THE 1808 DIGEST OF ORLEANS AND 1866 CIVIL CODE OF LOWER CANADA: AN HISTORICAL STUDY OF LEGAL CHANGE

John W. Cairns

Ph.D.
University of Edinburgh
1980
I, John W. Cairns, declare that this thesis has been composed by myself.

John W. Cairns
ABSTRACT

This thesis examines the influences on legal development, with a specific study of aspects of the law on codification in Louisiana in 1808 (the Digest of Orleans) and in Quebec in 1866 (the Civil Code of Lower Canada). The law in the two codes is compared with that prior to codification. The society and legal culture of both jurisdictions are examined, and some suggestions are put forward on controversial points in their legal history: notably, it is argued that the 1808 Louisiana Digest is an authentic code in the civilian tradition. The law relating to family and that relating to employment are studied in some detail, the changes (or lack of same) in the law being related to and explained in terms of the social circumstances and legal culture. Some general provisions on the law of contract are also examined. The process of codification and the nature of the sources used in the redaction of both codes are discussed: opportunity is taken to make suggestions on the nature of the de la Vergne manuscript and on the reasons why the Louisiana courts interpreted the Digest restrictively. Finally, it is argued: first, that the attitude of the lawmakers, their views of their society, and the influences upon them should be studied; and second, that legal change (or lack of same) is the result of a complex plurality of causes, deriving from the effect of the legal culture and of social values on those with the task of making the law, while various historical and political contingencies may promote or hinder the process of change.
## Contents

<table>
<thead>
<tr>
<th>Contents</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Introduction</td>
<td>1</td>
</tr>
<tr>
<td>Abbreviations</td>
<td>v</td>
</tr>
<tr>
<td><strong>Part One</strong></td>
<td></td>
</tr>
<tr>
<td>Chapter 1. The reasons for such a study and its method and subjects</td>
<td>1</td>
</tr>
<tr>
<td>Chapter 2. Introduction to Louisiana and Quebec</td>
<td>22</td>
</tr>
<tr>
<td>Chapter 3. The legal background to codification in Louisiana and Quebec</td>
<td>52</td>
</tr>
<tr>
<td><strong>Part Two</strong></td>
<td></td>
</tr>
<tr>
<td>Chapter 4. Family Law in the Louisiana Digest and Quebec Code</td>
<td>147</td>
</tr>
<tr>
<td>Introduction</td>
<td>148</td>
</tr>
<tr>
<td>Part One. Louisiana</td>
<td></td>
</tr>
<tr>
<td>Section One. Puissance Maritale</td>
<td>193</td>
</tr>
<tr>
<td>Section Two. Puissance Paternelle</td>
<td>286</td>
</tr>
<tr>
<td>Part Two. Quebec</td>
<td></td>
</tr>
<tr>
<td>Section One. Puissance Maritale</td>
<td>342</td>
</tr>
<tr>
<td>Section Two. Puissance Paternelle</td>
<td>436</td>
</tr>
<tr>
<td>Conclusion. The Family in the two codes</td>
<td>483</td>
</tr>
<tr>
<td><strong>Volume Two</strong></td>
<td></td>
</tr>
<tr>
<td>Chapter 5. Employment in the Louisiana Digest and Quebec Code</td>
<td>491</td>
</tr>
<tr>
<td>Introduction</td>
<td>492</td>
</tr>
<tr>
<td>Part One. Employment in the 1808 Louisiana Digest</td>
<td>514</td>
</tr>
<tr>
<td>Part Two. Employment in the 1866 Quebec Code</td>
<td>573</td>
</tr>
<tr>
<td>General Conclusions on Employment in the two codes</td>
<td>608</td>
</tr>
<tr>
<td><strong>Part Three</strong></td>
<td></td>
</tr>
<tr>
<td>Chapter 6. The 1808 Digest of Orleans</td>
<td>613</td>
</tr>
<tr>
<td>Chapter 7. The Civil Code of Lower Canada</td>
<td>687</td>
</tr>
<tr>
<td>Chapter 8. Conclusion: Codification, lawmaking and legal change</td>
<td>718</td>
</tr>
<tr>
<td>Bibliography</td>
<td>753</td>
</tr>
</tbody>
</table>
Introduction.

Recently, much attention has been focused on the relationship of law to the wider social structure, and many attempts have been made to describe this relationship. The results of such attempts have been diverse and the approach to definition of the relationship has caused some re-evaluation of standard social theory: notably, there has been much recent controversy among Marxist scholars as to the role and importance of law. Here we are concerned to investigate the problem of the relationship of law to the wider social structure through a comparative and historical study of some aspects of positive law, hoping thereby to aid understanding of this difficult topic.

The aim of this study can be stated then as the examination of the influences on legal development in an attempt to understand the causes of legal change or stasis. The subjects of study are the rules selected on codification in Louisiana in 1808 and Quebec in 1866. It is intended to ascertain why, in the context of Louisianian society in 1808, and that of Quebec in 1866, particular changes were introduced, and why potential reforms were rejected. Involved in this is a comparison of the rules in the two codes with the rules prior to codification and with the range of options open to the codifiers.

Unfortunately, but inevitably, a selection among rules and sets of rules (sets of rules being legal institutions in the MacCormick sense) is necessary in this study: however

1. By legal stasis is meant the phenomenon of law in a state of non-development; that is, since law is an historical phenomenon, legal stasis denotes law in a state of non-change or non-development over a period of time or at any particular instance.
2. In 1808, Louisiana was, of course, called the Territory of Orleans, while, in 1866, Quebec was referred to as Lower Canada. I shall generally use the more familiar names for convenience. The 1808 redaction in Louisiana was of course called a "Digest", on the implications of which see infra, chapters one and three.
satisfactory it would be to examine in close detail every particular rule and institution of the two codes, this would not be possible within the compass of this thesis. It is necessary to relate the individual rule to the set of rules of which it forms a part, and the set of rules to the code as a whole. An isolated codal article, although amenable to historical analysis on its own, can only fully be understood when considered in its relationship to other codal articles. Such an analysis is lengthy, and necessitates the restriction of the study to certain codal articles which can be understood in their relationship to one another and the wider society.

The areas of substantive law selected for examination are the two codes' treatments of the family in the husband and wife, and parent and child relationships, and employment. To some extent, the choice of these two areas is arbitrary: however, these topics mesh together, and also touch on questions of legal personality, and contract. Further, the examination of these areas of the law is sufficient to prove the essential thesis of this study, namely that the causes of legal change or stasis are located within society, but that these causes are many, and cannot be reduced to any one essential factor.

This work divides neatly into three parts. The first part consists of three chapters. The first of these chapters is devoted to showing the need for such a study as is undertaken here, to demonstrating a suitable method, and to showing why Louisiana and Quebec are suitable subjects of study. In showing the need for such a study, there will be a discussion of the views of various authors: there will be no attempt to cover all the literature on this topic, nor in dealing with the authors selected will there be any attempt to deal with their work and views in general or indeed its correctness; but the quotations from, and discussions of the various authors serve as illustrations of the differing theoretical approaches to the problem and the diversity of the conclusions reached. The second chapter helps locate this study within the context of Louisiana and Quebec societies at the period of their respective codifications, and is of the nature of an impressionistic survey: a rigorous specification of the nature of the family, or of
the master servant relationship, and their historical development will be postponed until the second part of the thesis. Chapter three comprises a discussion of Louisiana and Quebec legal history up to codification, indicating the juridical culture of the two societies and likely influences on their codifications.

The second part of the thesis consists of two chapters dealing with aspects of the substantive law in the two codes: chapters four and five. This part of the thesis constitutes a close examination of the legal rules in their social context, employing the method developed in the first part and drawing on the descriptions of the two societies and their legal culture made in chapters two and three.

The third part of the thesis is devoted to conclusions, linking the second part to the first, and developing some solutions to specific problems in the legal history of both societies, while portraying the causes of change and stasis in the law.

In quotations, the spelling of old Castilian or French has generally not been modernised. There should be no problems caused by this as regards the old French; but there could be problems with old Castilian. To avoid such problems, the following points should be borne in mind. First, the old Castilian, being closer to Latin, often has "f" where modern Spanish had "h"; thus: "fijos" for "hijos" (filii) and "facer" for "hacer" (facere). Second, the letters "v" and "b", pronounced identically, are often used interchangeably; thus, the 1640 edition of the Nueva Recopilación has "oviere" for "hobiere" (5.3.5.). (The silent "h" has been dropped.) There are one or two other minor differences, but they should not cause confusion. Abbreviations have generally been expanded in quoting, thus "q" will have been rendered "que".

Many people have helped me in various ways while I have written this thesis. Though there are too many to be mentioned specifically for their willingness to discuss points with me, a special debt is due to my two supervisors,
iv.

Professor Alan Watson, and Dr. R.A.A. McCall Smith, for their guidance and advice. In the libraries in which I worked, librarians have been unfailingly helpful and willing to seek out materials of dusty obscurity. Much is owed to Ms. Margaret Dowling and the rest of the staff of the Inter-Library Loans Department of Edinburgh University. Last, but by no means least, my mother bravely took on the arduous task of typing an untidy manuscript.
ABBREVIATIONS*


C or Cod: Codex Justinianus; vol. 2 of Corpus Juris Civilis.

C.L.: Civil Code of Louisiana of 1825.

C.N.: Code Civil des Français, 1804 (Code Napoléon).

C.Q. Civil Code of Lower Canada or Code Civil du Bas Canada, (Quebec Code).


*Other abbreviations may be found in the text, but they will be explained in appropriate footnotes. Methods of citation of the codes, reports, doctrinal writings etc. will also be explained in appropriate footnotes.
Justiniani Digesta; vol. 1 of Corpus Juris Civilis.

D. L. V.: de la Vergne manuscript: A Reprint of Moreau-Lislet's Copy of A Digest of the Civil Laws now in force in the Territory of Orleans (1808) Containing Manuscript References to its Sources and Other Civil Laws on the Same Subjects, Baton Rouge, 1971.


Febrero: El Febrero Adicionado ó Librería de Escritanos, abogados y jueces, Madrid, 1825.

Ferrière, Corps et Comp.: C. de Ferrière, Corps et Compilation de tous les Commentateurs Anciens et Modernes sur la Coutume de Paris, 1714.


* This was the only complete edition of Febrero available to me. It is by Aznar. That I used this work means that the references I give in the footnotes do not correspond with those in the D. L. V. Comparison with vol. 3 of the 1793 edition indicates that Aznar, as he himself claims, has not radically altered the text: the work generally has merely been rearranged.


La. Leg. Arch.: Louisiana Legal Archives.


Mart (O.S.): Martin's Reports (Old Series).


Miss. Vall. Hist. Rev.: Mississippi Valley Historical Review.


Pan. Fran.: Les Pandectes Françaises of J.B. Delaporte and P.N. Riffé-Caubray

Part.


<table>
<thead>
<tr>
<th>Author/Title</th>
<th>Reference</th>
</tr>
</thead>
<tbody>
<tr>
<td>Proj. An VIII:</td>
<td>Projet de Code Civil, Présenté par le Gouvernement le 24 Thermidor, an VIII.</td>
</tr>
<tr>
<td>R. du B.:</td>
<td>La Revue du Barreau de la Province de Quebec.</td>
</tr>
<tr>
<td>Rec. Cast.:</td>
<td>Nueva Recopilación de las Leyes destos Reynos etc.</td>
</tr>
<tr>
<td>Rec. Ind.:</td>
<td>Recopilación de las Leyes de las Indias.</td>
</tr>
<tr>
<td>Reports (First to Seventh, and Supplementary):</td>
<td>Reports of the Commissioners Appointed to Codify the Laws of Lower Canada in Civil Matters, 3 vols., 1865, 2nd edition.</td>
</tr>
<tr>
<td>Rev. Int. de Droit Comp.:</td>
<td>Revue Internationale de Droit Comparé.</td>
</tr>
<tr>
<td>Wis. L. Rev.:</td>
<td>Wisconsin Law Review.</td>
</tr>
</tbody>
</table>
Chapter One.
The reasons for such a study, and its method and subjects.
1. Need for this study.

At present, the nature of the relationship between law and the wider social structure within which it operates is problematic. No one now would regard law as an autonomous body of knowledge and practice distinct from the society within which it exists. Indeed, it is the society wherein the law is found which gives it its meaning. Opinions vary greatly, however, as to the nature of the relationship between any law and the society within which it orders certain social relationships.

To demonstrate the variance of views over the nature of this relationship, it is convenient to quote various authors and briefly to discuss their views. It should be noted here that we are mainly interested in the effect of social change on law.

Professor Lawrence Friedman states:
"... rules flow from the social setting. They change as it changes. They rise and fall with these forces, like a tide, obeying the pull of a power that cannot be seen." 3.

---

1. Cf. J.R. Lucas, "The Phenomenon of Law", in Hacker and Raz (eds.), Law Morality and Society. Essays in honour of H.L.A. Hart, pp.85-98 at p.85: "We should ... see law as a social phenomenon, to be distinguished from other social phenomena, but intelligible only in a social context, and not - as lawyers are too ready to suppose - an autonomous discipline which can be explained and understood entirely in its own terms."

2. Here it may appear that a false distinction is being posed between law and society as two discrete entities; it is clear, however, that law is a part of society and is an institution of regulation of society along with, for example, morality. The terms are being used here loosely for the sake of convenience; but definitions will be given at the end of this section.

3. The Legal System. A Social Science Perspective, p.309. Professor Friedman's account of the interaction of social and legal change is, of course, rather more sophisticated than this quotation might suggest. Nevertheless, the quotation does present what are substantially his views. See chap. X, pp.269-309, ibid., for further discussion.
Again he remarks:

"The problem of legal change is a little like Zeno's paradox, the race between the tortoise and the hare. Any given state of law is a kind of equilibrium. Everybody's interest is reflected in proportion to his power. How then is it possible to change? The simplest explanation is that the outside context changes... Wars, acts of God, new technology, or development or decay of the economy alter social relations, and legal change follows rapidly, obediently, thereafter." 4.

Friedman's conception is one of a close and necessary connection between social change and legal change: the latter necessarily follows on the former, in an unspecified mechanistic fashion. He does, however, admit of other factors bringing about legal change: hence he admits a reform may meet a purely "aesthetic" need.5 What is important to note is that Friedman regards social change as the prime cause of legal change, the latter flowing inevitably from the former, without adequately specifying what exactly is the mechanism bringing about such legal change.

The now discredited views of the historical school of law are too well known to merit more than a brief mention here. In 1927, Walton gave an adequate short statement of their position: "The law of a people, like their language, has an organic connexion with their peculiar being and character."6 Curiously enough, this view has had a great appeal and still has adherents,7 perhaps because individual legal systems are unique. A necessary connexion, however, between an individual people and its laws cannot be demonstrated.

The attitude taken by Marxism to law is the subject of controversy. Marx himself never directly discussed the rôle

4. Ibid., p.307.
5. Ibid., pp.269ff.
of law in capitalist societies, although there exists a large number of texts in which law is discussed in relation to another topic. With the recent attention among Marxist thinkers paid to the role of ideology, law has been more thoroughly considered from a Marxist perspective. This said, it should be pointed out that classic (perhaps naive or "vulgar") Marxist doctrine has posited a direct relationship between society and law, based on certain texts, notably the famous 1859 Preface to a Contribution to the Critique of Political Economy.

Classic or vulgar Marxism argues that the mode of production of any society determines all non-economic phenomena. Law is class law working for the benefit of those who own the means of production: "your jurisprudence is but the will of your class made into a law for all." The economy provides the "base" while all other social phenomena - including law - form part of the "superstructure". Changes in the "base" result inevitably in changes in the "superstructure". As the 1859 Preface put it:

"In the social production which men carry on they enter into definite relations that are indispensable and independent of their will; these relations of production correspond to a definite stage in the development of their material powers of production. The totality of these relations of production constitutes the economic structure of society - the real foundation, on which legal and political superstructures arise and to which definite forms of social consciousness correspond. The mode of production of material life determines the general character of the social, political and spiritual processes of life .... With the changes of the

---

8. For an idea of the range of texts dealing with law emanating from Marx and Engels, see M. Cain and A. Hunt, Max and Engels on Law, 1979, Academic Press.
economic foundation the entire immense superstructure is more or less rapidly transformed." 11.

Thus, in classic Marxist theory, changes in the economic structure transform the system of law; although it is conceded by Engels that changes in the superstructure may affect the base, and that law seeks a coherent statement, thus conceivably delaying the effect of changes in the economic base. 12 Engels later denied strict "vulgar" economic determinism, and in 1890 claimed that the concept of the economic base had been given such a prominent position in order to emphasise a new mode of analysis of society. 13.

As pointed out above, the contemporary re-evaluation of the role of ideology among Marxist thinkers has provided a re-assessed view of law. 15 Many of these thinkers have been profoundly influenced by the structuralist reading of Marx provided by the influential French philosopher, Louis Althusser. 16 Althusser rejected the base-superstructure distinction and exclusive concern with the economy, in an

11. Marx, 1859 Preface, which can be found translated in slightly different versions (there are no material differences) in Marx, Economy, Class and Social Revolution, ed. Z.A. Jordan, 1971, p.198; Marx, Early Writings, Pelican Marx Library, pp.425-5; or Lloyd, Introduction to Jurisprudence, 3rd. editn., p.655. Here I have quoted Lloyd's version.
13. See Engels' letter to Conrad Schmidt, 27th. October, 1890, which can be found quoted in Cain and Hunt, op. cit., pp.56-8, at p.57: "In a modern state, law must not only correspond to the general economic condition and be its expression, but must also be an internally coherent expression which does not, owing to internal conflicts, contradict itself. And in order to achieve this, the faithful reflection of economic conditions suffers increasingly."
14. Letter to J. Bloch, 21-22nd. Sept., 1890: "Marx and I are partly to blame for the fact that the younger people sometimes lay more stress on the economic side than is due to it. We had to emphasise the main principle vis-à-vis our adversaries, who denied it, and we had not always the time, the place or the opportunity to allow the other elements in the interaction [i.e. elements of the superstructure] to come into their rights." This can be found quoted in Z.A. Jordan (ed.), op. cit. supra note 11, at p.38. On these later letters of Engels, see Cain and Hunt, op. cit., pp.48-51.
15. See references, supra, note 9.
influential 1971 essay\textsuperscript{17}, though he maintained that the economic structural level was still the primary determinant of the social totality. Edelman, for example, applied Althusserian Marxism in a fascinating study of French copyright law\textsuperscript{18}. In 1977, Barry Hindess and Paul Hirst, two British Marxists, abandoned economism completely, and, building on this, Hirst went on to argue that Marxism had consistently failed to understand modern aspects of property law (corporations and joint stock companies) due to certain theoretical inadequacies\textsuperscript{20}. Hirst goes on to argue that law and legislation should be understood as processes, subject to many varied determinations, and that legislation is not a mere expression of the influences acting upon it, but a translation of these influences into something different: these influences are not merely reflected in the law, but are synthesised into something new\textsuperscript{21}. It is obvious that Hirst's sophisticated analysis of law is far removed from vulgar Marxism.

\textsuperscript{17} See Poster, \textit{op.cit.}, p.347. An approachable account of Althusser's essay can be found in the introduction by P. Hirst, to the translation of Edelman, \textit{op.cit.}, note 9 \textit{supra}, at pp. 4-6. A critique of Althusser's position will be found in e.g. Sumner, \textit{op.cit.}, note 9 \textit{supra}, at pp. 25-50.

\textsuperscript{18} \textit{op.cit.}, \textit{supra} note 9.

\textsuperscript{19} \textit{op.cit.}, \textit{supra} note 9.

\textsuperscript{20} \textit{op.cit.}, \textit{supra} note 9.

\textsuperscript{21} See their \textit{Mode of Production and Social Formation, 1977}: esp. the following significant remarks, p.57: "Neither the persisting nor the suppression of the economic, political or cultural/ideological forms can be deduced from the concept of the social formation in which they appear. In particular, the social formation cannot be resolved into the classical Marxist formula of economic base and its political-legal and ideological-cultural superstructures. Legal and political apparatuses and cultural or ideological forms provide the forms in which the conditions of existence of determinate relations of production are secured, but they are not organised into definite structural levels which merely reflect the structure of an underlying economic base. This means that political forces and ideological forms cannot be reduced to the expressions of 'interests' determined at the level of economic class relations."

\textsuperscript{20} \textit{On Law and Ideology}, ch.5, pp. 96-144.

\textsuperscript{21} \textit{Ibid.}, pp.113-4. The review by Kelvin Jones of Hirst's book, to be found in \textit{8 International Journal of the Sociology of Law, 1980} pp.83-90, is useful. I had the benefit of seeing a more complete version of Mr. Jones' critique.
I have stressed the varying Marxist approaches to the origins of legal change because the subtlety and sophistication of some of these approaches are often not appreciated, and "vulgar" Marxism is frequently taken as the norm.\textsuperscript{22}

All the above views, though they differ one from the other, posit a close, necessary relationship between law and other social phenomena, arguing that changes in the wider society inevitably result in legal change. Traditional legal text books have tended to treat law as an autonomous body of knowledge which develops through an inherent logic of its own. This view is such that it merits no consideration.\textsuperscript{23}

Recently, one author has argued that law and society are frequently out of phase. Professor W.A.J. Watson has argued that:

"though there is a historical reason for every legal development, yet to a considerable extent law in most places at most times does not progress in a rational or responsive way, and that the divergence between law and the needs and wishes of the people involved or the will of the leaders of the people is marked...." \textsuperscript{24}

"Society and ruling classes are, in practice, able to tolerate a great deal of private law which serves neither the interests of society at large or its ruling class nor the interests of anyone else." \textsuperscript{25}

"Theories of law and society, and of legal development, tend to focus on important innovations. This leads to the impression of a very close inherent relationship between law and the society within which it operates.... The dynamic casual relationship between legal rules at any one time and the society within which they operate... should be given less stress and the elements of inaction, above all the force of inertia, should be upgraded." \textsuperscript{26}

Watson's notion of what makes a law "rational" for any particular society is perhaps a difficult one; it is clear,

\textsuperscript{22} Cf. the remarks of Colin Sumner, \textit{op.cit.}, p.253.
\textsuperscript{23} See note i supra.
\textsuperscript{24} \textit{Society}, p.5.
\textsuperscript{25} \textit{Ibid.}, p.6.
\textsuperscript{26} \textit{Ibid.}, p.8, where he also states what he means by the "elements of inaction". See also his "Comparative Law and Legal Change", 37 Camb. L.J., pp.313-336.
however, that he is arguing that legal change is not necessarily the result of social change, and that social change does not inevitably result in legal change.

The above shows that the relationship of law to non-legal social phenomena is uncertain, and the object of many different approaches and theories. Simple mechanistic and functionalist explanations of legal change seem to be ex facie inadequate. This study will, it is hoped, add to our knowledge of the origins of legal change through the investigation of two societies' codifications. Roscoe Pound has stated that "Physical environment may not be ignored by jurist or legal historian." 27. Although we will not be directly discussing geography, it should be remembered that both Louisiana and Quebec took their laws from European countries which had a different geography, and that such changes in geographical surroundings could make certain changes in the law desirable: for example changes in the law on water rights.

This study aims to elucidate the relationship between social and legal change by examining the choice of laws on codification, and the nature of the reforms undertaken. No attempt will be made to draw up general "laws" of legal development in the sense that Maine did. 29.

The notion of "laws" operating within society is one developed by nineteenth century positivistic social science on analogy with the natural sciences. Since then, the philosophers of natural science have themselves rejected the notion of physical phenomena being governed by objectively valid and inevitably correct laws. 30. The notion of "law" has been replaced by that of "hypothesis". Hypotheses were

28. But see some of the remarks in the final part of this thesis on the Quebec codification, and shoreline in Louisiana.
29. See Maine's famous remark that: "the movement of the progressive societies has hitherto been a movement from Status to Contract." Ancient Law, p.170.
30. One thinks of the seminal work of Poincaré. For one theory of scientific method, see T. Kuhn, The Structure of Scientific Revolutions; Feyerabend, Against Method, will be found stimulating.
regarded as organising data in such a way as to make sense of them, and to provide a tool for further research, which further research could refine the hypotheses or lead to their overthrow. Thus, hypotheses and empirical research are in a relationship of mutual dependency. Theory and practice interact and change one another. If this is applied to the task on hand, we can see that the conclusions to be drawn from our study of Quebec and Louisiana should not be regarded as "laws" of legal development, but rather as hypotheses which are amenable to change in the light of further research along the lines indicated by them.31.

Further, the particular subjects of study might be such as to render the formulation of "laws" implausible. Both Louisiana and Quebec are being studied on codification of their laws, and it might be argued that the results might be peculiar to codified systems of law; or indeed might be specific to the two legal systems studied.

It is maintained, however, that some extent of generalisation from the circumstances of Louisiana and Quebec is possible and valid. First, what is being sought here is not a universal theory of legal development, but the isolation and understanding of those factors influencing legal change or stasis. Second, both Louisiana and Quebec formed part of the continental civilian tradition, and the historical circumstances resulting in legal change or stasis in their particular case would seem likely to apply in other civilian codifications, if due allowance is made for particular local

31. On the inadequacies of "laws" of legal development, see further, e.g. Watson, Transplants, pp.12-15; B.S. Jackson, Essays in Jewish and Comparative Legal History, Leiden, 1975, pp. 8-11. Dr. Jackson argues cogently for a common pattern of growth of sophistication in legal science, ibid. pp.11-12, as "the literary presentation is independent of the norms it describes, and would seem to provide the most promising area of law in which the search for universals may be conducted." Ibid. p.11.
32. On this, and its implications for this study, see below and see infra section 3 of this chapter.
circumstances. Third, although codification might well provide an unparalleled opportunity for reform and rationalisation of the law, and although other legal systems may progress more slowly, it would seem reasonable to suppose that the factors influencing or preventing legal change, on abstraction from the particular to the more general, might well be the same in the legal systems of developed western societies.

The terms "law" and "society" have been used so far rather imprecisely; and now it is necessary to define them in a way which does not purport to be comprehensive, but which is sufficient for the purposes of this study. "Law" is being used here in the limited sense of positive law: law as is to be found in the statutes, ordinances and juristic writings. Since what is being studied is the positive law applied in both jurisdictions, no questions will arise as to the nature of law as a system of norms. Law will be treated as a given, a datum of investigation. "Society" will be used to refer to those areas of human life potentially regulated by law. That is, it will refer to the interrelated and mutually dependent structures of the economy, the family system, land ownership, the relations of employment, and the general ideology which form a totality such as one could describe as "Louisiana society." This is not, perhaps, the most elegant or adequate description of society, but it provides a suitable model for investigation. As pointed out above, law is one other aspect of social life: it also is part of that totality called "society". That is, the legal provisions on a certain area of human activity may well influence human activity in that area: law also is a determining factor in society. To make this study feasible, we have to conceive of law as isolated from other social phenomena, and, given that we are concerned here with the effect upon law of other social phenomena, and that we are looking at such effect at one instant, namely of codification, such separation of law from the other aspects of society is inevitable and valid for the grounding of empirical research.

33. On this, and on law reform in uncodified systems, see section 3 of this chapter.
2. Method of Study.

A basic assumption being made here is that all legal change or legal stasis has an identifiable historical cause, and that such historical cause is rational, in the sense that it is not the result of a mere arbitrary whim on the part of legislator or jurist.

This study relies on the fact that it is possible — with some fair degree of certainty — to identify the provisions considered for inclusion in the codes of Louisiana and Quebec: further, it is also possible to build up a picture of the pre-codification law in both societies. Hence, one can compare the reformed law (the code) with the pre-code law, and with the range of options considered by the redactors for inclusion in the code. Thus, trends and patterns in the reform of the law may be identified, and related to the wider society; and the factors influencing the redactors — the efficient causes of legal change — may be identified. The Quebec redactors themselves left useful indications of motives in some cases of changes or stasis.

In Quebec, the redactors left indications of the sources considered; while for Louisiana, we can be fairly certain that the redactors considered those references found in the de la Vergne volume, the Code Napoléon and its projet, and the provisions traced by Batiza (whether or not they are sources). We can be certain of this because the 1808 Digest is demonstrably composed of a mélange of these materials:

34. Reports of the Commissioners Appointed to Codify the Laws of Lower Canada in Civil Matters. I have used the second edition of 1865 published in 3 volumes: volume I contains the first, second and third Reports, volume II, the fourth and fifth, and volume III, the sixth, seventh and supplementary. I will refer to them by report and page, e.g.: Second Report, p.33. For the Commissioners’ citations of sources consulted, I will use the versions in McCord’s 1867 edition of the Code, as they are more accurate than those in the second edn. of the Reports: see McCord’s Preface, pp.iii-iv. 35. On the nature of this volume see infra, chap. 3 and chap. 6. 36. See Sources, Appendices A, B and C. On the relevancy of Batiza’s work, see infra, ch.3 and ch. 6.
Castilian law, French customary law, and French codified law.

In the next chapter, there will be a description of Quebec and Louisiana societies. In the third chapter, the juridical culture of both societies will be described, paying close attention to the circumstances surrounding codification, and the legal history of both societies. The second part of the thesis will be devoted to an analysis of the codal provisions on family and employment, relating these provisions to the pre-codification law and the wider society, explaining the circumstances which have resulted in legal change or legal stasis, and the reasons behind the selection and rejection of provisions. The third part of the thesis will be devoted to explaining in more general terms the interrelation of law and other social phenomena in Quebec and Louisiana, paying attention to its wider and more general implications, and to dealing with incidental problems relating to the history of codification in both countries, the nature of codification itself and the role of lawmakers.

3. The suitability of Louisiana and Quebec as subjects of study.
   A. Rich juridical culture.

   As chapter 3 will make more apparent, the juridical culture of both Louisiana and Quebec was particularly rich. Both formed part of the learned European continental civilian tradition, while being, at the time of their respective codifications, open to influence from Anglo-American common law. This background meant that on codification, the codifiers would have been able to draw on wide and varied sources for inspiration, and for selecting rules. Indeed, as pointed out above, it is clear that in both codifications, there was a great deal of conscious "transplantation" of rules: 37 that is, both sets of redactors always had the provisions of other jurisdictions in mind and deliberately accepted or rejected them.

   37. On this notion of "legal transplant", see Watson, Transplants, generally, and especially, pp. 6-9; 19-20; 21-30; 95-101; and 102-6.
B. Societies in transition.

Quebec's law was codified in 1866; that of Louisiana in 1808. As will be shown in chapter two, at the period of their respective codifications, both societies were in the process of a transformation. Both societies were radically different from those of the period and countries from where they drew their laws. There had been material and ideological changes in the structure of the economy and the family. Both societies were developing along the model of laissez-faire liberalism. Quebec and Louisiana are thus very suitable subjects of study, since their laws were transplanted from different societies and conditions and since their own societies were in a period of transition. These changes ought to emphasise the relationship between legal change and other social change and help point out the nature of that relationship and the factors promoting and preventing legal change.

C. The validity of generalisations from Quebec and Louisiana.

We have already touched on the question of whether or not the results of our investigation of change and stasis in the codifications of Louisiana and Quebec could form the basis of valid generalisations about factors influencing legal change or whether the results would be too specific to the two societies.\(^{38}\) From what has been said above, it must be accepted that generalisation from the two codifications would be valid for other early to mid-nineteenth century codifications, and probably law reform of that period generally.

There are, however, two separate problems. First, there is the possible problem that the period since the promulgation of the Quebec code has seen a burgeoning of law dealing with welfare, labour and tax.\(^{39}\) Much of the law in these areas

\(^{38}\) See text supra at notes 31-33.
could be argued to be of a different nature from that studied here, such law being, in interventionist states, the result of conscious and deliberate governmental planning on the basis of carefully formulated social and economic policies. In the two codifications we are studying, to reform or not to reform the law, to decide what the law already was, and to select suitable provisions, was largely left to the discretion of the two sets of redactors. Such an argument, therefore, could have considerable force. Two points fall to be made. As regards those forms of law outlined above considered as typical of the interventionist state, one can say that because such laws are planned by governments, and are the result of policy decisions, their origins and causes are more readily ascertainable than those of reforms in the traditional private law fields. This said, I would not argue that the results, as regards the influences on legal development, obtained from this thesis, should be applied to modern welfare-type law. In this study, however, we are dealing with traditional private law, which is still the paradigm for law in general, and hence generalisations from this study could still be valid for traditional private law, as will be argued next.

Second, it could be argued that, with the growth of the modern interventionist state, reform in even the traditional areas of private law has become a matter of conscious governmental planning, and that this means that the 1808 and 1866 Louisiana and Quebec experiences can tell us nothing relevant about modern law. Again, this is an argument with some force. This argument loses some of its cogency, however,

---

40. B. Audit in "Recent Revisions of the French Civil Code", 38 La. L. Rev., (1978-9) pp. 747-804, remarks at p. 748. "Certainly in a liberal society this branch of the law is the fundamental one, and this accounts for the symbolic and practical importance of the code which states its rules." He goes on to remark that "the evolution of social and economic conditions in those same societies since the enactment of the codes has caused in each of them a decline in the relative importance of civil law and hence of the civil code." The same argument as used above applies here. He later reasserts, however, that "one could state rightly that the civil law contained in the code constituted the essential part of private law". Ibid., p. 749.
if the following points are considered. First, although the two sets of redactors appear to have been given considerable latitude in their work, it should be recalled that their codes had to be approved by their legislatures. This means that there was an opportunity for executive or legislative opposition to provisions. The complex nature of a civil code would make it a very difficult piece of legislation to scrutinise; but the Quebec redactors, in their comprehensive Reports, indicated major changes in the substantive law. Further, any provision of a radically unacceptable nature in either of the two codes undoubtedly would have led to their rejection: hence, although the actions of the redactors were generally uncontrolled, the fact that the codes would have to be passed would cause the redactors to modify their work to be acceptable, had they the desire to change the law drastically in an unacceptable way (which is unlikely given the structure of the society within which the redactors operated and their own place within that society). The position is similar in modern reform of uncontroversial areas of the law: reform is a task handed to specialists, such as the Law Commissions in England and Scotland. Such specialist bodies, as well as considering "modernisation", are concerned with general principle, over-all coherence, tradition, and those considerations which Professor Friedman has called "aesthetic". Not all modern law reform is guided by social purposes and practical functions, although even scholarly law reformers are concerned with modernising the law, as were the Quebec and Louisiana redactors.

It would then be acceptable to generalise from the

41. For example, some trifling reforms the C.Q. redactors introduced as to who should be able to convvoke, family councils were rejected.
42. See infra, chap. 3, and the third part of the thesis.
44. On the Law Commissions, see further Watson, Transplants, pp. 91-2, Society, pp. 102-4. Friedman op. cit. remarks at p.270: "As a general rule, revisers of law do not pay much attention to impact. They more or less assume that 'better' laws will have serious results in the world of behaviour.
Louisianian and Quebec experience as regards at least traditional private law. It should be borne in mind, however, as pointed out above, that we are not seeking to establish universal rules of legal development: what we are concerned with is exploring the reasoning behind stasis and reform in the two codifications to investigate the nature of the relationship between social change and legal change. Hence, the reasons behind the choice of law on codification in Louisiana and Quebec, while indicating the factors influential on legal change, are important in demonstrating the multiplicity of influences on law reform, and the importance of lawmakers as the mediators between law and the wider social structure. What should be clear is that, in selecting Louisiana and Quebec for investigation, we are not choosing two jurisdictions likely to be in any relevant way exceptional.

D. Advantages of studying a codified system.

Before discussing the advantages of studying a codified system, it is necessary to define "code" and "codification". Here certain key attributes common to codes will be pointed out; drawing on knowledge of several civilian codes and abstracting from them important common features. The definition of code is also important because there is at present a dispute over the exact nature of the 1808 Digest of the Territory of Orleans (the Louisiana Code of 1808). From the definition given here, it will be possible later to assess the arguments of those who reject the 1808 Digest as not being a true "code". 46.

The term "code" has never had an exact and specific meaning - its meaning has varied in time and place. The term, or one of its variants, has been utilised to refer to compilations of law from Roman times onwards; but the nature, 45. The literature on codification is vast, and there will be no attempt here to review it or refer to it en masse. 46. On this, see infra, ch. 3, sec. 3 and Part three of thesis.
content and form of the compilations has varied. From the early nineteenth century, however, the term "code" has had a particular meaning in civil law countries. This particular meaning originates in the Code Napoleon, the promulgation of which provided a new paradigm for a code. The coining of the neologisms "codification", "codify", and "codifier" by Jeremy Bentham gave linguistic expression to the paradigm set by the French code and those that followed it.

Certain features of this new model of code can be picked out to demonstrate what was meant by it. Firstly, codes are legislative enactments - positive law par excellence. Secondly they cover a specific area of the law. Thirdly, they aim to cover that area as comprehensively as possible, though, of course, this aim is never fulfilled as codifiers are neither clairvoyant nor infallible. Codes may approach perfection; they never achieve it. Fourthly, codes are arranged according to some logical system. Fifthly, they approach lucid, coherent expression as far as possible. Some have been inclined to emphasise that codes provide "a fresh start"; and, of course, they do in so far as they provide a reform and restatement of the law designed, through legislation, to replace the old law. Codes, however, are largely built out of old material, which is, of course,

47. See generally J. Vanderlinden, "Le Concept de Code en Europe Occidentale du XIII-au XIXe siècle", who argues that a common concept can be shown for the period to be studied. Nevertheless there was great variance in both form and substance between the codes he examined. See his pp.22-46 for an account of different examples of codes.
48. When promulgated in 1804, it was of course called the Code Civil des Français. Nevertheless, for convenience, I will generally refer to it as the Code Napoleon, following contemporary usage in France where the term Code Napoleon is used to refer to the original code before revision.
49. See J. Vanderlinden "Code et Codification dans la Pensée de Jeremy Bentham", 32 Tijdschrift voor Rechtsgechiedenis (1964) pp. 45-78, esp. at p. 46. Bentham himself wrote, "For characterising an object which not only is new, but is designed to be presented as such, a word as plainly new as the object itself is meant to be represented as being is much more convenient than any old word taken from the old-established stock of words belonging to the language." See G. Wallas, "Notes on Jeremy Bentham's attitude to word Creation", in Society for Pure English, Tract no. 31, Oxford 1928, pp.333-4.
reformed in the process of codification. Thus, the German code would have been impossible without the work of the Pandectists, while the Code Napoléon was constructed out of the old law, and that of the revolutionary period and the directorate. It clearly can be seen that codes attempt rationalisation of the law. They are the ultimate in rationality in a Weberian sense, in that they provide a logical system of rules that stand out with the legal process, and on which the actors in the legal process can rely for decisions.50.

Having given a working definition by selecting the key elements of a code, it is appropriate to refine it further by discovering the functions that can be served by codification. It may be used: 1) to unify the law; 2) to rejuvenate the law by removing illogicalities and inconsistencies and by introducing new solutions if thought necessary. These two functions can be called unification and modernisation, and both arise out of a tendency towards rationalisation.51. From these two functions, one can deduce that the process of codification involves a review of the substance of the law as well as its formal rearrangement. This review allows a re-appraisal of the law when faced with changing circumstances.

50. Weber was not, of course, primarily concerned with the substance of the law as we are here. He was concerned with the legal process. Yet, it is clear that he regarded codification as part of the tendency towards rationalisation of the law in its social operation. He also identified this tendency towards rationalisation with the growth of European capitalism. This gave him problems when he considered unmodified English law - the law of a highly developed capitalist state. See on this, D.W. Trubek, "Max Weber and the Rise of Capitalism", 1972 Wis. L. Rev., pp.720-53, at p.747. On his concept of rationality, see Reinhard Bendix, Max Weber, An Intellectual Portrait, ch. 12.

51. On what I have called functions, see further: R. Pound, "Codification in Anglo-American Law," in Schwarz (ed.) The Code Napoleon and the Common Law World, pp. 267-297 at p.278; and H.R. Hahlo, "Here lies the Common Law: Rest in Peace," 30 Mod. L. Rev. (1967) pp. 241-259 at pp. 243-4. Doubtless other functions could be identified; these two seem the most important. Hahlo mentions protection of a legal system against the invasion of foreign rules, and cites, as an instance of this, Quebec, on this see infra, chapter 3, Part Two.
This re-appraisal of the law combined with the modernisation function means that, in the process of codification, choices are constantly being made between competing provisions — whether of differing jurisdictions in unifying the law, or of doctrinal views in settling doubtful points, or of competing sources if foreign law or juristic writings have been referred to in order to modernise. Ferdinand Stone stated it thus:

"Codification as a method demands that stock be taken of existing legal materials and so forces an examination not only of those ideas existing in the State that is engaged in codification but also in all other civilized States."

Other writers here also stressed the importance of examining foreign laws in codifying with a view to a transplant.

From all this, one can see that the fact that Louisiana and Quebec have civil codes is very useful for this study, since codification allows re-assessment of the law, its reform and free transplantation of law. Thus, the historical causes of legal change ought to be more easily identifiable, since wholesale legal reform would be undertaken, of necessity, with codification. The process of reform has been speeded up, and made to cover a substantial area of law, while the codifiers had to make rational choices between possible provisions.

The positivistic attitude in which a code is drawn up aids this study in so far as codifiers thought it possible to formulate definitive rules to guide and reflect social

life. They did not conceive of rules functioning in an unintended way. Here we are concerned with the views of the codifiers and the factors which would influence them in their redaction of their respective civil codes, in order to discover the historical causes of legal change or stasis. The codifiers' belief in positive law and the possibility of their reform of the law in line with the influence on them enables us to avoid three problems in assessing the relationship between written law and other social phenomena. Firstly, as Karl Renner points out, a rule of law can remain the same in formulation, but, due to changes (or differences in the case of a transplant) in the social and economic structure, operate in a totally different way. This obviously poses problems in deciding whether for example, a rule from fourteenth century Castile, derived from Castilian social life is apt for nineteenth century Louisiana. In this study, however, we can avoid this problem because we are concerned with the choice made by the codifiers, not with how the rules functioned after codification, but why the codifiers in 1808 or 1866 chose any particular rule. Secondly, no written rule is ever comprehensive. New fact-situations constantly arise which stretch the interpretation of a verbally formulated rule. Furthermore, since rules are stated in general terms, they inevitably have a penumbra of vagueness, or, in Hartian terms, an inherently "open texture". Together, the penumbra of vagueness and the development of new fact situations allow for the development of the law away from its original positive statement. This means that it would be difficult to relate the authoritative statement

54. K. Renner, Institutions of Private Law, 1949, trans. Scharzschild, generally and see esp. pp. 74-77. "A legal institution is a composite of norms. If in the change of economic systems it has remained constant but its functions have either increased or diminished, changed or disappeared, then we speak of a change in the functions". - p. 75.
56. The Concept of Law, p. 120 and pp. 122-4.
(codal article) to social reality, because the rule as applied would be rather different. Since, however, we are here studying law at codification, and its relationship to fact situations at that time and before further development, we can avoid this problem. The third problem that studying codification enables us to avoid is that of legal interpretation. Interpretation of an original rule by subsequent jurists, judges and the like can cause the rule to come to mean something totally different from its original formulation. Similarly, Professor Sacco has pointed out that what is basically the same provision can be interpreted differently in different countries. Similarly, Professor Sacco has pointed out that what is basically the same provision can be interpreted differently in different countries. This problem of interpretation of a codal article away from its obvious meaning does not affect us in this study, because we are examining the provisions at the time of codification, before interpretation could take place, and we can safely assume that the codifiers meant the provisions they chose to bear their obvious meaning.

All the above indicates why law at the time of codification is particularly appropriate for this study. The study itself will produce some further understanding of the process of codification. Certain points relating to the nature of codes will be raised later in chapter three.

---

58. One thinks especially of rabbinical interpretation of, for example, the lex talionis of Exodus 21.24 to mean damages. For an amusing example of such rabbinical interpretation, see D. Daube, Civil Disobedience in Antiquity, p.ix - Rabbi Jose ben Taddai.

Chapter Two.

Introduction to Louisiana and Quebec.
"When you meet people who tell you that climate has no influence on the character of peoples, assure them that they are mistaken. We have seen the French of Canada: they are a tranquil, moral, religious people. We are leaving in Louisiana other Frenchmen: restless, dissolute, lax in all things. Between them are fifteen degrees of latitude, which we truly think the best reason that can be given for the difference". 1.

Thus wrote Alexis de Tocqueville in 1832, following the ideas of Montesquieu on the influence of climate. In this chapter we will examine economic and social life in Louisiana and Quebec at their periods of codification. The nature of the family in history and the master servant relationship will be examined more rigorously in chapters four and five: this chapter is more of an impressionistic survey.

1. Louisiana.

The Mississippi river system dominated Louisiana. The river was the main commercial artery and means of transport. 3. The river was central to the economy as it carried trade from the western states and territories of the U.S.A., and was the route of all Louisiana's exports and imports.

---

1. Letter by de Tocqueville to Chabrol, 16th Jan., 1832. This can be found quoted in G.W. Pierson, Tocqueville and Beaumont in America, Oxford, 1938, at p.632. This book contains invaluable source material and will be referred to hereafter simply as Tocqueville. Also found useful is A. de Tocqueville, Journey to America, ed. by J.P. Mayer, London, 1959, hereafter referred to as Journey.


3. Travelling up-river was by no means as easy as travelling down: far more boats came downstream to New Orleans than ever travelled back up. East-west traffic was a problem, as the river-system flowed north-south. On the problems of transport and the flow of streams, see P.B. Kniffen, Louisiana its Land and People, Baton Rouge, 1968, p.142. On the smaller number of boats sailing upstream, see A.P. Whitaker, The Mississippi Question, 1795-1803. A study in Trade, Politics and Diplomacy, New York, 1934, p.141.
Further, all settlement was along the banks of the river, the farms being protected from inundation by the augmentation of the natural levees by artificial ones.\(^4\)

Towards the end of the period of Spanish rule in Louisiana, two changes of major importance took place in the economic system of the colony: the first was the development of New Orleans as the natural entrepot of the American west, and the second, the development of the cotton and sugar industries in Louisiana. The westward spread of U.S. citizens into Kentucky, Tennessee and Ohio (the area then called the Northwest Territory)\(^6\) stimulated the growth of New Orleans as an entrepot during Spanish rule. The settlers in these areas were mainly farmers, who, if they wished to rise above the level of subsistence farming, had to get their goods quickly to market; however, the spread west meant that the markets and ports in the east were farther away.\(^7\) Before the railways, the simplest mode of transport was by water; there was, however, no eastwards river system these farmers could utilise, and to transport goods to market overland would have been prohibitively expensive. The water system of the Mississippi penetrated the whole area, however, and the obvious solution to the problem facing the farmers was to transport their goods to market through New Orleans.\(^8\) Berquin-Duvallon in 1802 described New Orleans,

---

6. See A.P. Whitaker, *op. cit.*, pp.3-15
7. A glance at any map of the area will reveal the nature of the problem. The map in Whitaker, *op. cit.*, facing p.3 may be consulted conveniently.
8. Clark, *History*, p.212, concludes that "Farmers east of Pittsburgh found it cheaper to ship their produce to market via New Orleans than to forward it to Philadelphia."
"as destined by nature to become one of the principal cities of North America, and perhaps the most important place of commerce in the new world, if it can only maintain the incalculable advantage of being the sole entrepot and central point of a country almost flat, immense in its extent, of which the Mississippi is the great receptacle of its produce and where the soil is fertile, the climate generally salubrious and the population increasing beyond all former example." 9.

For various reasons, mainly the result of the war in Europe during the 1790's, the Spanish authorities tolerated the U. S. to New Orleans trade. 10. In the 1790's, Spain wished peace with France, while also by placating the United States, wanting to prevent an Anglo-American attack on Louisiana: this was achieved in 1795 by the Treaty of San Lorenzo (Elkney's Treaty), which granted to the Americans free navigation of the Mississippi, and the privilege of depositing goods at New Orleans and re-exporting them without payment of duty. This Treaty basically granted legality to a trade that had been carried on for a number of years. 11. Thus, from the last decade of the eighteenth century, up to 1803, there was a large volume of American trade through New Orleans.

"The productions of Louisiana are - sugar, cotton, indigo, rice, furs and peltry, lumber, tar, pitch, lead, flour, horses and cattle. Population alone is wanting to multiply them to an astonishing degree." 12. Thus said an 1803 United States' pamphlet. During the 1790's, there was a shift in the staple crops produced in Louisiana. Up to this period, indigo had been an important staple, but

---

9. See his Travels in Louisiana and the Floridas in the year 1802, Giving a Correct Picture of those Countries ..., translated from the French by John Davis, New York, 1806. Berquin-Duvalon was from S. Domingo, and came to Louisiana fleeing the uprisings. One needs only to read his work to realise he is a notable "Louisianaphobe", and his judgments on the inhabitants cannot be relied on.
11. See Clark History, pp.205-212, and for an excellent, clear account, see Whitaker, op.cit., pp.79-97.
in the 1790's, a series of crop failures so set back its production, that Berquin-Duvallon could remark in 1802 that "Indigo, within 20 years, has been generally abandoned in Louisiana."13 Sugar and cotton became the important staples. The climate of Louisiana suited cotton production, and the invention in this period of the cotton gin made large scale commercial production feasible.14 It was, however, sugar production to which plantation owners changed after the failure of the indigo crops. For the first time sugar cane production was successful in Louisiana. The war and revolution in the West Indies, by disrupting production there, left open the lucrative European market for Louisiana sugar. This strife also raised the price of sugar, and caused many experienced sugar planters to emigrate from the West Indies to Louisiana.15

During this same period, Americans came to dominate economic life in Louisiana. Louisiana had always been underpopulated, and the Spanish government encouraged Americans to settle.16 The influence of these anglophone subjects of Spain was increased by the constant presence of U.S. citizens in Louisiana on business.17 The war in Europe again was effective in bringing Louisiana within the U.S. sphere of economic interest.18 In 1796 Spain went to war against Britain. At sea, Spain was not successful, and, to prevent her colonies collapsing, she authorised neutral vessels to carry

---

14. For an account of this industry's growth, see Clark, History, p.217.
17. Whitaker also points out that during this period many of the men on the flat boats bringing produce down from the west stayed behind in New Orleans on the completion of the journey: op.cit. pp.141-2.
18. See supra, text at notes 6-11.
virtually all goods to Spanish-American ports, and to load all goods bar specie. The U.S.A. was in fact the only neutral country capable of acting on this authorisation. Clark points out that:

"Implementation of the territorial and commercial clauses of Pinkney's treaty and the exigencies of war tightened the dependence of New Orleans upon the United States. Settlers on the east bank of the Mississippi and north of the 31st parallel, largely Anglo-Saxon, were now American citizens. American ships were admitted legally to the river and could dispose of goods and obtain cargoes at the deposit without the payment of any duties; or they could trade directly with merchants in New Orleans as a result of the neutral shipping regulations with duties assessed under prior regulations. Far more than fifty per cent. of the vessels entering the port of New Orleans carried the American flag while other vessels, under Spanish registry, were owned by Americans." 19.

The U.S. control of Louisiana's trade continued until its acquisition of the territory in 1803, despite Spanish attempts in 1799 and 1800 to reduce the privileges granted,20 and the suspension of the right of deposit in October, 1802.21 "By the time of the transfer of Louisiana to the United States, American control of Louisiana's trade was complete. Berquin-Duvallon remarked in 1802:

"Relative to what concerns the commerce of the colony, I shall observe, ...that, from the beginning of the maritime war, which has lately terminated, that is, about nine years, this commerce has been entirely in the hands of the Americans, who have shared the profits with the English, to whom they are factors or agents." 22.

As Clark points out, the Purchase merely gave political legitimacy to economic fact.23

During the period 1803 to 1808, the economic foundation of Louisiana society remained the same, sugar and cotton,

20. See ibid.
23. History, p.248: "the great number of American vessels ... in New Orleans adequately symbolised that the city functioned within the American Sphere of influence and that the Louisiana Purchase, in a sense, merely added political legitimacy to economic facts operative for over a decade."
produced by slave labour, still being the staple crops of the territory. The farmers in the western lands of the United States produced crops, especially grain, which were exported through New Orleans, and which, by their importation into the territory, supported Louisiana's plantation economy. There were two main influences on the territory's economic life in this period. First, the new century was to be dominated by the ideals of liberal capitalism: "The new century, in New Orleans as well as New York and Liverpool, was the century of the bourgeoisie." Second, with United States' control of the territory, and with economic affairs being mainly in the hands of Americans, their notions of how the economy ought to be run were implemented.

The Americans seem to have had a more entrepreneurial attitude than the Creoles; or, at least, their government did not discourage such an attitude. An obvious example of this is found in land speculation. Both the Spanish and French administrations did their utmost to prevent land speculation, the latter going so far as to annul land concessions made to those who speculated in land. After the Louisiana Purchase, however, there was widespread speculation in land, many Americans taking advantage of the confusion over the status of Spanish land grants in order to make substantial profits. It is clear that, while the Spanish government carefully regulated the market, in the first decade of American sovereignty, principles of free.

enterprise were applied. The total change wrought in the mechanisms of the Louisianian economy is conveyed by the following two quotations from Clark's standard work on Louisianian economic history. During the colonial period in New Orleans the Cabildo (city council) regulated the market:

"through the application of methods derived from the mediaeval city. Such concepts as fair price, purity in products, accuracy and standardisation of weights and measures, and prohibitions against engrossment or forestalling were all applied in the name of public welfare. Climaxing during the Spanish period, the role of the city government in these matters then declined in the face of contradictory concepts of the market place introduced by the Americans and current in other cities throughout the United States."

Clark also remarks that:

"While the Spanish had acted leniently toward Louisiania in formulating economic policy, the regulation of economic and political affairs in New Orleans was a fact of life .... Relative to the past, American sovereignty meant a free economy in New Orleans and the territory...." 31.

He then concludes that "the days of the fair price and regulated market place were numbered." 32.

It may be seen that through the period of the Louisiana purchase and onwards, with the ever-increasing United States' influence in Louisiania, the organisation of the market (and hence of economic affairs generally) altered from careful regulation based on notions of fair price and fair profit towards a free market and the maximisation of profits. Thus, one may say that there is a definite trend in the organisation of economic affairs towards the ideal of economic liberalism. It is perhaps not insignificant that copies of Adam Smith's

---

29. See Clark, op.cit. supra note 28 (in McDermott, Spanish) at pp.144-5.
31. Ibid., p.281.
32. Ibid., p.283.
The *Wealth of Nations* were in circulation in Louisiana in this period. 33.

In the early territorial period, manufacturing industry in Louisiana was negligible. 34. In 1802, Berquin-Duvalion stated that in the suburbs of New Orleans there were two cotton mills and a sugar bale-house. 35. The 1803 *Account of Louisiana* likewise mentions some manufacturing establishments, but it should be noted that much of the manufacturing was of necessaries for consumption within the territory. 36. Clearly, industrialisation had not taken place, there was no production of goods in bulk for export for profit. It should be noted those manufacturing establishments which there were tended to employ slave labour. 37. There was, therefore, little opportunity for the employment of a class of wage labourers.

So far it has been argued that there was an identifiable trend in Louisiana from regulation of the market towards the ideals of liberal economics. The most important units of

---

33. See R. P. McCutcheon, "Books and Booksellers in New Orleans, 1730-1830", 20 La. Hist. Quar., (1937), pp.606-618, esp. at pp. 612, 615, and 618. This article is useful for gaining an impression of the intellectual climate of Louisiana. See the same author's, "Libraries in New Orleans 1771-1833", 20 La. Hist. Quar., (1937), pp.152-165. Moreau Lislet was involved in some of the library projects. Note that the influential reviews of the period were available.

Recently, of course, there have been doubts thrown on Smith's role as the apostle of laissez-faire economics, and it has been alleged that Smith's œuvre, if looked at as a whole, belies the position attributed to him by nineteenth century economic liberalism. See D. Winch, *Adam Smith's Politics. An Essay in Historiographic Revision*, Cambridge, 1978, pp.13-14; 80-81 etc. for a discussion of this and for reference to other writers who have developed the new view of Smith's work. What is relevant, of course, as regards Smith's influence, is what others thought of his work. P. Stein, "Adam Smith's Jurisprudence-Between Morality and Economics", 64 Cornell L. Rev. (1978-9), pp.621-638, may be found useful.

34. See Clark, *History*, p.269.
35. See op. cit., p.32.
36. See op. cit. supra note 12, at p.41.
37. Clark, *History*, p.269 states: "Slaves were ... employed by their owners or as hired hands in the few manufacturing establishments located in or near the city."
38. Clark, *History*, p.269 states: "Opportunities for employment in New Orleans for the unskilled or semi-skilled free worker were restricted by the lack of an industrial base and by the presence of slavery."
production in the territory, the plantations were dependent on slave labour. The mercantile houses conformed to the ideals of liberal capitalism. Some authors have been inclined to see a conflict between the slave-owning planters as New World "aristocrats", and the merchants as "bourgeois". Such a distinction between the planters and merchants is false, and based (one suspects) on the naive view that slavery is incompatible with liberal capitalism. For the planters, as for the merchants, "their wealth was gained through the application of bourgeois-capitalist standards, ideals and methods of operation." The merchants and planters were often the same people. Related to this are the arguments of Professor Mitchell Franklin, who posits an ideological conflict between the slave-owners supporting the "mediaeval Spanish law" and the liberals supporting the Code Napoléon. He appears to argue that slavery was the product of mediaeval feudalism (whatever he exactly means by this term) in Louisiana, the result of Talleyrand's "penchant hispanophile". This is unconvincing. Clark and Dargo (who merely follows Clark) argue that slavery was an economic necessity in Louisiana, on the grounds that a primary cause of the economic failure of French Louisiana was the lack of slaves. They may be correct that slavery was an economic necessity, but their argument on the basis of French colonial Louisiana is not convincing, as, by the early nineteenth century, material circumstances might well have changed. What is relevant, 

39. For an argument on the relation between slavery and economic formation, see Orlando Patterson, "On Slavery and Slave Formations", in 117, New Left Review, 1979, pp.31-67.
40. Clark, History, p.270.
41. See generally, M. Franklin, Expulsion, 18th. Brumaire, and Existential Force. The explanation of these abbreviations will be found in the table of abbreviations.
however, is that Louisianians regarded slavery as necessary for the economic survival of the territory. Slaves were regarded by their owners as capital investments in bourgeois economic terms. The desire for the preservation of slavery was the result of supposed or actual economic necessity, and had nothing to do with the machinations of Talleyrand, as Franklin suggests but inadequately demonstrates. Slavery and support for slavery do not indicate what Franklin would call a "feudal" mentality. Similarly, there may have been conflict between merchants and planters over specific issues; but this conflict was never on an ideological level.

The ideology of the plantation owners and business community was that of liberal capitalism, and, although there were few industrial enterprises, production being primarily agricultural, the territorial period saw the

---

43. E. Mazureau, a leading New Orleans attorney (see note 47 infra), in reply to Tocqueville's asking if it would be possible for whites to cultivate the land without slaves, said that he did not think so. He stated that, like Tocqueville, he himself had come from Europe opposed to slavery, but had changed his mind, because he did not think that Europeans could work in the fields exposed to the Louisiana sun, and that to do so would risk death, or would permit so little work to be done as to be uneconomic. Tocqueville, p. 627, and Journey, p. 102. Mazureau's view would be typical. The same opinion was expressed in 1804 by an American, who thought the prohibition of the slave trade would result in economic disaster: see quotation and text in J. G. Taylor, "The Foreign Slave Trade in Louisiana After 1808," Louisiana History, (1960), pp. 36-43 at p. 37. The opposite view could be held, however. In Voyage a la Louisiane, et sur le Continent de l'Amérique septentrionale. Fait dans les années 1794 à 1798, Paris, an XI, (1802) by B* * D* * (i.e. L.N. Baudry des Lozières) it was stated at p. 109 that "La Louisiane est peut-être la colonie qui pourrait le plus se passer d'esclaves, puisque son climat permet davantage aux européens de travailler eux mêmes." Most Louisianians would have disagreed with this view.

44. See 18th. Brumaire.
setting up of the first chartered corporations in Louisiana, the New Orleans business community being heavily involved in them.\(^45\).

The economic strength of the anglophone presence in Louisiana has already been alluded to, as have class divisions within white society. Louisianian society was heterogeneous and culturally diverse, consisting of Anglo-Americans, native Louisianians of French, Spanish, French-Canadian, Acadian and German descent, and "free people of colour" and slaves.\(^46\).

Etienne Blazureau, a leading attorney, remarked to Alexis de Tocqueville in 1832 that, "Not a country in America or Europe but has sent us some representatives. New Orleans is a patchwork of people." At first sight, the ethnic diversity might seem to make it difficult to generalise as to the nature of family organisation in Louisiana; the diversity, however, was not really so great as might appear, as by the time of the Purchase, the German and Spanish descended inhabitants had largely been assimilated to the more numerous French.

---

47. Tregle, op.cit. supra note 46 at p.31 calls Mazureau "the brilliant lawyer and orator". He was one of the "foreign French" immigrants to Louisiana, arriving in 1804. He had left France on Napoleon's seizure of power. He became the partner of Edward Livingston.
48. Tocqueville, pp.627-8; a slightly different translation will be found in Journey, p.192.
Thus, among the white population, the only real social and cultural divide was between the francophones and the anglophones. The great divide was, of course, that between the blacks and the whites.

Others have treated the cultural and political polarization of the francophone and anglophone groups, and we need not discuss it here in any detail. Although the Anglo-American group was substantial, and important in commercial life, and although there was continuing immigration, the bulk of the population was francophone - the "ancient inhabitants" and many "foreign French" immigrants. The French speakers shared a common cultural background, although the French immigrants appear to have regarded the Louisianian French as boorish provincials. The anglophones were diverse in origin (American, Scots, English, Irish). It has been estimated that at this period the anglophones were outnumbered seven to one.

It is uncertain to what extent, if any, the fact of the francophones and anglophones forming two cultural groups, would be reflected in family organisations. In chapter 4, it will be shown that this period was a crucial one in the development of the modern family. Some general remarks may be made. The family tended to be "a much more potent

---

49. On the assimilation of the Germans, see Rene Le Conte, *op. cit.*, p.83; Kniffen, *op. cit.*, p.121. L.W. Newton, *op. cit.*, at pp. 31 and 34, quotes the famous historian Gayarre who said of the Germans that by 1803 they were "so Frenchified as to appear of Gallic parentage." On the assimilation of the Spaniards, see Kniffen, *op. cit.*, p.130. Kniffen thinks that by the end of the 18th. century, there were only two cultural groups, French and Anglo-Saxon. On the early history of Germans in Louisiana, see R. Kondert, "Les Allemands en Louisiane," 33 R.H.A.F., 1979, pp.51-65.
50. See works cited under note 46 supra, and Dargo, *op. cit.*, passim, and esp. pp.6-19.
52. Many of the French immigrants rose rapidly to prominence in Louisiana, often being better educated and more capable than the Creoles. See Tregle, *op. cit.*, pp.30-31. Moreau Lislet, the redactor, was one of them.
force than elsewhere in the republic." Tocqueville in 1832 touchingly described the venerable lawyer Mazureau on New Year's Day "receiving ... the homage of his assembled posterity.\(^5\) Family ties being close does not mean that some extended patriarchal-style family necessarily existed; on the contrary, a patriarchal extended family would not be likely in a developing frontier country, where intellectual life was conscious of the ideas of the Enlightenment and of notions of free will and individuality, and where it doubtless would be easy for sons to leave home and set up on their own account. Further, in a country where commerce and industry were starting to develop, the concentration in a few hands of control over property, presupposed by a patriarchal extended family, would hardly be appropriate. Family ties were close, but they were affective or associative rather than hierarchical.\(^5\)

The above remarks apply to the white population, but not to the black, which was, at this period, more numerous than the white.\(^5\) During the period of Spanish colonial government, it appears that the free people of colour had a relatively privileged position in comparison to that they held after the Louisiana Purchase, although they were, of course, of low social status: this higher position did last for a while after the cession, before they were assimilated.

\(^5\) Calhoun, A Social History of the American Family, vol. II, p.334. Calhoun's remarks apply to the whole of the antebellum south, which does not make them less applicable to Louisiana. See also his vol. I, pp.331-336 on the family in the French colonies in the west of North America: his account is, however, old-fashioned, and not very helpful.


to the position of free blacks in the other slave states. 60. There were no restrictions on their contractual competence or powers of ownership, and they had full competence in litigation against whites and other blacks. Among the free blacks, however, family ties were negligible, often the only known relationship being that of mother and child. Among the slaves, in many cases no such institution as "family" could be said to exist, because of the effects of slavery and the total control over slaves exercised by masters. 61.

The discussion of slavery brings up a related point: the position of free labourers vis-à-vis the family. Again this will be discussed more thoroughly elsewhere, but a few remarks are appropriate here. The Seventh Partida, book 33, ley 6, tells us that in mediaeval Castile a servant was regarded as one of the family, another person under the power of the patriarch. In general, by the early nineteenth century, this familial conception of the master-servant relationship had given way or was giving way to a contractual one. Further, the development of industrial factory-style manufacture and the disappearance of the artisan, involved the development of a class of wage-labourers far removed from any familial relationship with their master. In Louisiana, as already pointed out, industrialisation had not really begun, and the class of people who hired out their labour for wages, though it existed, was insignificant. Further, slavery would of course restrict the opportunities of employment for free labourers. 63. One can conclude, provisionally, that the status of free

60. See articles cited note 46 supra, and Dargo, op.cit., p.7.
61. On the reasons for this, see Calhoun, op.cit., vol. II, pp. 243-279, "Negro Sex and Family Relations", where he shows clearly how slavery broke down family ties between blacks in the South.
62. See chapter 5 infra, introduction.
63. See supra, text at notes 34-38.
servant in Louisiana would appear to be one in the process of changing from a familial relationship to a contractual one: how far had gone the trend towards rendering the relationship to the master contractual must be left undecided.

We can conclude this survey by remarking that there was a definite trend towards individualism and liberalism in Louisianian society. The regulated market had been replaced with the free market, while the plantation economy based on the new staple crops of cotton and sugar was supported by the imports from the American west. The mercantile community was strong, and industrialisation was starting, although as yet negligible. Individualism and economic liberalism can also be traced in the affective or associative family, based on free individuals, and in the increasing contractualisation of the master to servant relationship.

At the top of Louisianian society were the planters, merchants and professional classes. There was no large class of wage labourers, but there were artisans working for themselves to supply the needs of the colony: most of the labour was carried out by slaves. The blacks, both the free and the enslaved, came at the bottom of the social pyramid. The fact of slavery does not affect the conception of Louisiana in the territorial period as a society enthusiastically adopting the precepts of nineteenth century social and economic liberalism.

2. Quebec.

As in Louisiana, the dominating feature of the geography of Quebec is a river - the St. Lawrence. Settlement had originally taken place along the banks of the St. Lawrence; the farms tended to be small and narrow, due to subdivision on inheritance. The St. Lawrence river and canal system was

---

64. On the geography of Quebec, see generally Raoul Blanchard, Le Centre du Canada Français "Province de Québec", on the river system, ibid., pp.52ff.; on the harshness of the winters, see John Warkentin (Ed.), Canada: A Geographical Interpretation, ch.10, pp.281-333 by Pierre Bieys at pp.290-91; on abundancy of summer rainfall, see ibid., p.291.
vital for the trade and transport of the province. However, at the period of codification, the trade and transport of the province had been affected by the growth of the railways.

During French rule in Canada, the economy had two main bases: the fur trade with Europe, and agriculture. These two bases provided separate focal points, as the fur trade was carried on according to the mercantilist principles of the day, while the produce of agriculture was mainly for consumption within the colony. There was virtually no industry. The economy of New France was carefully regulated by the Crown officials and governing bodies. Thus, the Sovereign Council regulated the Indian trade, trade between Canadians and French merchants and internal commerce generally. The Council later lost some of these powers to Crown officials such as the Intendant. Thus, the Council and the Governor and Intendant regulated the profits of French merchants trading in Canada, and made detailed regulations on how the market was to be conducted, fixing the price of bread, meat and liquors.

No substantial class of merchant entrepreneurs developed in Canada during the French régime. External trade was in the hands of French merchants, while the wealthier colonists tended to spend their wealth in conspicuous consumption. It has been argued that the failure of such a class to arise

---

65. Here we will only highlight certain areas of the socio-economic development of Quebec. For a full treatment of the economic history, see especially, Hamelin, Économie et Société en Nouvelle France; P. Ouellet, Histoire Économique et Sociale du Québec, 1760-1850, (hereinafter cited as Ouellet, Histoire) and Hamelin and Roby, Histoire Économique du Québec, 1851-1896. Useful for the French régime, is Louise Dechêne, Habitants et Merchands de Montréal au XVIIe Siècle, 1974, pp. 125-347.
66. For a brief but useful outline, see Hamelin, Économie et Société (note 65 supra), pp. 21-34; on the fur trade, ibid., pp. 47-57; and on corn, ibid., pp. 58-71. On commerce and agriculture, see L. Dechêne, op.cit., pp. 125-347.
67. On the Sovereign Council, see further chapter 3 infra.
70. Ibid. p. 235.
was due to a contempt for trade, based on an aristocratic military cast being given to society by the presence of large bodies of soldiers in the province, and provincial demands for commissions (and indeed noble status). The officer class and the seigneurs became intermingled. From a rather different perspective, Hamelin comes to a similar conclusion: before 1760 there existed no bourgeoisie canadienne-française of any significance. He rejects as myth the thesis that the grande bourgeoisie either emigrated after 1760 or, cut off from trade, disappeared as a class. He states that: "Le commerce avec la métropole, les grandes pêcheries et le monopole de la vente du castor étaient aux mains des métropolitains, le chantier de construction navale et les Forges St. Maurice dans celles du roi." Thus, at the time of the conquest there was no form whatsoever of capitalist-style enterprise in French Canada.

In New France, land was held under the seigneurial system and hence was not easily treated as a marketable commodity, as the mutation fines payable to a feudal superior on transfer of property discouraged dealings in land. There also could be problems in gaining a clear title to land due to the lack of registration of title deeds in any way easy to check. That land was not easily transferable or mortgageable in the French period was no great disadvantage, since the habitants were not capitalists: they farmed, passed their farms to their children on death without need to pay mutation fines and were apparently reasonably prosperous. The seigneurs do not appear to

---

73. Ibid., p.137
74. See W.B. Munro, The Seigniorial System in Canada hereinafter cited as Munro, System), pp.95-97.
have made large profits from their seigneurie. The value of land was low due to it being in plentiful supply while the population was small, and the lowness of profits discouraged seigneurs from attempting to improve their seigneurie. Agriculture was not integrated into the commercial system of the colony, while the fur trade was more attractive and lucrative than farming.

Britain captured Canada in 1760, her possession confirmed by the 1763 Treaty of Paris. Britain applied the principles of mercantilism to her trade with her new colony. This trade was mainly in the staples of fur, wood and corn, with the latter two becoming much more important than the former. From the onset of British rule, the economy began to change: commerce expanded under the direction of British merchants, and the land was increasingly populated. The prosperity of Quebec became more and more dependent on the trading privileges she had with Britain under the old colonial system. Seigneurs adopted capitalist notions of ownership and tried to maximise their profits.

Generally, the English merchants regarded the seigneurial system as retarding the development of the province according to their notions of free enterprise.

Great changes in the economy started to take place in the period leading up to codification. Although the majority of the population was still one of peasant farmers, an important mercantile class based in Montreal and reliant on trade for its livelihood had developed. While the export of staple crops was still the most important aspect of the

---

75. See F. Ouellet, Éléments d'Histoire Sociale du Bas-Canada (hereinafter cited as Ouellet, Éléments), p. 94.
76. See Harris, The Seigneurial System in Early Canada, pp. 88ff.
77. See Ouellet, Éléments, pp. 95-96.
78. See infra, chapter 3.
79. See Ouellet, Histoire première partie, passim, esp. ch. 7.
80. Ibid., pp. 352-3.
81. Ibid., p. 403.
economy, industrialisation was beginning. Since the economy was dependent on preferential trade with Britain, there had been extensive canalisation of the St. Lawrence system to aid the Canadian trade and gain the trade of the American mid-west. It was intended that Montreal become the rival of New York as the entrepot of both the Canadian and American west. While Canada was dependent on privileged trading with Britain, Britain itself was moving from protectionism to free trade. The 1846 repeal of the Corn Laws and that subsequently of the Navigation Acts attracted commerce away from Montreal to New York and the other U.S. ports, because, although the route through the St. Lawrence to Britain was shorter, New York as an entrepot had many advantages over Montreal.

In the 1850's a new factor affected Canadian (and Quebec) economic development - the building of the railways. Montreal sought to use the railways to reinforce its metropolitan role. The building of the railways had two major effects on the Canadian economy: firstly, it stimulated industrialisation; secondly, it re-oriented the economy of Upper and Lower Canada towards the United States. The railways did not reinforce the St. Lawrence canal system; rather they opposed it and directed Canadian traffic to the United States, with the result that the Canadian economy became even more inextricably bound up with the American. The Quebec economy now became reliant on trade with the

82. See A. Faucher, Québec en Amérique au XIXe Siècle, pp. 26-7; and S. Ryerson, Unequal Union, pp. 257-8.
85. For an account of the reasons why, see Tucker, op. cit., pp. 40-43.
86. Faucher, op. cit., p. 44. On the railways generally, see ibid., pp. 43-68.
87. For an interesting view on this, see Ryerson, op. cit., pp. 253-4.
U.S.A. In fact, a whole series of events acting together brought this about: as already mentioned, the end of the old colonial system, the technological development of the railways, the interplay of market forces as a result of the capitalist drive to maximise revenue from investment and minimise operating costs, and finally the Treaty of Reciprocity of 1854 between Canada and the U.S.A. After the end of British protectionism Canada had to trade to survive, and trade with America was easiest and most profitable.

Only merchants based primarily in Montreal, a small proportion of the population, took part actively in this commerce, as the vast majority of the population were still peasant farmers. How were the latter faring during these years? The abolition of the seigneurial system obviously affected them, but it is doubtful if it had any great material effect on them, since they neither gained nor lost land and had to pay a certain sum in lump or over a period of years to redeem their feudal obligations. The habitants were most affected during this period by overpopulation, as the land in the seigneuries was overcrowded and often subdivided into lots too narrow to be economically farmed. Since industry was not developing at a rate sufficient to keep up with rural overpopulation, the surplus tended to emigrate to the United States or to colonise new lands away from the seigneuries. As well as subdivisions of land making farming no longer economically viable, the agriculture practised by the French Canadians was generally outmoded: "on persistait à conserver les techniques du XVIIIe siècle," remarks Faucher.

---

89. See Faucher, op.cit., p.189, and Hamelin and Roby, op. cit., pp. 161ff.
agriculture were practised near Montreal and in the Eastern Townships; both technique and profitability did improve, however, as the century wore on.\footnote{91}

At the time of codification, although industrialisation was commencing\footnote{92}, the mainstay of the Quebec economy was still the export of corn and timber. This commerce was, however, almost entirely in the hands of the anglophones, while the francophones, although important in the liberal professions, tended to farm or have menial occupations. Indeed, the bulk of the population was still peasant farmers; while rural overpopulation was causing many French Canadians to seek work in the industry of the United States.

The largely anglophone entrepreneurial class espoused the doctrines of liberal capitalism, and believed in unregulated freedom of the market. These views, originally prevalent only among the Montreal bourgeoisie, filtered down to other levels of society. In the early years of the nineteenth century, the liberal professions in the province had rejected commercial capitalism; but by 1847, Louis-Joseph Papineau, the staunch paternalistic upholder of seigneurialism, could declare that he was: "Disciple dès ma première jeunesse de l'école d'Adam Smith et de tout temps ennemi de tout monopole et privilège".\footnote{94}

Although Quebec was in many ways isolated and backward, it was still open to exterior influences from both Britain and the United States. The French, American and industrial revolutions all had an effect. Cuellet admirably sums it up thus:

"Après 1789, l'accélération de la croissance

\footnote{91} Ibid., pp.191-2 and Hamelin and Roby, \textit{op.cit.}, pp. 185-204.
\footnote{92} On the slowness of industrialisation, see Hamelin and Roby, \textit{op.cit.}, pp. 227ff.
\footnote{94} Speech reported in 21st. December, 1847, edition of \textit{La Revue Canadienne}. See Tucker, \textit{op.cit.}, p. 79, and see also note 33 supra.
économique, la hausse des prix, la commercialisation accrue de l'agriculture donnent plus de relief aux défis anciens. Puis l'introduction du parlementarisme, la révolution française et la montée des classes moyennes inscrivent de nouvelles pressions en faveur d'une transformation des mentalités. Ces réalités, penserait-on, préparent l'éclosion d'une société bourgeoise de caractère capitaliste et individualiste. Tout dans le monde de l'époque, incite à une semblable évolution. 95.

Several examples will usefully illustrate this growth of a liberal capitalist ideology. First, forest land, previously publicly owned and government administered, was sold by the government for commercial exploitation. Second, the employer-employee relation was redefined. Thus, the business community of Quebec made the following declaration in 1867:

"Every individual has the right to settle for himself the rate of remuneration for his services; and it is not illegal for a number to agree upon a rate of wages. This is but the full exercise of freedom, and against it there can be no complaint. The employer is left with the choice of submitting or procuring other labour; and, he too, is thus free." 97.

The process of industrialisation, slow though it was, was forming in Quebec an urban labour force. No longer were employees (servants) part of a family grouping, or employed by artisans or apprenticed to their trade; they were now in a contractual relationship with their employer, as the above quotation shows. Workers no longer tended to be skilled artisans owning the tools of their trade; they were being turned into unskilled labourers. This development of a class of wage labourers, and the contractualisation of the relationship between master and servant under the tenets of economic liberalism, along with

96. See on this Hamelin and Roby, op. cit., pp. 208ff.
the change in the nature of the family, will be discussed in more depth later. 100.

The third and most obvious example of the growth in Quebec of liberal capitalist notions of individualism is the controversy over seigneurial tenure of land. In many ways this tenure did appear to hinder industrialisation and the full enjoyment of private property. 101 (That those taking part in the controversy thought in terms of private property as absolute enjoyment is in itself significant.) The abolition of seigneurial tenure was achieved just prior to codification, and it is unnecessary to discuss it here in any detail. 102. The views of J.C. Taché may be taken as representative of one side of the controversy, as he highlights a disadvantage keenly felt in the 1850's:

"L'inféodation ne lie pas seulement le censitaire; mais elle lie la société toute entière .... Le crédit foncier, les entreprises publiques et privées, les droits des tiers, tout est soumis au régime de cette tenure. Je citerai un exemple duquel je ferai ressortir un fait important pour la cause. La province en commun avec de puissantes compagnies est engagée dans le confection d'un réseau de voies ferrées; mais il faut traverser le sol seigneurial et en asquérir une portion; or chaque parcelle du sol féodal, en vertu de l'indivisiblité du cens, est soumis au droit de Lods et Ventes, qu'une transaction arrive équivalent à vente, et il faudra payer aux seigneurs la douzième partie de la valeur des chemins de fer. Dans ce cas, comme dans celui de la fondation ou de l'agrandissement des villes ou de l'établissement d'usines ou de manufactures, ce n'est pas, le censitaire actuel de la propriété rurale qui souffre le mal le

100. See introduction to chap. 5.
102. For a conventional, rather old fashioned account, see Munro, System, pp.224-251. See also Ouellet's article "L'abolition du Régime Seigneurial et l'Idee de Propriété," Hermès, 1954, pp.21-36. (Cited hereinafter as Ouellet, Hermès Article). This paper can also be found in his Éléments, at pp.297-315: all references here will be to the Hermès publication. See also, M. Seguin, "Le Régime Seigneurial au Pays de Québec, 1760-1854", i R.H.A.F., (1947-h8), pp.382-402 and 519-532.
103. I.e., what have previously been called mutation fines: see text supra at note 74.
The seigneurial system was regarded as opposing economic growth, and opposition to it was articulated in terms of the needs of industry and capitalism: the retardation of industrial growth being recognised as detrimental for society as a whole. The opposition to feudal tenure was not merely on this material basis; opposition was made on ideological grounds: Ouellet convincingly shows that the jurists and liberals of the period conceived of property as individual and absolute, and consequently found the seigneurial system contrary to the public interest as based on out-moded notions of dependency and aristocracy inimical to liberalism, both political and economic.

The above discussion of the economic history of Quebec shows that the economy was developing towards liberal capitalism. Initially, the movement towards this style of economic regulation came with the British capture of the province: under the French régime, there had been a close regulation of the market. Although the largely anglophone commercial classes were the first to espouse the doctrines of laissez-faire economics, by the mid-nineteenth century, these doctrines were widely supported throughout Quebec society, notably by the French Canadian professional classes. Although industrialisation had commenced, the economy was still largely based on trade in staple crops: this trade

104. It appears that the censitaires also wished for the abolition of the seigneurial regime: see Lord Durham's Report, Lucas' edition, 1912, vol. II pp. 24-5. At this period the censitaires were generally in debt to their seigneurs, and were hard hit by their feudal burdens: see Ouellet, Histoire, pp. 353-4. Indeed, between 1840 and 1843, no less than twenty per cent of actions in King's Bench were those of seigneurs suing their censitaires for debts: see "Report of the Commissioners appointed to inquire into the Seigniorial Tenure", to be found in W.B. Munro, (ed.), Documents Relating to the Seigniorial Tenure in Canada, (hereinafter cited as Munro Docs.) p. 352.

105. La Tenure Seigneuriale en Canada et le Projet de Commutation, 1854, pp. 44., to be found quoted in Cuellet, Hermès Article, p. 24.

106. See his Hermès Article, passim.
was now governed by the rules of economic liberalism, as
evolved by the 1854 Reciprocity Treaty with the United
States, and the end of privileged trade with Britain.
The ideology of liberal capitalism was reflected in
conditions of employment, while also structuring the debate
over the abolition of the seigneurial system.

As we can identify a shift in the structure of the
Quebec economy in the period leading from British capture
to codification, so we identify a change in the nature of
the family when taken from France to Canada. Garigue has
argued that the French Canadian family of the eighteenth
and nineteenth centuries was rather different from the
French family of the same period and before colonisation.
Garigue gives as an example the prevalence of the communauté
taisible among peasants of ancien régime France, which
required a particular form of family organisation, and
which was not taken to New France. The communauté taisible
was a device developed by serfs to prevent land reverting
on death to the seigneur under the rules of mortaille or
mainmorte servile: the land was owned jointly and indivisibly,
so there was never a succession on a death, thus allowing
the serfs to keep their land. This device required that
married sons stay with their mother and father and that
family property be pooled and owned by the whole family
group. The family was thus one of close paternal and
fraternal links. This form of family organisation outlived
the institution of serfdom, but was nonetheless not taken
by the colonists to New France for several reasons.

107. Philippe Garigue, La Vie Familiale des Canadiens Français,
108. Vie, p. 15, and references cited thereon.
109. See generally, Fr. Olivier-Martín, Histoire du Droit Français des Origines à la Révolution, 1948, no. 475, p. 635,
and also no. 202, p. 271.
110. See Garigue, Vie, p. 15
111. See Garigue, Vie, pp. 15-16 for discussion.
Plentiful land rendered paternal and fraternal links less strong, and marriage, rather than paternal or fraternal bonds, came to define the family. Women came to have an enhanced status, because, first, of their original shortage, and, second, of the frequent absence of their husbands, making them more independent and responsible. Further, the parent-child relationship altered with the growth of New France. Society encouraged large families and, by 1709, one commentator was already remarking on the different status of children in New France: parents were reported as not having the same authority as French parents over their offspring, and children had much greater independence. Garigue concludes that by the eighteenth century the French Canadian family was typically North American. Louise Dechêne, in her useful study argues that the forces which, at this period, were resulting in the development of the modern family in Europe were intensified by the special pressures (as outlined above) of colonial life, resulting in the early development of the privatised affective family.

---

112. Garigue, *Vie*, p.17, mentions that rules on periods of mourning, designed to prevent the remarriage of widows, were never enforced in New France. Garigue is labouring under a misapprehension here. Such periods of waiting before remarriage were found in Roman law, and hence in the droit écrit of southern France and ultimately in the *Code Napoléon*. They never formed part of the *Coutume de Paris*, which was applied to New France.

113. See Nish, *The French Regime*, (Canadian Historical Documents Series), pp.57-8, for government incentives to marry early and have large families.

114. See Garigue, *Vie*, p.17.

115. See Dechêne, *op.cit.*, note 65 supra, at p.434. On the general movement in Europe, see *infra*. Dechêne's study, at pp. 441-449 gives an excellent account of the family in the 17th century. More account will be paid to what she says in chapter 4, where it will be more relevant. For Garigue's view that the French Canadian family was typically North American, see his *Vie*, p.7.
We need not concern ourselves with the usefulness of the categories of analysis developed by Garigue; the description given of the family in Quebec, however, is useful. The family is based round marriage, rather than lineage or some collective extended grouping. Children are independent in comparison to those in France. Family ties and relationship undoubtedly were strong in mid-nineteenth century Quebec; but such ties were affective or associative rather than hierarchial. The Superior of the Seminary of St. Sulpice remarked thus in 1831 to Tocqueville:

"[The Canadian Race] lacks that adventurous spirit and that scorn of the ties of birth and family that characterize the Americans. The Canadian removes only to the farthest extremity of his parish and [of the commune] of his parents, and he goes to establish himself as near as possible." 117.

This also evidences that French Canadian family ties were in general stronger than those of the anglophone North Americans. By the mid-nineteenth century, of course, the overpopulation of seigneurial land was forcing many habitants to leave; and this tendency would weaken family ties. The colonisation of New France, although it weakened the old extended patriarchal family, strengthened

116. On categories and typology, see further chap. 4, introduction.
117. Tocqueville, p. 316. (Journey, p. 39) The Superior points out, however, that the younger population is ever more mobile. At the beginning of the 19th. century, Lord Selkirk wrote in his dairy: "All that are in a thriving way set out their children on new lots as they come up, giving them some money to stock them - they do not send them off as in New England to seek their land at hundreds of miles distant, but take up their land in the same or adjoining seigneurie, the young men live at home for some years after going occasionally at suitable seasons to carry on their improvements. Lord Selkirk's Diary, 1803-4, ed. P. White, 1958, p. 224.
the relationships of the new-style family. The French Canadians, surrounded by anglophones, attributed great importance to family life and the ties of family generally.

There were, of course, substantial numbers of people in Quebec, not of French descent, and who generally controlled economic organisation and the colonial administration. There is no reason to believe that the nature of the family relationships among the anglophone population was appreciably different from that among the francophone. Considering, however, the stress placed on the family in French Canada, and considering the emphasis placed on there being closer family ties among francophones than anglophones, it is fair to conclude that family ties among the anglophones were less close. The evidence of the Superior of the Seminary of St. Sulpice would tend to confirm this.

Consonant with this development in Quebec of a new-style family based around marriage and with close parent-child ties, is the exclusion of the servant from the family, and his demotion to a purely contractual relationship, as pointed out above.

Overall, it may be concluded that, in Quebec, in the mid-nineteenth century, there had been a move towards an individualist conception of man, in both the social and economic spheres. There had been a shift from the

---

118. "La colonisation du Canada produisait une vie familiale ayant des caractéristiques particulières mais dont un certain nombre sont communes aux familles des groupes ethniques nord-américains. De plus, étant donné le 'vide' démographique du Canada, dès l'origine de la Nouvelle-France la famille fut l'instrument principal du peuplement. Après la Conquête de 1760, l'importance sociologique de la famille fut assurée par deux phénomènes sociaux: a) Le développement d'une vie rurale qui conserve, jusqu'à un certain degré, plusieurs des caractéristiques sociales de la colonisation de la Nouvelle-France; et b) Le développement d'une 'compensation sociologique' entre les institutions résultant en une intensification de l'importance attribuée par les Canadiens français à leur vie familiale." Thus Garigue, Vie, p.94.

119. See text at note 117 supra.

120. See text at notes 96-100 supra.
regulated market to free enterprise, and instead of hierarchical, extended family ties, there were close ties between the spouses and between the parents and children of an affective nature.

There had been a shift from protected trade with Britain in staple crops to free trade with the United States. Industrialisation and factory production had begun, stimulated by the growth of the railway system. There was, however, still insufficient industrial production to absorb the excess population on the land. Commerce and industry were largely in the hands of the anglophone population, while the francophones were strong in the liberal professions. Both the anglophone businessmen and francophone professionals adopted the ideology of liberal capitalism. The majority of the population was still peasant farmers, however; and although an urban labour force was developing, it was still numerically insignificant in comparison to the habitants.
Chapter Three.
The legal background to codification in Louisiana and Quebec.
Part One. Louisiana.

1. French Colony.

The original motive for French colonisation of Louisiana would appear to have been the desire to protect from British aggression the other French colonies in North America. Tentative explorations of the Louisiana area had been made by Cavelier de la Salle in the late seventeenth century: although these explorations had no immediate result, the importance of Louisiana had been recognised. Hence, over the period 1699-1702, under the direction of two Canadian brothers, Pierre le Moyne d'Iberville and Jean-Baptiste le Moyne de Bienville, the colony was gradually occupied for France. At its greatest extent, French Louisiana consisted not only of the present state, but also of substantial parts of Alabama, Arkansas and Missouri.

From the point of view of legal history, the first events of major importance in Louisiana were the founding in 1712 of the Conseil Supérieur, and the grant of Louisiana by charter in the same year to the financier

---

Antoine Crozat.  

Crozat's charter provided that:

"Nos Edits, Ordonnances Et Coutumes Et les usages de la Prevosté et Vicomté de Paris seront observés pour Loix et Coutumes dans le d. Pays de la Louisiane." 

The Superior Council acted as a law court, as well as carrying out general legal administration and registration of deeds. The Superior Council originally had been set up only provisionally, but it was made permanent in 1716. In 1717, Crozat transferred his monopoly rights to the newly established Compagnie d'Occident. The charter of this company empowered it to grant land in french allé, thus preventing the introduction of feudal tenure, and stated that:

"Seront tous les juges Etablis en tous les d. Lieux tenus de juger suivant les Loix Et Ordonnances du Royaume Et se Conformer a la Coutume de la Prevosté Et Vicomté de Paris suivant laquelle les habitants pourront Contracter sans que Lon y puisse introduire aucune autre Coutume pour Eviter La diversité."
Although the colony reverted to the Crown in 1731, the administration of justice in Louisiana remained on the basis set out above until the end of the French regime. 11.

The law thus brought into force in Louisiana comprised the Coutume de Paris, royal legislation precedent to the charter, and, ultimately, the Superior Council's own enactments. The validity in Louisiana of royal legislation subsequent to 1717 if not registered by the Superior Council will not be considered here. 12.

At this period, France was a country with a multiplicity of jurisdictions. First, there was the major division between the pays du droit écrit (the basically Roman law south) and the pays du droit coutumier (the customary law north). 13. The pays du droit coutumier was itself divided into many jurisdictions in which there were differing bodies of customary law. 14. These coutumes had been "codified" in the fifteenth and sixteenth centuries. 15. (By "codified" is meant their reduction to writing in concise, systematic form.) It is this multiplicity of laws which necessitated the designation of one particular coutume as applicable in Louisiana. 16.

The exact scope of the Coutume is important. As

11. An edict of 1719 did, however, introduce some changes. For full text see Dart, Legal Institutions, pp. 86-90. See also Baade, Marriage Contracts, pp. 7-10.
12. Baade, Marriage Contracts, discusses it at pp. 8-9. He relies on Quebec authority. The matter was more important in Quebec: see infra.
13. A useful map of the divisions in jurisdiction in France may be found e.g. in A General Survey of Events Sources Persons and Movements in Continental Legal History, Continental Legal History Series, 1912, vol. 1., (hereinafter General Survey) opposite p. 201.
14. The area of droit écrit was also divided into various jurisdictions based around the four Parlements of Toulouse, Aix, Bordeaux and Grenoble. There was some diversity in the law applied in the South, under local customs. See for some examples infra, ch. 4 introduction. See also General Survey, pp. 206-7.
16. There seems to have been confusion in Canada initially as to which coutume should be applied: see infra.
indicated, many royal ordinances on various matters of
importance were now in force in Louisiana.\footnote{On royal
legislation, see \textit{General Survey}, pp.263-265.}

The Coutume itself did not provide a complete system of law,
being a very short system of rules couched in a terse, concise style,
and by no means covering all areas of the law!\footnote{It contained
362 articles, divided into 16 titles:} for example, it contained no provisions on the general law of obligations,
nor on the law of special contracts. The Coutume de Paris
was not exceptional in this respect, and throughout the \textit{pays
du droit coutumier}, the law of obligations was based on
that of Rome.

It is necessary to touch on the vast topic of the
reception of Roman law in Europe, in order to understand
the position of Roman law in the French coutumes.\footnote{The
literature on the reception of Roman law is voluminous.
A useful general introduction (in English) is H.R. Hahlo, and
E. Kahn, \textit{The South African Legal System and its Background},
1968, ch. \textit{XV}, pp.484-523 ("The Reception of Roman Law"); see also the old fashioned, P. Vinogradoff, \textit{Roman
Law in Medieval Europe}, 2nd. ed., 1929, Ernst Levy, \textit{Gesammelte
Middle Ages," pp.220-247 is also of interest. On the humanist attitude to
Roman law, see M.P. Gilmore, \textit{Humanists and Jurists. Six Studies
in the Renaissance}, Harvard, 1963. Some useful information
may be found in W. Kunkel, \textit{An Introduction to Roman Legal and
at pp.177-191: (see also his bibliography at pp.227-8). See
also P. Koschaker, \textit{Europa und das römische Recht}, 1953: of this
work, I have used the translation by Biscardi into Italian as
\textit{L'Europa e il Diritto Romano}, Florence, 1962.}
Mediaeval period, the received Roman law became regarded as the *ius commune* of most of Europe. This acceptance of the Roman law as the *ius commune* had political implications because of the claims of the Holy Roman Emperor to be the successor of the Roman Emperors. The French Crown resisted the reception of Roman law, because such a reception might imply that the King of France was subject to the Emperor. The reception of Roman law in the south was, however, a *fait accompli*. Lest the argument be put that this necessarily implied the sovereignty of the Emperor, a theory was developed to the effect that the droit écrit was applied in the Midi only as custom and only with the permission of the French kings: *rex in regno suo est imperator*. Roman law, however, was taught in the universities in all of France: and, indeed, until the modern period, the only laws taught in universities were the Roman and Canon. In 1219, however, the public teaching of Roman law was prohibited in Paris, in the heartland of the droit coutumier. (This ban lasted until 1679, although an exception was made in favour of Cujas.)

---

20. This statement compresses a lot of history and begs many questions: see H. Coing, "The Roman Law as *Ius Commune* on the Continent", 89 *L.Q.R.*, (1973), pp.505-17, for a useful discussion.
24. See, especially Chêné, *op.cit.* note 22, at pp.209-210, especially his quotation from the 1312 ordinance of Philippe le Bel.
27. Not until 1679 was French law taught in Paris. It was only in the seventeenth and eighteenth centuries that in most countries the native law came to be taught in the universities. 28. See W. Ullman, "The Prohibition of Roman Law in Paris," 60 *J.R.* (1918), pp.177ff; Chêné, *op.cit.* note 22 at pp.198-201; *General Survey*, pp.211-212; Koschaker, *op.cit.* pp.134-7; and Ullman, *op.cit.* note 21, at p.103.
29. See *General Survey*, p.212.
Thus, in the Midi, the Roman law was accepted as the
custom in force, whereas, in the north, the droit coutumier
was the law in force, and Roman law had, in theory, no place.
The theory took no account of the tremendous attraction of
the Roman law; an attraction enhanced by the fact that any
university-trained lawyer would have studied Roman law.

As pointed out, the Coutumes were not complete systems.
In general, the Roman law was followed in the area of
obligations, and met little opposition. To a considerable
extent, the customs themselves were interpreted using the
Roman law.\textsuperscript{30} Brissaud states that the Roman law was used
extensively in the pays du droit coutumier, and referred
to constantly, even when irrelevant.\textsuperscript{31} Given that the jurists
would have their initial training in Roman law, this
influence is hardly surprising. Thus, the law as applied in
the pays du droit coutumier, had over-all a distinctly
Roman cast. An example of the adoption of the Roman law
in the north is provided by the fact that, until its
abolition in 1606, the Senatusconsultum Velleianum was
applied.\textsuperscript{32} An example of the penetration of Roman law into
the very coutumes is provided by the work of Philippe de
Remi de Beaumanoir: in his 1283 opus, Les Coutumes de
Beauvaisis, although on customary law, a great deal of
Roman law influence may be traced, even though his book
did not touch on those areas usually regulated by Roman
law in the pays du droit coutumier.\textsuperscript{33}

Although, as a matter of fact, we can posit a great
deal of Roman law influence in the droit coutumier,
sufficient to allow us to regard this law as part of the

\textsuperscript{30} See General Survey, p.207, and Chénon, Histoire Générale
du Droit Français Public et Privé, vol.2.i., pp.331-334,
\textsuperscript{31} See General Survey, p.208.
\textsuperscript{32} See further, introduction to chapter 4 infra.
\textsuperscript{33} See P. Van Wetter, "Le Droit Romain et Beaumanoir",
continental civil law tradition, it should be pointed out that there were two schools of thought as to the use of Roman law in supplementing the coutumes. One school rejected the use of Roman law, arguing that the Roman law should only be used when there is nothing in royal legislation, the particular custom concerned, and the general customs of France: this is an argument that there is a general droit commun coutumier (frequently identified with the Coutume de Paris). The other school of thought argued that the Roman law was the droit commun in the pays des coutumes. Neither school of thought had defeated the other by the end of the Ancien Régime. It should be recalled that there was no dispute that the law of obligations was Roman (as indeed were some other areas).

One can conclude that the law brought into force in Louisiana in 1712 was an amalgam of codified custom, royal legislation and Roman law (as received). Thus the law in Louisiana formed part of the civil law tradition. Dart has shown, using the records of the Superior Council, that it is clear that the Procureur du Roi, the leading lawyer of the colony, was well acquainted with the best and most useful commentaries on the Coutume de Paris, and, indeed, to some extent, with the Roman law.

2. Spanish Colony.

France ceded Louisiana to Spain by the November, 1762, secret Treaty of Fontainebleau, which did not come into force until after the 1763 Treaty of Paris concluded the

---

34. See, e.g. General Survey, p. 208; Calasso, Medio Evo, p. 614, and Diritto Comune, p. 312.
35. See references in note 34 supra. I found useful the arguments put forward by Bretonnier in his preface to the 1708 Paris edition of the Oeuvres of Claude Henrys.
36. See General Survey, p. 209. See also Van Wetter, op. cit., note 33 at p. 535 where he mentions the topics Beaumanoir did not cover, because they would be governed by Roman law.
Seven Years War. Spain did not attempt to enter into possession until 1766, when Don Antonio de Ulloa arrived at New Orleans to be governor. He was expelled in October 1768 by an uprising of the Louisiana population. Under authority of a royal cédula issued at Aranjuez on 16th. April, 1769, Don Alexandro O'Reilly was sent with a military force to receive formal possession of the colony under international law as part of the territory of the Spanish King: O'Reilly took formal possession of the colony on August 18th., 1769.

Under the system to be described below, the Castilian law as adapted, was applied by Spain to her colonies in the Americas. Unlike most of the Spanish conquests, Louisiana already had a functioning legal system of some sophistication. When Ulloa was governor, it appears that the Spanish authorities did not intend a drastic change in the laws applicable, since a cédula of March 27th., 1767, ordering the abolition of the Superior Council, provided:

"That civil and criminal law suits and proceedings instituted between natives of the country, or when a Spaniard or foreigner is involved, be commenced, continued and decided according to the laws and customs having a constant and uninterrupted force in the colony, and in situations which are either doubtful or have not been specifically contemplated, according to the Laws of the New Compilation of the Indies, but when the lawsuit be instituted between Spaniards, it shall be decided according to the said Laws of the Indies."

39. See, above all, Moore, op.cit. note 38, pp.1-20 on Ulloa and the possession of Louisiana.
40. See Moore, op.cit., pp.143-164. Moore gives a very detailed account of Ulloa's governorship and the events leading to his expulsion. See also the interesting essay by Pierre H. Boule, "French Reactions to the Louisiana Revolution of 1768", in McDermott, French Ways (note 5 supra), pp.143-157.
41. For text of cédula, see Batiza, "The Unity of Private Law in Louisiana under the Spanish Rule," (hereinafter Unity) 4 Inter-American Law Review, (1962) pp.139-156 at pp.143-4. Ulloa had been unable to take formal possession due to lack of troops: see Moore, op.cit., p.198; and on restoration of Spanish rule, see ibid., pp.185-215.
42. For text of cédula, see Batiza, Unity, pp.144-6. The provision quoted is the sixth, ibid., p.145. The first provision provides for the abolition of the Superior Council, ibid.
These provisions were not implemented.

When O'Reilly took possession, the circumstances were changed. Baade has recently and rightly drawn attention to the treason trials held by O'Reilly after the rebellion, and has pointed out that it was decided that the correct criminal and public law to be used in these was that of Spain. He then points out that the conduct of these trials according to Spanish law pointed to what was to come, more especially since the French Louisiana legal "establishment" had been heavily involved in the 1768 revolt.

The cédula of Aranjuez of 16th. April, 1769, had given O'Reilly more than sufficient authority to change the laws and legal system generally, and this he proceeded to do. On November 25th, 1769, he issued an ordinance which abolished the Superior Council, and established a Cabildo or city council in the style of local government in Spanish America. The ordinance also states that the administration of justice prescribed by the laws of Spain would be established, as throughout Spanish America. The preamble of this ordinance further said that:

"And as the want of advocates in this country, and the little knowledge which his new subjects possess of the Spanish laws might render a strict observance of them difficult ... we have thought it useful and even necessary to form an abstract or regulation drawn from the said laws ...." The promised abstract was also issued on the 25th. of November, and contained mainly rules of procedure, though

43. Marriage Contracts, pp. 35-6.
44. Ibid., p. 36.
45. See reference, note 41 supra.
46. The preamble will be found quoted in Batiza, Unity, at pp. 140-141. (This is the part most relevant for our purposes.)
47. See ibid., p. 141. On the administration of justice in Spanish America, the following may be found useful: Louis G. Hahle, "The Spanish Colonial Judiciary", 32 Southwestern Social Science Quarterly, (1951) pp. 26-37.
certain substantive law rules were also included. The rules in the ordinance establishing the Cabildo were drawn in the main from the *Recopilación de las Indias*, while those in the abstract were drawn mainly from the *Recopilación of Castile and the Siete Partidas*. (On these books of law, see below.) These two documents (usually collectively known as "O'Reilly's Code") were drafted by two academically trained lawyers who had accompanied O'Reilly to Louisiana.

Early in the new year, O'Reilly issued sets of instructions to various local governors and commandants throughout the newly acquired territory. These instructions, drafted by the same lawyers as was "O'Reilly's Code", were essentially an adaption of the abstract to the needs of communities and to circumstances outside New Orleans. This division between New Orleans and the rest of Louisiana, is, according to Baade, reflected in the history of the law

The abstract was entitled: "Instructions as to the manner of instituting suits, civil and criminal, and of pronouncing judgments in general, in conformity to the laws of the Nueva Recopilacion de Castilla, and the Recopilacion de las Indias, for the government of the judges and parties pleading, until a more general knowledge of the Spanish language, and more extensive information upon those laws may be acquired: digested and arranged by Doct. Don Manuel Joseph de Urrustia, and the counsellor Don Felix Rey, by order of his excellency Don Alexander O'Reilly, Governor and Captain General of this province, by special commission of His Majesty." See Batiza, *Unity*, pp.141-2 note 5. For an account of the contents, see, e.g., Dart, *Courts and Law*, pp.53-60.

applied from 1769 to 1803, in that the proper Castilian law was applied in New Orleans itself, but not in the outlying areas. Baade has argued that we can describe the situation as that of a "dual state". 52.

On October 17th, 1769, O'Reilly had written to the Council of the Indies, stating his intention to introduce the same law as applied throughout Spanish America, and arguing why he thought it expedient to do so.53. In a letter of January 27th, 1770, O'Reilly was informed of royal approval of his actions.54. Formal approval by royal cédula came on August 17th, 1772, on the recommendation of the Council of the Indies.55.

In the past there had been considerable uncertainty over two matters: first, over whether or not O'Reilly was empowered to introduce the laws as applied in Spanish America; and, second, over whether or not he actually had done so.56. There can now be no doubt: the work of Batiza,57. Baade and Brown has shown that O'Reilly was so empowered and had acted on the authority given him. The Laws of the Indies were introduced de facto and de jure. Baade has shown that, early in 1770, even in outlying areas of the territory, there was already an awareness that Spanish American law (the law of the Indies) had been introduced.60.

