Succession Before and After the Civil Code

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Most studies of the Civil Code's succession rules focus upon Napoleonic modifications of Revolutionary legislation, the chief effect of which was to reanimate conservative notions in old *coutumiers* and attire them in Roman Law raiment. While not disavowing this process, I shall myself present the matter in a different fashion. The main trick is revealed in the hourglass diagram (Fig. 1).[1] Revolutionary legislation serves only as the connecting aperture between the old and the new law. Just how the main parts of the old law, *coutumiers* and *droit écrit,* were blended in the fifteen years of the *droit intermédiaire* before they emerged in the Code Civil is not revealed in the diagram nor explained very fully in the text that follows. The old law and the Civil Code are simply juxtaposed as successive paradigms without explaining the revolutionary shift from one to the other.

The delineation of modern law in the bottom part of the hourglass has its own distortions. The Code's provisions are squeezed inside the dotted lines on the left, beneath which are given supplemental nineteenth century legislation on heritage rights of surviving spouses and illegitimate children, while the whole right side is devoted to the subject "the state as heir". Since the latter is really a trivial subject throughout the nineteenth century, coming into its own only in the twentieth, its prominence on the charts needs explaining.

The present paper is, in fact, the middle phase of a three-part study of the impact of the laws of succession upon French society from the Middle Ages to the present. The first phase dealt with the old regime's *coutumiers,* especially with the notion of ancestral or lineage property (*propres*) which is prominent in the upper left sector of the schematic chart; the last phase, essentially the twentieth century, will deal with *l'etat héritier,* wherefore I give that subject undue emphasis on the lower right of the chart. These idiosyncracies of the schematic chart, as well as of the text that follows, are therefore due to "ideomagnetic" influences emanating from an earlier essay and from one yet to be written.

Some elements in the top part of the hourglass have been connected by lines to elements below. Had I not feared making a graphic mess, more such could have been drawn, notably from both parts of the *droit ancien* down to "Forced Heirship of Family." Several antecedent-consequence relationships such as this, which do not appear on the diagram, will be discussed below.

More will be said later on about the lateral boxes at the top (Philosophy and Taxes), but I shall dispose of the two on the central axis right now. Primogeniture/*Preciput* and Entail, the distinctive elements of noble successions, did not receive much attention in my earlier study on

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[1] Before the lecture began, this diagram was distributed to the audience in a small pamphlet that also has a glossary, bibliography, and maps of *coutumier* regions; this pamphlet is reproduced below at the end of this article and the diagram is bookmarked.

pre-revolutionary law and they are important here only to signal what the revolution abolished. One exception is the Napoleonic *majorats,* a form of entail which Bonaparte established when he became emperor in order to create a new class of privileged families which would be loyal to him. He did this just two years after he, as First Consul, had been very active in the meetings of the Commission for the Code which had legislated against such a thing. After 1849 new *majorats* and most old ones were prohibited, and the eventual death of remaining old ones decreed in 1905.[2]

One of our time's best legal scholars, Henri Vialleton has organized a modest summary of the effect of laws of succession upon the family (or vice versa) in terms of the tension between the rules of the Civil Code and "social science".[3] This is an improvement upon the older lilting dichotomy of *dogmatique* versus *pratique,* which included only the world of legislators and judges and lawyers, because it suggests that social forces emanating from hearth and forum provide the real leverage to make the law budge.

The division of this paper is akin to Vialleton's; i) what legel historians usually claim to have been the Civil Code's main innovations and 2) what features of the code--even more so, later legislation--social historians should heed most. A synthesis of the two is not possible in this limited essay, but it is perhaps worthwhile to note what the danger of ignorance of one or the other is. On one hand (many legal scholars are quick to point out) strictly legalistic analysis is a diagnostic of historical myopia. On the other hand (one can answer many of those same people) dimsightedness about legal rules can have an equally ill effect upon historical vision.[4] Knowing these Scylla-Charybdis allurements, to see more than is there or less than is there, may enhance the chances for a safe passage through the evidence.

1.

Many legal historians are want to use just one word, *individualisme,* to characterize the changes wrought in the laws of succession during the Revolution and by the Civil Code; and others stress the Code's unusual emphasis upon *partage forcé*, the "forced division" of goods among descendants.

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[2] See Emmanuel Bès de Berc, *Le droit d'ainesse* (Paris, 1908), 73-88, where the author also deals with the swansong of entail during the Restoration, *i.e*., the movement headed by Peyronnet in 1826 which led to a weak "optional *préciput* based on wealth, not class. It was abolished in 1849 at the time that Napoleonic *majorats* were curtailed. Further on this, see Ernst Va!lier, *Le fondement du droit successoral en droit français*, (Paris, 1903), 354-62.

[3] "Famille, patrimonies et vocation hereditary en France deepest le Code Civil," in *Mélanges J. Hairy*, (Toulouse, 1960), II, 577.

[4] Excessive legalism has been made the butt of criticism in a recent article which is much cited: Pierre Bourdieu, "Les strategies matrimoniales dans le système de reproduction," *Annales (E.S.C.)*, XXVII (1972), 1105-1127, but the author's inclination to expand his tiny example into a general proposition has its own woeful results (see Edward Richards, "Strategies of Inheritance and Systems of French Customary Law: a *Mise au Point*" [paper given at the same session as this lecture.]).

