blood relatives. Lineage property is the term I think best describe *propres,* in less legalistic terms than "co-proprietary" between spouse and his blood family, as legal historians do. It is true that the fruits of the respective spouses *propres* fall into the community of goods of the marriage, so that there is a kind of "co-usufructory power" of *propres* by the spouses that goes along with the co-proprietary powers of the spouses with their respective families of origin. Thus one can add to the complexities of ownership between *unrelated* parties in old French law, which provided the challenge for codifiers, as Kelley and Smith have shown--to these we can add an extraordinary complexity of rights to a given piece of property within a given family.

The ultimate beneficiary of *propres* were the direct descendants of the marriage. In the twelfth and thirteenth centuries, when the rules of *propres* were developed, the great danger was the fragility of marriage due to the brevity of lifespan: if there were no children, or if none survived, the families that had endowed the marriage with property would recover exactly what they had given. *Propres* were, then, as much backward as forward looking, in terms of generations. In the early modern period the backward looking aspect of *propres* becomes far less important in law and jurisprudence than the future provisions for children. In the centuries leading up to the revolution one can think more and more of *propres* as property held in trust by one generation for the next, a trust automatically renewed at the moment of passing from one generation to the next. This has led legal historians to declare that as far as real property is concerned, France did not know individual ownership during the ancien regime.

To the jurists of the Revolution, the quasi-inalienable and quasi-entailed character of *propres* made them seem very similar to feudal perpetuities, and so the very concept of *propres* was abolished not long after the famous abolition of feudal proprietorship. When the word

reappears in the Code Civil, then, it is part of the term *bien propre*, property of one spouse which was his or hers alone. There is no shared proprietorship in bien *propres*, not with ones relatives, as in the ancient *propres*, nor with one's spouse. This is, then, property which could be disposed of in "the most absolute way", according to the famous definition of article 544 of the Code Civil.

I do not want to dwell upon *bien propre*, for it is but a small element in the patrimony, simply the property one of the spouses brings into the marriage, or acquires personally during the marriage, which he or she does not choose to let fall into the community. It is illustrative of the Code's new spirit of property, however, to note that *bien propre* differs from ancient *propres* in all respects: it does not have to be kept separate from between the spouses, but can be put voluntarily by the owner into the community; it is not inalienable, but can be disposed of in any way the possessor wishes; and it is not reserved for direct heirs in any quasi-entailment fashion. These are the characteristics of proprietorship in general, and reveal the spirit of individualism, of freedom of disposition, that seems to be unbounded in the Code-- unbounded, that is, until one comes to the sections on transmission of goods *causa mortis*, where it becomes manifest that these freedoms to dispose of property granted to the individual during his lifetime are not allowed at the time of death--that is, by testamentary disposition. In terms of succession, the essential qualities of the old customary regulations regarding necessary devolution of *propres* to heirs are preserved in the Code Civil. Indeed, the Code's regulations are even more expansive in that all kinds of property possessed--personality as well as realty--must go to the direct heirs, save for a certain percentage that can be freely disposed of. The Code Civil's disposable portion is usually more generous than the one-fifth of the old customs, but it never is as much as half of the goods.

Now there were strong advocates among revolutionary and code jurists for the adoption of full testamentary powers, and if they had prevailed then the notion of unqualified property right would have existed, not only during life which was accomplished, but also after death in the last will and testament, and the Roman notions of property would have triumphed completely. But in terms of *causa mortis* succession, the spirit of the customary law prevailed--indeed, the spirit of *propres* in the old law, which is reversed in the use of the word itself in the new law, as *bien propre*, that spirit is reborn in the institution of forced heirship. Indeed, remembering what I remarked about the late ancien regime development of *propres* to promote the cause of children, then the Code Civil is a consommation of that spirit in terms of *causa mortis* succession.

Now, to be sure, all this promotion of direct heir's rights can be violated by the parents during their lifetime if they choose to give away all their worldly goods and leave nothing at death. But the cases of this one reads about are as rare as they are notorious. What bothered 19th-century writers more than profligate parents leaving nothing for their children was the thought of wastrel children waiting around for their parents to die. For another aspect of the Civil Code's forced heirship was that all direct heirs had to receive an equal share. That includes lifetime gifts from the parents, which must be reported back for reckoning along with *causa mortis* inheritances in the grand division of the estate among the heirs. To disinherit a child was a very ugly bit of litigation, rarely done.