It is necessary to specify that the law introduced was that of the Indies, as Spain itself did not have a

---

52. On his idea of "dual state", see Real Estate Transactions, pp.684-6, and Marriage Contracts, pp.73-79.
53. For text, see Batiza, Unity, pp. 146-7.
54. For text, see ibid., pp.147-8.
55. See e.g. Baade, Real Estate Transactions, p.682.
56. For the doubts, see Batiza, Unity, pp.142-3, and Brown, Law and Government, pp.182-6. In 1812, Jefferson argued that the French law was the law in force, (quoted Brown, ibid., pp.183-4), but this opinion reverses his previous views, and was designed to support his position on the vexed Batture question, (see Dargo op.cit., pp.74-101 on Batture question).
57. See Unity, passim.
58. See e.g. Marriage Contracts, pp.30-40 and 73-79.
60. See Marriage Contracts, p.74.
unified system of law. The political unification of Spain under the Reyes Católicos, and the reconquista had not brought about legal uniformity. There were many differing customs and laws, varying from district to district. In 1493, a Papal Bull provided that the lands discovered in the Americas were to be the conjugal property of Ferdinand and Isabella, whose marriage had united Aragon and Castile; on the death of either, however, the new lands were to form part of the dominions of the Crown of Castile, but not of those of the Crown of Aragon. The Crown had a definite policy that so far as possible, the laws of the new lands should be the same as those of Castile.

Although the laws of Castile would apply, there was a great mass of legislation specifically for the Indies. The volume of legislation was such that, from the 16th century, moves were made to collect the separate laws. This movement eventually resulted in 1680 in the Recopilación de Leyes de los Reynos de las Indias. Few of the provisions of the Recopilación touched on matters of what would now be called private law, and so of paramount importance was the following ley:

"Ordenamos y mandamos, que en todos los casos, negocios y pleytos en que no estuviere decidido, ni declarado lo que se debe proveer por las leyes de esta Recopilacion, ó por Cédulas, Provisiones, ò Ordenanzas dadas, y no revocadas, para las Indias, y las que por nuestra órden se despachen, se guarden las leyes de nuestro Reyno de Castilla.


63. See ibid., p. 263 and note 3 thereon, and also, Angus MacKay, Spain in the Middle Ages, From Frontier to Empire, 1000-1500, MacMillan, 1977, p. 212.

64. On this, see Vance, op. cit., pp. 127-140 and 153-165; and Baade, Real Estate Transactions, pp. 665-668.

65. On the movement to collect the laws, see Vance, op. cit. pp. 155-165.

66. I used the 4th. Impresion, Madrid, 1791.
conforme á la de Toro así en quanto á la sustancia, resolución y decisión de los casos, negocios y pleytos, como á la forma y orden de substanciar." 67.

Up to 1614, Castilian legislation was automatically valid in the Indies; but after that date, it was only effective if reenacted by the Council of the Indies. 68.

The Leyes de Toro as referred to, provided an order of precedence for sources of Castilian law: 69. first the laws of Toro themselves, second, the Ordenamiento de Alcalá and indeed other ordenamientos and pragmáticas, third, the Fueros Municipales y Reales, and, last, the Siete Partidas. Hence, royal legislation in Castile was the primary source, then the Fueros, especially the Fuero Real, and last the Partidas. 70. The Leyes de Toro, dating from 1505, themselves contained important provisions on private law. 71. The Ordenamiento de Alcalá of 1348 contained a provision setting out an order of precedence of sources, similar to that of the Leyes de Toro. 72. The Fueros Municipales were local customs. 73. The Fuero Real was a custom applied throughout Castile, and introduced by Alfonso X in 1255. 74. Las Siete Partidas, stated by the ley to be supplementary if there be no provision in any other source, were a compilation of laws made for Alfonso X, but not achieving the force of statute until the Ordenamiento de Alcalá, although much used previously as a work of doctrine. The Partidas provided a synthesis of the law,

67. Rec. Ind. II.I.2 (=Book 2, title 1, ley 2.; this system of references will be used for the other Recopilaciones.)
69. Ley 1.
73. See first Minguijón reference, note 61 supra; Vance, op.cit., pp.79-83.
and were Romanising in effect. Although the Partidas were last in the order of precedence, they were of major importance, and were the main source of private law in Spanish North America.

Some other collections of law were important in Louisiana, and deserve mention here. First, the Nueva Recopilación, issued by order of Philip II in 1567, was a collection of Castilian legislation up to that period. Thus, many of the Leyes de Toro were included in it. Second, the Fuero Viejo was a collection of customs dating from the time of Alfonso VIII. Some have doubted its original legal authority, and certainly it appears to originate in a private compilation. However this may be, it is referred to by the author of the de la Vergue manuscript in Louisiana. The Leyes de Estilo, probably of 1310, were a series of provisions of a doctrinal character clarifying the Fuero Real, many were included in the 1805 Novísima Recopilación, and references to them...

---


76. See Batiza, Unity, p. 151, and note 19 thereon.

77. On the Nueva, see Vance, op. cit., pp. 121-4, and Minguíjón, op. cit., vol. II, pp. 122-3. In references, I will abbreviate it as Rec. Cast. (Castilla), following the D.L.V. for convenience; see note 67 supra for method of citation. In 1805 was issued the Novísima Recopilación, which I will cite as Nov. Rec. I used the 1640 Madrid edn. of the Nueva.

78. On the Fuero Viejo, see Minguíjón, op. cit., vol. 1, p. 76; Vance, op. cit., pp. 83-5; Van Kleffens, op. cit., pp. 128-30. The Fuero Viejo was first published in 1771 by Ignacio Jordán de Asso y del Río and Miguel de Manuel y Rodríguez: this is the edition I used.


are found in the de la Vergne manuscript.

Although no more need be said on the formal sources of law introduced into Louisiana by O'Reilly, it is useful to discuss the place of the Roman law in the system outlined; more especially so since it has been pointed out that the Partidas were Romanising in effect. To this end it is necessary to discuss Castilian legal history. There are two aspects to the "reception" of Roman law in Castile: First, the enactment of Roman rules in legislation, and, second, the use of Roman law as a supplement to legislation, custom and the like.

The Iberian peninsula had formed part of the Roman Empire, and, in 409 A.D., had been invaded by barbarian tribes. Of these tribes, the most significant were the Visigoths. Visigothic rulers issued various "barbarian" codes, composed of Roman and German elements. The two earliest of these codes were that of Euric of 475 or 476 and the Breviarium Alarici or Lex Romana Visigothorum of 506. Under the king Reckesvinth, there was a complete revision of the Visigothic law, resulting in the 654 promulgation of the Liber Judiciorum. This redaction was revised several times, reaching its final form under Egica in 694. This work became known as the Fuero Juzgo.

The Fuero Juzgo, written in Latin, was the last stage achieved by the Visigothic law, for shortly after its promulgation came the Moorish invasion and conquest of Spain. This work was a prime source of Castilian law. Its Roman law aspects were taken from a revised version of the code of

84. See Van Kleffens, op. cit., pp. 75-6; Vance, op. cit., pp. 50-2; Minguijón, op. cit., pp. 41-2.
Euric: the Breviarium of Alaric had no influence. The Roman law influence was fairly marked, and one commentator has described the work as an "especie de transacción entre las formulas y el rigorismo del derecho romano y las costumbres propias del pueblo godo". The Roman law itself had been abrogated by Reckesvinth, who allowed it to be used only in education. Garcia-Gallo comments that:

"El derecho romano fue totalmente desconocido y sólo indirectamente, en cuanto recogido en el Liber Iudiciorum o en los formularios visigodos, encontró aplicación." 86

The exact extent of the operation of the Fuero Juzgo in the Christian areas during the period of Muslim occupation before the reconquista is uncertain. We need not discuss the extent of Moorish influence on the law of Spain.

So far, the Roman law known in the Iberian peninsula would have been the ante-Justinianic law of the Western Empire. Just as the era of the reconquista began, the study of Roman law in its Justinianic form commenced in Italy, especially at Bologna. Spanish lawyers were not unaffected by the revival of Roman law. Many Spaniards went to Bologna to study, returning with many law books. In the early thirteenth century came the founding of the Spanish

86. Mingijón, op.cit., vol. 1, p.42, giving the opinion of Francisco de Cárdenas.
89. See, e.g., Altamira, General Survey pp.603-4; Van Kleffens, op.cit. pp.79-80, Vance, op.cit., p.58.
90. See, e.g., Van Kleffens, op.cit., pp.94-113; Altamira, General Survey, p.581.
91. From 544 to 629, Byzantium controlled the area around Cartagena. It is possible that the recently completed Justinianic compilation was applied to this area: if so, it has left no trace, and may be discounted.
93. See Van Kleffens, op.cit. p.177.
universities, where Roman and Canon Law were taught - Salamanca being a noted centre of legal studies. Not until the modern period did the Spanish universities teach the autochthonous law. Roman law thus became known in learned circles in the Peninsula. The different kingdoms reconquered from the Moors, and the various existing states, received Roman law in varying degrees: the reception in Catalonia, for example, was particularly extensive.

The use of Roman law had certain political implications. Castile was never part of the Holy Roman Empire - the ius commune was never, even in theory, in force ratione imperii. The formula rex in regno suo est imperator has been referred to already; it is echoed in the second Partida:

"Et tiene el Rey lugar de Dios para fazer justicia et derecho en el Reyno en que es señor, bien asi como desuso deximos quo lo tiene el emperador en el imperio ...."

Although Roman law was not applied ratione imperii, the Castilian kings were happy to use Roman law to re-inforce absolutism.

---

94. See Calasso, Medio Evo, pp.615-6, and Diritto Comune, pp.320-1; Koschaker, op. cit., p.131, Garcia-Gallo, op. cit., p.84 no.173; Van Kleffens, op. cit., pp.177-8.
95. Van Kleffens, op. cit., p.178.
96. See R.L. Kagan, Students and Society in Early Modern Spain, 1974, pp.162-3, 226-7 and 234-5 on the teaching of Spanish law as distinct from Roman. This work is useful on the position of law in the university curriculum.
98. See text at note 25 supra.
99. Part. 2.1.7 (=second Partida, first title, seventh ley: this is the system of citation that will be used henceforth.) (1807 edn.) See also Koschaker, op. cit., pp.137-8. The leyes of the first title of this second Partida carefully discuss the meaning of Emperor, King and their respective spheres of duty. Note that Alfonso X had ambitions to be Holy Roman Emperor: see Van Kleffens, op. cit., pp.150 and 212. See also Part. 2.1.5. for a similar sentiment that the King rules like the Emperor in his Empire.
100. See MacKay, op. cit., pp.99-100, 133 and 138-140. The Aragonese Kings made similar use of Roman law; see ibid., pp.111-113. Minguijón, op. cit. vol. 1, p.84 rightly states that "El influyo creciente del derecho romano y la preponderancia de los jurisconsultos en él formados favorecen la tendencia a la centralización y al absolutismo."
The factors influential in the penetration of Roman law into customary law France would undoubtedly be influential in Castile. In the Mediaeval period a substantial number of lawyers would be university-trained in Roman law. The Roman system would be attractive because of its apparent superiority over the native law. Some aspects of Roman law favoured the absolutist and centralising tendencies of the Castilian monarchy. The application of Canon law, closely related to the Roman, would have created conditions receptive to Roman jurisprudence. The details of the reception of Roman law in Castile are still largely unresearched; but the above factors would result in the Mediaeval period in the increasing influence of Roman jurisprudence in legal circles: certainly all scholarly lawyers would have a thorough grounding in Roman law.

From this, some conflict between the native law and that of Rome may be deduced. The Fuero Real, for example, was largely of native origin, with some traceable Roman influences;¹⁰¹ in the nearly contemporary Siete Partidas, Roman law was very influential: "sopra tutto del campo del diritto privato e del penale, l'influenza dei testi romani e degli insegnamenti dei più celebrati glossatori italiani, particolarmente Azzone e Accursio, è evidente."¹⁰² The Siete Partidas were a major factor in Romanising the Castilian law, and in many respects marked a dramatic change in the native law.¹⁰³ Although the Partidas were not officially in force until the Ordenamiento de Alcalá, it is clear that from the time of their redaction, they profoundly influenced Castilian legal thought.¹⁰⁴ Even the supplementary position of the Partidas in the Ordenamiento's order of precedence

¹⁰¹ See, e.g. Van Kleffens, op. cit., p.180; and Altamira, General Survey, p.628
¹⁰² Calasso, Diritto Comune, p.321
did not prevent them from becoming the major source of Castilian law.\textsuperscript{105}.

That the Roman law was in itself widely used in Castile may be deduced from the fact that several Castilian kings tried to prevent its use. Thus in August 1258, in a letter to the alcaídes of Valladolid, we find Alfonso X himself prohibiting the observance of the Roman laws in Castile.\textsuperscript{106}. In 1427, John II prohibited the citation before the courts of any civilian or canonist more recent than Bartolus or Joannes Andreae.\textsuperscript{107}. In 1713, the Council issued a resolution complaining of the belief that in the courts more weight should be given to the Roman and Canon laws than to the laws of Spain.\textsuperscript{108}.

Certainly, these laws seem to have been generally ineffective. Until the middle of the eighteenth century, all university instruction in law was in the Roman and Canon law.\textsuperscript{109} Indeed, the Reyes Católicos had enacted in 1493 that anyone seeking a royal judicial appointment should have studied canon or civil law for at least ten years in a Castilian or foreign university.\textsuperscript{110}. Although the Leyes de Toro required\textsuperscript{111} that office holders be versed in the laws of the realm, it is doubtful if many new appointees would have had the stipulated knowledge. Kagan reports repeated complaints of the universities' failure to train adequately future magistrates, who left university unable to understand the law in force: he suggests that one reason for this was the failure of the universities to teach any law other than the Roman or Canon.\textsuperscript{112} Inevitably

\begin{thebibliography}{9}
\bibitem{105} See ibid., p.663.
\bibitem{106} See ibid., p.622.
\bibitem{108} See Altamira, General Survey, p.663 and also pp.675-7.
\bibitem{109} See references, note 96 supra.
\bibitem{110} Rec. Cast., 3.9.2.
\bibitem{111} Ley 2.
\bibitem{112} See op.cit., pp.234-5. Kagan's study is invaluable in helping understand the position of the letrados in Castilian society.
\end{thebibliography}
such lawyers would tend to view Castilian law from the perspective of the law within which they were trained.

Thus, although, in theory, the Roman law could only be used as *ratio scripta*,113 except where introduced by legislation, there can be no doubt of its major influence in shaping Castilian law. Commentaries on the native law were endowed with massive civilian learning; the native law was interpreted using the Roman law.114 Despite all efforts, the Castilian law became Romanised, and took its place in the European civilian world.115

This, then, was the system introduced by O'Reilly into Louisiana by applying the Laws of the Indies to the newly acquired territories. There can now be no doubt that this system was in force in Spanish Louisiana both in theory and in practice.116 The Spanish judicial records confirm this, and two examples drawn from them serve as a useful illustration. In 1784, Juan Esteban Boré brought a court action to prove that husbands can appoint their wives tutrices to their children in their will, without calling a family meeting. Relying on the *Siète Partidas*, the court held this proved.117 In a 1771 case, brought by a tutor, the court decided that the family meeting had no place in Spanish law, and hence none in Louisiana.118

---

113. As the de la Vergne manuscript recognised: see Avant-Propos, p.7, "À l'égard des dispositions du droit Romain, elles ne peuvent être citées comme Loix en Espagne, mais seulement comme raison écrite."
114. See infra, chapter 4, on the provisions of the *Leyes de Toro*, relative to the legal incapacity of married women.
118. 8 *La. Hist. Quar.* (1925) 183.
3. The Territorial Period: the law prior to the 1808 Digest.

In October, 1800, Spain retroceded Louisiana to France by the secret Treaty of San Ildefonso, on condition that Napoleon erect an Italian kingdom for the Duke of Parma, brother-in-law of Carlos IV of Spain; but with the proviso that France would not cede Louisiana to any third country. 119. Napoleon attempted to put this plan into operation, but, disliking the Duke of Parma, persuaded Carlos that the kingdom be given to Parma's son, Luis, Prince of Parma. 120. Although Napoleon had not fully carried out his side of the agreement, 121 he pressured the Spanish Crown into formally surrendering Louisiana to France in October, 1802. For various reasons, including the likely reopening of hostilities in Europe, 122 Napoleon decided to sell Louisiana to the United States, and did so on April 30th., 1803. 123 Spain protested, but in her weak state could do nothing; and, accordingly, the French government, in the person of Pierre Clement de Laussat, newly appointed Prefect of Louisiana, received Louisiana from Spain on November 30th., 1803, and transferred the territory to the United States on December 30th., 1803. 124 During his time as Prefect, Laussat made no significant attempt to alter the laws in force, 125 and, therefore, the United States took control of Louisiana with the laws enforced by Spain still applying.

119. On the background to this, see A. Deconde, This Affair of Louisiana, 1976, pp.91-6.
120. Ibid. p.96, by the Convention of Aranjuz.
121. See ibid. p.104 for details.
122. See ibid., pp.157-8 and 162-6.
123. On the negotiations, see ibid., pp.167-175.
124. It had been intended that the two transfers take place on the same day so that American troops could be on hand to quell any demonstrations. The Americans were not ready on time, so that the transfers took place on different days: both, however, were peaceful: see ibid., pp.204-6.
125. See Brown, Law and Government, pp.186-7; and Dargo, op.cit., p.105.
The vast territory acquired by the United States was split up. Lower Louisiana, centred around New Orleans, was designated as the Territory of Orleans. 126 It is with this Territory, the future state of Louisiana, that we will be concerned, as it was only here that civil law was preserved: upper Louisiana, for example, the future state of Missouri, quickly adopted common law. 127

A former governor of the Mississippi Territory, William C.C. Claiborne, was appointed Governor of the Territory of Orleans. 128 His first official action was to issue a proclamation which provided for the continuance of the laws already in force. 129 Thus, the Spanish Laws of the Indies remained in force, although it was the earnest desire of President Jefferson to replace the existing laws with Anglo-American common law in order to aid absorption of Louisiana into the Union.

Various writers have discussed the conflict and confusion over the laws in force in Louisiana prior to the promulgation of the 1808 Digest. 130 This conflict was dominated by competition between the civil law and the Anglo-American common law, and has been most carefully investigated already; 131 so that it is unnecessary here to discuss it in any depth. There is a dispute over the sources of the 1808 Digest, a dispute directly relating to the history of Louisiana law prior to the redaction

126. I will, for convenience, continue to refer generally to the Territory of Orleans as Louisiana.
131. See references note 130 supra, especially Dargo.
of the code.\textsuperscript{132} Professor Pascal argues that, in his own term, "Spanish-Roman" law was in force in Louisiana prior to the Digest, the redactors were ordered to compile the Digest according to the law in force, and that the redactors carried out their orders, so that the Digest, despite its copying from the French code, is in fact a Digest of the "Spanish-Roman" law. (He also considers that the Digest is not a "true code": this view we will assess below.)\textsuperscript{133} Professor Batiza, on the basis of painstaking comparison of the text of individual articles of the Digest with other legal materials, argues that the sources of the overwhelming majority of articles are to be found in the work of the French codifiers, and also of certain French doctrinal writers, although some articles are drawn from Castilian, Roman and English law.

This dispute focuses not only on the actual source of many articles, but also on the appropriate methods of research. In chapters four and five there will be a consideration of the two viewpoints as they relate to sections of the code and individual articles, and, in the concluding part of the thesis, both Batiza's and Pascal's work will be evaluated. However, some aspects of Pascal's views fall for consideration here. His view that the Digest is a guide to the "Spanish-Roman" sources, denies that there are innovations. From this two results flow. This view, first, denies there has been any borrowing from other systems, and, second, denies that the 1808 redaction is a "code". Were Pascal correct in these two contentions, much of this study would be invalidated, since it posits the

\textsuperscript{132} See on this dispute: Sweeney, Tournament; Batiza, Sources, and Rejoinder; Pascal, Reply; Franklin, Existential Force; Baade, Marriage Contracts at pp.83-4; Derby and McDonald, "A Recent Discovery: Another Copy of Moreau Lialet's Annotations to the Code of 1808," 47 Tul. L. Rev. 6 (1972-3) pp. 1210-1213; Dargo, op. cit., pp. 156-164.

\textsuperscript{133} See infra, section 4.
redactors innovating and changing the law by selecting between competing sources.

Pascal's view relies on the redactors considering themselves free to examine only the sources as laid down in the Recopilación de las Indias: this being, in Austinian terms, the positive law formally in force by legislative authority of the sovereign. His view further relies on there being no use of or influence of French law in territorial Louisiana prior to 1808. These two points will now be considered in turn.

A. Louisiana as a civilian jurisdiction.

The period of redaction of the Digest would tend to suggest that the redactors would be supporters of natural law theories; indeed, evidence from the Digest itself shows that this suggestion is correct. That the redactors were supporters of natural law implies that they would not consider their actions hampered by a narrow conception of the positive law in force in Louisiana. Further, that the

134. See text at notes 61-80 supra.
135. I.e. Pascal assumes that the theoretical approach of the redactors would be that of the positive theory of law as exemplified in the writings of John Austin (e.g. The Province of Jurisprudence Determined, Lectures on Jurisprudence.); namely that the redactors would regard as law only that which has been posited or commanded by the sovereign. Therefore, the redactors would feel free to examine only those sources formally in force in Louisiana, as the "national" law: other sources would have no validity since they lacked the sanction of the sovereign. On Austin, see, e.g., G.W. Paton, A Textbook of Jurisprudence, 4th. ed. Oxford, 1972, pp.5-14. For consideration of Austin as an analytical philosopher, see A.R. White, "Austin as a Philosophical Analyst", 64 Archiv Für Rechts-und Sozialphilosophie (1978) pp.379-399 and G. Maher, "Analytical Philosophy and Austin's Philosophy of Law", ibid., pp.401-416. W.L. Morison, "Some Myths about Positivism", 68 Yale Law Journal (1958-9) pp.212-233, gives a sympathetic treatment of Austin. E. Ruben, "John Austin's Political Pamphlets, 1824-1859", pp.20-41 in Perspectives in Jurisprudence, ed. E. Atwoooll, Glasgow, 1977, argues that Austin's positivistic view of law is due to his rôle as defender of the middle class.
136. See infra, final part of thesis on the 1808 Digest.
The redactors' conception of the role of Roman law is significant: they clearly equate it with *ratio scripta*. As pointed out earlier, in the medieval period the Roman or civil law came to be regarded as the *ius commune* of much of Europe. 139 As in Castile and France, 140 the Roman law supplemented and even superseded the local law in a substantial part of Europe. 141 This resulted in there being a fairly fundamental similarity between much of European law. Whatever their nationality, the jurists who used and

137. See ch. 1 *supra*, at section 3. As to whether or not the Digest of 1808 can truly be described as a code, see *infra*, section 4.
139. See references notes 19, 20, 21 and 23 *supra* on this.
140. See text at notes 13–36 and 81–115 *supra*.
141. See references as cited in note 139 *supra* again.
wrote about the Roman law, through their university training, shared a common legal cultural background. Students would readily study abroad; teachers moved from country to country. Because of this common legal culture, and because most juristic works were written in Latin, legal ideas were readily passed from one country to another. It should be remembered that, before the development of the humanist approach to Roman law, the Roman law was studied as law immediately applicable. For example, Voet in his *Commentarius ad Pandectas*, which dealt with both the Roman and the modern law, cited many foreign authors: to indicate that this was not a mere academic exercise, it may be pointed out that he infrequently cited humanist scholars, but cited many practice-oriented foreign writers.

By the seventeenth and eighteenth centuries, however, the idea of Roman law as the *ius commune* of Europe was being rejected, and various systems of national law developing. It is clear, nonetheless, that the various civilian legal systems continued to influence one another, not only in juristic writing, but also in legal practice. Some examples drawn from the work of Coing neatly illustrate this. First, in the eighteenth century, the Hanoverian Court of Appeal used the works of Argentré, a sixteenth century French commentator on local custom. Second, a Portuguese judge is known to have used the writings of the German jurist Carpzow in his work. Third, the German bankruptcy law originates in the writings of a seventeenth century commentator.

---

144. See Klaus Luig, "The Institutes of National Law in the Seventeenth and Eighteenth Centuries", *J.R. (N.S.)* pp. 193-226. This is, of course, the period of the development of the nation state, and, as seen already, of the start to the teaching of national law in European Universities.
This mutual influence of the civilian systems continued into the nineteenth century: the century when the Code Napoléon influenced the law of most civilian countries. Zajtay explains it thus:

"L'unité de la famille des droits romano-germaniques, fondée sur la réception du système scientifique du droit romain, s'est trouvée de son côté, à la base de nombreux phénomènes intéressants, notamment des échanges et ses influences réciproques qui ont en lieu entre ses droits au cours de leur histoire. Rappelons notamment que cette unité a permis au droit français de jouer au XIXe siècle le rôle d'un véritable droit commun des pays latins." 146.

Thus, one may say that, in civil law Europe, there was a free flow of legal ideas from one area to another: the various civilian systems borrowing from and influencing one another. The civil law was regarded as supra-national, transcending national legal systems; whether it was conceived of as, in the early period, the ius commune, or, as later, ratio scripta.

There is evidence of this "supra-national" outlook in Louisiana prior to and after codification. During the period of conflict prior to the promulgation of the Digest, there was a clear tendency to oppose civil law to common law, regarding civil law as the Roman law in modern use. The civil law was identified as a whole system with minor national variations opposed to the Anglo-American law. Thus, after Governor Claiborne had vetoed the Act of 1806 which laid down the civilian sources to be consulted in Louisiana, the New Orleans' newspaper, Le Telegraphe, 147.

---

147. The text of this Act may be found in Brown, Conflict, pp. 47-8, and Franklin, Expulsion, at p.323.
in June, 1806, published a "Manifesto" which stated:

"We certainly do not attempt to draw any parallel between the civil law and the common law; but, in short, the wisdom of the civil law is recognised by all Europe." 148.

In 1807, Edward Livingston proposed that an Anglo-French translation be made of the entire body of Roman and Byzantine law, including some ante-Justinianic Roman law. He declared that mastery of the Roman law was indispensable for the Louisiana legislators, and that since Roman law operated in the Spanish, Portuguese and Dutch colonies, a knowledge of it would aid the Louisiana. 149. Livingston declared himself to be a convert to the Roman law. The debate over the law was couched in terms of the civil law against the common law, not the Castilian law as provided by the Laws of the Indies against the common law. 150. If final proof were needed, it is sufficient to examine a statement of the 1825 redactors, who said it was their intention to free the:

"Courts in every instance from the necessity of examining into Spanish Statutes, ordinances and usages, Latin Commentaries, the work of French and Italian Jurists, and the heavy tomes of Dutch and Flemish annotations, before they could decide the law." 151.

The sources listed are significant. Obviously the Spanish sources are given precedence, but they are followed by a whole train of learned civilian sources not of Spanish origin. This listing of sources relevant for reaching a decision would have been one familiar in any civilian country before codification. 152. That the redactors of the

---

148. This document may be found quoted almost in full in Brown, Conflict, pp.49-52. The quotation here is at p.51.
149. See Franklin, Expulsion, pp.324-5, note 2.
150. See Dargo, op.cit., pp.105-153 passim.
151. 1823 Preliminary Report, at p.XCII.
152. It is useful to compare the remarks of the redactors with the range and hierarchy of sources used in the decisions of the Rota Fiorentina in the eighteenth century. See G. Gorla, "A Decision of the Rota Fiorentina of 1760 on Liability for Damages Caused by the 'Ball Game'", 49 Tul. L. Rev. (1974-5) pp.346-57 at p.348.
1825 Code should stress Spanish law is also significant. In the period between 1808 and 1825, there had been a revival of Spanish (more properly Castilian) law, resulting in decisions such as Cottin.\textsuperscript{153} It is important to note that, prior to 1808, the "civil law" was not clearly differentiated by all into its national variations.

The civilian legal systems borrowed freely from one another, the borrowing being facilitated by their common Roman law background. Louisiana formed part of this tradition. Therefore, those who are surprised at the 1808 Digest copying much from the work of the French redactors,\textsuperscript{154} or those who deny the possibility that it could have done so,\textsuperscript{155} are mistaken. The 1808 Digest was following civilian tradition: indeed, many countries adopted versions of the French code far closer to the original than the Digest. Further, given the influence of French sources in Louisiana during the early territorial period, borrowing from the Code Napoleon is even less surprising.

B. French law in Louisiana prior to the 1808 Digest.

The records of the Louisiana Superior Court in the Territorial period have disappeared,\textsuperscript{156} and there was no system of court reporting until the start of Martin's Reports,\textsuperscript{157} in which the earliest reported cases come from 1809. This makes it difficult to reconstruct what exactly was the attitude of the court, and the use it made of the various possible legal materials. Nonetheless, informal sources and accounts indicate that there was both knowledge and use of French law in territorial Louisiana. It is, however, difficult to evaluate these accounts, and to decide

153. 5 Mart. O.S. 93 (1817).
154. Brown, Conflict, p.58 states: "Why Brown and Moreau Lislet departed from their instructions and based the Code of 1808 upon the contemporary French codification is not known."
156. See on this and lack of court reporting, Dargo, op.cit., p.225 note 17 and p.246.
157. Martin's Reports of Cases Argued and Determined in the Superior Court of the Territory of Orleans and in the Supreme Court of the State of Louisiana. I have used the 1846-1853 reissue; but will, of course, use the old, traditional mode of reference.
whether the reporters of the use of French law were
simply mistaken, or if there was a residual use of such
law tolerated outwith the courts, or, indeed, if the use
of French law was the result of the confusion and
uncertainty in the courts.\(^\text{158}\). It is useful, accordingly,
to examine a sample of such statements.

In his recent study of marriage contracts in colonial
and territorial Louisiana, Hans Baade shows that, after
the Purchase, there was a revival of French forms.\(^\text{159}\). He
has thus provided particularly important evidence of the
everyday use of French law. He does not think, however,
that there had been before codification a "definitive
reestablishment on a customary basis of French family
property law". \(^\text{160}\).

One statement of interest is that made by Daniel Clark,
a prominent merchant of New Orleans,\(^\text{161}\), in answer to a query
of Jefferson, who sought information on Louisiana before
the transfer in order to aid ratification of the treaty
of transfer by Congress.\(^\text{162}\). To the question: "Whence is
their Code of Laws derived?", Clark replied:

"The Code of laws is derived from the Recopilacion
de Indias, and Leyes de Castilla & les uses &
Coutumes de Paris for what respects usages and
Customs...." \(^\text{163}\).

Brown opines that Clark:

"As a merchant ... knew that the laws of Spain were
the official laws in force. As an individual, he
may have known of instances where the French
residents ... had been guided by French custom
and law in private decisions and family relationships." \(^\text{164}\).

158. See Brown, Conflict, passim; and Dargo, op. cit.,
pp.105-153 passim.
159. See Marriage Contracts, pp.54-57 and 79-82.
160. Ibid. p.80.
161. See J.G. Clark, History, pp.272, 336 and 251. At the
time of the Purchase, Clark was acting as U.S. consul in
162. See Jefferson to Claiborne, July 17th., 1803, quoted
163. Quoted ibid., p.172.
Edward Livingston had taken up practice as an attorney in New Orleans, and was consequently in a position to know the problems of legal practice and the authorities cited and used in court. In May, 1804, he wrote thus:

"The Governor conceives himself authorised to legislate and his ordinances in English mixed with those of his predecessors in Spanish and French, the laws of Castille [sic], the Customs of Paris, the Leyes de Partidas, les edite du Roi, the Statutes of the United States and the omnipresent Common Law of England make a confusion worse than that of babel ...." 165.

One of the redactors of the 1808 code, James Brown, in 1805, stated it was necessary to adopt a code to ease the confusion in the courts and to aid a reception of common law before the territorial legislature started to function, as:

"The members of the Council and House of Representatives will generally be attached to French Laws and will pass only acts resembling the Civil Laws and the Spanish Ordinances formerly in force here." 166.

Both Clark and Livingston are reliable and credible witnesses to the law applied in Louisiana, and, from their testimony, one must conclude that, at last to a limited extent, the French law was still applied in Louisiana.

Both Livingston and Brown emphasise the confusion reigning in the courts: this is perhaps not surprising when one considers that the first judge appointed to the Louisiana bench was one John Prevost, a common lawyer. Indeed, the Louisiana Remonstrance of 1804, 167 stated that the judges were "uncertain of by what codes they are to decide, wavering between the civil and the common law, between

167. On which see Dargo, op.cit., p.17.
the forms of French, Spanish and American jurisprudence...."

In an attempt to end this confusion, on the instigation of Prevost, a case was brought argued by the leading New Orleans attorneys, in which Prevost decided that the civil law was in force in Louisiana, including in the definition of "civil law", the Roman, French and Spanish laws. The 1825 Code, in article 3521, states that the French law had been in force along with the Spanish and Roman, when Louisiana was acquired by the United States. This is valuable evidence of the use of French law.

From this brief survey, one may conclude that French law was both known and applied in Louisiana before codification. It was applied perhaps as a result of, first, the uncertainty over the laws in force arising out of the transfer of sovereignty, second, the influx of American attorneys, ignorant of the exact nature of the law in force, and third, the only judge being common law trained and uncertain as to the law to apply. Two important conclusions may be drawn from the above discussion. First, it would appear that some knowledge of French law must have been fairly widespread and access to French legal materials possible during the territorial period. This means that there would have been no difficulty for the 1808 redactors in drawing on pre-codification French sources had they so chosen. It is evident that the redactors had access to the French code and its 1800 projet. Second, there seems to have been some use of French law in the early territorial period. That there was some use of French law would tend to suggest that the redactors would be inclined to utilise French law in drawing up their code especially since French law had been given judicial authorisation. Such an inclination would be supported by the civilian "supra-national" attitude in Louisiana outlined above.

168. Quoted Dargo, op.cit., p.117.
169. See Dargo, op.cit., p.132. On the need for this case, see Brown, Conflict, pp.38-40.
170. Batiza, Sources, p.11; Pascal, Reply, p.625.
Pascal's view, that the 1808 Digest was composed of "Spanish Roman" law because "Spanish Roman" law was the law in force, may be discounted, and for two reasons. First, the civilian tradition in Louisiana was not one which had a rigidly positive and nationalistic outlook on law. Second, to some extent, French law had been used in Louisiana, and had even been given judicial authority.

It is convenient, if not quite logical, to allude here to the Anglo-American common law. Some of the preceding quotations have referred both to its influence in Louisiana and to the desire of many Americans for a Louisianian reception of common law. Knowledge of common law was obviously widespread in Louisiana, many American attorneys having moved to New Orleans. All this, taken in conjunction with the fact that one of the redactors was by training a common lawyer, would have allowed the redactors, in their work of codification, to draw easily on common law.

4. The 1808 redaction: "digest" or "code"?

There is a dispute over whether or not the 1808 Digest should be classed as a "digest" or a "code". From the discussion in chapter one of the distinguishing features of a code, it would seem correct to define the 1808 redaction, officially entitled, A Digest of the Civil Laws now in force in the Territory of Orleans, as a code in the Romanistic civilian tradition. The dispute centres over the meaning to be attributed to "code" and "digest". Dargo gives a neat definition of both:

"A digest is a summary or compilation of pre-existing law designed to make that law known and available. Prior law remains authoritative. A code, on the other hand, replaces prior law and itself becomes the definitive and final statement of the law for purposes of adjudication."

171. See chap. 1 section 3, and text of this chapter at notes 133-137 supra.
172. See section 3 of chap. 1.
173. Or. cit., p. 157
Dargo believes the 1808 redaction to be a "digest", and so does Professor Pascal. Pascal claims that the work is a "digest" in order to reinforce his argument on the sources: this is because, if the redaction is a "digest" or compilation of the laws previously in force, the sources of the redaction must be the existing "Spanish" law. 174.

T.W. Tucker also argues that the Digest is a mere "Digest of the Spanish laws, which retained their subsidiary force." 175.

Professor Batiza, taking the opposing view, remarks that:

"The Code of 1808...in scope, structure and drafting technique is an authentic civil code in the western tradition inaugurated by the Code Civil des Francais in 1804, rather than a digest." 176.

On the basis of the previous discussion, Professor Batiza's view must be taken as correct.

Although Pascal himself puts forward no arguments for the 1808 redaction to be considered a "digest", Dargo does argue for their viewpoint, acknowledging indebtedness to Pascal for the arguments. 177. Tucker also argues for his view. 178.

With one exception, all these arguments relate to matters outwith the structure and contents of the actual code. This otherwise pointless dispute must be discussed as Dargo and Pascal use their "digest" theory as further proof that the sources of the 1808 redaction are Spanish. (They do not appear to realise the circularity of their argument: since only Spanish sources were used, the 1808 redaction is a "digest"; that it is a "digest" proves that only Spanish sources were used.) Were the code a "digest" - as they have defined it - this study would be, to some extent, pointless: the redactors would not have been selecting freely among competing provisions or consciously updating the law.

---

The arguments of Dargo and Tucker are the following. First, the word "Digest" was used to describe the redaction. Tucker quotes the full title and declares that it "implies ... that the work is but an outline, a resumé of a larger system, which is to remain in force." Dargo does not explicitly argue on the basis of the title. Second, the preamble to the statute providing for the promulgation of the digest/code stated that: "... it had become indispensable to make known the laws ... and to collect them in a single work, which might serve as a guide for the decision of the courts and juries without recurring to a multiplicity of books...." Dargo remarks that "a guide to sources was not a finished code". Third, the Digest in article 3 (pp.2-3) of its preliminary title apparently recognises custom as a source of law. Dargo argues that: "Since modern civil codes are based on legislative positivism this provision contravened a fundamental principle of code law". Fourth, section 2 of the Act promulgating the Digest stated:

"And be it further enacted, That whatever in the ancient civil laws of this territory, or in the territorial statute, is contrary to the dispositions contained in the said digest, or irreconcilable with them, is hereby abrogated."

Dargo deduces that "The obvious reference was inescapable: all other prior law not so abrogated remained in force." Tucker reaches a similar conclusion. Fifth, Dargo and Tucker both point to a series of decisions in which the Louisiana courts adopted the view that the 1808 compilation was merely a "digest" (in their definition). Sixth,

179. I.e Digest of the Civil Laws Now in Force in the Territory of Orleans with Alterations and Amendments Adapted to its Present System of Government.
183. Ibid. p.158.
184. For text, see Tucker, Source Books, p.XIX.
186. LCC Interpretation, p.101.
Dargo points to a letter of Claiborne to Secretary Madison, in which the former said: "The 'Civil Code' alluded to in my last letter is nothing more than a 'Digest of the Civil Laws in Force in this territory'." 188. Tucker, as contemporary evidence, quotes the writings of Martin, Moreau Lislet and Carleton, and Mazureau. 189. Seventh, Tucker argues for his "digest" view from the purpose of the redaction, stating that the Louisianians "did not codify to do away with the old laws; they codified so they could keep them." 190.

We will deal with these arguments in turn.

1. No significance should be ascribed to the use of the word "digest." It is obvious that at this period the two words "code" and "digest" could be used interchangeably. Similarly, "code" could be used to refer to any body of laws. Many examples could be given of these usages, 191. but to prove the point, only a few examples are necessary.

The Encyclopédie had declared that:

"Code signifie en général recueil de droit; mais on donne ce nomme à plusieurs sortes de recueils fort différents les uns des autres". 192.

There is ample evidence of this loose usage in Louisiana. In the introduction to their translation of the Partidas, Moreau Lislet and Carleton state:

"...the legislature of the territory of Orleans... ordered a digest of those laws to be made.... This code commonly known under the name of the Civil Code...." 193.

189. Martin's History of Louisiana, Martin being the law reporter and judge, see note 157 supra. Moreau Lislet and Carleton as translators of the Partidas. Mazureau whom Tocqueville interviewed: see chap. 2 at notes 43 and 47. See for Tucker's argument, LCC Interpretation, pp.105-109.
190. LCC Interpretation, pp.102-105.
191. Some will be found in section 3 of this chapter. See also Dargo, op. cit., pp. 105-153 passim.
193. Quoted Brown, Conflict, pp.74-5.
The Manifesto in *Le Telegraphe*¹⁹⁴ said of the vetoed 1806 Act: "By this measure one will not place the courts so to speak between the different codes...."¹⁹⁵. The civil law and the common law were the "codes" referred to. The Louisiana Remonstrance stated that the judges were "uncertain of[by]what codes they are to decide, wavering between the civil and the common law."¹⁹⁶. The whole corpus of Roman law could also be called a "code".¹⁹⁷ James Brown, one of the Digest redactors, wrote thus:

"The Civil Law - The Spanish Ordinances - the British statute and Common Laws, and the codes of all the States are spread before us...."¹⁹⁸.

"Code" and "digest" had very similar meanings in Louisiana at this period: both could be used to refer to any compilation of law, and "code" could refer to any whole system of laws.¹⁹⁹. Furthermore, "digest" as a term meaning systematic compilation of laws was familiar in any civilian jurisdiction because of the Justinianic compilation, and no significance should therefore be attached to its use. Therefore, the argument of Tucker on the basis of the title should be dismissed.

2. The preamble to the statute promulgating the Digest does not bear the interpretation put on it by Dargo. The preamble states that the Digest was intended to

"serve as a guide for the decision of the courts and juries, without recurring to a multiplicity of books, which, being for the most part written in foreign languages, offer in their interpretation inexhaustible sources of litigation." ²⁰⁰.

It is unclear how Dargo manages to make "a guide for the decision of the courts" come to mean "a guide to sources." ²⁰⁰

¹⁹⁴. See notes ¹⁴⁷ and ¹⁴⁸ supra, and text.
¹⁹⁷. See James Workman, quoted *ibid.* p. 124. It is obvious he does not refer merely to the *Codex Justinianus*.
¹⁹⁹. See also Franklin, *Existential Force*, p. 83.
²⁰⁰. See notes ¹⁸¹ and ¹⁸⁴ supra.
The real meaning is obvious: the legislature intended the Digest to supplant the old sources, to make examination of them unnecessary. The preamble conceives of the Digest as something new replacing the old sources - exactly the opposite of the meaning Dargo attributes to it. Further, and most damningly for the Dargo-Pascal thesis, the notion that the Digest was a guide to the sources is contradicted by section 5 of the same statute which states that, in the case of "obscurity or ambiguity, fault or omission", the courts should consult both the French and English texts which should "mutually serve to the interpretation of one and of the other." Were the Digest articles merely a guide to sources, this provision would be unnecessary, as the courts could examine the original text. This section of the statute clearly envisages the Digest as being the ultimate authority. Therefore, the preamble of the Act promulgating the Digest, and the Act itself both conceive of the Digest as something new replacing the old sources. The preamble has a meaning exactly the opposite of that attributed to it by Dargo.

3. The argument based on the Digest's recognition of custom as a source of law is irrelevant. Such recognition is not necessarily inconsistent with the principles of codification. The article defines what is custom recognisable in law. It poses a distinction between loi and coutume, both of which come under the generic term droit. Dargo apparently thinks that defining custom as a source of law means that the Digest may be supplemented by custom, and accordingly is not a "true code". This does not follow. That custom is defined as a source of law (droit) in the abstract does not detract from the

---

201. Tucker, Source Books, pp. XIX-XX.
202. The Swiss Civil Code of 1907 recognises customary law as a source supplementing the code: "A défaut d'une disposition légale applicable, le juge prononce selon le droit coutumier ...." Art. 1, 2nd. paragraph.
Digest as a code of *loi*. The article is merely didactic in intention, and was copied from article 5 of the preliminary book of the *Projet de l'an VIII* (1800), which was excluded from the finished Code Napoléon, not because the codifiers had changed their mind, but because definitions could more appropriately be dealt with by doctrine. The 1800 *Projet* was used as a source and model by the Louisiana redactors, and it is likely that this article was selected for the sake of logical completeness: since the aim of the Preliminary Title was to define *droit*, custom, as one aspect of *droit*, had to be defined. This article, therefore, should not be taken as an indication of the 1808 Digest not being a "true code".

4. The statutory provision abrogating all laws contrary to the Digest provisions or irreconcilable with them did not inevitably mean that the pre-Digest law had to be consulted in order to discover what were the complete provisions of the law. This view originates in a series of court decisions starting in 1812, which will be examined below. As shown above (under 2) the avowed intention of the legislature was to avoid the necessity of consulting the old law. If section 2 is read along with the preamble, it is apparent that the legislature intended to prevent any reference to the old laws: first, to avoid delay and expense in litigation, and second, to avoid attempts to overthrow the provisions of the Digest. Tucker argues as follows:

"It is not enough to argue that the Digest's


enactment implicitly repealed the old laws.... It is hard to believe that anyone could grasp the significance of a self-contained statement of the law without realizing, not the utility, but the absolute necessity of repealing anterior laws." 205.

What is at issue here is the intention of the legislature. Tucker is arguing that because the legislature did not expressly repeal anterior laws, it must have been intended that they should still be used, and, therefore, the 1808 Digest is not a "true code". This argument must be dismissed. As shown, the intention of the legislature was clearly to avoid use of the old laws, and, contrary to Tucker's view, the legislature did not anticipate or intend a revival of the old law to displace the Digest. The legislature intended the Digest to stand on its own.

A further point is that codification does not necessarily involve a complete abrogation of the old laws. The Quebec code of 1866 leaves open the possibility of appeal to the prior law. 206 The law of 30 Ventose, an XII (21st March, 1804), promulgating the French code abrogated the ancien droit "dans les matières qui forment l'objet du Code". (Should any topics exist completely ignored by the Code, the old law would still apply.) This loi did not mention the droit intermédiaire, which leads Marty and Raynaud to conclude that:

"Le droit intermédiaire au contraire, non compris dans la formule d'abrogation ne disparaissait que dans la mesure où il n'était pas compatible avec le droit nouveau." 207.

This is the same position as with the law promulgating the 1808 Digest. Presumably neither Dargo nor Tucker would argue that the 1804 Code Napoléon and 1866 Quebec code were

205. LCC Interpretation, p.102.
not "true codes". This fourth argument, therefore, must be dismissed.

5. The next argument is based on Louisiana court decisions from 1812 onwards which restricted the application of the Digest. On this three points should be made. First, the Louisiana courts would appear to have wanted to restrict the operation of the Digest as much as possible, and to revive the Castilian law. Second, this revival of Castilian law seems to have surprised at least some distinguished Louisianian civilians. Third, how the courts treated the Digest in the period 1812-1825, does not affect the intention of the legislature and redactors in 1808 that the Digest should be a complete code. To demonstrate these points, one of these cases will be discussed carefully, showing how the court treated the Digest. The courts likewise tried to restrict the operation of the 1825 code and to continue their revival of the Castilian law. Unless Dargo and Tucker want to argue that the 1825 code was not a "true code", they must admit that the motives of the court in restricting the Digest and reviving Castilian law were other than belief that the Digest was not a "true code".

The obvious case to discuss is the most important, the watershed case of Cottin v. Cottin, decided 1817. The plaintiff's son died leaving a pregnant widow, who was delivered of a child who lived only a few hours. The point at issue was whether or not the child inherited. The Digest had two relevant provisions: D.O. 64 and 65 (p.159). These provided that anyone who is free may inherit, but a child in utero when the succession opens,

208. In a later chapter, the Louisiana courts' treatment of the Digest will be analysed carefully, and a conclusion reached as to how the Digest came to be restricted and Castilian law revived. Since the answer to this problem is not relevant here, it may be postponed to a more convenient chapter of the thesis; see chapter 6 infra.
209. 5 Mart. (O.S.) 93.
210. On mode of citation, see chapter 4, note 51 infra.
must be born capable of living (viable) in order to inherit. D.0.6 (p.9) stated that abortive children were "such as by an untimely birth are born dead or incapable of living". It might have been thought that articles 64 and 65 sufficiently provided for the case: if the child, though it had died soon after birth, were judged to have been born capable of living, then it would inherit. In his plea for a rehearing, defence counsel, Edward Livingston, strongly argued this view.211. The court, however, took into account article 6 which stated that abortive children were those incapable of living because of untimely birth. The court then turned to the Nueva Recopilación, a provision of which declared that a child which did not live 24 hours was deemed abortive.212. Although the Digest on its own apparently provided adequately for the solution of the problem, the court reasoned that:

"There is, ...no doubt, that according to the Roman law, and to the laws of many modern nations, this child would be deemed capable of inheriting.

In Spain, however, the laws of which were, and have continued to be, ours, where not repealed, there exists a particular disposition ...[etc]." 213.

On any sensible construction of the Digest provisions, the old law had been repealed or superseded and new provisions made. For a determination of the dispute, the relevant matter for decision was whether or not the child was viable. The court, however, by making use of D.0.6 (p.9), managed to switch the point at issue to whether or not the child were abortive. Although the Digest provided an answer - an abortive child was one born dead or incapable of living because of untimely birth - the court referred to the Nueva Recopilación's provision on abortive children - an abortive child was one not living twenty-four hours. It

---

211. Cottin at pp.97-104.
212. Rec. Cast. 5.8.2. For court's argument, see Cottin, pp.93-4.
213. Cottin, at p.93
then declared that the child, not living twenty four hours, was abortive (ignoring the test of "untimely birth"), and therefore not viable. Consequently, the child could not inherit. The court would seem to have been seeking to outflank the Digest and reassert the Castilian law. D. O. 6 (p. 9) was taken from Domat, while D. O. 65 (p. 159) was copied from the French code. Domat and the French code would have allowed the child to inherit. The redactors had changed the law, and the court in Cottin was seeking to reverse that change, using a loophole provided by section 2 of the Act promulgating the Digest.

The court's treatment of the 1825 code indicates that the revival of Castilian law and downgrading of the Digest by Cottin were not the result of the nature of the Digest as not being a "true code". Article 3521 of the 1825 code states:

"From and after the promulgation of this code, the Spanish, Roman and French laws, which were in force in this state, when Louisiana was ceded to the United States, and the Acts of the Legislative Council, of the legislature of the State of Louisiana, be and are hereby repealed in every case, for which it has been especially provided in this code, and that they shall not be invoked as laws, even under the pretence that their provisions are not contrary or repugnant to those of this code."

Nothing could have been clearer. Despite this, in the 1827 case of Flower v Griffith, the Louisiana Supreme Court argued that where a provision of the 1808 Digest had been excluded from the 1825 Code, and where the legislature reveals no intention to suppress such provision, then it must be held to be still in force. Although the point

214. See Batiza, Sources, appendix C pp. 46 and 74. The de la Vergne manuscript, in relevant interleaf, refers to Domat and the Rec. Cast. as cited.
215. 6 Mart. (U.S.) 89 (1827).
216. The decision of the court turned on the method of promulgating the 1825 Code as a series of revisions and amendments of the Digest. The decision of Judge Porter is in fact logical if contrary to the intention of the 1825 redactors and legislature: see his judgment at pp. 90-2. Tucker, LCC Interpretation, pp. 139-141, gives a fair account.
in the case related to the Digest, the fact that the court refused to give any force to article 3521 meant that the old Castilian law was still in force except where specifically abrogated by the new code. As a result of this case in 1827, the state legislature passed two Acts in 1828, one providing that "all the civil laws which were in force before the promulgation of the Civil Code lately promulgated, be and are hereby abrogated"; while the other specifically repealed all the articles of the 1808 Digest (with certain exceptions). The Louisiana courts now fought a rearguard action, subsequently deciding that these acts repealed only the positive, written or statute laws of Spain and did not abrogate those legal principles established or settled by the courts' decisions.217.

217. On the 1828 Act, see Tucker, Source Books, p.XXVII. The relevant case is Reynolds v. Swain 13 La. 793(1839). On the acts and cases, see J.J. Hood, "The History and Development of the Louisiana Civil Code", 19 La. L. Rev. (1958), pp.18-33 at p.31. Tucker, LCC Interpretation, pp.138-157 gives a good account of the treatment of the 1825 Code. There was, perhaps, rather more reason behind the courts' revival of the Castilian law after the 1828 Act. The 1825 C.L., 3251, stated that it was only in cases provided for by the Code that the Spanish laws were abrogated; the 1828 Act repealed all the Spanish laws. There is an important difference: under the 1825 Code, areas not covered by the code and genuine lacunae would be provided for by the Spanish law; the 1828 Act prevented this. An "eminent lawyer" complained to Alexis de Tocqueville, about the state legislature:

"They make, unmake, slice and cut up at random. Here's an instance: Since the cession to Spain, many points in our civil law have been regulated according to Spanish law. At the end of 1828, at the end of the session, a bill was passed unperceived which abrogated all these laws, in a body, without putting anything in their place. The next day, the bar and bench learned with stupefaction of the performance of the day before. But the deed had been done."

Tocqueville, p.633; see also Journey, p.106. Tocqueville had forgotten the name of the lawyer. Tucker, LCC Interpretation, suggests it was Mazureau. (P.157, note 307.)
If one admits that the 1825 Code is a "true code", and, Tucker, for example, does, relying on the intention of the legislators and redactors, then one must accept that, considering the courts' treatment of the 1825 Code, one cannot argue from the decisions of the Louisiana courts as to the nature of the Digest. The Louisiana courts restricted the 1808 Digest and revived the Spanish law for reasons nothing to do with whether or not the Digest was a "true code". One could surmise that they preferred the Castilian law to the transplanted French code, or perhaps, influenced by the common law's restrictive attitude to statutes, they wished to restrict the role of the Digest and develop case law and principles. Tucker himself states that the intention of the legislature and redactors in 1808 is irrelevant, and that what is relevant is the attitude of the courts to the Digest:

"Regardless what the 1808 enactment was supposed to be, the cases tell us what it was." 220.

To be consistent, should he not apply this to the 1825 Code, and decide that, no matter what is said in the Preliminary Report, the 1825 Code is a "mere digest"?

That the reasoning of the Louisiana courts as exemplified by Cottin was both novel and unexpected, is shown by the attitude of some Louisiana lawyers. In their introduction to their 1820 translation of the Siete Partidas, Moreau Lislet and Carleton wrote thus:

"It was ... perceived that the Civil Code did not contain many and important provisions of the Spanish laws still in force, nor any rules of judicial proceedings; that the statutes regulating these proceedings had proved insufficient, and particularly as the case of Cottin vs. Cottin ... determined

218. See LCC Interpretation, pp.120-157.
219. In a later chapter we will discuss the reasons behind the Louisiana courts' attitude to the Digest.
220. LCC Interpretation, p.109; see also p.95 and p.101 note 205: "The reader may answer for himself whether after the court had finished with the 1808 'enactment', it matters at all what the draftsmen 'intended' - code or digest."
that the Spanish laws 'must be considered as untouched, whenever the alterations and amendments introduced in the Digest do not reach them; and that such parts of those laws only are repealed as are either contrary to, or incompatible with the provisions of the code.' It thus appeared that a much greater portion of the Spanish laws remained in force than had been at first supposed." 222.

This is a clear statement of the novelty of the reasoning in Cottin. Before the relevant decisions no one considered that the Digest ought to be interpreted in this manner, and it was not drawn up along the lines Cottin indicated. (It ought to be remembered that Moreau Lislet was one of the 1808 redactors: his evidence is particularly important.) It is perhaps significant that the 1823 Projet recommended the amendment of the articles dealt with in Cottin, so that, in effect, the decision on the law in Cottin was reversed in the 1825 Code, and the French law substituted. 223.

The redactors commented:

"There is a great difference between the conditions required by the Spanish laws and those required by our code, for the child born alive to inherit and transmit successions.

By the Spanish law the child must have lived 24 hours at least, and have been baptised. (Recopilacion de Castille, book 5, tit.8. law 2.)

The 65th article of this title of our code, in the part which we have retrenched, required that the child should be born capable of living, which, according to the interpretation we have given under the title of father and child, means that the child must be born alive after the sixth month of its conception.

We have thought that in relation to the right of succession granted to children born of the same

223. D.0.6 (p.9) was suppressed on the recommendation of the Projet. (See 1823 Projet p.3) D.0. 65 (p.159) was amended, and several new articles added: C.L. 947-51.


The 1823 Projet will be found in volume 1 of La. Leg. Arch.
marriage, there would be no inconvenience in permitting them to inherit from the instant they should be born alive, however few moments they may have lived." 224.

This is an obvious direct criticism of the position taken by the court in Cottin, tending to suggest that the approach taken in Cottin to the 1808 Digest was one not supported by the 1825 redactors. Further, in the 1823 Preliminary Report, the redactors, state that the Digest:

"took away on those subjects which are contained in its provisions, the necessity of a reference to the Spanish and Roman authorities...."

This is surely contrary to Cottin. The redactors recognise the Digest as imperfect, but state that reference to old authorities was only necessary in cases not covered in the code. 225 Other evidence supports the contention that the redactors of the 1825 Code (Moreau Lislet, Livingston and Derbigny) believed the Cottin approach to be wrong. The redactors proposed introducing a new article to abolish all grounds of nullity of marriage bar absolute impotence. They said:

"This amendment is necessary to remove all doubt relative to other causes of nullity which existed under the Spanish laws.... The general tenor of the code on this subject, induces the belief that it was not the intention of its framers to permit these causes of nullity to remain in our laws; but as they are not expressly abrogated, there must be an absolute disposition in order to prevent in future any resort to them." 226.

The new article and this comment are again a result of Cottin. The redactors here make clear their objection to the court's reasoning. The implication is that the 1808 redactors had not envisaged that the possibility of revival (such as in Cottin) existed; in other words, the 1808 redactors had considered the Digest as complete in itself.

224. Projet, p.118.
225. 1823 Preliminary Report, pp.LXXXVII-LXXXVIII. The quoted section is on p.LXXXVII.
226. 1823 Projet, p.10. The new article included in the 1825 Code is 116.
If Batiza is correct, and this section of the Projet was drafted by Moreau Lislet, then we have strong evidence that the 1808 redactors had intended that the Digest revoke the prior laws, even where not contrary to them: in the areas the Digest covered, it was intended to replace the old laws.

The fifth argument for the Digest not being a "true code" may be dismissed. First, when one considers the reactions to Cottin shown by Moreau Lislet and Carleton in their preface to their translation of the Partidas and by the 1823 redactors in some of their comments on proposed amendments, reactions showing that the Cottin interpretation was novel, one must accept that to argue from Cottin (and other decisions of the period) as to the nature of the Digest, and the intentions of the 1808 redactors, is plainly unhistorical. Second, it is obvious that the Louisiana courts wished to revive the old law and restrict the Digest, and, hence, their opinions on the nature of the Digest are suspect. Thus, these decisions do not prove that the 1808 Digest was not a code in the civilian sense.

6. The sixth argument that the Digest is not a "true code" is based on contemporary evidence. Dargo points to a letter of Claiborne to Madison. Claiborne's statement is of doubtful importance for two reasons. First, the letter is an example of special pleading by Claiborne intended to exculpate him from any possible blame for approving the Digest when the federal administration hoped for a reception of the common law. Second, Claiborne was not a civilian lawyer and not competent to state whether the Digest was a "code" or "digest", or whether it embodied the laws previously in force. Indeed, he seems merely to have seized on the name of the compilation (note that he

227. Batiza, op.cit. note 223 supra, at p.4.
228. Quoted at Note 188 supra.
quotes it almost exactly) as providing an escape route against complaints of his approval of the Digest.

Tucker cites Martin's *History of Louisiana* as evidence that the Digest was not a "true code", but a "digest".229. Martin, writing after the decision in Cottin, states that the Digest would have been more useful had the legislature sanctioned it as a system complete in itself and repealed all former laws. This statement is unexceptional given the period in which Martin was writing, that is, after the decision in Cottin had been given: it is no evidence for the intention of the legislature and redactors in 1808. Tucker cites another passage from Martin's *History*, which states that:

"In practice, the work was used as an incomplete digest of existing statutes." 230.

The same comment may be made on this passage as on the previous one: Martin was accurately describing circumstances when he wrote, after the watershed decision in Cottin. This is not evidence of the intentions of the redactors and legislature. Tucker cites a passage from Moreau Lislet and Carleton's introduction to their translation of the *Partidas*.231 Again this passage, if it bears the interpretation put on it by Tucker, dates from after Cottin. The last author Tucker cites as contemporary evidence is Etienne Mazureau.232 The passage from Mazureau dates from 1837. It is not a reliable guide to the intentions of the legislature and redactors in 1808. Tucker finally cites an anonymous writer in 1818.233 What this writer says does not in fact support Tucker's argument.

231. The passage may be found in Batiza *Sources*, p.30, note 173. It is from p. xxii of the introduction.
232. LCC Interpretation, p.107. The passage from Mazureau may be found quoted in Stone, op.cit. note 227 supra, at p.5.
233. LCC Interpretation p.108.
The writer states:

"In 1808, the civil code was adopted, which is principally a transcript of the code-Napoleon, or civil code of France. Where that is silent, its omissions are supplied by a resort to principles derived from the Roman law, and the codes founded on it, including the laws of Spain, France and the commentaries upon them." 234.

The 1808 Digest covered only the areas traditionally included in a civil code: this obviously meant areas of the law were excluded. For example, there were no provisions on commercial law. The 1818 writer is no doubt correct, but his evidence does not support Tucker's thesis.

This sixth argument on the basis of contemporary or near-contemporary evidence must be dismissed. The examples brought forward by Dargo and Tucker do not uphold their contentions as to the nature of the Digest.

7. The final argument is one made by Tucker, namely that the purpose of the redaction was to preserve the old laws, not to abolish them. 235. He states that:

"The various acts drawn up...from the 1804 Manifesto through the Act promulgating the Digest, and the rapidity of their succession, emphasises the direction of their concern which is less toward the specification of a civil law system than toward the repulsion of the common law." 236.

This is indeed correct: it does not however support Tucker's view. The native Louisianians did indeed wish to preserve the civil law against the common law: this was one reason for the vetoed 1806 Act and the decision to compile the Digest. Another reason was to resolve the confusion over which were the authoritative formal sources of law. A further reason behind the Digest was to prevent the necessity of recourse "to a multiplicity of books, which, being for the most part written in foreign languages, offer in their

---

235. LOC Interpretation pp.102-5.
236. Ibid. p.104.
interpretation inexhaustible sources of litigation.\textsuperscript{237} The codification was indeed to keep the old laws, but reduced to a new form to render unnecessary consultation of the old sources. This seventh and final argument for the Digest not being a "true code" must therefore be dismissed.

The seven points intended to establish the Digest as not being a "code" must be dismissed as either wrong or irrelevant. Dargo and Tucker fail to prove their argument. The internal evidence of the Digest shows that it was intended as a code in the tradition of the Code Napoléon—a comprehensive restatement of the law. The Act promulgating the Digest shows that the legislature intended the Digest to be complete in itself, and to replace the old law on the topics with which it dealt.\textsuperscript{238} That the courts, for reasons of their own, chose to ignore the intention of the legislature, does not matter, as we are here concerned with the actions of the redactors.

As already pointed out, Dargo and Pascal wish to regard the 1808 Digest as a "digest" (according to their own definition) in order to bolster their claim that the compilation was based on "Spanish" sources. It is inappropriate here to preempt discussion in the following chapters of the sources of the Digest, but it is safe to say that French sources were quite extensively used. Further, even were this not the case, and the sole sources of the 1808 Digest were Castilian, the Digest would still be an authentic civilian code. The Digest provided a new synthesis of the law: it rationalised and modernised. The legislature intended the Digest to supplant reference to the old sources of law on the topics which it governed, and only the later actions of the courts prevented this happening. Were the Digest to embody only "Spanish" sources, it would still be a code, for, as Brierley remarks,

\textsuperscript{237} Act promulgating Digest, Tucker, \textit{Source Books}, p.XIX.
\textsuperscript{238} See text at notes 200–201 supra.
"Codification ... is not in its essence a technique for bringing about a revolution in the content of the law."^{239}. Since the 1808 Digest is a true code, it represented for the redactors a break with the past, providing an opportunity for revision of the law into a coherent system using the legal materials at hand.

5. Preliminary Observations on the 1808 Digest.

A. The instructions of the legislature.

On 7th June, 1806, by a resolution of the Territory of Orleans, Louis Moreau Lislet and James Brown were appointed "to compile and prepare jointly a Civil Code for the use of this territory."^{240} The resolution further stated that: "the two jurisconsults shall make the civil law by which the territory is now governed, the groundwork of said code." Given the dispute between Pascal and Batiza, it is important to understand what the legislature intended by these instructions, and how Brown and Moreau Lislet would be likely to interpret them.

Sweeney gives the phrase "civil law" a broad interpretation, as meaning the law applied in the modern Romanist systems.^{242} Pascal interprets the instruction to mean that the redactors were instructed to use "Spanish-Roman" law.^{243} It is important to examine the legislature's instruction in context. First, the civilian legal systems tended to have a "supra-national" attitude, and there is evidence of such an attitude in Louisiana.^{244} Second, it appears that prior to the 1808 redaction, the Louisiana courts used a whole range of civilian learning, with Castilian law as the primary source.^{245} Third, an 1805 court decision had recognised as the law in force in Louisiana, Spanish, Roman and French law.^{246} Fourth, the whole thrust of the dispute over the law was one opposing civil law to...
common law, which tends to suggest that the legislature was not concerned with differentiation among the national laws of civilian states, but with opposing common law. 247. Fifth, Moreau Lislet and Brown did in fact incorporate a substantial proportion of law other than (in Pascal's phrase) "Spanish-Roman" into the Digest, and, after promulgation of the Digest, no one complained about what had been done. 248. A few years later, of course, the courts do appear to have reasserted the primacy of the Castilian law; 249 but it is implausible to suggest that this was because they believed that Moreau Lislet and James Brown had disobeyed their instructions. 250 Indeed in the case of Hayes v. Berwick 251 one of the decisions often cited as indicating that the Digest was not a true code, 252 the court said:

"What we call the Civil Code, is but a digest of the civil law, which regulated this country under the French and Spanish monarchs." 253.

The court here recognised the Digest as being compiled out of the civil law in a broad sense, not out of the "Spanish-Roman" law.

From the background to the legislature's instruction, it is clear that by "the civil law" was intended civil law in a fairly broad sense: certainly broad enough to encompass French law, which had been used in Louisiana and given recent judicial sanction. Pascal's argument that what was meant was "Spanish Roman" law is misguided. He takes too narrow a view of what amounted to the civil law in force in the territory, and of what the legislature intended. There is no evidence of any disapproval of the

---

247. See text supra, at notes 147-152.
248. See Dargo, op.cit., p.164. There is on record one complaint, from before promulgation of the Digest. One Jeremiah Brown wrote: "It is a matter of public notoriety that our St. Domingo Lycurgus is avowedly copying his new code from that of Bonaparte, to the infinite delight of the whole party by whom he is employed." - ibid., p.23, note 80. What Brown is complaining of is that common law has not been adopted: he has no interest in differing national civil laws.
249. See text supra, at notes 208-226.
250. Indeed I would argue they had obeyed their instructions.
251. 2 Mart. (O.S.) 138 (1812).
252. See Dargo, op.cit., p.158.
253. See note 250.
inclusion in the Digest of civil law from countries other than Spain. Since this is so, the redactors must be taken as having followed the instructions of the legislature.

B. The redactors.

Louis Casimir Elisabeth Moreau Lislet was born in 1767 at Cap Français, Santo Domingo. He received his education in France in languages and law.254 It has been suggested that at some point he had been secretary to Toussaint l'Ouverture;255 however this may be, he came to Louisiana to escape the excesses of the slave insurrection in Santo Domingo. He was thus one of the powerful group of "foreign French" who distinguished themselves in Louisiana.256 Moreau Lislet was an obviously successful lawyer, learned and knowledgeable, possessing an extensive library of works on Spanish, French, Roman and common law in their original languages.257

The other "jurisconsult" appointed, James Brown, was born in Virginia in 1766, and had practised law in Kentucky. Soon after the Louisiana Purchase he moved to New Orleans, where he apparently established himself fairly quickly as a successful attorney.258 The following excerpt from a letter written by Brown to Henry Clay is instructive as to the reasons for Brown's success:

"My success as a lawyer continues to be flattering and if the change in our government contemplated

254. Most of this information is taken from the entry on Moreau in the Dictionary of American Biography, which may be consulted if further information is required. Unfortunately, no biography of Moreau exists.
255. By Franklin, see Existential Force, p. 94 and "Libraries of Edward Livingston and Louis Moreau Lislet", 15 Tul. L. Rev. (1940-41) pp. 401-414 at p. 403 note 10. Franklin bases this on the evidence of de Clouet, a Spanish agent in Louisiana in 1812. (This latter will be cited hereafter as Libraries.)
256. See Tregle, op. cit., p. 31.
257. See Franklin, Libraries, pp. 405-9 for an inventory dating from Moreau's death in 1832; though added to during the years, presumably Moreau's library had always contained basic French, Spanish and Roman works.
by Congress does not obscure my prospects, I hope to acquire the means of a genteel support in a few years independent of my profession. My knowledge of two or three of the modern languages has saved me from ruin, or what was as bad, a resort to Kentucky for the means of support. I stand at the head of my profession and am employed in every important case, whilst lawyers of respectability who cannot speak French or Spanish are left without the means of a decent support." 259. Perhaps Brown mildly exaggerates here; but his choice of his knowledge of foreign language as the reason for his forensic success in New Orleans is significant, as showing he could consult the sources of Louisiana law in their original text. Brown had arrived in New Orleans in late November, 1804,260 and had early diagnosed the problems of the legal system in Louisiana, which led to his recommending in January, 1805, that a code be compiled from all the legal sources available.261. He anticipated that a code could be adopted which "would meet the approbation of our Judges and American Lawyers."262. This tends to suggest that he expected such a code to be based primarily on the common law. This is confirmed by his later letter of September, 1805, where, in complaining of Claiborne, he said, "A firm Governor will protect us against the introduction of the civil law, the French administration of justice, and the French language."263. It is thus clear that just nine months before Brown and Moreau Lislet were appointed to draw up "a Civil Code for the use of... the territory", Brown had apparently been in favour of a common law reception. He thus seems a rather curious choice for the legislature to have made: perhaps his views were generally unknown, or the legislature was swayed by his legal ability.

262. References as note 261.
and facility in French and Spanish, and it was thought politic to appoint at least one American redactor.

On all this, several remarks can be made. Between them, the two redactors would have a wide knowledge of the French pre-codification and codified law, Spanish law, Roman law both as found in the Corpus Juris and as developed by the modern civilians, and English common law. Both had a knowledge of French, English, Spanish and, presumably, Latin (Moreau Lislet's library contained a number of Latin texts). Thus, as well as having a knowledge of the various systems of law, the redactors would be able to read them in their original language: a necessary accomplishment, since translations would not readily be available. Given Moreau's French background and Brown's background in common law, it is tempting to suggest that the former might have favoured French law, the latter common law: this, however, is too vague and uncertain to be stressed.

C. Method of Working.

It is convenient to make some provisional remarks on the redactors' method of working. The Digest seems to have been completed in a remarkably short time. Moreau and Brown having been appointed on June 7th., 1806, already by January 22nd., 1807, Poydras, in his official reply to Claiborne's January message to the legislature, was able to say that the project of the code was "well advanced". The Digest was adopted by the territorial legislature on March 31st., 1808, and it is fair to assume that it had been completed earlier. The 1823 Preliminary Report states that the 1808 Digest was "hastily compiled. Sufficient time was not given for an accurate examination."

---

264. See on codified French law being known in Louisiana, note 170 supra. On French law generally, text at notes 156-170 supra.
266. See Dargo, op.cit., pp.154-5.
of the existing Law in its various sources."267.

The speed of completion of the Digest suggests the likely working method adopted in redaction. In its general style and structure, the Digest closely resembles the 1804 Code Napoléon and the latter's 1800 Projet (which the Digest resembles more is irrelevant). It is reasonable to suppose that either or both of the French compilations served as a basic model for the 1808 redactors, who would proceed by methodical examination of the French codes, leaving articles of which they approved, replacing provisions not thought appropriate, and inserting articles of which the French redactions had no equivalents. Such a method of working would be fairly rapid, and would allow the codifiers to review the law and change it where considered appropriate. It is a plausible conjecture given the time taken to compile the Digest, and its general appearance. This does not imply that there was a slavish copying of the French provisions, nor that the redactors adopted French provisions because they thought them to be substantially the same as those of the "Spanish-Roman" law (to use Pascal's inelegant phrase).268. On the contrary, Moreau Lislet, and probably Brown too, would be well aware of the differences between the French law, the Castilian law as applied in Louisiana, and the Roman law. This is readily demonstrated. First, provisions of Castilian law, and indeed of Roman law, were adopted in place of French codal articles.269. Second, Moreau, at least, was aware of differences between the French and Castilian law, since, in the famous Batture case,270 he has been described as making "a wise tactical switch from French law to Spanish law as the basis of argument."271.

267. P.XCIII.
269. There is little point in referring to instances of this. Several may be noted in subsequent chapters.
270. See on this case, Dargo, op.cit., ch.4, pp. 74-101.
271. Ibid. p.82.
Indeed, the Batture case highlighted differences between the Castilian and French laws, and an able and learned lawyer such as Moreau Lislet would be well aware of them. Thus, where a particular provision was selected or rejected, this must be the result of choice, not of uncritical imitation.

Professor Batiza has concluded that Moreau Lislet alone compiled the 1808 Digest. Tucker has suggested the same, but with greater caution. Both base this conclusion on a statement made in the 1823 Preliminary Report, where the writers, after praising the Digest, state that the problems of construction of some of the Digest articles arise mainly from faulty translation and errors due to its quick compilation; they continue:

"Sufficient time was not given for an examination of the existing Law in its various sources. No decisions had then been reported to throw light on their operation, and the unaided exertions of one person were not sufficient for the completion of the task."

The relevant sentence is, of course, ambiguous. The meaning depends on what is "the task" referred to. Batiza and Tucker obviously believe "the task" to be the redaction of the Digest. "The task" could also be the examination by one redactor of the courts' operation of the laws, or the examination by one redactor of the "various sources" of the "existing Law". Of the three possible meanings it is difficult to say which is correct. Batiza and Tucker's interpretation would seem the least likely. First, the Digest was completed in a very short time, which suggests

---

273. See LQC Interpretation, p.104 note 211. Tucker reports a tradition that Brown left Louisiana immediately after compilation of the Digests. He wonders if Brown could have left before. He quotes the passage (supra in text), and comments that if one person drew up the Digest it would have been likely to be Moreau: he points out that Moreau was the most popular choice for redactor of the 1825 Code.
274. P.XCIII.
that both men worked on it. Second, if only one man had drawn up the Digest, it would surely be surprising that this enigmatic sentence were the only record of this remarkable feat. Third, both Moreau and Brown were paid for their work as redactors, and paid exactly the same amount; this would have been unfair had only Moreau done the work, and indeed one cannot imagine the legislature so acting. Therefore, this suggestion of Batiza and Pascal must be rejected as being inherently improbable and inadequately supported by the evidence. 276.

Mitchell Franklin has suggested that Brown was helped in the work of redaction by Edward Livingston:

"It may be ventured that through Brown, Livingston also participated in preparing the civil code of 1808. Livingston is usually introduced to the history of Louisiana codification through his role in the codification movement ending in 1826. However, Brown wanted Livingston associated with him in preparing the code of 1808, but Claiborne prevented an official connection." 277.

There is absolutely no evidence to support Franklin's suggestion. He refers to a letter from Brown to Breckinridge of 1805, where the former regrets that Claiborne's hostility will not allow the appointment of Livingston as Brown's assistant, Livingston being the only man whom the Council seemed willing to appoint; and to a letter from Prevost to Madison of 1804 in which it was stated that Claiborne's enmity towards Livingston was such that he would not wish to see him employed in such an important task. 279. There is absolutely no hint anywhere of Livingston's possible collaboration with Brown. (Both these letters were written long before Brown was appointed

as a redactor. Furthermore, Brown does not say he wanted Livingston associated with him, only that Claiborne opposed Livingston, the only man the Council was likely to appoint. This claim of Franklin's should therefore be rejected.

The following conclusions may be drawn from the above discussion of the working method of the redactors. First, although there is virtually no evidence as to the method employed, it is likely that the redactors constructed their code around the French code of 1804 or its projet.\textsuperscript{280} Second, although the Digest was completed in a short time, it would be wrong to conclude that the redactors fudged the distinction between the French and the Castilian law. Third, it must be assumed that both Brown and Moreau Lislet, and only they, drew up the Digest. (It should be pointed out that either of them alone, and Livingston, too, probably had the knowledge and capacity to consult all the relevant sources.) Fourth, according to Moreau Lislet, the Digest was drawn up in French, and then translated into English.\textsuperscript{281}

Conclusion on the background to codification in Louisiana.

By the time of redaction of the 1808 Digest, Louisiana had passed through a complicated legal history. The original French colonisation had brought the application of French customary law. The cession to Spain had resulted in the application of Castilian law. The cession to Spain had resulted in the application of Castilian law by way of the laws of \textsuperscript{280}. As will be seen below, the Quebec redactors used a similar procedure.\textsuperscript{281} In the 1822 case of Dufour v. Camfranc 11 Mart. (O.S.) 675, Moreau said in court, "We have nothing to do with the imperfections of the translation of the Code, the French text, in which it is known that work was drawn up leaves no doubt." Dufour, at p.704. See E. Dubuisson, "The Codes of Louisiana (Originals written in French; Errors of Translation)", 1924 Louisiana Bar Association Reports, pp.143-157 at p.144. A territorial act of 1807 (Chap.XXI, s.2, April 14th.) provided remuneration for the translators; see ibid. What of the close similarities between the English versions of some articles and Blackstone? Does this affect Moreau's declaration? Some further points about this will arise infra.
the Indies. Both the French customary law and Castilian law had been influenced considerably by the reception of Roman law. With the Louisiana Purchase, there came confusion over the laws actually in force; a confusion made worse by the Louisianian fear of an imposed reception of Anglo-American common law. To sort out the confusion, and to make the laws more readily accessible, the territorial legislature ordered the codification of the law. Codification was undertaken by Brown and Moreau Lislet, the code being entitled "Digest". This code was intended to replace the old laws, in the areas for which it made provision.

The complex and varied background to codification in Louisiana would have allowed the redactors access to many different sources of law. The legal system had a rich civilian heritage; and the civilian tradition allowed for the easy transmissability of rules from one country to another, because of the common foundation in Roman law.

The multiplicity of possible sources of law for the code made inevitable a process of selection among competing potential provisions. The probable working method of the redactors, and the revival of French law after 1803, might suggest that there would be a prejudice in favour of the utilisation of French law; a use of French law made more likely by the obvious superiority of the French Code Civil to any other source available. There would be no barrier to such a "reception" of French law, as what was wanted was a code which would settle confusion and uphold civil law, and thus prevent a reception of common law.

Part Two. Quebec.

The background to the redaction of the 1866 Civil Code of Lower Canada is simple in comparison to that of the redaction of the Louisiana Digest. This part of the chapter is therefore shorter than the previous one, as much less of the background is controversial.

1. The French Period.

Not until the early seventeenth century did France successfully establish a colony in Canada, although the land had been claimed for France in 1534 by Jacques
Cartier. 282. The successful establishment of the colony came after the 1608 founding of Quebec by Samuel de Champlain. 283. Although in the early years of the colony it is likely there would have been little need for a developed system of law, some legal provisions would be necessary to provide for the granting of land for settlement and development. Land was granted under the seigneurial system of tenure, but it appears that there was confusion over which coutume should be applicable. 284. No provision had been made for the extension of any particular coutume to Canada, and, in the early years, parts of more than one seem to have been applied. The inhabitants of the colony came from differing French provinces, though mainly from those on the Atlantic coast, with the largest single group being Norman. 285. This variety in the provenance of the inhabitants has caused one writer to speculate that: "Il est probable que chacun y était régis par le droit coutumier de sa province d'origine"; 286. while the high proportion of Normans has led some to consider that the Coutume de Normandie was probably frequently applied. 287.


283. On Champlain and the founding of Quebec, see, e.g., Trudel, op. cit., pp. 93 et seq. The colony was captured by the English in 1629 (they had captured Acadia in 1627); but the French regained control in 1632: see Trudel, op. cit., pp. 172-80 and Lanctot, op. cit., vol. 1., pp. 131-137.

284. On the variety of customary laws in the north of France, see supra at notes 13-16.

285. See M. Trudel, La Population du Canada en 1663, Montreal, 1973, on the preponderance of Normans among immigrants (pp. 45-7) and those born in Canada (p. 150).


It does appear that the Coutume de Paris was often referred to in judicial proceedings in the colony, and often the inhabitants referred to it in their notarial documents as the law to be applied. The necessity of invoking a particular coutume indicates the uncertainty over the law applicable.

Early seigneurial land grants show variation in the coutumes used. So far, the early history of seigneurialism in New France seems to have been misunderstood. Early grants of land en fief et seigneurie made by the Compagnie des Cent Associés (the company organised by Richelieu to be in charge of Canada) often included a clause specifying that, on each mutation of tenure, the revenue of one year from the land should be payable to the seigneur. This payment was the incident of tenure called relief or rachat. Such a payment was not exigible under the Coutume de Paris when the mutation was by inheritance in the direct line. Thus, such seigneurial grants were not being made according to the Coutume de Paris. Some seigneurial grants did, however, specifically state that the Coutume de Paris governed the grant, and even stated that the Compagnie des Cent Associés intended to apply this Coutume to the whole of New France. In a land grant of 15th. November, 1653, it was stated that relief should be payable on each mutation of tenure, and that this provision followed the Coutume de Paris.

288. Olivier Martin states thus; "Nous avons nombre de sentences de la prévôté de Québec et on y constate que très fréquemment cette prévôté, bien avant 1664, se réfère expressément à la Coutume de Paris. Quant aux gens du Canada, nous avons des preuves nettes que dans leurs arrangements familiaux, notamment dans les contrats de mariage, ils se réfèrent volontiers aux usages de la Coutume de la prévôté et vicomté de Paris." Taken from his article "Comment la Coutume de Paris s'est installé en Nouvelle-France", in Le Devoir, lundi, 24 Oct., 1938, p.5, found quoted in Deleury et al., op.cit., p.815.


290. See Munro, System, pp.62-3.

291. Article 3 of the Coutume de Paris.

Coutume of Vexin-le-Français.\textsuperscript{293} This was the first document to mention this coutume.

On the basis of this 1653 statement, scholars have always assumed that in the earlier grants stipulating for relief, the law being followed was that of Vexin Français, and that the grants were made according to this custom in order to allow the seigneur greater returns from his vassals.\textsuperscript{294} This view, however, is surely wrong.

Vexin Français was in the Ile de France, on the border with Normandy: directly across the border was Vexin Normand. The two Vexins had originally been one, but had been separated by Charles the Simple, one half being allotted to the Ile de France, the other to Normandy.\textsuperscript{295} According to Yver’s analysis, the Coutume du Vexin Français was of the Parisian type, though influenced by the Coutume de Normandie.\textsuperscript{296} In the modern period, the Coutume was a coutume locale, not a coutume générale,\textsuperscript{297} and had to be proved for each fief by the seigneur.\textsuperscript{298} This provision on relief of the Coutume du Vexin Français was unique in the

\textsuperscript{293} Doutre and Lareau, \textit{op. cit.}, p. 40


\textsuperscript{296} Yver, \textit{op. cit.}, pp. 232-4: he notes that the coutume was excluded from Normandy and also from the Usus et Consuetudines Franciae.


Ile de France, and was described by Dumoulin as valde odiosum et illiberale. 299. The Coutume de Paris specifically referred to this provision of Vexin Français. 300.

It might be thought that the traditional view of these early Canadian provisions on relief was the correct one; but the evidence can be interpreted in a more satisfactory way. The major problem for the traditional interpretation is to explain why a provision of a fairly unimportant local custom of a few fiefs in the west of the Ile de France was applied in Canada. The explanation that this was to allow seigneurs greater revenue is not convincing if we consider rather more evidence than that considered by other writers. 301. The bulk of the colonists in Canada came from the west of France, especially Brittany and Normandy, the largest one group being Norman. 302. Until 1663, appeals from the prévôté de Québec went to the Parlement de Rouen. 303. The colony at the same time formed part of the Archdiocese of Rouen. 304. It should be noted that not until 1653 was the custom of Vexin Français mentioned in a grant. Since this is so, and given the strong Norman presence and influence in the colony, it may plausibly be suggested that the colonists, in inserting the clause providing for payment of relief on each mutation, were following the Coutume de Normandie; the coutume with which many would be most familiar. Article 163

299. Quoted Ferrière, Corps et Compilation, 4th. gloss on article III, no. 4, column 210.
300. In article 3, see note 316 infra.
301. Other writers have merely examined the statement in the 1653 land grant, accepted it and applied to the period before 1653, and examined Ferrière's commentary on article 3 of the Coutume de Paris, without pursuing the matter any further. There is also some confusion over the nature of the Coutume du Vexin Français. Gerin-Lajoie, op. cit., p. 63 describes Vexin as part of Normandy with a distinct custom; Munro, New World, p. 137 note 5, describes the custom as "a code of rules not forming part of the Custom of Paris, but in a way supplementing the latter." This is very vague. Trudel, op. cit., p. 246 describes the custom as the codified law of the Coutume de Normandie. Confusion obviously reigns!
302. See text at note 285 supra.
303. See, e.g. Besnier, op. cit., p. 735.
304. See Doutre and Lareau, op. cit., p. 43.
of the reformed *Coutume* stated that:

"Par mort ou mutation du vassal, relief est dû et hommage nouveau." 305.

Relief was similarly payable under the old custom. 306.

Henri Basnage, Seigneur du Franquesne, a noted commentator on the *Coutume de Normandie*, discussing article 163, remarked that the custom here differed from that of Paris, where only hommage was due on succession in the direct line, while only in the fiefs of *Vexin Français* was relief due as in Normandy. 307. It is much more likely that, in the early seigneurial grants in New France which provided for payment of relief on each mutation of tenure, the Norman custom was being followed, rather than the obscure rule of *Vexin Français*. The colonists did not require to be Norman for the rule on relief to be the one to which they were accustomed: for Bretons the rule was the same. In Brittany *rachat* was due on each mutation of tenure, under both the old 308 and the reformed *coutume*. 309. Commenting on

305. *Coutumes du Pays et Duché de Normandie*, 1732 edn., Rouen. Article 164, provided that: "Tous fiefs qui doivent relief, doivent aide de relief, avenant la mort du Seigneur immediat: et cet aide est dû aux hoirs des seigneurs par les vassaux pour leur aider à relever leurs fiefs vers les chefs-seigneurs," Art.165: "Les héritiers de celui qui a fait profession de religion, doivent relief et hommage au seigneur duquel le fief est tenu et leur est dû aide de relief par leurs Vassaux, laquelle aide est acquitté par demi relief."

306. See *Le Grand Coustumier du Pays et Duché de Normandie* [sic], chap. xxxiii on relief. I used the 1539 edition glossed by Guillaume le Rouille Dalençon.


308. Article 76, see V.C.E. D'Argentré *Rhedonensis Provinciae Praesidis Commentarii in patrias Britonum Lezes, seu Consuetudines generales antiquiss. Ducatus Britanniae* Brussels, 1664, for text.

article 76 of the old custom, although the comment would also apply to article 67 of the new, d'Argentre stated of this rule:

"...sed diverso jure quam Franci ultimur, apud quos in linea directa relevium non debetur...." 310.

The Coutume de Bretagne was of course related to the Norman, both being of the western group of customs which had many unique features, and were quite distinct from the coutumes of the Paris-Orleans type. 311. Indeed, the Coutumes of Normandy and Brittany were sufficiently different from other French customs that Loisel did not consider them in the composition of his Institutes Coutumieres. 312. Loisel did, however, mention the rule of Vexin Français as an exception to the norm. 313.

In sum, it is contended here that the presence, in early seigneurial grants, of clauses providing for the payment of relief on every mutation of ownership should probably be ascribed to the following by the colonists of their accustomed rules relating to fiefs (that is, the rules of Normandy and Brittany) rather than to the adoption of the Coutume of Vexin Français. 314.

If this argument is correct, it is still necessary to

311. See Jean Yver, "Les caractères originaux du groupe de coutumes de l'ouest de la France, 29 R.H.D.F.E., (1952) pp. 18-79. Unfortunately, Yver only discusses the law relating to family, and does not deal with the points we are considering here.
312. See M. Reulos, Étude sur l'Esprit, les Sources et la Méthode des Institutes Coutumières d'Antoine Loisel, Paris, Sirey, 1935, pp. 74-5. Talking of the use made of the various coutumes by Loisel Reulos says that: "La Bretagne et la Normandie surtout sont exclues à cause de leur particularisme trop accentué."
313. Institutes Coutumieres ou Manuel de Plusieurs et Diverses Reprises ... du Droit Coutumier et plus ordinaire de la France, edn. Reulos, 1935, based on 3d. edn. of 1611: Book IV tit. III, rule, XXII: "Es lieux où est deu relief en toute mutation, comme au Vuexin; quand quint est deu, n'est deu relief."
314. Gérin-Lajoie, op. cit., p. 63, states that some of the colonists were Norman, and took to Canada with them the Coutume du Vexin, Vexin being a part of Normandy with a distinct custom. There was, of course, a Norman Vexin, however, the custom referred to was that of French Vexin. Further, that there should be a significant number of colonists from either Vexin is improbable. It is much more likely that the relevant clauses were based on Norman or Breton practice. Gérin-Lajoie's hypothesis is riddled with errors and confusion; see note 301 supra.
explain why a 1653 land grant stated that a clause for relief to be payable on each mutation was following the custom of Vexin Français. This is readily accomplished. It will be recalled that some grants had stated that the company intended to introduce the Coutume de Paris. 315. There has obviously been a decision made to apply this custom as the uniform law in New France. However, once this coutume was examined, it must have been discovered that several land grants, made according to the traditions of the bulk of the colonists, were prohibited by article three. The same article, however, stated that the clause they were using was part of the custom of Vexin Français. 316. Given that the Compagnie des Cent Associés wished to apply the Coutume de Paris, to justify the past granting of fiefs with relief payable on each mutation of tenure, and to legitimise such a clause in the 1653 grant, the clause was stated to be following the custom of Vexin Français: a custom included in article three of the reformed Coutume de Paris. This does not necessarily mean that the drafter of the relevant 1653 grant was deliberately concealing the origin of the clause in the earlier grants: he may simply have been ignorant of the Coutumes of Normandy and Brittany. It is surely of importance that this clause was stated to be following the customs of Vexin Français only after the apparent decision to apply the Coutume de Paris to New France.

We may conclude that the early seigneurial grants providing for the payment of relief on each mutation of tenure were the result of the colonists following the established

315. See note 292 supra.
316. Article 3 of the Coutume de Paris reads: "Quand aucun Fief échot par succession de pere, mere, ayeul ou ayeule, il n'est dû au Seigneur féodal dudit Fief par les descendants en ligne directe, que la bouche et les mains, avec le serment de fidélité, quand les dits pere, mere, ayeul ou ayeule, on fait et payé les droits et devoirs en leurs temps: en ce non compris les Fiefs qui relevent et se gouvernent selon la Coutume du Vexin le Français; esquels Fiefs, qui se gouvernent selon la Coutume dudit Vexin, est dû relief a toutes mutations, et aussi ne sont dus quints."
practices of their main provinces of origin. A later grant stated this provision followed the custom of *Vexin Français*. This later statement may be attributed to the attempted introduction of the *Coutume de Paris*. Thus, the tradition that the early grants were following the *Coutume of Vexin Français* must be discarded: they were following the *Coutume de Normandie* or *Coutume de Bretagne*, the customs with which the majority of the colonists would be familiar.

It would appear that the *Coutume de Normandie* was a stronger influence in New France than previously has been thought.\(^{317}\) There is evidence of the application of the *Coutume de Paris*. The lack of a clear provision as to the laws applicable, as the colony developed, must have been likely to cause problems. The legal system was, however, finally settled in 1663 or 1664 by the explicit provision that the Custom of Paris was to regulate legal affairs. There is a dispute over which year is the correct one for the introduction of the *Coutume*. Which year is the correct one depends on the interpretation of two charters. The first, that of 1663 setting up the Sovereign and Superior Council, provided thus:

---

317. None of the writers to whom has been attributed the traditional view of the clause on relief appear to be aware that such was the normal provision under the *Coutume de Normandie*. If the argument outlined above is the correct interpretation of this early period (remembering that I am relying on others' descriptions of the relevant deeds), then it is obvious that a reappraisal of early Quebec legal history is necessary. This reappraisal would involve the analysis of the surviving legal documents of the period, with a view to their assessment according to legal practices under the various *coutumes*, especially, obviously, the *Coutume de Normandie*. As far as I am aware, there has been no attempt to carry out such a thorough analysis. Significant for what may probably be found, is the fact that in the first *seigneurie* granted, that of Beauport, as well as the clause for payment of relief on each mutation, there was a clause empowering the *seigneur* to grant land, not only *en censive*, but also *en fief*. (Doutre and Lareau, op. cit., p.27). This was not allowed under the custom of Paris, but was under that of Normandy.
"Nous [Louis par la grâce de Dieu, roi de France et de Navarre] ... donnons et attribuons au conseil souverain le pouvoir et connaître de toutes causes civiles et criminelles, pour juger souverainement et en dernier ressort selon les loix et ordonnances de notre royaume, et y procéder autant qu'il se pourra en la forme et manière qui se pratique et se garde dans le ressort de notre cour de Parlement de Paris...." 318.

The second charter, the Édit d'établissement de la Compagnie des Indes Occidentales, stated as follows:

"Seront les juges établis en tous lesdits lieux, tenus de juger suivant les loix et ordonnances du royaume, et les officiers de suivre et se conformer à la coutume de la prévôté et vicomté de Paris, suivant laquelle les habitans pourront contracter sans que l'on puisse introduire aucune coutume pour éviter la diversité." 319.

Some scholars argue that the terms of the 1663 charter were sufficient to introduce the coutume, while others argue that this charter meant simply that the new court was to follow the procedure of the Parlement de Paris, the law being left uncertain and vague as "les loix et ordonnances de notre royaume". These scholars believe that only the 1664 Édit introduced the Coutume de Paris. It is not necessary to decide this matter, although the latter view seems preferable.

As already discussed, the Coutume did not provide a complete system of rules. Thus, it had no provisions on the general law of obligations nor on the law of special contracts. Roman law was used extensively to fill in gaps and interpret the Coutume, although this conception of Roman law as a residual common law was rejected by adherents of the notion of a droit commun coutumier.

319. Text quoted Munro, New World, p.136 note 3. (This is article 33 of the Édit.)
320. See Castel and Doutre and Lareau as cit supra note 318.
322. See text at notes 17-19 and 30-36 supra.
323. For contents, see note 18 supra.
324. See text at notes 33-36.
Royal ordinances were of vital importance too. The Coutume was developed into a comprehensive system of laws using Roman law and royal ordinances. There is a long-running dispute over whether or not the series of "grandes ordonnances" under Louis XIV and Louis XV were valid in Quebec if not registered by the Sovereign Council. This debate is mainly technical in nature, as the courts frequently applied the provisions of these ordonnances without questioning their validity in Quebec. Indeed, it seems that it was only after the British conquest that the matter was first considered. Thus, we need not attempt to decide this point, it being sufficient to point out that these ordinances provided a possible source of law for the Quebec redactors, ignoring the legal niceties of their validity in Quebec.

The sources of the law used in New France were the Coutume de Paris, royal ordinances, colonial legislation and Roman law. It appears that not all the provisions of the Coutume were applied in New France. Munro believes there to have been very little influence of Roman law in the colony under the French regime. His arguments are not convincing. He states that the law introduced was the Custom of Paris, and that the Custom of Paris was not based on Roman law. He also recognises as sources of law for Canada under France royal ordinances and colonial

---

326. See An Abstract of Those Parts of the Custom of the Viscounty and Provostship of Paris, which were received and practised in the Province of Quebec, in the time of the French Government. Drawn up by a "Select Committee of Canadian Gentlemen, well skilled in the Laws of France and of that Province." By the Desire of Guy Carleton, Esquire, Governor in Chief of the said Province, London, 1772. see pp.1 and ii. On p.ii is a note of the articles revoked in whole or in part. See also Sequel to the Abstract etc., London, 1773.
327. New World, passim, esp. at pp.132-3, 135, 143.
328. Ibid., pp.133-136.
329. Ibid., pp.139-142.
He points out that the Code Napoléon, unlike the Coutume de Paris, contains rules of Roman origin, and that the Quebec code copied the French code. He concludes that, rules of Roman origin were adopted in Quebec through copying the Code Napoléon. Munro indicates the role played by Roman law in customary law France, but then, curiously enough, denies it any validity in New France. He does not consider that the colonists or traders would need a law of contracts. Further, Munro does not take into consideration that the 1664 stated that the judges were to follow not only the Coutume and ordinances, but also more generally "les loix ... du royaume." This would surely include the subjects normally covered by Roman law in the jurisdiction of the Parlement de Paris. It is possible that, in the early colonial period, the more refined areas of the law of obligations would have little practical importance; but this does not matter. The Roman-based aspects of the law of northern France were introduced, at least as a potentiality. Thus, the later elaboration of these Roman rules, and their eventual incorporation in the 1866 Code, can be ascribed to the 1664 introduction of the law as practised in the Vicomté and Prévôté of Paris. Thus, Roman law, as received in the pays du droit coutumier, was a live source of law in New France, along with the Coutume de Paris, royal ordinances and colonial legislation.

---

330. Ibid., pp.142-143.
331. Ibid., p.148.
332. Ibid., pp.147-8.
333. Ibid., pp.135-6.
334. I should not be understood to mean that there were no innovations on the old law in the 1866 Code taken from the French code. Obviously many provisions of importance were borrowed from the French code. What I wish to stress is that there was a potential role for Roman law in Quebec before any borrowing from the French code. The law was of necessity more than the few provisions of the Coutume de Paris.
335. On Roman law and the droit coutumier, see text at notes 19-36 supra.
2. The British Period.

Britain captured New France in 1760, in the course of the Seven Years War. Britain's possession of the colony was confirmed in 1763 by the Treaty of Paris. The subsequent legal history of the province is complex, and there will be no attempt here to discuss it in any detail, as to do so would not help this study. It is sufficient to outline some of the main events relating to the British desire to introduce the English common law, and to note the reforms undertaken before codification.

In 1763, the British Crown issued a Royal Proclamation providing a system of government for various newly conquered colonies, including Canada (which was renamed Quebec). In providing for the establishment of courts, the Proclamation stated that the courts were to determine, "all Causes, as well criminal as civil, according to Law and Equity, and as near as may be agreeable to the Laws of England." Provision was made for legislation "as near as may be agreeable to the Laws of England," and, furthermore, "all Persons Inhabiting in or resorting to..." Quebec could expect royal protection, "for the Enjoyment of the Benefit of the Laws of our Realm of England." Although the point has been argued, there can be no doubt that the British government intended to abolish the Canadian law and introduce the English.

338. Ibid., p.165
339. Ibid., p.165.
340. Ibid., p.165.
341. Lord Hillsborough, Secretary of State, later claimed that this had not been the government's intention. This is unconvincing given the overwhelming contrary evidence. See his letter, S. and D., p.297. The commissions of the first two Chief-Justices, Gregory (Doutre and Lareau, op. cit., pp. 585-7) and Hey, (S. and D., pp.273-6) instructed them to judge according to common law. The first Governor and his administration obviously thought they were instructed to introduce the common law. For the arguments on the Royal Proclamation, see Doutre and Lareau, op. cit., pp.310-354.
doubts as to whether the British Government could validly introduce English law in this fashion.\textsuperscript{342} It seems that for ten years the two systems of private law existed uneasily side by side.\textsuperscript{343}

In 1774, the British Parliament passed the Quebec Act (14 Geo. III, ch. 83), intending to settle various unsatisfactory matters relating to the government of the Province. The Act also attempted to end the confusion caused by the semi-introduction of English law.\textsuperscript{344} With certain (important) exceptions, this Act reinstated the French Canadian law. First, the English criminal law was retained. Second, the free disposal of property by testament was extended.\textsuperscript{345} Third, the Act stated in a proviso that nothing in it should be taken to apply to lands granted in free and common socage (an English tenure).\textsuperscript{346} The interpretation of this proviso was to cause problems, as was the general wording of the Act, which stated it was


\textsuperscript{343} Probably the best published account of the confusion over the laws and of French Canadian reactions is A. Morel, "La réaction des Canadiens devant l'administration de la justice de 1764 à 1774" 20 R. du B. (1960) pp.53-63, who shows that the French Canadians boycotted the courts. H.M. Neatby, Quebec, The Revolutionary Age 1760-1791, Toronto, 1968, points out at p.52 that the Court of Common Pleas tended to employ French law. W. Smith, "The Struggle over the Laws of Canada, 1763-1783", 1 Can. Hist. Rev. (1920), pp.166-186, may be found useful, though it should be read with caution, being a fairly slight work, containing some inaccuracies and written before all documentary sources were available.

\textsuperscript{344} For the relevant sections relating to the law, see S. and D., pp.573-4.


to apply to "all His Majesty's Canadian subjects": Canadian at this period meant French Canadian. This point was considered in 1785 in the case of Gray v Grant. The new Chief Justice of Quebec, William Smith, decided that the Canadian laws were introduced by the Act only as applicable to the French Canadians, and that in disputes between others, the "old subjects", English common law should be applied. 347. Many—including other judges—opposed this interpretation, and indeed, after Smith's death in 1793, it seems to have been forgotten. 348.

In 1791, the Constitutional Act (31 Geo. III ch.3) was passed by the British Parliament. 349. This Act split the province of Quebec into two new provinces—Upper and Lower Canada. Each new province had a new constitution, involving an elective legislative assembly. 350. No change was made in the laws of Lower Canada, although Upper Canada quickly introduced common law. 351. The Act had originally been intended to have provisions introducing English-style commercial laws, and provisions granting the holder of lands directly from the Crown en seigneurie the power to surrender them and have them regranted in free and common socage. 352.

348. See H. Neatby, The Administration of Justice under the Quebec Act, London, 1937, p. 331 and pp. 320 et seq. On the opposition to Smith's view, see The Diary of William Smith, vol. II, p. 163 note 2, and Neatby, as cited above, p. 227. The downfall of Smith's interpretation is shown with fine irony by the fact that, on his death, his widow had to go to court to request the election of a tutor under French law for their minor daughter, Harriet. See Neatby, as cited, p. 227.
For various technical reasons these provisions had been excluded from the final bill. 353.

The early 1800's saw some changes in the law and increasing confusion generally in the state of the law. The Provincial Act, 41 Geo.III, ch.4, (1801) extended the freedom of testamentary disposition of property introduced in 1774 354. The proviso to the 1774 Act, apparently exempting land held in free and common socage from its provisions, 355 caused considerable confusion at this period, because it was unclear whether the English law was to be used only to define socage and its incidents, or whether the English laws on conveyancing, dower, and succession were to be applied to such land rather than the French equivalents. An added problem was that if, as some thought, 356 the 1763 Proclamation could not and did not validly introduce English law, then it was doubtful if English law could be introduced by way of exception in a proviso to the 1774 Act. At this period, many English holders of seigneurial land in Canada wished to change their tenure from seigneurial to socage. 357 The English law officers decided that such a change would require legislative authority. 358 We need not discuss the dispute over the abolition of seigneurial tenure in any detail. 359 it is sufficient to point out that in the early 1800's the

354. See A. Mayrand, Les Successions ab Intestat, Montreal, 1971, pp. 5-6 and A. Morel, "L'apparition de la succession testamentaire", (op. cit. note 345 supra), at pp.503-510.
355. See text at note 346 supra.
356. See references, note 242 supra.
357. Munro, System, pp.221-223 gives details of the attempted change by John Caldwell, seigneur of Lauzun. (He does not give this detail). Munro's account is not the best possible, but it is the most convenient for reference, without having to cite numerous documents.
358. See their report in D. and MacA., pp.501-2 on this point.
359. See on this Munro, System, ch.XII, pp.224-251. His account is still the only complete one, though regretably defective in many respects and somewhat superficial and old-fashioned. For the background see Ouellep, Hermès Article (see chap.2 note 1025 supra) and his "Le régime seigneurial dans le Québec," in Éléments at pp.91-110. (See chap. 2 note 75 supra,) Useful may also be found M. Séguin, "Le Régime Seigneurial au Pays de Québec, 1760-1854," 1 R.H.A.F. (1947-8), pp.382-402 and 519-532. See also the second section of chapter 2 supra.
merchant class wished for abolition of seigneurial tenure, while, in general, the French Canadians resisted any attempt at abolition. In 1822, the British Parliament passed the Canada Trade Act. This Act provided that anyone holding land directly from the Crown, either en fief et seigneurie or en censive, and having power to alienate the same, could surrender such land to the Crown, and have it regranted in free and common socage. This Act was ineffective in helping commute tenure and ending confusion over the laws in force, as it did not allow for commutation by the censitaires of a seigneur and did not settle which law was applicable to land held in free and common socage. In 1825, the British Parliament enacted the Canada Tenures Act, which continued the provisions of the 1822 Act, but bound a seigneur, who had himself commuted his tenure, to commute that of his censitaires, should they demand that he do so. The commuted land would be held in free and common socage as in England. The eighth section is of great interest, since it stated that, in land held in socage, all matters of conveyancing, succession and rights of married women were to be governed by the laws of England. This section attempted to settle the doubts over the meaning of the 1774 proviso. It thus appears that, by 1825, English law was to govern important areas of social life in a substantial part of Lower Canada, as, in the Eastern Townships, land was already held in free and

360. See Ouellet, Histoire (see chap. 2 note 65 supra) pp. 199-200 on seigneurialism retarding economic development; and also, chap. 2 supra text at notes 101-106.
361. 3 Geo. IV, ch. 119. The text may conveniently be found in A.G. Doughty and N. Story, Documents Relating to the Constitutional History of Canada, 1819-1825, Public Archives of Canada, 1935, at pp. 106-120, as well as the usual Statutes at Large, vol. 8 (1819-1822).
362. By sections 31 and 32.
363. See Munro, System, pp. 224-5, and Séguin, op. cit. note 359 supra, at pp. 391-2. This Act, S. 31, also abolished the need, in making such a regrant, of reserving land for the use of the Protestant clergy - a necessity which had caused problems in previous attempts at changing tenure, and which originated in S. 36 of the Constitutional Act of 1791.
364. 6 Geo. IV, ch. 59, Statutes at Large, vol. 10, 1825-6, give text at pp. 151-156.
365. By sections 3 and 4.
366. See text at note 346 supra.
common socage, and there was a prospect of large areas of the *seigneuries* being held in socage.