"Individualism" in this context refers, and I believe should be restricted to the untrammeled freedom to dispose of one's property while one is alive. It should not be confused with *liberté de tester,* which refers to controlling disposition of one's goods after one dies. During the *ancien régime*, at least among the *coutumiers,* each generation was considered to be the guardian of the ancestral goods--i.e., those which were inherited, the *propres*, which often were the largest part of a patrimony.[5] Revolutionary hatred for any mechanism that served to perpetuate a family holding intact doomed the *propres* to extinction. In Revolutionary speeches, *propres* appear as commoner's equivalent to noble's primogeniture, *préciput.* and *substitution,* all of which served to perpetuate the family's power and glory--vainglory in the mind of a Mirabeau or a Robespierre.[6]

Revolutionary legislation and the Code declared that all property held by a living person was to be freed from ancestral constraints in any explicit or implicit form of entail. This "individualism" was, to be sure, an important manifesto in the arrival of the concept of private property in France. But "individualism" ends when one considers the second important innovation in the Civil Code, from the jurist's point of view, that of *partage forc*é.

Forced division of the estate among descendants also stemmed directly from the Revolutionaries' persistent effort to prevent the perpetuation of great estates. Since landed possessions were still regarded as the primary source of power, removing ancestral forms of entail upon them would be effective only if each successive possessor were prevented from voluntarily advantaging one of his descendants. Testamentary power had to be limited, therefore, and this was done. The *coup de grace* to great fortunes would be struck--or so at least the revolutionary legislators thought--by requiring that every estate have a "reserve" which must be divided equally among the nearest branches of its relations.[7] In this way every great family

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[5] Nota Bene: *biens propres* in modern French law refer to an individual's property, not differentiated as to its origin; ignorance of the change in meaning of the word *propres* (whereim the appearance of *individualisme* is capsulated) can lead to egregious errors such as those found in Rapelje Howell's translation of Jean Brissaud, *A History of French Private Law* (Boston, 1912), 642-44 [§457] *et passim.*

[6] The case for individualism is set forth in two works which retain their status for the subject of this essay despite their years: Ambroise Colin, "Le droit de succession dans le Code Civil," in *Le Code Civil, 1804-1904~ Livre du Centenaire* (Paris, 1904), II, 311f. and Vallier, *Fondement* (above, n.2), 282ff. Another work of this epoch devoted to the *droit intermédiaire,* also still holds its vitality: Gustave Aron, "Étude sur les lois successorales de la Révo1ution depuis 1789 jusqu'à la promulgation du Code Civil," *Nouvelle revue historique de droit français et étranger,* XXV(1901), 444-620, especially p. 478ff for Mirabeau's and Robespierre's speeches (cited by him from *Archives parlementaires,* vol. 24, but also found in *Gazette Nationale ou Moniteur Universel,* No. 95, pp. 388-89 [5 April 1791], and No. 97, pp. 396-97 [7 April 1791]) and 601-11 for the abolition of *propres*. The latter subject is dealt with fully in André Déjace, *Les règles de la dévolution successorale sous la révolution (1789-1794),* (Paris, 1957), 60-68.

[7] The term "forced heirship" has been used by a modern American legal historian, Joseph Dainow, "Forced Heirship in French Law," *Louisiana Law Review,* II (1940), 669-692, to combine the aspects of a necessary reserve for direct-line heirs and necessary division of it among them; but to the extent that it insinuates something like a "necessary family heir"--Roman Law's *suus et necessarius heres* (Institutes, II,19)--it is misleading because the beneficiary of *partage forcé* in the Code Civil is not bound to accept anything. (In fact, the law itself does not decree the forced division, but only allows anyone who could benefit from it to require it.) Dainow's article does. however, provide a good historical summary from an Anglo-American perspective of this peculiarity of French law; for a philosophical exposé of the *réserve,* by a French jurist, see Ferdinand Charles Jeantet, *Le droit à la réserve en*

fortune would be constantly under the threat of division. And to ensure that one child would not be given all his share in real property while the others received only personal property, the principle of equal division was applied to both *meubles* and *immeubles.* Thus each category of wealth--houses as well as fluid forms--had to be divided equally among the children. The messes created by "equal division in kind" during the nineteenth century are legion: ownership of houses divided up among co-heirs (one of whom might declare that he owned "la moitié dúne porte"), landplots parceled out, sale by auction (*licitation*) of heirlooms, etc. [8] The courts enforced this strictly whenever they were called to declare the partage, believing that they were living up to the principles of Revolutionary and Code legislation. From all we know, the public approved of it despite the great efforts mounted by Frederic Le Play and others to ameliorate the effects of this
forced division.[9]

The principles of individualism and forced division thus established a tension between freedom and restraint: the first denied family right in terms of ancestral control, the second reasserted it in terms of descendants' claims. Just after 1900 Jean Jaures contended that familial perpetuity of inheritance was as much guaranteed by the Code Civil as it had been by the devices known in the *droit ancien*.[10] This was certainly true if the deceased had any descendants or ascendants who survived him and who could lay claim to the *réserve.* Without surviving descendants or ascendants, however, he was totally free. Wags therefore could claim that the Code's succession rules were made for an orphan who lived his life as a celibate: then alone would "individualism" work fully, since there would be neither parents nor children to constitute necessary heirs.

