Legal Dogma and Actual Practice of Estate Succession in France

(Lecture by Ralph E. Giesey at American Society for Legal History, Oct. 1984)

Asked once whether he was the heir of the monarchy or of the revolution, Napoleon is said to have replied: "From Clovis to the Committee of Public Safety, I embrace it all." He might have cited as evidence of this his greatest legislative achievement, the Code Civil of 1804. The Code revivified much old-regime jurisprudence, both customary and Roman, that had been overthrown during the revolution, but at the same time it maintained pronounced features of revolutionary legislation (*droit intermédiaire*). Legal historians agree fairly well on specific correspondences between the Civil Code and pre-revolutionary laws, but they still argue whether the Code's spiritual values reneged on revolutionary efforts to fulfil enlightenment ideals or just mitigated the excessive zeal of revolutionary efforts to break with the feudal past.

From the records of revolutionary debates and meetings of the preparatory commission of the Code Civil we have a quite clear notion of the legislators' intentions--at least of their professed intentions--to modify successoral practices. The first part of this essay will sketch out those intentions. The second part will deal with three schools of thought on how the French family was affected by the provisions of the Code during the first hundred years of its existence: first school, that those provisions were accomplishing just what the framers intended them to, but with disastrous results; a second that they were accomplishing quite the reverse of what the framers intended, but with equally evil results; the third that the Code's provisions were perfectly in tune with the true French spirit and hadn't done that badly at all. In the third part, then, I will suggest some ways that the hidden hand of historical change--economic, demographic, and political--was operating already in the nineteenth century to make the Code's succes-soral laws affect the French family in ways that contemporaries did not--probably could not have--known. My overall goal is to illuminate the interplay between legal history and social history, a process I see filled with accident and irony.

Part 1. Revolutionary Legislation

Some legal historians are wont to use the single word *individualisme*, referring to freedom in managing real property assets, to characterize the basic change wrought in the laws of succession during the revolution and preserved in the Civil Code. Most legal historians, however, point instead to *partage forcé*, the "forced sharing" of descendants as the most radical new departure. *Individualisme* and *partage forcé* are, in my view of things, a balanced pair. The first operates therapeutically to cure the old regime's restrictions upon an individual's right to sell or otherwise exploit real property that had been inherited from ascendants. The second operates prophylactically to prevent individuals from transferring more than a specified small portion of the property they own, inherited or earned, to anyone other than family heirs. Individualism thus looks to curing past evils, forced division to preventing future ones.

The revolutionaries were bent on destroying feudal privilege, the main legal arm of which was primogeniture. The nobles themselves renounced their titles in a dramatic act of self-abnegation early in the revolution, and revolutionary legislators gave this substance soon afterwards by an enactment which made fiefs, in effect, into allods, to which all heirs should succeed without distinction, the way commoners' had done in most of France -- i.e., wherever

customary law prevailed--from time immemorial. Immediately upon the passage of this law, noble families hurried to protect the integrity of their estates by using inter vivos devices still on the books to advantage eldest sons, such as instituting them as favored heirs (typically Roman) or giving them the feudal estate as a lifetime gift (typically customary). Such actions by the nobles proved to the revolutionaries that they had been correct in their initial action against the rights of eldest sons. In order to plug the loopholes that still existed, new legislation of 1791 was enacted providing that 1) property (including lifetime gifts) must be divided equally among children of both sexes, and 2) the amount of property that could be disposed of by testament was severely limited. As codified later, in 1804, the *réserve*--the portion of the patrimony that had to be reserved for the heirs, and divided among them equally--was one-half if one child, two-thirds if two children, three-fourths if three, four-fifths if four, and so on. This is the essence of *partage forcé*, forced division of the heritage.