This was an obviously unsatisfactory state for the law. Not only were two systems of law existing side by side in the same jurisdiction, but also many past land transactions would seem to have been overturned because section eight of the 1825 Act was declaratory in nature. There were doubts about the effect of this section, and, in 1829, the Provincial legislature passed an Act rendering it only prospective in effect; but the validity and scope of this Act were also doubtful.\(^{367}\). In fact, the problem of the applicability of English law to large areas of Lower Canada remained unsettled until the 1850's.\(^{368}\). In 1857, the Provincial legislature\(^{369}\) passed "An Act for settling the Law covering Lands held in Free and Common Socage in Lower Canada",\(^{370}\) which removed the anomaly of English law and rendered the Lower Canadian law uniform.

In 1840, the two provinces of Upper and Lower Canada had been reunited as part of the political settlement of the rebellions of 1837 and 1838.\(^{371}\) Although the British government wished to introduce the English laws,\(^{372}\) under the Union there was no serious attempt to assimilate the laws of the formerly separate provinces, both retaining...

---

367. On the problems as regards this Act, see St. Laurent, *op. cit.*, pp.452-3; and also the case of Stuart v. Bowman, 3 Lower Canada Reports, 309 (1853): esp. at pp.369-77 (Panet J.) and 392-6 (Alwyn J.) on this Provincial Act. See also the case of Wilcox v. Wilcox 8 Lower Canada Reports 34 (1857) esp.94-98.

368. The differing opinions of the judges in Wilcox show that, even in 1857, the meaning of the 1763 Proclamation, the Quebec Act etc. could still be a matter of dispute.


their own laws and court structure. 373.

The period of Union was one of major reforms in the Lower Canadian law, reforms which commenced under the Special Council, even before the Act of Union came into effect. Thus, in 1841, there were major reforms of the law on customary dower and hypothecs, reforms making for greater security of transactions, especially through registration. 374. In 1843 and 1849 there were major reforms of the Court of Appeal of Lower Canada. 375. The bar and notaries of Lower Canada were incorporated, in 1849 and 1847 respectively. 376. During this period, university teaching of law became regular, with the organisation of law faculties in the universities of McGill and Laval. 377.

---


374. These reforms will be found in Consolidated Statutes of Lower Canada, ch. 37. (This compilation of legislation, completed 1861, will be referred to hereafter as C.S.L.C.). On these reforms, see A. Perrault, "Le conseil spécial, 1838-1841", 3 R. du B. (1943), pp. 130-144, 213-230, 265-274, and 299-307, at pp. 269-72, and Y. F. Zoltvany, "Esquisse de la Coutume de Paris", 25 R.H.A.F. (1971-72) pp. 365-384 at p. 371 and p. 375. There were later attempts to reform the law on hypothecs, on one such failure, see "J.C.", "De la publicité des Hypothèques dans le Bas-Canada", 3 Revue de Législation et de Jurisprudence, (1847) pp. 24-33.


In 1857 came an important restructuring of judicial organisation. A reform of major importance accomplished under the Union was the abolition of the seigneurial system. The moves to achieve this started in 1841 with the appointment of a commission to investigate the system of land tenure. In its report of 1843, the commission condemned the seigneurial system and recommended its abolition. As a result of this report, in 1845, the provincial legislature passed an act "to facilitate optional Commutation of the Tenure of Lands." This act was amended in 1849, but commutation was still optional. In 1850, the Legislative Assembly resolved that commutation be made obligatory, and, in 1854, was eventually passed an "Act for the Abolition of Feudal Rights and Duties in Lower Canada". The work of commutation was completed in 1859, the new tenure being a free one of French origin, not the English one of free and common socage.

The period of Union was one of major reform in the Quebec law. The anomalies of the semi-introduction of English law were removed; the court structure was reformed; the legal profession was reorganised; university teaching of law started; and the substantive law was modernised. As part of this reform movement, in 1857, the legislature passed "An Act to provide for the Codification of the Laws of Lower Canada relative to Civil matters and Procedure." This Act resulted in the 1866 Code.

379. See Munro, Docs., (op.cit. chap. 2 note 104 supra) at pp.308-357.
380. Ibid. p.353.
381. See Munro, System, pp.242-4 for discussion of this Act.
382. See ibid., pp.243-4.
383. For text, see Kennedy, Docs., pp.519-532. On this Act and its operation, see Munro, System, pp.245-51.
384. See text at notes 369-370 supra.
385. The text of this Act (20 Vict. S.C. 1857, ch.43), may readily be found in T. McCord's 1867 edition of The Civil Code of Lower Canada, pp.XXXIII-XXXVII. (C.S.L.C., ch.2.) Castel, op.cit., pp.24-6, may also conveniently be consulted for the text.
The legal history of Quebec or Lower Canada after cession to Britain has some important implications for codification. It is obvious that the British government had wished to introduce English common law, although attempts to do so had met with failure. English law had been applied in the period 1764 to 1774, and had apparently been applicable to large areas of land after that date. English law obviously would be well known in Lower Canada, and thus a possible source for the Commissioners for Codification to draw on. The French Canadian resistance to the common law would suggest that, as a source for the code, it would not readily be used, especially in the traditional areas of family, property and obligations. Furthermore, the reforms of the law (sketched in above), carried out prior to codification, modernised the law while maintaining it as a cohesive system based on the old French law. This would suggest that arguments for introducing English law because of its "modernity" would not carry much weight. Likewise, if new provisions were required for modernisation, the codifiers would be likely to turn to civilian compilations, such as the Code Napoléon, in search of rules consistent with the general tenor of the indigenous law.

3. Codification.

The background to the 1866 codification has already carefully been investigated by J.E.C. Brierley. This section, therefore, will be devoted merely to extracting, from the whole complex process of codification, those elements which help explain the sources selected on codification, and their relevance to conditions in Quebec. Four topics will be examined: first, the immediate background to codification; second, the legislature's instructions to the codification Commissioners; third, the characters of the codification Commissioners; and fourth, the Commissioners' interpretation of their instructions and their method of working.

386. Brierley, Codification.
A. Immediate background to codification.

The Act enabling codification was passed in 1857. The code was completed and came into force in 1866, just one year prior to confederation in Canada. Some writers have been inclined to infer that the two events of codification and confederation are connected in some way other than by closeness in time, and conjecture that codification was a means of preserving the Quebec civil law from common law encroachment after confederation. Brierley has shown that the original motive for codification could not have been this one of preservation, since codification was proposed before confederation became a policy of the provincial government. Further, in all the negotiations leading up to confederation, the special status of the Quebec civil law had been recognised. Even without codification, the Quebec laws would seem to have been secure on entering the confederation. The "preservation" conjecture seems to be based almost entirely on the coincidence in time of codification and confederation, and on the following statement of McCord:

"In view of a union of the British American provinces, the codification of our laws is perhaps better calculated than any other available means to secure to Lower Canada an advantage which the proposed plan of confederation appears to have contemplated, that of being the standard of assimilation and unity, and of entering into new political relations without undergoing disturbing alterations in her laws or institutions."

The British North America Act of 1867, by s.94, provided for the possible unification of private law in the confederation, but specifically excluded Quebec. This had

387. See note 385 supra and text.
388. See Brierley, Codification, pp.527-8, and note 18. See also, chapter 1 supra, note 51.
390. See the Quebec Resolutions of 1864, clause 43, parts 15, 17 and 18 on preserving local laws: Kennedy Docs., pp.541-7 at p.547; and the London Resolutions of December 4th., 1866, on the same in ibid., pp.614-617 at p.615.
391. McCord, Synopsis of Changes in the Law Effected by the Civil Code of Lower Canada (hereafter cited as Synopsis), to be found in his 1867 edn. of the Code at pp.I-XXX at pp.I-II.
been a policy in confederation from 1864,392 and makes McCord's remarks seem strange. His comment seems to have two possible meanings. First, codification meant that the Quebec laws could serve as a model for the possible assimilation or unification of the Canadian laws.393 Second, if there were an assimilation, codification would prevent the Quebec laws from being much altered. That Lower Canada had insisted on control of her own private laws must render McCord's statement fairly pointless, and it is difficult to decide how much reliance should be placed on it. The statement may reflect an erroneous fear among the French Canadians that their laws would be infiltrated by the common law. As Brierley suggests,394 it is possible that during the process of codification, as confederation approached, there developed the notion of codification as preserving the Quebec laws: it must be accepted, however, that the prime motive for codification was not a political desire to preserve the Quebec laws and to affirm the existence of a francophone population with their unique laws and institutions. If preservation of the integrity of Lower Canadian law had been an aim of codification, it would suggest that common law sources would not be used.

Brierley identifies as the main motive for codification in Quebec the desire to solve three legal and technical problems: the diversity of the sources of law, the problem of language, and the absence of any legislative or doctrinal synthesis. A spur to codification was the ready availability of foreign models.395 The bulk of the laws were of French origin: codification in France had stopped

392. See note 390 supra.
393. See Brierley, Codification, p.531, on proposed assimilation of the laws of Upper and Lower Canada in 1857 — not necessarily to the detriment of Lower Canadian law.
394. Ibid., p.528.
395. Ibid., pp.533-542. These were also the reasons given in the preamble to the 1857 enabling statute. See note 385 supra.
the reprinting of these sources, and the vital commentaries upon them, making access difficult to the sources of Quebec law.\textsuperscript{396} To these French sources, had been added a considerable amount of provincial legislation and court decisions. While many inhabitants were monolingual, parts of the law were written in French, parts in English. Some provisions of English law had been introduced. All was obvious confusion.\textsuperscript{397} The Code Napoléon and the Louisiana Code of 1825\textsuperscript{398} both offered examples of a synthesis of the law, and of the benefits accruing on codification.

Brierley concludes that:

"The essential reasons ... motivating the proposed codification ... were rooted in this fact: the actual content of the legal system of Lower Canada was not easily ascertainable, by way of reference to either an official compilation or suitable doctrinal synthesis. The difficulty existed on two levels: the substance of the law was only to be gathered from a multiplicity of different sources which, themselves, existed in a language not always accessible to all portions of the population. The classification and organisation of the law, to be exposed in the systematic fashion of a code along the lines of the two obvious models available, were thus the aims of the new compilation." 399.

B. Instructions to the Codification Commission.

The 1857 Act\textsuperscript{400} laid down in its various sections an outline method of operation for the Codification Commission. Under ss.1 and 2, three Commissioners, who had to be barristers and could be judges, and two secretaries (one francophone the other anglophone each with a good knowledge of the other's language) were to be appointed. The

\textsuperscript{396} See text at notes 320-335 supra on French sources.
\textsuperscript{397} See sections one and two supra. Castel, \textit{op.cit.}, gives a simple review of the sources at pp.14-15, 17-18, and 20-23 with excerpts from some of the source material.
\textsuperscript{398} On the role of the 1825 Civil Code of Louisiana, see J.P. Richert and E.S. Richert, "The Impact of the Civil Code of Louisiana upon the Civil Code of Quebec of 1866", \textit{Revue Juridique Thémis} (de l'Université de Montréal) (1973) pp.501-520.
\textsuperscript{399} Codification, p.542. (It is clear that the C.N. and C.L. offered new alternative provisions.) R. Taschereau gave the same explanation for codification: "Le Bas-Canada conservait cependant les lois françaises, mais ces lois étaient devenues tellement compliquées, tellement mêlées, qu'en 1857 Sir Georges Etienne Cartier proposait la codification pour des lois françaises pour le Bas-Canada", in "La Codification de Nos Lois Civiles," pp.657-671 at p.662 of \textit{Le Droit Civil Français Livre Souvenir des Journées du Droit Civil Français} (Montréal - 31 Aout - 2 Septembre, 1934). Publié par le Barreau de Montréal, Siréy, Paris, Montréal, 1936.
\textsuperscript{400} See note 385 supra for reference to text.
Commissioners were instructed by s. 4 to reduce the whole of the civil law to one code composed of laws of "a general and permanent character", but excluding any laws relating to seigneurial tenure. By s. 6, only laws actually in force were to be embodied in the code, while proposed amendments had to be stated separately and distinctly, with reasons given for their suggested adoption. The code was to be framed on the same general plan and was to contain a similar amount of detail as the French code (s. 7). Reports to the Governor were to be made periodically, and could be submitted to the Lower Canadian judges for their comments and advice on amendments or the accuracy of the statement of the actual law (ss. 8-12). Under s. 15, the code was to be "framed and made in the French and English languages", and when printed, the two texts were to be next to each other. Any two Commissioners could frame a report, but the third could frame a separate report or enter his dissent into the minutes of the proceedings of the Commission (s. 16).

From the Commission's instructions, it is clear that the primary task was to reduce the vast mass of source material of Quebec law into one concise code, using the French Code Civil as a plan and example: while amendments were allowed, they had to be stated separately with arguments in support. It appears that the Commission was not given a totally free hand and that the redaction was to be of a basically conservative nature.

That the Commission was instructed to draw up the code on the basis of the law in force does not mean that there would be no element of selection present in this, the primary task. As has been pointed out, the law in force would have to be gathered from many, and possibly conflicting, sources. Doctrinal writers, for example, could have differing views of the meaning of the law; statutes could conflict; and cases could give contradictory decisions. The doubtful nature of much of the Lower Canadian law would mean that, in deciding what was the law actually in force, the Commission would inevitably be involved in selecting among competing possible sources in areas of the law that were unclear or unsettled. The process of selection would
likely be guided by the Commissioners' views on what the law ought to be, taking into account matters such as purity of principle, reform needed in view of changing social circumstances, and the like. Indeed, the Commissioners were well aware of the necessity of their making selections between competing sources in deciding what the law actually was, and they left on record their views as to what should guide their decisions.\textsuperscript{401} Proposing amendments, the secondary task of the codifiers, obviously allowed them freedom to innovate wherever they thought necessary. They, of course, would use their freedom in a restricted way. That is, they would be likely to innovate by using obvious and traditional sources, and they would be unlikely to attempt to frame a completely new provision, given the obvious tendency of those with the task of reforming the law to borrow provisions from other systems.\textsuperscript{402}

C. Characters of the individual commissioners.

It is appropriate briefly to examine the background and careers of the three Commissioners, as it is possible that their political views and general character could predispose them to favour a particular view of the law and to adopt particular provisions. Although the Act enabling codification had been passed in 1857, not until 1859 was the Commission appointed.\textsuperscript{403} On 4th February of that year, René-Edouard Caron,\textsuperscript{404} puisne judge of the Court of Queen's Bench, Charles Dewey Day,\textsuperscript{405} and Augustin-Norbert Morin,\textsuperscript{406}

\textsuperscript{401} See infra text at notes 423-4.
\textsuperscript{402} See chap. 1 supra, text at notes 34-37 and 51-53. The purpose of this study is, of course, to see why the codifiers chose a particular source and rule for use in Quebec.
\textsuperscript{403} In 1857, Cartier had offered the position of President of the Commission to L-H. LaFontaine, Chief-Justice of Lower Canada, who had declined on grounds of ill health. See Brierley, Codification, appendix II, p.581.
\textsuperscript{404} 1800-1876.
\textsuperscript{405} 1806-1884.
\textsuperscript{406} 1803-1865.
puisné judges of the Lower Canadian Superior Court, were appointed as Commissioners for Codification. On the 10th. of the same month, J.U. Baudry and T.K. Ramsay, both members of the bar, were appointed as the bilingual secretaries. On 25th. October, 1862, Ramsay was replaced as secretary with Thomas G. McCord; while in 1865, on A-N. Morin's death, Baudry replaced him as Commissioner—one L.S. Morin taking the latter's position as secretary. Out of this group, we need discuss only the three judges originally appointed as Commissioners, as theirs was the task of codification. When A-N. Morin died, the work was effectively finished, as the draft code was already being examined by the legislature: and thus Baudry, appointed to replace Morin, would have no determining influence on the provisions of the civil code.

Morin and Caron were francophone, while Day was anglophone. Day had been born in Vermont; but his family had come in 1812 to Montreal where he had been educated. All three were called to the bar in the late 1820's and had a common training in the Quebec civil law. All had had active political careers prior to elevation to the bench. Thus Day had been solicitor-general prior to his 1842 appointment to Queen's Bench. (He had transferred to the Superior Court in 1849.) Caron had been active as a moderate and liberal, and had been mayor of Quebec, speaker of the Legislative Council, and had held ministerial position under the Hincks-Morin liberal coalition (see below) before his 1853 appointment to the Superior Court, from which, in 1855, he was appointed to Queen's Bench. Of all three, Morin had the most lively political background. In 1830 he had been elected to

---

407. See Brierley, Codification, appendix II, p.588.
408. On this, see the Preface to McCord's 1867 edn. of the code (hereafter cited as Preface) at pp.v-vi; and Brierley, Codification, app.II pp.581-9.
409. See Careless, op.cit., p.47.
410. See ibid., p.100.
411. It is undoubtedly due to this that he has attracted the interest of more than one biographer.
the Legislative Assembly of Lower Canada, and he took a prominent part in all the troubles during the 1830's. He was entrusted by L-J. Papineau with drawing up the famous Ninety-Two Resolutions of 1834, on which the Assembly had taken its stand against the Provincial administration and Imperial government. During the Patriote rebellions of 1837-8, Morin was charged with high treason, but escaped arrest by going into hiding. During the Union he had returned to political life, being elected to the Assembly in 1841, being the Assembly's Speaker from 1848 to 1851, in which latter year he joined with Hincks of Upper Canada to head the liberal coalition ministry which bears their names. He held various ministerial posts until his 1855 appointment to the Superior Court.

All three Commissioners had had ministerial responsibility and had played an important part in the events of their time. The three were men of learning and practical experience, undoubtedly familiar with the intellectual movements of their period. They would seem to be suitable candidates for the work of redaction, to which they could apply their knowledge of intellectual and material life. Though deeply versed in Lower Canadian law, by virtue of education and linguistic ability, all three would have access to sources written in languages not their own. While there is nothing in Day's background to suggest he would favour the introduction of common law notions, the strong commitment of both Caron and Morin to the French Canadian cause suggests that they would be zealous in preserving the integrity of the French Canadian law. This does not

412. See Parizeau, La Société Canadienne Françaiseau XIXe Siècle, Montreal, 1975, at pp.465 and 474-5. Parizeau devotes a whole chapter to Morin (pp.465-519), containing useful information.
413. See ibid., pp.465-7.
414. From 1852 until his death, Day was Chancellor of McGill University. Morin was, first, Professor of Law at Laval, and then Dean of Laval's Law Faculty: Parizeau, op.cit., pp.503-5 and see note 415 below.
mean they would favour the retention of archaic provisions; on the contrary, the legal practices all had had before elevation to the bench, and their judicial positions themselves, would mean that all three would be well aware of any deficiencies in the Lower Canadian law, and the need for corresponding revision and modernisation.\textsuperscript{415}

D. The Commission's interpretation of its instructions and manner of working.

Since Brierley has given a very full account of the \textit{modus operandi} of the Commission, and McCord a brief but important one, only certain aspects of the Commission's work need be touched on here.\textsuperscript{416} Caron acted as \textit{de facto} president of the Commission, and early in 1859 gave thought to how the Legislature's instructions were to be implemented. Turning his attention first to determining what exactly were the laws in force in Lower Canada,\textsuperscript{417} he set down his thoughts in a \textit{Mémoire}, in which he classified all the possible sources of the existing law.\textsuperscript{418} The list of sources in the \textit{Mémoire} is comprehensive and exhaustive,\textsuperscript{419} and includes the \textit{Coutume de Paris}, French ordinances and edicts, provincial legislation, juristic writers on French law of the \textit{ancien régime}, such as Pothier, and those who wrote

\textsuperscript{415} For further information on all three, the following may be used. The \textit{Canadian Dictionary of National Biography}, vol. IX, for Morin and X for Caron, and on both, see Morgan, \textit{Sketches of Celebrated Canadians}, Quebec, 1862, pp. 351-2 (Morin) and pp. 472-3 (Caron). Also on Morin, see Parizeau \textit{op. cit.} The \textit{Canadian Dictionary} (supra) being unfinished, the volume which will contain Day's entry is unavailable. Therefore, on Day, see his entry in The \textit{MacMillan Dictionary of Canadian Biography}. These works are the sources of the information in the text not attributed in a note. Further biographies of Korin are cited by Brierley, \textit{Codification}, pp. 581-2, note 7.


\textsuperscript{417} Brierley, \textit{Codification}, pp. 544-5.

\textsuperscript{418} Further comprehensive lists of sources were proposed; but seemingly never drawn up: \textit{ibid.} p. 546.

\textsuperscript{419} See \textit{ibid.}, pp. 547-552 for list, and notes thereon for commentary.
on the Roman law as adapted to France, notably Domat. 420.
Although the writings of jurists were only given a brief
mention towards the end of the list, they in fact
constituted the most important and fruitful source; 421.
the bulk of the other sources being found of little
relevance. 422. As well as the sources of the ancien droit,
the codifiers examined the provisions of the Code Napoléon
and the Louisiana Code for a concise expression of the old
law. The latter code was especially useful, having both
an English and French text.

The codifiers commented on the task of sifting through
the sources in order to discover the laws actually in
force. They stated:

"...on an infinity of points there is uncertainty
and difference of opinion. The legislature is
silent, the courts do not concur, the authors
disagree, and yet in all these cases a decision
must be come to ...." 423.

The codifiers had already outlined in an earlier Report,
some of the criteria by which they decided on any particular
rule as being the law in force:

"The Commissioners would remark that in all cases
of doubt and conflicting opinions upon the law, and
in the cases of suggested amendments, they have not
been governed by the mere weight of authority upon
the one side or the other, but have preferred the
rules likely to be found practically the most
convenient and beneficial." 424.

420. Ibid., pp.550-2.
421. Brierley remarks (ibid., p.553): "The vast bulk of
actual law to be included in the provisions of the future
code was thus contained in a myriad of French writers of
the seventeenth and eighteenth centuries."
422. See ibid., pp.552-4
423. Second Report, pp.139-143 esp. at pp.141-3 for these
general statements made by the codifiers on their work.
They also remarked that the sources were "so varied, and
more-numerous perhaps with us than in any other country
and the long enumeration of which would be out of place
here." Ibid. On mode of citation of these Reports, see
chap. 1 supra, note 34. These important general remarks
at the beginning of the Second Report, may also be found
quoted in Castel, op. cit., pp.27-29.
424. First Report, p.32. On p.32 of their First Report,
the Commissioners make several remarks of interest on the
nature of law and codification.
It is obvious that the codifiers recognised that in deciding what was the law in force they were involved in a creative act, as they often had to choose between competing potential provisions. This statement indicates that in exercising such choices, they were concerned to fit law to what they saw as the requirements of their society.

When it came to amending the law, the codifiers apparently examined many and varied sources in a search for provisions suitable for borrowing. The Code Napoléon and the 1825 Louisiana Code would often offer potential amendments. Caron believed that the latter, completed after the French code, might well contain provisions suitable for adoption in Quebec. The Louisiana Code was also specifically mentioned in the preamble to the 1857 Act, and Cartier had been warm in recommending it in the debate over the codification bill. Fortunately, the Commission left in its Reports details of sources consulted, and this renders comparatively easy ascertainment of sources consulted, and provisions accepted and rejected. McCord states (and as one of the secretaries to the Commission his evidence is very valuable) that in their amendments, the Commissioners consciously sought to fit the law to the existing society:

"[The amendments are intended for the most part to improve our law as a system, and to adapt it more perfectly to our present state of society."

He adds that the amendments:

"... of a nature to harmonize with the ideas

425. See the list of abbreviations in McCord, op.cit., at pp. XLII-LI for an idea of the range of sources consulted. See also Brierley, Codification, p.552, where he gives a count of over 350 different sources, and A. Morel, op.cit., note 345 supra, where he gives, at p.501, a count of more than 300 "titres".
426. Brierley, Codification, p.545.
427. Ibid., pp.541-2 and his note 54.
428. McCord, Synopsis, p.II.
of the present day, and to adapt our ancient laws to the changes which since their date society itself has undergone."

These statements by McCord are confirmed by the Commissioners themselves in the passage already quoted from their First Report. Thus, the Commissioners were actively seeking provisions suited to the state of society, and the sources they consulted, the provisions accepted or rejected, and the reasons they gave for doing the same, will obviously reflect on the influences on them in their task of creatively developing and modernising the law.

The work of drafting individual books and titles of the code was split among the three Commissioners, and it is possible to ascertain which parts were originally drafted in French and which in English (obviously by Day). The drafts were translated into the other language by the secretaries, checked by the Commissioner who drew them up, and then carefully examined by all three. Both texts are thus of equal authority. The especial prominence given to the French code is clearly shown by the method of working adopted in drawing up individual articles. The Commission worked using cahiers, each double page of which was divided into four columns, headed: "Existing law", "Corresponding Article of the Civil Code of France", "Proposed Amendment" and "Remarks". The intention was to utilise, as instructed by the Legislature, the expression and wording of the French code in drawing up articles to encapsulate the existing law. It is obvious that this method, involving comparison with the French code, would cause the Commissioners to reflect critically

429. Ibid.
430. See quotation in text at note 424.
431. See McCord, Preface, pp.viii-ix, and Brierley, Codification, p.537.
432. See references note 431 supra.
433. McCord tells us that to overcome difficulties attendant upon the translation of French texts into English, Scots legal terminology was often used. Preface, p.ix.
434. See Brierley, Codification, appendix I on cahiers at pp.577-580.
on the existing law, and would inevitably mean that, in considering a possible amendment, the French provision would always be the one most convenient and obvious to borrow.

Conclusion on the background to codification in Quebec.

French colonisation of New France had resulted in the introduction of the law of the customary-law north of France, specifically, the Coutume de Paris. Right up until codification, the Quebec private law remained firmly based in the law of ancien régime France (the Coutume de Paris, royal ordinances, and the received Roman law) despite the attempted introduction of Anglo-American common law, and the application of aspects of the common law to some areas of the province. 436.

Although the legal culture of Quebec was firmly based in the French law of the ancien régime, with the inclusion of some common law, the large amount of source material apparently available in Quebec for consultation meant that the codifiers, in so far as they chose to modernise the law, could choose among many differing sources and provisions. The codifiers had access to the doctrinal writers on the old and new French law, writers on the Roman law, the Corpus Iuris Civilis itself, English law, American law and Scots law. From their Reports, it is clear that the Commissioners made full use of these sources, as well as of the Code Napoléon and Code of Louisiana.

The strong commitment of the codifiers to the French Canadian law and the conservative instructions of the legislature, would both tend to suggest that the sources most used would be the traditional ones, although, as

436. The droit commercial is rather different from the droit civil in Quebec. See the conclusions on codification in Quebec in the final part of the thesis.
pointed out by the codifiers themselves,\textsuperscript{437} even in constructing the code out of the traditional sources, to embody the law presently in force, the codifiers would be involved in choosing between different provisions. The same conservative tendencies would suggest that in modernising the law, the sources most likely to be used by the codifiers, especially in the traditional fields of family, property and obligations, would be the modern French ones, as being the ones closest in outlook to the traditional Quebec law. The method used in drawing up the code would also mean that the provisions of the Code Napoléon were those most convenient and obvious to borrow.

\textsuperscript{437} See text at notes 423-4 \textit{supra}. 
Chapter Four.

Family Law in the Louisiana Digest and Quebec Code.
Introduction.

(i) The Family.

To provide a definition of "family" is notoriously difficult. Poster remarks that:

"social science does not have an adequate definition of the family, or a coherent set of categories from which to analyze it, or a rigorous conceptual scheme to specify what is important about it." 1.

To some extent, this is because, until recently, there had not been much research into the historical development of the family. Most of those scholars who were interested in the history of the family generally accepted the views of Le Play. 2. The theories of Le Play have now been questioned and rejected most vigorously, especially by the Cambridge Group for the History of Population and Social Structure, the attack being led by Peter Laslett. 3. The work of the Cambridge Group has itself been questioned. There is, therefore, a revived and continuing debate over the nature of the family as an historical phenomenon, and over the appropriate method of study. 4. Ariès found it

---

2. A good account of Le Play's work and the reasons for rejecting it may be found in J-L. Flandarin, Families in Former Times, Kinship, Household and Sexuality, Cambridge, 1979, at pp.50-68.
4. C. Middleton, "The Sexual Division of Labour in Feudal England," 1979 New Left Review, nos. 113-114, pp.147-168, remarked at p.148: "Whereas a decade ago 'the family' was regarded as one of the most boring topics on the sociology curriculum ... it is now the subject of an intense controversy." The method of investigation is very controversial: new theoretical concepts are constantly being developed to further analysis: e.g. the new approach based on the "life cycle" (of individuals) rather than "family cycle" to be found in Transitions. The Family and Life Course in Historical Perspective, 1978, ed. T.K. Hareven; see especially the introduction by Ms. Hareven, pp.1-15, and chapter 1 by Glen Elder, pp.17-56. On another recent contribution to the debate, see M. Verdon, "The Stem Family: Toward a General Theory", 10 Journal of Interdisciplinary History (1979-80) pp.87-105. See also Lawrence Stone, The Family, Sex and Marriage in England 1500-1800, Weidenfeld and Nicolson, London, 1977, at pp.21 et seq.
necessary to ask "...have we any right to talk of a
history of the family? Is the family a phenomenon any more
subject to history than instinct is?\(^5\) While Hareven
remarked that, "As a new field, the history of the family
is broadly interpreted, its boundaries undefined."\(^6\)

The very term "family" is ambiguous, with a meaning
varying historically and from place to place. The changes
in meaning often reflect the growth and change of "family"
as a concept.\(^7\) The term has included servants and
apprentices. The seventh Partida gives a very wide
definition of family,\(^8\) and Laslett remarks that "servants
were workers in the position of sons and daughters, the
sons and daughters of the house were workers too."\(^9\)
Family organisation varied also according to class: nobles,
peasants and town dwellers all had differing family and
household structures.\(^10\)

From the nineteenth century until recently, it was
accepted that the family had progressed in a linear manner
from an extended cohesive kin group (Middle Ages) to the
modern nuclear family, which, it was thought, developed

---

5. P. Ariès, *Centuries of Childhood*, trans. R. Baldwick,
6. T.K. Hareven, "The History of the Family as an
Interdisciplinary Field," pp.211-226 at p.211 of *The Family
7. On this, see R. Williams, *Keywords*, Fontana, 1976,
pp.108-111; and Flandrin, *op.cit.*, pp.4-10 for an excellent
conceptual analysis covering the 17th. and 18th. centuries.
8. See below at note 166.
cited as *World*), p.3.
10. Poster, *op.cit.* note 1, at pp.166-205 develops 4
"models" of family structure in Europe. The notion of
class variation of family structure is implicit in Laslett, *World*
at p.2 and p.6 where he shows the different households
of a baker (artisan, town dweller) and peasants. Stone,
*op.cit.*, discusses the variation of family types according
to social stratification at pp.9-10. He also takes such
into account in the discussion of change in the nature of
the family, *passim*. 
under the impact of industrialisation. This notion has been refuted by modern research which has shown that the history of the family is infinitely more complex than this simple linear model suggested. Whereas previously the rise of the privatised nuclear family was directly linked to the economic changes in the structure of society caused by the development of capitalism, with "a tendency ... to collapse into a single category ('pre-industrial or 'pre-capitalist' society) periods of history ... quite distinct in time and character," it is now thought that the development of changes in the family structure has a certain autonomy within the overall social structure. Thus Ariès has shown that the concepts of "childhood" and "family" which are associated with bourgeois society from the nineteenth century onwards developed before the onset of industrialisation gave rise to that particular society. The work of others confirms his view. The notion that before the development of the bourgeois family people tended to live in extended kin groups has been seriously challenged by Laslett, who, on the basis of his demographic studies analysing parish registers, concluded that:

"It is simply untrue as far as we can yet tell that there was ever a time or place when the complex family was the universal background to the ordinary lives of ordinary people." Laslett argued that family size had remained constant through the ages, but with a shift from high fertility and high mortality to low fertility and low mortality. Laslett's views have given rise to an extended controversy. It has been pointed out that the family has a "cycle" and that

11. This is, of course, the analysis of Le Play (see note 2 supra). See also, Stone, op.cit., pp.661-665.
16. See note 4 supra.
often the married child who was to inherit the peasant farm lived with his parents (until they died or retired) and his own children, along with any unmarried siblings. This form of organisation has been called the stem family; the family being conceived of as going through a cycle of stem family, nuclear family to stem family as generations died out and were replaced. The position thus becomes rather more complex than Laslett showed. Flandrin has shown that Laslett's analysis of the statistics of household size is misleading: by a reanalysis of Laslett's own findings, he shows that, in one village, although 4.47 was the average size of the household, 65% of the population lived in exceptionally large households. The households of the gentry and wealthier yeomen were very large indeed. In other words, in this village, the majority of the population lived in a few very large households, while the minority lived in a large number of tiny households. Flandrin shows, as Ariès had already shown, that households of the elite could be huge. Further complexities are introduced by consideration of the nature of the relationships within the family, the relationships of the family to the wider community, and of the way in which the family is viewed.

Even were Laslett correct that in the past families lived in "nuclear-style" households, it must still be stressed that the structure of the relationships within the family was different, and hence the structure of the family was different (at least on an ideological level).

18. See Berkner, op.cit., pp.86-87 for a discussion of the cycle of the stem family, and its possible variations.
The relationships of the members of the family with the wider society were also different.

In village societies of peasant farmers, individual members of the family owed allegiance to peer groups outwith the family. Shorter has argued that the meaningful relationships of peasants under the ancien régime were with the village as a whole, the wider community of the village intervening to a very great extent in family life, regulating the rituals of courtship, marriage and death, with the result that social authority over family members was exercised collectively, and not by the father and husband. 21 He contrasts the modern nuclear family with the old-style peasant family by stating that "The locus of meaningful ties ... shifted from without the family to within." 22 After reviewing the literature and research on the topic, Poster reaches the same conclusion. 23 Noble families were also radically different from the modern nuclear family. The households within which they were situated could be huge, with the size of the household increasing with the status of the family. 24 Ariès remarks that "the houses of the rich sheltered, apart from the family proper, a whole population of servants, employees, clerics, clerks, shopkeepers, apprentices and so on." 25 It must be admitted that after the development of the modern-style family in the eighteenth century, the noble family would still share its house with a considerable number of servants; but the circumstances were rather different. Ariès shows this brilliantly, by pointing out the change in the organisation of the dwellinghouse, and by reviewing literary sources. Up to the seventeenth century,

23. Op.cit., note 1 supra, p.185: "The basic unit of early modern peasant life was not the conjugal family ... but the village. The village was the peasant's family."
rooms were general purpose, and communicated with one another, as there were no corridors. Tables and beds were collapsible and could be moved from room to room. The noble and bourgeois families were perforce on intimate terms with their servants. "In those rooms intended for no special purpose, where people ate, slept and received visitors, servants never left their masters.... This was not only true of the middle class, but of the nobility as well." It must also be recalled that the place of business of an artisan, a merchant or a lawyer was his home; there was no separation of home and work. From the eighteenth century onwards this closeness of master and servant no longer existed. Rooms became specialised, corridors developed, as did an elaborate system of bells. The family was able to isolate itself physically from the outside world.

Ariès concludes that:

"The rearrangement of the house and the reform of manners left more room for private life; and this was taken up by a family reduced to parents and children, a family from which servants, clients and friends were excluded."

Thus, we can see that the family (narrow sense) under the ancien régime was very different from the modern. It may have consisted of parents and children, but there was a qualitative difference in that the family was not an isolated unit. Peasant families were influenced by the village as a community. Nobles and other wealthy groups lived constantly surrounded by servants, friends and the like. For all classes of society, up to the period around the end of the seventeenth century and the beginning of the eighteenth, life was conducted in public gaze. The

27. Ibid. p.396. See the anecdote about the Princesse de Condé, her page and her footman, which well illustrates the familiarity between even the highest nobility and their servants: ibid. p.397.
28. Ibid., p.399: "This specialisation of rooms ... was ... one of the greatest changes in everyday life. It satisfied a new desire for isolation."
29. Ibid. p.400.
family was not a private place. Further, Flandrin has shown that in rural society, the small households were dependent on the dominant large ones. Disagreeing with Laslett and the Cambridge Group, he states:

"It is this co-existence and this association that characterized western society in former times. The averages calculated on the basis of the parishes can give no indication of this." 30

Corresponding to the above, and, of course, interdependent with it, there was a change in relationships within the family. These relationships became more intense. Parents became much more concerned with their children. Ariès demonstrates this well. 31 He argues that the present concept of "childhood" is a modern one for Western Europe. Previously children were not separated from adults, but with the development of schooling and the growing intensity of parent-child relationships a new concept of childhood developed, with children no longer being regarded as little adults, but as a special group in whom parents invested a good deal of time and emotion. Formerly, he argues, children up to the age of seven or nine were treated virtually as "non-persons", and, if the families could afford it, were sent away to be nursed, with, apparently, no great interest taken in them. After the age of seven or so, children played a full part in the adult world, often being sent to live in other households as "apprentices" in order to learn useful social skills. 32 In the seventeenth century, this way of life was changing, and in the eighteenth, the modern notion of childhood and family developed. The wealthy might still employ wetnurses; but the child was no longer sent away to nurse, the wetnurse stayed in the family home. Parents started to take an

31. See his book (as cited) generally, but esp. pp.365-404 for the following.
32. See ibid., pp.71-81 and 128-133.
intense interest in their children, around whom family life now pivoted. The family no longer was only a method of transferring inherited property and privilege; it became a sanctuary of close emotion away from the outside world. The middle classes withdrew into the family, and physically separated themselves from the rest of humanity. There are doubts as to Ariès' accuracy in stating that childhood itself was a new discovery; nonetheless, his argument is correct in so far as he shows that the modern concept of childhood developed in the seventeenth and eighteenth centuries. Not all classes were affected by this change in the relationship between parent and child. The peasantry continued to live much as they had always done; the new working classes in the towns of the nineteenth century did not adopt bourgeois family organisation. For the latter class, for example, childhood was not a prolonged experience, as children worked alongside adults from an early age.

The same time as there arose the new concept of childhood, the husband-wife relationship changed. Ties between husband and wife grew closer; affection between a married couple came to be thought more necessary. In short, there developed what Stone has called the companionate marriage. However, this brought in its train some disadvantages, notably isolation. The married couple were denied the external support from kin groups and neighbours, as marriage came to be thought a more personal affair between the partners.

33. See ibid., pp.71-81 and 128-133.
34. An obvious example of this is the building of the eighteenth century New Town in Edinburgh.
35. D.E. Stannard, for example, in The Puritan Way of Death. A study in Religion, Culture and Social Change, Oxford, New York, 1979, pp.44-7 indicates doubts about the accuracy of Ariès' work for New England. See also pp.168-9, however, for an approving discussion.
Laslett's thesis requires amendment. The emotional structure of the old-style family was quite different from that of the modern. Parents and children did not have the same intense relationship. The family took a full part in wider social life, from which it was not hermetically sealed away.

In conclusion, it may be said that the seventeenth and eighteenth centuries saw the development of the modern conception of family. Before the modern period, people did not oppose family to society: the two were inseparable. The family existed; but the conception of the family as a privatised area of life did not. While there had been no rigid separation of business from family as Ariès shows, with the privatisation of the family such a separation developed. The old social contacts of work, friends and neighbours were devalued, while the "family" was valued more and more. Parents came to care for their children qua their children, not as representatives of the family line or as a means of improving the family's status or helpers with the farm. With the growth of the concept of childhood came the growth of the notion of caring within the family. Parental (especially paternal) authority grew; but its nature changed. It was no longer based on the power of a father over those subject to him, but rather on notions of care and protection. The husband-wife tie grew closer, revolving around domesticity. Companionship and affection became much more important in marriage than hitherto. The closeness of the husband and wife bond paradoxically resulted in the early nineteenth century in the repression of wives, as the nuclear family became the emotional focus of the lives of its members. That is, under notions of care for the weaker wife and children, the husband's authority grew. The old-style family was not the sole source of social contact and emotion, but with the growth of the close and exclusive modern family,

38. Stone shows this particularly well. See *op.cit.*, pp.666-673.
the family became almost the sole source of emotion and affection based on care for the children. Thus, there can be traced a change from the old hierarchical style family, based on the power and authority of its head, to a modern associative or affective family, composed of individuals held together by notions of care and affection.

(ii) Quebec and Louisiana.

The above discussion, arguing for a qualitative change in parent-child and husband-wife relationships in the course of the seventeenth and eighteenth centuries, relies on works dealing with the family in Europe (especially France). Unfortunately, there is no equivalent detailed systematic research for Louisiana and Quebec; but from the survey in chapter 2, it is clear that a similar pattern emerges. In that chapter it was argued that by the time of the respective codifications in Louisiana and Quebec the nature of family relationships had changed vis-à-vis the countries from which they drew their laws. In both it appears that families were no longer conceived of as patriarchal in the sense of being grouped under the authority of a father, with other members of the family being dependent on him because of his power over them as head of the household. It must be remembered that servants were regarded as under his power in the same type of relationship as sons. Rather, by the time of their respective codifications, in both Louisiana and Quebec, family structure was associative rather than hierarchical. The physical

---

40. Very useful on Quebec, will be found Louise Dechène, Habitants et Marchands de Montréal au XVIIe Siècle, Pion, Paris and Montréal, 1974, pp.433-449. Verdon, op.cit. refers to a paper of his "The Quebec Stem Family Revisited", in K. Ishwaran (Ed.), Canadian Families: Ethnic Variations, which he describes as forthcoming. It has now been published (Toronto: McGraw-Hill Ryerson, 1980: see Canadiana, 1980 (1) January, Part 1, p.25); but unfortunately I have not been able to see it. Verdon's own account of the paper leads me to believe, however, that it would not be relevant here.
41. See chapter 2 supra, esp. text at notes 46-57, and 107-120.
42. R.L. Kagan, Students and Society in Early Modern Spain, 1974, pp.5-9, makes some relevant remarks on patriarchal family organisation. He points to the lack of research on the history of the Spanish family.
circumstances of life (plenitude of land)\textsuperscript{43}, and the intellectual movements of the period (individualism) had tended to produce greater independence for children. Commentators on both Louisiana and Quebec stressed the closeness of family ties in both; but, it must be stressed, this was a closeness based on affection, not authority. The husband-wife relationship is rather more difficult to assess. Early commentators on New France remarked on the independence of women, and, conceivably, this independence existed for them in early Louisiana; but this is no reason to suppose that such independence existed at the time of codification. Given, however, the general social conditions, both material and ideological, we can suppose a close tie between the husband and wife based on domesticity, with the husband in a position of superiority.

In Quebec we know that the French-Canadian population put a very great emphasis on the family: not the family in the sense of lineage, but as an emotional unit. In the basically peasant communities of much of nineteenth century Quebec, there was doubtless a great interaction of communal and family life and the situation among, for example, the Acadians in Louisiana, was presumably similar. The life of town dwellers of the middle class would be different, corresponding to what above has been called the bourgeois family. Given the middle class origins of both sets of redactors, we can fairly expect that they would perceive the family as being the bourgeois family; or, at least, if they recognised differences of family organisation, they would favour the bourgeois family as superior. Dechêne argues that colonial circumstances accelerated the growth of the modern family, \textsuperscript{44}, and, if she is correct, it is

\begin{itemize}
\item \textsuperscript{43} L. Dechêne, \textit{op.cit.}, p.443 gives examples of the ease with which children could gain independence from their parents.
\item \textsuperscript{44} Op.cit., p.434: After discussing the work of Ariès, she states, "La famille canadienne du XVIIe siècle s'inscrit dans ce mouvement général, mais les circonstances particulières du milieu colonial accélèrent son modernisation."
\end{itemize}
possible that there was less variety of family types in North America than in Europe.

(iii) Elements important for the law.

From the foregoing discussion it is clear that from the historical view of the family what is important is to investigate changing relationships within the family. This is not to deny the importance of relationships of the family with the outside wider society, both are interconnected; but while the changing social structure initiates changes within the family organisation, it is the family organisation and relationships within it that structure the relationships of individual family members with outside society. This is so given that it appears that the historical development of the family is to some extent independent of that of the wider social structure. 45.

Hence, the investigation of changes in the law on codification and their connection with the changing concept of family should be centred round relationships within the family as revealed by the law. Thus, we should attempt to identify legal change or stasis and assess its significance. A note of caution should be added. While in the above discussion of the history of the family, the changes in its nature have been emphasised, it will have been noticed that many of these changes were not such as necessarily to call for any particularly dramatic change in the law, since these changes were mainly of an internal, qualitative nature. On the other hand, we are dealing here with the selection of rules from among competing potential sources, and some of these sources (for example the old Castilian law), might well suppose a rather different family structure, or have individual inappropriate provisions, while some of the modern sources might suggest important reforms. The selection among these sources, and the reasons for it are what is important. If the formal law in force were particularly inapt, codification provided (potentially)

45. See (i) above generally, especially text at notes 11-14.
an opportunity for reform. Whether or not that opportunity was taken (if necessary) and why (if not) are of great importance.

Since what is important is the shifting nature of relationships within the family, as regulated by law, we must study the law relating to husband and wife and parent and child in the two codes. (Other close relatives will be occasionally referred to, because, as Shorter points out, with the withdrawal of the family from social life in general, not only parent-child relationships became more intense but also those with other close kin.) The law on these relationships provides the central core on family law in the two codes. This has the effect of limiting the body of research (excluding, for example, that on guardianship). This is unfortunate, but to cover every aspect of the law relating to the family would be a huge task, while it is clear that in concentrating on these two relationships we are covering what is most important. Thus, succession as it reflects on the family will be excluded. Matrimonial property will be touched on in so far as it illuminates the husband-wife relationship. The French law provides two concepts around which it is useful to centre the discussion - that of *puissance maritale* (or *puissance du mari*) and that of *puissance paternelle*. These two concepts deal with the two significant relationships that are the central core of law on the family and provide a useful way of structuring the study by examining the way each power arises, its content and significance, and how it comes to an end. In the next section these two powers will be explained and the general civilian background to the family set out.

---

46. See reference, note 21 supra.
47. This is of most relevance with regard to children, as will be seen infra.
48. In concentrating on paternal power or authority, we will ignore reciprocal duties of aliment between parent and child as not being of prime importance. We will also ignore illegitimate children. These omissions are unfortunate, but inevitable, especially considering time.
In the above discussion the exclusion of the servant from the family was mentioned. This is a theme that will be taken up and developed later. 49.

(iv) The Civilian Background.

A. The notion of "Puissance Maritale".

Neither the Quebec Code (C.Q.) nor the Louisiana 1808 Digest (D.O.) articulate a coherent concept of the \textit{puissance du mari}, which was carefully described by authors of the ancien régime in France; 50 yet, as will be seen, the notion is implicit in both codes, both of which mention the actual term \textit{(puissance maritale)} in one of their articles. The actual extent of the power in both codes will be shown later. The notion of the \textit{puissance du mari} over his wife is not of Roman origin, apparently having originated in the old German mundium, 52 whereby the patriarchal head of the household had control over the persons and possessions of all the members of his household, including his wife.

In the process of the Reception of Roman law in Europe, the Roman principles of the husband and wife relationship appear to have contested this area of the law with the concept of \textit{puissance du mari}. Accordingly, to explain the development of the law it is appropriate to discuss the Roman rules, then the provisions of the old French law - both \textit{droit coutumier} and \textit{droit écrit} - and then discuss the control over wives exercised by husbands, as can be gathered from the old Castilian law. Details will not be entered into, as these will be developed in discussing the selection of sources by the redactors of the C.Q. and the D.O. What exactly was meant by \textit{puissance maritale} will be explained below, but to make the following discussion comprehensible,

---

49. See chapter 5.
50. E.g. Pothier, \textit{Traité de la Puissance du Mari}, Bugnet edition, 1861, vol.7. All references to Pothier will be to this edition, and will generally be cited by number, initials of the treatise, volume and page, thus: Poth. T.P.M. no. 52 Bug. 7 p.21.
51. C.Q. 1259 (i.e. Civil Code of Lower Canada Quebec article 1259) and D.O. 4 (p.325) (i.e. article 4 on p.325 of the Digest of the Civil Laws of the Territory of Orleans), both having taken their wording from C.N. 1388 (i.e. art. 1388 of the Code Napoleon of 1804). These are the methods of citation that will be used throughout, with C.L. for the 1825 Louisiana Code.
it should be pointed out that it related to the restriction of the contractual and proprietary capacity of women, simply because they were married.

B. Husband and Wife in Roman Law.

During the long history of Roman law, from the Republic to the Justinianic compilation, the status of wives changed. During the early Republic (at least) it had been common for wives to be married cum manu. Marriage cum manu meant that the wife left her own family and entered that of her husband, to whom she was in the position of a daughter in potestate.\(^53\) Marriage cum manu disappeared entirely in the early Empire, and marriage generally became liberum matrimonium. This meant that the wife did not enter her husband’s family, but stayed within her own, which meant that if she were alieni iuris, she continued in the power of her own paterfamilias, or if sui iuris, she was independent, although until late in the Empire there was nominal tutelage of all women (tutela perpetua mulierum). As Corbett states: "Free marriage had no effect on the general proprietary and contractual capacity of the wife."\(^54\).

In Roman law, it was supposed that a wife generally brought a dowry (dos) to her husband, and, indeed, with the very different concept of marriage in Roman law and society from our own, dos was one of the most important ways of proving liberum matrimonium existed between the couple rather than concubinage.\(^55\) Dos became the property of the husband (or of his pater if he were a filius familiae) who

\(^54\) Op.cit. p.113. The Roman law terms relating to patria potestas, and the institution itself, will be briefly explained infra in discussing puissance paternelle.
administered it, but it had to be accounted for at the end of the marriage. The other property of the wife (if she were sui iuris) constituted her paraphernas, which she administered herself, unless there were a specific agreement to the contrary, and we know from legal texts of circumstances where the husband had control of it. 57.

As pointed out above, in general marriage had no effect on the wife’s contractual or proprietary capacity (although both of these could be affected by her being a filia familias). One exception to this was the Lex Julia de Fundo Dotali, which, as amended by Justinian in a constitution of 530 A.D., forbade the alienation or hypothecation of dotal land, even with the consent of the wife, "ne fragilitate naturae suae in repentinam deducatur inopiam." 58. The capacity of women in general (not just wives) was limited by the Senatusconsultum Velleianum of A.D. 46, which forbade women to undertake liability for others, but not on their own account. 59. One final point to be made is that, to speak broadly, by Novel 61 of 537 A.D., Justinian applied the rules established for donatio propter nuptias to dotal land, with the result that dotal land could be validly alienated or pledged, if the wife consented and repeated her consent after two years, and provided that the husband continued to have resources to meet her lawful claims to her dowry. 60. It is not proposed to enter further into the question of matrimonial property in Roman law, as it is outwith the scope of this discussion. What must be stressed is that

56. See D. 23.3.75: "quamvis in bonis mariti dos sitý tamen mulieris est."
58. C. 15.13.1.15-150. The original lex Julia de Fundo dotali was part of the lex Julia de adulteris according to Corbett, (Op. cit. p. 180 relying on Paul Sent. 2.21b) and prohibited on pain of nullity the alienation of rustic or urban praedia in Italy without the wife’s consent, or their hypothecation even with her consent. Justinian extended this to all dotal land wherever situated, and forbade alienation even with her consent, lest, as stated in Inst. II.8 pr., "sexus muliebris fragilitas in perniciem substantiae earum converteretur."
61. See generally the works cited in notes 53-60 supra. Jolowicz, Foundations, pp. 161-177 is useful from our perspective.
Roman law in general did not reduce the capacity of women to any great extent because they were wives. The origins of the French puissance du mari cannot be traced to the Roman law.

C. Husband and Wife in the droit coutumier and droit écrit.

In Rome, a wife who was alieni iuris was in the power of her pater, not of her husband. In the customary law north of France, the position was different. As Loisel laconically put it: "Femmes franches sont en la puissance de leurs maris, et non de leurs pères." As has been pointed out above, this notion of the power of the husband originated in the German mundium, but, by the period towards the end of the ancien régime, the power in general meant only that the husband had a certain control over his wife's person and property, with the result that she lacked capacity in certain matters. It is unnecessary here to trace the historical development of this incapacity of the married woman, but it seems that in the customary law north of France its extent had varied greatly, with at some periods the wife having more capacity at others less. There was also variation from one coutume to another. In the Roman law, the restrictions on the capacity of women were generally ascribed to notions of fragilitas sexus; but the foundation of the incapacity due to the puissance du mari was necessarily quite different, because unmarried women and widows had full contractual and proprietary capacity. Claude de Ferrière stated that:

"Cette disposition n'est pas fondée sur le foiblesse du sexe puisque les filles majeures et usantes de leurs droits peuvent disposer de leurs biens à leur volonté de même que les hommes: mais sur la puissance maritale établie par le mariage...."

---

62. Loisel, Institutes Coutumières, Bk. 1 tit. II, no. 2 (hereinafter Inst. Cout.)
63. See text at note 52.
64. See Brissaud, History, pp. 163-177
65. Corps et Compilation de Tous les Commentateurs Anciens et Modernes sur la Coutume de Paris, 2nd ed., 1714 (hereafter cited as Corps et Comp.), vol. 3, column 141n. 2. Discussing art. 233 of the Coutume de Paris (hereafter C.deP.): "La femme mariée ne peut vendre, aliéner, ni hypotéquer ses héritages, sans l'autorité et consentement exprès de son dit mari: et si elle fait aucun contrat sans l'autorité et consentement de son dit mari tel contrat est nul, tant pour le regard d'elle, que de son mari, et n'en peut être poursuivie par ses héritiers après le décès de son dit mari."
This was the crucial point: according to the commentators on the *ancien droit*, the *puissance maritale*, justified by natural and divine law, was necessary so that the society between husband and wife be given a firm and unified direction. Ferrière explains thus:

"Dieu les [i.e. les femmes] y a assujetties par une puissante raison, que l'homme et la femme étant mis ensemble par le mariage, par une union qui ne peut se rompre que par la mort de l'un d'eux, il étoit nécessaire que l'un fût soumis à l'autre pour le gouvernement et l'administration des affaires communes." 67.

Pothier argued thus:

"Le mariage, en formant une société entre le mari et la femme, dont le mari est le chef, donne au mari, en la qualité qu'il a de chef de cette société, un droit de puissance sur la personne de la femme, qui s'étant aussi sur ses biens." 68.

The individual rules of this power will be described in discussing the codes, but these statements give an idea of the ideology underpinning the rules. The notion of marriage implicit in the statements is obviously very different from the Roman one, and is based on Christian ideas of conjugal union. In the *droit coutumier*, these Christian notions of matrimony have been used to rationalise and justify the incapacity of wives inherited from the German *mundium*. The wife is incapacitated so that the conjugal association can have a unified direction by the natural head: the husband. 69. Thus, by the eighteenth

---


century, the leading commentators on the droit coutumier had rationalised a theory of the puissance du mari, which resulted logically in provisions relating to control over a wife's person, and property, and restriction of her administrative and contractual capacity.

The puissance du mari in this form did not generally exist in the pays du droit écrit. The law there was much more Roman in cast. The useful work of Serres shows this clearly. Further, in the south in most areas, the paternal power retained an almost Roman extent, despite in some instances, provisions to the contrary in local coutumes. Marriage in the south did not necessarily emancipate. Thus, d'Espeisses remarks that:

"Le mariage ne délivre pas l'enfant de la puissance paternelle .... Ainsi la fille de famille ne peut tester de sa Dot, bien que sa Dot soit adventice...."

If a son or daughter lived away from home for ten years, there normally was a presumed tacit emancipation. D'Espeisses comments on this:

"Il en est autrement de la fille mariée; car bien qu'elle ait demeuré dix ans mariée hors de la maison

70. Claude Serres, Les Institutions du Droit François, suivant l'ordre de celles de Justinien, 1753. Bk. 1 tit 8, p.25. Serres was referring to the law as applied by the Parlement de Toulouse. He was an avocat and a professeur at Montpellier.

71. Thus both the Coutume de la Ville de Montpellier and that of Ville de Toulouse provided that marriage emancipated. Neither of these provisions were followed. See Serres, Inst. Bk.1, tit XII, p.65 and Bk.1 tit IX p.28.

72. See note above and see further infra.

73. Oeuvres de M. Antoine d'Espeisses, Avocat et Jurisconsulte de Montpellier où Toutes les Plus Importantes Matières du Droit Romain sont méthodiquement expliquées et accommodées au Droit Français. Confirinées par les Arrêts des Cours Souverains, et enrichies des plus utiles Doctrines des Auteurs anciens et modernes. Edition by Guy du Rousseau de la Combe, Lyon, 1750. (D'Espeisses lived from 1594-1658, the 1750 edition of his work is generally taken to be the best.) The quotation in the text is from vol. II, Part. 1, tit. 1, Sect. 1, no.17, p.13. At pp.13-14, Rousseau de la Combe remarks that in those areas of droit écrit in the jurisdiction of the Parlement de Paris, marriage emancipates both sons and daughters. On the areas of droit écrit in the jurisdiction of the Parlement de Paris, see note 77 infra. The main Parlements in the south were at Aix, Toulouse, Bordeaux.
Thus, the northern concept of *puissance maritale* was not applicable in most areas of *droit écrit*, because of the more Roman concept of *puissance paternelle*; as Argou said:

"...dans le ressort du parlement de Toulouse, ...le mariage n'emancipe pas les enfants de l'un ni de l'autre sexe ...." 75.

The legal capacity of women was limited, however, by the *Senatusconsultum Velleianum*, and that of wives by the *Lex Julia de Fundo Dotali*, in its 530 A.D. version.76. A royal edict of August 1606 repealed the *Senatusconsultum*; but, as the Parlements of the south refused to register this

74. *Op. cit.*, vol. II, Part 1, tit. 1, Sect. 1, no. 17, p. 15. Rousseaud de la Combe, in his note on p. 16, remarks that this usage of the Parlement de Toulouse was not followed by the Parlement de Paris as regards those areas of written law under its jurisdiction. He points out, though, that the Parlements of Aix, Bordeaux and Toulouse all here followed the same rule. Serres explains the rule here as regards married women: "il faut que la séparation de dix ans ait été volontaire de part et d'autre et non une séparation de nécessité; car une fille qui aurait demeuré dix ans mariée et séparée de son père comme étant obligée de suivre son mari, ne seroit pas censée emancipée."

(Inst. Bk. I, tit. XII, p. 65.)

75. Gabriel Argou, *Institution au Droit Français*, dernière édition, revûe et augmentée considérablement [By B.J. Bretonnier and E.J. Barkier]. 2 vols., Paris, 1719, vol. II, Bk. III, chap. VIII, p. 76. The effect of marriage of sons and daughters on *puissance paternelle* is more complex than here stated, we will return to it later in discussing *puissance paternelle* in the *droit écrit*. There seems to have been a good deal of confusion among scholars over the point. See infra, text at notes 111-124.

76. On the fate of Novel 61, see Boyé, *op. cit.* note 60 supra, esp. at pp. 513-4, where he remarks that the commentators generally refused to apply this Novel to dot. I certainly could find no trace in the works I consulted.
edict, the *Senatusconsultum* remained in force.77. (From this it will be obvious that the south followed the Roman law on dowry.) Thus, we may conclude that, in the *pays du droit écrit*, a wife was not under the power of her husband in the sense of the customary law, and did not require authorisation for almost every action as she did in the *droit coutumier*.78. Her dot would of course be controlled by her husband, and she had to live with him, be faithful to him and the like; but, if she had administration of her *parapherna* (*biens paraphernaux*), her

77. See Serres, *Inst.*, at p.487, and Brissaud, *History*, p.229, note 5. J.B. Delaporte and P.N. Riffé-Caubray, in their *Pandectes Françaises*, 1803 onwards, (hereafter cited as *Pan Fran.*, with volume and page, e.g. 3 *Pan. Fran.* p.378), in note 1 at pp.378-9 of their 3d. volume, curiously remark: "Les édits d'août 1606, et avril 1664, en abrogeant la loi Julia, rendaient cette autorisation (i.e. par le mari) assez commune, dans les pays du Droit écrit, du ressort du Parlement de Paris." The edict of 1606, of course, repealed the *sc. Velleianum*, while that of 1664 repealed the *lex Julia de Fundo dotali* as regards the districts of Lyonnais, Mâconnais, Beaujolais and Forez, all districts of written law within the jurisdiction of the Parlement de Paris. Because of the restricted nature of the 1664 edict, and because of the failure of the southern Parlements to register the 1606 edict, the southern law remained untouched. In general, what Delaporte and Riffé-Caubray say is correct, though somewhat confused. Serres and Brissaud, as cited supra, make the position clear. The *sc. Velleianum* was particularly tenacious in the south: thus, it was applied in Toulouse, even though an article of that town's coutume specifically stated it was inapplicable; see Serres, *Inst.*, pp.487-8. This suggests how powerful Roman law was in the south.

78. Olivier-Martin in his *Histoire du Droit Français*, 1948, (hereafter cited as *Histoire*) at p.654, no.490 states: "L'autorité maritale s'est même étendue en pays du droit écrit, malgré la grande liberté de disposer de ses biens paraphernaux traditionnellement reconnue à la femme." This is stated too broadly. Obviously, some areas were more influenced by the northern law than others ("... la puissance maritale n'était pas absolument étrangère dans notre Droit français à plusieurs provinces régies par le Droit écrit. Quelques coutumes locales exigeaient cette autorisation du mari." -3 *Pan. Fran.* pp.378-9, note 1); but the statements of d'Espeisses and Serres allow us to be certain that in general a wife in the south did not come under a northern-style marital authority. See Brissaud, *History*, p.166.
actions as regards it were untrammelled. Thus, it is clear that the general concept of _puissance du mari_ was specific to customary-law France.

D. Husband and Wife in the old Castilian law.

Only some general remarks need be made here, as the details of the relationship between husband and wife will be shown in discussing the 1808 Digest. The Castilian law operated a community of property system, with the husband controlling the community. There was also a system of dowry and _parapherna_, and the _Senatusconsultum Velleianum_ had been received into the law. In _Las Siete Partidas_, the most important Castilian law book for the Louisiana redactors, there is no treatment of community property, probably because of the Romanising tendencies of the work: the _Fuero Real_, however, dealt with the matter.

Despite the Roman cast of the law, it would be wrong to think there is no trace of a husband's authority over his wife. The _Partidas_ does not indeed treat of the question, but elements of such an authority over the wife's capacity to act can be found. Thus, under Part. 4.11.7, the husband has control over his wife's property, but he cannot alienate or squander it ("non puede el marido vender, nin enagenar nin malmeter mientras que durare el matrimonio la donación..."

---

80. By Part. 5.12.2. Ley 3 of the same title allowed for the exceptions permitted by contemporary commentators: a wife could thus renounce this protection (or prohibition). Ley 61 de Toro changed the position slightly. See R. Altamira, "Spain" in General Survey, pp.578-702 at p.629 and 633; and see also N. Pugh, "The Spanish Community of Gains in 1803: Sociedad de Gananciales," 30 La. L. Rev. (1969-70) pp. 1-43 at pp.22-3 (hereafter cited as Pugh). The reception of this _senatusconsultum_ was no doubt due to the "Romanising" tendencies of the _Partidas_. On the reception of Roman law in Castile, see _supra_, chapter 3, text at notes 61-115.
81. See _supra_, chap. 3.
82. Part. 4.11.24 and 30 allow the making of marriage contracts and communities, although there is no attempt to regulate them. 83. See _infra_ in discussing the 1808 Digest esp. at note 303.
that she will hand it to her husband to administer, but does not demand that she do so. What is clear though, is that, in the Partidas, a wife, merely because she was a wife, did not suffer lack of legal capacity and require authorisation by her husband to contract, appear in court and the like. Some examples show this clearly. The Tercera Partida, titulos 1 to 27 deals with procedure. Part. III. 7.3. states an exception to who can be summoned to appear personally in court. This exception applies to all women, there is no distinction made for wives: "Dueña casada, ó viuda, ó doncella ó otra muger que viva honestamente en su casa, non debe ser emplazada ninguna dellas de manera que sea tenida de venir personalmente ante les jugadores...." I have located only one text which gives a generalised description of marital authority conceived of as power, Part.3.2.5: a ley on whether husband and wife can sue one another. It starts as follows:

"Marido et muger son una compaña que ayuntó nuestro señor Dios, entre quien debe ser siempre muy verdadero amor et grant avencia; et por ende tovieron por bien los sabios antiguos que los maridos usasen de los bienes de sus mugeres et se acorriessen delles do les fuese meester; et otrosi que gobernassen á ellas et que les diesen lo que les conviniese segunt el poderio et la riqueza que hobiesen." The text continues that what one has taken from the goods (cosas) of the other cannot be claimed in court. There arise from this text some points meriting discussion. The poderio referred to means something akin to status (not puissance du mari) as is indicated by, inter alia, its conjunction with riqueza (wealth). The husband can aid himself with the use of his wife's goods only when necessary.

85. Cf. Part. 3.7.6.
86. A Roman rule - in Roman law there could be no actio furti between spouses, although there could be an actio rerum amotarum: D.25.2; C.5.21.
87. The subjunctive mood of the verb "to be" a meerjester following on from acorrer shows this clearly.
Generally, however, the husband has control over his wife (gobernar). Further, the passage is intended primarily to provide the premise on which the prohibition of husband and wife suing each other is based. Thus, if this passage is considered in its particular context, it is clear that it does provide some generalised statement of marital authority, but this statement is not rigorously conceptualised nor, in the general context of the whole Partidas, are any particular rules logically derived from it. It provides a particular, localised statement of marital authority in general terms, (possibly revealing popular sentiment) but there is no general concept of marital authority (similar to that in northern France) working through the Partidas, influencing the particular legal provisions.

Minguijón relies on this passage to make a general statement on the husband-wife relationship in the Partidas. This is misleading for the reasons given above. Further, he neither mentions the particular context of the passage in ley 5 of the second title of the third Partida (he does not even state a reference or give any indication of from where he has plucked his quotation) nor does he attempt to locate the passage within the general context of husband and wife in all seven Partidas. Had he said that the passage was symptomatic of a general trend within Castilian life he might very well have been correct; but he does not. The passage clearly does not reveal the attitude taken by the Partidas towards wives qua wives. Hence we can conclude that the Partidas provide no general concept of marital authority.

Despite the Partidas' neglect of marital authority, provisions can be found in the old Castilian law that reflect such an authority. A good example of this is

88. Historia, vol.1. p.127. His quotation is slightly different (due to his using a different edition) but identical in meaning, so there is no doubt that this is the passage he is quoting. I have quoted from the 1807 Real Academia edition (1972 reprint). See note 75, chap. 3 supra.
provided by the 1505 Leyes de Toro. The specific provisions will be discussed infra, but a few general statements may be made, the accuracy of which can be checked later.

A sequence of individual leyes, from ley 54 onwards, enacts principles of the incapacity of married women because of their status as wives. These provisions were reaffirmed in the later Recopilación de Las Leyes Destos Reynos of 1567, commonly called the Nueva Recopilación. Similarly to the French droit coutumier, these leyes require that a wife be authorised by her husband to contract and appear in court (estar en Juicio); but this requirement of authorisation is not as extensive as in the droit coutumier, and is rather more flexible, while there is no statement of a general concept of marital authority from which these individual legal provisions flow, (although, of course, such a concept could be developed inductively from the individual provisions, and given an ideological foundation on, for example, divine or natural law). Some specific differences from the droit coutumier may be pointed out.

Two major differences were that, in the Castilian law, a husband could give a general authorisation to his wife for future actions, and he could subsequently ratify unauthorised actions. The droit coutumier permitted neither of these.

---

89. See infra on the D.O. in Louisiana.
90. On the Nueva Recopilación, see note 77 of chapter 2. As pointed out there, I will abbreviate it as Rec. Cast., following the usage of the de la Vergne volume. On mode of citation, see ibid, and also chap. 2, note 67. The Leves de Toro I will cite by Toro and ley, e.g. Toro 54. The relevant provisions of the Leves de Toro, may be found in Rec. Cast. 5.3.1 et seq. They may also be found in the Novísima Recopilación de Las Leyes de España, Madrid, 1805, at Nov. Rec. Cast., 10.1.10 et seq. The de la Vergne volume will henceforth be cited as D.L.V. - the particular interleaf will be obvious from the discussion of the D.O. provisions.
91. We need not concern ourselves with the historical origins of these rules of the Leves de Toro, given that we are primarily concerned with developing the general legal background that the D.O. redactors could draw on.
92. Toro 56, Rec. Cast. 5.3.3.
93. Toro 58, Rec. Cast. 5.3.5.
94. See infra.
are provisions excepting from authorisation wives who are public traders: 95. there are no equivalents in the *Leyes de Toro*. 96. Since, however, the Castilian law permitted general authorisations, a wife as a public trader could be presumably so authorised. In the droit coutumier, unauthorised actions by the wife were radically null, and the provisions of Toro apparently provide the same, but with the possibility of the husband ratifying unauthorised actions by his wife.

The treatment of the incapacity of married women by the legal writers is most instructive. Asso and Manuel 97. in their Instituciones 98. discuss nothing remotely resembling *puissance maritale*, which, as a legal concept, obviously did not exist for them, although they occasionally refer to the incapacity of married women. Had they so chosen, they could easily have fitted such a concept into their natural law scheme. Llamas y Molina in his commentary on the *Leyes de Toro* makes no attempt to develop a general theory of the incapacity of married women, 99. nor does Gomez. 100.

95. See infra, esp. under Quebec.
98. I used the 1806 Madrid 7th edition by El Doctor Don Joaquin Maria Palacios, entitled: Instituciones del derecho civil de Castilla, que escribieron los doctores Asso y Manuel, emendadas, ilustradas y aKadas conforme a la Real orden de 5 de Octubre de 1802 ... Por ... Palacios, 2 vols. All references will be to this 1806 edition, which will be cited as Asso y Manuel. This work was one of the books written to meet the need arising out of the introduction of the teaching of the national law in Spain. There exists an interesting 1825 London edition, translated by L.F. Johnston as Institutes of the Civil Law of Spain. It was intended to be useful in former Spanish colonies now governed by Britain.
99. Don Sancho de Llamas y Molina, Comentario Critico-Juridico-Literal á las ochenta y tres Leyes de Toro, Madrid, 1827; see his commentaries on leyes 54-59.
100. Antonio Gomez. *Commentarius ad Leges Tauri*. I used the 1624 Antwerp edition, with additional notes of Diego Gomez. See the commentaries on leyes 54-9, here at pp. 503-4. Gomez was a 16th century jurist, and his was probably the most respected commentary on the *Leyes de Toro*. 
Febrero discusses frequently the contractual capacity of married women (an obviously important topic given that his work was intended for notaries); but he too gives no general theoretical statement analogous to that of Pothier, even though he does provide some reasons for the limitation of the capacity of married women. It will be shown later that these provisions restricting the capacity of married women were interpreted by the jurists in such a way as to minimise their effect. The provisions were already less restrictive than those of the droit coutumier; but the Castilian jurists rendered them even less restrictive. This helps explain why a concept of puissance maritale was never developed by the jurists. They followed the tradition established by the Partidas, influenced by the Roman law.

In the Castilian law, there existed some measure of marital authority, both in control over a wife's property and over those of her actions which had legal consequences. The Siete Partidas, the main legal text providing a coherent account of all the law (that is, the account most important for the Louisiana redactors), provided no adequate statement of such marital authority, either as to individual provisions, or as to a generalised concept. Other legal sources provided an account of individual provisions, but no coherent concept of marital authority, while the jurists interpreted the provisions as restrictively as possible.

101. Josef Febrero, Escribano que fue de Colegio de Madrid. I used the 1825 Madrid 8th. edn. of his work by D. Miguel Aznar, entitled, El Febrero Adicionado & Librerfa de Escribanos, abogados y jueces. Febrero entitled his work, Libreria de Escribanos. Azner claimed not to have altered the original text substantially, and comparison of the 1825 text with vol.3 of the 1797 edition of the Libreria (the only volume out of the four available to me) shows him to be telling the truth. The subject matter has been rearranged, so that my references will not match those in the D.L.V. On this, see the Abbreviations at the front of this work. The citation will be as Febrero.
102. See note 50 supra.
103. See e.g. Febrero, Parte Primera, ch.1, §IV no.119 p.87 on ley 55 of Toro, where he states motive is not "imbecilidad, ô fragilidad de la muger", but because husband is legitimate administrator of her property during marriage, with responsibility for it (Tomo Primo); ch.7. §IV, no.98 (p.58 of Tomo Secundo), on women being prohibited as guarantors, because of the "imbecilidad de su sexo", never thinking of the future, and easily persuaded etc.
104. See infra, text at notes 430-437 and 450-455.

The C.N. and its projet\textsuperscript{105} provided further legal provisions among which the Louisiana and Quebec redactors could select. The relevant individual provisions will be made clear in the discussion of both codifications, but it may be noted that, in general, the C.N. followed the droit coutumier on puissance maritale, though with some modification, rationalisation and modernisation of the provisions. The C.N. also included provisions on the dotal regime of matrimonial property. During the Revolutionary period, there had been moves to abolish marital authority, and put spouses on an equal footing;\textsuperscript{106} but there was, however, a return to the traditional customary law notion of the subjection of a wife to her husband.

The redactors of the C.Q. could draw on the ancien droit and the C.N., while the D.O. redactors could draw on both these sources and on the Castilian law in force. Thus, from the existing sources, both sets of redactors, could develop a scheme of marital authority which could vary on a continuum from very slight to very great. They could change the existing law or keep it, affecting either minor details or the totality of provisions.

F. Puissance Paternelle.

Puissance paternelle refers to that power and control which a father has over the persons and property of his children. Here the Roman patria potestas, the French analogous provisions in the droit écrit and droit coutumier, and the Castilian patria potestad will be discussed. The position taken by the C.N. will be indicated.

\textsuperscript{105} Projet de Code Civil, Presenté par la Commission nommée par le Gouvernement le 24 Thermidor, an VIII. An VIII was the Revolutionary Calendar's name for 1800. Hereafter, the 1800 projet will be referred to as Proj. An. VIII, for brevity's sake, and will be cited by Book, title and article, e.g., Proj. An. VIII, 1.3.5.

\textsuperscript{106} See A.H. Huussen Jr., "Le Droit du Mariage au Cours de la Révolution Française", Tijdschrift Voor Rechtsgezchiedenis (1979) pp.9-51 (1st. part) and 99-127 (2nd. part.) at pp.114-115 and 118-9. See also Brissaud, History, p.166 and notes 4 and 5 thereon.
The whole of the Roman law is pervaded by the concept of *patria potestas*, and this concept defined the family: the members of the family being those (including slaves) in *potestas* of the *paterfamilias*, the head of the household. The *paterfamilias* had an almost total legal control over his descendants in the male line. He alone owned the family’s property, and anything his *filiifamilias* or *filiaefamilias* acquired, they acquired for him. In classical times, a *filius* could acquire a *peculium castrense* (as the name suggests, it consisted of property acquired while soldiering), which was his own property, and he could be granted a *peculium* (*profecticium*); that is, property given him by his father to control, which, in theory, remained the father's and could be taken back. In the later Empire, a son's proprietary capacity increased. The *peculium quasi-castrense* was introduced, permitting the son to control property gained in certain non-military forms of employment. The Emperor Constantine limited to a usufruct a *pater's* interest in property his *filius* inherited from his mother (*bona materna*). This principle was extended, first, to all acquisitions coming to the *filius* from his mother and her family, and, eventually, to all acquisitions. These were called *bona adventicia*. This class of property is sometimes called *peculium adventicium*.

The power of the *pater* over his descendants in the male line (or those adopted into the family) lasted until his death, or he emancipated them. On his death his descendants either became *sui iuris* or remained *alieni iuris*. Those who

---

107. See, generally, Buckland, *Textbook*, pp.101 et seq., and Jolowicz, *Foundations*, pp.181-203. I will not bother to give references for specific aspects of the Roman law. In general outline, this area of the law is uncontentious, and any standard textbook will confirm what is said in the text. The Romans recognised the uniqueness of their conception of *patria potestas*: "quod ius proprium civium Romanorum est. Fere enim nulli alii sunt homines qui talem in filios suos habent potestatem qualem nos habemus." Thus says Gaius, *Institutes*, 1.55.

108. Originally, at the end of a campaign, such property would go to the father.
became sui iuris were freed from power and if male became patres familias in their own right, although if impuberes they were under tutelage, and if women, they were (originally) likewise under tutelage because of the tutela perpetua mulierum. Those who remained alieni iuris fell into the power of their ascendant who was now a paterfamilias through having been freed by the death of the pater. 109.

In France, under the ancien régime, the north and the south had very different conceptions of puissance paternelle, because of the different historical origins of the laws on paternal authority. The south had received the Roman patria potestas, while the north followed a law derived from the Germanic concept of mundium. 110.

In the droit écrit, the Roman rules were in almost full vigour. There has in the past been some confusion over puissance paternelle in the south, and it is, therefore, important to discuss it fairly fully here; more especially to support the statements already made as regards married women in the south. 111.

First, paternal power lasted until the father died, or he emancipated his children. As already indicated, there could be a tacit emancipation. 112. In the local thirteenth century coutumes of Toulouse and Montpellier, it was provided that marriage should emancipate: 113. however, with


110. On the origins of mundium, and its similarity to patria potestas, see Brissaud, History, pp.179-185.

111. See text supra at notes 70-79.

112. See text at notes 73-75 and the notes themselves.

113. Chénon, op.cit, note 79 supra, vol.1, quotes the relevant provisions at p.133 notes 2 and 3.
the revival of Roman law these provisions were not followed. 114. (Indeed, before the reception of Roman law in the south, the law on husband and wife was very similar to that of the north. 115.) This point was controversial, it appears that some authors asserted that marriage emancipated in the whole of France (Henrys for example 116.), and they appear to have based this statement on a knowledge of the droit écrit within the jurisdiction of the Parlement de Paris. Even more controversial than whether marriage emancipated generally was whether marriage emancipated daughters: for, if daughters were not emancipated from paternal power by marriage, then the northern-style puissance maritale could not exist. Bretonnier on Henrys discusses the confusion, and deals with each area of the written law. He concludes that, except for areas of droit écrit within the jurisdiction of the Parlement de Paris, marriage did not generally emancipate either sex. 117. Argou reached the same conclusion. It was only in the course of the sixteenth century that it was decided that, in the droit écrit in the jurisdiction of the Parlement de Paris, marriage emancipated. 119. This change in the law, according to Argou, "excita de grands murmures

114. See Serres, Inst., Bk. 1, tit XII p.65 and Bk. 1, tit IX, p.28. At the latter reference he says, "on n'observe pas même en Languedoc les articles de la Coutume de Toulouse et de celle de Montpellier, qui veulent que les enfants soient émancipés par le mariage ...."

115. See Ch. Lefebvre, Le Droit des Gens Mariés aux Pays de Droit Écrit et de Normandie, Sirey, Paris, 1912 (the copy I used was bound at the end of Le Droit des Gens Mariés, 1908, part of his Cours de Doctorat sur l'Histoire du Droit Matrimonial Français) at p.10 who states that, in the pre-reception southern customs, we find "une donnée d'autorité et de direction maritale, analogue à notre puissance maritale des pays coutumiers, nonobstant certains vestiges alors fort attenues de la patria potestas." Also for this period, he states at p.12: "Pour ce qui regarde la vie conjugale, au Midi comme au Nord, nulle autorité dans le ménage que celle du mari". Of the local customs, he states they suffered a "desuetude de plus en plus marquée en face de droit romain...." (p.9).


118. See quotation in text at note 75. See also d'Espeisse, at notes 73-74.

119. See Bretonnier, reference as note 117 supra, and Argou, op.cit., vol. II p.78 (Bk. III ch.8). This case was considered in the Toulouse case below - notes 121 and 123.
à Lyon", but the law remained as decided. 120. The same point later came for consideration by the Parlement of Toulouse. The point at issue in the Toulouse case was whether or not a married woman could validly make a will without the consent of her father. It was decided that she could not. 121. Hence, paternal power over women continued after their marriage. 122.

120. Op. cit. vol. II p.78. Of the principle in these areas within the jurisdiction of Paris, Argou states that it "n'a été établi à l'égard des filles que vers la fin du dernier siècle; et les auteurs qui en rapportent les arrêts, remarquent que ce changement de jurisprudence excita de grands murmures à Lyon, que les états de la province dressèrent des mémoires pour s'opposer au premier arrêt mais les troubles du royaume en ayant empêché l'effet, la jurisprudence de nouveaux arrêts a prevalu à l'ancien usage." (Ibid.) Bretonnier (as at note 117 supra) reports that there were three relevant arrêts: 1540, 1595 and 1597.

121. The case is reported by Maynard; I used the 1611 Latin edition of his collection of cases, entitled: Illustres Controversiae Forenses, secundum iuris civilis Romanorum normas in amplissimo Senatu Tholosano decisse, Quas collegit .... D.N. Gerardus de Maynard, I.C. Consilium Regius et Suprema Curiae Tholosano Senator, atque e Gallico sermone in Latinum transullit .... Hieronymus Brückner. (Coloniae Allobrogum) The relevant case is at Book V, Decisio II, col. 1067-1071. The summaria at col. 1067 adequately reveal the reasoning: "1. Glossa vulgaris Accursii quoad exemptionem a patria potestate liberum Gallicorum explicatur. 2. In qua Glossa, quemadmodum vulgo accepitur, Accursius deceptus fuit. 3. Filius emancipatus aut pro emancipato vigore consuetudinis habitus valide testatur. 4. In provinciis iuris scripti, nisi peculiaris consuetudo aut statutum in contrarium extet, filiae familias nuptae testari aut etiam sine patris consensu mortis causa donare nequeunt. 5. Arresta contraria suprema curiae Parisiensis haud generaliter accipienda sunt. 6. Testamentum tamen, quod a filio coram quinque testibus patre consentiente factum fuit et clausulam codicillarem habet, subsistere potest. 122. It should be noted the question of paternal authority over married women was discussed in the case as it touched on their capacity to dispose of property. The point would always arise in this manner, as it would only be as regards her property rights, that the question of authority would arise. The wife would live with and follow her husband. This is in tune with the Roman notion of patria potestas.
The jurisprudence on the droit écrit within the jurisdiction of the Parlement de Paris is said, in the case report, not generally to be followed. 123. It must be concluded that in all areas of droit écrit within the jurisdiction of the southern Parlements, neither sex was emancipated by marriage. 124.

The père de famille, under the droit écrit, had a usufruct in his children's own property, that is, in their biens adventices; 125 as regards the biens profectices of children in power, "le père a non seulement l'Usufrit, mais aussi la propriété ...," as d'Espeisses said. 126. This usufruct did not need to be relinquished on the marriage of the child, unless the child was emancipated, although Serres does point out that if a father made a gift in the marriage contract to his son on the occasion of the son's marriage, there would not be a usufruct in the gift, even

123. See note 121 supra.
124. Lefebvre does not unfortunately, directly address himself to the point we have considered (See op.cit. note 115 supra, at pp. 35 et seq.) He only alludes to the question on p.46 and note 1; but he does state that: "Une autre conséquence de la Renaissance romaine fut l'abandon du principe autorisation maritale aux pays de droit écrit, parce qu'on n'en trouvait pas de trace et de précédents dans le droit romain." (p.43) He is not aware, or at least does not state, that one of the reasons behind the abandonment of marital authorisation was the revival of the contradictory concept of patria potestas.
125. Argou, op.cit., vol.1, pp.18–19 (Bk.1, ch.3); d'Espeisses, op.cit., vol.1, Part II, Tit. 1, preliminary article, no.2, p.607; and Serres, Inst. Bk.1 tit 9, p.26 and Bk. 2 tit 9, pp.203–4.
if the son was not emancipated. As in the late Roman law, sons could have a peculium castrense or quasi-castrense.

We may conclude that in the pays du droit écrit, except for those areas under the jurisdiction of the Parlement de Paris, the Roman patria potestas had been received, and continued in full vigour.

In northern France, the puissance paternelle had a very different appearance. Some coutumes explicitly recognised it.

---

127. Serres, Inst. Bk. 2, tit 9, p. 210. Maleville, Analyse Raisonné de la discussion de Code Civil au Conseil d'État, 2nd edn., Paris, 1807, vol. 1, p. 337 (hereafter cited thus: e.g. Analyse, p. 337) states that in the pays de droit écrit, paternal power continued as in Roman law, bar two modifications. The first was tacit emancipation after ten years separation. (See text supra at notes 73-75.) The second was "que le père était obligé de se départir de l'usufruit des biens de ses enfants à leur mariage, sauf à s'en reserver ce qui lui était nécessaire pour sa subsistance et celles de ses autres enfants, s'il n'avait pas d'autres moyens pour y pourvoir. Lapeyrère, lettre D, n. 115. Il ne parle, il est vrai, que du mariage de la fille, mais les mêmes raisons s'appliquent au fils .... Il faut bien en effet pourvoir aux besoins de la nouvelle famille qui se forme." The accuracy of Maleville's proposition is doubtful: see Serres, Inst., Bk. 2, tit. 9, pp. 205-9, and Argou as cit. note 125 supra. The Parlement de Toulouse had decided differently to the proposition stated by Maleville; see Maynard, Illustres Controversiae Forenses, (note 121 supra) Bk. II, deciso 73, col. 308, where, in the case of Austry filius contra Austry pater, the Parlement de Toulouse said that first, in the areas of written law, the father has a usufruct of his children's property, and second, this usufruct does not end on the marriage of the children, since in the event, father is bound to assign to them, on the decision of the near relations, fixed alimentary payments and certain moveables, in proportion to the property belonging to them. Serres, Inst. Bk. 2 tit. 9, pp. 205-210, and Argou, as cit. note 125 supra, would agree. According to the Biographie Universelle, vol. 32, A. de la Peyrère, although an advocate in Bordeaux, was noted for not distinguishing clearly or adequately between the droit écrit and droit coutumier; he was perhaps an unwise source for Maleville to rely on. 128. See, e.g. Argou, op. cit. vol. 1, p. 19 (Bk. 1 ch. 3); Serres, Inst. Bk. 2 tit. 9, p. 206.

129. See e.g. Maleville, 1 Analyse, pp. 335-6 for a discussion.
but their particular provisions and the general law in the
react du droit coutumier were such that Loisel could assert
as a general maxim: "Droit de puissance paternelle n'a lieu."
The maxim, however, is stated in too general terms. The
Quebec codifiers state correctly that "it is certain that,
under the customs in France, there was formerly a species of
paternal authority." The individual provisions on this
paternal authority varied from coutume to coutume, but the
following general remarks may be made. The paternal power
was of limited duration, ending on the minor's reaching the
age of majority or his emancipation by marriage. On the
death of the father, the minor did not come under the control
of any ascendant, but rather under that of a tutor. The
father had certain rights over the child as inter alia to
his marriage and certain powers of correction. The child
could, of course, hold property in his own right, but the
father had certain rights in that property. These rights
of the father varied from coutume to coutume; sometimes
he had a right of administration, sometimes he had a right
of usufruct. In coutumes where there was no mention of a
right of usufruct, the father would not have one, and the
fruits of the property would belong to the child, although
rights of garde noble and garde bourgeoise could complicate

130. Inst. Coutst. 1.1.36. (He borrowed this from the Coutume
de Senlis, art.221).
132. Loisel, Inst. Coutst. 1.1.37: "Feu et leu font mancipation
de pain et pot, c'est à dire emancipez."
133. Henrys, op. cit., vol. II bk. IV, Quest XIII, p.338:
"... on peut dire, que parce qu'en France le mariage émancipe,
le fils marié sort de la puissance du père est fait père
de famille, et par consequent a ses enfans en sa puissance,
lesquels autrement par le Droit Romain seroient aussibien
que le père en la puissance de l'ayeul. " Ibid. p.339:
"Concluons donc, que c'est une erreur de croire que le père
mort, les enfans qu'il laisse retombent en la puissance de
leur ayeul paternel, et que cet ayeul ait l'usufruit de
leurs biens." His remarks should be taken to apply only to
the north of France.
134. See generally Ferrière, Corps et Comp. vol.3 cols. 497-8
nos. 18-22.
135. Ibid. The père could keep the fruits under the following
coutumes: Reims (art.8); Laon (art.56); Châlons (art.8);
Sedan (art.7); and Bourbonnais (art.174). Not in the
Coutume de Paris.
the situation. Further, the customary law gave authority to the mother as well as the father; but it was the father who exercised the authority during the marriage.

In the *pays du droit coutumier*, the concept of paternal power was very different from that in the Midi. The customary law limited severely a father's rights in his children's property, and, in general, his authority ended on their marriage or reaching the age of majority.

The Castilian law on paternal authority is rendered complex by an uneasy mix of customary and Roman law, although the law is essentially more Roman than customary. It is therefore useful to look at the prime sources of the law, which were rather contradictory. The *Siete Partidas* provide most material on *patronato* testament. Titulo XVIII of the fourth *Partida* is devoted to the "Poder que han los padres sobre los hijos." The *Partidas* follow the Roman law very closely indeed: "El derecho real de las partidas siguió las disposiciones del derecho Romano," remarks Llamas y Molina. The *Partidas* provisions will be discussed at length in dealing with Louisiana, but the following general points may be made. The *Partidas* granted the power to the paternal male ascendant; grandfathers would have both sons and grandsons in their power. Things gained by a son using the property of his father belong to the father, and are called *peculium profectitium*. Gains which a son makes due to his own work, or by using property not his father's, belong to the son, while the father has a usufruct in them; this is called in Latin *adventititia*, explains the *Partidas*, "porque [*esta ganancia*] viene de fuera et non por los bienes del padre". The *Partidas* even allow a father to sell his son, but only as a last resort.

---

136. These two forms of *garde* cause some problems. The position of a father's rights in his children's property under the *Coutume de Paris* is unclear; but see infra. On *garde*, see *Ferrière, Corps et Comp.*, vol.3, title 11, esp. cols. 945-8; and *Pothier, Traité de la Garde Noble et Bourgeoise* (T.G.N.B.), Bug. 6 & Ang. Den. 2, s.v. *garde* pp.503-10.

137. The 18th. title is on how the power comes to an end.


139. Part. 4.17.5. The property provisions (*leyes* 5-7) are very Roman.

140. Part. 4.17.5. *Leyes* 6 and 7 regulated *peculium castrense* and *peculium quasi-castrense*.

141. Part. 4.17.8.
If we look at the *Fuero Real*, which is also the work of Alfonso el sabio, a different version of paternal power is given. "El Fuero Real limita claramente la potestad paterna", Minguijón accurately points out. The *Fuero* contradicted the provision on the sale of sons. In the *Partidas*, the paternal power could never pass to the mother, whereas the *Fuero Real* allowed a widowed mother (in certain circumstances) to exercise authority over her children. In a different *ley*, the same *Fuero* again implies that the mother may have her children in power, though the gloss of Montalvo states that this is wrong. Minguijón states that some municipal *fueros* allowed the mother exercise of the *patria potestad* along with the father, for which he says there is a precedent in the Visigothic law. Although the *Fuero Real* says nothing explicitly about marriage freeing sons from *patria potestad*, one text does imply very strongly that such was the law. *The significant text is ley 47 de Toro*, which states:

"El hijo ó hija casado y velado, sea avido por emancipado, en todas cosas para siempre."

It is obvious that the provisions of the *Partidas* and those of the *Fuero Real* are contradictory.

The Romanising tendencies of the *Partidas* successfully overbore the customary law tradition. The *patria potestad* of Castile was of a Roman nature. The only notable difference

---

143. *Fuero Real*, 3.10.8.
144. *Fuero Real* 3.7.2 and 3 (cf. *Fuero Viejo* 5.4.1). Minguijón states that both these *Fueros* "dan a entender que la patria potestad corresponde no sólo al padre sino también a la madre viuda, pues sólo a falta de ésta llaman a los parientes a que se encarguen de los menores". *Historia*, vol.1, p.136.
145. *Fuero Real* 1.11.8. The gloss on *si padre* by Montalvo is the one to be consulted.
147. *Fuero Real* 1.11.8. See Llamas y Molina, op.cit. note 99 supra, commentary on Toro 47, no. 8. What of the same *ley*'s mention of 25 years of age?
was the provision of ley 47 of Toro: marriage emancipated. The treatment of the whole of the law on patria potestad by the Castilian jurists is of importance in indicating the extent of the influence of the Roman conception of patria potestas in Castile. Asso and Manuel in their Instituciones betray some kind of confusion. Their account of the law is clear and logical, and very firmly based on the Partidas. 148. In their section on the modes of ending patria potestad, they state that the first method is by the death of the pater:

"El primer modo se entiende, si el padre que murió no estaba al tiempo de morir bajo el poder de su propio padre; porque en este caso, el hijo que dexaba rasearía bajo la potestad del abuelo, según la 1.1 tit. 18. part. 4;" 148a.

They then add, rather lamely, that the Reconciliación provides differently, "as we shall see". 149. The fourth mode of ending paternal power, according to Asso and Manuel, is emancipation, one method of which they state to be marriage, and add that children do not, therefore, fall into the power of their grandfather when their father dies, because the act of marriage has freed their father from his father's power. 150. This is a very curious procedure on the part of Asso and Manuel: to state the out of date rule and then later contradict it. They show some confusion of purpose. They seem to believe that the 47th. law of Toro is inconsistent with the Castilian concept of patria potestad. Whatever their motives, Asso and Manuel clearly adopt an entirely Roman concept of patria potestad, viewing ley 47 of Toro as a minor variation, along with some other minor differences from the Roman rules. 151.

Gomez' discussion of the 47th. law of Toro is also interesting. 152. At the end of his commentary, he deals with

148. Asso y Manuel, Book 1, tit. 8, cap. 2 pp. 115-123, vol. 1. (In the edition I used - see note supra - this is accidentally stated to be cap. 3.)
148a. Ibid., vol. 1, p. 119.
149. Ibid., vol. 1, pp. 119-120. They refer to Rec. Cast. 5.1.8 (Nov. Rec. Cast. 10.5.3) which, of course, is ley 47 de Toro.
151. On some differences between the Roman rules and those of the Partidas, see Llamas y Molina, op.cit., commentary on ley 47, pp. 118-125 (Tomo 2) no. 5.
"velado". The meaning of this term - which seems to have been problematic - need not concern us; but Gomez states that if a grandchild is born to a son:

"desponsato per verba de praesenti et non velato, erit in potestate avi, sicut de iure communi, cum non sit natus ex filio coniugato et velato ut nostra lex requirit, et in hoc nepote habebunt locum et verificabuntur omnes effectus patriae potestatis." 154.

(It should be recalled that the Leyes de Toro date from before the Council of Trent and the decree Tametsi. 155.)

Thus, Gomez interpreted the law in such a way that if the son was casado, but not velado (whatever this technicality is) then he was not freed from patria potestad, and the grandson too came under the power of his grandfather as in the Roman law - the ius commune as Gomez calls it. Gomez thus narrowly interpreted the ley so as to retain much of the Roman rule.

Despite the limited customary law concept of paternal power in Castile, the Roman law was received through the instrumentality of the Partidas and the actions of the Castilian jurists. 156. So thoroughly Roman was the concept of paternal power that jurists could treat the 47th. law of Toro as a mere aberration. The Partidas' version of patria potestad was probably so successful because they gave a thorough account with clear and logical rules, whereas the other provisions with the contradictory concept were scattered in various sources, 157 and because the Castilian jurists, trained in the Roman law (the ius commune), would

153. See Llamas y Molina, op. cit., on same ley, at nos.11-18. "Velado" means, literally, veiled. The laws of Toro date from before the Council of Trent, and there were few requirements of ceremony for a marriage to be valid.


155. See note 153 supra, and also see infra on Council of Trent, text at notes 181-197.

156. Patria potestad in the Roman or Castilian style did not exist in Aragon: see Asso y Manuel, vol.1, pp.122-3: "En Aragon no se conoce la patria potestad".

157. On the reception of Roman law in Castile, see chap. 3 supra at notes 61-115. According to the Ordenamiento de Alcalá, the Fuero Real should have taken precedence over the Partidas; see chap.3 supra at notes 68-76.
find in the Partidas rules with which they were familiar.

In France, the Revolutionary law attacked paternal power. Puissance paternelle over adults was abolished on 28th August, 1792.\(^{158}\) The age of majority was lowered to 21, and other limitations were introduced.\(^{159}\) There was a reaction against this liberalisation, and, from 1800 onwards, it was proposed to reassert and extend puissance paternelle. The motivation of this restoration can be gathered from examining some of the statements made by legal authors. Thus says Maleville:

"Il serait peut-être important d'examiner si maintenant que la France est bien lassée de révolutions, qu'elle n'aspire qu'à conserver la tranquillité intérieure que le gouvernement d'un seul lui a enfin procurée les mêmes raisons qui ont fait abolir la puissance paternelle, ne devraient pas aujourd'hui la faire rétablir."\(^{160}\)

Again, summarising the arguments of the tribunal d'appel de Montpellier, he states:

"La puissance paternelle est dans la famille ce que le gouvernement est dans la société.... Si le maintien de l'ordre social dépend de la force du Gouvernement, le maintien de l'ordre domestique tient à l'efficacité de la puissance paternelle...."\(^{161}\)

---

159. See e.g. Huussen, \textit{op. cit.}, pp.34, 35, 37, 41-43, 115-6; and Brissaud, \textit{History}, pp.34, pp.199-200. Maleville comments thus at \textit{1 Analyse}, pp.338-9: "Quelque modérée fût la puissance paternelle, dans les pays où elle s'était conservée, il restait cependant aux pères de grands moyens pour contenir leurs enfans, et cette puissance paternelle devait nécessairement déplaire à ceux qui avaient envie de renverser l'ordre des choses alors établi. Ils n'ignoraient pas que la conservation et le repos sont les deux grands objets de la vieillesse, que ce n'était pas parmi les hommes d'un âge mûr qu'ils devaient trouver beaucoup de partisans, qu'il fallait en conséquence dégager de ses liens, et abandonner à sa fougue la jeunesse toujours ouverte à l'espérance."
161. \textit{Ibid.}
He continues in like vein, mentioning that all that parents do for their children requires that children respect them and that it is insufficient for a father to be regarded a mere guardian of their property, liable to account for his husbandry when the children come of age. The affection of parents will prevent them from abusing their authority. He next discusses Montesquieu saying that "toujours est-il constant qu'il a reconnu partout l'efficacité de la puissance paternelle pour le maintien des moeurs." 162. The authors of the Pandectes Françaises held similar views: "Dans quel temps était-il plus nécessaire de répéter ce précepte divin, [i.e. that children should honour and respect their parents] que dans celui où tous les liens de la subordination sont encore relâchés; où l'on sent la nécessité de rétablir le gouvernement des familles pour fortifier celui de l'État?" 163. Such examples could be multiplied, but these few will suffice to indicate the atmosphere within which were drawn up the C.N. provisions on puissance paternelle.

Given the time at which they were drawn up, it is hardly surprising that the articles of the C.N. restored and reinforced puissance paternelle. The concept of puissance paternelle from which these articles were drawn was that of the pays du droit coutumier. A father, failing whom the...

162. Ibid. p.341.
163. 4 Pen. Fran., p.318. The authors feel threatened not only by young people, but also by utilitarianism: they continue, answering their own question: "Que dans un temps, où la nouvelle philosophie vient encore semer ses poisons mortels; où l'on s'érigé audacieusement en Légitimateur, pour détruire tous les principes de législation; où l'on vient jeter, au sein de la déprevation effrayante des moeurs, de nouveaux fermens de corruption; enseigner dogmatiquement, qu'il a ni droit naturel ni vices, ni vertus; que ces sont des mots vides de sens faits pour amuser les enfants; que les deux seules principes de la conduite des hommes, sont le plaisir et la peine; qu'ils ont le droit de faire tout ce qui peut leur procurer l'un et de repousser tout ce qui peut leur faire souffrir l'autre; et qu'enfim, toute loi est un attentat à la liberté." Ibid. pp.318-9. This attack on Bentham and Utilitarianism (incidentally neither being named) strikes us as quaint; but it is important in revealing an attitude of mind, and a desire to restore old principles. Bentham's writings were very influential in France.
mother, had great powers over the persons and property of his children—having a usufruct in the property. Some Roman principles were included: emancipation, for example. In some respects, close relatives were given a new importance.\textsuperscript{164}

Both the D.O. and C.Q. redactors had fairly similar material to hand for the construction of their provisions on paternal authority. Both had access to the two types or models of \textit{puissance paternelle}: first the Castilian and that of the \textit{droit écrit}, second that of the customary law and C.N. Of course, between these two models, and indeed between the versions of each model, there were differences, and many alternative possibilities would face the redactors in Louisiana and Quebec.

G. The general Civilian notion of "family".

As already seen, the Roman conception of marriage was radically different from that of modern times.\textsuperscript{165} The modern concept of the legal institution of marriage originates not in the Roman law, but the Canon. This must be taken account of when we consider how marital authority arises. The Roman concept of "family", however, has been influential. It will be recalled that \textit{familia} consisted of all those in potestate of the patriarchal \textit{paterfamilias}: children born in \textit{iustum matrimoniun}, those adopted, and slaves. The \textit{Partidas} give a neat description or definition of family:

\begin{quote}
"Et aun decimos que por esta palabra \textit{familia} se entiende el señor de la casa et su muger, et todos los que viven con él sobre que ha mandamiento, así como los hijos, et los servientes, et los siervos et los otros criados. Et \textit{familia} es dicha aquella, en que viven mas de dos homes á mandamiento del señor, mas dende ayuso non serie \textit{familia}. Et aquel es dicho \textit{paterfamilias}, el que es señor de la casa, muger non haya fijos: et \textit{materfamilias} es dicha la"
\end{quote}

\textsuperscript{164} Cf. text at notes 46-7 \textit{supra}.
\textsuperscript{165} See text \textit{supra} at notes 53-51. Jolowicz, \textit{Foundations}, pp.141-160 can usefully be consulted.
Here again the family is hierarchical and defined by power or authority, and, following the Roman law, it includes all those over whom the padre has authority. As will be seen, as a general definition of family, this text had some influence on the D.O., as indeed had a similar text of Domat.

The French customary law, in the modern period, had a more restricted notion of family. The Nouveau Denisart states: "Dans le sens le plus ordinaire, la famille signifie le père la mère et les enfants." 168 Henrys defines the family through marriage, and, taking a Hobbesian view of society,
he states as follows:

"Disons donc qu'il faut avouer que sans la société civile, le monde ne serait qu'un vaste et affreux desert, que les hommes y servent pires que les animaux, et que comme ils auraient plus d'industrie pour se nuire on n'y verroit aussi qu'un perpetual brigandage, et coupe-gorge; mais que s'il faut avouer cela, il faut aussi qu'on avoue, que le principal lien de la société civile est le mariage, que comme c'est lui qui l'établit, c'est aussi lui qui la maintient, et que qui le vouoir ôter ou confondre, causerait aussi-tôt la ruine du monde: En effet ce sont les mariages qui forment les familles et les distinguent, ce sont eux qui en les séparant ne laissent pas de les unir par les alliances." 170.

This notion of marriage as defining the family was operative during codification; thus we find the following statement in 1806:

"Les familles commencent par le mariage, et c'est la nature elle-même qui invite les hommes à cette union." 171.