If we imagine such an orphaned celibate living in the early 19th century, we can say that no Frenchman before or since has had such complete property rights. Gone was the old regime's claim to ancestral goods by blood relations to an indefinite degree, not yet arrived was the state's position as a necessary heir of sorts.

A superficial examination of the antecedents to the Civil Code's *indi-vidualisme* and *partage forcé* would lead to the assumption that both derived from the old *droit écrit*: individualism because the Civil Code, like Roman Law, recognized no such thing as ancestral

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nature, (Paris, 1939).

[8] Léon Meunier, *La maison et le bien familial et le rôle de l'État dans leur conservation,* (Paris, 1926), 89-94.

[9] Le Play's testamentary freedom campaign reached a peak in the 1870's, in conjunction with a national opinion survey; this can be savored fully in the popular tract by Charles Adrien His, Conte de Butenval, *Les lois de succession appréciés dans leurs effets économiques par les Chambres de Commerce de France,* (Paris, 1875, reprinted through 1884).

[10] "La propriété individuelle et le droit successoral (22 September 1901)", in *Études Socialistes*, II (Paris, 1933), 385 [=Vol. VI of *Oeuvres de Jean Jaurès*, ed. Max Bonnafous].

property; forced division because the Code's intestate operation is nearly identical to Novel ll8 of the *Corpus Juris Civilis* and its testamentary *réserve* is close to Roman Law's légitime.

But the letter of the law here, as so often, is deceiving. In spirit, the Civil Code is much closer to the *coutumiers:* both are essentially laws of intestate succession. The Revolutionaries wanted it that way, the Civil Code's framers set it forth that way, and the French people so treated it, at least through the 19th century. By contrast, *droit écrit* was overwhelmingly a system of testamentary succession. In testamentary systems, the will of the deceased is paramount; in intestate systems, the will of society dominates as it is expressed in the law. In the Civil Code, the hereditary reserve which is placed in the diagram under testamentary succession as a limit to the right of disposition is in fact defined as a minimal statement of intestate rules of equal division which have been imposed upon testamentary succession.[11]

A simple summation, then, is that the Civil Code is a literal descendant of the *droit écrit* but a spiritual descendent of the *coutumiers.* The proof of this lies in the guaranteed family right, as potent in the Civil Code as in the old customary laws, perhaps even more so. Just now I can only insist, but not elaborate, upon the need to see continuance of familial right in the Civil Code. To find change one must look more to 19th-century legislation, where the modification of rights of family members have special interest for the student of social history.

2.

Family structure is defined in the Civil Code's laws of succession and later legislation basically in two ways: 1) the limits of collateral heirship according to blood relatedness; 2) the rights of the nuclear family members independent of blood ties or even marital vows. In these matters the law sometimes lagged far behind practice and only belatedly confirmed social reality, but at other times, particularly when the interest of the state as heir came into question, the law was aggressive and prescriptive.

What I call the "attack on the collateral heirs" did not begin in a dramatic way in the Code itself. The finite limit of 12 degrees which it set upon blood rights constitutes a kind of philosophical change from the *coutumiers,* which usually held such rights to be unlimited; but twelve degrees is such a distant family relationship that the effect was negligible. The Roman Law intestate-heirship limit of six degrees more clearly reflects the situation of a normal extended family, but this point is academic since Roman Law succesions were seldom intestate.[12]

When French collateral heirship was reduced to 6 degrees in 1917, statisticians

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[11] Aubry & Rau, *Droit Civil français*, §679,1, esp. n. 1 (transl. C. Lazarus, St. Paul, Minn., 1969 [=Civil Law Translations, 3], 191).

[12] Civil Code and nineteenth-century legislation concerning collateral heirship is covered thoroughly by Vallier, *Fondement* (above n.2), 474-514.

predicated on the basis of recent intestate deaths resulting in searches for relations between the seventh and twelfth degrees, that the state would fall heir to successions worth a total revenue of four million francs per year. But the only certain result of this was to increase the number of testaments made by the wealthy, for few people will allow the state to inherit by default.[13]

More effective--and unavoidable--inroads on collateral heirship had been made much earlier by the state through its use of succession taxes. [14] The legislation of 1816 and 1832 noted on the chart reveals how early legislative discrimination against collateral heirs began, and the laws of 1901 and 1902 show the point of drastic acceleration of the process when they declare that beneficiaries beyond the fourth degree, whether testate or intestate, would henceforth be regarded as non-relations for tax purposes. The 1901-1902 debates in the French parliament must have beenn filled with keen arguments about what constituted the family: in the 1902 law, everyone beyond a first cousin is deemed a stranger to the family.

This truncation of the blood ties of distant relatives was balanced by a subversion of the rule of blood relationship within the nuclear family in the form of the greater successoral status accorded to the surviving spouse.[15] The laws of 1891 and 1901 on the lower left of the chart represent the beginnings of a movement in the law which, by our own time, has raised the surviving spouse--in meaningful terms, usually the wife--to co-heirship with the children. The impetus for legal chsnge came from changed social practice but, having said that, we should also appreciate how legislation does finally canonize actuality.