Within the world of commoners however, one also found in pre-revolutionary law a legal category of real property that smacked of entail; *propres,* the term which today means personal property but in olden days meant lineage property. *Propres* was real property acquired by children from their parents at the time of marriage, by gifts later on, or as an inheritance. Such property could not be alienated (or, if disposed of, had to be replaced in kind) because it had to be passed on to descendants. In the patrimony of a wealthy commoner, *propres* could function as a fief did among nobles. Indeed, revolutionary jurists considered *propres* to have originated as an offshoot of the fief, and early on they outlawed the very notion of *propres.* Ancestral property became the same as other property--and, as we just saw, all property was subject to equal division and limited testamentary disposition. By this device the revolutionaries hoped over time to fractionalize great riches among commoners in pace with the breakup of formerly noble estates.

During the old regime fiefs and *propres* had functioned as kinds of collective or lineage property that successive generations held, in effect, just in usufruct. Removing this inhibition -- in effect, removing the trait of inalienability -- freed the individual to put ancestral real property on the marketplace, whence the often said characterization of new laws as promoting *individualisme*. By the time all the new laws of succession were in place, however, there had been created a strong set of "descendants' lineage rights". That is to say, children had the right to inherit most of what there was to be inherited. Only if parents dissipated the entire patrimony could the children fail to inherit it. Such eventualities in the stratum of the superrich were devoutly hoped for by the revolutionary foes of inequality. This is the bais of the other main characterization of new laws, "enforced division of the heritage" (*partage forcé*).

Much of the debate leading to the laws just summarized was focused upon the right of testamentary freedom *per se*. Many revolutionary legislators were set against any testamentary freedom whatever, but they finally settled for limiting the freedom of disposition to ten percent. This *quotité disponible,* the amount of the patrimony that could go to non-heirs, included lifetime gifts as well as testamentary legacies. In the Code Civil the "disposable portion" as limited to fifty percent if there were just one child, one-third if two, one quarter if three or more--that is, the reverse of what revolutionary legislators had established as the heirs' guaranteed percentage, except that now the fractionalizing ended at the three quarter level. This included all property, moveable and immovable. Lifetime gifts to children had to be returned, fictively, to

calculate their equal shares in the potlatch (*rapport*) carried out when the parents died. Moreover, in order to be sure that each child got an equal share of real property -- for that was considered the heart of every patrimony -- it was specified that each child receive an equal amount of each kind of property. The principle of "equal division in kind" created frightful juridical problems during the nineteenth century: ownership of houses divided up among co-heirs (one of whom might declare exasperatedly that he owned "la moitié d'une porte"); land plots parceled out; sale by auction (*licitation*) of heirlooms, and so forth. Some problems of this kind promoted by the Code still plague French jurisprudence today, but they are beyond our concern here.

Since the Code requires that half or more of an estate be transmitted by rules of intestacy, all of France since the revolution has been what northern France had always been, a land of predominantly intestate succession. It happens that France's Civil Code specifies the heirs' reserved portion in terms almost identical to those of Rome's *Corpus Iuris Civilis*, where *Novel 118* provides just what shares the heirs should get if the parents leave no testament. This is an oddity, for in the land of Roman law one never died without a testament unless he were a complete fool or a victim of fateful circumstances. This is illustrated beyond need for a gloss by a story told in the Midi during the old regime concerning a man who died in an accident (perhaps on the way to visit his notary), a story that finishes with these words: "Il est mort sans sacrament, et sans testament, sans testament, sans testament!" It was, therefore, the south of France that suffered the greatest affront by the Code's provisions: the very laws of Roman intestacy that for centuries had been assiduously avoided were made mandatory for succession of up to three-quarters of the patrimony.

Gone was the paterfamilial power to advantage one child by making him the "instituted heir" who got most of the patrimony while other children got lesser shares known as the *légitime*. Most revolutionary legislators from the Midi deplored the paterfamilial power inherent in the Roman Law system of instituting a major heir by testament. They claimed that it functioned little differently from feudal primogeniture as a way to disadvantage cadet children; a few from the south, however, pointed out the advantage paterfamilial power gave parents in terms of commanding respect from all the children, whose life chances were dependent upon their place in the parent's testament. Under the old system it was not foreordained who would be named instituted heir (it did not have to be the eldest son), nor specified how much the other children might hope to get (if dutiful) beyond their minimum *légitime*. In other words, those revolutionary legislators who opposed paterfamilial power pointed to the suffering it brought to cadet children when the parents died, while those who supported paterfamilial power pointed to the suffering from childrens' unruliness it spared the parents while they were alive.

