CIVIL CODE REVISION OFFICE

report on THE QUÉBEC CIVIL CODE

Volume II COMMENTARIES

Tome 1, Books 1 to 4

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THE QUÉBEC CIVIL CODE

Volume II, Tome 1

COMMENTARIES

1977

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BOOK ONE

PERSONS

INTRODUCTION

Every person is the holder of rights. As a being capable of possessing rights and duties, he is the keystone of all the legal relationships for which provision is made in the Civil Code.

The first Book deals with persons. Its first Title is intended to define juridical personality and to determine the conditions under which it is recognized as an attribute of the human person or conferred upon legal persons.

Juridical personality is recognized as a characteristic of every human being, and of legal persons established in accordance with the law. No longer is any distinction made between a citizen and an alien. While Article 18 of the Civil Code, as it was amended in 1971 (1), sought to break with a long tradition of discrimination against aliens, it is now recognized that this distinction no longer has any justification. Every person has full enjoyment of civil rights and possesses a patrimony.

As a general rule, a person has full exercise of his civil rights. The capacity to exercise them, however, can be limited by law in certain cases; for example, because of minority or of mental deficiency. Furthermore, while a person cannot renounce enjoyment of his civil rights, he may, under certain circumstances, renounce the exercise of them.

The chapter on the exercise of rights provides fundamental rules on the subject: it stipulates that good faith is a condition for the performance of duties and the exercise of rights; it inserts in the Code the theory of abuse of rights which asserts that a right may not be exercised with the intention of harming another or so as to cause damage out of proportion to the benefit sought; it retains the rule that no one may, in a juridical act, contravene the laws of public order and good morals.

The Draft contains a chapter on respect of privacy. It incorporates the principle of Article 5 of the *Charter of human rights and freedoms* (2), but amplifies it with provisions expressly forbidding violations of privacy. Article 13 lists a number of acts which are violations of privacy. The list, however, is not exhaustive. Finally, the Draft recognizes the right of access to files maintained in accordance with the law, and the possibility to have any errors corrected.

Title Two, dealing with the human person, incorporates, with amendments, Articles 18 and following of the Civil Code. Provisions dealing with children are found in chapter II of the Title. The Draft recognizes the child's right to affection and security. The interest of the

child should be the determining consideration in every decision affecting him, and for this reason the judge should consult him unless circumstances make this inadvisable; he must appoint a lawyer to represent him when the minor's interest so requires.

Moreover, a conceived child is considered to be born provided he is born alive and viable. He is deemed to have been conceived in the three hundred days preceding birth.

The definition of the word "children", either in Article 980 C.C. or in Articles 218 and 608 C.C., has given rise to several problems of interpretation. In the Draft, the word "children" used by itself means only children in the first degree; the word "descendants" means the issue of one person, whatever the degree; children include the issue of a marriage or of a union outside marriage, or adopted children.

Title Two also includes provisions on the name which is the most usual means of identifying people, places and things. From a legal point of view, the name is a sign consisting of one or more words identifying either a human person or a legal person.

The Romans had devised a highly complex system for this. A Roman citizen had at least three names, and often five: the *praenomen*, which was the equivalent of the contemporary given name; the *nomen*, borne by all members of the same *gens* and also by their relations, such as their wives, and by adopted members of the *gens* and freedmen; the *cognomen*, a name by which one family distinguished itself from another of the same *gens*; the father's *praenomen*, which indicated the citizen's direct filiation; and the *agnomen*, awarded in recognition of a great achievement (3).

The modern system relating to names developed between the eleventh and the sixteenth centuries, in the most heavily populated and most civilized centres of Europe. The custom was first created within the gentry where, in order to establish clearly the situation of their family within the feudal system, these people styled themselves by the name of the fief which had belonged to their ancestors. The custom survived for about two centuries, and gradually the middle and lower classes adopted it.

During the period from the eleventh century to the fifteenth, the surname tended to become hereditary, although it only came into its own when civil status was organized in the sixteenth century. The *Ordonnance de Villers-Cotterets* of 1539 compelled priests to keep registers of civil status for Roman Catholics. This order was confirmed by the *Ordonnance* of 1667 respecting civil procedure which required that the "*article des baptêmes*" contain the child's date of birth, his name, and the names of his

parents and godparents; similar entries respecting marriages had to contain the given names, surnames, age, quality and domicile of the couple to be married.

From this period on, the given name became less important than the surname, and the surname became hereditary. Because of the importance attached in the Middle Ages to the family, and the considerable legal interest aroused by filiation in the field of succession, it became necessary to be able to relate a person not only to his parents, but to his entire family in the broader sense. This was done by using the family name common to all descendants through the male line. Finally, notaries and officers of justice also contributed to the hereditary aspect of surnames by entering them on deeds and in civil registers.

While the Civil Code does not actually govern the names of human persons, some articles do refer to them, such as Articles 54, 56a, 65 and 67 in Title second of Book first, on acts of civil status, and Article 232 in Title seventh of Book first, governing filiation. Names are also mentioned in legislation other than the Civil Code, for instance in Article 115 of the Code of Civil Procedure, paragraph (b) of Section 38 of the *Adoption Act* (4), paragraph (5) of Section 2 of the *Election Act* (5), and paragraph (2) of Section 4 of the *Notarial Act* (6).

The *Change of Name Act* (7), assented to in 1965, is undoubtedly the most important Québec legislation concerning the names of persons. This act describes the procedure to be followed and the conditions to be met to obtain a change of name.

This legislation is complemented by custom. Usage governs the surname given a child and the name which a woman bears after her marriage. There is no provision to cover what happens in a case of separation as to bed and board or of divorce.

Some foreign laws include more or less complete legislation governing attribution and change of name (8), but as is the case now in Québec, usage is frequently resorted to in most countries.

It was intended to propose solutions to problems which arise today in this matter, particularly following a divorce or a "sexual conversion" operation undergone by a transsexual person.

An attempt was also made to combine in one chapter the provisions concerning the names of children, adopted persons, and consorts during marriage, and the rules concerning change of name or of physical identity.

With respect to names of children, an in-depth study was made of various solutions enshrined in foreign legislation or submitted to the

Office by various commentators of the *Report on the Name and Physical Identity of Human Persons* (9). Following lengthy consideration and for the reasons given in the comments on Article 33, the Draft maintains existing usage according to which a child takes his father's name when his filiation is established with regard to both his parents, and his mother's name when only maternal filiation is established.

With respect to married persons, the Draft consecrates the equality of men and women by proposing that both consorts retain their respective surname and given names. This is not to say that, as is presently the custom, a woman may not use her husband's name in social relations. In exercising her rights, she must use her own name, particularly whenever she enters into a contract or a juridical act.

In effect, stability in naming persons is a strong point in favour of each person retaining for life the name attributed to him at birth; on the other hand, it is more and more frequently recognized that a married woman, for professional or other reasons, may wish to retain an identity distinct from that of her husband.

Another advantage inherent in this solution is that it terminates current controversy with regard to the name of a divorced wife.

The problem of the married woman's name has just been reviewed by the Ontario Law Reform Commission, which decided specifically to submit it to public opinion, just as the Civil Code Revision Office has done (10).

Although, in principle, and in order that individuals can be identified easily, surnames and given names should not change, still in certain cases a person must be able to change his name. According to French commentators (11), whose lead has been followed by Québec jurists (12), a change of name is a privilege which the State may or may not grant an individual. The *Change of Name Act* (13) consecrates this principle, and the work preparatory to its adoption shows the wish to systematize name changes, but not however to grant them unless exceptional circumstances justify it (14).

However, the existing rules seem unsatisfactory because the policy of the Department of Justice concerning acceptable criteria for name changes is not common knowledge to the public. When a petition is rejected, the refusal of a change of name may seem unjust because no reason is given for it.

The Draft was intended, on the one hand, to simplify existing procedure and, on the other hand, to make the present system seem less

arbitrary. To this end, it is proposed that the power to grant or to refuse a change of name be expressly entrusted by law to the Registrar of Civil Status, the senior civil servant to whom it is proposed to entrust the responsibility for a central system of civil status in Québec (15). Decisions in this field should be standardized; in addition, all these changes must be centralized so that they are easily accessible and may be swiftly entered in the proposed central register of civil status.

Although it seemed necessary to simplify the procedure by not subjecting changes of name to the decision of the government on proposal by the Minister of Justice, it did seem essential to give the court the power to review the decision of the Registrar of Civil Status. This power of review would allow an applicant who believes himself harmed because he has been refused a change of name to state his case again before a judge. The second reason for creating this power of review is that, hopefully, with use, judicial standards of interpretation will develop which will not only enlighten jurists and justiciables, but also will allow appraisal of the system, a procedure which is hardly possible at the moment.

It also seemed desirable to allow third parties to eventually oppose a change of name. Although they are advised of changes of names by the notices required under existing legislation, they have no official means of making their objections heard. The Draft provides that third parties would have the right to be heard and their arguments would be taken into consideration by the Registrar of Civil Status when assessing the merits of the petition.

While leaving change of name a privilege and not a right, the Draft proposes a list of grounds for this change, something not done in existing law. This list would help the petitioner in drawing up his petition, and would guide the Registrar of Civil Status in making a decision.

Finally, the Draft proposes an innovation by undertaking to deal with a problem which has already come up several times in Québec. Should a transsexual person (16) who has successfully undergone "sexual conversion" surgery and hormone treatment be permitted to change his given names and the entry respecting his sex in the Civil Status Register?

Some Canadian provinces, particularly British Columbia (17), Alberta (18) and New Brunswick (19) have given an affirmative answer. Others, such as Manitoba, are examining the question (20).

Without entering into the controversy surrounding the scientific definition of sex and the possibility of a real change of sex (21), it was first of all noted that such operations are practised in Québec (22).

Moreover, commentators agree that such operations are licit when they are the only way "*de mettre fin à des troubles psychiques sérieux et de sortir le malade de son état obsessionnel*" (23) and when they are done according to medical standards accepted by the medical profession. Finally, these operations, once completed, bring about an irreversible change in appearance, if not of sex.

It seemed suitable, therefore, to permit persons who, after the appropriate treatment, give every appearance of having undergone a "change of sex", to exist in society without risking suspicion or problems, thus meeting their persistent requests (24).

Concerning the procedure for changing the physical identity of transsexual persons, there were two possibilities. As in British Columbia, Alberta and New Brunswick, a change in an act of birth could stem from an administrative decision, analogous to that granting a change of name. On the other hand, the importance of preventing fraud and the seriousness of the change requested might make a judicial decision preferable.

In any case, the irreversible nature of a "sexual conversion" seems to indicate that once proof has been furnished of the success of the treatments and the surgery, the person concerned should be entitled to have his act of birth altered.

This consideration and the small number of transsexualism cases favoured the administrative procedure, which is simpler and quicker than the judicial procedure.

Title Two also contains provisions governing domicile. This concept is of paramount importance in Québec civil law. In particular, domicile determines the place where successions (a. 600 C.C.) or tutorship (a. 249 C.C.) opens; it also indicates the place of payment in general law (a. 1152 C.C.).

In private international law generally, domicile determines the personal status of individuals, that is, their status and capacity under Article 6 of the Civil Code. It also determines the law which governs moveable property, saving the exceptions in the second paragraph of Article 6 C.C. Again, the first common domicile of consorts determines which law will govern their matrimonial regime when they have no marriage contract (25).

Finally, domicile is a determining factor in the jurisdiction of our courts under Articles 68 and following of the Code of Civil Procedure.

Considering this importance, the concept of domicile must meet the needs of all those to whom Québec law applies, even foreigners visiting the Province. The existing rules in Articles 79 and following of the Civil

Code were obviously adopted in a period when the population was less mobile and when, under the influence of English jurisprudence, domicile implied a particularly tenacious concept of permanence. Specifically, Article 80 of the Civil Code provides that, if there is to be a change of domicile, actual residence in another place must be coupled with the intention of the person to make it his principal establishment.

Although this principle seems simple at first glance, it is difficult to apply because there is no presumption to facilitate proof of such intention; on the contrary, there often seems to be a presumption in favour of retention of domicile (26).

Jurisprudence and doctrine agree on the importance of this intention which takes precedence even over a considerably prolonged stay in a place (27). Jurisprudence also clearly shows how difficult it is to prove this intention (28).

It thus seems essential, in revising the definition of domicile, to eliminate intention as a dominant factor and to place it on the same level as the various considerations whose eventual presence may contribute to determining domicile.

This has been done, moreover, in many statutes which, for their application, require that persons be located in a determined place. These statutes are based either on a definition of domicile which eliminates intention (29) or on the concept of residence (30).

Most of the recent Conventions on private international law adopted by the Hague Conference, which Canada joined in 1968, have also adopted the concept of "habitual residence" (31).

Any revised concept of domicile should comply with this idea (see a. 60).

Moreover, the legal domicile of the married woman as envisaged in Article 83 of the Civil Code ignores the evolution of mores and has been severely criticized (32). It is out of step with the principle of equality of consorts in marriage, proclaimed by the Act, assented to 18 June 1964 (33), respecting the capacity of married women, and by Article 41 of the Book on *The Family*. It was thus deemed desirable to propose repeal of this requirement of legal domicile which, moreover, has been considerably weakened by our Code of Civil Procedure in cases of separation as to bed and board (a. 70) and by the Federal *Divorce Act* (34).

Similar progress tending towards abolition of the legal domicile of the married woman has been made in recent laws passed in England (35) and France (36).

Nevertheless, disappearance of the legal domicile of married women could create difficulties in private international law when the matrimonial regime of consorts without a marriage contract must be determined. According to the present rule, such cases are governed by the law of the matrimonial domicile of consorts (37), defined by abundant jurisprudence as the domicile of the husband at the time of his marriage (38). Book Nine of the Draft devoted to Private International Law, endeavoured to settle the problem by providing that where consorts married without a marriage contract had no common domicile at the time of their marriage, their matrimonial regime would be governed by the law of their first common domicile or, in the absence of such a common domicile, by the law of their common nationality or, in the absence of one and the other, by the law of the place where the marriage was solemnized (39).

Since it would be possible for consorts to have separate domiciles, the existing rule governing the legal domicile of minors whose parents are separated *de facto* requires clarification.

While the principle of the third paragraph of Article 83 C.C., on domicile of interdicted persons, is maintained, it is adapted to the proposed reform of the law on interdiction (40).

What seems even more obvious is that the provisions governing legal domicile of servants correspond to obsolete conditions and should disappear.

Finally, the concept of elected domicile should be brought into line with the present legislative and jurisprudential situation.

Chapter V of Title Two deals with civil status. In 1866, a system which had been in use since the early days of this country was given force of law in the title of the Civil Code which deals with acts of civil status (41). The basic rules of this system had been laid down in the *Ordonnance* on Civil Procedure issued in April 1667 (42) and completed by the Royal Declaration of 9 April 1736 (43). After the conquest, ministers of the various religious denominations newly established in the province were granted, under various laws, the powers of officers of civil status which until that time had been accorded only to Roman Catholic priests (44). The authors of the Code felt that this "order of things ... so intimately connected with (our) institutions" was preferable to the system provided by the French Civil Code and "that it could not be suppressed without giving rise to great inconvenience" (45).

Although this system has lasted until today, no one could look upon it so approvingly at present. It was certainly still suitable for people living in the mid-nineteenth century, since they saw fit to retain it. And no one can

overemphasize the services rendered for more than three centuries by the ministers of religion in fulfilling the surrogate role with which the State had entrusted them in this field. This traditional system, however, is obviously no longer suited to the needs of a population whose mobility is great and for whom the parish no longer constitutes the same pole of attachment it once did. This has unfortunately resulted in certain acts relating to one person or one family being dispersed among several places of worship some distance from one another, whereas centralization of such documents would be to the advantage of both individuals and the State.

Moreover, under the system, acts of civil status were related to the performance of a religious ceremony or at least to certain formalities carried out by a minister of a religious congregation or community. Already in 1888, the legislator had to provide, by Article 53a C.C., that the birth of any unbaptized child be registered with the municipal corporation. Then in 1968, following a recommendation by the Civil Code Revision Office and in answer to the hopes of a large sector of the population, the *Act Respecting Civil Marriage* (46) (a. 129 et s. C.C.) was adopted. Finally, two years later, the *Act Respecting Declaratory Judgments of Death* (47) (a. 70 et s. C.C.) allowed the issue of death certificates in circumstances where it was impossible to prepare an act of burial.

These reforms were intended to fill only the most obvious gaps in the present system. This system must now be systematically revised in terms of the role of acts of civil status, the nature of the information they should contain and the preparation and conservation of these acts, in order to achieve the administrative efficiency that modern techniques can offer.

Civil status is a means of establishing facts relating to the status of persons in society. Its object is to make available to interested persons a convenient means of proving these facts, either for the purpose of deriving legal advantages from them or in order to benefit from social or administrative services, among others. It was necessary, therefore, to propose a system which would take into account all major acts affecting civil status and facilitate access to the information sought.

Despite the variety of acts respecting the civil status of individuals, it was not deemed advisable to increase the categories of acts of civil status. It was deemed preferable to retain the simplicity of the traditional system which recognizes only acts of birth, marriage and death, while providing for the entry in the register of anything which might result in a change of the tenor or the scope of an act of civil status. The original acts so affected

would consequently be either corrected or completed, or include the relevant detail.

Because of the marked increase in the amount of data included in the register of civil status, the system should become more efficient without necessarily growing more unwieldy. Accordingly, various means have been provided for the registration of changes of names and of judgments of adoption, disavowal of paternity or admission of paternity or maternity, and of divorce or annulment of marriage. Provision is also made for obtaining correction or rectification of errors and omissions in any act. The Draft also suggests the adoption of a new procedure for obtaining judgments to reconstitute or replace acts of civil status, to be used in cases where a person is unable to obtain an act of civil status that concerns him, either because the act was lost or destroyed, or for some other reason. Finally, the procedure for obtaining declaratory judgments of death is preserved and retains its effectiveness.

Every act of civil status is based on a declaration made to an officer of civil status who attests that what is contained in the act is in conformity with what the persons appearing have stated. In the system now in force, however, the declaration does not have the same authority as to the veracity of the facts set forth according to whether it involves a birth where the officer is not called upon to establish the material fact which he registers, or whether it involves a marriage where the person who draws up the act is the same person who received the consent of the consorts. For this reason, on the strength of certain foreign legislations (48) it is proposed that acts of birth and death be drawn up on the basis of declarations accompanying medical attestations of birth or death.

In order to make a clear distinction between attestations intended to establish civil status and declarations prescribed for statistical, demographic or other purposes by various administrative services (49), it is important to point out that attestations of birth and death contain only data which is absolutely essential. All other information required of physicians would be entered on additional forms and would be dealt with separately by the administrative services concerned. The service principally involved will be the Population Register (formerly the Demography Service) of the Québec Department of Social Affairs. This body collects data according to the basic model supplied by the *Vital Statistics Acts* of the other Canadian provinces, and has been in operation since 1926.

Also, it is suggested that the present act of burial be abolished and replaced by an act of death, and finally, some changes are proposed in the information which acts of birth, marriage and death must contain.

Certain details now required seemed unnecessary, and others have been added to facilitate identification of persons or to ensure smooth co-ordination between all the acts which relate to the same person.

The second objective was to create a solution to the problem posed by the fragmentation of the existing civil status system, thereby making it easier for interested persons to obtain copies and certificates of the acts which concern them.

The fact that births, marriages and deaths are now entered in registers kept by officers of civil status scattered among the various places of worship, municipal corporations and, in the case of civil marriage, offices of the Superior Court, causes a number of inconveniences as regards the obtaining of extracts of acts of civil status. Consequently, in certain judicial districts, the initiative has been taken of setting up a system of reference by onomastic files; this, however, constitutes only a partial solution to the problem. These facts have led to propose the creation of a central register of civil status where all acts of civil status would henceforth be grouped. One register, covering the entire population and territory of Québec would contain all the essential data on civil status, whether involving births, marriages, deaths or judgements affecting the civil status of persons or amending some entry in an act of civil status.

This central register, which would replace all the existing local registers, would be under the control of a Registrar of civil status, who would thus become the sole officer of civil status.

This system of central registration must be based on a simple, direct and expedient method aimed at gathering all pertinent information.

