

# Translating Part of France's Legal Heritage: Aubry and Rau on the Patrimoine

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Article abstract

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# Translating Part of France's Legal Heritage: Aubry and Rau on the Patrimoine

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## ABSTRACT

*Reading the pages of the 19th century legal treatise written by Charles Aubry (1803–1882) and Frédéric-Charles Rau (1803–1877) on the patrimony has been, for generations, a rite of passage in French legal education. The theory of the patrimony has aptly been described as fundamental for French private law and the account given by Aubry and Rau, however distant it may be from the law in force, should be read by anyone who seeks to understand the French legal mind. Drawing on the English-language civilian vocabulary that is part of Quebec legal culture, the author offers a translation of this text by Aubry and Rau with some commentary on its canonical status in French legal letters. Even in its translated form, it offers a*

## RÉSUMÉ

*La lecture des extraits portant sur le patrimoine du traité écrit au XIX<sup>e</sup> siècle par Charles Aubry (1803-1882) et Frédéric-Charles Rau (1803-1877) constitue, depuis des générations, un rite de passage dans la formation des juristes en France. La théorie du patrimoine a très justement été décrite comme fondamentale pour le droit privé français et le récit offert par Aubry et Rau doit être lu, malgré son écart avec le droit en vigueur, par toute personne qui cherche à comprendre l'imaginaire du juriste français. S'inspirant du lexique civiliste de langue anglaise qui fait partie de la culture juridique québécoise, l'auteur présente une traduction de ce texte d'Aubry et Rau assortie de quelques commentaires sur son statut canonique dans la littérature*

means for the English-speaking reader to encounter a tradition of abstract rationality in legal scholarship that is part of France's legal "heritage" (itself a French patrimoine, but in another sense).

juridique française. Même traduit, ce texte offre au lecteur de langue anglaise une façon de prendre contact avec une tradition de rationalité abstraite dans la doctrine juridique qui participe au « patrimoine » (au sens, ici de heritage en anglais) de droit français.

**Key-words :** *Property — patrimony — legal scholarship — French law — legal translation*

**Mots-clés :** *Biens — patrimoine — doctrine juridique — droit français — traduction juridique*

1. In a once important and now neglected book published in the 1950s, German-born art historian Nikolaus Pevsner sought to describe the "Englishness of English art" as part of a broader account of the geography of painting and sculpture. This was not, it would seem, undertaken as an exercise in identity politics or aesthetic nationalism—Pevsner used what his publisher called "the unbiased eye of a foreigner" to identify aspects of the seventeenth and eighteenth century English character that found dominant and recurring expression in the visual arts. Quite apart from rather fantastical conclusions—the author contended that "practical sense, reason and tolerance" were for-reaching plastic themes in English art—Pevsner's book stands as a bold signpost for scholars in other disciplines, such as law, where efforts to ally culture and political geography are on-going intellectual pursuits.<sup>1</sup> If jurists were to look not for the Englishness in English art but, say, the "Frenchness" in French law, how could they go about doing it in a meaningful way? There are some fine studies that undertake this kind of venture from the perspective of the social sciences, but the humanities and the arts—no less

1. Nikolaus PEVSNER, *The Englishness of English Art*, London, Pelegrine/Penguin, 1956, p. 206.

alive to law's symbolic and persuasive attributes—are also deserving of attention when one situates law in culture and society.<sup>2</sup>

2. The Pevsner project is of special interest to the comparative lawyer who works to draw French law out of its hexagonal setting; it is of interest too for legal translators who seek to transpose French legal writing out of its habitual language of expression. This paper offers a translation of a scholarly description of the patrimony in French law written by Charles Aubry (1803–1882) and Frédéric-Charles Rau (1803–1877) as a means of presenting one of the great texts of nineteenth century French legal literature to a new audience. It proceeds on three assumptions about legal translation as a means of giving voice to some of the supposed Frenchness of French law. First, some of the substantive genius of French property law is trapped in this familiar text, and, until it is translated, that part of France's legal heritage will be lost on some of those from outside trying to look in. Second, that part of the formal genius of French law—its style, its aesthetic—is also trapped in texts such as Aubry and Rau on the patrimony, and this formal dimension bears some of French law's cultural and even normative colour. Lastly, that these formal and substantive messages can be drawn out of French and then cast—transposed, translated—into English, a language sufficiently elastic to convey the essential aspects of this Frenchness of French law, notwithstanding the associations of English with Anglo-American law and that language's apparent distance from French legal ideas.

3. Translation studies—a burgeoning, humanities-based discipline taught in stray corners of comparative literature and linguistics departments—provides an increasingly helpful theoretical framework for those who endeavour to measure the relationship between law and culture through language and comparison.<sup>3</sup> While legal translators' eyes and

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2. For a recent study of representations of justice and enactment in the law and the visual arts, see Nycole PAQUIN, "Regards complémentaires", in N. PAQUIN (ed.), *Les signes de la justice et de la loi dans les arts*, Ste-Foy, P.U.L., 2008, p. 7.

3. See Pierre LEGRAND, "Issues in the Translatability of Law", in Sandra BERMAN and Michael WOODS (eds.), *Nation, Language and the Ethics of Translation*, Princeton, N.J., Princeton U. P., 2005, p. 30.

ears are more generally trained on legislation and cases, the exercise of translating scholarship may in fact be more useful in eking out what makes French law different. *Doctrine*, at least as its status amongst the sources of law is understood doctrinally in France, is a secondary “authority” to be sure. The question of their formal role in law-in-the-making aside, texts of French scholarship are read as a rite of passage in the education of a French jurist, and the cultural setting for French law cannot be understood without some kind of encounter with the influential work of French law’s first-class citizens, often described generically as “the author”. These great texts can, as in the case of the work of Jean-Étienne-Marie Portalis, embody the stylistic model that shapes how the French understand how law should ideally sound.<sup>4</sup> Elsewhere, the substantive contribution to the law made by scholars—François GénY’s “free scientific research” is an example<sup>5</sup>—is as important as enactment in pointing to what the French imagine law to be. The shape and voices of French legal scholarship direct us to ways of knowing law. Scholarly writing does more than simply show what the law is, as other sources are often content to do: instead it takes up the mission, at least implicitly, of defining an epistemic community. Nowhere is the command of scholarship over the French legal imagination plainer than in France’s celebrated work in the law of property—maybe the most abstract field in the high-church abstraction of French private law—written 150 years ago by two Alsatian law professors, Charles Aubry and Frédéric-Charles Rau. Their joint work on the patrimony is nothing if not one of the defining texts of French legal literature *qua* literature—it may be weak as a measure of positive law but every major work on French legal scholarship singles

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4. See, for a translation of Portalis’ famous speech on codification, Shael HERMAN (transl.), “Preliminary Discourse”, (1969) 43 *Tulane L. Rev.* 767 and, for a translation of his speech on the origins and nature of ownership, by the present author, “Portalis Now”, in *Le droit civil, avant tout un style?*, Montreal, Éditions Thémis, 2003, p. 1.

5. See François GÉNY, *Méthode d’interprétation et sources en droit privé positif: An English Translation*, 2nd ed., Louisiana Law Institute/Jaro Mayda (transl.), Baton Rouge, West Publishing Co., 1963, and, by the present author, “François GénY’s *libre recherche scientifique* as a Guide for Legal Translation”, (2001) 61 *La L. Rev.* 331.

it out for comment.<sup>6</sup> So fundamental is their theory of the patrimony to France's legal heritage that without Aubry and Rau (according to one very brilliant study of their influence), French lawyers cannot today think about law at all.<sup>7</sup> Translating the French legal canon, made up of scholarly works like Aubry and Rau, involves first recognizing scholarship which, by reason of its style or originality, has marked the French way of knowing law. The challenge then, in parsing the French canon in English, is transposing it, with these marks intact, out of the language in which, for some, French law is forever bound up. Aubry and Rau on the patrimony offers these two challenges to the comparative lawyer and the legal translator.

4. Charles Aubry and Frédéric-Charles Rau—fabled civilian “friends-in-law”<sup>8</sup>—seem like two characters out of a Flaubert novel as much as pillars of the nineteenth century French legal establishment.<sup>9</sup> Born in the same year, both in profoundly Alsatian settings—one in Saverne, the other in Bouxwiller—they spent a lifetime writing together in Strasbourg under the doctrinal *raison sociale* of “Aubry & Rau”. Their multiple-volume, many-editioned *Cours de droit civil français* is their best known work—is still in print, albeit in a new format and, of course, piloted by new editors respectful of what came before but writing in their own voices.<sup>10</sup> It is the portion of this standard

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6. See, e.g., Nader HAKIM, *L'autorité de la doctrine civiliste française au XIX<sup>e</sup> siècle*, Paris, L.G.D.J., 2002, who devoted careful attention to Aubry and Rau through his book, observing that their influence grew substantially after their deaths and into the twentieth century (p. 360).

7. Frédéric ZENATI, “Mise en perspectives de la théorie du patrimoine”, (2003) 4 *R.T.D. civ.* 667, where this leading expert on contemporary French property law contended that the theory of the patrimony made famous by Aubry and Rau (transl.) “brought about a conceptual transformation in the law arising out of [the 1804] codification so profound that jurists are incapable of thinking without reference to it” (p. 667).

8. On the phenomenon of co-authorship, of which Aubry and Rau represent an example worthy of study, see Tony WEIR, “Friendships in the Law”, (1991-92) 6/7 *Tulane Civil L. Forum* 61.

9. Useful biographical material and an appraisal of their work was published following a colloquium on the bicentenary of their birth held in Strasbourg in 2003: Jean-François WEBER, “Aubry et Rau, conseillers à la Cour de cassation”, in Jean-Michel PUGHON (ed.), *Aubry et Rau. Leurs œuvres, leurs enseignements*, Strasbourg, P.U. Strasbourg, 2006, p. 12.

10. The most recent edition, apparently unfinished, is André PONSARD and Ibrahim FADLALLAH, *Droit civil français. Aubry et Rau*, Paris, Éd. Techniques, 1989.

text devoted to the theory of the patrimony—"there are few pages in the literature of French law as famous as the passage of the treatise of Aubry and Rau devoted to the theory of the patrimony"<sup>11</sup>—that deserve to be read by anyone who, even today, seeks to understand French law of property or, more generally, French legal culture.<sup>12</sup> Their book has been called "the masterpiece of French legal science in the 19th century"<sup>13</sup> and there are numerous examples of those who contend that pages on the patrimony set, in many respects, a high-water mark of the post-codification legal literature.<sup>14</sup> They certainly represented a new way of writing about law in France—free from the formalistic, article-by-article codal commentary that dominated French scholarship until then—that gives the work special methodological significance.<sup>15</sup> In their important book on French legal scholarship which stressed the role of scholars in shaping the French law, Philippe Jestaz and Christophe Jamin devoted substantial space to Aubry and Rau and, in particular, to the pages they wrote on the patrimony. They identified these two nineteenth-century authors as the first to write about the law in the *Code civil* as a "system", based on "general theory", as opposed to an ensemble of articles deserving of successive exegetical study.<sup>16</sup> Aubry and Rau on the patrimony is universally seen as a canonical text in the literature.

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11. Jacques GHESTIN and G. GOUBEAU, *Traité de droit civil : Introduction générale*, 3rd ed., Paris, L.D.G.J., 1990, n° 198.

12. The translation is prepared from the 1873 edition: Charles AUBRY and Frédéric-Charles RAU, *Cours de droit civil français d'après la méthode de Zachariæ*, 4th ed., Paris, Imprimerie et Librairie générale de jurisprudence Marchal et Billard, 1873, n° 573 *et seq.* The French text may be consulted, in its original typeface, at the excellent Droit-Méthodes-Documents Wester-Ouisse website at [http://droit.wester.ouisse.free.fr/pages/brocantes/aubry\\_rau\\_patrimoine.htm](http://droit.wester.ouisse.free.fr/pages/brocantes/aubry_rau_patrimoine.htm).

13. Jean-Louis HALPÉRIN, *Histoire du droit privé français depuis 1804*, Paris, Quadridge, 1996, p. 65. (transl.)

14. In this sense, one might argue that the last contribution of Aubry and Rau is to the ways and means that French law is represented in scholarship as much as to the law itself. For a suggestion of this, see Paul DUBOUCHET, *La pensée juridique avant et après le Code civil*, 4th ed., Paris, L'Hermès, 1998, p. 178.

