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Patrimony

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Article abstract

L'importance nouvelle accordée au concept de patrimoine par l'Office de révision du Code civil prend pour point de départ le concept opposé de personne. Dans le but d'éclairer la nature exacte de cette opposition, la présente étude se penche sur l'évolution du concept de patrimoine du droit romain à nos jours. C'est ainsi que de la notion *de Patrimonium,* dont l'unité est avant tout procédurale, l'auteur remonte au *Code Napoléon* qui lui ne traite qu'accidentellement du patrimoine dans une perspective davantage utilitariste que transcendentale. L'auteur aborde ensuite les commentateurs du Code, en particulier Aubry et Rau, Zachariae et Savigny, lesquels élaborent une véritable théorie du patrimoine. Avec le *Code civil du Bas-Canada,* enfin, qui tout comme le *Code Napoléon,* n'accorde qu'une importance mineure au concept de patrimoine, l'auteur complète son analyse historique pour critiquer ensuite le *Projet de Code civil* qui prétend corriger certaines distorsions apportées au concept original de patrimoine. En effet, l'oeuvre de l'Office de révision, ainsi que le souligne l'auteur, n'est pas elle-même dépourvue d'ambiguïté.

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C. B. GRAY*

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Car, pour rendre à chacun le sien, il faut que chacun puisse avoir quelque chose.

PORTALIS

Introduction

This research is evoked by the challenge blazoned across Quebec's draft code by its project director:

> On a souvent dit du Code civil qu'il était un code de propriétaires et de rentiers, davantage préoccupé de la protection du patrimoine/"property" que du respect des droits de la personne humaine. Aussi a-t-on voulu que la reconnaissance du rôle de la personne humaine, l'affirmation et la protection

> de sa dignité fussent l'un des traits saillants du Projet. ... Les règles traditionnelles, issues d'une philosophie attachée davantage à la transmission du patrimoine dans la famille/"an inheritance" qu'à l'épanouissement de l'enfant, devaient disparaître.[1]

This situates patrimony as a concern central to the civil law. Instead of a background concern, which the challenge insists it has been all along, the concept is now thematized in its centrality, although perhaps only to be dismissed or, as promised, reduced. Reduction of its force may, in fact, be accomplished in part by the new attention given to it, on the principle that only when drained of pulsating intimacy with the vital events it inseparably enveined can a cultural phenomenon become the mummified object of awed regard: the principle of the "rearview mirror" in McLuhan. "The Owl of Minerva sets flights only in the gathering dusk", in Hegel's preface to his legal philosophy.

The core meaning of patrimony is, however, polemical. It acquires its centrality at law only at the expense of personality in law. Patrimony appears as the competitor of the human person for attention, for "protection". It is not self-evident that this is the only way to propel patrimony onto centrestage. Certainly it was not so for classical theory, according to which patrimony is an emanation of personality. For it now to attract attention in this stance demands some explanation.

One likely explanation is that the person is characterized by rights while patrimony is cast under property. Property appears as things non-human, rights appear as attributes of the person. How property, the consummate real right, should have so developed is no clearer than how rights should have appeared as the rubric for the appreciation of persons. This, too, needs explanation.

Of course, person is priceless while things are venal. But many of the relations in which things stand to persons are as struck with the public order which is partly the criterion for persons themselves. And it is difficult to take seriously the assertion that our personal uniqueness, our indivisibility in space and time, belongs in a category of reality which lacks pecuniary value and is thus extra-patrimonial, *extra commercium, hors commerce.* For indivisibility (read: universality) is the very feature which characterizes patrimony in classical theory. Yet more ironic, what elicits the declaration of pricelessness is the brutal fact that the human person has a price indeed, is very much of interest to "commerce", and finds more willing buyers than any commodity. Priceless he is; but only in the sense that other highly priced

1. OFFICE DE RÉVISION DU CODE CIVIL/CIVIL CODE REVISION OFFICE, *Rapport sur le Code civil, du Québec/Report on the Quebec Civil Code*, I, *Projet de Code civil/Draft Civil Code*, preface by P.-A. CRÉPEAU, Québec, Éditeur officiel, 1977, p. xxxi.

treasures are. Legal extrapatrimoniality cannot be based on the natural fact of pricelessness and non commerciality; for that fact is a legal fact and at best the effect of extrapatrimoniality rather than its cause. We cannot simplify the problem by taking the person as better known, and then distinguishing patrimony from his extrapatrimoniality; rather, we must still commence by characterizing patrimony, and thence raise any discussion of extrapatrimoniality.

In characterizing patrimony, we are engaged in stipulative definition. The material to be researched is the use of a word. We know only that some claims have been made by the word about some idea and perhaps about some existing susbtance or attribute it is used to mean. We do not start with grounds for taking any one position upon what that idea or existent is, so that we could perceive it even under a different symbol. Instead, this research is bound into the search for the textual uses of the term in civil law. The points of research are those four codifications of greater relevance to contemporary Quebec: the Quebec *Draft Civil Code* of 1977, the *Civil Code of Quebec* of 1866, the French *Code civil* of 1804, and the Roman *Corpus Iuris Civilis* of 529. Primary research is performed upon each legislative text for its use of the relevant term "patrimony-*patrimoine-patrimonium*". Secondary research consists in locating uses of the term in the major pieces of doctrine both subsequent and just prior to codification. This secondary research is unmanageably large, so selections must depend upon tertiary research which indicates where the crucial discussions are to be found, as well as what additional categories may further enlighten the first two phases. The most persistent categories are property (as a right, as a real right), things and goods (as property, as its object), and universality. This tertiary research is most frequently happenstance. For commentators upon the few legislative occurrences of the terms seldom gloss patrimony as such; the systematic works repeat each others' remarks when attending to patrimony at all; and contemporary indexers ignore it.

The order of research is from past to present, assuming no less intelligibility to distant patrimony than to a present patrimony we understand no better. To locate alternatives in horizontal comparative law, next, a scan is made of cognate categories in non-civilian law, as well as the bases and evolution of the category in civilian laws not of the French group. But most scope will be given to the explicit critiques by recent French authors. Finally a suggestion will be made of what implicit underpinning is required for the doctrine of patrimony explicit in the draft code. Its coherence will be evaluated.

1. *Corpus iuris civilis*

No effort will be made in this phase to isolate legislation from doctrine, since only one reference will be made to the *Novellae* which, if anything, would deserve such a title, and none to Justinian's *Institutiones* which might also be so called. Most of the references are to the collected doctrine of the *Digesta* plus an exposition of part of Gaius' earlier *Institutiones*. Only the later discussion of one contemporary doctrinal source countering Savigny's view of Roman law falls into the modern categorization.

The strategy here will be to locate the uses of *patrimonium* in Roman law and, secondly, those of *bona* which authors agree is where any correlative doctrine should be sought. In both, the research will seek some sense of universality, its meaning, sources and effects. Separate attention will be given to the distinction between corporeal and incorporeal; the features of succession, including separation, continuation of person, and responsibility for debts; and distinctions between types of goods, particularly the distinction between moveables and immoveables and its impact upon the unifying tendencies in private international law.

1.1. *Patrimonium*

The overcapping use of the phrase in Gaius' second book, "de rebus singulis et de rerum universitatibus", is in the first article: "... modo videamus de rebus; quae vel in nostro patrimonio sunt vel extra nostrum patrimonium habentur"[2]. The most likely meaning is taken from the article immediately following, which uses the same reference to a *summa divisio* and identifies the classes as things of divine right and things of human right. It would be natural to read these as the extrapatrimonial and patrimonial things, respectively; but Gaius does not help by explicitly equating them. On the other hand, Foote's commentary is puzzling:

> The phrases in nostro patrimonio and extra nostrum patrimonium, #1, are apparently equivalent to alicujus in bonis and nullius in bonis, #9, and to the expressions we meet elsewhere, in commercio and extra commercium.[3]

His first equivalence is merely accidental, not essential; for *res derelictae* may always be reduced into someone's possession. And the second meaning reflects back onto the divine and human rights, rather than onto the pecuniary and the non-pecuniary. Overall, there is no enlightenment here for the contemporary distinction of extra — and intrapatrimonial rights, nor any hint of a universality.

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2. *Gaii Institutiones or Institutes of Roma Law by Gaius*, tr. and comm. by Edward POSTE, 4th ed. rev. by E.A. WHITLOCK, Oxford, Clarendon, 1904, p. 123, II, 1.
3. *Id.*, p. 127.

In the other sources for the code given by Dirksen, only the third meaning of four shows any universality, but there is no hint of its source[4]. After he locates as its synonym *bona* and equates it to *familia*, as will be seen later, *patrimonium* is opposed to *persona, personale*; but again there is not the slightest resemblance between the meaning of this opposition and that of the modern. For both "praedia quae nostri patrimonii sunt" (landed estates) and "vectigalia, vel superficiaria" (personal income) which are not in our patrimony are opposed to the abstract modern person of the *Willenstheorie.* The same might be said for the two sides of "quae in patrimonio habet" and "quae in nominibus sunt".

Somewhat more fruitful, universality appears in the cognate uses of the term in this third sense. To speak of a *corpus patrimonii* gives it considerable unity, but no indication of its source. And Gaius' own phrase, *totum patrimonium*, is used not to unify it as such but only to differentiate one quantity of it from another quantity of it, viz., a *dodrantem totius patrimonii*, three-quarters.

The doctrine in the *Digest* itself is of little more help. As summarized, the patrimony is the goods received from father or mother, governed by the will of the paterfamilias, and including what we can keep or recover. The slave has none; the woman exceeding hers has a right of restitution, even though all are presumed to know the extent of their own patrimonies. Even a hopeful reference to the "glosse sur le mot patrimonium" [5] turns out to be no more than a statement of the principle that patrimony is determined only upon the execution of debts. While, further, the right to keep or recover (*persequendi retinendique*) is known by the name *ius patrimonii*, implying a right over a single object (Ulpian, 275, 17), its unity is too ambiguous to stand upon. For one can say both that *patrimonium est compositum* (Julian, 764,25) ant that "unius duo patrimonia non videntur" (Papinian, 790, 37); that is, one can both establish and obliterate its unity by texts[6]. Even the cognate quote from Julian that "hereditas nihil aliud est quas successio in universum jus" must have its crucial term criticized as an interpolation of later Romanists[7].

4. H.E. DIRKSEN, "Patrimonium", in *Manuale Latinitatis Fontium Iuris Civilis Romanorum*, Berlin, Duncker u. Humbolt, 1837, p. 687: 1. Bona a parentibus profecta; 2. Fundus hereditarius; 3. Substantia bonorum nostrorum: 4. Corpus rerum fiscalium, item rerum Principis tam privatarum quam patrimonialium.
5. D.4.4.9.1, in *La Clef des Lois romaines ou Dictionnaire analytique et raisonné de toutes les matières contenues dans le Corps de droit*, II, Metz, C. Lamort, 1810, p. 231.
6. *Vocabularium Jurisprudentiae Romanae*, IV, ed. B. KUEBLER, Berlin, W. DeGruyter, 1936, p. 554.
7. F.H. SPETH, *La divisibilité du patrimoine et l'entreprise d'une personne*, Paris, Librairie générale de droit et de jurisprudence, 1957, no. 45, p. 42, n. 3, from D.50.16.62.

Nonetheless, commentators regularly see the *peculium* as built upon the model of the *patrimonium* of which it was part. It has a universality because it is a liability limited to its assets; so, when its universality is seen to model that of patrimony, this identifies what the universality of patrimony is understood as, also. The *peculium* is a mass of goods entrusted by master to slave, or father to son, with which the slave could transact business for the master, business whose liability was limited to the value of those goods, except for creditors' suit, also, *in rem versum* or upon fruits turned back to the master[8]. This is "a legal universality, separated from his own, but of which he is owner"[9]. Within the general monies held by the slave for his master, further, there was also the *merx* or that portion of the *peculium* devoted to particular enterprise with its liabilities limited from spilling over upon the rest of the *peculium*. The *merx* within the *peculium* within the *patrimonium* is seen by Speth as a separate patrimony within a separate patrimony from the residual patrimony. The cogent feature is that the unity of each has the very same source: limited liability.

1.2. *Bona*

Speth argues the same universality for *bona*. Citing passages from the *Digest* some of which include debts within *bona*, some of which identify *bona* only as the balance after debts have been subtracted, he asserts that both imply an intimate link of assets and liabilities; and concludes that their universality is known to the Romans because they have "le concept de l'universalité qui résulte de la combinaison de ces éléments"[10].

Villey argues for a different source of universality in the patrimony, which he locates in the inconvenience of treating the deceased's valuables separately rather than passing them *en bloc*. Such an ensemble of goods can be perceived even from the time of the Twelve Tables, when it is called the *familia pecuniaque, familia* being the *res mancipi* or more valuable because they can pass only by *mancipatio* (slaves, animals, maybe land), and *pecunia* being the *res nec mancipi* (money, flocks)[11]. This ensemble is made up of corporeal goods only; their unity corresponds to their nature. They form a

8. Gu. CARDASCIA and J. IMBERT, *Histoire des institutions et des faits sociaux*, Paris, Monchrestien, 1955, pp. 396-397.
9. F.H. SPETH, *supra*, note 7, p. 45, no. 47.
10. *Id.*, p. 43, no. 45. He reproduces these: "Bona autem hic, ut plerumque solemus dicere, ita accipienda sunt universitatis cuiusque successionem, qua succeditur in ius demortui suscipiturque eius rei commodum et incommodum..." (D.37,1.3); "Bonorum appellatio, sicut hereditatis, universitatem quandam ac ius successionis et non singulares res demonstrat." (D.50.16.208)
11. *Pecus* sets the structure of *pecunia* and in turn *peculium*.

unity as does a flock of sheep, a *corpus ex distantibus* as the Stoics called it, "chose unique formée de parties distantes" [12].

1.2.1. Incorporeals

But the catalogue of things could be expanded, and accordingly its kinds of unity. Before Cicero, only the concrete *dominus* was known of — things changed owners; it was not the ownership that was changed. Cicero introduced the Greek Stoic distinction between things seen and touched, and things conceived by the spirit; and *dominium* becomes a reality. Seneca gives these the names of corporeal things and incorporeal things. This is the name and distinction repeated by Gaius [13]. He exemplifies incorporeal things by inheritance, usufruct and obligation, and later on by property; although the things to which they relate or bind us are corporeal, the *jus* in each example is not itself corporeal.

This abstraction makes possible, and perhaps necessary, the tighter unfication of goods. Once an abstraction, it could contain abstractions, viz., credit claims and debts; this could be sought as a single object by *hereditatis petitio*, and could be transmitted by a single act, a *universitas* given by universal title as particular things are given by particular title. Gaius' *dominium* is not only the quality of a *dominus* but one of his objects of exercise; *proprietas* is not only the corporeal thing upon which the exercise bears, but is an incorporeal itself subject to that exercise [14].

Foote's commentary to Gaius is characteristically critical of such a move, but goes beyond the simple observation that the same object is made at once something corporeal and something incorporeal — which is not the case, for there is just the analogous use of the single term *bona*, instead of an equiv on any particular *bonum*. Foote notes in addition that "the secondary object of a right, however, is not always a body... Other rights, apparently, have no determinate object, corporeal or incorporeal" [15]. This is an effective criticism ot the analogy where no *bona* appear as objects of rights; the criticism is less cogent where the object of right is not absent. The conclusion, then, that *dominium* and *proprietas* are incorporeal exclusively, and never corporeal, seems less well supported [16].

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12. M. VILLEY, *Le droit romain*, Paris, P.U.F., 1964, p. 75; F.H. SPETH, *supra*, note 7, p. 42, no. 45.
13. Bk.II, a.13.
14. VILLEY, *supra*, note 12, p. 76, and n.1.
15. In *Gaius, supra*, note 2, p. 125.
16. It is precisely this point, at the root of patrimony, which the Quebec draft code rejects.

Upon these considerations depends the status of real rights, and their dismemberment's open or closed list. If property is an "abstraction", that is, the name of a right rather than a natural thing, it can extend over both natural things as well as over rights themselves, including itself and especially including the ensemble of rights in the patrimony to which it belongs. Patrimony can be unified by reason of its elements all being subject to the same right, whether the property (of corporeal goods) or (property of) personal credits [17]. A further result, stressed by Ginossar [18], is that those rights which seem to be dismemberments of property become instead objects of property; the property upon corporeal goods is not, then, split but instead is one exercise of property while its exercise upon the "dismemberments" is another, with the special features which procedurally attach to "real rights". One can dispense with their reality, while finding patrimonial unity in the right of property, a right no longer set off against personal existence [19].

1.2.2. Successions

Bona is the term by which successions is treated, as well. There is no use of the term *patrimonium* in this context, even in an area now institutionalized as "separation of patrimonies". As will be seen true for the *Ancien droit*, Roman law too used only the expression *separatio bonorum* which predominates even in the French *Code civil* and the presentations thereof; only the ninteenth century commentators bring the current term into wide use, by reason of the philosophical influences to be canvassed. Barafort, who

17. This is punctuated to leave outside parentheses the terms which would have been considered to name rights, apart from a property in their incorporeality.
18. S. GINOSSAR, *Droit réel, propriété et créance; élaboration d'un système des droits patrimoniaux*, Paris, Librairie générale de droit et de jurisprudence, 1960, p. 137, no. 50, n.240; F.H. SPETH, *supra*, note 7, p. 44, no. 45, n.1, hints at the same solution, viz., that goods have the sense also of rights which are social products that can also be property, when he expresses regrets at the loss of the text at D.50.16.49, in which Ulpian explains the sense of "civil goods" following his extant explanation of "natural goods", the passage to which Zachariae and Aubry and Rau appeal, commencing: "Bonorum appellatio aut naturalis aut civilis est, naturaliter bona ex eo dicuntur, quod beant, hoc est beatos faciunt: beare est prodesse. In bonis autem nostris computari sciendum est non solum, quae dominii nostri sunt, sed et si bona fide a nobis possideantur vel superficiaria sint. Aeque bonis adnumerabitur etiam, si quid est in actionibus, petitionibus, persucutionibus: nam haec omnia in bonis esse videntur."
19. Ginossar finds that the counterpart to personalized real rights, viz., obligation resting upon real property rather than upon persons, is present in the words of Roman law, *supra*, note 18, p. 95, no. 37: "Labeo autem hanc servitutem non hominem debere sed rem" (D.8.5.6. #2, on servitude); "Si debitor res suas duobus simul pignori obligaverit..." (D.20.1.10, on pledge); "... priori domino vel creditori, qui nomine hypothecae rem obligatam habuit..." (C.7.39.8, on hypothec).

collects the Roman sources, concludes that in Roman law this is *une voie d'exécution* open to all creditors at once, while in the French code it is a privilege of creditors and available only singly[20]. That is, the institutionalizing of this category procedes apace with that of the other, viz., of patrimony.

The goods which pass, separated or not, have not at first such striking unity in themselves, because it is not needed. For they are unified not in themselves but by attachment to the person of their owner. But the attachment to person is completely other than that to be seen in the nineteenth century's person made out of will. The person is still one whose unity is moral, but his morality is not voluntarist. The crisis with which death faced *ce peuple, avide d'immortalité* as Treilhard called the Romans is identified by Fustel de Coulanges: "l'homme meurt, le culte reste, le foyer ne doit pas s'étendre ni le tombeau être abandonné. Avec le culte subsiste la fortune qui en est inséparable, immobile comme le foyer et le tombeau auxquels elle est attachée"[21]. While primitive coproperty was a favourite thesis of socialist reformers to explain why an heir succeeded, the hypothesis is unhistorical. Instead, the person must be replaced in the performance of the *sacra privata*; this power and duty is what is transferred[22], and the inheritance of goods is only its external manifestation. In fact, according to Blondel's study[23], originally *only* extrapatrimonial rights as they would be known today make up the primitive succession, in the manner still visible in dynastic succession. Only late did primitive Roman law allow transmission of goods by succession, and only later still their transmission *inter vivos*[24]. The heir's inability to refuse is one side of the policy of ensuring a successor, the testamentary freedom is the other. To prove further that succession is "de nature morale avant d'être de nature patrimoniale", Blondel supplies texts to show that in areas under customary law with a heavy dose of truly Roman law the *reserve* is not an alimentary duty but rests on the policy idea of a family duty. This shows a succession not reducible to something material[25]. Armand carries further the argument by noting that in Roman

20. M.F. BARAFORT, *Traité théorique et pratique de la séparation des patrimoines*, Paris, Durand, 1866, pp. 11-12, no. 6. Contrast the Quebec draft, which follows Rome.
21. *La cité antique*, forenote to J. ARMAND, *Successeurs universels et successeurs particuliers*, Paris, Bonvalot-Jouve, 1906.
22. *Id.*, p. 58: "hereditas nihil aliud est quam successio in universum jus quod defunctus habuerit" (D.50.16.62; but see *supra*, n.228); "ejiusdem juris et potestatis cujus et defunctus fuit" (D.50.16.24; D.50,17,59; D.29.2.37).
23. P. BLONDEL, *La transmission à cause de mort des droits extrapatrimoniaux et des droits patrimoniaux à caractère personnel*, Paris, L.G.D.J., 1969, p. 4, n. 4.
24. *Id.*, p. 5, n.5.
25. While in the "Romanist" law of the *pays de droit écrit*, that is, the glossators' law, the *legitime* is an alimentary duty or of a patrimonial nature, against the impoverishing policy of testamentary freedom: *id.*, p. 17, no. 20.

law there is no such institution as succession *à titre universel*, general succession[26]. One succeeds to the person, or succeeds not at all. Instead of being measured as so much of a successor by the quantity of goods he receives, the successor is so by reference to the person he succeeds, and some aliquot part of his goods — all or some — comes to the successor; *sustinent personam defuncti*. Thus aliquot heirs bear full liability *ultra vires successionis*, too[27]. The particular legatee receives instead a gift, by reference to the item and not the person; his liability is limited accordingly[28].

Despite Armand's expression of these results in nineteenth century prose, that "les volontés du testateur et de l'héritier, consécutives l'une à l'autre, se touchent et se lient"[29], their result is to show a succession universalized not by attachment to private personhood, but by attachment to the public glory in the person of the benefactor. The problems, inherent in the classical French doctrine, of how external goods in patrimony could be an emanation from the internal isolate of will, cannot arise.

The only other sense of successoral universality is irrelevant to these purposes. This is "the ways in which things are acquired as a universality/ quibus modis per universitatem res adquirantur". Such a *universitas* comes either by testamentary or intestate succession, purchase of an insolvent's estate, adoption of a person who is *sui juris*, or marriage *in manum*; in all of these the person cared for has his whole property transferred to the other in an aggregate mass[30]. But as Gaius points out in the preceding article, this has nothing to do with the character of the goods, or of the person; it is just procedural, how to transfer rights altogether instead of singly. Nor is the universality of goods formed because it is the property of a *universitas* or group of persons any more in issue here[31].