In view of the fact that almost all births take place in hospital, and that provincial legislation already requires that a medical certificate of death be obtained prior to the burial of a deceased person (50), it seemed advisable to entrust the physician who has been called to attend a delivery or to verify a death, with the duty of transmitting to the Registrar of civil status an attestation of the events he has witnessed. When, in exceptional cases, the delivery does not take place in a hospital, the person who attends the mother would be required to draw up this statement.

Moreover, those required to declare a birth or a death, most frequently the close relatives, would be responsible for transmitting a declaration to the Registrar of civil status, containing all the information required by law. Similarly, the officiant at a marriage would sign a declaration of marriage, along with the consorts, and forward it to the Registrar of civil status.

In this way, any declaration made as to civil status would be corroborated by the testimony of a competent person who has witnessed the event declared.

On receipt of these declarations, the Registrar of civil status would sign them and convert them into acts of civil status. He would see to their conservation and would be entrusted with issuing copies and certificates.

Prothonotaries and clerks of the courts handing down judgments amending the tenor or scope of acts of civil status would also be required to forward copies of these judgments to the Registrar of civil status who would ensure that the pertinent data be recorded and the acts co-ordinated.

Thanks to a network of terminals connected to a central computer, it would be possible to enter the data contained in attestations and declarations in the civil status offices scattered throughout Québec. The same network could also be used to provide, on request, a certificate or copy of any act kept in the central register. Because of developments in telecommunications it will soon be possible to set up such a network at reasonable cost. As a first step, however, the system could function using more conventional means of communication: the civil status offices could render the necessary services without being hooked up to the central register's computer, and most requirements which, in this field, can tolerate delays of twenty-four to forty-eight hours could be dealt with by mail.

Although merely conventional means of communication can be used, most of the storing and processing of information should be done by computer. The new Registrar of civil status could not fulfil the obligations entrusted to him by law unless he can refer quickly and accurately to the thousands of documents of which he must daily furnish copies and certificates.

Acts of civil status entered in the existing registers will have to be transferred to the central register. It will therefore be necessary to provide transitional measures until this new system is fully applied.

While concern for efficiency calls for the mechanization of the system of civil status, it is necessary, on the other hand, to protect the individual from invasion of his privacy which is threatened by the power of the computer. The information compiled in the civil status register should be used only for the objective in question and should not pose a threat to any individual freedoms. It therefore seemed necessary to provide, on the one hand, that acts of civil status must contain only what is required by law and, on the other hand, that the contents of these acts can be disclosed only

in the manner and cases provided by law. In order to guarantee the confidential nature of much of the data stored in the civil status register, it is imperative that only certain persons should be allowed access to the full contents of these acts. With this in mind, it is suggested that a distinction be made between copies and certificates of acts of civil status. While a copy, as its name implies, is a complete reproduction of the act itself with all the details that may subsequently be added to it, a certificate discloses only certain limited information. In addition, a special provision stipulates that no copy of the original birth certificate of an adopted child may ever be issued.

In order to carry out this comprehensive plan, two drafts are submitted.

The first draft proposes that Title Second of Book First of the Civil Code be reformed. It outlines, in particular, the procedure by which acts relating to the civil status of persons would be transmitted to the Registrar of civil status, who would enter them in the central register. It specifies when and how persons would be able to obtain copies or certificates of these acts, and it describes the procedure to follow to have them corrected or rectified, if need be.

The second draft, annexed as a schedule, provides for the creation of the administrative structure necessary to put the new system into operation. It lists the powers and obligations of the Registrar of civil status, and allows for the establishment of regional civil status offices where citizens may obtain forms and receive appropriate advice when necessary. It specifies the way in which declarations would be forwarded to the Registrar of civil status, and provides for the appointment of civil servants and employees of the civil status service; finally, this draft statute sets penalties for offences against it.

Chapters VI and following of Title Two deal with majority, minority and protected persons. They are devoted primarily to juridical protection of all persons, both minors and adults (51).

This area has been greatly simplified. The two means of protection of children and of incapable persons of major age, representation and assistance, which, in existing law, take the form of tutorship, curatorship and providing a judicial adviser, are carried out as much as possible within the family. Ordinarily, parents, of right, should act as tutors to their children. A dative tutor would be appointed only in the absence of parents. The formalities for such an appointment would be accomplished far more quickly, particularly since the family council would be done away with. Also, a surviving parent might appoint a tutor by will.

Since the age of majority has been lowered, emancipation would also be done away with.

The various kinds of interdiction, and appointment of a judicial adviser, would be replaced by two flexible regimes of protection for incapable persons of major age.

The proposals contained in the Draft are a reflection of an inevitable evolution. Two main concerns are paramount in the Draft: first, in the interest of protected persons and of the physical care of such persons, it was clearly wished to "*basculer le système du côté de la protection*" (52); secondly, simplification of the administration of property, whether it be the administration of a child's property by his parents or his tutor or the administration of the property of a protected person of major age by his tutor (who would replace the curator in existing law).

The economic situation has developed considerably since 1866. Moveable property has taken on far greater importance than immoveable property. Inflation and frequent speculation in various kinds of property require more flexible and particularly more rapid investment. For this reason, the whole philosophy of supervising the administration of property of another has changed.

Before the different sections of the chapter on *Protected Persons* are examined, it should be pointed out that any reform which lies so close to the realities of everyday life, influenced by profound personal convictions, can hardly be expected to attain unanimous support. For this reason, the comments record the doubts raised by certain jurists who participated in the preparation of the Draft.

Moreover, the Draft tends to incorporate into the Civil Code those principles on which Public Curatorship is based. The Civil Code Revision Office received valuable assistance from the Public Curator, and from his staff, with whom it ascertained the appropriateness of the reforms it recommended.

The chapter on *Protected Persons* deals with what is generally called in existing law "protection of incapable persons". This designation has not been retained, since it was specifically sought to sanction - as the legislation fails to do clearly - capacity in principle, along with adequate protection, for every minor, in order to reflect more closely the legal reality whereby no minor is incapable of making a contract, but merely incapable of harming himself (53). Every minor is thus considered a capable person, saving the exceptions provided by law.

A short section is devoted to persons of major age; next, the section

on minors seeks primarily to clarify the principles of lesion relating to minors. It introduces some new elements, particularly assimilating married persons of minor age to persons of major age, since every marriage of any person under eighteen years of age must be judicially authorized, and such authorization can only be granted to those over sixteen years of age (54).

Recognition of the capacity of minors capable of discernment, the safeguards provided for the actions of such minors, and finally the lowering of the age of majority (55), have induced the abolition of an institution which no longer seems to have any reason for existence. That institution is emancipation (56). Finally, the Draft incorporates the rules of the *Public Health Protection Act* on consent for medical care, thereby making it possible for minors fourteen years of age to be treated medically without the consent of their parents.

The Draft next deals with protected persons, and in particular with tutorship. First of all, it lays down some general rules for different categories of tutorships. These provisions greatly simplify the organization of tutorship. Few parts of the Civil Code have become so out of date as these, and the authors are unanimous in criticizing them and in calling for reform. Professors Azard and Bisson have stated:

> "*La multiplicité des règles, leur complexité et aussi leur caractère souvent superflu conduisent à confirmer sans hésiter l'opinion avancée au début du présent paragraphe: l'excès de réglementation paralyse le fonctionnement des meilleures institutions*" (57).

Professor Carbonnier, in speaking of the reform of tutorship in French law, explains its obsolescence as follows:

> "*La faute en était à une double transformation qui avait affecté, d'un côté la structure des familles, de l'autre la gestion des patrimoines*" (58).

Having defined tutorship as an institution for protection, the Draft goes on to lay down one of its most sweeping reforms: abolition of the principle of Article 249 of the Civil Code under which all tutorships of minor persons are dative, that is, conferred by judicial authority. In addition to the fact that certain legal tutorships already exist (59), it is sought to grant parents the right to become tutors *ex officio* to their children's property, and to make it possible for either surviving parent to appoint a tutor in a will (60).

With respect to administration of the child's property, the Draft

subjects parents to the same supervision proposed for all tutorships, but at the same time it seeks to promote a spirit of confidence in the family, and to simplify administration of property. It seems unnecessary, in fact, to have to appoint a tutor every time a child who still has a father or mother, or either, receives a sum of money.

On the other hand, tutorship to incapable persons of major age can only be dative. As it produces a state of incapacity, it is too serious to permit automatic application.

The Draft departs from the principle of existing law which asserts that tutorship is a compulsory responsibility. Moreover, the list of exemptions in Articles 273 and following C.C. is so long that this reform is hardly revolutionary. It was felt that it was preferable to have the State take the place of the family, in the absence of the latter, rather than to run the risk of having a responsibility badly carried out because of its obligatory nature. The Public Curator would then act as tutor if no member of the family were available to assume the responsibility.

Although the Draft lays special emphasis on care of the person himself, the most important proposals are made in the realm of the law on administration of property. These changes reflect the proposals for the reform of the administration of the property of other persons (61). Tutorship of property of others as conceived in the Civil Code has been the subject of much criticism:

> "*Même si la loi prescrit que le tuteur doit placer les deniers et faire l'emploi des revenus, l'argent n'a pas la même permanence que les terres et les bâtiments... Qu'arrive-t-il si le tuteur, à court d'argent pour faire face aux exigences de notre standard de vie, cède à la tentation d'emprunter temporairement sur l'argent du mineur pour acquitter un créancier menaçant? Bien sûr, il doit rendre compte de son administration lorsque le mineur atteint sa majorité, mais un enfant osera rarement intenter une poursuite contre son père et, même s'il le fait, ce recours peut devenir inefficace si, à ce moment, le père n'est plus solvable.*
>
> *On pourrait répondre à ces objections en nous reportant au droit du subrogé tuteur d'exercer une surveillance sur l'administration du tuteur. En pratique, il faut admettre que la nomination du subrogé tuteur demeure une simple formalité et que ce dernier n'ose pas trop questionner le tuteur, car il craint de passer pour indiscret et semeur de trouble*" (62).

The family council has drawn the critics' special wrath. Some writers deplore "*la complexité excessive des règles qui, issues d'un respect trop*

grand de la tradition d'un souci assez chimérique d'atteindre la perfection, empêche la plupart des conseils de famille de voir le jour et partant, des tutelles d'être organisées" (63). The net result of an *a priori* control, carried out through consultation of the family council and authorization of the court before certain acts specified in the Code can be performed, coupled with supervision of the subrogate tutor, strictly limited to certain circumstances, is an unwieldy administration with no guarantee of effectiveness. What happens, for example, if the tutor squanders the price of a property which the court has authorized him to sell? Similarly, what if he fails to respect the rules governing investment? The Draft proposes that the present system of control be replaced by a system of *a posteriori* supervision by the Public Curator. If the tutor follows the rules of supervision which include preparation of an initial inventory, possible provision of a surety and submission of annual financial statements, and if he complies with the provisions governing the investment of property of others (which would be similar to those of Article 981o C.C.), he would then have, with regard to the property of the person protected, the powers similar to those of a fiduciary owner.

He could thus be free to make any investments and alienations necessary for the proper administration of the patrimony. Naturally, the rule in Article 763 C.C., under which he cannot make any aliemations by gratuitous title, would be retained.

This great freedom would involve no risk of prejudice to the protected person since the surety required of tutors administering property worth more than three thousand dollars would insure reimbursement in the event of poor administration.

The Public Curator exercises strict supervision and the Draft strengthens the requirements of the *Public Curatorship Act* (64). In addition to annual reports, auditors' statements might be required whenever the Public Curator considered them necessary. Similarly, he might require that all documents and explanations necessary for carrying out the supervision be filed.

This also applies, despite doubts expressed by some, to all property of any protected person, even if given, bequeathed or judicially granted to him on the condition that it be exempted from the tutor's administration.

Both the effectiveness of the supervision by the Public Curator, and the success of the proposed reform, would depend on the powers and means granted to the Public Curator.

The Public Curator would have sanctions at his disposal, and the

most appropriate of these would be the power to ask for the removal of a tutor who did not meet his obligations.

Moreover, tutors might be fined, as well as any third parties whose negligence or even inaction impeded the proper supervision of the Public Curator.

The Draft provides that fathers and mothers will administer their tutorships jointly, with full equality, in keeping with the principle of equality and collaboration of parents in the moral and material control of the family and in the education of the children (65). The parents are jointly responsible to the children for their administration. The collaboration has been set up so as to be flexible and practical. Either parent may give a mandate to the other, and they both may entrust the administration of the property of their child to a specialized agency.

If there are no parents, a judicial or a testamentary tutor takes their place, and here the Draft has added a new element by permitting appointment of co-tutors, in order to help create, if at all possible, a family atmosphere where the child has been deprived of this.

The provisions on protection of incapable persons of major age attempt to take account of medical reality. The present conditions under which the Code authorizes a person to be placed under protection seem singularly outmoded.

They involve imbecility, insanity, madness, prodigality, drunkenness and drug addiction, as prescribed in Articles 325, 326, 336a and 336r of the Civil Code. These categories go too far as regards diseases which can be cured and which do not necessarily deprive a person of his faculties. Above all, they are incomplete, since sick persons with major physical handicaps need protection just as much as those who are mentally ill (66).

At times, after careful consideration, a choice had to be made between the rights of the person and the protection of the interests of the family. Thus, under the Draft, prodigal persons should no longer be given special protection. This particular case gave rise to some doubts: "*La réponse dépend des conditions économiques... également d'un parti pris pour la liberté: le droit civil doit-il se mêler de contrôler les passions?*" (67). It was felt that there are other ways to protect the family without diminishing the capacity of the individual in question.

The proposed rules deal with protection of persons of major age whose mental faculties are impaired or who are physically incapable of expressing their will. They are divided into two parts: tutorship to persons not in a position to act for themselves and who must be represented in the

exercise of their civil rights (a. 181); and curatorship of persons who are incapable of acting without help and require assistance in the exercise of their civil rights (a. 182). The Draft tries not to lose sight of the possibility of rehabilitation, which is always desirable and often possible. In keeping with this possibility, the greatest flexibility is left to the regime, which may allow for complete representation, simple assistance, or assistance for certain acts and complete capacity for others. This flexibility meets the wish, often expressed in medical circles, that the patient be kept in the stream of normal activities as much as his condition permits (68).

Tutors of protected persons of major age are subject to the same strict supervision as tutors of minor persons.

The curator of a protected person of major age assumes the duties that existing law gives to judicial advisers (69). Since the curator does not represent the protected person or administer his property, he is not subject to the supervision of the Public Curator.

With respect to tutorship to absentees, the rules of existing law have been retained with drastic simplifications (70). An attempt was made to strike as fair a balance as possible between the interests of the absentee himself and those of his family for whom the uncertainties of the situation may be harmful (71).

The tutor of an absentee would represent the absentee's interests for seven years. After this period, a declaratory judgment of absence would make it possible to consider the absentee deceased, and allow the heirs to inherit. The speed of modern communications would justify such presumption of death if no news of the absentee had been received.

This judgment, which omits the stage of provisional giving of possession, would dissolve the matrimonial regime and permit the remaining consort to remarry. This new element seems logical, since any consort is entitled to seek a divorce after his spouse has been away for three years (72).

The Draft attempts to combine all the relevant provisions of various statutes: the *Public Curatorship Act*, the *Public Health Protection* Act, the *Mental Patients Protection Act* (73).

Title Three deals with legal persons. Chapter I contains general provisions that apply to all legal persons. This chapter includes some of the rules laid down in Articles 352 and following of the Civil Code, but some innovations as well, such as those relating to registration of a legal person, its domicile, and in particular, to the responsibility of its members and directors.

Chapter II deals with corporations. In part, it repeats the existing provisions of the Civil Code, but these are reinforced by certain rules taken from the *Companies Act* (74), the *Canada Business Corporations Act* (75), the French *Loi du 24 juillet 1966 sur les sociétés commerciales*, and the *Companies Act, 1948* (U.K.).

These provisions are intended not to replace the *Companies Act*, but to supply suppletive rules for the activities of corporations in Québec. The rules apply to all legal persons and to all corporations, whether or not they are established in accordance with a specific law of Québec. The reform of the *Companies Act* should be guided by the suppletive provisions of the Civil Code.

Chapter III deals with legal persons in public law and this is an important innovation since it draws up rules on public legal persons, and on the contractual and extra-contractual responsibility of the Crown. Probably the most eagerly awaited provision of all stipulates that an agent of a public legal person does not cease carrying out his functions simply because he commits an illegal, *ultra vires* or unauthorized act, or because he has acted as a peace officer. This rule fills a gap in existing law.

The chapter also provides rules for the exercise of recourses against public legal persons. It governs the legal relations between these persons, including the Crown, and the citizen.

TITLE ONE

JURIDICAL PERSONALITY

CHAPTER I

ENJOYMENT OF CIVIL RIGHTS

1

This article repeats part of Article 18 C.C.

2

This article incorporates part of Article 352 C.C. Reference should also be made to Article 19 of the Book on *Private International Law* with respect to the law applicable to corporate persons.

3

This article incorporates paragraph 2 of Article 18 C.C.

"Full enjoyment of civil rights" is not generally defined. The expression usually means the aptitude to possess these rights, as opposed to the exercise of them (76). Anyone who possesses civil rights can, among other things, sue in court, acquire or own property and dispose of it.

4

This article is new.

Sometimes a distinction is made between "extra-patrimonial rights" (such as a person's right to his life, his integrity, his name and his privacy) and "civil liberties" (such as freedom of conscience, professional freedom, the right to do or not to do something, and freedom of movement). It did not appear necessary to make this distinction as the term "extra-patrimonial rights" seemed broad enough to cover all these cases.

The word "status" in the second paragraph makes a distinction between physical and legal persons. Legal persons have no right to marry, make a will, or perform other acts which are peculiar to human beings.

5

A distinction must also be made here between the enjoyment and the exercise of these rights. If it is not possible to renounce the enjoyment of

rights, it is possible to renounce the exercise of them, provided that, in so doing, nothing is done contrary to public order and good morals (a. 11).

CHAPTER II

EXERCISE OF CIVIL RIGHTS

6

This article embodies in substance the principle of capacity to exercise rights laid down in Article 985 C.C., and completes Article l.

The human being is presumed to be capable. The burden of proving incapacity is upon him who alleges it. The Draft, moreover, provides for the protection of minors and sets the limits to the exercise of their civil rights (77).

A person not capable of discernment is also placed under protection; the exercise of his rights and duties is thus limited (78).

7

This article embodies Article 352, the second paragraph of Article 356, and Articles 358 and 364 C.C.

A legal person has the same capacity as a person of major age. It can perform all acts except those peculiar to human beings. Unless excluded by the law, it can hold property and dispose of it, and perform all other kinds of acts, including those related to gifts, whether as a donor or a donee. However, the directors cannot, on their own, make any gifts other than conventional ones (79).

8

This article is new, but is based on long standing tradition.

Article 1134 of the French Civil Code (corresponding to Article 1022 C.C.) has a similar provision on contractual matters: "*Elles (les conventions légalement formées) doivent être exécutées de bonne foi.*"

The report of the 1866 codifiers gives no explanation why they did not follow the French model in this respect (80).

9

This article expressly confirms the theory of violation of rights laid down in the maxim *sic utere tuo ut alienum non laedas*, which is now recognized both in doctrine (81) and in jurisprudence (82). It is found in several recent Codes (83).

10

This article repeats Article 13 C.C.

Sanctions for this rule are found specifically in Articles 48 and 51 of the Book on *Obligations.*

11

This article makes it clear that civil rights and fundamental freedoms cannot be objects of commerce. This article was drawn, in part, from several foreign codes, but the principle is already established in certain provisions of the Civil Code, such as Articles 13 and 1667.

It goes without saying that certain contracts, such as a contract of employment, involve deprivation of freedom for a certain period. No one, however, can completely and definitively give up the exercise of his civil rights and fundamental freedoms.

The judge will have an important part to play in evaluating the facts and in determining the bounds of imperative rules, public order and good morals beyond which the contracting parties may not go.

CHAPTER III

RESPECT OF PRIVACY

12

This article repeats Article 5 of the *Charter of human rights and freedoms.* The courts have already put this principle into action in the case of *Robbins v. C.B.C.* (84).

This chapter applies to all persons, since legal persons can suffer damage in this way (e.g., theft, commercial and industrial espionage).

Sanction for this provision is found in Articles 290 and 293 of the Book on *Obligations* which provide indemnity for material and moral injury, and punitive damages in the event of intentional injury.