We can see that both sets of redactors were presented with two models for the family. One based on marriage (northern France) and one based on paternal authority (southern France and Castile). The two models were perhaps not particularly far apart and were capable of reconciliation; but there were significant differences nonetheless. In this section, we have been concentrating on the family as a unified concept; but one important point should be made clear. Neither the C.N. nor the D.O. nor the C.Q. presents us with a unified system of family law in the modern sense, and indeed, their legal sources did not present them with such a system. Provisions on the family are scattered throughout the code; in provisions, for example, on persons and obligations. The codes dealt with two separate relationships: husband and wife, and parent and child. The two were obviously connected, since it was marriage that resulted in legitimate filiation for the children of the union. The main method for unification of the law into a whole is clearly through the one person, in his different aspects as

170. Henrys, Oeuvres, vo. 1, p.987. It is he who puts the diaeresis over the "u" of "avouer".  
husband and father, who controlled the other members of the family. The *Nouveaux Denisart* expresses this clearly:

"Le gouvernement d'une famille, et celui d'un corps politique doivent rouler sur les mêmes principes; l'une est en petit l'image de l'autre.... La puissance domestique représente en quelque manière la souveraineté...." 172.

The law was concerned with the person who was the sovereign of the family, who governed the other members through his *puissance domestique* in its two aspects of *puissance maritale* (*puissance du mari*) and *puissance paternelle*.173. This stress by the law on the two relationships of spouses and parents ties in with the argument of treating the family historically by studying the changes in the relationships within,174 and further justifies us in studying the family through the two different *puissances*, that of the husband and that of the father. We will examine each *puissance* in turn by studying how they arise, their scope, and how they end, taking Louisiana and Quebec in turn.

---

173. The theme of comparing the organisation of the family to that of the nation state was a very common one. We find that, in the discussion of the first Cambacérès projet, many revolutionary leaders argued that *puissance maritale* was a creation of despotic governments, and, husband and wife were equal, so the wife should be freed from her bondage: see Huussen, *op.cit.*, p.199.
174. See the argument in no. i-iii *supra*, esp. text at notes 45-49.
Part One. Louisiana.
The 1808 Digest of the Territory of Orleans.
Section One. Puissance Maritale.

1. How puissance maritale arises in the D.O.

In this subsection we shall be concerned with the forms of marriage and their requirements for validity. Hence we shall examine the following chapters of title IV of Book One of the D.O.: Chapitre Premier, "Du Mariage"; and Chapitre II, "Comment les Mariages peuvent être contractés". The third chapter of the title, "Des Demandes en nullité de mariage" will not be examined (except for one aspect later175) because the provisions relate closely to the provisions of chapter II and are not directly relevant for the general theme of this section; one or two relevant remarks on the provisions will be made, however, when appropriate.

Title IV is called "Du mari et de la femme", while the equivalent title V of the C.N. is headed "Du mariage", divided into the relevant chapters thus: first, "Des qualités et conditions requises pour pouvoir contracter mariage"; second, "Des formalités relatives à la célébration du mariage"; third, "Des Oppositions au Mariage"; and fourth, "Des Demandes en nullité de mariage". The scheme of division is obviously different. The third C.N. chapter has provisions on who can oppose an intended marriage, and there is no equivalent in the D.O. The C.N. carefully regulated oppositions to marriage, in reaction to the ancien droit where, following the Canon law, any person claiming the right to do so could oppose a marriage.176 Although the D.O. had no provisions on the matter, oppositions were regulated by an Act of 1807, ch. 17.177 This Act, by its sections 42, 43 and 44, limited the class of those who could

175. See infra on paternal authority, text at notes 656-662.
oppose a marriage to exactly the same persons as permitted by the C.N., except that, in the D.O., ascendants could not oppose the marriage of those over twenty-one. The Louisiana Act's provisions are obviously based on the work of the equivalent sections of the 1807 Act and articles of the C.N. are as follows. C.N. 172: "Le droit de former opposition à la célébration du mariage, appartient à la personne engagée par mariage avec l'une des deux parties contractantes." S.43: "A person already married to either of the parties proposing to intermarry, may oppose the marriage." C.N. 173: "Le père, et à défaut du père, la mère, les aieux et aieux, peuvent former opposition au mariage de leurs enfants et descendants, encore que ceux-ci aient vingt-cinq ans accomplis." S.42: "The father and mother or the surviving parent, the grand father and grand mother or the survivor, may oppose the marriage of such of their descendants, as have not completed their twenty-first year." C.N. 174. "À défaut d'aucun ascendant, le frère ou la soeur, l'oncle ou la tante, le cousin ou la cousine germains, majeurs, ne peuvent former aucune opposition que dans les deux cas suivains: 1. Lorsque le consentement du conseil de famille, requis par l'article 160, n'a pas été obtenu; 2. Lorsque l'opposition est fondée sur l'état de démence du futur époux; cette opposition, dont le tribunal pourra prononcer mainlevée pure et simple, ne sera jamais reçue qu'à la charge, par l'opposant de provoquer l'interdiction, et d'y faire statuer dans le délai qui sera fixé par le jugement." S.44: "If there are no relations in the ascending line, the brother or the sister, the uncle or the aunt, the cousin germain, having attained the age of majority, can oppose the marriage in the two following cases only: 1st. When the consent of the family required by the nineteenth section has not been duly obtained; 2nd. When the opposition is grounded upon the madness or insanity of the person whose marriage is opposed." The Proj. An. VIII, 1.5.28-30 covers the same situations, and possibly has exercised some influence on the 1807 Act's sections: notably, the order of the Act follows that of the Projet rather than the C.N. S.44 of the Act is, however, closer to C.N. 174 than Proj. An. VIII, 1.5.30. There are, of course, significant differences between the French and Louisiana provisions.
of the French codifiers. Thus, although there are no provisions in the D.O., the Louisiana and French laws were similar.

The 1825 C.L. did regulate oppositions. Its article 110 provided:

"Toute personne peut former opposition à un mariage; mais dans le cas où l'opposition est rejetée, l'opposant doit payer les frais de la procédure."

This is obviously an amendment of the law. The compilers of the 1823 Projet had merely stated (of a whole series of articles including this one) that this chapter of their proposed amended code was extracted from the 1807 Act. C.L. 110, however, broadened the class of opposants to the state of the old law, that is, the Canon law. Why the redactors of the C.L. should have changed the law, while claiming to be enacting the provisions of the 1807 Act is unclear.

The D.O. provisions in the three relevant chapters amount to 18 articles, while in the C.N., excluding the provisions on oppositions, the equivalent chapters contain 50 articles. The D.O. redactors are obviously not following the C.N. This said, it must be admitted that, in general, the provisions of the D.O. are very similar to those of the C.N. A major difference does exist, however, in regards to the marriage of minors: this will be discussed below in the context of paternal authority. There are some other differences which will also be pointed out in discussing...

179. 1823 Projet, comment on p.8, proposed article on p.9.
180. There is little point here in speculating on this curious reversal of the law. Batiza, in his "The Actual Sources of the Louisiana Projet of 1823: A General Analytical Survey," 47 Tul. L. Rev. (1972-3) pp.1-115 in his appendix B at p.32 states that C.L. 110 was "substantially influenced" by S.46 of the 1807 Act. This section reads: "If the opposition is rejected, the party petitioning shall pay costs and damages, unless such party be a father or mother, or grand father or grand mother to one of the contracting parties." Note that, first, s.46 is analogous to only half of C.L. 110, and that the legal provision is different, the 1807 Act exempting parents and grandparents. This is a neat example of how misleading Batiza's work may be. S.46 is almost identical in provision to C.N. 179.
the relevant D.O. articles (e.g. age of marriage). Given that, in general, the D.O. redactors were very influenced by the C.N., why have they here departed from its organisation of material? The answer must be the existence of the 1807 Act, ch.17 on the celebration of marriages. This recent Act of the territorial legislature covered in great detail the topics we are here concerned with, and many of the provisions of this Act are the sources of the relevant D.O. articles. The Act trammelled the operations of the redactors, and, given its nature, they could hardly depart from it. Nevertheless, it is clear that the redactors have done their best to mold the statutory provisions into a form equivalent to the C.N. and the Proj. An. VIII. Indeed, the first chapter of this title of the D.O., containing articles 1 to 3 (p.25), follows the Proj. An. VIII, 1.5.1-3 in both form and intent, and lays down provisions of a general, very abstract and indeed didactic nature, not found in the C.N., and from which the more specific provisions of the following chapter flow logically. Despite following the Proj. An. VIII in this, the articles are firmly based in the 1807 Act, though rearranged to the scheme of the Proj. An. VIII.

The 1807 Act thus explains the differences from the C.N. and its projet. The specific provisions of the Act will be revealed in discussing the D.O. articles, but it is relevant here to give a rough indication of the law prior to the Act during the Spanish government of Louisiana. A recent article by Hans Baade has explored this area of the law, and the following remarks are based on his work. 181. Baade is concerned to show whether the provisions of the Council of Trent on the form of marriage were in force in Spanish North America. In the pre-Tridentine Canon law there were no formal requirements for the validity of marriage other than the mutual expression of consent on the part of

the spouses.182. This state of the law is found expressed in, for example, the Partidas.183. In 1563, the Council of Trent changed this and prescribed that all marriages take place with the assistance of a priest and the presence of witnesses. One of the aims of this provision was to ensure the prevention of clandestine marriages by requiring all valid marriages to be in facie ecclesiae.184. In any area where the decrees of the Council had been promulgated, any marriage not in Tridentine form was invalid, even if the marriage was of non-Catholics.185. (By the so-called Benedictine Declaration of 1741, the rules for the marriages of non-Catholics were changed;186. but since this was never in force in Spain or her American Empire, we can ignore it.187.)

The application of this provision of the Council of Trent in the Spanish dominions was dependant on the authority of the King, who could extend its scope.188. A royal cédula of 1564 applied the Tridentine legislation to all the Spanish realms.189. Although the matter was previously obscure, Baade shows conclusively that "the legislation of the Council of Trent simply was the law of the land in Spanish North America." 190. Louisiana, however, caused problems by virtue both of its late acquisition by Spain and the existence of a protestant population (although the vast majority were Catholics). Further, during the Spanish régime, the government encouraged American immigration.191. Under France, the substance of the Tridentine law had been in force in Louisiana.192. Baade shows that, certainly in theory 

182. See Baade, Form, p. 20. The decisions of the Council of Trent never having been promulgated in Scotland, the old Canon law forms of marriage continued in Scotland, being called "irregular" marriages (although valid in law). See on them, T. B. Smith, A Short Commentary on the Law of Scotland, 1962, pp. 310–314.
183. See Part 4.1.4; see also Fuero Real, 3.1.1.
184. See Baade, Form, pp. 20-21. On clandestine marriages, and those in facie ecclesiae, see infra.
185. Baade, Form, p. 21.
186. Ibid.
187. Ibid., p. 28.
188. Ibid., pp. 28-30
189. Ibid., p. 29.
190. Ibid., p. 46.
191. See chap. 2 supra.
192. See Baade, Form, p. 49, and on the Council of Trent and the French law see infra.
the Tridentine law was in force in Spanish Louisiana as part of the general law, and that there is strong evidence that it was actually enforced. This said, Baade points out that there was in fact general contemporary uncertainty about the applicability of the Tridentine Canon law, even among the upper ranks of the Roman Catholic hierarchy. This confusion was exacerbated by the Gédula of 1564 not being republished until the 1805 Novísima Recopilación, and because a 1792 Royal Order, directing the enforcement of the Tridentine law in Louisiana, was not published until 1845. This lack of publication meant that two texts of primary importance were not available.

This account of the Spanish background helps place the 1807 Louisiana Act in perspective. The law before was obscure and uncertain and this Act provided definitively for the forms and conditions of marriage. In so far as the previous law was not obscure, it provided for marriage by a Roman Catholic priest. This would have been unacceptable to the new immigrants from the U.S.A. In the other states and territories of the Union, marriage was, in theory, a civil contract, capable of being solemnised either by magistrates or ministers of religion. The 1807 Act stated that only marriages celebrated by one licensed for that purpose by any parish judge of Louisiana would be valid. Any priest or minister of the gospel ordained or admitted

194. Ibid., pp.54-55 and p.74.
195. Ibid., p.55 and passim.
197. See Baade, Form, p.62.
198. See L.M. Friedman, A History of American Law, 1973, p.179. Haskins points out that the civil form of marriage was an innovation of the Plymouth Colony: see "The Legal Heritage of the Plymouth Colony," in Essays in Early American Law, 1969, (Ed. D.H. Flaherty), pp.121-134 at 130. The so-called "common law" marriages found in some of the common law states were apparently not introduced to Louisiana. On them, see Friedman, op.cit., pp.179-181. Baade makes some relevant remarks, passim.
199. S.27.
into any religious society could obtain such a licence. The parish judge, if he thought there were insufficient licensed ministers or priests, could license justices of the peace to solemnise marriages. There was a special provision for Quakers and Menonists. Thus, to a large extent, the 1807 Act brought the Louisiana law into line with that of the Union as to who could solemnise marriages. We need not consider whether the 1807 Act was influenced by other American law; it is sufficient to point out that, the provisions, as to who may celebrate marriages, were only sensible given the heterogeneity of Louisianian society and religious persuasion.

Having set out the background, it is appropriate now to turn to the D.O. provisions. The first article of the first chapter of this title, D.O. 1 (p.25), states that "La loi ne considère le mariage que comme un contrat civil." The D.L.V. refers to s.1 of the 1807 Act, while Batiza claims that this Act is the "almost verbatim" source of the article with Proj. An. VIII, 1.5.1 and 3 as subsidiary sources. "La loi ne reconnaît que les mariages qui sont contractés et solemnisés conformément au règles qu'elle prescrit," states D.O.2 (p.25). The D.L.V. refers to s.3 of the 1807 Act, which Batiza claims as the "verbatim" source with Proj. An. VIII, 1.5.2 as a subsidiary. D.O.3 (p.25) states that "Le mariage est un contrat qui, dans son origine, est destiné à durer jusqu'à la mort de l'une des parties contractantes, néanmoins ce contrat peut être dissous avant la mort de l'un ou de l'autre des époux, pour des causes déterminées par la loi." The D.L.V. refers here to

201. S.29.  
203. An interesting point which might be worth exploring in helping to understand the origins of the Louisiana law. 204. See chap 2 supra, esp. text at notes 46-61.  
205. From now on, all mentions of Batiza without a reference to one of his writings indicate that appendix C of his Sources article is referred to under the relevant D.O. article.
Pothier, 206. *Part.* 4.2.3 and 7 and s.4 of the 1807 Act. Batiza gives *Proj. An.* VIII, 1.5.3, as the "almost verbatim" source.

These three articles of the D.O. clearly originate in the provisions of the 1807 Act indicated by the D.L.V., that is: ss1, 3 and 4. (S.2 of the Act was included in the 1825 C.L. at this point as article 86.) The provisions of the *Proj. An.* VIII are broadly similar in expression, 207 and probably suggested this organisation of the statutory material, (the exclusion of s.2 would support this). Further, although the wording of 1.5.3 of the *Proj. An.* VIII is similar to that of D.O.3 (p.25) it should be recalled that the *Proj. An.* VIII intended divorce to be included as one means of dissolving marriage before the death of one of the spouses, whereas the D.O. did not, and was only referring to nullification of the marriage. The *Partidas* provisions referred to by the D.L.V. are again very roughly similar to the D.O. provisions, and so are the statements made by Pothier. The strongly religious bias of Pothier and the *Partidas* to some extent makes their provisions incompatible with D.O.1 (p.25); but, nonetheless, in considering that marriage lasts until death, and can only be ended before that by annulment on the grounds of invalidity, they are closer to the D.O. than is the *Proj. An.* VIII. In fact, the provisions of the D.O. are of such generality that they are inevitably similar to the provisions found in other legal authorities, and it is only in the details dependant on these generalities that meaningful differences and similarities can be indicated. The discussion of divorce in the *Proj. An.* VIII shows this. Further, we know that the *Partidas* envisaged the pre-Tridentive form of marriage, Pothier the Tridentine (as applied in France) and the *Proj. An.* VIII a purely civil

206. *Traité du Contrat de Mariage* (afterwards *T.C.M.*) no. 442, Bug. 6 p.204.
207. *Proj. An.* VIII 1.5.1: "Le loy ne considère le mariage que sous ses rapports civils et politiques"; 1.5.2: "Elle ne reconnaît que le mariage contracté conformément à ce qu'elle prescrit;" 1.5.3: "Le mariage est un contrat dont la durée est dans l'intention des époux, celle de la vie de l'un d'eux; ce contrat peut néanmoins être résolu avant la mort de l'un des époux, dans les cas ou pour les causes déterminés par la loy." Note the possibly significant differences from the D.O. equivalents.
form; all three different from the D.O. and the relevant 1807 Act. In their details the laws were all different. Hence, all that can be said about these articles is that they are of a very general nature, originate in the 1807 Act and that their resemblance to the Proij. An. VIII is of a literary rather than a legal nature, based on the organisation of the material.

The next chapter of the D.O. is on how marriage may be contracted. The first article, D.O.4 (p.25), states that since the law considers marriage only as a civil contract, it sanctions as valid all those marriages where at the time of contracting the parties were willing to contract, able to contract, and did contract according to the formalities and solemnities prescribed by the law. This article is taken directly from s.5 of the 1807 Act, which Batiza states to be the "almost verbatim" source. The D.L.V. as well as citing the Act, refers to Part.4.2.5,6 and 7 and Pothier[208]. Part.4.2.5 states that: "Consentimiento solo con voluntad de casar face matrimonio entre el varon et la muger." It develops on this theme by discussing, for example, how deaf and dumb people may signify consent. Ley 6 discusses who has the capacity to marry, and provides that they must be of sound mind (entendimiento sano), capable of lying with women and of sufficient age to understand to what they are consenting. Further, castrated men and those debilitated in their sexual organs cannot marry since they are incapable of coupling carnally with their wives to father children, despite the fact they have sufficient understanding to consent. Finally, those who are mad (loco) cannot marry, unless they have lucid intervals during which they signify consent. Ley 7 is not directly relevant. It should be noted that the Partidas are only envisaging mutual consent as required and no other formalities, and in this they are, of course, following the pre-Tridentine Canon law, as they are also in stressing copula carnalis. The D.O.

208. T.C.M., 3d. and 4th. parts (nos.85-378) Bug.6, pp.36-173.
provides for other formalities to be found in the 1807 Act. Pothier, as referred to, gives an extended discussion of the requirements of marriage, who can marry, impediments and the relevant formalities. We need not consider his discussion further than to remark he is providing an exegesis of the French law based on the contemporary Canon law. Again his remarks are relevant; but the details differ from those of the D.O. and the 1807 Act. We can conclude by stressing that this D.O. provision comes directly from the 1807 Act, to which it alludes (indirectly) for the required forms and solemnities of marriage. These detailed formalities were not included in the D.O., whereas they were inserted as a new chapter in the 1825 C.L., on the recommendation of the latter's redactors. 209.

D.O. 5 (p. 25) states that marriage is only valid if consent has been given freely, while consent has not been given freely: first, if given to a ravisher, 210. unless given by the person ravished after completely recovering her liberty; second, when extorted by violence; and third, when there has been error as to the person whom one of the parties intended to marry. This article is taken directly from s. 6 of the 1807 Act, which Batiza gives as the "verbatim" source with Proj. An. VIII 1.5.5 as a subsidiary source. The D.L.V. refers to the Act, Part. 4.2.10 and 15 and Pothier. 211. The Proj. An. VIII is very similar in wording and meaning. (It was possibly - probably - the source of s. 6 of the Act.) Part. 4.2.10 states that error as to person invalidates a marriage, while 4.2.15 states (inter alia) that force (fuerza) or fear (miedo) invalidate a marriage. Thus these provisions are the same as that of the D.O. It must be pointed out, however, that the Partidas provide for no less than fifteen

209. See 1823 Projet of the C.L., pp. 8-9: see also text supra notes 176-180.
210. In old sense of abduction.
things that prevent a marriage, some of which are covered in later articles of the D.O., although many are not. Pothier covers similar material to the D.O.: error, violence and seduction. Again we conclude that the D.O. is following the 1807 Act; but it must be pointed out that lack of free consent for the three reasons stated would invalidate the marriage in all systems derived from Roman or Canon law. Hence this provision is not particularly relevant for our purposes.

The next article, D.O. 6 (p. 25), states that ministers of the gospel (ministres du culte) and magistrates authorised to celebrate marriages in the Territory are forbidden to marry boys under fourteen years and girls under twelve, on the pain of the former having the right to celebrate marriages withdrawn and of the latter being dismissed from office. Batiza gives no source. The D.L.V. refers to Part. 4.1.6 and the formalities on the marriage of minors found in the 1807 Act. The C.N. states in its article 144 that men cannot marry before eighteen nor women before fifteen. (C.N. 156 provides penalties for public officers who marry people below age.) As will be seen below, the C.N. provision is the result of amending legislation during the Revolution and Directory, while under the ancien régime, the ages of marriage for the two sexes were as is stated in the D.O. These ages were fixed by the Canon law (and were the same in the Roman law) as the presumed age of puberty, and those who were impubert, not being able to have sexual intercourse with their spouses and thus procreate, could not validly marry. Part. 4.1.6 states this in saying that if a man

212. Part. 4.2.10-18, thus: ley 10: 1) error; ley 11: 2) servile condition; 3) vows of celibacy; ley 12: 4) relationship; leyes 13 and 14: 5) having committed a grievous sin, e.g. incest; ley 15: 6) can't marry heretic or non-Christian, 7) force and fear; ley 16: 8) being in the last 3 of the 9 gradations of holy orders (subdeacon, deacon, priest); 9) having certain afflictions as the result of sin (venereal disease?); ley 17: 10) when against honour of church or people; 11) relationship; 12) when man of too cold a nature to lie with a woman; 13) madness; 14) nonage and impotency; ley 18: 15) when church prohibits and during religious holidays. This ragbag of provisions is repetitious and shows the analytical imperfections of the Partidas.

212a. See infra on Quebec.

213. See Poth. TC.M. no. 94, Bug. 6 p. 39.
below fourteen and a girl below twelve give consent to marry, the status they achieve is not one of marriage but of betrothal. It should be noticed that this D.O. article penalises those who conduct the marriage ceremony, but does not state that the marriage is necessarily invalid in the definite manner of C.N. 144. Is there any significance in this? It could reflect the Canon law stress on puberty and copula carnalis. 214. First, under chapter 3 of this title on nullity, nullity has to be sued for, otherwise the marriage is valid: D.O. 16 (p.27). Second, the Canon law, although prohibiting marriage before the (legal) age of puberty, rendered such a marriage valid if the spouses were capable of sexual intercourse. Esmein puts it thus:

"Le droit canonique défendait bien de contracter mariage avant la puberté; mais si, en fait, cette prohibition n'avait pas été respectée et que l'impuèbe marié eut été, d'un côté physiquement capable d'établir les relations sexuelles avec son conjoint, et, d'autre part moralement capable de bien comprendre l'acte qu'il accomplissait, doli capax, le mariage était reconnu valable; la présomption cédait devant la vérité." 215. Third, this recognition of the Canon law of physical capacity rebutting the presumption of a party below the legal age being impuber would be known to the D.O. redactors: it is found, for example, in Pothier. 216. The careful phrasing of D.O. 6 (p.25) would suggest they are intending to allow this defence to an action of nullity on grounds of the parties, or one of them, being below the age of puberty. Be that as it may, however, this D.O. article provides for the traditional age of marriage, following the Canon and Roman law.

214. See Esmein, Mariage, vol.1, p.83: "Le droit canonique assigne aux rapports sexuels, à la copula carnalis, une importance particulière; aucune autre législation, je le crois, n'est entrée aussi loin dans cette voie." See also, pp.83-85 generally.
216. T.C.M., no. 94, Bug. 6 p.40. He quotes Pope Alexander III: "Si ita fuerint aetati proximi, quod potuerint copula carnali coniungi minoris aetatis intuitu separari non debent, quem in eis aetatem supplevisse malitia videtur."
The D.L.V. referred to the 1807 Act, ch.17. This Act has no specific provisions as to the minimum age of marriage, although sa.16-20 regulate the marriage of minors.

D.O. 7 (p.25) provides that those who are legally married cannot contract another marriage until the dissolution of the first, under the penalties prescribed by statute. This provision is taken directly from the 1807 Act, s.10, to which it also alludes. The D.L.V. refers to the Act as does Batiza who claims it as the "almost verbatim" source, and who gives as subsidiary sources C.N.147 and Proj. An. VIII, 1.5.8. These two latter are indeed similar: "On ne peut contracter un second mariage avant la dissolution du premier", says C.N.147; but it must be borne in mind that the C.N. and its projet envisages dissolution by divorce, while the D.O. does not. Further, no Christian countries have allowed polygamy, so the "source" of the article is largely irrelevant; but Batiza, in claiming these two "subsidiary" sources, is being misleading, especially when there are not even strong literary resemblances between them and D.O.7 (p.25).

D.O.8 (p.25) is of rather more interest:
"Les personnes libres et les esclaves ne peuvent contracter mariage ensemble; la célébration de ces mariages est défendue et le mariage est nul; il en est de même du mariage des blancs ou blanches avec les personnes de couleur, libres."

No doubt the prevailing mores are reflected in this article forbidding marriage between blacks and whites and free and enslaved. The 1807 Act, s.13 provides:
"Free persons and slaves are incapable of contracting marriage together, the celebration of such is forbidden, and the marriage is void."

Batiza states this is the "almost verbatim, first part" source of the article. The D.L.V. also refers to this section of the Act, and to Part.4.2.11 and 4.5.1. The second part of the article is not derived from the 1807 Act, ch.17; but it probably correctly represents the law in Louisiana
prior to the Digest. 217. The references to the Partidas are of great interest. Slavery is provided for in the Partidas, but, of course, no account is taken of specifically black slavery. 218. Part. 4.2.11 states that, if the free person marrying the slave did not know the latter was unfree, then the marriage is invalid; but if the former knew of the latter's unfree status and still married the latter then the marriage is valid, and cannot be annulled for that reason. Part. 4.5.1 provides the same, but regulates slave marriages in greater detail. Both parties must be Christian. A slave can marry another slave, and such a marriage is valid even if their masters (señores) prohibit the marriage; but they are not released from bondage to their master. Masters have to sell married slaves in such a manner that they can continue to live together. Further if a free person (of either sex) marries a slave with the knowledge or permission of the latter's owner, the slave becomes free. These provisions are obviously very different from those of the D.O., and considerably more humane. 219. (They are also radically different from the Roman law.) According to Van Kleffens, in the thirteenth century in Spain, "slavery was still of frequent occurrence;" 220, but it was not approved of, as is shown by the introduction to title 5 of the Querena Partidas, the title "De los casamientos de los servios." The title starts thus: "Servidumbre es la mas vil et la mas despreciada cosa que entre los homes puede ser," because man "es la mas noble et libre criatura entre todas las otras

217. I have not been able to check this, due to inability to obtain the relevant source material. The original French Code Noir of the time of Louis XV apparently provided the same as the relevant article; see D.E. Everett, "Free Persons of Color in Colonial Louisiana", 7 Louisiana History (1966), pp.21-50 at p.22. What exactly was the law need not concern us here.
219. See D.O. 15-27 (pp.39-43), Bk.1, tit.6, chap.3.
220. Van Kleffens, Hispanic Law, p.199.
207.

ciaturas que Dios fizo". This attitude towards slavery was not that prevalent in Territorial Louisiana, where there existed not only contempt for slaves but colour prejudice against blacks. Thus, the 1806 Act, ch. 33, 221. by s. 40 provided:

"And be it further enacted, That free people of colour ought never to insult or strike white people, nor presume to conceive themselves equal to the white; but on the contrary that they ought to yield to them in every occasion, and never speak or answer to them but with respect, under the penalty of imprisonment according to the nature of the offence."

Hence, given opinion in Louisiana, the humaner provisions of the Partidas, although known to the redactors, would not be likely to find favour. Thus, given the current ideology and conditions, the D.O. article is readily explained. 222.

D.O. 9 (p. 25) and 10 (p. 27) lay down the prohibited degrees of marriage. The first prohibits marriage between those in direct ascending and descending line, including those born illegitimate, while the second prohibits marriage in the collateral line between brother and sister (whether of whole or half blood, or illegitimate or not) and between uncle and niece and aunt and nephew. These two articles are taken directly from ss. 14 and 15 of the 1807 Act, which Batiza classes as their "verbatim" sources. He also includes C.N. 161, 162 and 163 and Proj. An. VIII, 1.5.17 and 18 as subsidiary sources, and these are indeed roughly similar to the D.O. articles; but this is hardly surprising. The D.L.V. also refers to these sections of the 1807 Act: it also refers on D.O. 9 (p. 25) to Part. 4.2.12 and 4.6.4 and Pothier, 223 and on D.O. 10 (p. 27) to the Partidas again (same leyes) and once more to Pothier 224. Part. 4.2.12 states:

"Parentesco et cuñadía fasta el quarto grado..."

221. Louisiana Acts, 1806, ch. 33, "Black Code. An Act Prescribing the rules and conduct to be observed with respect to Negroes and other Slaves of this Territory." June 7th., 1806.

222. This is valid even if the statement I have made (text at note 217 supra) is incorrect.

223. T.C.M. no. 132, Bug. 6, p. 63.

224. T.C.M. nos. 133-149, Bug. 6, pp. 63-74.
embarga el casamiento que se non faga, et si fuere fecho débenlo desfacer: etrosi el parentesco espiritual ... embarga el casamiento .... Otrosi: porfijando algunt home a alguna muger, non debe el casar con ella nin ninguno de sus fijos mientras que durase el porfijamiento...."

Thus, relationship or affinity to the fourth degree prevented marriage, as did the spiritual relationship between godparents, between godparents and godchildren, and between godchildren and their godparents' children who were "hermanos espirituales." Finally adoptive relationships prevented marriage. Part. 4.6.4 describes clearly how relationships to the fourth degree are to be computed according to the Canon law. In effect, these provisions of the Partidas are stating the Canon law as laid down in 1215 by the Fourth Lateran Council. The Council of Trent restricted to some extent the cognatio spiritualis, that is the prohibitions on the marriage between those connected through godparents; but, in general, the provisions of the Partidas would be in force on this matter in Louisiana under Spanish government. As the references to Pothier show, the law on this matter in France under the ancien régime was almost exactly the same. Since this is so, it can be seen that ss. 14 and 15 of the Louisiana Act of 1807 introduced a massive restriction of the prohibited degrees of relationship. We need not concern ourselves with the sources of these sections of the Act: it is sufficient to point out that, as re-enacted in the D.O., they provided a very useful reform. It is quite conceivable that in a small rural community without easy means of transport it would be difficult to meet a marriageable person who was

---

225. See Esmein, Mariage, vol. I, p. 355 and II, p. 130 (cognatio spiritualis), and Poth. T.C.M. nos. 146-9, Bug. 6, pp. 73-4; and for an impression of the social effects of the prohibitions before and after Lateran IV, see J.L. Flandrin, op. cit. note 2 supra, pp. 24-6. On the development of the Canon law on prohibited degrees, see Poth. loc. cit., nos. 133-149, where he also discusses the Roman law, and Esmein, op. cit., vol. I, pp. 335-383 and vol. II pp. 258-266. 226. See Esmein, Mariage, vol. II, pp. 261-2. 227. See as cited in notes 223 and 224 supra.
not within the extended prohibited degrees of the Canon law. In a frontier community this might well be an acute problem.\(^\text{228}\). To search for sources is not important, as the prohibitions in these two articles are fairly universal, conforming to the Roman law, and, indeed, to Leviticus, chapter eighteen. This explains why they are so similar to C.N. 161-3.\(^\text{229}\). They differ from the C.N. also in that the latter by its article 164 states that the government can for "causes graves" dispense from the prohibition of marriage between uncle and niece, aunt and nephew.\(^\text{230}\). This facility to grant such a dispensation would doubtless be thought unnecessary in Louisiana and indeed contrary to tradition and popular sentiment.

Hence these articles were only reasonable and sensible reforms, given the nature of the territory at the period. One very interesting point arises out of them in connection with the 1825 C.L., the 1823 \text{Projet} of which recommended the inclusion of a new article,\(^\text{231}\), which became C.L. 98. C.L. 98 states: "Tout autre empêchement, pour raison de parenté ou d'affinité, est aboli." This article must have been included because of fears of an attempt to revive the old law on prohibited degrees, fears arising out of decisions such as Cottin.\(^\text{232}\). This relates to the discussion of whether or not the 1808 D.O. is a "true" code. In chapter three, it was argued that the D.O. was a true code, and that attempts after 1808 to revive the Spanish law arose out of factors other than the D.O. not being an authoritative legislative statement, superseding what had gone before.\(^\text{233}\).

The inclusion of this new article in the C.L. backs this up, because the old law on prohibited degrees had been

\(^{228}\) See Flandrin, as cited note 225 \textit{supra}.

\(^{229}\) See on the C.N., Maleville, 1 \textit{Analyse}, pp.156-9.

\(^{230}\) These matters will be canvassed on Quebec, \textit{infra}.

\(^{231}\) 1823 \textit{Projet}, p.8.

\(^{232}\) See chapter 3 \textit{supra}, esp. text at notes 208-227.

\(^{233}\) See chapter 3 \textit{supra}, esp. text at notes 171-239.
abolished before the redaction of the D. O. by the 1807 statute. Even those who tend to reject the D. O. as a "true" code must accept that this statute is more than a consolidating statement of the existing law!

The next article, D. O. 11 (p. 27), relates to the marriage of minors, and will be discussed infra; but it should be pointed out that it also has some base in s. 16 of the 1807 Act.

D. O. 12 (p. 27), the final article of this chapter, states that as well as the above general rules, the formalities relating to the publication and celebration of marriages will be found in a special law of the legislature. This is a direct reference to the 1807 Act, to which the D. L. V. also refers on this point. Batiza states that this D. O. article has a "substantially influencing" source Proj. An. VIII, 1. 5. 24. Any correspondence between the two, however, can only be a coincidence based on linguistic similarity. How can an article referring to an 1807 territorial statute be in any way based on an 1800 French provision? These sections of the 1807 Act were included in the 1825 C. L., as articles 100-110. Finally, C. L. iii forbade marriages by procuration which the Spanish laws had permitted. This C. L. article is again undoubtedly the result of fears aroused by Cottin.

The above provisions are all that the D. O. contains on the nature and formalities requisite for marriage. The redactors intended that their general statements be supplemented by recourse to the detailed provisions of the 1807 Act. It is notable that neither in the requisites for marriage nor in the section on nullity is impotency

234. On puissance paternelle, text infra at notes 645-643.
235. See Projet, 1823, pp. 8-9. The redactors said there that "The Chapter relative to the celebration of marriages, is extracted from the Act of the 6th. April, 1807, ... and contains all the material dispositions concerning them, which were not inserted in the code." But cf. text at notes 176-180 supra.
236. See Projet, 1823, p. 9.
237. See notes 232-3 supra and the text above them.
mentioned as a ground for invalidating the marriage. Why is this so? Before considering this question it is appropriate to mention that in the 1823 Projet it was intended to include an article stating that all causes of nullity which existed by the old laws are abolished, apart from impotency of one of the parties, either caused by a defective anatomy or from an accident before the marriage. The first part of this provision is again the result of Gottin. The second attempts to reassert impotency as a ground of nullity. In fact this section was excluded from the final redaction of this article, which became C.L. 116. Impotency was a ground of nullity in the Canon law and, as such a ground, is found in the Partidas. It is, however, not included in the C.N., and it may be suggested (but only suggested) that it was excluded from the D.O. in copying in this respect the C.N. (The C.N. excluded it on the grounds of difficulty of proof.) By the time of the drawing up of the 1823 Projet, the redactors might well have been aware of the problems this exclusion was causing in the operation of the law in France, and they might have sought to rectify the situation. This is, of course, speculation, but nonetheless is a plausible explanation. A further explanation could be that in this area of the D.O. the redactors were closely following the 1807 Act, which in its turn did not mention impotency. Both of these suggestions could be correct, but want of evidence necessitates leaving the question posed above without a definite answer.

This discussion of how, according to the D.O., a valid...

238. See Projet, 1823, pp.9-10.
239. This is obvious from the interesting comment at Projet, 1823, p.10.
240. Part. 4.2.6 and 4.2.17 show this.
241. See further infra on Quebec.
242. See further infra on Quebec.
243. Why did the enacted version of C.L. 116 exclude impotency as a ground of nullity? It would be interesting to know the answer to this question. C.L. 116, or rather the 1823 Projet's version, was intended "to follow article 16".
marriage is contracted may be concluded by making the following points. First, Professor Baade's conclusions on the law in force under Spain have already been discussed. He argued and demonstrated that, in theory, and to some extent in fact, the Tridentine law on the form of marriage was in force. He also showed that the legal sources proving this would have been difficult to acquire in Louisiana. Moreau Lislet probably did not come to Louisiana until late in the Spanish régime, and James Brown certainly did not come until after the cession to the United States. It would seem unlikely that they would know that the Tridentine law was formally in force. This could explain why, in this section of the D. L. V., the only references to the Castilian law are to the Partidas. Against this, it may be said that it is quite possible that Moreau and Brown would simply assume the Tridentine law was in force, and that this was the reason for the D. L. V. referring to Pothier who gives the substance of the Tridentine law. Be this as it may, the 1807 Act introduced, for the celebration of marriages, a system similar to that of the law arising out of the French revolution, and similar, in some ways, to the laws of the states of the Union.

In the redaction of this section of the 1808 Digest, the codifiers were aware of the pre-Tridentine Canon Law, the Tridentine Canon Law, the law of ancien régime France, of Castile, the common law as applied in the U.S.A., and the C.N. and its projet. There was, however, no great eclectic innovation because of the existence of the 1807 Act. Although the over-all structure of the two chapters of the title which have been considered in depth is, to some extent, based on that of the Proj. An. VIII, or the C.N. (but much more likely the former), there can be no doubt that the provisions of the D.O. are here very firmly

244. See text supra at notes 181-197.
245. See chapter 3 supra at notes 254-265.
based on the 1807 Act. The redactors conceived of their code and the relevant sections of the Act being read together to give the full law. Professor Batiza refers frequently to the Proj. An. VIII as an influence on individual articles; but it is clear that any influence exerted is on style.

The D.O. provides for religious and civil forms of marriage (although the law only considers marriage as a civil contract), while the French code and its projet envisage only a purely civil form of marriage. Further, the C.N. and its projet contain provisions on divorce, whereas the D.O. does not consider it at all; although the 1807 Act does mention it, but without regulating it in any way. It was earlier pointed out that the C.N. contains a great many more articles than the D.O. The reasons for this should now be obvious. The D.O., unlike the C.N., excluded the minutiae of the formalities of publication, and of parental consent to children's marriages. These topics were covered in the 1807 Act. Perhaps Brown and Moreau believed that such precise details were best excluded from a code, and were encouraged in this belief by the existence of the very recent act. A reading of Batiza's appendix C might lead one to suppose that the Louisiana Digest is, in this section, virtually identical to the French code or its projet. This appendix is, however, misleading. This impression is given purely because of Batiza's comparison of individual article with individual article, ignoring the fact that there are far more articles in the French codification. The French and Louisiana codes are, indeed, similar, and there is some influence on general form; but the source for the provisions of this section of the Digest is the 1807 Act, and much of the similarity between the individual articles of the D.O. and of the French code and its projet is due to the similarity of the Act to the French materials.

---

246. Although usually only as an "indirect" source.
247. In its last section, 70: on which see infra, text at notes 497-503.
248. See text supra between notes 180 and 181.
249. On parental consent, see infra on puissance paternelle. See 1807 Act, ch.17, ss.16-25.
The redactors of the D. O. here had to provide clear, concise rules on the nature of marriage and the requirements for formal validity. This they did, basing their provisions on the 1807 Act. They had no chance to innovate, as the Act restricted their operations. Further, they had no need to innovate, as the law embodied in the Act provided for the formalities and requirements adequate regulation, given the material conditions of the territory and its heterogeneous society.

2. **Puissance maritale** and the property aspects of the husband-wife relationship.

Marriage, when validly contracted according to the provisions of the D. O. and 1807 Act ch. 17, had certain consequences as to property. The D. O. provides for a community of gains (sociedad de ganancias or communauté d'acquêts ou de gains) between the husband and wife, and regulates control over property belonging to them as individuals. The origins of the Digest's provisions on matrimonial property are very controversial.

Professor Pascal has maintained that the origins are in the Castilian law, while Professor Batiza claims that the

"Spanish system of community of acquêts or gains (sociedad de ganancias) that appears in the Code, rather than being opposed to the French system of communauté, supplements it." 252.

He explains this as:

"the adoption by the drafter of the Spanish system of gains as one partial aspect of the general concept of conjugal partnership in a French inspired background of rules, irrespective of differences

---


252. Sources, p. 29.
in their original metropolitan settlements." 253. Very recently, Professor Batiza has reasserted his view, stating that, of the ninety-seven articles of title V of Book III of the Digest containing a "real rule", 254. fifty-six were taken from the C.N., nine from the Proj. An. VIII, three from Pothier, two from Domat, three from Febrero, and the rest from combinations of various sources, namely: Domat, Pothier, Febrero, Fuero Real, Las Siete Partidas, Nueva Recopilación, Fuero Juzgo, and the Leyes de Toro. 255. Essentially, Batiza is arguing for a basically French law on the point with some Castilian additions.

Professor Baade has recently dealt with this debate. 256. He shows the socio-legal context and social and legal practice (legal folkways) at the period of codification. He points out that there was a French legal folk custom of making marriage contracts and that this folk custom was transplanted to Louisiana along with the Coutume de Paris. 257. In Castile there was no equivalent folk custom of drawing up such contracts. 258. One reason for this difference is that the French coutume allowed marriage contracts to be used to provide for the future transmission of wealth, whereas the Castilian law did not, a will and testament being used for such future transmissions of property. 259. Baade goes on to show that the French legal folkway of concluding marriage contracts continued in Louisiana under Spanish rule, although there can be no doubt that Castilian law was introduced. 260. (The Castilian law did allow for the making of such contracts. 261.) Professor Baade classifies the two legal approaches thus: the old French approach he calls "notarial" or "contractual", the old Castilian,

---

254. Textual Evidence, p.105 and see passim. He states that one article does not contain a "real rule": there are 98 relevant articles in total.
255. Ibid. p.105 and note 113.
256. Marriage Contracts, passim.
257. Ibid., pp.15-30.
258. Ibid., pp.45-49.
259. Ibid., pp.47-48
260. Ibid., pp.73-75.
261. Part. 4.11.24 and 30.
"statutory". By this he means that, in France, the accepted folkway was to draw up a marriage contract using the services of a notary, while in Castile it was normal to accept the provisions of *sociedad de gananciales* without varying them in a contract. He argues that the northern French law was based around the concept of the marriage contract, while the Castilian was not. He then goes on to show that the D.O. redactors chose to follow the French "contractual" model of matrimonial property, rather than the Castilian "statutory" one. His evidence is the prominence given to the marriage contract in the D.O., a prominence which Castilian law would have denied, the general scheme of the relevant D.O. provisions, and certain important articles which contradict the Castilian law.

As regards Pascal's view that the D.O. inevitably was based on Castilian law, Baade points out that, to some limited extent, there had been a revival of the French law on marriage contracts between 1803 and 1808. He bases this view on an examination of marriage contracts of the period. Further, the folkway of concluding such contracts had continued even under Spain. He then points out that the adopting of the French "contractual" régime from the French sources was hardly a surprising act on the part of the Digest redactors:

"the codification had to reflect enacted law previously in effect, for any reliance on customary law was bound to be exploited by the champions of the 'new' customary law of the United States, the common law." Further:

"since time was of the essence, extent French-language legislative precedent had to be followed."

---

263. Ibid. generally, but especially pp.84-85.
264. Ibid., pp.85-86.
265. Ibid., pp.85-89.
266. See chapter 3 *supra*, at notes 132-170; and Reply, *passim*.
267. *Marriage Contracts*.
268. Ibid. pp.73-75 and see text at notes 260-1 *supra*.
That the "living law" was of the "contractual" model meant that any choice of provisions other than those basically French would have been very surprising.\textsuperscript{271}.

That the basic model adopted was the French "contractual" one does not prevent individual articles from being of Castilian origin. Baade himself points out that the 1808 redactors adopted as the "statutory" regime the Castilian ganancial community, whereas the C.N. had adopted the community of moveables and acquêts of the Coutume de Paris.\textsuperscript{272}.

As Baade shows, the redactors could have adopted the French communauté réduite aux acquêts as the statutory regime.\textsuperscript{273}.

Baade's work has very recently been attacked by Batiza\textsuperscript{274}. Batiza alleges that Baade argues that the marriage contract provisions of the Digest originated in the "living law" of the Orleans Territory.\textsuperscript{275} Batiza then points out that, of all the relevant articles, none have a source in the "living law" but only in materials such as the French code.\textsuperscript{276} Batiza seems to have misunderstood Baade's argument. Nowhere does Baade state that any individual article had an origin in the "living law". He merely states that the "living law" being of a "contractual" model, the adoption in the D.O. of the "contractual" model of the French materials is hardly surprising.\textsuperscript{277} Batiza claims Baade is being inconsistent in stating that the code had to reflect enacted law while its "source" was the living law.\textsuperscript{278} This inconsistency is the product of Batiza's misunderstanding of Baade's argument, for, as just pointed out, Baade does not claim the "living law" anywhere as a "source" in the

\textsuperscript{271} Ibid., p.87.
\textsuperscript{272} See ibid., pp.87-8 and on the C.N. and C.de P. see infra.
\textsuperscript{273} Marriage Contracts, pp.87-9; but cf. Batiza, Textual Evidence, p.97 note 75.
\textsuperscript{274} Textual Evidence.
\textsuperscript{275} Ibid., pp.77 and 97.
\textsuperscript{276} Ibid., pp.97-105.
\textsuperscript{277} See text supra at notes 256-271.
\textsuperscript{278} Textual Evidence, p.107. He quotes the passage from Baade's article partially quoted in two sections at notes 269 and 270 supra.
sense Batiza alleges. Batiza alleges that Baade has failed to show a "key relationship" between D.O.9 (p.325) and the "living law" of marriage contracts and that this invalidates the latter's hypothesis. This article provides thus:

"Les conventions les plus ordinaires, dans le contrat de mariage, sont:
La constitution de dot;
Et les diverses donations que les époux peuvent se faire, soit réciproquement, soit l'un à l'autre, ou qu'ils peuvent recevoir d'autrui, en considération du mariage."

Batiza argues that, since Baade has failed to show that these were the most ordinary clauses of a marriage contract in Louisfana prior to the Digest, in the "living law", Baade's argument should be rejected. This argument of Batiza's is again based on a misunderstanding. Baade does not allege that this article represents notarial practice in Louisiana; he states that this article should be read with the articles (found in chapters 8 and 9 of the title on Donations) on interspousal donations and donations by third parties to the spouses or their children. He states that the combined effect of these articles was to allow

"spouses when there were no children of the marriage to make irrevocable reciprocal donations of their future shares of the community to each other in full property by marriage contract, but not otherwise."

This was contrary to Castilian law. Baade uses this article to show that it, when taken with the other relevant articles, indicates that the D.O. redactors were adopting French substantive laws on marriage contracts. He does not argue that this individual article was based on the "living law",

---

279. See text at notes 256-271 and 277 supra.
281. Ibid., pp.106-7. This is article 9 of title 5 of Book 3.
283. The relevant articles are D.O.222 (p.257) and D.O.210-218 (pp.255-257). That is of articles 222 and 210-218 of title 2 (Donations) of Book 3.
284. Marriage Contracts, p.87.
nor that this individual article could be only of French origin: this means that Batiza’s point, that Castilian equivalent statements may be found, is quite irrelevant. 286. We may conclude that the arguments Batiza puts forward on the grounds that the "sources" of the 1808 Digest marriage contract provisions are not the "living law" should be dismissed, as based on a complete misunderstanding of Baade’s argument.

Batiza has a second line of attack on Baade’s work. Baade adduces ample evidence to show that the making of a marriage contract was not a Castilian legal folkway. 287. Batiza takes two quotations from Baade’s argument, and attempts to refute Baade’s interpretation of them, 288. and on the basis of this refutation, he claims that Baade “went too far in minimizing the importance of marriage contracts in Castile.” 289. It must be stressed that even were Batiza’s interpretation of these quotations correct, Baade’s argument would not seriously be affected. As a contemporary author cited by Baade states; "En [C]astilla los capitulos fueron desconocidos en la practica." 290. Batiza refers to the following statement by Baade:

"As late as 1851, Garcia Goyena observed that in contradistinction to France, the use of marriage contracts in (non-foral) Spain was likely to be ‘rarisimo’ even with full freedom to contract." 291. Batiza states that Baade has "misread and mistranslated" Garcia Goyena’s remark. Batiza provides the following translation. After referring to the French position, Goyena states:

"among us, despite the freedom that always has existed to modify the partnership by special pact, the case will be extremely rare in which that freedom has been used." 292.

---

286. Textual Evidence, p.107. As will have been seen, D.0.9 (p.325), on its own, is not really a rule of any significance.
287. Marriage Contracts, pp.45-7 and p.85.
288. Textual Evidence, pp.94-5.
289. Ibid., p.94.
292. Textual Evidence, p.94, and see note 69 thereon.
Professor Batiza obviously gives the correct translation. Batiza's interpretation is, however, unjustified. He states that Goyena means that:

"while marriage agreements in Castile were seldom modified by the parties, the marriage agreements themselves were of normal occurrence." 294.

Goyena just does not say that such marriage contracts were of normal occurrence. Although Baade has here mistranslated Goyena’s remark, his argument is not affected. Baade points out that, contrary to French attitudes, Febrero did not seem to consider marriage contracts as the most important civil transaction, while of testaments he said:

"Ninguna cosa pide más cuidado, más sabiduría y claridad que la disposición de un Testamento" 296.

Batiza states that this is correct, but that the reason why Febrero regarded a testament as so important, was not to do with capitulaciones matrimoniales, but because, by its very nature, a testament cannot be improved, as it takes effect after the testator's death. This does not really

293. The relevant passage from Goyena reads: "Nuestra posición en este punto es más ventajosa que la del Código Frances y otros, donde la comunión y sociedad se halla modificada por muchas clausulas y pactos que ha sido preciso consignar en los mismos Códigos, por ser de uso muy frecuente: entre nosotros, a pesar de la libertad que siempre ha habido para modificar la sociedad por pactos especiales, sera rarisimo el caso en que se haya hecho uso de ella." Professor Batiza points out that the feminine pronoun ella refers to libertad, whereas Professor Baade has taken it to refer to sociedad. See Textual Evidence, p.94 note 69 where Batiza quotes Goyena and where in the text, he gives a translation of the whole passage.

294. Textual Evidence, pp.94-5.
295. Marriage Contracts, p.47.
296. Quoted ibid., p.47.
297. Textual Evidence, p.95. The relevant text of Febrero reads, as cited by Batiza, ibid., p.95, note 71: "El hombre mientras vive puede corregir sus yerros; pero quando dexa de existir y no puede evitar las contiendas, y los funestos efectos que causen la ignorancia y la obscurredad de su Testamento. Para evitar estas fatales consecuencias debe otorganle estando sano; debe consultarla con personas doctas y timoratas: debe sobre todo implorar los auxilios divinos, y de esta suerte descargara su conciencia y conseguirá el acierto haciendo á sus herederos el bien que les desea."
affect Baade's point: Febrero does appear to put more stress on testaments than on marriage contracts. Batiza's allegation, that Baade unjustifiably minimises the importance of marriage contracts in Castile, should be dismissed.

Batiza has a third line of argument against Baade's views. He argues that the 1808 redactors did not make a clear choice of the French "contractual" prototype. He points out that in the droit coutumier it was possible, by contract, to modify the community or exclude it. This was also allowed by the French code. He argues that the only way provided in the D.O. to escape the legal community was to use D.O. 2 (pp.323-5) to stipulate that their matrimonial agreement should be regulated by the law of another state or territory. That this should be so does not really affect Baade's argument. He argues that the model of matrimonial régime adopted in the D.O. was the "contractual" one: he does not state, nor need he state, that all the provisions of the D.O. are based in the customary law of northern France. That some aspects of the provisions in the D.O. are of Castilian or other non-French origin does not matter: the over-all conception of the law in the Digest, and the whole thrust of that law, are derived from the northern French "contractual" conception of matrimonial régime. Batiza's third, and strongest, argument should be dismissed.

Baade's argument must be upheld. The 1808 redactors have adopted a "contractual" model of the matrimonial régime, a model derived from the droit coutumier. The over-all tenor of the articles of the code is of French origin, and, while several articles have Castilian origin, the Digest incorporates some key provisions which, in a

298. Textual Evidence, pp.95-97.
299. Ibid., pp.96-7.
300. Ibid., p.96.
fundamental way, are antithetical to the Castilian substantive law. 301.

The above discussion of the controversy over the provisions on matrimonial property helps ground the following account of the authority of the husband over property. At issue in this section of the thesis is not the matrimonial property system as such, but rather the authority of the husband over the community property, and the separate property of his wife. The following discussion will be concerned with whether or not this authority has changed with codification, when the redactors adopted a French "contractual" model of matrimonial property, though with the intercalation of some rules of Castilian origin.

Although matrimonial property is not at issue here in its important aspects of preserving and transmitting wealth, and securing protection for wives and children, in order to facilitate discussion of marital authority, it is necessary to give a brief outline of the system provided in the 1808 Digest.

D.O.1 (p.323) permits a husband and wife to regulate matrimonial agreements in any way they wish, so long as they do not contravene good morals, and provided they follow the modifications prescribed in the code. Under D.O.15 (p.327), in a marriage contract spouses can make reciprocally, or one to another, or receive from others, in consideration of their marriage, all kinds of donations inter vivos or mortis causa. (Mortis causa donations in a marriage contract were invalid under Castilian law. 302.) Under D.O.16 (p.327) a wife can bring a dowry to support the expenses of the marriage. Under D.O.56 (p.335) all the effects belonging to the wife that have not been settled on her as dowry belong to her parapherna. D.O.63 (p.337)

301. Marriage Contracts, pp.85-9, and see text supra at notes 280-86. Note that Batiza's original position is not far removed from that of Baade; see text at note 253 supra.
302. See Baade, Marriage Contracts, p.86.
provides that any marriage contracted in the territory brings about communauté d'acquêts ou de gains, and this is so, whether or not there is a marriage contract, and although there is one, if it is silent on communauté. D.0.9 and 10 (p.325) state the same principle. D.0.64 (p.337) describes the composition of the community, which is stated to consist of: first, the fruits of all the effects of which the husband has administration or enjoyment; second, of the produce of the reciprocal labour and industry of both husband and wife; and third, of the biens which they may acquire during marriage, either by donation made jointly to them both, or by purchase, or in any other similar way, even though the purchase be made only in the name of one of the two, because what is relevant is the time of purchase, and not the purchaser.

This last article, D.0.64 (p.337), involves a change from the Castilian law. This article refers to the fruits of the property which the husband administers and enjoys: hence, if a wife administered her parapherna, the fruits would not fall into the community. The Fuero Real, 3.3.3, provided thus:

"Maguer que el marido [h]aya mas que la muger, o la muger [más] que el marido: quier en heredad, quier en mueble, los frutos sean comunales de ambos a dos: y la heredad y las otras cosas do vienen los frutos [h]ayalas el marido o la muger cuyas antes eran, a sus heredos." 303.

This text was included in the Nueva Recopilacion, 304, and was interpreted to mean that the fruits of a wife's parapherna belong to the sociedad, whether or not she administered it. This was the view, for example, of Azevedo. 305. Thus, this provision of the D.O. includes

---

303. I have quoted from a 1544 edition of the Fuero Real which contains the Latin gloss of Montalvo. (National Library of Scotland.) The spelling has been modernised slightly and the text clarified as indicated by the square brackets. Abbreviations have been extended.

304. Rec. Cast. 5.9.4; Nov. Rec. Cast. 10.4.3.
a minor amendment of the old law. Whether this change amounts to a conscious freeing of the wife from marital authority would seem doubtful: perhaps it is merely the result of an oversight of the redactors, although this also would seem doubtful. The matter will be discussed below.

One article, not directly on matrimonial property, deserves mention. This is D.0.4 (p.325), and it is concerned to show what cannot be done in a marriage contract, as being (presumably) contra bonae mores. It states thus:

"Les époux ne peuvent, non plus, déroger par leurs conventions matrimoniales, ni aux droits résultant de la puissance maritale sur la personne de la femme et des enfants, ou qui appartient au mari, comme chef, ni aux droits conférés aux survivant des époux, par le titre des pères et des enfants, et par le titre des mineurs, de leurs tuteurs et curateurs, ni aux dispositions prohibitives du présent code."

Batiza gives as the "almost verbatim" source C.N. 1388. The D.L.V. refers to Pothier. C.N. 1388 is indeed almost identical. The Pothier reference of the D.L.V. is of considerably more interest. He states that since God has made man "le chef de la femme, Vir est caput mulieris", any marriage contract making the woman head of the matrimonial community is contrary to good morals and public order.

"Les conventions qui paraissent tendre à soustraire la femme à la puissance que notre droit municipal a accordée au mari sur elle, sont aussi regardées comme étant, dans nos moeurs, contraires à la bienséance publique, et en conséquence nulles.

C'est pour cette raison que la jurisprudence a déclaré nulles les autorisations générales dans les contrats de mariage, c'est-à-dire, les clauses par lesquelles il était porté que le mari, par le contrat de mariage, autorisait sa femme, non-seulement pour administrer, mais même pour aliéner à son gré ses héritages, à quelque titre que ce soit, sans qu'elle eût besoin d'avoir recours pour cela à une autorisation particulière." 309.

---

306. Pugh p.8 recognises this.
308. No. 4, Bug.7, pp.50-51.
309. No. 5, Bug.7, p.51.
It was pointed out in the introduction to this chapter\textsuperscript{310} that in the Castilian law a husband could give his wife a general authorisation, contrary to the droit coutumier. If in the provisions on authorisation (discussed later) in the D.O., the redactors have followed D.O.4 (p.325) to its logical conclusion as indicated by Pothier, and have forbidden such general authorisations, then such a change would indicate the adoption of the French concept of \textit{puissance maritale} and the rejection of the rather more limited Castilian conception. If so, then this article, D.O.4 (p.325), will be crucial in demonstrating the change in concepts of marital authority. The fact that the D.L.V. makes no reference to a Spanish source suggests that in the redaction of this article the redactors have adopted the French concept. This matter will be discussed further in the next subsection. Further, the use of the term "puissance maritale", along with the reference to Pothier, suggest that the redactors are working with a much more rigorous conception of \textit{puissance maritale} than that found in the Castilian law.

It is now appropriate to turn to the articles on exercise of authority over property. If we start with the control over the \textit{société} or \textit{communauté de gains ou acquêts}, the relevant article is D.O.66 (p.337). It states thus:

"Le mari est chef et maître de la société, ou communauté d'acquêts; il en administre les biens, dispose des revenus qu'ils produisent, et peut les vendre, et même les donner, sans le consentement, ni la permission de son épouse, parce que celle-ci n'y a aucun droit, jusqu'à ce que son mari meure.

Mais s'il était prouvé que le mari n'a aliéné lesdits biens, ou n'en a autrement disposé que par dol pour porter préjudice à la femme, elle pourrait avoir son action contre les héritiers de son mari, en répétition de sa moitié desdits biens, en par elle, justifiant du dol."

\textsuperscript{310} See text at notes 90-93 supra.
Batiza gives as the "substantially influencing" sources: Pothier, Communauté, nos. 3, 467 and 480, the Coutume de Paris, art. 225, the Nueva Recopilación, 5.9.5. and Febrero. The D.L.V. also refers to Rec. Cast. 5.9.5, Leyes de Estilo, ley 205, and Febrero. Pothier, as cited by Batiza, makes statements broadly similar to those of the D.O. The article of the Coutume de Paris also provides similarly, although it refers to "meubles et conquêts immeubles", in line with its community of moveables and acquests. Febrero, as cited by Batiza, enunciates, at great length, a rule very similar to that of D.O. 66 (p.237). The 205th. ley of Estilo provides that if any married man buys an "heredad é otra cosa", which he gains while living with his wife, then he can sell it, even though the wife owns half of the "ganancia", provided he does not do so in fraud of his wife. The Nueva Recopilación, as cited, provides that a husband may dispose of property gained during the marriage, "sin licencia ni otorgamiento de su muger", and this disposition will be valid, unless it is proved he has alienated the property "por defraudar é damnificar á la muger". Thus, these two Castilian sources allow a husband to sell or alienate ganancial property, provided he is not acting fraudulently to deprive his wife of her rightful claims. Febrero, as cited by the D.L.V., states that the wife owns half the gains made by her and her husband during the marriage. The husband administers them, however, and may dispose of them.

311. T. Comm, no.3 Bug. 7 p.57; no.467, ibid. p.258; no.480, ibid., p.264.
312. 1 Adicionado, Part.1. cap.II, no.10 (p.234). In the edition I have used, the equivalent reference is the same, but with the page being p.206. See note 101 supra.
313. On these Leyes, see chapter 3 at note 79.
314. Parte Primera (Part 1) cap. IV nos. 29-30 (pp.212-3) and also 32 nos. 60, 63, 64 and 65. These are the references according to the 1825 edition I used: they are different from those in the D.L.V., although the provisions are the same. See note 101 supra.
315. See note 312 supra.
316. A copy of these leyes not readily being available, I have used de Funiak, op.cit. vol.2, appendix 1, where he cites ley 205 at pp.7-8.
317. This became Nov. Rec. Cast. 10.4.5. The ley points out that a wife will forfeit her share of the ganancias if she lives luxuriosamente as a widow.
318. No.29, see note 314.
them as he wills, provided he is not acting to defraud his wife.\footnote{319}{Febrero reports that there was a dispute over whether the husband could give away the *gananciales* or consume them in a frivolous way.\footnote{320}{He himself favoured the view that a husband could make modest donations, if there were just cause, to relations, domestics or friends.\footnote{321}{It is obvious that the whole thrust of the Castilian law on this point is very similar, or indeed identical, to that of the D.O. The husband is the administrator of the community and can do with it as he wishes, provided he does not act in such a way as to defraud his wife. The French law to which Batiza refers is substantially the same. Thus, the redactors introduced no change in this aspect of the husband's authority.}

It will have been noted that no reference was made by Batiza to the C.N. or its *projet*. From our perspective, the French code has articles of great importance. The C.N. provides as follows:

"1421. Le mari administre seul les biens de la communauté. Il peut les vendre, aliéner et hypothéquer sans le concours de la femme. 1422. Il ne peut disposer entre-vifs à titre gratuit des immeubles de la communauté, ni d'universalité ou d'une quotité de mobilier, si ce n'est pour l'établissement des enfans communs. Il peut néanmoins disposer des effets mobiliers à titre gratuit et particulier au profit de toutes personnes, pourvu qu'il ne s'en réserve pas l'usufruit."

Thus, the C.N. restricted the husband's right to make donations. Maleville characterised the powers under the *ancien droit* of the husband to make donations as *abusif*:\footnote{322}{Maleville characterised the powers under the *ancien droit* of the husband to make donations as *abusif*: this was the reason for the change in the C.N. (It should be pointed out that it was a change from the provisions of the *Coutume de Paris*: some other *coutumes* had a provision similar to that selected in the C.N.\footnote{323}{See infrare on Quebec.) Would such a...}
reform have been useful in Louisiana? It is difficult to say. Firstly, under the C.N., a husband could still sell an immoveable and then dissipate its proceeds, thus causing his wife to suffer. Secondly, excessive donations might well amount to fraud, and the wife could gain restitution from her husband's property after the dissolution of the community. If these two reasons are taken into account, it appears that perhaps the reform of the C.N. is not so radical as it might appear. Further, a wife could petition for separation of property under the D.O. if her husband was maladministering such property. (This is something that will be considered later. 324.) The D.O. redactors, since to some extent they were strengthening the husband's authority, might have felt that a derogation from his control over the community property would be illogical and inconsistent. All this is, of course, mere speculation. The innovation of the C.N. could well have been useful, and the reasons for its rejection must be a combination of traditionalism in law and a preference for strong marital authority: the latter can reasonably be inferred when it is considered (as will be shown) that the D.O. redactors strengthened the marital authority of the husband. We can conclude discussion of this D.O. article by remarking that the redactors followed the old law, and rejected a possibly useful innovation of the C.N.

If we next turn to consideration of dowry in the D.O., we find, not surprisingly, very traditional provisions. Thus D.O.16 (p.327) states that by dowry are meant the effects the wife brings to the husband to support the charges of marriage; and D.O.17 (p.327) states that everything the wife settles upon herself or which is given her is included as dowry, unless there be a stipulation to the contrary. D.O.29 (p.329) states as follows:

"Le mari a seul l'administration de la dot, et sa femme ne peut la lui ôter; il peut agir seul

324. See infra, text at notes 465-475.
en justice pour la conservation et le recouvrement de la dot contre ceux qui en sont débiteurs ou détenteurs, ce qui n'empêche pas que la femme ne demeure propriétaire des biens qu'elle a apportés en dot."

This is again a traditional statement, by the very nature of dowry, the husband had the administration of it. No innovation would be possible, thus we need not examine the relevant source material.\textsuperscript{325} The statement at the end that the wife is owner of the dowry is again traditional: "quamvis in bonis mariti dos sit, tamen mulieris est," said Justinian's Digest.\textsuperscript{326}

D.O.30 (p.329) is of more interest:

"La femme peut cependant agir en justice pour ses biens dotaux, soit lorsqu'elle est séparée de biens d'avec son mari ou lorsqu'elle est autorisée à cet effet par lui, ou à son refus, par justice."

The probable "source" of this article is Domat.\textsuperscript{327} The D.L.V. gives no references. There is no equivalent article in the C.N. Domat points out that this provision is contrary to Roman law. There is no equivalent provision in the Partidas. The notion of séparation de biens as found in the D.O., was not found in the Castilian law as regards mismanagement by the husband, although a wife had remedies to stop her husband dissipating her dowry.\textsuperscript{328}

It seems that this article of the D.O. had no equivalent

\textsuperscript{325}See e.g. C.N. 1549 and Domat, Part 1, Bk. 1., tit. 9, sectn. 1. nos. 2 and 3. Febrero, Primera Parte, cap. IV no. 6 pp.213-4. See also Briissaud, History, pp.802-3. In his Sources article, in appendix 3, Batiza had given as the "source" of this article C.N. 1549 as a "substantial influence", first paragraph. He has, correctly, changed his mind and identified Domat (supra no.3) and the C.N. as the source: Textual Evidence, pp.85-86 and note 40 thereon.

\textsuperscript{326}D.23.3.75.

\textsuperscript{327}Domat 1.1.9.1.3; second footnote "d" to this provision (Part One Bk. 1., tit. 9, sec.1. no. 3 - method of citation hereafter). Batiza, Sources, appendix C, originally gave no "source" for this article; but now he has reached the same conclusion as I: see Textual Evidence, pp.108-9.

\textsuperscript{328}See Pugh, p.30. On the wife's remedies to stop the dissipation of her dowry: see Febrero, Part.1, cap.4, no. 10, p.215.
in the old Castilian law.\textsuperscript{329} Since there is no citation in the D.L.V., it possibly is fair to suggest that no equivalent Castilian provision was known to the redactors of the D.O. Thus, the D.O. redactors would appear to have increased the wife's power over her dowry by borrowing a provision from Domat, in order to allow her to protect her interest. This to some extent might appear to derogate from marital authority, since it increases a wife's power over her dowry. This change is, however, consistent with marital authority in the D.O. in general, since the wife needs the authorisation of her husband or of a judge to act, when she is not separated as to property.

Alienation of dotal land deserves some remarks. D.O. 36 (p.329) provides:

"Les immeubles constitués en dot, ne peuvent être alienés ou hypothéqués pendant le mariage, ni par le mari, ni par la femme, ni par les deux conjointement; sauf les exceptions qui suivent."

Batiza gives C.N. 1554 as the "verbatim" source; and, indeed, the two articles are identical. The D.L.V. refers to Part.4.11.7, Domat,\textsuperscript{330} and Febrero.\textsuperscript{331} Before considering this article, it is necessary to set out the exceptions to the general rule. D.O. 37 (p.329) states that a wife, with the authorisation of her husband, or, on his refusal, of the court, may give dotal effects to establish children she has had by a previous marriage; but if the authorisation is by the court, she must reserve the enjoyment of the effects for her husband. This article is identical to C.N. 1555, which Batiza classes as its "verbatim" source. The D.L.V. gives no references. D.O. 38 (p.329) states that the wife, with the authorisation of her husband, may give her dotal effects to establish

\textsuperscript{329} At least none that I have been able to find. The Partidas on dowry were very Roman in approach.
\textsuperscript{330} Domat, 1.1.9.1.13 and 14.
\textsuperscript{331} Febrero, Part 1, cap.4, § 1 no.8. and Part 2, libro primero cap.3, § 1 no 39, pp.174-5. (References to 1825 edn.)
their common children. This is identical to C.N. 1556, which Batiza claims as the "verbatim" source: once more the D.L.V. makes no references. D.O. 39 (p.329) states that a dotal immoveable may be alienated when this is permitted by the marriage contract: this is a provision identical to C.N. 1557, the "source" according to Batiza, while the D.L.V. gives no references. Finally D.O. 40 (p.331) states that a dotal immoveable may be sold with the judge's authorisation after certain formalities for certain specific limited purposes. Any moneys left over from such transactions remain dotal effects, and should be employed as such to the wife's benefit. Batiza claims C.N. 1558 as the "almost verbatim" source, and indeed it is almost identical, while the D.L.V. refers to Domat.

The provisions will now be discussed in turn. To some extent D.O. 36 is merely the restatement of the traditional principle of the inalienability of dotal immoveables, and follows the Justinianic pre-Novel 61 version of the lex Julia de fundo dotali. What is curious is the stress on the wife. The received Roman law forbade the husband to alienate even with the consent of his wife. The D.O. has pushed the wife into equal prominence with her husband. Domat, as cited, follows the Roman rule, and does not give the wife such prominence; nor does the fourth Partida, which states as follows: "non puede el marido vender, nin enagenar nin malmenter mientras que durare el matrimonio ... la dote que el rescebiese de la muger...." Febrero states, similarly, that the husband "no los[i.e. dotal immoveables] puede enagenar, obligar, ni hipotecar aunque su muger lo consienta...." Febrero does, however, state that:

---

332. The English version is rather curious; but this is unimportant.
333. Domat, 1.1.9.1.15.
334. Part. 4.11.7.
335. No.8 cit. note 331 supra. No.39, as cited, states: "El marido no puede enagenar los bienes dotaless immuebles 6 raices de su muger, aunque esta lo consienta verbalmente."
"si ésta [la muger] concurre á la celebración del contrato, se obliga expontáneamente con juramento á no reclamarlo ni contravenirlo y renuncie (como puede) el derecho y accion hipotecaria que la compete contra los bienes de él; pues contiendo estos requisitos, valdró su enagenacion y gravamen." 336.

Febrerdo does allow then for the alienation of dotal immovableables if the wife takes part in the contract, and on oath renounces her rights of hypothec for the relevant dotal property over the husband's goods. After consideration of the exceptions to D.O.36 (p.329), the significance of this statement of Febrerdo's will more readily be assessed. It may be stated, however, that the greater stress the D.O. appears to place on the rights of a wife over her dowry originates in the C.N.: Febrerdo does not envisage the wife disposing of her dowry. The C.N. considers the husband as having only a right of usufruct in the dowry: C.N. 1562. The Partidas, following the Roman law, regard the husband more as some kind of owner: though with a fairly limited ownership. Febrerdo considers that in dotal property the husband's right is a usufruct. 337. If the above is correct, then the D.O. redactors, in adopting the C.N.'s stress or emphasis on the wife's actings as regards her dowry, have altered, in a subtle fashion, the balance of the law, since the Castilian sources appear only to conceive of the husband alienating or hypothecating the dowry.

The next article, D.O.37 (p.329), has again obviously been copied from the C.N. The Partidas contain no such provision, neither do the Nueva Recopilación and the Leyes de Toro, nor Domat. Again, this article is predicated on the wife having a greater right over the dowry than her

---

336. No.8 cit. note 331 supra. No.39, as cited makes a similar statement.
337. Febrerdo, Part 1, ch.4, no.6, pp.213-4, where he states that the wife is owner of the dowry and the husband the usufructuary. The dowry is intended (he says) to support the charges of the marriage.
husband. It is not surprising, perhaps, that there are no Castilian sources, as the C.N. here has adopted and, to some extent, amended the jurisprudence of some of the regions of droit écrit. Thus, this exception to the inalienability of dowry is again of French provenance. It is incompatible with the Partidas' notion of the husband's absolute control over the dowry. Although it derogates from that control, the D.O. provision, following the C.N., requires the wife to be authorised, and the article thus fits into the general notion of the incapacity of married women. The stress on the wife is dependent on the existence of the previous article. D.O. 38 (p. 329) is again copied from the C.N. I can trace no equivalent Castilian provision. The D.O. article is again in contradiction with the Partidas' conception of inalienability and the husband's control. In changing the law, the principles of marital authority have been adhered to. D.O. 39 (p. 329) is copied from the C.N. Since by D.O. 1 (p. 323) husbands and wives have been allowed to regulate their property as they wish within certain limits, the existence of the article under discussion is hardly surprising. Again there is no Castilian equivalent and again the French nature of this article is obvious. (D.O. 1 itself is very "French".) D.O. 40 (p. 331) is copied reasonably closely from the C.N. 1558. Domat as cited enunciates a provision fairly similar to the D.O. Once more I can find no Castilian equivalent. This article is not really relevant for the purpose of examining marital authority, but I have included it for completeness.

It is now appropriate to sum up this discussion of these articles by relating them to marital authority. The D.O. redactors, by adopting these C.N. provisions, have altered the law in a subtle way. In so far as they have stressed the interest of the wife in the dowry, they have

338. See Maleville, 3 Analyse, p. 274.
339. See supra, text at notes 199-200.
340. See note 333 supra, and the note Domat appends to his provision.
reduced the husband's control. Nevertheless, they have asserted marital authority by requiring the wife's authorisation by her husband or the court. This renders the provisions congruent with the other articles on authorisation. In the discussion I have stressed the difference of the D.O. articles from the Castilian law; but it should be pointed out that these articles could be regarded more as a development of that law rather than a complete break. The Castilian law showed the same ambiguity over the ownership of dowry, an ambiguity inherited from the Roman law. Febrero shows that dotal property may be alienated with the concurrence of the wife; but, in contradistinction to the French law, it is the husband who is envisaged as actually alienating the property. It may be asserted, therefore, that these articles are of specifically French provenance, and show a weakening of the husband's control over his wife's dowry, along with an assertion of marital authorisation of the wife.

It is now convenient to turn to the question of the control over the wife's other property. D.O.56 (p.335) states that all the effects of the wife which are not settled as dowry are paraphernal. This is identical to C.N.1574, which Batiza classes as the "verbatim" source. The D.L.V. refers to Part.4.11.17, Domat,341 and Febrero.342 Part.4.11.17 states: "Paraferna son llamadas en griego todos los bienes et las cosas, quier sean muebles o raices que retienen los mugeres para si apartadamiente et non entran en cuento de dote." This is an identical rule. Domat, section 1, no.7 as cited, states similarly; his section 4 no. 1 is again compatible and the same section's number 6 states that paraphernal property is distinguished from dowry by the marriage contract. The similarity of all these

341. Domat, 1.1.9.1.7 and 1.1.9.4.1 and 6.
342. Part 1, chap. 4, no. 11, pp. 215-6; and Part 2 (Parte Segunda), libro primero chap. 3, §1 nos. 42 and 54 pp. 175-6 and 180. (References not those of D.L.V., but of edition I used.)
provisions is hardly surprising, given their common foundation in Roman law. Febrero defines paraphernal bienes as "los que la muger lleva al matrimonio sin incluirlos en las dotales."\(^{343}\) He also states the difference between *parapherna* and *extradotales*, but opines that:

"... esta diferencia es puramente verbal, y el derecho lo llama indistintamente con la palabra griega *parafernales*, que equivale a la latina *extradotales*, adoptando en Castellano."\(^{344}\)

Febrero's definition of the wife's *parapherna*, is, as cited by the D.L.V., identical to that of the D.O.

A point of some, if minor, interest is that under the Castilian law a wife could have a third class of property—*bienes propios*. Gomez states of the wife:

"Nam primo potest habere bona dotalia que, fuerunt date in dotem, maritio, in quibus solus maritus agit tanquam dominus.... Secundo potest habere bona paraphernalia quorum dominium est penes eam, administratio vero penes maritum, in quibus maritus agit sine mandato. Tertio potest habere alia bona propria quorum dominium et administratio est penes eam, in quibus sola uxor potest agere, vel maritus praestita cautione tanquam coniuncta persona...."\(^{345}\)

What is the relationship between this third form of property and the *parapherna*? Paraphernal property was property brought to the marriage, but not as dowry, and as will be seen, the husband may, but need not, be granted administration of it.\(^{346}\) *Bienes propios* appear to have been property not brought to the marriage, and over which the wife always had control. Thus, *bienes propios* were in the same position as *parapherna* of which the husband had not been granted administration. The difference is perhaps not of importance, and certainly the D.O. redactors have not incorporated it in the Digest. The disappearance of this third class of property would appear (potentially at least) to extend the sphere of a husband's interest in his wife's property.

---

\(^{343}\) No. 11 as cited note 342. (Part.1.)

\(^{344}\) No. 42, pp.175-6, as cited note 342. (Part.2.)

\(^{345}\) Gomez, *op.cit.*, commentary on *layes* 54-59 of Toro, no.1, p.504.

\(^{346}\) See *infra*, text at notes 349-356.
Could this be an unknowing change on the part of the redactors? Febrero does discuss the class of property called **proprios**, but, as regards the wife, he classes them with **bienes parafernales**.\(^{347}\) We may conclude that this class of property might have been known to the redactors. As a class, however, it was not readily distinguishable from the parapherna, and the difference was, perhaps, mainly one of terminology. As regards **bienes proprios**, just as **parapherna**, a wife would require authorisation to act.\(^{348}\)

\[\text{D.O.58 (p.335) states thus:} \]

"La femme a l'administration et la jouissance de ses biens paraphernaux, mais elle ne peut les aliéner, ni paraître en jugement, à raison desdits biens, sans l'autorisation du mari, ou à son défaut, sans permission de la justice."

Batiza gives C.N. 1576 as the "almost verbatim" source, and the two articles are indeed virtually identical. The D.L.V. cites Domat \(^{349}\) and Febrero. \(^{350}\) Domat, as cited, differs from the D.O., as he does not require the wife to be authorised in her dealings with her **parapherna**. Febrero, as cited, mentions the two possibilities, first of the husband having control of the **parapherna**, and second, of the wife having control. In the second case, he points out that the husband has no responsibility.\(^{351}\) He does not expressly point out that the wife would require authorisation for her administration; but, for contracts, she would indeed require authorisation under the **Leyes de**

\[\text{347. Part.1, ch.4, no.13, p.216: "Otros se llaman Proprios, y son los que cada conyuge lleva al matrimonio, y hereda, ó adquirere durante el por ultima voluntad ó por contrato lucrativo, y á estos llaman tambien hereditarios. En todos ellos tiene su dueño la propiedad y dominio natural; pero en los de la muger toca á su marido el civil para administrarlos, y mantener con sus frutos las cargas del matrimonio, si al tiempo de casarse no se pactó expresamente otra cosa entre los dos en cuanto a los parafernales como pueden hacerlo."} \]

\[\text{348. See generally, de Funiak, op.cit., vol.1, pp.317-9.} \]

\[\text{349. Domat, 1.1.9,1.2 and 3.} \]

\[\text{350. Part 1 ch.4, §1 no.11, pp.215-6 and Part 2 libro primero ch.3, nos.46-54, pp.177-180. (These references are, of course, to the edition I used, and are those of the passages differently referred to by the D.L.V.)} \]

\[\text{351. As cited note 350 supra.} \]
Thus, the Castilian law here would be roughly identical with the D.O.; it should be noted, however, that authorisation in Castilian law was very different from that in the French law. 353.

D.O.59 (p.335) states:

"La femme peut donner sa procuration à son mari, comme à toute autre personne, pour administrer ses biens paraphernaux, et dans ce cas, il sera tenu vis-à-vis d'elle, comme toute autre mandataire."

C.N.1577 is almost identical. (The source according to Batiza.) The D.L.V. refers to Domat and Febrero. 354, 355. Domat and Febrero both allow the wife to grant to her husband administration of her parapherna, and he is responsible for it, although neither describe this responsibility as that of a mandatary. In the Castilian law, as in D.O. 62 (pp.335-7), a husband's estate is tacitly hypothecated for the return of the wife's parapherna. This tacit hypothec is preferred, in Castile, to prior personal creditors, and to later creditors whether or not they have an express hypothec, but not to prior creditors with express special or general hypothecas. 357. A further point arises out of D.O.62, and it will be considered below.

D.O.57 (p.335) is of some interest. It states that if all the wife's goods are paraphernal, and there is no provision in the marriage contract, then she shall contribute a third of her income to support the charges of the marriage. This is drawn from C.N. 1575. The D.L.V. cites no authorities. This is not surprising, since the C.N. article was a new arbitrary provision. 358. There was

352. See infra, text at notes 392-400. See also supra, text at notes 80-104.
353. See supra, text at notes 62-104 and infra, text at notes 452-455.
354. Domat, 1.1.9.4.3 and 5.
355. Part 1, ch 4, §1, no.11, pp.215-6, and Part 2 libro primero, ch.3, nos. 44 and 45.
357. Ibid.
358. See for discussion, infra on Quebec. See also Maleville, 3 Analyse, pp.287-8. Note that this article arose out of the droit écrit, where, unlike Castilian law, there was no community, and where the fruits of a wife's parapherna remained her own.
no Castilian equivalent. For the Castilian law, it is appropriate to refer back to the discussion above of D.O. 64 (p.337), which described the composition of the community. 359. It was pointed out that D.O. 64 excluded from the community the fruits of the wife's separate assets; such fruits, under the Castilian law, went to the community and hence to support the changes of the marriage. The article at present under discussion, D.O. 57, helps explain the change in the law contained in D.O. 64. D.O. 57 (which precedes D.O. 64 in the code) copied the provision of the C.N., and thus necessitated the change in the law on composition of the ganancial community. What the D.O. redactors have done is hand the fruits of her parapherna to the wife (unless her husband administers it under D.O. 59) and substitute for the sensible Castilian provision the arbitrary one of the C.N. The only reason that can be ascribed for such a change is one of desire to copy the C.N. (or ignorance of the Castilian law, which seems unlikely). Further, D.O. 57 does not make an exception for when the parapherna are administered by the husband; whereas under D.O. 64 if he has administration and enjoyment of them the fruits go into the community. The law is clearly confused. Whether or not this article has any bearing on puissance maritale is difficult to say. It is clear, however, that the redactors were here very influenced by the French code, and readily copied its dispositions.

D.O. 62 (pp.335-7) has already been referred to. 360. As well as the point already discussed, this article states that, if a husband enjoys the parapherna, he is bound by all the obligations of a usufructuary. This part of the article appears to have been copied from C.N. 1580. 361. It raises the question of the nature of the husband's

---

359. See text supra at notes 302-306.
360. See text supra, at notes 354-357.
361. According to Batiza the "almost verbatim" source, first part.
interest in the dowry and parapherna. D.O. 43 (p. 331) classes the husband as a usufructuary and D.O. 29 (p. 329) classes the wife as owner. Both of these articles take these views from the French law: first the C.N., article 1562, and second, Domat. 362. In D.O. 62, the C.N. has again been followed, as the logic of the code required. The statement that the wife is owner of the dowry is traditional.363.

To classify the husband as a usufructuary is rather more problematic. As seen, Febrero did so.364. In Roman law, according to some sources, dos became the property of the husband, but he had to restore it.365. In fact, throughout the ancien régime, the authors disputed over the exact nature of the rights of husband and wife in the dowry.366.

The C.N. chose one solution, the same as Febrero had chosen, and the D.O. redactors enacted the same. The Siete Partidas, reflecting juristic thought of their period, do not class the husband as a usufructuary. The relevant provisions of the D.O. are obviously strongly influenced by the C.N.: the redactors are copying the French code rather than Febrero. Further, as already pointed out,367. the C.N. puts a new stress on the wife's interest in the dowry, a stress copied by the D.O. The differences between the C.N. and the Castilian law on this point are more differences of approach or attitude; but the adoption of the C.N. provisions in the D.O. indicates that the French attitude has been followed.

In summing up the discussion of control over property during marriage, and its consequences for marital authority, the first point to be made is that the whole approach of the D.O. to matrimonial property is, in nature, French rather than Castilian. This is shown by the accent on

362. See text supra, at notes 325-6.
363. See text supra at note 326.
364. See text supra at note 337.
366. See Brissaud, History, pp. 802-3.
367. See text at notes 330-337 supra.
ante-nuptial marriage contracts and the pervasive influence of French sources in the substance of the law. Some aspects of the Castilian law have been overturned; other areas of the law, which have been left compatible with the French provisions, have been given a different emphasis, as a result of the adoption of French models. In both the D.O. and the Castilian law, the husband controls community property. He controls his wife's dowry. The D.O. redactors, by copying provisions from the C.N., have given greater prominence than is found in the Castilian law, to the rights of the wife in her dowry. A wife controls her parapherna unless she hands control of it to her husband. The wife's actions with regards to her parapherna require authorisation, according to both the Castilian law and the C.N. It must be noted, however, that the nature of the requirement of marital authorisation in both the C.N. and the Castilian law is rather different. The Castilian law was more liberal than the French droit coutumier and the C.N. Thus, when this is taken into account, the Castilian law and the C.N., in many ways apparently congruent, may not be so similar as the discussion has already suggested. It is relevant to recall D.O.4 (p.325),368, which gave an account, derived from the droit coutumier, of ruissece maritale, which Pothier described as logically preventing the general authorisation of wives. Such general authorisations were permissable in Castille. If this is taken into consideration, it becomes apparent that authorisation of the wife as regards her actions with her personal property was very different in the Castilian law and the C.N. Thus, apparently similar attitudes to the wife's actions may well be revealed to be radically different, when the provisions on authorisation are examined.

It is worth stressing that the approach to dowry and

368. See text at notes 306-311 supra.
paraphernalia is heavily influenced by the C.N., in that the wife's interest has been stressed vis-à-vis that of her husband. This might appear to have lessened a husband's authority over his wife's property but it should be noted that, along with the apparent technical increase of the wife's interest, the requirements of authorisation have also been asserted. Although this change is arguably more one of terminology than one with real effects, it is important in revealing the attitude of the redactors in Louisiana. Further, although the Castilian sociedad de gananciales has been adopted as the "statutory" matrimonial régime, the composition of the ganancial community has been affected by the reception of C.N. 1575 as D.O. 57 (p.335); a reception which seems to have caused confusion.369.

3. Puissance maritale: aspects other than property.

In this subsection we turn to consideration of the non-property aspects of the husband-wife relationship, and consider the power-balance within the marriage. We shall examine the articles in chapter 4, "Des Droits et Devoirs respectifs des Époux," of the fourth title of Book one of the D.O. In form this chapter is very similar to that of the C.N.: chapter 6 of its fifth title of its first Book, the chapter having the same rubric. The relevant C.N. chapter contains fifteen articles, that of the D.O. eleven. In the discussion of the D.O. articles, the nature of the "absent" C.N. provisions will be indicated; but it can straightaway be pointed out that these "absences" are not too significant, and that the influence of the C.N. on this chapter is obvious. In this chapter, all of the D.O. provisions, bar the last, are drawing on the 1807 Act, ss.60-69 inclusive.370. Linguistically, the D.O. articles are sometimes closer to the C.N., sometimes closer to the Act. In the introduction to this chapter, it was pointed

369. See text at notes 357-360 supra.
370. See note 177 supra.
out that the Castilian law was rather more liberal than the C.N. or droit coutumier on the question of authorisation. Full discussion of the D.O. articles will reveal their attitude; but it can be pointed out that if they depart from the Castilian law they are following the 1807 Act, and that this act changed the law, not the D.O. This brings us back to the point above: the absences in the D.O. of articles equivalent to some of the C.N. provisions can tentatively be ascribed to the redactors' following of the Act. The Act did not have sections equivalent to the excluded C.N. provisions. In one sense this is an obviously inadequate explanation: the redactors could depart from the Act, as they did in including C.N. 226 as D.O. 29 (p.29). Because of this, the excluded C.N. provisions will be examined to see if any reason, other than copying the Act, can be given for the redactor's rejection of them.

In the conclusion to this subsection, we will discuss the 1807 Act, its relation to the D.O. and the previous Castilian law, and its likely source of inspiration on these matters. In the discussion of the articles, it will be shown that the D.O. here embodies a primarily northern French conception of puissance maritale, a conception rather different from that of the Castilian law. The Castilian provisions that radically change the nature of puissance maritale in that law will be discussed (mainly) in the concluding remarks to this subsection.

The first article to be considered is D.O. 19 (p.27), which states that "Le mari et la femme se doivent mutuellement fidélité, secours et assistance." This is identical to s.60 of the 1807 Act (the source according to Batiza) and very nearly identical to C.N. 212. The D.L.V. cites Pothier and Part. 4.2.7 at its end. Pothier, as cited, is roughly congruous with the D.O.: he stresses

---

371. See text at notes 90-104 supra.
the reciprocity of these marital duties; he also stresses the duty of the husband to receive and support his wife, and that of the wife to live with her husband (provided he does not leave the royaume). Part. 4.2.7 is again similar, and stresses the duties of loyalty as promised in marriage supported by the church. This D.O. article is on the lines of a moral precept, and is not really relevant from our point of view, except in so far as infidelity could ground an action for separation.

C.N. 213 is one of the "absences" in the D.O. In the C.N. it is the article following from the above. It states that the husband owes protection to his wife and the wife obedience to her husband. Why would this be excluded? It is a provision compatible with the others of the D.O. and indeed with the Castilian law: the wife's obedience was promised during the religious marriage ceremony. It cannot have been excluded on ideological grounds: the D.O. redactors were hardly champions of women's equality and rights. The only reason that can be given is that here the redactors were following the 1807 Act closely, and it had no equivalent section.

D.O. 20 (pp. 27-9) is as follows:

"La femme est tenue d'habiter avec son mari et de le suivre partout où il juge à propos de resider; le mari est obligé de la recevoir et de lui fournir tout ce qui est nécessaire pour les besoins de la vie, selon ses facultés et son état."

This is almost identical to s. 61 of the 1807 Act, and indeed to C.N. 214 and the Proj. An. VIII, 1.5.64. The D.L.V. refers to Pothier on Puissance du Mari and on Marriage. In the first treatise cited, he states that a wife has to follow her husband except out of the kingdom, while in the second, as cited, he states a husband has to

373. T.C.M. no. 379, Bug. 6 p. 174.
375. T.C.M. nos. 382-3, Bug. 6 p. 175.
376. See infra.
377. These three Batiza claims as the equal "almost verbatim" sources.
379. T.C.M., nos. 380 and 382, Bug. 6 pp. 174 and 175.
receive and support his wife, and the wife has to follow him, except out of the kingdom. The D.L.V. makes no reference to Castilian law; but it is obvious that the position there would be the same. Again, this article of the D.O. is typical of its period, and is not significant for our purposes. It should be noted that the D.O. phrases these two duties as equal and reciprocal, but in effect they are not. The wife is in a lesser position. As Pothier says explicitly the duty to follow her husband is part of "les devoirs de soumission qui sont dus à un supérieur." 380.

The next article, D.O. 21 (p. 29) is of more interest:

"La femme ne peut ester en jugement sans l'autorisation de son mari, quand même elle serait marchande publique, ou serait séparée de biens d'avec son mari."

Thus, a wife requires authorisation to be either plaintiff or defendant. S. 62 was slightly different:

"The wife cannot appear in court as plaintiff without the authority of her husband, although she may be a public merchant or possess her goods separate from her husband."

D.O. 21 has apparently slightly restricted the wife's capacity by copying C.N. 215. 381. (C.N. 215 also refers to wives non-commune; this is not applicable given matrimonial property in the D.O. 382.) This apparent change in the law indicates the extent to which the D.O. redactors were adopting the French conception of nuissance maritale. The D.L.V. refers to the Nueva Recopilación and the Leyes de Toro, 383. Pothier, 384. and Febrero. 385. Pothier states that a wife cannot appear in court unless authorised. The specific references of the D.L.V. to Febrero are to the ramifications of the Castilian law, rather than to the equivalent provisions, although in one cited section Febrero does state that authorisation is required even after separation e mensa e thoro. 386. In a nearby section, Febrero does, however, give an account of the Castilian law as found in the Leyes de Toro. 387. The Nueva Recopilación and 388.

381. Batiza claims these as equal "almost verbatim" sources, and he claims Proj. An. VIII, 1.5.65, as a subsidiary.
382. See infra on Quebec.
383. Rec. Cast. 5.3.2 and Toro 55.
384. T.P.M. no. 55, Bug. 7, p. 22
386. No 109 cited note 385 supra.
Toro provide thus:

"La muger durante el matrimonio, sin licencia de su marido, como no puede fazer contrato alguno, assi mismo no se puede apartar, ni desistir de ningun contrato que á ella toque, ni dar por quito á nadie del; ni puede fazer casi contrato, ni estar en juizio, faziendo, ni defendiendo, sin la dicha licencia de su marido: y si estuviere por si, ó por su procurador, mandamos, que ne vala lo que fiziere."

Under Toro 57, the judge, "con conocimiento de causa legitima ó necessaria", could give the wife authorisation, or force the husband to give his. In relevant part, these Castilian provisions might seem very similar to those of the D.O. or C.N. The Castilian law does differ greatly, however, when it is considered that a husband can ratify his wife's unauthorised actions, and can give her a general authorisation. Note that the provision just quoted does not mention separation of property. Further, it does not mention wives who are public traders. In the D.O., following the C.N. and the 1807 Act, wives who are public traders require authorisation to appear in court. The most relevant Castilian ley (not cited in the D.L.V. in this connection) is Fuero Real 3.20.13:

"Maguer que muger de su marido no puede fiar ni fazer deuda sin otorgamiento de su marido: pero si fuere muger que vende o compra, por si o aya menester de mercaderia vala todo deuda y toda cosa que fiziere en quanto pertenesce a su menester."

Thus a wife who was a public trader could contract without authorisation. The ley does not mention court appearances, and nor do Gomez, Febrero and Montalvo in their discussions.

---

388. Also Rec. Cast. 5.3.4.
389. Toro 58 and Rec. Cast. 5.3.5: "El marido puede ratificar lo que su muger oviere hecho sin su licencia, no embargante que le dicha licencia no aya precidido ora la ratificacion sea general ó especial."
390. Toro 56 and Rec. Cast. 5.3.3: "Mandamos, que el marido puede dar licencia general á su muger para contraher, y para hazer todo aquello que no podia fazer sin su licencia: y si el marido se la diere, vala todo lo que su muger hiziere por virtud de la dicha licencia."
of wives contracting as public traders. Thus, it would appear that the Castilian authorities do not consider the point. If the general rule, as in ley 55 of Toro, were applied, then the Castilian law would be as that of the D.O., except for the matter of ratification and general authorisation. The width of the phrase "toda cosa que fiziere" might suggest the interpretation that she should be allowed estar en juicio, in matters of her trade, without being authorised. What is more important, perhaps, is to understand that the Castilian law and authorities were not so interested in the point at issue, as were the French, and the D.O. Over-all, it would appear that the D.O. in this article has increased the authority of the husband.

We may conclude discussion of this article by pointing out that the D.O. redactors have increased puissance maritale by using C.N. 215 to modify s.62 of the 1807 Act. The French conception of marital authority, found in both the D.O. and the Act, is wider than the Castilian. Thus, both the Digest and the Act involve an increase in marital authority in Louisiana.

At this point, the D.O. misses out a C.N. provision: C.N. 216. This article states that the husband's authorisation is not necessary when the wife is pursued in a police or criminal action. This absence in the D.O. is not very important, and we need not consider it.

D.O. 22 (p.29):
"La femme même lorsqu'elle est séparée de biens de son mari, ne peut donner, aliéner, hypothéquer ou acquérir à titre onéreux ou gratuit, sans le concours de son mari dans l'acte, ou son consentement par écrit."

This article is virtually identical to s.63 of the 1807

391. Pebrero, Part 1, ch. 7, §4, no. 102, p.62 and Gomez, commentary no. 7 on leyes 54-9 of Toro. Montalvo, gloss "d" on ley 13 of Book 3, tit 20 the Fuero Real, 1544 edition. See infra, note 411, where Gomez is quoted.
Act, and C.N. 217. The D.L.V. refers to the Nueva Recopilación (as quoted in text above) and the Leyes de Toro, and also Pothier and Febrero. The provision of the Toro and the Nueva is broadly similar to that of the D.O., although they do not mention se'paration de biens; but the proviso to the discussion of the previous D.O. article must be recalled: the Castilian law allowed general authorisation and validation after the act. Thus, although apparently similar, the law was in fact different. Pothier gives an extended discussion of authorisation, how it is given, and of women séparées de biens. It should be noted that since Pothier is discussing the pre-Code customary law, authorisation, as he describes it, is a much more formal affair than in the C.N. or D.O. article.

Febrero states that a wife requires authorisation if separated e mensa e thoro, and discusses generally the requirements of authorisation from the point of view of notarial practice. It should be pointed out that séparation de biens, without séparation de corps, did not really exist in Castilian law. The Castilian requirements for authorisation were laxer than in the droit coutumier.

392. Curiously enough, s.63 of the 1807 Act, and C.N. 217 are closer to each other than either is to D.O. 22 (p.29). This is because s.63 starts "The wife even where there is not a community of goods between her and her husband, or where she holds her property separate...." C.F. 217 starts: "La femme non commune ou séparée de biens...." Both continue thereafter as does D.O. 22 (p.29). Note that the D.O. makes no allowance for no community.

393. Toro 55, quoted supra, text at notes 387-388. 394. T.P.M. nos 3-14 and 15-19, Bug. 7, pp.3-9. The D.L.V. actually cites the sections and subsections; but here I have converted the reference to the form used in this study.


396. T.P.M., nos. 3-6 esp. no. 6, Bug. 7, pp.3-4. On the formalities of authorisation in the ancien droit, see infra, Quebec.

397. No. 109, of ch 7 as cit. note 395 supra.

398. As cited note 395 supra.

399. See infra, text at notes 465-473.

400. See infra, text at notes 450-453.
It would be wrong, however, to argue that here the D.O. redactors have adopted the C.N. provisions as a near equivalent to the Castilian law. The D.O. redactors are following the 1807 Act, which has adopted a northern French conception of marital authority, rather different from that of the Castilian law. This article follows the 1807 Act's departure from the Castilian law. Proj. An. VIII, 1.5.66, the equivalent article of C.N. 217, is interesting in that it has an extra paragraph stating that "Le consentement du mari, quoique postérieur à l'acte, suffit pour le valider." Thus, the 1800 Projet allowed retrospective validation of deeds. This is similar to the Castilian law, and the D.O. redactors have obviously rejected this provision (if they considered it) for the same reasons as they rejected the Castilian equivalents.

D.O.23 (p.29) states that: "Si le mari refuse d'autoriser sa femme à ester en jugement, le juge peut donner l'autorisation." This is identical to C.N. 218. The 1807 Act, s.64, in line with s.62, only mentions wives as plaintiffs, and is more specific as to which courts the wife should apply for authorisation. The redactors have adopted the rule of the C.N., as they require to do for consistency. D.O.24 (p.29) provides that:

"Si le mari refuse d'autoriser sa femme à passer un acte, la femme peut le faire citer devant le juge qui peut l'autoriser, à passer cet acte ou lui refuser cette autorisation, après que le mari aura été dûment entendu ou appelé devant lui."

C.N. 219 is very similar (the differences between the two articles being primarily due to different procedure). The 1807 Act, by its s.65, provides similarly to the D.O.; although, as with s.64, more precise procedural details are

401. See text supra at notes 380-382.
402. Batiza classes the C.N. article as the "verbatim" source, and the 1807 Act as a subsidiary, along with Proj. An. VIII, 1.5.6.7, first part.
403. Batiza classes C.N. 219 as the "almost verbatim, first part" source, with Proj. An. VIII, 1.5.67, second part, as a subsidiary. Strangely, he ignores s.65 of the 1807 Act.
given, rather as in the C.N. On both these articles of the D.O., the D.L.V. refers to the same texts, the *Nueva Recopilación*, 5.3.4., Pothier, 404. and Febrero. 405. The *Nueva Recopilación*, taking its provision from Toro 57, provides:

"El juez, con conocimiento de causa legitima, & necessaria, compela al marido que de licencia a su muger para todo aquello que ella no podria fazer sin licencia de su marido: y si compelido no se la diere, el juez solo se la puede dar."

The effect of this ley is broadly similar to that of the D.O. provisions, although the judge's first action is to compel the husband to consent, and only if the husband does not obey, does the judge give authorisation. Pothier, as cited, gives the same rule as the D.O. and C.N. Febrero also, of course, recognises this power of the judge. 406.

This article could appear to be an example of Pascal's notion of the D.O. redactors using the C.N. as an expression of the Castilian rules, 407. considering that the Castilian provision is similar in substance to the D.O. and C.N. articles. However, if the context of the provision is borne in mind, it will be obvious that this article is another expression of the importance of northern French *puissance maritale*, as adopted in the 1807 Act and D.O.

C.N. 219 is another article not included in the D.O.: it relates to procedure for judicial authorisation, and its specificity to the French court system obviously meant its exclusion from the D.O. The redactors of the D.O. could obviously have included a provision equivalent relating to the Louisiana courts; but this would have been unnecessary, and they obviously chose to follow the sequence of the 1807 Act.

D.O. 25 (p. 29) is as follows:

404. T.P.M. no. 12, Aug. 7, p. 5.
405. Part 1, ch. 7 § 4, no. 110, pp. 69-70, and Part 2, libro tercer, ch. 1, no 27, p. 239.
406. See e.g., no. 101, p. 61 of ch. 7 § 4 of Part 1. Some of the references of the D.L.V. here are not directly relevant; see note 405.
407. See *Reply*, pp. 605-7
La femme, si elle est marchande publique, peut, sans l'autorisation de son mari, s'obliger pour ce qui concerne son négoce, et audit cas, elle oblige aussi son mari, s'il y communauté de biens entre eux.

La femme n'est pas réputée marchande publique, si elle ne fait que détailler les marchandises du commerce de son mari, mais seulement quand elle fait un commerce séparé.

C.N. 220 is almost identical, and s.66 of the 1807 Act is of the same substance. The D.L.V. refers only to Pothier, and he does indeed lay down a similar principle. Although the D.L.V. refers to no Castilian law, it is necessary here to see if we can recover what its provisions would be. (An interesting point is why the D.L.V. referred to no Castilian provisions.) A basic text is Fuero Real, 3.20.13, already quoted. This provides that a wife who is a public trader can oblige herself in the course of that trade, as regards that trade. This is the same as the first part of the first paragraph of D.O. 25. Febrero and Gomez state that a wife who is a public merchant does not require authorisation. The Castilian law can also be assumed to be the same as the second paragraph of D.O. 25, since otherwise the wife would not be acting as a public trader, but as an agent for her husband. In the Castilian law, would the wife also obligate her husband if there were community between them? This is more difficult to say.

Batiza classes the former as the "almost verbatim" source, and the latter and Proi. An. VIII, 1.5.68 as subsidiary sources.

See text after note 391 supra.

Febrero, Part 1, ch. 7, §4, no. 102, p.62 and Gomez, commentary no. 7 on leyes 54-9 of Toro: "Sexto quaero, si uxor sit posita alicui officio vel negotiationi sciente et patiente marito, ut quia sit posita mercantiae, vel officio obstetricis, vel chirurgiae vel similii officio, an requiratur licentia mariti in contractibus eius: et breviter et resolutive dico et teneo quod non, quia eo ipso, quod de voluntate mariti est posita in illo officio visus est licentiam et consensum sibi praestare...."

Interestingly, in his gloss "d" on ley 13 of the Fuero Real, 3.20, Montalvo also talks of officium obstetricis, vel chirurgiae. Gomez might be following Montalvo's gloss fairly closely, or these might be stock examples.
primarily because the most utilised sources, the Nueva Recopilación, and the Leyes de Toro, do not directly envisage the situation. Nor do the provisions of the Fuero Real on the sociedad de gananciales: (the quoted text is appended to title 20, "De las deudas y de las pagas", almost in the manner of an afterthought). This lack of relevant provisions is undoubtedly the result of the Castilian law's lack of interest (in comparison to the droit coutumier) in marital authority. The French droit coutumier had a tradition of commentary on the puissance maritale, and the question of wives as public traders had frequently been discussed. One point can be made; the profits of the wife's trade would have accrued to the ganancial community. It must be supposed that the wife as public trader was using her own property, since if she were using sociedad property, it is doubtful if, given the husband's control, this would have amounted to a separate trade. Thus we must assume that a wife was using her separate property. Thus, the debts she would contract would seem to be separate debts not community debts, although this is unclear. To give an example of the uncertainty, it is convenient to quote de Funiak:

"debts contracted by a spouse in a matter not concerning the actual marriage and the conjugal partnership and not for its benefit were not payable from the community property." 414.