In a universality by control, the objects lose their identity and become fungible. The impetus is given, then, to reduce all distinctions based upon the

26. *Supra*, note 21, p. 16.
27. Armand, p. 57, locates the origin of the notion of succession by general title as distinct from universal title in the *loi de ventôse an XII*, whose purpose was to restrict the right of seisin to successors of the universality solely; also p. 16. The need to do this he finds, in turn, in an error of Pothier who understood *le mort saisit le vif* to mean that claim not only to possession but also to property was given, involving thus a crushing burden upon heirs to pay debts beyond their legacy's value. This the Revolutionary authors wished to escape.
28. The obligation to pay upon the particular legacies should not be confused with the obligation to pay out the particular legacies. The first would fall upon the legatees, the latter upon the universal heir. That is, instead of the particular legatees being seized of their bequests directly, the heir serves as trustee for them, in the procedure described by Gaius, II, 102, which he says has become the only procedure in use, II, 103.
29. *Supra*, note 21, p. 60.
30. *Supra*, note 2, II, 97.
31. *Id.*, II, 11.

types of goods; the French codifiers reject the *materna* and *paterna*, the Quebec commissioners reject the same distinction and base their rejection in part upon the law of Novella 118, to be seen. But that law looks to quite different considerations than the maintenance of fungible universality. The sole consideration to which the official preface to the law looks is the "unfittingness" of such a distinction, and perhaps the fact that the old distinctions are complexifying; nothing more is said:

> Plurimas et diversas leges veteribus temporibus prolatas invenientes, per quas *non juste* differentia [non juste discrepantia, in the draft version] ab intestato successionis inter cognatos ex masculis et feminis introducta est, necessarium esse perspeximus omnes simul ab intestato cognationum successiones per praesentem legem *clara compendiosaque divisione* disponere...[32]

1.2.3. Immoveables

The other prominent division within goods in the patrimony, between moveables and immoveables, does not even appear in Gaius' divisions, and hardly appears elsewhere. But this division is largely equivalent to the distinction between the paternal and maternal goods, and the goods acquired by oneself, the *propres* and the *acquets* of a later era. The difficulty with the distinction where it did appear was the same as with the distinction between corporeal and incorporeal goods: once the property at the core of patrimony is seen as a right over both sides of the division, it makes as little sense to characterize that right as corporeal as to characterize it as immoveable or moveable, and even less when the former is identified with a real right.

The absence of any need for the division at the start of this evolution in Rome is parallel at its end to Savigny's attachment of each good to the whole of patrimony, so as to treat all the same according to what he saw as *l'idée du caractère incorporel et universel* of Roman succession law[33]. But, in between, changing valuations of goods drives their legal control out of the law of situation when immoveables were wealth (with agricultural wealth and territorial fief) and into a law of domicile when moveables become wealth[34].

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32. *Corpus Iuris Civilis*, 6th ed., v.3, *Novellae*, ed. R. SCHOEIL and W. KROLL, Berlin, 1959, p. 567; my emphasis.
33. F. BOULANGER, *Étude comparative du droit international privé des successions en France et en Allemagne*, Paris, L.G.D.J., 1964, p. 31, no. 32.
34. *Id.*, pp. 30 to 40. This is reflected in the difference between article 334 of the *Coutume de Paris* charging of debts upon all goods without distinction, and the charging of debts primarily upon *acquets* (mostly moveables) and only secondarily upon *propres*, (mostly immoveables) in article 400 of the *Coutume de Normandie*, according to BOULANGER, p. 36, n.372. The latter was the primary influence on Quebec law until the *Quebec Act*: A. MAYRAND, "La dévolution successorale ab intestat en droit québécois", (1972) *Rev. jur. et pol. Ind. et coop. 887, passim.*

While this contribution to the unity of patrimony proceeded apace in both France and Germany, the unification in France was more thoroughgoing. For though the Prussian Code of 1794 set personal capacity under the law of domicile (art. 23) while placing both moveables and immoveables under the law of their situation (arts 28, 32), the French Code of 1804 in following this located the law of domicile in the national law, in effect the law of situation [35]. The subsequent theoretical patrimonialization of French law easily suggested that its unity of treatment for moveables and immoveables could be shown to be derived from the Roman law because of the latter's lack of such a distinction, too. The difference between an absence of distinction and an affirmative exclusion of it was given as little importance, if even recognized, as was the totally different Roman conception of *ius* from the classical patrimonial theorists.

1.3. *Ius*

Modern patrimony is spoken of in terms of rights; it is the ensemble of rights incorporeal rather than of goods corporeal. The assembling is possible because rights are related to the single isolated will; they are its powers. In the Roman law of Savigny, this right is a quality of the subject, one of his faculties or powers; it is defined by its own content, the object it stands faced with for control by it. It is unilateral, a matter of fact about the subject of rights [36].

The repeated argument of the jurisprudent Michel Villey has been that this is not what *ius* meant in Roman law, not even when put into the plural *iura* and given a genitive object, e.g., *ius disponendi* [37]. A faculty or power is a pre-legal fact; "la puissance absolue qu'exerce le maître romain sur sa chose, ce n'est point le droit, c'est le silence, ce sont les lacunes du droit", "en dehors de la cité, *en dehors du droit*, dans une autre sphère de la vie" [38]. For Ulpian as for Aristotle and Aquinas, says Villey, *ius* is instead "*cela* qui est juste (id quod justum est), le résultat auquel tend le travail du juriste : le juste rapport objectif, la juste proportion découverte *entre* les pouvoirs",

35. *Allgemeines Landrecht fuer Preussischen Staaten*, 1794, served as model for the *Code civil*, 1804; B. NOLDE, *La codification du Droit international public*, Paris, extrait du Cours de l'Académie du droit international de LaHaye, 1936, showed that the *ministère de la Justice* ordered it translated in 1801, and that the preliminary schema of the code followed it: F. BOULANGER, *supra*, note 33, p. 38, no. 40.
36. M. VILLEY, "La genèse du droit subjectif chez Guillaume d'Ockham", (1964) 9 *A.P.D.* 97, p. 101.
37. As Armand following Villey closely here remarks, the stress is upon the object in the gerundive, not upon the noun: *supra*, note 21, p. 182.
38. M. VILLEY, *supra*, note 36, pp. 107, 108.

"appliqué à l'individu, ... la *part* qui lui revient dans ce juste partage", "son *statut*, sa condition particulière, ... ou telle chose, tel bien, telle valeur en tant qu'ils constituent sa part" [39]. *Ius dominii*, rather than the tautology it might now seem, was instead a contradiction in terms. *Ius creditoris* is not his power, but is the obligation or *vinculum iuris* itself, "le rapport liant objectivement le créancier et le débiteur" [40]. No other notion is to be found in Roman law nor in canon law, nor in medieval thought. With William of Ockham or the Franciscan school of voluntarism more generally, the dispute over voluntary poverty is resolved for the friars on their claim that they bear a *ius poli* to use goods in fact, without having to bear a *ius fori* to sue for them [41]. A right of property based on use, such as Locke developed, finds in the former inherent power or faculty its perfect conceptualization legally [42].

What appears unmistakably is not only that Villey's conceptualization of Roman *ius* stands at the far pole from Savigny's conception of Roman *ius*, but also that a centering of a unity of rights in patrimony around the person and his will is meaningless upon Villey's view. If it is correct — and Villey is as suspiciously lavish with his accusation of the egoism and disordered appetite attendant upon *droit subjectif* as is Savigny's voluntarist fixation, for one to be confident of his own objectivity — then one may look elsewhere than in Roman law for anything to do with classical patrimonial theory. A rejection of the latter, in turn, would require either an acceptance of Roman *droit objectif* simply, or else an alternative foundation to the legal relevance of *droits subjectifs*. One way to pose the issue is to ask whether there is any way to make rights (and so patrimony) concrete, without making them individual, factual and extra-legal; and any way to make them relational, without making them therewith abstract.

39. *Id.*, p. 103.
40. *Id.*, p. 106.
41. *Id.*, p. 118.
42. Villey's thesis is not without critics. Several Franciscan thinkers, as well as the thomist Heinrich Rommen — whose views Villey rejects in turn, *id.*, p. 111, n.1 — have noted various flaws even while agreeing overall with Villey's characterization of Roman *ius*. See: ROMMEN, "The Geneology of Natural Rights", (1954) 8 *Thought* 403. For example, Aquinas also held views on subjective rights; only early Roman law held *dominium* outside the city; subjective rights emerge as a practical claim in the free cities long before Ockham's fourteenth century systematization, as well as in the glossators; his theory is in a polemical and political context, against a Pope adverse to his vow of poverty, and is not related to his voluntarism — not to mention the rejection of that latter characterization itself.

2. *Code Napoléon*

2.1. Legislation

As in the Quebec code, the term *patrimoine* is never defined in the French *Code civil*, although many terms are, and is rarely used. Only three present uses are found[43], and one since abrogated[44].

2.2. Doctrine

These articles which mention patrimony would not be likely to ground any theory, even though one might be provoked to ask what it means there and whence it comes, that is, what ideology it imports into that objective ideality that is the code by its very presence there. But given the fact to be reviewed shortly of a grand structure of explanation erected over *patrimoine*, authors subsequent to the codifiers and to the builders have tried to explain its origin in the code. Speth is perhaps the most forthright[45]: the classical theory is supported by articles 732 C.N. and 2092-4 C.N.[46]. He points to

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43. *Code civil*, 77e éd., Paris, Jurisprudence générale Dalloz, 1977-78 (as "C.N."): Art. 878 C.N. Ils peuvent demander dans tous les cas, et contre tout créancier, la séparation du patrimoine du défunt d'avec le patrimoine de l'héritier.
Art. 881 C.N. Les créanciers de l'héritier ne sont point admis à demander la séparation des patrimoines contre les créanciers de la succession.
Art. 963 C.N. Les biens compris dans la donation révoquée de plein droit rentreront dans le patrimoine du donateur, libre de toutes charges et hypothèques du chef du donataire... [Such a situation arises as in art. 960 C.N. upon the birth of later children. Compare the expression apparently equivalent to *dans le patrimoine du donateur* that is found in the parallel article 954 C.N. regarding revocation for reason of ingratitude: *dans les mains du donateur.*]
44. *Codes annotés. Nouveau Code civil*, IV, Paris, Jurisprudence générale Dalloz, 1909; am. 1957, to a version with a different limitation and without the word.
Art. 2111 C.N. Les créanciers et légataires qui demandent la séparation du patrimoine du défunt, conformément à l'article 878 du titre *des Successions*, conservent, à l'égard des créanciers des héritiers ou représentants du défunt, leur privilège sur les immeubles de la succession, par les inscriptions faites sur chacun de ses biens, dans le six mois à compter de l'ouverture de la succession...
45. F.H. SPETH, *La divisibilité du patrimoine et l'entreprise d'une personne*, Paris, Librairie générale de droit et de jurisprudence, 1957.
46. Art. 732 C.N. La loi ne considère ni la nature ni le régime des biens, pour en régler la succession.
Art. 2092 C.N. Quiconque s'est obligé personnellement est tenu de remplir ses engagements sur tous ses biens mobiliers et immobiliers présents et à venir.
Art. 2093 C.N. Les biens du débiteur sont le gage commun de ses créanciers, et le prix s'en distribue entre eux par contribution, à moins qu'il n'y ait entre les créanciers des causes légitimes de préférence.
Art. 2094 C.N. Les causes légitimes de préférence sont les privilèges et hypothèques.

places other than explicit patrimonial separations where the authors of the code also clearly envisaged an institution such as patrimony as an integral part of the legal system [47]: in life, the explicit administration of others' goods as a whole for them (tutorship, interdiction, spouses, absentees, *gestion d'affaires*), and the resulting implicit administration of the totality of one's own goods; and, in death, the curatorship of vacant successions, and the ability to dispose of the goods as a universality.

2.2.1. Codifiers and Intermediary Law

The institution of separation of patrimonies did not appear at all on the first relevant opportunity of the new order, viz., the law of 9 *messidor an* III which organized a system of hypothecs. Only in a replacement section of the law of 11 *brumaire* and VIII was *la distinction et la séparation des patrimoines* carefully saved from any other regulations on the effect of privileges and hypothecs [48]. The motives and spirit of the civil code's separation of patrimonies — the sole codal mention of patrimony, recall — appear in Siméon's presentation of 29 *germinal an* XI: he skips the matter entirely! Having proceded in his discourse up to what now is article 877 C.N., he next treats of articles 883 onwards, never returning to his omission of articles 878–881 dealing with separations [49]. No other treatment of this issue has been located except for the brief reference by Portalis on 20 *ventôse an* XI in *his "Exposé des motifs relatifs au titre De la propriété":*

> Loin que la division des patrimoines ait pu détruire la justice et la morale, c'est au contraire la propriété, reconnue et constituée par cette division, qui a développé et affirmé les premières règles de la morale et de la justice. Car, pour rendre à chacun le sien, il faut que chacun puisse avoir quelque chose.[50]

As for the indistinction of goods in article 732 C.N., which is supposed to be one implicit *locus classicus* for the theory of patrimony, Treilhard stated the preoccupations of the legislator to the *Corps législatif* [51]: in paraphrase, under the Old Law the desire to preserve family possessions — praiseworthy

47. F.H. SPETH, *supra*, note 45, p. 110, no. 127.
48. M.F. BARAFORT, *Traité théorique et pratique de la séparation des patrimoines*, Paris, Durand, 1866, pp. 16-17.
49. Discours prononcé devant le Corps législatif, in P.A. FENET (éd.), *Recueil complet des travaux préparatoires du Code civil*, XII, Paris, 1827 p.
50. *Code civil français*, IV, Paris, Firmin Didot, XII (1804), p. 29; Speth's reference to a presentation by Treilhard on the matter of separations was not found, at large nor at the references cited to: 23 *nivose an* XI, Procès-verbal du Conseil d'État, séance du 23 *nivose an* XI, V, no. 28; Exposé de motifs, IX, no. 35.
51. B. DE LOCRÉ, *La législation civile, commerciale et criminelle de la France*, X, Paris, Treuttel and Wuertz, 1827, pp. 183–185.

if kept within balance — made inalienable the *biens propres*, i.e., immoveables received by succession. The results were: (1) uncertainty, harmful both the private interest since an innocent acquirer could find his acquisition withdrawn, and to public interest because this roused much litigation; (2) contrary to the presumed will of the intestate, whose immediate family would be stripped for the sake of distant relatives, perhaps unknown; and (3) not according to natural law, for distinction by origin is artificial. Instead, "on voulait surtout dans les lois cette unité qui semble être leur essence, puisqu'elles sont l'image de l'ordre éternel". The unity which counters *l'anarchie féodale* and its *maximes funestes et antisociales* is, first, that the efforts of the fathers not be lost upon their children — although this would seem rather to argue for maintenance of the Old Law's free *acquets* but bound *propres* — and, much more to the lurking nerve of the reform, that there be no resultant stifling of "le principe le plus pur et le plus actif d'une louable émulation". Competition underlies fathers' love, it seems; *this* is the natural unity, image of the eternal, which makes foods fungible and serves as "le vœu de tous les hommes éclairés".

Still, even this much suggestion of purposeful creation of patrimonial unity probably goes too far. More likely is just the economic fact that such distinctions are outmoded. Rather than expunged, they are just abandoned [52].

> Il fut un temps où les immeubles formaient la portion la plus précieuse du patrimoine des citoyens... On n'a pas dû attacher autant d'importance à une portion de terre, autrefois patrimoine impose [sic] des citoyens, et qui, aujourd'hui, ne forme peut-être pas la moitié de leur fortune.

As for the alternative pedestal of the theory of patrimony, the common pledge of articles 2092 C.N. ff., its brief explanation is similar, and similarly not in terms of patrimony [53].

> La conséquence de ce principe est que le crédit de celui qui contracte un engagement se compose non seulement de ses immeubles, non seulement de ses biens actuels, mais encore de ceux que sa bonne conduite, que son industrie, que l'ordre naturel des successions peuvent lui faire espérer.

Speth finds here not an allusion to the institution of a cohesive patrimony, but only an intention to exclude the arbitrary withdrawal of some types of goods [54]. That is, instead of pointing to the uniqueness of patrimony as a common pledge as against the multiplicity of creditors, what is stressed is the additive character of their pledge: every new item acquired feeds into them. The stress is on *biens* as *choses*, not as *droits*.

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52. TREILHARD, "Présentation du titre *De la distinction des biens*", 20 vendémaire an XII, in P.A. FENET, (ed.), *supra*, note 49, XI, p. 34. N.B. *fortune* for *patrimoine*.
53. B. DE LOCRÉ, *supra*, note 51, XVI, Bruxelles, 1836, p. 108.
54. *Supra*, note 45, p. 118, no. 132.

Expanding the openness of goods' disposition at one point, the codifiers contract is elsewhere. From Treilhard alone, it is alleged [55], arises the *numerus clausus* of real rights: "Il ne peut exister aucune autre espèce de droits". Again, the ending of the different treatment for different types of goods is identified by Blondel as Roman in its organization but not Roman in its foundation, i.e., not being utterly individualistic. To show this he cites Bigot-Prémeneau:

> Il est difficile de convaincre celui qui est habitué à se regarder comme maître absolu de sa fortune, qu'il n'est pas dépouillé de son droit de propriété, lorsqu'on veut l'assujettir à des règles, soit sur la quantité des biens dont il entende disposer, soit sur les personnes qui sont l'objet de son affectation, soit sur les formes avec les quelles il manifeste sa volonté.[56]

Roman indistinction is supposed chosen, then, only in order to win over the owners, while succession is really non-individualistic in the codifiers. Such is shown, says Blondel [57], by Treilhard's explanation that "l'héritier que crée la volonté de l'homme ne le devient que par dérogation au droit commun". Only nineteenth century authors gave precedence to testamentary succession.

That this shows, as Speth agrees [58], the codifiers reacting only against complexity and not promoting individualistic will is doubtful. What is clear, however, is that this will is left in the pedestrian position of bourgeois competition, rather than being erected into the transcendent principle of a patrimony, as did the later nineteenth century writers.

2.2.2. *Ancien droit:* Pothier

Neither is patrimony in pre-Revolutionary French law a prominent feature. Speth notes that it attends not to patrimony, but the patrimonies. Among these he describes as an autonomous universality the fief; and discovers its cohesion in the special affectation of the goods, that is, they could bear debts only of the fief, making it a distinct entity. In turn, the disappearance of many and the rise of a single patrimony occurred through a change in the *passif*: payment *en nature* being shunted aside by the use of money, the single payment, so also was the need to keep multiple *actifs* instead of one [59].

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55. S. GINOSSAR, *supra*, note 18, p. 182, no. 67, quoting from B. DE LOCRÉ, *supra*, note 51, VIII, p. 51.
56. P. BLONDEL, *La transmission à cause de mort des droits extrapatrimoniaux et des droits patrimoniaux à caractère personnel*, Paris, Librairie générale de droit et de jurisprudence, 1969, quoting from P.A. FENET (ed.), *supra*, note 49, XII, p. 509, at p. 18, no. 21-23.
57. *Id.*, p. 20, no. 25.
58. *Supra*, note 45, p. 57, no. 64.
59. *Id.*, pp. 56-57, no. 63.

Similarly, Blondel explains the absence of a patrimony at death by the prominence of succession to person, not to goods. On the one hand, children continue parents and are bound by succession to personality, rather than to goods; rather than goods as a common pledge, liability is personal — "la première des aumônes est de payer ses dettes", quoting Saleilles. On the other hand, feudal land passes in such a way as to ensure the lord's territorial sovereignty — not to a foreign heir but to one who will be subject to the lord. Both are far from patrimonial succession [60].

Certainly the texts collected from Domat, Lebrun and Pothier by Barafort, upon what he calls "separation of patrimonies" neither make mention of the term nor hint at a concept of universality, speaking instead of *séparation des biens* [61].

Pothier does, however, speak in the context of property about a universality such as a succession. In order to recover this once possession is lost, one cannot use an action in revendication as upon particular items lost, but must use a petition for the inheritance. This is not true of all universalities, for there are some which can be revendicated as particulars, e.g., a flock of sheep, a brace of horses. "Il ne faut pas confondre avec l'universalité des biens, ce qui n'est qu'universalité de choses" [62]. The distinction of *biens* and *choses* is provocative, but never developed in this treatise nor in the preceding *Traité des personnes et des choses.* Nor are the concepts of universality here distinguished; for despite the editor's footnote that this is one of the most important distinctions in law because of its practical consequences [63], Pothier does not even use the concept or the term when he comes to treat of its appropriate action, the petition for inheritance, later on [64]. This is the only discussion of a universality which is owned, aside from the ordinary use of *universel* in the context of the whole or aliquot part of an inheritance [65].

Likewise, it is not possible to cue to the reference to will, for the demand that tradition, gain and loss of property be by will is an unspectacular insistence upon consensus [66]. What is worthy of note, however, is the exception to the demand for tradition. The reason why tradition is required in order to pass property is that tradition gives possession, which is essential

60. *Supra*, note 56, p. 35, no. 42.
61. *Supra*, note 48, no. 7, pp. 13–16.
62. R.-J. POTHIER, *Traité du droit de domaine de propriété* (1771), no. 283, in *Œuvres*, IX, 2e éd. par M. BUGNET, Paris, Plon, 1861, p. 200.
63. *Id.*, n.3.
64. *Id.*, no. 365, p. 234.
65. *Id.*, nos 248–250.
66. *Id.*, nos 231, 259-260, 265-266, respectively.

for ownership[67]; and possession means a physical detention[68], of which incorporeals are incapable. Nonetheless, property — itself an incorporeal — does pass. As a first explanation, it is said that there is a quasi-possession given by use[69]; but so is there of the *peculium* of the slave, child or religious, which is not his property[70]. So as a second approach, Pothier cites Pufendorf in one of his few non-Roman references herein, to the effect that only when property is looked upon as physical and present power to make use is tradition indispensible.