15. See the critical appraisal of this view in Alain SÉRIAUX, "Heurs et malheurs de l'esprit de système : la théorie du patrimoine d'Aubry et Rau", (2007) 32 *R.R.J.* 89.

16. Philippe JESTAZ and Christophe JAMIN, *La doctrine*, Paris, Dalloz, 2004, p. 80 *et seq.* They contended that Aubry and Rau's theory of the patrimony is a compelling example, notwithstanding its practical failings, of the scholarly ability to cast law as general theory, (transl.) "implicitly having the same binding force as enactment or decided cases of the Plenary Assembly of the Court of Cassation" (p. 231).

5. There is something perverse in this. First, Aubry and Rau wrote rather badly. Their marathon run-on sentences champion truth over clarity, setting standards along the way of how not to use the *virgule* for Grevisse. "It is Chinese", said one leading French author who obviously sees this characterization as the ultimate measure of the unintelligibly in law, if not worse.<sup>17</sup> It would seem that they were so preoccupied with precision of thought for the conceptual finery of the patrimony that, in the words of another great French law professor, their work was "à peine accessible aux aspirants au doctorat".<sup>18</sup> Labouring over their travaux, one feels that they wrote *à quatre mains, comme un pied*, to mix redactional metaphors. Second, the text is not, strictly speaking, original French—the first edition of their book started as a translation, or at least an adaptation, from German.<sup>19</sup> Zachariæ had written in that language on the fundamentals of French law and, while subsequent editions left the German text rather far behind, some of the cadence of the original remained through this process of linguistic appropriation.<sup>20</sup> Indeed it is certainly strange to think of the archetypical French text on property, so celebrated as a perfect depiction of the French legal mind, as itself a linguistically derivative text. Third, while the powerful influence of these few pages cannot be

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17. Philippe Malaurie wrote that Aubry and Rau are much less read today by reason of the technical and abstract character of their prose. "C'est du chinois", he said: Philippe MALAURIE, *Anthologie de la pensée juridique*, 2nd ed., Paris, Éd. Cujas, 2001, p. 184.

18. "The learned *Cours de droit civil français* by Aubry and Rau, is barely accessible to doctoral students" (transl.): François GÉNY, "L'évolution contemporaine de la pensée juridique dans la doctrine française", in *Le droit privé français au milieu du XX<sup>e</sup> siècle. Études offertes à Georges Ripert*, t. 1, Paris, L.G.D.J., 1950, p. 3.

19. Charles AUBRY and Frédéric-Charles RAU, *Cours de droit civil français, traduit de l'allemand, de M. C.S. Zachariæ*, Strasbourg, Lagier éd., 1837. It was only for the third edition, published between 1856 and 1865, that the authors asserted in their title that the book was no longer a translation but an adaptation of the thought of Zachariæ (i.e. "d'après l'ouvrage allemand de C.S. Zachariæ"). By the fourth edition—the one preferred here – the authors adapted the method rather than the German itself (i.e. "d'après la méthode de Zachariæ"). Malaurie, who pointed to the fourth edition as the one in which the authors left their most personal imprint, described the process of appropriation of the German as (transl.) "a rare instance of a phenomenon of acculturation in our law": *supra*, note 17, p. 182.

20. Claude BOCQUET, "Traduction juridique et appropriation par le traducteur. L'affaire Zachariæ, Aubry et Rau", in *Legal Translation. History, Theory/ies and Practice*, Geneva, ASTTI, 2000, p. 15, at p. 20 *et seq.*



denied, the prevailing view today is that the theory of the patrimony has failed to explain what Aubry and Rau set out to prove, and may in fact explain nothing.<sup>21</sup> There are so many exceptions to their theory of the patrimony, centered as it is on the legal person, that one recent author decried it as irrelevant to positive law.<sup>22</sup> Finally, while the book triumphed at a time and in a spirit of exegetical commentary on the Code, this passage on the patrimony owes little to enactment and in fact presented a theory that had only a fragile textual foundation.<sup>23</sup> All in all, Aubry and Rau are far from obvious poster boys for the French scholarly tradition in private law. And yet a statue was erected in their honour in a park in Strasbourg.<sup>24</sup> How many law professors can claim that?

**6.** What follows this commentary is a translation of a most modest portion—20-some short pages—of their massive *Cours de droit civil français* that remains, 150 years after their death, a touchstone in French legal writing. As a transposition

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21. There are, nevertheless, still some ardent believers in the explanatory powers of the theory and of the relevance of Aubry and Rau: see, e.g., Frédérique COHET-CORDEY, "La valeur explicative de la théorie du patrimoine en droit positif français", (1996) 4 *R.T.D. civ.* 819.

22. See the compelling case made for the abandonment of the theory of the patrimony on the premise that, as a framework for explaining property and obligation, it is "useless" in practical terms: David HIEZ, *Étude critique de la notion de patrimoine en droit privé actuel*, Paris, L.G.D.J., 2003. But why does the author of this superbly researched thesis leave out, by his own design (n<sup>o</sup> 12), the *fiducie*/trust? This would have helped make his case (as the patrimony of Aubry and Rau cannot accommodate fiduciary ownership in the English sense). Moreover the trust also contains the seeds of the patrimony's salvation in the *patrimoine d'affectation*/patrimony by appropriation: see Pierre LEPAULLE, "An Outsider's View Point on the Nature of the Trust", (1929) 14 *Cornell L.Q.* 52.

23. See F. ZENATI, *supra*, note 7, at note 6, and accompanying text, who argued that this absence of textual foundation for their argument means that Aubry and Rau are best thought of as "moderns" and not as "classical" scholars in that they understood positive law as residing outside the codal texts.

24. At the unveiling of the statue, emotion in the Strasbourg community of property lawyers ran high: see Eugène GAUDEMET, "Aubry & Rau: Discours prononcé à l'Université de Strasbourg le 21 novembre 1922, à l'occasion de l'inauguration du Monument Aubry & Rau", (1923) *R.T.D. civ.* 65. Gaudemet took pains to describe the affective side of the relationship between the authors that produced "the most perfect book ever inspired by the science of the civil law in France" (p. 66) and noted, with effusive admiration, that the style of the portion of the book on the patrimony was marked by an "elegance, in the sense that mathematicians use the term" (p. 94). Quizzically, Gaudemet made special mention, not fully explained, of the authors' diverging religious practices as a source of "a double portrait made fully of mutual sympathies and antitheses" (p. 74) (transl.).

of a dated and often cumbersome literary work, the resulting English text presents many of the recurring problems faced by those who must decide to what extent the awkwardness of an original text should find its way into the translation.<sup>25</sup> Aubry and Rau should be encountered in good English, of course, but not in better English than they wrote in French. They wrote, too, in the language of the civil law, which suggests that the civil law in English is the right jurilinguistic mode and proper lexicon to be used for the translation.<sup>26</sup> The choice of words will ring exotic to English-speaking jurists for whom the common law vocabulary—those “words and phrases judicially considered”, as the terminology of English law is often described—provides the most familiar lexicon for private law. Civilians working in English—in Quebec, but elsewhere, including, for our lexical purposes, Scotland and Louisiana—draw the fundamental vocabulary of private law from a fund of words that articulate the “common law” (*droit commun*), including words that come, variously, from enactment (including codes where they exist), scholarship, ancient practice and, occasionally, the courts.<sup>27</sup>

7. But even then choices are sometimes difficult—*patrimoine*, for example, has various meanings in law—it may allude to wealth generally<sup>28</sup>, or successoral wealth in particular<sup>29</sup>,

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25. See the comment to this effect in one major translation of Aubry and Rau prepared by the Louisiana State Law Institute: “the translator [soon to be renowned civilian property expert A.N. Yiannopoulos] has refrained from taking liberties with the original text merely for the purpose of enhancing readability”. J. DENSON SMITH, “Foreword”, in *Cours de droit civil français* by C. Aubry and C. Rau: *An English Translation*, Vol. IV, Baton Rouge, La., L.S.L.I., 1965, p. IV.

26. I have in many cases relied on Paul-André CRÉPEAU *et al.*, *Private Law Dictionary*, 2nd ed., Cowansville, Éd. Yvon Blais, 1991.

27. See John E.C. BRIERLEY, “Les langues du Code civil du Québec”, in Pierre-André CÔTÉ (ed.), *Le nouveau Code civil : interprétation et application. Les Journées Maximilien-Caron 1992*, Montreal, Éd. Thémis, 1993, p. 129, at p. 138 *et seq.*

28. Portalis used the term *patrimoine* in this common sense, in his discourse on ownership, to refer simply to wealth or the assets of a person: see *supra*, note 4, p. 24.

29. The term *patrimoine*/patrimony is sometimes used to refer to an “estate” when, technically speaking, the legal person to which the universality of rights and obligations adheres is no longer present to assure that assets answer for liabilities, except by way of the successoral principle that death immediately seizes the living of the patrimony of the deceased (*le mort saisit le vif*). Compare William de M. MARLER, *The Law of Real Property — Quebec*, ed. by George C. MARLER, Toronto, Burroughs,

to heritage in a generic<sup>30</sup> or even genetic<sup>31</sup> sense, and to a mass of property that falls short of the civilian notion of a universality.<sup>32</sup> In choosing the word “patrimony”, I have done more than rely on the usage anointed—unevenly—in the *Civil Code of Québec*<sup>33</sup>, a most useful source of French–English translation for civilians.<sup>34</sup> The English term had long ago emerged as a standard through usage outside of the civil codes in Quebec.<sup>35</sup> This was necessarily so as the term occupied so small a place in the *Code civil des Français*, as Aubry and Rau pointed out, which formed the basis of both the French and English terminological choices in this regard in

1932, n° 360 (who avoided the term “patrimony”), and John E.C. BRIERLEY and Roderick A. MACDONALD (eds.), *Quebec Civil Law*, Toronto, Carswell, 1993, n° 335 (where the term is embraced).

30. As in the expressions *patrimoine commun de l'humanité*/common heritage of mankind, used in public international law or in the *Loi sur le ministère du Patrimoine canadien/Department of Canadian Heritage Act*, S.C. 1995, c. 11 in the law of the Canadian public administration.

31. On the idea of a *patrimoine génétique* as the object of legal regulation, see Marie-Josée BERNARDI, “Diversité génétique humaine : éléments d'une politique”, (2001) 35 *R.J.T.* 327 at 387.

32. As in the case of the *patrimoine familial*/family patrimony at arts. 414 *et seq.* C.C.Q., which refers to the net value of a mass of designated property, held by spouses in marriage or civil union, but where assets do not answer for liabilities.

33. Breaking with its predecessor, the *Civil Code of Lower Canada*, and with the French *Code civil*, the *Civil Code of Québec*, S.Q. 1991, c. 64 consecrates explicitly the *patrimoine*/patrimony as a foundational structure of knowledge for the civil law in observing, in the prominent art. 2 (1) of the Code, that “*Toute personne est titulaire d'un patrimoine*/Every person has a patrimony.”

34. Whatever the practical circumstances of its preparation, however, the English text of the *Civil Code of Québec* is not to be considered a translation if that is understood as conferring upon it a status less authoritative than that of a notionally original text. The Supreme Court of Canada has affirmed that the English text enjoys equal authoritative status, as a matter of Canadian constitutional law, with the French text : see *Doré v. Verdun (City)*, [1997] S.C.R. 862.