Before the Revolution, the unquestioned rule of blood relationship in succession rules was epitomized by lineage property, *propres*, which only parents and children, never the spouse, could inherit° Revolutionary projects would have given the surviving spouse regular inheritance rights, but the Civil Code relegated her to the outmost limits, as an irregular successor like the state, if no blood relations within the twelfth degree of the deceased survived. In terms of generational peer group, that meant a branch of descendants (different from one's own) of one's great-great-great-great-grandparents. The welfare of widows, therefore, had to be guaranteed after the Revolution, as before it, by marriage contracts. The classic old device, the *dot*, was almost completely superseded by contractual community of goods between spouses during the course of the nineteenth century.[16] As co-owner of community goods, the surviving spouse was

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[13] The percentage of intestate successions actually increased (77.2 to 81.9) from 1906 to 1928, but in the latter year only 63 percent of those subject to any tax were intestate. I owe the 1906 figures to Mr. Edward Richards, who calculated them from *Annuaire statistique,* XXVII (1907), 244-47, and the 1928 ones from Louis Josserand, *Cours du droit civil positif français,* §715 (2nd ed. [Paris, 1933], III, 405), who cites *Bulletin de statistique et de législation comparée,* (1929), 351.

[14] Vallier, *Fondement* (above, *n.2),* 489-95.

[15] *Ibid*., 362-410; Vialleton, "Famille," 588-93; Jean-Philippe Levy, "L'évolution du droit familial français depuis 1789," in *Mélanges Roger Aubenas* (Montpellier, l974), 588-93 [=*Recueil de mémoires et travaux publié par la Société d'Histoire du Droit*, IX].

[16] Jean Hilaire, "Vie en commun, famille et esprit communautaire," *Revue historique de droit français et étranger,* LI (1973), 44ff; Pierre Arsac, "Le comportement juridique des individus d'après les contrats de mariage au

not destitute. Indeed, considering the limitations upon the wife's right to handle family property while her husband lived--the Civil Code being reowned for its misogyny--she may be said to have been better off after he was dead. The pressure for change, however, came from the common wish of the spouses to establish a unity of their goods, and finally, beginning in 1891, the legislators began to acknowledge the changed character of the family, viz., the growing importance of its conjugal alongside its genealogical definition. The surviving spouse moved into a privileged intestate position, sharing the estate with blood heirs. If the surviving spouse could not be classified as *héritier nécessaire* because she was unrelated by blood, she can be said to have become a *légatiare nécessaire*.

Lest one believe that the sanctity of marriage impelled this betterment of the surviving spouse's heirship, we should take note of that legislation of 1896 which promoted illegitimate children to the status of legitimate ones in successions; it indicates the reverse.[17] Here the sacrament of marriage, a principle equally strong as the ties of blood, was violated. Put bluntly, the surviving-spouse and illegitimate-children laws show that blood and wedlock--the seminal and sacramental principles of family, as it were--were both being overtaken by the bonds of affection within the narrowest element of the family: father, mother, child. This had appeared briefly in revolutionary legislation, as is well known, but was reversed by the Code; it finally blossomed, despite all the old principles that had worked against it--and it should be added that this movement has grown enormously during the twentieth century. Viewed alongside the "attack upon collaterals," this "concession to the conjugal unit" sums up how modern French law has yielded to social change.

If the laws concerning surviving spouse and natural children were tardy responses to social change, in another realm the laws were innovative and coercive, and operated in advance of, and contrary to, family interests: namely, in the role of the state as heir.

Two lines on the chart connect pre-revolutionary elements with the heading "State as Heir" on the lower right. A hird one could have been drawn, emanating jointly from the last items under intestacy in both customary and written law: the state's succession in the absence of family heirs.

Of these three old and new connections, the *centième*, a one-percent tax imposed on successions in 1703, is the most obvious antecedent. It is not, however, a presage of modern estate taxes, but rather a variety of what are called "probate taxes" in English. States have levied them often throughout history as a kind of fee for their role in administering property transfer. The *centiéme* was levied only on real property and did not even apply to inheritance by descendants (the most common form), which makes it difficult to argue that the state was competing with the family for the spoils of the deceased's treasure.[18]

XIX siècle (Grenobles, 1813-1860)", *Revue d'histoire économique et sociale*, XLIX (1971), 550-591; Adeline Daumard *et al*., *Les fortunes francaises* au *XIXe siècle* (Paris, 1973), 12, 52, 79, 119.

[17] Vallier, *Fondement*, 411-473; Vialleton, "Famille", 583ff.

[18] Vallier, *Fondement*, 548-552.

The philosophical antecedents--the other box at the top of the chart--are well known, going back to German natural law theories of the 17th century and expounded by both Rousseau and Montesquieu in the 18th.[19] Whether one held that the existence of the state was a precondition for private property or that the state, though only the guarantor of property rights, must oversee the transfer of it (of which inheritance was the single most important instance), the state was vested with rights to regulate successions. Hardly anyone before, during or just after the Revolution disagreed with the notion that the common good was best served by allowing devoltion of goods within the family. The unusual feature of the Civil Code in this respect, which continued Revolutionary ideals, was not to let family sentiment operate naturally but to institutionalize that sentiment--referred to as the "presumed will [or presumed duties] of the defunct"[20]--by what I have labled on the diagram "Direct-line heirs' reserve" which declares which family heirs should get exactly what portion. The state here requires the individual to do what most legal systems leave for the individual to do out of affection for his or her kin.