> Mais lorsque le domaine de propriété d'une chose n'est considéré que comme une qualité purement morale, en vertu de la quelle une chose appartient à quelqu'un, rien n'empêche, dans les purs termes du droit naturel, que le domaine de propriété, considéré de cette manière, puisse passer d'une personne à une autre par une simple convention, avant qu'elle ait été suivi de la tradition.[71]

The hint this gives, which would escape attention, however, were such not focused comparatively, is carried out in the overall structure of study Pothier makes. Following Arnaud, one can find in Pothier the change of perspective from property as defined by its object to property as defined by our rights which, as will be seen, makes possible or even necessary the classical conception of patrimony[72]. Studying the final treatise added to Pothier's vast commentary on Roman law[73], wherein he rearranges the rules of law from the order of Gaius' treatment which Pothier's *Pandects* had followed, Arnaud finds in its third part, *Res*, the Roman law transformed as did the Modern School of Natural Law, that is, the replacement of Gaius' division of objects by the rationalist and axiomatic division of rights: set out definitions, expound their conditions, expound their effects in a systematic way:

> Partant de l'observation du monde, il note l'existence de *res in commercio*, qui se divise en corporelles et incorporelles. Mais examinant l'utilité des choses pour le Droit, il adopte un autre point de vue, admettant des Jura, au sens de droits subjectifs, qui peuvent ou bien avoir directement pour objet les *res* (jura in re) ou bien simplement les concerner (jura ad rem).[74]

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67. *Id.*, no. 245.
68. *Id.*, no. 214.
69. *Ibid.*
70. *Id.*, no. 254.
71. *Id.*, no. 245.
72. A.-J. ARNAUD, *Les origines doctrinales du Code civil français*, Paris, Librairie générale de droit et de jurisprudence, 1969.
73. *De diversis regulis juris antiqui*, L.50, T.17, in *Pandectae Justinianeae in novum ordinem digestae*, 1748–52. Arnaud claims the design is prolonged twenty years later in the *Traité du droit de domaine de propriété*; but that is not clear.
74. A.J. ARNAUD, *supra*, note 72, p. 165.

Arnaud sees here the watershed or *truchement* in France between the system of Gaius who sees only *res*, and the system of Struve who sees things only in terms of their utility, an individualist inspiration [75]. From *le père du Code civil* the future commentators take the hints of their explanations [76]. Pothier popularized if not created the term *démembrements* of real rights [77], and conceived them as dismemberments of the principal right, the right of property, from which they emanate [78]. Although property is listed with possession as a corporeal *res*, and the dismemberments as incorporeals [79], both are now rights primarily, property a right being divided into other rights instead of primarily a sensible thing upon which intellectual distinctions can be made.

2.2.3. Nineteenth Century Commentary: Aubry and Rau

It is agreed on all sides that not the *Code Napoléon* but its commentators Aubry and Rau are responsible for the grand development of patrimonial theory, if not its origin, in the French civilian group. The climate is dependent upon the new code. They follow it in spirit: "ils ont voulu, avant tout, faire ressortir l'idée maîtresse du Code civil, opposant l'unité à la diversité" [80]. They follow also the methodology required by it: "the task was for the interpreter alone, with his eyes fixed on nothing but the code", i.e., a method of "individualism and self-assertion", since no longer steeped in the context of pre-codal caselaw — their first edition appeared in 1839 — and neither bound by nor helped by current caselaw insofar as both civil and penal codes had forbidden courts to engage in legislative activities [81].

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75. George-Adam Struve's *Pandectes* of 1670 commences with the global category of *jus*, not *res*. Of interest is his division of real rights into *dominium singulare* (including all dismemberments of property and property too) and *dominium universale* (i.e., *succession à titre universel*). Unfortunately, his work was unavailable for study, other than through Arnaud's brief chart, taken from Villey.
76. A.J. ARNAUD, *supra*, note 72, pp. 166-167.
77. S. GINOSSAR, *supra*, note 18, p. 108, no. 41, n.198.
78. *Supra*, note 62, no. 2, p. 101.
79. A.J. ARNAUD, *supra*, note 72, p. 167; although Pothier also so divided *choses*, in *Traité des personnes et des choses*, no. 232, in *Œuvres, supra*, note 62, p. 87. Also, the initial distinction Arnaud at p. 166 finds in Pothier between *res in commercio* and *res extra commercium* is only minimal although it would have been of interest to the present investigations. It appears only as: "Toutes les choses corporelles ou incorporelles, qui ne sont point du droit divin ou du droit public, sont du droit privé": *Pandectae*, XXIII, Paris, Dondy-Dupré, 1818, p. 315. Finally, the only mention of things as of a universal right is the *universalités* of public law, i.e., those universal because they belong to *universitates: id., p. 304.*
80. F.H. SPETH, *supra*, note 45, p. 18, no.23.
81. J.-P. DAWSON, *Oracles of the Law*, Ann Arbor, University of Michigan Law School, 1968, p. 395.

Illustrating what have been termed the harmful effects of codification, viz., no proposals of model just law but mere exegesis along with a nationalism encouraged by this legal positivism[82], Aubry laid out nineteenth-century methods to the law faculty of Strasbourg, of which he was dean, in 1857: professors are

> to dispense legal education in the name of the state, a mission to protest in a measured way not doubt but firmly against every innovation that would tend to substitute a will other than the legislator's.[83]

The method is paralleled in the content of their doctrine, for it is the ultimacy of will which will later be viewed as underlying the attachment of patrimony to person.

The setting of the doctrine of patrimony within the whole of their doctrine is laid out in their preface[84]. The study of the civil law has two parts, the first on persons and the second on goods; this second part has two books, the first on goods taken individually and the second on goods taken universally. This second book is the theory of patrimony and has two divisions the first on patrimony taken generally and the second on patrimony taken as applied. This seems standard enough, up until the second book; but there are features of the first part and of the second part's first book, which are already eccentric and which lead with logical necessity to the second book. That is, patrimony is not a peculiar addendum to an otherwise pedestrian exposition, but is an essential part of a revised notion of law, if not its goal.

The situation of person in the first part is that "l'homme est envisagé comme personne juridique, abstraction faite des droits qu'il peut avoir en cette qualité, suivant les diverses positions dans lesquelles il se trouve placé". Legal person is usually seen by jurists of the modern era as equivalent to the bearer of rights and duties, a bearer exhausted by them for legal purposes, and thus not available for study but through them. Aubry and Rau do leave this quality which defines legal person, however; it is only that man is being abstracted from that which constitutes him. The authors take back with one hand what they gave with the other. The rights, in turn, do not attach to him *qua* person, but insofar as he is located in concrete circumstances. Person, if distinct from patrimony, is so only precariously: he is constituted by rights, but is separated from them; his essence is rights, but they arise from situations.

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82. R. DAVID and J.E.C. BRIERLEY, *Major legal Systems in the World Today*, 1[st] Engl. ed., London, Strauss, 1968, p. 51.

83. J.P. DAWSON, *supra*, note 81, quoted from J. BONNECASSE, *L'école de l'exégèse*, p. 1819.

84. C. AUBRY and C. RAU, *Cours de droit civil français d'après la méthode de Zachariae*, I, 4[e] éd., 1869, pp. vi-vii. Unfortunately neither the first edition of 1838 nor any earlier edition than the fourth was available for consultation.

The characterization of rights is equally noteworthy; rights "peuvent appartenir aux personnes sur les objets du monde extérieur avec lesquels elles se trouvent en rapport". Relations are ultimate, rights lie on their hither side, objects lie yonder. Rights are "upon" the external world, but are not the relations themselves. However, it is the objects and not the rights which form the content of the patrimony, indeed of the whole law of goods. "Or, ces objets ne doivent pas être envisagés seulement dans leur individualité, mais comme faisant partie intégrante d'une universalité juridique (*Patrimoine*)". "Objects in the external world" make up patrimony as its integral parts; its parts are not rights, nor even goods/*biens*. Even the category of things/*choses* is eschewed although it seems not only to express the idea but also to be the traditional term. Note that no reason is offered here for why we "must" study objects in their universality, that is, why we need patrimony at all.

This terminology is not consistently kept to; for the first book of part two "s'occupe des *droits* sur les objets" outside in their individuality, while the second is the book "dans lequel les *objets* des droits de l'homme sont envisagés" within patrimony. The novel terminology of objects, pointed up by the underlining now added, perhaps is insisted upon to the detriment of their doctrine's clarity because of the novelty the authors recognize in their efforts; for the general theory of patrimony "comble ainsi une regrettable lacune qui se rencontre dans les autres ouvrages de Droit civil français", in which they are regrettably correct.

What does the theory of patrimony cover? What considerations can be made under that rubric which cannot be made under particular rights? While taking rights individually serves as the vehicle for a wide range of studies [85], these objects taken universally have only one suggested application: the second book of part two "contient ensuite l'application spéciale de cette théorie à l'acquisition du patrimoine d'une personne décédée..., et traite accessoirement des donations entre vifs, et des legs à titre particulier".

Moving from the prefaced design into the treatment proper of patrimony in the second book of part two, there appear the ways of defining patrimony seen in the preface: "l'ensemble des *biens* d'une personne, envisagé comme formant une universalité du droit" [86]; and "le *droit* de propriété dont toute

85. Real rights (of property, of servitudes personal (!) and real, of hypothecs and privileges), personal rights (obligations), *droits de puissance et de famille* (leaving little scope for a critique that the first part on person-as-abstracted-for-rights is concerned with person's extrapatrimonial rights as distinct from rights upon the external world or patrimonial, since today's extrapatrimonial rights are included within patrimony).

86. *Supra*, note 84, IX, 5[e] éd. par E. BARTIN, 1917, p. 333, no. 573.

personne jouit sur son patrimoine," i.e., upon patrimony in the first sense [87]. Patrimony in the second sense is a *bien inné* since inherent in personality [88], and so it is in theory a member of patrimony in the first sense, although in practice it does not so function since there is no suit upon it until it is violated ans losses in money appear [89].

There is no distinction drawn between the sources of universality of the two: the second is not acquirable, since "inhérent à sa personnalité même" [90]; and the first is one and indivisible, "comme la personnalité même", "à raison de l'unité de la personne" [91]. It is one, "étant une émanation de la personnalité, et l'expression de la puissance juridique dont une personne se trouve investie comme telle" [92], "déduit directement de celle [idée] de la personnalité" [93].

The right (patrimony $_2$) is more identified, however, with the personality that are the goods (patrimony $_1$), in these expressions, although the first sense is also identified with personality: "le patrimoine étant... la personnalité même de l'homme", "le patrimoine d'une personne est sa puissance juridique" [94]. Patrimony $_2$ (right) is universal by being the personality; patrimony $_1$ (objects) is universal by being related to personality. How is it related to personality? It is "soumis au libre arbitre d'une seule et même volonté, à l'action d'un seul et même pouvoir juridique" [95]. That is, patrimony $_2$ is the control, patrimony $_1$ is what is controlled; and the control is single because the controller is single, viz., the will, or its free choice. Thus far, one sees the unity of patrimony [2], but hardly that of patrimony $_1$.

And the authors agree. For while both patrimonies are inalienable and not acquirable, only patrimony $_2$ (the right of property over patrimony $_1$, *which right is a member of patrimony* $_1$) is absolutely indivisible, whereas patrimony, is indivisible only in principle. But looking first to their features in common, the authors say only of patrimony $_1$ (objects) that only persons, physical or moral, may have one [96]; but it is no leap to say that they would agree the same is true of patrimony $_2$, although in strict logic — and in some legal systems — there is no contradiction between finding the right of property in one location and the control elsewhere.

87. *Id.*, p. 339, no. 577.
88. *Id.*, 1°.
89. *Id.*, pp. 334-335, no. 573, 2°.
90. *Id.*, p. 339, no. 577, 1°.
91. *Id.*, p. 336, no. 574, 1°.
92. *Id.*, p. 335, no. 573, 4°.
93. *Id.*, p. 333, no. 573, 1°.
94. *Id.*, n.6.
95. *Id.*, p. 334, no. 573, 1°.
96. *Id.*, p. 336, no. 573, 4°, #1.

Secondly, they explicitly require of both patrimonies that they be inalienable and unacquirable. Regarding patrimony$_1$, every person necessarily has one, despite actually possessing nothing[97]; that is, the existence of personality comprehends not only its existence *in actu* but also its existence *in potentia* upon objects. As such, patrimony is not only actual control but also potential control, and so inalienable by merely disposing of what is actually controlled[98]. Regarding patrimony$_2$, it cannot be detached from the person because it has no independent existence of its own, so there is nothing to detach[99].

Looking next to their differing features, patrimony$_1$ differs from patrimony$_2$ because the former is indivisible only in principle while the latter is indivisible absolutely. As for the universality of goods (patrimony$_1$), the following divisions are found in fact: between different sorts of goods, in the Old Law though not in the modern[100], although it is "contrary to reason" to use natural qualities to divide intellectual entities; into two universalities consisting of aliquot parts, which are intellectual parts, not natural, for each of which the heirs come *à titre universel*[101]; and between the universality of patrimony and the universality of some other patrimony formed out of it and split off from it[102]. But as for the right of property over patrimony$_1$ (viz., patrimony$_2$), this is divisible not even into intellectual parts. Are not the several aliquot parts, making universal heirs as they say [sic], a

97. *Id.*, #2.

98. *Id.*, p. 334, no. 573, 2°, n.6. For this reason, they find the German term *Vermoegen* even more expressive than *patrimoine*, for the former expresses both power and patrimony. Two fallacies appear here: the potentiality to acquire objects does not include the potentiality of the objects to be acquired — unless the sense of patrimony under discussion here has merged with patrimony$_2$ — but that would beg the question; and although alienating actual patrimony$_1$ does not involve alienating potential patrimony$_2$, it may nonetheless be possible to alienate the latter in some way.

99. *Id.*, p. 350, no. 577, 2°. It would be worth asking why this distinguishes the right of property over patrimony from other rights which are surely alienable. Being "inherent in the very personality", 1°, is explanatory of this difference only if it is not itself explained circularly in terms of the difference; but it is.

100. *Id.*, p. 336, no. 574, 1°.

101. *Ibid.*, and p. 339, 3°.

102. Such are the patrimonies kept at a distance from one's own by: benefit of inventory; separation of patrimonies; *droit de retour*, the return to ascendents of gifts to children deceased childless and single; the absentee's goods; held fiduciarily; the wife's reserve: *ibid.*, 2°. The distinct is highly relevant: only division *within* the patrimony can be an objection to its individuality, whereas all these examples are divisions *from* patrimony. At most, these could serve as objections to the principle that a person can have one and only one patrimony, not that patrimony is indivisible. Unfortunately, most critics have argued against the latter using the same examples that the originators themselves offer. However, even the first objection is unfounded: the same person holds not two patrimonies of his own, but one of his own and one of someone else.

counterinstance to this claim? No, for the integrity of the patrimony persists since heirs to any intestacy represent the deceased integrally, despite the presence of multiple "universal" heirs, i.e., *à titre universel*[103]. That is, as long as the personality is represented universally by only one, then there is no contradiction to the indivisibility of patrimony falling into multiple universalities[104].

Patrimony$_2$ (right) has no parts; patrimony$_1$ (objects) has intellectual parts, but the objects in patrimony$_1$ are not its parts, only the objects which have lost their particularity in being universalized. They form parts of patrimony$_1$ not by reason of their own natures but by reason of being *biens*, that is, not having usefulness themselves but having something useful which they can procure; as such, they have a money value[105]. But the money value of some is not estimable until after their violation[106]; these fall outside patrimony$_1$, and outside patrimony$_2$ since this is defined in terms of the former. Finally, objects form patrimony$_1$ only after debts are subtracted[107]. Subtracted from which goods? The question is pointless: "goods" has lost its particular meaning by being universalized.

In summary, patrimony is a universality. A universality is required because personality is universal. The universality negatively consists in the absence of distinction, multiplicity, divisibility, separability. It consists positively in the characteristic feature of person: his will. His will controls objects (patrimony$_1$); he is or he owns that control (patrimony$_2$: *droit de propriété* upon patrimony$_1$). The characteristic feature of will is its singleness by reason of being set off from multiple material objects. The will is rights[108].

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103. *Supra*, note 86, p. 351, no. 577, 4°.
104. The explanation, of course, overlooks both the split between personality and patrimony which this introduces, and also that the singleness of heirs to an intestacy who may be multiple can arise only *ipso jure*, as the authors say, which can mean here only "by fiction of the law".
105. *Supra*, note 86, p. 334, no. 573, 1°.
106. *Id.*, p. 335, no. 573, 2°.
107. *Id.*, 3°.
108. It is here that Speth's critique shows more how a contemporary still shares this underlying assumption of these modern authors, rather than rebutting it. He finds the two senses of patrimony to be the principal source of confusion. Namely, while he finds no problem for his theory of *affectation* (discussed later in this study) in patrimony$_1$, the problem is insuperable regarding patrimony$_2$, which certainly does mean an inner, inalienable and indivisible right "dans la conception actuelle des droits naturels de l'homme": p. 14, *supra*, note 45, no. 13, nn.2 and 3. That is, attchment to will by rights would still demand universality, since the comonplaces regarding will persist.

The fact that patrimony serves as common pledge must be modified, on this theory. Creditors cannot strip the debtor of his patrimonial rights, but only exercise his rights in his stead [109]. Likewise its feature of being the continuation of personality must be altered. Instead of an inheritance continuing the moral person, as originally, it continues the legal person. Blondel suggests that, once the codifiers had dispensed with continuation of the person morally, the nineteenth century commentators had do reintroduce it logically. Instead of heirs continuing the deceased extrapatrimonially, they continue him patrimonially, with the danger that the family that is no more would overcome the family being born. Aubry and Rau, Blondel says, pushed this logic furthest, by developing "une continuation juridique grâce à la construction abstraite du patrimoine autour de la personne et inséparable de celle-ci" [110]. But Blondel locates their need to develop such an envelope abstracted from contents in their need to explain codal provisions once the codifiers had taken away the former tool, viz., moral personality. He does not continue further and find the nub of both the exclusion and its replacement in the modern will, which Aubry and Rau admit.

Their theory of patrimony has suffered critique, but it still forms the substance of modern French civilian theory; it has not been replaced, even by objectivist theory to be seen later, but only critiqued [111]. And even the critiques have taken the cover of the classical theory itself: Aubry and Rau, as altered by Bartin who edited their sixth edition [112]; Colin and Capitant, by their editor Julliot de la Morandière, and Planiol and Ripert, by their editor Picard [113].

2.2.4. Nineteenth Century Commentary: Zachariae

Aubry and Rau's title acknowledges their dependence upon Karl S. Zachariae von Lingenthal, and in their preface they specify this as a dependency in overall design. They also note that no Frenchman has developed a general theory of patrimony. Their development of such a theory is generally adknowledged to be dependent upon Zachariae; and in

109. C. AUBRY, and C. RAU, *supra*, note 86, IX, p. 366, no. 579.

110. P. BLONDEL, *supra*, note 56, p. 36, no. 44.

111. *Encyclopédie Dalloz* in its *Répertoire de Droit civil* repeats the theory without critique: 1953 edition, III, pp. 732-733, by G. RIPERT; 2nd edition, 1970-1976, V, by P. ROBINO.

112. At IX, no. 573, he abandons the idea that the relation between a person and every object in his patrimony consists in a right of property, i.e., a property over objects including both corporeal things and incorporeal rights, which is essential to patrimony$_2$, and thus to patrimony$_1$. S. GINOSSAR, *supra*, note 18, p. 39, no. 15, n. 71 draws attention to this alteration.

113. These editors excised their mentors' acceptance of the indivisibility of patrimony, and replaced it with the theory of affectation, according to Speth, *supra*, note 45, pp. 24-25.

its execution they constantly relate their theory to his, while never so slavishly as later commentators do. Zachariae's conception of patrimony can highlight the assumptions and objections to the one Aubry and Rau fed into French law.

Aurbry and Rau's first edition in 1839 of volume one of the French translation of Zachariae [114] is taken from his third German edition of the *Handbuch des franzoesischen Recht* in 1827 [115]. As successive editions, its characteristic feature is to treat the code first theoretically, giving the rationale of substantive law, and only later to treat it practically, i.e., in terms of procedure and evidence. In the thoeoretical portion he takes the approach familiar from Aubry and Rau of treating first of rights without reference to objects, in a second part "des droits civils considérés sous le rapport des objets auxquels ils s'appliquent". Also familiar is his treatment of them first individually, and as a universality or patrimony in a second book "des objets extérieurs envisagés comme éléments constitutifs du patrimoine d'une personne": This is preceded by several volumes of book one dealing with property and other rights, again as Aubry and Rau [116].

In the introductory passage to the objects of rights, patrimony is given two definitions: the ensemble of a person's biens [117]; and the ensemble of a person's rights. The ensemble is an *ensemble juridique, universalité de droit,*

114. Not to be confused with the first edition of their own treatise of the preceding year.

115. K.S. ZACHARIAE, *Cours de droit civil français*, tr. de l'allemand de la 1re éd. par C. AUBRY et C. RAU, I, Strasbourg, Lugier, 1839. It has not been possible to consult the first German edition, nor to discover its year of publication.

116. This is distinct from G. Massé and Ch. Vergé's third edition of Aubry and Rau's French translation made from Zachariae's fifth edition, which the former acknowledge to be freely rearranged. Therein "the second place" is a chapter, not a book; it comes early in the second volume; it is followed by the treatment of property, not preceded by it; and it is named "des choses appartenant à une personne considérées comme une universalité juridique, ou du patrimoine". It is not extravagent to see here a change in the conception of patrimony, parallel to that worked upon Aubry and Rau by Bartin in 1917, despite the similarity in content between these sections in first and third French translations. The first edition concerns objects, which while external leave room to include both *choses* and *droits*; in the third, *choses* only. In the first, they are considered constitutive elements; in the third, only the universality is considered. In the first, the right of property is an exercise upon individual objects primarily although also exercised upon patrimony itself; in the third, the belonging/*appartenance* is an activity upon things primarily as they appear in patrimony, and only on the model of patrimony upon things individually in the subsequent title. That is to say, the success of the theory's first thirty years has acted to modify the theory itself, giving it place of honour, and making property a right exercised within it rather than as originally both within it an upon it.

117. This is the only definition given later, "l'universalité juridique de ses biens", *biens* being external objects on which he has rights to exercise insofar as they are considered as *biens*: *supra*, note 115, IV, 1844, p. 99, no. 573.

united by reason of the unity of the person to whom the *biens* belong. There are other legal universalities than patrimony, alongside it [118], exemplified by those Aubry and Rau found to be examples of a division in patrimony. The patrimony is not a "collection of objects", a *universalité de fait*, united by reason of a common use or by reason of having the same species [119], or even by reason of that bond which is the act of will turning them to that common end; this act of will is a question of intention, a fact, and not a matter of law [120]. Nonetheless, an act of will can turn a factual universality into a legal universality, viz., the act of will which leaves an inheritance [121].

The reason why patrimony must be postulated, as a legal universality, depends upon the characterization of its elements. Civil rights are the matter under study. Civil rights have objects. Their objects are corporeal (sensible), or incorporeal (intelligible), i.e., including rights and patrimony [122]; that is, rights can have rights for objects. The objects are also either outside and independent of person, or identified with his existence. The latter are *biens innés*, e.g., body, liberty, honour [123]. The latter are indeed included in patrimony [124]; but need not be treated separately because they only become manifest when violated, sued upon and become rights over external objects [125].