To sum up this first part, we can say that the legislation of 1804 reserved the spirit of old customary law (*coutumier*) by virtually mandating intestacy and equal division among children, although the Code accomplished this by using the letter of an unused article of Roman law. The revolutionary trick was to replace the old entail-like restrictions upon real property gained from ascendants by new restrictions on the right to dispose of one's property to descendants.

2. The French *Code Civil*

The few warnings against subverting paterfamilial power that were raised during the revolution were echoed later in the debates of the preparatory commission, but they proved to be of little avail in the final legislation of 1804. The codification of anti-testamentary principles did not, however, end the debate over the matter. Many French agreed with what the Englishman Lord Castelreagh is reported to have said at the Congress of Vienna, in 1815, "it's not necessary to destroy France, the Code Civil has undertaken the job," by which he announced his belief that debilitating testamentary power and mandating equal division of estates among heirs would break up great patrimonies and undermine the social base of the nation -- that social basis being, of course, great families (such as his own) in England.

France found its own] immortal champion of the pro-testament movement around the middle of the century in the person of Frederic Le Play, an internationally renowned engineer turned social reformer. Le Play was the prototypical "social engineer" with fixed ideas of the functional relationship between a well-ordered family and a well-ordered society. My favorite theme out of *Réforme Sociale,* the periodical voice of his movement, is the paean sung to the testamentary powers enjoyed by the English. It makes a fine analogue, though probably not consciously meant to be so, to Castelreagh's statement. The whole British Empire, the story goes, was built on the efforts of cadet sons of great families, who, knowing that they would not get by inheritance the wherewithal to live as adults in the style they had been raised as children, went out into the world to make their own fortune. Contrast this with the (canard one finds told about) ungrateful children of the wealthy French whiling away their lives in the cafes on the *Boulevard des Italiens* until their parents died and they inherited their full and equal share of the patrimony as required by law. France's whole failure in empire-building could be tied in with its failure to produce disadvantaged cadets, and the Code Civil was to blame for having sapped paterfamilial authority by reducing the freedom of testamentary disposition to a paltry status.

The *Boulévard des Italiens* scenario would have meaning only for sons of the well-to-do. Le Play and and his followers believed that a complementary kind of evil was being wrought on small patrimonies by the law of equal partition: none of the heirs ended up with a viable estate. This was a much more serious matter in the minds of virtuous citizens than the fate of wastrel offspring of the well-to-do. Indeed, it was an issue that attracted attention throughout Europe, for many governments faced the issue of sustaining viable peasant households. The flaw in Le Play's argument was not revealed until after his death, and it is, as we shall see later, most instructive for social historians.

In sum, Le Play's principles have as their premise that the goals of revolutionary legislation were being achieved, but with disastrous results. Paterfamilial power was being ruined; the cadet sons so much pitied by the revolutionaries had become n'er do wells; and the estates of poor peasants were being obliterated.

I have chosen as a counterpoise to Le Play the eminent Marxist philosopher and political leader, Jean Jaurès, who wrote a series of connected essays on *Propriété individuelle* in th e year 1901. Jaurès does not set forth a communist position explicitly, but couches his arguments in the form of a reply to the "radical" party, his rivals, who were vying for bourgeois support by instilling fear that the right to private property would be abolished by the communists. Jaurés ridiculed the idea that the French people actually possessed the kind of free proprietary rights

they thought they did. His arguments rested on the provisions of the Code Civil, above all on its articles devoted to the laws of succession. As was his wont, he also reviewed the question historically, including a separate essay on La *Révolution Française* et le *Droit Successoral.*