13

This article elaborates the general principle set out in the preceding article. Obviously, it does not affect cases where the individuals agree to have confidential information concerning them divulged or where the law allows certain invasions of privacy on conditions it sets out, as in declarations of income for tax purposes or searches in the homes of suspected persons.

The list of possible invasions of privacy given in the article is by no means exhaustive.

Paragraph 1 covers not only the case where the fact of entering upon the property of another, without authorization, causes damage, but also that in which an individual enters a dwelling without having caused any physical damage. There should be recourse for compensation for moral damage caused by such intrusion.

The expression "upon property lawfully occupied by another" was chosen because it was intended to include not only the domicile or residence of a person, but also the land and any building and appurtenances which he owns, leases or possesses.

Interception of private communications was dealt with in a draft amendment to the Criminal Code (85). Such interception is prohibited by virtue of Section 3 of Manitoba's *Privacy Act* (86); see also British Columbia's *Privacy Act* (87).

The prohibition against using a person's name, image, likeness or voice takes the form of an article broad enough to allow a margin for interpretation but specific enough to prevent error and abuse (88).

Disclosure of information contained in government registers and files is regulated by the statutes governing such registers and files, which declare certain information confidential and provide a penalty for civil servants who divulge it and for those who use it contrary to law.

This principle is sufficiently important to warrant insertion in the Civil Code.

14

This provision proclaims the citizen's right, with certain exceptions, to have access to information concerning him in all files concerning him, the keeping of which is prescribed by law.

The same holds true as regards the right to correct errors which might appear in such files.

TITLE TWO

HUMAN PERSONS

CHAPTER I

GENERAL PROVISIONS

15

This article repeats Article 19 C.C. (89).

16

This article repeats Article 20 C.C., but specifying that non-therapeutic experiments are here contemplated. When experimentation is therapeutic, the normal rules relating to contracts for medical services apply. The provision takes account of the concept of parental authority and adds, in the fourth paragraph, the possibility of oral revocation of consent.

17

This article, of new law, is intended to prevent anyone incapable of discernment from being subjected to any experiment likely to present risks. This article allows experimentation where no risks are involved, which does not seem the case in Article 20 of the Civil Code.

18

This article repeats Article 21 C.C., but takes into account the concept of parental authority. It also specifies that the remains may serve gratuitously for medical or scientific purposes. The third paragraph provides for verbal revocation of consent.

19

This article repeats Article 22 C.C.

20

This article repeats part of the first paragraph of Article 23 C.C. (90).

It seemed advisable to expressly permit any minor capable of discernment to consent in writing, with the authorization of his father or mother, or failing them, of the person who exercises parental authority (91).

21

This article repeats the substance of the second paragraph of Article 23 C.C., in recognizing this right only to the close relatives and heirs of the deceased, as well as to the attending physician.

22

This article repeats part of Article 23 C.C.

23

This article repeats the last paragraph *in fine* of Article 23 C.C. and applies to all cases of applications for autopsy.

CHAPTER II

PROVISIONS RELATING TO CHILDREN

24

This article, which is new law, based on the United Nations *Declaration of the Rights of the Child* (92), and on the *Charter of human rights and freedoms* (93), tends toward a transformation of the basis of Articles 242 and following C.C., according to which the children apparently have all the duties, and the parents all the rights.

It is in line with the following article which makes the interest of the child the determining factor in any decision concerning him.

25

This article is new. It states the principle that the child's interest is of supreme importance when decisions concerning him are made. It also determines the criteria by which the court must be guided in its assessment, particularly in cases of adoption, custody or support.

26

This article, which is new law, is based on Section 9 of the *Adoption Act* (94), although the age limit (ten years) is replaced by the concept of discernment.

27

This article is new law. Under it, the court is obliged to appoint an attorney to represent a child whenever the child's interest demands it. It was considered preferable to impose this obligation rather than to leave

this question to the discretion of the judge. Under this article, moreover, any interested person may make such an application to the court.

28

This article is based on Article 608 C.C. (95).

29

This article, based on the second paragraph of Article 218 C.C., creates an irrebuttable presumption of conception within three hundred days before birth.

30

This article repeats Article 980 C.C., with certain changes. It terminates the ambiguity resulting from the use of the words "children" and "grandchildren", and includes all children, born in or out of wedlock or adopted.

31

This article is new. It eliminates the distinctions respecting the source of filiation. It arises from a basic principle governing the reform of family law: complete equality between the various filiations, regardless of the circumstances of birth, and in matters of adoption.

CHAPTER III

NAME AND PHYSICAL IDENTITY

Section I

Attribution of name

32

This article lays down a general rule. The requirement of at least two given names consecrates modern usage and is intended to permit better identification of persons, something which has become necessary by reason of the frequency of certain names, the growth of population and the increased use made of computers.

33

This article inserts a long standing practice in the Civil Code. Even though in principle, because the law is silent on the subject, a child could

be given another surname, the accepted custom in Québec is that a child takes his father's surname (96).

True, this rule runs counter to the principle of equality of consorts (97). Various systems, then, were studied in the light of comparative law. It could thus have been proposed that:

1. a child bear a name consisting of his parents' names;
2. parents choose which of their names the child will bear;
3. the child always bear his mother's name.

The first proposal would give rise, among others, to problems of the order of attribution (98). Also, it would only "pass the buck" to later generations who would have to decide as to the names to be borne by children of parents with compound names.

The second proposal would give rise to the problem of the moment of choice. Would parents choose a family name for their children when they married, when the first child was born, or as each was born? Would provision have to be made for each child bearing the same name? Considering the hesitations involved in choosing a given name, there is hesitancy in imposing the far more important choice of a family name. This seems likely to complicate attribution of the name unduly.

Of course, the ideal solution would be the third (99). Even if it were as discriminatory toward the consorts as the proposal retained, it would have the advantage of placing all the children on an equal footing regardless of the circumtances surrounding their birth, and whether or not their paternal filiation is established. It would also determine the primacy of the biological tie over the legal tie. It seemed premature, however, to recommend this type of measure since it would disrupt an age-old tradition.

Attribution of his mother's surname to a child whose maternal filiation alone is established also corresponds to usage (100).

The child whose father and mother are both unknown is dealt with in Article 34.

34

This article is new law. When the father and mother of a child are not known, the Registrar of Civil Status would choose the child's surname and given names, as an officer of Civil Status does now (101).

35

The judgment allowing an action for disavowal or contestation of paternity would have the effect of breaking the ties of filiation between the child and his presumed father. Since surname of the child is one of the effects of legally established filiation, any break in the ties of paternal filiation would involve loss of the child's right to bear his father's surname, which was granted him by a legal presumption. The child would then take his mother's surname.

36

This provision is new law. Since the general rule is that the child takes his father's surname, it seemed desirable to permit a child who, although his paternal filiation is not determined at the time of his birth, is subsequently recognized by his father, to apply for a change in the registers of civil status when acknowledgment of paternity makes proof with respect to third parties. This is a question of voluntary recognition by the father (102), since the change in the registers of civil status is carried out automatically in cases of judicial recognition (103).

37

This article repeats the provisions of the preceding article applying them to recognition of maternity.

38

It seemed preferable to allow minors fourteen years old to submit themselves motions for rectification of acts of civil status.

39

This article is new law. It did not seem necessary or desirable, in the event of a change in a surname resulting from a disavowal or contestation of paternity or from recognition of paternity after the birth of the child, to make an exception to the principle whereby the given names at birth are permanent.

40

Although at present, in theory, by virtue of paternal authority, the choice of given names is up to the father in a legitimate family (104), in practice, both parents obviously choose their children's names together. The proposed article confirms this practice, and proposes a solution, for cases of disagreement between consorts, which respects their equality.

41, 42 and 43

These provisions are based on Section 38(b) of the *Adoption Act*. However, the rule of attributing the surname of the person adopting reduces the total latitude which the court now has. In effect, it seemed desirable to facilitate the child's entrance into his new family by giving him the surname of the person adopting, since every surname is a consequence of filiation.

Since, taking an example from existing law, the Draft reform of the law on the family permits the adoption of persons of major age (105), it seemed useful to specify that, if an adopted person has minor children of his own, any change in that person's surname would affect his minor children of the same surname, except those fourteen years of age or over who object to this.

Finally, as is the case under existing law, the court would be allowed to change the child's given names according to the wishes of the person adopting, or of the adopted person himself.

44

This article is intended to ensure the updating of acts of civil status in the event of a change of surname resulting from a change in status. It complies with the recommendations on civil status (106).

45

This article is new law. In point of fact, the question of the names of consorts is not provided for by the Civil Code. In practice, while the husband does not change his surname following marriage, the wife, by virtue of widespread and well established custom, acquires her husband's surname when she marries, although she retains her maiden name (107). This custom is sometimes indirectly ratified by such government directives as those governing passports (108).

Under existing law, a married woman or a widow may exercise her civil rights under her maiden name (109), her husband's surname or both surnames together (110).

It was wished to propose a rule which would respect the principles of the unchangeability of names and of the equality of the consorts, but without destroying an existing custom which is deeply rooted in our society. It was first wondered whether the family name could not be made up of both consorts' names, but this idea was abandoned because of the difficulties that would arise upon marriage of future generations, when the compound names would unavoidably become longer and longer.

Also studied was the possibility of both consorts together choosing a family name. This name would be that of either consort and would be entered in the declaration of marriage (111). It was felt, however, that such a system would unduly complicate the keeping of registers of civil status and that changes of name would not be given all the publicity desired. The more so because, given the increasing fragility of the marriage bond, cases of divorce or of separation, and remarriage, would entail several changes in the name of any one person during his lifetime.

Finally, the rule of unchangeability of names was adopted, it being agreed that a consort may always use his spouse's surname in social relations, provided he uses his own surname in exercising civil acts.

Section II

Change of name

46

This article is based on Article 56a of the Civil Code and on Section 2 of the *Change of Name Act* which allow changes of name only under State supervision.

A name change would remain a privilege and not a right, although the decision-making authority would be transferred from the government to the Registrar of Civil Status, a considerable simplification of the existing procedure.

47

This article is new law. It specifies the reasons for authorizing name changes.

48

This article is based on Section 3 of the *Change of Name Act*. The period of one year presently required by law is maintained so as to discourage persons who do not normally live in Québec from spending a short time there for the sole purpose of changing their name.

49

This article, also based on Section 3 of the *Change of Name Act*, drops the present requirement that the petitioner be of major age. On the basis of observations made, it seemed desirable to permit a minor to apply alone for a change of name. This could occur in the case of a child adopted

de facto by a family which, for financial or other reasons, could not adopt him legally.

50

This article is based in part on Section 8 of the *Change of Name Act*. It specifies that a change of name affects all minor children who have the same family name as the applicant. If a mother of children all bearing their father's surname should petition for a change in her own family surname, this change would have no effect on her children.

Secondly, it did not seem necessary to specify that a change of surname would affect the petitioner's children as yet unborn, and his descendants. In effect, when the child is born, he is given the name which his father bears at that time.

Section III

Change of physical identity

51

The purpose of this new article is to enable transsexual persons who have undergone so-called "sexual conversion" surgery (112), in accordance with recognized medical standards, to have a change made in the entry related to their sex on their act of birth (113) and also to have their given names changed.

Contrary to the change of surname, which is a privilege granted by the State and not a right, a change in the given names and in the entry related to a person's sex on his act of birth would constitute a right for any person whose external appearance has been altered.

This article requires that the applicant be a Canadian citizen and have resided in Québec for at least one year; in this way, foreigners will not be able to avail themselves of this provision to obtain a change of physical identity which might be forbidden by the laws of their own country (114).

The article finally requires that the petitioner be unmarried, namely that he be a bachelor or a widowed or divorced person; this will avoid the incongruity of marriages in which, as the result of a change of the physical identity of one consort, both of them would appear to be of the same sex (115).

52 and 53

These articles are new law. If, for humanitarian reasons, it seemed desirable to permit a transsexual person to have the entries related to his sex and to his given names changed in his act of birth, in keeping with his new physical identity (116), it did not seem appropriate to authorize any change in his surname, except under exceptional circumstances.

Section IV

Effects of change of name or of physical identity

54, 55 and 56

These articles are based on Sections 11 to 15 of the *Change of Name Act*, simplifying the formulation. Indeed, it seemed unnecessary to list all the rights and obligations which subsist despite a change of name or of physical identity of a person. It was sufficient to state the principle that these rights and obligations would not be affected by a change of name or of physical identity.

Still, it was thought desirable to specify that all acts, titles and other documents, such as diplomas, drivers' licenses, passports (117), health insurance cards, and so on, made out to a person who has changed his name or his physical identity, are deemed to have been made out under his new name or physical identity, and to provide that the person in question may require the authorities concerned to re-issue these documents under his new name or identity.

It goes without saying that a person who has changed his name or his physical identity should use the new surname or given names which, under Article 32, become his sole legal surname and given names. Naturally, nothing would prevent him from making reference to his former name for reasons of convenience.

It should be noted that Article 82 allows a person who has changed his name to obtain a copy of the original act of birth giving his former surname or given names.

Section V

Use and protection of name

57, 58 and 59

These provisions confirm the idea of the special character of the right to a name recognized by doctrine (118).

Any person who carries a name legitimately is entitled to prevent that name being used by someone who has no right to do so according to the rules on the attribution of names, and to protect it from any usurpation which might be harmful to him (119). This right could also be exercised by his consort and by his relatives in the direct line.

CHAPTER IV

DOMICILE

60

This article substitutes the concept of "habitual residence" for that of "principal establishment" contained in Article 79 of the Civil Code.

This amendment is intended to remove the necessity of determining, for the establishment of domicile, the intention of a person to establish his principal establishment in a particular place. An examination of Québec jurisprudence shows that the greatest difficulty encountered by judges in conflicts regarding the establishment of a person's domicile is seen in proof of his intention (120). When the person is deceased - and this problem arises often in matters of succession since the domicile of the deceased determines the place where the succession devolves - it is frequently difficult to determine with certainty what his intention was when he made his will or when he died. If, on the other hand, the person is alive, he may be expected to express before the court an intention which will be useful to his case rather than his real intention when the problem arose (121).

On the other hand, no person should be able to live habitually in Québec and, for the sole reason that he intends to return to his native country one day, avoid being subject to the Québec law governing his status and capacity.

The advantage of the habitual residence is that it may be proven objectively on the basis of concrete facts: the place where a person lives, where he works, the duration of residence, and so on. Moreover, it is

possible to consider intention not as a deciding factor, but merely as one of the many elements of proof.

The adjective "habitual" was chosen intentionally, to show clearly that residence must have a certain element of permanence and to avoid the possibility of persons changing their domicile too frequently. This word is also used in the Hague Conventions on private international law to qualify residence (122).

61

This article is intended to amend the rule in Article 80 of the Civil Code.

If intention is eliminated as a criterion for establishing domicile, obviously it must also be removed from the concept of change of domicile. To determine whether there has been a change of domicile, consideration is to be given to the same objective factors already mentioned: duration and continuous nature of the residence and any other personal and professional considerations which create a durable bond between the person and this residence.

62

This article of new law proposes a series of presumptions to be applied where it would be difficult or impossible to discover a person's domicile.

63

The first paragraph of this article retains the principle of the legal domicile of persons of minor age, provided for in the second paragraph of Article 83 of the Civil Code.

Only rarely, under the new law, would any child who is not orphaned be provided with a tutor, since the Draft proposes that parents represent their minor children *ex officio* in all acts of civil life (123). In any case, the proposed article terminates the present controversy concerning the domicile of a child who is provided with a tutor while he still has his parents (124), since, whether or not the parents were still living, the tutor would have custody of the child.

The second paragraph of the article makes provision for cases where the parents are divorced or separated as to bed and board, and custody of the child becomes the object of a court decision.

The third paragraph provides for cases where, because of the parents'

separation, no judicial decision has been made concerning custody of the child.

64

This article restates the third paragraph of Article 83 of the Civil Code, adapting the drafting of that paragraph to the provisions of the Draft regarding reform of interdiction. Persons who need to be represented in acts of civil life would be placed under tutorship and domiciled with their tutor (125).

65

This article restates the first two paragraphs of Article 85 of the Civil Code while simplifying their drafting.

It was not considered necessary to retain the third paragraph of Article 85 of the Civil Code which requires a notarial deed for election of a domicile respecting jurisdiction of the courts if it is signed by a non-trader within the boundaries of the district in which he resides. This requirement seems somewhat artificial and leads to many problems. In most disputes, the parties who wish to evade an election of domicile clause or, on the contrary, have it play in their favour, invoke the commercial or non-commercial nature of the act (126).

CHAPTER V

ACTS OF CIVIL STATUS

Section I

General provisions

66

The Draft provides, as under the present system, for three kinds of acts of civil status. Acts of death replace acts of burial.

Every act of civil status, as defined in Article 69, must contain only the data required for purposes of civil status and not those required for statistical purposes, since these are already provided for in the *Public Health Protection Act.*

67

The purpose of this article is to protect the confidential nature of certain facts relating to the civil status of persons. For example, adoption or the disavowal or admission of paternity or maternity are facts which should not be common knowledge. The *Adoption Act* already provides the means of guarding this secrecy.

Articles 79 and 82 provide that any person who justifies his interest in, or whose name appears on, an act may obtain a copy of the act, whereas certificates, which contain only essential and non-confidential data, are furnished to whoever requests them. Articles 80, 88, 92 and 101 list the information these certificates must contain.

68

The Registrar of Civil Status becomes the sole officer of civil status. He is responsible for preparing and registering acts of civil status as soon as possible. Of course, transitional measures will have to be provided to cover the period during which the contents of the registers of civil status are being fully incorporated into the central register; this is provided in Section 6 of the Draft Civil Status Register Act (127).

Under this article, the Registrar is required to receive declarations and attestations. A declaration of marriage does not include an attestation (Article 91). With respect to marriage, therefore, the Registrar receives only a declaration.

69

The first paragraph of this article defines an act of civil status.

The second paragraph remedies the inconvenience caused by Article 53a C.C. which prescribes a period of four months without specifying that a declaration might be made after this period. It is indeed desirable that all facts relative to civil status be registered. Penalties for late registration are provided in the Draft Civil Status Register Act.

This proposed article also allows the Registrar to receive declarations outside the prescribed eight-day period (aa.85, 90, 97). In these cases, however, it seemed advisable to grant him a power of investigation and even to authorize him to apply for a judgment confirming a declaration made outside such a period (on investigation by the court) and calling upon the Registrar to accept it for the purposes of preparing or changing an act of civil status. According to the administrative method chosen, the Registrar may return a copy of the act he has just drawn up to the declarant for verification and immediate correction if necessary.

70

This article lists the information required in all declarations of civil status. Particular details are mentioned for each type of act (aa. 87, 91 and 98).

71

It will be the Registrar's duty to determine whether the information obtained is sufficient to draw up an act of civil status. If it is not, or if the information in the attestation is not the same as that in the declaration, he may request more information or require that another declaration be made. It would be necessary in these cases to grant him discretionary powers in order to simplify operations.

72

This article requires prothonotaries and court clerks to forward copies of judgments changing the civil status of individuals to the Registrar who must enter them in the register. In this way, he can co-ordinate the acts and any subsequent changes made to them and ensure that they are continually kept up to date.

73

This provision is based on the *Act to amend the Public Health Protection Act* (128).

However, as no clerk of a court outside Québec can be obliged to send the Registrar a copy of the judgment, the person adopting, who is domiciled in Québec, must do so. The term "act of adoption" was used to cover not only judgments of adoption, but also administrative decisions, and even contracts of adoption. This policy was also adopted in the Draft with respect to recognition of adoptions made outside Québec (129).

Moreover, as children adopted abroad generally come from afflicted regions, the person adopting may be unable to provide an acceptable certified copy of the act of adoption. In such cases, it seemed that the Registrar should be allowed to enter the adoption justified by documents considered sufficient.

74

This provision is intended to allow inclusion in the Québec register of acts drawn up outside Québec but which concern people domiciled in Québec, such as, for example, the act of birth of a child born to Québec parents outside the province. It would also allow the Registrar to attach a

judgment of divorce pronounced outside Québec to the act of marriage entered in the Québec register.

75

The Registrar first ascertains the authenticity of the copy of any act of civil status drawn up outside Québec which concerns a person domiciled in Québec, or of any decision rendered outside Québec which is likely to alter a Québec act of civil status. He then ensures its preservation, and issues copies and certificates thereof.