These external objects have utility. Utility is wider than money value; it includes everything which can contribute to man's moral or material well-being; as such, even persons can be *biens* [126]. Only as such do objects enter into a patrimony, and as such they are called *biens* [127]. They are an abstraction [128], as is patrimony itself [129]. Thus they suffer no distinctions. The persons holding rights on an object may be multiple, and so its utility can be divided among them [130]; but the constitutive nature of the objects is not such as to distinguish them, either into corporeals and incorporeals, or into moveables and immoveables [131]. The utility is acquired as a quality of objects

118. *Id.*, I, p. 333, no. 168.
119. *Id.*, p. 334.
120. *Id.*, n.10.
121. *Id.*, p. 333.
122. *Id.*, p. 331.
123. *Id.*, p. 333, no. 168.
124. *Id.*, IV, p. 99, no. 573, 1°.
125. *Id.*, I, p. 332, no. 168, and n.3.
126. *Id.*, n.5.
127. *Id.*, I, p. 332, no. 168; IV, p. 100, no. 573, 3°.
128. *Id.*, I, p. 333, no. 168.
129. *Id.*, IV, p. 100, no. 573, 2°.
130. *Id.*, I, p. 332, no. 168.
131. *Id.*, I, p. 333, and nn.6 and 7; IV, p. 100, 3°.

only when they are put under control of rights; *biens* thus are the result of rights of which they are the material. Rights are the cause, *biens* the effect [132]. There is a leap then to be made: patrimony, "c'est la personnalité même de l'homme mise en rapport avec les différents objets de ses droits. Il forme donc un tout juridique, une universalité de droit" [133]. The content of the leap is unmistakable: as the missing premises, personality must be identified with rights, and rights with control. On the further edge, this is what gives the utility; on the nearer side, this control is not identified with acts, with the actual fact of that action being performed, but with their faculty, the will. Will and its control are single; so also is patrimony, its object. Will's control as the precondition for utility or *biens* fully defines them, so it is total; and so is patrimony, for objects before the faculty of human will have only one character — utility — and so are indistinguishible and fungible. These are the features which define a universality; this is the faculty which necessitates it.

Patrimony is needed as a universality because of the useful character of the goods which compose it, a character which is the result of control. The control is man, and it is exercised upon objects. The only supplementary considerations required are continuation of that personality, and its control by the right of property.

"Le droit de propriété, absorbant toute l'utilité de l'objet qui y est soumis, se confond, en quelque sorte, avec cet objet qui en est le représentant" [134]. Property is the fullest utility, there is none left over; but since utility is the object so far as relevant to law, there is nothing of the object left over. So the immaterial right is materially represented by the material object. The same is not true of other real and personal rights, which are control of only part of the utility of objects [135].

Although patrimony is not an external object [136], it is an object of the right of property [137]. "The ensemble of a person's *biens* is basically nothing other than the collective utility of all his civil rights" [138]. That is to say,

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132. *Id.*, I, p. 333, no. 168, and n.8.
133 *Id.*, IV, p. 100, no. 573, 2°.
134. *Id.*, I, p. 333, no. 168, n.6.
135. *Ibid.* This is why it is not nonsensical to distinguish *biens*, which are incorporeal, into corporeal and incorporeal. In his 1855 edition, Zachariae clarifies that when the dismemberment of property bears upon even all the goods of another, it does not bear properly upon his patrimony, a *universalité*, but upon a *généralité: id.*,II, 1855, p. 47, no. 270.
136. *Id.*, IV, 1844, p. 100, no. 573, 2°.
137. *Id.*, p. 102 ff, no. 575.
138. *Id.*, I, p. 333, no. 168, n.9.

patrimony is utility collectivized; though not an external object, it has about it whatever there is about an external object which allows it to stand as an object of the right of property, viz., utility. Zachariae puts it more elliptically, that "patrimony is founded in man's personality" [139].

Searching for principles of this property in patrimony which are "vrai sous le rapport philosophique", the right of property in patrimony is indivisible, inalienable and unacquirable. This property is "indivisible comme la personnalité même". Thus it is indifferent to time: acquired at different times, the credits and debits relate indiscriminately [140]. It can be alienated as a whole only in death, not while living [141]. Objects constitute patrimony only by their legal relation to person, which ceases at alienation; they no longer constitute patrimony, such that alienating them would be alienating patrimony. It can be lost only "en perdant la personnalité même", and so one cannot ever be distant enough from it to acquire his own patrimony, either [142].

But he can acquire another's patrimony, i.e., be the *ayant droit* of his *droit de propriété*, once the other is separated from it by death. But he can do so only by representing the other, continuing him [143],

> et forme une seule et même personne avec ce propriétaire, puisque le patrimoine d'une personne, c'est la personne même, considérée sous le rapport de son empire sur un ensemble de biens, envisagés eux-mêmes comme la propriété d'une personne déterminée.

Nearly everything is here: their property is their control (*empire*), which is the person, which is the patrimony, with all of which any pretending successor must identify himself. The editors of the 1855 French edition add a two-page footnote to Zachariae's study of property itself which sums up these points while strangely turning the meaning [144]. Quoting Portalis' presentation to the *Corps législatif* that "le principe du droit de propriété est en nous" as a rebuttal of the Revolutionaries who sought in the law the origin of property, the editors continue that "la propriété est l'extension de la personnalité de l'homme aux choses qu'il a créées, ou dont il a créé la

139. *Id.*, IV, p. 102, no. 575.

140. *Ibid.* And thus heirs are bound to the indivisibility: they cannot accept only in part; they are held for all charges and not just prorata; and the inheritance must be all intestate or all testamentary, not mixed. Rationally true, the last two effects are alleviated by positive law: *id.*, p. 103.

141. *Id.*, IV, p. 105, no. 576, 3°.

142. *Id.*, p. 104, no. 575.

143. *Id.*, II, 1855, p. 44, no. 268. Although then Zachariae no longer asserted a right of property over patrimony, his explanation here is informative regarding his earlier notion.

144. *Id.*, pp. 50-51, no. 274, n.1.

valeur..." Pufendorf and Wolff, belonging to what is later called the School of law of Nature, had to be corrected by Locke and by his imitators among the Physiocrats who "en avait démontré la nature, en faisant ressortir les avantages". What is lost in this otherwise suggestive hypothesis of whence came Zachariae's theory that the code universalizes patrimony as the utility of goods, is Zachariae's insistence that this is a legal universality and not a natural one. The control is the empire of will which makes law in making value. The next step must be to trace back that notion.

This radicalization of the doctrine is visible in Zachariae's attitude toward his research, an attitude the direct opposite of Aubry and Rau [145]. There must "exist in all Europe, at least among the interpreters of the civil law, as among those who study nature, a union which no difference of a political nature would upset" [146]. The scientific doctrine referred to is one which achieves that unanimity without reducing it to the common availability of natural fact. Rather it is what is done with fact that is shared, which accords with the Zachariae seen above. The heritage is summarized usefully by Del Vecchio, a summary which schematizes the subsequent research herein:

> The Law of Nature School, which became more precisely the Law of Reason School, above all through the efforts of Kant, reached the greatest heights with Fichte in the first phase of his thought... K. Grosz, K. Zachariae, A. Bauer, W. Krug, C. Droste-Huelshoff are still other writers in this School. ... All these authors hold firmly to the principle that an ideal law exists before the positive law... From this comes a sort of logical schematism, and a character which at times can seem too strongly individualistic in its treatment of social problems.[147]

All that is lacking from this junction of Zachariae to Fichte to Kant to Leibnitz, Wolff and Grotius is the role of Savigny's mediation of Fichte to Zachariae, and the influence of the earlier tieback of the writers in the *Ancien droit* to the "hommes, éclairés" by the Locke of Voltaire's *Lettres philosophiques; sur les anglais.* But Zachariae's freedom from the chauvinism of Aubry and Rau and his greater willingness to propose reforms to the codified French law which serves as his vehicle for exposition of the law, hint

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145. Following Zachariae overall, Aubry and Rau differ in their unwillingness to divide patrimony into a patrimony of moveables and one of immoveables, as well as to admit that patrimony as a universality can be lost by civil death (*supra*, note 86, p. 337, no. 574, 1°, and p. 351, no. 577, 3°, n.9), both of which Zachariae admits (*supra*, note 115, IV, p. 101, no. 574, and no. 578). That is, the French authors carry further that abstractness the German theorist introduced.

146. *Handbuch des franzoesischen Rechts*, 3. Aufl., 1827, in R. DAVID and J. BRIERLEY, *supra*, note 82, p. 51, n.30.

147. G. DEL VECCHIO, *Philosophy of Law*, tr. T.O. MARTIN from 8th ed. of 1952, Washington, D.C., The Catholic University of America Press, 1953, pp. 119-120.

that his rooting of patrimony in will has relationships which may have been lost upon the later authors for whom patrimony appears as an institutionalized category to be taken unquestioningly as part of their tools, albeit critiqued intramurally.

2.2.5. Nineteenth Century Legal Philosophy: Savigny

What leads Zachariae to the conception of patrimony which Aubry and Rau take from him? The code and codifiers would not provoke such a construction by their use of the term *patrimoine*, even if it were agreed that they could bear its weight. Faced with either a pure novelty or a development of a doctrinal tradition, one is inclined to look for the latter. It is not far to seek.

Although the first volume of Friedrick Karl von Savigny's treatise [148] was not published until thirteen years after the third German edition of Zachariae and two years after Aubry and Rau's first translation and first treatise, it still is their formative influence insofar as it represents more frankly than either the themes which appear in both but which are curtailed there, themes which are those of the eighteenth century, of the Enlightenment and of post-Medieval thought generally. Because he defines *Vermoegen* in his eighth volume on private international law as the reflection of the deceased's person, *ideales Object von unbestimmten Inhalt*, thus disposing of Zachariae's distinction between moveable and immoveable patrimony, "Savigny semble bien être *le premier à avoir développé la notion unitaire de patrimoine* reprise en droit civil par Aubry et Rau" [149]. Even today, says Boulanger, no one has answered his critiques of the divisions in successions.

Savigny's "complete and systematic formulation of the program of the Historical School" [150] is in part a reaction of restoration against the French Revolution's excesses. Based on the negation of sovereignty and replacing it with the popular juridical consciousness, so that every people has its own spirit and every popular spirit its own definite law, nationality is expunged as a criterion of jurisdiction from civil law and is restricted to public law. Only the law of domicile can govern successions [151].

148. *System des heutigen roemischen Rechts*, I, 1840; simultaneously published as *Traité de droit romain*, I, tr. Ch. GUENOUX, Paris, Firmin Didot, 1840. The French edition was the only one available for research.

149. Emphasis in F. BOULANGER, *supra*, note 33, p. 44, n.46, translating Savigny's phrase as "objet idéal à contenu indéterminé" from *System*, VIII, 1845, p. 296.

150. G. DEL VECCHIO, *supra*, note 147, p. 130.

151. F. BOULANGER, *supra*, note 33, p. 59, no. 62; p. 45, no. 47.

But the popular history that is relevant for him is "the history of a concept as it evolved in Roman law... a central, ordering principle — possession as a manifestation of human will" [152]. Del Vecchio repeats the commonplace that, for Savigny, the Roman law seen as the work of will is a substitute for the natural law Savigny attacked as unscientific [153]. While Savigny gives the first theoretical discussion of law as jural relations [154], the prominence of this instrument cannot obscure the yet deeper nerve, for "*la personne* est au centre de toute relation juridique, non la chose" [155]. And the will is at the centre of person [156].

> Every Jural Relation consists in the relation of one person to another person. The first essential element of that relation which requires a closer consideration, is the nature of the persons whose reciprocal relation is capable of producing it.

So, for example, the succession is "l'extension de la puissance et de la volonté de l'homme au-delà des termes de la vie" [157]. The nature and effects of will as ground of law is what shall be sought out.

Le droit (law) as a penetrating environment is a power of the individual. Within the limits of this power, the will of the individual is supreme. The power or faculty is called *droit* (right, *subjectif*). This right is visible only in defence against its violations; but this is an accidental and abstract side of right. The profound reality of right is the jural relation (*rapport de droit*), an organic balance of parts [158].

Droit as the general rule governing particular cases is a *droit objectif*. This is visible only in a law, in the sense of a rule authorized by the State; but its basis is again jural relation. The jural relation is the reality which makes the abstractions intelligible; thus legal theory and practice are one [159].

Summarily, statutory and case law find their root in right, objective and subjective, respectively. Right finds its root in jural relation. Jural relation

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152. J.P. DAWSON, *supra*, note 81, p. 452.
153. *Supra*, note 147, p. 134.
154. H. CAIRNS, *Legal Philosophy from Plato to Hegel*, Baltimore, Johns Hopkins, 1949, p. 470.
155. F. BOULANGER, *supra*, note 33, p. 43, no. 46.
156. F.K. SAVIGNY, *Jural Relations or the Roman Law of Persons as Subjects of Jural Relations*, tr. W.H. RATTIGAN from Savigny's *System of Modern Roman Law*, II, London, Wildy, 1884, p. 1, no. 60.
157. F. BOULANGER, *supra*, note 33, p. 43, no. 46, tr. "Erstreckung des Willens und der Macht eines Menschen uber die Grenze des Lebens" from *System*, VIII, 1849, p. 295.
158. K.F. SAVIGNY, *supra*, note 148, I, pp. 7-8, no. 4.
159. *Id.*, pp. 9-11, no. 5. Despite Savigny's frequent criticisms of Hegel, he accepts the nineteenth century dialectician's view that "abstract" means partial, while "reason" means whole.

finds its root in will. The arrangement is translated in a passage from paragraph fifty-two famous enough to be quoted by Pound:

> Man stands in the midst of the external world, and the most important element in his environment is contact with those who are like him in their nature and destiny. If free beings are to coexist in such a condition of contact, furthering rather than hindering each other in their development, invisible boundaries must be recognized within which the existence and activity of each individual gains a secure free opportunity. The rules whereby such boundaries are determined and through them this free opportunity is secured are the law.[160]

Savigny stresses that law is, therefore, an expansion of freedom rather than its confinement. Instead of law commencing with injustice which must be remedied by negation in the form of a restriction of wills, in accord with the restrictions of morals, law begins with the new power which the State introduces, by assigning each person a domain wherein his will reigns independent of every foreign will. "Laws serves morality not by carrying out its precepts, but by ensuring the individual the exercise of this free choice" [161]. The jural relation is the domain of free choice [162].

Law gives form to this relation; but not all relations need it [163]. For example, will acts upon (1) oneself and (2) the world outside one, either (a) on unfree nature or (b) on other persons, whether (i) as unfree or (ii) as also free. (1) There is no meaning to any right over oneself. Having a right over the intellectual freedoms or *incolumitas animi* would imply that they could be impeded and thus violated, but that is impossible [164]. Having a right over one's body or *incolumitas corporis* would legitimate suicide, and this is unacceptable. Having rights of property or by obligations are artificial extensions of our personal power, but they are artificial, acquired and transitory, while the person is original and natural. What remains unmistakably to man for himself is "que l'homme dispose licitement de lui-même et de ses facultés" [165]. There is no right of property over oneself. Inviolability of person is the end of the extensions of one's power in property and obligation. But if by personality one understands just the capacity for rights, then these rights of personality are patently artificial, invented for no other purpose than the protection of possession [166].

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160. As repeated by CAIRNS, *supra*, note 154, p. 401. While visible in Pound's translation the fact that the "free opportunity" is itself isolated, needing boundaries only to confirm it, is clearer in the French text, which translates this as "parallel development", K.F. SAVIGNY, *supra*, note 148, I, p. 326, no. 52.
161. K.F. SAVIGNY, *supra*, note 148, I, pp. 326-327, no. 52.
162. *Id.*, p. 328, no. 53.
163. *Id.*, p. 328, no. 52.
164. *Id.*, p. 329, no. 53.
165. *Id.*, p. 330, no. 53.
166. *Id.*, pp. 331-332, no. 53, and n.(a).

Rights (2) over the external world consist in its domination by our will. (a) We cannot dominate the whole of unfree nature, but only some portion cut off from the whole: *choses*. Right to a thing, in its most pure and complete form, is called property. (b) Over free beings, (i) absolute domination is slavery, a right of property; (ii) domination without destroying freedom is a right like property, but touches only one act: obligation. "... cet acte, soustrait au libre arbitre de cette personne, passe sous l'empire de notre volonté" [167]. Property and obligation both extend the domination by our will, both are resolved into a sum of money of which we can transfer the property, both are focused upon enjoyment of property, both extend our power beyond natural limits.

These relations which extend power are called, as a whole, *biens*. The Latin name of *bona* expresses only an accessory idea, the happiness resulting from this power; their German name of *Vermoegen* expresses the essence of the *chose*, the extension of power, which rights make us obtain [168]. The "totality of relations" (*biens*) is an important idea in law, indispensible for its complete study. Its features are that: the goods have changing confines; in order to be seen generally, they must be seen abstractly, i.e., as a "pure quantity of identical elements". Thus the abstract quantity of will's extension also includes its restraints, viz., debts [169].

The abstraction of goods into pure quantity is expressed in a "common denominator": value. Value means money value; this is how it is manifested, this is where its usefulness lies [170]. Under such a rubric, even the pure *obligatio faciendi* becomes property [171].

Finally, this unity of *Vermoegen* or *patrimoine* which goods have when totalized, abstracted, fungible and pecuniary is based upon the person of its possessor [172], i.e., the person as will. This description of patrimony, thus far highly reminiscent of the French authors', departs radically here, in that its basis in will means that artificial and arbitrary unities for specific ends are quite acceptable. Each is called a *universitas juris*, that is, a whole in opposition to its constitutive parts, with no distinctions among the qualitative differences of those parts. The term is not in use among the Roman jurists. Savigny warns, without explaining why, however, that though emptied of content each universality has special rules following from its own specificity, and "explicitly forbids" submission of all of them to the same set of rules [173].

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167. *Id.*, p. 333, no. 53.
168. *Id.*, no. 53, p. 334, and n.(b).
169. *Id.*, no. 56, pp. 370-371.
170. *Id.*, no. 56, p. 371, and n.(k).
171. *Ibid.*
172. *Id.*, p. 372.

As examples, in Roman family law the content of the jural relation is not the absolute power of the head; that power is only its natural character, as shown by the absence of any imperative law governing nor any action at law implementing this power [174]. Instead, its content is "that placement which the individual's different relations give him" [175], "a rigorously determined mode of existence, independent of individual will and tied to the overall scheme of nature" [176], "the recognition and imposition of rules upon his conditions of existence" [177].

As in Roman successions, the absence of rights to exercise does not exclude jural relation, for the law rigorously determines the conditions of life [178]. Thus, the son cannot acquire, because he assumes his father's personality to continue that life by the fiction of representing it, and thus already shares his father's goods; property is useless to him [179]. In life the person is the substance, and the totality of goods his accident; in death that totality is the substance and his personality their accident [180]. By themselves, goods would disperse and lose legal meaning at death, because as an extension of the individual's power and thus an attribute of his personality, they also are temporary. But the property finds real existence within the State, which does not die and to which general organism the goods attach themselves without break. Therein they retain by a fiction their character as private property and continue to be dominated by the deceased's will, either by a testamentary document or by devolving upon those closest to him [181].

The inheritance is a unity based in the person of the deceased. It is a pure quantity, abstracted from its elements' diversity. As such it it is known as a *successio per universitatem*, as known in Roman practice is not an abstract principle. Succession as action is a means to acquire the totality of rights which are the individual's goods, "l'ensemble des droits qui composent les biens d'un individu"; succession as an object, the material of the action, is a distinctive right independent of any other, a *universitas* [182].

Roman donation has forms fitted only to individual things, not their totality as an ideal unity; and it prohibits from any such unity the future goods, for that would be a disguised contract on succession which positive

173. *Id.*, p. 373, n.(n).
174. *Id.*, p. 342, no. 54.
175. *Id.*, p. 343.
176. *Id.*, p. 344.
177. *Id.*, p. 346.
178. *Id.*, p. 349.
179. *Id.*, p. 348, no. 54.
180. *Id.*, p. 379, no. 57.
181. *Id.*, pp. 375-376, no. 57.
182. *Id.*, pp. 378-379, no. 57.

law prohibits. The donor would be abandoning all control by will over his *patrimoine* [183]. While this is permitted by German law's recognition of contracts on succession [184], the more interesting facet is the manner in which Savigny totalizes goods such that a like contract could be carried out. The object of gift is "l'universalité des biens, c'est-à-dire la totalité des droits dont ils se composent" [185], "l'universalité des biens, ... car on entend par là l'ensemble des droits appartenant à un individu" [186]; "*bona* et *res* sont ici synonymes" [187]. Quoting Paulus on his action for fraud, Savigny continues: "'universas res suas *tradidit*', c'est-à-dire les divers objets composant son patrimoine" [188].

The patrimony of Savigny has many drastic differences from Zachariae's or Aubry and Rau's. Such are the total incoherence of any extrapatrimonial rights, the explicit assertion of a right of property over not only the patrimonial whole but over each of its contained elements such as obligations, the identification of value much more forcefully with money value to the considerable downplaying of utility of a more general sort, the greatly lessened emphasis upon universality arising from the need for a common pledge to creditors. Despite these differences of detail, their bond is tight in view of the fundamental category of patrimony. It is a universality of goods, which can be universalized only because the rights upon them can be universalized. And these rights must be universalized because they attach to unique personhood. What makes the personhood unique and unified — *individuum*, undivided within and divided from all without — is the singleness of control (rights) over objects (goods). This single control is the exercise of unique will, the faculty of legal relevance. If not drawing from Savigny, Zachariae draws from the same pool. But it is more likely that he draws as an eminent lawyer from the eminent legal philosopher, Savigny. But the eminent legal philosopher himself draws from eminent philosophers, and as closer to the fountainhead is both more vigorous and more consequential. Who those eminent philosophers are, and what they had to draw from, must be the next phase of investigation. The research is not interminable, for it is nearing the breaking point between the ancients and the moderns.

183. *Id.*, IV, no. 159, pp. 139, 146-147.
184. *Id.*, p. 149.
185. *Id.*, p. 139.
186. *Id.*, p. 142.
187. *Id.*, n.(g).
188. *Id.*, no. 159, p. 144, n.(k); from L.17, no. 1; XLII, 8.

2.2.6. Eighteenth Century Legal Philosophy: Fichte and Kant

Cairns says frankly that Savigny's discussion of legal relations seems to have been inspired directly by Fichte [189]. Not referring to Savigny's frequent footnotes to Fichte, Cairns bases his judgment on the similarity between the doctrine in passages cited above from Savigny's *System* to Fichte's *Science* [190]. For Fichte the basis of law is the ideal of jural relations. This relationship is the compulsion upon each individual to restrict his freedom in recognition of the possibility of the freedom of others [191].