It comes as a shock to hear in Jaurès clear echoes of Le Play: indolent children getting full shares of the patrimony; poor peasants unable to maintain the integrity of an estate by passing it to just one child. He even mentions, with disarming sympathy, industrialists whose enterprises suffered by not being kept intact in the hands of the single most capable heir. These things made it clear to Jaurès that the eloquent revolutionary talk about, and the subsequent Code articulation of *propriété individuelle* was very deceptive. True, individual owners are now free to sell ancestral property; true, all real property can be converted into fluid wealth by the individual owner and used by him to satisfy personal whims or to invest wisely; not true, however, that the individual has free power to *dispose* of everything he owns. Jaurès works up his own scenarios, to match Le Play's, to show how farcical the idea of individual property can become in the workings of the law.

Jaurès' greatest sarcasm is saved for the Code's provisions concerning lifetime gifts, especially the restrictions placed upon gifts to non-heirs. The problem lies in calculating the"disposable portion", the percentage of an estate that the deceased can give to non-heirs. Let us say that the deceased has three or more children. They must receive three quarters of the estate, leaving the deceased free to give to others only one quarter. But this "disposable portion" means not just one-quarter of what is still possessed at the moment of death, but one quarter of all the goods the deceased had ever possessed during his lifetime." If the deceased should have made a testament bequeathing gifts to non-heirs and not have made any such gifts *inter vivos*, the question of whether he had stayed within the "disposable portion" is easily calculated. But most successions are intestate, so that the disposable portion must be calculated by recalling, fictively, all the gifts to non-heirs made by the deceased when alive. If there were such lifetime gifts to non-heirs and they added up to more than one-fourth of the total value of the "lifetime estate", as it might be called, they had to be returned to the estate, in the reverse order in which they had been given, until the sum recovered was reduced to one-quarter the total estate's value. And if decades-old gifts that were recalled in this fashion had passed from the donee to a third party, that third party had to make good the value of the gift. Or imagine a very rich man who had made liberal gifts to friends early in his life--always careful to stay within the limits of his disposible portion--dying broke because of bad business ventures: all the lifetime gifts to friends, each in its entirety, would have to be returned to be distributed to the heirs. (Cf. p. 396)

The Code is very explicit on all this, and Jean Jaurès left no article in it unturned in order to prove his point that so-called individual proprietorship was a farce. True *propriété individuelle* meant the full right of disposition of property, while alive and upon death, by gifts and by legacies. In France the fact it, disposition of an individual's property is controlled largely by decisions of the state, as found in the law.

Jaurès concedes that revolutionary legislators aimed these laws at feudal and nobiliary holdings, but the effect was only to create a new stratum of entailed wealth among the bourgeoisie. For, after declaring all forms of property fluid in the hands of the owner, forced heir-ship placed an "eternal mortgage" ("une hypothèque éternelle", p. 385) upon that wealth in

favor of descendants. The revolution was zealous to create "the guarantee of a preexistent right of children born to the wealthy classes" ("la garantie du droit préexistant de l'enfant des classes possédantes", p. 389.) That is the great evil of the Code, for which, of course, Jaurès had a remedy. Let every child born of the national community have a preexistent right to the social patrimony of the nation. What Jaurès meant by "social patrimony" is something that revolutionaries of the 1790s could scarcely have considered, for it was then virtually nonexistent: ownership of the means of production (p. 400).

In sum, as much as Jaurès concedes Le Play's criticism and maintains Le Play's tone of reprobation about the Code's laws of succession, his reasoning and Le Play's end in almost opposite conclusions: Le Play's that those laws tended to ruin the morale fabric of well-off French families and render non-viable the patrimonies of poor ones; Jaurès's that those laws worked to make ordinary French families servile by establishing the progeny of very wealthy families as a transgenerational elite that was not less exploitive than the feudal class had once been.