35. The currency of the term in civilian scholarship is well-established as the one seen as appropriate to express the theory of the *patrimoine* formulated by Aubry and Rau (although not everyone seems to think it translatable, including leading comparative expert Barry NICHOLAS, *French Law of Contract*, London, Butterworths, 1982, p. 29, where the French term is left in italics and explained, with some of the moral flavour drained out of it, as a “balance sheet”). Jurists with Quebec training are at peace with the pairing *patrimoine*/patrimony : see, e.g., C.B. GRAY, “Patrimony”, (1981) 22 *C. de D.* 81, especially at 101 *et seq.* Gray followed a grammatically correct usage in not using the definitive article “the” in his paper on “patrimony”. Idiomatically, civilian usage appears to prefer “the patrimony”, perhaps under the sway of the French-language *le patrimoine*. I am grateful to Aileen Doetsch for our discussion of this point.

the *Civil Code of Lower Canada*.<sup>36</sup> It is important to observe that for all the prominence that the *Civil Code of Québec* affords to the theory of the patrimony and the patrimony by appropriation, neither concept is defined there, which gives the work of Aubry and Rau (except on matters of the appropriation and division of patrimonies) heightened relevance.<sup>37</sup>

8. There is nothing modest about the scholarly ambitions of Aubry and Rau's text: the pages they devoted to the theory of the patrimony are not just the foundation for their work on successions, it is also the moral and philosophical anchor of the whole of theory of property (*les biens*). Arguably the patrimony has been a more solid and lasting conceptual basis than ownership itself (*la propriété*) which, since its renewed articulation as article 544 of the French *Code civil*, has suffered assaults on its theoretically absolute character, and inroads into its Romanist materiality. Ownership does indeed organize the law of real rights into a perfect architecture of dismemberments and modalities, but however important it is as an organizing construct for the law, it hardly speaks meaningfully to a world of wealth held in mutual funds and commercial paper.<sup>38</sup> The patrimony, on the other hand, organizes all rights (as opposed to things) having financial value—real, personal and intellectual—around the natural, legal, political and moral ideal of the “person”. It then draws them into a relationship with that person's financial obligations so that assets answer for liabilities as a moral postulate that makes capitalism in the liberal political tradition possible. The concept allowed for the assertion of the centrality of the human person, which emerged historically on the strength of property law and obligations, as a defining theme in modern

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36. John E.C. BRIERLEY, “Quebec Civil Law Codification Viewed and Reviewed”, (1968) 14 *McGill L.J.* 521, 535 *et seq.*

37. It bears mentioning that the theory of the patrimony of Aubry and Rau was explicitly cited as one of the inspirations of art. 2 C.C.Q. by the Minister of Justice responsible for presenting the Civil Code to the Quebec Parliament in 1991: *Commentaires du ministre de la Justice: Le Code civil du Québec*, t. 1, Quebec City, Publications du Québec, 1993, p. 5.

38. See Michael MCAULEY, “The Architecture of Entitlements”, (1996) 3 *Trusts & Trustees* 4, who argued that the civilian challenge to the trust was not fiduciary ownership—a “red herring” he rightly said—but a way for the patrimony to accommodate it.

civilian thought<sup>39</sup> and remains a living dimension of the civil law as it adapts to changing political and cultural circumstances around the world.<sup>40</sup>

9. The patrimony also defines itself by establishing its own negative space as extrapatrimonial rights.<sup>41</sup> By excluding (and thereby identifying *a contrario*) a person's rights and obligations that do not have economic value, be they the right to privacy, the right to vote, the alimentary obligation, or the right to life, the theory of the patrimony in fact takes on a pivotal role in describing virtually the whole range of *droits subjectifs* or legal rights known to private law in the French tradition. The advent of a sophisticated understanding of extrapatrimonial rights extending to what is today called "personality rights" is recent in French law: what is surprising in reading Aubry and Rau, and indeed a tribute to the incisiveness of their text, is that they foresaw the idea of extrapatrimonial right by reference to what they described as "innate property". These *biens innés* are not property in the conventional sense—they are not amenable of value in exchange and are generally not susceptible of exchange at all. A person can alienate the content of his or her patrimony at will, subject only to the obligation not to defraud creditors. But he or she cannot alienate innate property. The right to privacy, the right to integrity of the person and indeed the right to the patrimony itself, to name just these, are extrapatrimonially bound up in the person's very existence.

10. As a matter of substantive law, the patrimony is presented by Aubry and Rau as an abstraction—a notional container, held individually by every person, distinct from what it may or may not contain—that organizes itself and the

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39. See the explanation of how "the centrality of the person and the growth of rights" is part of property in civil law tradition in H.P. GLENN, *Legal Traditions of the World*, 3rd ed., Oxford, O.U.P., 2007, p. 141. Professor Glenn emphasized ownership in his account of the civil law tradition, although obliquely he does point to the patrimony in discussing the place of the trust in civilian thought.

40. See, e.g., David LAMETTI, "General Concepts of Private Law Relating to Private Property in the Civil Code of the Russian Federation and the Civil Code of Québec", (2005) 30 *Rev. Central & East European L.* 7.

41. For a fine overview of the distinction between patrimonial and extrapatrimonial rights which evinces a particularly careful use of language, see Eric REITER, "Personality and Patrimony: Comparative Perspectives on the Right to One's Image", (2002) 76 *Tulane L. Rev.* 673.

rights and obligations it contains as a “universality of law”.<sup>42</sup> On this basis, “patrimonial rights” (*droits patrimoniaux*) are synonymous with “property” (*biens*) when those rights are appropriated by a person. All legal persons have one, and only one, patrimony, whether or not they hold rights or obligations (and thus, again, the right to a patrimony is not itself property but an inalienable extrapatrimonial right, like the right to life itself); the patrimony is indivisible as a universality of law (although its composite parts can be divided up, even into “universalities of fact” in respect of which assets do not necessarily answer for liabilities). The connection between the person and the patrimony as a legal universality has been one of the unshakeable truths of French private law for which the Aubry and Rau remains the touchstone account.<sup>43</sup>

11. It is the personality of the holder that gives the patrimony its vocation in legal life which is itself an *affectation*: the appropriation to the purpose of serving the legal person to whom it is attached.<sup>44</sup> Aubry and Rau tolerate no other patrimony by appropriation (*patrimoine d'affectation*) except that tied to the person, which earned them the disdain of those who hungered for a more dynamic law of property in France. To detach the patrimony from the person and this fundamental

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42. Very often the definition of a universality of law is very closely tied to that of the patrimony, suggesting to some that the second might in fact be the only true example of the first. For a fine example of such a definition, see Gérard CORNU (ed.), *Vocabulaire juridique*, Paris, P.U.F., 1998, p. 860 (“Universalité 1.”). Aubry and Rau took a different view: see translation, *infra*, § 574.

43. In its expression of the view that the patrimony forms a whole that is necessarily connected to the person, “the theory of the patrimony find its most sublime expression” (transl.): Gérard CORNU, *Droit civil. Les biens*, 13th ed., Paris, Monchrestien, 2007, n° 5. But their account has never been accepted uncritically, notably from early twentieth century objections raised by René Demogue on the connection between the person and this universality: see, in this respect, Céline KUHN, *Le patrimoine fiduciaire. Contribution à l'étude de l'universalité*, unpub. doctoral thesis, Université de Paris I, 2003 (summary at <http://panjuris.univ-paris1.fr/pdf/resumekuhn.pdf>). I am grateful to an anonymous reviewer of the *Revue générale de droit* for bringing this reference to my attention.

44. It should be noted that most experts do not explain the patrimony tied to the person as having an explicit appropriation, although it most certainly does. Art. 2 (2) C.C.Q. provides that “[t]he patrimony may be divided or appropriated to a purpose, but only to the extent provided by law”. This is a further purpose or appropriation, other than the purpose of serving the person who, by reason of paragraph (1), has a patrimony. In this standard case, the patrimony is thereby appropriated to the purpose of serving the person as titular. That is its *affectation*.

vocation could only be achieved, on their view, at the expense of the interests of creditors. Assets within the universality of law, imagined as a fund, are subject to real subrogation and answer for obligations, present and future, that a person might take on. This centrality of the person is reasserted again at the confluence of the law of property, obligations, and persons, expressed prosaically in the idea that the property of a debtor forms the common pledge of his or her creditors. Sometimes called the “subjectivist” theory of private law, it was found to be “congenial”, as one scholar has brilliantly explained, for the useful brand of economic liberalism it promised rather more than for its coherence or the truth it stood for.<sup>45</sup> Aubry and Rau’s patrimony held out the universal transmission of a person’s property, without regard to its origin, upon death; it advanced unlimited individual liability of individual debtors; it built a model for holding property that was most plainly based on the human person as the paradigmatic holder of rights. That all of these were riddled with exceptions is less important than the moral posture struck by the authors: the theory of the patrimony of Aubry and Rau was, above all things, a product of the “dogma of the individual will, a dogma that explains law through subjectivity”.<sup>46</sup>

12. It is indeed this centrality of the person to the theory of the patrimony, much more than Romanist ownership, that sets the common law and the civil law so far apart in respect of the trust as a fundamental structure of legal knowledge.<sup>47</sup> To be sure, Romanist ownership cannot fathom the magic of Equity and its division of title between legal and equitable owners. But it is the indivisibility of the patrimony, and its necessary connection to the person, that precludes the separation of management and enjoyment of property so that each of the trustee and the beneficiary has patrimonial real rights in

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45. Roderick A. MACDONALD, “Reconceiving the Symbols of Property: Universalities, Interests and Other Heresies”, (1994) 39 *McGill L.J.* 761, 771.

46. F. ZENATI, *supra*, note 7, p. 671 (transl.).

47. Two leading texts make plain the necessity to adapt the theory of the patrimony in order to accommodate a dynamic trust in the conceptual language of the civil law, citing Aubry and Rau as the point of departure of their analysis: see Jacques BEAULNE, *Droit des fiducies*, Montreal, Wilson & Lafleur, 1998, n° 36 *et seq.*, and John CLAXTON, *Studies on the Quebec Law of Trust*, Toronto, Thomson-Carswell, 2005, n° 1.65 *et seq.*

the *res* of the trust. As long as the dogma of Aubry and Rau held, the English trust, in the fullest sense, was not possible in the French civil law tradition without undermining the moral postulate of individual responsibility for debts at the expense of creditors. The long struggle for civilians to have “trusts without equity”<sup>48</sup> or “trusts as patrimonies by appropriation”<sup>49</sup> required not a reconfiguration of title or of Romanist real rights, but an acceptance that the patrimony could be split in two (as in Scotland) or appropriated to a purpose other than a person (as in Quebec) for a civilian trust to exist.<sup>50</sup> But in both of these cases, the patrimony as an emanation of the person is defeated.<sup>51</sup> Somewhere in Strasbourg, two former patrimonies are spinning in their scholarly graves.

**13.** France has introduced, at article 2011 of the *Code civil*, a limited-purpose *fiducie* in 2007, but this was done in the most hesitant and “timid” fashion.<sup>52</sup> The French trust is a far cry from the foundational legal idea that the trust represent for English law—it is an “*opération*” (the word itself, so uncharacteristic for the *droit commun*, is a reminder of the exceptional character of a reform that had to struggle with general principle in order to be recognized).<sup>53</sup> A very narrow patrimony by

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48. On the impact of the trust in Scotland on the patrimony, see George L. GRETTON, “Trusts without Equity”, (2000) 49 *Int'l & Comp. L.Q.* 599.

49. For an account of how Quebec law accommodated the trust through the patrimony by appropriation, see John E.C. BRIERLEY, “The New Quebec Law of Trusts: The Adaptation of Common Law Thought to Civil Law Concepts”, in H.P. GLENN (ed.), *Droit québécois et droit français: communauté, autonomie, concordance*, Cowansville, Éd. Yvon Blais, 1992, p. 383.

50. There is an argument advanced by some that the effect of the detachment of the patrimony from the person is to redefine patrimonial rights completely. See, for a balanced discussion of the different views, Yaëll EMERICH, *La propriété des créances: approche comparative*, Paris, L.G.D.J., 2007, n° 532 et seq.

51. One of the most original efforts to save the foundations of the subjectivist theory in the face of the patrimony without a person as its titular has been developed by Madeleine Cantin Cumyn who has argued for the recognition of the patrimony by appropriation as a subject of law (*sujet de droit*). See Madeleine CANTIN CUMYN, “La fiducie, un nouveau sujet de droit?”, in Jacques BEAULNE (ed.), *Mélanges Ernest Caparros*, Montréal, Wilson & Lafleur, 2002, p. 129.

52. François Barrière observed upon the enactment of the Loi n° 2007-211 of Feb. 19, 2007, (*J.O.* Feb. 21 at p. 3052), that it took 15 years before “timidement” the trust was received into the *Code civil*: François BARRIÈRE, “La fiducie”, *D.*2007, n° 20 at p. 1346.

53. See Philippe MARINI, “Enfin une fiducie à la française!”, *D.*2007, n° 20 at p. 1347, in which the senator who piloted the French legislation to enactment takes



appropriation is now consecrated in France, but the protections provided by Aubry and Rau's link between patrimonies and persons are assured by other means, all of which limits the scope of the *fiducie*. Because it refuses to give up on the theory of the patrimony as the general rule, the French trust certainly fails to extend the scope of powers accorded to the trustee as legal owner in the common law, and does not try to conjure up a jurisdiction in Equity or a conscience for the court to limit the trustee's behaviour.<sup>54</sup> Less bold than the Scots and Quebec initiatives which were nevertheless cited as inspiration by the artisans of the French trust, the new rules end by asserting, perversely, the higher importance of the Aubry and Rau view of the patrimony as the general principle to which art. 2011 is only an exception. Like Maitland's causes of action, Aubry and Rau continue in some measure to rule the French law of property from their graves.