Man cannot be man unless he appears. We are constituted by the dialectic of Ego and Non-Ego, and the latter is the sensuous world. So the rights of free persons cannot exist at all unless they appear in the sensuous world, where they can be obstructed by others, i.e., unless they reciprocally limit each other. Man can be free only by being so recognized:

> But no free being can recognize the other as such unless both mutually thus recognize each other; and no one can treat the other as a free being, unless both mutually thus treat each other. Hence the relationship between rational beings is a determined one, and is the legal relation. In essence, this is Fichte's deduction of the idea of legal relations.[192]

Fichte's jural relation finds its model in Immanuel Kant's principle of rights, although its setting is methodologically different [193]. His definition of legal right is: "totality of conditions under which the will of one can be harmonized with the will of others according to a universal law of freedom" [194]. Right is a relation of one's free action to the free action of another. Not its material object but only its freedom is taken into account; and this freedom is mutually recognizable only when both actions are directed according to the universal law of reason [195], viz., the categorical imperative. The categorical imperative is that norm of action which expresses the action of the will upon principles identified with its own nature in order to be good in itself, not upon the motive of some anticipated outcome of action. Only the will so acting can be judged good without qualification; and

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189. J.-G. FICHTE, *Grundlagen des Naturrechts nach den prinzipien des Wissenschaftslehren* (1796), tr. A.E. KROEGER, *The Science of Right*, 1869. Since the following authors use the rhetoric of patrimony not at all, the liberty is taken of treating summarily and via secondary research only.
190. The second volume is cited incorrectly, instead of the first.
191. H. CAIRNS, *supra*, note 154, p. 470, from J.G. FICHTE, *supra*, note 189, pp. 81, 78.
192. *Id.*, p. 472.
193. Kant provides Fichte not only his doctrine, but his influence past censorship: see F. COPLESTON, *A History of Philosophy*, VII(1), Doubleday, 1963, p. 51.
194. H. CAIRNS, *supra*, note 154, p. 399.
195. *Ibid.*

only such action can relate us to the existence of the thing-in-itself which we lose in our rational knowledge. Yet the understanding's penchant to generalize affects the formulation of the categorical imperative: only if we can recognize all men to be free can we recognize ourselves to be so [196].

It would be possible to trace back this consummate importance of will in Kant into earlier modern sources; that has often been done in historical studies. The important task here has been to root back the dynamics of patrimony into the mainstream of modern philosophy, onto its most basic assumptions. The remaining step must be not to rehearse its sequence but to find its outcome. As the setting of Roman law, without Savigny's doctrinal overlay, was the locus to find one alternative both to modern patrimony, and to the modern doctrine of will as the content of *jus* or rights, rights universalized into patrimony, now the movement of patrimony from the French code into the Quebec code remains to be studied.

3. Civil Code of Quebec

3.1. Legislation

There is hardly any use of the term *patrimoine* in the present civil code. There are only three mentions in French [197]. Two are concerned with the separation of patrimonies, once for successions at article 743 C.C. and again for gifts at article 802 C.C. This institution is taken as a matter of course from the continental French code, with more thought given to the function of separation than to the object separated, viz., patrimony. The absence of reflection and reform, unlike the draft, shows this fact. Neither of the two articles employs "patrimony", but only "property" which elsewhere in the code is *biens*. The only use of the term in both languages is in articles 2475

196. *Grundlegung zur Metaphysik der Sitten* (1785), often translated as *Foundations of the Metaphysics of Morals*, is the most accessible source for this doctrine.

197. 743 C.C. Les créanciers du défunt et ses légataires ont droit à la séparation de son patrimoine d'avec celui des héritiers et légataires universels, ou à titre universel, à moins qu'il n'y ait novation... (The creditors of the deceased and his legatees have a right to a separation of the property of the succession from that of the heirs and universal legatees, or legatees under general title, unless there is novation...) 802 C.C. Les créanciers du donateur ont droit à la séparation de son patrimoine d'avec celui du donataire, dans les cas où celui-ci est tenu de la dette, suivant les règles sur la séparation de patrimoines en matière de successions, exposées au titre précédent (The creditors of the donor have a right to demand the separation of his property from that of the donee, whenever the latter is liable for the debt, according to the rules laid down in the preceding title as to such separation in matters of succession). 2475 C.C. L'assurance de dommages garantit l'assuré contre les conséquences d'un événement pouvant porter atteinte à son patrimoine (... adversely affect his patrimony).

C.C. defining damage insurance; and this is uncharacteristic of the code, having been introduced in the draft code's phrasing only three years before the draft code's final completion, and thus more part of the draft than of the *Civil Code.*

3.2. Doctrine

3.2.1. Mid-Nineteenth Century: Code Commission and Precodification

No more than for the French codifiers is patrimony a driving concept for the Civil Code Commissioners. Through their three volumes of final reports, there are only a half-dozen mentions of the term at all, all but one in the fifth report on "Successions and Gifts", always in French with the English term remaining "property", and there concerned either with the seperation of patrimonies or, more fruitful conceptually, with the indistinction of goods inherited.

The first instance concerns the "division" of the deceased's patrimony from that of the heir [198]. Commentary on draft article 145 makes a point of rejecting the "arbitrary and new" articles of the *Code Napoléon* on issue, in order to ensure greater freedom to Quebec heirs in disposing of the inheritance. Separation is proper where it is possible and useful; but it is not useful where a debt in the succession has been novated. Nor should it keep the heir from administering the succession in good faith and intelligently, and often necessitously. As well, instead of the French short limitation on separation of moveables and its removal of a limitation for separation of immoveables in possession though not on their unpaid price, the Quebec article's commentary finds that all inherited goods secure debts on them until alienated or while price is due; but once received and mixed, the heir is free. This approach has the same tenor as draft article 146 according to which separation of *patrimoine/*property cannot be sought by the heir's own creditors; for, as in Roman and customary law, the heir cannot be kept from contracting new debts. It is also consistent with draft article 144 which, rejecting the *Code Napoléon* innovation again where it makes debts which were executory against the deceased executory *de plano* against the heir, instead requires a declaration that they are executory against the heir; and this approach is taken in explicit awareness of its inconsistency with the maxim that *le mort saisit le vif.* Through each of these, the Quebec emphasis upon freeing the heir, mingling the goods and, by implication, thus

198. COMMISSION FOR CODIFICATION OF LAWS RELATING TO CIVIL MATTERS, *Report*, Quebec, Desbarats, 1865, II, pp. 144–147.

diminishing the integrity or universality of the succession takes pride in running counter to Revolutionary law and developing according to Roman and customary law.

On the other hand, the commissioners are quite willing to make their own *droit nouveau* by introducing separation of *patrimoines*/property regarding gifts, and to do so in order to tip toward protection of creditors rather than freedom of donees [199]. As their reason for introducing succession's rule here, the commissioners say that creditors' interest prevails and they should not be burdened with having to take paulian action to recover improper dispositions. The net effect seems to be that a drastic difference attains between patrimonies during life and after death [200]. Similarly the *Code Napoléon's* rules are applied to that other separation of debts, not patrimonies, which can be contracted between intending spouses [201]. Article 137 permits one to avoid liability for his partner's prior debts and thus, in effect if not in so many words, separate their patrimonies. But this effect is achieved only if inventory is made; otherwise, creditors can ignore the clause of separation. Here the maxim "bona non intelliguntur nisi deducto aere alieno" has full scope, in article 138, though once the fruits of the separate patrimony are enjoyed by the community the expenses attached to the fruits burden spouses' own patrimony, by article 139.

The final separation of patrimonies discussed occurs between institute and substitute of a substitution [202]. While the property in the substitution is mixed with what is otherwise the institute's own, this mix is temporary and is defeated as to debts between institute and substitute. This is explicitly related back by its rationale to the paradigm case of successions: in respect of an institute's claim against a substitute, the institute is free to exercise the claim because he holds the property by will of the testator, while the substitute takes the role of an heir.

The second prominent use of the terminology of patrimony is found in the characterization of the inheritance [203]. Following the *Code Napoléon*'s article 732, Justinian's *Novels* 118 and 127, and the modifications introduced years before by the Legislative Assembly of Lower Canada, the commissioners end the complex rules of the Custom of Paris *de biens et de patrimoines* "of property and inheritances", whereby different kinds of property went to different classes of people. Now, "chaque individu était

199. *Id.*, pp. 160-161, a.52.
200. Nonetheless, seisin is given of gifts *de plano*, as in *Ancien droit* and contrary to the *Code Napoléon*: *id.*, pp. 150-151.
201. *Id.*, pp. 230-231.
202. *Id.*, pp. 196-197, aa.219-220.
203. *Id.*, pp. 110-113.

regardé comme ne possédant qu'un seul patrimoine/... but one inheritance"; "tous ensemble ils [c.-à-d., les biens] ne forment qu'un seul patrimoine/... inheritance", "un seul et unique patrimoine/... inheritance". Several items in this exposition deserve note. First, resort to the term "inheritance" to express *patrimoine* is demanded by the need to use the term "property", the usual counterpart for *patrimoine* in the commissioners' report, as the counterpart of *biens*; "inheritance" is usually expressed by *succession.* Inheritance is only one sort or stage of patrimony and is a less accurate meaning than the "property" which is also used to express *biens*; it is difficult to explain the tortuous avoidance of the English term, "patrimony". Next, the *Code Napoléon* is followed only in part; for its excessive logic is not followed, of replacing the principle of different goods to different people by the equally unbending principle of goods all indiscriminately to but one person, viz., the nearest relative. Some of the prudence of the Customs survives. Finally, the French code — and its commentary — is not the precedent even for this less ambitious principle. For the commissioners' report of 1865 explicitly derives its article from the *Consolidated Statutes for Lower Canada*, c.34, of 1861. In turn, however, this chapter entitled *An Act respecting divers Personal Rights* is not a single piece of legislation but instead a rationalized reordering of bits and pieces from a hodgepodge of earlier statutes. The relevant bit to the commissioners is article 2(1); and this article has noted as its regnal year 41 G.III, that is, 1801 — or three years before the *Code Napoléon* was legislated. Although it deals with the distinctively French institutions of *propres, acquets* and *conquets*, remaining untranslated in the English version, the diction of the remainder is distinctly of English origin, e.g., the term "estates" in subsection 2(3); and, while the history of the *salons* is another story, this was not a period of history when English public institutions were imitating the French. In fact, as appears in Mayrand's brief reference to this Act of 1801 for a different purpose[204], its intent was to reinforce the English institution of testamentary freedom introduced into Quebec by the predecessor *Quebec Act* of 1774[205]. The upshot of this historical note is that a seeming dependence of the Quebec civil law upon the French regarding a policy whose purpose appears to go a long way towards defining patrimony, is not such at all.

The only other use of the term *patrimoine* is in the third report, on property, while explaining the distinctions used therein[206]. *Biens* are not

204. A. MAYRAND, *supra*, note 34, p. 889.

205. The same is implied by the preamble written continuously into the provisions in its original format under the title *An Act to explain and amend the Law respecting Last Wills and Testaments*, collected in the *Revised Acts and Ordinances of Lower Canada*, 1845.

206. *Supra*, note 198, I, pp. 562-563, a.374.

choses; the latter is a wider expression, and means "whatever could be of any usefulness to a man, although he does not possess it", while the former is narrower and means "whatever he possesses and which *fait partie du patrimoine*". *Choses* are whatever he can use; *biens* are whatever he possesses in fact. Beyond this non-committal usage, *biens* consistently means "property" in the various reports. While at one point *biens* are integrated and universalized — *biens vacants* are "estates which are vacant" [207], usually they are not. The difference, indeed, between universal title and general title is always kept, as regarding legatees [208] and donees [209], and abridged only once, as regards usufructuaries who, in both languages, are also known as universal even though they may claim for a portion or percentage only [210]. Also, a universality appears in the description of *succession* ("inheritance") as "la transmission des biens, droits et charges" and of *hérédité* ("inheritance") as "l'universalité des biens, droits et charges" ("property, rights and liabilities") [211]. The transmission is a universality; or it is the transmission of a universality. The sense is not developed, however; nor is it elsewhere, in accord with the principle in the preface to the *Reports* of offering no definitions, unlike the *Code Napoléon* [212]. Nonetheless, what is striking is the absence of any reference to the writing of Aubry and Rau throughout, and especially in the second report on person, the third on property and the fifth on successions. If there had been consciousness or intent of grounding the code in a theory of patrimony, this omission would have been unthinkable, less than thirty years after those authors had turned French doctrine around.

If no theory of patrimony stands out, it is no surprise that no theory of extrapatrimoniality is visible either. But its trace is provocative, as left in the commissionners' dispute recorded over disinterment, which is still a *locus classicus* for the issue of extrapatrimoniality to arise. The majority position in the second report on persons is that the provisions regarding disinterment are not police regulations [213]. But reference is made to their disagreement with a minority consisting of Commissioner Day, whose opinion is expressed in a separate report that the provisions regarding disinterment are only police regulations because they impose penalties [214]. What is unsure is where what is now alleged to be the extrapatrimoniality of the body is to be found: in the minority position that it lies beyond substantive civil law? Or in the

207. *Id.*, I, pp. 366-367.
208. *Id.*, II, pp. 142-143.
209. *Id.*, II, pp. 156-157.
210. *Id.*, I, pp. 378-379.
211. *Id.*, II, pp. 108-109.
212. *Id.*, I, pp. 10-11, para. 1.
213. *Id.*, pp. 160-161.
214. *Id.*, pp. 238-239.

majority stand that it is profoundly rooted rather than just legal, as Day's "only" might imply?

3.2.2. Late Nineteenth Century: Mignault

Mignault has no treatment of patrimony, and makes use of the term not at all in successions and only twice in property. What defines *biens* as such is that they are *choses* capable of entering the patrimony. *Choses* are everything which exists. *Biens* are a species of *choses*, those which are capable of being appropriated to a person to the exclusion of other men, those which contribute to human happiness by their moral or material usefulness, following Ulpian's etymology at L.49 of the *Digest* — all except the most useful (air, light, stars) which being destined by their nature to the use of all cannot by anyone's exclusively[215].

A right is a faculty given to a person to do or to demand something. The right of property (the faculty given a person to take from something all the usefulness it offers) is a real right (the faculty given a person to take all or part of the usefulness of something, to the exclusion of all others): immediate, acquired and present upon its object, rather than a title to arrive via intermediaries at a real right in the future. To it corresponds a general and negative obligation whose debtor is not a person but a *chose*, personified by fiction of law[216].

With but a passing use of the term *patrimoine*[217], Mignault recommences later a discussion of what would have been the contents of patrimony, had the category been of the slightest interest to him. Corporeals are things with real bodies, seizable by the senses; incorporeals are things without body and graspable only by intellects, such as are rights, which form the class of incorporeal things[218]. But not all rights are incorporeals: only personal rights are, and dismemberments of the right of property; the right of property itself is a *bien corporel*. Rationally this is unexplainable: the right of property, too, is an insensible abstraction as are other rights. But historically

215. *Droit civil canadien*, II, Montréal, Théoret, 1896, pp. 388-389.

216. *Id.*, pp. 389-390, and p. 391, n.1, in doctrine drawn from Ortolan and Demangeat, the sources also of his doctrine of personality in v.I, Montreal, Wilson and Lafleur, 1895, p. 9, n.1, as well as of the wider development of this point by S. GINOSSAR, *Droit réel, propriété et créance; élaboration d'un système des droits patrimoniaux*, Paris, Librairie générale de droit et de jurisprudence, 1960.

217. P.-B. MIGNAULT, *supra*, note 215, II, p. 394.

218. The basis noted is Justinian's *Institutes*, 2 de reb. incorp., II, ii, that "incorporales sunt quae tangi non possunt; qualia sunt ea quae in jure consistunt" — which supports Mignault only if *jus* is a faculty in the sense Mignault has previously defined right.

it subjects the *chose* so fully to the owner that the *droit* is identified with its *objet*; the Romans' speech, as ours, says not "I have got the right of property over this thing, the property of this thing belongs to me", but says "I have got this thing, this thing belongs to me" [219]. Such exceptional standing is paralleled by the even more exceptional fact that, since no thing is permitted not to have an owner, it is not incorrect to say that "la propriété, au concret, est d'ordre public" [220], the feature Baudouin will find distinctive of extra-patrimonial rights, a term not used by Mignault at all.

Summarizing these results, Mignault feels able to explain *droits sur des biens* in a way counter to the intent of the law but in accord with its deeper drive. When the code names the rights over *biens*, or real rights, at article 405 C.C., it obviously intends *biens* to mean corporeal things, says Mignault. But rights, that is, incorporeals, can also be *biens*. So they can be the object of another right, he says citing 453 C.C. and offering as example a right of usufruct upon a right of usufruct. Even if, then, the sole rights on *biens* are those enumerated below the preceding in 405 C.C.[221], there seems nothing eccentric about a right of property upon right of usufruct, or indeed upon a right or property. But it is just this which Mignault disavowed nearly thirty years later as judge in *Duchaine c. Matamajaw Salmon Club* [222], on the basis that a right to fish in another's river cannot be a right of property in the form of a *profit à prendre*, because it gives no title to the riverbed, but is only a right of usufruct. His policy reason may be convincing or not, that such splintering beyond the real dismemberments allowed by the code's *numerous clausus* would reduce the bare ownership to an entity of no commercial value but only a burden once all benefits were sold off. And his righteousness against the adulteration of the civilian law may be admirable [223]. But his legal reason seems beside the point: the right of property may be established upon that *bien* which is the right of usufruct, without breaking the closed categories but while reaching the same result. The correspondent to this appeared when the classical theory was described in terms of a right of

219. P.-B. MIGNAULT, *supra*, note 215, II, p. 395.
220. *Id.*, p. 477.
221. *Id.*, p. 464.
222. (1922) 58 S.C.R. 222, 246.
223. It is an impoverishment of civilian property law that this provinciality is all for which *Matamajaw* is remembered, by Castel and by Baudouin, which with the two "Trudel" references above are the sole mentions of the case discoverable from *Index Gagnon*. Cf.: J.-G. CASTEL, "Le juge Mignault défenseur de l'intégrité du droit civil québécois", (1975) 53 *Can. Bar Rev.* 544, p. 547; J.-L. BAUDOUIN, "L'interprétation du Code civil québécois par la Cour suprême du Canada", (1975) 53 *Can. Bar Rev.*, 715, p. 726, n.30.

property upon the patrimony, that is, upon the real and personal rights that are pecuniary, or upon the corresponding goods that are their objects [224].

3.2.3. Mid-Twentieth Century: Trudel

The lack of attention to patrimony is not of recent occurrence. Marler's book makes no mention of it at all [225]. The *Traité de droit civil du Québec* edited by Trudel goes only slightly further. Faribault writes the only passage of relevance in accepting without comment the Privy Council's decision in *Matamajaw* that there is a right of property, and not just a right of enjoyment or a dismemberment, over a fishing right; seemingly without noticing the difference of this phrasing from the *Banc du roi*'s decision for the same party, that there is a right of property over the riverbed, although this difference between objects is crucial to the structure of patrimony [226]. Montpetit and Taillefer labour to the same acceptance, even forming a principle that "on peut créer tous les démembrements imaginables du droit du propriété non défendus par la loi", but only on the *Banc du roi*'s decision of *copropriété du lit* [227]. Somehow this is presumed equivalent to the principle that "il n'y a de droits réels que ceux qui sont déclarés tels par la loi". Among these, "la propriété constitue un droit sur sa propre chose" [228]. The *chose*, however, is relevant to law only so far as it is *propre*, that is "capable of being appropriated", for things themselves are "hors de son contrôle" [229]. As such they are the elements of patrimony, *biens*, namely, "les choses pouvant faire l'objet d'un droit et représentant une valeur pécuniaire" as the classical French writers Colin and Capitant are cited to define it. As such, rights also are *biens*, and thus enter patrimony, since they too can be appropriated or possessed. Patrimony is "l'ensemble des droits ou biens et des charges d'une personne appréciables en argent, envisagés comme une universalité de droit". When the authors say that "notre théorie du patrimoine vient de notre

224. If doctrine is not concerned with patrimonial rights as such, it is no wonder that caselaw should be even less so, and that its categories as well as its extrapatrimonial counterparts should be entirely absent from the *Repertoire*, its three *Supplements*, and the *Annuaire de jurisprudence*, both as such and even as a title under "Propriété" or "Successions". It is shocking to discover, however, that even the concept of rights as *droits subjectifs*, which is a precondition to the former consideration, is itself totally absent until this decade, when first appear titles of "Droits civils", in 1971, "Droits de l'homme" in 1972, and "Droits de la personne" in 1974.

225. W. de M. MARLER, *The Law of Real Property*, Toronto, Burroughs, 1932.

226. T. IV by L. FARIBAULT, Montreal, Wilson and Lafleur, 1954, p. 60.

227. T. III by A. MONTPETIT and G. TAILLEFER, Montreal, Wilson and Lafleur, 1945, p. 101.

228. *Id.*, p. 18.

229. *Id.*, p. 15.

théorie de la personnalité... Le patrimoine, c'est l'expression de la personnalité juridique en matière des biens", it is unsure whether they are speaking for themselves or for Quebec in saying "our" [230]. In fact the theory is entirely classical: only persons have patrimony; every person does; he has only one, *une masse unique*; it is inseparable in life, it is his succession in death. Some rights are not estimable in money, and fall extrapatrimonially; these are the rights of personality, including political rights and rights attached to status [231]. So, while *biens* form the patrimony, some rights are not in patrimony, although rights can be *biens* if appropriatable.

3.2.4. Late Twentieth Century: Baudouin

The taciturn code is mirrored by the silence of its doctrine, making all the more striking the blossoming of the concept in the draft code. Even recently, patrimony functions as only a foil against which to define other concepts; neuter itself, it allows for their identity. Thus Pineau uses patrimony to distinguish capacities from powers; the former refer to the person, the latter to goods the person acts upon, "non seulement sur son patrimoine, mais encore sur le patrimoine d'autrui" [232]. Mayrand defines seizin in terms which employ the concept of patrimony, but there it is a non-committal operator used to distinguish possession from property [233]. Even the prominence given to patrimony by Castelli's study of the movement from patrimony as a function of blood relationship (*lignagère*), through its individual attachment, to a *destination conjugale* is deceptive. For the concept is of importance only insofar as patrimony is held by such and such differing parties, not insofar as its structure or contents are either changed or studied; "c'est dans la mesure où le patrimoine est devenu celui d'une personne plus que d'une famille que le conjoint a cessé d'être étranger" [234].

The striking exception to this is Beaudoin's profound and sustained reliance upon the notion of patrimony to explain obligations. *Cette notion extrêmement importante* is first defined at length, then is used indirectly in giving exposition of the extrapatrimonial rights Baudouin appeals to throughout, and finally serves directly as the rationale of several institutions of civil law.