Another well known device to advantage certain heirs, widely practiced in Anglo-

American law, is prohibited in the Code Civil: trusts and foundations. The Civil Code thus allows no generation-skipping allowed by inter vivos gifts or by *causa mortis* bequests to grandchildren, for example. Every generation must have the free use of the patrimony during the years of its existence.

If I were to try now quickly to declare what these peculiarities of Civil Code succession mean for the theory of property and possession as discussed by Kelley and Smith, it should be made clear at the outset that I am only concerned with intra-familial relations, which is a very special matter. But within this sphere I would say that, in modern French law, whoever has a direct heir--or really now, whoever is married or has had an illegitimate child, for surviving spouses and illegitimate children now enjoy the privileges which the Code originally gave only direct descendants born in wedlock--whoever then is married or been a parent in or out of wedlock that is to say, almost every adult French person, has a kind of tacit co-proprietorship with spouse and children, but an absolute usufructory power during his or her lifetime, according to which the property can be diminished or totally alienated to the detriment of the others. Usually of course, the estate is augmented during the lifetime. In medieval times proprietary right was shared with the extended family whence the *propres* originated; in modern law proprietorship centers exclusively upon the nuclear family, two generations only at a time. The prohibitions against generation skipping needs to be stressed, since it puts an absolute time limit on the forging of trans-generational links. To change the metaphor, it moves into the future only by baby steps. During the old regime, the concept of propres was that of an unending string of generations reaching backwards and forwards so that the very lineage itself, and no specific generation seemed to possess the property. Now it is just the parents and children, constantly renewed.

The co-proprietorship of parents and children in modern French successions is most decisively revealed in one phenomenon I have not yet even mentioned: the right of possession of the estate at the moment of death. Here the Code Civil preserves almost unaltered the principle of old customary law that the heirs have instantaneous *saisine.* It was in the 16th century, it seems, that the word *saisine* became restricted to heirs instantaneous possession, while the cognate *saisine* was used for all the other forms of seizin. While the French were limiting *saisine* to succession to immovables, the English were eliminating *seizin*, its original verbal equivalent, from succession to realty and instead developed the system of administrators and executors who needed sanction by judicial authority--probate, to be brief. France still has none, no form of probate if the heirs are on the spot and ready to enter the house. The direct heirs lay their hands on the property before anyone. The judiciary need never be involved. It will be if there is a testament which specifies an executor who is not an heir, and that executor has to get an instrument to allow him to intervene. But the heirs still have *saisine* before such an executor; he, like the fisc, must wait until the heirs declare what the state is. The possibilities for *fraude* in these circumstances are obvious, and some of you may have heard the amusing stories about this I had in my paper given two years ago at the Boston meeting of this society on "notaries, *saisine* and family secrets".

The heirs' *saisine* provides a perfect instance of possession as both fact and right, the right emanating from the corolary principle of forced heirship. Forced heirship and *saisine* compliment each other. They are both very Germanic in origin character, continuing old regime ***coutumier*** principles for this day. Kelley and Smith have both indicated that where the law, i.e.,

the Civil Code, prescribed property in possessory terms, the judicial and legal professions would suffer status, if not business. (I was reminded in this respect of lawyers who predict a legal depression in measure as states legislate no-fault car insurance). In terms of property succession within the family, the code's heavy prescriptions about forced heirship, and toleration of heir's *saisine,* has virtually excluded avocats from involvement. Everything is handled by notaries, who are the trusted family counselors.

Asking myself to make a grand statement about what the Civil Code's practices of succession tell us about the theory of property, I have come
up with the following: absolute right of property, the *individualisme* of the Code, really a cryptic nuclear-family co-possessory action, tacit during the parents' lifetime and manifest at the moment of their death when the heirs have *saisine*.

It is above all *saisine* that supports my thesis, and French *saisine* is unique, if I am not mistaken. All the nations that adopted or copied the Napoleonic code have since modified *saisine* in the direction of probate actions. That the French preserve it purely makes me believe that they preserve a sense of famial proprietorship--now nuclear, or almost atomic, rather than extended--as no other developed society of the world does.

[N.B. The original of this commentary is in hanging folder for "Saisine", along with the papers of Don Kelley and Bonnie Smith.]