14. Do other legal traditions know Aubry and Rau's patrimony, such that it might not express much of any presumptive Frenchness of French law? Many of the ideas and functions of the patrimony would be recognizable to a common law expert. Certainly there is a long-standing habit of thinking of the trust as a fund, susceptible of a sort of real subrogation, and of certain qualities a civilian would associate with the patrimony.<sup>55</sup> But the idea of a universality of law, attached to a person and extending to all rights and obligations of economic value, itself indivisible, is hard to square with a tradition where regimes for seizure, tracing, bankruptcy and insolvency, and inheritance of real property, to name just these, make for a sort of patchwork of rules and

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pains to explain (with italics for the untranslatable and unnameable) that "la fiducie est donc proche du *trust* anglo-saxon dans ses effets, mais s'en distingue dans sa substance".

54. See Paul MATHEWS, "The French Fiducie: And Now for Something Completely Different?", (2007) 21 *Trust Law International* 17, at 24, who explicitly cites Aubry and Rau's theory of the patrimony as the reason France will not have a true trust, and the absence of that theory as a condition precedent to English law having one.

55. See the imaginative argument advanced in this volume by Lionel SMITH, "Trust and Patrimony". Sometimes a functional argument is presented: the trust may not be a patrimony in the French sense but this is of no consequence because a patrimony is "unnecessary": Paul MATHEWS, "From Obligation to Property, and Back Again? The Future of the Non-Charitable Trust", in David HAYTON, *Extending the Boundaries of Trusts and Similar Ring-Fenced Funds*, The Hague, Kluwer, 2002, 203, 215. I am grateful to Lionel Smith for our discussion of this point.

exceptions which cannot do the work of the general theory—a veritable “system” as it has been called—of Aubry and Rau’s patrimony. Just as it is hard to imagine the *droit subjectif* as having any *a priori* existence in English law, it is hard to argue that the patrimony exists as a purely intellectual concept tying together property, persons and obligations in the common law.<sup>56</sup> This abstract character of the patrimony is the key to identifying the importance of Aubry and Rau in French legal culture. By reason of the role that their theory plays in the law of property and persons, it stands as one of the best exemplars of the methodology of abstract rationality that characterizes French legal thinking. Aubry and Rau is, in some measure, the beginning of any understanding of French law, and it is not surprising that French law students start their studies here, as successive editions of various *Introduction au droit* books demonstrate.<sup>57</sup> It is not so much the style of Aubry and Rau, or the substance of their theory, but it is the baldly abstract character of their presentation—as incorporeal in some ways as the patrimony itself—that expresses what is so characteristically French about the text.

15. What part of the great genius of French law rests in this penchant for abstraction of which Aubry and Rau is such a telling exemplar? It is certainly a convenient quality for outsiders to fix on as they try to find the path of the law in France. Abstraction takes the law out of the courts and into the library by allowing the French to lift their law out of the messy Anglo-American judicial world of fact that is the common law’s grand laboratory. The French lawyer seems to look down at social ordering from a high rational perch of the patrimony where *droits subjectifs* tower over human experience in the national understanding of the *juridique*. The taste for abstraction that would champion the patrimony explains much more than the primacy of rights in French legal culture. The reliance on abstract rationality provides both a mode of reasoning and a

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56. On the significant absence of the *droit subjectif* in the common law, see Geoffrey SAMUEL, “Le droit subjectif and English Law”, (1987) 46 *Camb. L.J.* 264. I am grateful to Professor Samuel for our discussion of this point.

57. On the mischievous influence of these books upon free thought in France, see Christian MOULY, “Crise des introductions au droit”, (1986) *Droits* 109. Virtually all these standard texts currently in print record, in very similar hagiographic language, the central place of Aubry and Rau’s theory of the patrimony in private law.

theory of justice where fairness is measured by bloodless comparisons between the rights held by different titularies, rather than the impact of those rights on their lived lives. Abstraction also points to the overwhelming consensus that French law's dominant aesthetic is one of order. It explains the contented sense that law is best stated in disembodied enactment before it is discovered through experience. It accounts for the French law students' lust for formalism in law. It helps an outsider understand the supreme disinterest in earthy custom as an account of legal normativity. Abstract legal reasoning generates a lexicon for legal discourse drawn from the table of contents of the *Code civil* rather than from another's words and phrases, *et encore, et encore*. Abstraction as practiced so well by the likes of Aubry and Rau is the principal plaything of French law's professorate, whose lifeless but often profoundly beautiful expositions of the law—legal scholarship as “still life”!—dominate the French legal imagination, arguably as much than does the Code itself. The theory of the patrimony is essential reading to understand how the French jurist imagines the law of property, and Aubry and Rau's text on the patrimony are the French doors through which the scholarly tradition of abstract rationality can best be understood. The glass in these patrimonial doors is now very opaque—they are not really right on the substance of the law, and the formal virtues of the text are slender. But with some effort one can see not only French property law, but some of what makes France an epistemic community for law, with categories of thought, structures of legal knowledge and a way of speaking about law that evinces something different. So unequivocally French, this once-translated Germanic text, now translated again, can be henceforth appropriated by English-speaking readers to new purposes, like the patrimony itself. It might even encourage them to place new trust in French legal ideas.

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## ANNEX

[Translator's note : what follows is a translation of excerpts of Charles Aubry (1803–1882) and Frédéric-Charles Rau (1803–1877), *Cours de droit civil français d'après la méthode de Zachariæ*, 4th ed., t. 6, Paris, Imp. et lib. générale de jurisprudence Marchal et Billard, 1873, bearing on the patrimony taken from the portion of that work on successions. The internal references are to those referred to by the authors, in the original citation form and in keeping with the abbreviations established there. This translation forms part of the paper "Translating Part of France's Legal Heritage : Aubry and Rau on the *Patrimoine*". Translation was prepared by Nicholas Kasirer. The translator acknowledges with thanks the critical comments of Aileen Doetsch, Edmund Coates and Michael McAuley. © Nicholas Kasirer]

### OF RIGHT BEARING ON EXTERNAL OBJECTS, CONSIDERED AS ELEMENTS OF A PERSON'S PATRIMONY

#### I. OF THE PATRIMONY IN GENERAL<sup>1</sup>

##### INTRODUCTION

##### § 573.

##### Primary Notions as to the Patrimony<sup>2</sup>

The patrimony is the whole of the property of a person, imagined as forming a universality of law.

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1. The Redactors of the Code did not assemble the general rules relating to the patrimony in a single chapter. The rules which will be examined in this first section are scattered throughout the Code. It should also be observed that the word *patrimony* is used in the Code on very rare occasions. The term is only found in the provisions dealing with the separation of patrimonies. See arts. 878, 881 and 2221. As a rule, the aggregate of the property of a person, considered as forming a juridical whole, is designated in the Code by the expressions *the property, rights and actions*; or *all the property*; or simply *the property*. See arts. 724, 2092 and 2093. The term *bona* was used in Roman Law in this same sense. See L. 3, D. *de bon. poss.* (37.1); L. 83 and L. 208, D. *of V. S.* (50, 16).

2. The propositions found in the present paragraph elaborate on those already considered at § 162.

1° The idea of the patrimony deduces itself directly from that of personality. However varied the objects upon which man may have rights to exercise and however diverse they may be in their essential natures, when viewed as the subject of the rights of a determinate person, these objects are all under the free choice of one and the same will, the deployment of one and the same legal power. They constitute, by this very fact, a juridical whole (*universum jus*).

By nature purely of the intellect, the patrimony is necessarily composed of elements clothed with the same character. The external objects upon which the rights of a person bear are not parts integrating within the patrimony in and of themselves or by reason of their essential nature. Rather, they are part of the patrimony in relation to their status as property, and in relation to the utility they are susceptible of procuring.<sup>3</sup> As such, these objects all reduce to the common idea of pecuniary value.<sup>4</sup>

2° As a matter of pure theory, the patrimony is made up of all property, without distinction, including, in particular, innate property<sup>5</sup> and future property.<sup>6</sup>

French Law accorded itself with this theory in treating future property as virtually part of the patrimony, even before the property enters the patrimony as a matter of fact as articles 1270, 2092, 2122 and 2123 clearly indicate.

Yet French Law distanced itself from the theory with regard to innate property. Even while it considers actions arising out of harm to innate property to be parts integrating within the patrimony, our Law does not include within it innate property in and of itself so long as it has not suffered any harm.<sup>7</sup>

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3. *Naturaliter bona ex eo dicuntur quod beant. Beare est prodesse.* L. 49, D. de V. S. (50, 16).

4. In the language of Roman Law, the same term *pecunia* designated at once money coined of precious metal (*pecunia numerata*) and all the property in general which makes up the patrimony. *Quum pecuniæ significatione ad ea referuntur, quæ in patrimonio sunt.* L. 5, præ. D. of V. S. (50, 16). See also, L. 178, eod. tit.

5. It is from this point of view that the action in damages for wrongful interference with innate property can be justified rationally. ZACHARIÆ, *Manuel de droit français*, § 373, note 1; and *Quarante livres sur l'État*, III, p. 221, text and note 182.

6. The patrimony is, in its most exalted expression, the very personality of man considered in its relations with exterior objects upon which he has or will have rights to exercise. The patrimony encompasses not only property already acquired *in actâ*, but also property to be acquired *in potentiâ*. This is aptly expressed in the German word *Vermögen*, which means at once *capacity* and *patrimony*. A person's patrimony is his juridical authority, considered in absolute terms, free from any limits in time and space.

7. The expressions *property, rights and actions*; and *all the property*; and *the property* which one encounters at arts. 724, 2092 and 2093 plainly do not encompass innate property. The Redactors of the Code appear to have proceeded from the idea

There is more. According to our Code, rights to exercise authority considered independently of whatever pecuniary advantages may be attached to them are not to be seen as forming part of the patrimony<sup>8</sup>.

3° Viewed as an aggregate of property or of pecuniary values, the patrimony gives definitive expression to the idea that property represents such value. In order to determine the content of the patrimony, liabilities must absolutely be deducted from assets.<sup>9</sup> However, a situation where the liabilities exceeded the assets would not cause the patrimony's existence to cease: it encompasses the debts just as it encompasses the property.<sup>10</sup>

4° Given that the patrimony is at once an emanation of legal personality and the expression of a person's legal prerogatives, it follows therefrom:

That only physical and legal persons can have a patrimony,<sup>11</sup>

That all persons necessarily have a patrimony, even if, at any given moment, they possess no property;

That any one person can have only one patrimony, in the essential sense of the term.

#### § 574.

### **Of the Unity and Indivisibility of the Patrimony — Of Universalities of Law that can be distinguished from the Patrimony**

1° Like legal personality itself, the patrimony is, in principle, one and indivisible. This is true not only from the perspective indicated at the end of the preceding paragraph, that the same person can only have one patrimony. It is also true in the sense that the patrimony of a person is not divisible into material or quantitative parts because of its incorporeal nature and that, by reason of the unity of the person, the patrimony is not even susceptible of

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that such property is priceless and thus must be excluded from the patrimony because it is not, in itself and *a priori*, susceptible of pecuniary evaluation, and may only occasion such an evaluation where it has sustained some harm and, then, only in the amount of such harm.

8. Rights to exercise authority are not part of the patrimony in Roman Law either. See L. 5 *præ.*, D. *de V. S.* (50, 16); Law of the Twelve Tables, tab. V. frag. 3.

9. *Bona intelliguntur cujusque, quæ deducto œre alieno supersunt.* L. 3, D. *de V. S.* (50, 16). See also L. 88, D. *eod. tit.*

10. *Nam, sive solvendo sunt bona, sive non sunt, sive damnum habent, sive lucrum, in hoc loco proprie bona appellabuntur.* L. 3, *præ.*, D. *de bon. poss.* (37, 1).

11. It is for this reason that slaves, deprived of personality, did not have a patrimony in Roman Law, but only a *peculium*. *Paterfamilias liber peculium habere non potest, quemadmodum nec servus bona.* L. 182, D. *de V. S.* (50, 16).

division into several universalities of law, distinct from one another. As to this last however, our Old Law was to the contrary, in matters of intestate succession, testamentary gifts and even gifts *inter vivos*, considering moveables, acquests and private property there as distinct universalities of law within the same patrimony.<sup>12</sup> But article 732 now precludes this kind of division of the patrimony, having abolished all distinctions between moveables, acquests and private property, even in matters of the law of succession.