My last witness on the Code's performance wrote on the occasion of the Code's hundredth birthday, in 1904. He is Ambroise Colin, a scholar of the law asked to write a chapter on the laws of succession in a collaborative work that commemorated the Code in all its rubrics. Colin confessed some flaws (mostly procedural) in the successoral laws, but he rebuked all the standard criticisms he knew about. (Not Jaurès', but he may well not have known of them.) For instance, some claimed that the declining birthrate in France was to be blamed upon the *partage forcé*, upon the assumption that families had fewer children in order to lessen the morcellization of the patrimony. "L'Ancien régime faisait des fils aînes, le nouveau régime fait des fils uniques" was the bon mot of this group. (Colin, p.314.) But, Colin pointed out, Belgium had adopted the Napoleonic laws of succession and it had a fast- rising population. Again: limiting testamentary power promoted two related evils, on one hand creating wastrel heirs who lacked initiative and on the other imposing a "permanent state of liquidation" upon otherwise stable family enterprises, commercial and agricultural. But Spain and Italy, although borrowers of the Napoleonic Code at large, had preserved greater testamentary power but were suffering much greater economic depression than was France. And again: Frenchmen were said to be frustrated by the paltry size of the disposable portion allowed by law. If that is so, why do we find so very few French ever availing themselves of the *quotité disponible* such as it is, which can be as high as fifty percent? (Colin p. 312)

Colin gives Le Play's plaints about the "morcellizing of the land" (*Morcellement du sol*) considerable attention. For one thing, Colin says, that phenomenon cannot be said to be the Code's fault alone, for one finds it despaired about by the Physiocrats long before the rigors of revolutionary *partage forcé* became law. As for the remedy Le Play proposed, greater testamentary freedom, one only has to read the learned work of Dr. A. de Brandt, a German who traveled through France in the early 1890s and asked the proprietors of tiny estates how they managed to keep them intact without having a legal means to advantage one heir. Simple enough: the children simply agreed, or were brought up to understand, that a certain one of them alone would inherit the family lands. The rest went off to the city, or made their was in life by finding employment in some other place. If no heir raised an objection at the time the estate was settled, the law of *partage forcé* was a dead letter. It was enforced by the courts only upon the

request of an heir who might benefit from it.

Ambroise Colin was convinced in 1901 that equal division of the patrimony among direct heirs was eternally dear to the hearts of the French before, during, and since the revolution--all the nay-sayers notwithstanding. The research of recent years tends to bear him out. Aside from the nobility, where primogenitary succession was mandatory, and succession to hereditable royal offices, which (something like the fief) had to be transmitted whole, well-off French families during early modern times tended to divide patrimonies among their children equally. This "revolutionary" principle is in fact traditional.

3. The Hidden Hand of Historical Change

It was a common saying in old regime jurisprudence that *res mobilis, res vilis*--movable property is a vile (lowly) thing. *Meubles* could be transferred freely by testament. However great the rise in value during late pre-revolutionary times of a whole range of "movables", from new instruments of capital to objets d'art, all movables remained "lowly" in the customary laws of the old regime by dint of being exempt from the strictures imposed on succession to *immeubles,*, realty which alone constituted ancestral *propres*.

Revolutionary laws of property changed this situation quite drastically. When the distinctions of ancestral (lineage) kinds of property were abolished, so that the owner could sell them and change their status into the most fluid form of "movable", money (the essence of the new "individualism"), then all possessions could be viewed in old terminology as potentially "vile". For purposes of inheritance, no distinctions between kinds of property was allowed. Article 732 of the Code declares: "*La loi ne considère ni la nature ni l'origine des biens pour en règler la succession*." Now you can consider this to mean that everything was vile, since the family house was not to be distinguished from kitchenware in calculating the *successorale masse*. On the other hand the new rules of "forced heir-ship" included both movable and immovable property in the half to three-fourths of the "descendant lineage property" which had to go to heirs, so that the kitchenware is entailed and joins the family house in the class of what used to be known as *res nobilis.* Let us say, and be done with it, that as far as the owner's right of marketing goods was concerned, nothing anymore was noble; as far as his right to dispose of his goods by gifts or legacies, nothing was vile.