If the acts mentioned in Articles 73 and 74 are not drafted in French or English, they must be accompanied by a translation into one of these languages, certified as accurate either by a diplomatic or consular agent, or by any other person authorized to do so in Québec or in the place of origin.

76

Since the acts mentioned in this article affect the status of persons, it is not sufficient to add them as schedules to the act of civil status concerned. The Registrar must draw up a new act on the basis of the original act and of the judgment rendered.

Copies and certificates are governed by Articles 81 and 82.

77

This article refers to Article 102 (declaratory judgments of death), and to Articles 109 (judgments to reconstitute acts of civil status), and 110 (judgments to replace acts of civil status).

The Registrar must draw up an act of civil status in such cases since the situation is one where he would normally have to do so.

78

As sole officer of civil status, the Registrar issues copies and certificates.

79

This article is new law since the Civil Code does not mention certificates.

80

The information in question is that provided for in Articles 88 and 89 (birth), 92 and 93 (marriage), and 101 (death).

81

A certificate of civil status contains only information which may be known to all. It must not indicate, for example, that there has been a change in filiation following an acknowledgment of paternity or of maternity.

Certain information which has been changed is nonetheless retained; a marriage certificate would, for instance, mention the annulment of a marriage or its dissolution by divorce or death (Article 93), and similarly, any birth certificate or copy thereof issued after death would include such information (Article 89).

82

This article replaces Article 50 of the Civil Code.

The Registrar may, at his discretion, allow those who justify their interest to obtain copies of acts of civil status. The interest to be justified includes not only individual interest, but also family interest and the interest of a person appointed as mandatary.

In certain circumstances, the *Adoption Act* forbids issue of the adopted person's act of birth.

In other cases, it may be necessary to consult the original act, but subsequent changes to it must always be noted.

Section II

Acts of birth

83

This obligation of a person who attends a mother during childbirth is highly important since it allows for an attestation to support the declaration of the parents (130).

84

This article specifies the content of an attestation of delivery. The forms to be used for attestations will be specified by regulation.

85

This article specifies the period allowed for declarations of birth. The prescribed period is short. This is necessary in order to ensure the system's effectiveness; moreover, as the declaration is made by filling out a form, there is no reason to extend the period. In Canada, the period is varying:

ten days in Manitoba and Alberta, fifteen days in Saskatchewan and thirty days in other provinces. In Switzerland and France, the period is three days while Germany allows one week.

86

This article provides for special cases of abandoned new-born children. A medical report is considered the best way of establishing the presumed date of birth.

87

This article prescribes the contents of the declaration of birth which provides the information required by Article 54 C.C., except as regards baptism, godfather and godmother, and occupation of the father and mother. It seemed advisable to mention the degree of relationship between the declarant and the child.

88

This article prescribes the content of birth certificates. Since birth certificates are accessible to all, it seemed preferable not to provide on them any information referring to filiation.

89

This provision aims at preventing the fraudulent use of the acts of birth of deceased persons.

Section III

Acts of marriage

90

It seemed preferable to require the officiant, rather than the parties involved, to send the declaration of marriage to the Registrar. The officiant represents an element of administrative stability at the time of the marriage. This procedure differs from that for births where the person who performs the delivery sends the Registrar only the attestation while the parents send the declaration.

91

This article specifies the content of a declaration of marriage. The declaration includes some information already required by Article 65 of the Civil Code, namely the day of the marriage, the surname, given names

and domicile of each consort and of their parents, and the names of the witnesses.

The following information would no longer be required: the occupation of each consort, the name of the former consort, the fact that the parties are or are not of age (since this can be determined by the date of their birth), the fact that banns were published, the consent required in case of minority, the question of whether the witnesses are related or allied to the consorts, the fact that there was no opposition, or the fact that the consorts are married or not under a contract. The declaration, then, contains only essentials.

The chapter of the Code dealing with solemnization of marriage obliges the officiant to verify certain facts concerning the identity and capacity of the future consorts (131).

92

This article describes the content of a marriage certificate.

93

Anyone who requests copies or marriage certificates should know whether the marriage has been annulled or dissolved.

Section IV

Acts of death

§ - 1 Attestations and declarations of death

94

The physician's attestation of death corroborates the declaration of death. This article is based on Sections 40 and 59 of the *Public Health Protection Act*.

95

This article describes the contents of an attestation of death.

96

This provision is intended to allow the Registrar to draw up an act of death later.

97

Declaration of death is a new procedure; the declaration will constitute the basis of the act of death which replaces the act of burial.

98

This article describes the contents of a declaration of death. This provision facilitates mention of death in the deceased person's acts of birth and of marriage. If there is no surviving consort, the marriage is already dissolved, so it seems pointless to mention deceased or divorced consorts.

99

If the date and the place of death are unknown, the Registrar determines a presumed date and place after an inquiry, leaving it, if necessary, to the courts to determine such date and place on the basis of the evidence.

100

This article is intended to avoid fraudulent use of acts of civil status.

101

This article describes the content of a certificate of death.

§ - 2 Declaratory judgments of death

102

This article substantially reproduces Article 70 of the Civil Code which is amended, however, taking into account the existence of attestations and acts of death. The effects of declaratory judgments of death are governed by other provisions of the Draft, particularly in the chapter on *Dissolution of Marriage* (132).

103

This article reproduces part of Article 71 of the Civil Code.

However, the third paragraph of Article 71 C.C., which deals with the setting up of a judgment against an insurer who has insured the life of the deceased, is repeated in more general form in Article 107.

104

This article is intended to dispel the doubts caused by the last paragraph of Article 73 C.C. Since a declaratory judgment of death is rendered only when death appears certain, only rarely will people

declared to have died return. Better to free the consort from the bonds of marriage. The same solution is recommended in cases of declaratory judgments of absence (133).

105

This article amends Article 73 of the Civil Code.

A person who has been the object of a declaratory judgment of death, and has reappeared, may apply for revocation of the judgment and cancellation of the act of death.

106

This article repeats the beginning of the second paragraph of Article 73 C.C.

107

This article repeats the second part of the second paragraph of Article 73 C.C.

Section V

Correction and rectification of acts of civil status

108

Errors other than clerical must be rectified by judicial intervention, given the importance of acts of civil status and the necessity for such acts of procedure as service on third parties and hearing of the persons concerned.

The rules which replace Article 864 of the Code of Civil Procedure are contained in a schedule. Article 865 C.C.P. should be repealed.

Section VI

Judgments to reconstitute and replace acts of civil status

109

This article, which is new law, covers several situations.

In some cases, an act can be lost or destroyed, either by itself or at the same time as a register. This situation may arise as regards acts made in or outside Québec.

In other cases, a person may find it impossible to obtain a copy or a

certificate of an act of civil status; this can occur, for example, if his native State refuses to provide him with one.

This provision allows any act to be reconstituted by a principal suit. The judgment, in accordance with the procedures described in Article 77, may then be incorporated into the Québec register of civil status. This method is different from that set out in Article 453 of the Code of Civil Procedure.

110

Certain persons born in Québec have never been entered in the registers of civil status. Others come from countries where civil status is not organized. This provision will allow these persons to obtain a judgment which can be incorporated into Québec's register of civil status.

CHAPTER VI

MAJORITY AND MINORITY

Section I

Majority

111

This article is based on Articles 246 and 324 of the Civil Code.

The question was raised as to when a minor attained majority.

In effect, the method of establishing the date on which majority is reached has given rise to debate (134). Some writers maintain that, under Article 2240 of the Civil Code, majority is attained only after the final minute of the birthday has expired. Under another method, the period would be calculated to the hour; this would presume knowledge of the exact time of birth. It was finally considered wiser to adhere to the common practice and to decide that majority began at the first instant of the eighteenth birthday.

A minor not more than sixteen years of age authorized by the court to marry would be likened to a person of major age. It is to be hoped that if the court considered him capable of assuming marital responsibilities, he would be able to face other responsibilities of civil life.

112

This article repeats Article 324 of the Civil Code, changing the wording.

Section II

Minority

113

This article runs counter to Article 986 of the Civil Code which stipulates that, in the cases and according to the provisions contained in the Code, minors are legally incapable of contracting.

Though authors sometimes describe minors as being in a position of "*incapacité d'exercice*" (135), they agree that actually "*le mineur, malgré les termes de l'article 986, n'est pas incapable de contracter, il est incapable de se léser*" (136).

So this provision formally clarifies existing law which is not accurately reflected in the wording of Article 986 of the Civil Code. It seemed unnecessary to specify that the minor be capable of discernment, since consent required for validity of the contract supposes discernment (137).

It was felt that the question of the capacity of minors should be dealt with in the chapter devoted to minority, rather than in the Book on *Obligations*. This decision is in conformity with the overall policy governing the structure of the new Code, under which provisions concerning capacity are mostly concentrated in the chapter on *Protected Persons*.

114

This article must be read in the light of the provisions of the Book on *Obligations* dealing with lesion of persons of major age; it restates the principle of Articles 987 and 1002 of the Civil Code (138). Article 1002 is ambiguous and the suggested provision is intended to avoid any jurisprudential arguments which might arise concerning the stipulation purportedly contained therein. It was therefore decided to insert here the principle already established in jurisprudence to the effect that a minor may harm himself only when, on the one hand, he acts on his own behalf, and when, on the other hand, the contract involved is detrimental, in the broadest sense of the term, to his patrimony. The minor, in other words, is not deemed incapable of contracting, but only incapable of causing prejudice to himself.

There is no intention of departing from the well established jurisprudential tradition (139) which assesses lesion in relation to certain subjective elements such as the type and nature of the contract or of its provisions, its effects on the patrimony, the usefulness of such a commitment, the degree of risk involved, and so on (140).

The provision that the minor may confirm the contract on attaining the age of majority is consistent with existing law (141). Such confirmation would in no way deprive him of the major person's right to invoke lesion, provided in the Book on *Obligations* (142).

Finally, the proposed article constitutes a major reform of existing law, in that it abolishes the distinction between the rescission of certain acts because of lesion and the nullity of acts for which the tutor should have obtained the court's permission, as provided in Article 1009 C.C. There would no longer be any reason for such nullity, since the tutor himself would have over the minor's property all the powers of an administrator of the property of another, entrusted with full administration (143).

The sanction of lesion, namely the rescission or reduction of the obligation, is dealt with in the Book on *Obligations,* as is the rule whereby no minor is required to make restitution except to the extent that he has profited from the benefit received (144).

Prescription of this action is the three-year prescription proposed for the extinction of personal rights in the Book on *Prescription* (145).

115

This article revises the wording of Article 1003 of the Civil Code, and specifies the solutions in established jurisprudence (146).

Obviously, when a minor goes beyond the confines of a simple statement, for example, by submitting a false declaration in writing from his parents to the effect that he is a major, he cannot plead lesion (147).

116

This article corresponds to Article 1004 of the Civil Code.

117

This article repeats Article 1007 of the Civil Code with revised wording (148).

118

This article embraces the principle expressed in Article 1005 of the Civil Code, while updating the wording. In addition, it extends this principle to cover wage-earning minors.

This addition has considerable importance since, under present law, the exception involved is clearly confined to cases where the minor is self-employed (149).

The article thus includes the principles stated in paragraphs 2 and 3 of Article 304 of the Civil Code, while broadening their scope.

119

The first paragraph of this article deals with minors who obtain judicial dispensation to marry under the age of eighteen years.

This is an instance of application of Article 111. Since minority is terminated of right by the marriage itself, it is logical that, once a minor has been authorized to marry, he be legally competent to draw up his own marriage contract.

In the suggested provision, there is a divergence from existing law, which is more strict concerning consent for the marriage contract than consent for the actual marriage (150).

A further advantage envisaged is that this provision will put an end to the present controversy concerning the nature of the nullity of a marriage contract drawn up without appropriate consent (151).

The second paragraph covers the case of a minor who wishes to draw up his marriage contract a few days prior to marrying on his eighteenth birthday.

120

This article clarifies existing law. The first paragraph repeats the principle of the first paragraph of Article 304 C.C., while retaining the right of minors to act alone whenever they are allowed to do so.

The second paragraph allows minors to institute actions in fields other than patrimonial where, under existing law, they may generally act alone (152). With the judge's permission, then, a minor could institute an action for recognition of paternity, or oppose such an action, if it were directed against him.

The third paragraph repeats the rule of the fourth paragraph of Article 304 of the Civil Code.

The proposed article in no way changes the rule of Article 56 of the

Code of Civil Procedure, according to which the irregularity arising from a lack of representation has effect only if it is not remedied; this may be done retroactively at any stage of a case, even in appeal. This rule has ended the controversy respecting the nature of the nullity of judicial acts performed by minors (153). If the period for appeal has expired, the minor would have recourse to revocation of judgment (Article 483 C.C.P.).

121

This rule, of new law, is based on the first paragraph of Section 36 of the *Public Health Protection Act*, which provides that an establishment or a physician may provide the care and treatment required by the state of health of a minor fourteen years of age or older, with his consent, without being required to obtain the consent of the person who exercises paternal authority.

Some reservations were expressed as to the wisdom of such a rule; it was felt that often minors might be persuaded by a physician that a particular treatment is indicated, whereas consultation with another physician might be preferable.

Other persons pointed out that, with regard to certain diseases, such as drug addiction or venereal disease, children often prefer that their parents not be informed of the situation. The requirement to ask for parental authorization could lead these children to deprive themselves of the care required by their condition (154).

In any case, the proposed article does not mean that the child alone may consent to receive care, but rather that his consent is enough to ensure that he receives it. In most cases, of course, the parents will be notified and will enter into a medical or hospital contract (155).

The solution chosen is that provided in the *Public Health Protection Act;* by setting an age of majority in medical matters and by requiring that parents be notified when children are sheltered for more than twelve hours or where treatment is prolonged, the law "*tente de concilier l'autonomie de la personne humaine et les exigences légitimes de l'autorité paternelle*" (156).

122

This article repeats the second paragraph of Section 36 of the *Public Health Protection Act.*

The right of the court to overrule parental refusal is intended to deal

with the typical situation where parents refuse essential surgical intervention on religious grounds. The *Public Health Protection Act* merely legislated existing jurisprudence (157).

It was not considered necessary to specify to which court the judge authorizing the care would belong, since this decision may possibly be within the competence of the Family Court (158).

123

Opinions differed as to whether or not a child should be able to refuse any medical care his condition requires (159).

There were some who opposed the notion that parents would be unable to compel a minor to undergo treatment necessary for his health. They considered that parental consent should take precedence over the minor's refusal until that minor comes of age. They also pointed out that if the child became unable to live a normal life as a result of his refusal to receive medical care, his parents' obligation to support him would increase *ipso facto.*

Others inclined more to the opinion that a child over fourteen years of age should be able to refuse any medical treatment which his parents wish to impose upon him. This solution was finally retained.

124

This article is in line with Section 37 of the *Public Health Protection Act.*

CHAPTER VII

PROTECTED PERSONS

Section I

General provisions

125

This introductory article emphasizes the protective purpose of tutorship.

It announces that the systems for protecting minors and persons of major age are combined.

126

This article constitutes a major reform of existing law. The principle of Article 249 of the Civil Code, under which "all tutorships are dative", meaning that they are assigned by the court, would disappear.

Moreover, Article 249 C.C. is not an accurate expression of existing law, since some legal tutorships do exist, such as those established for foundlings (160), immigrant children (161) and Indian children (162).

On the other hand, the proposed article introduces the concept of testamentary tutorship into Québec law. This kind of tutorship exists in most Western countries (163).

According to the notaries consulted on the subject, testamentary tutorship seems to fill a genuine need. It is natural for parents to want to ensure the well-being of their children and, especially, to entrust them to a relative or friend in the event of their own death (164).

The Ontario Law Reform Commission has made recommendations similar to those contained in the Draft (165).

127

This article is the counterpart, for the person of major age, of the preceding article. Since no person of major age should be subject to any protective regime, save in exceptional circumstances strictly defined by law, it is logical that the court should decide as to the regime and as to the appointment of the tutor.

128

This article makes a distinction between the legal tutorships provided for in the special statutes listed in the commentaries on Article 126, which are not regulated by the Civil Code, and that exercised by parents over the property of their minor children.

129 and 130

These articles embody the principle of Article 266 of the Civil Code, making it more specific by adding one detail accepted by court decisions, namely that an alien may act as a tutor (166). This follows the spirit of Article 18 C.C. (Article 3) which entitles aliens to full enjoyment of civil rights in the same manner as citizens, unless otherwise expressly provided by law.

131 and 132

Even though tutorship has traditionally been "*gratuite et de bienfaisance*" (167), jurisprudence has admitted that tutors and curators may be remunerated (168).

It was felt that parents' tutorship should be gratuitous; in other cases, the tutor's work - which can be heavy if the minor's property is substantial - would doubtless be better performed if the tutor were remunerated. In any event, the Public Curator, who would often assume tutorship over property, is entitled to fees under the *Public Curatorship Act* (169).

In other cases, the amount of remuneration would be determined by the court, and possibly by the testator.

133

This article embodies, with some modifications, the rules of Articles 282 and 284 of the Civil Code.

When the question arose as to whether it would be wise to permit an unmarried minor to be the tutor of his child, whatever the age at which that minor became a parent, it was mentioned that the Code obliges fathers of minor age to accept tutorship to their children, and that no distinction should be made between fathers and mothers, and between married persons and unmarried persons.

The second sub-paragraph refers to all persons who may be placed under a protective regime under Articles 180 and following.

The third sub-paragraph proposes a change in Article 282 of the Civil Code, which forbids the appointment as a tutor of anyone who is involved in legal proceedings with the minor, or whose father or mother is involved in such an action. It was considered that there is a greater community of interest between a person and his consort than between that person and his parents. "Trial" is replaced by "dispute" which is broader.

134

This article departs from the principle of existing law which holds that tutorship is an obligatory office.

It seemed that, with the exception of parents who cannot refuse tutorship to the property of their children, no other person should be obliged to accept this office; the reasoning was that such persons might carry out their duties badly because these had been imposed on them. The long list of permissible excuses for refusing a tutorship, provided in Articles 272 to 278 of the Civil Code, is an indication that frequently

tutorship is considered too burdensome an office. Moreover, jurisprudence seems to admit that any tutor may resign for reasons other than those enumerated in the Code (170). The proposed reform only makes a general rule out of all these specific instances.

135

Since the tutor to the person must replace the minor's parents and ensure that minor a family life which will encourage the full development of his personality, the tutor should, in performing his duties, have the spontaneous collaboration of his spouse.

Tutorship accepted in the face of opposition by the tutor's spouse would threaten the harmony of the household, and consequently the interests of the child.

Accordingly, no one should accept a tutorship without the consent of his spouse, nor should he continue to be a tutor without that consent.

136

The purpose of this article is to do away with the principle of immutability of tutorship; as the law now stands, tutorship is established permanently at the domicile of the minor when the family council is summoned (171). Under the proposed reform, tutorship would be based at the tutor's domicile, even if he changed it, since minors and persons of major age provided with a tutor are domiciled with their tutor (172).

This provision also has the advantage of concentrating all property administration at the domicile of the tutor to the person in the event that there might be one or more tutors to the property, in addition to the tutor to the person.

137

This article repeats the principle of unity of tutorship to the person, laid down by Article 264 of the Civil Code.

Given the necessity of the spouse's consent, provided for in Article 135, the proposed rule permits the appointment as co-tutors of consorts living together. Several notaries have cited cases in which a testator has requested that a specific family be appointed "tutors" of his children. Under this provision, such an appointment would now be possible.

138

This article embodies the principle of Article 264 of the Civil Code and its provision for the appointment of one or more tutors to the property in addition to the tutor to the person.

139

This article enshrines the possibility, which has been recognized by the courts (173), of entrusting a specialized organization with tutorship to the property.

140

It seems reasonable to authorize the tutor to give a mandate for a specific action, or to allow him to delegate the administration of the protected person's property to a trust company or some other organization specialized in the administration of property of others, as provided in the Title on *Administration of the Property of Others.*

Some felt that parents should not be entitled to delegate the administration of their children's property to anyone else. It seemed questionable, however, whether the fact of being a father or a mother necessarily conferred the qualities of a good administrator. Parents are in fact in a position different from that of a testamentary or a dative tutor, since the latter are deemed chosen by the testator or the court because of their professional qualities.