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230. *Id.*, p. 16.
231. *Id.*, p. 17.
232. J. PINEAU, *La famille*, Montreal, P.U.M., 1972, p. 198, no. 220.
233. A. MAYRAND, *Les successions ab intestat*, Montreal, P.U.M., 1971, no. 45, as reported by J. ROY, "Transmission successorale: saisine, envoi en possession, faculté d'accepter, de refuser ou d'accepter sous bénéfice d'inventaire en droit québécois", (1972) 26 *Rev. jur. et pol. Ind. et coop.* 899, p. 900.
234. M. D. CASTELLI, "L'évolution du droit successoral en France et au Québec", (1973) 14 *C. de D.* 411, p. 467.

The comparative character of patrimonial and extrapatrimonial rights in Baudouin's exposition can best be expressed schematically[235].

droits extrapatrimoniaux	**droits patrimoniaux**
possessed by physical person	...or moral
attached to person	do not depend on personality: anyone can have them;
die with person	do not die with him: are part of patrimony;
imprescriptible	prescriptible and transmissible: for one survives *par son patrimoine*;
not estimable in money	estimable in money: "Le patrimoine est avant tout une notion économique.";
conferred by law: because of one's place in society.	arise from economic activity.

The rationale of extrapatrimonial rights is of interest, to see which characteristic conditions which other[236]. (1) They have no pecuniary value, *so* they have no market value, and *therefore* cannot be sold. (2) They are *hors commerce, because* their cession is against public order, *since* it is exclusively the law which creates them and determines the holder. (3) They are unseizable, *since* they have no material situs and serve no economic needs, and *thus* are open to all regardless of material position. The absence of market value in (1) is a natural fact, and so may or may not be the case; it appears that founding this upon a failure of pecuniary value is intended to redefine the market as an affair of principle. This is explicit in (2), where their extrapatrimoniality is acknowledged to be an affair of legal concoction. Thus follows the absence of material situs and distance from economic needs in (3), which at first glance appears to have again a factual root, but can as well be grasped as a matter of legal fiction. It is not surprising that its consequence, extrapatrimonial rights' openness to all, should be ill-distinguished from the openness to all of patrimonial rights which stems from their detachment from personality. This positioning of patrimony as opposed to extrapatrimoniality, on the ground that the first is irrespective of person and the latter is integral to person, is strikingly contrary to the concept of patrimony in classical tradition.

Baudouin excludes from oblique action the "droits exclusivement attachés à la personne du débiteur"[237]. It is lest the creditor control the

235. J.-L. BAUDOUIN, *Les obligations*, Montreal, P.U.M., 1970, p. 7, nos. 8-9.
236. *Id.*, p. 8, no. 8.
237. *Id.*, p. 239, no. 447.

debtor's family life and status contrary to his will that extrapatrimonial rights and rights which would substantially increase the assets of the patrimony are excluded from oblique action. Also excluded are rights involving the debtor's moral interest; but Baudouin questions the inclusion among these of damages for delicts relating to goods of body, since their purpose is partly to restore earnings whose loss diminishes the *solidité* of one's patrimony. One is at the point of crossover, where his arrangement of the whole distinction as one between types rather than among degrees becomes less believable.

Patrimony serves Baudouin as the explanatory tool for many institutions. Extinction of confusion operates only when, in a succession, acceptance is made without benefit, "qui n'emporte pas la confusion des deux patrimoines" [238]. In stipulation for a third party, the beneficiary's claim in newly created and has never been part of the stipulator's patrimony; instead, it exists in the beneficiary's patrimony from the moment the contract is concluded. Thus, his acceptance does not create the right but only confirms it; so the stipulator no longer is able to withdraw from his obligation, even though the beneficiary may not yet have accepted [239]. Again, in enrichment without cause, Baudouin accepts as the basis for action not the theories of a quasi-contractual supplement to *negotiorum gestio* nor a quasi-delictual civil responsibility, but "la théorie dite de la transmission de valeurs ou de l'équilibre des patrimoines". This "independent, autonomous institution" consists of making a value reenter the patrimony whence it was lifted when it entered the other's patrimony [240]. It is highly significant that Baudouin's attachment to this theory, along with Morel, Mayrand and the Mignault of *Regent Taxi* rather than the textbook Mignault, is coupled to the recognition that Aubry and Rau were the first to defend it from their first edition onwards [241]. For Aubry and Rau were the fathers of the classical theory of patrimony whose acceptance becomes a matter of course and only infrequently acknowledged, as here. Baudouin, true to his earlier distinction, refuses to recognize such enrichment of patrimony when the gain is purely moral; for such is not a "transmission of values" between two patrimonies [242].

Above all, Baudouin's treatment of oblique and paulian actions, integrated into a *droit de surveillance du patrimoine*, is couched on this explanatory tool. Because patrimony rather than the debtor's person is

238. *Id.*, p. 371, no. 690.
239. *Id.*, pp. 176-177, no. 330.
240. *Id.*, p. 215, no. 411; p. 218, no. 417.
241. *Ibid.*, citing their *Cours...*, 1re éd., Paris, Marchal, 1939, IV, p. 106.
242. J.-L. BAUDOUIN, *supra*, note 235, p. 219, no. 417.

creditors' common pledge, they can oversee it, "pour assurer la conservation *du patrimoine*", and guarantee against "une dilapidation ou un affaiblissement *du contenu du patrimoine*" [243]. Patrimony and contents are one and the same here. Further, as in the draft code's commentary, the claim must be shown to be prior to the disposition being attacked ; for it is the patrimony at the moment of the claim which is the common pledge [244]. Finally, the disposition which is attacked is unopposable only against the suing creditor, not against all creditors, in paulian action unlike oblique action. This "classic theory" is explained as follows, all in terms of patrimony : the good pursued does not return to the debtor's patrimony, where it might have been accessible to all creditors again ; instead it remains in the patrimony of the third party who has received it [245] ; for this third can pay off the creditor, so as to keep that good *intact dans son patrimoine* [246].

4. Quebec draft civil code

4.1. Legislation

The draft code offers nearly two dozen articles in which the term *patrimoine* is employed, a much stronger presence than formerly. Some are traditional uses where the term is but a marker for a vague reference left unpenetrated ; but other uses are reflective innovations in civilian tradition. Among the most innovative is the insertion of the term "patrimony" into the legal vocabulary of the English language for the first time in any legislative text.

Nearly as drastic as the refounding of legal language is the announcement in article I-4 :

> Toute personne est titulaire d'un patrimoine composé de l'universalité de ses biens et de ses dettes.
>
> Elle est aussi titulaire des droits et devoirs extra-patrimoniaux propres à son état.
>
> (Every person has a patrimony which consists of all his property and all his debts.
>
> He also possesses the extra-patrimonial rights and duties peculiar to his status).

This is supposedly no innovation, only making explicit what was always understood in the civilian law. But explicitation is extremely important when

243. *Id.*, p. 233, no. 437, my stress.
244. *Id.*, p. 244, no. 457.
245. *Id.*, p. 253, no. 471.
246. *Id.*, p. 253, no. 473.

what was implicit was hotly disputed and, in some respects, vague. In such circumstances this can only be taking sides, giving a definition and the manner-and-form of proper discussion of the issues, cutting off the alternatives; there can be no neutrality in the deed[247].

This judgment is borne out by examination of the text, especially the first paragraph. While the English text is studded with the key term, it is not laced with the theory behind it, as is the French text. If "having" a patrimony and "all" his "property" is relatively bland, the French terms have fully another flavour. Being a *titulaire* is considerably stronger than being a "haver", for it approximates the position of a proprietor who here would have a right, the right of property in that patrimony. Patrimony is an object of property. Also, there is no accident in the use of *l'universalité* to state what the content of such patrimony is, for that term is the root of contention in previous theory: whether patrimony is a unit, or is a bundle. Having opted for the former, the draft code is inconsistent in the use of *composé* to express how the *biens* and *dettes* make up that universality; for as a unit it is uncomposed, and from this flows its classical features. Bold as the definition here is, it hedges one theory by another. While it remains to be seen just what the *biens* are of which the patrimony is composed — although they are already identified as "property" in which alone the *patrimoine* is elsewhere stated in English to consist — the draft code's option for assets-minus-liabilities remains in the mainstream French tradition under the Roman slogan that *nulla bona nisi aere alieno deducto*, as distinct from the German tradition and a minority French tradition.

The second paragraph manifests a striking attempt to maintain a parallel to the first, presumably to take advantage of its doctrinal exposition. What universal patrimony is to person as regards his property and debts, extrapatrimoniality by status is to person as regards other persons. Here again — this time in both legislative languages — is the adoption of a new concept into civilian legislation, one presumably clear from civilian doctrine; yet definitionally it is a function of the notion of patrimony, a residue. Yet the parallelism cannot be complete, for these rights and duties are not a universality, both because a huge subtraction has already been made from their totality for patrimony, and because status has one of the cohesive force of patrimony. This is so whether status is understood as one's concrete legal position, from whose confines some general extrapatrimonial rights spill over, or in the weakened sense of the commentary at this point, which suffers the same overflow. And least of all is there any extrapatrimonial unity

247. Compare the absence of any such vocabulary in the Quebec *Charter of Human Rights*'s parallel dispositions.

arising from an analogous setoff between its rights and duties, as there is between patrimonial goods and debts. Extrapatrimonial rights do not form a whole subject to deduction of another whole in a strictly fungible fashion, an accountant's unity, but each extrapatrimonial right stands independently. Nor is any single right determined first and then subject to deduction from without, since moral limitations are part of the very concept of rights. As well, each single right is not conditioned by each single duty, in the way that each debt conditions each asset; rather, the limitations inherent in one right may be and usually are simply irrelevant to the definition of each other right in the extrapatrimonial order. While it is not the intent to criticize here, it is necessary to point out that patrimony is set in formal parallel to extrapatrimonial rights despite their conceptual assymetry. Again the innovation is striking.

The other two uses of *patrimoine* in the first book are also innovations in each language, though less drastic in meaning[248]. Regarding tutorship, article I-125 again distinguishes patrimony from person, although finding them not incompatible responsibilities for a tutor; while article I-133, in addition to again distinguishing patrimony from person (although the status with which person is identified seems to mean something different than it did in article I-4), differentiates patrimony also from the *biens* ("property") which make it up. Harming the patrimony and harming a sizeable portion of one's goods or property are two different harms.

In the second book on family under the section dealing with the matrimonial regime of partnership of acquests, some four articles employ the term *patrimoine* in prescribing the rules for dissolving that regime, particularly the accounting between the private property and the acquests[249].

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248. I-125. La tutelle est destinée à assurer la protection de la personne et du patrimoine, ou du patrimoine seulement (Tutorship is intended to ensure protection of the person and of the patrimony, or of the patrimony only). I-133. Ne peut être tuteur: ... 3. celui qui a ou dont le conjoint a, avec la personne protégée, un litige dans lequel l'état de cette personne, son patrimoine ou une partie notable de ses biens sont compromis (... status, patrimony, or a significant portion of the property...).

249. II-105. Sur acceptation des acquêts d'un conjoint, on forme d'abord deux masses des biens du patrimoine de ce dernier, l'une constituée des propres, l'autre des acquêts (When a consort's acquests are accepted, the property of his patrimony must first be divided into two masses, one comprising the private property and the other the acquests). II-112. Si le compte accuse un solde en faveur de la masse des acquêts, l'époux titulaire du patrimoine en fait rapport à cette masse partageable, soit en moins prenant, soit en valeur, soit à même les propres... (If the statement shows a balance in favour of the mass of acquests, the consort who holds the patrimony makes a return to the mass for partition, either by taking less, or in value, or from his private property...). II-113. Le règlement des récompenses achevé, la masse des acquêts de l'époux titulaire du patrimoine est soumise à partage par moitié avec le conjoint, suivant les règles de ce Code sur le partage, à moins que l'époux

It is novel in both languages to describe the regime in these terms. The role of patrimony is, first, to remain whole so that all creditors may be satisfied: neither spouse is entitled to his share in the other's patrimony until the other has taken care of his debts, by article II-115. Article II-113 then envisages the accounting within that patrimony taking place while the patrimony rests in the hands either of a spouse who is entitled to it, *titulaire*, or out of his hands and administered by another. That is, it is detachable from a person, in its entirety; it is rather something he "holds". Also, some piercing of the veil of indiscernability which hides the particular character of goods in the patrimony serving to secure the creditor is envisaged: the other spouse can seek for his share to be given in kind, not currency.

Article II-105 locates two masses in the patrimonial whole, made up each of goods qualified differently but both within the whole, each a small patrimony in that it is an accounting of goods against debts of its own as described in article I-4; II-112 tells how to carry out that accounting, in order to derive a whole fit to be divided in half-shares of which one shall enter the other's patrimony. From finish to start of this cluster of articles, then, there is a movement from a whole, to its displacement, and then to its divisibility by natural kind and finally by legal type.

Book Three, on "Successions", contains a seventh chapter traditional in that here alone was the term *patrimoine* used in earlier codes. In the final articles of the chapter on "Liabilities of the Succession and Separation of Patrimonies" ("Du passif de la succession et de la séparation des patrimoines"), the draft follows one of the civilian practices which had led commentators to doubt the unity of patrimony, that is, it keeps separate the debts and liabilities of the deceased from the debts and liabilities of the heir; the heir holds both, having indeed inherited the deceased's patrimony, but he holds them separately, one as his own and one as the deceased's. The deceased's creditors, however, no longer need demand this under article III-181 [250]; the separation is now part of the legal characterization of patri-

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titulaire de ce patrimoine ne préfère désintéresser le conjoint pour la totalité ou pour une part de ce qui lui revient en lui en payant la valeur. Toutefois, si la dissolution du régime résulte du décès ou de l'absence de l'époux titulaire du patrimoine, son conjoint peut exiger que l'on place dans son lot, moyenant soulte, s'il y a lieu, la résidence familiale et les meubles de ménage, ainsi que tout autre bien faisant partie de la masse à partager... (...of the consort who holds the patrimony). II-115. La dissolution du régime ne peut préjudicier, avant le partage, au recours des créanciers antérieurs sur l'intégralité du patrimoine de leur débiteur... (Dissolution of the regime cannot prejudice the recourse, before the partition, of former creditors against all of their debtor's patrimony).

250. III-181. La séparation entre le patrimoine du défunt et celui de l'héritier a toujours lieu, sans qu'il faille la demander... (The patrimony of the deceased is always separated from that of the heir without separation being applied for...)

mony, rather than an accidental feature which might be added at creditor's behest. As well, it is essential to patrimony in that a creditor may always invoke it, under article III-183; nor is there a time limit, as though an heir's holding of two patrimonies separately is eccentric or exceptional. The heir owns the items in the patrimonies, both his own and those which were the deceased's; he "owns" the "property", he has *propriété* in the *biens*[251]. But this assimilation of ownerships works no assimilation of patrimonies, which remain accountable only for each its own debts.

Beyond the confines of that chapter, separation occurs by article III-321 as much under a will as it did without one, not surprisingly since there it is even more conceivable that a testator would seek to benefit a beloved legatee by relieving him of his creditors, while leaving unsatisfied the testator's own creditors. But the latter is always benefitted, under III-322. Similarly, separation of patrimonies occurs by law alone, according to article III-399, in a substitution as in the other articles of this cluster[252]. The institute may have had claims against the grantor, or have spent his resources to preserve the substitution for the substitute. Lest his claims be displaced by the substitute's creditors and their claims upon the substitution once assimilated into the substitute's patrimony, that substitution remains separate. It was (part of) the grantor's patrimony; it first became separated therefrom; it then became confused with the institute's patrimony; but it later became a separate patrimony from that, at termination; finally, its goods became owned by the substitute while its liabilities remained separate, that is, it remained a separate patrimony from his own in the hands of the substitute, and this forever. This patrimony lives a life of its own, at times losing its outlines in another patrimony, then regaining them. It is not the case, however, that claims in the institute's patrimony against assets in the substitute's patrimony, as separate from the patrimony of the substitution, can be realized against assets in the patrimony of the substitution. The

251. III-183. Le droit à la séparation des patrimoines s'exerce sur les biens tant qu'ils demeurent la propriété de l'héritier ou sur le prix de l'aliénation s'il est encore dû (The right to separation of patrimonies is exercised on the property as long as it is owned by the heir or on the price of the sale if it is still unpaid).

252. III-321. La séparation des patrimoines a lieu dans les successions testamentaires de la même manière que dans les successions ab intestat... (Separation of patrimonies takes place in testamentary succession in the same manner as in intestate succession...) III-322. La séparation des patrimoines a lieu à l'encontre des créanciers du légataire dans le cas de réduction du legs particulier (Separation of patrimonies operates to the detriment of the creditors of the legatee whenever a particular legacy is reduced). III-399. Dans l'exercise de leurs droits, le grevé ou ses successeurs ont droit à la séparation des patrimoines contre l'appelé et ils peuvent retenir les biens jusqu'au paiement (The institute or his successors, in exercising their rights, are entitled to separation of patrimonies against the substitute, and may retain the property until they are paid).

separation for the benefit of the institute works for his benefit only as institute, not as ordinary creditor of the substitute; that is, he benefits only as related to the patrimony of the substitution, not as related to the patrimony of the substitute, although the substitute holds both and owns the goods in each.

A setting of patrimonial considerations analogous to that of intestacies and of testamentary gifts *mortis causa* occurs regarding gifts *inter vivos*, at article V-472 of the fifth book on obligations [253]. The concept and mechanics of separation of patrimonies here is meant to be the same, except that here the possibility of fraud intended upon creditors is increased yet more. The more striking difference, however, is that here the small patrimony of the gift has not been already separated from the person of the donor by his death, before being separated from the patrimony of the donee, but rather the donor must first pry himself loose from it while persisting in whatever other patrimonial endeavours he may. Less than in successions is the patrimony inseparable from person, for while there it is loosed by natural fact of death, here it is loosed by mere legal will.

Nothing in the draft is more striking that the use of the new concept in a new institution. The questions to be seen later about an alleged incompatibility between the trust and the civilian ownership are cut through in the fourth book by article IV-603 [254]. Again the stress is upon the self-containment of the property making up the patrimony; it is distinct. But only the English text, not the French, says what patrimony the trust patrimony is distinct from; it is distinct from the trustee's own patrimony. But whose, then, is it? The trustee's while just distinct from his own? The grantor's? The beneficiairies'? Or need not this question be posed at all? For article I-4 stated that every person has a patrimony, not that every patrimony has a person. Already it has appeared that ownership of the goods and integration of the patrimony as one's own are two different things. It still must be possible, however, at least to identify a *titulaire* or one who holds the patrimony as part of its concept; the draft does not inform us who this is, nor even whether it is a singular interest as against a duality of interest, the beneficiary's and the trustee's.

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253. IV-472. Les créanciers du donateur et ceux du donataire ont droit à la séparation des patrimoines, selon les règles énoncées au Livre des Successions (The creditors of the donor and of the donee are entitled to separation of patrimonies according to the Book on Succession).

254. IV-603. Les biens transportés en fiducie forment un patrimoine distinct... (Property transferred in trust constitutes a patrimony which is distinct from that of the trustee...)

In the next book, damage insurance is defined in terms of a remedy for patrimony at article V-874. Since the intent of the article is to distinguish between two types of insurance, some further grasp of patrimony can be gained by attending to what the alternative kind of insurance, personal insurance, is defined in terms of[255]. Article V-869 gives life, health and physical integrity as the latter. In addition to this distinction of patrimony and person, the patrimony can be adversely affected in a way that can be guaranteed against, whereas person may be "dealt sith" in a way not restricted to adverse effects on the one hand but not set in terms of any guarantees on the other hand. A universe of speculation lies just under the surface of these two articles.

The final articles of the draft code which employ the term in both languages are found in the ninth book on private international law[256]. In article IX-20 the conflict of laws concerning the form of a legal act is settled by allowing such a vast exception for patrimonial matters that the general rule of the first paragraph, and the long list or articles preceding this and governing the form of personal acts, are rendered almost inapplicable. In article IX-48 the conflict of jurisdictions is settled in the area of "personal rights of a patrimonial nature", by giving jurisdiction to Quebec courts in some cases. The stress in the two versions is different: the personal *matière* is the basic consideration of the French text, modified by its patrimoniality; while their patrimonial nature is prominent in English. Whichever is stressed, what is acknowledged explicitly is an absence of strong separation between person and patrimony, although by the very fact that both terms are required there remains a distinction of some sort. The personal matters of articles IX-51 to IX-59 are strongly distinguished from the patrimonial matters of IX-50, regarding real rights; but the article we are studying is not cleanly placed within this distinction, and thus it may be concluded that neither is the concept of patrimony.

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255. V-869. L'assurance des personnes porte sur la vie, la santé ou l'intégrité physique de l'assuré. V-874. L'assurance de dommages garantit l'assuré des conséquences d'un événement pouvant porter atteinte à son patrimoine (... patrimony).

256. IX-20. La forme d'un acte juridique est régie par la loi du lieu où il est passé. Est néanmoins valable l'acte relatif au patrimoine qui est fait dans la forme requise par la loi applicable au fond de cet acte ou par celle du lieu de la situation des biens qui en font l'objet... (The form of juridical acts is governed by the law of the place where the act is passed. An act relating to patrimony is nevertheless valid if made in the form required by the law applicable to the substance of the act or by that of the place where the property which is its object is situated...). IX-48. En matière personnelle à caractère patrimonial, les tribunaux du Québec ont compétence générale dans les cas suivants: ... (In matters involving personal rights of a patrimonial nature, the courts of Quebec have general jurisdiction when:...)

4.2. Doctrine

Besides the explicit legislative appeals to the concept of patrimony in the draft code, there are other articles which, by previous doctrine, are associated with the implicit appeal to patrimony, as well as commentary upon the draft which both explicitly uses and implicitly contributes to the understanding of patrimony.

4.2.1. Traditional Implication of Patrimony

Among the former, some articles suggest the classical unity of patrimony, others its divisibility, and still others characterize the contents of patrimony in such a way that one or the other of the first two positions is rendered more likely. Article III-4 lays out the universal character of an inheritance: there is no distinction among the types of goods found in it. Its counterpart for the patrimony of the living person is article V-193, which assembles all one's possessions into the single "common pledge" securing his creditors; it is common, that is, single or unique or universal, both because the goods are assembled indiscriminately and the creditors claim all together. The exceptions to this universality are that some creditors take precedence and some goods are exempted. But preferences in the draft are reduced by contraction of privileges, while increased by expansion of hypothecs in title five of the fifth book; and unseizable property is described in article IV-278. One purpose for universalizing a patrimony is for accounting purposes, as directed in article III-65 between an heir and the succession, and in article III-123 between the succession's creditors and the heir who seeks protection from them by claiming benefit of inventory, his equivalent of their separation of patrimonies. But the integrality of the goods is broken when the parties or their legal relations are of special types; thus particular heirs fail to receive benefits of contracts by article V-73, and only the indivisible obligation remains undivided in succession, unlike the solidary obligation, under articles V-171 and V-183. Even within the broken integrity received by the particular heir, however, there remain universalities of assets and liabilities as in article III-319 which meet the description of patrimony in article I-4.