Of these two situations, the first has by far the greater consequence. Freeing the owner to use ancestral property in whatever way he chose was exactly what the French nation needed as it entered the period of capitalistic expansion. Jaurès stressed the locking of wealth into "possessing families" by dint of forced heir-ship; he might have pondered, too, the issue of how the free lifetime use of all the family's wealth had promoted the growth of industrial "means of production"--the very instruments that would make the proletariat free at last, if it could get control of them. I hesitate to declare outright a causal connection between freeing patrimonies and the growth of capitalistic ventures, although I can give you some bibliography of modern economic historians who argue that, considering the vast wealth that existed in France during the old regime, the entailing of ancestral property worked to retard industrial development.

But why didn't equal division work to break up the estates? The revolutionaries were

quite correct in believing that the greatness of noble and plutocratic families was supported in legal terms by feudal primogeniture and other forms of lineage property that preserved the integrity of the patrimony. It was not illogical to assume that the removal of these legal props would work, over the generations, to break up the aristocratic and plutocratic elite. The revolutionaries were wrong in this calculation, I venture to suggest, because they had simple-minded notions of what real riches amounted to. They believed that very large estates were not different from very small ones. Division into three parts of an estate known to be able to support just one household would be disastrous. Division into three parts of a reasonably large estate would push it in the direction of becoming three marginal ones, and further multliple successions would finish off the process. Not so with very large estates, however. Dividing one very large estate into three parts leaves you with three large estates, each of them still having means beyond the families needs, blessed by the rule "riches beget riches"--in that state, that is to say, where take-off to really great wealth is possible.

The revolutionaries efforts to help disadvantaged cadet children thus had differing results. One-household estates were not divided, as Dr. Brandt has shown. For small to medium-large estates the new laws brought cadets equal shares, but their holdings were of only modest size; for very large estates the new laws brought cadet children the wherewithal to build their own fortunes. The logic of mediocre patrimonies does not apply to giant ones. This is, of course, much truer of the post-revolutionary world, where all wealth was by law fluid in the hands of the owner and theopportunity for capitalistic ventures was greatly expanded, than of the old regime where wealth was measured above all by land and houses. This, then, is the first of my historical ironies: the legal tactics contrived to break up great estates according to the old notions of property were conducive to building great fortunes in the emergent capitalistic economy.

The second quirk of history that dissipated the force of revolutionary intentions and Code regulations regarding patrimonies is demographic: longevity. At the time of the revolution, the average lifespan was forty years. In the middle of the 19th century it began to climb until it has reached almost twice that today. When parents' average lifespan was fifty, children would find themselves dividing the patrimony as soon as they reached majority--indeed, more often when they were still minors. For simplicity's sake, I shall assume the old lifespan to have been fifty (the well-to-do, who are our subject, tended to live longer anyway), and children to have been born when the parents were twenty five. On the average, then, the parents would die just when their children were beginning to form their own families. Each generation, therefore, would
have the full use of the patrimony during the most productive years of life.

When, however, parents began to live into their sixties and seventies, their children had to establish their own households and raise their families largely without benefit of the whole patrimony. In these circumstances lifetime gifts to heirs become a much more important device to help children when they need it most, in young adulthood. I shall return to this question in a minute, if only to speculate how complicated family strategies must be today in light of vagaries in forensic interpretions of the Code's dogma concerning gifts. Suffice to say that in recent times the bulk of the patrimony is transmitted only when the parents die, so that it serves the children's needs only when the prime of their adult life has already half (or more) gone by--mostly, that is, during own retirement years.

In these circumstances the aim of the revolutionary legislators, sanctified by the framers of the Code, is made obsolete. They saw new households lbeing formed at just the age of life when inheritances were received, so that patrimonies were nurtured by full patrimonial inheritnce from the beginning. It was quite logical, therefore, to effect the break-up of concentrated patrimonies by denying to any one child, such as the eldest son, an advantaged position in the inheritance. So, the new principle of equality of heir-ship would bring an immediate dividing up of the concentrated estate. But this demographic premise of "forced heir-ship" changed from the
mid-nineteenth century onwards, and the socio-economic impact that principle was supposed to have was attenuated. Adult children had to form new families on their own, advantaged by their parents less in direct material terms as in the past than indirectly in such things as quality of domestic environment, education, and social connections.