That explains the diagram's strong line drawn from the philosophical principles down to forced heirship of family, the quintessence of which is *partage force*. Near the bottom a broken line goes off to connect with "State as Heir," by which I mean to convey the following. While it was nearly universally agreed that the common good was best served by family succession, the implication lurks hidden that the time might come when the common good would be better served by different rules governing the devolution of goods by reason of death.

The state's role was at first not extraordinary. The laws of registration of estates of 1791–which, as I have noted on the chart, were made comprehensive by including direct heirs, as the 1703 law had not–facilitated the state's task of enforcing the rules of succession and collecting its still modest "probate-like" tax.

Registration of estates upon death brought into existence a complete archive of the wealth of citizens--provided, of course, there was no fraud involved. It was a sore temptation for officialdom, especially fiscal experts, not to exploit this information for the state's purposes. For more than a century now, connoisseurs of techniques of taxation among government bureaucracies have reveled at the sheer availability of wealth at the moment when it loses one owner and is about to get another--a transition which the state must survey in any event. Many are the authors who present the history of inheritance taxes something like this: the state is a predator, ever needful of more sustinence, choosing as its prey the hapless family, which, in the moment of its bereavement, is required to lay bare its body plutocratic.[21]

Two techniques by which the state intruded into inheritances have already been mentioned under the heading "attack upon collaterals": 1) reducing the limit of collaterals eligible for

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[19] *Ibid*., 140-182; Alfonso de Pietri-Tonelli, *Il diritto ereditario*, (Venice, 1908), 3-70; Lucien Aulagnon, *Le problème de la perpetuité de la propriété*, (Paris, 1933).

[20] Usually attributed to Puffendorf, *De jure naturae*, IV, ix, 1; see Vallier, *Fondement*, 149f & 608f.

[21] This is the mood of Charles Turgeon, "Le socialisme et le droit d'hérédité," *Travaux juridiques et économiques de l'Université de Rennes*, I (1909), 163-274.

intestate succession so that the state hecame the total heir sooner, the state called have an irregular successor, like the surviving spouse); 2) by taxing collateral heirs more and more heavily, whether they were called to the succession by testament or by intestacy.

The first of these never amounted to much, but the second grew and grew and grew. Its technical name is *impôt de mutation par déces*, which preserves the "probate" sentiment, but beyond a certain tariff rate this term becomes ambiguous. Long before the tax became progressive, in 1901, the ideas of the state as heir was talked about. Its foes have always been as vocal as its protagonists, but it is hard to deny that the state was an heir after 1917, when a progressively scaled tax was imposed upon the global inheritance, in addition to the tax upon the heirs, before it was distributed to them. The state, in these circumstances, was a beneficiary of the deceased as well as a creditor of the heirs. The 1917 tax on the global inheritance applied, to be sure, only to families which has less than four children and, correspondingly, gave reduced rates to large families, ten percent per child beyond the third one, up to fifty percent. Considering the date, 1917, this amounted to a gun-fodder clause--but viewed another way the state became a necessary heir in the case of small families.[22]

Fiscal needs were always alleged for justifying increases in tax rates, but a better excuse than the state's penury was needed at the point when the state's role in successions was becoming so regular and so great. Even when limiting one's view to ideas expounded around 1900, it is surprising to find how many philosophical notions about the state's role in inheritance which one thinks much be quite recent had in fact been espoused already in the late 19th century.

One group, who might be called slow-track socialists, envisioned using confiscatory inheritance taxes as a way of phasing out private ownership of real property altogether over a generation's time.[23] A more realistic position, as things turned out, was set forth by Ernst Vallier, in 1903. He proposed that the state be deemed an official heir because it had come to perform serives for its citizens which families formerly had had to provide for their own progeny: education, health care, pensions, etc. If the state guaranteed the perpetual care of every family's offspring in these fundamental respects, then the state should get a share of the patrimony. Vallier called this the "*Réserve de l'État*."[24]

Another theory, similar to one which Andrew Carnegie espoused in our country, was based on the premise that an individual gains wealth in modern times only because society is organised in such a way as to be easily exploited--as opposed to tearing wealth from the wilds, or from wild peoples, presumably--and that therefore society should be a principal heir, a communal

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[22] For the period up to 1901 see Vallier, *Fondement*, 474-513 & 548,76, and Jean Gosse, *De la vocation héréditaire de l'état,* (Grenoble, 1941), 1-89; after 1901 see *ibid.*, 90-126 and Hossein Khallaf, *L'impôt sur les successions,* (Paris, 1939), 153-55 & 162-75.

[23] Jules Guesde and Albert Schäffle--cf. Turgeon "Socialisme", 169-175 and Vallier, *Fondement,* 596-603.

[24] *Ibid*. 640-655.

heir as it were, of that wealth.[25]

Some of the schemes that reached the floor of the French parliament around the turn of the century would have advanced the state's heirship to such an extend that every great fortune would have been reduced to mediocrity the moment it changed hands by succession. Throughout the literature of that time one encounters the belief (not always held with enthusiasm, to be sure) that before long all great fortunes would regularly be topped off as they changed generational hands. But, as we know, the same families now, as then, tend to be wealthy. How this is managed is not as clear as one might think. But that is another problem.