4.2.2. Patrimony and Personality

The commentaries pick out as one of two major goals of the draft that administration of patrimony be simplified, as at the start of the first book. This overall thrust of the draft appears especially in this book at the section on tutorship: the tutor must be able to act quickly, upon a mere report,

without constant fear of a heavily protective hand, and for this he should be encouraged by a salary[257].

This is not really at odds with the alternative and overriding general purpose of the revision effort, namely, to protect the person, despite some possible conflicts[258]. For he is protected by protecting his patrimony, in the commentary at I-114. The conflict seems to appear to the Revision Office to lie between patrimony and person. While such a notion as familial patrimony is not totally expunged, as shown by the expansion of the spousal mandate in cases of indisposition in the commentary to II-216, it has disappeared for all practical purposes: so testamentary freedom is expanded at the expense of descendants' reserve at c.III-243; parental usufruct over personal damages won by their child is refused at c.II, page 124; and the prodigal is no longer protected. For when forced to make a choice between personal rights and family interest, the person wins out, according to c.I, page 21. Person wins over any private interest, by c.V-301, for his status is of public order by c.II-272, at least Quebec public order if not everybody's under c.IX-5.

On the other hand, while the family-grouping loses its hold on a patrimony, the partnership-grouping can now possess its own patrimony, distinct from its partners' patrimonies; the most interesting feature of such a change is that this endowment is explicitly made to depend upon the partnerships' acquisition of legal personality, at c.V, page 591, and c.V-748. That is, patrimony depends upon personality even if only personality by representation (though not obligatorily according to art. III-83), which art. III-32 defines as before.

Distinctly patrimonial are matters of real rights and of succession; distinctly personal are matters regarding the status of persons; mediating between them are borderline matters, "personal of a patrimonial nature", in art. IX-48. Status, the definitional criterion of persons, is different between physical and moral persons by reason of certain incapabilities in the latter, by c.I-4; but there is nothing any more essential and final about the incapacities than of ordinary incapability. For moral persons are unable to marry or to give testimony not because they cannot so bind themselves or suffer sanction, both of which they surely can do, but because they lack genitals and lack ears, respectively, just as a physical person lacking same cannot perform the actions requiring them.

But while in these places the association of patrimony to person is so forceful, it is disclaimed with equal force of the trust-patrimony. To cast the

257. I, p. 16; 146 and p. 20; 224–227; 180; 131. Henceforward, a reference to the term "patrimony" or other relevant categories in the commentary will be indicated by "c." before the reference, and an Article in the draft text by "art".

258. C.I, p. 96, n.52, and p. 97, n.62.

concept of the trust property into the form of a patrimony is the civilian answer to the common law distinction of interests, legal and equitable, and perhaps even of ownerships; whichever it be, its mix into Louisiana civilian law was unsuccessful and the Quebec draft's conceptualization is intended as its more civilian remedy[259]. The remedy consists in making the trust property into a patrimony distinct from the trustee's personal patrimony; the result is to ensure the autonomy of the *patrimoine fidiciaire*, and in turn its permanence regardless of change in trustees[260]. The solution is surely not that of the common law; but it is just as certainly not explained in terms of that civilian doctrinal school which bonds patrimony to personality.

The primacy of person is reinforced by bringing to the fore those obligations which do not have *en soi de valeur patrimoniale* at c.V, page 571. What they consist in, however, is left blank, except for the definitions given before in a.I-4. The splendid opportunity to ground this theme is let slip in the commentary to article I-4, where not only the distinction of patrimonial and extrapatrimonial is passed in silence, but also the obliteration in the commentary alone of the distinction between extrapatrimonial rights and civil liberties. While the distinction according to provincial competencies as against federal is only an artificial hurdle to the latter assimilation, the distinction did not originate in such an area; and so some explanation of the distinction and its rejection here would have been helpful, not least to the present study. At any rate, the primacy of obligations extrapatrimonial by reason of personal attachment and absence of patrimonial value is left at least querelous by the presence of numerous contractual obligations distinctly patrimonial without using the term despite the draft's notes that they are formed *intuitu personae*[261].

4.2.3. Constitution of Patrimony by Contents

The most fascinatingly explicit if brief dealing of the draft commentary with the notion of patrimony, beyond the way it is connected to personality, is the way it is constituted in terms of its contents: how they adhere to each other, how contents enter and leave, and most of all what those contents are in order to be able so to combine and pass. These three points take up the reminder of this commentary upon the commentaries.

Firstly, patrimony continues to be conceived as a universality as at c.IV-113. While attention to *l'ensemble du patrimoine* implies that attention

259. C.IV, p. 380; n.51, p. 545.
260. C.IV, p. 380.
261. V-589 contract with mandatory; V-90(1) right of revocation; V-105 *gestion d'affaires*; V-217 hire; V-695 enterprise; V-972 insurance; V-1217 arbitration.

could be given only to part, also, such that its ensemble is a matter of fact and not essential, nonetheless this ensemble is treated in the same way as another "universality". But this other universality, in turn, is an ensemble of fungibles, implying that this is an inherent feature of patrimony, too; that is, in order for objects to lose their identity enough to join into one indiscriminate whole, they must be replaceable without loss being involved in the replacement. This does not involve a loss of identity as against other items in the ensemble, any more than it does in a consumable whole; for the comestible with vitamin C cannot be replaced by one with vitamin B. The loss of identity occurs only vis-à-vis objects replacing the originals. And this is of no particular help in conceptualizing the universality. A reflection of the failure to think it through is the use of *patrimoine* at one time as synonymous with a mass of value contained within it at c.II-107 and 108, and again as distinct from it at c.III-65 and 66.

The event constitutive of patrimony is, first of all, its separation from other patrimonies. This is no privilege, for the benefit of only some; rather it is for the benefit of all creditors, at c.VIII-6(3). Making the benefit for all creditors, those of the deceased and those of the heir, as well as effecting it by law and not by demand, for acquisition both by succession in c.III-181 and 182 and by gift inter vivos at c. V-472, this stresses the institutional character of patrimony, and the disinclination to define it in terms of its holder's will. This is reflected by c. IV-95. The function of separation is institutional, that is, towards all the world, just as the return of gifts to the patrimony is for spouse as well as creditors, at c.III-65 and 66.

As in the separation of patrimonies at c.III-181 and 182(3), timing the exit from patrimony of the goods being sought is important in paulian actions, as at c.V-201. In both, the patrimony fluctuates through time, rather than remaining unchanging; in the latter case, this fluctuation is made essential to patrimony by being offerred as an explanation of why the creditor must show his debt to be prior to the act of disposition which is under attack, rather than being a mere observation. In entry as well as in exit, goods differ as to the relevant time: for example, "patrimonial rights" under a marriage covenant are acquired rights from the moment of marriage, while successoral rights are so only from the opening of the succession, at c.III-59, which acquisition is their moment of entry to the patrimony.

This favour towards a patrimony stabilized through time, the surprising effect of the temporally prominent character of entry and exit, works some equally surprising effects upon transactions, whether upon their constitution or their comprehension. Of the former sort is the hypothec now presumed wherever a creditor has a particular right on a good: such is his right solely,

even where it could not appear more clearly from the documented transaction that the debtor was agreeing to the goods leaving his patrimony, at c.IV-281 to 284, on page 432; the drastic change wrought here remains a hypothec, never a mortgage. The same underpinning on patrimony explains the abolition of the vendor's privilege with the rest. For he has contributed no more than others to enriching the debtor's patrimony: he has brought about no enrichment at all, for the assets of the patrimony are increased only to the same amount that the liabilities are increased, cancelling each other out, at c.IV on page 370. Running this explanation in reverse, the value given by a bankrupt debtor to an unsuspecting third party has never left the debtor's patrimony, never entered the third's; since the third has given nothing in return, the recovery of the payment to the bankrupt's patrimony is not an impoverishment of the third's patrimony, but only its failure to be increased, *un manque à gagner*, at c.V-199.

4.2.4. Contents of Patrimony

Patrimony, so constituted in relation to person, could have the features it does only if its contents were such as to permit of a like treatment. Indeed, even to be conceived as a universality which has contents rather than one which obliterates its contents' identity depends upon what sort of contents these are. The furniture in the halls of patrimony are set out in the mild-mannered definitions commencing book four, *Les biens (Property)* [262]. While it is their explanation in the commentary which is of crucial importance to the subject, this study will proceed by first locating effects of this revision of definition in the draft code's articles, both in order to raise the questions which the redefinitions answer, and to introduce the historical study which they call for.

The draft code permits acquisition by prescription not only of *le droit de propriété* by a period of ten years, but also permits it of *les démembrements du droit de propriété* such as *un droit d'usufruit* or *un droit de servitude réel* or *l'emphytéose* [263]. As for extinctive prescription, the draft permits it after ten years for *des droits réels sauf la propriété*; until now, the present code had required thirty years to extinguish *les droits réels relatifs* [264].

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262. IV-1. Les biens sont les droits personnels et réels d'une personne (Property consists of the personal and real rights that belong to a person). IV-2. Les droits réels portent sur des choses ou sur des droits (Real rights relate to things or to rights). IV-3. Les biens et les choses sont meubles ou immeubles (Property and things are moveable or immoveable).
263. VII-41; VII, p. 921, no. 4.
264. *Id.*, no. 6.

Les droits réels are not able to be expanded in number indefinitely; there is what is, elsewhere, called a *numerus clausus* of real rights. This is stated explicitly by overruling the Privy Council's decision in *Matamajaw Salmon Club v. Duchaine*. Any candidates for classification as a new real right must be fitted under the existing categories or be denied recognition as a real right at all. So benefits such as rights to hunt or fish must be a real right which is personal in its use and so temporary (usufruct) or a real right which burdens land for other land (servitude), as at c.IV-94.

Propriété is a more restricted term than *droit immobilier*, for the latter contains both ownership and its dismemberments, according to c.VIII-6. *Propriété* is a more restricted term than *droits*, for rights other than those of ownership may be hypothecated, e.g., a mere *créance* as at c.IV-402. *Droit* is a more restricted term than *intérêt*, for the latter may be only indirect, as at c.IV-515. Among interests, *d'avantage pécuniaire* is a more restricted term than *profit*, for the material community may derive use or enjoyment from a thing without deriving any pecuniary benefit, at c.II-143 and 144.

The relevance of these distinctions is that they point up just what it is which constitutes the assets of the patrimony: personal rights and real rights constitute the assets of the patrimony. *Biens* are defined as such rights in article IV-1; this redefinition neutralizes the error of Roman law perpetuated throughout the centuries, it is alleged at c.IV, page 345. No more frank acknowledgement could be asked for a totally new start in civilian law, for patrimony is reconstituted when its components are, and person is reconstituted when that from which he is distinguished is.

The Romans' error, explains a full page of commentary at c.IV-1, was to identify the *right* of *property* with the *thing* which is its object. As Jhering is quoted to have recognized the error, basically formative of Roman law, it is: "dans la propriété, confond[re] la chose et le droit". They are brought under one category: *biens* = *choses* + *droits*.

The remedy also is Jhering's, quoted from Savatier: that all *biens* in a patrimony are *droits*, i.e., incorporeal *biens* only[265]. The right of property is

265. François Frenette criticizes this *opposition indue entre choses et biens* in "Le rapport de l'O.R.C.C. sur les biens", (1976) 17 *C. de D.* 991, p. 997: "... 'les biens d'une personne sont l'ensemble de ses droits personnels et réels.' Cette définition en est une, non pas des biens, mais plutôt de l'actif du patrimoine. ... il prétend limiter les biens aux droits, à l'actif du patrimoine. Or la notion du bien a une extension plus grande que celle du droit et même que celle du patrimoine... Pour considérer une chose comme un bien, il suffit en effet qu'elle soit susceptible d'appropriation, et non pas qu'elle soit effectivement appropriée. Au demeurant, à vouloir restreindre les biens aux droits, le Comité, fort de l'opinion de Savatier, néglige l'appropriation du fait, la possession, qui est valeur économique indéniable méritant figurer d'une quelconque façon au patrimoine."

like other real rights : it is incorporeal ; it has corporeal things as object only ; it is not itself a corporeal thing. Patrimony contains only incorporeal *biens*, i.e., rights. But, and the note at c.IV, page 384 is important, rights are themselves exercised over either concrete corporeal objects, or over abstract incorporeal objects. "Les biens sont les droits personnels et réels ; ils constituent l'actif du patrimoine." Included therein are rights, as article IV-2 if not the commentary clarifies : the patrimony consists of rights over rights.

This is all that *Matamajaw* had claimed. As was noted earlier, the object of a right was less for the Romans a thing than the very legal relation which constitutes the right itself, so that this critique is correct only within an alternative narrowly modernistic perspective but wrongheaded beyond it, as is the characterization of patrimony, consequently. In addition, it need only be observed that, within the draft code and commentary itself, the "object" of a right or duty is not identified with the thing but with an incorporeal. Thus, at article V-1 the object of an obligation is identified with a "prestation", which the commentary is at pains to distinguish from a "quelque chose" of the current law in C.C. 1058. And at article V-41 the object of a contract is an activity : to create, modify, transfer or extinguish obligations or real rights, without commentary.

5. Alternative settings of patrimony

Alternatives to the unity, universality, and attachment to personal will which characterize patrimony classically are sought in this chapter. Here it is not the question whether one can speak of these features without patrimony, but whether there is an alternative rationalization of patrimony itself, in the absence of these features.

5.1. Non-Civilian Alternative : Common Law

In common law the relation between legal personality and an equivalent to patrimony is unknown [266]. One result is that partners may act for the interest of their partnership, which lacks legal personality, only by acting each in his own name [267]. Another is that a succession may float, without attaching to person as a patrimony must in civilian law. "Contrairement au principe 'le mort saisit le vif' du droit civil, dérivé du droit romain, la loi américaine considère les biens et les dettes d'un défunt comme une entité légale séparée, comme étant la 'succession du défunt' " [268]. Further, since

266. F.H. SPETH, *supra*, note 45, pp. 21-22, no. 29, n.3 ; p. 143, no. 154, n.1.
267. *Id.*, p. 200, no. 198.
268. F.G. OPTON and A. FREEMAN, "Loi américaine sur les successions", tr. J.S. MACKAY, (1977-1978) 80 *R. du N.* 212.

there is no personal universality to the passive patrimony or to its subject, codebtors are not subject to one and the same obligation, but each of those many individuals is held to a like but different liability, so that the failure of one to pay does not affect the liability of the others[269].

The property in incorporeals which is essential to the universalizing of patrimony by attaching it to will is, nonetheless, present in common law. Salmond recognizes two terms: ownership, bearing only upon corporeals; and property, over anything capable of appropriation, including claims. Further, he defines even ownership as "*the relation between a person and any right vested in him*... Every man is, in this sense, *the owner of all rights which are his*"[270].

While the estate appears to be the same sort of universality of rights as patrimony — "... each kind of estate became to some extent reified — it became a thing that could be 'owned'"[271] —, it is not equivalent to the universality which englobed the rights of property in an object, but rather to a medium between the holder and his land[272]. So while particular estates analogous to the civilian real rights are a sharing of whatever "ownership" might be alleged, because that ownership is a holding-of-another (tenure) and a holding-for-a-period (limitation), the civilian property is a relation to the objects owned without any intermediary so that any "dismemberment" of these rights are "real rights, but no part of the ownership"[273]. Common law ownership in an object is splinters of relationships to other persons; civilian property is unified regarding any single object, and is unified only that much more when it is the property upon one's patrimony. That is why, in the following description of property in objects, the characterization corresponds to the often repeated characterization of patrimony as a *contenant* rather than its *contenu*:

> Romanic ownership can be thought of as a box, with the word "ownership" written on it. Whoever has the box is the "owner". In the case of complete, unencumbered ownership, the box contains certain rights, including that of use and occupancy, that to the fruits or income, and the power of alienation. The owner can, however, open the box and remove one or more such rights and transfer them to others. But, as long as he keeps the box, he still has the ownership, even if the box is empty.

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269. S. GINOSSAR, *supra*, note 18, p. 8, no. 4, n.15.
270. *Id.*, p. 41, no. 15, n.72, citing with Salmond's emphasis.
271. J.H. MERRYMAN, "Ownership and Estates; Variations on a Theme by Lawson". (1974) 48 *Tulane L.R.* 916, p. 929.
272. *Id.*, p. 925.
273. *Ibid.*

> The contrast with the Anglo-American law of property is simple. There is no box. There are merely various sets of legal interests. One who has the fee simple absolute has the largest possible bundle of such sets of legal interests. When he conveys one or more of them to another person, a part of the bundle is gone.[274]

Ownership in common law systems differs most noticeably from civilian by the presence of trusts. Despite the fact that the self-containment of its assets and liabilities is taken by civilians to make trust the very model of a *patrimoine d'affectation*[275], the division of interests between legal and equitable is not a division of civilian ownership, such that their addition equates its whole[276]. Rather, trust effects a contraction of ownership, not just its division: the trust corpus is immune to the holders of either interest, as well as to both together[277].

Waters considers the same common law alternative to patrimony, but in terms of the problems which would attend its introduction into civilian law. In civilian law, again, the direct relation of owner to owned object is central; it remedies the Old Law's ranked interests in land, and accordingly the ranking of persons. It is formulated as ownership that is autonomous and indivisible, which one may add forms a model for patrimony; it results in other rights being either merely personal or else a closed list of rights over some other owner's thing, rather than being a share of his ownership such as would diminish his certainty. Waters suggests that the only way for a civilian to comprehend the trust is as a *fondation, stipulation pour autrui, mandat* or *dépôt*, none of which breach the principle of absolute ownership. His comparison to *patrimoine affecté* or *herditas jacens* of modern or ancient civilian tradition, then, implies that these notions clearly have nothing in common with the patrimony of the classical theorists[278].

5.2. Non-French Civilian System: Germany

The German civil code, as well as the Swiss, makes property bear only upon a corpus, not upon incorporeals[279]. The corresponding fact about

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274. *Id.*, p. 927. This description in terms of estates and landlaw is generalized by Honoré and then reapplied to the concept of possession constituting the "ownership" of personalty by Harris. See: D.R. HARRIS, "The Concept of Possession in English Law", and A.M. HONORÉ, "Ownership" both in *Oxford Essays in Jurisprudence* (First Series), Ed. A.G. GUEST, Oxford, Clarendon, 1961, pp. 69 and 107 respectively.
275. As by Speth, *supra*, note 45, p. 264, no. 258.
276. Despite the fact that earlier Roman "bonitary" and "quiritary" ownerships parallelled the distinction between beneficial and legal interests: J.H. MERRYMAN, *supra*, note 271, p. 940.
277. J.H. MERRYMAN, *supra*, note 271, p. 941, n.65.
278. D.W.M. WATERS, *Law of Trusts in Canada*, Toronto, Carswell, 1974, pp. 931-936.
279. S. GINOSSAR, *supra*, note 18, p. 41, no. 15, n.72; incorporeal things are not even recognized: M.G.V. SCHERER, *Principales différences entre le Code Napoléon (1804) et le Code Guillaume II (1900)*, Paris, Librairie de la société du recueil général des lois et des arrêts Larose, 1903, p. 18, no. 37.

patrimony (*Vermoegen*) is that it is not conceptually related to any notion of personality: its object not being a feature of personality, viz., rights or their universalization, there is neither need nor possibility of identifying patrimony with personality, or of attaching them inseparably. Thus detached from personality, patrimony is envisaged in a strictly objective manner, as an ensemble of goods and services constituting a legal whole. The objects, the content, is looked to more than the subject, the container. As one result, it is possible for patrimony to be ceded in its entirety to another person, not simply *mortis causa* but *inter vivos*. The patrimony, the assets and liabilities tallied at the time of gift, are what are given; the person is not given, for his possibilities of holding property do not make up patrimony. This donation, the *Vermoegensuebernahme* of art. 419 B.G.B.,

> du point de vue de la doctrine française, ... aurait pour effet de réaliser la cession du *contenu* du patrimoine cristallisé à un moment déterminé, le patrimoine en tant que *contenant* "en puissance" continuant à subsister.[280]

This is also the case of the German doctrine; but there is nothing of patrimony which continues to attach to that potentiality.

The unity of these goods must be founded elsewhere. For unity there is. The real rights are simply "splinters of ownership that have become independent"; and, though they could be increased in number at will, unlike the French corresponding dismemberment, they are all reducible to ownership[281]. Unity of ownership is kept not by making them rights in the land of another, but parts of ownership. As well, the principle of universal succession attains: there can be no break in the seisin, the heir takes the whole, and does so immediately on the death of the testator[282].

The unity of the different elements is found in their common end (*Zweck*); under this theory of *Zweckvermoegen* derived from Jhering, the patrimony is found not so much *pertinere ad aliquem* as *pertinere ad aliquid*[283]. With subjective unity, but only as much "universality" as is required for any transmission of several rights under a single title, "the property falling to the heir passed to him as an objective unity, without regard to the question whether it constituted the entire property of the deceased or only a certain part of that"[284]. Universality means only that each

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280. F.H. SPETH, *supra*, note 45, p. 22, no. 29, n.3; also p. 143, no. 154, n.1.
281. R. HUEBNER, *A History of Germanic Private Law*, tr. F.S. PHILBRICK, Boston, Little, Brown, 1918, no. 31, p. 299; quoting Gierke.
283. F.H. SPETH, *supra*, note 45, p. 21, no. 29, n.3; R. VON IHERING, *Der Zweck im Recht*, Leipzig, 1877.
282. W. BRESLAUER, *The Private International Law of Succession in England, America and Germany*, London, Sweet and Maxwell, 1937, p. 144.
284. R. HUEBNER, *supra*, note 281, no. 102, p. 699.

portion of the inheritance (*Nachvermoegen*) is universalized into a distinctive grouping (*Sondervermoegen*)[285].

5.3. Non-Classical French Doctrine

5.3.1. Nineteenth Century Objectivism: Saleilles

The same influences which directed the Wilhelmite codification re-oriented also the later French conprehension of their own code, and patrimony in it. The French leader was Raymond Saleilles, his German model was Rudolph von Jhering, and the turning point was the doctrine of will, the key to classical French doctrine's universalization of patrimony. "Loin de nous apparaître comme la volonté en exercice, le droit se présente à nous, selon le mot de Jhering, comme un but supérieur ayant la volonté à son service." How could such a drastic reformation of French doctrine have taken place? By agreeable steps:

> La volonté a cessé d'être un but, elle n'a pas cessé d'être un moyen, et le moyen lorsqu'il est indispensable à la réalisation d'un but ne cesse pas d'être un élément essentiel de l'institution à laquelle se relient les deux termes. La volonté devenue le moyen de la réalisation du droit est un élément différent sans doute de la volonté, but exclusif du droit, mais non moins essentiel à sa conception et à sa constitution.[286]

This could even masquerade under the same auspices as *Willensmachttheorie*: Roman law's transmission of personality created not a new personality, but the old one now freed of its physical bearer, or any other physical form. Instead it rested upon the newly personified State[287]. Through this vehicle, the force of will is maintained, but "dérivée, non initiale" as in earlier nineteenth century individualism; its force "ne se justifie que par l'accord de cette volonté avec la règle de droit qui préexiste et la domine"[288].