In these circumstances, wastrel heirs would have to live the better part of their lives in po verty before they came into their inheritance. Restoring testamentary freedom, as Le Play urged, would not mean a revival of old time paterfamilial power over children by holding them under the threat of getting just a pittance for inheritance: in the new order of things, children seldom get the major part of their inheritance much before they achieve the status of senior citizens. So much for Le Play's program of social reform, though he may be excused for not knowing about the demographical changes that undermined his argument. He believed the Code was working as its framers had planned, and he hated it. But even as he battled to reverse the Code's laws of succession, longevity was vitiating a basic premise upon which those laws, and the evils Le Play saw in them, was predicated.

If we were to pursue the consequences of longevity into the realm of the sociology of law, we would have to consider to what degree the rise of state-sponsered social services in the last half century and more were quickened by the need to fill the gap in young families' needs as patrimonial support came to them later and later in life. This is not, however, the place to pursue that subject, although I must say that I do not recall having seen any discussion of it commensurate to the importance I think it has for modern social history, in the reading I've done on patrimony and inheritance in modern France.

The final twist of fate that has affected inheritance practices in modern France, the most important one in my estimation, is not substantive but procedural. Earlier on I mentioned how Dr. Brandt's field work showed that it was not uncommon for all the heirs but one to forego their right to an equal share, so that a given small patrimony could be kept intact; if none of the heirs appealed this arrangement to the courts, the Code's principle of equal shares could be flagrantly violated. The fact is, heirs still today can make any division of the estate they chose as long as none of them appeals to the court to enforce the law of equal division. Simply put, there is no necessary probate action in French successions as in Anglo-American common law. The heirs themselves--those family relations, descendants in most cases, that the Code takes such care to specify as having the right to inherit most of the estate--also have instantaneous and full possession of the entire estate the moment the *de* cujus dies. In French law this is known as *saisine,* a term of medieval origin, originally the same as "seizin", now reserved in France for successions.

Seven years ago, at the meeting of this society in Boston, *saisine* was the pivotal legal factor in a paper I gave on "Notaries, Family Secrets and *Fraude* in Modern France." The story then was how French families regularly conceal what can be concealed of the things they inherit in order to keep down estate taxes. The government is not presented with an inventory of the estate, declaring who has got what, until months after the death of the *de cujus*. The heirs make up that inventory, with the help of the family notary. The notary usually knows that things have been withheld from the inventory. None of the six notaries i interviewed while preparing that essay denied knowing in general terms that *fraude* does take place, though the rules of their profession calls for them to be blind, deaf and mute when the heirs are dividing up the concealables. The notaries advise on provisions of the law, and arbitrate (if called upon) the division of real property which, since it requires a notarized title of ownership, has to be listed on the inventory. The heirs must at all cost agree upon the division of the estate before making the inventory; otherwise, all the gains they stand to make by escaping taxes on things they can conceal--gold and bearer bonds the classic items, but objets d'art increasingly important in recent times--will be lost if any one of the heirs is dissatisfied and appeals to the court. In that case, something like an Anglo-American probate action does take place, and the complaints of the disaffected heir are likely to reveal to the world the entirety of the estate involved.

It needs to be stressed that *fraude* in French estate taxes is not a felony as is "fraud" in our law. It is a little white lie, not telling tile whole truth, and if you're caught you simply have to pay up on what you've hidden. This is a national sport, universally practiced in France, and opprobrium. Code carried over the principle of *saisine* from old customary laws. There were no estate taxes then, no inventory necessary, and no fraud -- just keeping family secrets, a most venerable principle in France. When estate taxes came into existence late in the nineteenth century (reaching sizeable proportions just before and during World War I) the element of self interest was added to that of preserving family secrets: the state had to be resisted in its effort to become an heir of sorts. As I concluded in that paper seven years ago, the appearance of estate taxes created a community of self-interest among heirs, a necessary corporate unity, that cancelled out Le Play's and many others' claims that the Code's laws of succession were demoralizing to French families.