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If the elements of legal rules and social practice involved in the foregoing discussion were to be fixed in the most succinct fashion and judgments made about them, the following three propositions emerge:

1) concerning individualism: its application was qualified from the beginning by the existence of necessary heirs declared by *partage forc*é, and it became even more constrained during the 19th century by the role of the state as heir.

2) concerning *partage forcé*: the importance of the first word, *partage,* can easily be overstresed because family succession as such is more important than equal division among members; but the second word, *forcé*, needs to be appreciated because the state's enforcement of specific heirs, by endowing those heirs with rights to the patrimony, must have bred in them some different notion of the family unit than would be present in more truly "individualistic" systems.

3) concerning the weakening of the bond of the extended family and the strengthening of the nuclear one: the historians of the family can tell us much that the schedule of laws cannot, but ultimately the accelerated growth of those laws seems to relate directly to the growth of the position of the state as an heir.

Nota Bene: The typewritten text of this lecture is filed in the "Succession, Hereditary" folder.

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[25] Herckenrath--cf. Turgeon, "Socialisme", 185-198; also Vallier, *Fondement*, 624-34.

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Session Five: FAMILY, SUCCESSION, AND PROPERTY

Glossary, Chart, Maps, and Bibliography

relative to the papers of

Ralph Giesey
Edward Richards
Robert Wheaton

Acquêts. (Also called conquêts) In the coutumiers, immeubles which are "acquired" by an individual, or jointly by spouses, in contrast to inherited immeubles (propres); acquêts (like meubles) are usually disposable by testament, but they become propres upon their transmission to a descendant.

Agencement. In a marriage contract, the sum stipulated which the surviving spouse should have from the estate of the first deceased.

Communauté maritale. Property held jointly by husband and wife, defined either by marriage contract or by rules embodied in the coutumiers (also later in the Code Civil); cf. régime dotal.

Donation entre vifs. Inter vivos gifts, irrevocable but susceptable later on to collation (cf. rapport) if the beneficiary is an heir in the settlement of the donor's estate, unless specifically exempted by the donor.

Donation à cause de mort. A gift which takes place on the death of the donor, but can be revoked if the danger of death passes; also, if kept, it is susceptable to collation later on (as a donation entre vifs).

Dot. That which is given to the daughter (or a son, in earlier times) entering marriage, goods which she brings to her husband; when the new family had no issue, some or all of the dot returns to the wife's family of birth.

Douaire. A life interest in certain property given by the husband to the wife to support her after his death, which property goes to his heirs after her death. (In English, "dower" and "dowry" have this meaning but also they may be used synonymously with "dot".)

Droit d'ainesse. The right of the eldest child, irrespective of any discretionary action by the deceased; usually equated with primogeniture.

Exclusion des enfants dotés. The exclusion of children who have received dots from the partition of the inheritance after their parents' deaths.

Fidéicommis. Entail, similar to substitution and majorat.

Immeubles. Real property, "immovables".

Légitime. In old law, as in the Civil Code's réserve, that portion of the estate assured by the law in testamentary successions to certain heirs (primarily descendants), calculated as a percentage of what they would have received had the succession been intestate.

Lignage. All the descendants of a common ancestor or ancestors.

Majorat. A form of entail, equivalent to fidéicommis or substitution.

Meubles. Personal property, "movables".

Option. The right of an heir to choose between retaining a donation and/or a legacy and giving it up through the rapport to share as a legal intestate heir.

Partage de succession. The act of dividing an estate among the heirs.

Partage forcé. In modern law, equal division among heirs of a portion of the estate in testamentary successions (see réserve héréditaire), of the whole estate in intestate successions.

Pays de droit coutumier. Regions where provincial or local compilations of customs (coutumiers) regulated civil matters; northern France above all.

Pays de droit écrit. Areas in which Roman law (often with some modifications in practice) was followed as a general rule; most of southern France.

Préciput. An advantage accorded to an heir in addition to a regular intestate share, either as a part of the droit d'ainesse or by donation or testament.

Propres. In the coutumiers, immeubles which had been received by succession, as opposed to acquêts (but acquêts--and even meubles--could be designated by contract as propres "by fiction"); translatable as "inherited property", "family property", or "lineage property". The two spouses' propres were kept distinct and were supposed to be kept intact and passed on to descendants, and, if there were none, to be returned to their respective lineages of origin. In modern law, the term biens propres designates the individual's own property as opposed to community property.

Rapport. "Collation" or "hotchpot" in technical English jurisprudence; the act by which heirs restore to the inheritance all goods (or their equivalent value) received earlier from the deceased, in order the calculate the partage fairly.

Régime dotal. A marital property system, found mainly in the pays de droit écrit and recognized as a permissible exception to the normal system of communauté in the Civil Code, in which most or all of the wife's dot was administered by the husband but was inalienable and did not enter into the communauté maritale.

Renonciation. Voluntary abandonment of rights of succession by an heir either (1) at the time of receipt of an inter vivos gift, such as a dot, out of the patrimony, or (2) after the proprietor's death, in order either (a) to retain a donation or legacy under the option or (b) to escape responsability for creditors' claims upon the deceased.