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285. As in customary French law, no general principle governed successoral transmission, according to the thirteenth-century *Sachsenspiegel* and *Schwabenspiegel*: "l'ensemble des biens du défunt se disperse à sa mort" (F. BOULANGER, *supra*, note 33, p. 25, no. 21).
286. R. SALEILLES, *De la personnalité juridique*, Paris, Rousseau, 1910, p. 532; quoted by M. DESLANDRES, "Les travaux de Raymond Saleilles sur les questions sociales", E. THALLER, in *L'œuvre juridique de Raymond Saleilles*, Paris, Rousseau, 1914, p. 265.
287. Éd. MEYNIAL, "Les Travaux de R. Saleilles sur le Droit romain", in E. THALLER, *supra*, note 286, p. 225.
288. E. GAUDEMET, "Raymond Saleilles et le Code civil allemand", in E. THALLER, *supra*, note 286, 141, the first phrase taken from Saleilles' *Introduction à l'étude du droit civil allemand*, Paris, Pichon, 1904, p. 45.

5.3.2. Early Twentieth Century Objectivism

Examples of transplanted influence by German objectivism abound through the turn of the century. A spate of theses focus the critique on French subjectivism and directly upon the notion of patrimony. More frankly than others, Pierre Cazelles makes his own the positivist claim of R. Roguin, equally as derivative as the contemporaneous American legal realism from the degeneration of Jhering's sociological doctrines into *Interessenjurisprudenz*: "Au fond de cette discussion l'on retrouve la vieille querelle des réaux et des nominaux et nous sommes nominalistes déclarés" [289].

Cazelles shows the extent of success the classical theory had enjoyed: from the original position that patrimony is a necessary consequence of the features of personality, namely its unicity of will and its resulting continuance, he can state in all innocence precisely the opposite relationship, that "la seule, la vraie raison d'être de ce principe de continuation de la personne se trouve dans la conception du patrimoine", "cette conception spéciale de l'universalité du patrimoine" [290]. Nonetheless he lays the finger correctly upon the logical flaw in classical doctrine: that Aubry and Rau's "deduction" of the idea of patrimony from the idea of personality is not a detailed reasoning process but is rather a simple substitution of patrimony for personality, and an application to patrimony of all the characteristics and consequences of personality [291]. In traditional logic one could identify the fallacy as superalternation: substituting "all" for "some". What Cazelles misses is the reason for this: that the kantian person's existence *is* his will, his control of the world, and nothing more. Upon that premise, no fallacy arises.

The paradox is that, while Cazelles criticizes this as an intellectual abstraction to the neglect of the economic reality of patrimony, the classical doctrine sets itself out as a distorted mirror image of property. In the enlightning phrase of a minor classical author Cazelles cites in passing, the person's property (attribute) becomes his property (possession): "der Mensch *ist* nicht sowohl vermoegensfaehig, er *hat* Vermoe gensfaehigkeit" [292]. Rights inhere not in the person, but in the patrimony he owns.

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289. *De l'idée de la continuation de la personne comme principe des transmissions universelles*, Paris, 1905, p. 392. See also: J. JALLU, *Essai critique sur l'idée de continuation de la personne considérée comme principe des transmissions à titre universel*, Paris, 1902; L. PLASTARA, *La notion juridique du patrimoine*, Paris, 1903; R. REMPLER, *L'individu et son patrimoine*, Paris, 1910; P. GAZIN, *Essai critique sur la notion de patrimoine dans la doctrine classique*, Dijon, 1910, at Saleilles' home university.
290. P. CAZELLES, *supra*, note 289, pp. 367-368.
291. *Id.*, p. 371.
292. *Id.*, p. 373, n.1; from Neuner.

Yet it is not this excess of zeal in the first branch of traditional methodology, *distinguer pour unir*, that Cazelles attacks but the second:

> La personne est titulaire de son patrimoine, elle est donc son propre sujet, elle s'appartient à elle-même. Si, entre deux notions que vous distinguez soigneusement, vous établissez un rapport d'interdépendence, on ne saurait rationnellement le transformer en équivalence. De deux choses l'une: ... Ce que l'on peut distinguer ne saurait se confondre.[293]

To be distinguishable, elements must be separable; to be separable, they must be different existents: this is the Cartesian methodology[294] allegedly derivative from Ockham as a "razor" shaving off inseparable entities, of which the subjectivism inveighed is but one development and the objectivism applauded is the other.

Negatively, the core of the critique here is that no difference can be grounded between a universality of fact among separate economic objects (*sachenrechtliche Einheit*) and the universality of law which patrimony was alleged to be. Cazelles is as frank as earlier :the difference collapses because the legal universality of patrimony is just an attempt to objectify conditions, to make the intramental extramental, to stop the flow:

> Comme les facultés de l'esprit, ce n'est que la personnification d'une cause, la réalisation de certaines conditions données dans l'abstraction... Ce n'est donc plus au patrimoine, simple universalité de biens que l'on succède, c'est à une entité intellectuelle, à quelque chose qui n'a jamais existé que dans le cerveau de ceux qui l'ont imaginé. Ce quelque chose, n'étant que le caractère successif des biens dans la fortune d'un individu, on a voulu le fixer, le personnifier... Au fond, c'est l'érection en entité juridique du caractère successif du patrimoine... Le patrimoine est, en somme, une expression collective servant à désigner un groupement de choses individuelles, et rien en dehors.[295]

Affirmatively, patrimony is only a current account, a running tally. It is successive, it requires suspension until a final liquidation, it locates credit in the debtor's economic activity as a negative element and not a charge upon the positive, and it disintegrates any idea of patrimony as some object. The only universal feature of rights in a patrimony is that they have influence one upon the other. "Il n'y a pas de patrimoine, il n'y a que des droits patrimoniaux. Le patrimoine n'est pas une chose existant en soi, ce n'est qu'une qualité des droits"[296]. Once given credit, execution upon goods and

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293. *Id.*, p. 377.

294. *Les principes de la philosophie*, I, 45-46.

295. P. CAZELLES *supra*, note 289, pp. 382, 387, 392.

296. Cazelles, p. 394, n.2, cites as the source for this metaphor, the only positive one he offers, the *Leçons sur le mouvement social* of Maurice Hauriou, app. II, p. 148, which JALLU, *supra*, note 289, p. 103, and PLASTARA, *supra*, note 289, p. 66, also follow. This source shall be a focal point in the conclusions to this study.

not person is inevitable; once given goods as common pledge, the idea of patrimony is inevitable; but once given this idea as a purely economic feature, the separation of patrimonies is inevitable not only as an option but as a matter of law[297]. Patrimony is rights which are independent, but influence each other.

5.3.3. Recent Patrimonial Theory: Mazeaud

One cannot possess a notion of patrimony, as he can possess a patrimony; one may not have an objective patrimonial capacity to acquire, as he has a patrimony; and while the subjective capacity to acquire may be one, indivisible and inalienable, its realization may not be. "L'aptitude ne peut être gagée, elle ne peut être une universalité (n'étant pas un bien) et ne se transmet pas aux héritiers"[298]. On the basis of such a critique at quarter-century, already less profound, and despite its contrary judgment that passive elements are not part of patrimony but a charge upon it, the same conclusion follows: "il a des éléments patrimoniaux et n'a que des éléments". Their only unity is to belong to the same patrimony; so no unique right of property over patrimony occurs, either[299].

By mid-century the tempests of objectivism as well as subjectivism had subsided, and patrimony as a category with them. Mazeaud's treatment is characteristic. The first step is not to admit patrimony, but to admit universalities of rights and then patrimony as one type. The broader reason for universalities at all also bears the mark of the current philosophies of context, horizon and hermeneutic circle: "Mais, de même que l'homme ne vit qu'en société, les droits n'existent que groupés"; "l'homme conçoit le nombre en même temps que l'unité"[300]. But, while no longer polemical, it is evident that purpose (*Zweck*) has won over faculty (*Wille*): "est-ce par notre volonté que nos droits forment un ensemble, que notre actif répond de notre passif... C'est en raison de leur affectation commune; ils sont groupés autour de la personne, parce qu'ils lui sont affectés; ils sont les moyens de son activité"[301]. Patrimony precedes personality, rather than following it: rather than a person existing and controlling goods, goods are devoted to some purpose and then personality is granted. "Si l'œuvre prend vie, c'est parce que des biens lui sont affectés"[302]. Likewise, no difference appears between

297. P. CAZELLES, *supra*, note 289, pp. 398-399; compare the conclusions of the Quebec draft.
298. M.N. MEVORACH, "Le patrimoine" (1936) 35 *R.D.C.T.* 811, pp. 816-817.
299. *Id.*, p. 821, 824.
300. H.L. et J. MAZEAUD, *Leçons de droit civil*, I, 4e éd. par DE JUGLART, Paris, Éd. Montchrestien, 1967, p. 314.
301. *Id.*, p. 322.
302. *Ibid.*

the universality of fact and of law: "Reconnaître l'existence d'une universalité de fait, c'est admettre qu'elle est gouvernée par des règles particulières; ces règles ne peuvent être que de droit". The upshot of this reduction of patrimony is that any distinction between patrimonial rights and extrapatrimonial is otiose [303].

5.3.4. Contemporary Patrimonial Theory: Uppsala Congress

"La transformation du patrimoine dans le droit civil moderne" was the theme of the Seventh International Congress of Comparative Law at Uppsala in 1967. The conclusion was that while objectivist theories had vanquished classical subjectivism, the changed contents and nature of patrimonial goods had vanquished objectivism [304]. Although all recognized these criticisms both of classical and modern patrimonial theory, responses differed. While, on the one hand, the Latin American civilian systems show only a piecemeal detachment from a commitment in their codes to classical theory by no more than the typical "common pledge" articles [305], the Eastern European systems' wholesale turn towards the objectivist theory of *affectation* is made distinctive by their social destination of the means of production (individual property) while property destined to satisfy individual needs (personal property) alone stands in the typical position of a patrimony. The former is subject to jurisprudential debate, whether it constitutes the State's patrimony or that of the particular public enterprises [306]. Clearly metaphysics is not abolished by abolition of classical theory.

But the major transformations occur in the content of patrimony, and thereby its notion. For if, on the one hand, there is no problem in the loose German patrimony of accommodating the "materiellen Erfolg seines

303. *Id.*, pp. 323-324.

304. P. RAYNAUD, "La transformation du patrimoine dans le droit civil moderne", in *Rapports généraux au VII^e Congrès international de droit comparatif*, Stockholm, Almquist and Wiksel, 1967, 136, 137.

305. G. KUMMEROW, "La Transformation del Patrimonio en el Derecho civil moderno" in *Panencias Venezolanas al VII Congreso Internacional de Derecho comparado*, Caracas, Publ. del Instituto de Derecho Privado, 1966, 71, 76, says, speaking also for at least Brazil and Honduras: "Tal tendencia [en los textos positivos afiliados al grupo germanico que el patrimonio se delimita en virtud del destino] no es trasplantable en bloque a legislaciones que, commo la venezolana, aun se sostienen sobre la armazon fundada por la teoria tradicional".

306. J.S. PIATOWSKI, "La transformation du patrimoine dans le droit civil polonais moderne, in *Rapports polonais présentés au 7^e congrès international de droit comparé*, Varsovie, Ossolineum, 1966, 223, 228-229. The same is true for Hungary, *id.*, p. 228, n.17, and for the Soviet Union, *per* P. RAYNAUD, *supra*, note 304, p. 138; the Rumanian and Yugoslav reports were not available.

Wirkens, seiner Arbeit" as compatible with the subjective thrust of this civilian system [307], the systems of French influence find it difficult to accommodate these in the traditional ways, that is, including things in patrimony only via rights over them. For present day patrimonies are composed more of things than of rights, though the things are of an incorporeal nature akin to rights [308]. The entire Belgian report studies these in concrete detail with no speculation: rights to clientele, right to occupational position, public land management, and coproperty [309]. But by far the most important revision is that, in the French report, this changed content changes the very way of categorizing patrimony: from patrimonial/extrapatrimonial, to a greater or less degree of patrimoniality. The scale is set up upon the following criteria: "plus forts sont l'intuitus personae et le caractère complexe ou abstrait des biens, plus nombreux sont les obstacles à leur pleine patrimonialité" [310]. These factors being determined by law more than by will, they do change. No value, then, can be said to be permanently extrapatrimonial; "il existe donc comme un élan des droits, une force d'ascension qui les pousse d'un degré à l'autre de la patrimonialité: évaluation, exigibilité, cessibilité, saisissabilité, transmissibilité et, pour finir, inclusion purement comptable dans la masse commune" [311]. For example:

> au pied de l'échelle on trouve les obligations naturelles, première ébauche d'un droit à naître ou reflet ultime d'un droit expirant. Évaluables en argent, elles ne confèrent même pas le droit au paiement mais donnent une juste cause à l'exécution spontanée. Il arrive que leur existence précède et préface la reconnaissance des obligations civiles notamment alimentaires. À un degré plus haut se situent précisément ces droits alimentaires. Leur exigibilité étant énergiquement sanctionnée, ils nourrissent le patrimoine, mais demeurent indisponibles aux mains du créancier et échappent à ses ayants cause. Plus haut encore apparaissent les créances patrimoniales nées de l'atteinte apportée à un attribut extra-patrimonial de la personne: nom, honneur, affection, intégrité physique, droit au travail. Ces recours, aujourd'hui, foisonnent. Parfois ils contituent une étape du processus qui mène à la patrimonialité du droit protégé.[312]

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307. F. RITTNER, "Die Veraenderungen des Vermoegens im modernen deutschen Privatrecht", in *Deutsche Landesreferate zum VII. Internationale Kongresz fuer Rechtsvergleichung im Uppsala*, hrsg. E.V. CAEMMERER u. K. ZWEIGERT, Berlin, W. DEGRUYTER, 1967, 129, 134-135.
308. P. RAYNAUD, *supra*, note 304.
309. J.-G. RENAULD, "La transformation du patrimoine dans le droit civil moderne", *Rapports belges au VII^e Congrès international de droit comparé*, Bruxelles, C.I.D.C., 1966, 61-72.
310. P. CATALA, "La transformation du patrimoine dans le droit civil moderne", (1966) 64 *R.T.D.C.* 185, p. 206, no. 25.
311. *Id.*, pp. 212-213, no. 29.
312. *Id.*, p. 210, no. 28.

The conciliatory tenor of these reports is found also in contemporaneous monographs as to the person of the holder, the character of his holding, and the objects he can hold. Personality, if not determinative of patrimony, is not irrelevant to it (Speth); property extends over not just things, but also rights (Ginossar); and patrimoniality continually eats into extrapatrimoniality (Blondel). In Speth's view, classical connection of patrimony to person holds good for the general patrimony and for the residual patrimony, once specially destined ones have been removed. The connection to personality lies in the fact that patrimony is active and dynamic, tied to the holder and his possibilities of earning, whereupon he gains credit; it is not just a strict accounting of goods and debts. Earning power in a going concern is of greater value than its elements crystallized at their market value in liquidation. "Il peut être comparé à un vase de fleurs dont la maîtresse de maison peut changer l'assortiment au gré de sa fantasie du moment, et dont l'effet est tout différent de celui de la botte cueillie par le jardinier" [313].

As to the character of the person's holding of his patrimony, this too, is a possibility. It remains possible to describe the holding of a patrimony as a right of property, once property is removed from the mastery or control which it was in classical theory. Not the right to drain all usefulness from the object owned, property is simply "la relation par laquelle une chose appartient à une personne". "Si le propriétaire ne peut toujours la retirer effectivement, il en conserve à tout moment l'expectative, la potentialité". Such a "belonging" covers rights as well as things, and could include the right of property itself [314].

Finally, Blondel holds out only a token number of rights which cannot be patrimonialized, at least not by transmission upon death. Intransmissibility is the exception, not the rule. For, while withholding from *inter vivos* transmission those rights whose purpose is the protection of the physical and moral individual, and thus lack market value, even these may be not strictly personal, but familial [315]. That criterion is a question of fact; and, presumably, if some use could be found for transmitting them, then they could be transmitted. The only other rights intransmissible would be civil liberties, because they involve an unlimited possibility for action; but his distinction of these from "faculties", which are not unlimited and unconditioned but depend on the play of legal conditions in a number of combinations limited in advance, and so are transmissible, shows how faint such a dividing line remains [316].

313. F.H. SPETH, *supra*, note 45, p. 134, no. 145.

314. S. GINOSSAR, *supra*, note 18, p. 32, no. 120; he finds such a phrase as the final one, however, an *excès de subtilité* for some unexpressed reason, p. 42, no. 16, n.75.

315. P. BLONDEL, *supra*, note 23, p. 3.

316. *Id.*, p. 112, no. 127.

6. Patrimony and personhood

The status of the concept of patrimony in Quebec civilian law may now be evaluated. First, it has only a limited range of exercise. No Quebec, French or Roman legal institutions require it in a codal text; almost no Quebec or Roman doctrine appeals to it; the French doctrine which did so has been displaced; and it is indispensible in the draft Quebec code to only one institution, namely, the extrapatrimoniality which is defined over against it. Secondly, the concept of patrimony is insufficient to perform even that limited exercise. Neither concept of patrimony, subjective or objective, suffices to define extrapatrimoniality.

The subjective model of patrimony took up four chapters of this study. It involved an ambiguity which destroyed its usefulness: it is both thing and right; and as right it is both a particular right of property, and the right of property over all property rights. The ambiguity is not, as the draft code suggests, an aberration which can be cleared up by selecting one side distinctly; for it is the product of the concept of rights, of will and of person whence it issues. The absolute will which determines autonomously the existence of person assimilates into personal unity the multiple distinctions between rights, as well as the objects whence come those distinctions. The object is assimilated in volition because it is constituted in cognition, and so the ambiguity is unavoidable. This means also the destruction of extrapatrimoniality, for the rights distinct from patrimonial rights are distinct only provisionally. The thing assimilated to person can be kept distinct from him only for localized purposes. The right of property has in draft no longer the absoluteness required for the classical distinction. But be it as absolute as wished, an insuperable dilemma ensues, recognized by even the main conduit of patrimonial theory, Savigny. If so absolute that the object is assimilated to person, then no distinction from extrapatrimonial rights can be discovered; but if the objects remain distinct from person because their absolute control is what makes up personality, there still is implied no control over oneself, no extrapatrimonial rights which would interest the law. There may be such; but patrimoniality does not define them.

The objective model of patrimony was launched in the fifth chapter upon these recognized deficiencies. It remedies them by separating patrimony from the definition of personality as rights. Patrimony is a concrete unity: a sum of things. It is unified as a shorthand for the accounting which protects other persons; it is concrete because it describes what components are as a matter of fact present within it. But from this contingent fact nothing of logical or conceptual necessity can be inferred. There is no implication in this descriptive unity that some elements factually outside of it must be proscribed from entering it. Anything outside patrimony is so only as a

matter of fact; and so it may as a matter of subsequent fact enter patrimony. Its extrapatrimoniality is purely negative: nothing in its nature keeps it outside, but it just happens to be outside. There may be some reason for it to remain outside; but that reason must arise upon considerations other than the definition of patrimony.

The solution to the problems of objective patrimony comes from the same source as does the model for it which its exponents use, namely, the model presented by Maurice Hauriou [317]. His definition of patrimony as "La comptabilité toujours ouverte d'un compte unique" is lifted out of his discussion of the reality of legal personality. The definition of patrimony is given as an example of one of the most important legal fictions, along with capacity and its distinction between *jouissance* and *exercise* of rights. These fictions' role is to ensure continuity and identity to the "organic individuality" of groups, that is, to the ever-changing reality of the concepts and wills of the singular persons interacting in the group. Legal fictions give unity to this data by "representing" it; legal personality is a reality insofar as the organic individuality is represented by such fictions. Legal personality is thus founded on something other than the moral personality of the individual. For example, succession is based not just on the deceased's will, for the social group imposes rules in its own interest, its interest being in a stability given by continuity. In a Bergsonian phrase Hauriou uses frequently, without this stability the singular realities would "ignite like paper flowers", be exhausted in their momentary appearance; this is later the source for Hauriou's theory of institution. Therefore, "ces traits de la personne jurique trouvent leur origine dans les représentations mentales communes à tous les membres du groupe".

In the role Hauriou assigns it here, patrimony remains both indispensible and universal, for it is both imposed by all the members for their communal survival, and is common to them all. But its universality is neither subjectively dependent on the will of each subject of rights, nor is it objectively reducible to the objects included. Its universality is personal: the objective existence of the person (group or singular) comes to subjective recognition of itself. Patrimony remains a necessary institution, but only hypothetically. That is, some representation of singular facts is required, and patrimoniality is one way to fulfill this requirement, a way which is acceptable as long as misunderstandings of it do not rob it of efficacy.

Similarly, extrapatrimoniality is able to be given a standing adjusted to a more adequate notion of personhood. Instead of being based on either the subjective will of inviolably inaccessible personality, or else on the bundling

317. *Supra*, note 296.

of the person's acts into a package practicable for momentary purposes, these personal rights are the way he realizes himself publicly. He is immune from attack not simply because he is inacessible, nor because it is not yet useful to the collectivity to attack him, but because his public existence is at this time being realized in this public way [318].

Extrapatrimoniality is defined, then, no longer as the protection from the threats of patrimony; for patrimony as properly understood does not threaten, and extrapatrimoniality as improperly understood does not protect. Instead, the two classes of rights are, in the famous words of Rand in *Saumur*: "at once the necessary attributes and modes of self-expression of human beings and the primary conditions of their community life within a legal order" [319]. Without such a notion, the project of the draft to protect person from patrimony cannot be realized by any dispositions; with it, both the old and the new dispositions suffice.

318. This "Institutional" alternative, of legal personhood hardly more than mentioned here in property law, is developed at greater length: in the law of persons by "The Concept of Person for Medica Law", (1981) 11 *Revue de droit*, 341; and in public law by the contribution, "Must Quebec Nationalism be Racist? Delos and *La Nation*", to the S. French anthology, *Philosophers Look at Canadian Confederation/La confédération canadienne, qu'en pensent les philosophes?*, Montreal, Canadian Philosophical Association, 1979. At yet greater length: *The Methodology of Maurice Hauriou*, C.U.A., 1970, and *Tradition in Social Science*, tr. from Hauriou, 1976, both unpublished.

319. Though used there only of civil liberties (extrapatrimonial rights), and not of civil rights (patrimonial rights). See Saumur v. City of Quebec [1953] 2 S.C.R. 299.