According to Zachariæ, whose scholarly opinion we have adhered to in the past, a person's patrimony may be divided into an immoveable patrimony, encompassing the entirety of his immoveables, and a moveable patrimony, enclosing the entirety of his moveable property. This distinction would have certain practical advantages in Zachariæ's view, in the field of privileges and hypothecs, in community of property between spouses, and in respect of dispositions of property by gratuitous title.<sup>13</sup>

But it is an affront to reason that the patrimony, whose elements are purely of the intellect, could be open to a division which would rest upon the physical attributes of the objects which it happens to encompass. Moreover, whatever practical advantage arises out of this kind of division is more apparent than real.

Turning first to matters relating to privileges and hypothecs, it is clear that while certain privileges extend to all moveable property, and while legal and judicial hypothecs can be exercised against all immoveables, these rights of preference bear far less upon distinct juridical universalities within the patrimony of a debtor than upon each and every one of the specific moveables and immoveables which belong to him, according to the qualities according to nature and the legal characteristics that distinguish them from one another.

The same observation may be made regarding the matrimonial regime of the community of property. Moveables and immoveables are divided up—moveables in the common mass, immoveables excluded therefrom—based on particular qualities which distinguish them from one another rather than on their abstract character as property.<sup>14</sup>

12. See POTHIER, *Des donations entre vifs*, sect. III, art. 1, § 2.

13. See ZACHARIÆ, *Manuel de droit civil français*, § 574, text and note 2.

14. It would be pointless to argue for the contrary position, that moveable debts also fall into the common mass, since it is as property that moveables are considered part of the community pursuant to the rule *Bona non sunt, nisi deducto ære alieno*. Art. 1409, 1<sup>o</sup>. Indeed, if this rule had been taken as a guide for the liquidation of liabilities of the community, these liabilities would include all debts, both immoveable and moveable, in proportion to the comparative value of the moveables against that of the immoveables. By limiting community property to moveable debts and excluding immoveable ones, the legislator did not follow the latter rule strictly. The

In the final analysis, article 1110 is the only provision of our Code where a trace of the division of the patrimony into two juridical universalities—one moveable, the other immovable—remains. This article directs that a legacy, be it of all immovables, of all moveables or even of a fixed portion of immovables or moveables, is a legacy by general title.<sup>15</sup>

2° Although the patrimony is, in principle, one and indivisible, our Law nevertheless recognizes the existence of certain other universalities of law that must be distinguished from it. It is thus that the property within a succession is, in some respects, separated from the patrimony of the heir due to the benefit of inventory or separation of patrimonies even though the property remains, in reality, part of the heir's patrimony.<sup>16</sup> It is again thus, in the cases provided for by articles 351, 352, 747 and 766, that property which certain persons are called upon to receive back from a succession forms a universality of law distinct from the complex of moveables and acquets in the succession. In the same way, property held by an absentee at the time of his disappearance or the time he was last heard from constitutes, after a court order to take provisional possession, a universality distinct from the patrimony of the absentee and, after the order to take absolute possession, a universality distinct from the patrimony of the person taking possession.<sup>17</sup> And, finally, in many respects, property encompassed within a mass fixed inalienably to the line of those who succeed to a title of nobility or encompassed within a fideicommissum by general or by universal

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legislator simply proceeded from the idea that liabilities must be treated in the same way as assets, as directed by the rules of equity. Proof beyond question of this is that debts, even moveable debts, do not fall into the community except, and even then only with compensation, when they relate to immovables that are private property of the spouses. One must interpret article 1414 in the same way, which in no way contradicts our position. As Pothier, from whence this article of the Code was taken, explains so well (*De la communauté*, n<sup>o</sup> 267), this does not represent an exception to the rule at article 1409, n<sup>o</sup> 1, it is rather just a repetition of the final provision, of that subdivision of the article, according to which compensation is due to the community for moveable debts relating to immovables which are private property.

15. Article 1110 was borrowed from Pothier (*Des donations testamentaires*, chap. III, sect. I, § 2), who taught that all property of a given species (*genera subalterna*), contained in the general universality of property of a person, also forms a universality of property. This explanation, worthless in the eye of reason, might, to some extent, have been valid under the rules of our Old Law, which saw moveables, acquets and private property, within one and the same person's patrimony, as each constituting distinct universalities of law. But, today, the characterization of a legacy consisting of all ones moveables or of all ones immovables as a legacy by general title is an oddity and cannot be justified as a matter of legal theory.

16. See art. 802, § 618; arts. 878 to 882, and § 619. ZACHARIÆ, § 573, text n<sup>o</sup> 1, *in fine*.

17. See in respect of the right of return, § 608. See in respect of the property relinquished by the absentee, §§ 152 and 157.



title forms a universality of law, distinct from the patrimony of the titulary of that mass<sup>18</sup> or fideicommissum,<sup>19</sup> as the case may be.

3° It may be observed, as a final matter, that while the patrimony, being an incorporeal entity, is not divisible into material or quantitative parts, it can nevertheless be divided, as an aggregate of property, into intellectual parts or fractional shares. This division takes place in particular in the case of a legacy by general title bearing upon an aliquot share of a succession. See article 1110.

### § 575.

#### Of the Fungibility of the Elements of the Patrimony — Of Real Subrogation

1° Through their quality as property, the elements which make up the patrimony may all be reduced to the common idea of pecuniary value. It is precisely this last which clothes them, in regard to each other, with the character of fungible things.

It is this character that both explains and justifies the theory that damages are payable for non-performance of an obligation to do requiring the debtor's personal intervention. It also explains and justifies why compensation is due for loss caused by delict or quasi-delict.<sup>20</sup> The same may be said of the action *de in rem verso*, which will be addressed below in § 578, and of real subrogation, to which we will devote the remainder of this paragraph.<sup>21</sup>

2° Taken in its broadest sense, real subrogation is a fiction according to which one object replaces another so that it becomes the property of the person who owned the first object and is clothed with that object's juridical nature.<sup>22</sup>

This fiction is justified, as we have just said, by the fungibility of objects within a given universality of law. Whatever their diverse origins may be, these objects are susceptible of replacing one another. Where an act resulting respectively in the alienation and acquisition of property causes an object to leave a universality of law, it stands to reason that the alienated object be replaced, as an

18. Comp. Decree of March 1st, 1808, arts. 40 *et seq.*, and § 695; ZACHARIÆ, § 573, text and note 4.

19. See L. 70, § 7, D. de leg., 2<sup>o</sup> (31); arts. 1048 *et seq.*, and § 698.

20. Comp. art. 1142 and § 299, text, lett. *c*; arts. 1382 and 1383, and § 443 *et seq.*

21. On this subject, see RENUSSON, *Traité des propres*, chap. I, sect. x, and *Traité de la subrogation*, chap. I, n<sup>os</sup> 3 and 4; *Rép.*, of MERLIN, see Subrogation of things; *De la subrogation réelle*, by FLACH, Paris, 1870, broch. in-8.

22. Subrogation is real when it operates from thing to thing. It is so designated to distinguish it from personal subrogation which operates from person to person. See § 321. Demolombe mistakenly attributes to us the view that personal subrogation operates in the instance provided for in article 747. We do not see, and we have never seen in it anything but a real subrogation.

element forming part of this universality, by the object so acquired. The rule *In judiciis universalibus, pretium succedit loco rei, et res loci pretii* gives expression to this idea.<sup>23</sup>

It follows from the rule that, at the time the universality of law is delivered-over or returned, the one to whom this must be made will always then have the right to require the handing over of the object that replaced the object which left the universality. Whether he is also obliged to content himself with the object acquired as a replacement for the alienated object, or whether he is permitted to claim either the object itself or its value in damages, as the case may be, depends on the circumstances. These circumstances include, in particular, the good or bad faith of the person upon whom rests the obligation to return or deliver-over and of third persons in favour of whom the alienation was granted.<sup>24</sup>

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23. The scholars within our Old Law generally recognized this rule, justifying their view on Law 70, § 7, and on Law 71, D. *de leg.*, 2<sup>o</sup> (31). LOUET, lett. S, Som, X. Henrys, II, liv. IV, chap. VI, quest. 28, n<sup>o</sup> 8. BRILLON, *Dictionnaire des arrêts*, III, see Subrogation, n<sup>os</sup> 43 and 43 bis. RENUSSON, *De la subrogation*, chap. 1, n<sup>os</sup> 3 and 4. Here are the texts of these two laws which appear indeed to consecrate the principle of real subrogation: *Quum autem rogatus, quidquid ex hereditate supererit, post mortem suam restituere, de pretio rerum venditarum alias comparat, deminuisse, quæ vendidit non videtur. — Sed quod inde comparatum est, vice permutati domini restitueretur.* The author of the entry *Subrogation of things* in the *Rép.* of Merlin sought however to demonstrate the contrary position. According to this author, the laws directed simply that the fideicommissary was to be considered to be as rich as if he had not sold, and ends up bound to give satisfaction for the value of the things he alienated. And, in support of his opinion, he cited the Law 72, D. *de leg.*, 2<sup>o</sup>, which follows those previously cited, as well as Law 25, § 1, D. *de hered. pet.* (5, 3). But the first of these, according to which the fideicommissary who paid his own creditors out of the proceeds of sale is bound to restore this value, serves to confirm rather than contradict the principle of subrogation. As to the argument based on the Law 25, § 1, D. *de hered. pet.* which stipulates “*Item si rem distraxit, et ex pretio aliam rem comparavit, veniet pretium in petitionem hereditatis, non res, quam in patrimonium suum convertit*”, it is more specious, but not at all convincing. If this Law, which begins by recognizing the subrogation of the price to the thing, does not also recognize the subrogation of the thing to the price, it must be based on the assumption that this thing has indeed entered the patrimony rather than the succession of the person who held it, as had been the case under Law 20, § 1, D. *eod. tit.* where, in situations in which the acquisition was of no use to the succession, the heir had no interest in claiming the thing purchased in the place and stead of the thing alienated. Moreover, whatever one's views of the state of Roman Law on point, the rule set forth in the text must nevertheless be considered as justified in theory and consistent with tradition. While our Code did not reproduce the rule as a general matter, it does however include various provisions which are only applications of the rule and which presuppose the rule's existence. See arts. 132, 747, 766, 1697. ZACHARIÆ, § 573, text n<sup>o</sup> 3.

24. We will content ourselves with referring the reader, for the applications of these propositions, to the subject-matters of absence, the assignment of successional rights, of the petition of heirship, and of the separation of patrimonies. See art. 132, and § 157; art. 1697, and § 359 *ter*, n<sup>o</sup> 1; § 616, text n<sup>o</sup> 3, lett. *a*, and text n<sup>o</sup> 5; § 619, text n<sup>o</sup> 3.

By virtue of the subrogation, the subrogated object assumes not only as a matter of fact the place, within the universality, which was occupied by the object to which it is substituted, but is also clothed, as an element of this universality, with the object's juridical nature. *Subrogatum sapit naturam subrogati.*<sup>25</sup>

Subrogation assumes, in fact, that the origin and identity of the object claimed, by virtue of its operation, to be an element of this or that universality, will duly be established.<sup>26</sup>

On the other hand, subrogation being just a fiction based on the fungibility of the elements which make up one and the same universality of law, it can only but operate between two objects, one of which having replaced the other as an element of this sort of universality, being claimed pursuant to a *judicium universale*. If, to the contrary, the issue is one of the exercise of an action bearing on one or more particular things, taken in and of themselves, rather than an action bearing on a universality of law or on the elements that compose it, then the prior noted fiction would lack foundation and subrogation by the sole operation of law will not occur. *In judiciis singularibus, pretium non succedit loco rei, nec res loco pretii.*<sup>27</sup>

The same would hold with respect to objects which are part of a universality of fact (*universum corpus*), such as a library, a herd or the stock-in-trade of a business.<sup>28</sup>

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25. Particularly in this respect, the system of the property termed private had given rise to an extensive development of real subrogation under our Old Law. The maxim quoted in the text continues to enjoy numerous applications today. We have already noted the examples of investment and re-investment in community of property between spouses and in the dotal regime. See § 507, text n<sup>o</sup> 3, lett. c; § 543, text n<sup>o</sup> 3. We will note others below when we deal with the successorial return and fideicommissary substitutions. See § 608, text n<sup>o</sup> 2; § 696, text n<sup>o</sup> 2, lett. c.