"In the Spanish law, on the other hand, the income etc., from the separate property or business interest of either spouse was community property. Hence contracts or transactions in connection with such separate property or separate interests of the spouse which raised obligations on the part of the spouse would usually be transactions to assure or further interests or property rights, the returns from which would belong to the community. Even though the debts or obligations might arise from transactions relating to interests or property belonging individually to the spouse, it would be highly probable that the community had been or would be benefited in some way. And any debt or obligation relating to the community affairs and the success of the conjugal partnership would come under the head of a community debt." 415

412. See infra on Quebec.
413. See discussion at notes 302-306 and 358-360 supra, see also Pugh, p.6
415. Ibid. p. 450.
Note de Funiak's uncertainty. The Castilian law in this point was simply not certain. If de Funiak is correct, and he is plausible, then the sociedad would be obligated for the wife's debts arising out of her separate trade. Would her husband be liable? Again the Castilian sources do not envisage this question or deal with it in any way. One can infer that he is liable as regards his share of the community property. It is clear that we need not pursue this line of enquiry any further, as to do so would be pointless. Perhaps if we prosecuted the investigation to its logical end we might come up with a proposition similar to that of D.O. 25 (p.29) and C.N. 220.

That we might result with a provision similar to D.O. 25 is not any support for Pascal. What is important from the above discussion is that the Castilian sources just simply do not deal with the question on hand. The long quotation from de Funiak above is not based on any legal sources: it is his inference from the known provisions of the law. He is extending the law by a process of logical deduction. The Castilian law, just as it did not properly consider the question of wives as public traders, did not consider husbands' liability for debts arising out of their wives' trade. From this we must conclude that D.O. 25 (p.29) is indeed a very French provision: the Castilian law simply did not regulate the matter. The French law, because of its academic discussions of puissance maritale, regulated the question: its developed concept of marital authority had been worked out to include propositions of law such as that embodied in D.O. 25 (p.29) and C.N. 220. This explains why the D.L.V. referred to no Castilian provisions: apart from Fuero Real 3.20.13 there were none in point. This article of the D.O. is of particular importance in showing that the Castilian approach

416. See note 407 supra.
to this area of the law was entirely superseded by the French, even if this supersession came from the 1807 Act rather than the D. O. itself. It should be pointed out that this article might well usefully fill a gap in the old law.

The next D. O. article to be discussed is article 26 (p. 29): "Si le mari est interdit ou absent, le juge peut en connaissance de cause, autoriser la femme, soit pour ester en jugement, soit pour contracter." This is identical to C. N. 222, and the same principle is enunciated in s. 67 of the 1807 Act. The D. L. V. cites the Nueva Recopilación, 5.3.6, Febrero and Pothier. Curiously, here the 1807 Act includes the wife as defendant, unlike ss. 62 and 64. The Nueva Recopilación (the relevant passage being the 59th. ley of Toro) states that when "el marido estuviere ausente, y no se espera de proximo venider, o corre peligro en la tardenza", then the court, "con conocimiento de causa", when such cause is legitimate or necessary, may authorise the wife to act, such authorisation being as valid as one from the husband. This is broadly similar to the provision of the D. O., except that interdicted husbands are not mentioned. Febrero states:

"La muger casada no puede comparecer en juicio, ni elegir Procurador sin licencia de su marido, a menos que esté ausente del Pueblo donde se ha de litigar, y no espere su pronto regreso, que en este caso puede el Juez concedérse la con previo conocimiento de causa, o que el marido sea loco, furioso, mudo, o mentecato, pues aunque esté presente, se le estima por ausente...." 422.

---

417. C. N. 221 has been excluded from the D. O.: it is not relevant here.
418. The former is the "verbatim" source according to Batiza, while the latter, and Prot. An. VIII, 1.5.70, are subsidiary sources.
420. T. P. M., nos. 25-27, Bug. 7, pp. 11-12. The D. L. V. cites these sections in a different way: see note 394 supra.
421. Why there are these differences between the sections of this Act, I cannot tell. They are not, perhaps, important. I have only seen the English text of the Acts, the French version could be different, although this would seem unlikely.
422. Part 2, libro tercero, ch. 1, no 26 p. 238 as cit. note 419 supra.
Thus, although interdiction is not specifically mentioned, the circumstances in which a wife could go to court for authorisation were much the same as in D.O. 26 (p. 29). Like Febrero, Pothier as cited discusses the authorisation of wives whose husbands have succumbed to madness or have disappeared: two obviously related topics, which are included in the D.O. article's more general terms. Thus, the Castilian law and the French law were similar to each other and to the D.O. The article of the D.O. is, however, of a French cast, and its phrasing and terminology suggest the influence of the concept of puissance maritale found in the droit coutumier. It should always be remembered that in Castile a wife's capacity to act was always greater, and the laws interpreted liberally.

D.O. 27 (p. 29) states as follows:
"Toute autorisation générale, même stipulée par contrat de mariage, n'est valable que quant à l'administration des biens de la femme." C.N. 223 and the 1807 Act, s. 68 provide the same. The D.L.V. comments that this article is a "dérogation" from ley 56 of Toro, and the Nueva Recopilación, 5.3.3, and a statement of Febrero. This is correct: Castilian law allowed general authorisations. This article of the D.O., and this section of the 1807 Act overturn the Castilian law. They import, into Louisiana, the much stricter French conception of puissance maritale. The implications of this will more fully be worked out later; but it should be noted, that it was such general authorisations which Pothier considered to be contrary to the puissance du mari.

C.N. 224 has been rejected by the D.O. redactors for

---

423. Note that Febrero, following the Roman law, includes deaf mutes among those interdicted. The modern French law and the D.O. would not; see Maleville 1 Analyse, pp. 433-4, and Justinian's Institutes, 1.23.4.
424. The "verbatim" sources according to Batiza, with Proil. An. VIII, 1.5.70 as a subsidiary source.
425. Quoted supra, in note 390.
427. See text supra at notes 307-310.
inclusion; this is a very interesting article which will be discussed later.\textsuperscript{428}

D.O. 28 (p.29) states that:

"La nullité fondée sur le défaut d'autorisation, ne peut être opposée que par la femme, par le mari, ou par leurs héritiers."

C.N. 225 and s.69 of the 1807 Act provide the same.\textsuperscript{429} The D.L.V. gives no references. This article embodies a notion of the relative nullity of the unauthorised actions of wives, following the C.N., which had innovated, the old droit coutumier having rendered unauthorised actions absolutely null.\textsuperscript{430} The Castilian law was as follows. Ley 55 of Toro stated that unauthorised actions of wives were not valid.\textsuperscript{431} One point should be mentioned (again): husbands could give a general authorisation, so individual authorisations were not so crucial. Ley 58 de Toro\textsuperscript{432} allowed a husband to validate retrospectively, in general or in particular, actions of his wife. These are the only relevant legal provisions. It would appear that unauthorised actions were invalid until ratified, which is obviously unsatisfactory. Llamas y Molina pointed out the confusion caused by the contradictory nature of the two laws.\textsuperscript{433}

Further, the laws of Toro do not consider who had the right

\textsuperscript{428} See text \textit{infra} at notes 441-449.
\textsuperscript{429} Batiza states that the former is the "verbatim" source, and the latter and \textit{Proj. An.} VIII, 1.5.73 are subsidiary sources.
\textsuperscript{430} See \textit{infra} on Quebec.
\textsuperscript{431} Quoted \textit{supra} in text between notes 387 and 388.
\textsuperscript{432} Quoted \textit{supra} in note 389.
\textsuperscript{433} Op. cit. (note 99 \textit{supra}) commentary on \textit{ley} 58, no. 7: "Como la ley establece por regla general que en virtud de la ratificacion general o especial subsista el acto que habia celebrado la muger sin licencia de su marido, y entre los actos de esta especie se prohíba la comparencia en juicio, bien sea demandado o respondiendo, según la ley 55, se sigue claramente que también esta especie de actos celebrados por la muger sin licencia de su marido son comprendidos en la presente ley, y se revalidan por la ratificacion."
to have declared null and void a concluded contract (ex facie valid) on the grounds of want of authorisation. This is presumably because of the lack of attention devoted to marital authority in general. What this amounts to, in effect, is that on this question the Leyes de Toro are unsatisfactory. D.O. 28 (p.29) can be declared to be firmly rooted in the French tradition, not the Castilian. Having said that the provisions of Toro were unsatisfactory, it is necessary briefly to examine the attitude of the Spanish authorities to the interpretation of this question. The typical attitude was that of Antonio Gomez,434 and in his commentary on Leyes 54-59 de Toro he addressed himself to the question: "si contractus sit utilis ipsi mulieri, an possit fieri et valere sine licentia viri?" The way in which he argued the point, and the conclusion he came to, are both instructive. It should first be noted that he had already admitted the incapacity of married women to contract without licentia mariti.435 He first points out that it is open to the husband not to ratify the unauthorised contract. He then gives an extended discussion of the position of the contracts of unauthorised minors, pointing out the circumstances in which their contracts would be valid despite want of authorisation from their tutors or curators, and, with much citation of Justinian's Code and Digest, and of jurists such as Baldus, Bartolus and Albericus, he concludes that the general view was that the contracts of minors, unauthorised by tutors or curators, were valid, if the contracts were to the benefit of the minors. Following the obvious analogy, he turns to the provisions of Toro on the contracts of married women, and what he says is worth quoting in full:

"Tauri, ubi habetur, quod quando maritus est absens et non speratur venire de proximo, et contractus apparent utilis mulieri, potest adiri iudex ut

435. See the six conclusiones at the start of his first commentary on leyes 54-59.
praestet licentiam in defectum mariti: ergo sentit clarce, quod etiam, si contractus sit utilis, non valet, nec potest fieri sine licentia mariti: quia notabiliter respondet et intelligo ut requiratur licentia, ut semper et perpetuo valeat et teneat, licet postea deficiat utilitas contractus: sed in nostro casu et quaestione utilitas debet durare et probari ut valeat et teneat contractus, quo casu valebit et tenebit contractus sine aliqua licentia mariti vel judiciis." 436.

In other words, if the utilitas of the contract (that is its benefit) lasts and can be proved, then the contract is valid and adhered to without any authorisation, whether from the husband or the judge. Febrero stated the law to be that, when the wife contracted unauthorised, then the contract was valid "cuando hace contrato es util." 437.

The Castilian law is thus seen to be rather different from that in the C.N., D.O., and 1807 Act. What is most significant though, is the very different way in which Gomez conceived of the problem. The C.N. provisions still conceived of unauthorised acts being null ab initio, whereas the Castilian law did not. Ultimately, the effect of the Castilian law and of the C.N. might be broadly the same; but the whole approach to marital authority on this question was different. Authorisation under the Castilian law lacked the rigour it had in northern France. Here the D.O. and 1807 Act imported the French conception of puissance du mari.

The final D.O. article to be discussed in this subsection is D.O. 29 (p.29), which briefly states: "La femme peut tester sans l'autorisation de son mari." This is identical to C.N. 226.438. The D.L.V. cites no works or statutes. There is no equivalent provision in the 1807 Act. This article was included in the C.N. because several coutumes had taken puissance maritale to the extent of requiring a husband to authorise his wife to make a will:

436. Commentary no. 2 on leyes 54-9 of Toro.
438. According to Batiza, the "verbatim" source, with Proj. An. VIII, 1.5.74 as a subsidiary source.
for example those of Burgundy and Normandy.\textsuperscript{439} C.N. 226
is thus the product of specifically French circumstances,
and of the very extended scope of \textit{puissance maritale} in
the \textit{droit coutumier}. The D.L.V. cites no Castilian sources:
this is hardly surprising, because the whole thrust of
marital authorisation in Castille was so radically different
from that in France that in the \textit{Leyes de Toro}, for example,
it would never have been considered that a wife might need
her husband's authorisation to make a will. Such an
authorisation would have been antithetical to the general
Castilian approach. In so far as this is the case, one
can say that D.O. 29 indeed expresses the pre-codification
Castilian law; but the fact that it was thought necessary
to insert such a provision shows to what extent the French
concept of \textit{puissance maritale}, its individual provisions
and modes of expression, had been adopted into Louisiana
by the 1807 Act and the D.O. Gomez, in commenting on \textit{ley}
3 of Toro (a general provision on testation), does say
"Ex quo infero quod licet mulier coniugata hodie in nostro
regno, non possit contrahere sine licentia mariti, tamen
bene poterit testari."\textsuperscript{440} The fact that this is the only
statement he makes on the question, and that it comes in
a discussion on testaments, not in the discussion on
authorisation, shows to what extent such a conception would
have been antithetical to the Castilian law. D.O. 29 (p.29)
is the result of the French conception of \textit{puissance maritale}:
the fact that the individual provision coincides with the
Castilian law is purely fortuitous.

Before going on to discuss the conclusions to be drawn
from the discussion in this subsection, it is appropriate
to devote some attention to the exclusion of C.N. 224 from
the D.O. This article provided thus: "Si le mari est mineur,
l'autorisation du juge est nécessaire à la femme, soit pour

\textsuperscript{439} See Maleville, \textit{1 Analyse}, pp.208-9, and see \textit{infra}
on Quebec.
\textsuperscript{440} Commentary no. 5 on \textit{ley} 3 of Toro.
ester en jugement, soit pour contracter." This provision in the C.N. removed an absurdity from the old customary law, to some extent reduced slightly the marital authority, and in strict theory was in fact illogical. There are two points at issue here. First, would such a provision have been useful in Louisiana? Second, why was it excluded? The first question is not easily answered. There does seem something curious in allowing a minor to authorise his major wife to do something he himself might not be able to do. This brings up points of law which will be discussed in answering the second question. In fact, the question as to suitability must be left open: there can really be no definitive answer. As to the second question there are some relevant points to be made. The Castilian law did not consider the question of minor husbands as separate from that of adult ones: the laws of Toro spoke of husbands generally. Further, the Siete Partidas had introduced into the Castilian law the Roman distinction between pupillage and minority, minors having greater capacity than pupils and acting along with their curators. The French customary law and the C.N. did not have this distinction: anyone below the age of majority was a minor in a unified notion of minority. In the French customary law and the C.N., the question of minors authorising their wives was an acute problem, because of the minor's very limited contractual capacity. On the other hand, in Castilian law as expressed in the Partidas (although the latter did not treat of authorisation), this problem would not be acute, as minors, following the Roman law, would have a greater capacity to act for themselves. Only those who were minors under curators could marry, as only they were above the age of puberty.

441. See Maleville, Analyse, p. 208 and infra on Quebec.
442. See infra on Quebec for a full discussion.
443. See Part. 6.16 generally, esp. leyes 1 and 13. Inguinión, Historia, vol. 1 p. 139 states: "En las Partidas la institución única, que el derecho germano y nuestros fueos establecían para la guarda de los menores, se ve sustituida por el doble sistema romano de la tutela y la curatela."
444. See supra, discussion of D.O. 6 (p. 25), text at notes 212-216.
no conflict with potestad paterna, because under ley 47 Toro, marriage emancipated.\textsuperscript{445} This explains why the Castilian sources, in contradistinction to the droit coutumier\textsuperscript{446}, ignored this question: it simply did not arise. Further, the fact that Gomez, for example, did not discuss this question is also a reflection of the relative unimportance and lax nature of marital authorisation in the Castilian law when compared to the northern French. In other words, in the Castilian law, the dealings of married minors would be dealt with under the general law on minority. Instructive in this respect is Febrero's discussion of Part 6.17.3: this ley stated that a husband ought not to be guardador of the goods of his minor wife, lest the wife, because of her love for her husband, not demand the correction of his mismanagement; and the husband should go to the judge for the appointment of a guardador of his wife's goods, a guardador who will be above suspicion. Febrero concluded that if a wife was under twenty-five, then the validation of her contract required the intervention of a judge and a curator.\textsuperscript{447} This restriction did not apply to a husband appearing in court for his wife, nor to his actions with bienes dotales. Febrero did not mention minor husbands. The Castilian law dealt with this matter from the perspective of minority, rather than from that of marital authority. The emphasis of the law was different from that of the droit coutumier, reflecting the different outlooks on authorisation by the husband, and on minority. In the D.O., the redactors have followed the Castilian divisions of nonage into pupillage and minority, which

\textsuperscript{445} "El hijo o hija casada y velado sea avido por emancipado, en todas cosas para siempre." See infra on paternal power.
\textsuperscript{446} Loisel in his Inst. Coust., 1.2.21, said: "Un marg mineur peut auctoriser sa femme majeure sans qu'elle s'en puisse faire relever: mais bien luy." The whole question of authorisation by minors in the droit coutumier will be canvassed infra on Quebec. Some commentators had thought they could not so authorise their wives; but by the eighteenth century, it was firm law that they could.
\textsuperscript{447} Part 1, ch.7 § 4 no 103, p.63.
might well explain why the C.N. provision has not been followed. There are a further two potential explanations of why the C.N. has not been followed here. First, the C.N. provision was an intrusion into the customary law conception of *puissance du mari*, which it rendered illogical in part.  

Pothier said:

"Un mari, quoique mineur, a le droit de puissance maritale sur la personne de sa femme, quoiqu'elle soit majeure; d'où il suit qu'un mari, quoique mineur, a le pouvoir d'autoriser sa femme, soit qu'elle soit mineure, soit qu'elle soit majeure, ce pouvoir étant un effet et une dépendance de la puissance qu'il a sur elle.

Un mari mineur, quoiqu'il n'ait pas le pouvoir d'amener ses propres biens immeubles, a néanmoins le pouvoir d'autoriser sa femme majeure pour l'aliénation des immeubles de cette femme."  

Hence, in the droit coutumier, the *puissance du mari* was such that a minor husband could validly authorise his adult wife. The C.N. provision under consideration detracted from the logic of the traditional *puissance*. The D.O. redactors, in excluding this C.N. provision, were following the premisses of the *puissance maritale* of northern France to their logical conclusion. They had introduced in every aspect so far the rigorous customary law conception; Pothier's views were well known to them. By omitting the C.N. provision, they allowed the customary law notion to remain logical. The D.L.V. contains no specific reference to Pothier's relevant provisions; but this is inevitable given the fact that specific references could only be made in connection with specific articles. Their omission of this article allowed the old French law to be in force and prevented specific reference to that law in the D.L.V. The desire to introduce the rigours of the customary law *puissance maritale* provides another explanation of this absence of C.N. 224 in the D.O. The final point in connection with this absence in the D.O.

---

448. See *infra* on Quebec, especially the reasoning of the redactors of the Quebec code.
is to do with the 1807 Act. In all the articles of the D.O. chapter under consideration, with the exception of D.O. 29 (p.29), the redactors have followed ss. 60-69 of the Act in sequence, even if they have sometimes preferred the expression of the C.N. to that of the Act.

There are three possible reasons for the omission of C.N. 224 from the D.O. The omission might well have been the result of all three possible influences acting together. The redactors, following the lead of the 1807 Act, throughout this chapter have introduced the concept of *puissance maritale* found in the *droit coutumier*. The inclusion of C.N. 224 would have destroyed the pure logic of their innovation. The exclusion of this article found precedent in the 1807 Act: the redactors' examination of the *Nueva Recopilación* would have shown that no equivalent provision was contained therein. Hence, everything would suggest to the redactors that C.N. 224 should not be copied in their code. That the redactors have copied so completely the concept of *puissance du mari* would suggest that their prime motive in excluding C.N. 224 was the desire to follow this concept in all its ramifications. Following the Castilian law could have been no more than an added bonus, since the redactors had so vigorously departed from its general notion and individual provisions on marital authorisation.

It should now be clear that this aspect of the D.O. is radically different from the equivalent Castilian provisions. These articles, following the 1807 Act,
amounted to a massive restriction of the capacity of married women. There were equivalent Castilian laws, but they were less comprehensive: wives could be given a general authorisation and their actions retrospectively validated, even by a judge. Further, the provisions were liberally interpreted. Another example from Gomez can be adduced to show the liberal interpretation of the leyes de Toro. In the droit coutumier, authorisation had to be very formal; it had to express, and it was disputed whether it had to be in the deed itself or could be in a preceding "acte".\textsuperscript{451} C.N. 217 (as followed by D.O. 22 (p.29)) mitigated this somewhat; but the husband still had to consent in writing or concur in the deed. The leyes de Toro did not regulate how authorisation should be indicated; but Gomez was of no doubt but that the mere presence of the husband, without his speaking a word, when his wife contracted was sufficient to render the contract validly authorised.\textsuperscript{452} Febrero too was of this opinion.\textsuperscript{453} There is an obvious and radical difference in attitude between the Castilian and French laws: here the D.O. and the 1807 Act adopted the French approach.

It has already been pointed out that Pothier considered the possibility of general authorisations, even in the marriage contract, as antithetical to the basic premisses of puissance maritale, namely that \textit{vir est carut mulieris} and was by virtue of his superiority the necessary guide and controller of the conjugal association as regards person and property.\textsuperscript{454} In the Castilian law, however,

\begin{itemize}
\item \textsuperscript{451} See e.g., the Coutume de Paris, article 223 on the formalities of the old law. See infra on Quebec for a full discussion of the old law; some coutumes were not so rigorous as that of Paris.
\item \textsuperscript{452} Op.cit., commentary no.5 on leyes 54-9: "Quarto quaero, si uxor contrahat cum alio in praesentia maritii, an sufficiat eius taciturnitas? et videtur quod non, sed requiritur consensus expressus \[he here cites various authorities including Baldus\] quia verba statuti debent intelligi propriet et ideo non sufficit sola praesentia mariti cum tacurnitate: quia est fictus et improprius consensus. Sed certe ego tenerem contrarium, quia pr[ae]dict[ae] regni non requirunt consensus mariti pro forma et solemnitate actus sed pro evitando et prejudicio eius."
\item \textsuperscript{453} Part I, ch. 7\textsuperscript{4}, no. 102, p.62. He does point out that not everyone was of this view.
\item \textsuperscript{454} See text supra at notes 307-311, and 424-7. It will be recalled that the D.L.V. referred specifically to this passage of Pothier.
\end{itemize}
general authorisations were permis-sable, contracts could be retrospectively validated either in particular or general by either the husband or the judge, and in the opinion of one of the leading jurists (and he was not alone in his opinion) unauthorised contracts, if beneficial to the wife, were valid. Clearly, the whole concept of marital authority and its concomitant, married women's incapacity, was, in the Castilian law, radically different from that in the French customary law and the C.N. In short, married women had effectively much greater capacity under the *Leyes de Toro*.

The redactors of the D.O. have followed the French concept of *puissance du mari*. It is important to try to recover their reasons for doing so, and thus explore the causes for these changes in the law. The existence of the 1807 Act has to be taken into account: it was this Act which originally introduced the *puissance du mari* of the droit coutumier into the territory. Further, the similarity of this Act to the C.N. and its projet (to which it is closer does not matter here) is too great to be coincidental. The Act must have been, at the least, strongly influenced by the French law, and it thus caused a radical departure from the Castilian model of *puissance maritale*. The existence of this recent legislation inevitably tied the hands of the redactors. Nonetheless, whatever the motives of the legislature, it is certain that the D.O. redactors

455. See Llamas Y Molina, op.cit., commentary no. 3 on ley 59 of Toro; Febrero, Part I., ch. 7 § 4, no 101, p. 61.
456. It would be of great interest to know the circumstances surrounding the specific background to the passing of the Act. Who drafted it? Why did it change the law in this way? Is it evidence of an ongoing revival of French law in the early territorial period? Consider James Brown's remark that the future House of Representatives in the territory would be dominated by French inhabitants "attached to French Law ... [passing] only acts resembling the Civil Law and the Spanish Ordinances formerly in force here." Dargo, op.cit. p.115.
approved of this change in the law. This is easily
demonstrated. First, their articles on matrimonial property,
all of which were not affected by this Act, embodied the
French conception of *puissance du mari*. Second, they
extended the scope of ss. 62 and 64 of the Act by copying
the C.N. That is, they deliberately extended the limitations
found in the Act on the capacity of married women, with
the result that the limitations exactly matched those
found in the *droit coutumier*. The inclusion of D.O. 29
(*p.* 29) also shows the extent to which the redactors were
copying the C.N. on this point. Third, the exclusion of
C.N. 224 (which could have been included without disturbing
the 1807 Act), given the close attention paid by the
redactors to the French code, shows how closely they were
adhering to the customary law conception of *puissance du
mari*, as presented, for example, by Pothier. Fourth,
the redactors, without departing from the individual sections
of the 1807 Act, could have defeated its provisions by
inserting articles equivalent to leyes 56 or 59 of Toro.
Such articles would have redirected the law into the
Castilian model. Instead, they chose to amend ss. 62 and 64
to be the same as the French law. Fifth, the redactors
could have openly amended the law as provided in the 1807
Act. They did so, even if to a minor extent, as regards
ss. 62 and 64. The title of the Digest acknowledged that
some amendments were included in the provisions. It
would always have been open to the legislature to reject
such amendments. There can be no doubt, however, that the
redactors preferred the French provisions, and that they
deliberately extended the 1807 Act's introduction of the
French concept of *puissance du mari*.

Some points should be made on the redactors' reasons
for adopting the French provisions, and the suitability
---

457. These articles, in the sequence of the D.O., of
course follow long after those presently under discussion.
458. That is, if my argument in the text, between notes
441-449 *supra*, is correct.
of such provisions for Louisiana. First, it is obvious that the redactors did not adopt these provisions through ignorance of the Castilian law. The Castilian provisions were readily ascertainable in the *Nueva Recopilación*; and the liberal juristic interpretation of these provisions could be found in Febrero, whose work was extremely popular in Spanish America. Second, that the redactors were using the Code Napoléon as a model would not necessitate the adoption of these provisions. The general scheme of the French code (or its projet) could have been followed, but with minor changes made in the text to render the provisions on authorisation like those in the *Leyes de Toro*. This would still have been a rapid method of redaction.

The redactors clearly preferred the *puissance maritale* of the droit coutumier. There remain two (compatible) possibilities. The redactors were swayed by the legal-technical excellence of the Code Napoléon, and they approved of the very great incapacity of married women. The ideology of the period favoured the husband as controller of the household, and, indeed, at the time of Louisiana's codification, there appears to have been an intensification of the social authority of the husband, in comparison to the eighteenth century (at least among middle class families).

The *Leyes de Toro* cannot be described as favouring the emancipation of women: the husband was clearly the head of the household; but the wife's capacity was less circumscribed. The ideology of the husband as head of the household did not necessitate the adoption of the French provisions.

459. De Funiak, *op.cit.*, vol. 1, pp.277-281, expresses regret that Febrero was used so much in America, since he was not jurist. The use of Febrero's work is not really strange; it was reasonably concise and clear, it was written in the vernacular, and, above all, it was practice-oriented. He reports the decisions of the great jurists, but gives instructions as to how, for example, contracts should be drawn up to be valid. De Funiak regrets the use of Febrero in early U.S. cases; but his work was used extensively throughout Spanish America.

460. And was the one the redactors adopted in many instances.

461. See text *supra* at notes 37-8 and 169-74.

462. See text *supra* at notes 37-8 and 105-6.
because the Leves de Toro themselves gave sufficient symbolic assertion of that ideology. It is possible that the Castilian provisions would have been more useful, in facilitating economic activity and making for greater contractual certainty. Married women's property could have been dealt with much more simply. Only in New Orleans would it have been easy for a woman to go to court to obtain judicial authorisation for each act, were her husband away. A system of general authorisation and the possibility of the ratification of unauthorised actions would have been, potentially at least, useful. The French provisions on women as public traders made more economic sense in that they were more thoroughly worked out and systematic. Women separated from bed and board still required authorisation. Separation from bed and board will be discussed later; but it may be pointed out that this provision was amended in the 1825 C.L. 463. The only "improvement" (in a functional sense) made by following the C.N. was D.O. 25 (p.29), which decided that a woman who was a public trader obligated her husband, if they were in community of property. 464. We may conclude that these changes in the law were not introduced because they brought about an improvement in the economic functioning of society. It is a fair surmise that as regards most (if not all) of these provisions, the redactors did not consider the effect they would have.

That the ideology of the subjection of women to their husbands was very influential in Louisiana is suggested by the passing of the 1807 Act, the provisions of which gave expression to the views of the Louisiana legislators. This ideology was one cause of the adoption of the provisions of the French law. Another, perhaps more important cause was the prestige and modernity of the French code, taken along with the trend set by the 1807 Act itself. Further,

463. See 1823 Projet, p.10.
464. See text supra at notes 405-416.
although it might possibly be argued that the Castilian law was more sensible in a functional manner, the C.N. provisions were not such as to in any way prevent the functioning of Louisiana society, while at the same time the latter asserted the aspirations of the Louisiana middle classes.

4. Effect of *separation de corps* or *separation de biens* on the husband and wife relationship.

Having discussed the *puissance du mari* over the property and person of his wife, it is appropriate now to examine separation of property and separation from bed and board, in order to ascertain the effect these had on the *puissance du mari*. In turn will be discussed: first, how separation of property comes about; second, how that from bed and board comes about; and third, the effect of both of these on *puissance maritale*. Both have the same effect on marital authority over property, as under D.O. 17 (p.35), *separation de corps* results in separation of property.

D.O. 86 (pp.341-3) states thus:

"La femme peut, pendant le mariage, former contre le mari une demande en séparation de biens, toutes les fois que sa dot est mise en péril par la mauvaise conduite du mari, ou autrement, ou lorsque le désordre de ses affaires fait craindre que ses biens ne soient pas suffisants pour remplir les droits et reprises de sa femme."

(D.O. 87-89 (p.343) lay down the procedure for *séparation de biens.)* D.O. 86 (pp.341-3) is very similar in substance and phrasing to C.N. 1443 (first paragraph) and Proj. An. VIII, 3.10.57. 465. On this article, the D.L.V. refers to Part. 4.11.29, Domat, 466. Febrero 468. and Pothier. 467. Part. 4.11.29 states that a wife can demand restitution of her dowry if she fears that her husband's mismanagement will result in

465. According to Batiza, the latter is the "almost verbatim" source, the former a subsidiary one.
466. Domat, 1.1.9.5.1 and 2.
468. Part 1, ch. 4 § 1 no. 10, p.215.
its loss; however, if her husband has always made good provision in managing that which he has, and has not misused that which has been placed in his care, but has come to poverty for different reasons (that is, not by reason of his own mismanagement) then his wife cannot demand restitution of her dowry during the marriage.\textsuperscript{469} Febrero, as cited, provides for the restitution of the dowry of the wife if her husband dissipates or fritters away her dowry; for success in the action, however, the husband must be coming "à pobreza por su culpa." \textsuperscript{470} Like the Partidas, Febrero required there to be fault on the part of the husband. Domat, as cited, defines separation of property, and states that can only take place when the husband's affairs are in such disorder, and his estate so small that his wife's property is in danger. Pothier makes similar statements; but it is interesting to note the following:

"Il n'est pas nécessaire que le mauvais état des affaires du mari soit arrivé par sa faute ou par sa mauvaise conduite. Quoique le dérangement de ses affaires s'est arrivé sans sa faute ... il suffit, pour obtenir la séparation, que les biens du mari ne soient plus suffisants pour répondre de la dot de la femme." \textsuperscript{471}

This would seem to be rather different from the Partidas' provision, which seems to require fault on the part of the husband. As a protection, a wife had a tacit hypothec over her husband's property for the return of her dowry.\textsuperscript{472} The Castilian and French laws were essentially the same in allowing a wife to sue for the restitution of her dowry.

\textsuperscript{469} "Et en tal razón como esta se entiende lo que dice el derecho, que la muger que mete su cuerpo en poder de su marido, que nol debe desapoderar de la dote quel dió."
\textsuperscript{470} Part.1, ch. 4, § 1 no. 10, p.215.
\textsuperscript{471} T. Comm., no. 510, Bug. 7, p.276.
\textsuperscript{472} Part. 4.11.17; D.O. 53 (p.333) and 62 (p.335); see for same in ancien droit français, Brissaud, History, pp.806-807.
were it at risk due to her husband's financial difficulties; but an important difference was that the Castilian law seems to have required such financial difficulties to be the fault of the husband, before the wife could succeed in gaining restitution. Thus, separation of property, in the sense of return of the dowry, would be more readily obtained under the D.O. and the French law than under the Castilian.

In the D.O., if a wife petitioned successfully for separation of property, she brought about dissolution of the community. No article states this specifically; but it is implicit in the provisions for separation of property: see on this, for example, D.O. 90 (p.343). This was not possible in the Castilian law, where a wife could obtain restitution of her dowry but not the dissolution of the sociedad de gananciales. Thus, in permitting dissolution of the community while the spouses continued to live together, the D.O. has adopted the C.N. concept of "séparation de biens" rather than the Castilian law, which only allowed dissolution of the sociedad if there were separation from bed and board ending cohabitation. The Castilian law only allowed restitution of the dowry (and the paraphernalia, if under the husband's control).

Hence, the 1808 Digest, following the French law but not the Castilian, permitted a wife to seek separation of property, if her husband were mismanaging such property. This separation resulted in return of her dowry and paraphernalia (if not under her own control) and dissolution of the communauté d'acquêts ou de gains. Before discussing the results of such séparation on marital authority, séparation de corps must be discussed, as it also resulted in separation of property.

---

473. I can certainly trace no texts to that effect; neither apparently could de Funiak, op.cit., vo. 1, pp.374-5 nor Pugh: see her p.30 and note 185 thereon.
The fifth title of the first book of the D@'O. is called "De la séparation de corps." The C.N. has no exactly equivalent title because of its recognition of judicial divorce; but the D@O. title is obviously modelled after the French code, and the grounds given for the action are very similar to those found in the C.N. and the Proj. An. VIII for divorce and séparation de corps. The D@O. does not regulate divorce. Though what is at issue is the effect of such separation on the puissance du mari, the grounds for separation are of interest for the insight they give into the relative status of husband and wife.

D@O. 1-5 (p.31) state:

"La séparation de corps qui existait d'après les anciennes lois du pays, aura lieu pour les causes suivantes:"

"Le mari pourra demander la séparation pour cause d'adultère de sa femme."

"La femme pourra demander la séparation pour cause d'adultère de son mari, lorsqu'il aura tenu sa concubine dans la maison commune."

"Les époux pourront réciproquement demander la séparation pour excès, sévices, ou injures graves de l'un deux envers l'autre, si ces mauvais traitements sont d'une nature à rendre à celui-ci, la vie commune insupportable."

"La séparation peut être également demandée réciproquement dans les cas

1. De diffamation publique de l'un des époux envers l'autre;
2. D'abandonnement du mari par la femme, ou de la femme le mari;
3. D'attentat d'un époux à la vie de l'autre."

These provisions seem to be borrowed from the French code and its projet. For the fourth and fifth articles, the

474. See below, note 476.
475. See below, notes 497-503.
476. For article 1, Batiza gives Proj. An. VIII, 1.6.1. as the "partially influencing" source; for article 2, he gives C.N. 229 as the "almost verbatim" source; for article 3, he gives C.N. 230 as the "almost verbatim" source; for article 4, he gives C.N. 231 as the "almost verbatim in part" source; and for article 5, he gives Proj. An. VIII, 1.5.3, 3d. to 5th. paragraphs, as the "almost verbatim" source.
D.L.V. gives no references; for the first to the third it refers to Part. 4.10.2, while for the second and third, it refers to Pothier. 477.

Examination of Pothier and the Partidas show that there can be no doubt that the redactors here followed the French code and its projet. Pothier states that a husband may demand separation on the grounds of his wife's adultery, with the result that, on her conviction of adultery, she may be secluded in a convent. 478. Although the D.L.V. does not cite the section, Pothier states that a wife cannot ground an action for separation on the adultery of her husband. 479. Further, again uncited, Pothier allowed only the wife to sue on the grounds of sévices or excès. 480. (Pothier is not necessarily correct in his opinion on this last point, but, given the lack of other references in the D.L.V., it seems likely that, for the redactors, he represented accurately the law of the ancien régime. 481.) The Partidas allowed only one relevant ground for separation: the adultery of either spouse. 482. Part. 4.10.2 might suggest that only the wife's adultery is relevant; 483. Part. 4.9.2, however, shows that this is probably not the case. 484. Canon law allowed separation

478. See references, note 477 supra.
479. T.C.M. no. 516, Bug. 6, p.238
480. T.C.M. nos. 508-510, Bug. 6, pp.235-6.
481. Cf., for example, the statement in A.H. Huussen, op. cit., pp.110-111, the separation of citizen Jacquotot and his wife. The complex history of the grounds for separation will be discussed infra on Quebec, where the discussion is more relevant.
482. Part. 4.10.2: separation was also allowed for one spouse entering a religious order.
483."Otro se faciendo la muger contra su maridó pecado de forniccio ó de adulterio, es la otra razon que deximos por que se face propriamente el divorcio." For the first reason, see note 482 supra.
484."Acusarse pueden aun et otra manera sin las que deximos en la ley ante desta el marido et la muger; et esta es por razon de adulterio. Et si la acusacion fuere fecha para deparirlos que non vivan en uno nin se ayuntan carnalmiente, por tal razon non los puede otro ninguno acusar sinon ellos mismos uno a otro."
on the grounds of a husband's adultery.\textsuperscript{485} Since here the Partidas are closely following Canon law, even submitting such questions to the ecclesiastical courts,\textsuperscript{486} this suggests that such adultery was a relevant ground for separation. It appears that other grounds for separation were recognised later;\textsuperscript{487} but the D.L.V. refers to no sources bar the Partidas. The D.O. redactors obviously conceived of the grounds for separation entirely within the limits set by the C.N. and its projet, the provisions of which they preferred to those of Pothier and the Partidas. Thus, the redactors preferred to make the husband and wife unequal as to the effects of their adultery. Although the redactors gave more attention to the adultery of the husband than did Pothier, they would have agreed with him that the adultery of the wife is more reprehensible, since it could introduce illegitimate children into the family.\textsuperscript{488} The adoption of the provisions on ill-treatment, defamation, abandonment and attempted murder need occasion no surprise.\textsuperscript{489}

Chapter five of this title of the D.O. lists the effects of séparation de corps. The only article we need mention is D.O. 17 (p.35): "La séparation de corps entraîne toujours celle de biens." This is copied from C.N. 311. The position adopted by the Castilian law on the effects of separation (divorcio) was rather different from that of the French law, involving a different approach: fortunately, we need not discuss it here, save to point out that in substance, context, and mode of expression, D.O. 17 is

\textsuperscript{485} See Esmein, Mariage, vol. 2, pp.90-91.
\textsuperscript{486} See Part. 4.9.2 and Asso y Manuel, vol. 1, p.76.
\textsuperscript{487} See de Funiak, op.cit., vol. 1, p.626, where he suggests that Fuero Real, 4.5.5, was used for separation on the grounds of desertion, and that later cruelty and dangerous insanity were admitted as grounds.
\textsuperscript{488} See T.C.M., no.516, Bug. 6, p.238.
\textsuperscript{489} They were not adopted because they, in some way, expressed the Castilian law, nace Pascal; that they were similar to other Castilian provisions is fortuitous: see note 487 supra.
firmly rooted in the French tradition. 490.

It is now appropriate to discuss the effect séparation de corps and that de biens had on the capacity of the wife, and the extent to which either liberated her from puissance maritale. First, and most obviously, séparation de corps released the wife from her obligation to live with her husband. Second, séparation de biens alone obliged the wife to contribute to the expenses of the still joint household and the education of the common children. This was a contribution to be proportional to her and her husband's means; but if he had none, she had to support all the expenses. 491.

The article of most importance to us is D. O. 97 (p. 343):
"La femme séparée, soit de corps et de biens, soit de biens seulement, en reprend la libre administration. Elle peut disposer de son mobilier et l'aliéner. Elle ne peut aliéner ses immeubles sans le consentement de son mari, ou sans être autorisée en justice, à son refus."

This article is copied from C. N. 1449. 492 The D. L. V. gives no references. Before going on to consider the Castilian law on this, it is as well to indicate the effects of this provision on the wife's capacity. She could administer her property unauthorised, and did not require authorisation to dispose of moveables. D. O. 21 and 22 (p. 29) would still apply. 493 Thus she would require authorisation to appear in court as well as to alienate or to dispose otherwise of her immovable. Thus, the requirement of authorisation was only relaxed to a slight extent. Her capacity was still reduced by the puissance du

490. On the approach taken by Castilian law, see Pugh pp. 34-39, and de Funiak, op. cit., vol. 1, pp. 626-633. It is no doubt significant that in title five, the D. L. V. has very few references opposite the articles.
491. See D. O. 96 (p. 343).
492. According to Batiza, the "verbatim" source, with Prod. An. VIII, 3. 10. 67 as a subsidiary. The whole of this section of the D. O. is copied, in general, from the French law, both in substance and in spirit. See note 490 supra.
493. See text at notes 380-400 supra.
mari. The D.L.V. makes virtually no references to Castilian law on this point, because there were no relevant provisions. The commentators simply did not discuss the question of authorisation and control over property after separation. This is the result of the different approach taken to separation, to marital authorisation and to the incapacity of married women. Pugh attempts to reconstruct what the law should have been, at least as regards financial property, dowry and paraphernalia; this need not concern us, as what is important is that the matter was not dealt with. The D.O. redactors could not have followed any Castilian provisions, as the logic of their articles on puissance du mari required the adoption of provisions, at the least, similar to those of the French code or its projet. The D.O. redactors had adopted the rigorous northern French conception of puissance du mari, with its requirements of authorisation, which rendered acute the problem of administration and authorisation after separation. The Castilian law did not render separation and its effects an acute problem, for it had a much laxer attitude to authorisation in general: hence, it had no provisions in point, and no doctrines developed by the jurists. The adoption of the puissance du mari of the droit coutumier required provision to be made to cover authority after separation, so the D.O. redactors also borrowed the French provisions on this.

An interesting point is why the redactors adopted the French provisions without amendment. As regards separation, the redactors must have been innovating freely: they could easily have amended the C.N. provisions, and indeed some amendments might well have been very appropriate. First, it seems ridiculous that, after a wife has separated from her husband on the grounds of, for example, his cruelty, she should have to go to him to seek authorisation before alienating an immovable, and, indeed, before seeking

494. At least so far as I can discover. Pugh reaches the same conclusion, pp.38-9.
authorisation from the judge. If the requirement of authorisation was to be maintained, because of the logic of the system, it would have been more suitable to confine it to judicial authorisation in these circumstances. 495. Second, if the separation was of property only, and hence on the grounds of the husband's financial incapability, was he the correct person to authorise his wife to alienate immovable property, an alienation with potentially disastrous consequences? In both these sets of circumstances if authorisation were thought to be necessary, judicial authorisation would have been better. Further, given the geographical circumstances of much of Louisiana, it might well have been better to dispense completely with the requirement of authorisation, if a woman were separated either as to property, or as to bed and board. A woman living in an isolated community might not find it convenient to go to court to seek authorisation. The redactors of the 1825 C.L. acknowledged the inappropriateness of aspects of this requirement of authorisation. 496.

Despite this, the D.O. redactors followed the C.N., and embodied the whole of the droit coutumier's puissance maritale in their provisions on authorisation of women separated from their husbands, either as regards property or bed and board. They could not have followed the Castilian law, because it had no relevant provisions. Nonetheless, they need not have copied the C.N. here, as innovation would have been easy, as the 1825 C.L. shows. One can only conclude that a combination of haste, admiration for the C.N. and ease of borrowing from the latter resulted in the law on authorisation of separated women. The general ideology of the period supported the

---

495. See the 1823 Projet, p.10.
496. They remarked, in the 1823 Projet: "It appeared to us, improper to oblige the wife separated from bed and board, generally in consequence of bad treatment, to address herself to her husband to obtain permission to conduct her own affairs." P.10.
law adopted, without necessitating its adoption. These provisions were an innovation: the redactors were not including in the court the law in force; no Castilian law nor territorial act enjoined these provisions.

Separation thus did not end a husband's authority over his wife, but merely reduced it slightly; here the D.O. redactors have copied the French concepts of séparation de biens, séparation de corps, and puissance du mari.

5. The dissolution of marriage, and the ending of puissance maritale.

Only the dissolution of the marriage ended the husband's authority over his wife. The 1808 Digest has one relevant provision, D.O. 30 (p.29):

"Le lien du mariage se dissout,
1. Par la mort de l'un des époux;
2. Lorsque le mariage s'est déclaré nul par l'une des causes exprimées au chapitre 3 du présent titre, ou lorsqu'il en est contracté un autre, en raison de l'absence d'un des époux dans les cas autorisés par la loi.
Les séparations de corps n'opèrent pas la dissolution du lien de mariage, puisque les époux séparés ne peuvent pas se marier à d'autres personnes, mais elles mettent fin à la cohabitation conjugale, ainsi qu'aux intérêts communs qui pouvaient exister entre les époux."

Thus, according to the D.O., death alone ended marriage, except for special provisions on nullity or absence. In mode of expression, to a limited extent, this passage is modelled on C.N. 227; but the C.N., of course, regulated divorce, whereas the D.O. did not. The D.L.V. refers to Part. 4.9.9. and 4.12.3, and Pothier. Part. 4.9.9. regulated annulment of marriage, while 4.12.3 was on the second marriages of widows. Pothier, as cited, enunciated principles similar to D.O. 30 (p.29). In the Partidas, a marriage validly contracted, and with no impediments, was

---

497. Batiza classes it as the "substantially influencing first part" source in its first paragraph, along with the first paragraph of Proil. An. VIII, 1.5.15 as a subsidiary.
498. T.C.M., nos. 462 and 506, Bug. 6, pp.211 and 235.
for life; divorce in the modern sense was not allowed, only separation. 499.

The 1807 Act, ch. 17, stated thus in its final section (70):

"Marriages are dissolved,
1stly, By the death of the husband or wife.
2ndly, By a sentence of divorce legally pronounced."

This refers to legislative divorces, which had been granted by the territorial legislature as early as 1805. 500. Such legislative divorces were apparently fairly common in the U.S.A. in the early nineteenth century. 501. Why did the redactors of the D.O. not mention this? D.O. 30 (p. 29) was altered on the recommendation of the 1823 Projet, 502. so that in the 1825 C.L., article 133, it was stated that marriage would be dissolved by a divorce legally pronounced. The 1825 Act made no further mention of divorce. Presumably, the 1808 redactors excluded any mention of divorce because each individual divorce was an act of the legislature; there was certainly no need to regulate divorce. Each divorce was a specialised legislative act intended to apply only to the parties, and not altering the general provisions of the law. Whatever were the reasons for excluding mention of the divorce (and the exclusion must have been deliberate, since the sources in front of the redactors - the C.N. and the 1807 Act - mentioned it), the redactors would probably have done better to have mentioned divorce as was done in the 1825 C.L., because the statement in D.O. 30 (p. 29) is not quite accurate. Judicial divorce being impossible, there was no need on the topic for any articles such as those found in the C.N. or its Projet.

499. See Part. 4.10.1; "divorcio" in Castilian signified separation.
502. 1823 Projet, p.10: "Among the causes of the dissolution of marriages mentioned in art. 30, divorce is not mentioned, as if it were not known among us."
Thus, puissance maritale only ended on the dissolution of the marriage, whether by death or legislative divorce. Separation from bed and board only reduced this puissance, and did not free the wife from it. 503.

6. Conclusion on the relationship between husband and wife in the 1808 Digest.

In this subsection, conclusions on the changes in the various areas of the law will be drawn together, in order to gain an overall impression of the provisions of the D.O. on the husband and wife relationship and on how these provisions as a whole relate to the C.N., its projet, the French customary law as revealed by Pothier, and the Castilian law. Also at issue is how the provisions relate to the relationship between husband and wife when considered from a social rather than a legal perspective.

503. One article of the D.O. not touched on as not really relevant here, but deserving some mention, is D.O. 31 (p.29) which states that a widow cannot remarry until 10 months after the dissolution of the marriage. This is copied exactly from C.N. 228. (Note that the droit coutumier had no provision forbidding such remarriage.) The D.L.V. refers to Part. 4.12.3 and Fuero Real, 3.1.13 and Febrero, Parte Segunda, libro segundo, chap.5, nos. 1-3, pp.17-18. Drawing on the Roman law, the Partidas and the Fuero Real state that a widow cannot remarry within a year of her husband's death (unless with a dispensation from the king) without suffering certain penalties. The Canon law did not disallow remarriage within any period, though disapproving of remarriage in general: see Esmein, Mariage, vol. I, p.107 and pp.401-2 and vol. II pp.99-104, and Pothier, T.C.M. nos. 528-531, Bug. 6, pp.244-5. Febrero points out that in Spain the law was now changed, there was no prohibition on remarriage within a certain period (see, e.g. Nov. Rec. Cast. 10.2.4, or Rec. Cast. 5.3.1 and Asso y Manuel, vol. 1, pp.76-7.) Why, given that the Castilian law was found in sources known to them, did the redactors here change the law? The C.N. article was, (according to Maleville, Analyse, pp.209-10), intended to avoid turbatio sanguinis. It was an innovation on the droit coutumier, but not in the droit écrit, where a 4 year period applied. The D.O. redactors can only have copied the C.N. article because it was in the C.N., and part of the civil law tradition.
The D.O. articles on the method of contracting marriage are closely based on the territorial Act of 1807, ch. 27, though with some traceable influence from the C.N. and Proj. An. VIII. The 1807 Act itself has, to some extent, been influenced by the French codification.504. The nature of the rules on the contract of marriage embodied in the D.O. is different from that of those in the Proj. An. VIII or C.N., in that the latter two envisage a purely civil ceremony and consider marriage terminable by divorce, which they carefully regulate. Although there could be legislative divorce in Louisiana, in principle a valid marriage was only terminated by the death of one of the spouses. This aspect of the D.O. also differs from the rules of the pre-Tridentine and Tridentine Canon law. The D.O. articles, based on the 1807 Act, are clear and concise, providing suitable provisions for the territory, given the heterogeneous nature of Louisiana society.

The property aspects of the husband and wife relationship are conceived of in a French manner, even though some Castilian notions have been intercalated in the text of the D.O.: notably, the "statutory" matrimonial regime is based on the sociedad de ganancias. There can be no doubt that the overall conception is French, given that, as in the droit coutumier and C.N., and not as in the Castilian law, marriage contracts can be used to regulate the future disposition of family wealth.

It is clear that the Castilian notion of the relationship between husband and wife has been replaced with the puissance maritale of the droit coutumier. The Castilian law had a very limited, underdeveloped concept of marital authority. Montalvo states that a wife is in the power of her husband in so far as she ought to live with him and obey him, but: "In aliis autem non dicitur

504. See esp. ss.42-44 discussed supra at notes 177-180.
esse in viri potestate." 505. Gomez, in the only general statement he makes on the nature of the husband's authority, says:

"nam licet vere et proprie quoad omnia non sit uxor in potestate mariti sicut filius et servus, tamen quo ad tria bene est in eius potestate. Primo ad residentiam et cohabitationem quam, debet uxor facere cum viro, et inde est quod potest intentare maritus contra eam detinentam utile interdictum de liberis exhibendis ut in ... [D.43.30.1.5]. 506. Secundo quo ad operas quas debet reddere et praestare marito. Tertio quo ad iurisdictionem: quia efficitur de iurisdictione et domicilio mariti, ut in ... [D.5.1.65]. 507." 508.

Thus, for Gomez, a wife is only in the power of her husband in so far as she should live with him, owed him certain operae and was domiciled with him. This is very different from the extensive and comprehensive conception of puissance du mari found in the droit coutumier, and which pervaded all the law on husband and wife. Some of the provisions of the Castilian law were antithetical to the French concept of puissance maritale, notably those on general authorisations and ratification. The Castilian law provided a much laxer conception of marital authority, which, moreover was interpreted by the Castilian jurists in such a way as to give a wife considerable freedom of action. Further, because the Castilian law, in comparison to the French, had a minimal notion of marital authority, and one to which scant juristic attention was devoted, the Castilian law failed to regulate areas of social life, potentially involving marital authority, which were regulated in great detail by the droit coutumier and C.N. In some of these areas, the approach of the Castilian law was so radically different that its provisions cannot

506. This Digest provision, to which Gomez refers, states that a father cannot succeed in an actio de exhibendis liberorum to recover his daughter from her husband. He cannot exercise his patria potestas harshly and overturn the marriage. Gomez also refers to C.6.8.3 on the same topic, and states this is the common opinion of the learned. I have modernised the references.
507. This provision states that a woman ought to exact her dowry where her husband is domiciled. Gomez also refers to Baldus on C.6.46.5.
readily be compared to those of the C.N. or droit coutumier. The attempts by Pugh and de Funiak to reconstruct the Castilian law on such apparently unregulated areas of social life show this clearly, in that they both fail to give a satisfactory account of what the law had been. The reason for their failure is obvious: they are approaching the old Castilian law from the perspective of the modern French law, and they fail to appreciate that, for the Castilian law, the problems they pose are non-problems or conceived of in a different way. They both attempt to impose on the Castilian law a structure derived from the modern law. This relates to the provisions on puissance du mari in the D.O. The structure (and concept) of marital authority in the C.N. was very different from that in the Castilian law, causing both laws to have different and (in some cases) antithetical provisions: some provisions did correspond; but the existence or not of some essential provisions caused both laws to have a different appearance and substance.

The D.O. has adopted the C.N. and northern French concept of puissance maritale; and, indeed, has adopted this concept so rigorously as to exclude C.N.224, which was an illogical provision, given the premises of this puissance. From the adoption of the basic premises of puissance maritale, various consequences flow. This adoption, along with the borrowing of the scheme of the C.N., entails provision being made for contingencies not covered by the Castilian law. This explains the absence in the D.L.V. of references to Castilian provisions for many of the articles in point: there were no such provisions because of the different structure of the law. Leves 56 and 58 of Toro are provisions of major importance by their allowance of general authorisations and ex post facto validation, these provisions render the Castilian

509. See text supra at notes 413-416, 490 and 494-5.
510. See text at notes 441-449.
511. Quoted supra in notes 389 and 390.
law very different from the droit coutumier. They are incompatible with the puissance du mari of the droit coutumier, as Pothier states explicitly. 512. These two leyes were rejected for the D.O., in which there is a complete acceptance of the conception of marital authority found in the C.N. and the customary law. Further, the D.O. rejects the very liberal interpretation given by the Castilian law to the provisions on authorisation. Some of the articles of the D.O. are compatible with some of the provisions of the Castilian law, but the absence of these two leyes shows how radically different the law in the D.O. is from the Castilian: indeed, any correspondence on this matter between individual provisions of the Leyes de Toro and individual articles of the D.O. is unimportant or, indeed, irrelevant, as both sets of provisions, when regarded as a whole, are quite different on marital authority.

Given that, in the D.O., the basic premisses on northern French puissance maritale were accepted in articles such as D.O.4 (p.325) and 27 (p.29), there was no particular reason for the redactors to have accepted all the individual provisions of the C.N., its projet, or the droit coutumier. Yet, by and large, this they did. As already indicated, the adoption of the conceptual scheme of the C.N. necessitated the redaction of provisions for contingencies not perceived of in the Castilian law. In these areas, the D.O. redactors simply copied the C.N. provisions. Some points should be made about this. As previously argued, 513. in the provisions on authorisation, the D.O. redactors had generally to follow sections 61-69 of the 1807 Act. Perhaps, to some extent, the redactors could have circumvented these sections, while remaining faithful to their individual provisions: given that the Act was recent, it is, however, probably not sensible to

512. See text at notes 307-310, 424-427 and 454 supra.
513. See text supra at notes 456-459.
suggest that the D.O. redactors could have effectively repealed some of these sections. What is clear is that the D.O. redactors followed the provisions of this Act, and the trend thus set, not only because they felt compelled to do so, but also because they approved of them. Thus, the redactors extended some of the provisions of the Act, and included the whole of the French conception of puissance maritale in the individual provisions of the D.O., and without possible amendments: consider authorisations after separation de corps.

Hence, it may be concluded that the D.O. redactors imported provisions on marital authority from the French law. The 1807 Act prompted this, and, to some extent, had already done so itself; but it did not necessitate the extent of the borrowing undertaken by the redactors. Further, this major change in the law can have been neither accidental nor occasioned by ignorance of the Castilian law, which was easily ascertainable, in so far as it extended, in the Nueva Recopilación and Febrero's work, both of which were known to and also used by the redactors. Thus, this reversal of the law was conscious and deliberate. This leads on to consideration of the change in the law in relation to the social context, and whether or not the change was the result of changes in Louisiana society.

As already argued, at the period in which codification was undertaken in Louisiana, there was a general trend, especially among bourgeois families, towards closer family relationships, with the tie of husband to wife becoming closer, based around domesticity and child care, and, at the same time, the authority of the husband grew. This qualitative change in the nature of husband and wife relationships would not necessitate a drastic change.

---

514. See ss.62 and 64 and text supra at notes 377-391, 401-402 and 457-9.
515. See text supra at notes 492-496.
516. See supra, text at notes 36-43, and 45-9.
curtailment of the proprietary and contractual capacities of married women, though it would certainly support such curtailment. The alteration in the capacity of married women was possibly not desirable in an economic sense, although the economic disadvantages most certainly were not prohibitive.\footnote{517} Although the ideology of supremacy of the husband would definitely support such an increase in marital authority, on its own it might not necessitate it, because the Castilian law also clearly asserted such supremacy.

This factor, the ideology of male dominance in marriage, on its own would not have necessitated change; however, the facts surrounding codification made for the expression of this ideology in the new Digest. First, there existed convenient, prestigious and readily borrowed French texts, all containing an extended concept of \textit{puissance du mari}. The redactors were already following fairly closely the scheme of the C.N. and/or its \textit{projet}. They were drawing up their code in French. The French law had, rather confusingly, been stated by the court, in 1805, to be part of the law of Louisiana,\footnote{518} and there had, in part, already been a revival of French law and French legal folkways in Louisiana after 1803.\footnote{519} The 1807 Act itself seems to have imported French legal notions into the Louisiana law. The civilian tradition and codification both facilitated borrowing from foreign sources.\footnote{520} The prestige of the Code Napoléon would make its articles very attractive to the redactors.

Thus, it may be concluded that the changes in the husband and wife relationship were the result of the process of codification, the civilian tradition and the existence of the French texts, all of which permitted the redactors to

\footnote{517} See text \textit{supra} at notes 461-3.\footnote{518} See \textit{supra}, chapter 3, text at note 169.\footnote{519} See \textit{supra}, chapter 3, text at notes 156-160, and Baade, \textit{Marriage Contracts}, \textit{passim}; but esp. at pp.79 et seq.\footnote{520} See \textit{supra}, chapter 1, text at notes 51-53 and chapter three, text at notes 136-155.
assert, in a series of legal provisions, the current ideology of the husband as head of the conjugal association. Undoubtedly the redactors would have included provisions in some way asserting this ideology, even if only on a symbolic level; but the extent of the puissance du mari, and the form of its expression were the direct result of the redactors' use of the French sources.

Section Two. Puissance Paternelle.

In the first title of the first book of the D.O., some fundamental statements are made on puissance paternelle. This title is taken almost word for word from Domat's Livre Prélaminare. D.O. 3 (p.9) says that under natural law, children are subject, by the fact of birth, to the power and authority of those to whom they are born. D.O. 16 (p.11) states that, under civil law:

"Les fils et filles de famille, sont les personnes qui sont sous la puissance paternelle; et les pères ou mères de famille, qu'on appelle aussi chefs de famille, sont les personnes qui ne sont pas sous cette puissance, soit qu'ils aient des enfants ou non, et soit qu'ils aient été dégagés de la puissance paternelle par l'émancipation ou par la mort du père."

D.O. 17 (p.11) states that emancipation and the other methods of freeing children affect only the civil law aspects of paternal power, but not the natural law aspects. This title, of which there is no equivalent in the C.N., was obviously suggested to the D.O. redactors by Domat's work. With the division into distinctions between persons established by nature, and those established by law (loi), this title indicates the influence on the D.O. redactors of natural law theories. Though Domat was obviously the inspiration for this title and its substance, similar statements may be found elsewhere. Thus, the Quarta Partida, in the introduction to título XVII, states:

---

521. Batiza in Sources, appendix C, at pp.46-7 shows this clearly.
"Poderio et señorío han los padres sobre los fíjos según razón natural et según derecho: lo uno porque nacen dellos, et lo al porque han de heredar lo suyo."

The D.O., in fact, bears much more of an imprint of natural law than does the C.N. These articles provide the theoretical foundation for the more specific provisions on puissance paternelle found elsewhere in the D.O.

1. How puissance paternelle arises.

The first and most common method of a child coming under paternal power is legitimate birth. Chapter two of the seventh title of the first book of the D.O. provides for legitimacy if born within marriage, and the manner of proving such legitimacy. We need not discuss these articles, since they are purely incidental to the subject matter of this section, and do not reflect on the father and child relationship. In general, the articles embody the ancient maxim: pater is est quem nuptiae demonstrant. "Les enfants légitimes sont ceux qui sont nés dans le mariage", states D.O. 2 (p.45), while D.O. 7 (p.47) states that "L'enfant conçu pendant le mariage a pour père le mari." The D.O. rules are basically similar to those in Castile and France, though with some differences which are not particularly important. Pothier states that:

"La puissance paternelle sur les enfants qui naissent du mariage est ... un des effets civils du mariage ...." 522.

Though their concepts of paternal power differed, his remark holds good for Castile, France and Louisiana.

The second method of a child coming under puissance paternelle is legitimation. D.O. 21 (p.49) states:

"Les enfants nés hors du mariage, autres que ceux nés d'un commerce incestueux ou adultère, pourront être légitimés par le mariage subséquent de leur père et mère, lorsque ceux-ci les auront légalement

522. T.O.W. no. 399, Bug. 6, p.181.
reconnus avant leur mariage, ou qu'ils les reconnaîtront par leur contrat de mariage."

This is very similar to C.N. 331, which Batiza classes as the "almost verbatim" source. The D.L.V. refers to Part. 4.13.1 and 2, Part. 4.15.2 and Febbrero.523 Although the last clause of the C.N. article reads: "ou qu'ils reconnaîtront dans l'acte même de célébration", it is obvious that the D.O. redactors have copied their provision from the C.N. Thus, both the D.O. and the C.N. required a strict, formal recognition of the child for legitimation to take place by subsequent marriage. Under the Canon law524 and the ancien droit in France 525, such recognition was not necessary: marriage ipso facto legitimated natural children, that is those who were born of neither incestuous nor adulterous intercourse. The position under the Castilian law is more complex: however, Enrique Gacto Fernandez, in a valuable historical study, permits the easy ascertainment of the Castilian provisions.526

Legitimation by subsequent marriage was permitted in the Roman law of Justinian's time only in the case of a marriage of a man to his concubine, where there was an instrumentum dotis, and where, at the time of conception of the children, the parents could have married.527 Concubinage was a recognised relationship in Roman law,528 and only children born of such a concubinage were classed as natural children, liberi naturales, other illegitimate children were spurii.529 The mediaeval Castilian law...

523. Part 1, ch. 15 § 2, nos. 7-15; Part 1, ch. 1 § II, no. 78, p. 61; Part 2, libro segundo, ch. 1 § IV nos. 74 and 75, pp. 408-9; Part 2, libro segundo, ch. 7 nos. 6 and 7, pp. 95-6. (Note: libro segundo is split between two volumes, thus explaining the apparently odd pagination.)
524. See Esmein, Mariage, vol. 1, pp. 39-44.
525. See, e.g. Pothier, T.C.M., nos. 409-425, Bug. 6, pp. 183-194, and Maleville, I Analyse, pp. 294-5, and see infra, on Quebec.
527. See C. 5.27.8, 10 and 11. See Buckland, Textbook, p. 129. Constantine had originally allowed such legitimation for present but not future cases of concubinage, with certain requirements to be fulfilled. Anastasius allowed such legitimation for future cases of concubinage. This had subsequently been repealed. See ibid.
528. See Buckland, Textbook, pp. 128-9, and D. 25.7.3 pr.
recognised the institution of concubinage (barraganfa),\textsuperscript{530} and, contrary to the Canon law, it seems that only to a child of such a union did the Partidas give the status of natural child.\textsuperscript{531} Here the Partidas were obviously following the Roman law, Canon law granting the status of natural child to any illegitimate child who was born of a union which was neither adulterous or incestuous, that is, one where the parents had been free to marry at the time of conception.\textsuperscript{532} Gacto points out, however, that although the rules in the Partidas on legitimation by subsequent marriage refer to sons born to a barraganfa (concubine), it is not necessary for the child to have been born of a stable union for him to be legitimated, it is sufficient that the Canon law requirements on the status of natural child be fulfilled.\textsuperscript{533} Thus, legitimation by subsequent marriage comes about by the law of Partidas in the same circumstances as it would in Canon law. Although the laws of Toro expanded the class of liberi naturales,\textsuperscript{534} they did not affect legitimation by subsequent marriage.\textsuperscript{535} Thus, the rules in Castilian law stayed the same as those in Canon law.

\textsuperscript{530} See Part. 4, titulo 14 which regulates barraganfa; and see also, Gacto, \textit{op.cit.}, pp.4-55, where concubinage is discussed.

\textsuperscript{531} See, for Canon law, Esmein, \textit{Mariage II}, pp.37-44; and, for Castilian law, Gacto, \textit{op.cit.}, pp.70-72 and 75.

\textsuperscript{532} Esmein, \textit{Mariage}, II, pp.37-44. Febrero, Part 1, ch.1, §2 no.82 pp.63-4 gives an account of the law on natural children, and those who were espurios. See also Asso y Manuel, p.113.

\textsuperscript{533} Gacto, \textit{op.cit.}, pp.96-7, where he demonstrates how closely the Partidas here are following Canon law.

\textsuperscript{534} Toro II: \textit{"Y porque no se pueda dudar quales son hijos naturales: ordenamos y mandamos que entonces se digan ser los hijos naturales, quando al tiempo que nascieren, o fueran concebidos, sus padres podian casar con sus madres justamente sin dispensacion: con tanto que el padre lo reconozca por su hijo, puesto que no haya tenido muger de quien lo uvo en su casa, ni sea una sola: ca concurriendo en el hijo las calidades suso dichas, mandamos que sea hijo naturale. See Gacto, \textit{op.cit.}, P.75.

\textsuperscript{535} See Gacto, \textit{op.cit.}, p.100.
If the authorities cited by the D.L.V. are examined, the following results are obtained. Part 4.13.1 states that if a man has children by a concubine (barragana) and he subsequently marries such concubine, the children will be legitimated. Part 4.13.2 lists the advantages of legitimacy. Part 4.15.2 states that children born of a union prohibited by the church are illegitimate (that is, incestuous children); likewise those a man fathers on his concubine while his wife is alive are not capable of legitimation by the subsequent marriage of their father and his concubine, since they were conceived in adultery. Febrero gives the later Castilian position on legitimation by subsequent marriage.

The redactors of the D.O. have not copied C.N. 331 because it in any way expresses the Castilian law. In the Castilian law, marriage ipso facto legitimated liberi naturales, and reconocimiento was just one possible way of proving the status of liber naturalis, rather than a requirement of legitimation, as it was in the C.N. The redactors have copied C.N. 331 for some reason other than belief it embodied the existing law: they must have approved of the change it wrought in the Canon law and the ancien droit of France.

Maleville states that one reason for the change in the C.N. was that recherche de paternité had been abolished; with such abolition, proof of parentage was rendered very difficult, and C.N. 331, in limiting legitimation, allowed for certainty as to the children legitimated. This could not apply in Louisiana, because the D.O. allowed such a recherche for free white children.

Maleville does make the following instructive remark. In answer to the criticism that this article might prevent a woman of strict parents from legitimating her children, since she would have to acknowledge publicly her faute; and, further, that it was unnecessary to forbid legitimation by recognition after the marriage, when C.N. 337 allowed one spouse to recognise a natural child (though without prejudicing the interests of the other spouse and their common children).

536. Part 2, libro segundo, ch. 1 § IV nos. 74 and 75, pp. 408-9, and ibid., ch. 7 nos. 6 and 7, pp. 95-6. The other references in note 523 supra are to other methods of legitimation.
537. See note 534 supra.
538. ¹ Analyse, p. 294.
539. See D.O. 30-32 (p. 51)
with resulting rights of succession, Maleville states:

"On répondit qu'il fallait tranquilliser les familles, et ne pas s'arrêter à la répugnance d'une fausse pudeur." 540.

Thus, given the social circumstances of the period, such a change as that in D.O. 21 (p.49) becomes understandable; it made the nuclear family unit more certain. This notion seems likely to have influenced the redactors. Further, the article avoided difficult problems of proof of parenthood, and so rendered the law rather more simple - though this does not quite match the permission of legal recherche de paternité. 541. Finally, the D.O. redactors seem always ready to borrow from the C.N. or its projet. In conclusion, three factors would seem to have affected the redactors' decision: a social one, a legal-technical one, and a legal-cultural one.

One last point on D.O. 21 (p.49) relates to its statement that incestuous children may not be legitimated by the subsequent marriage of their parents. Supposing that by incest is meant sexual intercourse within the prohibited degrees of marriage laid down in D.O. 9 and 10 (pp.25-27), such parents of incestuous children would never be able to marry. The C.N. did allow in its article 164 for dispensations; the D.O. did not. It would seem likely that the D.O. redactors on this minor point have unthinkingly copied a provision of the C.N. This would not be of great importance here, as the D.O. phrase is merely unnecessary, having no legal effect. The point is more important in relation to the Quebec code and will be discussed there. The relationship of the C.N. provision to the ancien droit and the Canon law is of interest.

Legitimatio per subsequens matrimonium is the only form of legitimation mentioned in the D.O.; yet others had existed according to the Castilian law. Febrero, for example, lists them all, as do Asso y Manuel. 542. Thus, fathers could legitimate children in written public deeds; a natural daughter would be legitimated by marriage with an hombre illustre; a natural son would be legitimated by his father offering him in the service of the king or of a municipal council; a natural child could be legitimated in

541. Thus, a child could prove his paternity by recherche, yet not be legitimated by subsequent marriage if not formally acknowledged; here there would have been no problems of proof.
a testament which was confirmed by the king; and, finally, children could be legitimated by favour of the king or of the Pope. Obviously, not all of these would have been applicable in Louisiana, and, from the point of view of this study, not all would have given rise to paternal power over the legitimated child. However, some of these forms of legitimation could have been useful. Thus, legitimatio per rescriptum principis was used in Texas in the middle of the nineteenth century, when one of the parents had died before they could legitimate their children by marriage. 543.

The redactors must have chosen to exclude these other forms of legitimation. Some of them were obviously inapplicable; but others might have been useful, as that per rescriptum principis was found to be in Texas. In the 1825 Code, a new paragraph was added to D.0. 21 (p.49) stating that "Tout autre mode de légitimation est aboli." 544. The C.L. redactors remarked:

"The 7th law, tit 5, part. 4, published by the translators as being in force, permits the father to legitimate his children by a simple declaration under his hand, or received by a Notary before three witnesses. We propose to suppress this law." 545.

The reference to "the translators" is to the translation of the Partidas by Moreau Lislet and Carleton. 546. Obviously, the decision in Cottin has influenced the redactors of the 1825 C.L. 547. What this suggests is that the 1808 redactors copied the provisions of the C.N. and rejected the Castilian provisions because they thought them inapplicable and because they did not appear in the C.N. or its projet.

One other obvious method of acquiring puissance paternelle over another is adoption. The D.O. redactors devote the whole of chapter IV of this title to one article

543. See Baade, Form (note 181 supra), p.9 and note 37 thereon.
544. C.L. 217.
545. 1823 Projet, p.17. The redactors mean Part.4.15.7; they have made an obvious slip.
546. See text supra, chapter 3 at notes 221-222.
547. See text supra, chapter 3 at notes 208-227.
on adoption, D.O. 8 (p.51), which states:

"L'adoption qui était autorisée par les lois du pays, est, et demeure abolie."

The French code allowed adoption, as did the Castilian laws. In Part 4, adoption is specifically stated to be a method of gaining potestas over another. We need not discuss the specific rules, but to point out that the Castilian rules on adoption were obviously derived from the Roman, to the extent of having the Roman distinction between adrogatio and adoptio. This distinction is logical, given the Castilian law's very Roman conception of patria potestas. Adoption had not been possible under the droit coutumier.

There is no indication as to why the redactors abolished adoption. They perhaps considered it contrary to the "true" conception of marriage and family according to the Christian tradition. Further, other social circumstances might render adoption unnecessary. Adoption, according to Roman law, appears to have served the purpose of preventing families dying out, lest the religious duties of the family no longer be carried out. The

---

548. See C.N. 343 et seq.
549. The D.L.V. refers to the 16th title of the fourth Partida, which is devoted entirely to adoption, and to Febrero Part 1, ch. 15 nos. 1-6, pp. 231-234. See also Asso y Manuel, vol. 1, pp. 117-119.
550. See references, note 549 supra. On the Roman law, see e.g. Buckland, Textbook, pp. 121-128.
551. L. Baudouin, Le Droit de la Province de Québec, Montreal, 1953, states at p. 244: "Si l'on considère la morale comme le fondement des relations de famille, il est hors de doute que l'adoption doit être vue avec défaveur. N'est-il pas immoral qu'une personne ayant la puissance paternelle sur son enfant, puisse en faire abandon à une autre comme si l'enfant était une marchandise cessible? Il est également difficile d'admettre qu'une personne n'ayant pas d'enfant puisse s'en donner fictivement. L'adoption paraît ainsi contraire à toutes les normes légales de l'organisation de la famille, en ce qu'elle fait de la puissance paternelle un élément de négociabilité et en ce qu'elle détourné du mariage, dont la finalité selon la doctrine chrétienne, est la procréation."
Canon law did not recognise adoption and Brissaud suggests that the revival of adoption in Revolutionary France was in imitation of antiquity,\textsuperscript{553} while Baudouin suggests such revival was prompted by the gaps left in families by the Revolutionary and Napoleonic wars.\textsuperscript{554} None of these reasons would have called for the continuance of adoption in Louisiana.

It must be assumed that, in the absence of any obvious need for adoption, the D.O. redactors abolished the institution which they considered contrary to their conception of family. The Roman reasons for adoption were hardly applicable. Further, although technically in force, one may doubt that the Castilian provisions on adoption were much used, if at all.\textsuperscript{555} Certainly the Castilian law and the Code Napoléon were exceptional, in the legal systems of the period, in permitting adoption, and it is clear from Maleville's discussion that there was opposition to adoption in the redaction of the French code.\textsuperscript{555}

Adoption was certainly contrary to the traditional Canon law conception of marriage and family.

The Castilian sources mention a fourth method of acquiring \textit{patria potestas} over another: the ingratitude of an emancipated son returns him to the potestad of his father.\textsuperscript{557} There is no equivalent provision in the D.O. nor in the C.N. or its projet. The Castilian rule is of Roman origin.\textsuperscript{558} The Castilian rule is the result of the Roman concept of \textit{patria potestas} in the Castilian law, even though children are emancipated by marriage.\textsuperscript{559} The C.N. has no need of such a rule, considering that most aspects of paternal power ended with the child's reaching the age of majority. The D.O. redactors have here followed the C.N. and excluded any such rule, just as they have

\textsuperscript{553} Brissaud, \textit{History}, pp. 218-9.
\textsuperscript{555} Examination of the colonial archives, especially those of notaries, might help establish this.
\textsuperscript{556} 1 \textit{Analyse}, pp. 301-309.
\textsuperscript{557} See Part. 4.18.19. See \textit{Asso y Manuel}, vol. 1, p. 117; Febrero, Part 1, ch. 15 no. 17, p. 237
\textsuperscript{558} C.8.49.1, cf. D.1.7.12.
\textsuperscript{559} See supra, text at notes 137-157.
adopted the droit coutumier's conception of puissance paternelle (as will be demonstrated). Thus, the adoption by the D.O. redactors of the northern French concept of puissance paternelle renders a rule such as this Castilian one, unnecessary.

Thus, under the D.O., puissance paternelle was acquired over those born in legitimate marriage or those legitimated by subsequent marriage. Adoption was rejected as a method of creating family ties. The subjection of ungrateful emancipated children to puissance paternelle was irrelevant given the concept of paternal authority found in the D.O. The redactors copied the C.N.'s conception of legitimation, and rejected that of the Castilian law. Overall, the D.O. redactors have restricted the possibilities for the creation of legitimate ties of parent to child: they have limited the possibilities of operation of paternal authority by restricting the class of those who may be subject to such authority. The restriction of legitimation and abolition of adoption show this clearly. Such limitation seems to have been the result of both social and legal-technical factors, being in accord with the growth of the close affective nuclear family unit, and permitting easy proof of legitimation. The C.N. was obviously influential in the restriction of legitimation; but, although the French code's influence is pervasive, it was not enough to prevent the abolition of adoption, though found in both the C.N. and the Castilian law.

2. Scope of puissance paternelle.

A. Rules in chapter V, title 7 of Book 1.

This chapter, articles 36-58, deals with puissance paternelle. It is the equivalent of title 9 of the C.N.'s first book: C.N. 371-387. The title and the chapter, however, do not correspond completely; this is because, from D.O. 46 (p.53) onwards, the D.O. deals with reciprocal rights and duties (for example, aliment) of parents and children. The C.N. has dealt with these earlier in chapter V of its fifth title. These D.O. articles (46-58 (pp.53-5))
will not be discussed here, as they do not deal directly with the notion of paternal power. The remaining articles, D.O. 36-45 (p.53), are the equivalents of the corresponding C.N. title, though there are differences between the two codes, as will be seen from the fact that the C.N. title contains articles 371-387, seventeen in all, while the D.O., in the part to be discussed, contains only ten. The reason for this difference will be shown infra; but it may be pointed out that the same fact situations are being regulated.

D.O. 36 (p.53) states:

"L'enfant â tout âge doit honneur et respect à ses père et mère."

This is identical to C.N. 371. The D.L.V. refers to Part. 4.19.1, which states that an upbringing (crianza) is one of the greatest benefits one man can give another, and such upbringing causes the natural love of a son for his father to grow:

"Otrosi el fijo es mas tenudo de amar et de obedecer al padre, porque el mismo quiso levar el afan en criarle ante que darle a otro."

Thus, the Partidas' provision is similar to that in the D.O.; but this article is not particularly significant and no conclusions of interest may be drawn from it.

D.O. 37 (p.53) states:

"L'enfant reste sous l'autorité de ses père et mère, jusqu'à son majorité, ou à son emancipation."

C.N. 372 provides much the same. C.N. 373 states that during the marriage, the father alone exercises this authority. There is no equivalent in the D.O. to C.N. 373, though, in the 1823 projet of the 1825 C.L., it was recommended that there be added to D.O. 37 the sentence: "En cas de dissentiment, l'autorité de père prévaut."

---

560. Not that these articles would not be relevant from the point of view of illuminating the parent-child relationship; but space dictates a choice.  
561. According to Batiza, the "verbatim" source.  
562. According to Batiza, the "almost verbatim" source.  
563. 1823 Projet, p.18: C.L. 234.
refers to Part.4.17.1, 2 and 3 and to Pothier. 564. Ley 1 of the Partidas' reference states that patria potestas is the power a father has over his sons, grandsons and all who descend from him in the direct line. Ley 2 describes those sons not under a father's power, and repeats that the padre has in his power all his legitimate descendants in the male line. Ley 3 defines what is meant by potestas or poder. The Pothier reference states that puissance paternelle ends not only on the natural or civil death of the child, but also on his majority, marriage or emancipation. Pothier also remarks that puissance paternelle belongs to the mother as well as the father; but the mother only exercises the power when the father is unable to do so, otherwise she is excluded, being herself under the power of her husband.

The D.O. redactors have based their article on C.N. 372. They have thus overturned the Castilian law, where the patria potestad belonged to the father alone. The provision of the C.N. originates in the droit coutumier of France, whereas the Castilian provision originates in the Partidas' copying of Roman law. 565. The D.O. follows the droit coutumier in permitting majority to emancipate, whereas the Castilian law does not. (It should be recalled that contrary to the Partidas, in the Castilian law of a later date, marriage emancipated. 566.) The D.O., however, has rejected C.N. 373, and in theory has put the mother and father in a position of equality. The reasons for overturning the Castilian concept of patria potestad will be canvassed infra; but the reasons behind the rejection of C.N. 373 should be discussed here. A first point is that the 1807 Act ch.17, on the celebration of marriages, by its section 16, on the consents of parents to the marriage of minor children, stated that both mother and

564. T.P.C. (Traite des Personnes et des Choses)no. 134, Bug. 9, p.52.
565. See text supra at notes 137-157.
566. See text supra at notes 147-155.
father should consent; but if they disagreed, the consent of the father sufficed. Thus, this provision of the D.O. was not dictated by an anterior statute. Nor can the rejection of C.N. 373 have been accidental: given how closely the D.O. redactors were following the C.N., the rejection must have been a deliberate choice. One must assume that the D.O. redactors felt that such sharing of the authority over children was appropriate; and, indeed, all the rest of the articles of this section give the parents an apparently equal authority, only in a later article is it stated that the father alone has the administration of his children's property, although both parents have an equal right to the enjoyment of such property. That such equal authority might be thought as being likely to lead to conflicts would explain the amendment of D.O. 37 (p.53) in the 1825 C.L. This article, then, in both allowing majority to emancipate, and giving equal authority to the parents, signifies a rejection of the Castilian concept of patria potestas for the droit coutumier's concept of puissance paternelle.

D.O. 38 (p.53) states:
"Tant que l'enfant reste sous la puissance de ses père et mère, il doit leur obéir dans tout ce qui n'est pas contraire à la religion et aux lois."

Batiza gives, as the "substantially influencing" source, a passage of Pothier. 567. This must be correct. There is no equivalent provision in the C.N., nor are any references given by the D.L.V. It should be noted that Pothier only states that children should obey their parents in all matters bar those contrary to "la loi de Dieu." The D.O. refines this statement; but the difference is unlikely to be important. The statement on obedience is an obvious one, given the nature of puissance paternelle, and holds no great significance.

567. T.C.M. no.389, Bug. 6, p.177.
D.O. 39 (p.53) is more interesting:

"L'enfant au dessous de l'âge de puberté, ne peut quitter la maison paternelle, sans la permission de ses père et mère et ceux-ci ont le droit de le corriger, pourvu que ce soit d'une manière raisonnable."

Batiza gives, as the equal "substantially influencing" sources, Pothier568 and C.N. 374. The D.L.V. gives no references. C.N. 374 states:

"L'enfant ne peut quitter la maison paternelle sans la permission de son père, si ce n'est pour enrôlement volontaire, après l'âge de dix-huit ans révolus."

Pothier, mutatis mutandis, gives a roughly equivalent statement to that in the C.N. There are two obvious differences from the D.O.: the latter applies only to children under puberty, while the C.N. and Pothier refer to any child under paternal authority; second, the C.N. and Pothier make an exception for voluntary enlistment, an exception not necessary in Louisiana, given that the D.O. refers only to pre-pubertal children. The D.O. has retained the Castilian division of nonage into minority and pupillage. 569. It is by virtue of this distinction that the redactors have rendered their article applicable only to pupils, that is those under puberty. The Castilian law allowed fathers to compel their children to stay with them: such a right is implicit in the notion of paternal power being the ligamiento of reverencia, subyeccion and castigamiento, as defined by the Quarta Partida. 570. Part. 4.17.10 allows a father to demand of the judge that his son be returned into his power, should the son be vagando por la tierra, not wishing to obey his father. Asso and Manuel also point out that vagrant children may be compelled to return to their father. 571. The D.O. has thus lessened the puissance paternelle in comparison to the droit coutumier, the C.N., and Castilian law, by virtue of only compelling pupils to remain with their parents. Given that, in the D.O., majority emancipated, that the division of

569. See text supra at notes 443-448; and see also, e.g., Asso y Manuel, vol 1, pp.4-5 and 6-7 III.
570. Part.4.17.3.
nonage into puberty and minority did not necessitate this D.O. provision, and that the redactors were not copying any obvious source, it must be assumed that the redactors considered this restriction of puissance paternelle appropriate for Louisiana. Perhaps they thought that the social circumstances of the New World favoured the early freeing of children from parental restriction.

This article of the D.O., as quoted, includes a power of reasonable chastisement. Neither of the "sources" cited by Batizal as cited, include such a provision: they both do have elaborate provisions on "correction" of the child. Thus, in its articles 375-383, the C.N. permits and regulates the imprisonment of the child by the parents. Pothier states that parents have a "droit d'une correction modérée ... sur leurs enfants," and adds that this "droit de correction dans la personne du père va jusqu'à pouvoir de sa seule autorité faire enfermer ses enfants dans des maisons de force". If, however, a father had remarried, he required a judicial decree for the imprisonment of his son; while mothers, because of the "faiblesse de leur jugement, et le caractère d'emportement, assez ordinaire à ce sexe", always required judicial authorisation for the imprisonment of their children. Although the C.N.'s provisions differ in details from those of Pothier, the essential idea is the same: parents may demand the imprisonment of their children. The D.O. gives no such draconian powers to parents. Maleville claims that the principle behind these articles is taken from a constitution of the Emperor Alexander, which is found in Justinian's code. The provisions of the C.N., however, are much more closely related to the ancien droit as stated by Pothier than to this imperial constitution. The Castilian law permitted the chastisement of children (Part.4.17.3, as

572. T.P.C. no. 132, Bug. 9, p.51.
574. We will discuss them further infra, on Quebec.
575. Analyse, p.346 and p.332 C.8.46.3.
already cited, shows this\textsuperscript{576}); but there are no detailed provisions on imprisonment on the demand of fathers.
Blackstone states that a father "may lawfully correct his child, being under age, in a reasonable manner".\textsuperscript{577} The D.O. rather echoes this in its provision; but this has, for us, no significance. The D.O. has excluded the C.N.'s regulation of imprisonment. Given the noticeable liberalisation of \textit{puissance paternelle} in the D.O., to have included such severe powers of imprisonment would have been to violate, to a certain extent, the policy of the redactors. Further, there would be no facilities in Louisiana for such imprisonment of disobedient children; in France the tradition of such imprisonment would result in there being facilities available. Similarly, severe misconduct on the part of children would usually mean they had committed some criminal offence, and the penal law could be left to deal with them. Circumstances would not favour the adoption of provisions such as those in the C.N., especially when there were no Castilian equivalents.

In conclusion, this article seems to be an amalgam of the French and Castilian law; but with a liberalisation of both, and a rejection of the harsh powers of correction granted by the French law. The form of the article seems prompted by the sources, though the content is explicable in terms of contemporary society in Louisiana. Even if the wording of the right of reasonable correction has been adopted from Blackstone, there has been no importation of a common law principle: the expression of Blackstone has

\textsuperscript{576} See text at note 570 supra.
been adopted as congruent with the principles of the civil law, and offering a refined statement suitable for borrowing.

D.O. 40 (p.53) states:

"Les père et mère ont le droit de nommer des tuteurs à leurs enfans, ainsi qu'il est prescrit au titre des mineurs, etc. et de leur transmettre leur autorité pour l'exercer même après leur mort." 578.

Batiza states that the "substantially influencing" source of this article is Domat. 579. The D.L.V. refers to Part. 6.16.3 and 6. The provision of Domat is roughly in accord with that of the 1808 Digest. Part. 6.16.3 states that a father or grandfather may appoint by testament a tutor to his son or grandson. Part. 6.16.6 states that a mother may appoint in her testament a tutor to her son, if she has made her son her heir and if there be no father to appoint a tutor. This tutor is controlled and directed by the local judge. If a mother does not so appoint her son as her heir, she may not name a tutor for him; but if she nevertheless does so name a tutor, the judge has a discretion to confirm him. T.W. Tucker suggests that Blackstone is the source of this article. 580. In relevant part Blackstone states:

"The legal power of a father (for a mother, as such is entitled to no power, but only to reverence and respect), the power of a father, I say, over the persons of his children ceases at the age of twenty-one .... Yet till that age arrives this empire of the father continues even after his death; for he may by his will appoint a guardian to his children." 581.

The last sentence of this quotation seems to have exercised some influence on D.O. 43 (p.53), since there is no equivalent in Domat. In form, D.O. 40 (p.53) would seem to be an amalgam of Blackstone and Domat. This has,

578. Note that the spelling of enfans has changed; in this article the spelling enfans is used. The two spellings appear to vary at random in the (only) edition of the D.O.; it is conceivable that the spelling used indicates a source copied. If this hypothesis is correct, then such variation could be used to help pinpoint sources even more precisely.

579. Domat, I. II, I. I. 4. (=Part 1, Book II, title 1, sec. 1 no 4; see notes 167 and 327 supra).


581. 1 Commentaries, p.453.
however, little significance for the rule enunciated, which is a traditional rule of the droit coutumier of France. Further, if as directed by the article, the relevant part of the title des mineurs is examined, the rules on testamentary tutors in the D.O. and C.N. are very similar. Thus, this article, though possibly an amalgam of Domat and Blackstone in form, contains a civilian rule in content. The wording may in part be influenced by Blackstone, but the rule is different.

The rule in the D.O. is of French origin, in that the mother has certain rights to appoint a testamentary tutor, whereas, in the Castilian law, her right to do so is very limited indeed. On the other hand, in the D.O., as in the Castilian law, tutorship ends when the child reaches puberty; thereafter there may be a curator, but curatorship is always dative, never testamentary. Thus, the rule in the D.O. is rather more restricted than would initially appear, and is an amalgam of the French concept of puissance paternelle, as shared between the mother and father, and the Castilian division of pupillage and minority. The only influence Blackstone has had is on the expression of D.O. 40 (p.53). Thus, this provision of the D.O. is the result of the inclusion in the 1808 Digest of the Castilian division of nonage into pupillage and minority and the French concept of puissance paternelle shared between father and mother. The increased rôle given to the wife and mother is consistent with the rest of the provisions on paternal power.

D.O. 41 (p.52) states:
"Fathers and mothers may, during their life, delegate a part of their authority to teachers, schoolmasters and other persons to whom they entrust their children for their education, such as the power of restraint and correction, as far as may be necessary to answer the purposes for which they employ them."

582. Compare C.N. 397-401 and D.O. 11-14 (p.61).
583. See e.g. Asso y Manuel, vol 1, p.9.
584. Titre VIII of Book 1 is interesting. It is entitled "Des mineurs, de leur tutelle, curatelle et de leur emancipation." There is an uneasy mixture of French and Castilian concepts: notably the French concepts of puissance paternelle and emancipation, and the Castilian division of pupils and minors, these Castilian rules being, to some extent, predicated on the concept of patria potestas.
Batiza claims Pothier as the "partially influencing" source of this article. Pothier states that a father and mother have a right to retain their children with them, "ou les envoyer dans tel collège, ou autre endroit ou ils jugent à propos de les envoyer pour leur éducation." Pothier says nothing of a licence to delegate paternal powers; but such would exist. This delegation of paternal power is made explicit in Blackstone, who says, in a text bearing a very strong resemblance to the English version of the D.O. article:

"He [i.e. the father] may also delegate part of his parental authority, during his life, to the tutor or schoolmaster of his child; who is then in loco parentis, and has as such a portion of the power of the parent committed to his charge, viz. that of restraint and correction, as may be necessary to answer the purposes for which he is employed." 586.

Tucker claims this as the source of the D.O. article. 587.

The D.L.V. refers to Febrero, who states:

"En consecuencia de esta oblicion y dominio pueden los padres servirse de sus hijos, sin que estos tengan accion á pedirles salarios; por lo que cumplen con mantenerlos, y educarlos según su esfera y posibilidad. (1) [Part. 2.20.3] Pueden asimismo ponertos a pupilage con maestros que los enseñen, y estos deben hacerlo sin ocultarles cosa alguna de la ciencia arte à oficio que professan, áfin de que se instruyan à satisfacción de inteligentes, y à este efecto se les permite castigarlos, de suerte que no los lisien en sus cuerpos, pena de los daños (2) [Part. 5.8.11]." 588.

There can be no doubt that the actual wording and expression of D.O. 41 (p. 52) is taken from Blackstone; as regards the rule contained, that the mode of expression which should have been adopted is that of Blackstone is of little significance, in so far as similar rules may be found in other sources: there has been no importation of a rule of the common law. Blackstone has provided a useful expression of the rule, and his expression has been appropriated. It

585. T.P.C., no. 131, Bug. 9, p. 50.
should be noted that, consistent with the general trend of this title, this power has been given by the D.O. redactors to both the mother and father.

D.O. 42 (p.53) states that:
"Les père et mère auront, durant leur mariage, la jouissance des biens de leurs enfants jusqu'à leur majorité ou emancipation."

Batiza states that C.N. 384 is the "substantially influencing" source of the D.O. article, while Proj. An. VIII, 1.8.12 is a subsidiary source. The D.L.V. refers to Domat589 and Part.4.17.5. C.N. 384 states:
"Le père, durant le mariage, et après la dissolution du mariage, le survivant des père et mère auront la jouissance des biens de leurs enfants, jusqu'à l'âge de dix-huit ans accomplis, ou jusqu'à l'émancipation qui pourrait avoir lieu avant l'âge de dix-huit ans."

The Proj. An. VIII is, in relevant part, substantially the same as C.N. 384, except that, unlike the latter, the enjoyment ends at the majority (or emancipation) of the children, not their reaching eighteen. The difference between the C.N. and its projet is the result of a decision during the redaction of the Code Napoléon to lower the age of this ending of the enjoyment of the usufruct, lest parents, desirous of keeping this usufruct, unreasonably refused either to allow their child to marry or to emancipate him or her.590 Domat states that the father, during his life, has a usufruct of the goods which may have been acquired by his unemancipated children. Part. 4.17.5 states that those gains made by sons using the goods of their fathers belong to their fathers, while those gains made by sons by their own industry or by, inter alia, finding a treasure or by donations to them mortis causa.

590. See Maleville, 1 Analyse, pp.351-3; Maleville thoroughly disapproved of the C.N. provision; see also Planiol, Traité Elémentaire de Droit Civil (Louisiana State Law Institute translation), 1959, no. 1704, vol.I, Part II. Note that this article of the 1800 projet also states that this usufruct does not cover children's earnings. The C.N. gives the same rule in C.N. 387, copied by the D.O. See infra at notes 599-604.
or inter vivos belong to the sons; but the usufruct of this last class of goods belongs to the father, by reason of his power, while he is alive. The Partidas' provision follows the Roman law on bona adventicia and bona profecticia.

The provision of the Partidas has not been followed because it is contradictory to the much more restricted conception of puissance paternelle found in the D.O., where, for example, majority ended paternal authority. Further, in line with their policy of giving wives equal rights with their husbands in such authority, the D.O. redactors have given both parents equal enjoyment, whereas the C.N. and its projet state that, during the marriage, the father alone enjoys the property. The D.O. redactors have followed the Proj. An. VIII in providing that the parental usufruct should last until the children reached the age of majority. The French codifiers' fear that parents would unreasonably refuse permission to their children to marry might not have been relevant in Louisiana, where lack of parental consent was not a ground for annulling a marriage. Further, the more traditional view adopted by the D.O. redactors was more in line with the theory of family implicit in their conception of puissance paternelle, since it assumed that parents would be acting in the best interests of their children, and that their usufruct of the children's property was reasonable given the parental tasks of care, control and upbringing. In the D.O., the usufruct ends at the dissolution of the marriage, because the surviving parent is entitled to become the natural tutor of the child. Under D.O. 44 (p.53) (discussed below), in the event of separation from bed and board, the right of usufruct goes to the parent who sued for the separation.

D.O. 43 (p.53) provides thus:

"Les charges de cette jouissance seront:
1. Celles auxquelles sont tenus les usufruitiers;"

591. See Buckland, Textbook, pp.280-1, and see text supra at notes 107-109.
592. See D.O. 6 (p.59).
2. La nourriture, l'entretien, et l'éducation des enfants, selon leur fortune."

Batiza states that the "verbatim" source of this article is C.N. 385, in its first two paragraphs. The D.L.V. refers to Domat,\(^{593}\) and Part.4.17.5. Domat gives the duty of a father as regards his usufruct, and the provisions are much as those in the D.O.\(^{594}\) He also states that parents are obliged to nourish and maintain their children, not only because of the usufruct, but also because of the blood tie.\(^{595}\) He generalises this into a reciprocal duty between ascendants and descendants. Part.4.17.5 is not really equivalent to the D.O. article, merely stating that a father has a usufruct of the bona adventicia.\(^{596}\) Part. 4.19.1 and 2, however, do contain provisions on the care of children. Ley 1 states that fathers should look after their children, ley 2 giving the reasons why. No statement is made to the effect that this is a reciprocal duty correlative to the parental right of usufruct; but, the relevant ley does state that this duty is the result of the natural law that makes all creatures nourish and guard their offspring, of the natural love parents have towards their children, and of the spiritual and temporal laws enjoining parents so to do. The Louisiana article, following the C.N., has formed the parental right of usufruct and the duties of upbringing into the mold of reciprocal obligations. A connection has been made between the two not found in the old Castilian law, which regarded the paternal usufruct as a right resulting from the natural and civil power of parents over children, while the duty of care and upbringing was the result also of natural and civil law. The C.N. and D.O. here conceive of family relationships as those between individuals with reciprocal rights and duties, while the Partidas conceive of such relationships as the result of the natural power of the ascendant over his descendants, though tempered by the

593. Domat, II, II, II, sect. 2, arts. 7 and 11.
594. Ibid. art 7.
595. Ibid. art 11.
596. See text supra at note 591.
natural love he has for them; that is, family relationships are regarded as those of dependency. That the D.O. does not copy the last two paragraphs of C.N. 385 has no significance for the above argument. 597.

D.O. 44 (p.53) states that:
"Cet usufruit, en cas de séparation de corps, aura lieu pour la totalité, au profit de celui des père et mère qui aura obtenu la séparation, aux charges prescrites dans l'article précédent et l'autre époux en sera privé." 598.

Batiza gives C.N. 386 as the "partially influencing" source. The D.L.V. gives no references. C.N. 386 is as follows:
"Cette jouissance n'aura pas lieu au profit de celui des père et mère, contre lequel le divorce aurait été prononcé; et elle cesserà à l'égard de la mère, dans le cas d'un second mariage."

Although the C.N. mentions divorce, mutatis mutandis, the general drift of the two articles is the same: the usufruct goes to the innocent party who wins the action. Given the notion of one party being guilty, given that the wife has equal rights of authority, the D.O. provision is hardly surprising. The D.L.V. makes no reference to Castilian law. The concept of _retinere retested_ in the Castilian law is so Roman that such power may never be exercised by the mother. The usufruct always belonged to the father alone: _separation a mensa et a thoro_ would have no effect on his rights. An important difference between the D.O. and the C.N. is that, in the latter code, the mother did not enjoy the usufruct during the marriage, so that, if her husband divorced her, as regards the usufruct, she lost nothing.

D.O. 45 (p.53) provides thus:
"Cet usufruit ne s'étendra pas aux biens que les enfants pourront acquérir par un travail et une industrie séparée, et a ceux qui leur seront donnés et légués, sous la condition expresse que les père et mère n'en jouiront pas."

597. The fourth paragraph of the C.N. article on the usufruct is taken from the northern conception of _garde_, and there was no equivalent in the _droit écrit_; see Maleville, _Analyse_, pp.353-4. An argument that this was excluded as contrary to the Castilian law would be dubious.
598. My emphasis. The section underlined is not translated in the English version of the article.
The English version of this article reads:

"This usufruct shall not extend to any estate which the children may acquire by their own labour or industry, whilst they live apart from their father and mother, nor to such estate as is given or left them under the express condition that the father and mother shall not enjoy such usufruct."

The clause underlined does not appear in the French text, and significantly alters the meaning of the article. Though there was no mention in the 1823 Projet, this clause was removed from the English text in the 1825 Code (C.L.242), and the French was altered by changing "séparée" to "séparés."

The French text of D.O. 45 (p.53) is very similar to C.N. 387:

"Elle ne s'étendra pas aux biens que les enfans pourront acquérir par un travail et une industrie séparées, ni à ceux qui leur seront donnés ou légués sous la condition expresse que les père et mère n'en jouiront pas."

The D.L.V. refers to Part 4.17.6 and 7, and to Febrero. 600. These two leyes deal with peculium castrense and peculium quasi-castrense, following the provisions of the Roman law, though the categories are adapted for mediaeval Castile. 601. The father is stated to have no rights in such acquisitions. Part. 4.17.5, though uncited here, provided that bona adventicia (all property acquired other than from the father's goods) belonged to the son, but the father had a usufruct: such property included gains made "por obra de sus manos". 602. Febrero, as cited, defines bienes castrenses and quasi castrenses, much as do leyes 6 and 7 discussed above. The categories include gains made in war, at the court and palace of the king (either for services or from royal munificence and liberality), what is gained as the salary or stipend paid for the public teaching of some science, and also gains from ecclesiastical benefices and dignities.

599. According to Batiza, the "almost verbatim" source. This point is covered in Proj. An. VIII, 1.8.12. See note 590 supra.
600. Part 2, libro segundo, chap. 3 § II no.38, p.510.
601. See text supra at notes 107-109 and 137-141.
602. See text supra at notes 590-591.
If the English text of D.O. 45 (p.53) were taken as the correct one, it would result that the parental usufruct would extend to acquisitions made by children by their own labour while living with their parents. This would seem to be similar to Part 4.17.5. If whatever children acquired while living away from their parents were regarded as the modern equivalent of peculium castrense and quasi-castrense, it might perhaps be argued that D.O. 45 (p.53) embodied a modernised version of the Castilian law, and that this chapter had obviously been drawn up in English, as the similarity to Blackstone of some of the English versions of the articles would suggest.

This argument, however, must be wrong. Although the addition of an extra clause would seem an odd error to make in translating, it is obvious that the translators have taken "separate" to refer to the children themselves, rather than to "travail" and "industrie". It is indeed a strange error to have made, given that "separé" is feminine singular (to agree with "industrie") while "enfants" is masculine plural. One may surmise that hasty translation resulted in the mistake. That the difference is the result of error is suggested by the removal of the clause in the 1825 C.L. without any comment having been made. Further, to regard the English text as embodying the Castilian law would be rather too fanciful.

Thus, in D.O. 45 (p.53), the redactors have followed the C.N. and overturned the Castilian law with its categories of bona profecticia, bona adventicia, peculium castrense and peculium quasi-castrense. The Roman rules of Castile have not been favoured, and this is in line with the general actions of the redactors in this chapter.

As already indicated, the remaining articles of this chapter of the D.O. will not be discussed. Title VIII of Book One does have a relevant article which it is appropriate to mention here. D.O. 5 (p.59) states:
"Le père est, durant le mariage, administrateur des biens de ses enfants mineurs.
Il est comptable quant à la propriété et aux revenus, des biens dont il n'a pas la jouissance; et quant à la propriété seulement, de ceux des biens dont la loi lui donne l'usufruit.
Cette administration, cesse lors de la majorité ou de l'émanicipation desdits enfants."

This is nearly identical to C.N. 389. 603. The D.L.V. gives no references. The Castilian position was that the father was administrator of the bona adventicia, that is the property of which he had a usufruct. He owned the bona profecticia. He had no interest in any peculium castrense or quasi-castrense which his son might have. 604. It should be recalled that more classes of property were subject to the paternal usufruct in Castile and that such usufruct lasted until the death of the padre or the emancipation of the son.

The above articles contain the core of the provisions on puissance paternelle in the D.O.; thus, although there will be further discussion of relevant provisions, it is useful here to form some conclusions on the foregoing. Although not all the articles of the C.N. have been introduced, and although not all of those which have been introduced have been followed exactly, there can be no doubt that the conception of puissance paternelle found in the D.O. is that of the C.N. The Castilian law had permitted more control over property, and had envisaged a form of authority which was not ended by the child reaching majority. In both these aspects of the power (control over property, and emancipating majority) the D.O. has followed the C.N. The Castilian law only gave the power to fathers. The D.O. gives it equally to mothers and fathers. Though the father administers the property of the children, the D.O. redactors have gone farther than the C.N. in granting equality to the mother. The D.O., following the C.N., has

603. According to Batiza the source, classed as "almost verbatim, first paragraph", and "verbatim second paragraph."
given the parents a usufruct in the property of their minor children. This was not generally the position in the droit coutumier, where, unless the relevant coutume specified that such a usufruct existed, the parents would not have had one. It would probably not be correct to argue that the D.O. redactors have copied the C.N. here because it embodied a rule similar to that of Castile: in other aspects of this chapter of their code, the Louisiana redactors have not hesitated to overturn the Castilian provisions. The C.N. provisions were copied because they were in the C.N., not because they were similar to the Castilian. (Reasons derived from Louisiana society will be discussed below.)