141

This article embodies the principle of Article 290 of the Civil Code.

It should be read in conjunction with Articles 113 and following, which provide that any minor, endowed with discernment, is legally capable, subject to a number of exceptions. The rules governing capacity of protected persons of major age are set out in Articles 180 and following.

142

This article retains the principle of independence of tutors with respect to each other, laid down at the end of the first paragraph of Article 264 of the Civil Code.

143

This article is intended to determine the relations between the tutor to the person and the tutors to the property, in such a way as to ensure that the tutor to the person has the leading role.

It is logical that the tutor to the person be kept up to date on the administration of the minor's property, since he is responsible for supporting the minor out of that property.

144

This article follows logically from Article 141 under which the tutor must care for the protected person and ensure his support. It is acknowledged that if the property of the protected person is not sufficient to ensure such support, the tutor may draw from the capital (174).

The second paragraph envisages a situation in which the protected person himself, or a member of his family, feels that the tutor is not paying enough money for the support of that person. A case in point would be that of a sick person under tutorship who is hospitalized and wishes to have small amounts of money available, in proportion to his resources.

145

This article is also intended to determine relations between the tutors to the property and the tutor to the person. The amount necessary to carry out the office of tutor to the person includes the support of that person and, eventually, the remuneration of the tutor.

146

In view of the new philosophy on tutorship, which proposes replacing the *a priori* authorization provided for in the Civil Code by regular *a posteriori* supervision, it seems logical that the tutor should have very wide powers over the property of the protected person.

The tutor must be able to perform swiftly all acts of administration or disposal necessary to preserve the patrimony. At a time when moveable property appears more important than immoveable property, and when market conditions are changing rapidly, it would be unfair to tie the tutor's hands by requiring him to institute proceedings, often lengthy, to obtain the necessary authorization.

It is obvious nevertheless that, like every other person who administers the property of others, the tutor must carry out his duties in the interests of his pupil. The rules on protection of administered property, provided in the Title on *Administration of the Property of Others*, apply to the property of a minor and of a person of major age under tutorship, as provided in Article 162.

147

It seemed logical that a testator should be able to stipulate that certain property bequeathed to a protected person be exempt from tutorship. The same applies to a court which attributes property to a protected person.

148

This article gives the Public Curator supervision of all property of the protected person which is excluded from the administration of the tutor.

The article should be read in conjunction with Articles 221, 222 and 223. Article 221 requires the prothonotary to send the Public Curator a copy of every judgment ordering payment to be made to a protected person or to his tutor. Article 222 allows the Curator to intervene in a settlement. Article 223 requires that the Public Curator's authorization be obtained every time a payment is to be made to a protected person or to his tutor.

It would, in fact, be abnormal for a protected person to have large amounts of money at his disposal with no supervision.

149

Nevertheless, it seems logical that the money which a protected person earns through his own work should belong to him. Moreover, Article 118 provides that a minor is considered of age for the purposes of his work. The *Public Curatorship Act* also provides that mental patients retain the proceeds of their work (175).

150

This proposed article embodies the principle of Article 269 of the Civil Code, widening its scope to include all conflicts of interest between protected persons and their tutors, whether submitted to the court or not.

The question was raised as to whether parents should be excluded from the purview of this article, and whether, as under Article 269 of the Civil Code, the intervention of an *ad hoc* tutor be strictly limited to the matters to be discussed in judicial proceedings.

It was nevertheless considered that, like any other tutors, parents could find themselves in conflict with their children, and that, in these cases, the important thing was to protect the interests of the minor. It could happen, for example, that parents and children injured in the same accident would have opposing interests. Under the present system of tutorship, the family council and the subrogate tutor must theoretically always be in control. The subrogate tutor, in particular, must act in the interests of the minor whenever these are opposed to those of the tutor (a. 267 C.C.)-(176).

Moreover, since under the proposed reform, the family council and

the subrogate tutor would be abolished in favour of *a posteriori* supervision by the Public Curator, the latter should be able to protect the interests of the protected person.

Finally, the principle of Article 1484 C.C., which states that no tutor may acquire property of a minor, would be retained, as recommended in the chapter on *Sale* (177).

151

Termination of tutorship for the reasons envisaged in paragraphs 1 and 2 is self-explanatory.

Paragraph 3 is consistent with Section 38 of the *Adoption Act*, dealt with in Article 324 of the Book on *The Family* (178).

Further clarification of the causes for replacement or dismissal, as envisioned in the fourth paragraph, is provided in Articles 153 and following.

This article and the next are consistent with the provisions dealing with termination of administration of the property of others (179).

152

The causes in the preceding article apply to termination of legal tutorship of parents over the property of their children.

Deprivation of parental authority obviously carries with it loss of legal tutorship to property. Withdrawal of legal tutorship may take place, not only as a result of a motion to this effect in accordance with Article 360 of the Book on *The Family*, but also following divorce or separation as to bed and board.

Dative tutorship may be established even when the parents are still living, if they are unable to express their wishes because of absence or for any other reason (180).

153

This article is an application of the principle proposed in Article 134, under which no person may be compelled to accept the responsibility of tutorship.

Under existing law, any tutor may always invoke valid reasons for being relieved by the court of such duties (181).

The last paragraph restates the principle in Article 876a of the Code of Civil Procedure.

154

This article covers all cases where tutors are unable to perform their duties. These include incarceration, absence, extended travel and other reasons.

Thus, when legal tutorship devolves on one parent and that parent becomes incapable of discharging his responsibility, a dative tutor must be appointed.

155

This article gives any interested person the right to begin proceedings in order to bring about the replacement of a tutor, as provided in the preceding article.

156

This article is designed to fill a gap in existing law, where causes of dismissal are apparently based only on property considerations.

If either parent mistreats his child, that parent is liable to be deprived of parental authority under Article 359 of the Book on *The Family*. In similar circumstances, any other tutor should be liable to withdrawal of tutorship to the person.

157 and 158

These articles reproduce the substance of Article 289 of the Civil Code, with simplified wording, extending it to cover legal tutorship by parents.

Obviously, when the cause for dismissal of a tutor is mistreatment of the protected person by that tutor, the court will not permit him to retain his authority during the proceedings.

159

This article is consistent with the new second paragraph of Section 32 of the *Public Curatorship Act* (182).

160

The first paragraph of this proposed article lays down the principle of Article 288 of the Civil Code, with simplified wording.

The second paragraph is designed to meet a practical need and is consistent with the recent amendment to Section 32 of the *Public Curatorship Act* (183). In effect, the Public Curator complained that, in each case where he has applied for dismissal of a tutor following charges brought by a relative, there was never any relative, including the relative

who brought the charges, willing to take over the responsibilities of the dismissed tutor.

The third paragraph completes Section 32 of the *Public Curatorship Act*, which specifies in effect that the Public Curator does not have custody of the person. If such person is seriously ill and undergoing treatment in a hospital centre, his custody will be entrusted to the director of the centre's professional services, according to Article 202. If such person is a child, a court decision will be indispensable.

161

This article ensures protection of third parties; they may continue to deal with the tutor, even if they are unaware that he has been dismissed.

The central register of protected persons thus provides a degree of publicity comparable to that offered by the central register of matrimonial regimes.

162

The tutor, in the words of the Title on *Administration of the Property of Others*, must "act honestly and in all loyalty, and in the exclusive interest of the beneficiary" (184). He may not acquire any rights in the property he administers (185). He may be dismissed for negligence or dishonesty (186) which complies with the principle of Articles 285 and 286 C.C. and Section 32 of the *Public Curatorship Act*. He is responsible for all damage resulting from his administration (187). Parents are solidarily responsible toward their children for their administration (188).

Furthermore, the property administered is protected by the security which the tutor will be required to provide in accordance with Articles 224 and 225. It is also protected by the fact the tutor may make no investments other than those provided for in Article 552 of the Book on *Property*, which repeats Article 981o of the Civil Code.

Section II

Parents' legal tutorship to the property of their minor children

163

This provision constitutes a major reform of existing law, since it confers of right on parents the tutorship to the property of their children;

all the formalities required for their appointment as tutors are thus eliminated. Tutorship to the children's person also belongs legally to the parents under Article 353 of the Book on *The Family*.

Provision for the legal tutorship of parents is made in many foreign countries (189).

As Professor Louis Baudouin wrote:

"*La scission opérée en droit québécois entre la puissance paternelle ayant pour objet la personne de l'enfant et la puissance paternelle ayant pour objet l'administration de ses biens, est assez surprenante...*" (190).

In any event, such a dichotomy is difficult to justify as long as both parents are still living, since they appear to constitute the natural choice for the duty of administering their children's property, with appropriate safeguards.

Some persons felt, however, that unmarried minor parents not able to administer their own property should not be allowed to administer their children's property. In an opposing view, others considered that, if a minor father or mother is deemed capable of undertaking responsibility for the person of a child, he must, as a rule, be deemed capable of administering the child's property.

164

The proposed article repeats the principle of equality and co-operation between parents in the moral and material control of the family.

It derives from the second paragraph of Article 354 of the Book on *The Family*. If the parents are not living together, they must continue to fulfil their duties as tutors together, unless one of them authorizes the other to represent him in exercising the tutorship, in accordance with Article 166. Where there is disagreement concerning the administration of their child's property, the parents may apply to the court.

165

In the same way as parental authority devolves on the other parent if one of the two dies or is unable to make clear his wishes, it follows that tutorship should be exercised by one parent in similar circumstances. The same principle applies to the question of control of the family (191).

166

This provision derives from Article 178 of the Civil Code, which establishes that one consort may authorize his spouse to act on his behalf in exercising the rights and powers arising from his matrimonial regime. Since the parents administer their children's property together, it follows that each should be entitled to confer a mandate on the other in the carrying out of such administration.

The object of the second paragraph is to protect third parties in good faith who must deal with one parent without requiring them to obtain consent from the other in every case. It derives from the principle that either consort may act alone in matters concerning household needs and the support of children (192).

Initially, consideration was given to setting a limit to the extent to which either parent could become committed without obtaining the consent of the other. Since such a figure would necessarily be arbitrary, however, and would require constant updating to keep pace with inflation, it was judged preferable to extend this presumption to cover all acts related to tutorship to the property of children. The scrutiny to which such acts are subject is already sufficiently strict (193).

This presumption departs from the principle according to which when one of the administrators of a single patrimony is entrusted with taking action with respect to certain acts, he alone is responsible for these acts (194).

167

Article 366 of the Book on *The Family* provides that a parent deprived of parental authority or of any of its attributes may have this authority or these attributes restored, if justified by new circumstances.

If the court considers the parent worthy of recovering his authority, it follows that he should also recover tutorship to the child's property. In this area, however, it was intended that the courts enjoy wide discretionary powers, since even though a parent has made honourable amends, he may still not become a sound administrator.

Section III

Dative tutorship

168

According to the proposed reform, every minor whose parents cannot exercise their tutorship will be assigned a tutor by the court.

The first sub-paragraph of the proposed article refers to all cases, besides that of death, where parents cannot exercise parental authority, whether by reason of absence, of remoteness, of illness which renders them incapable of exercising it, or of some other cause.

The second sub-paragraph concerns the deprivation of parental authority provided for in Article 359 of the Book on *The Family*. Since the

parent affected loses all his rights over the child, he also loses the power to administer the child's property.

The third sub-paragraph envisages the situation where, because the parent is a bad administrator, he loses tutorship to his child's property, either following partial withdrawal of certain attributes of parental authority, or following his dismissal as tutor to the property.

169

This proposed article repeats the principle in Article 250 of the Civil Code which gives any interested person the power to have a family council called, thereby beginning the procedure which will lead to the appointment of a tutor.

The person who submits the name of a person to act as tutor may also, for the reasons set forth in the comments on Article 137, submit the names of consorts living together.

It is wise to obtain the prospective tutor's consent, since he will have to give that consent before the court that appoints him.

The Public Curator is an interested person, in accordance with Section 17 of the *Public Curatorship Act*.

170

This article repeats the principle in Article 265 of the Civil Code, adapting it to the new concept of tutorship.

Moreover, any decision appointing a tutor is subject to provisional execution under Article 547 C.C.P.

Section IV

Testamentary tutorship

171

The proposed definition gives the surviving parent alone the right to appoint a testamentary tutor. Obviously, neither parent may exclude the other by will.

The surviving parent must also be vested with parental authority; in other words, he must not have been deprived of it, nor must he be unable to exercise it.

172

This article is an application of Article 137 which states the principle whereby there may be only one tutor to the person; the sole exception to this is the case of consorts living together.

If, by error, a testator appointed two persons not living together, or not married, it would be necessary to appoint a dative tutor. The court could very well choose one of the persons appointed by the testator.

173

Even if the testator cannot appoint several tutors to the person, he could nevertheless appoint them successively, indicating his order of preference. Such a procedure would avoid appointment of a dative tutor, unless all the testamentary tutors refused the tutorship.

174

This article is intended to dissipate any doubts as to possible conflicts of interest between, for example, an heir and minors who might also be heirs.

As long as the appointed tutor has no dispute with such minor, which would constitute grounds for exclusion under sub-paragraph 3 of Article 133, there is no reason why such a tutor could not accept the tutorship.

175

This proposed article, and that which follows, attempt to avoid a time gap during which no one would exercise parental authority over the minor in question, or administer his property.

This is why, although under Article 134 a testamentary tutor has the right to refuse the tutorship like all other tutors, he is presumed to have accepted if he does not refuse within a certain period of time.

In most cases, the tutor appointed in a will will be a relative or friend of the deceased, and already familiar with that person's wishes.

Naturally, the tutor will begin to take care of the child as soon as the death occurs, and his appointment will be valid even if he does not formally accept. In any case, the Public Curator will be notified of the tutor's appointment under Article 177.

176

Although no formal acceptance by the tutor is necessary, since he is presumed to have accepted his office, his refusal, on the other hand, must be in the form of an authentic deed. He may apply to a notary or a

prothonotary, as he wishes. Such notary or prothonotary is responsible for submitting the refusal to the Public Curator to advise him of this and allow him to proceed with the necessary formalities for making it public.

The central register of protected persons is designed to replace the list of interdicted persons, distributed periodically to notaries.

This register is intended to ensure both the protection of third parties who might seek information there as to the possible incapacity of their cocontractors, and the protection of protected persons themselves, since, in this way, they will have access to authentic proof of their incapacity.

177

It is essential that the Public Curator be notified of all appointments of testamentary tutors. If the Public Curator does not receive any deed of refusal in accordance with the preceding article, he will know that the appointed tutor has assumed office, and must submit himself to supervision by the Public Curator.

The starting point of the thirty-day period differs according to the form of the will; wills in authentic form are kept in a notary's office and are therefore very easy to find; this is not true, however, of wills in other forms, which may only be discovered some time after the death.

The term "will before witnesses" is taken from the Book on *Succession* (195).

178

This proposed article makes provision for cases where the testator has appointed several successive tutors. When the first tutor does not accept the duty, it is up to the notary or the prothonotary who drew up the deed of refusal to advise the substitute. The substitute might not be aware of his appointment, or the first tutor might fail to notify him, or might be unable to do so.

Like any other testamentary tutor, the substitute is presumed to have accepted. The period allowed him for refusal is shorter than that allowed the first tutor, since a whole series of formalities, including probate of the will, transmission of a copy of the will to the prothonotary by the first tutor, and so forth are presumed to have been dealt with.

179

If the testamentary tutor or his substitute refuses tutorship within the prescribed period, a dative tutor must be appointed under Article 168. If no one applies for commencement of tutorship, the Public Curator,

advised of the refusal submitted by the notary or the prothonotary, may apply for it.

The Public Curator may be appointed tutor, in accordance with Article 160, if no one accepts the office of tutor.

Section V

Protection of persons of major age

§ - 1 Tutorship and curatorship to persons of major age

180

Existing law allows for interdiction of persons of major age on grounds of imbecility, insanity, madness, prodigality, drunkenness, and drug addiction, according to Articles 325, 326, 336a and 336r of the Civil Code.

These criteria are outmoded because either they go too far, as in the case of drunkenness where it would be better to deintoxicate the person than to interdict him, or else, since the list is strictly restrictive, they make no provision for cases of serious illness, where the person absolutely should be protected (196). Moreover, the courts have often refused to interdict a person or to place him under a judicial adviser when the grounds invoked seemed insufficient. Thus, because a person administers property badly, this does not of itself justify his being placed under a judicial adviser (197); drunkenness must be extremely serious to warrant interdiction (198), and isolated acts of madness, or eccentricities, are not sufficient motivation for interdiction (199).

181

This article sets up the distinction between the two systems for the protection of persons of major age. Even though, in both cases, the grounds for applying a regime of protection are impairment of physical or mental faculties, and the inability to act for oneself, the degree of such impairment and inability may vary. If it is very high, the person must be represented, and is placed under tutorship. Moreover, the same distinction is present in existing law, since Article 343 C.C. provides that the curator of a person interdicted for imbecility, insanity or madness is tutor to that person, and represents the patient, while the curator of a person interdicted for prodigality or for habitual drunkenness does not represent that person.

The exercise of civil rights extends to all acts of civil life, including lawsuits relating to civil status. For example, the tutor of a protected person of major age might be required to act as defendant in divorce proceedings, or might even bring an action for disavowal of paternity, when the sick person obviously could not be the father of the child attributed to him. The Public Curator currently acts as defendant in divorce proceedings involving the sick persons he represents; this is very useful practice when applying for support payments.

182

This article establishes the other system for the protection of persons of major age, to be applied when such persons do not require representation, but must be assisted.

The Draft makes no provision for the commencement of protection on grounds of prodigality, drug addiction or drunkenness, unless such state is complicated by serious impairment of the person's mental or physical faculties.

It was pointed out that a prodigal person, drunkard or drug addict can endanger his property, and consequently the safety of his family. Still, it was felt that the proposed systems of protection were intended to protect the persons incapable of acting for themselves or in need of assistance, and not these persons' families, who have other ways of enforcing their rights, such as judicial separation as to property or application for support payments.

183

This article is based on Article 351 of the Civil Code, which allows the judge to define the powers of a judicial adviser. If he does so, the protected person may perform alone any acts the performance of which do not require the assistance of his adviser. This provision is intended to import the greatest flexibility to a regime applicable to persons who, although they act normally most of the time, are afflicted by dangerous manias.

184

The first paragraph repeats the principles in Articles 327 and 336b of the Civil Code, replacing the very long list of persons authorized to apply for interdiction by the provision that any interested person may so apply. In this way, the paragraph merely applies the principle in Article 169.

185

This article gives judges all the necessary power to select the system of protection that will best suit the case in question. Moreover, this principle is acknowledged in existing law; Article 881 of the Code of Civil Procedure allows a judge or a prothonotary to order a person placed under a judicial adviser rather than interdicted, if the circumstances so require.

186

This proposed article concerns situations where the court cannot pronounce judgment as to the system of protection needed by the sick person, and where it would be advisable to appoint a provisional administrator for that person's property.

187

The provisional administrator has powers of "simple administration", that is, he must perform "any acts required for the preservation of the property in a good state of repair and use for the purposes for which it is intended" according to the definition of simple administration proposed in the Title on *Administration of the Property of Others* (200).

The opinion was expressed that the provisional administrator should have full power, like the tutor who would eventually be appointed to administer the incapable person's property. There might be a risk in retaining any property likely to depreciate, and an administrator, even a provisional one, should be able to alienate such property whenever he deems it wise to do so.

It was, however, considered that, in view of the provisional nature of the administration, it seemed wiser not to allow the administrator to alienate any property entrusted to his administration.

188

Since any sick person's condition can change, it seemed desirable to give judges the power to revise their decisions accordingly. Obviously, this power of revision also includes the power to order *mainlevée* of the regime of protection.

The *Mental Patients Protection Act* (201) also follows this principle, since it provides for revision in the case of persons under close treatment.

The patient himself may institute proceedings, since he has the most to gain in having his full capacity restored (202).

The formalities accompanying *mainlevée* or change of protection are

the same as those governing commencement of such protection, in accordance with the principle in Article 884 C.C.P.

189

This article repeats Article 986 C.C.

190

This article repeats the principle of the second paragraph of Article 334 of the Civil Code, and specifies that any act performed by a person of major age after he is placed under protection is relatively null. This is the solution upheld by most writers, although jurisprudence has sometimes hesitated on this point (203).