26. This proposition will be elaborated upon at § 608, text n<sup>o</sup> 2 and § 619, text n<sup>o</sup> 3 relating to the successorial return and the separation of patrimonies. See the exception indicated in the text and note 11, *infra*.

27. This is plainly established by numerous texts of Roman Law. "*Nummus ergo qui redactus est ex pretio rei furtivæ, non est furtivus.*" L. 48, § 7, *D. de furtis* (47, 2). "*Si ex ea pecunia, quam deposueras, is, apud quem collocata fuerat, sibi possessiones comparavit, ipsique traditæ sunt, tibi vel omnes tradi, vel quasdam compensationis causa, ab invito eo in te transferri, injuriosum est.*" L. 6, *C. de rei vind.* (3, 32). See also: L. 4, *C. com. utriusque jud.* (3, 38); L. 8, *C. si quis alt. vel sibi* (4, 50); L. 12, *C. de jur. dot.* (5, 12). This also reflects the teachings of the scholars within our Old Law cited at note 4, *supra*, and ZACHARIÆ, § 573, text and note 55.

28. Given that such universalities are made up only of objects similar in their essential nature, it is impossible to apply the rule *Pretium succedit loco rei* to them. And if, in actuality, a given book were to enter a library collection as another leaves it for example, as a result of an exchange, this is not to say, merely on this basis, that the first will be subrogated to the second, since enters the library far less as replacing of the other, than as, by its very nature, and by the purpose given to it by the owner, an integrating part of the same universality of fact.

While the scholars within our Old Law rejected in principle that real subrogation would operate in the case of a *judicium singulare*, they taught, however, that this principle could find an exception by virtue of a law or an agreement. This sort of exception is encountered frequently according to our present Law, with respect to community of property between spouses and the dotal regime.<sup>29</sup>

It is for this reason, among others, that under article 1407, an immovable acquired in exchange for the immovable of one of the spouses, that was held as private property, does not come under the community as an acquet. Instead it is subrogated, by the sole operation of law, as private property, to the immovable that has been alienated. Also, the immovable received in exchange for a dotal immovable is also characterized as dotal, according to article 1559.

It is thus as well that an immovable acquired when the community applies, by re-investing the funds generated from the alienation of private property of one of the spouses, remains private, on condition that the act of acquisition records that the immovable was acquired as a reinvestment, and that the reinvestment was accepted by the married woman where the immovable that was alienated was her private property. It is not, however, necessary that the funds which acquitted the acquisition itself be the very ones which were paid into the community as the price of the property sold.<sup>30</sup> Articles 1434 and 1435.

Lastly, we also mention, as an exceptional case of real subrogation, that provided by the last paragraph of article 1558. The

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29. The masses of private property of each of the spouses do not form, under the community of property regime, juridical universalities distinct from the spouses' respective patrimonies. Similarly, the patrimony of the married woman under the dotal regime is not divided into two universalities of law, one made up of dotal property, the other made up of paraphernal property. Contrary to Zachariae's mistaken suggestions (§ 573, text *in fine*), there could thus be no question that subrogation in matters of private property or dotal property, is an application of the rule *In judiciis universalibus, pretium succedit loco rei, et res loco pretii*. It represents instead a true exception to the rule which works in the inverse direction. The provisions of law which enshrine or allow for subrogation with respect to subject matters of this type appear to have been introduced into our Old Law as a generalization and approbation of marriage covenants relating to the investment of monies that were private or dotal property brought into the marriage, or again as re-investment of the proceeds of alienation, of immovables that were private or dotal property undertaken during the marriage. The Redactors of the Code were correct in following the past traditions in this respect which are perfectly justified from a practical point of view.

30. See § 507, text n<sup>o</sup> 3, lett. c, and note 61. The latter proposition set forth in the text represents a significant exception to the established rule, text and note 7, *supra*. This exception was permitted to facilitate re-investment, which could seldom take place, and would thus only have been of a most limited usefulness, had it been subject to the condition that the funds used to acquit the price of replacement property as acquired in re-investment be of the very ones from the alienation of the private property sold.

excess proceeds of sale of a dotal immoveable which has been alienated to meet the needs of the spouses remains dotal property, once those needs have been met, just as do the immoveables acquired as a re-investment of this excess.

Beyond the exceptional circumstances where, contrary to the rule *In judiciis singularibus, pretium non succedit loco rei, nec res loco pretii*, a law itself establishes real subrogation or at least authorizes it under certain conditions, this fiction must be rejected as lacking all rational and legislative foundation.<sup>31</sup>

### OF THE PATRIMONY CONSIDERED AS THE SUBJECT OF RIGHTS

#### § 576.

#### Of Real Rights which may bear upon the Patrimony

The patrimony, as a universality of property, is founded on legal personality, yet it is distinct from the person himself. It is possible therefore to conceive the existence of a relationship between the person and the patrimony. This relationship is the same one that is established between a person and any object belonging to that person. It is a right of ownership.

The right of ownership is the only real right which may bear upon the patrimony, during the lifetime of the person to whom the patrimony belongs.<sup>32</sup> The patrimony can be neither subject to the right of usufruct or of use, nor can it be subject to privileges or hypothecs.<sup>33</sup>

It is true that a person may come to be the holder of a right of usufruct bearing on all the property in the patrimony of another person. It is in this manner that a father's or mother's legal enjoyment extends, as a general rule, to all the property of his or her children. It is in the same manner as well that a person may be called upon by will to exercise a right of usufruct on all of the property left by the

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31. RENUSSON, *op. et loc. cit.*, ZACHARIÆ, § 573, text and note 5. BORDEAUX, 20 May 1830, Sir., 30, 2, 248. Comp. Angers, 13 March 1867, Sir., 68, 2, 273. Zachariæ errs in saying that (*loc. cit.*), the decisions of the Court of Cassation and the Court of Grenoble cited in note 10 of § 283 are rendered in application of the proposition set forth in the text. In the event that fire strikes a hypothecated building, the hypothecary creditors have no right of preference to exercise on the indemnity paid by the insurer. Yet this is far less by virtue of the rule *In judiciis singularibus, pretium non succedit loco rei*, as it is due to the equivalence of the indemnity to the premiums paid by the insured and not to the price of the immoveable struck by fire.

32. At his death, it becomes the object of a right of succession. See §§ 582 and 583.

33. The aggregate of the property of a person amounts to a universality of law only because that aggregate might be said to be confounded with his personality. During the lifetime of the person, the very essence of the patrimony is such as to preclude that it be considered as forming the object of a real right held by a third person. Comp. however ZACHARIÆ, § 579.

testator. But, in circumstances of this sort, the enjoyment or the usufruct bears far less on the patrimony as a universality of property but instead on the objects taken individually that are encompassed within it. As well a legatee, in usufruct only, of all or an aliquot share of the property of a person should not be considered to be a universal legatee or a legatee by general title, for is he not, in truth, merely a successor by particular title.<sup>34</sup>

The same observation applies to privileges or hypothecs bearing on either all the moveables or on all the immoveables in a patrimony, all the more that the aggregate of the moveables or the aggregate of the immoveables do not constitute universalities of law distinct from the patrimony which encompasses them.

As for the right of pledge established by article 2092 in favour of the creditors and bearing on all the property of their debtor, it is not a real right. This pledge can only be exercised on the determinate objects which come under the patrimony, even though it appropriates the patrimony in itself.<sup>35</sup>

## § 577.

### **Of the Nature of the Right of Ownership that belongs to Every Person in respect of his Patrimony**

The right of ownership that every person enjoys over his *patrimony* is itself also called patrimony. We use the term in this paragraph in this sense here except where otherwise indicated.

1° A person does not acquire his patrimony. It is his innate property in that it is part of his very personality. Its existence does not depend on whether or not he actually holds property.<sup>36</sup>

Individuals who have no property or who only possess a small amount are called indigents. Indigents enjoy a number of exemptions as a consequence of their status, or certain privileges<sup>37</sup>, notably that of judicial assistance.<sup>38</sup>

34. PROUDHON, *De l'usufruit*, II, 475 and 476. See § 175; § 232, text and note 5; § 621 *bis*, text n<sup>os</sup> 1 and 2, notes 11, 14 and 22; § 714, text n<sup>o</sup> 3, notes 16 and 17.

35. See the justification and detailed exposition of these propositions at § 579.

36. ZACHARIÆ, § 575, text *in fine*.

37. See the Law of 14 Brumaire 14 year V, and the *Code of Criminal Procedure*, art. 420; Order of 13 Frimaire year IX; Decision of the Conseil d'Etat of 13–20 March 1810; the Law of 3 July 1846 (income budget) art. 8; Law of 10–27 November and 10 December 1850 having the purpose of facilitating the marriage of indigents, the legitimation of their children, and the withdrawal of these children confided to hospices; Decision of the Minister of Finance and Directive of the Commission of 3 September and 3 November 1861, Sir. 62, 2, 184. See also the Law of 4 June 1853, on the composition of juries, art. 5.

38. Law of 29 November, 7 December 1850 and 22 January 1851 on judicial assistance. Comp. study of this law by DOUBLET, *Revue pratique*, 1852, XIII, p. 481,

2° The patrimony is inalienable. The very idea of the alienation of the patrimony is nonsensical given that it has no freestanding and autonomous existence. The patrimony cannot therefore be conceived in isolation from the person to whom it belongs.<sup>39</sup>

The principle of the inalienability of the patrimony, so incontrovertible from a theoretical point of view, has been implicitly enshrined by our *Civil Code*. Quite apart from their basis as a matter of morality or political economy, the provisions of this Code which render without effect *inter vivos* dispositions of one's rights as to an unopened succession find their legal justification in the inalienability of the patrimony.<sup>40</sup>

In actual fact, the new legislation is in keeping with the principles of our Old Law, in that it allows one to dispose in a marriage contract, by universal and by general title, of future property or of present and future property.<sup>41</sup> But this is merely an exception originating in the favour always shown to marriage contracts in France.<sup>42</sup>

One of the consequences of the principle of inalienability of the patrimony is that even when an *inter vivos* gift might extend to all present property of the donor, it nonetheless bears only on objects taken individually. Accordingly, the donee is not bound, of right, to pay the debts of the donor because he is merely a successor by particular title.<sup>43</sup>

3° Just as a person may not, during his lifetime, voluntarily abandon his patrimony, neither may he be deprived of his patrimony against his will. The patrimony is lost only when a person loses his legal personality, at the time he loses life itself.<sup>44</sup>

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XIV, pp. 63 and 299. By reason of diplomatic convention, the benefit of judicial assistance was successively extended to the Swiss (decree of 19 October 1869), to the Italians (decree of 29 February 1870), to the Bavarians (decree of 7 May 1870), and to the Belgians (decree of 8 June 1870).

39. DEMOLOMBE, XX, 455. ZACHARIÆ, § 576, text n° 3.

40. See arts. 791, 1130 and 160; § 344, text and notes 13 to 22. ZACHARIÆ, § [576], text n° 3 *in fine*.

41. See arts. 1082 to 1085 and 1093; §§ 739 to 742.

42. The provisions of the Code relating to universal partnerships in general, and in particular, to community of property between spouses, in no way contradict the principle of inalienability of the patrimony. By establishing a universal partnership, one in no way alienates one's patrimony. ZACHARIÆ, § 576, note 2, *in fine*.

43. See § 706 for the explanation of this proposition.

44. Pursuant to the legislation in force prior to the Law of 31 May 1854, civil death constrained, within very narrow limits, the capacity of the person civilly dead, and caused him to lose ownership over the property he held at the time it was pronounced. But it did not deprive him of his personality nor did it deprive him, by extension, of his patrimony, which is envisaged as an incorporeal entity distinct from that property. Comp. § 82, text and note 2, text n° 3, lett. b. See for an opposing view: ZACHARIÆ, § 578, text *in principio*. Furthermore, the general confiscation of property, for which the *Penal Code* of 1810 provided ample authority, did not bring about the

The loss of the patrimony itself is one matter, the loss of property contained in a patrimony, understood as a universality of law, is quite another. This property may be lost either by the effect of the extinction of the rights bearing on determined objects, without any compensation, or else when the objects upon which the rights bear perish, as they might by reason of a fortuitous event or superior force.<sup>45</sup> We refer the reader, here, to the paragraphs treating the matter of extinction of different kinds of rights that man may have on things or against persons,<sup>46</sup> and to the explanations of the rule *Res perit domino*<sup>47</sup> and the exceptions to that rule.<sup>48</sup> We would add, nevertheless, to the exceptions already indicated, those found in articles 410 and 429 of the *Code of Commerce*.<sup>49</sup>

4° Understood as forming the object of a right of ownership, the patrimony is absolutely indivisible. Different in this respect from the patrimony considered as a universality of law, the patrimony envisaged as the object of ownership is not even susceptible of being divided into intellectual parts or fractional shares. The rule in Roman Law, *Nemo pro parte testatus pro parte intestatus decedere potest*, is founded upon the indivisibility of the patrimony. If this rule has not been adopted in French Law, it is solely because the deceased is, *ipso jure*, represented in all respects, both actively and passively, by his intestate heirs, even when those heirs find themselves competing against universal legatees or legatees by general title.<sup>50</sup>

Moreover, in the paragraphs that follow, we shall have the opportunity to indicate some important consequences flowing from the indivisibility of the patrimony, considered as an object of the right of ownership and of the right as to a succession in our present legislation.