In the above discussion, little attention has been paid to the Proj. An. VIII. Title VIII of its first book was devoted to puissance paternelle. The articles of this title have exerted no real influence over the D.O. equivalent. The title of the Projet is divided into three chapters, with an initial general provision (Proj. An. VIII, 1.8.1) which states:

"La puissance paternelle est un droit fondé sur la nature et confirmé par la loi, qui donne au père et à la mère la surveillance de la personne et l'administration des biens de leurs enfans mineurs et non émancipés par mariage."

This article apparently puts the husband and wife on an equal footing; but the specific provisions of the Projet on detention of children in a maison de correction (Proj. An. VIII, 1.8.2-11, all of chapter one) and on the administration and jouissance of the property of the children - other than that earned by their own labour and industry (Proj. An. VIII, 1.8.12-14, all of chapter two) - show that during the marriage the father alone exercised these rights. Thus, in this respect, the Proj. An. VIII is the same as the C.N. and droit coutumier: the equality of husband and wife found in the D.O. cannot have been borrowed from the Proj. An. VIII; at the most, such equality could have been inspired by Proj. An. VIII, 1.8.1, though this would seem so oblique an influence as
not to be worth considering. The third and final chapter of title VIII of the 1800 Projet is on disposition officieuse, which has no equivalent in the C.N. and D.O., and need not be considered here. Thus, it may be concluded that the 1800 Projet's title on puissance paternelle has had no considerable influence on the D.O.: the influence of the work of the French redactors on this area of the D.O. came from the C.N. itself.

An important aspect of this chapter of the D.O. is the influence of Blackstone, who seems to have exerted some sway on D.O. 39, 40 and 41 (p.53). A first point to make is that these same articles express rules which may be traced elsewhere in civilian sources. That Blackstone was copied here does not mean that principles of the common law were introduced. Further, Blackstone's rules were modified in the redaction of the chapter, since he only gave authority to the father. The wording of Blackstone was adapted to serve the purposes of the redactors in parts of D.O. 39 and 40 (p.53). One may surmise that the inclusion of D.O. 41 (p.53) was prompted by the redactors' examination of Blackstone. (Indeed, the inclusion of D.O. 40 (p.53) may also have been prompted by Blackstone - as well as his wording being adopted and adapted - as there is no C.N. equivalent.) The D.O. redactors obviously used Blackstone where they considered he might put forward a useful or borrowable proposition. These articles in part are the result of such consultation: they do not denote an introduction of common law principles, and they are congruent with the civil law. Blackstone merely prompted some provisions, and his mode of expression to some extent was borrowed.

The above articles indicate the rejection of the Castilian model of patria potestad in favour of the Napoleonic version of puissance paternelle. The D.O. redactors have apparently increased the authority of the mother in comparison to the C.N. This change in the law, ---

605. On disposition officieuse, see infra, note 627.
the borrowing of the essentially French concept of *puissance paternelle*, is not the result of slavish copying of the C.N.: there are too many differences between the codes for that to be so, though some specific provisions must have been prompted by the C.N. The D.O. redactors approved of the C.N.'s provisions on *puissance paternelle*. The Castilian concept of *patria potestas* is based on a notion of family where the patriarchal head of the household has his descendants in his power, and they are dependent on him by virtue of such power and his control over the family property. The C.N.'s concept of *puissance paternelle* to a large extent is based on the notion that children are in the authority of their parents for their own protection and care: their parents look after them and their property. Such authority ends, in most of its aspects, on the children's reaching majority, because the necessity for care and protection no longer exists. Further, the C.N. conceives of the family as nuclear and composed of individuals bound together by reciprocal rights and duties, based on affection, while the Castilian law conceives of the family as based on the authority and power of the head of the household. The difference on this point between the two is shown over the attitudes to the parental usufruct and education and rearing of the children. 606. The D.O. redactors selected the version of family found in the C.N., as regards the articles already discussed. They modified the C.N. provisions, and denied fathers any rights of imprisonment; but the model of *puissance paternelle* adopted is that of the C.N. Given that the redactors had a choice to exercise, to have exercised it in any other way would have been unthinkable, since the C.N. provided provisions which reflected the modern, affective, companionate family. Children were to be controlled by their parents for their own good while minors; they were not, as adults, to be subject to the authority of a *paterfamilias* merely because they were descended from him.

606. See text *supra* at notes 593-7.
B. The marriage of *enfants de famille*.

Pothier states that one aspect of paternal power was the right of parents to exact from their children certain duties of respect. He adds that this aspect of paternal power only finished with the natural death of the child or his parents. From this aspect of paternal power derived the obligation of children to gain the consent of their parents to marry. The rules of the *ancien droit* in France will be discussed below; but it may be pointed out that the 1808 Louisiana Digest requires parental consent only for the marriage of minors. From the necessity of parental consent to the marriage of children derive certain issues: first, oppositions to a proposed marriage; second, the possibility of nullification of a marriage where parental consent had not been gained; and third, the question of who, if anyone, was required to consent in default of parents. To discuss these problems in relation to Louisiana, it is appropriate to set out: first, the Canon law, second, the *ancien droit* and codal law of France, third, the Castilian law as applicable in Spanish North America, and fourth the Louisianaian provisions. This allows the ascertainment of the sources of the Louisianaian provisions.

The Canon law on the marriage of *enfants de famille* is simple: there was no requirement of parental consent to the marriage of minors, even after the Council of Trent (1563). Originally, it had been proposed in the Council that marriages would be null if they were contracted without the consent of parents by sons under eighteen years and daughters under sixteen; but this proposal was ultimately rejected, though, *pro futuro*, the Council decreed the nullity of clandestine marriages, while, for the past, clandestine marriages were valid if free consent of the

---

607. T.P.C., no. 130, Bug. 9, p.50.
608. T.P.C., no. 135, Bug. 9, p.52.
609. T.P.C., no. 135, Bug. 9, p.52.
contracting parties had existed. Thus, under Tridentine Canon law, the marriage of enfants de famille was valid, although contracted without the consent of parents. 612.

It appears that until 1556 there were no restrictions on the marriage of minors without parental consent in the ancien droit, such restrictions as there had been having fallen into desuetude. 613. The policy of the Canon law was contrary to that of the French Crown, and, in 1556, Henri II stated in an edict that enfants de familles who married clandestinely against the wishes of their parents could be disinherited, and their parents could also revoke any donations made to such children; if such children were disinherited, they were deprived of the advantages they would otherwise have received under their marriage contracts, or local coutumes. Sons over thirty years of age and daughters over twenty-five could avoid these penalties, if, before marrying, they had sought the advice and consent of their mother and father. 614. This ordinance was confirmed by article 41 of the 1579 Ordonnance of Blois; and, by article 40 of the same, priests, who celebrated the marriages — — — — — — —

612. The Council decreed thus: "Tametsi dubitandum non est clandestina matrimonia libero consensu contrahentium facta, rata et vera esse matrimonia, quamdui Ecclesia ea irrita non fecit, proinde jure dammandi sint, ut eos sancta synodus anathemate damnat, qui ea vera et rata esse negant, quique falsos affirmant matrimonia a filiis-familias sine consensu parentum contracta irrita esse, et parentes ea rata et irrita facere posse; nihilominus sancta Dei Ecclesia, ex iustissimis causis illa semper detestata est atque prohibuit. On the necessity of future marriages being in facie ecclesiae, the Council said: "Qui aliter, quam praesente parocho, vel alio sacerdote de ipsius parochi seu ordinarii licentia, et duobus vel tribus testibus matrimonium contraherere attentabunt, eos sancta synodus ad sic contrahendum omnino inhahiles reddit, et huiusmodi contractus irritos et nullos esse decernit, prout eos praesenti decreto irritos facit et annullat. See Baade, Form, pp. 20-21 and note 100, and Pothier, T.C.M., no. 324, Bug. 6, pp. 138-9.

613. According to Pothier, T.C.M., nos. 323-4, Bug. 6, p. 140, and also 3 Pan Fran., pp. 164-5.

614. Quoted in relevant part in Pothier, T.C.M., no. 324, Bug. 6, p. 141.
of enfants de famille ou en puissance d'autrui, if such enfants did not show the requisite consent of their father, mother, tutor or curator, were punishable as fauteurs du crime de rapt. 615. Subsequent royal legislation at various times confirmed and extended these provisions. 616.

Although it was nowhere stated that the marriages of minor children were null for lack of parental consent, this was the position taken by the jurisprudence and doctrine in the ancien droit. It was argued that, since the priest, under article 40 of the Ordonnance of Blois, was guilty as fauteur du crime de rapt, the marriage of the minor was rendered null by such crime de rapt (abduction), because abduction was contrary to freedom of consent, which was of the essence of marriage. 617. The presumption that the marriage of a minor without parental consent had been procured by abduction was irrebuttable. 618. The marriages of sons over thirty years and daughters over twenty-five years were valid, there being no presumption of crime de rapt. By the Royal edict of November 26th, 1639, such sons and daughters could only be disinherited if they had not sent an "acte de sommation respectueuse" as provided for under the 1556 edict, asking for permission to marry. 619. A 1692 arrêt de règlement of the Parlement de Paris stated that a child had to go in person to his father and mother's house to make the sommation respectueuse. 620.

Thus, in the ancien droit minor children required the consent of their father and mother to marry, and if they did not have such consent, their marriages were annulable. Their parents could always oppose such a marriage. 621.

615. See Pothier, T.C.M., no.325, Bug. 6, p.141.
617. See Pothier, T.C.M., no. 326, Bug.6, p.142 and ibid., nos.225 and 228, pp.100-101.
618. See Pothier, T.C.M., no. 326, p.142, and Brissaud, History, p.117.
619. See Pothier, T.C.M., nos. 324-326, Bug.6, pp.140-144, Loisel, Inst. Coust.1.2.5, and Poquet de Livonniere, Regles du Droit Francois, 1737, (3d. edn.), (hereafter cited as Poquet), Bk.1, tit.2, sectn. 1, art. VII.
621. See Brissaud, History, pp.129-30, and supra, text this chapter at notes 176-180.
over thirty, and daughters over twenty-five could validly marry without the consent of their parents; but they could be disinheritied unless they had sent an acte de sommation respectueuse. 622. If the mother or father were dead, the tutor or curator of the minor child had to consent to such child's marriage, after having taken the advice of the nearest relatives, following article 43 of the Ordonnance of Blois. There was no such procedure for adults whose parents were dead, since they would not have tutors and curators.

The Code Napoléon states in article 148 that sons under twenty-five years and daughters under twenty-one years cannot marry without the consent of their parents; if their parents disagree, the consent of the father suffices. C.N. 149 states that if one is dead or incapable of consenting, the consent of the other suffices. C.N. 150 states that if both parents are dead or incapable of consenting, then the grandparents should consent. If the grandparents of one line disagree, then the consent of the grandfather suffices; while if there is disagreement between the grandparents of the maternal line and the paternal line, then this taken to amount to consent. C.N. 160 states that if there be no father, mother, grandfather or grandmother, or if such are incapable of consenting, then sons and daughters under twenty-one years cannot marry without the consent of the family council. Thus, the C.N. differs from the ancien droit in replacing the consent of the tutor with that of the grandparents or the family council. The 1800 projet of the C.N. had stipulated that children of either sex up to the age of twenty-five years required parental consent; if the parents disagreed, then that of the father sufficed (Proj. An. VIII, 1:5.10). Proj. An. VIII, 1.5.11 provided that if one parent was dead or otherwise incapable, the consent of the other sufficed, "bien qu'il ait contracté un second mariage." 623. Proj.

622. See Loisel and Rocquet as cited in note 619 supra. 623. This clause was dropped from the C.N. to avoid prejudging in cases of divorce; see Maleville, 1 Analyse, p.148; but see Proj. An. VIII, 1.5.12 on controls on consent in cases of divorce.
An. VII, 1.5.13 stated that if the father or mother are dead or incapable, then the grandparents replace them; if the grandparents disagree, then the majority decision rules; while if they are evenly divided, then the family council should decide. Proj. An. VIII, 1.5.14 stated that if there be no parents or grandparents, then the family council is required to consent to the marriage of children under twenty-five years. Essentially, the rules of the 1800 projet are the same as those of the C.N. in that they have replaced the tutor with the grandparents and family council.

As regards adult children, during the Revolution the requirements of sommations respectueuses has been abolished. Such sommations do not appear in the Proj. An. VIII, which provided that children can never be disinherited. In the C.N., however, in articles 151 to 154, a similar institution has been reintroduced, with the name of the formal request changed to acte respectueuse. Sons between 25 and 30 years had to send three such actes to their parents, or if their parents be dead, their grandparents. One acte had to be sent a month for three months, and then the son had to wait a further month before being able to marry without parental (or grandparental) consent. Daughters between twenty-one and twenty-five had to do likewise. Under C.N. 153, sons over thirty could marry without parental consent after having sent one such acte, and having waited one month. Daughters over twenty-five were not mentioned, but the same rule would apply to them.

---

624. Proj. An. VIII, 1.5.12 is not strictly relevant here, see note 623 supra.
625. Note that, contrary to C.N., the age for males and females is the same in all these articles. Proj. An. VIII, 1.5.15 is on what happens when child and family council persist in their different views.
626. By the loi of 20 September, 1792: see Huussen, op. cit., pp.42-4. It was this law which replaced the consent of the tutor with that of the family council.
627. See Proj. An. VIII, 1.8.15-20 on disposition officieuse whereby by a testamentary acts parents can by-pass married children who were notorious dissipateurs, but only by leaving property to the dissipateur's children or farther descendants.
The C.N. provided no penalty of disinherited if the child failed to send such actes; only the officier de l'État civil could be punished (C.N. 157). The authors of the Pandectes Françaises argued that the father could still disinherit his children for not sending such actes on the grounds that, first, though the code was silent on the matter, there is little point in a prohibition without a penalty, and second, the silence of the code must mean the ancien droit on this point continues to exist.

These authors are presumably the auteur récent to whom Maleville refers and with whom he disagrees, arguing that there no longer can be disinheritance. Maleville's view was the one followed. Thus, with the C.N., there is the reintroduction of the requirement of the seeking of parental consent to the marriage of adult children, though adult children may no longer be disinherited for failing to comply with this requirement. In line with other C.N. provisions in this area of the law, failing the mother and father, grandparental consent should be sought.

The relevant Castilian law is contained in a royal Práctica of 1776. Minor children (those under twenty-five years) no matter what their social class must seek and obtain consent and counsel for betrothal or marriage. They require such consent and counsel from their father, whom failing from their mother. If both their parents fail, then they require the consent and counsel of both of the grandparents, by both lines respectively.

630. 1 Analyse, pp. 153-4; he does not specifically refer to the Pandectes Françaises, but it is fairly certain this is the work he means.
631. See Toullier, op. cit., p. 327., no. 5/50.
632. Nov. Rec. Cast., 10.2.9. Don Carlos III por pragmática de 23 Marzo de 1776 publicada en 27 el mismo. Entitled "Consentimiento paterno para la contracción de esponsales y matrimonio por los hijos de familia." This Pragmática is divided into 19 sections, and I will refer in the notes to the relevant section.
633. See section 2 of the Pragmática on social class. There were further restrictions, of course, on the marriages of Princes and certain public functionaries. See nos. 11-19.
Failing grandparents, minors require the consent and counsel of the two nearest adult relatives who have no interest in such marriage; if such relatives have not the capacity to give consent and counsel, then the consent and counsel of tutors or curators is required. In this matter, however, the actions of the said close relatives and of the tutors and curators are subject to the supervision of the courts. If minors celebrate their marriage without such consent and counsel, although the marriage is valid, it is deprived of civil effects such as the right to claim dowry. The contracting party may be disinherited completely, and even excluded from entailed property. This disinheritance and exclusion affects all his descendants. There still would exist, however, a right for suitable necessary aliment.

Adults of twenty-five years are said by this Pragmática to comply with its provisions by seeking paternal counsel only when they wish to marry. If they fail to seek such parental counsel, then they are subject to the established

634. Pragmática, no.1, in relevant part, reads: "...los hijos é hijas de familia menores de veinte y cinco años... deben, para celebrar el contrato de esponsales, pedir y obtener el consejo y consentimiento de su padre, y en su defecto de la madre, y á falta de ambos de los abuelos, por ambos lineas respectivamente y no teniendo los, de los dos parientes mas cercanos que se hallen en la mayor edad, y no sean interesadod ó aspirantes al tal matrimonio, y no habiendo los capaces de darle de los tutores ó curadores; bien entendido, que prestando los expresados parientes, tutores ó curadores su consentimiento, deberán ejecutarlo con aprobacion del Juez Real é interviniendo su autoridad, sinó fuese interesado; y siéndolo, se devolvera esta autoridad al Corregidor ó Alcalde mayor Realengo mas cercano." Although the start of the above quotation only refers to betrothals, marriages are also intended to be covered.

635. Pragmática, nos. 3, 4 and 5.
636. Pragmática, nos. 3 and 5 at end of each.
penalties.\textsuperscript{637} Note that adults are only required to seek parental counsel; unlike minors, they are not required to gain parental consent. The Pragmática has provisions to guard against the abuse of their powers by parents and relatives.\textsuperscript{638}

Thus, in Castilian law, minors had to seek and obtain parental consent to their marriages. If they had not obtained such consent, they were subject to severe penalties, though their marriage was valid. That the marriage was not invalidated was because for the king to legislate so would be to interfere with the spiritual powers: as the Pragmática itself said, only the civil effects of marriage could be dealt with by the king.\textsuperscript{639}

The decree Tametsi of the Council of Trent anathematised those who stated that the marriages of minor sons of families were invalid for want of paternal consent.\textsuperscript{640} (This is, of course, why the ancien droit in France adopted such an indirect method to invalidate such marriages.\textsuperscript{641}) Failing their father, minors had, in turn, to gain the consent of their mother, grandparents, near relatives, tutors or curators. That relatives should come before tutors and curators indicates that this provision was more concerned with the protection and welfare of the minors than with the fact that the death of the father had liberated the child from paternal power. As regards adults, only the paternal counsel is mentioned. Failing the father, an adult son would be a \textit{paterfamilias} himself.

\textsuperscript{637} No. 6 of \textit{Pragmática}: "Los mayores de veinte y cinco años cumplen con pedir el consejo paterno para colocarse en estado de matrimonio, que en aquella edad ya no admite dilación, como está prevenido en otras leyes; pero si contravinieren, dexando, de pedir este consejo paterno, incurrirán en las mismas penas que quedan establecidas, así en quanto ó los bienes libres como en los vinculados."

\textsuperscript{638} \textit{Pragmática}, nos. 7-10.

\textsuperscript{639} See no. 1 of \textit{Pragmática}, where the authority of the church over the sacrament of marriage is mentioned.

\textsuperscript{640} Quoted supra in note 612.

\textsuperscript{641} See text at notes 612-623 supra.
and without need for protection. Adult children need to seek only paternal counsel to avoid disinheritance: consent to the marriage was not necessary.

For this Pragmática to be valid in Spanish North America (the Indies) and hence in Louisiana, it had to be approved by the Council of the Indies and then sent to the Spanish Indies. It appears that this was done. Thus, this Pragmática was the basis of the law on this point in Louisiana at the time of the cession to the United States. (A pragmática of 1803 altered the law of Castile on these matters. It is very unlikely indeed that this would have been received and become applicable in Louisiana before cession to the U.S.A.: certainly, the D.O. redactors would have been very unlikely to have known of it, and there is no reference to it in the D.L.V.)

In Louisiana, the 1807 Act, ch.17, on the celebration of marriages regulated consents to marriage. Section 16 of this act stated:

"A minor who has not yet compleated [sic] his or her twenty-first year, shall previous to obtaining a licence to be married in the manner hereinafter directed, have received the consent of his or her father and mother, if alive and capable of consenting; in case of a difference of opinion between them the consent of the father shall be sufficient."

Section 17 provided:

"If either of the parents is dead, or is incapable of consenting, the consent of the other shall be sufficient, even although he or she may have contracted a second marriage."

Section 18 said:

"If the father and mother are both dead or incapable

---

642. See chapter 3 supra, at note 68. Rec. Ind., 2.1.39 and 40. See also Baade, Marriage Contracts, pp.40-41.
643. Nov. Rec. Cast., 10.2.18, contains an 1803 Pragmática amending that of 1776. This new pragmática was promulgated on the advice of the Council of the Indies: see first sentence of the Pragmática. This strongly suggests that the 1776 Pragmática was applied in the Indies.
644. This Pragmática may be found in Nov. Rec. Cast., 10.2.18.
645. See note 177 supra.
of giving a consent, the grand father and grand
mother shall supply their places as to this consent,
and in case of difference of opinion a majority
shall prevail; when they are equally divided in
their opinions, the council of the family is
convoked to decide."

Section 19 stated:

"If there be neither father nor mother, nor grand
father nor grand mother alive and capable of consent,
then the minor under twenty-one years of age cannot
obtain a licence to marry without the consent of
the council of the family, legally convoked for
that purpose."

Section 20 said that such a family council had to decide
within one month of being convoked and their consent
requested. After the delay of a month, if the consent had
neither been granted nor been refused, the marriage could
be celebrated. It is obvious that these rules are taken
from the Projet. An. VIII and perhaps the C.N. 646.

The 1808 Louisiana Digest states thus (D.O.11, p.27):

"Tout mineur des deux sexes qui a atteint l'âge
compétent pour se marier, est tenu de prendre le
consentement de ses père et mère s'ils sont vivans, ou du survivant d'entre eux, s'il y
en a un de mort."

This is all the D.O. states on this matter, although D.O.12
(p.27) does refer to the 1807 Act. Presumably, the 1808
redactors intended that on this point the 1807 Act would
apply and, failing the mother and father, sections 17-20
would be applied. It has already been pointed out that
in this part of the D.O. (that on the celebration of marriages)
the D.O. redactors have incorporated far fewer provisions
than the C.N. has, mainly because the D.O. redactors have
deliberately left the detailed provisions on marriage in
the 1807 Act. 647.

The redactors of the 1823 Projet inserted such detailed

---

646. See text at notes 622-631 supra. Note that section
17 is closer to the 1800 Projet than to the C.N.; see note
623 supra.

647. See supra, text at notes 246-250, and between notes
180 and 181.
provisions their revised code. \textsuperscript{648}D.O.\textsuperscript{11} (p.27) was amended by them, \textsuperscript{649}and in the 1825 C.L. became C.L.\textsuperscript{99}. It reads thus:

\begin{quote}
"Tout mineur des deux sexes, qui a atteint l'âge compétent pour se marier est tenu de prendre le consentement de ses père et mère, ou du survivant d'entre eux; et si tous les deux sont morts, celui de son curateur. Il doit fournir la preuve de ce consentement au juge à qu'il s'adresse pour obtenir une permission de mariage."
\end{quote}

Thus, the law has been reformed radically in the 1825 Code. The redactors unfortunately give no indication as to why they have reformed the law in this way.\textsuperscript{650} The redactors of the C.L. have returned the law on consents to the marriages of minors to what it was under the ancien droit of France. Why they have done so need not be considered here, as we are more concerned with the actions of the D.O. redactors.\textsuperscript{651}

It should be stressed that the actions of the redactors of the C.L. do not provide evidence of the intentions of the redactors of the D.O. The D.O. redactors (as D.O. \textsuperscript{12} (p.27) suggests) presumably intended the relevant sections of the 1807 Act to be applied.

On D.O. \textsuperscript{11} (p.27), the D.L.V. refers to the \textit{Pragmática} of 1776, already discussed,\textsuperscript{652} to s.16 of the 1807 Act, and to Pothier.\textsuperscript{653} Pothier gives an extended account of the ancien droit as already indicated. Batiza gives s.16 of the 1807 Act as the "substantially influencing" source, with C.N. \textsuperscript{148} and \textit{Proj. An. VIII}, 1.5.10 as subsidiary sources.

The redactors of the 1808 D.O., along with the relevant sections of the 1808 Act, provide a series of rules which

\textsuperscript{648} 1823 \textit{Projet}, p.8, comment on chapter 3.
\textsuperscript{649} 1823 \textit{Projet}, p.8. Note that in the \textit{projet}, \textit{tuteur} is used; \textit{curateur} is more accurately used in the C.L. itself.
\textsuperscript{650} See 1823 \textit{Projet}, p.8.
\textsuperscript{651} Note the similar actions of the C.L. redactors as discussed supra, text at notes 175-180.
\textsuperscript{652} I have cited this \textit{Pragmática} as found in the Novísima Recopilación. The D.L.V. refers to it as found in another source. It is notable that nowhere in the D.L.V. is the Novísima Recopilación referred to.
\textsuperscript{653} T.C.M. nos. 321-336, Bug. 6, pp.138-148.
originate in the work of codification in France. Before discussing their reasons for doing so, it is useful to look at rights to oppose the marriage of minor children and the effect on validity of such a marriage of lack of consent.

As pointed out, the 1808 D.O. contains no provisions on oppositions to marriages. The 1807 Act, following the work of the French codifiers yet again, restricts the class of those who can oppose the marriages of minors. Here the old law has been overturned by the Act, since the Canon law allowed anyone to oppose a marriage. The D.O. redactors have evidently intended that the Act's provisions should remain in force; this is in line with their actions on who was required to consent to a marriage. The redactors of the C.L. here restored the Canon law, and allowed anyone to oppose a marriage: as with consents, the 1825 redactors have overturned the joint provisions of the 1808 Digest and the 1807 Act.

On the validity of a marriage by a minor without the required consent, the 1808 Louisiana Digest states thus, at D.O. 15 (p.27):

"Le mariage des mineurs qui a été contracté sans le consentement de leur père et mère, n'est pas nul pour cela, s'il est d'ailleurs revêtu des autres formalités prescrites par la loi mais ce défaut de consentement est une juste raison pour les père et mère, de deshériter leurs enfans ainsi mariés, s'ils le trouvent convenable."

Section 49 of the 1807 Act had provided:

"A marriage contracted without the consent of the father and mother, the relations in the direct ascending line, or the council of the family, cannot for that cause be annulled, but the relatives whose consent was wanting, shall have a right to sue upon the bonds of the person issuing the licence, or of the person celebrating the marriage, and to recover damages."

654. See text and notes supra, at notes 175-180.
655. See text and notes supra, at notes 176-180. The relevant provisions of the Act, and those of the French code are quoted in note 178. On the Canon law and ancien droit on oppositions, see references in note 176.
656. See text supra at notes 178-80.
On this article of the D.O., the D.L.V. referred to the \textit{Pragmáticas}, "cidessus citée art. 3"\textsuperscript{657} and s.49 of the 1807 Act. Batiza gives s.49 of the Act and a text of Pothier\textsuperscript{658} as equal "substantially influencing" sources. The \textit{Pragmáticas} in relevant part, allowed the disinheretance of minor children who had not obtained consent, while not nullifying their marriage.\textsuperscript{659} Pothier, as cited, states:

"Une fille qui, avant l'âge de vingt-cinq ans, un garçon qui, avant l'âge de trente ans, se marient sans le consentement de leurs père et mère, sont sujets à la peine d'exhérédation. Après cet âge, ils peuvent se marier, malgré leurs père et mère, pourvu qu'ils aient requis leur consentement par des sommations respectueuses faites en présence de notaire, qui leur en donne acte, faute de quoi, ils seraient pareillement sujets à la peine de l'exhérédation." \textsuperscript{660}

Although it is not obvious in this text, lack of parental consent to the marriage of minors could, in the ancien droit, lead to the annulment of the marriage.\textsuperscript{661} The C.N., article 182, states that if a marriage had been contracted without the consent of the father and mother, ascendants or family council, where such consent was necessary, then the validity of the marriage may be attacked by those whose consent was required, or by the spouse who had required such consent. The \textit{Proj.An.} VIII, 1.5.38 allowed parents and ascendants to sue for the nullity of a marriage to which their consent had been required, such consent not having been gained. Thus, the C.N. and its projet allowed the annulment of the marriages of minors who had not gained the requisite consent. In this aspect of the law, the D.O. redactors and the 1807 Act have not followed the examples of the French codification, but have perpetuated the provision found, as regards the

---

\textsuperscript{657} See note 632 supra, this refers to section 3, in the usage here.
\textsuperscript{658} \textit{Traité des Successions} (T.S.), Bug.8, p.26 (Chap.1, Sect.2, Art.IV. §1 Quest. 1,14.)
\textsuperscript{659} See supra, section 3, at note 635.
\textsuperscript{660} He goes on to refer to the 1556 Edict, the \textit{Ordonnance} of Blois and the 1639 Declaration.
\textsuperscript{661} See text supra at notes 612-622.
marriage of minors, in the Castilian law and the Canon law. Despite Batiza's citation of Pothier, the ancien droit of France has not been followed, since the ancien droit (though by an indirect method) rendered annulable the marriages of minors who had not gained the requisite consents. The D.O. redactors could hardly have reversed s.49 of the Act; but it is probable that they would have approved this provision. It seems likely that the redactors allowed such marriages to be valid because to do so was in line with their policy of restricting puissance paternelle. Given that minors above the age of puberty in Louisiana were able to leave home and could not be forced to return, to have annulled the marriages of other minors might have seemed rather contradictory.

So far, it has been assumed that the two relevant provisions in the D.O. on consents to the marriages of minors were intended to be read with the 1807 Act, though that Act had far more detailed and rather broader provisions than the D.O. It might be argued that, since the 1825 C.L. expanded the D.O. provisions, but in such a way as to contradict the 1807 Act, it is likely that the D.O. redactors had intended these two provisions completely to replace the relevant sections of the 1807 Act: in effect, the D.O. had repealed these parts of the Act. One or two arguments have already hinted that such an approach to the D.O. provisions would be wrong. First, as regards oppositions, the D.O., having no provisions, referred specifically to the 1807 Act. The Act's provisions on oppositions were in line with those on consents and disinherition. Second, the whole of this title of the 1808 D.O. is intended to be read with the 1807 Act. None of the necessary detail on the procedures for marrying, opposing a marriage, or annulling a marriage are included.

662. See text supra at notes 568-572.
663. D.O. 12 (p.27): see text supra at notes 646-7.
The D.O. redactors intended that these be governed by the Act. It seems likely that this was their intention as regards the further rules on consents to marriage. Third, the rules in the D.O. were manifestly incomplete, since D.O. 11 (p.27) makes no attempt to regulate the possible disagreement of parents. This article is, of course, directly followed by the article referring to the Act. This again indicates that the D.O. redactors intended the 1807 Act's rules to govern. Thus, it seems likely that the 1808 redactors intended their provisions to be read along with those in the 1807 Act. The major change in the law would then have been introduced by the 1825 redactors; this would be in line with the 1825 C.L.'s obvious reversal of the law relating to oppositions to a marriage. The redactors of the 1825 C.L. have, in effect, introduced the ancien droit français on the marriages of minors - anyone can oppose, failing parents, curators are to consent - without, however, allowing such marriages to be annulled.

The Castilian law in the 1776 Pragmática had a certain similarity to the system in the 1807 Act and D.O. The Castilian law did not invalidate the marriages; mothers, grandparents and other relatives also had some control over the marriage of minors. It would probably be wrong, however, to argue that the 1807 Act and the D.O. had here followed the C.N. or its projet because the French codal rules were similar to the Castilian; it is likely that the similarity between the Louisiana rules and those of the Pragmática is fortuitous. (One may surmise that similar social circumstances gave rise to the rules of the French code and the Pragmática.)

664. Quoted supra between notes 646 and 647.
665. Note that in the 1823 Projet, p.8, the redactors used the term tuteurs: this term is appropriate for the French law, but not the D.O. or Castilian, which both have a division into pupillage and minority. See note 649 supra.
666. The eighteenth century being the period of change towards the modern nuclear-style family based on affection rather than the power of the head of the household. Note that the Castilian provisions do not go so far in this direction as those of Louisiana.
The 1807 Act and the D.O. are, in this whole area of the law, very influenced by the work of the French codifiers. Since the influence of the French codal provisions on the Louisianian law on the marriages of minors is so great (though in Louisiana such marriages may not be annulled) it is important to attempt to discover the reasons for the Louisianian copying of the French laws.

The D.O. and the Act have rejected any control over the marriages of adult children, while giving control over the marriages of minor children to the family as a whole, rather than to tutors or curators. 667. That the family, in the sense of close relatives, has control over such marriages indicates a new stress on the care of minors for their own good, with such care being exercised by close relatives, failing the mother and father. Adult marriages are not controlled, because adults are presumed not to need such protection. Adult marriages need only be controlled by ascendants when the family is conceived of as more than a domestic unit for the care and nurture of children. If paternal power is conceived of in the Roman sense, the marriages of adult filiifamilias are subject to the authority of the pater by virtue of their dependency on him and subjection to his authority. In such a system of paternal power, a minor with no ascendants is himself a pater, subject to no one. The only consent that could possibly be needed would be that of a curator who has been appointed to advise him. On the other hand, if paternal authority is conceived of as being for the protection of the child, then in the event of the parents being dead, other relatives become important, because of the affection they are supposed to have for the minor. Marriage becomes a matter for such relatives, because their care and affection for the minor are taken to be

667. In the 1825 C.L., of course, close relatives have been replaced by curators.
the best protection. One must conclude that a strong motive, for the adoption of the provisions of the 1808 D.O. and 1807 Act on the marriage of minors, must have been the development of the new style family based on marriage and centred on care and affection for the children. This new style family also brought close relatives into greater prominence than hitherto. The exact expression of the Louisiana rules obviously was influenced by the work of the French redactors; but a desire and tendency to copy the French codal provisions cannot have been the sole motive for the Louisiana provisions, since the Louisiana provisions differ in many crucial respects from those of the C.N. and Proj. An. VIII. (In not controlling the marriage of adults, the Louisiana provisions are closer to those of the 1800 Projet than those of the C.N. itself, though there are still sufficient differences for it to be clear that the D.O. redactors are not merely slavishly copying the Proj. An. VIII's articles.) Thus, these provisions of the early Louisiana law are the result of the growth of the modern affective or associative family, with much of their expression borrowed from and suggested by the work of the French redactors.

3. How puissance paternelle ends.

The most obvious method of ending paternal authority is the death of the parent exercising authority over the child. In Louisiana, the mother was granted equal authority with the father. Some aspects of parental control lasted only so long as the marriage (notably, jouissance of the property of the child), but other aspects of parental authority survived the end of the marriage, so long as the child was still a minor. Certain rights deriving from paternal power (those relating to the marriage of minors) on the death of both parents, devolved on other close relatives. In general, the Louisiana law has here followed

668. See text supra at notes 46 and 47, on the greater role allotted to close relatives.
the French codal versions of *puissance paternelle*, rather than the Castilian. The Castilian law granted *patria potestad* to the father alone; the death of only the father was required to end this *potestad*. The consents to the marriage of minors were a special case in Castilian law in giving some of the paternal authority over minors to the mother, grandparents and other close relatives; but, even in this aspect of the law, the person conceived of as having the authority was the father, and the others who exercised such authority after the father's death did so because, in the words of the 1776 *Pragmática*, they were "en lugar de padres".669.

The second way whereby a child would be freed from power was his reaching the age of majority, which, in Louisiana, was twenty-one years. Majority in the Castilian law did not end *patria potestad*. Here the Louisianian redactors have followed the law of the French code and the *droit coutumier*, presumably because it was more in keeping with their conception of paternal authority as being for the welfare of the minor child, rather than the institution defining the family of the head of the household. Emancipating majority was suited to the close affective family composed of individuals bound together by ties of care and affection. That majority should not emancipate is appropriate for the family conceived of as a hierarchy bound together by the power of the head of the household.

The third method of freeing children from paternal power was emancipation. The eighth title of the first book of the D.O. devoted its third chapter to emancipation, articles 87-97.670. It is not necessary to deal with D.O. 90-97 (p.77), as they are concerned with matters of accounting and administration. D.O. 89 (p.75) concerns the

669. *Pragmática*, no. 1 (see note 632 supra).
emancipation of a minor by the judge, when the minor has no mother and father: this is not emancipation from paternal power, but a method of allowing a minor control of his own property. 671. This leaves D.O. 87 and 88 (p.75).

D.O. 87 (p.75) states thus:

"Le mineur est émancipé de plein droit par le mariage."

This is identical to C.N. 476. 672. It is, of course, the rule of the droit coutumier. 673. The D.L.V. here refers to Ley 47 of Toro, the Recopilacion of Castile 674. and Febbrero. 675. The Castilian rule referred to is that marriage emancipates children from paternal power. 676. This rule has been discussed already, and it has been argued that the Castilian jurists treated this rule as an illogical addition to the concept of patria portestad, 677. and Gomez even limited its applicability. 678. The Partidas did not permit marriage to emancipate. 679. The Castilian rule and the Louisiana rule here correspond; but it is obvious that the D.O. has copied the French rule because of the new conception of paternal authority that has been introduced.

D.O. 88 (p.75) is as follows:

"Le mineur même non marié, pourra être émancipé par son père, ou à défaut de son père, par sa mère, lorsqu'il aura quinze ans révolus.

Cette émancipation s'opère par la seule déclaration du père ou de la mère reçue par un notaire, en présence de deux témoins."

---

671. This is, of course, the Roman venia aetatis. See Jolowicz, Foundations, p.203.
672. According to Batiza the "verbatim" source. He also gives Proj. An. VIII, 1.9.106 as a subsidiary source; but this last article is more concerned with venia aetatis. 673. See text supra at notes 130-136.
674. Rec.Cast. 5.1.8. This is ley 47 of Toro.
675. Febbrero, Part 1, ch.15 § 3 no. 16, pp.236-7. There is a further reference I have not located in the Adicionado; but this does not matter, the rule is clear. See further, ibid. no. 23, at p.240; emancipation by marrying "en faz de la Sante Madre Iglesia".
676. Ley 47 is quoted supra in text between notes 147 and 148.
678. See text supra at notes 152-157.
679. See text supra at notes 563-566.
C.N. 477 is very similar, with the difference that the déclaration should be made to the juge de paix assisted by his clerk, no further witnesses being required. The D.L.V. here refers to Part. 4.18.15, 16 and 17, and to Febrero. Febrero states that for emancipation there are three requirements. First, that the child be fully seven years of age. If the child is under such age, then royal permission is required for the emancipation. Second, judicial approval of the emancipation is necessary. Third, in the presence of the juez ordinario, the father emancipates the son and the son accepts. Thus, the child must be above seven, must consent to be emancipated, and judicial authority is necessary for the validity of the emancipation. Part. 4.18.15 provides for judicial emancipation. Ley 16 allows for emancipation be letters from the king, while ley 17 states that a father may emancipate his son if both wish it.

In the droit écrit in France, as in the D.O. article, emancipations could be made before notaries; there is probably little significance in the departure from the C.N. here of the D.O. The emancipation provided for in the D.O. (and C.N.) is rather different from that in the Castilian law. The difference in the ages at which such emancipation becomes possible is very important. The purpose underlying the French and Louisianian provision is to give a fairly mature minor independence from his father and control over his property. The presumption behind this is that care and protection are no longer necessary. In Castile, on the other hand, although the intention is to render the hijo independent, since the hijo may be emancipated from seven years of age, the reasoning behind the emancipation cannot have been that the son was able and competent to manage his own affairs. The effect of emancipation in Castile was to render the

680. According to Batiza, the "almost verbatim" source.
682. Asso y Manuel, vol. 1, p. 121 give an account the same as Febrero's.
683. Maleville, 1 Analyse, p. 426.
son a paterfamilies in his own right, and to make him legally independent of his father's family, of which he was no longer formally a member. The Castilian rules betray their Roman origin, and show the Castilian idea that the family was the group connected to the head of the household by virtue of being under his potestad. The C.N. provisions have been followed in the D.O. as being more in keeping with the Louisianian conception of puissance paternelle being for the care and protection of children, as a result of which, children could only be freed from such paternal authority when they no longer required such care and protection.

The Castilian law had further methods of emancipating children from patria potestad. Febrero, for example, stated that there were seven methods of ending paternal authority. These include natural death of the padre, the marriage of the son en faz de la Sante Madre Iglesia, and emancipation. The other methods include the civil death of the father, through perpetual banishment, condemnation to the mines or permanent outlawry. The eighteenth title of the Quarta Partida, in its leyes 7 to 15, provided for the ending of patria potestad on the son's achieving certain dignities (many of which indicate the late-Roman origin of the rule). Asso and Manuel state that many of these dignities are no longer recognised; but, arguing from them, they think that every dignidad which may have jurisdiction attached to it and every ecclesiastical dignity are sufficient to end power over the hijo. This rule is unnecessary in Louisiana where majority emancipated, and would only be required where paternal power in general lasted until the death of the father.

---

685. See ibid., nos. 21 and 22, p.239. See also Asso y Manuel, vol. 1, pp.119-120.
686. Consider that the proconsulship and the praetorian prefecture are stated to end paternal power.
687. Asso y Manuel, vol. 1, p.120.
In the Castilian law, a judge could force a father to emancipate his children for four reasons: first, if the father cruelly chastised them; second, if he prostituted his daughters; third, if he had taken possession of property bequeathed to him on condition he emancipate the child, and had not done so; and fourth, if he were misspending the property of or misconducting himself towards an adopted child. The D.O. contained no such provisions. The 1823 Projet, however, recommended the inclusion of an article stating thus:

"Le mineur peut être émancipé contre la volonté de ses père et mère, lorsqu'ils le maltraitent outre mesure, lui refusent des alimens, ou lui donnent des exemples corrupteurs."

This recommended article became C.L. 371. This article, though of Castilian origin, conforms to the conception of the purpose of paternal power found in the D.O.: namely, care and protection of the child. The D.O. redactors do not appear to have included such a provision because there was no equivalent in the French code, and the D.O. redactors appear here to have been following the French code very closely. There were certainly no social reasons for the exclusion of a provision such as this.

A final important point relates to the effect of emancipation on the paternal usufruct. In the D.O. and C.N. this usufruct ended on emancipation. This is only logical given that the enjoyment of the child's property was a right corresponding with and derived from the duty of caring for the child. The Castilian law was different. Febrero states:

"En premio de la emancipación puede el padre retener para sí la mitad del usufruto de los bienes adventicios que su hijo tenía antes de ser emancipado, y no de los que después adquirera; antes, bien, si su hijo se casa luego, debería volverle la mitad que se reservó, porque por..."

689. 1823 Projet, p.29. The redactors state that their recommended article conforms to Part.4.18.18.
690. See text supra at notes 589-604.
691. See text supra at notes 589-591.
legal disposicion le pertenescen enteramente los bienes adventicios, sin que su padre pueda retenérselos, ni su usufruto." 692.

This is a revised version of the Justinianic Roman rule. The difference between the Castilian law and the D.O. and C.N. is once more derived from their different ideas as to the purpose and extent of paternal power: in the D.O. and C.N. the power is considered as necessary for the care and protection of minor children, and the usufruct is a recompense for the attention and upbringing the parents give their children. In the Castilian law, the usufruct derives from the father's power and authority as head of the household. The D.O. redactors have adopted the C.N.'s version of paternal power.

The methods of ending paternal power in the 1808 Louisiana code are derived from the French code. Some of them have corresponding Castilian provisions, but there can be no doubt that the D.O. redactors were following the French provisions, and such correspondence is fortuitous. This action on the part of the D.O. redactors is necessary given their introduction of the northern French concept of paternal power. The Castilian provisions on ending patricia potestad are dependant on the extended power given to fathers in Castile. The one Castilian rule, excluded from the D.O., that is included in the 1825 C.L. is one which is consistent with the D.O.'s conception of puissance paternelle as being for the care and protection of minor children.

4. Conclusion on paternal power in Louisiana.

The provisions of the D.O. on the acquisition of puissance paternelle are taken from the French code. The D.O. redactors have limited the methods of acquiring such power over children, and have thus restricted the family grouping. The number of forms of legitimating children

692. Part 1, ch. 15 §3 no 25, p.243.
has been reduced to one only - *legitimation per subsequens matrimonium*. That form of legitimation itself has been rendered more complex. It is possible to be quite certain that the D.O. redactors were deliberately shaping the law for reasons other than an observable tendency to copy the French code, since the D.O. redactors abolished adoption, permitted by the C.N. as by the Castilian law. The D.O. redactors here appear to have a deliberate policy of restricting the family of the married couple to those children definitely born from the marriage. They seem to be attempting to render the nuclear family unit more secure. Obviously they were influenced by the work of the French redactors; but the French codal articles also allowed them to express an ideology of which they approved.

That the actions of the D.O. redactors were not dictated by a desire to copy unthinkingly the Code Napoléon is also shown by the title specifically devoted to *puissance paternelle*. Although there are obvious influences from the C.N., many of the articles are derived from other sources. Clearly, the redactors were consciously shaping the law, using the materials to hand. This said, it is obvious that the redactors have introduced the concept of paternal power found in the droit coutumier of northern France. They have rejected the Roman concept of patria potestad found in the Castilian law. The D.O. redactors have gone further than the droit coutumier and Code Napoléon, however, since in all the relevant articles of the D.O., the wife is given equal status with the husband, and there is no article equivalent to C.N. 373. The only article inconsistent with this total equality and exercise of the power is D.O. 5 (p.59) which seems to assume that only the father has the enjoyment of the children's property, which is contrary to the statements

---

693. Chapter 5 of the seventh title of the first book of the D.O. See text *supra* at note 560.
694. See text *supra* at notes 562-3.
695. See text *supra* at notes 603-4.
in D.O. 42 and 44 (p.53).\textsuperscript{696} This inconsistency must be the result of the close copying of D.O.5 (p.59) from C.N. 389.\textsuperscript{697} It seems correct to deduce that the D.O. redactors deliberately gave equality to the husband and wife, since C.N. 373 was known to them and before them as they worked.

As well as differing from the droit coutumier and C.N. (and indeed the Castilian law) in giving complete equality to mothers, the D.O. differed from them in giving more freedom to fils and filles de famille, who could, if above the age of puberty, leave home, and could also validly marry (though under penalty of disinheritance). To some extent, this difference is founded on the adoption of the Castilian division of nonage into pupillage and minority; but this division really only permitted the redactors to provide that children over puberty not be compelled to stay with their parents,\textsuperscript{698} it most certainly did not require such a provision: in the Castilian law, no matter what their age, children in power could be compelled to return to their father if they had left home. Thus, the D.O. redactors, in comparison to their sources and models, have liberalised the paternal power. In comparison to the Castilian law, under the D.O. a father has fewer rights in the property of his children, and such rights end completely on emancipation.\textsuperscript{699} He has a right of usufruct as in the C.N., but which most coutumes of northern France (notably that of Paris) did not give fathers. A right of usufruct as incorporated in the D.O., is quite consistent with the social circumstances of the period, and is stated to be reciprocal to the parental duty to feed, bring up and educate their children. The Castilian right of usufruct is declared to be a natural aspect of the dependency of the son on the padre who has him in his power.

\textsuperscript{696} See text supra at notes 588-592 and 598.
\textsuperscript{697} See text supra at note 603.
\textsuperscript{698} See text supra at notes 568-571.
\textsuperscript{699} See Febrero as quoted at note 692 supra.
The D.O., taken with the 1807 Act, ch. 17, extends control over the marriages of minors to grandparents and other close relatives. These provisions, adopted and adapted from the C.N. and its projet, are consistent with the current notion of the family as being based on care; and closer connections with near relatives are compatible with the development of the private nuclear family. The C.N., the droit coutumier and the Castilian law all allowed parents some measure of control over the marriage of their adult children. The D.O. and the 1807 Act denied such control to parents. This is quite consistent with the general liberalisation of puissance paternelle by the D.O. redactors, who, as regards the marriage of minors, only permitted disinheritance of the minors, not annullment of their marriage, if the requisite consents had not been obtained.

The D.O. provisions on puissance paternelle thus mark a radical departure from the Castilian law. The D.O. provisions are obviously strongly influenced by the C.N. and its projet, and resemble those of the latter two codes; but the D.O. redactors themselves went beyond their models and source materials in liberalising their provisions on paternal authority.

The Castilian rules on paternal authority presupposed a hierarchical family based on the authority of the padre. The link binding fathers and children was the subjection of the latter to the former by virtue of the former's potestad as head of the household. The Code Napoléon had a different conception of puissance paternelle. In the C.N., paternal power ended on the majority of the child, and was shared to some extent by the mother. The power was more limited than in Castilian law. The code phrased the rights of the parents as having corresponding duties towards the children. Parent and child were connected by links of reciprocal obligations. The paternal power was in many ways apparently for the benefit of the minor child.

700. See text supra at notes 45 and 47.
and was based on notions of care and protection. The rules of the Code Napoléon provided an expression of the affective, associative family, bound together by parental care for the children: puissance paternelle was to provide care and protection for the child, the usufruct of the child's property helping the parents make such provision, and preventing the awkward case of a father having to account for his administration of his child's property.

The D.O. redactors, no matter the sources they used, expressed in their code the same conception of puissance paternelle as providing care and protection for the child in the bosom of the family. The rules of the Castilian law would have been quite unsuitable in early-nineteenth century Louisiana, being premised on a mode of family organisation not found in the territory. The possible restriction on the capacity of adults in the Castilian law would have been unthinkable in a commercial society where wealth was not based solely on land. Further, the restriction on the freedom of action of adults would have been unacceptable from an ideological viewpoint, and indeed impractical in a society such as that of early Louisiana. Although every article discussed has some minimal basis in another code, statute or doctrinal writing, the redactors of the 1803 Digest were using their varying source material to construct, on the relationship between parent and child, articles embodying their view of that relationship, and expressing the ideology of the close, affective family based on domesticity and childcare. The French codal articles might have suggested this view of the tie of parent to child, other sources may have suggested specific provisions, but it must be accepted that the D.O. redactors used these materials to express their own conception of paternal authority, especially since they went further than any of their sources in liberalising the authority and in giving equality of control to the mother.
Part Two. Quebec.
The 1866 Civil Code of Lower Canada.
Section One. Puissance Maritale.

1. How puissance maritale arises in the Quebec Code.

In the Quebec code, as in that of France and Louisiana, and as in the ancien droit coutumier, the puissance du mari came from the fact of marriage. Thus, although by an antenuptial marriage contract the spouses could vary the normal property consequences of marriage, by C.Q. 1259, the spouses could not derogate from the husband's rights over his wife and children, nor from his rights as head of the conjugal association. The C.N. and the ancien droit had imposed the same restriction.

The fifth title of the first book of the C.Q. is entitled "Of Marriage". It is divided into seven chapters: "Of the qualities and conditions necessary for contracting marriage"; "Of the formalities relating to the solemnization of marriage"; "Of oppositions to marriage"; "Of actions for annulling a marriage"; "Of the obligations arising from marriage"; "Of the respective rights and duties of husband and wife"; and "Of the dissolution of marriage". This division of the title is closer to that of title five of the first book of the C.N., than is that of title four of the D.O. Chapters 6 and 7 of this title of the C.Q. will be discussed later.

In this subsection will be discussed how a valid marriage may be contracted. As with the D.O., annulment of marriages will not be discussed, nor will all of the

---

701. See C.N. 1388 and Poth, T. Comm, (Introduction) nos. 4 and 5, Bug. 7, pp.50-51.
702. The C.N. has, of course, an eighth chapter in this title, "Des Seconds Mariages", composed of one article, C.N. 228. (See note 503 supra.) The C.Q. redactors point out that this provision was not found in the droit coutumier; Second Report, p.175. Chapter 5, "Of obligations arising from marriage", is, in the D.O., covered in the section on paternal power: see supra, text at 560.
703. See infra, subsections 3 and 5 of this section.
704. Except as it relates to paternal power: infra.
more technical formalities.

The first article of this title is C.Q. 115, which states that:

"A man cannot contract marriage before the full age of fourteen years, nor a woman before the full age of twelve years."

C.N. 144, the equivalent French codal article, made the age of marriage eighteen for men and fifteen for women, though C.N. 145 allowed dispensations for motifs graves. Here Quebec has followed the old law in fixing the age of puberty and marriage at fourteen and twelve for males and females respectively. One below the legal age of puberty was presumed impuber and incapable of marriage. The redactors state that they are here following the old rule. Prior to codification in France, the age required to contract a valid marriage had already been raised by one year by the loi of 20th. September, 1792. In the final redaction of the C.N., the ages in C.N. 144 were decided on. Maleville explained that there were two reasons for raising these ages. First:

"Le climat influe d’une manière puissante sur la puberté; la loi qui la fixait à quatorze et à douze, avait été originalement faite pour Athènes, plus méridionale que Paris d’environ six degrés; elle pouvait être bonne encore à Rome et à Constantinople, mais elle était mauvaise pour nos climats plus septentrionaux...." 709.

Second (a social reason):

"Des époux trop jeunes, aujourd’hui émancipés par le

705. Pothier says: "La procréation des enfants étant la fin principale du mariage ... ceux qui ne sont pas habiles à la génération... ne sont pas habiles au mariage." T.C.M., no. 94, Bug. 6, p.39. Justinian's Institutes at 1.10 state: "Justas nuptias contrahunt masculi quidem puberes, feminae vero viripotentes". The Canon law had followed the Roman: Esmein, Mariage, vol.1, pp.212-216.

706. Second Report, p.177. In the ancien droit the presumption that a person below the required ages was impuber could be overturned if "la vigueur avait devancé en âge en cette personne, et qu'elle eut donné des preuves de puberté." Pothier T.C.M. no. 94, Bug. 6, p.40. This could only be proved if the party below the legal age had already married, and pregnancy resulted. It was thus, in fact, a means of contesting an action for annulment on the ground of nonage. As such a defence it is included in the C.Q. as article 145. 707. See Huussen, op.cit., pp.40-41.

708. The 1800 Projet of the French code still gave the required ages as fifteen and thirteen: Projet. An. VIII, 1.5.4. 709. 1 Analyse, p.143.
mariage n'ont d'ailleurs pas la maturité d'esprit et l'expérience nécessaires pour conduire leur maison et élever des enfants; ces enfants eux-mêmes sont ordinairement d'une constitution faible." 710.

These two reasons would have been just as relevant for Quebec, and the raising of the minimum age for marriage just as appropriate. The codifiers give no reason for not suggesting a reform such as that in the French code. They merely remark that since they have retained the old rule, an article such as C.N. 145 is unnecessary. 711. Their actions here reflect their conservative interpretation of their instructions.

C.Q. 116 states that: "There is no marriage when there is no consent." C.N. 146 is virtually identical. Pothier states that "consentement ... est de l'essence du mariage." 712. Here the C.Q., the C.N., and the ancien droit were the same. Consent was nullified by violence, seduction or error. 713. Pothier states that those entirely deprived of the power of reason because of folie or imbécilité could not contract marriage, being incapable of consent. 714. The same would apply in Quebec. The position on the consent of deaf mutes is rather more complex, and neither the Quebec nor French code explicitly treat of it. Pothier states:

"Il ne faut pas non plus mettre au rang des personnes privées de l'usage de la raison, les sourds et muets de naissance. Ces personnes non-seulement jouissent de leur raison, mais elles font entendre par des signes leurs pensées, et on leur fait pareillement entendre par des signes ce qu'on veut leur faire entendre; c'est pourquoi, pouvant faire entendre le consentement qu'elles donneraient à un mariage, elles ne sont point incapables de le contracter." 715.

DeLaporte and Riffé-Caubray state that those who cannot indicate their will are incapable of contracting marriage:

710. Ibid.
712. T.C.M. no. 92, Bug. 6 p.38.
713. See C.Q. 148-151; C.N. 180-183. 3 Pan. Frang. pp.141-7 discusses violence nullifying consent; pp.148-9 seduction having the same result; and pp.149-152 error.
714. T.C.M. no.92, Bug. 6, p.38.
715. T.C.M. no.93, Bug. 6, p.39.
"En conséquence les sourds-muets étaient autrefois dans l'impossibilité de se marier, parce qu'ils ne pouvaient, d'aucune manière, faire connaître leur consentement." 716.

They continue mentioning that it had been intended to include an article on the marriage of deaf mutes, but that since this was not done, the law must still be the same, and deaf mutes cannot marry. 717. Their statement of the ancien droit is incorrect. If deaf mutes could indicate their consent by signs they could marry; and, indeed, this seems to be the position taken by doctrine in both Quebec and France. 718.

The proposed article, referred to by DeLaporte and Riffé-Caubray, had stated that madmen, imbeciles, those condemned to civil death, and deaf mutes could not marry; with the exception that deaf mutes could marry if they could indicate their wishes. There was a lengthy dispute over this article when it was discussed, and it was proposed to replace it with one in the chapter "des actes de mariage" of the title "des actes de l'état civil", explaining how deaf mutes could express consent; but this was not done. 719. Although the C.Q. redactors were aware of the potential problems with consents in the marriage of deaf mutes, they chose to follow the C.N. and make no special provision.

C.Q. 117 is as follows:

"Impotency, natural or accidental, existing at the time of the marriage, renders it null; but only if such impotency be apparent and manifest.

This nullity cannot be invoked by any one but the party who has contracted with the impotent person nor at any time after three years from the marriage."

There is no equivalent article in the C.N., which apparently rejected this form of annulling a marriage because "la preuve

717. Ibid., pp.153-4.
719. See Maleville, 1 Analyse, pp.144-5.
en est difficile et scandaleuse."\textsuperscript{720} After the redaction of the C.N., however, both jurisprudence and doctrine in France had allowed the annulment of the marriage of an impotent, on the grounds of error as to person.\textsuperscript{721} The Quebec codifiers did not follow the example of the C.N.: they provided a specific article on impuissance.\textsuperscript{722} In their remarks on their proposed article, the C.Q. redactors remark that they thought the old law should be preserved, and that impotency should be grounds for invalidating a marriage; but they also thought there should be a restriction to impotency at the time of marriage, such impotency being apparent and manifest. That the impotency be apparent and manifest means that it must be capable of being demonstrated by a simple inspection of the alleged impotent, and must result from some demonstrable malformation:\textsuperscript{723} mere refusal to have sexual intercourse due to repugnance for the act is also not sufficient.\textsuperscript{724} The Quebec codal rule is the result of problems and difficulties with both the ancien droit and the new law in France. The ancien droit merely required that impotency be

\textsuperscript{720} 3 Pan. Fran., p.276. See also note 730 infra.
\textsuperscript{722} Second Report, p.177.
\textsuperscript{723} See Traité de Droit Civil du Québec, Montreal, 1942, vol. 1 by G. Trudel (hereafter cited by author's name and Traité and volume) at p.359, P.B. Mignault, Droit Civil, vol. 1, p.357; L. Baudouin, Le Droit Civil de la Province de Québec, Cœcle Vivant de Droit Comparé, Montreal, 1953, (hereafter cited as Droit Civil) at pp.152-3. Trudel, as cited, states: "La seule débilité des organes est insuffisante pour fonder la nullité."
\textsuperscript{724} In relatively recent years, however, Scholes v. Warlow (1927) 65 C.S. p.6, decided that "invincible repugnance to this act of consommation resulting in a paralysis of the will" was sufficient to found an action for nullity on the grounds of impotency. See Trudel, Traité vol. 1, p.359, and Baudouin, Droit Civil, pp.152-3.
incurable and existing from the time of marriage for it to be an effective ground for annulling a marriage. Pothier states thus:

"Pour que l'impuissance soit un empêchement de mariage... il n'importe qu'elle soit de naissance ou qu'elle lui soit survenue depuis....

Mais il n'y a qu'une impuissance perpétuelle et incurable, telle que celle qui résulte de la privation de quelqu'une des parties nécessaire à la génération, qui forme un empêchement de mariage ....

L'impuissance est un empêchement dirimant de mariage, lorsque celui-ci existe au temps auquel le mariage se contracte; mais s'il n'est survenu que depuis le mariage, il ne le rompt pas." 725.

That impotency to be an effective ground for annulment had merely to be incurable and exist from the time of marriage, rendered acute the problem of proof. Up to 1677, proof of impotency was made by a procedure known as Congrès; but this method was abolished because it was considered "aussi équivoque qu'indécente et contraire à la pudeur." 726. In the eighteenth century, modesty restrained proof of impotency to

725. T.C.M. nos. 97-98, Bug. 6, p.41. The Ancien Denisart, vol. 2, s.v. Impuissance, no. 6 states:"Comme l'impuissance est un obstacle à la principale fin du mariage, elle la rend nul si elle est perpétuelle, ou si elle existoit au temps de la célébration, mais quoiqu'elle soit perpétuelle, le mariage est bon si elle n'est survenue que depuis le mariage."

726. Pothier, T.C.M. no. 458, Bug. 6, p.210. Congrès was a procedure instituted around 1550 by the Parlement de Paris whereby the couple were put to bed with witnesses in the room, and it was for the alleged impotent to prove his potency. There are obvious problems with this procedure. See Ancien Denisart, vol. 2 s.v. Impuissance, nos. 19-21, pp.702-3. In Merlin's Répertoire, vol. 2 (1812), s.v. Congrès, n. 3, it is stated that "On attribue l'origine du Congrès à l'effronterie d'un jeune homme qui étant accusé d'impuissance, offrit de prouver le contraire en présence de chirurgiens et de matrones. L'official eut l'indiscretion d'admettre ce nouveau genre de preuve." In ibid. vol. 6, (1813) s.v. Impuissance there is a long discussion of all the problems of proving or disproving impotency. The explanation of the origin of congrès originates in the writings of Hotman: see Esmein, Mariage, vol. II, p.280 and note 2 thereon. Esmein, Mariage, vol. II, pp.275-284 gives a good discussion of this institution.
the following procedure described by Denisart:

"On ne peut donc actuellement acquérir le preuve d'impuissance que par la voie de l'interrogatoire et des visites par des experts; car nos tribunaux ne consentent pas du serment des parties, ni de l'enquête per septimam manum, et le congrès et aboli: aussi c'est par la visite des parties et sur le rapport des experts, qui font cette visite, que les juges doivent porter leur jugement." 727.

Pothier points out that the experts were chirurgeons or matrones; 728. he also remarks that:

"Il suffit aujourd'hui qu'il résulte de la visite, que les parties extérieures sont bien conformées, pour que la personne ne soit pas réputée impuissante." 729.

This is perhaps not far removed from the position in the Quebec code, despite the difference in phrasing. This statement no doubt also reflects the eighteenth century French embarrassment with this topic and the problems of proof. 730.

The second paragraph of C.Q. 117 states that only the party with whom the impotent has contracted marriage can found an action for nullity on such impotency. The ancien droit was the same, for to permit otherwise would be to permit

---

727. Ancien Denisart, vol. 2 s.v. Impuissance, no. 23, p.703. Pocquet states thus, Ek. 1, tit.1, Sectn. 6, no. 58 (p.25): "La preuve d'impuissance ne se peut faire que par l'interrogatoire et la visite, celle du Congrès a été abolie." 728. T.C.N. no. 458, Bug. 6, p.210. 729. Ibid. 730. See P.J.J.G. Guyot, Répertoire Universel et Raisonné de Jurisprudence ...; Ouvrage de Plusieurs Jurisconsultes, Paris, new edition of 1784-85 in 17 vols., (hereafter cited as Guyot), at vol. 9 s.v. "Impuissance": "Le jurisconsulte, qui doit être chaste et pur comme la loi, se trouve embarrassé en traitant ces matières, qui peuvent reveiller des images voluptueuses: mais en se rendant l'interprète de la loi, il s'oblige à parler avec autant de courage que le législateur des mystères de la nature; et ce n'est pas, sans doute, dans un livre de jurisprudence que l'imagination viendra chercher ce qui peut inflammer les sens. Ici tout est épuré par la justice, qui est à la fois le guide et l'objet de nos recherches." This is a neat statement of the attitude which culminated in the exclusion of an article on impuissance from the C.N.
someone to allege his own turpitude. 731. The Canon law, however, had allowed important persons to sue for annulment, alleging their own impotency. 732. The C.Q. redactors maintained the rule of the ancien droit.

The second paragraph of C.Q. 117 also states that the action of nullity could not be brought if three years had elapsed from the date of the marriage. This is new law; the ancien droit was not so precise, providing that after cohabitation for "un grand nombre d'années" 733 the marriage could not be attacked on the grounds of the impotency of one of the spouses. The number of years which would bar such an action would vary according to the circumstances. Denisart, for example, reports an arrêt where a wife was allowed to seek the annulment of her marriage on the grounds of her husband's impotency eight years after the marriage had been celebrated. 734.

In C.Q. 117, the Quebec redactors have followed the ancien droit, though reforming it, while rejecting the position taken by the C.N. The Quebec redactors knew that the C.N. had no article on impotency annulling marriage because proof was considered difficult and improper. 735. They would also know from the French commentaries on the C.N. that actions to annul a marriage on the grounds of impotency were successfully brought in France, alleging error as to person. 736. They would realise that the same would be likely to happen in Quebec were there not a specific provision on impotency. Further, the introduction of a specific article on impotency

731. Pothier, T.C.I. no.445, Bug. 6, p.203: "il n'y a que la partie avec qui l'impuissant a contracté mariage qui soit recevable à intenter la demande en cassation de mariage pour raison de l'empêchement d'impuissance; et l'impuissant n'est pas reçu à attaquer son mariage pour cause de ce prétendu vice, lorsque la personne avec qui il a contracté mariage ne s'en plaint pas." D'Espessies, op. cit., vol. 1, Part 1, tit 13 no. 3 at p.275: "Le marié impuissant n'est reçu à poursuivre le cassation du mariage, contre celui qui est puissant; car c'est alléguer sa turpitude.... [S]eulement il est reçu en ladite poursuite, lorsque le marié puissant y consent."
733. Pothier, T.C.I, no.445, Bug. 6, p.203.
734. 2 Ancien Denisart, s.v. "Impuissance", no.32, p.704.
735. See supra text at note 720.
736. See supra text at note 721 and references in 721.
would permit useful reforms of the law. Proof of impotency had caused many problems in the ancien droit; the C.Q. redactors provided that such impotency had to be "apparent and manifest" in order to found an action. Another reform was the limitation to three years after the marriage of the period within which such an action could be brought. Thus, this article of the C.Q. is the result of the redactors' desire to follow the ancien droit. The experience of the C.N. would reinforce this desire. Further, the inclusion of a specific article allowed useful reforms of the law as regards mode of proof and time within which the relevant action should be brought.

C.Q. 118 states that: "A second marriage cannot be contracted before the dissolution of the first." C.N. 147 states the same; the ancien droit provided similarly. Any other provision would have been quite unthinkable.

C.Q. 119-123 relate to the necessary consents to the marriage of minors and will be discussed below. C.Q. 124-126 lay down the prohibited degrees of relationship. They are the same as in C.N. 161-163, though C.N. 164 allowed the government to grant dispensations from C.N. 163. The C.Q. redactors merely remarked that a power to grant dispensations as in C.N. 164 did not exist in Quebec. The prohibited degrees as laid down by the C.Q. are those of Leviticus and of the Roman law. They are the minimum prohibited degrees of most Christian societies and are not of great interest here.

737. The period in France under the C.N. would be different. Doctrine had applied C.N. 180 (error as to person) to impotency. C.N. 181 stated that the wronged person had only six months to demand nullity "depuis que l'erreur a été par lui reconnue."

738. 3 Pan Fran. pp. 154-162 has an interesting discussion on this point. There it is argued that polygyny is not contrary to natural law or the essence of marriage (pp. 155-6). Polyandry is stated to be contrary to natural law: "Si une femme avait plusieurs maris on ne pourrait pas savoir qui serait le père des enfants qu'elle mettrait au monde. On ne pourrait pas non plus déterminer auquel de ces maris elle devrait obéir." (p. 156.)


The ancien droit of France followed the Canon law and accordingly had much wider prohibitions.\(^\text{741}\) We need not consider the difficult question of what the law in Quebec on the prohibited degrees of relationship would have been prior to codification.\(^\text{742}\) The redactors, however, included the following article, C. Q. 127, in their code:

"The other impediments recognised according to the different religious persuasions, as resulting from relationships or affinity or from other causes, remain subject to the rules hitherto followed in the different churches and religious communities.

The right, likewise, of granting dispensations from such impediments appertains, as heretofore, to those who have hitherto enjoyed it."

The second paragraph of C. Q. 129 states that no priest or minister can be compelled to solemnise a marriage to which an impediment exists according to his religion. There is no equivalent to C. Q. 127 in the C. N., where marriage is purely secular. C. Q. 127 has been the subject of lively controversy; and it has been much disputed whether this article introduces into the law of Quebec Canon law impediments as regards the marriage of Roman Catholics.\(^\text{743}\)

The C. Q. redactors state that there are certain impediments applicable only to members of particular religions; and since these impediments could not be governed by general provisions, the redactors included this article leaving the members of such religions governed by the rules of their religion.\(^\text{744}\) It seems likely that the redactors intended to introduce these impediments as the law of Quebec as regards the members of particular religions.\(^\text{745}\) The Privy Council decided otherwise, however, in Despatie v. Tremblay.\(^\text{746}\) What cannot be doubted, however, is that the redactors were attempting to give suitable recognition to the religious

---

\(^\text{741}\) See Daleville, 1 Analyse, p. 160, Pothier, T. C. M. nos. 120-211 Bug. 6 pp. 57-95, Esmein, Mariage, vol. 1, pp. 335-383. See also supra where this has been discussed in relation to Louisiana, text at notes 222-230.


\(^\text{744}\) Second Report, p. 179.

\(^\text{745}\) So certainly is the opinion of Brierley, Husband and Wife, p. 806.

\(^\text{746}\) 1921 A. C. 702.
diversity of the Province. In their introduction to their title on marriage, the redactors had admitted that circumstances in Quebec prevented:

"the adoption on the subject of marriage of uniform and specific rules, applicable to all the inhabitants of the province where such variety of usages, religions and religious associations are to be met with, having different customs and practices, and having ministers authorized to celebrate marriages, and to make acts of their celebration." 747.

On this particular article, the C.Q. redactors refer to an English author, who, at the relevant section of his work, remarks that there are two kinds of impediments to marriage:
"first, such as are canonical; secondly, such as are municipal or civil," going on to discuss the differences between them. 748. The redactors have accepted this division, permitting them to recognise the religious diversity of the Province.

C.Q. 127 completes the first chapter of this title of the Code. The next article, the first of the second chapter, C.Q. 128, states thus:

"Marriage must be solemnised openly, by a competent officer recognized by law."

The first paragraph of C.Q. 129 states thus:

"All priests, rectors, ministers and other officers authorised by law to keep registers of acts of civil status are competent to solemnize marriage." 749.

C.N. 165 states thus:

"Le mariage sera célébré publiquement devant l'Officier civil du domicile de l'une des parties."

The ancien droit in France had followed the Tridentine Canon law, though the decrees of the Council of Trent had in themselves no validity in France. 750. Especially crucial was the December, 1606, Edict of Henri IV which, following article

749. The second paragraph, referred to already in connection with C.Q. 127 states: "But none of the officers thus authorized, can be compelled to solemnize a marriage to which any impediment exists according to the doctrine and belief of his religion, and the discipline of the church to which he belongs."
750. See Pothier, T.C.M. no.349, Bug. 6, pp.158-9.
40 of the Ordonnance of Blois, declared that marriages not celebrated in church were null. 751 Thus, the only valid marriage was that celebrated by a Roman Catholic priest, and the parties had to go to church to receive the nuptial benediction and to celebrate the marriage "en face d'Eglise". (A 1787 Edict of Louis XVI allowed non-Catholics to marry in front of an officer of civil justice. 752 ) The Tridentine law as enacted in France would be unacceptable in Quebec under British rule. Although there was no legislation on the point, it is evident that from the time of the cession to Britain onwards, Protestant clergymen (certainly those of the Anglican faith) could solemnise marriages in Quebec. 753 The first legislation on marriage came in 1795, when a provincial Act required clergymen in charge of parishes to keep official registers of civil status. 754 This applied to Protestant and Catholic clergymen. Lemesurier points out that no express power to conduct marriages is granted; it is merely assumed. 755 It was doubtful if this Act applied to Church of Scotland ministers, but an 1827 Act provided that any marriages which had been celebrated and any which were to be celebrated by a Church of Scotland minister were to be valid. 756 The power to solemnise marriages and to keep registers of civil status was gradually extended to ministers of other Protestant denominations, and this series of statutes was consolidated in 1860. 757 This is basically the law contained in these

752. See Toullier, op. cit., vol. 1, p.301, no. 492.
753. See Lemesurier, op. cit., pp.147-8.
754. See Lemesurier, op. cit., p.148. I have not seen these statutes, and am relying on Lemesurier's account of and quotation from them. This statute was 35 Geo. III, ch. 4.
756. 7 Geo. IV, ch. 2: Lemesurier, op. cit., p.148.
provisions of the Quebec code. Thus, these codal provisions stated the existing law of the Province, which already recognised the religious diversity of the inhabitants. The redactors point out that in France of the ancien régime, uniform rules on the solemnisation of marriage were practicable, there being only one recognised religion: after the Revolution, all religions being recognised, to secure uniformity in the celebration of marriages, marriage was made a purely civil act. The redactors continue:

"A change of such a nature, not appearing in any way desirable in this country, it became necessary to renounce the idea of establishing here, as to the formalities of marriage, uniform and detailed rules, and of following the Code Napoleon in the new system it has adopted."  

The term "openly" ("publiquement") in C.Q. 128 was the subject of a dispute between the redactors. Commissioner Day feared that this term might be interpreted to mean "in church" (en face d'Eglise) as it had been in ancien régime France. He pointed out that Protestants generally did not marry in church. The other Commissioners, Caron and Morin, considered the term to be sufficiently elastic to cover the variations in mode and place of celebration among the several religious denominations. This dispute indicates once more the extent to which the redactors were concerned, in these articles, to take account of the diversity of religions and practices in the Province.

The remaining articles of chapter two of this title do not provide material of interest here. C.Q. 130-134 deal

758. On these articles the Commissioners make the following references. On C.Q. 128, they refer only to C.N. 165. On C.Q. 129 they refer to Pothier as cited in note 751 supra, to 35 Geo III ch. 4 s.1 and C.S.L.C. ch. 20 ss.16 and 17 (quoted Lemessurier as cited note 757 supra), and to W.O. Russell, A Treatise on Crimes and Misdemeanors, vol.1, p.192. The C.Q. redactors do not indicate which edition of Russell they are referring to: I consulted the second of 1826-28 (2 vols.) and the third, of 1843 (2 vols.). The section the redactors cite is a discussion of marriage law in England, in Russell's chapter 23 on bigamy; it contains nothing of direct relevance here. They also refer to C.N.75, which deals with the celebration of marriages.

759. See text supra, however, at note 752.


761. Ibid., p.177

with bans and their publication.\textsuperscript{763} \textit{C.Q. 135} is a conflict of laws provision. On these articles, the only point to be made is that \textit{C.Q. 134}, consistent with \textit{C.Q. 127} and 129, states that those "who have hitherto held the right to grant licenses or dispensations for marriage," may grant exemptions from the publication of bans.

Chapter three of title five is on oppositions to marriage, and consists of twelve articles, \textit{C.Q. 136-147}. This chapter follows the equivalent one of the \textit{C.N.} fairly closely. \textit{C.Q. 137-142} deal with oppositions to the marriages of children, and will be discussed later.\textsuperscript{764} Publication of bans permitted the making of oppositions: \textit{C.Q. 144} refers to the Code of Civil Procedure which lays down the method of making oppositions, while \textit{C.Q. 145} states before which court such actions of opposition are to be brought. \textit{C.Q. 146} states that proceedings on appeal from a judgment under \textit{C.Q. 144} and 145 are to be summary, and to be given precedence.

In general, the Quebec code has followed here the provisions of the \textit{C.N.} in so far as the code provides for only a restricted class of persons having the right to make oppositions to a marriage. In the \textit{ancien droit}, following the Canon law, any person claiming a right to do so could oppose a marriage.\textsuperscript{766} Opposition was made by writing intimated to the parish priest who had published the bans. The opposition, no matter how ill-founded, prevented celebration of the marriage by the priest, until the opposition had been withdrawn by the party making it or had been set aside by the judge.\textsuperscript{767} If the court lifted the

\textsuperscript{763} On the \textit{ancien droit}, see Pothier, \textit{T.C.W.}, nos. 66-80, Bug. 6, pp. 27-33. The \textit{C.N.} deals with this matter in articles 165-169.

\textsuperscript{764} See infra, on paternal authority.

\textsuperscript{765} See the Second Report, p. 181. Pothier, \textit{T.C.W.}, no. 81, Bug. 6, p. 33 states that: "Les personnes qui prétendent avoir droit d’empêcher le mariage dont on a publié les bans, peuvent former opposition aux bans." Bugnet in his footnote 1 on p. 33 points out that Pothier is really referring to oppositions to marriage.

\textsuperscript{766} See Pothier \textit{T.C.W.} no. 81, Bug. 6, p. 33, especially sentence quoted in note 765 supra; Brissaud, \textit{History}, pp. 129-30; and also Esmein, \textit{Mariage}, vol. 1, pp. 421-427.

\textsuperscript{767} The technical term used was \textit{donner mainlevée}. 
opposition, and the person opposing the marriage appealed, the priest still could not celebrate the marriage. The system was obviously open to abuse, because of, first, the lack of clear regulation of who had a right to oppose, and, second, the want of adequately defined grounds for making opposition. Further, the system involved long delays, and, apparently, thus ultimately prevented from taking place marriages to which there could be no valid objection. The church had made it a sin to oppose maliciously and unreasonably a marriage; but this measure was of doubtful efficacy in remedying the problem.

Towards the end of the ancien régime, an arrêt of the Parlement de Paris improved the position somewhat. This arrêt, of 28th. April, 1778, forbade anyone, other than fathers, mothers, tutors, curators, brothers, sisters, uncles and aunts, from making oppositions to marriages. The loi on marriage of 20th. September, 1792, devoted the third section of its fourth title to marriage. This enactment solved the problems, noted above, relating to oppositions by limiting to a small number of persons the right of making opposition, and by compelling judges to decide on oppositions with despatch. The French code adopted the system of this loi, and, in turn, the C. Q. generally followed the system of the C. N. Thus, it would appear that the C. Q. restricted the class of those who could oppose a marriage.

On this whole procedure, see Pothier, T.C.M. no. 82, Bug. 6, pp. 34-5. If a priest celebrated a marriage without the opposition having been lifted, he was subject to severe penalties; Order of 5th. June, 1691 - see Pothier, T.C.M. no. 82, Bug. 6, p. 34.

Huussen, op. cit., p. 43 points out that this particular section of the highly contentious loi of 1792 was passed easily.

With some exceptions which will be noted infra in discussing paternal authority.

It should be noted that the arrêt of the Parlement de Paris would be of no validity in Quebec. Note that none of the relevant articles here of the C. Q. purport to be reforming the law. Indeed, all their provisions had precedents in the ancien droit; but because they are restrictive, the law is quite changed.
The benefits of so doing are obvious.

C. Q. 136 states thus:

"The solemnizing of a marriage may be opposed by any person already married to one of the parties intending to contract."

C. N. 172 provides the same. Pothier states the same, and adds that opposition may even be made by a person affianced to one of the persons whose bans have been proclaimed. (The ancien droit was less restrictive, and, as shown, anyone claiming the right could make an opposition; whether that opposition would be successful is a different question.) Neither the C. N. nor the C. Q. state that a fiancé may make an opposition. Maleville remarks that if a fiancé attempts to oppose a marriage the court has to give main-levé. He debates whether the court ought to condemn the opposant to pay damages as authorised under C. N. 179 (C. Q. 147). He refers to a recent author (this is probably a reference to the work of DeLaporte and Riffe-Caubray who was of the opinion that in such circumstances, a fiancé could make opposition, and the person against whom the opposition had been made should pay damages to the opposant (for breach of promise to marry). Maleville disagreed, arguing that a person to whom a promise of marriage had been made could not make an opposition not permitted by law, and the only remedy such person would have would be to sue, independently, for damages. DeLaporte and Riffe-Caubray in their Pandectes Françaises, (surely, collectively, the recent author to whom Maleville refers) argue that, if A has made a promise of marriage to B, there is sufficient ground for B to oppose A's marriage to a third party; if, however, A persists in marrying the third party, they add, the judge must lift the opposition and merely cause A to pay damages to B. Here the Pandectes Françaises are closely following...
the *ancien droit*, especially as found in Pothier. The Commissioners referred to this section of the *Pandectes Françaises* in connection with C.Q. 136; but it seems most unlikely that they would have supported the views found therein on this matter. The C.Q. makes no reference to fiancés opposing marriages, and they must not have been granted this right. An article of relevance here, though placed in a different section of the Code, is C.Q. 62, which supports the view already put:

"If, however, the opposition be founded on a simple promise of marriage, it is of no effect, and the marriage is proceeded with as if no such opposition had been made."

There is no equivalent article in the C.N.; and, indeed, this article originates in provincial legislation. This article would suggest that the interpretation here given of the C.Q.'s failure to mention fiancés is the correct one, though, as Trudel and Mignault point out, there is a difference between a mere promise to marry and a formal betrothal (*fiançailles*), the latter having an effect under Canon law.

The next article to be considered, C.Q. 143, states as follows:

"Whatever may be the quality of the opposant, it is his duty to adapt and follow up the formalities and proceedings necessary to have his opposition brought before the court and decided within the legal delays,

---

780. Pothier, T.C.M., no. 83, Bug. 6, p. 35, states: "Lorsque ce ne sont que des fiançailles qui font le sujet de l'opposition, si l'opposant en fait la preuve, l'official les déclare bonnes et valables, et il exhorte l'autre partie à les accomplir. Si elle persiste en son refus, après lui avoir imposé une pénitence, il prononce la dissolution des fiançailles, et en conséquence fait mainlevée de l'opposition."

In the *ancien droit*, oppositions on the grounds of marriage or betrothal were in the jurisdiction of the ecclesiastical courts: hence the penalty of penance. This was because they referred to spiritual matters; other oppositions were in the jurisdiction of temporal courts.

781. 12 Vict. ch. 53, s. 1, which became C.S.L.C. ch. 34, s. 4. See Trudel, *Traité* vol. 1, pp. 196-7; and Mignault, *Droit Civil*, vol. 1, pp. 409-410.

782. See Trudel and Mignault as cited in note 781. See also note 780, where it is pointed out that oppositions on the grounds of marriage or betrothal were heard by ecclesiastical courts.

783. On exclusion of C.Q. 137-142, see text *supra*, at note 764.
a demand for its dismissal not being required; in
default of his so doing the opposition is regarded
as never having been made, and the marriage ceremony
is proceeded with, notwithstanding."

This is new law, and stated as such by the redactors. There
is no exact equivalent in the C.N. C.N. 176, read along
with C.N. 66, lays down the form of the opposition to be
given to the Officier de l'état civil; there is no statement
that the onus is on the opposant to take the opposition to
court. C.N. 177 and 178 lay down time limits for the courts' decisions on actions for main-levée brought by the couple intending to marry. In the ancien droit, it was the couple to whose marriage opposition had been made who had to seek main-levée, 784 and there was no provision for an especially speedy decision. The C.N. improved on the ancien droit here by providing for a speedier court decision. The C.Q. improved on the C.N. by enacting that a demand for main-levée was not required: the opposant had to go to court and justify his opposition, and, if he failed to do so, his opposition was ignored. Given the criticisms of the right of opposition under the old law, it is obvious why the Quebec codifiers reversed the old law, and made the procedure quicker. (C.Q. 144, 145 and 146 lay down the relevant procedure; they contain no matter of interest to us.)

C.N. 147 states that:
"If the opposition be rejected, the opposants, other than the father and mother, may be condemned to pay costs, and are liable for damages according to circumstances."

C.N. 179 is similar in purport:
"Si l'opposition est rejetée, les opposants, autre
n'énanmoins que les ascendans, pourront être condamnés
à des dommages-intérêts."

The reason for exempting parents (and ascendants in the C.N. 785.) from damages is explained thus in the Pandectes Françaises:

784. Pothier, T.C.M. no.83, Bug. 6, p.35: "La partie qui veut avoir mainlevée de l'opposition faite à ses bans de mariage, doit assigner l'opposant devant le juge qui est compétent pour en connaître."

785. On this difference between the C.N. and the C.Q., see infra on paternal power.
"[L]a loi, par la grande confiance qu'elle a dans leur [i.e. parents and ascendants] tendresse pour leurs enfants, suppose toujours qu'ils ont agi par des motifs raisonnables; et que, d'ailleurs, les enfants doivent toujours respecter leurs actions." 786.

Thus, in their provisions on oppositions to marriage, the Quebec redactors have radically amended the law. They have reduced the categories of persons entitled formally to oppose a marriage; and they have done so without indicating they have changed the law. They must be taken to have restricted the making of oppositions to the persons named in the articles; if any other person purports to make an opposition, it may be ignored completely. Because of the nature of the ancien droit, inevitably, under the ancien droit, all the persons named in the C.Q. could make oppositions; it is this that enables the redactors to avoid stating these articles as new law. The expressions used in these articles leave no doubt that other persons may not make oppositions, even although this is nowhere explicitly stated. 787. The restriction of the class of persons entitled to oppose a marriage was only reasonable, given that the ancien droit had been "un moyen de vexation." 788. The only opposition that could be made under the C.Q. to the marriage of a sane adult was that by a person purporting to be married to such adult. 789. The C.Q. redactors must be taken as having restricted the class of potential opposants because they considered that no others could have, or claim, any real interest in the marriage of adults in a modern society. To have allowed others to make opposition, even if such oppositions would be rejected ultimately, would have been to bring about unjustifiable delays in the marriage of independent individuals: a result unacceptable given the liberal individualist conception of society current in nineteenth century Quebec. This must explain why the redactors have followed the scheme of the C.N.

One of the problems connected with the old law had been delay in the court hearings on oppositions. The C.Q. provided a speedy procedure. Further, the C.Q. required the person opposing the marriage to go to court to make good his case; if he did not go to court, his opposition automatically lapsed. The C.N. and the ancien droit both required the person whose marriage had been opposed to go to court to gain main-levée. The action here of the C.Q. redactors seems just, and reflects their notion that oppositions to marriage should be restricted and should not be allowed to hinder or inconvenience couples proposing to marry.

Although the chapter of the code on anulling marriages will not be discussed here, it may be pointed out that the C.Q. redactors, following the C.N., have adopted the view of Pothier, that if a marriage, to which opposition has been made, is celebrated without such opposition having been lifted, the marriage is nonetheless incapable of annulment, if otherwise valid. Lamoignon had been of the opposite opinion. Neither of the two codes state that a marriage may be annulled simply because there had been an opposition to it.

The above discussion indicates the requirements for contracting marriage in the C.Q., and shows their relationship to the equivalent provisions of the C.N. and of the ancien droit. The work of the C.Q. redactors is here a mixture of conservatism and innovation. They have preserved the ages of marriage as provided under the Canon law, though there might well have been reason for raising such ages. They have preserved impotency as a factor rendering marriage null, though amended in light of the criticisms of the ancien droit.

790. Generally a marriage could only be annulled if invalid due to a defect or lack in the meeting of the conditions set out in the discussion above if such defect or lack was in relation to more than a mere formality. The C.Q. articles do not contain any major departure from the ancien droit or C.N. except as regards the marriages of minors, and these differences will be discussed infra on paternal authority. See C.Q. 143-164, C.N. 180-202, and Pothier, T.C.M., no. 442-451, Bug. 6, pp.201-208. See also the discussion in the Second Report, of the redactors at pp. 183-5. Day disagreed with C.Q. 149, taken from C.N. 181, preferring the ancien droit; he also disapproved of the fines under C.N. 157 and 158.

791. Pothier, T.C.M., no. 82, Bug. 6, p.35.
The exclusion of an equivalent article from the C.N. had not resulted in the disappearance of impotency as a ground for annulling a marriage. Obviously, the inclusion of C.Q. 117 on impotency may be ascribed to the redactors' knowledge of the interpretation of the C.N., and the necessity of reforms of the ancien droit to render proof easier with an acceptable method of acquiring that proof. Interesting articles are those in which the redactors give due recognition to the diversity of religions in the Province, and allow the solemnisation of marriages, according to their various forms of doctrine, by clergymen authorised to keep registers of civil status. These provisions are founded in provincial statutes, and do not connote any massive innovation, though the intention behind C.Q. 127, on impediments not recognised by the code but recognised by other religions, is rather more problematic. On oppositions to marriage, the C.Q. redactors have introduced great innovations into the law. Following the C.N., they have restricted the class of persons who may oppose a marriage (although the class of persons in the C.Q. is not exactly the same as that in the C.N.). There were obvious reasons of social policy for doing so: to have allowed any one to oppose the marriage of a sane adult would have been unthinkable in mid-nineteenth Quebec. In following the C.N. here, the redactors were knowingly importing a restriction on the class of those who could oppose marriages. Again for reasons of social policy, the Quebec redactors have required the person opposing to bring his opposition to court, failing which his opposition automatically falls: similarly, the court procedure is particularly expeditious.

In this section of the code, the redactors had to provide clear concise rules on the requirements for marriage. This they did, using the French code as a model. The French code has exerted some influence on the substance, though here the C.Q. redactors were both independent (consider their rules on oppositions and the reform of the law on impotency) and conservative (consider their rules on the ages required for marriage and the inclusion of a rule on impotency). The redactors also had to recognise the diversity of religions
in the Province, and had to follow the Acts of the legislature on who was authorised to celebrate marriages. The relevant articles fulfilled these functions, being consonant with Quebec society. As regards the preservation of the Canonical ages for marriage, it should be recalled that the instructions of the legislature were essentially conservative, and that there would be no obvious or pressing need for reform of a rule that presumably caused no problems in practice.

2. Puissance maritale and the property aspects of the husband-wife relationship.

As in discussing the provisions of the D.O. on the property relations between husband and wife, the matter at issue here is not such property relationships in themselves, but rather their effect on the relationship between husband and wife. The nature of matrimonial property in the Quebec code is much less controversial than in that of Louisiana.

The fourth title of the third book of the C.Q. is called: "Of marriage covenants and of the effect of marriage upon the property of the consorts." The Quebec redactors preferred this to the C.N.'s "Du contrat de Mariage, et des Droits respectifs des Epoux", which they considered to be ambiguous. Indeed, Toullier remarks that "le contrat de mariage proprement dit" is matrimony, the marital union, rather than the conventions regulating the property relations of the spouses. There is a major difference between these provisions of the C.Q. and those of the C.N., in that the latter includes the dotal regime of property and excludes dower, whereas the former, following the Coutume de Paris, contains no provisions on dowry but does regulate dower.

C.Q. 1257 states that:

"All kinds of agreements, may be lawfully made in contracts of marriage, even those which, in any other act inter vivos, would be void; such as the renunciation of successions which have not yet devolved, the gift of future property, the conventional appointment of an heir, and other dispositions in contemplation of death."

792. Fifth Report, p.201.
794. See Fifth Report, pp.201-3.
C. Q. 1258 states thus:

"All covenants contrary to public order or to good morals, or forbidden by any prohibitory law, are, however, excepted from the above rule."

C. Q. 1259, already referred to, stated that one example of covenants struck at by C. Q. 1258 would be those derogating from the power of the husband over the persons of his wife and children, or from that power belonging to the husband as head of the conjugal association. C. Q. 1260 states that if no covenants have been made, or if the contrary has not been stipulated, then the consorts are presumed to have subjected themselves to the general law of the country, and in particular to the legal community of property and to customary or legal dower in favour of the wife and children. C. Q. 1270 gives a neat definition of legal community as

"that which the law, in the absence of stipulation to the contrary, establishes between consorts, by the mere fact of their marriage, in respect of certain descriptions of property, which they are presumed to have intended to subject to it."

These articles of the C.Q. express the ancien droit coutumier of Paris, and make no change in the law of Quebec.

According to C. Q. 1272, the legal community consists of the following property: all moveable property possessed by the consorts on the day of their marriage; all moveable property they acquire during marriage or which comes to them by succession or gift, unless the testator or donor has otherwise provided; all the fruits, revenues, interests and arrears of whatever nature, which fall due or are received during the marriage, and arise from property which belonged to the consorts at the time of marriage, or from property which has accrued to them during marriage, by any title whatsoever; and, finally, all immovable property acquired during marriage. C. Q. 1273-9 refine further the rules on

---

795. See text at note 701 supra.
796. It is not proposed here to deal with dower.
797. See, e.g. Pothier, T. Comm. introduction, nos. 1-10, Bug. 7, pp. 49-52 and ibid. nos. 4, 9, 10 and 11, pp. 58-60.
immoveables; but we need not consider them here. The C.N. provided similarly to C.Q. 1272 in its article 1401. The Coutume de Paris stated thus in its article 220:

"Homme et femme conjoints ensemble par mariage, sont communs en biens meubles, et conquêts immeubles faits durant et constant ledit mariage, et commence le communauté du jour des épousailles et benediction nuptiale."

Thus, C.Q. 1272 follows the ancien droit. There has been no change in the composition of the legal community.

C.Q. 1292 is an important article:

"The husband alone administers the property of the community. He may sell, alienate, or hypothecate it without the concurrence of his wife.

He may even alone dispose of it, either by gifts or otherwise inter vivos, provided it is in favour of persons who are legally capable, and without fraud."

C.N. 1421 provides the same as the first paragraph of C.Q. 1292:

"Le mari administre seul les biens de la communauté. Il peut les vendre, aliéner et hypothéquer sans le concours de la femme."

C.N. 1422 is, however, different from the second paragraph of C.Q. 1292:

"Il ne peut disposer entre-vifs, à titre gratuit, des immeubles de la communauté, ni de l'universalité ou d'une quotité du mobilier, si ce n'est pour l'établissement des enfants communs.

Il peut néanmoins disposer des objets mobiliers, à titre gratuit et particulier, au profit de toutes personnes, pourvu qu'il ne s'en réserve pas l'usufruit."

Quebec is here following the ancien droit as found in the Coutume de Paris, article 225 of which stated thus:

"Le mari est seigneur des meubles et conquêts immeubles par lui faits durant et constant le mariage de lui et de sa femme. En telle manière qu'il peut les vendre, aliéner ou hypothéquer, et en faire et disposer par donation ou autre disposition, entre-vifs, à son plaisir et volonté, sans le consentement de sa femme, à personne capable, et sans fraude."

That this article of the Coutume mentions only "conquêts immeubles par lui faits", does not limit the husband's power of alienation to immoveables he himself has acquired during the marriage. Included in the power of alienation, according

798. Among the numerous authorities which could be cited (see the references of the C.Q. redactors), see, e.g., Pothier, T. Comm. nos. 24-26, Bug. 7, pp.65-6.
to most of the commentators, were all the immovable of
the communauté. 799.

The provisions of the Coutume de Paris, expressed in
C.N. 1421 and the first half of C.Q. 1292, were droit commun
coutumier; but those expressed in the second half of C.Q.
1292 were not. While, for example, the Coutume d'Orléans
had a provision almost identical to that of Paris, 800. the
Coutumes of Anjou (art. 289), of Île-de-France (art. 304) and of
Lodunois (chap. 26, art. 5) allowed the husband to sell,
hypothecate and exchange the goods of the communauté, but
not to donate them inter vivos. The Coutume of Saintonge
(tit. 8, art. 68) allowed the husband alone to dispose of
meubles and conquêtes, while excepting from this general
power those which had been acquired by the husband and wife
contractants ensemble; whereas the Coutumes of Bayonne (tit.
9, art. 29) and of Labour (tit. 9, art. 2) excepted, from
this general power of disposal granted to the husband, any
property acquired by the wife or gained by her work. 801.

The French code restricted the husband's power of
donating community property. 802. The redactors of the C.Q.
did not choose to adopt the innovation of the C.N. - if
"innovation" be correct, since there was precedent in some

799. See Pothier, T. Comm., no. 468, Bug. 7, p. 258. Lebrun had
been of the contrary opinion; but his views were not accepted.
See Ferrière, Corps et Comp., vol. 3, col. 209, n. 1 on art.
225: "La Coutume en cet article rend le mari maître absolu
de tous les biens de la Communauté, meubles ou immeubles,
pour en pouvoir disposer à sa volonté, sans le consentement
de sa femme." Note article 233 of the Coutume de Paris
(hereafter cited as C. de P.): "Le mari est seigneur des
actions mobilières et possessoires, posé qu'elles procèdent
du côté de sa femme; et peut le mari agir et déduire lesdits
droits et actions en jugement sans sadite femme."
800. Article 193: "Le mari est seigneur des meubles et
conquêtes imméubles par lui faits durant le mariage de lui
et de sa femme; en telle manière qu'il les peut vendre,
aliéner ou hypothéquer, et en faire et disposer par
disposition ou donation faite entre-vifs à son plaisir et
volonté, sans le consentement de sadite femme à personne
capable et sans fraude." I used the edition of Pothier, in
Bugnet, vol. 1.
802. See Maleville, 3 Analyse, pp. 202-3.
of the coutumes - and kept to dispositions of the Coutume de Paris. They retained the ancien droit of Paris which they considered to be "more consonant with the fundamental principles of conjugal community...." 803. They argued that given that the husband could sell an immoveable belonging to the communauté, and dissipate the proceeds, it is pointless to refuse him power to donate it, provided that he should not do so with intent to defraud his wife or her heirs. 804. Toullier had also stressed the inefficacy of the C.N.'s provision in restraining the husband from dissipating community property. 805. In both the ancien droit and the C.Q., excessive donations could amount to fraud. 806. Lebrun had stated that the time when a donation was made could amount to fraud on the wife; Pothier agreed. 807. Pothier also considered that a husband could donate a conquêt inter-vivos and retain the usufruct "à lui seul" without fraud resulting; Lebrun disagreed. 808. Here, as Toullier points out, the C.N. redactors have followed the view of Lebrun. 809. On this point, the redactors of the C.Q. were rather more cautious than Pothier, while not adopting the explicit rule of the C.N.: they stated that C.Q. 1292 does not go so far as Pothier, and that they felt it best left to doctrine to decide whether such a usufruct of property donated would amount to fraud, according to the circumstances. 810. Donations by the husband, amounting to fraud, would usually be the result of an attempt by the husband to advantage himself or his heirs at the expense of his wife and her heirs. 811. The C.Q. redactors have rejected the rule of C.N. 1422, and have asserted the traditional rule on the husband's control of community property because of his puissance maritale: "La

803. Fifth Report, p. 211.
804. Ibid.
805. Toullier, op.cit., vol. 12, pp. 275-6, no. 311.
806. See Pothier, T. Comm. no. 480, Bug. 7, p. 264. This rule is articulated precisely by the Coutume de Poitou, art. 244, and the Coutume de Saintonge, tit. 8, art. 67. See also Fifth Report, p. 211.
808. References as note 807.
810. Fifth Report, p. 211.
811. See Pothier, T. Comm. nos. 481-483, Bug. 7, pp. 264-5. Pothier cites Dumoulin on the ancienne coutume of Paris, who was also of this opinion.
puissance qu'a le mari, le rend maître absolu de tous les biens de la communauté...." 812. Undoubtedly this rule is consistent with the ideology of the period. The argument the C.Q. redactors put forward for rejecting the provision of C.N. 1422 is, however, not very satisfactory. They state that: since the husband may sell an immovable and dissipate the proceeds, why not let him donate such immovable? Certainly the French codal article does not necessarily prevent a prodigal husband from wasting the community property, but it does render more indirect the method of dissipation. Even though the husband has the potentially disastrous power of selling an immovable and dissipating the proceeds, there is no reason why he should have a second method of frittering away community property. Further, although the French article is imperfect, the redactors could have improved on it, and further protected the interests of the wife. Thus, it seems likely that the reason for the rejection of the innovation in C.N. 1422, is the desire, as expressed by the redactors, 813. to preserve intact the traditional control of the husband over the community, as an important aspect of his puissance maritale. The redactors in C.Q. 1292 asserted that traditional control, consonant with the ideology of the period.

Various other articles expand on this power of the husband over the communauté, and some of them, relating to authorisation of the wife, will be returned to later. It is unnecessary here to discuss further control over community property, and convenient to turn to the control exercised by the husband over his wife's property which did not fall into the community, when legal or customary (as distinct from conventional) community existed between them. C.Q. 1298 is as follows:

"The husband has the administration of all the private property of his wife. He may exercise, alone, all the moveable and possessory actions which belong to his wife. He cannot, without her consent, dispose of the immovables which belong to her.

812. Pothier, T.P.W. no. 82, Bug. 7, p. 32. Pothier's emphasis. See also his edition of the Coutume d'Orléans, introduction to title 10, no. 158; Bug. 1, p. 258. (Hereafter cited thus, for example: C. d'O., introdu. to tit. 10, no. 158, Bug. 1, p. 258.)
813. See text at note 803 supra.
He is responsible for all deteriorations which his wife's private property may suffer for want of conservatory acts."

C.N. 1428 provides identically. This follows the ancien droit coutumier, where the husband administered the biens propres of his wife, 814, and could exercise alone all his wife's moveable and possessory actions. 815. He could not dispose of her immovable without her consent:

"Le mari ne peut vendre, échanger, faire partage ou licitation, charger, obliger, ni hypothéquer le propre héritage de sa femme sans le consentement de ladite femme et icelle par lui autorisée à cette fin." 816.

Finally, the ancien droit also provided that the husband had to conserve his wife's property; if he did not, or acted negligently, he would have been liable for damages. 817.

C. q. 1299 gives a further refinement of the power of the husband over a wife's private property when they are communes en biens:

"Leases of the wife's property, made by her husband alone, cannot exceed nine years; she is not bound, after the dissolution of the community, to maintain those which have been made for a longer term."

C.N. 1429, the equivalent provision, is different:

"Les baux que le mari seul a faits des biens de sa femme pour un temps qui excède neuf ans, ne sont, en cas de dissolution de la communauté, obligatoires vis-à-vis de la femme ou de ses héritiers que pour le temps qui, reste à courir, soit de la première

---

815. See C. de P., art. 233, quoted note 799 supra.
816. C. de P., art. 226.
817. Pothier, C. d'O., introd. to tit. X, nos. 114 and 157, Bug. 1, p. 246 and p. 258. In his laconic style, Loisel described the powers of the husband over his wife's property thus in three articles: "Le mari est maître de la communauté, possession et jouissance des propres de sa femme et non de la propriété d'iceux." "Car quant à ce qui concerne la propriété des propres de la femme: il faut que tous deux y parlent, selon la coutume de la France, remarquée Jean Faure." "Le mari ne pouvant directement, ni indirectement obliger les propres de sa femme." In order, Inst. Coust. I. II. 16, 17, and 12.
The system under the C.N. is that if a husband has granted a lease for more than nine years, when the community is dissolved, the whole term of the lease is divided into periods of nine years, and the wife will have to respect the lease for the period of nine years which is running at the time of dissolution of the community. This is perhaps best understood by demonstration. Thus, if a husband has granted a lease of his wife's property for twenty-seven years, and the community is dissolved in the twelfth year of the lease, the lease is divided into three periods of nine years. At the time of dissolution of the community, the lease is in the third year of the second period of nine years, and hence the lessee is entitled to the property for another six years, which brings the second period of nine years to an end. The ancien droit, on the other hand, essentially was as in the C.Q. Under article 79 of the Ordonnance de Blois, leases of more than nine years were regarded as amounting to alienation; a husband could not alienate his wife's immovable property. Article 227 of the Coutume de Paris states the rule explicitly:

"Peut toutefois le mari faire baux à loyer ou à moisson à six ans, pour héritages assis à Paris; et neuf ans, pour héritages assis aux champs; et au-dessous, sans fraude."

(The restriction to six years was peculiar to houses in the town of Paris; houses in other towns governed by the Coutume de Paris were not affected. Indeed, the writers of the Pandectes Françaises state that by the end of the ancien régime, the distinction in the Coutume de Paris between houses in Paris and other immovables had fallen into desuetude, so that husbands could make a nine year lease of town houses.) Thus, it was droit commun coutumier that the husband could lease out his wife's property for up to

818. See Pothier, T.P.M., nos. 92-93, Bug. 7, pp. 34-5 and Maleville, 3 Analyse, p. 205.
819. See Pothier, T.P.M., nos. 92-93, Bug. 7, pp. 34-5.
820. 11 Pen Fran., p. 375.
nine years, except for those coutumes which explicitly forbade husbands to make leases, without the consent of their wives, which would extend beyond the period of the marriage.\(^{821}\). The wife was not obliged to maintain leases of over nine years after the dissolution of the community, even if very few years were left to run.\(^{822}\). The C.N. innovated here. Maleville points out that, now that article 79 of the Ordonnance de Blois was no longer followed, and leases of over nine years were no longer regarded as alienation, it was necessary to determine afresh the effect of long leases made by a husband of his wife's property.\(^{823}\). The redactors of the C.N. chose the provision now embodied in their article 1429.\(^{824}\). The Quebec codifiers did not adopt this reform found in the C.N. They remarked that they followed the old rule as embodied in the Coutume de Paris and enunciated by Pothier. The change contained in C.N. 1429, they said, had not been regarded by some commentators as an improvement.\(^{825}\). The Quebec redactors probably considered that the old law provided adequate security for lessees, while giving more protection to the interests of the wife. A provision permitting the granting of longer leases by a husband might have been useful in Quebec, in encouraging lessees to improve the land in the knowledge that they would have a certain time in which to enjoy the benefits of the improvements: under the Quebec provision, a lessee would not be likely to initiate major improvements or invest much capital in the land. This is not necessarily an unimportant point when the backward nature of Quebec agriculture in the nineteenth century is considered.\(^{826}\). It is nonetheless clear that such considerations were not taken account of by the C.Q. redactors. Given the rather arbitrary nature of the C.N. provision itself, it is unlikely anyway that it would have fulfilled the function

\(^{821}\) E.g., the Coutume de Blois, art. 179 - see Pothier, T.P.M. no. 92, Bug. 7, p. 34.
\(^{822}\) Pothier, T.P.M. no. 93, Bug. 7, p. 35.
\(^{823}\) Analyse, p. 206.
\(^{826}\) See text, ch. 2 supra at notes 89-91.
here suggested. The redactors of the C.Q. believed there to be no reason for changing the rule of the ancien droit.