Réserve héréditaire. That portion of the goods which the law declares the deceased is not free to dispose of gratuitously, reserving it for certain heirs. In the coutumiers this was usually limited to lineage property (propres) and protected the entire lineage; in the Civil Code it applies to all property but protects only descendants and ascendants.

Retrait lignager. A legal action in customary law whereby the nearest kin of the seller of a propre can repurchase it (within a given time limit) from the buyer.

Substitution. The designation of alternative heirs, especially in the substitution fidéicommissaire, establishing an entail in which the recipient is required in turn to transmit the property to a designated person or persons, including a child or children to be born in the future.

SUCCESSION RULES IN FRANCE

BEFORE AND AFTER THE CIVIL CODE

17th-18th CENT. PHILOSOPHY (State power to regulate laws of succession.)

SUCCESSION TAX (centième of 1703.)

PRIMOGENITURE/PRÉCIPUT (2/3 to eldest son, noble estates.)

ENTAIL [SUBSTITUTION] (Esp. Nobles before 1747.)

COUTUMIERS

[Cout. de Paris, in the main]

TESTAMENTARY (Common only for large fortunes)
1. Freedom of disposition
   a. Real property (immeubles)
      --1/5 of inherited (propres)
      --all of acquired (acquêts)
   b. Personal property (meubles): all free
2. Limitations upon disposition
   a. Réserve héréditaire (propres only)
      --4/5 to descendants; if no descendants, return to family line of origin
   b. Légitime (in North)
      --each descendant can claim 1/2 of what his or her intestate share would be

INTESTATE (Usual)
1. If descendants, all goods equally by branch
2. If ascendants or collaterals (no limit to degree) propres to the family of origin, other goods to the nearest relations
3. Failing all relations, to ruler

DONATIONS: see note at bottom

DROIT ÉCRIT

[In effect, Roman Law]

TESTAMENTARY (Uniformly--a misfortune if not)
1. Freedom of disposition
   a. Institution of an heir (usually eldest son) who can be advantaged from 1/2 to 3/4 of all goods
   b. Legacies to others (mandatory for légitime)
2. Limitation upon disposition: légitime
   a. If 2, 3, or 4 children; 1/2 an intestate portion each, of all goods
   b. If 5 or more children, 1/3 an intestate portion each, of all goods

INTESTATE (Very seldom)
1. Division of all goods among heirs, equally by branch within the nearest degree, up to the sixth degree
2. Beyond the sixth degree, to the state

DONATIONS: see note at bottom

DROIT ANCIEN

1789

"Droit intermédiaire"

1804

CODE CIVIL

["FORCED HEIRSHIP OF FAMILY"]

TESTAMENTARY (1/4 cases in 19th cent.)
1. Freedom of disposition
   a. 1/4 to 1/2 all goods if direct line heirs survive
   b. All goods if no direct line heirs
2. Limitations: Réserve (for direct line)
   a. If descendants survive, 1/2 to 3/4 all goods (acc. to no. children) equally divided (partage forcé)
   b. If ascendants only survive, 1/4 each to paternal and maternal lines

INTESTATE (3/4 cases in 19th cent.)
1. Equal division among heirs of same degree, up to 12th degree [reduced to 6th degree in 1917]
2. Beyond 18th [later, 6th] degree, the surviving spouse, then the state.

DONATIONS: see note at bottom

[During 19th Cent., dowry contracts almost disappear in favor of community of goods.]

[1855 and following, Le Play and followers attack partage forcé.]

Surviving spouse shares estate with blood heirs on a lifetime usufructory basis.

Natural children treated as legitimate in successions

Surviving spouse gets usufruct of 1/4 of all goods in intestate successions

PRIMOGENITURE and ENTAIL abolished in Droit interm. & Code Civil

Napoleonic Majorats 1806-[1849]

["STATE AS HEIR"]

[1790 Droit d'enregistrement--including heirs in the direct line]

[1799 1 percent tax in immeubles
.25 percent tax on meubles]