Here is how a middle class family succession takes place in France today, based on a few instances related to me by French friends, who assure me they are typical. Serious talk begins when the children reach adulthood. The critical issue is real property, things that must be in the official inventory. The parents always have in mind a likely division of the realty, and the final division of it when they die is usually a long-established consensus. There may have to be a solemn meeting of all the heirs with the parents, late in the parents' life, to exert pressures upon individuals to accept arrangements that are not really to their liking, such as forcing unmarried heirs with lucrative professional incomes to allow their married siblings to get larger shares of the realty.

Lifetime gifts to heirs have become very important for new families,as said earlier, and according to the law they must be reckoned in the final division, of course. Until I read John Dawson's Gifts and Promises I believed that lifetime advantaging of heirs was a very clear matter in the law and in the minds of those affected by it, in *dogmatique* as in *pratique.* The Code requires that all lifetime gifts, to heirs and non-heirs, be notarized. The value of the

"lifetime estate" upon which the disposable portion is calculated must take into account gifts to non-heirs, else Jean Jaur6s scenario makes no sense whatever. Lifetime gifts to heirs must be kept track of in order to reckon equal shares. But the facts are, as Dawson has shown, that notarizing of gifts was virtually abandoned starting in the early nineteenth century, while the Code's strict definition of gifts has been so obfuscated by juridical decisions during the past century or more that parents would seem to be able to dispose of their property far more freely than the Code would allow them to.

We may dispose out of hand with the problem of gifts to non-heirs. The history of litigation in France shows that the Code's elaborate provisions in this matter are very rarely called into force. Common sense tells us that instances of parents depriving their heirs of their legal inheritance must be very rare. The real question is the possibility of preferential treatment of heirs. Jaurès' scenario is respect to lifetime gifts to non-heirs is a fantasy.

From this point of view it would seem that the parents have regained a good measure of the paterfamilial power Le Play so lamented having been lost. (Perhaps we should say pater-mater-familial power, considering the improved status of surviving spouses in recent French legislation.) Longer lifespans means a longer period of controlling the patrimony, and the parlous state of gifts in the law would seem to allow great flexibility in disposing of that patrimony. It is certainly true that parents have ways of providing a given child with income from parentally-owned property that are not called gifts in the law. Are there now truly preferred heirs, advantaged by *de facto* gifts by the parents of what are de iure non-gifts? Or do parents observe the same rules of equality in these non-gifts ("disguised gifts" is one term used) that the heirs are able to impose upon each other in the final estate settlement? The answers to these questions will remain family secrets, the domain of the parents along with the children while the parents live, of the children alone when the parents die, as long as the courts are excluded from the process of actual estate transfers.

Some years ago in a paper on succession I reported that the French revenue service has more or less given up on trying to prevent *fraude* in successions. After a century of valiant but vain effort to identify the size and destiny of the estate of a deceased person the government has begun to concentrate upon discovery of unreported income of living persons. It watches what is called "*le train de vie*" of individuals over the years, concentrating on titled property and whatever other objects can literally be seen (second houses, yachts, etc.) that indicate the level of wealth. Sudden rises have to be accounted for by the individual, or taxes are levied on the presumed unreported income. Among very rich families, at least, the source of such hidden income is presumed to be patrimonial transfers. This is not the arena in which revolutionaries and Code framers thought the duel between the law and the family would be waged, but one created since their legislation by the changing nature of wealth and the greater longevity of the wealthy. If we could know how those estates are actually divided we might be answer the question whether equality of heir-ship is truly part of the Gallic ethic. I think one would find that it is.

FIN

Nota Bene: The typewritten text of this is in the "Succession: Code Civil" folder.