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loss of patrimony. This confiscation was abolished by article 66 of the *Charter* of 1814, the relevant provision being reproduced in article 57 of the *Charter* of 1830. The edition of the *Penal Code* promulgated in 1832 harmonized provisions of this Code with corresponding changes introduced in the legislation.

45. ZACHARIÆ, § 578, text and note 2.

46. See principally §§ 220, 234, 255, 292 and 293, 314 *et seq.*, 549, text n° 4.

47. See arts. 1148, 1302, 1810, 1827, 1893, 1929; § 308, text n° 3, and § 331.

48. See arts. 1302, 1379, 1807, 1822, 1881 and 1882, 1929; § 308, text n° 3.

49. Can this exception be extended by analogy? If, for example, in the case of fire, a house were to be demolished as a safety measure to prevent the spread of flames to neighbouring houses, would the owners of saved houses be bound to compensate the owner of the house that was destroyed? A negative answer appears to us to be indisputable. See in this sense: TOULLIER, XI, 180; MERLIN, *Rép.*, see Fire, § 2, n° 11. Zachariæ (§ 578, text and note 3) is mistaken where he attributes the opposing view to Merlin.

50. ZACHARIÆ, § 575, text *in medio*.



## § 578.

**Of Prerogatives Inherent to the Right of Ownership  
that Every Person enjoys in respect of his Patrimony,  
Considered as a Universality of Property**

This right of ownership notionally comprises the following prerogatives :

1° The prerogative to administer the patrimony, that is to say to undertake all measures and accomplish all juridical acts that endeavour to preserve or increase the patrimony or take any advantage that the patrimony might procure.<sup>51</sup>

2° The prerogative to collect the income of the patrimony.

This income is considered to be an inherent part of the patrimony that produces it. This reflects the rule *Fructus augent hereditatem*. Set down in numerous texts of Roman Law,<sup>52</sup> this rule also finds expression in the *Civil Code*.<sup>53</sup> With the exception of the petition of heirship, specifically regulated by article 138,<sup>54</sup> the rule must be respected in the other situations where one is to determine all that is comprised by a succession. It would seem to us that the rule applies in particular to the separation of patrimonies, the

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51. The *Civil Code* often makes use of the expressions *right to administer, acts of administration, acts of pure administration* without, however, indicating the precise ambit of this right or of these acts, either by way of a general definition or through specific provisions of the Code. Comp. arts. 125, 450, 481, 482, 1428, 1449, 1536, 1578 and 1998. The definition that is found in the text, however vague, is the only one possible for the right to administer and for the acts of administration. Moreover, the question as to whether any given act be classified in the category of acts of administration cannot be resolved in a general or absolute sense. The classification only occurs *secundum subjectam materiam*. A judge who faces this kind of question must never lose sight of the variety of circumstances in which, according to the spirit of the law, different persons find themselves charged with the right to administer the patrimony of others by the Code. The judge must also keep in mind those circumstances in which the Code only provides persons with the right to administer their own patrimony, while prohibiting them from exercising the power to dispose of it. Comp. § 113, text and note 1; § 123, text and note 28; § 132; § 153; § 412; § 510; § 516, text n° 7; § 531, text n° 2; § 535, text n° 1. ZACHARIÆ, § 576, text and note 1.

52. See L. 20, § 3, L. 40, § 1. D. *de hered. pet.* (5, 3); L. 11, D. *fam. ercisc.* (10, 2); L. 178, § 1, D. *of V. S.* (50, 16); L.2. C. *de hered. pet.* (3, 31); LL.9 and 17. C. *fam. ercisc.* (3, 36).

53. See arts. 1005 and 1697. Article 138, by placing the possessor of a succession on the same footing as the possessor of a particular thing, and recognizing for the former, as articles 549 and 550 recognize for the latter, the right to appropriate fruits collected in good faith, seems to have rejected one of the consequences of this rule. But it would not be justified to conclude that the legislature intended to abolish it completely. Rightly interpreted, article 138 must be considered instead as an exception to the provision of the Law 28, D. *de hered. pet.* (5, 3): "*Omne lucrum auferendum esse, tam bonæ fidei possessori quam prædoni, dicendum est*" rather than as a derogation from the rule *Fructus augent hereditatem*.

54. See § 158, text and note 10; § 618, text n° 3, lett. e.

action for the partition of a succession, and to the remittance of a legacy by universal or general title.<sup>55</sup>

3° The prerogative to dispose of the whole or an aliquot share of the patrimony by will.<sup>56</sup>

4° The prerogative to claim the restitution of objects or things to value that belong to the patrimony by way of personal action that may be characterized as an action *de in rem verso*.<sup>57</sup>

The action *de in rem verso*, for which only particular applications are found in the *Civil Code*,<sup>58</sup> must be understood generally as a sanction of the rule of equity that directs that it is prohibited to enrich oneself at the expense of another.<sup>59</sup> This rule applies in all cases where the patrimony of a person is enriched, without legitimate cause, to the detriment of the patrimony of another person, and where the latter has no action, arising either out of contract, quasi-contract, delict or quasi-delict, to secure what is his or what is owed to him.<sup>60</sup>

Where one patrimony has been depleted to the benefit of another, the action *de in rem verso* seeks to obtain the restitution of the object itself in circumstances in which no obstacle of fact or of law prevents restitution in kind. Alternatively, restitution is made in value as a substitute for the object. To determine this value, one must, in principle and in the absence of a legal provision to the contrary<sup>61</sup>, calculate the amount from the time of the introduction of the action *de in rem verso* and not from the moment at which the obligation of restitution arose. Unlike the action *negotiorum gestororum contraria*, the action *de in rem verso* is generally only available up to the amount of what remains of the enrichment in the defendant's patrimony at the time of the introduction of proceedings.<sup>62</sup>

55. See § 619, text n° 3, notes 18 and 19; § 624, text n° 3 and note 23; § 719, text and note 1; § 720, text and note 4. Req. rej., 9 November 1831, Sir., 32, 1, 5.

56. By *inter vivos* act, on the other hand, one cannot generally dispose of objects except when taken individually. See on this rule and on the exception recognized in connection with the marriage contract : § 577, text n° 2, notes 5 to 7.

57. This action shares only its name with the action *de in rem verso* of Roman Law. Comp. § 4, *Inst. quod cum eo contr.* (4, 7) : L. 1, *præ.*, D. *de in rem verso* (15, 3); L. 7, § 1, C. *quod cum eo contr.* (4, 26). This latter action is *adjectitiæ qualitatis*, and draws its force from the principal action to which it is attached, whereas the former action exists independently, without the requirement of any other action for support. Comp. ZACHARIÆ, § 576, text and note 4. Zachariæ is wrong in suggesting that the action *de in rem verso* is a sort of real action. As such the action would be precluded for corporeal moveables that still exist in kind by reason of article. 2279.

58. See arts. 548, 554, 555, 556, 570 and 571, 594, 1241, 1312, 1437, 1864 and 1926.

59. *Jure naturæ æquum est neminem cum alterius detrimento et injuriâ locupletio rem fieri.* L. 206, D. de R. J. (50, 17).

60. Comp. § 441, text n° 2, and notes 15 to 17; ZACHARIÆ, § 576, text *in fine*.

61. See arts. 554, 555 para. 2, 556, 570, 571 and 574.

62. Comp. ZACHARIÆ, § 576, text and note 5.

Moreover, according to its foundational principles, the action *de in rem verso* is independent of the capacity or incapacity of the person against whom it is directed.<sup>63</sup>

5° The prerogative to revendicate the patrimony.

Given that a person cannot be deprived of his patrimony except when he loses, at death, his very personality, the action in revendication cannot, in principle, be thought of as bearing upon the patrimony of the person taking such an action.<sup>64</sup>

However, the action afforded the absentee after the court order to take definitive possession of property under article 132, does in fact constitute a sort of action in revendication of the patrimony and should be considered like a universal action.<sup>65</sup>

Leaving this latter case aside, the action in revendication of the patrimony is unthinkable except as it bears on the patrimony of a deceased person, and that the action be taken by that person's heir. The action is thus called a petition of heirship.

## II. OF THE PATRIMONY CONSIDERED AS SUBJECT OF OBLIGATIONS

### § 579.

#### Of the right of Pledge to which the Patrimony is subject

Because the patrimony is an emanation of legal personality, the obligations imposed on a person naturally burden his patrimony. This principle, which our Old Law expressed in the maxim *Qui s'oblige, oblige le sien* [(transl.) *He who obliges himself, obliges that which is his*], was enshrined in article 2092 in the following terms: "Whosoever obliges himself personally charges, for the performance of that undertaking, all of his property, moveable and immoveable, present and future".

Article 2092 thus establishes a right of pledge, in favour of creditors, on the debtor's patrimony itself as well as each and every item of property in the patrimony.

Yet because patrimony is in itself inalienable, it can no more be subject to a forced expropriation than to a voluntary alienation. Accordingly, this right of pledge can only be exercised on the elements that make up the patrimony even if the pledge is said to bear upon the patrimony itself. Consequently, the means of enforcing this right of pledge—the right to seize property, the faculty to exercise the rights and actions of the debtor and the Paulian action—can only bear on specific items of property.

63. Arts. 1241, 1312, 1926 and arg. of these articles. Comp. § 335, text and note 21; § 411, text and note 10; § 482, text n<sup>o</sup> 3 and note 23; ZACHARIÆ, § 576, text *in fine*.

64. ZACHARIÆ, § 576, text n<sup>o</sup> 5.

65. Comp. § 157, text and notes 6 to 10; ZACHARIÆ, § 576, note 3.

The right of pledge is indivisible, like the patrimony to which it applies. Accordingly, creditors of a person who has disposed of some of his property nevertheless retain the right to seize the whole of what remains in his patrimony for what is due to them.

And while it may be indivisible, the pledge established by article 2092 does not amount to a real right. This is made plain by the fact that the pledge is only exercised on the property of the debtor as such, that is to say the elements of his patrimony, and that it necessarily disappears in respect of the objects which have ceased to be part of this patrimony.<sup>66</sup>

### § 580.

#### **Of the Equal Rank of Creditors in the Exercise of the Right of Pledge — Of the Insolvency of the Debtor**

The indivisibility of the right of pledge established by article 2092 has, as a corollary, the principle that all the property that makes up a person's patrimony is uniformly charged, in a like manner, for the performance of all his obligations. This is true whatever the date at which the obligations arose and irrespective of the date at which the property was acquired. Earlier creditors have no preference over later ones, no more than the later creditors can claim precedence over the ones who came before in respect of property that was not yet in the debtor's patrimony at the time he had earlier obliged himself to them.

Because all of the various creditors of any one person have equal rights over the property in the debtor's patrimony subject to the pledge, accordingly, where the proceeds of sale of this property is insufficient to pay the debts in full, these proceeds are divided up between the creditors rateably, unless one or another of them has special grounds for preference that they might claim, apart from the general right of pledge of which we are speaking here. Article 2093.

Insolvency is the term used to describe the circumstances of the debtor, who is not a merchant, for whom liabilities exceed assets and who accordingly finds himself in a situation where he is unable to fully satisfy his creditors.<sup>67</sup>

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66. Comp. ZACHARIÆ, § 580, note 1. See for an opposing view: LAFONTAINE, *Revue critique*, 1859, XV, p. 359, n<sup>o</sup> XI. The honourable magistrate did not appear to have understood the philosophical basis that definitively counters his position, and read article 2092 as though it said that the debtor is obliged to fulfil his undertaking not only on his *present and future property*, but also on his past property. He also forgot that there is no right to follow moveables by hypothec and that immoveables are only subject to a right to follow if a hypothec is registered against them. Finally, he did not consider that, in his system, the Paulian action would be of no use.