1816 Different tax rates for collaterals & non-relations

1826 Charles X's unsuccessful effort to restore primogeniture for wealthy landed families

1832 Collateral heirs divided into 4 diff. tax brackets

1840 Intangible business assets taxed in successions

1850 State bonds & foreign stocks taxed in successions
Meubles/immeubles subject to same tax rates

1855 Principle "State as Heir" first invoked in courts

1891

1896

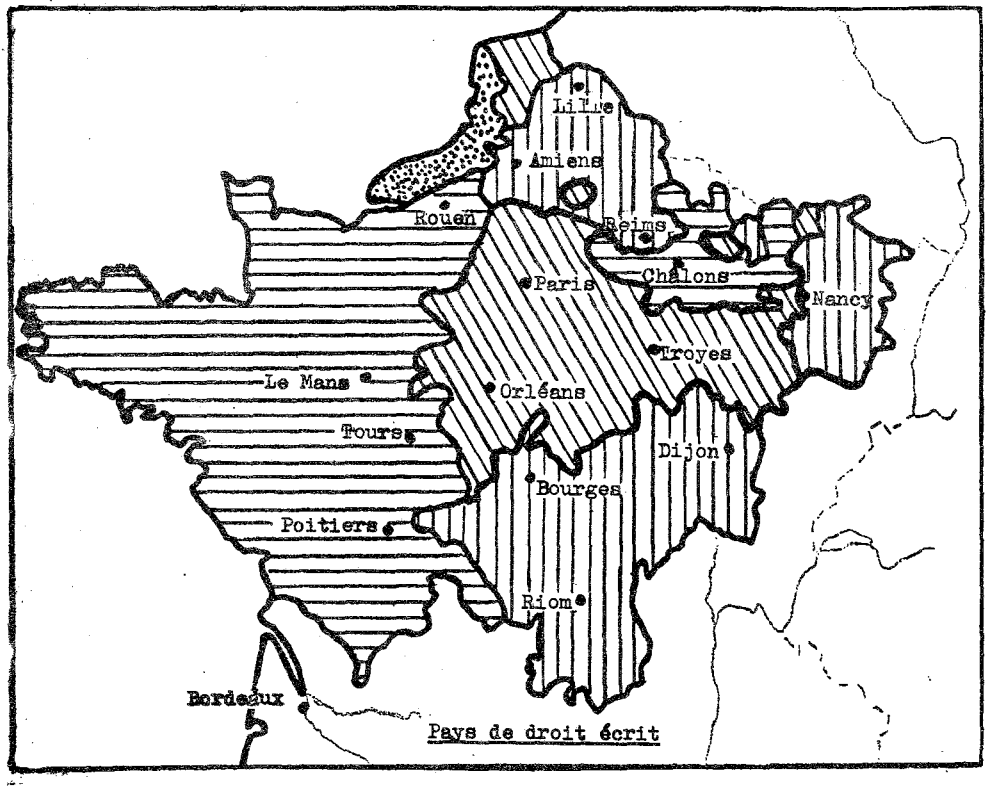
1901 Progressive rate of taxation in successions
Relations beyond 6th degree treated as non-relations
Collateral rates: siblings 8.5%; non-relations 15%

1902 Relations beyond 4th degree taxed as non-relations

DONATIONS: Both the old law (customary and written) and the Civil Code provided that when an estate was finally settled, lifetime gifts made to heirs had to be counted in the estimation of the whole heritage. "Collation" (from Roman law's collatio bonorum; in the coutumiers, rapport) guaranteed that heirs (unless they "opted out" of the succession) would get legal portions; though very important, it is too complex to give in detail here.

EQUALITY AMONG ROTURIER HEIRS IN THE PAYS DE DROIT COUTUMIER

after Jean Yver, Egalité entre héritiers et exclusion des enfants dotés; Essai de géographie coutumière (Paris: Sirey, 1966)



KEY

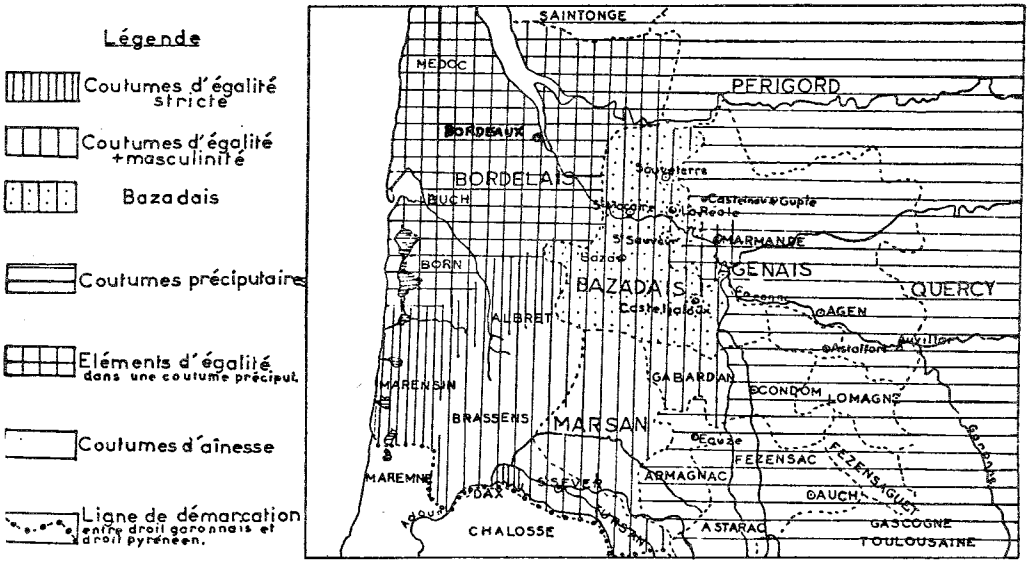
Customs of strict equality, or rapport forcé: advantages to heirs prohibited and rapport of donations required.

Customs of simple equality, or option intégrale: advantages to direct heirs prohibited, but descendants able to evade the rapport and keep a donation or legacy by choosing not to share in the partage as legal heirs.

Preferential or préciputaire customs: children may retain advantages and also share as intestate heirs.

Droit d'ainesse en roture: customs according the eldest son from 2/3 to 4/5 of roturier tenures.

Géographie coutumière des pays garonnais au XIV^e siècle



[From Jacques Poumarède, Les Successions dans le sud-ouest de la France au moyen âge. Paris, 1972]

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