It is considered that incapable persons are placed under tutorship to ensure their protection, not the protection of third parties who may contract with them.

191

This article restates the principle in Article 335 of the Civil Code.

The notorious nature of an illness could be assessed by the court, as in existing jurisprudence; moreover, notoriety has been defined by the Court of Appeal as "*la commune renommée qui fait la notoriété et qui pointe du doigt à tous et pour tout, le malheureux qu'on dit et qu'on juge être privé d'un usage suffisant de ses facultés*" (204).

The requirement of proof of the notoriety of the grounds for interdiction protects third parties in good faith who have contracted with the interdicted person (205).

The rules governing nullity of actions performed after a person is placed under tutorship are described in the preceding article.

Assimilation of acts committed prior to placing under protection to acts subsequent to this decision would have the advantage of terminating the controversy respecting the need to prove lesion in order to obtain nullity of the act (206).

192

This article restates the principle in the second paragraph of Article 334, and refers to the protection of minors as set down in Articles 113 and following. This is the rule currently applied to prodigal persons, drunkards and drug addicts (207).

193 and 194

These articles repeat, for persons of major age under curatorship, the rule in Article 114.

195

This article repeats, for persons of major age under curatorship, the rule in Article 120.

196

The first paragraph of this proposed article is the counterpart of Article 170 which states the same principle for tutors, and is justified by the same reasons.

The second paragraph repeats the principle in Article 337a of the Civil Code.

§ - 2 Tutorship to sick persons

197

This article is based on Section 6 of the *Public Curatorship Act* (208), but considerably broadens the scope of that section. That statute applies only to mentally ill persons incapable of administering their property.

It was considered desirable not to base the Public Curator's tutorship solely on incapacity to administer property. A sick person who has no property may still require protection. For example, the Public Curator, acting as tutor to the person, could take out a writ of *habeas corpus* when an institution might be detaining a patient for no reason.

198

In view of the seriousness of being placed under tutorship, it seemed desirable that the certificate which the director of professional services must submit to the Public Curator be accompanied by a reasoned recommendation in writing from a specialist.

199

Given the broader scope of the Public Curator's tutorship, it seemed necessary to provide that it could only be ordered by the court. Protection of civil rights requires that all precautions be taken before depriving a person of the exercise of his rights.

200

This article repeats part of paragraph 1 of Section 7 of the *Public Curatorship Act.*

201

This article repeats paragraph 2 of Section 7 of the *Public Curatorship Act.*

202

This article clarifies Article 200 which, for obvious reasons, does not give custody of the person to the Public Curator.

203

The first sub-paragraph of this proposed article is an application of Section 6 of the *Public Curatorship Act*, which provides that the Public Curator performs his duties solely with regard to sick persons who do not already have a tutor.

The second sub-paragraph provides for termination of the Public Curator's tutorship by a judicial decision such as the order for liberation provided for in Section 24 of the *Mental Patients Protection Act* or by *mainlevée* of tutorship, provided for in Article 188 in cases where the Public Curator exercises tutorship.

204

This article repeats the principle in Section 33 of the *Public Curatorship Act.*

§ - 3 Tutorship to absentees

205

This provision repeats the definition given in Article 86 of the Civil Code. It retains three elements provided for in existing law, namely domicile in Québec, disappearance and uncertainty as to whether the person is still alive.

206

This article follows the principle of Article 87 C.C.

Under the general principle of Article 169, any interested person, including the Public Curator, may present a motion for appointment of a tutor.

Failure of an attorney to act should be interpreted to cover cases in

which a known attorney does exist but lacks sufficient mandate to exercise some of the absentee's rights.

On the other hand, it was wondered whether, in the event of absence, the Public Curator should not be empowered to act as tutor *ex officio*. Indeed, Section 12(a) of the *Public Curatorship Act* provides that the Public Curator is *ex officio* the provisional administrator of the property of any absentee until a curator is appointed; he is also the provisional administrator of the proceeds of any insurance policy on the life of a person domiciled in Québec when the beneficiary under that policy cannot be located. Finally, under Section 12(c) of the same statute, the Public Curator is the provisional administrator of all property in Québec whose owner, or the heirs to which, remain unknown or cannot be located. The Public Curator thus has some power to act in cases of absence.

Nevertheless, it was considered difficult to set up an *ex officio* tutorship, because in the case of absentees it cannot be accurately foreseen when the tutor should assume his duties.

207

This suggested article constitutes a far-reaching reform of existing law, since it suggests that absentees be placed under genuine tutorship and no longer merely curatorship to the property.

208

The return of the absentee, a power of attorney issued by him and proof of his death are the traditional reasons for terminating curatorship to an absentee. These are provided for in Article 92 C.C.

In the new conception of this institution, the declaratory judgment of absence, provided for in Article 209, replaces both giving of provisional possession and giving of absolute possession.

It was questioned whether provision should be made for termination of tutorship if the absentee is proven to be alive. Failing his return or his power of attorney, it was thought preferable to continue the tutorship in order to protect the property of the absentee.

209

This proposed article is an example of the extensive simplification which has been brought to the notion of absence. The declaratory judgment of absence, based on the declaratory judgment of death provided for in Articles 70 and following of the Civil Code, replaces provisional possession, provided for in Article 93 C.C., and absolute possession, provided for in Article 98 C.C.

A period of seven years has been substituted for the thirty-year period provided for in Article 98 of the Civil Code. Considering the speed of modern communications, that period seemed sufficiently long to allow presumption that a person who has not been heard from is dead.

The seven-year period is inevitably an arbitrary one, although it has been deemed sufficient for payment of life insurance after the disappearance of the insured (a. 2529 C.C.) (209). It is also sufficiently long to permit a person whose consort is absent to remarry without being found guilty of bigamy (a. 254 Cr. C.) (210).

210

This proposed article is a sharp departure from existing law. Under Article 108 of the Civil Code, no spouse of an absentee may ever remarry unless he can produce positive proof of the death of his spouse. This principle can be considered out of date, since the courts have attenuated it to a marked degree. At present, any second marriage contracted by the spouse of an absentee, in violation of Article 108 of the Civil Code, is presumed valid; this presumption cannot be rebutted except by proof that the first marriage was still valid at the time the second was celebrated (211).

Furthermore, since the adoption of the *Divorce Act*, the spouse of an absentee may obtain a divorce after three years (212).

As a result of the suggested provision, a marriage contracted by the spouse of an absentee after the declaratory judgment of absence is rendered would remain valid.

The matrimonial regime is dissolved at the time the declaratory judgment of absence is issued, without the necessity of any special application, as provided for in Articles 109, 1266r and 1310 C.C. The dissolution would no longer have the provisional nature which these articles provide.

Possession becomes absolute, as under Article 98 C.C.

The second paragraph also departs from existing law. The presumption of death would take effect from the time of the declaratory judgment of absence, and not, as provided in Article 98 C.C., from the time the absentee leaves or the last news of him is received. After some hesitation, it seemed that, although the date of departure of the absentee was perhaps less arbitrary for determining the date of death, that of the declaratory judgment of absence was more certain.

On the other hand, the retroactive nature of the presumption would

have the effect of validating all irregular acts performed since the departure of the absentee.

A presumption established as of the day of the declaratory judgment would render unnecessary the procedure of Article 2529 C.C. regarding life insurance policies.

211

The first paragraph of this proposed article retains the principle of Article 103 of the Civil Code. The second paragraph has been added by incorporating the general rules in matter of succession.

212

The proposed article takes up the principle of Article 99 of the Civil Code, with modifications as to form, and specifies that the absentee's heirs are entitled to have his property turned over to them in its present state (213).

213

After long deliberations, it was decided to make an exception to Article 210 when the absentee is proven to have died on a date prior to the declaratory judgment of absence. In this event, distribution of the matrimonial regime may perhaps have to be readjusted.

It did not seem desirable to adopt the same rule when death occurs following the declaratory judgment of absence. It was not considered useful to go back on the decisions made with respect to dissolution of the matrimonial regime, and even less regarding the marriage itself (214). If the spouse of the absentee remarries after the declaratory judgment of absence, the marriage remains valid, even if the absentee dies after the declaratory judgment.

214

This is the counterpart of Article 105 in the chapter on *Acts of Civil Status*, which provides similar recourse if a person returns who has been the object of a declaratory judgment of death.

215

This proposed article incorporates the principle of Articles 101 and 102 of the Civil Code, providing for cases where a person put in possession has alienated property of an absentee and spent all or part of the price. It seemed hardly fair to make him repay the price, given the presumption that the absentee has died.

216

This article is based on the second part of the second paragraph of Article 73 C.C.

217

This article is based on Article 107 of the Civil Code, but expands the rule in that article to cover all rights which heirs given possession may exercise over the property of absentees.

The mere fact of learning that the absentee is still alive does not change these rights, if the absentee does not resume administration of his property himself, or through his mandatary.

This provision makes Article 107 of the Civil Code more specific in the light of Articles 411 and 412 C.C., which govern acquisition of fruits by possessors in good faith.

Under existing law, every person who acquires possession is considered to be in good faith as long as he has not learned through the courts that the absentee is still alive (215). Nevertheless, some doubt remains, which it is hoped the proposed text will dispel, since certain French authorities have maintained that good faith is extinguished at the time the person given possession learns that the absentee is alive (216).

218

This provision takes up the principle of Article 104 of the Civil Code, with textual modifications.

219

This article repeats Article 105 of the Civil Code.

220

This article takes up the principle of Article 106 of the Civil Code.

Section VI

Measures of supervision applying to tutorship

221 and 222

These articles repeat the rules in the fifth paragraph of Article 304 C.C.

They cover all judicial decisions and all transactions directly or indirectly related to a protected person's pecuniary interests. For example,

the Draft provides that the heirs to an intestate succession may apply, by motion, for the appointment of a person to administer that succession. If one of such heirs is under tutorship, the Public Curator must be advised of the decision.

223

This provision is new law; it is intended to avoid situations where property intended for a person under tutorship is remitted to his tutor until the tutor has provided security to ensure his good administration, in accordance with the following article.

The obligation to obtain authorization from the Public Curator before handing over to the tutor property due to the person under tutorship is encumbent on every person or body holding that property at the time when it must be transferred to the protected person. A testamentary executor, for example, would have seizin of the property in question until his mandate terminates, so he would not be bound by such an obligation until that time (217).

The rule does not apply to proceeds of the work done by a protected person, since minors are deemed of major age for the purposes of their work, in line with Article 118, and since persons of major age under tutorship retain the complete administration of the proceeds of their work accomplished under tutorship, under Article 149.

The exclusion of customary presents is based on tradition.

224, 225, 226 and 227

The purpose of these new provisions of law is to ensure effectiveness of the *a posteriori* supervision proposed in the Draft.

Article 224 repeats the obligation to make an inventory, laid down in Article 292 C.C.

The existence of a guarantee which ensures integrity of the protected person's patrimony makes it possible to allow the tutor a broad freedom of administration; at the same time, this guarantee is an effective means of ensuring that no errors of judgment which the tutor may commit would harm the protected person.

True, not everyone will be able to supply the guarantee required. It was considered preferable, however, that the administration of the protected person's property be entrusted to the Public Curator; this would be preferable to having persons with little experience in managing property for others run the risk of making mistakes and being compelled to pay damages, and perhaps wasting the protected person's property.

This preventive measure is in force in some Canadian provinces (218).

It would make possible avoidance of those unfortunate situations, still too frequent today, where the property of minors or of interdicted persons is frequently wasted by reason of inexperience and incompetence on the part of the tutor; when minors became of major age, or sick persons recovered, they would no longer have to choose between loss of their property and the institution of proceedings against a close relative.

There were some who expressed certain reservations with regard to Articles 224 and following, considering it exorbitant to require the tutor to furnish surety, the more so since Article 148 prevents testators and donors from allowing tutors to avoid the supervision of the Public Curator.

228

This article extends the obligation to make inventory, stated in Article 292 C.C., to property which devolves to persons under tutorship by gift.

The Law on Succession obliges executors to make an inventory (219). The reference to an article of the Book on *Succession* contemplates this provision.

229

In view of the importance of this inventory in the exercise of the Public Curator's supervision, it is logical that no tutor, executor or trustee should be able to ignore it. This principle is in conformity with the principles on administration of the property of others (220).

230

This article restates the principle in Section 31 of the *Public Curatorship Act.*

The question was raised as to whether tutors should not be exempt from making these financial statements when the fortune of the minor in question is small, for example, less than three thousand or five thousand dollars.

Nevertheless, in order to ensure the universality of the Public Curator's supervision, it was deemed preferable to require all tutors to submit financial statements, with the reservation that the Public Curator could exempt a tutor if the fortune of the protected person were really too small.

The wisdom was discussed of providing minors, who have reached the age of sixteen, with a copy of these statements in order to allow them to learn how to manage their affairs.

There were some who objected to this proposal, since they considered that even a child sixteen years old should not be made aware of the value of any property belonging to him, since this might provoke a change in his behaviour towards his parents or his tutor.

As a compromise, it was decided to allow a minor to demand a copy of the statement from his tutor.

231

The purpose of this provision is to preserve the fortune of the protected person, since one duty of an expert accountant is to determine whether or not the administration has been properly done. The fortune of the minor in question must necessarily be large enough if this requirement is to make sense, since the cost of such an audit is high.

The first idea was to fix a minimum of fifty thousand dollars. To avoid inserting figures, which would require periodic amendment, in the Civil Code, it was considered preferable that the amount be determined under the *Public Curatorship Act.*

Moreover, jurisprudence has already decided that the court, at its discretion, may require financial statements prepared by an expert accountant when the property of an interdicted person is considerable (221).

232

This article is a protective measure, since it prevents tutors from selling property for less than its value. This is all the more necessary since tutors would have all the powers of trustees over protected persons' property, and would no longer need to go through the formalities in Articles 885 and following of the Code of Civil Procedure.

With regard to shares quoted and negotiated on a known stock exchange, the price of these shares will be sufficiently well-known to make an assessment certificate unnecessary. In addition, stock prices change too quickly to make such a certificate useful.

The third paragraph is intended to avoid fractions being used to circumvent controls.

This provision is in line with Section 24 of the *Public Curatorship Act.*

233

This provision allows the Public Curator at all times to exercise adequate supervision and make continuing checks on tutors' books.

234

Like the preceding article, this provision is required to make the Public Curator's supervision effective.

235

Like any person administering the property of another, a tutor is obliged to render an account (222). The provisions on persons administering property for another are consistent with the principles of Articles 308 and 310 of the Civil Code.

All expenses incurred for the administration of the protected person's property are charged to that person (223).

In order to enable the Public Curator to close the file or to make another audit if the tutorship continues, the tutor must send him a copy of the final account.

This article restates the principle in Section 31 of the *Public Curatorship Act* (224) and Section 7.03 of the *Regulation* made under that statute, which compels tutors to submit an account to the Public Curator at the end of their administration. It is not at all the Public Curator's responsibility to approve such account. Such approval can only be given by the person for whom the account is made, namely a minor who has become of major age, a protected person whose regime of protection has terminated, or a new tutor who replaces the preceding one.

Remittance of any balance and of any interest is also dealt with in the Title on *Administration of the Property of Others* (225).

236

This provision is based on Section 32 of the *Public Curatorship Act* (226).

237

This article is one of concordance (see a. 535 C.C.P.), like Article 312 of the Civil Code, which it repeats, simply changing the wording.

238

From what we have been able to learn from the Public Curator, several private tutors and curators apparently do not fulfil the obligations imposed on them by existing law; this applies particularly to the

obligation to make an inventory and the obligation to send annual financial statements to the Public Curator. The penalty in such cases is dismissal of the tutor concerned; it seems, however, that even though a tutor might not be complying with the law, the courts would hesitate to dismiss him if he were adequately administering the property entrusted to him. It was then considered useful to provide a more effective means of ensuring that all tutors respect the obligations imposed on them.

The proposed article is intended not only to provide strict penalties for tutors who are negligent and unfaithful; it is also meant to convince the public of the serious nature of the responsibility placed on the shoulders of those who administer the property of protected persons.

239

It appeared essential to provide for fairly severe penalties for non-fulfilment of the obligation mentioned in Article 223; this is to avoid negligence on the part of persons holding property which should revert to a person under tutorship.

240

Acting on a suggestion from the Public Curator, it seemed wise to make provision for a penalty to cover cases where the obligation to advise the Public Curator is not fulfilled.

TITLE THREE

LEGAL PERSONS

CHAPTER I

GENERAL PROVISIONS

241

This article repeats Article 353 C.C., making certain changes.

It is not necessary to make provision for the manner of creating legal persons; the law will do this in each case.

242

This article is new. Registration will normally be made under the *Companies and Partnerships Declaration Act* (227), unless required under another law.

With respect to the sanction, it seemed sufficient to prevent the legal person from suing and to provide for inopposability of the personality.

243 and 244

These articles repeat the essence of Article 357 C.C., making it more flexible regarding the use of names.

A legal person has its own name. The laws governing the registration of these persons will regulate the choice of names and any conflicts (e.g. similitude). The use of a name other than the corporate name will make it possible to retain a separate name for an enterprise provided the legal person uses its own name in contracts (with the other name underneath if necessary) (228).

This possibility does not, however, remove the obligation to divulge the commercial name and all the separate names used by any enterprise and register them in the central register of enterprises and corporate names.

245

This article is new. It completes the provisions on domicile (a. 60 et s.).

246 and 247

These articles repeat Articles 359, 360 and 361 C.C., changing them regarding administration (229).

248

This article repeats Articles 358 and 360 C.C., adapting them to the rules generally accepted in corporate law (230).

249

The rule in this article is based on the law on civil and commercial partnerships. Members of a legal person are responsible for its debts. There are many exceptions to this rule, particularly with respect to limited partnerships, associations and corporations, regardless of whether they are non-profit organizations or not. Although because of these exceptions, the general rule will have limited application (specifically to partnerships), it will be important, nevertheless. It also confirms the historical rule that the limited responsibility of the members of a corporation results from a privilege conferred by the sovereign and not from the mere fact of juridical personality.

250 and 251

These articles are new. They are based on Section 248 of the Law of 24 July 1966 (France) concerning commercial corporations (*sociétés commerciales*).

They also constitute an application of the principle enunciated in Article 1053 C.C. which is repeated in Article 94 of the Book on *Obligations*.

252

This article is based on and simplifies Article 365 C.C.

Articles 366, 366a and 367 C.C. have not been reproduced, since special statutes will specify the other incapacities of legal persons. In some cases, their activity will require a permit (e.g. schools and hospital centres) or special authorization (e.g. public announcement).

Application of the second sub-paragraph is subject to the *Trust Companies Act* (231).

The *Mortmain Act* (232) should also be re-examined in relation to the reform of the *Companies Act* (233).

253

This article and the following deal with meetings of the members of legal persons. These articles make up the suppletive law governing legal persons whose incorporating acts or by-laws do not include provisions to that end. These articles will be repeated in specific statutes (c.f. the *Compagnies Act*), to be completed according to the needs of each type.

254

This article determines when meetings of the members of legal persons must be held. It gives recognition to the principle of the holding of annual and extraordinary meetings.

255

This article settles certain questions relating to the calling of meetings.

256

This article obliges directors to keep a register of members and allow consultation of it. The creditors are entitled to consult the register in view of their interest arising from Article 249.

257 and 258

These articles more clearly define the rules respecting a quorum.

259

Under this article, those members attending a meeting which was called previously during a meeting without a quorum may proceed with their meeting. Under this rule, meetings may be held when it is impossible to gather enough members to make up a quorum.

260

This article governs the case of legal persons made up of one member. The meeting may nevertheless be held in such cases.

261

The rule in this article is the same as that governing associations, co-operatives and non-profit corporations. There will be an exception to this rule in specific legislation respecting commercial legal persons (e.g. partnerships and corporations), where the vote is to be taken by shares or by stocks.

262

This article is based on modern corporation law, and under it, the holding of a meeting may be replaced by a resolution signed by all members; the mail may be used for this purpose. The holding of meetings of small groups is often an artificial procedure, and may be replaced to advantage in this manner.

263

This article allows members of a legal person to demand that a meeting be called if the directors neglect or refuse to call one.

264

This article establishes the directors' obligation to transmit annual financial statements to the members of the legal person (their obligation to render an annual account is established in the Title on *Administration of the Property of Others*). The same rule applies when changes are proposed to the act constituting the legal person or to its activity or enterprise; this requirement allows members time to consider these questions and to make more informed decisions.