As already indicated, spouses in Quebec, within certain limits, could in a marriage contract avoid or vary the legal community. That is, they could provide that there be no community of property between the spouses, or provide for a conventional community. It is important to see what effect on the husband's control of his wife's property such marriage contracts could have.

C.Q. 1416 provides thus:

"The clause which declares that the consorts marry without community does not give the wife the right to administer her property, nor to receive the fruits thereof; these are deemed to be contributed to her husband to enable him to bear the charges of marriage."

C.N. 1530 made identical provision. The rule of the ancien droit was the same. Maleville, following the doctrine of Renusson, wrote as follows:

"C'est... la puissance maritale et non la communauté, qui donne au mari le droit d'administrer les revenus des biens de sa femme, et les employer aux besoins de la famille."

C.Q. 1417 states further on the clause simply excluding community:

"The husband retains the administration of the moveable and immoveable property of his wife, and as a
consequence the right to receive all the moveable property she brings with her, or which accrues to her during the marriage; saving the restitution he is bound to make after its dissolution, or after a separation of property judicially pronounced."

C.N. 1531 is the same in meaning, though using the term "dot". The ancien droit made the same provision as the C.Q. 830.

The next two articles, C.Q. 1418 and 1419, are more interesting. The former states thus:

"If, amongst the moveable property brought by the wife or which accrues to her during marriage, there be things which cannot be used without being consumed, an appreciative statement must be joined to the contract of marriage, or an inventory must be made of them at the time when they so accrue to her, and the husband is bound to give back their value according to the valuation."

C.Q. 1419 adds that:

"The husband, with regard to such property, has all the rights and is subject to all the obligations of a usufructuary."

On C.Q. 1418, the codifiers give no authority from the ancien régime. They refer to commentators on the modern French law, as they have copied C.N. 1532, and to Justinian's Digest. 831. With C.Q. 1419, again they refer to commentators on the modern French law and the Digest. 832. C.Q. 1419 probably derives from C.N. 1533. On C.Q. 1418, the codifiers remark that no such rule is found in Pothier, but that the rule they have borrowed from the French code is just and conformable to principle. 833. This comment is fair. The ancien droit coutumier does not seem specifically to have dealt with this.

830. See e.g. Pothier, T. Comm., no. 463, Bug. 7, p. 255, and T.P.H. no. 97, Bug. 7, p. 36.
831. D.23.3.42: "Res in dotem datae, quae pondere numero mensura constant, mariti periculo sunt, quia in hoc dantur, ut eas maritus ad arbitrium suum distrahat et quandoque soluto matrimonio eiusdem, generis et qualitatis alias restituat vel ipse vel heres eius." They refer to Maleville, 3 Analyse, p. 259, 12 Pan. Fran. 147, and some authors, including Toullier, who will be mentioned below.
832. D. 25.1.13, 15 & 16; D. 24.1.28.1. The modern authors are those as in C.Q. 1418. The Digest texts relate to necessary expenses taken from dowries: none make a direct statement such as found in the C.Q. article; they seem a random choice.
point. On C.Q. 1419, the redactors again cite no author of the ancien régime. Again, this provision, putting the husband in the position of a usufructuary, is just.

It is interesting to examine the statements of authors of the ancien droit to establish the attitude they took to the husband's control over his wife's separate property. Pothier remarks that:

"La puissance maritale ne donne pas à la vérité au mari jus dominii sur les immeubles propres de sa femme; mais elle lui donne, par rapport auxdits biens, une espèce de droit de bail et de gouvernement...." 834.

Under this "espèce de droit de bail et de gouvernement", the husband exercised the feudal rights and carried out the duties of any seigneurie belonging to his wife. 835. Pothier, in discussing a husband's powers of administration of his wife's property, remarks that they are greater than those of a usufructuary. 836. He contrasts the husband's position with that of a usufructuary in so far as a husband may grant a lease of his wife's property which will be effective after his administration has ended: a usufructuary could not. 837.

Pothier describes the husband's right as an "espèce de droit de bail et de gouvernement." Elsewhere he stated, "Garde et bail, sont des termes qui, dans nos coutumes, signifient gouvernement, administration avec autorité." 838. Again in a different work he said: "Ces noms [i.e. garde et bail] sont synonymes et signifient gouvernement, administration." 839.

As the terminology suggests, the husband's right has an obvious analogy and connection with the right called in some coutumes garde-noble and in others bail. 840. Garde-noble originated in the requirement that someone carry out the military and other duties attached to a fief or seigneurie.

---

834. T.P.H. no. 86, Bug. 7, p. 33.
835. Ibid. nos. 87-89, pp. 33-4.
836. Ibid. nos. 91-92, pp. 34-5.
837. Ibid. nos. 91-2, pp. 34-5.
839. T.G.H.B., no. 5, Bug. 6, p. 500.
840. See ibid., nos. 1-7, pp. 499-500. Garde-noble will be discussed further infra, in connection with paternal power.
if such fief or seigneurie had devolved by the law of succession to a minor, who, by reason of nonage, was unable to carry them out himself. \textsuperscript{841} Under this institution, the gardien or baillistre had the right to enjoy and to apply to his own use all the immovable property which had come to the person under his garde.

Pothier obviously linked the rights of a husband in his wife's immovable property with the rights of the gardien in garde-noble. The two institutions are very similar. Both indeed have historical origins in the feudal system of tenure, as the husband carried out the duties connected with seigneuries belonging to his wife, she herself being incapable in this respect. The feudal origins of these rights of the husband are reflected in Pothier's terminology. That there was no community did not affect the situation, this right of the husband's having been adjudged to be an aspect of puissance maritale rather than a corollary of the communauté de biens: this last decision being, as Toullier shows, also a consequence of feudalism. \textsuperscript{842}

It will be recalled, from the discussion of dowry in Louisiana, that the C.N. placed the husband in the position of a usufructuary of his wife's dowry. \textsuperscript{843} The property relations between spouses when they were simply non-communs were obviously analogous to those of spouses married under the dotal regime. \textsuperscript{844} Given that the categories of bail or garde could no longer be used to define the authority of a husband over his wife's property, it was an obvious solution for the redactors of the C.N. to place the husband here in the category of a usufructuary. Although Pothier contrasts the husband with a usufructuary, it should be noted that the example he gives of the difference still holds good: husbands, unlike usufructuaries, could grant leases which could last, in certain circumstances, beyond the husband's enjoyment and administration of the property. The assimilation, on this

841. See Pothier, T.G.R.B. nos. 8-10, Bug. 7, pp.500-501.
843. See text supra at notes 360-367.
844. See, e.g. Toullier, op.cit., vol. 14, nos.16-30, pp.12-23, esp. no. 21, p.15.
point, to the law on dowry is eminently reasonable, and it is unlikely that any change in the details of the law has been brought about. Thus, the C.Q. redactors, although there is no provision for dowry in their code, were probably embodying the provisions of the ancien droit, if not its mode of expression, by following C.N. 1533.

C.Q. 1420 states thus:

"The clause which declares that the consorts marry without community, does not prevent its being agreed that the wife, for her support and personal wants, shall receive her revenues in whole or in part, upon her own acquittances."

C.N. 1534 made similar provision, as did the ancien droit. This article is of no great interest here. C.Q. 1421 provides the following:

"The immovable of the wife which are excluded from the community in the cases of the preceding articles are not inalienable.

Nevertheless, they cannot be alienated without the consent of the husband, or, upon his refusal without judicial authorisation."

This is taken from C.N. 1535. This article is unnecessary in the Quebec code, as such property would never be inalienable in Quebec law, whether the parties were in community or not. The sole effect of this article is to restate the principle that the wife requires authorisation to alienate her immovable property. Although there is no harm in restating the law thus, it is likely that the main reason behind the inclusion of C.Q. 1421 is copying of the French code. In the C.N., this article was required, because the code provided for a dotal regime of matrimonial property (unlike the Quebec code), under which, if adopted, the wife's dot was inalienable, following the Roman law of the pays du droit écrit. In the articles on spouses marrying without community, the C.N. referred to the wife's property as dot.

845. See Maleville, 3 Analyse, pp.259-60. Maleville did not think the assimilation of the husband to a usufructuary was particularly happy.
846. Note that the Digest references under C.Q. 1418 and 1419 are to passages on dowry.
847. See Pothier, T.Comm., no.646, Bug. 7, pp.256-7. There was a dispute between Pothier and Bourjon on a related point which need not concern us. See further on this 12 Pan. Fran., pp.149-50, whose authors disagree with Pothier.
so that C.N. 1535 was necessary to avoid confusion. 848.

As well as simply not being in community, spouses could live under a matrimonial regime of total separation of property, regulated by articles 1422-25 of the C.Q. This had certain effects on the husband's rights over his wife's property. The first relevant article is C.Q. 1422. This states that when the marriage contract stipulates separation of property, the wife retains the complete administration of her property, both moveable and immovable, and the free enjoyment of her revenues. C.N. 1536 made a similar provision. The ancien droit of most of the neva du droit coutumier was the same, 849. though some coutumes stated that the wife separate as to property was in the position of an unmarried woman. 850. The C.Q. redactors made no change in the law here. Their reading of Pothier would have made them well aware that some coutumes denied the husband any powers over the property of the wife separate as to property. They chose to maintain the existing rule. Reasons for the redactors actions here will be discussed below.

C.Q. 1423 provides that the spouses contribute to the expenses of the marriage according to the terms of their marriage contract, or if there be no such regulation in the contract, and the parties cannot agree on appropriate contributions, then the court determines the amount each shall contribute according to his or her wealth. The equivalent provision of the French code is quite different: C.F. 1537 states that spouses should contribute to the expenses of their marriage according to the terms of their marriage contract; but if there be none, then the wife should

848. C.N. 1554-1563 are on the inalienability of dowry under the dotal regime, except in certain specific carefully defined instances. See on this point 12 Pan. Fran., pp. 150-1, and Toullier, op. cit., vol. 14, no. 29, pp. 21-22.
849. See Pothier, T.P.I., nos. 15 and 98, Bug. 7, p. 7 and pp. 35-7; and T. Comm., no. 454, Bug. 7, p. 255.
contribute up to a third of her revenues. Quebec has here followed the ancien droit which stated that, failing regulation in the marriage contract, or agreement between the parties, the judge should decide how much the wife should contribute, according to her means and circumstances, both to the expenses of the marriage and the aliment and education of the common children. The Quebec redactors chose to reject the innovation of the C.N. and to follow the ancien droit: they considered the new French provision as arbitrary and preferred the ancien droit as enunciated by Pothier. The criticism of C.N. 1537 is to the point. The only advantage of the C.N. is that it avoided the necessity of going to court. It could, however, be very unfair if the wife were wealthy and the husband poor.

C.Q. 1424, the next article on spouses separate as to property, provides that the wife still cannot alienate her immovable without the consent of her husband, or, on his refusal, judicial authorisation: any general authorisation to alienate immovables, whether given in the marriage contract or otherwise, is void. C.N. 1538 provides likewise, and so generally did the ancien droit: though some coutumes provided that a wife separate as to property had the capacity of an unmarried woman.

The final article of this section, C.Q. 1425, states thus: "When the wife who is separated as to property has left the enjoyment of her property to her husband, the latter upon the demand which his wife may make or upon the dissolution of the marriage, is bound to give up only the fruits which are then existing, and is not accountable for those which, up to such time, have been consumed."

This is taken from C.N. 1539. The Quebec redactors cited

853. Note that C.N. 1537 conforms to C.N. 1575. This latter article covered the situation where, under the dotal regime, all the wife's property was paraphernal. It too is a new rule.
856. See Pothier, T.P.M. no. 10, Bug. 7, p.8.
no source of the ancien droit coutumier. They stated that their article conforms to the Roman law and the French code. 857. They cite a provision of the Justinianic corpus, and various modern commentators on the C.N. 858. Though there be no equivalent specific provision in the droit coutumier, the article is eminently sensible. The provision of the C.N. here is consistent with its articles on the husband's enjoyment of the wife's paraphernal property under the dotal regime. 859. Given that the C.Q. redactors considered a rule such as this filled a lacuna in the law, the C.N. provided a useful article for borrowing, even though it perhaps originated in the Roman rules on parapherna.

Before going on to conclude this subsection on the property aspects of the ruissance du mari, it is useful to comment on the section of the C.Q., "Of the clause of separation of property," which has just been discussed. The redactors remark that by this clause the powers of the husband are severely restricted, though not destroyed. 860. As pointed out already, the redactors would be aware that in some coutumes, such a clause would, as regards her property, give a wife the capacity of an unmarried woman, allowing her to deal with her property as she wished. The redactors chose to follow the existing law of Quebec, copying the expression of the C.N.: they saw no reason for reducing here the traditional puissance du mari, and, indeed, there is no indication in their Fifth Report that they ever considered changing the law of Quebec in this respect. They presumably saw no pressing or obvious reason for changing the law here, which was the same as in the C.N. and which asserted the ideology of the time: the conservative instructions of the 

859. See C.N. 1577-1579, Maleville, 3 Analyse, pp.289-290, and Toullier, op.cit., vol.14, nos. 361-369, pp.259-265. As the C.N. provisions on a clause simply excluding community were seen as, in some ways, analogous to the dotal regime's rules on dowry, so a clause bringing about complete separation as to property was seen as analogous to the provisions of the dotal regime where all the wife's property was paraphernal.
legislature would reinforce this attitude.

This area of the C.Q. is obviously closely modelled on the equivalent sections of the French code. The rules on what constitutes community property if there be no marriage contract are those of the existing law in Quebec, which was also the same as the rules in the French code on this point. The husband's authority over the community property under the rules of the C.Q. was as in the ancien droit. As head of the conjugal association, he was in control of the communal property. The C.N. had reduced the husband's authority over the community by limiting his power to make donations of community property. If the argument above is accepted, as correct, then the reason for rejecting this innovation was not so much that the husband would still be able to dissipate the community property, but rather that the old law was more consistent with the community property being controlled by the husband as head of the conjugal association by virtue of his puissance maritale. The redactors of the C.Q. saw the innovation contained in C.N. 1422 as an unnecessary restriction of the husband's authority. Should there be no stipulation in a marriage contract to the contrary, the husband, under the regime of legal community, by virtue of his puissance maritale, had control of his wife's separate property, though he could not alienate such property without her consent. This rule is consistent with the customary law conception of the puissance du mari, and follows the provisions of the ancien droit. The redactors' support for this authority of the husband's meant that no change was made or even considered.

Following the ancien droit once more, if the spouses concluded a marriage contract to govern their property relations, they could not, by such a contract, derogate from the husband's power over his wife and children, nor from his power as head of the conjugal association: puissance maritale inevitably resulted from the marriage and could not be

861. See text supra at notes 802-813.
contracted against. If the spouses simply excluded community of property, the husband had administration of his wife's property, the revenues of which went to him to help bear the expenses of the marriage: this was because the husband's authority over his wife's property was taken to be the result of his *puissance maritale*, rather than a corollary of the existence of community of property. If by a marriage contract there were complete separation of property, the husband did not have the right to administer his wife's property or receive the revenues therefrom: she would continue to administer it herself. As Toullier shows, the difference between these two situations can be explained as resulting from feudal law. Though the wife completely separate as to property could administer her property, she could not alienate her immoveables without the authorisation of her husband or of the judge: furthermore, any purported general authorisation to alienate immoveables was invalid. This requirement of authorisation to alienate was the result of the *puissance du mari*: the C.Q. redactors would have known that some coutumes considered the wife, separate as to property, as having the capacity of an unmarried woman. They made no change in the Quebec law, preferring to perpetuate the system of *puissance maritale* followed in most of northern France and, indeed, adopted by the French code. This action on the part of the Quebec redactors is consistent with their attitudes towards the other property aspects of *puissance maritale*.

The redactors of the C.Q. asserted the traditional *puissance du mari* in their provisions on the property relations of husband and wife: in so doing, they asserted the current ideology of the husband and wife relationship. Some restrictions on the husband's authority in this area of the law might have been useful: notably, it might have been useful to let a wife separated as to property to alienate her immoveables without authorisation, as some coutumes had in fact permitted. The C.Q. redactors did not

consider this. It is unlikely that there would have seemed to them any reason for so weakening the husband's authority, especially when their instructions were very conservative. Further, they had already rejected more minor reforms introduced by the C.N. For the C.Q. redactors to have acted other than they did would have been most improbable. The only articles here in which they perhaps incorporated new law into their code were C.Q. 1418 and 1425. These articles embodied useful rules, and did not detract from the principles of puissance maritale. 863.

3. Puissance Maritale: aspects other than property.

The sixth chapter of title five of the first book of the C.Q. is called "Of the respective rights and duties of husband and wife." 864. This title contains legal provisions which the ancien droit regarded as deriving from the puissance du mari. Despite the title of the chapter, most of the rights belong to the husband, to whom most of the duties are owed by the wife. This chapter follows closely the sixth chapter of the C.N.'s fifth title: there are, however, significant differences between the C.Q. and its model.

C.Q. 173 states that: "Husband and wife mutually owe each other fidelity, succour and assistance." C.N. 212 states the same. The ancien droit took a similar attitude. 865. Although this article has the appearance of being mainly a moral precept, infidelity could ground an action for separation from bed and board, while wives had usually a

863. It should be noted that in C.Q. 1418, 1419 and 1425 the redactors cite texts of the Roman law. These Roman provisions are on dowry. The C.Q. articles are on community property. In these three articles, the redactors have departed from the terms of the ancien droit, and copied the new French code. They appear to cite the Roman texts and stress their articles' conformity to the Roman law, to support their copying of the C.N.: they seem to believe that the Roman texts give extra authority to their work.

864. See text supra at notes 701-3.
865. See e.g. Pothier, T.C.M. nos. 380 and 382, Bug. 6 pp. 174 and 175.
right to be maintained by their husbands, as C.Q. 175 points out.

C.Q. 174 states that: "A husband owes protection to his wife; a wife obedience to her husband." C.N. 213 states the same. The *ancien droit* made similar provision. Maleville remarks thus:

"Protection, obéissance, ces mots sont durs, ils sont pourtant pris de St.-Paul, et cette autorité en vaut bien une autre." 867.

On the duty of wifely obedience, the *ancien droit*, as would the new, limited the obedience to all things not "contraires à la loi de Dieu", and which were reasonable. For the C.Q. redactors not to have adopted such a provision would have been unthinkable. Toullier expresses the opinions of the period when he states:

"La femme doit obéissance à son mari. La société conjugale ne pourrait subsister, si l'un des époux n'était subordonné à l'autre." 869.

That the husband should command his wife was axiomatic.

C.Q. 175 states as follows.

"A wife is obliged to live with her husband, and to follow him wherever he thinks fit to reside. The husband is obliged to receive her and to supply her with all the necessaries of life, according to his means and condition."

C.N. 214 states likewise. Pothier remarks that:

"La femme...contracte envers son mari l'obligation de le suivre partout où il jugera à propos d'établir sa résidence ou sa demeure, pourvu néanmoins que ce ne soit pas hors du royaume." 870.

Originally it had been proposed to add a section to the article which became C.N. 214, stating that a husband could

---

866. See e.g. Pothier, *T.P.M.* no. 1, Bug. 7, p. 1 and *T.C.M.* no. 382, Bug. 6, p. 175.
867. *Analyse*, p. 201.
870. *T.C.M.* no. 382, Bug. 6, p. 175. See also his *T.P.M.* no. 1, Bug. 7, pp. 1-2 and *C.d'O.*, introd. to titl X, no. 143, Bug. 1, p. 255. In 3 *Pan. Fran.* p. 176, the following is said: "Autrefois le mari ne pouvait point obliger sa femme à le suivre hors du royaume."
not oblige his wife to follow him out of the Republic unless he was on a government mission; on the opposition of Napoleon, this proposed qualification of the husband's authority was withdrawn. 871. Napoleon, notoriously, upheld the principle of the husband's authority over his wife. 872. The Quebec redactors considered an addition to C.Q. 175 along the lines of the proposed addition to C.N. 214: they decided, however, to follow C.N. 214, arguing that a derogation from the power of the husband to compel his wife to follow him where he chose to reside, if it had existed in the old law, was part of the public law, and not of the private, and hence was not relevant in a civil code, since it only gave rise to questions of allegiance and whether a husband could compel his wife to change her allegiance and abdicate her native land. 873. The C.Q. redactors appear to be, to some extent, avoiding the issue: presumably they considered that the general principle was best left to stand without qualification, as a proper assertion of the husband's authority. The duties of a husband towards his wife as set out in C.Q. 175 were the same in the ancien droit. 874.

These first three articles contain no provisions to cause surprise. They are a fairly faithful translation of the substance of the ancien droit, and though the various rights and duties are stated to be reciprocal, it is obvious that the wife is under the authority of her husband: she has to obey him, to live with him, and to follow him; he has to receive her, to protect her, and to supply her with the necessities of life. The husband and wife, in accordance with the general principle, are in accordance

872. He is reported to have remarked: "Est-ce que vous ne ferez pas promettre obéissance par la femme? Il faut que la femme sache qu'en sortant de la tutelle de sa famille, elle passe sous la tutelle de son mari.... Ce mot-là obéissance est bon pour Paris surtout où les femmes se croient un droit de faire ce qu'elles veulent." Reported by Thibaudeau, Mémoires sur le Consulat, p. 426, and quoted here from The Progress of Continental Law in the Nineteenth Century, (various Authors), Cont. Leg. Hist. Ser., vol. II, 1919, pp. 196-7 no. 24.
874. See Pothier, T.C.M. no. 380, Bug. 6, p. 174.
with the prevailing _mores_, are not of an equal status. Perhaps what is most interesting about these articles is that the rights and duties are stated to be reciprocal, as if in a contract reached through a series of bargains: the wife has given up her independence in return for certain benefits, but the parties are viewed as free and equal agents. Pothier, for example, merely states that:

"La puissance du mari sur la personne de la femme, consiste, par le droit naturel, dans le droit qu'a le mari d'exiger d'elle tous les devoirs de soumission qui sont dus à un supérieur .... Le droit civil a beaucoup augmenté la puissance du mari sur la personne de sa femme." 875.

For Pothier, the husband's authority derives from natural law; he is his wife's natural superior; she has not bargained away her independence for his protection. The rights are not stated in the contractual form of reciprocal duties and obligations. Although Pothier regards these obligations of both spouses as being a consequence of the contracting of marriage, such obligations are not put into the form of mutually interdependent reciprocal rights and duties, but are regarded as separate obligations depending from marriage and governed by the husband's natural superiority. 876.

The next article of the code, C.Q. 176, states thus:

"A wife cannot appear in judicial proceedings, without her husband or his authorisation, even if she be a public trader or not common as to property; nor can she, when separate as to property, except in matters of simple administration."

The equivalent French article, C.N. 215 is rather different:

"La femme ne peut ester en jugement sans l'autorisation de son mari, quand même elle serait marchande publique, ou non commune, ou séparée de biens."

The ancien droit was as follows. The _Coutume de Paris_, in articles 224 and 234, said thus:

"Femme ne peut ester en jugement sans le consentement de son mari, si elle n'est autorisée ou séparée par Justice, et ladite séparation executée." (224)

"Une femme mariée ne se peut obliger sans le

consentement de son mari, si elle n'est séparée par effet, ou marchande publique, auquel cas étant marchande publique, elle s'oblige et son mari, touchant le fait et dependances de ladite marchandise publique."

The wife who was simply non-commune still has her property administered by her husband, and for the reasons already described. As Ferrière said, "La femme n'est pas moins sous l'autorité de son mary, quoiqu'elle ne soit point commune avec luy." Thus, a wife who was simply non-commune with her husband, like a wife who was commune, required her husband's or the judge's consent to appear in court proceedings. From this requirement of authorisation to sue or be sued, article 224 exempted the wife separated as to property. Ferrière commented:

"C'est une maxime généralement requête, en pays coutumier, que la femme séparée d'avec son mary peut ester en jugement sans être ni par luy autorisée, ni par Justice.

La raison est, que le mary n'étant pas maître des meubles et effets mobiliers de sa femme, et n'ayant plus d'administration et la jouissance de ses biens, il semble être sans intérêt."

Pothier expands on this point:

"Ce pouvoir que la coutume [de Paris] donne aux femmes séparées, d'ester en jugement sans l'assistance de leurs maris, étant une suite du pouvoir que la séparation donne aux femmes d'administrer leurs biens, sans avoir besoin pour cela de leurs maris,

877. See supra, text at notes 827-848. Ferrière states: La raison de la règle est que la femme entrait en la puissance de son mary par le mariage; et transmettant en sa personne l'administration et jouissance de ses biens, ... elle ne peut point disposer de ses biens par actes entre-vifs, ni s'obliger sans son consentement." Corps et Comp., vol. 3, col. 171, no. 2. "[S]'il le refuse, le juge y supplée en l'autorisant sur l'exposé d'une requête pour cause legitime, c'est-à-dire, pour agir ou défendre, pour la conservation de ses droits, et non pour aliéner ses biens." Ibid. no. 4.

The Coutume de Sedan in tit. 4, art. 96 said that a wife could be authorised by justice "pour son profit et cause raisonnable," that of Bourbonnais, "au refus du mari sans cause legitime," and that of Peronne, "au cas qu'il [i.e. le mari] fût refusant sans cause raisonnable." See Pothier, T.P.X. no. 58, Bug. 7, p. 23.


879. Ibid., col. 181, no. 1.
il est évident que cette exception pour les femmes séparées, ne doit s'entendre que des actions qui concernent l'administration de leurs biens, qu'elles peuvent intenter, et auxquelles elles peuvent défendre sans leurs maris.

A l'égard de celles qui concernent la propriété de leurs immeubles les femmes quoique séparées, ne peuvent les intenter ni y défendre sans l'assistance de leur mari, ou l'autorisation du juge. 880.

Thus, the ancien droit on the authorisation of wives communes, non-communes, and séparées, whether by justice or by contract, 881 was the same as the law expressed in C.Q. 176; though C.Q. 210, discussed below, changed the law on wives séparées de corps. The Quebec redactors followed the ancien droit here, whereas the C.N. did not. The question of wives marchandes publiques has still to be discussed; but before doing so, it is convenient to discuss the reasons behind the difference here between the C.N. and the C.Q.

In the Pendectes Françaises, the authors explain why the C.N. changed the ancien droit, so that wives séparées de biens now would require authorisation to appear in judicial proceedings: they state that under the ancien droit, though not required by law, it was legal practice ("dans l'usage") to adjoin the husband's name for regularity of procedure. 882 The Quebec codifiers did not adopt this reasoning, and argued that, given the powers of administration granted to a wife separated as to property by justice or contract, it would be quite inconsistent to forbid her to appear in judicial proceedings: they expressly supported the reasoning of Pothier. 883 There is a logic in the Quebec position. Given that a wife séparée could administer her property, there seems to be no convincing reason why she should not be able to appear unauthorised in court in actions relating to that administration. There was certainly no

880. Pothier, T.P.M. no. 61, Bug. 7, pp. 23-4. On this topic, see generally Pothier, ibid., nos. 55-66, Bug. 7, pp. 22-5.
881. See Pothier T.P.M. no. 61, Bug. 7, p. 24.
882. 3 Pan Fran. p. 385. Note that the authors of this work are confused about the positions of wives who were non-communes and those who were séparées in the ancien droit, as regards appearing in court proceedings: ibid.
883. Second Report, pp. 187-9. The reasoning of Pothier to which they refer is that in T.P.M. no. 61 Bug. 7, pp. 23-4, the bulk of which is quoted in the text supra, at note 880.
social reason for restricting further the capacity of wives séparées de biens; though there was also no social reason for not so restricting wives' capacities.

Neither C.Q. 176 nor C.N. 215 permit wives who are public traders to appear unauthorised in court, even in matters relating to their trade. In the ancien droit coutumier, some coutumes had a specific provision permitting wives who were public traders to bring and defend actions relating to their trade.\(^{884}\). It was always a matter of controversy whether those coutumes with no explicit provision to this effect allowed a wife who was a public trader to do likewise,\(^{885}\), though the general opinion was that, if there were no specific provision in the coutume, then wives who were public traders required authorisation to appear in court proceedings. Pothier, in discussing article 224 of the Coutume de Paris, argues that had it been wished in the Coutume to give this power to wives who were marchandes publiques, they would have been specifically mentioned in the exception to article 224 along with wives separated as to property and those authorised by justice, in the same way as they were specifically mentioned in article 234 of the same Coutume.\(^{886}\). The C.N. and the C.Q. adopted the law as followed under the Coutume de Paris. The reasons why the C.N. and the C.Q. kept to the law as under the Coutume de Paris were presumably the reasons given by Pothier for the difference between wives séparées and wives marchandes publiques. The relevant passage of Pothier is referred to by the C.Q. redactors and by the Pandectes Françaises, the latter work citing the passage approvingly.\(^{887}\).

---

884. E.g. the coutumes of Dourdang, tit. 6, art. 80, and of Mantes, art. 125: Pothier, T.P.M. no. 62, Bug. 6, p. 24.
886. T.P.M. no. 62, Bug. 7, p. 24. Article 234 is quoted in the text supra between notes 876 and 877. A problem with this argument of Pothier's is that article 234 of the C.deP. does not mention wives authorised by justice: Pothier's argument should here have the result that wives could not be authorised by justice to contract. This, of course, was not the case. See T.P.M. nos. 12-14, Bug. 7, pp. 5-6, and see further below.
887. 3 Pan. Fran., p. 387.
Pothier states that separation gives the wife power to administer her goods and to enjoy them on her own account, the right of suing or defending on such administration deriving from her enjoyment of the goods, in which her husband had no interest. On the other hand, a wife who was a public trader exercised her trade for the benefit of the community, and the fact that her husband, having authorised her to carry on a trade, is taken to have permitted her to contract relative to such trade without further authorisation from him, does not mean that to sue or to defend concerning such trade is a necessary consequence of such permission. This argument is tenable; but to have concluded the opposite from a husband’s permitting his wife to carry on a separate trade would have been as plausible. Pothier’s argument is derived directly from the omission of an exception in favour of marchandes publiques in article 224 of the Coutume de Paris. Neither the Quebec nor the French redactors were bound any more necessarily to follow the exact provisions of the Coutume. The C.N. redactors had already departed from article 224 of the Coutume in restricting the capacity of wives separated as to property; but their adoption of the Coutume’s provision prohibiting wives marchandes publiques from appearing in court proceedings without authorisation is consistent with that departure. Under C.N. 215, a wife, be she non commune en biens, séparée de biens or marchande publique, could not appear in court without her husband or his authorisation. C.Q. 176 lacked this consistent denial of capacity to take part in court proceedings. The redactors are merely following exactly the ancien droit in the whole of their article. The reasons for their rejection of the C.N.’s innovation on wives séparées have been discussed above; their refusal here to amend the ancien droit on marchandes publiques seems to have been dictated by legal conservatism. The redactors did not consider an amendment.

though an amendment might have been useful. To have allowed a wife to sue or defend concerning her trade might have expedited legal proceedings. Clearly, the redactors did not consider this, and rejected the examples of some of the coutumes. Their legal conservatism preserved the status quo.

C.N. 216 states that authorisation by the husband is not necessary when the wife is pursued "en matière criminelle ou de police." There is no equivalent in the C.Q. The redactors probably did not consider this matter appropriate for a civil code. Some coutumes allowed a wife to appear alone in certain cases; but the C.Q. redactors obviously wished to retain the law as laid down by the Coutume de Paris.

C.Q. 177 states thus:

"A wife even when not common as to property, cannot give nor accept, alienate, nor dispose of property inter vivos, nor otherwise enter into contracts or obligations, unless her husband becomes a party to the deed, or gives his consent in writing; saving the provisions contained in the act 25 Vict., chap.66."

If, however, she be separate as to property, she may do and make alone all acts and contracts connected with the administration of her property."

C.N. 217 differs from C.Q. 177, and provides as follows:

"La femme même non commune, ou séparée de biens, ne peut donner, aliéner, hypothéquer, acquérir, à titre onéreux ou gratuit, sans le concours de son mari dans l'acte, ou son consentement par écrit."

Two matters require discussion here: first, the method of authorisation, and, second, when authorisation is required. Following the C.N. on method of authorisation, the C.Q. merely requires that the husband be a party to the deed or consent to it in writing. The old law was quite different. Most coutumes required express and explicit authorisation, using the verb "autoriser". Ferrière, in discussing the

889. See text supra at note 884, and note 884 itself.
890. Cf. their remarks on C.N. 214, supra at notes 872-3. The ancien droit was as in the C.N.: see Rother, T.P.M. no. 63, Bug. 7, p.24.
891. See Rother, T.P.M. nos. 65-66, Bug. 7, p.25.
892. "L'autorisation, suivant la plupart des coutumes, était si rigoureusement exigée que le terme autorisée, était sacramentel." 3 Pan. Fran., p.381.
law under the *Coutume de Paris*, said as follows:

"Le consentement du mari ne suffit pas, il faut une autorisation expresse....

Le mari doit declarer en termes expres qu'il autorise sa femme à l'effet et pour la validité du present acte ....

Ces termes autorisation, autoriser, sont solemnels et consacrez par un usage tres-ancien dans nos Coutumes, pour rendre valables les contrats passés par les femmes mariées; et ces termes consentement, consentir, n'ont pas la même force...." 893.

It was disputed in the ancien droit whether or not the authorisation was required to be in the deed itself. 894. Some coutumes provided that the mere concurrence of the husband in the deed was sufficient to make it valid; 895. but the majority, followed the law as set out above. 896. The reasoning behind the Quebec adoption of the rule found in the C.N. is obvious. The old law was complex and over-subtle. 897. There was no need for such formality, which could only cause problems by resulting in delay in concluding a contract, or by bringing about unnecessary nullities if there were some minor mistake in form. 898.

If we turn now to the second point: under what circumstances authorisation is required. C.N. 217 is differently worded from C.Q. 177. The French article lacks the sentence allowing a wife separate as to property to make alone all contracts and acts connected with the administration of her property. Before considering the significance of this, it is useful to set out the ancien droit. The *Coutume de Paris* stated that, no matter a wife's property relations with her husband, she could not alienate, hypothecate or in any way

893. *Corps et Comp.* vol.3, col. 147, nos. 23 and 24. He goes on to cite the authors who agree with him.
894. An *acte de notoriété* of the *Châtelet de Paris* of 25th. February, 1708, required that the authorisation be given in the deed: see *Ferrière, Corps et Comp.*, vol.3, cols. 198-203, where this *acte* is quoted; see on authorisation especially nos. 4,5 and 6. Pothier was of the opposite opinion: "[L]e mari peut valablement autoriser sa femme par un acte qui précède celui pour lequel il l'autorise, et il n'importe quel intervalle de temps il y ait entre l'acte d'autorisation et le contrat pour lequel la femme a été autorisée." *T.P.M.* no. 71, Bug. 7, p.27.
896. Brissaud, *History*, pp.173-4, no.149 states that this requirement of express authorisation was not found in the early law.
dispose of her immovable property (héritages); nor, under article 234, could she place herself under any obligation unless she were separate as to property. 900. Article 234 of the Coutume might suggest that a wife séparée could obligate herself to any extent. This was not so, as Ferrière points out:

"Enfin telle est la disposition de notre Coutume, que la femme séparée ne peut faire aucun acte emportant alienation de ses biens, si elle n'est autorisée suivant l'article 223, mais qu'elle peut s'obliger par de simples obligations, pour sommes mediocres de deniers, qui se peuvent acquitter sur ses meubles ou sur le revenu de ses immeubles." 901.

Pothier summed up the law thus:

"[L]a femme qui n'est pas séparée, ne peut faire valablement aucun acte, aucun contrat, quel qu'il soit, sans autorisation de son mari, ou du juge. Au contraire, la femme séparée ayant, par sa séparation, le droit d'administrer, elle-même, ses biens, les coutumes l'ont dispensée de l'autorisation pour tous les actes qui ne concernent que la simple administration de ses biens." 902.

Although the husband had no apparent or immediate interest in her property, such authorisation was still necessary, because authorisation was a requirement of the puissance du mari, not a result of the existence of communauté de biens: 903. Ferrière also points out that a husband has an interest by virtue of the children born and to be born of the marriage. 904.

899. C. de P. art. 223: "La femme mariée ne peut vendre, aliéner ni hypothéquer ses héritages, sans l'autorité et consentement exprès de son mari, et si elle fait aucun contrat sans l'autorité et consentement de son mari, tel contrat est nul, tant pour le regard d'elle que de son mari; et n'en peut être poursuivie, ni ses héritiers après le décès de son mari."

900. C. de P., art. 234, is quoted supra in text at notes 876-7.

901. Corps et Comp., vol. 3, col.355, no.16. He explains further, ibid. no.19: "Il paraît assez que l'esprit de (la) notre coutume, en cet article est de donner à la femme séparée le pouvoir de s'obliger indefiniment et indistinctement pour quelque cause que ce soit. - Mais la Cour a jugé le contraire, quoique la séparation elle soit, soluta a lege mariiti, à cause de l'intérêt du mari par l'esperance qu'il a de se reconcilier avec elle: ainsi elle ne peut s'obliger que par de simples obligations dont la cause soit juste et legitime, comme pour le besoin de sa maison."

902. T.P.M. no.15, Bug. 7, p.7.

903. See ibid. and Ferrière, Corps et Comp., vol. 3, cols. 357-8, no.23.

904. Corps et Comp., vol. 3, cols. 357-8, no.23. He points out that Duplessis doubted if a wife séparée required authorisation: Ferrière disagreed with Duplessis for the reasons in the text.
Some coutumes did allow wives separated as to property to contract and to dispose of their moveable and immoveable property as if they were not married; but the general droit coutumier was as under the Coutume de Paris. Under article 9 of the Ordonnance des Donations of 1731, a wife could not accept donations unless authorised.

It is obvious that C.Q. 177 has followed the ancien droit; the import of C.N. 217 is rather more problematic. C.N. 217 does not contain the exception permitting a wife, who is separate as to property, to contract as regards the administration of her property. It might be concluded from this that such a wife suffered the same complete incapacity to contract as a wife not so separated. C.N. 1538, already discussed, stated that a wife, separate as to property, might administer her property: all that was forbidden her being alienation of her immoveables. C.N. 217, if interpreted literally, would contradict C.N. 1538: the article, however, has not been given this literal interpretation. The authors of the Pandectes Françaises state that C.N. 217 deals solely with disposing of immoveables, simple administration not being governed by it, and therefore not being excluded. Thus, a wife separate as to property could contract as regards simple administration following C.N. 1538, while a wife commune en biens could not. Ingenious though this argument is, Maleville is no doubt correct when he suggests that the reason for the prohibition in C.N. 217 being so wide, is that the redactors of the code simply forgot to mitigate its rigours in favour of the wife separate as to property.

---

905. See Ferrière, Corps et Comp. vol. 3, col. 355, no. 18; Pothier, T.P.M. no. 16, Bug. 7, p. 8; and 3 Pan. Fran., p. 397.
907. See text supra at notes 849-856.
908. See Maleville, 1 Analyse, p. 204, who states that the difference between the two articles "lève tout équivoque."
910. 1 Analyse, p. 204.
If the above argument be correct, then, despite the differences in expression, the law on the subject matter covered in C.Q. 177 is the same as in C.N. 217 and the ancien droit. No doubt the C.Q. redactors departed from the wording of C.N. 217 because they were well aware of the problems it entailed. It was always open for the C.Q. redactors to suggest reform of the law here, and perhaps allow a woman separate as to property to act in any manner towards her property without requiring authorisation: if the redactors had done so, they would have followed the views of Duplessis, Dumoulin, and the provisions of various coutumes. They chose not to do so. They preferred to keep to the traditional rule, and seemed unable to see any reason for a change in the law here. They probably considered that there was no need to enhance the capacity of a wife.

C.Q. 178 states as follows:

"If a husband refuse to authorise his wife to appear in judicial proceedings or to make a deed, the judge may give the necessary authorization."

C.N. 218 provides that "Si le mari refuse d'autoriser sa femme à ester en jugement, le Juge peut donner l'autorisation".

C.N. 219 dealt with authorisation, by the court, of the wife to make a deed: this article goes into greater detail than C.Q. 178 on the point. These two articles of the C.N. provide in principle the same rule as C.Q. 178. The ancien droit was the same. No conclusions relevant here may be drawn from this article on its own: it merely enacts a necessary rule given the general requirement of authorisation by the husband.

C.Q. 179 provides thus:

"A wife who is a public trader may, without the authorization of her husband, obligate herself for all that relates to her commerce; and in such case she also binds her husband, if there be community between them.

911. See note 904 supra.
912. See Brissaud, History, p.175.
913. See note 905 supra and relevant text.
914. See C. de P., art. 224, C. d'Q, art. 201, Pothier, T.P.M. nos. 12, 57 and 59, Bug. 7, pp.5 and 23.
She cannot become a public trader without such authorization express or implied."

The first paragraph of C.N. 220 has a provision identical to that of the first paragraph of C.Q. 179. The second paragraph of C.N. 220 reads as follows:

"Elle n'est pas réputée marchande publique, si elle ne fait que detailler les marchandises du commerce de son mari; mais seulement quand elle fait un commerce séparé."

Article 4 of the French Code de Commerce stated that "La femme ne peut être marchande publique sans le consentement de son mari." The relevant provisions of the ancien droit in Quebec are articles 234, 235 and 236 of the Coutume de Paris. The first of these has been quoted already, the other two provide as follows:

"La femme n'est pas réputée marchande publique pour debiter la marchandise dont son mari se mêle; mais elle est réputée marchande publique, quand elle fait marchandise séparée, et autre que celle de son mari." (235)

"La femme marchande publique, se peut s'obliger sans son mari, touchant le fait et dépendance de ladite marchandise." (236) 916.

The Coutume d'Orléans, articles 196 and 197, made similar provision. Thus, under the Coutume de Paris, a wife was a marchande publique if she had a trade separate from that of her husband; such a wife, marchande publique, could oblige herself without authorisation as regards her trade, and she would also oblige her husband. 917. Although these articles of the Coutume de Paris do not mention the point, to be a marchande publique, a wife required the consent of her husband. 918. Of course, a wife who was a public trader would

915. See text supra between notes 876 and 877.
916. Article 236 was added when the Coutume was reformed. As Ferrière points out, it is a mere repetition of the rules of 234 and 235: Corps et Comp., vol. 3, comment on art. 236, cols. 373-4.
917. See Ferrière, Corps et Comp. vol. 3, col. 362 no. 11, and Pothier, T.P.M. nos. 20-21, Bug. 7, pp. 9-10.
918. See Ferrière, Corps et Comp., vol. 3, col. 359, no. 1: "La femme marchande publique peut valablement s'obliger sans l'autorisation de son mari, suivant la disposition précise de cet article. - Ce qui est fondé sur la faveur du commerce et sur la foy publique, qui requiert, que la femme s'oblige en conséquence de la seule liberté, que le mary lui donne de trafiquer publiquement: c'est pourquoi il faut qu'il le sache et en ait connaissance."
require authorisation for contracts not concerning her trade:

"Ce qui est fondé sur cette raison, savoir, que le consentement exprès ou tacite du mari, ne regarde que le negoce dont sa femme se mêle...." 919.

The ancien droit was the same as that in the C.N. and in the C.Q.

The C.Q. article does not state that the wife's trade should be separate from that of her husband; this, however, is implied, as she would otherwise be acting as his agent, not as a trader on her own account. The requirement that the wife have permission to be a public trader is included in the C.Q. article, while not in the equivalent C.N. one; under the French system, this requirement was stated in the Code de Commerce. Quebec, however, having no separate commercial code, the provision was included here. C.Q. 179 thus contained no reform of the law. That the wife could contract on her own without specific authorisation was sufficient to meet the demands of trade and to favour commerce and maintain public confidence in the contractual capacity of married women carrying on a trade. That she should be authorised to be a public trader is logical given that the premisses of authorisation by the husband have been accepted.

Here the C.N. has an article, 221, for which the Quebec code has no equivalent. There is no obvious significance in the omission of this article from the C.Q., the redactors of which no doubt considered the points raised by C.N. 221 adequately covered by the general rules.

Article 180 of the Quebec code states thus:

"If a husband be interdicted or absent, the judge may authorise his wife, either to appear in judicial proceedings or to contract."

C.N. 222 states the same, though pointing out that the judge can only give authorisation "en connaissance de cause". The omission of this phrase from the C.Q. is of no significance: in Quebec, as in the ancien droit, the judge would obviously

919. Ferrièrè, Corps et Comp. vol. 3, col. 363.
only give authorisation "en connaissance de cause". A difficult point arises out of the meaning of the term "absent" in the C.N.; but before dealing with this, the ancien droit should be set out. Pothier states that if the husband has fallen into a state of demence, then the wife requires the authorisation of the judge. If it is unknown where the husband is, or uncertain if he is living or dead, again the wife requires the authorisation of the judge. Pothier, however, adds:

"Néanmoins, comme il n'est guère possible que la femme ait recours à l'autorisation du juge pour chacun des actes qui sont à faire pour l'administration des biens tant de son mari que d'elle, j'aurais de la peine à ne pas regarder comme valables tous les actes et contrats de pure administration, quoique faits sans autorisation. Il est pourtant plus sûr que cette femme se fasse autoriser par le juge pour cette administration." 923.

Pothier is further of the opinion that if a woman's husband is publicly accepted as dead, and she acts without authorisation, then her acts are valid, even if her husband later returns. Pothier also states that:

"Comme un mari ... pourrait être trop éloigné pour donner cette autorisation aussi promptement que le cas l'exige, nos coutumes ont pourvu à cela, en permettant en ce cas à la femme de se faire autoriser par le juge ... pour l'absence de son mari." 925.

The ancien droit is thus apparently the same as the C.N. and C.Q. provisions, with the exception that wives may, in some circumstances, carry out unauthorised acts of administration.

As indicated, there is a problem concerning the import of the word "absent" in the C.N. For Pothier, there can be no doubt that absence permitting authorisation by the judge meant merely non-présence. Some writers on the C.N.,

920. See Pothier, T.P.M. no.12, Bug. 7, p.5.
921. See Pothier, T.P.M. no.25, Bug. 7, p.11. In no.26, ibid., Pothier states that if the wife has been appointed curatrix by the judge of her husband's person and property, she needs no farther authorisation to administer the property; but for alienation of heritage, acceptance or refusal of an inheritance, and anything outwith the bounds of administration, she requires authorisation.
922. Pothier, T.P.M. no. 27, Bug. 7, p.11
923. Ibid. no. 27, pp.11-12.
924. Ibid. no. 28, p.12.
925. Ibid. no.12, p.5.
926. See text at note 925 supra.
however, were of the opinion that "absent" in C.N. 222 had the technical meaning ascribed to it in title four of the C.N., "Des Absens". 927. Marcadé, in his commentary on C.N. 222, said the following:

"C'est de l'absence proprement dite, et non de la simple non-présence, qu'il s'agit ici .... Il est vrai que lors de la discussion de cet art. 222, quelques membres du Conseil d'État parurent l'entendre dans le sens de la non-présence; mais quand même il aurait été écrit et voté dans ce sens, tout ce qu'il en faudrait conclure, c'est que l'art. 863 du Code de Procédure serait venu y déroger. La femme devra donc, dans le cas de simple non-présence, ou attendre le retour du mari, ou lui demander une autorisation par lettre." 928.

Demolombe disagrees with Marcadé's interpretation, which he quotes, and then remarks:

"Cette proposition toutefois me semble trop absolue: Pothier n'hésitait pas à dire que 'la femme peut recourir à la justice lorsque le mari est trop éloigné pour donner l'autorisation aussi promptement que le cas exige...'. Pourquoi en serait-il autrement aujourd'hui? Il est vrai que l'article 863 du Code de procédure ne s'occupe que de l'absence proprement dite; mais la généralité des termes de l'article 222 du Code civil peut s'appliquer même au cas de simple éloignement .... Car le mot absence n'a pas toujours dans nos lois son acception technique et spéciale." 929.

Toullier was also of the opinion that "absence" was not meant in any technical sense: merely that the husband should be away and not readily accessible. 930. There is some evidence of the intention behind the redaction of C.N. 222, for, as Marcadé pointed out, it appears from the discussion of the article in the Conseil d'État that the article was considered

927. See Maleville, 1 Analyse, pp.111-112: "Le mot absent, dans le langage des lois, a une acception bien différente de celle qu'il a dans l'usage ordinaire; on dit communément qu'un homme est absent, pour exprimer qu'il n'est pas dans le lieu où il demeure; mais dans les lois, et particulièrement dans ce titre, l'absent est celui qui a disparu de son domicile, sans qu'on ait eu depuis aucune nouvelle de son existence."


to refer to husbands too far away to be readily accessible. Maleville naturally repeats this.

Had the C.Q. redactors studied the French books, it would have been obvious to them that the wording of C.N. 222 had caused problems; nonetheless, the C.Q. redactors themselves used the term "absent". In their references after C.Q. 180, the redactors refer to the following works: Pothier's treatise on the puissance du mari, numbers 25 to 28; the Pandectes Françaises; Fenet's work correlating Pothier's treatises with the Code Napoleon, and C.N. 222 itself. The Pandectes Françaises say nothing of significance to the point under discussion. Fenet on Pothier cites numbers 25 to 28 of the latter's treatise on the puissance du mari, and does not discuss the import of the term "absent". Pothier's account has been set out above. It should be noted that the C.Q. redactors do not cite the passage of Pothier where Pothier states that wives whose husbands are too far away for it to be practicable for them to give authorisation may be authorised by the judge. It is difficult to see any significance in this exclusion of number 12 of Pothier's treatise: it would seem unlikely that it had been excluded from the references because the C.Q. redactors did not intend their article to cover the situation where a husband was away but not "absent" in the technical sense. In fact, the most likely reason for the exclusion of a reference to number 12 of Pothier's treatise is that the C.Q. redactors have simply followed the references given by Fenet, and have not considered referring to other parts of the relevant work. The passage of Pothier...

931. Fenet, Recueil Complet, vol. 9, p.78.
932. Analyse, p.207: "Le mot absent n'est pas pris ici dans la signification qu'il a au titre 4; il se prend dans l'acception ordinaire, c'est-à-dire, que si le mari, n'est pas à portée d'autoriser sa femme, et qu'il s'agisse d'une affaire urgence, le juge peut s'autoriser."
933. P.A. Fenet, Pothier Analyse dans ses Rapports avec le Code Civil, et Mis en Ordre sous Chacun des Articles de ce Code, 2nd. Edn., Paris, 1829, p.57 on article 222. This work will hereafter be cited as Fenet on Pothier.
934. See Fenet on Pothier, p.57.
935. See text supra at notes 920-926.
936. Quoted supra in text at note 925.
was presumably known to the redactors, since they cite it under C.Q. 178. That the redactors did not intend "absent" in C.Q. 180 to have its technical sense is strongly suggested: they do not indicate in their Second Report\(^{938}\) that they are changing the law here, nor do they refer to any of the modern commentators who were of the opinion that "absent" in C.N. 222 was used in its strict technical sense.

If it is accepted that the word "absent" was not intended to bear its technical sense, the Quebec redactors were still using a term potentially ambiguous, and which, in fact, was to cause the same problems of interpretation in Quebec as in France.\(^{939}\) Why should they have done so? It is notable that under C.Q. 180, the redactors make no reference to any of the French works where this point is discussed, though, they referred quite often to Marcadé, Demolombe and Toullier, and indeed were to do so as regards C.N. 183. From this, however, it would seem unwise to deduce that they were unaware of the debate: the frequency of reference to these authors would suggest that the redactors consulted them regularly on the import of the articles of the C.N., and the method of working followed by the redactors would have made it advisable to consult such works of doctrine.\(^{940}\) It is probably correct to assume that the redactors knew of the problems caused by the use of the word "absent". Despite this knowledge, the redactors copied the unsatisfactory wording of the C.N., though they could easily have amended the expression to avoid the difficulty. It may only be suggested that the redactors preferred the concise tersely expressed French article, and assumed that "absent" would be given its ordinary meaning, and not the technical one.\(^{941}\) If this is correct, the redactors were misled by the apparent technical perfection of the C.N., which they were generally copying fairly closely. They accordingly failed

938. See p.189.
939. See Mignault, Droit Civil, vol.1, p.526.
940. See text supra in chapter 3 at notes 432-435.
941. This criticism of the C.Q. redactors holds good even if, contrary to the argument above, they had intended "absence" to have its technical meaning.
to make an appropriate alteration in the wording of the article.

There is one final point of note in connection with C.Q. 180: as indicated, Pothier was of the opinion that, if a husband were away, a wife probably could carry out simple acts of administration without being authorised. 942. Neither the C.N. nor the C.Q. bear this interpretation. To have followed Pothier's suggestion might well have provided a useful reform in that the wife of an interdicted or absent man would have been able to act speedily in dealing with property, and would have been spared the necessity of seeking judicial authorisation for fairly trivial actions. 943. The Quebec redactors chose to assert the incapacity of the married woman, who would require the authorisation of the judge if her husband could not authorise her, because even were a husband absent or interdicted, the *puissance du mari* over his wife continues.

C.Q. 181, the next article, states thus:

"All general authorizations, even those stipulated by marriage contract, are only valid in so far as regards the administration of the wife's property."

C.N. 223 makes an identical provision. The *ancien droit coutumier* was the same, 944. unless a *coutume* had a specific provision allowing wider general authorisations. 945. No doubt...

---

942. See text *supra* at note 923.
943. It appears that in an earlier period of French law, a wife could so act: Eriessaud, *History*, p.174, no.150.
945. Francois Bourjon, *Le Droit Commun de la France etc.*, Paris, 1747, (hereafter cited as Bourjon, and cited by volume, page, and number on that page, for simplicity; rather than using the complex system of Books, chapters, and sections) was of the opinion that there could be general authorisations in marriage contracts, even to alienate property, provided there was contractual separation of property. He states thus, vol. 1, p.37, no.14: "Cependant elle [i.e. l'autorisation générale] est valable lorsqu'elle est portée par contrat de mariage, c'est le seul cas dans lequel l'autorisation générale vaut." Ibid., no.15: "En ce cas la femme non-seulement administrer, mais encore aliéner, et même à titre de liberalité; telle autorisation mettant ses biens hors la dépendance de son mari." He repeats the same in vol.1, pp.509-510, nos. 33 to 37, where he develops the principle more thoroughly. Bourjon, among the more modern writers on the *ancien droit*, is definitely not giving a commonly-held view.
the redactors, in theory, could have departed from the droit commun coutumier, and permitted general authorisations to alienate property; but, given that the redactors were upholding the ancien droit, they would have thought such a general authorisation as inconsistent with the principles of the puissance du mari, despite the odd example or opinion to the contrary. It must be concluded that the redactors approved of the ancien droit on authorisations as embodied in Pothier. 946.

C.Q. 182 states thus:

"A husband although a minor may, in all cases, authorize his wife who is of age; if the wife be a minor, the authorization of her husband, whether he is of age or a minor, is sufficient for those cases only in which an emancipated minor might act alone."

C.N. 224, the equivalent article, is quite different.

"Si le mari est mineur, l'autorisation du juge est nécessaire à la femme, soit pour ester en jugement, soit pour contracter."

Quebec is here following the ancien droit, under which a minor husband could authorise his adult wife to contract, because her incapacity was the result of the puissance du mari, the majority or minority of the husband being irrelevant. Ferrière explains this clearly:

"La raison pour laquelle un mari mineur peut autoriser sa femme majeure ou mineure, est que le droit d'autorisation ne dépend pas de l'âge et de l'expérience du mari, mais de sa qualité et de l'autorité que la Loy lui donne sur sa femme.

946. Although in some circumstances the Quebec redactors refer to Bourjon (see note 945), it would seem unlikely, given their likely working method (see text at notes 954-5 infra, and 936-8 supra), that the redactors consulted Bourjon on this point. Accordingly, one cannot say that they rejected Bourjon's version of the law; nonetheless, given that Bourjon's opinion was one readily imagined, the C.Q. redactors may be said to be rejecting such an opinion: the wording of C.Q. 181, though following C.N. 223, by specifically mentioning marriage contracts, immediately suggests the opposite to its own opinion.

La Coutume de Paris dans tous les articles où elle parle de l'autorisation, et toutes les autres Coutumes ne distinguent point entre le mari majeur ou mineur.

La raison est, que l'effet de l'autorisation est de rendre la femme habile à contracter comme elle n'étoit point sous la puissance du mari, elle ôte l'inhabitabilité provenante de la dépendance; et parconsequent l'acte fait par la femme autorisée par son mari mineur, comme il pourrait valoir si elle étoit independante." 948.

If a minor husband suffered loss, he could seek to rescind the authorisation. 949. Dumoulin, in his commentary on the ancienne Coutume of Paris, argued that a minor husband could not authorise his adult wife: "qui ipse vendere non potest, autore non potest." Others, for example Chopin and Tiraqueau, had been of the same opinion. 950. By the eighteenth century, however, it was settled law that a minor husband could authorise his adult wife. 951. One illogicality noted by some commentators on the ancien droit was that, although a minor could authorise his adult wife to contract, he could not authorise her to appear in court: 952. "ce qui était absurde", remarks Maleville. 953. A minor wife's capacity was determined by her minority, not by her husband's capacity; thus, an adult husband could not authorise his minor wife to alienate her propres. 954.

The Quebec redactors have here followed the ancien droit: the acts of which a wife authorised by her husband was capable depended upon her age, not that of her husband. The wife did not lack capacity; she was merely prevented from exercising her capacity because of the puissance du mari.

950. See Ferrière, Corps et Comp., vol. 3, col. 144 no.18.
951. Loisel, in Inst. Cour., 1.2.21 had been of this opinion: "Un mary mineur peut auctoriser sa femme majeure, sans qu'elle s'en puisse faire relever: mais bien luy."
954. Pothier, T.P.M., nos.31-32, Bug.7, pp.13-14, and Rousseaud de la Combe, s.v. "Autorisation", sectn. II, no.6, p.57 states: "Femme mineure, quoiqul autorisée de son mari, ne peut intenter action concernant ses propres, sans curateur...."
The codifiers have rationalized the ancien droit by rejecting the authority which rendered a minor husband incapable of authorising his wife to appear in court: it is likely that, agreeing with Maleville, they considered this exception to the general principle of the ancien droit as somewhat absurd. It is interesting to note that Pothier does not mention this exception to the ancien droit: the law as stated by the Quebec redactors in their article is the law as given by Pothier. It is likely that the C.Q. redactors were here able to cite Rousseaud de la Combe's collection of jurisprudence because they were referred to it by Maleville, and it is thus only due to Maleville's reference that the C.Q. redactors were aware of Rousseaud de la Combe's statement, on the basis of various arrêts, that minors could not advise their wives to appear in court. The Quebec code has again followed the ancien droit in providing that, if the wife be a minor, on the authorisation of her husband, she could only act as an emancipated minor: her husband's authorisation did not make up for her own lack of capacity. In the C.Q., the capacity of the authorised wife depends on her status as either a minor or an adult, and not on that of her husband. Authorisation was intended to remove the restriction on her capacity, a restriction resulting from the puissance du mari.

The French code innovated, and seems to have altered the conception of the puissance du mari to one different from that of the ancien droit. Under the ancien droit, wives did not lack capacity; they were merely prevented from exercising that capacity by the authority their husbands had over them, an authority grounded in the respect a wife was judged to owe her husband. This article of the French code, C.N. 224, seems to imply the adoption of the Roman

955. Maleville refers to this author as Rousseau, while in the abbreviations used by the Quebec redactors he appears as Lac.; this is one instance of the readily observable fact that the C.Q. redactors tended to consult only a few works and then followed any interesting references these works gave.
notion that incapacity resulted from *fragititas sexus*: wives required protection due to their inevitable weakness and incompetence. This is, of course, illogical, since neither unmarried women nor widows suffered from incapacity by virtue of their sex. In fact, this change has caused problems for some commentators on the Code Napoléon, and Marcadé, for example, devotes a lot of time to attempting to resolve the apparent contradiction.\(^{956}\). His argument is interesting. He points out that wives, during their marriage, are under the care of their husbands; accordingly, as is only natural, such wives occupy themselves less with business affairs than with the upbringing of children and care of the household, while their husbands look after the family patrimony. He states:

"Donc, la femme, tout en conservant au fond, et de manière à s’en servir encore au besoin, sa pleine capacité, la voit sommeiller, s’évanouir, sous la force des circonstances, et elle tombe, pour les cas généraux et ordinaires, presque dans l’état où nous place la minorité même: il y a pour ainsi dire, de la part de la femme, démission forcée de sa capacité."  

Thus, wives require the assistance of their husbands, not merely because they owe respect to their husbands, but because the social facts resulting from marriage render wives unaccustomed to business matters. Thus authorisation is no longer to remove the barrier to the wife exercising her capacity, but rather to assist one unused to transaction to act. Therefore, if husbands are unable to assist their wives, then the wives require assistance from elsewhere. A minor husband, himself requiring assistance, accordingly cannot authorise and assist his wife in the circumstances envisaged in the C.N. article. Marcadé is able to conclude:

"Ainsi donc, la nécessité de l’autorisation maritale se fonde sur deux causes simultanées, dont l’une le respect du au mari, existe toujours, tandis que l’autre, l’inhabitabilité purement accidentelle de la femme, disparaît dans certaines circonstances." 958.

\(^{956}\). *Marcadé, op. cit.* vol. 1, pp.562-566 nos. 746-748, esp. no. 747.
Marcadé's argument may or may not reflect the thoughts of the redactors of the French code. It is tempting to suggest that the French redactors enacted the provision in C.N. 224 because, at some level, they considered it ridiculous that a minor should be able to authorise his wife to act in a way he himself could not act. Indeed, if such had been their opinion, motivating it must have been the idea, as expressed by Marcadé, that wives required their husbands' aid. The redactors of the C.N. certainly have incorporated a notion of surveillance not found in the ancien droit. As Marcadé has pointed out, this notion of surveillance, required by the seclusion of the wife in the marital home occupied with education of the children and running the household, reflects the social practice of the day; but this social practice is one to be associated with the middleclasses rather than other sectors of society. 959.

The Québec redactors have not followed the example of the French code; they described C.N. 224 as:

"a new rule to which the old one has been preferred as more in accordance with the principles of marital authority, and with the reasons upon which the necessity of authorisation is founded." 960.

The C.Q. redactors are, of course, correct: the rule of C.Q. 182 is more in line with the principles of marital authority in the ancien droit. The redactors do not reveal themselves as having considered that C.N. 224, rather than merely being inconsistent with the rest of the articles of the French code, has resulted in a new conception of marital authority in line with the nineteenth century ideal conception of the family. Though the redactors make no statements to that effect, they must have been aware of this new conception implicit in the C.N., if only because they had read Marcadé's

---

959. See supra, introduction to this chapter, at notes 25-39, and chapter two at notes 107-119.
It must be concluded that in rejecting C.N. 224, the redactors were rejecting not so much a rule inconsistent with the principles of their Code, but a different conception of marital authority. Given the background of the Quebec redactors, it is implausible to suggest that they disapproved of the ideal of the relationship between husband and wife implicit in the C.N. Nor does it seem likely that they rejected the provisions of the C.N. because they considered that the relationship between husband and wife was of a different nature for the majority of the inhabitants of the province: no remarks made by the redactors anywhere hint at the variation of family organisation according to social class, nor do their actions betray such a thought. Considering the statement made by the redactors on their article, it seems clear that they rejected the innovation of the C.N. (an innovation reflecting the ideology of the period), because of their general conservative outlook and behaviour. They saw no reason for changing the law here merely to reflect a prevailing ideology of family relationships, so they preserved the disposition of the ancien droit, though rationalised to permit the authorisation to appear in court of wives by their minor husbands.

The next article in this chapter of the Quebec code is C.Q. 183, an important article, which provides thus:

"The want of authorisation by the husband, where it is necessary, constitutes a cause of nullity which nothing can cover, and which may be taken advantage of by all those who have an existing and actual interest in doing so."

C.N. 225 is quite different:

961. Demolombe, for example, though he does not discuss the matter in as great a detail as Marcadé, implies a similar conception of marital authority: "Il ne s'agit plus seulement aujourd'hui d'une marque d'obéissance envers l'autorité maritale, que le mineur, aussi bien que le majeur, pouvait, en effet, recevoir; c'est, de la part du mari, un acte de surveillance que son incapacité personnelle ne lui permet d'exercer. La loi n'a pas voulu qu'un incapable fût charger d'autoriser un autre incapable." Op. cit. vol. 4, no. 220, p.269.
962. See chapter 3 supra at notes 403-415.
"La nullité fondée sur le défaut, d'autorisation, ne peut être opposée que par la femme, par le mari ou par leurs héritiers."

The Quebec code provides for an absolute nullity, while the C.N. enjoins only a relative nullity. Here the C.Q. has followed one version of the ancien droit, rejecting the provisions of the C.N.

Pothier on this point stated thus:
"À l'égard du défaut d'autorisation, l'effet est de rendre absolument nuls les actes de la femme mariée, dans lesquels l'autorisation n'est point intervenue." 963.

He points out that:
"il ne suffirait pas, pour que le contrat de la femme fût valable, que l'autorisation du mari fût intervenue depuis le contrat, quoique la femme, dans le contrat, se fût dite d'avance autorisée de son mari, dans la confiance qu'elle avait d'obtenir cette autorisation. Cet acte ayant été absolument nul, faute d'autorisation, n'a pu être confirmé par l'autorisation qui est survenue depuis...."

Thus, for Pothier, an unauthorised acte was radically null, and could not be ratified by the husband's subsequent authorisation. In two arrêts reported by Lepretre, it was decided that authorisation coming after an acte of the wife could validate such acte: Pothier points out that both Lebrun and Lepretre are of the opinion that these arrêts rendered the deed valid only from the date of authorisation, and not from the date of the deed itself. 965. The Quebec redactors have not followed this authority; there seems to be no statement in their code allowing for any ratification by the husband of previous deeds, and, indeed, Quebec jurisprudence subsequently so decided. 966. Thus, the Quebec redactors have followed Pothier's principles without

---

963. T.P.M. no. 78, Bug. 7, p.30: see also ibid. no.5, p.4.
964. Ibid. no. 74, p.28.
965. Ibid., no. 74, p.28, where the arrêts and the views of Leprêtre and Lebrun are discussed.
966. The cases are Pesant v. Robin (1917) 23 R.J. 211 and Saint-Pierre v. Dupont (1934) 37 R.F. 14: I have not seen these cases, and am relying on Baudouin, Droit Civil, pp.275-6. They referred to wives appearing in court; but the principle would be the same for wives contracting.
qualification, and not the arrêts reported by Leprêtre. The principle of absolute nullity is restated in C.Q. 1301.

The French article greatly restricts the class of those who may attack an unauthorised contract by a married woman, on the grounds of lack of such authorisation. A wife's unauthorised act is no longer radically null but can only be attacked by herself, her heirs, her husband or his heirs.967. The limitation of the class of those entitled to seek the annulment of such a contract raises the question of whether or not a husband may subsequently ratify an unauthorised contract. Whether or not he could do so was the subject of a dispute among the commentators on the C.N.; Marcadé was firmly of the opinion that, during the marriage, a husband could validate the posterior acts of his wife, even if she wished to annul them.968. Demolombe took the contrary view,969. as did Toullier.970. We need not discuss this vexed question further, though it should be noted that the redactors of the C.Q. were well aware of this problem in the French law.971.

The Quebec redactors have followed the ancien droit and rejected any restriction of the class of those entitled to seek the annulment of an unauthorised contract. They provide for an absolute nullity, and contracts may not be validated by the husband after they have been made by the wife. The article of the code states that, "... the want of authorization... constitutes a nullity which nothing can cover...;" it is difficult not to see this as a deliberate exclusion of the possibility of posterior ratification, an exclusion suggested by the debate in the

967. Demolombe, op. cit., vol. 4, pp.437-9 no. 342 argues that such an unauthorised contract may also be attacked by her creditors. Some authors have wondered why the husband's heirs could attack such an act, since they could not possibly have any pecuniary interest. See Toullier, op. cit. vol. 2, p.20 no. 661 note a. (Duvergier); and Demolombe, op. cit., vol. 4, pp.435-7, no. 341.


971. This is apparent from their citation of the relevant passages of doctrine. Marcadé, op. cit. vol. 1, p.567 no. 749 footnote 1 gives all the sources for the differing sides in the debate.
French doctrine. This also means that the Quebec redactors have followed Pothier’s view of the ancien droit. They state of the C.N.‘s restriction of the class of those entitled to sue for annulment:

"There appears to be no good reason for adopting this change, contrary to principle and repelled by the old jurisprudence and by ours." 972.

Maleville remarks that C.N. 225 "a embrassé l'opinion le plus favorable à la femme." 973. It is important to discover why the C.Q. redactors retained the ancien droit.

The French article allows an unauthorised contract to stand, unless the wife, husband or their heirs choose to challenge it: this would seem to support the principle of pacta sunt servanda. If a wife’s unauthorised contracts are advantageous, they may be allowed to remain unchallenged: the person with whom she has contracted cannot seek their annulment. A motive for the requirement of authorisation is preservation of family property, and, under C.N. 225, if the contract is advantageous, there need be no fear that such property is in jeopardy, so the contract may be maintained. Implicit in this view is the notion that authorisation of the wife is required for her protection against her own inexperience and folly: if there be no disadvantage in the contract, there need be no nullity, since the purpose of authorisation is to prevent her suffering loss, and she has not suffered such loss. This is in line with C.N. 224.

C.N. 224 was rejected as contrary to the Quebec principles of puissance maritale; C.N. 225 has been rejected for the same reason. The Quebec redactors retained the ancien droit’s notion that authorisation was required because of the respect due to a husband by his wife. C.N. 225 goes against this in rendering her unauthorised contracts only annulable by a restricted class of persons. C.Q. 183, on the other hand, by rendering all unauthorised

973. 1 Analyse, p.208.
contracts radically null upholds the principle of the ancien droit, while C.N. 225 follows C.N. 224 in implying that authorisation is the result of the wife's need of guidance. Though C.N. 225 might have had practical usefulness in allowing advantageous contracts to stand, and perhaps supported the principle of pacta sunt servanda, the C.Q. redactors preferred to maintain the ancien droit, upholding the traditional principle of the puissance du mari, whereby a wife's incapacity to contract is, in general, absolute. Authorisation is always required, and any unauthorised act is null and void, of which nullity anyone with an existing and actual interest may take advantage. Since an unauthorised act is a nullity, completely without legal effect, prescription does not serve to render an unauthorised contract incapable of being attacked after a certain period. 974.

The reform contained in C.N. 225, in restricting the class of those entitled to seek the nullity of an unauthorised contract, might have seemed useful in Quebec: it would be easy, however, to emphasise too much the advantages of such a reform in the Quebec law. At the time of codification, most women in Quebec would marry communes en biens, so their moveable property would fall into the community administered by their husbands, who would also have the right to administer their wives' immoveables. The wife would have little practical opportunity to contract. Further, the likelihood of a wife selling an immoveable without consulting her husband would always be slight. Thus, though the reform in C.N. 225 might have been advantageous, not to introduce this reform could not be described as disadvantageous. Given the instructions to the Quebec codifiers, and given their own conservative attitudes to much of the law, the lack of reform here is not surprising.

The final article of this chapter of title V is C.Q. 974. See Trudel, Traité, vol. 1, p.561.
which states thus:
"A wife may make a will without the authorization of her husband."

C.N. 226 states the same. Certain of the coutumes of northern France had demanded that wives be authorised to dispose of property by testament, but that of Paris was not one of them. There can be no surprise that the redactors here followed the ancien droit and the C.N. It should be remembered, however, that in Quebec there was much greater liberty to test on property than in the C.N. or the ancien droit.

There are many articles in the C.Q. which duplicate or depend on the provisions discussed above; but because they duplicate these rules or depend on them, we need not discuss them. The principles outlined above are worked out throughout the code in relevant areas of the law.

Chapter six contains the most important provisions relating to the husband's control over the person of his wife. Most of these rules of the C.Q. follow the provisions of the ancien droit as applied under the Coutume de Paris, though molded into the form of the French code. Indeed, many of the C.N.'s provisions also are derived from the same ancien droit. Apart from one provision rationalising the ancien droit, the C.Q. here only introduces one reform of importance: C.Q. 177 no longer requires authorisation to be in the strict form demanded by the ancien droit. This is an obviously useful reform, making for ease of contracting and rendering wives' contracts less prone to annulment.

976. See C.Q. 832, and A. Morel, "L'apparition de la succession testamentaire", 26 R. du B. (1966) pp.499-511. Under the Coutume de Paris, a testator could dispose by will of all his moveables and acquêts, but only of a fifth of his propres, propres being immovable one has acquired by succession in the direct or collateral line, or by gift in the direct line; acquêts being immovable acquired a titre onereux ou lucratif, except those classed as propres. See Pothier, Traité des Donations Testamentaires, no.180, Bug. 8, pp.273-4.
977. See e.g. C.Q. 643, on the acceptance of successions by wives.
978. In C.Q. 182, minor husbands may authorise their wives to appear in court.
because of a minor fault in complex requirements for valid authorisation. This reform is taken from the C.N.

The C.N. contains two other important reforms; but these were not adopted. These are the ones contained in C.N. 224 and 225. It has been argued above that these articles of the C.N. have resulted in a new conception of the reasons for the necessity of the authorisation of married women. 979. The C.N. has altered this requirement of authorisation so that it appears to be the result of a necessity to protect a wife who, by virtue of her domestic seclusion in the home, has become unable to cope adequately with the demands of business. Under the ancien droit, of course, authorisation was required because a wife owed respect and obedience to her husband, not because she was judged to require protection from her own inevitable lack of business acumen.

The C.Q. copied the reform of the C.N. on authorisation, while rejecting those contained in C.N. 224 and 225. The reasons for the actions of the codifiers here appear to have been that the useful reform on authorisation could be copied without doing violence to the traditional conception of the puissance du mari; those reforms in C.N. 224 and 225 could not be copied without changing the traditional notion of the puissance du mari. The C.N. provisions implied that wives generally, through remaining at home absorbed in domestic matters, became out of touch with the world of affairs. They thus required guidance and help in their dealings with their property. The C.N. envisages thus a different form of relationships between husband and wife from the ancien droit. The ancien droit coutumier saw the requirement of authorisation as resulting not from the wife's need for help, but from her duty to be respectful and to be obedient to her husband. The C.Q. redactors preferred the ancien droit's version of the relationship between husband and wife. This preference, however, seems to be the result, not so much of different ideals of the relationship between husband and wife, much less different family relationships, 979. See text supra at notes 947-959 and 963-974.
but rather of the conservatism of the redactors towards the law.

The Quebec codifiers obviously believed in the rightness of the incapacity of wives. For example, Routhier suggested that, in the absence of her husband, a wife might unauthorised carry out acts of administration.\(^{980}\) The C.Q. redactors do not allow this. The C.N. reforms, however, do not detract from this incapacity, but put it on a different basis. Though the C.N.'s articles conformed more to the nineteenth century's ideal of the rôle of wives, the Quebec redactors, because of their strong conservative tendencies, undoubtedly saw no reason for change. The ancien droit adequately expressed the ideology of the supremacy of the husband: that the conception of husband and wife relationships underlying the C.N. articles was more in line with the ideals of the nineteenth century did not matter. The redactors saw no reason to justify a departure from the traditional version of the puissance du mari. Although Quebec society would have permitted such a departure from the ancien droit, it did not necessitate it, and there were no technical reasons for such a reform of the law; whereas the reforms in the C.Q. in this chapter, in C.Q. 177 and 182, though doubtless of practical usefulness, were also technical improvements rendering the law more rational.

A last point relates to wives séparées de biens from their husbands. The C.Q. followed the C.N. and the ancien droit of Paris in still requiring such wives to be authorised. This has been referred to already in connection with contractual separation\(^{981}\) and will be referred to in the next subsection in relation to judicial separation. All that need be said here is that the C.Q. redactors maintained the law, not following the examples of some coutumes which permitted wives separate as to property to act as if unmarried.

\(^{980}\) T.P.M. no. 27 Bug. 7, pp.11-12, quoted supra in text at note 923.
\(^{981}\) See subsection 2 supra, esp. text between notes 862-863 and 849-860.
4. Effect of séparation de corps or séparation de biens on the husband and wife relationship.

The Quebec code permits both judicial separation of property and also separation from bed and board. Both of these had an effect on the puissance du mari over his wife. Before going on to describe that effect, it is necessary to set out the grounds permitting each kind of separation, as they throw useful light on the changing nature of the husband and wife relationship.

C. Q. 1311 states thus:
"Separation of property can only be obtained judicially, before the court of the domicile, when the interests of the wife are imperilled and the disordered state of the husband's affairs gives reason to fear that his property will not be sufficient to satisfy what the wife has a right to receive or to get back."

All voluntary separations are null."

C. Q. 1312-1317 regulate further separation of property; we need not discuss them. Although this article comes in a section on the dissolution of the community, and indeed séparation de biens, under C. Q. 1310, did dissolve the community, its provision would also be applicable to a separation of property when the spouses were simply non communs en biens, without being séparés de biens, as C. Q. 1417 provides. C. Q. 1311 follows C. N. 1443, and the ancien jurisprudence, as the Quebec redactors point out. 982.

C. Q. 1318 regulates the effect of séparation de biens on the relationship between husband and wife. Since séparation de corps also brings about séparation de biens as C. Q. 1318 points out, and also ends the community (if there be one) under C. Q. 1310, it is as well to discuss séparation de corps and then return to C. Q. 1318.

982. Fifth Report, p. 217. For ancien droit, see Pothier, T. Comm. nos. 510, 512, 514, 517, Bug. 7, pp. 275, 276, 277 and 278. Ibid. no. 463, p. 255, discusses spouses where community is excluded, but without separation of property. This last passage is not cited by the C. Q. redactors, nor indeed by Fenet sur Pothier, p. 449: no doubt because the C. N. and C. Q. follow Pothier's organisation of the material in these areas.
The Quebec code devotes the whole of the sixth title of its first book to separation from bed and board. Here will only be discussed the causes of separation from bed and board, and those of the effects which are relevant to the theme.

The causes of such separation are laid out in C.Q. 186-191, which provide as follows:

186. Separation from bed and board can only be demanded for specific causes; it cannot be based on the mutual consent of the parties.

187. A husband may demand the separation on the ground of his wife's adultery.

188. A wife may demand the separation on the ground of her husband's adultery, if he keep his concubine in their common habitation.

189. Husband and wife may respectively demand this separation on the ground of outrage, ill-usage or grievous insult committed by one toward the other.

190. The grievous nature and sufficiency of such outrage, ill-usage and insult, are left to the discretion of the court which, in appreciating them, must take into consideration the rank, condition and other circumstances of the parties.

191. The refusal of a husband to receive his wife and to furnish her with the necessaries of life, according to his rank, means and condition, is another cause for which she may demand the separation.

The Code Napoléon was organised differently from this title of the C.Q., because it provided for divorce, while the C.Q. did not. The C.N.'s title VI, as well as regulating divorce, also regulated separation from bed and board, and its article 306 stated that:

"Dans les cas où il y a lieu à la demande en divorce, pour cause déterminée, il sera libre aux époux de former demande en séparation de corps."

Thus, the relevant grounds for séparation de corps in the C.N., are those that ground an action for divorce, and they are contained in C.N. 229-233. C.N. 229 permits a husband to divorce his wife if she has committed adultery. C.N. 230 states that a wife may divorce her husband on the grounds of adultery if he has kept his concubine in the maison commune. C.N. 231 allows the spouses reciprocally to demand

983. See infra, next subsection, at notes 1039-1042.
416.

divorce on the grounds of outrage (excès), ill-usage (sévices) and grievous insult (injures graves). C.N. 232 states that there may be a divorce if one of the spouses has been condemned to a punishment importing infamy. C.N. 233 allows divorce on the grounds of mutual consent. The redactors of the C.Q. remark that the grounds for separation contained in C.N. 229-233 are all admitted in Quebec bar condemnation to an infamous punishment and mutual consent: the first being contrary to their article declaring that death alone dissolves a marriage and the second contrary to C.Q. 193 which does not allow the admission of allegations in an action for separation from bed and board. 984. Although the C.N. has no equivalent to C.Q. 191, the circumstances envisaged in that article would permit an action for separation in the C.N. under article 231 for injures graves. 985.

With the exceptions above noted, it may be said that the Quebec redactors have followed the provisions of the French code on the causes giving rise to an action for séparation de corps. In the redactors' report, they state that their provisions "are conformable to the ancient jurisprudence, saving some exceptions which are indicated as they occur." 986. It is not indicated that any of the grounds for separation are not conformable to the ancien droit.

The Quebec redactors' statement that their provisions conform to the ancien droit is, as regards the causes for separation, rather disingenuous. The ancien droit differed in many significant respects. Pothier, and in this matter he is representative of the attitudes of most writers on the ancien droit, makes a strict separation between conduct allowing a wife to sue for separation and conduct permitting a husband to sue for the same. 987.

985. See e.g. Demolombe, op.cit. vol. 4, p.490 no. 388.
If, following Pothier, we deal first with the wife, we find Pothier makes the following statement:

"Elle est obligée, dans le for de la conscience, à s'attirer par sa douceur et par ses complaisances, les bonnes graces de son mari; et si, en faisant tout ce qui en son pouvoir, elle ne peut y réussir, elle ne doit opposer que la patience aux mauvaises manières de son mari, et même à ses mauvais traitements: elle doit regarder cela comme arrivant par l'ordre de Dieu et comme une croix qu'il lui envoie pour expier ses péchés." 988.

Although this statement deals with the for de la conscience, it indicates the tone of the provisions of the ancien droit. On the circumstances allowing a wife to separate from her husband, Pothier states thus:

"À l'égard du for extérieur, les juges ne doivent pas trop facilement permettre à une femme de se séparer d'habitation de son mari...; mais lorsqu'il y a de justes causes, ils doivent le lui permettre....

Quelles sont ces justes causes? C'est ce qui n'est pas facile à déterminer....
C'est pourquoi on doit laisser entièrement à l'arbitrage et à la prudence du juge les causes de séparation...." 989.

The ancien droit, in contrast to the C.N. and C.Q., does not then give limited grounds for separation for the wife; but there was much discussion of what circumstances would permit her to separate, and, thus, by laying down the usual circumstances for separation and by stating which circumstances would not allow separation, the writers on the ancien droit gave some definition to the topic.

It was clear that, if a husband refused to receive his wife, or to supply her with the necessaries of life, on these grounds she could seek separation. 990. The most usual circumstances on which wives could ground actions for separation, were their husbands' mistreatment of them. What amounted to mauvais traitements sufficiently severe to ground such a separation would vary according to the circumstances and quality of the parties; thus the judge

988. Ibid. no. 507, p.235.
989. Ibid. no. 508, pp.235-6.
990. Ibid. no. 511, p.237 and no. 381, p.175.
ought to take into consideration, for example, whether the wife had brought the mistreatment on herself by her own misbehaviour. Pasquier considered that such services had to be atroces, while Rousseaul de la Combe thought that, though the Canon law required the wife to be in fear of her life, in French custom that was not required, and he considered that:

"il suffit que les faits soient graves, qu'ils rendent la vie insupportable et infiniment triste et disgracieuse...." 

The writers on the ancien droit believed mauvais traitements to be the most common reason for granting separation. An arrêt of 1716 had decided that if the husband had defamed his wife by accusing her of a capital crime, she could justly separate from him. Pothier states that a wife could not sue for separation on the grounds that her husband had contracted epilepsy, leprosy, or indeed any disease, no matter how contagious; nor, according to Pothier, could a husband separate from his wife if she had contracted any such disease. A wife, according to Pothier and Ferrière, could not separate from her husband even if he was infected with venereal disease; D'Espeisses, however, did allow either spouse to separate from the other if he or she had contracted venereal disease.

991. Ibid. nos. 509-510, p. 236. Rousseaul de la Combe p.639, s.v. "Séparation" no. 9 states: "Il faut encore avoir égard aux personnes: car ce qui ne seroit pas un moyen de séparation entre gens du commun, en peut servir entre personnes d'une condition plus relevée."


994. See Pothier, T.C.M., no.509, Bug. 6, p.236 and Ferrière, Corps et Comp., vol. III col.185, no.19.

995. Pothier, T.C.M. no. 512, Bug. 6, p.237.

996. Ibid. no.514; pp.237-8. Ferrière states the same but says that the husband could separate from the wife if she has contracted leprosy and it could be communicated to the children: Corps et Comp. vol. III col.185 nos.20-22.

997. Pothier, T.C.M. no. 514, Bug. 6, p.238; and Ferrière, Corps et Comp., vol. III, col. 185, no.23.

998. Op.cit., vol.1, part 1, tit. XIII, Sect. III, no.3 p.310. He makes the following curious statement: "si l'un des mariés est affligé de la vérole, le sain n'est pas tenu de cohabiter avec lui, car cette maladie est contagieuse...et particulièrement, elle est plus contagieuse contre le mari sain, cohabitant avec sa femme vérolée, que contre la femme saine, cohabitant avec son mari vérolé."
Whether or not a wife could separate from her husband on the ground of his adultery is an interesting point. The general view taken by the authors on the ancien droit was that she could not. The courts had perhaps originally been uncertain; but it is clear that, by the eighteenth century at the latest, the courts generally would not allow her to separate from him on the grounds of his adultery.

Guyot sums up the matter thus:

"Plusieurs auteurs croient aussi que la femme du mari Adultère peut intenter contre lui l'action d'Adultère, non par la voie criminelle pour le faire punir, mais par la voie civile pour obtenir une séparation de corps et de biens, et le faire priver de la dot et des autres avantages qu'elle a pu lui faire par contrat de mariage. Mais d'autres pensent qui si la femme n'alleugoit que ce seul moyen, elle ne seroit point écoute, et qu'il faut, pour que son action soit admise, que l'Adultère soit accompagné de scandale ou de mauvais traitements, disipation, et autres choses semblables. Cette dernière opinion est suivie dans les tribunaux du royaume." 1000.

Pothier had absolutely no doubt that:

"Les adulteres commis par le mari, ne peuvent servir à une femme de fondement pour une demande en séparation d'habitation..." 1001.

Thus, though some authors were of the contrary opinion, the better view, and the view followed by the courts, was that the adultery of the husband on its own would not give rise to an action for separation.

Pothier allowed only one ground on which a husband could separate from his wife: her adultery. 1002. Though some authors were inclined to allow a husband to separate from

999. Ferriére reports one arrêt where a wife was refused separation, even though her husband had transmitted venereal disease to her; he points out that an arrêt of 14th. June, 1561, had allowed such separation, but that since then the court had judged to the contrary in many cases. Corps et Comp., vol. 3, col. 185, nos. 23 & 24.


1001. T.C.M. no. 516, Bug. 6, p.238.

1002. See Rousseaud de la Combe, s.v. "Adultère", p.12. no.2: note that he is relying on Spanish and Roman authorities, not French ones: and D'Espeisses, op.cit. vol.1, Part 1, tit. XIII, sect. 3 no. 3, p.310.

1003. T.C.M. nos. 526-7, Bug. 6, pp.242-3.
his wife if she were suffering from some highly contagious
disease, the only certain ground on which a husband
could separate from his wife was her adultery. A wife
convicted of adultery, could suffer the Justinianic penalty
of seclusion in a nunnery.

In short, the ancien droit in general was that a wife
could only separate from her husband if he mistreated her,
such mistreatment being fairly severe, and a husband from
his wife if she had committed adultery. On why the husband's
adultery was irrelevant, the reasoning of the jurists is
instructive. Pasquier remarked that "la pudeur des femmes
n'a jamais permis qu'elles eussent action pour cet effet
contre leurs maris," while Pothier stated:

"La raison de différence est évidente: l'adultère
que commet la femme est infiniment plus contraire
au bon ordre de la société civile, puisqu'il tend
d'à dépouiller les familles, et à en faire passer les
biens à des enfants adultes qui y sont étrangers;
au lieu que l'adultère commis par le mari, quoi qu'
très criminel en soi, est à cet égard son conséquence.
Ajoutez qu'il n'appartient pas à la femme, qui est
une inférieure, d'avoir inspection sur la conduite
de son mari, qui est son supérieur. Elle doit
prêsumer qu'il lui est fidèle, et la jalousie ne
doit pas porter à faire des recherches de sa
conduite." The adultery of the wife was thought to threaten the family
and hence the social structure; that of the husband did not.
The wife was her husband's inferior and, because of the
respect she owed him, ought not to look into his affairs.

The Quebec code followed the French in laying down

1004. See text supra at notes 996-998.
1005. Pothier, T.C.M. no. 527, Bug. 6, p. 243, and Merlin,
notes a case of 1765 where a wife was sent to a nunnery.
l'obtient que sur la preuve des faits graves qui font
apprehender pour sa vie; ce qui reçoit l'exception qu'on verra
par la proposition qui suit." The proposition that follows
is that if the wife is of high degree, "les procédés inhumains,
même les mèpris marqués" suffice. (No. 28).
1008. T.C.M. no. 516, Bug. 6, p. 238.
definite grounds for separation, and in applying all these grounds to either spouse. C.N. 308 still allowed for the seclusion of adulteresses; but there was no equivalent in the C.Q. However, both codes retained a difference between the adultery of the wife and that of the husband. To ground an action for adultery, a husband must have been maintaining his concubine in the marital home.

It is obvious that the provisions of the Quebec code here owe much more to the C.N. than to the ancien droit. The ancien droit left the decision as to what amounted to sufficient grounds for separation much more to the judge; but much doctrinal writing and jurisprudence had refined the notions of what would be conduct sufficient to ground an action for separation. Moreover, it is clear that essentially there were only the grounds demonstrated above: the husband's mistreatment of his wife, and the wife's adultery. The fact that much was left to the individual judge did mean, however, that there would be departures from these two certain grounds. But, even though the redactors might find precedent for their provisions in the ancien droit, it is disingenuous of them to state they are following the ancien jurisprudence.

The works the redactors refer to on the ancien droit are those of Pothier, Rousseaud de la Combe, and Guyot and Merlin's Répertoires. These writers all stated the ancien droit as set out above, except for Rousseaud de la Combe, who

1009. There had been doubts expressed in the debates on the code whether it was desirable that there should be separation without the seclusion of the adulterous wife, as, without such separation, "elle peut continuer à le [i.e. her husband] déshonorer, vivre même avec son séducteur." No longer could she be sent to a convent, the convents having been suppressed, and the state no longer being officially Roman Catholic, and the criminal code did not punish adultery. See Maleville, 1 Analyse, pp.226-7, 266-9 and 273.
1011. Merlin's Répertoire dates after the ancien régime; but because it was based on that of Guyot, it gives an account of the ancien droit.
allowed a wife to use her husband's adultery to prevent him having control of her property.\textsuperscript{1012} Rousseaud de la Combe in fact relies on Spanish rather than French authority.\textsuperscript{1013} The C.Q. redactors must have been well aware that their articles did not embody the traditional rules on separation. It is possible that the Quebec courts had been granting \textit{séparations de corps} in the circumstances envisaged in the C.Q. articles; but the redactors certainly do not cite any Quebec \textit{jurisprudence} to support their articles.

For C.Q. 187, the redactors cite Pothier, a writer on the \textit{nouveau droit} and C.N. 229. On C.Q. 188, they cite Rousseaud de la Combe,\textsuperscript{1014} Guyot,\textsuperscript{1015} Merlin,\textsuperscript{1016} C.N. 230 and a writer on the \textit{nouveau droit}, and Roman texts. On C.Q. 189, they cite C.N. 231 and only writers on the \textit{nouveau droit}. On C.Q. 190, they cite Pothier, and two writers on the \textit{nouveau droit}. On C.Q. 191 they cite Pothier and a writer on the \textit{nouveau droit}.\textsuperscript{1017} That the provisions are taken from those of the C.N., the \textit{nouveau droit}, rather than those of the \textit{ancien droit}, is clear.

C.Q. 188's reference to Roman law is interesting. The redactors cite Justinian's Code and Novels.\textsuperscript{1018} The relevant provisions state a wife could divorce her husband if he kept his concubine in the matrimonial home (or, under the Novel, even if he kept his concubine in the same city, were the offence repeated). Both the Code and the Novel allow either spouse to divorce the other on the grounds of adultery; adultery in the modern sense, however, did not necessarily

\begin{flushleft}
\textsuperscript{1012} See note 1002 \textit{supra}.
\textsuperscript{1013} See note 1002 \textit{supra}.
\textsuperscript{1014} See reference note 1002 \textit{supra}.
\textsuperscript{1015} See reference note 1000 \textit{supra}.
\textsuperscript{1016} See reference note 1000 \textit{supra}.
\textsuperscript{1017} The Pothier references are those discussed above. The writers on the \textit{ancien droit} are various, and we need not consider them.
\textsuperscript{1018} Cod. 5.17.8, and Novel 117.9.5.
\end{flushleft}
amount to adultery in Roman law. It seems likely that the Quebec redactors used these Roman texts to give some support for their departure from the ancien droit here: it is clear that the provision was borrowed from the C.N., it would not be sensible to conclude otherwise. The redactors might also find some support in those statements of the jurists that adultery on its own was not enough; their provision only took into account a very aggravated form of adultery.

The redactors cited no writer on the ancien droit in connection with the C.Q. 189: and, indeed, none of the writers whom they seem to have consulted here on the ancien droit would have permitted a husband to separate from his wife in these circumstances. Indeed, the novelty of the C.N.'s rule was such that one commentator on the C.N., Pigeau, considered it necessary to stress that both could sue in these circumstances.

Given that the redactors are innovating here, what has motivated their actions? First, the provisions of the C.N. themselves seem to have been influential; however, considering that the redactors altered the form of the articles, if not their substance, to make explicit aspects of the law the C.N. left implicit, it is clear that the C.Q. redactors were not thoughtlessly copying the C.N.'s rules. The rules of the C.N. were, however, fairly obviously derived from the ancien droit, though differing from it, and this also may have persuaded the redactors to copy them. It must be concluded that the Quebec redactors approved of the rules.

1019. See P. Corbett, The Roman Law of Marriage, 1930, pp. 141-2. Both the constitution in the Code - one of Theodosius and Valentinian of 449 A.D. - and the Novel laid down many other grounds of divorce, none of which were adopted in Quebec. It would have been most surprising if the C.Q. had allowed separation if the husband were a brigand or a cattle thief, or if the wife attended theatres and games prohibited to her by her husband! It is obvious that the C.Q. redactors are using the Roman texts for purposes of authority, rather than accepting the Roman rules.

1020. M. Pigeau, Notions Elémentaires du Nouveau Droit Civil, 4 vols., Paris, 1803-1805, vol. 1, p. 67, where, discussing the article which became C.N. 231, he states: "Mais sur cette troisième cause, deux observations importantes à faire - 1. Tous deux le peuvent: ainsi, le mari en a le droit contre sa femme coupable d'excès, sèvices et injures graves envers lui."
of the C.N. which they copied; they must have deliberately changed the law. The extension of mauvais traitements as a ground of separation to allow a husband to sue, seems an obvious sensible action needing no explanation. Allowing a wife to sue for separation on the grounds of her husband's adultery also seems sensible and equitable, given that, in a predominantly Catholic country such as Quebec, adultery was regarded as a sin. There was of course some authority from the ancien régime to the effect that, in some circumstances, wives could found on their husbands' adulteries. The question resolves itself into why should the only relevant adultery on the part of the husband be that committed when he keeps his concubine in the marital home. It seems likely that this specific qualification owes a great deal to the C.N.; the idea, however, that only certain adulteries should be taken into account must have been one the redactors approved of. On the French article, Maleville reports the following discussion during the redaction of the Code:

"[O]n a considéré que bien que l'adultère soit de la part des deux époux, une infraction aux lois du mariage, il a cependant des conséquences bien plus funestes lorsqu'il est commis par la femme, puisqu'il tend à introduire, dans la famille des enfants étrangers; que d'ailleurs l'adultère du mari était beaucoup plus difficile à prouver que celui de la femme, et l'on a fini par conserver la condition qu'on avait d'abord rejetée." 1021.

No doubt similar considerations swayed the Quebec redactors. Pothier also stressed the possibility of introducing enfants étrangers into the family. 1022. Demolombe gives the following fascinating explanation:

"Ce n'est point, sans doute, que l'adultère ne constitue aussi de la part du mari un très-repréhensible manquement à la morale et aux devoirs du mariage; mais on ne peut nier que l'adultère de la femme soit bien plus coupable encore: soit parce que la femme devant être plus retenue par la pudeur même de son sexe, l'adultère suppose en elle plus de dépravation; soit parce que, dans l'état de nos mœurs, ou si vous voulez, de nos préjugés, l'adultère de la femme porte à l'honneur du mari la plus grave atteinte;

1021. 1 Analyse, pp. 221-2.  
1022. See text supra at note 1008.
soit enfin parce qu'il peut avoir les plus funestes conséquences, et introduire dans la famille des enfants étrangers." 1023.

Demolombe, whose work the redactors used, wrote much nearer their time than did Maleville or, indeed, Pothier.

There is a definite and obvious shift in the rationalisation of discrimination between the adultery of the husband and that of the wife. For Maleville and Pothier, the adultery of the wife introduced enfants étrangers into the family and dishonoured her husband; 1024 that of the husband had no such effects, and a wife, because she was linked to her husband by duties of respect and obedience, and was his inferior, should not inquire into his affairs. Demolombe indicates that rationalisation on the grounds that the wife's adultery dishonoured her husband was no longer totally acceptable. The reason that adulterous bastards would be introduced into the family still held good. What is significant is Demolombe's stressing of the view that an adulterous wife was more depraved than an adulterous husband because of the natural modesty of the female sex. Since there could be separation on the grounds of a husband's adultery, that the wife, as an inferior owing obedience and respect to her husband, ought not to look into his affairs would no longer serve as justification for the discrimination.

The view of the respective roles of husband and wife propounded by Demolombe is one of which the C.Q. redactors would have approved. Their adoption of this provision of the C.N. would have been justified by their views of the husband and wife relationship. They might also have taken support from the fact that they could have been said to be following the ancien droit in so far as the only relevant adultery of the husband was that accompanied by an injure grave: the maintenance of his mistress in the conjugal home.

The fourth chapter of this title contains provisions on the effects of separation from bed and board. C.Q. 207

1024. 1 Analyse, p.226.
points out that the husband is no longer obliged to receive the wife, nor the wife to live with him. This is a reduction in the puissance du mari over the person of his wife, found obviously in the ancien droit too. Though the C.N. has no article equivalent to C.Q. 207, its provisions necessarily had the same result.

C.Q. 208 states thus:

"Separation from bed and board carries with it separation of property; it deprives the husband of the rights which he had over the property of his wife, and gives to the wife the right to obtain restitution of her dowry, and of the property that she brought in marriage.

Unless by the judgment they are declared forfeited, which only takes place in the case of adultery, the separation also gives the wife the right to claim the benefit of all the gifts and advantages conferred on her by the marriage contract; saving the rights of survivorship, to which such separation does not give rise, unless the contrary has been specially stipulated."

There is no problem with this article. The ancien droit and the C.N. provided the same. Separation from bed and board always ended the community, as, the next article, C.Q. 209, explicitly states, and thus the husband's control over the communal property.

The last article we need note here is C.Q. 210:

"The separation renders the wife capable of suing and being sued, and of contracting alone for all that relates to the administration of her property; but for all acts and suits tending to alienate her immovable property, she requires the authorization of a judge."

This article changes the law: under the ancien droit, the wife would have to seek authorisation from her husband before requesting that of the judge, if there were séparation de corps. The C.N. still required the same. The Pandectes Françaises explained the matter thus:

1025. See Pothier, T.C.M. no. 522, Bug. 6, p. 240.
1026. See e.g. Demolombe, op.cit., vol. 4 p. 599 no. 498.
1027. See Pothier, T.C.M. no. 522, Bug. 6, pp. 240-1; C.N. 311, 1452. Trudel, Traité, vol. 2, pp. 19-20 indicates some problems with this article: they are not relevant here.
1028. Pothier, T.C.M. no. 522, Bug. 6, pp. 240-1; C.N. 311 and see also C.Q. 1340.
1029. See Pothier, T.C.M. no. 523, Bug. 6, p. 241.
"La nécessité d'authorisation pour l'alienation des immeubles est fondée sur ce que la séparation ne détruit pas la puissance maritale." 1030.

The Quebec redactors explained their reform as one which would simplify proceedings and relieve the wife of a formality both useless and disagreeable.1031. In fact, their motives are the same as those of the redactors of the 1825 C.L. who had introduced the same reform.1032. There is no reason to attribute this change in the C.Q. to the redactors' study of the Louisiana code. The C.Q. redactors' reform is sensible, though, as the Pandectes Françaises state, possibly contrary to the principles of puissance maritale. The Quebec redactors have, however, arguably maintained these principles in requiring the wife to be authorised by the judge. Marriage still has reduced her capacity, but, appropriately given the circumstances, authorisation is given by the judge. In fact, that the Quebec redactors did not dispense with the necessity of authorisation in these circumstances must be due to their obvious desire to preserve the traditional puissance du mari: they have rejected any notion that wives require authorisation because of lack of ability.1033.

Above we mentioned the séparation de biens obtainable if the husband's affairs be such that a wife fears her property to be at risk.1034. The effect this form of separation has on the puissance du mari differs from that resulting from séparation de corps. C.Q. 1318 states thus:

"The wife, when separated either from bed and board or as to property only, regains the uncontrolled administration of her property. She may dispose of and alienate her moveable property. She cannot alienate her immovable without the consent of her husband or, upon his refusal, without being judicially authorised."

This provision is identical to that in C.N. 1449. To some extent, however, it contradicts C.Q. 210 discussed above.1035.

1030. 11 Pan. Fran., p. 420. See C.N. 1449 and also 4 Pan. Fran. 164.
1032. C.L. 125. See 1823 Projet p.10. See supra, text this chapter at notes 495-496.
1033. See supra, text at notes 945-974.
1034. See text at note 982 supra.
1035. See text supra at notes 1028-1032.
This article seems to suggest that wives *séparées de corps* require to seek authorisation first from their husband, before going to the judge, in order to alienate immovable property. Presumably, that this article should apparently provide so is the result of an oversight caused by too close adherence here to the C.N. The redactors make no relevant remarks in their report on this article.\footnote{526 The article, as it stands, follows generally the ancien droit. \footnote{527 If it is accepted that the contradiction here of C.Q. 210 is an oversight, and that C.Q. 210 embodies the redactors' views on the authorisation of women *séparées de corps*, the fact that under C.Q. 1318 only C.Q. 177, 178 and 206 are cited would support this hypothesis of error - then under C.Q. 1318 wives *séparées de biens*, but not *de corps*, would have to seek and to be refused their husband's authorisation before they could request that of the judge. Given that the only ground for *séparation de biens* was that the husband's affairs were in sufficient disorder that the interests of the wife were endangered, this token gesture towards the *puissance du mari* seems unnecessary, and results in a cumbersome procedure. There can have been no social reason for the requirement other than that of preserving the facade of *puissance maritale*. Since the husband probably would be financially inept, he cannot have been considered as a person suitable to advise his wife. Here, despite the sensible reform in C.Q. 210, the redactors preferred to maintain the *status quo*, this being in line with their instructions and the probable lack of any obvious necessity for change.}

\footnote{1036 Fifth Report, p.217.}
\footnote{1037 See e.g. Pothier, T. Comm. nos. 464 and 522, Bug. 7, pp.255 and p.283.}
\footnote{1038 McCord, Synopsis, p.XIX picks out C.Q. 210 as one of the important reforms in the law. If Mignault, Droit Civil, vol. 2 p.39 is consulted, it will be seen that he quotes a version of the article which embodies the ancien droit. Presumably there has been a subsequent change in the law? Why this should be so is not relevant here, but an interesting question nonetheless.}
5. The dissolution of marriage, and the ending of puissance maritale.

Neither séparation de corps nor séparation de biens ended the puissance du mari, though they both reduced it to a greater or lesser extent. Only the dissolution of the marriage ended the husband's authority over his wife. The seventh chapter of the fifth title of the first book of the Quebec code has only one article, C.Q. 185, and it is devoted to dissolution of marriage, providing as follows:

"Marriage can only be dissolved by the natural death of one of the parties; while both live it is indissoluble."