67. *Coutume de Paris*, art. 180. *Coutume d'Orléans*, art. 449. COLMET DE SANTERRE, *V bis*, I. DEMOLOMBE, XXV, 666 and 667. ZACHARIÆ, § 582, text and note 1.

One should not confuse insolvency with bankruptcy, that is to say the circumstances of a debtor who is a merchant who has stopped making payments.<sup>68</sup>

[...]

### § 581.

#### **Of the Consequences of the Right of Pledge as it Affects the Debtor's Person**

By charging the patrimony with the fulfillment of the debtor's obligations, the legislator naturally sought to shield the debtor's person from legal proceedings taken by his creditors.

The performance of duties connected to rights to exercise authority may be enforced by means of a coercive action against the physical person.<sup>69</sup> By contrast, obligations which correspond to personal rights strictly speaking only charge, as a general rule, the patrimony of he who is subject to them.

Consequently, the performance of these obligations cannot be enforced against the person of the debtor by means of an action seeking imprisonment for debt except in those exceptional circumstances where a specific enactment formally authorizes this kind of proceeding. Article 2063.

As a further consequence, the legal provisions which allow for this action for imprisonment must be interpreted restrictively and are not susceptible of being extended to other situations by analogy.<sup>70</sup>

Where imprisonment for debt is authorized exceptionally, the exercise of this recourse neither precludes nor suspends proceedings taken against the property in the patrimony. Article 2069.

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Comp. however *Des obligations*, II, art. 1168, n° 5. This author does not specifically define insolvency, saying that it refers to the circumstances of a non-merchant who has stopped payments. See on insolvency, *Dissertation*, by BREYNAT; *Revue de législation*, 1846, III, p. 173.

68. Because the circumstances of the bankruptcy are connected to the fact of the stopping of payments, a merchant may find himself in bankruptcy even as he sustains his business. *Code de commerce*, art. 437.

69. See arts. 214 and 372 to 383, § 172, text *in fine*; § 471, text and notes 5 to 8; § 550, text n° 1.

70. Comp. Cass. civ. 4 January 1825, Sir., 31, 1, 55; Cass. civ., 19 January 1832, Sir., 32, 1, 687; Toulouse, 20 February 1832, Sir., 32, 2, 389; Cass. civ., 15 November 1834, Sir., 34, 1, 777.

### III. OF THE TRANSMISSION OF THE PATRIMONY OF A DECEASED PERSON

#### § 582.

#### Of the Transmission of Succession Considered in its Effects on Assets

The aggregate of a person's property does not lose its quality as a universality of law. It is in this quality that this property is transmitted, under the name of succession, to those who are called upon to take the whole or an aliquot share of it either by law or by the will of the deceased.

The person who succeeds to the whole or an aliquot share of the property of another is generally called the universal successor. But from a strictly theoretical point of view, this title is only really fitting for those who represent the deceased individual by continuing his legal person. Given that the patrimony is, in a manner of speaking, to be identified with the personality, it follows that those called upon to take the whole or an aliquot share of a deceased individual's property, without continuing his legal person, actually succeed only to his property and not to his patrimony. Consequently, they are best thought of as particular legatees, with the notable difference that their title to property does not, as does that of particular legatees in the technical sense, bear on individually specified objects.<sup>71</sup>

In Roman Law, every person who succeeding *in universum jus defuncti* was, as heir, the legal representative of the deceased, whether or not he was called to the succession by law or by will.

Under our Old Customary Law, on the other hand, the legitimate relatives enjoyed the title of heir, in the order in which the law called upon them to succeed, to the exclusion, in principle, of others. They alone were considered as continuing the legal person of the deceased; they alone were vested, pursuant to this title to property, with hereditary seizin.<sup>72</sup> The Redactors of the *Civil Code* plainly

71. ZACHARIÆ, § 577, text *in principio* and note 1.

72. These were the principles expressed, by contrast with Roman Law, by the adage *Deus solus heredem facere potest, non homo*, and the customary rules *Institution d'héritier n'a point lieu* and *Le mort saisit le vif, son hoir le plus proche, et habile à lui succéder*. It is true that some scholars, under the influence of Romanist thinking, assimilated universal legatees to heirs in certain respects. Moreover, the favour extended to marriage contracts rendered permissible a gift of future property in those contracts, and the donees thereof were commonly called contractually appointed heirs. But notwithstanding the foregoing, these legatees and donees were not considered as continuing the person of the deceased. Neither one of them was vested with hereditary seizin, except in certain rare customs, notably those of Burgundy and Nivernais. See on all of these matters, LOISEL, *Institutes coutumières*, Laboulaye edit., Bk II, tit. IV, reg. 5, 9 and 14, tit. V, reg. 1.

followed the wayward path of Customary Law since, with the exception of the extraordinary text at article 1006, they only attributed hereditary seizin to the legitimate relatives of the deceased called to succeed to him under the law. The Redactors refused to grant seizin, whether explicitly or implicitly, to all other persons that one would ordinarily count among the universal successors, in particular irregular successors, legatees and donees by general title, and even universal legatees and donees where they are competing with heirs of reserved property.<sup>73</sup>

By establishing such a sharp distinction between these two orders of successors, the Redactors of the Code clearly manifested the intention, in keeping with traditional customs, to recognize as successors only those whom they vest with hereditary seizin.

[...]

[...] Hereditary seizin allows the legitimate relatives of the deceased<sup>74</sup> to become, at the very moment of his death, owners and possessors of the property that makes up the succession, in the absence of any manifestation of intention by them, and even without their knowledge. As such, hereditary seizin is a legal fiction that, rationally, the legislator could only have established because it viewed the legitimate relatives of the deceased as continuing his legal person and, in point of fact, hereditary seizin was so established for this sole reason.<sup>75</sup> The reverse, consequently, is also true: the other successors are denied hereditary seizin only because the legislator did not view them as continuing the person of the deceased. The legitimate relatives are not representatives of the

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73. This is what emerges, in the plainest fashion, from a reading of articles 724, 770 and 773, 1004, 1006 and 1011 together. It follows further that the exception provided, under article 1003, for the universal legatee who does not find himself in competition with the heirs to reserved property must also apply, in the same circumstance, to the universal donee of present and future property, or just of future property, in a marriage contract.

74. We will only consider the case of legitimate relatives because, in principle, they alone enjoy seizin. But it is certainly the case that everything that we say in respect of blood relatives also applies, exceptionally, to the legatee or the universal donee who is not in competition with the heirs of the reserve.

75. The correlation between the legal seizin of the heirs and the representation of the deceased by the heirs is formally established by the final provision of article 1220 according to which “[les héritiers ne peuvent demander la dette, ou ne sont tenus de la payer, que pour les parts dont ils sont *saisis* ou dont ils sont *tenus*, comme *représentant* le créancier ou le débiteur] heirs [...] cannot demand payment of the debt or are not bound to pay it except in the proportion of the fraction of which they are *seized* or in which they are *bound as representing* the creditor or the debtor.” Does this not amount to saying, in the most forceful manner, that it is because they are representatives of the deceased, and only to the extent of this representation, that the heirs are vested with the advantages of the seizin, and find themselves subject, on the other hand, to the obligations that flow therefrom?

deceased because they enjoy hereditary seizin but they are, instead, vested with this seizin because they continue the deceased's legal person [...].

After the death of the person who was the owner of the patrimony, its indivisible character continues to apply to the succession understood as the object of the right of succession. Among the consequences of this is the following: a sole heir cannot accept only a portion of the succession that devolves to him; and in cases where the succession devolves to several heirs, they are seized thereof, in an indivisible manner, at least until partition, such that the portions of those who renounce the succession necessarily increased the portion of those who accept it.<sup>76</sup> Article 789.

### § 583.

#### Of the Transmission of Debts that Encumber a Succession

The universal successors in the proper sense of that expression, that is to say those who represent the person of the deceased, are not only called upon to take the whole or an aliquot share of the property in the deceased's patrimony but they succeed to the patrimony itself. As a result they must answer, of right, and with their own patrimony, for all the debts that encumber the succession as if they had contracted those debts themselves. Article 724.

The indivisibility of the succession considered as the object of the right of succession would naturally encourage the view that each heir must, as a consequence of his acceptance, be held liable for the whole of the debts of the succession rather than proportionally to the extent of his share.<sup>77</sup> But, consonant here with Roman Law and the general law of customary France, the *Civil Code* rejected this corollary of the indivisibility of the succession in order to avoid the actions and recourses to which this would have given rise.<sup>78</sup> Consequently, the Code provides that the debts of the succession are to be divided, of right, amongst the heirs so that each one of them will only be liable in proportion to his share in the succession, that is to say the share in respect of which he represents the deceased. Articles 873 and 1220.

The heirs are responsible for this share even if, as a result of competition with legatees by general title or illegitimate children, it happens to be greater than the amount of their portion of the succession, that is to say what they in fact take from the succession.

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76. ZACHARIÆ, § 575, text *in medio*.

77. It used to be the case in the territory in which the *Custom of Amiens* applied (art. 159), as well as in that of the *Custom of Normandy* (Reg. of 1866, art. 130). MERLIN, *Rép.*, see Debts, § 3, n<sup>o</sup> 2. DEMOLOMBE, XVII, 20.

78. ZACHARIÆ, § 575, text and note 1.



[...]

The indivisibility of hereditary seizin only ends with the effect of partition. It follows that, notwithstanding the legal division of the debts of the succession between the heirs, the total amount of each of these debts is guaranteed by the whole of the successorial property as long as partition has not taken place. In other words, the right of pledge that the creditors of the deceased enjoyed while he was alive continues, even after his death, to operate indivisibly on the whole of the succession up to the moment of partition.<sup>79</sup>

The successors improperly designated as universal, that is to say those who are only called upon to take the whole or an aliquot share of the deceased's property, without representing his person and without, in strict speech, succeeding to his patrimony, should not, as a matter of theory, be responsible for payment of the debts of the succession.<sup>80</sup> But contrary teachings, already recognized in the most recent developments of our old jurisprudence, were definitely enshrined in the *Civil Code*.<sup>81</sup>

This said, while the successors are liable to pay the debts of the succession, they are only so obliged as holders of successorial

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79. Prior to the partition of the succession, each creditor of the deceased unquestionably has the right to seize, for the whole amount of his claim, each and every item of successorial property. The division of the debts, effected as of right amongst the heirs, does not preclude this right to seize property. The division only gives rise to a personal action against the heirs, and has no impact on the assets of the succession which the heirs hold in indivision. Those assets remain, indivisible, and stand as the common pledge of the creditors of the succession until the partition is carried out. Lafontaine (*Revue critique*, 1856, XV, p. 335 *et seq.*) went so far as to argue that it must be the case even after partition is completed, but it appears to us that this paradoxical opinion cannot be defended seriously, either as a matter of legal theory or in light of the rules of our positive Law. Partition, which renders each heir an exclusive owner of the objects that fall within his lot, thereby breaks up the elements that make up the succession so that it can no longer be considered as constituting a universality of law or as forming, on this basis, the common pledge of the creditors of the succession. Once completed, partition renders it impossible for the creditors to lay claim to the hereditary property as such. They can no longer reach that property except as elements of the patrimonies of the heirs and on the basis of personal actions against them.

80. In keeping with this theory, the paritary legatee was not, under Roman Law, liable for the debts owed to the creditors of the succession. That legatee could only be held liable, in virtue of the stipulations *partis et pro parte*, vis-à-vis the heir, to contribute to the debts in proportion to the extent of his portion of the succession. Ulp., *Freg., de fideicom.*, tit. 25, § 15; THIHAUT, *System des Pandekten Rechts*, § 753. In our very Old Customary Law, it was also long contended that legatees by general title, and even universal legatees in competition with heirs, were not subject to payment of debts to creditors nor were they subject to the obligation to contribute to such payments vis-à-vis the heirs, at least not of right and independently of any stipulations *partis et pro parte*. LOISEL, *Institutes coutumières*, bk. II, tit. 3, reg. 14. [...].

81. See arts. 871, 873, 1009 and 1012. [...].

property and, in consequence, only to the extent of the value of the property which they have received. They are not required to answer with their own patrimonies and do not therefore have to resort to the benefit of inventory in order to limit their liability to the extent they have profited. In this respect, just as from the perspective of hereditary seizin when considered in its effects on assets, their position differs fundamentally from that of the universal legatees in the proper sense, that is to say the representatives of the deceased.

[...]