265

This article removes possible confusion with respect to the delegation of votes.

266 and 267

These articles simplify but repeat the essence of Articles 368, 369 and 370 C.C.

Other statutes complete these provisions, in particular regarding the dissolution of corporations (see the *Winding-up Act*, and Article 832 C.C.P.)

268

This article substantially repeats Article 371 C.C., adding the criterion of solvency. Insolvent legal persons must be liquidated according to the rules governing bankruptcy. The procedure of voluntary liquidation of insolvent legal persons has been abused in an attempt to evade the more stringent rules governing insolvency.

The reference to the *Winding-up Act* will have to be amended, in view of the reform of corporate law.

269

This article is based on the law governing corporations and partnerships. The person subsists for all the purposes of its liquidation, notwithstanding its extinction.

270

This article partly repeats Article 371 C.C. The Book on *Succession* may be consulted regarding the procedure applicable in such cases.

CHAPTER II

CORPORATIONS

271

This article repeats the essence of Articles 352 and 363 C.C., adding the second part relating to the responsibility of the members, which is an exception to Article 37.

272

This article substantially repeats Article 353 C.C.

The preceding article seems to require this provision; a corporation must be created under a specific law, so *de facto* corporations cannot exist. See also Section 5 of the *Companies Act.*

273

This article extends the rule in Article 354 C.C. to cover all cases.

This article appears useful in that it removes any confusion regarding "aggregate" corporations of which only one member remains, and also in that it differentiates corporations from partnerships, which require more than one member. It also follows the current tendency towards reform of North American corporation law, abandoning excessive formality.

This article and Articles 275 to 278 should be in line with the act respecting commercial corporations in which they will be adapted to the particular circumstances of that type.

274

This article partly repeats Article 363 C.C. General law has been reworded in order to prevent any doubts in matters of corporate law.

A member of the corporation remains responsible for his contribution (e.g. the price of his shares or the value of his contribution). In

many cases, this will be minimal if the shares are issued only after they are completely paid for. If a member acts as a director, whether he has been elected or unanimously chosen by shareholders, or *de facto*, he is personally responsible.

275

This article is based on the *Companies Act*. It completes Article 246, which applies to all legal persons. Directors always represent legal persons, but the directors of corporations also have exclusive management of the internal affairs and activities of the corporation, through the board of directors. When the members (e.g. shareholders) reach unanimous agreement, they act in fact as directors.

This provision does not exclude the possibility of intervention by meetings of members or by the court; such cases will be governed by special legislation, as a means of exception or supervision of management. The principle here results from the autonomy of corporations in relation to their members, and follows naturally from the rule of limited responsibility of members.

Article 246 permits adoption of by-laws; this article specifies that they are to be adopted on the initiative of the board of directors, subject to unanimous agreement of members where applicable.

276

This article determines the number of directors; it also governs cases where there are very few members.

277

This article is based on Article 359 C.C. and on Section 100(2) of the *Canada Business Corporations Act* (234).

The term "members" will be clarified in special legislation governing the different types of corporations.

Thus, in business corporations, the shareholders vote by shares and not by head.

The fact that directors are not required to be members of the corporation would be new in Québec law, but it follows current developments in foreign legislation. The draft reform of Québec's *Companies Act* contains a provision to the same effect. Other statutes will have to be amended along similar lines.

278

This article applies to corporations the usual standards for access to administrative positions. The cases of bankrupt and insolvent persons are added, in line with corporation law.

No act drawn up contrary to this article is null for that reason, under the principle of the internal management of corporations (235).

279

This article is new. It fits into the framework of new ethics governing administration of corporations. Here again, no third parties may be affected by an action committed in violation of this article, since such an action is part of internal management.

280

This article, which is new in Québec law, is based on Article 91 of the *Loi française du 24 juillet 1966* respecting business corporations (*sociétés commerciales*). Under it, legal persons may act as directors of corporations; the article specifies that the physical person appointed director is personally responsible, solidarily with the legal person which remains responsible.

Anglo-Canadian law does not generally accept this type of provision (236).

281, 282, 283 and 284

These articles are based on Section 188 of the *Companies Act*, 1948, (U.K.)(237).

Apart from the penalties provided for the person at fault, there are no consequences for third parties, since this again is a question of internal management.

285

This article is based on Section 181 of the *Companies Act*, 1948, (U.K.).

286

This article is based on Section 101(3) of the *Canada Business Corporations Act.*

287

This article repeats Section 101(4) of the *Canada Business Corporations Act.*

288

This article is based on Section 101(5) of the *Canada Business Corporations Act.*

289

This article is based on Section 101(6) of the *Canada Business Corporations Act.*

290

This article substantially repeats Section 101(7) of the *Canada Business Corporations Act.*

291

This article is based on Section 111 of the *Canada Business Corporations Act.*

It removes any possible doubt as to whether a corporation could imply that its directors are qualified to act.

292

This article substantially repeats Section 116 of the *Canada Business Corporations Act.* It will be completed by special legislation governing corporations and by internal statutes of corporations. See also the Title on *Administration of the Property of Others* with respect to delegation, and to the responsibility of those who delegate and those to whom authority is delegated.

CHAPTER III

LEGAL PERSONS IN PUBLIC LAW

293

This article is new, but merely inserts already acquired rules into the Code.

294

This article is new, but confirms practice.

Some consider that the provisions governing the Crown's responsibility should appear in a special statute. However, because of the general nature of these provisions, they are easily inserted into the Civil Code. The judgment in *J.E. Verreault & Fils Ltée v. Le Procureur Général de la*

Province de Québec (238) seems to support this view. This provision has effect notwithstanding Section 42 of the *Interpretation Act* (239).

295

This article clarifies the concept of servant of the Crown, thus removing a problem of interpretation.

296

This article is new. Of course, discretionary power may always be exercised, and the Crown is not responsible as a result.

297

This article is partly new. It is intended to fill a gap in existing law. It completes the Book on *Obligations* with respect to the responsibility of the Crown, particularly as it concerns a damaging act by a member of the Québec Police Force acting as peace officer. The courts have ruled that a peace officer, in the performance of his duties, is no longer acting as a servant of the municipality which employs him, even if he remains generally under its control (240).

298

This article states a more flexible version of a rule common to many public legal persons.

(1) See *An Act to again amend the Civil Code and to amend the Act to abolish civil death*, S.Q. 1971, c. 84, s. 2.

(2) S.Q. 1971, c. 6, sanctioned on 27 June 1975 and came into force on 28 June 1976, Q.O.G. 23 June 1976, No. 28, p. 3875.

(3) See, on this subject, H., L. et J. MAZEAUD, *Leçons de droit civil*, Les personnes: la personnalité, 5th ed., by M. de JUGLART, Paris, Montchrestien, 1972, t. 1, vol. II, No. 531 et s., p. 551.

(4) S.Q. 1969, c. 64.

(5) R.S.Q. 1964, c. 7.

(6) S.Q. 1968, c. 70.

(7) S.Q. 1965, c. 77.

(8) See for example, aa. 29, 30, 149, 161, 270, 325 of the Swiss Civil Code; a. 32 et s. of the Ethiopian Civil Code, drafted by René David; aa. 1353, 1616, 1706 of the West German Civil Code; aa. 6 to 8, 149, 262 of the Italian Civil Code. In France, see the laws of 6 fructidor an II, 11 germinal an XI, 10 February 1942, 3 July 1963, 12 July 1975, which constitute a fairly complete legislation concerning names (*Code civil Dalloz*, a. 57). It should also be observed that the preliminary draft of the French Civil

Code contains a complete regulation on names. See aa. 204 to 223 of the *Avant-projet de Code civil*, handed in to the Minister of Justice by the Commission de Réforme, Paris, Sirey, 1955.

(9) C.C.R.O., 1975, XXXV.

(10) Ontario Law Reform Commission, *A Woman's Name*, A Study Paper, Toronto, 1975.

(11) DALLOZ, *Nouveau répertoire de droit*, 2nd ed., Paris, 1964, *Vo* nom-prénom, No. 21, p. 427; H., L. et J. MAZEAUD, op. cit., p. 551; PLANIOL et RIPERT, *Traité pratique de droit civil français*, 2nd ed., Paris, Librairie Générale de Droit et de Jurisprudence, 1952, t. I, p. 128 to 130.

(12) See S.G. PARENT, *Le nom patronymique dans le droit québécois*, doctoral thesis, Laval University, Québec, 1951, p. 174; P. AZARD and A.F. BISSON, *Droit civil québécois*, Ottawa, Presses de l'Université d'Ottawa, 1971, t. I, No. 52, p. 67; L. BAUDOUIN, *Les aspects généraux du droit privé dans la Province de Québec*, Paris, Dalloz, 1967, p. 160 et s.

(13) S.Q. 1965, c. 77.

(14) See *Débats de l'Assemblée législative du Québec*, 2 April 1965, p. 1830 et s.

(15) See Article 68; see also, in the schedule, the draft law to govern the Registrar of Civil Status.

(16) See, on the concept of transsexualism, D.H. RUSSELL, *The Sex-Conversion Controversy*, (1968) 279 New England Journal of Medicine 535, and R.J. STOLLER, *Sex and Gender,* New York, Science House, 1968, p. 132. The causes of transsexualism are unknown: see J. MONEY, *Sex Reassignment as Related to Hermaphroditism and Transsexualism* in R. Green, J. Money ed., *Transsexualism and Sex Reassignment*, Baltimore, The Johns Hopkins Press, 1969, p. 112-113.

(17) See *An Act to Amend the Vital Statistics Act*, S.B.C., 1973, c. 160, s. 3.

(18) See *The Vital Statistics Amendment Act*, S.A., 1973, c. 86, s. 2.

(19) S.N.B. 1975, c. 27.

(20) Press conference given by Mr. Frank Muldoon, Chairman of the Manitoba Law Reform Commission, published in the Montreal Star, 18 August 1972.

(21) On the question of change of sex, see R.P. KOURI, *Certain Legal Aspects of Modern Medicine*, (Sex Reassignment and Sterilization), doctoral thesis, McGill University, September 1975.

(22) See the statistics contained in the work of the *Colloque sur la transsexualité* organized by the Department of Sexology of the Université du Québec, Montreal, 18 April 1975, particularly in J. BUREAU, J.P. TREMPE and L. JODOIN, *Transsexualité: catégorie, diagnostic ou expérience d'un individu*, multicopied text, p. 5.

(23) See A. MAYRAND, *L'inviolabilité de la personne humaine*, Montreal, Wilson & Lafleur, 1975, p. 34; see, also, R.P. KOURI, *Comments on Transsexualism in the Province of Quebec*, (1973) 4 R.D.U.S. 4, p. 167; E. GROFFIER, *De certains aspects juridiques du transsexualisme dans le droit québécois*, (1975) 6 R.D.U.S. 115, p. 148; D.L. HEALY, *The legal problems of sex determination*, (1977) XV Alberta L. Rev. 122.

(24) See, particularly, *D. et L. et le Procureur général de la Province de Québec*, S.C. (Montreal, 14-000528-73) 17 May 1973.

(25) See, on this subject, J.G. CASTEL, *Les conflits de lois en matière de régimes matrimoniaux dans la province de Québec*, (1962) 22 R. du B. 233, p. 253 et s.; *Lister v. McAnulty*, [1944] S.C.R. 317; *Winnycka v. Oryschuc*, [1970] C.A. 1163.

(26) See Taylor v. Taylor, [1930] S.C.R. 26, conf. (1928) 45 B.R. 184; *McMullen v. Wadsworth*, (1889) 14 A.C. 631, conf. (1887) 12 S.C.R. 466, rev. (1886) 2 M.L.R. 113 (Q.B.); *Ingelsberger v. Molho*, [1971] C.A. 699.

(27) G. TRUDEL, in *Traité de droit civil du Québec*, Montreal, Wilson & Lafleur, 1942, t. I, p. 235 and the references given; W.S. JOHNSON, *Conflict of Laws*, Montreal, Wilson & Lafleur, 1962, p. 61 et s. and the references given.

(28) See the references in footnote 26 and also, in particular, *Trottier v. Rajotte*, [1940] S.C.R. 203, rev. (1938) 64 K.B. 484 (sub nom. *X v. Rajotte*), conf. (1936) 74 *S.C. 569; Smith v. Martin*, (1944-45) 48 P.R. 386 (S.C.); *Fonds d'indemnisation des victimes d'accidents d'automobile v. Dame Rahima*, [1969] Q.B. 1090.

(29) *Election Act*, R.S.Q. 1964, c. 7, s. 2, amended by S.Q. 1965, c. 12, s. 1, and S.Q. 1972, c. 6, s. 3; *Youth Protection Act*, R.S.Q. 1964, c. 220, s. 1, amended by S.Q. 1971, c. 48.

(30) *Taxation Act*, S.Q. 1972, c. 23, s. 8, amended by S.Q. 1972, c. 26, s. 32 and S.Q. 1974, c. 18, s. 1; *Health Insurance Act*, S.Q. 1970, c. 37, s. 4, replaced by S.Q. 1973, c. 30, s. 3.

(31) See, for example, *Convention sur la loi applicable aux obligations alimentaires envers les enfants*, (signed on 24 October 1956, a. 1); *Convention concernant la compétence des autorités et la loi applicable en matière de protection des mineurs*, (signed on 5 October 1961, aa. 4 and 5); *Convention on the Conflicts of Laws Relating to the Form of Testamentary Dispositions*, (signed on 5 October 1961, a. 1); *Convention on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoptions*, (signed on 15 November 1965, a. 3); *Convention on the Recognition of Divorces and Legal Separations*, (concluded 1 June 1970, a. 2 et s.); *Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations* (signed on 21 October 1972); *Convention on the Law Applicable to Maintenance Obligations*, (signed on 28 March 1973). These various Conventions are published by the *Bureau Permanent* of the Hague Conference.

(32) See the *Report of the Royal Commission on the Status of Women in Canada*, Ottawa, Information Canada, 1970, p. 267 et s.

(33) *An Act respecting the legal capacity of married women*, S.Q. 1963-64, c. 66.

(34) R.S.C. 1970, c. D-8, s. 6(1).

(35) *Domicile and Matrimonial Proceedings Act*, 1973, c. 45, s. 6; see, on this subject, T.C. HARTLEY and I.G.F. KARSTEN, *The Domicile and Matrimonial Proceedings Act 1973*, (1974) 37 Modern L.R. 179.

(36) Article 108 C.C.

(37) See, *supra*, footnote 25.

(38) See, particularly, *Brien dit Desrochers v. Marchildon*, (1898) 15 S.C. 318; *Lemay v. Dignard et Lepage*, (1927) 65 S.C. 103; *Lister v. McAnulty*, *supra*, footnote 25; *Pouliot v. Cloutier*, [1944] S.C.R. 284; *McMullen v. Wadsworth*, *supra*, footnote 26.

(39) See a. 26 of the Book on *Private International Law*.

(40) See Article 180 et s.

(41) See Articles 39 to 78j C.C.

(42) Title XX, aa. 7-18: ISAMBERT, *Recueil général des anciennes lois françaises*, t. XVIII, p. 137-140.

(43) *Déclaration concernant la forme de tenir les registres des baptêmes, mariages, sépultures ... et des extraits qui en doivent être délivrés*, ISAMBERT, *ibid.*, t. XXI, p. 405-416.

(44) The various legislative measures adopted on this subject since the end of the 18th century have been gathered and placed in the *Act Concerning the Registry of Marriages, Births and Burials*, R.S.L.C. 1861, c. 20, s. 16 and 17.

(45) Second Report of the Commissioners for Codification, Québec, Desbarats, 1865, t. I, p. 156.

(46) S.Q. 1967-68, c. 82.

(47) S.Q. 1969, c. 79, amended by S.Q. 1970, c. 61, s. 1, adopted following a report submitted by the Civil Code Revision Office.

(48) In France, *Décret* No. 60-285 of 28 March 1960 for acts of death; in New York State, Public Health Law, McKinney's, Book 44, s. 4130(3) (birth) and s. 4141(4) (death).

(49) See, in this respect, *Public Health Protection Act*, S.Q. 1972, c. 42.

(50) *Burial Act*, R.S.Q. 1964, c. 310, s. 1, replaced by s. 59 of the *Public Health Protection Act*, S.Q. 1972, c. 42.

(51) See Article 111 et s.

(52) See JEAN CARBONNIER, *Droit civil*, 8th ed., Paris, P.U.F. 1969, t. 2, No. 125, p. 365. The growing importance of protection of persons, as compared to the traditional protection of patrimony, is stressed in a report of the National Institute on Mental Retardation, *Mental Retardation - The Law - Guardianship,* Toronto, National Institute of Mental Retardation, 1972, edited by B. Swadron and D. Sullivan, p. 186.

(53) See J.-G. CARDINAL, *Les actes du mineur sont-ils nuls?* (1959-1960) 62 R. du N. 195, p. 197; see also, J. PINEAU, *La famille*, Montreal, P.U.M., 1972, No. 225. See also, the proposed Alberta law reform in "*Minor's Contracts*", Institute of Law Research and Reform, Report No. 14, University of Alberta, 1975. For a draft reform founded more on protection of minor persons than on their capacity, see Law Reform Commission of British Columbia, *Report on Minors' Contracts*, Dept. of Attorney-General, 1976.

(54) See the Book on *The Family*, Article 9.

(55) *An Act to again amend the Civil Code*, S.Q. 1971, c. 85.

(56) See a. 314 et s. C.C.

(57) P. AZARD and A.F. BISSON, *Droit civil québécois*, Editions de l'Université d'Ottawa, 1971, No. 149, p. 291. See also, A. COSSETTE, *Le droit civil des années 1970*, (1970-71) 73 R. du N. 594, p. 597.

(58) *Introduction à l'étude de la réforme*, in *La réforme de l'administration légale, de la tutelle et de l'émancipation*, 2nd ed., by E. BLONDY and G. MORIN, extract from the Répertoire du notariat, Paris, 1967, p. 7.

(59) See references under comments on Article 126.

(60) Testamentary tutorship, in fact, exists in many foreign statutes and was recommended by the Ontario Law Reform Commission (see comments on Article 126).

(61) See the Book on *Property.*

(62) See B. GAGNON, *La tutelle et la curatelle assurent-elles une protection efficace pour le patrimoine d'un incapable?*, (1969) 29 R. du B. 601, p. 603; as an example of the uselessness of the role of the subrogate tutor, see also, *Lebourdais v. Boisvert*, [1974] S.C. 10.

(63) See P. AZARD and A.F. BISSON, *op. cit.*, No. 149, p. 295; see also J. CARBONNIER who mentions similar problems in France prior to the *Loi du 14 décembre 1964*: "*On renonçait par principe à constituer les tutelles tant c'était une montagne de rassembler six parents*". Préface, *op. cit., supra*, footnote 60.

(64) S.Q. 1971, c. 81.

(65) See The Book on *The family*, Article 42.

(66) See, though, *Perrier v. Perrier*, [1970] C.A. 133 and L. PATENAUDE, *Capacité (Tutelle et Curatelle)*, Librairie de l'Université de Montréal, 1974-75, p. 129.

(67) See, J. CARBONNIER, *Droit civil, op. cit.*, t. 2, No. 163, p. 506.

(68) See *Mental Retardation - The Law - Guardianship, op. cit.*, p. 3; see, also, L.M. RAYMONDIS, *Quelques aperçus sur une réforme des services psychiatriques*, Paris, L.G.D.J., 1966, p. 23 et s.; J. BARRIERE, *Droit à la santé et politique psychiatrique*, (1970) 30 R. du B. 282.

(69) See a. 349 C.C. et s.

(70) See M. LAUZON, *Quid novi chez les absents?*, (1972) 32 R. du B. 132.

(71) See the works of the Conference of Commissioners on Uniformity of Legislation in Canada, (1972) Proceedings, p. 154 to 177; (1974) Proceedings, p. 215 to 220.

(72) *Divorce Act*, s. 4(1)(c). This ground for divorce was retained in the provisions of the Book on *The Family*, a. 241.

(73) S.Q. 1972, c. 44, amended by *An Act to amend the Mental Patients Protection Act*, S.Q. 1974, c. 43.

(74) R.S.Q. 1964, c. 271.

(75) S.C. 1975, c. 33.