The equivalent article of the French code, C.N. 227 stated thus:

"Le mariage se dissout,
1. Par la mort de l'un des époux;
2. Par le divorce légalement prononcé;
3. Par la condamnation devenue définitive de l'un des époux à une peine emportant mort civile."

The Quebec redactors point out that divorce no longer exists in France, having been abolished in 1816, and that it had only recently been permitted in England other than by an Act of Parliament in each individual instance. They state that their civil laws do not recognise divorce, though, as formerly in England, the Canadian legislature considers itself authorised to pronounce divorce in individual cases. As to civil death, they point out that it also has been abolished in France (1854) and state that the C.N. has innovated in allowing civil death to dissolve the marriage. Accordingly, they state that their article rejects the innovations of the C.N., and that only natural death dissolves the marriage tie. 1039 Their description of the ancien droit is correct. 1040

To suggest that the redactors could have proposed the

---

1040. See Pothier, T.C.M. no. 462, Bug. 6, p.211. Maleville, Analyse, pp.41-2 points out that it was a "maxime constante, avant la révolution", that civil death did not end marriage.
introduction of divorce would be wrong: circumstances in Quebec were such that judicial divorce was quite unthinkable. Quebec was a predominantly Roman Catholic country. That feelings on the subject of divorce were strong cannot be doubted: when confederation came, under s. 91 of the British North America Act of 1867, "Marriage and Divorce" was a topic within the legislative competency of the Federal Parliament, causing fears that "Protestant" divorce might be forced on French Canada.\textsuperscript{1041} Everything would militate against the redactors even considering the introduction of divorce.\textsuperscript{1042}

Thus, that only the natural death of one of the parties should end the marriage, and hence the puissance maritale, need occasion no surprise. The provision of C.Q. 185 was inevitable given Quebec society of the period.

6. Conclusion on the relationship between husband and wife in the 1866 Quebec code.

As in the equivalent subsection in the first part of this chapter,\textsuperscript{1043} at issue here are the changes made in the various areas of the law discussed, in relation to the possibilities of reform. The relationship of these provisions to Quebec society will also be considered.

The redactors have followed their instructions in their provisions on the method of contracting marriage. As instructed, they have molded the form of the Quebec law into that of the C.N. They have retained the traditional ages at which marriage may be contracted. They have included a specific article on impotency: the inclusion of this article, and the reforms contained in it, are attributable to the redactors' knowledge of the problems with the ancien

\textsuperscript{1042} The French writers disagreed on divorce. Demolombe, \textit{op.cit.} vol. 4, p. 462 no. 361 was opposed to its reintroduction. Bugnet, in his footnote 1 on pp. 212-213 of his volume 6 thought it should be reintroduced. Maleville, \textit{1 Analyse}, pp. 210-218 criticises divorce, \textit{passim}.
\textsuperscript{1043} See text supra at notes 503-520.
droit and with the Code Napoléon. The Quebec redactors, however, have included a major reform of one area of the law relating to the contracting of marriage. They have radically changed the law on oppositions. As in the C.N., and indeed there was precedent for the change from the last years of the ancien régime in France, the redactors have restricted the class of those entitled to oppose a marriage. They have also reversed the procedures on opposition, so that it is the opposant who has to take his action to court, and they have provided for a speedy court procedure: these reforms are not taken from the C.N. There was one obvious reason for restricting the class of people entitled to oppose a marriage: an unlimited class of potential opposants not only could cause great inconvenience, but was also contrary to the ideals of nineteenth century liberal individualism. The articles in the French code recognised that marriage was a private affair, in which, if the contracting parties were adults, the wider society outside the family had no real interest. Reversing the procedure on who should take the action to court also furthered this notion that, in the absence of some very pressing reason, the marriages of adults should not be regulated in any way. A notable point is that the redactors do not claim to be reforming the law on who may make oppositions. They are able to do this because those who may oppose after their articles could have opposed before: their articles, however, inevitably have the result of excluding others from making oppositions. This must have been the intention of the redactors; for, although the class of opposants in the C.Q. is slightly different from that in the C.N., the redactors must have been well aware that the C.N.'s articles were exclusive in effect. A last point relates to C.Q. 127: it is possible that the redactors intended to introduce the Roman Catholic impediments to

1044. See text supra at notes 770 and 764-791.
1045. See text supra, at note 787. From the commentators on the C.N., they would be aware of the interpretation.
marriage into the law of Quebec for Roman Catholics. Whatever their intention, the redactors here clearly recognised the religious diversity of the Province. In respect of the other formalities and requirements, the redactors have made no change.

On the property relations between the spouses, the redactors have made no changes relevant to the puissance du mari. In fact, they firmly asserted such puissance in rejecting the potential reform contained in the Code Napoléon on the husband making donations from the community.1046. Were there community between the spouses, the husband controlled the community, and also the separate property of his wife. Were the spouses simply non-communs, the husband again controlled his wife's property. Were there contractual separation, though the wife controlled her property, she could not dispose of her immoveables without the consent of her husband, or of the judge. In these articles the redactors maintained the traditional puissance maritale: indeed, the C.N. had generally done the same, and would not suggest possible reforms.

The effect of the property relations on marital authority leads on to the general need of the wife to be authorised to contract or to take part in court proceedings. In this area of the law, the redactors have made no changes in the principles of the ancien droit, bar that contained in C.Q. 210 on wives séparées de corps from their husband; this article we will consider further below. The only change made in the details of the law is that in C.Q. 177 on the method of authorisation, and this useful reform does not affect the traditional conception of the puissance du mari. The C.Q. maintains the conception of the puissance du mari found in Pothier. The requirement that the wife be authorised was not because she suffered from any supposed diminished ability to contract or take part in court proceedings, whereby she required help and guidance, but because she owed a duty of obedience and respect to her husband: hence the provision

1046. See text supra at notes 798-813.
in C.Q. 182. The only difference in the law here from the ancient droit is that resulting from C.Q. 210 (though indeed the actual articles on authorisation do not hint at this difference) whereby women séparées de corps did not require to seek their husband's authorisation before seeking that of the judge. Even this change, however, maintains the principle of the incapacity of wives, since the judge's authorisation was necessary; such wives were not in the position of widows or unmarried women. Because of its article 224, the French code presents a rather different version of puissance maritale. In the C.N., the implicit theory behind the puissance du mari has shifted to one based on the idea that wives, because of their wifely duties and domestic seclusion in the home, require some assistance to make contracts, since they are unaccustomed to dealing with business matters, the care of the family patrimony being the lot of their husbands. This version of puissance maritale is one in line with the nineteenth century ideal of the husband and wife relationship. The Quebec redactors, however, prefer the traditional version of the ancien droit: why they should have done so will be discussed below.

In relation to the articles on authorisation, one final point is that the C.Q. redactors have maintained the principle that unauthorised actions are null, with a radical nullity that nothing could cure. C.N. 225 had provided for a relative nullity. This, to some extent, was in line with C.N. 224,1047 but probably was a more generally pragmatic "improvement" in the law. Here again the Quebec redactors preferred to assert the traditional law rather than accept the potentially useful change.

The rules on what conduct would be such as to give sufficient ground for an action of separation owe more to the Code Napoléon than to the ancien droit, though the Quebec redactors do not state they are changing the law. The rules they have taken from the French law are, however, more in line with nineteenth century attitudes to the

1047. See text supra at notes 967-974.
relationship between husband and wife than were those of
the ancien droit; and, indeed, the actions of the Quebec
redactors may satisfactorily be explained on those grounds.
On the effects of separation from bed and board on the
puissance du mari, the redactors have innovated by
introducing C.Q. 210's rule that wives so separated need
only seek the authorisation of the judge. This is an
obvious and useful reform. Wives judicially separated as
to property still required to seek authorisation from their
husbands, which requirement was not perhaps satisfactory,
though the disadvantages were obviously not major enough
to have inspired the redactors in either France or Louisiana
to make a change. The rule can be explained as a result
of the Quebec redactors' desire to assert the traditional
authority of the husband.

As regards the law discussed in this section, the C.Q.
redactors have made few changes. They have obviously
wished to maintain the traditional rules, though they
reformed the law on oppositions to marriage, the method of
authorising, and the authorisation of women separated from
bed and board. The obvious question is: why these reforms
were made and not others found in the C.N.? C.Q. 177 on the
form of giving authority preserved the traditional
puissance du mari, while introducing a useful reform. The
reform on oppositions was again useful; but the redactors
were able to fudge its appearance as a reform, while it
was a change in tune with nineteenth century liberal
individualist conceptions of society. The only real
alteration to the traditional puissance maritale was that
in C.Q. 210, and even here the redactors still maintained
the appearance of this authority since the wife still could
not alienate her immovable: by virtue of being a wife she
could not alienate immoveable property and required judicial
authorisation, her husband, in the circumstances, being
considered an unsuitable person to give authorisation.

The period of codification in Quebec was the period

1048. See text supra, at notes 1014-1025.
when there was a trend towards the development of close family relationships based round domesticity and child care, with the development of an affective or associative family rather than a hierarchical one. Though the provisions of the C.N. arguably presented a more accurate reflection of this new style of family, with stress being on the wife's inability outside the home, rather than on her legal incapacity being derived from her husband's authority, the provisions of the ancien droit still were such as to be compatible with such a conception of the respective roles of husband and wife. There was no necessity for change. Given then, the conservative instructions to the Codification Commission, it would be wrong to have expected the redactors to have espoused enthusiastically the new conception of puissance maritale implicit in the Code Napoléon. Bar some obvious pragmatically useful reforms, and some reforms which were disguised, the Quebec redactors preferred to assert here the continuity of the law, which still adequately asserted the traditional ideology of the husband's authority over his wife.

One point not yet mentioned here is that perhaps the major reform in this area of the code was in the form of the law, rather than in its substance. It has been argued above that, in C.Q. 173, 174 and 175, the Quebec redactors have recast the traditional substance of the law as a series of reciprocal rights and duties between husband and wife; in this, the redactors have followed the French code. 1049. This has put these provisions into a contractual form, as if they were the results of bargaining between free individuals. In the ancien droit, these provisions were derived from the husband's natural authority and obligations arising from the fact of marriage. These articles conceive of the husband and wife, much more than do the provisions of the ancien droit, as being individuals connected by rights and duties rather than by links of authority in a hierarchy. They thus express the newer associative or affective conception of family, with the husband as the dominant partner.

1049. See text supra at notes 864-876.
Section Two. Puissance Paternelle.

1. How puissance paternelle arises.

As in Louisiana under the D.O., in Quebec the most common method for a child becoming subject to paternal power would be uncontested legitimate birth. The provisions on the filiation of legitimate children are set out in C.Q. 218-227, the first chapter of Title Seventh, "Of Filiation", and are, in all relevant parts, the same as those contained in C.N. 312-318. Both C.Q. 218 and C.N. 312 provide that a child conceived during the marriage is legitimate, and taken to be the child of the husband. The Quebec redactors stress conception: "it is conception and not birth during marriage, which is the principle of legitimacy." They explain: "It is only a provision of positive law that legitimacy is presumed from birth during marriage." There is little point in discussing the detailed provisions of the Quebec code as they relate to the French code, and The ancien droit: as with the D.O., these rules, at their least complex, embody the maxim pater is est quem nuptiae demonstrant, and do not reflect over much on the nature and content of the relationship between father and child. Legitimate birth, under the C.Q., as under the C.N. and ancien droit, brings a child under the authority of his father, this being one of the civil effects of marriage.

The second method of acquiring paternal power is by the legitimation of children already born. C.Q. 237 states thus:

"Children born out of marriage, other than the issue of an incestuous or adulterous connection, are legitimated by the subsequent marriage of their

1050. Second Report, p.197. As a result of this, they have given a rubric to this chapter different from that of the C.N. The C.N. reads: "De la filiation des Enfants légitimes, ou nés durant le Mariage." The C.Q. replaced the last clause with "or conceived during marriage". They have followed the criticism of Marcadé, op.cit., vol. 2, p.2.
1051. See Pothier, T.C.M. no. 3399 Bug. 6, p.181, quoted supra in text at note 522.
father and mother."

C.N. 331 differs, stating that such children "pourront être légitimés", and adding that this would only take place if the mother and father had recognised the children as theirs before the marriage, or acknowledged them in the very "acte ... de célébration." The Quebec redactors have rejected the reform expressed in the C.N., and have continued the rule that marriage ipso facto legitimated such children.1052.

The rule of the ancien droit was derived from the Canon law, not because the Canon law had had any civil force in France, but because it had been adopted to promote order and encourage marriage, according to Pothier.1053. Roman law had only legitimated by subsequent marriage children born ex concubinatu; but Canon law allowed the legitimation of those born of any illicit union which was neither incestuous nor adulterous.1054. Lebrun stated thus the ancien droit (note that he is not using "concubinage" in its Roman sense):

"Enfin nostre Droit se contente de deux choses: La première, que le mariage ait pu se contracter au temps de concubinage; La seconde, qu'il soit actuellement célébré." 1055.

The attitude of the ancien droit was expressed by Pothier:

"Il n'est donc pas nécessaire que le consentement du père et de la mère intervienne pour cette légitimation; il n'est pas en leur pouvoir de priver leurs enfants du droit que la loi leur donne, par l'effet qu'elle donne au mariage de leurs père et mère de les legitimer." 1056.

Pothier also argued that children born of an incestuous union were legitimated if their parents subsequently married after obtaining the necessary dispensation; indeed this was a

1053. Pothier, T.C.M., no. 412, Bug. 6, p.186; and see Esmein, Mariage, vol. II, pp.37-44.
1054. See text supra, at notes 524-529.
1056. T.C.M., no. 422, Bug. 6, p.192.
common view. It had once been the custom to place the children "sous le poêle" during the celebration of the marriage as a solemn recognition of the children by their parents; but this had died out relatively early, all that there being required was some form of recognition (not used in any technical sense) before or after the marriage, whereby the children could prove their status. In strict theory, in the ancien droit as in the C.Q., marriage ipso facto legitimated, though proof of filiation might be a problem.

The Quebec redactors chose not to adopt the innovation of C.N. 331. Though they give no reason for following the ancien droit, they must have made a policy decision in favour of legitimation, as favouring marriage and the family. Parents could relieve their illegitimate offspring from the disadvantages of bastardy simply by marrying. The Quebec redactors may have been in agreement with the argument put during the redaction of the C.N. that the requirement of public acknowledgement could deter parents from legitimating their children. Maleville points out that the C.N. has not permitted recherche de la paternité, and, therefore, some form of recognition would be necessary to allow proof of filiation. This would not apply in Quebec, as C.Q. 241

1057. T.C.M. no. 414, Bug. 6, p.188; T.S. ch. 1, sect. II, art. III & V, quest. 1, Bug. 8, p.22. Poquet, Book 1, title 1, Sect. 6, art. LXXVI (p.34), said thus: "Les bâtards adultérins ou incestueux ne peuvent être légitimés par mariage subsequent, à moins que l'inceste ne vienne de consanguinité et affinité, dont l'empêchement n'ait pas pu être levé et l'ait été par des dispenses antérieures au mariage." Poquet cites two arrêts to this effect.

1058. Poêle or pallium was a canopy held over the spouses at the celebration of marriages under the Gallican liturgy.


1061. See Maleville, 1 Analyse, p.295, and text supra at notes 539-40.

1062. See 1 Analyse, p.294.
allowed illegitimate children to establish judicially their paternity. 1063.

A problem arises out of C.Q. 237's statement that children born of an incestuous marriage are not legitimated by the subsequent marriage of their parents. C.Q. 124-126 state the prohibited degrees of marriage: under no circumstances could the parties so prohibited ever marry. The C.N., however, under its article 164, allowed dispensations to permit uncle and niece, aunt and nephew, to marry. Thus, the provision in C.N. 331 on incestuous children is understandable: there are circumstances in which the parents of such could marry. Who, then, are the children of an incestuous union who may not be legitimated by the subsequent marriage of their parents in terms of C.Q. 237? The terms of the 1808 Digest's article, D.O. 21 (p.49), follow the C.N. in not allowing the legitimation per subsequens matrimoniun of incestuous children: the D.O. admits no possibility of the parents of incestuous children marrying, assuming incest means sexual intercourse between those within the prohibited degrees of marriage. As pointed out, the D.O. redactors have copied the C.N. article without considering its full import; but this is unimportant, the provision merely being unnecessary. 1064. It is tempting to conclude that the Quebec redactors have merely copied this statement of the C.N. without considering its import, and that there is no significance in the provision. C.Q. 127, however, falls to be considered. This article, discussed already in a different context, 1065 coming after those on the prohibited degrees, stated that the other impediments recognised by the various religions as resulting from relationship or affinity remained subject to the rules followed by the various churches, with those already having the right to grant dispensations from such impediments retaining such the right. Should the clause on incestuous

---

1063. The C.Q. redactors in their Second Report, p.201, point out that they have not introduced the C.N. rules on acknowledgement of children.
1064. See text supra between notes 541 and 542.
1065. See text supra at notes 742-748.
children in C.Q. 237 be taken as referring to this article? There are two separate issues here: first, the intention of the redactors, and second, the correct construction of the Quebec code. Here only the first issue is relevant, since we are dealing with the intentions of the codifiers.

The redactors gave several references for this article. First, they referred to Pothier, then to Fenet on Pothier, to C.L. 217, to C.N. 331, and to some commentators on the C.N. Some of these references relate to other aspects of C.Q. 237. It is worth noting that there are no references to other articles of the C.Q. itself: a reference to C.Q. 127 is absent.

The passages cited by the redactors from Pothier's treatise on the contract of marriage say nothing on the point in question. One passage cited from his treatise on persons and things states that:

"Les bâtards nés d'une conjonction incestueuse ou adultère, sont d'une condition pire que les autres bâtards, en ce que - ils ne peuvent devenir légitimes par le mariage subséquent de leurs père ou mère." 1070.

The passage cited from Pothier's treatise on successions states in relevant part:

"Il en est de même d'une simple conjonction passagère d'un homme avec une fille; s'il l'épouse par la suite, le mariage ... rendra légitime l'enfant qui en est né; s'il y avait une parenté collatérale entre le garçon et la fille, qui ont habitude ensemble, le mariage célébré par la suite entre ces personnes légitimera-t-il les enfants nés de cette habitude? La raison de douter est que cette conjonction est entachée d'un vice d'inceste qui la rend plus criminelle; néanmoins il faut décider que les enfants sont légitimés: la dispense obtenue depuis a un effet rétroactif qui purge ce vice d'inceste." 1071.

In an uncited passage of his treatise on marriage, Pothier - - - -

1067. Fenet sur Pothier, on art. 331, pp. 77-8.
1068. 2 Pan. Fran. 80; Toulliott, op.cit., vol. 2, no. 921, p. 132; Marcadé, op.cit. vol. 2, p. 43; and one other commentator - Biret - whose work I have been unable to consult; but this is probably unimportant.
1069. See T.C.M. as cited note 1066 supra; other sections of the T.C.M., uncited, are relevant.
1070. No. 120, p. 47, see T.P.C. as cited note 1066 supra.
1071. T.S. as cited note 1066 supra, p. 22.
states exactly the same. 1072. Fenet on Pothier states:

"Lorsqu'il s'agissait d'enfants nés d'un commerce incestueux, si le mariage s'ensuivait, la dispense avait un effet rétroactif et les légitimait... M. Merlin, Vo. Légitimation, pense qu'elle n'a plus cet effet sous l'empire de l'art. 331, et M. Toullier, tome 2, n. 933, semble d'un avis contraire." 1073.

The passage of Toullier cited by the C.Q. redactors does not bear on the topic at issue here; but, as Fenet points out (and the C.Q. redactors must have read Fenet) Toullier elsewhere said thus:

"L'ancienne jurisprudence distinguait entre les enfants nés de parens ou aliés dans les degrés où l'on obtenait des dispenses; ceux-la étaient légitimés par le mariage que leurs père et mère contractaient après les dispenses obtenues. On ne voit, dans le Code, aucune disposition contraire à cette distinction raisonnable; car, si l'art. 331 exclut en général, du bienfait de la légitimation enfants nés d'un commerce incestueux, il ne définit pas l'inceste." 1074.

He quotes Merlin (as cited above by Fenet) as being of the opposite opinion, that now incestuous children were not legitimated. 1075. The C.Q. redactors also cite Marcadé, who stated that:

"Malgré la disposition si formelle et si absolue de notre article, quelques jurisconsultes, notamment Malleville (art.331), Toullier (II-933) M. Pont... et M. Dupin aîné... ont enseigné que les enfants incestueux sont légitimés par le mariage subséquent que leurs père et mère contractent en vertu de dispenses. Mais cette doctrine est repoussée, avec raison, par le plupart des auteurs. Et en effet, bien loin que la prohibition de notre article ne soit pas faite pour cette classe d'enfants incestueux, elle n'est au contraire faite, que pour elle!

L'impossibilité d'obtenir le bénéfice de la légitimation n'est écrite que pour ceux des enfants incestueux dont les parents se marient ensuite au

1072. T.C.M. no. 414, Bug. 6, p.188. The redactors do not cite this, because it would seem they have copied their Pothier references from the first set of references Fenet gives on art. 331: Fenet sur Pothier, p.77. This does not mean they have not read Pothier's work.

1073. Fenet sur Pothier, on art. 331, p.78. The dots signify where I have omitted Fenet's references to Pothier's works.


1075. Ibid., p.136. Duvergier disagreed with Toullier; see his note "a" on p.136.
moyen de dispenses, puisque ces dispenses sont le seul moyen de mariage, et que ce mariage est à son tour le seul moyen de légitimation. Ce n'est pas, apparemment, à deux parents qui ne peuvent jamais se marier, que la loi dit: Je ne veux pas que le mariage que vous contracterez légitime vos enfants! " 1076.

Toullier and Marcadé adequately represent the two views taken on C.N. 331: the most common being that C.N. 331's provision on incestuous children must be referring to the children of parents marrying under dispensation granted following C.N. 164, for otherwise the provision was pointless. 1077.

The C.Q. redactors must have been aware of this dispute: it is, for example, clearly pointed out by Fenet. Would their awareness of this dispute, and that the most common view was that of Marcadé, mean that they deliberately followed C.N. 331, intending this provision of their article to have some definite legal effect? Did they envisage circumstances wherein the parents of incestuous children could marry? Those prohibited from marrying under C.Q. 124, 125 and 126 could never marry. The C.Q. has no article equivalent to C.N. 164. There are two possible answers to the above questions. The first is that the Quebec redactors intended the provision preventing the legitimation of incestuous children to apply in circumstances where the parties marrying were within degrees of relationship prohibiting marriage according to their religion but from which prohibition, following C.Q. 127, dispensation could be granted, again according to the dispositions of their religion: the prohibited degrees concerned could not be those preventing marriage under C.Q. 124-126. Supporting this answer is the fact that the Quebec redactors must have been aware of the problems over the interpretation of C.N. 331, which might mean that they knew that most commentators considered C.N. 331 to apply to C.N. 164. The C.Q. redactors—

1076. Marcadé, op.cit., vol. 2, on art. 331, pp.44-5. The misspelling of Maleville is by Marcadé.
1077. Marcadé, op.cit. vol. 2, p.45 note 1 gives references to the various commentators and their views.
would thus have intended C.Q. 237 to apply to C.Q. 127. This answer would make sense of the mention of incestuous children in C.Q. 237, interpreting incest to be sexual intercourse within the degrees prohibited not only by the Code, but also by the various religions. The second, and alternative, answer would be that the prohibition of the legitimation of incestuous children by the subsequent marriage of their parents is merely a conventional statement embodying a traditional precept, found also, for example in Pothier, without it being intended to be construed along with C.Q. 127. The following evidence would support this second answer. First, in connection with C.Q. 237, the redactors make no reference to C.Q. 127 or its provisions. Second, C.Q. 237 could be construed to apply to the prior offspring of putative incestuous marriages, though the indirectness of the article suggests that this was not the intention of the redactors. Third, the view that C.Q. 237 was intended to apply to C.Q. 127 has ridiculous effects. It would mean that the redactors intended that if, for example, Roman Catholic first cousins, having had an illegitimate child, with the child not being conceived in adultery, later decided to marry, and, having gained the necessary dispensation from the appropriate ecclesiastical authority, did marry, their illegitimate child would not be legitimated according to the Quebec code, though both the Canon law itself and the ancien droit (according to most commentators) would have regarded the child as legitimated. It is difficult to accept that this was the intention of the codifiers here, no matter what they had intended by C.Q. 127. Fourth, if the first answer were the correct one, then the redactors would have here probably changed the law, assuming that the Quebec courts, before codification, would have followed, as seems likely, the views of Pothier, Lebrun and

1079. See quotation in text supra, at note 1070.
Pocquet, rather than those of, for example, Dumoulin.\textsuperscript{1080}

The redactors give no indication that they have changed the law, and their study of the writers on the C.N. would have made them conscious of that code's change in the law on this point.

It would seem likely that the second answer is the correct one: the redactors did not intend C.Q. 237's provision on incestuous children to apply to marriages prohibited by the various religions on the grounds of relationship, but not prohibited by C.Q. 124-6. It is likely that the redactors merely copied this provision of the C.N. without considering adequately its possible implications, and intended that it should stand as a general statement of policy. Pothier in his \textit{Traité des Personnes et des Choses} makes an unqualified statement that incestuous children may not be legitimated by subsequent marriage,\textsuperscript{1081} though, from his other writings, it is evident that he thought such children would be legitimated if their parents married with a dispensation.\textsuperscript{1082}

The redactors could have considered their provision as being of the nature of this statement of Pothier's, or indeed of C.L. 217, since the C.L. has no provisions for dispensation from its provisions on the prohibited degrees of marriage. The Quebec provision thus would have the meaning Toullier attributed to C.N. 331, and also would probably be following the \textit{ancien droit}.\textsuperscript{1083}

If the above argument, that the redactors here were only making a traditional statement without intending it to have a specific legal effect, be correct, their action in copying the wording of this part of C.N. 331 may be criticised in that, since they must have known of the

\textsuperscript{1080} See Pothier, as cited notes 1071 and 1072, and \textit{4 Pan. Fran.}, p.212, where the varying views of the writers on the \textit{ancien droit} are mentioned. On the Canon law, see Esmein, \textit{Mariage}, vol. 2, pp.355-68.\textsuperscript{1081} T.F.C. no. 120, Bug. 9, p.47.\textsuperscript{1082} \textit{T.C.M.} or \textit{T.S.} as cited supra, notes 1071 and 1072.\textsuperscript{1083} \textit{4 Pan. Fran.}, p.212, follows the opinion of Pothier, though the C.Q. redactors do not cite this passage.
problems of interpretation of the French article, they ought to have altered their own accordingly. (Indeed, this criticism is applicable even if the above argument be rejected.) Supposing that the argument given is correct, the C.Q. redactors had no reason to change the law here. There can have been no social reasons for preventing the legitimation of children whom only some of the Province's religions would have regarded as conceived in incest. There would indeed seem to be positive reasons for not changing the law: that the illegitimate child of Protestant first cousins should be legitimated by their subsequent marriage, but that of Roman Catholic first cousins should not is ridiculous.

Legitimation per subsequens matrimonium is the only form of legitimation found in the C.Q., though the droit coutumier had permitted legitimation par lettres du roi. This form of legitimation, rather different from the Roman per rescriptum principis, had only a limited effect. It was the only form of legitimation in the ancien droit other than that per subsequens matrimonium. Pothier remarks that such legitimation only allowed a child to use his father's name, and the family coat of arms, with a "brisure de gauche à droite" to signify the child was not born in marriage. Some authors stated that the child could have certain limited rights of succession to his parents, if the other relatives agreed, and if in the Lettres du Roi there were a clause permitting succession. Pothier, however, stated that in his day a child so legitimated could not succeed at all, as Lettres with a "clause de succéder" were no longer used.
par Lettres did not give a minor, in Pothier's phrase, "droits de famille": he would not have come under his father's authority in the relevant sense. The main importance of this form of legitimation was that it relieved the child from some of the disabilities arising from bastardy, such disabilities having been very extensive under the ancien régime. This form of legitimation was not included in the French code. Maleville explained the exclusion thus:

"Aujourd'hui que les enfants naturels peuvent posséder des charges et des emplois comme les légitimes, on a moins besoin de cette espèce de legitimation." 1089.

The same reasoning would apply in Quebec. The redactors of the C.Q., however, make no reference to this institution, though it would seem most unlikely that they would not know of it. They presumably preferred here to follow the example of the C.N., and probably for the same reasons. There was perhaps no social reason for including such a form of legitimation, which could be regarded as discouraging marriage and encouraging fornication. Quebec would have no shortage of competent marriage officers, unlike Texas. 1091.

The 1866 Quebec code did not permit adoption, rejecting the example of the French code. The redactors remark that adoption had been unknown in the ancien droit. 1092. The arguments put forward on why Louisiana rejected adoption would apply here, but with one important difference: adoption had never been permitted by Quebec law. 1093. For the codifiers to have permitted adoption would have been to upset the status quo, and overturn the current conceptions of family: indeed, one writer has argued that adoption was contrary to the principles on the family embodied in the code. 1094.

---

1089. See Brissaud, History, pp.202-211.
1090. 1 Analyse, p.296.
1091. See supra, text at notes 543-4.
1093. See text supra, at notes 547-556.
1094. Hervé Roch, L'Adoption dans la Province de Québec (as quoted by Baudouin, Droit Civil, p.250 note 3), in discussing the later provincial law on adoption said: "Le législateur a préféré la laisser comme loi statutaire et en dehors du Code, voulant, sans doute, ne pas associer aux principes fondamentaux et intangibles de celui-ci, une loi nouvelle qui les bouleverse à plus d'un pointe de vue." P.53. Maleville's discussion of the C.N. shows that there was opposition in France to adoption: 1 Analyse, pp.304-9.
There can have been no obvious reason for changing the law here, and adoption was not introduced as a method of creating legal ties of puissance paternelle.

Under the C.Q., paternal authority was brought into being in only two ways: first, by legitimate birth in marriage, and second, by legitimation by subsequent marriage. The redactors here closely followed the ancien droit, preserving the traditional legal concept of family. That there should be only these methods of creating ties of parent and child was appropriate given the development of the nineteenth-century close affective family. The continuation of the traditional law on legitimation, if the argument above be correct, may be explained by the traditional outlook of the redactors when there was no obvious reason for change. Certainly the C.N.'s innovation in requiring recognition for legitimation, while perhaps making it easier to ascertain legitimate parent and child relationships, was not at all necessary in Quebec, given the redactors' preservation of recherche de paternité. \(^{1095}\) There is no need to summarise the problems over C.Q. 237's provision on incestuous children, bar to remark that it is obvious that the Quebec redactors were more intent on following the C.N. than in considering the implications, be they legal or social, of their article. As pointed out, such statements are traditional, and this may have obscured from the redactors the potential construction of their article. \(^{1096}\)

2. Scope of puissance paternelle.

The eighth title of the Quebec code's first book is entitled "Of Paternal Authority." It is a short title containing only four articles, C.Q. 242-245; but, as in Louisiana, provisions relating to puissance paternelle

\(^{1095}\) Second Report, p.201.
\(^{1096}\) See text supra at notes 1079, 1081-83.
may be located in other parts of the code. 

The title is considerably shorter than that of the C.N. The articles from the latter's title on paternal authority, title nine of the first book, C.N. 371-387, which are not followed by the C.Q. redactors, will also be discussed, in order to reach an understanding of the actions of the Quebec codifiers.

A. Rules in Title Eighth of Book First.

On this title, the Codification Commissioners made the following general remark:

"The articles which follow give the rules of this authority, as admitted and practised within the jurisdiction of the Parliament of Paris; it has much analogy with that adopted by the Code of Louisiana...." 1098.

It is useful here to discuss first the Quebec provisions and their origins, and then deal with the provisions of the C.N. differing from those of the C.Q.

C.Q. 242 states that:

"A child, whatever may be his age, owes honor and respect to his father and mother."

C.N. 371 and C.L. 233 state exactly the same. The Quebec redactors give a host of references. 1099. The provision is more moral precept (with obvious Biblical echoes) than one from which legal consequences may be derived, though Maleville reports that when, during the redaction of the C.N., it was proposed to remove this article as not containing a rule, the argument was put that this article enunciated the

---

1097. Toullier, op.cit., vol. 2, p.185, no. 1045 said: "On n'a point entendu réunir sous ce titre toutes les dispositions qui ont traité à la puissance paternelle, et qui se trouve mieu placées dans d'autres titres, d'où l'on ne pourrait les écarter, sans y laisser une lacune trop marquée." His remarks would apply not only to the C.N., but also to the C.Q. and D.Q.


1099. E.g. Pothisier, T.C.M. no. 389, Bug. 6, p.177; 4 Pan. Fran. 317 etc. Of interest are references to Roman law, to D.37.15.9, D.2.4.6 and one mistaken reference to the Novels (the citation - McCord - is Nov. 12.c.9, there is no caput 9 in this Novel). D.37.15.9 states: "Liberto et filio semper honesta et sancta persona patris ac patroni videri debeat." D.2.4.6: "Parentes naturales in ius vocare nemo potest: una et enim omnibus parentibus servanda reverentia." One wonders what significance these citations had for the redactors. They seem redundant; it is likely that the redactors felt these citations added on extra authority to their article.
principle from which the others were derived. 1100. Equivalent statements by authors on the ancien droit are legion. Pothier, for example, states:

"Les enfants sont obligés, de leur côté, d'aimer et d'honorer leurs père et mère, de leur obéir, et de 1101. les assister dans leurs besoins, selon leurs moyens."

No great significance may be attached to this article.

C.Q. 243 is as follows:

"He remains subject to their authority until his majority or his emancipation, but the father alone exercises this authority during marriage; saving the provisions contained in the act 25 Vict., chap.66."

Taken together, C.N. 372 and 373 provide much the same (bar, of course, the unimportant reference to the Provincial Act). C.L. 234 is similar; it does not state, however, that the father alone exercises the authority during the marriage, but rather that if the parents disagree, the authority of the father prevails. 1102.

The redactors here embodied a traditional provision of the ancien droit. 1103. Again they give a myriad of references to works consulted; but none of these are of interest here. 1104. The C.Q. redactors have chosen to follow the C.N., which was in accord with the ancien droit coutumier on this point. Whether the wording of the Louisianian provision would have had a different effect is difficult to say: the Quebec provision follows C.N. 373 in saying the father alone exercises the authority during the marriage, and this would

---

1100. 1 Analyse, p.342.
1101. T.C.M. no. 389, Bug. 6, p.177.
1102. See text supra, at notes 562-567.
1103. See e.g., Pothier, T.C.M. nos. 389-390, Bug. 6, pp.177-8, and T.P.C. nos. 134-5, Bug. 9, p.52.
1104. E.g. Pothier, T.C.M., nos. 388 and 389, Bug. 6, p.177, 2 Pan. Fran., p.305 and 4 Pan. Fran. pp.324 and 327 etc. Here the redactors also cite the Corpus Iuris Civilis: D.50.16.196 and Inst. 1.2 and 12. D.50.16.196 states: "Familiae appellatione et ipse princeps familiae continetur. Feminarum liberos in familia earum non esse palam est, quia qui nascuntur patris familiam sequuntur." Inst. 1.2. is the title "De iure naturali, gentium et civili" while 1.12 is that "Quibus modis ius potestatis solvitur." See the remark in note 1099. Curiously the Digest is here cited by book, title and "lex", while the citations for C.Q. 242 are by the cumbersome traditional method.
seem a happier formulation of the rule.

The next article, C.Q. 244, provides thus:

"An unemancipated minor cannot leave his father's house without his permission."

C.N. 374 is similar, though adding that the child could leave "pour enrôlement volontaire," after having reached the full age of eighteen years. C.L. 236 states thus:

"L'enfant au-dessous de l'âge de puberté ne peut quitter la maison paternelle, sans la permission de ses père et mère, et ceux-ci ont le droit de la corriger, pourvu que ce soit d'une manière raisonnable."

In the relevant part of this article, it is obvious that the rule is quite different from that of the C.Q.: C.L. 236 gives freedom to leave home to children over the age of puberty. The C.L. provision has been rejected: that of the C.Q., following the C.N., is the traditional rule of the ancien droit. The exception providing for voluntary enlistment in the army was included in the C.N. on the urging of Cambacérès, because the government intended to use conscription as little as possible as a method of recruiting the army. The exception in C.N. 374 was intended to encourage and to facilitate voluntary enlistment. Maleville states that "suivant les anciens règlements, le fils mineur ne pouvait s'enrôler sans le consentement de son père...." This is not quite correct. Pothier points out that:

"Il faut excepter de notre règle le service du roi, auquel les enfants de famille peuvent valablement s'engager contre le consentement de leurs père et mère. L'intérêt public l'emporte sur l'intérêt particulier de la puissance paternelle."
No actual provision in any Coutume or in royal legislation actually so provided; but the exception, as stated by Pothier, was followed nonetheless.1110 Pothier, however, gives no age limit, unlike C.N. 374.1111

The Quebec redactors have followed the C.N. and ancien droit, apart from their sources' exceptions in favour of enlistment. Quebec had no need of such an exception to maintain a supply of army recruits. Unlike in Louisiana, minors above the age of puberty were not allowed to leave home without parental consent. The rejection of the C.L.'s rule conforms to the idea that the reason for puissance paternelle was the protection of the minor. The C.L., unlike the C.Q., laid more stress on the division of nonage into pupillage before puberty and minority after puberty, with those above the age of puberty having greater legal capacity. The C.Q. preserved the ancien droit coutumier's unified notion of minority.

The final article of this title of the Code is C.Q. 245, which states thus:

"The father, and in his default, the mother of an unemancipated minor have over him a right of reasonable and moderate correction, which may be delegated to and exercised by those to whom his education has been entrusted."

There is no exactly equivalent article in the C.N., which did, however, provide the father and mother with powers to have their children imprisoned.1112 C.L. 236, quoted above, allows parents to correct their children, "pourvu que ce soit d'une manière raisonnable." C.L. 238 allows parents to delegate their authority to those to whom they have entrusted

1110. See 4 Pan. Fran. p.329, where on C.N. 374, the authors state: "L'exception portée par cette article n'était pas exprimée par les Lois anciennes, mais elle s'observait de même. Le père réclamait vainement un fils en âge de porter les armes qui s'était enrôlé volontairement. On ne l'écoutait pas."

1111. Penet sur Pothier, on art. 374, p.85 states: "Pothier ne fixe pas l'âge auquel l'enfant pouvait s'enrôler sans le consentement."

1112. Discussed infra, text at notes 1127-1135.
their children. The Quebec redactors state:

"This article is new and is not to be found in the code; nevertheless it is conformable as well to the Roman as to the old French law. The code of Louisiana (art. 236) contains a similar provision. Instead of that right of moderate correction, the Code Napoleon (articles from 376 to 381) grants to the father and mother, under certain circumstances and with certain formalities more or less solemn, according to the age of the child and the position of the parents, the right to have him arrested and kept in custody, without being even obliged, in certain cases to give reasons therefor." 1114.

The C.Q. redactors obviously chose to adopt the "moderate" Louisiana provisions. The C.N. articles, and their relationship to the ancien droit will be discussed below; it is convenient here to quote one author on the ancien droit, to show its attitude:

"Les pères et les mères ont droit de correction sur leurs enfants; ils peuvent même, s'ils sont indociles, les faire renfermer dans des Maisons de force, en vertu d'une simple Ordonnance du juge." 1115.

Thus, there were ancien droit equivalents to the C.N. articles the redactors have rejected. The redactors' own article, however, had authority from the ancien droit. Pothier stated that parents had a "droit de correction modérée" over their children. 1116. It is sufficient here to state that the redactors' article is eminently reasonable, and has been

1113. C.L. 238 is identical to D.O. 41 (p.53), except for the addition of an extra paragraph which states thus: "Ils ont également le droit d'engager leurs enfants comme apprentis." D.O. 41, is quoted (in English) supra between notes 584 and 585.


1115. Encquest, Bk. 1, tit. 2, Sect. 1, no. 5.

1116. T.P.C. no. 132, Bug. 9 p.51. Note that Pothier considered that this right of moderate correction extended so far as the imprisonment of the child. Fenet sur Pothier, on art. 375, p.85 states thus: "Les père et mère avaient sur leurs enfants, jusqu'à ce qu'ils fussent en âge de se gouverner eux-mêmes, le droit d'une correction modérée." This statement would seem to have had some influence on the redaction of the Quebec article, and the redactors certainly cite it. Inter alia, they also cite the Nouveau Denisart, vol. 9, s.v. "Garde Noble et Bourgeoise", p.183 and p.201. The latter reference is probably a mistake for p.204. At p.204 § XI, no. 1, it is pointed out that a gardien has a duty to educate the minor, whether in his own house or by sending him away.
influenced by the C.L.; the reasons for their rejection of the C.N.'s provisions will be canvassed later.

It will be recalled that the Quebec redactors stated that their title of four articles on puissance paternelle "has much analogy with that adopted by the Code of Louisiana...."\textsuperscript{1117} They also claim that their provisions are closer to the ancien droit coutumier than are those of the C.N.\textsuperscript{1118} In fact, this statement made by the C.Q. redactors about the C.L. is misleading. The title of the C.L. which contains articles on paternal power and the nature of that power are not particularly close to the title and provisions of the C.Q. In fact, the title of the C.L. is the same as that of the D.O. already discussed, except for some insignificant changes in the relevant articles. Thus, we discussed D.O. 36 (p.53) to D.O. 45 (p.53); C.L. 233 to C.L. 242 are essentially the same articles.\textsuperscript{1119} Thus, C.L. 239 gives parents the enjoyment of their children's property: this, as will be seen, is not a right parents have in Quebec, though it is granted by the C.N. C.L. 237 allows parents to appoint tutors to their offspring: again the C.Q. does not grant this power, though the C.N. does. Further, as already shown,\textsuperscript{1120} in Louisiana children could leave home after they had reached the age of puberty: this is contrary to the C.Q. These major differences in the content of paternal power show that the nature of puissance paternelle in the Quebec code differs from that of the Louisiana code.

Further, the form of the Louisiana title differs considerably: as in the D.O., the title containing articles on paternal authority discusses respective rights and duties

\textsuperscript{1117} Second Report, p.203.
\textsuperscript{1118} Ibid.
\textsuperscript{1120} See supra at notes 1105-1111.
of parents and children (rights such as alimem)\textsuperscript{1121.} Here the C.Q. follows the order of the C.N. The C.Q. redactors also did not copy a provision of the C.L. which was taken from the \textit{ancien droit}. C.L. 235 stated thus:

"Tant que l'enfant reste sous la puissance de ses père et mère, il doit leur obéir dans tout ce qui n'est pas contraire aux lois et aux bonnes moeurs."\textsuperscript{1122.} This provision echoes statements made by writers on the \textit{ancien droit}\.\textsuperscript{1123.} From the rejection of C.L. 235 by the redactors of the C.Q., it is obvious that they were not even following the C.L. where it agreed with the droit coutumier, much less where it disagreed with the droit coutumier. In fact, it seems plausible to suggest that C.L. 235 was rejected because there was no equivalent in the C.N. The only influence from the C.L. traceable in the C.Q. here is in C.Q. 245:\textsuperscript{1124.} and even in this article the form of the C.L. has been followed not at all.

The statement of the Quebec redactors that the paternal authority in their code "has much analogy" with that in Louisiana\textsuperscript{1125.} is misleading in so far as it implies that paternal authority is of the same nature in the two codes, when in fact it is not. In many ways, the nature of paternal authority in the C.L. is much closer to that of paternal authority in the C.N. than that of paternal authority in the C.Q. The only similarity between the C.L. and the C.Q. not found in the C.N. is in relation to powers of correction. Certainly, the C.Q. articles are analogous to those of the C.L. in so far as they deal with the same fact-situations; but the Quebec provisions are also analogous to those of the C.N. in exactly the same way: and the redactors are here contrasting the difference between the C.Q. and the C.N. (the former having purportedly followed the \textit{ancien droit coutumier} of Paris) with the analogy between the paternal authority found in the C.Q. and that found in the

\textsuperscript{1121.} See text \textit{supra} at notes 560-561.
\textsuperscript{1122.} An amended version of D.O. 38 (p.53): see text at note 567.
\textsuperscript{1123.} See e.g. Pothier, \textit{T.C.M.}, no. 389, Bug. 6, p.177.
\textsuperscript{1124.} See text \textit{supra} at notes 1112-1116.
\textsuperscript{1125.} See text \textit{supra} at note 1117.
B. Certain Napoleonic and Customary laws on puissance paternelle not found in the Quebec code.

Both the ancien droit coutumier and the C.N. contain provisions on paternal authority which are not incorporated into the C.Q. The Quebec redactors rejected these rules for various reasons. In their Second Report, they stated that the French code's title on paternal authority "contains many provisions quite different from those of the Roman law, and foreign to the old French jurisprudence, particularly in the parts governed by customary law...." They imply that they have rejected these rules because they are not found in the ancien droit.

The first provisions to be noted here are those already mentioned: the parental powers of correction. C.N. 375 stated that "Le père qui aura des sujets de mécontentement très-graves sur la conduite d'un enfant, aura les moyens de correction suivans." C.N. 376-382 then provide for powers of incarceration of children, even by a surviving mother; these powers are

1126. This is clearly understood from the redactors' comments: "The title 'De la puissance paternelle' in the Code Napoleon, contains provisions quite different from those of the Roman law, and foreign to the old French jurisprudence, particularly in the parts governed by customary law, where it was even pretended that paternal authority had never existed, so much so that Loysel (liv. 1, Tit. 1, art. 37) has given it as a rule of French law that 'The right of paternal authority does not exist'. - Nevertheless it is certain that, under the customs in France, there was formerly a species of paternal authority, although different from that of the Roman law, and that of the code. - The articles which follow give the rules of this authority, as admitted and practised within the jurisdiction of the Parliament of Paris; it has much analogy with that adopted by the code of Louisiana ...." Second Report, p. 203.


1128. See quotation in note 1126 supra.
carefully regulated, though we need not discuss the details. A right of incarceration also existed in the ancien droit, though its exercise was less regulated, and its content different in significant ways. 1130. Pocquet de Livonnière, as quoted, 1131. enunciates the general rule of the ancien droit; Pothier gives a more detailed elaboration of the procedure. 1132. On the French code's provisions, the Quebec Codification Commissioners said:

"These rigorous measures, which were not wholly foreign to the old jurisprudence, rather making part of the public and criminal than of the private law, have been suppressed by the commissioners, who regard as sufficient, for ordinary cases, the right of correction accorded by article 4 [i.e. C.Q. 245], leaving the criminal laws and those of the police to provide for cases of a grave and exceptional character."

Under the ancien régime, as well as according to the C.N., it was the state which ultimately incarcerated, not the father; but, despite the Quebec redactors' statement, this right of the father's to have his child imprisoned derived from his paternal power; the courts, to a greater or lesser extent, merely regulated the exercise of that power. Even under the C.N., in some circumstances, the father did not need to give reasons for the incarceration of the child: he need only demand it. 1134. Thus, to a certain extent, the Quebec redactors are rationalising their reasons for rejecting this aspect of traditional puissance paternelle: the circumstances envisaged by the ancien droit and the C.N. would not all be dealt with under the criminal law. The Quebec redactors have chosen to reduce the authority of

1129. For a discussion of the C.N.'s rules, see Toullié, op. cit., vol. 2, nos. 1050-1058, pp. 184-6; and Marcadé, op. cit., vol. 2, pp. 144-52, nos. 136-142. 1130. The differences between the C.N. and the ancien droit are most easily grasped by looking at Fenet sur Pothier, on arts. 376-383, pp. 85-87. Some notable differences are that the C.N. makes a distinction between the ages of the child, the ancien droit did not. Contrary to the C.N., the ancien droit did not provide time limits. The ancien droit only required the mother to have the authority of the Judge, the C.N. required approval by paternal relatives. 1131. See supra, text at note 1115. 1132. T.P.C., nos. 132-3, Bug. 9, pp. 51-2. See also text at notes 572-575 supra. 1133. Second Report, p. 203. 1134. See Marcadé, op. cit., vol. 2 pp. 144-6.
fathers here because they considered that such powers of incarceration were contrary to the *mores* of Quebec. In this they were undoubtedly correct. The Province would also lack the institutional framework necessary to permit such incarceration. That parents should be able to imprison their children would be contrary to the prevailing attitude on the nature of the relationship between parent and child, an attitude deriving from the contemporary conception of the close affective nuclear family. Further, that parents should have such powers would be unthinkable in a country where, already in the eighteenth century, the discipline of children was reported to be lax.\textsuperscript{1135}

As already noted in discussing the D.O.,\textsuperscript{1136} under C.N. 389, the father had a right to administer the goods of his unemancipated minor child. There is no equivalent article in the C.Q., though the Commissioners said that "the father, and in his default, the mother, as a general rule, have the right to the tutorship of their minor children, a charge which in fact gives them the administration of the property so long as the minor is unemancipated."\textsuperscript{1137} Under the C.Q., the right to administer children's property is not dependent on having paternal authority but on appointment as tutor. The father's powers to administer are rather more fettered by the C.Q. than by the C.N., because under the former code he is liable for his administration as any tutor would be. The father might have "a right to the tutorship"; but the appointment is made by the court: "le père ou la mère qui détient la puissance paternelle n'exerce la tutelle que s'il le demande."\textsuperscript{1138} This exclusion of the right of administration might seem rather strange, especially when it is considered that the family was regarded in nineteenth century Quebec as a most important social and political institution. This point will be considered further infra.\textsuperscript{1139}

\textsuperscript{1135} See Garigue, *Vie* (see chap. 2, note 107), p.16, and chap. 2 supra, at notes 107-120.
\textsuperscript{1136} See text supra at notes 603-604.
\textsuperscript{1137} Second Report, p.205.
\textsuperscript{1138} Baudouin, *Droit Civil*, p.289.
\textsuperscript{1139} See infra, text at notes 1158-1161.
458.

Under C.N. 384-7, parents had a right of usufruct in their children's property. This right was not adopted in the C.Q., the redactors of which said:

"This draft omits also the articles 384, 385, 386 and 387 of the Code Napoleon, relating to the enjoyment, granted in its system to the fathers and mothers, of the property of their children, up to the age of eighteen years, or up to the period of their emancipation. This enjoyment, granted by the code, is nearly the garde bourgeoise of the article 266 of the Custom of Paris, which does not exist in this country, where it never was introduced nor observed.... This, after all, is not surprising, since the article 266 of the Custom only grants the garde bourgeoise 'to the fathers and mothers, burgesses of Paris', thus excluding those who were not so." 1140.

The accuracy of this argument as to why the parental usufruct was not introduced has been doubted by one author; 1141 but the Codification Commissioners are correct in their statement. Some coutumes allowed fathers to keep the fruits of the property of their sons; 1142 but if a coutume did not explicitly and specifically grant this right to a father, he did not have it, unless under garde noble or bourgeoise. 1143 The Coutume de Paris did not grant such a right to fathers. Thus, under the Coutume de Paris, there was no right of parental usufruct, except under garde. The Coutume de Paris accorded garde noble to the survivor of the mother or father, or, in their default, to an ascendant, whether male or female, over minor children up to the age of twenty for males or fifteen for females. Garde bourgeoise, according to the same Coutume, was granted to the survivor of the mother or father (not to other ascendants) over their minor children up to the age of fourteen for boys and twelve for

---

1141. Baudouin, Droit Civil, p. 189.
1142. E.g. Rheims, art. 8; Laon, art. 56; Châlons, art. 8; Sedan, art. 7; Bourbonnais, art. 174; See Ferrière, Corps et Comp. vol. 3, col. 497-8, nos. 20-21. See also text supra at notes 134-136.
1143. See Ferrière, Corps et Comp. vol. 3, col. 498, no. 22: "Dans les Coutumes qui n'en parlent point, le père ne gagne point les fruits des héritages donnés à son fils ou qui lui appartiennent de quelque manière que ce soit, si ce n'est en vertu de la garde noble."
girls. Pothier defines thus the Parisian garde bourgeoise:

"[L]e droit que la loi municipale accorde au survivant de deux conjoints bourgeois de Paris, de percevoir, à son profit, le revenu des biens que ses mineurs ont eu de la succession du prédécesseur, jusqu'à ce qu'ils aient atteint un certain âge, sous certaines charges qu'elle lui impose, et en récompense de l'éducation desdits enfants qu'elle lui confie." 1145.

Under article 266 of the Coutume de Paris, garde bourgeoise applied only to the bourgeois of Paris not to those of other towns regulated by the Coutume. 1146. It therefore is obvious that the system of garde bourgeoise would not be applied in Quebec. In the 1772 Abstract of Canadian Law, it was pointed out that articles 265-271 of the Coutume (that is, those dealing with garde) were revoked for Quebec, 1147. and in place of these articles, the authors of the Abstract gave an account of the law on tutelle and curatelle as applied in the Province. 1148. The garde bourgeoise of the Coutume de Paris was exceptional in the droit coutumier: in most coutumes, a gardien bourgeois was only in the position of a legitimate tutor, and had no right to receive the revenue of the property of the minor. 1149.

C.N. 384-7 innovated, as regards most of the coutumes of northern France, in granting parents a usufruct of their children's property: this went far beyond the coutumes' generally limited provisions on garde. The system of garde itself apparently had not been applied in Quebec, and, therefore, it is not surprising that the redactors did not introduce the right of usufruct found in the C.N., given their

1144. Ferrière, Corps et Comp. vol. 3, cols. 946-7.
1145. T.G.N.B. no. 12, Bug. 6, p.501.
1147. An Abstract of those Parts of the Custom of the Viscounty and Provostship of Paris, which were received and practised in the Province of Quebec, in the time of the French Government, drawn up be a Select Committee of Canadian Gentlemen, well skilled in the Laws of France, and of that Province, by the Desire of the Honourable Guy Carleton, Esquire, Governor in Chief of the said Province, London, 1772, p.ii.
1148. Ibid., pp.97-99.
1149. See Pothier, T.G.N.B., nos. 11-13, Bug. 6, p.501.
generally conservative approach to codification. Before this is finally decided on, however, it is appropriate to discuss tutelle. It may be pointed out that Maleville thoroughly approved of the French Code's system of parental usufruct, to the extent that he believed it should not end on the minor child's reaching the age of eighteen years. 1150.

C.N. 390 provided that a surviving parent was entitled, as of right, to the tutelle of any minor children of the marriage. 1151. C.N. 397 permitted surviving parents to appoint tutors to their minor children. Neither of these rights exist in the Quebec code, because under C.Q. 249 all tutorships are dative: in this, the C.Q. follows the ancien droit coutumier. The Roman law allowed testamentary, legitimate and dative tutorships, and the C.N. has adopted, adapted and expanded on the categories of the Roman law. 1152.

Pothier said the following:

"Dans la plupart de nos coutumes, il n'y a qu'une espèce de tutelle, qui est la dative, c'est-à-dire celle qui est donnée par le magistrat, sur l'avis des parents des mineurs; et de ce nombre est la coutume de Paris." 1153.

According to the droit coutumier, if a father left a will in which he named a tutor to his minor child, great respect would be paid to his wishes; but the tutor's appointment would have to be confirmed by the judge on the advice of the nearest relatives. 1154. Similarly, it was customary for the surviving parent to be appointed tutor; 1155. and if no

1150. 1 Analyse, pp. 351-5.
1151. Articles 389 and 390 of the C.N. are not located in its title on paternal power, though, as Marcadé points out, they rightly belong there. The D.O. is rather better organised in this respect. See Marcadé, op.cit., vol. 2, pp. 156-161, nos. 147-153.
1153. T.P.C. no. 146, Bug. 9, pp. 55-6. Rocquet, Bk. 1, tit. 2, Sect. 3, art XXI, pp. 45-6 said thus: "Toutes les tutelles sont datives en France hors en quelques Coutumes, comme celles d'Anjou et du Maine, où il y a des tutelles naturelles et légittimes en faveur du père et de la mère seulement."
1154. Loisel, Inst. Cout., I. IV. VII: "Toutefois, quant par le testament y a tuteur nommé, il doit estre confirmé, si les parens n'allèguent cause légitime que le defunct eust vray semblablement ignore." See also Maleville, 1 Analyse, p. 360.
1155. See the Abstract of Canadian Law, note 1147 supra, p. 97: "Le père ou la mère survivant est ordinairement préféré pour la tutelle, et à son défaut, un des plus proches parents...."
election of tutor had been made, the survivor of the mother
or father would be reputed tutor. 1156. The principle,
however, was certain: all tutorships were dative. 1157. In
C.Q. 249, the redactors have followed the ancien droit, and
rejected innovations possibly suggested by the C.N.

It is now convenient to consider the implications of
the preference shown to the old law over the provisions of
C.N. 384-7, 389 and 390. First, the Quebec redactors have
a generally conservative outlook on the law, and are not
usually concerned to introduce change unless absolutely
necessary. Second, in Quebec, family ties were notably
strong and close, the family being regarded as the foundation
of the social fabric. Maleville obviously regarded these
articles' provisions on parental usufruct, administration
and tutorship as reflecting and asserting the importance and
cohesion of the family; 1158. and he even believed that
parental rights in these areas should be increased. 1159.

Toullier, in discussing this topic stated:

"Le Code n'a voulu rétablir ni le droit de garde,
ni la jurisprudence des pays de droit écrit, qui
dépouillait les enfants pendant la vie de leurs pères,
sans rien accorder aux mères; mais il a voulu
accorder aux pères et aux mères une indemnité des
peines, des soins et des responsabilités qu'entraînait
l'éducation des enfants et l'administration de leurs
biens. Il n'est pas juste que la garde des enfants ne
soit, dans tous les cas, qu'une charge pour les
pères et mères.

D'un autre côté, il est contraire à la morale
de ne présenter aux enfants le survivant de leur père
et mère, que sous l'aspect d'un tuteur ou d'un homme
daftaires, dont les comptes doivent être rendus de
clerc à maître et suivis de discussions, souvent de
procès, qui ne peuvent s'accorder avec la piété
filiale, et qui exposent toujours les enfants à un très
grand mal, la perte de la bienveillance et de
l'affection de leurs père et mère." 1160.

1156. Abstract of Canadian Law, p.98, and see also Ferrière,
Corps et Comp. vol. 3, col. 497, no. 19.
tuteurs sont datives." Pasquier, the humanist, disapproved
of the application of the Roman term "dative" to a rather
different legal institution: Op.cit., Ek. 1, ch.LVII,
pp.121-2 at p.122.
1158. Ibid., pp.351-2.
1159. Ibid., pp.351-2.
This argument would be applicable in Quebec, where, the only form of tutorship being dative, a parent, as tutor, would be subject to all the liabilities and duties of any tutor. That parents' actions on their children's behalf should be controlled in this way would be contrary to the current conceptions of the parent and child tie. Further, the right of a parent to appoint a tutor to his or her minor child is a reflection of the value placed on the relationship between parent and child. These articles of the C.N. granting parental administration, usufruct and tutorship all asserted the special closeness of the domestic relationship between parents and their children, a closeness bound up with the growth of the affective family. The Roman law had granted fathers great rights in their children's separate property; but such rights were derived from the power fathers had over their children in a hierarchical family. It seems likely that, given the stress placed on the family in Quebec, the rules of the C.N. would have asserted the ideology of family life more than those of the ancien droit in fact did. That this was so, however, was not sufficient to defeat the conservative attitude to codification taken by the redactors, who must have considered there to be no need for reform.

This part of the chapter has been devoted to explaining the reasons for the C.Q. redactors' rejection of some rules of the ancien droit and the C.N. on paternal power. A notable absence from the C.Q. is that no provision allows a father to emancipate his son; this will be discussed below. 1161 A right that parents had according to the ancien droit and the C.N. was that of consenting to or opposing the marriage of their adult children. The next part of this section will be devoted to paternal power and the marriage of enfants de famille.

C. The marriage of enfants de famille.

As in the discussion of Louisiana, 1162 at issue here are

1161. See text infra at notes 1212-1227.
1162. See text supra at notes 607-668.
certain parental rights in relation to the marriage of their children: their right to oppose a marriage; and their right to seek the annulment of a marriage.

The Canon law and the ancien droit have been discussed above, and it is merely necessary here to point out that, for the validity of the marriages of minor children, the ancien droit required the consent of the parents: if the children did not have such consent, their marriages were annulable, and parents could always oppose such a marriage. Sons over thirty and daughters over twenty-five could validly marry without parental consent, but were liable to being disinherited, unless they had sent an acte de sommation respectueuse seeking consent to marry. If the mother or father of the minor child were dead, the tutor or curator had to consent to the marriage, after having taken the advice of the nearest relatives. Adults whose mother and father were dead had no restriction of any kind on their marriage.

The C.N. changed this. To recap what has been said in respect of the D.O., C.N. 148 provided that sons under twenty-five and daughters under twenty-one could not marry without the consent of their parents; if they disagreed, that of the father sufficed. C.N. 149 stated that if one parent were dead or incapable, the consent of the other sufficed. C.N. 150 stated that if there be no parents alive or capable of consenting, the grandparents' consent is required. If the grandparents of one line disagree, then the consent of the grandfather of that line suffices; while if there be disagreement between the lines, this amounts to consent. C.N. 160 provides that should there be no father, mother or other ascendant or should such be incapable of consenting, then sons and daughters under twenty-one years may not marry without the consent of the

See text supra at notes 610-618. The Canon law did not invalidate such marriages. The route of the ancien droit to reach invalidity was circuitous.

See text supra at notes 619-620.

See text after note 622.
family council. As regards adult enfants de famille, C.N. 151-4 had a complex system of actes respectueuses, which children were required to send to their parents before they could marry without parental consent. If their parents were dead or incapable, then children had to send such actes to their grandparents, if alive. The C.N., however, attached no penalty of disinheretance to failure to send such actes.

The ancien droit on oppositions has been discussed above: essentially, any one claiming the right could bring an opposition to any marriage.

The Quebec code's rules on consent to the marriage of minors are contained in five articles, C.Q. 119-123:

119. Children who have not reached the age of twenty-one years must obtain the consent of their father and mother before contracting marriage; in case of disagreement, the consent of the father suffices.

120. If one of them be dead or unable to express his will, the consent of the other suffices.

121. If there be neither father nor mother, or if both be unable to express their will, minor children, before contracting marriage, must obtain the consent of their tutor, or, in cases of emancipation, their curator, who is bound, before giving such consent, to take the advice of a family council, duly called to deliberate on the subject.

122. Respectful requisitions to the father and mother are no longer necessary.

C.Q. 119 and 120 are essentially the same as C.N. 148 and 149, bar that under the C.N. sons required consent until they reached twenty-five years. The rules in the Quebec code, allowing for difference in the age of majority, follow

1166. See text supra, at notes 626-631 for fuller account.
1167. See text supra, at notes 629-31.
1168. See e.g. text supra at notes 764-790.
1169. C.Q. 121 deals with the marriages of minör illegitimate children, and is not relevant here.
1170. Maleville explains thus the reason for the difference in the C.N: "la nature a rendu les filles plus précoces, et qu'il importe pour la conservation de moeurs de les marier plutôt."  Analyse, p.147.
the ancien droit.\footnote{1171}

C.Q. 122 does not follow the C.N. C.N. 150 granted to the ascendants the right to consent; there being no ascendants capable of consenting, under C.N. 160, the consent of the family council was required. Here the Quebec redactors have followed the ancien droit: failing the mother or father, the consent of the tutor or curator was required, and he had to have taken the advice of the nearest relatives as provided by article 43 of the Ordonnance de Blois.\footnote{1172} The Quebec Code has stayed closer, in this area of the law, to the old customary law notions of puissance paternelle, in so far as a minor, on the death of his parents, became himself a père de famille, outwith the control of his grandparents, though under certain legal disabilities because of his age.\footnote{1173} The French provisions in C.N. 150 and 160, by giving grandparents and then close relatives authority over the marriages of minors, juridically enhanced the status of the family. These provisions were also in accord with the modern notion that puissance paternelle was an institution designed for the protection and care of minors. Were a minor's parents dead, those who could generally be considered to have most affection and care for him would be his grandparents. The development of the affective family gave an increased importance to close relatives, joined to the smaller family unit by links of affection.\footnote{1174}

\footnote{1171} Under the ancien droit, the right to have required one's consent to one's children's marriages was an aspect of puissance paternelle, belonging to both parents, but exercised during the marriage by the father. On default of the father, the mother's consent was required. In theory, as Pothier points out, the consent of both parents was required; but that of the father was the deciding one. See Pothier, T.C.M., nos. 324-328, Bug. 6, pp.140-144, and T.P.C., nos. 134-135, Bug. 9, p.52.

\footnote{1172} See Pothier, T.C.M., nos.333 and 336, Bug. 6, pp.146-7. The royal legislation referred to by the redactors may be found discussed in Pothier.

\footnote{1173} See Henrys, Oeuvres, vol.2, Bk. IV, Quest. XII, 3d. edn. pp.338-9: "c'est une erreur de croire que le père mort, les enfants qu'il laisse retombent en la puissance de leur ayeul paternel."

\footnote{1174} See supra, at notes 46-47.
however, could be reviewed. Under C.Q. 122, the family council had only to be consulted by the tutor for its opinion: again, this follows the ancien droit. The Quebec redactors took the term "family council", "conseil de famille", from the C.N.; but they kept, in general, the old procedures relating to the "assemblée de parents", who had to be called together by the judge, and whose decision had to be accepted by the judge to have any force. Here, because of their legal conservatism, the Quebec redactors have rejected the enhanced role played by the family under the provisions of the C.N.: a role which the mores of Quebec and the ideology of the period would have upheld.

C.Q. 123 said that respectful requisitions (sommations respectueuses) were no longer required. The ancien droit and provisions of the C.N. have already been described. The Quebec codifiers have rejected this whole procedure. They stated that it had fallen into disuse in Quebec, and that the reason for its incorporation in the C.N. was "to inspire greater respect for the paternal authority, which the revolution had done much to weaken." They remarked that such sommations "are not consonant with our state of society, and are not only useless and without object, but are calculated to produce a result quite different from that desired." They explained thus:

1175. See Toullier, op.cit., vol. 1, p.326 no. 547.
1177. See text supra, at notes 618-620 and 626-631.
1178. See text supra, at notes 618-620 and 626-631.
1179. See text supra, at notes 618-620 and 626-631.
1180. Second Report, p.177. This statement of the Quebec redactors obviously is taken from Maleville, 1 Analyse, p.152: "Leur objet est d'inspirer plus de respect pour l'autorité paternelle, que la révolution a deaucoup affaibli."
"In reality these requisitions are only made after the consent has been asked and refused, that is to say, when the child is perfectly determined to marry, and the father equally determined to refuse his consent. In such a position can it be reasonably presumed that the child will abandon his project, or the father his opposition, in consequence of a step more insulting than respectful and more irritating than conciliatory." 1182.

The original intention of sommations respectueuses had been to prevent parents from being able, should they so have wished, to disinherit their adult children from marrying against their wishes. This was no longer important in Quebec, where free testation had been introduced; the French codifiers, however, had included a system of actes respectueuses in their code, without providing that failure to send such an acte should result in disinheritance. The aim of this revival of the necessity of adult children to request parental consent to their marriages was to encourage respect for paternal authority. 1184. Given the background to codification in Quebec, there would not be felt the same need to assert control over children: the Province had not just been the scene of events as dramatic as the French Revolution. Further, the whole notion of sommation respectueuse would be one alien to the doctrines of liberal individualism which were influential in nineteenth century Quebec, whereby adults were regarded as autonomous agents unless they were prodigals or insane. 1185.

Oppositions to marriage have already been discussed, and, accordingly, there is no need here to do more than sketch in the general system of the C.Q. The ancien droit had permitted anyone claiming the right to oppose a marriage; the Quebec code, following the example of the C.N., but

1182. Ibid.
1184. Maleville, 1 Analyse, p.152: see note 1180 supra.
1185. See chapter 2, supra, at notes 93-120. Note that not all Quebec lawyers would have agreed with the C.Q. redactors that sommations respectueuses were not required: see E. Deleury et al., op.cit. (see note 286, ch.3 supra) at p.859, note 267.
going farther than the latter, restricted to a very small class those entitled to make oppositions. 1186.

The provisions to be considered here are set out in articles 137 to 139 of the C.Q:

"137. The marriage of a minor may be opposed by his father, or in default of the latter, by his mother.

138. In default of both father and mother, the tutor or, in cases of emancipation, the curator may also oppose the marriage of such minor; but the court to which such opposition is submitted, cannot decide on its merits without the advice of a family council, which it must order to be called.

139. If there be neither father nor mother, tutor nor curator, or if the tutor or curator have consented without taking the advice of a family council, the grandfathers and grandmothers, the uncles and aunts, and the cousins - german, who are of full age, may oppose the marriage of their minor relative; but only in the two following cases:

1. When a family council, which, according to article 122, should have been consulted, has not been so;

2. When the party to be married is insane."

The equivalent provisions of the C.N. may be found quoted elsewhere, and it is not necessary to repeat them here. 1187. They restricted the class of those entitled to oppose a marriage, the intention being to prevent abuse of the right of opposition. 1188. All those named in the C.N. and the C.Q. could have opposed the marriage under the ancien droit. 1189.

The ancien droit was restricted by the French codifiers because it was open to abuse: the Quebec redactors followed the French code for the same reason, and they considered it a great improvement; 1190. but, they did not adopt the particular rules of the C.N. First, in the C.Q. opposition is restricted to the marriage of minors; 1191. this is

1186. See text supra, at notes 764-790.
1188. 3 Pan. Fran., p.245: "Autrefois, toute personne, quelle qu'elle fût, pouvait former opposition au mariage. Cette grande liberté était un abus qui servait merveilleusement la méchanceté, la jalousie et l'envie de nuire."
1189. See Pothier, T.P.M. no. 81, Bug. 6, p.33.
1191. There is one exception. The marriage of an adult can be opposed on the grounds of insanity: C.Q. 141. There is no equivalent article in the C.N., as the proposed marriage of an insane adult could be opposed under the general articles on opposition. See also C.Q. 142 and C.N. 174, second paragraph.
consistent with the law on consents. In the C.N., the marriage of adults may be opposed by their ascendants. 1192. Second, in the C.N., the right of tutors and curators to oppose was postponed to after that of ascendants and collaterals, and then they could only oppose on the authority of a meeting of the family council. 1193. In Quebec, the law was the opposite, in default of parents, tutors and curators opposed, before other ascendants and collaterals; such tutors and curators need only have consulted the family council. It was only after tutors and curators and in very restricted circumstances that ascendants and collaterals could oppose. 1194. The C.N. provision restricting the rights of tutors and curators to oppose was completely new law, as they had always been entitled to oppose the marriages of their charges; and at least one French commentary (referred to by the Quebec redactors) did not approve of these new provisions on tutors and curators. 1195. The French code's provisions did give more importance to the family; while the Quebec redactors innovated by extending the ancien droit in a logical fashion, so that the right to oppose a marriage was restricted to coincide with the requirement of consent. On the death of the father and mother, the tutor became more important than grandparents, brothers, sisters, uncles or aunts. Baudouin remarked:

"Dans les familles aussi unies que le sont les

---

1192. C.N. 173.
1193. C.N. 175 and 174. C.N. 175 states: "Dans les deux cas prévus par le précédent article, le tuteur ou curateur ne pourra, pendant la durée de la tutelle ou curatelle, former opposition qu'autant qu'il y aura été autorisé par un conseil de famille, qu'il pourra convoquer." C.N. 175 is the only article of C.N. 172-175 not quoted in note 178 supra. 1194. Note that the C.N. includes brothers and sisters among collaterals, curiously omitted in the C.Q., probably because of oversight.
1195. 3 Pan. Fran. p.248: "C'est disposition est absolument neuve, elle est exorbitante du Droit commun. Elle est contraire à tout ce qui s'est pratiqué jusqu'à présent." The authors felt that since the tutor had the care of the person of a minor, he ought not to be deprived of the power of opposition.
familles québécoises, ou les plus vieilles traditions semblent s'être maintenues, il est incontestable que les aieux jouent dans la domaine de l'autorité morale un rôle plus considérable que le tuteur ou le curateur." 1196.

The redactors chose to innovate by restricting the right to oppose to tutors and curators, should the parents of a minor be dead; they rejected the French codifiers' stress on the importance of family relationships.

The final topic relevant here is the effect of lack of consent to the marriage of minors. C.Q. 150 states thus:

"A marriage contracted without the consent of the father or mother, tutor or curator, or without the advice of a family council, in cases where such consent or advice was necessary, can only be attacked by those whose consent or advice was required."

The ancien droit was the same as the rule in C.Q. 150. The father and mother could attack the marriage, or, if there were no father and mother, the tutor could attack the marriage as "présumé entaché de séduction." 1197. In the ancien droit the other relatives generally could not attack a marriage for any reason while the parties lived, as it was presumed that such relatives could have no interest in doing so; but after the death of one of the parties to the marriage, the other relatives could attack the validity of the marriage, but not for vices respectifs, only for vices absolus. Lack of parental consent was a vice respectif; other relatives therefore could not attack a marriage should some necessary consent be wanted. In the ancien droit, it must be concluded that only the mother, father, tutor or curator could attack a marriage should their consent have been required and not been given; other relatives could not attack on these grounds, since their consent could never be required. 1198. The equivalent article of the French code, C.N. 182, stated thus:

"Le mariage contracté sans le consentement des père

1196. Droit Civil, p.178.
1197. Pothier, T.C.M. no. 447, Bug. 6, p.204.
1198. See generally Pothier, T.C.M. nos. 446-8, Bug. 6, pp.203-4.
et mère, des ascendants, ou du conseil de famille, dans les cas où ce consentement était nécessaire, ne peut être attaqué que par ceux dont le consentement était requis, ou par celui des deux époux qui avait besoin de ce consentement."

As to most of this article, the reasons for those who may attack being allowed to do so are the same as the reasons for their consents being required: the C.N., in contrast to the C.Q., here places more importance on the family. The Quebec code excluded the family in favour of the tutor, who needed only to consult the family, whereas the French code provided that the family should sue for annulment, and when the tutor sued, he was acting as directed by the family council. An important difference in the C.N. is that the spouse who required such consent may sue on the grounds that it is wanting. This is an innovation on the system of the ancien droit. The C.Q. redactors give no indication as to why they rejected this: presumably they saw no good reason for this change, which they alluded to in their discussion of the next article of the C.N., 183. 1199. The C.N. here permits a minor to annul a marriage he or she has contracted; this seems rather inconsistent, and there appears to be no good reason for allowing a minor to do so. The C.N. rule perhaps lays more stress on the minor's need for care: the minor requires the consent of his ascendants, for his own protection; if they be indifferent or neglectful, he may himself seek the annulment of his inappropriate marriage, should the required consent not have been given. Such at least is the explanation of Toullier for this rule. 1200.

1199. See Second Report, p.185. The redactors state that for C.Q. 151 they have adopted the new rule of C.N. 183, but struck off the last paragraph of the C.N. article, as they have kept old law that a minor cannot attack his own marriage for lack of necessary consent by parents or tutors. 1200. Op. cit., vol.1, p.357, no. 613: "L'indifférence des ascendants ou de la famille ne doit pas priver du bénéfice de la loi celui des deux époux qui avait besoin de leur consentement. Si les plaintes d'un mineur qui a été surpris dans une convention peu importante, sont écoutée favorablement, on doit, à plus forte raison, lui accorder la même faveur, lorsqu'il demande à être restitué contre l'aliénation qu'il a faite de tous ses biens et de sa personne. - Tel est le motif de la demande en nullité que le Code l'autorise à former." Note how far removed this is from the Canon law conception of marriage.
No such considerations have weighed with the Quebec redactors, who have preferred to preserve the ancien droit. 1201.

Toullier stated that:

"De toutes les actions de l'homme, le mariage est une de celles qui intéressent le plus sa destinée; et comme les facultés et les forces du corps se développent avant celles de l'esprit, l'homme se trouve habile à contracter mariage avant que l'âge ait muri sa raison, et qu'il soit en état de faire un choix éclairé. Dans le premier âge des passions, la loi ne l'abandonne point à lui-même; elle lui donne un guide pour le diriger dans l'acte peut-être le plus important de sa vie." 1202.

The French code provided that, should there be no mother and father, the guides of an enfant de famille should be his ascendants or other close relatives. Ascendants even had some control over the marriages of enfants de famille who were adult. The Quebec code chose a different system: there could only be control over the marriages of minors, and should there be no mother and father to exercise such control, it passed to tutors and curators. To some extent the Quebec redactors were merely carrying out their instructions, and embodying in the code the rules of the ancien droit. Legal conservatism prevented them from embodying in their code rules giving more prominence to the family, a prominence the family probably merited in Quebec, given the strength and cohesion of family life in the Province at the period of redaction. In their rules on oppositions, however, the redactors were not following the ancien droit, but were innovating by restricting the class of those entitled to oppose a marriage. In their innovations, they did not recognise that grandparents and other close relatives undoubtedly were regarded as having much greater moral

1201. They have departed from the ancien droit in C.Q. 151, copying C.N. 183's provision of a time limit within which actions under C.N. 150 would have to be brought. The redactors regarded this as a useful improvement, and, taken with the reform in C.Q. 149 adopted from C.N. 181, the redactors obviously were seeking certainty. Second Report, p.185.

authority over their minor relatives than tutors or curators. The redactors here merely made a logical extension of the rules on consents: they provided that it was up to tutors and curators to oppose the marriages of their charges. Though the redactors here perhaps could have given more weight to the family, since they were already innovating, it is probably unrealistic to have expected them to do so. Given the nature of the code, it was obvious for the redactors to provide the rules they in fact did provide on oppositions, especially when tutors and curators were specifically mentioned by Pothier as being entitled to oppose their charges' marriages: and Pothier generally exercised great influence on the Quebec redactors.

The Quebec rules here may all be attributed to legal factors, rather than any consideration of the nature of family life in the Province. The most effective reforms in this area of the law were perhaps those contained in C.Q. 149 and 151 laying down time limits within which should be brought actions seeking to annul a marriage on the grounds of want of the requisite consents. These reforms, adopted from C.N. 181 and 183, made for greater certainty as to whether or not a marriage was valid. These reforms, however, were not motivated by any consideration of the state of Quebec family life.

3. How puissance paternelle ends.

In general, the two most obvious ways in which puissance

1203. Toullier, op.cit., vol. 1, pp.325-6, no.546, states: "La nécessité du consentement des père et mère ou ascendants au mariage de leurs enfans et petits enfans qui n'ont pas atteint l'âge de vingt-cinq ou vingt-et-un ans, est fondée sur l'amour des parens, sur leur raison, sur l'incertitude de celle des enfans, et surtout sur l'autorité de cette magistrature domestique que la loi donne aux pères et mères, et qui s'étend en ce point aux aïeuls et aïeules."

1204. See Pothier, T.C.M. no. 81, Bug. 6, p.33: "Ces oppositions sont aussi quelquefois formées par les parents, surtout par le père, mère tuteurs ou curateurs qui prétendent avoir droit d'empêcher le mariage de l'une des parties."

puissances paternelles ended in Quebec were by the child reaching majority, and by the death of the parents, except that, in the latter case, some of the authority came into the hands of a tutor or curator, though it could no longer properly be called paternal authority. This in conformity with the ancien droit coutumier. 1206. Pothier, of course, pointed out that some aspects of puissance paternelle only ended on the death of the parents of the child. Thus, the necessity to seek parental approval to one's marriage continued. 1207. In Quebec, however, adults no longer were required to send sommations respectueuses. The French codal provisions were essentially similar, except that on the death of his parents, a child seemed to a certain extent to fall into a residuary power held by his grandparents. With the above qualifications, it may be said that the C.Q., the C.N., and the droit coutumier agreed: puissance paternelle ended on the death of the parents or the majority of the child. C.Q. 246 fixed the age of majority as twenty-one years; C.N. 388 did likewise. In the ancien droit, most coutumes fixed the age of majority at twenty-five years. 1208. In France, the law of September, 1792, fixed majority at twenty-one, and the Code preserved this. 1209. In Quebec, the age of majority had been lowered to twenty-one years in 1782 by an ordinance of the Governor, probably under the influence of English law. 1210.

1207. See e.g. Pothier, T.P.C. nos. 134-5, Bug. 9, p. 52.
1208. Ferrière, Corps et Comp., vol. 3, col. 499, no. 28: "c'est l'usage de la France coutumière que les enfants sortent de la puissance de leur père à l'âge de 25 ans accomplis." The fixing of the age of majority at 25 was, according to the Pandectes Françaises, due to the influence of Roman law; before this happened, different coutumes had made differing provisions, depending on the status of the child as noble or roturier. "La découverte des Pandectes, et l'étude du droit Romain, qui s'établit partout, introduisirent un changement dans les Coutumes. Lors de leur rédaction, on fixa généralement l'âge de majorité à vingt-cinq ans." Some coutumes kept to other ages for majority; e.g. Anjou, Maine and Normandy. On all this, see 4 - Pan. Fran., pp. 471-4, and Ferrière, loc. cit.
1209. See Maleville, 1 Analyse, pp. 356-7.
The codifiers, not unnaturally, retained twenty-one years as the age of majority; it was also the age of majority for purposes of public law.\textsuperscript{1211} The two articles which state the age of majority - C.Q. 246 and 324 - borrow their expression from C.N. 388 and 488.

The third method of ending paternal authority in Quebec law is by emancipation, as C.Q. 243 states. The Quebec codifiers state that the Roman form of emancipation was intended to release a son from his father's potestas, while emancipation in Quebec frees a minor from tutelle, and constitutes him administrator of his own property under the protection of a curator charged to assist him.\textsuperscript{1212} They state that this form of emancipation differs from that of the C.N., which, admitting paternal power, necessarily permits these to whom it belongs to liberate those subject to it.\textsuperscript{1213} (This should not be taken to imply that there can be no emancipation ending paternal power as it exists in the Quebec code.) The codifiers add that the methods of emancipation recognized by Quebec are those found in the Coutume de Paris: namely, emancipation by marriage and letters of the Prince.\textsuperscript{1214}

Before discussing the above, it is useful to recapitulate some aspects of the relationship between parent and child according to the Quebec law on puissance paternelle. First, the authority belongs to both parents, though the father exercises it during the marriage. Second, the father has a right to keep the children with him and to punish them, and they cannot marry without his consent. Third, the paternal power of Quebec does not give a father any rights over his children's property; he would only have rights over it and control were he also his children's tutor. Under the Coutume de Paris, as interpreted,\textsuperscript{1215} a father would not have control

\textsuperscript{1211} See generally, Saint-Laurent, op. cit. previous note, at pp.155-158.
\textsuperscript{1212} Second Report, p.219.
\textsuperscript{1213} Ibid., p.221.
\textsuperscript{1214} Ibid., p.221.
\textsuperscript{1215} See Guyot, Répertoire, vol. 14, p.93, s.v. "puissance paternelle", where it is pointed out that at some time a more Roman paternal authority had been known at Paris.
over any of his children's property simply by virtue of his position as father; only under garde noble or bourgeoise would he have power over the property of his children. Fourth, in both the Quebec law and the ancien droit, the legal incapacities of children derived not from their being fils de famille but from their status as minors: neither the C.Q. nor the ancien droit allowed minors to administer their property unless emancipated, and, if emancipated, they could only freely use their moveables and administer their immovable.

The commentators on the ancien droit do admit of emancipation ending puissance paternelle. Pothier states that, "La puissance paternelle, quant à la première partie, finit ... par la majorité de l'enfant, par son mariage, ... et par l'émancipation"; while Ferrière remarks (on article 239 of the Coutume de Paris) that, by marriage, children "sont delivrez de la puissance paternelle, et de l'autorité de leurs tuteurs et curateurs, s'ils sont en tutelle." These authors state that emancipation brings about the end of paternal power; this is also the position in Quebec. If we turn to consideration of the Quebec redactors' remarks on emancipation and puissance paternelle, it is now clear that what they mean is that both the C.N. and the Roman law permit a father as a father to liberate...
his children from his own power, while the puissance paternelle of Quebec cannot be ended in this way. In the Quebec law, emancipation is not a method used by a père de famille to liberate his children; but rather emancipation by the two methods considered below brings a father's power over his children to an end, as indeed C.Q. 243 expressly states: "He [i.e. the child] remains subject to their authority until his majority or emancipation...." C.Q. 314 states that: "Every minor is, of right, emancipated by marriage." C.N. 476 gives an identical provision. Thus, emancipation by marriage frees a child from puissance paternelle. The ancien droit was the same. 1220.

C.Q. 315 is an interesting article; it states:

"An unmarried minor may, at his own request, or that of his tutor, or of any one related or allied to him, be emancipated by any court, judge or prothonotary having jurisdiction to confer tutorship, on the advice of a family council called and consulted as in the case of tutorship."

Although not immediately apparent, this article is the Quebec survival of emancipation par lettres du roi. 1221. The ancien droit coutumier had borrowed this form of emancipation from the Roman law. 1222. It was similar to the Roman venia aetatis, 1223. and relieved the minor subject to tutelle from the legal disabilities he suffered. The procedure is well described by Denisart:

"On a recours au Prince pour en obtenir des lettres, par quelles il commande au juge du lieu de la tutelle, qu'après avoir pris l'avis de ses parents et amis, s'ils sont d'avis de l'emanciper, en ce cas il a l'habitude à jouir de ses meubles et à gérer et recevoir les revenus de ses immeubles, sans pouvoir les aliéner." 1224.


1222. See Brissaud, History, p. 196.
1223. See Pothier, T.P.C., no. 187, Bug. 9, p. 71, and Buckley, Textbook, p. 171. See C. 2.44.2.
The Quebec article, like the rule of the ancien droit, is not designed to free children from the authority of their parents, that is, from puissance paternelle. Given that in the Quebec law tutelle was separate from puissance paternelle, it was, in theory, possible for a minor to have a tutor to look after his property and still to be under paternal power. In which case, emancipation from the tutelle would result in the ending of the puissance paternelle, under C.Q. 243. Emancipation par lettres du roi came to take on the appearance it has in the C.Q. because of two Provincial statutes, one placing this form of emancipation under the jurisdiction of the court, the other extending the power to judges and prothonotaries. The redactors declared themselves to be following the ancien droit as amended by Provincial legislation.

The system of the French code is rather different. C.N. 477 states that an unmarried minor may be emancipated by his father (or on his default his mother) by a declaration made by the person emancipating delivered to the juge de paix assisted by his clerk, provided the minor is fully fifteen years of age. This is a true emancipation from paternal authority. The Quebec redactors did not adopt this provision, as it was taken from the droit écrit, and was not generally found in the droit coutumier. C.N. 478 states that a minor who is an orphan, having reached eighteen years of age, may be emancipated if thought capable by the family council. This concerns solely emancipation from tutelle, and is a modern equivalent of venia aetatis. The authors of the Pandectes Françaises remark that: "Cet acte n'est point une véritable émancipation." 1227. C.N. 478

1225. 34 Geo. III. ch.6 (1794) and 12 Vict. ch. 38. See, e.g. Trudel, Traité, vol. 2, p. 361, and Mignault, Droit Civil, vol. 2, p. 258.
1227. 4 Pan. Fran., p. 615.
is obviously the French code's equivalent of C.Q. 315, except that the French article envisages that paternal power already be ended, both parents being dead, whereas the C.Q. completely separates tutelle from puissance paternelle.

The rules of the Quebec code on the ending of puissance paternelle follow the ancien droit coutumier: death of the parents (or the child), the child's reaching of the age of majority, the marriage of the child, and the child's emancipation from tutelle all end paternal authority. The rules of the C.N. are the same, except for those on emancipation other than by marriage. Here the C.N., because it permits parents, as of right, the administration and enjoyment of their children's property, allows parents to emancipate their children, to free them from puissance paternelle. This was not possible under the ancien droit as followed in Quebec, where emancipation, while ending paternal control in general, was intended to give minors control over their property. The Quebec redactors here chose not to follow C.N. 477, allowing parents to free children from paternal authority, because they must have considered such an emancipation unnecessary, since parents in Quebec would not have control and enjoyment of their children's property, and since it had not been possible in the ancien droit coutumier. The redactors preferred to keep the ancien droit.

4. Conclusion on paternal power in Quebec.

All of the articles of the Quebec code at which we have looked in connection with puissance paternelle show a profound conservatism. The provisions on the acquisition of paternal authority are those of the ancien droit. The redactors have kept the traditional rule on legitimation, rejecting the C.N.'s requirement of acknowledgement. There were not in Quebec the technical reasons for this change that there were in France: recherche de paternité was still possible. The redactors presumably felt that the old rule

1228. This would include civil death, of course.
encouraged marriage, and that there were no reasons for the change.

The content of the paternal authority in the C.Q. is also very traditional. The Quebec redactors have followed the ancien droit as closely as they could. The first three articles of the C.Q. title on paternal authority, C.Q. 242-245, follow the first four articles of the C.N. title, C.N. 371-374, and are obviously based on them: and indeed this title of the C.Q. is obviously modelled on that of the C.N. 1229. The Quebec title, however, departs from that of the C.N. in two important respects. First, the C.Q. does not permit parents to seek the imprisonment of their children, and, second, it does not grant parents the enjoyment of their children's property. As regards powers of punishment, the C.Q. has been influenced by the C.L.; indeed this is the only obvious influence of the C.L. on these articles of the C.Q. 1230. Parental powers to incarcerate children also existed under the ancien droit, though they differed from those of the C.N. The institutional framework necessary for such powers had never existed in Quebec. 1231. The redactors, in not allowing parents to seek the imprisonment of their children, were not only following the law as applied in Quebec, but probably were also maintaining puissance paternelle as an institution considered primarily to be in the interests of the child for his care and protection. The C.Q. redactors rejected the C.N.'s grant to the parents of the enjoyment of the property of their children in their power. Here they were following the ancien droit coutumier of Paris. Nor did the redactors follow the C.N. to give parents the right to administer their children's property. 1232. In this, the codifiers also followed the ancien droit. Similarly, the Quebec redactors did not give parents an automatic right to the tutorship of their children. 1233. The

1229. See text supra, at notes 1098-1126.
1230. See text supra at 1117-1126.
1231. See Deleury et al., op.cit., p.863.
1232. This article is not of course in the C.N.'s title on paternal authority, though it does, of course, belong there. See supra, note 1151.
1233. See note 1232 supra.
Quebec codifiers' actions here were all designed to preserve the *ancien droit coutumier* as they thought it had been received in the Province. This had the result that, if an *enfant de famille* had property of his own, for the administration of that property, his father would have to seek to be appointed tutor. In his actions as tutor, the father would be subject to the same scrutiny as any other tutor. He would have to give the same accounts of his tutorship. This is a fairly complex process, and is premised on the notion that fathers cannot be trusted to look after their children's property, without being subject to scrutiny. This might indeed be the case; however, such an idea is rather contrary to the nineteenth century ideal of family. The Quebec redactors, however, did not consider this point, or, since some of the authors they used made it, did not consider it worth changing the law here, merely in order that the law should assert the contemporary ideology of the relationship between parent and child. The Quebec provisions are also apparently fairer to the child. There was no obvious need for any change in the law here; and given both the instructions of the legislature, and the obvious conservatism of the redactors, the provisions are what might be expected.

As regards the requirement that parents should consent to the marriage of their minor children, the Quebec redactors have once more kept strictly to the *ancien droit*. Failing parents, tutors and curators have to consent. This provision follows the old rule. The C.N. here innovated, giving an enhanced importance to close relatives. The redactors rejected the C.N.'s innovation, an innovation which, in comparison to the C.Q. articles, would undoubtedly have reflected more accurately the importance placed on the close family circle in Quebec, where grandparents would most certainly have more authority than tutors. The rules on who might seek annulment of the marriages of minors, if there had been no required consent, in the C.Q. followed the *ancien*.

1234. See, e.g. Toullier, *op.cit.*, vol. 2 pp.187-8, no. 1060.
droit once more, and were consistent with the rules on consents. Only on oppositions to marriage did the Quebec redactors innovate. Following the example of the French code, the right to oppose a marriage was limited to a restricted class of people. Their innovations, however, logically extended the ancien droit on consents, so that those who had the right to consent had the right to oppose the marriage of minors. Consistent with their other articles, the Quebec redactors, as regards oppositions, rejected the French code's enhancement of the importance of the close family. The redactors were not influenced by the apparent appropriateness for Quebec of the C.N.'s innovations; they preferred to keep to the ancien droit, and, on the law on oppositions, where an innovation was obviously necessary, they extended the principle of the ancien droit to apply. That the C.N.'s provisions were more suitable did not cause the redactors to change the law, when the ancien droit would serve quite adequately. They thus obeyed their instructions to codify the law in force.

As regards the modes of ending puissance paternelle, the redactors again kept to the ancien droit, there being no obvious need for change.

It is clear that in their rules on puissance paternelle the Quebec redactors have kept firmly to the ancien droit. They rejected all the French code's provisions which, in line with the nineteenth century ideology of the family, gave increased importance to close relatives, and asserted the affective nature of the modern family. What may be singled out as being of primary importance here is that the rules of the ancien droit were adequate to serve the purposes of the modern family of the nineteenth century. The C.N. may have seemed to express better the aspirations of the modern family; but the ancien droit sufficed. The adequacy of the ancien droit, and the conservative instructions given by the legislature, combined to produce no change. The redactors saw no reason to do other than preserve the status quo. Where the codifiers did change the law here, they acted because change was considered very necessary: the old law on oppositions was considered "un moyen de vexation". 1235.

Conclusion. The family in the two codes.

In this chapter have been studied the operations of the two sets of redactors in their tasks of providing articles to regulate the family. The codes, following the C.N., have no specific provisions on the family, but treat the husband and wife relationship and the parent and child relationship quite separately: there are no series of provisions which may be classed as "family law". The connection between husband and wife and parent and child is made primarily through the father, through the two concepts of puissance maritale and puissance paternelle, even though the puissance paternelle may also be exercised by the mother.\textsuperscript{1236} The Quebec code, the Louisiana Digest and the Code Napoléon all recognise the importance of these two puissances belonging to the husband and father, since they all state, with minor variation, as follows (in the wording of the French code, article 1388):

"Les époux ne peuvent déroger ni aux droits résultant de la puissance maritale sur la personne de la femme et des enfants ou qui appartient au mari comme chef, ni aux droits conférés au survivant des époux par le titre de la Puissance paternelle et par 

\begin{quote}
1236. Jean Pinesu, \textit{Mariage Séparation Divorce}, Les Presses de l'Université de Montréal, 1978, states as follows, at p.3: "Il est assez surprenant de constater, à la lecture du Code civil, que la famille ne tient nullement la place d'une véritable institution juridique alors qu'on s'accorde à la considérer comme un fait social méritant une protection particulière. - Le Code civil, en effet, se borne à énoncer des règles juridiques qui gouvernent les relations familiales, c'est-à-dire le mariage, la séparation de corps, la filiation, la puissance paternelle, les incapacités; il régis donc les rapports existant entre certains individus, sans prendre en considération les intérêts de la famille en tant que groupe." This would apply also to the C.N. and D.O. It is interesting to note in the new Draft Civil Code for Quebec that Book Two is devoted to the family. See Civil Code Revision Office, \textit{Report on the Quebec Civil Code, 1977}, Editeur officiel Québec, 1978, vol. 1 Draft Civil Code, pp.53-126, and vol. 2, tome 1, pp.109-235 (Commentary).\end{quote}
le titre de la Minorité, de la Tutelle et de l'Emancipation, ni aux dispositions prohibitives du présent code."

To derogate from these puissances would be considered contra bonos mores. Although mothers under the three codes had varying degrees of authority over their children, the figure unifying the family obviously was that of the husband and father.

Both the Quebec and Louisiana redactors were faced with two models of the family in the legal sources they consulted. First, there was a Roman model of family, based on the concept of paternal power; this model would be found not only in the texts of the Corpus Iuris Civilis, but also in the Castilian law, especially in the Siete Partidas, and in the droit écrit of the Midi. Second, there was the customary law model of family, which was centred on marriage and immediate children, rather than on lineage and descent. This model of family was that discussed by various writers on the ancien droit coutumier, notably by Rother. The family of the Code Napoléon conformed to this model (though fathers and mothers had greater rights in their children's property than in much of the ancien droit coutumier).

Both the C.Q. and the D.O. have adopted slightly differing versions of the customary law model of the family; but this adoption has a different significance for each.

The D.O. contains a major change in the law on family. The law on marital and paternal authority in the 1808 Digest is, while having some originality, largely that found in the C.N. and droit coutumier: the provisions on family conform to the customary law model. This is a major change from the Castilian law, which conformed to the Roman model of family. The central feature of the Castilian law here was a modified version of patria potestas. Family was defined by the padre's control over those in his power, rather than by an association of husband, wife and children. No doubt because of the extent of the reception of Roman

1237. See C.N. 1387. See C.Q. 1258 and 1259, and D.O. 1 (p.323) and 4 (p.325).
law in Castile, the wife was accorded little importance in the legal family; and while her legal capacity was reduced by the mere fact of marriage, it was reduced to a considerably lesser extent than that of the wife under the droit coutumier. The D.O. increased the incapacity of the married woman by subjecting her to the full rigours of puissance maritale, while freeing children to a considerable extent by applying to them a form of puissance paternelle derived from the C.N. and the droit coutumier.

The C.Q., however, did not mark any dramatic change in this area of the law: indeed, the most significant aspect of codification, in so far as it related to the law on the family, was the casting of the law into a more modern form. The customary law versions of puissance maritale and puissance paternelle were preferred to those of the C.N., which were slightly, but significantly, different, in that they expressed better than those of Quebec the ideals and reality of the nineteenth century family. The C.N. had increased parental control over children's property, and given greater prominence to close relatives and grandparents than had the ancien droit. The C.N. changed the conception of puissance maritale in such a way as to reflect more thoroughly the nineteenth century view of the role of women in marriage. The Quebec redactors rejected all these reforms, preserving the status quo; those reforms that they did make were more in the nature of improvements of the existing law than changes of significance marking a reorientation of the law.

The reasons why the D.O. preferred the provisions of the C.N. or the droit coutumier to those of the Castilian law and why the C.Q. redactors preferred the ancien droit coutumier to the C.N. or droit écrit already have been sufficiently discussed, and it is unnecessary to repeat them here; it is useful, however, to consider why the Louisiana redactors introduced radical changes into the law, while the Quebec redactors did not. The general conservatism of the Quebec redactors was such that here
they rejected reforms suggested by the C.N. which would have expressed better than the rules they chose the ideology of family in nineteenth century Quebec. Both societies had seen the development of a modern associative or affective family centred round marriage and care for children. This family was patriarchal in so far as the husband was the undoubted head of the conjugal association, with greater moral authority than the wife; the wife ideally was confined to domestic duties. The Castilian law presupposed a different organisation of family. The law was quite inappropriate for Louisiana in the early nineteenth century: Castilian patria potestad would be insupportable in a liberal, individualist society. It is obvious that a major reform would have been considered necessary. It would have been unthinkable for the redactors to have re-enacted the Castilian rules in their code; and the redactors’ actions here would be supported by the ambiguity in their instructions and the ambiguity in the law in force. 1238. The restriction in the capacity of wives found in the D.O. must be the result of the attraction of the French texts and the changes already made by the 1807 Act on the celebration of marriages. 1239. It is obvious, too, that the redactors approved of this restriction (which asserted current ideology) even though the use of the French sources seems to have been of most importance here. In Quebec, on the other hand, the law in force before codification was not so obviously inappropriate. The ancien droit coutumier had a restricted conception of puissance paternelle. The notion of puissance maritale was similar to that of the C.N. There was no clear or immediate necessity for reform. Thus, though the C.N.

1238. I here refer to the fact that the redactors were instructed to base their code on the civil law in force, and to the problem of the applicability of French law in Louisiana prior to codification, though the Castilian law, in theory, should have been in force. Consider also the 1805 decision of Prevost. See chapter 3 supra, at notes 136-170 and 240-253.
contained rules which might well have asserted the contemporary ideology of family better than did those of the ancien droit coutumier, the rules of the ancien droit sufficed. The Quebec redactors had been instructed to codify the law in force, and in many ways their task was one of conservation.

The 1808 Digest's articles on the family changed Louisiana law; the 1866 Quebec code in large part merely restated in more modern form the ancien droit as applicable in Quebec. Few provisions in either code on this area of the law may be said to be truly original. The redactors of both codes utilised other codes and juristic writings in their work. The organisation of the material on the family in the two codes derives from the Napoleonic model; though the 1808 Digest shows more originality in this than does the Quebec code. Most provisions of both codes have a traceable historical source. The rule may always have been altered in borrowing, and some sources may only have had influence on the phrasing of articles.

The redactors of the D.O. adopted the provisions of the French law on puissance maritale and the concept of puissance paternelle found in the French code. The C.Q. redactors followed the French code as much as possible while, in general, retaining the provisions of the ancien droit coutumier. The reasons for the difference between the actions of the codifiers would seem to be the following. First, the law in Louisiana on paternal authority was very outmoded, and the redactors borrowed from the French sources (and indeed Blackstone) to provide a series of articles they considered appropriate given their view of Louisianian society. Second, the C.N.'s provisions on much of paternal authority might have been more appropriate for Quebec than the ancien droit the redactors selected; nonetheless, the ancien droit's rules on puissance paternelle were adequate and workable in a way that those of the Castilian law were not. Therefore, given the opportunity presented by codification, the Louisiana
redactors innovated by selectively adopting rules from various sources, whereas the Quebec redactors saw no need to do so. Third, the D.O. redactors adopted the droit coutumier's notion of puissance maritale especially as found in the C.N.: they thus altered their law. This change seems to be due to very great extent to the seductiveness, for the redactors, of the Napoleonic texts; though there can be no doubt that the ideology of the period supported the change, and that the redactors themselves approved of the incapacity of married women. Fourth, the Quebec redactors maintained the ancien droit on puissance maritale, rejecting the innovations of the C.N. which were in line with the ideology of the period. The rules of the ancien droit, however, were also reasonably consonant with the ideals of the period. The C.Q. redactors here, therefore, generally obeyed their instructions, and maintained the ancien droit, bar for a technical improvement on mode of authorisation. In conclusion, the actions of the Louisiana redactors in reforming the law were dictated by the usefulness of reform in some areas, and by the seductiveness of the French texts. The Quebec redactors preserved the ancien droit, though reformed in part, and rejected the innovations of the C.N. The innovation of the C.N. might have been closer to the contemporary ideal of the family, but the ancien droit, as expressed in the C.Q., adequately expressed the current ideology of family. There was no obvious need for change, and the Quebec redactors followed their conservative instructions.

Earlier it was remarked that neither of the two codes have general provisions on the family. Tucker, however, refers to two articles of the 1808 Digest, D.O. 16 (p. 11) and D.O. 78 (p. 127). The first of these states that:

"Les fils et filles de famille, sont les personnes qui sont sous la puissance paternelle; et les pères ou mères de famille qu'on appelle aussi chefs de famille, sont les personnes qui ne sont pas sous cette puissance, soit qu'ils aient des enfants ou non, et soit qu'ils aient été dégagés de la puissance paternelle par l'émancipation ou par la mort du père."
Tucker believes this article to contradict the other provisions of the code on the relationships between family members;¹²⁴⁰ he states that it "goes a long way toward re-establishing a quasi-Roman familia, with a paterfamilias at its head, as the unit of law."¹²⁴¹ Tucker would seem to be reading too much into this article. It is taken from Domat,¹²⁴² as are most of the articles of the title in which it appears: the first title of Book One of the code. The article is perfectly compatible with the other articles on puissance paternelle. Rather than regarding this article as a statement by the redactors on the nature of the family, it is better to regard the provision as a conventional definition included for reasons of tradition and because the rest of the title in which it appears is drawn from Domat. The article does not negate the provisions of the D.O. regarding the family as the modern nuclear unit. All the effective provisions are drawn from the modern law. The second article Tucker¹²⁴³ mentions - D.O. 78 (p.127) - states as follows:

"Le mot de famille employé dans cette section, doit s'entendre de la femme, des enfants et des domestiques de celui à qui le droit d'usage ou d'habitation est accordé."

This article is taken from Book 2, title 3, chapter 2, "De l'usage et de l'habitation", and only means that when a man is granted a right of habitation, he may take his servants. It does not affect the nature of the family in the D.O.; it merely shows that the D.O. redactors were aware of the possible ambiguities in the term "family", and that it was still possible to use "family" in the wider sense. That the redactors thought it necessary to state this indicates that the more limited usage was becoming predominant. This article is of more significance for the

---

¹²⁴⁰ Persons, pp.283-5.
¹²⁴¹ Ibid. p.284.
¹²⁴² Domat, Prel. Bk. 2.2.5.
next chapter; it does not really affect the family as revealed in the articles on husband and wife and parent and child.

Thus, both the C.Q. and D.O. provide a series of modern provisions on the family, deriving ultimately from the model of family found in the *droit coutumier* of France. The extent of the changes in the law made by the two codes was dependent on both the state of the old law in the light of social organisation, and the sources available to the redactors.