(76) On this subject, see P.B. MIGNAULT, *Traité de droit civil canadien*, t. 1, 1895, p. 132-133; G. TRUDEL, in *Traité de droit civil du Québec*, t. 1, 1942, p. 112; J.L. BAUDOUIN, *Les Obligations*, 1970, No. 181 et s., p. 107 to 109. See also the *Charter of human rights and freedoms*, S.Q. 1975, c. 6.

(77) See Article 125 et s.

(78) *Ibid.*

(79) See also the *Mortmain Act*, R.S.Q. 1964, c. 276.

(80) See *Civil Code of Lower Canada*, lst Report of the Commissioners, 1865, t. 1, p. 14-15, regarding Article 41 (a. 1022 C.C.).

(81) On this subject, see A. MAYRAND, *L'abus des droits en France et au Québec*, (1974) 9 R.J.T. 321; D. ANGUS, *Abuse of rights in contractual matters*, (1961-62) 8 McGill L.J. 150; L. MAZEAUD, *La responsabilité dans l'exercice d'un droit*, (1956) 58 R. du N. 369.

(82) On extra-contractual matters, see *Connelly v. Bernier*, (1924) 36 B.R. 57; *Air-Rimouski Ltée v. Gagnon*, [1952] S.C. 149; *Blais v. Giroux*, [1958] C.S. 569; *Brodeur v. Choinière*, [1945] S.C. 334. Also on contractual matters, *Quaker Oats Co. of Canada Ltd v. Côté*, [1949] B.R. 389; *Fiorito v. The Contingency Insurance Co. Ltd*, [1971] S.C. 1; *Ph. Beaubien et Cie Ltée v. Can. Gen. Electric Co. Ltd*, S.C. (Montreal, 05-779, 426-69) 7 Oct. 1976.

(83) See, in particular, the Swiss Civil Code, a. 2 par. 2; the Ethiopian Civil Code, a. 2032; the Czech Civil Code, a. VI; the Polish Civil Code, a. 5; the Hungarian Civil Code, a. 5; the West German Civil Code, a. 226.

(84) [1958] S.C. 152. See also, *Field v. United Amusements Corp. Ltd*, [1971] S.C. 283; *Deschamps v. Automobiles Renault Canada Ltée*, S.C. (Montreal 05-818-140-71) 24 Feb. 1972; *Rebeiro v. Shawinigan Chemicals (1969) Ltd*, [1973] S.C. 389.

(85) See the *Protection of Privacy Act*, S.C. 1973-74, c. 50.

(86) *Privacy Act*, S.M. 1970, c. 74.

(87) S.B.C. 1968, c. 39.

(88) M. LINDON, quoted in J. MALHERBE, *La vie privée et le droit moderne*, Paris, Librairie du Journal des notaires et des avocats, 1968, p. 14.

(89) See, on this subject, L. BAUDOUIN, *Les aspects généraux du droit privé dans la province de Québec*, Paris, Dalloz, 1967, p. 147 et s; E. DELEURY, *Une perspective nouvelle: le sujet reconnu comme objet de droit*, (1972) 13 C. de D. 477; F. HELEINE, *Le dogme de l'intangibilité du corps humain et ses atteintes normalisées dans le droit des obligations du Québec contemporain*, (1976) 36 R. du B. 2; M. LAUZON, *Chroniques régulières*, Personnes, (1972) 32 R. du B. 410; A. MAYRAND, *L'inviolabilité de la personne humaine*, Montreal, Wilson & Lafleur, 1975.

(90) See, concerning autopsy provided by law, the *Coroners Act*, S.Q. 1966-67, c. 19, s. 12 par. 2, 37; *Study of Anatomy Act*, R.S.Q. 1964, c. 250, s. 4 par. 3. Regarding this, it is to be observed that there is no concordance between Article 21 (a. 23 C.C.) and Article 3.9.3. of the Regulation O.C. 3322 of 8 November 1972 made under the *Act respecting health services and social services*, S.Q. 1971, c. 48, Q.O.G. 25 November 1972, vol. 104, No. 47, p. 10566, on p. 10583.

(91) See, on this subject, A. MAYRAND, *op. cit.*, No. 131, p. 172.

(92) Res. 1386 (XIV) adopted 20 November 1959.

(93) See Section 39: "Every child has a right to the protection, security and attention that must be provided to him by his family or the persons acting in their stead".

(94) See, also, the jurisprudence on this subject, particularly: *Marshall v. Fournelle*, [1927] S.C.R. 48; *Dugal v. Lefebvre*, [1934] S.C.R. 501; *M. v. D.*, [1966] S.C. 224; *M. v. C.*, [1968] S.C. 219; *Twynam v. McGuire*, [1971] S.C. 640; *Morin v. Gagnon*, [1973] S.C. 279.

(95) See A. MAYRAND, *op. cit.*, No. 55 et s., p. 70 et s. Also, in Common Law, K.M. WEILER and K. CATTON, *The Unborn Child in Canadian Law*, (1976) 14 Osgoode Hall L.J. 643.

(96) P. AZARD and A.F. BISSON, *op. cit.*, No. 49, p. 61.

(97) See the Book on *The Family*, Article 41.

(98) In Ontario, *The Vital Statistics Act*, R.S.O. 1970, c. 483, s. 6, was

amended in 1976 to permit parents to register their children under double surnames, so long as the husband's name comes first.

(99) M. OUELLETTE-LAUZON, Chroniques régulières, *Recommandations de l'O.R.C.C. concernant le nom et l'identité physique de la personne humaine*, (1976) R. du B. 408.

(100) See P.B. MIGNAULT, *Le Droit civil canadien*, Montreal, Théorêt, 1896, t. 2, p. 138; J. CLARKE, *De la situation juridique des enfants naturels*, (1952) 5 Thémis 14, p. 17; J. PINEAU, *La situation juridique des enfants nés hors mariage*, (1973) 8 R.J.T. 209, p. 212.

(101) See P. AZARD and A.F. BISSON, *op. cit.*, No. 49, p. 61.

(102) See the Book on *The Family*, Article 273.

(103) See Article 72.

(104) See a. 243 C.C.; see P. AZARD and A.F. BISSON, *op. cit.*, No. 51.

(105) *Adoption Act*, s. 8 and Article 312 of the Book on *The Family*.

(106) See Article 72.

(107) See S.G. PARENT, *op. cit.*, p. 56-57; J. PINEAU, *La famille*, Les Presses de l'Université de Montréal, 1971, No. 192, p. 175.

(108) See the comments and recommendations of the Royal Commission on the Status of Women on this subject, *Report of the Royal Commission on the Status of Women in Canada*, Ottawa, Information Canada, 1970, p. 226 and 461.

(109) This usage is seemingly becoming more popular, see in this regard, M. LEGARE, *L'exactitude du nom en matière d'acte notarié*, (1976) 79 R. du N. 202, p. 204.

(110) See J. BEETZ, *Attribution et changement du nom patronymique*, (1956) 16 R. du B. 56, p. 59; see, also, *Harris v. Bosworthick*, [1966] S.C. 82 (Mag. C.).

(111) This system exists in several countries. See, especially, in Poland, Family Code, aa. 23 and 88; in Rumania, as well and in East Germany, there are similar systems; see V. COLE, *La femme mariée, évolution récente de sa condition en droit et en fait; Europe orientale*, in *Travaux du 9ième colloque international de droit comparé*, Editions de l'Université d'Ottawa, 1971, p. 195 et s.

(112) The proposed legislation only mentions the change in sexual appearance rather than a change of sex, for it seems at this time scientifically impossible to change a person's sex, see H. BENJAMIN, *The Transsexual Phenomenon*, New York, Science House, 1968, p. 46; J. RANDELL, *Pre-operative and Post-operative Status of Male and Female Transsexuals* in R. Green, J. Money, ed., *Transsexualism and Sex-Reassignment*, *op. cit.*, 355, p. 367; *Corbett v. Corbett* (Otherwise Ashley), (1970) 2 W.L.R. 1306, (Prob. C.) p. 1323, 1324 and 1325 (Ormrod J.).

(113) For example, Alberta, under the *Vital Statistics Amendment Act*, S.A. 1973, c. 86, s. 2 and British Columbia, under the *Act to Amend the Vital Statistics Act*, S.B.C. 1973, c. 160, s. 3, allow the entry of the sex in acts of birth to be changed after "sexual conversion".

(114) Also, our medical services would not be overloaded by an influx of transsexual foreigners; see E. GROFFIER, *De certains aspects juridiques du transsexualisme dans le droit québécois*, (1975) 6 R.D.U.S. 114, p. 148.

(115) The laws of British Columbia have similar requirements. See the *Act to Amend the Vital Statistics Act*, S.B.C. 1973, c. 160, s. 3.

(116) See G. BRENT, *Some Legal Problems of the Postoperative Transsexual*, (1972-73) 12 J. of Family Law 405, p. 410-413.

(117) It seems that the passport office of the federal Department of External Affairs is willing to furnish passports entering the new sex if all other passport conditions are met and a medical certificate indicating the nature of the operation is supplied. See G. BRENT, *loc. cit.*, p. 406.

(118) See P. AZARD and A.F. BISSON, *op. cit.*, No. 50, p. 64; S.G. PARENT, *op. cit.*, p. 182 et s.; T.P. SLATTERY, *The Meaning and Effect of Article 56a C.C.*, (1953) 13 R. du B. 23, p. 24; see, in French law, Civ. 19 June 1961, D. 1961. 544 (Affaire Boissy d'Anglas).

(119) See A. and R. NADEAU, *Traité pratique de la responsabilité civile délictuelle*, Montreal, Wilson & Lafleur, 1971, No. 206, p. 223 and the jurisprudence mentioned.

(120) See, specifically, *Fonds d'indemnisation des victimes d'accidents d'automobile v. Dame Rahima*, [1969] Q.B. 1090 and the other references mentioned in the Introduction, *supra*.

(121) See, specifically, *Taylor v. Taylor*, [1930] S.C.R. 26, conf. (1928) 45 K.B. 184; *Trottier v. Rajotte*, [1940] S.C.R. 203, rev. (1938) 64 K.B. 484 (sub nom. *X v. Dame Rajotte*), conf. (1936) 74 S.C. 569.

(122) See specifically, Article 5 of the *Convention pour régler les conflits entre la loi nationale et la loi du domicile*, concluded 15 June 1955, in *Recueil des Conventions de la Haye*, 1973.

(123) See The Book on *The Family*, Article 353.

(124) Some decisions provide that a child is domiciled with his parents even when he is residing with his tutor: *Keane v. The Pembroke Lumber Co. Ltd.*, (1924) 27 P.R. 55 (S.C.); *Elliott et J. Pilkington v. Protestant School Municipality of Ste. Therese*, [1951] S.C. 395; in favour of this solution, see G. TRUDEL, in *Traité de droit civil du Québec*, Montreal, Wilson & Lafleur, 1942, t. I, p. 248. Other decisions consider that a minor is domiciled with his tutor: see, specifically, *Dumulong v. Claing*, [1969] P.R. 274 (S.C.); also, P.B. MIGNAULT, *Droit civil canadien*, Montreal, Théorêt, 1896, t. I, p. 236 et s.

(125) See Article 136.

(126) *Drouin v. Néron,* [1955] S.C. 287; *Drouin v. Dumoulin,* [1955] P.R. 277 (S.C.); *Morin & Cie Ltée v. Gagné,* [1954] P.R. 388 (S.C.).

(127) See in Schedule IV.

(128) S.Q. 1975, c. 63, a. 12.

(129) See the Book on *Private International Law*, Article 77.

(130) See s. 38 of the *Public Health Protection Act.*

(131) See the Book on *The Family*, Article 19.

(132) On this subject, see the Book on *The Family*, Article 235.

(133) See Article 210.

(134) See, for a synopsis of current opinions, J.-G. CARDINAL, *Durée de la minorité*, (1958-59) 61 R. du N. 128, p. 134 et s.; see, also, L. PATENAUDE, *op. cit.*, p. 100.

(135) See P. AZARD and A.F. BISSON, *op. cit.*, No. 145; J.-L. BAUDOUIN, *Les Obligations*, P.U.M., 1970, No. 189.

(136) See J.-G. CARDINAL, *Les actes du mineur sont-ils nuls?*, (1959-60) 62 R. du N. 195, p. 197; J. PINEAU, *op. cit.*, No. 225.

(137) See the Book on *Obligations*, Article 28.

(138) *Ibid.*, Article 37.

(139) See, in this respect, *Rosemont Realty Co. v. Boivin*, (1921) 31 K.B. 40; *Moreau v. Veilleux*, (1923) 35 K.B. 279; *Aubin v. Marceau*, (1932) 70 S.C. 408; *Lepage Automobile Ltée v. Couturier*, [1956] S.C. 80; *Marcel Grenier Automobile Enrg. v. Thauvette*, [1969] S.C. 159.

(140) See J.-L. BAUDOUIN, *op. cit.*, No. 153 et s., p. 91 et s.; G. TRUDEL, *op. cit.*, t. 7, p. 227 et s.

(141) See Article 1008 C.C. and, on the subject, *Châteauneuf v. Couture*, [1970] S.C. 412; *Renzi v. Azeman*, [1959] S.C. 170; *Gérard v. White*, [1954] S.C. 149; *Larivière v. Morin*, (1931) 37 R.L. 8 (S.C.).

(142) See Article 37.

(143) See the Book on *Property*, Article 509.

(144) See Article 54.

(145) See Article 49.

(146) See *Lepage Automobile Ltée v. Couturier*, [1956] S.C. 80; *Garage Girard v. Hénault*, [1963] S.C. 253; *Demers v. La Cie Hector Meunier Ltée*, (1926) 32 R.L. 222 (S.C.).

(147) See *Charbonneau Auto Ltée v. Therrien*, [1967] R.L. 251 (Prov. C.).

(148) See, for an example in jurisprudence, *Ouellet v. Tremblay*, [1957] S.C.

351. See, also, A. and R. NADEAU, *Traité pratique de la responsabilité civile*, Montreal, Wilson & Lafleur, 1971, No. 70 et s.

(149) See *Caisse Populaire des Saints Martyrs Canadiens v. Robillard*, [1970] R.L. 354 (Prov. C.); *Caisse Populaire de Lanoraie v. Dalcourt*, [1969] R.L. 182 (Prov. C.).

(150) See H. DE MESTIER DU BOURG, *Réflexions à propos des nouveaux articles 1262 et 1263 C.C.* (Bill 10), (1971) 2 R.D.U.S. 89.

(151) See P. AZARD and A.F. BISSON, *op. cit.*, p. 281; also, *Turbide v. Tremblay*, (1927) 65 S.C. 254; *Gaudreault v. Gendron*, [1974] C.A. 33.

(152) See P. AZARD and A.F. BISSON, *op. cit.*, No. 146, p. 277 et s.

(153) See J.-G. CARDINAL, *L'acte judiciaire du mineur*, (1959) 19 R. du B. 273; see, also, P. AZARD and A.F. BISSON, *op. cit.*, No. 147, p. 249 et s.; *Brousseau v. Hamel*, [1968] Q.B. 129; see, however, *Tantalo v. Klaydianos*, [1970] S.C. 331 (Prov. C.).

(154) These differing opinions recall the lively debate in the National Assembly during the adoption of the corresponding section in the *Public Health Protection Act*, *Journal des Débats*, 1972, vol. 12, No. 74, p. 2635 et s.; see, also, the works of the Commissioners of the Uniform Law Conference of Canada (1973) Proceedings, p. 24 and 228, (1974) Proceedings, p. 29 and 116.

(155) See, for the law of the Common Law Provinces, W.F. BOWKER, *Experimentation on Humans and Gift of Tissue: Articles 20-23 of the Civil Code*, (1973) 19 McGill L.J. 163, p. 172; see, also, in Alberta, *An Act to Amend the Infants Act*, S.A. 1973, c. 43.

(156) See P.-A. CREPEAU, *Le consentement du mineur en matière de soins médicaux ou chirurgicaux selon le droit civil canadien*, (1974) 52 Can. Bar Rev. 247, p. 254.

(157) See P.-A. CREPEAU, *loc. cit.*, p. 249 et s.

(158) See the *Report on the Family Court*, C.C.R.O., 1975, XXVII, p. 60 et s.

(159) See A. MAYRAND, *L'inviolabilité de la personne humaine*, Montreal, Wilson & Lafleur, 1975, No. 53, p. 66.

(160) *Youth Protection Act*, R.S.Q. 1964, c. 220, s. 45.

(161) *Immigrant Children Act*, R.S.Q. 1964, c. 219, s. 9.

(162) *Indian Act*, R.S.C. 1970, c. I-6, s. 52.

(163) See, in particular, France, a. 397 C.C..; Belgium, a. 397 C.C.; Spain, a. 199 C.C.; West Germany, a. 1777 C.C.; Greece, a. 591 C.C. and England, *Guardianship of Minors Act*, 1971, s. 4.

(164) M. LEGARE, *Quelques considérations sur la nouvelle tutelle*, (1976) 78 R. du N. 475.

(165) See the *Report on Family Law*, Part III, Children, Toronto, Ontario Law

Reform Commission, Ministry of the Attorney-General, 1973, p. 118 et s. At present, the Ontario law seems unclear as to the power of parents to appoint a testamentary tutor. One judicial decision holds that this power was abolished in 1923 by an amendment to the *Infants Act*, (*An Act to Amend the Infants Act*, 13 and 14 Geo. V, c. 33, ss. 2(2)): *Re Doyle*, [1943] O.W.N. 119, (Surr. Ct of the County of Haldimand), while another holds that the power still exists: *Re McPherson Estate*, [1945] O.W.N. 533 (High Ct).

(166) See, on this subject, *Dame D'Ambrosio v. Fusco*, (1929) 35 R.L. 431 (S.C.); *Papista v. Langlois*, [1967] P.R. 13 (S.C.).

(167) See P. AZARD and A.F. BISSON, *op. cit.*, p. 308.

(168) See, on this subject, *Charron v. Brosseau*, [1953] Q.B. 762; but see *Béland v. Lacasse*, (1924) 62 S.C. 264.

(169) See Section 37.

(170) See P. CIOTOLA, *Démission volontaire du tuteur - Validité*, (1974) 76 R. du N. 301; see, also, *Ozenc v. MacLeod*, [1973] S.C. 701.

(171) See, on this subject, L.P. SIROIS, *Tutelle et curatelle*, Québec, Imprimeries de l'action sociale, 1911, p. 13; *Lacasse v. Hardy*, (1908) 34 S.C. 247.

(172) See Articles 63 and 64.

(173) See *Re Hector Proulx*, [1953] S.C. 224.

(174) See L.P. SIROIS, *op. cit.*, p. 127.

(175) See Section 7.

(176) See, on this subject, *Lebourdais v. Boisvert*, [1974] S.C. 10.

(177) See the Book on *Obligations*, Article 352.

(178) See on this subject, *Gilbert v. Gilbert*, [1942] S.C. 193; *Savoie v. Pomerleau*, (1935) 73 S.C. 403.

(179) See the Book on *Property*, Article 574 et s.

(180) See Article 168.

(181) See P. AZARD and A.F. BISSON, *op. cit.*, p. 287; P. CIOTOLA, *Démission volontaire du tuteur - Validité*, (1974) 76 R. du N. 301; *Ozenc v. MacLeod Junior*, [1973] S.C. 701.

(182) See *An Act to Amend the Public Curatorship Act and the Mental Patients Protection Act*, S.Q. 1974, c. 71, s. 13.

(183) *Ibid.*

(184) See Article 512 of the Book on *Property*.

(185) *Ibid.*, a. 522.

(186) See the Book on *Property*, a. 582.

(187) *Ibid.*, a. 558 et s.

(188) *Ibid.*, a. 556.

(189) See, in France, a. 389 C.C.; in West Germany, a. 1626 C.C.; in Spain, a. 159 C.C.

(190) See *Le droit civil de la Province de Québec*, Montreal, Wilson & Lafleur, 1953, p. 292.

(191) See the Book on *The Family*, Article 42.

(192) See the Book on *The Family*, Article 43.

(193) See Article 221 et s.

(194) See the Book on *Property*, Article 566.

(195) See the Book on *Succession*, Article 270.

(196) See J. PINEAU, *op. cit.*, No. 290; *Dupré v. Papillon*, (1936-37) 40 P.R. 321 (S.C.); *Thibodeau v. Dufort*, [1956] R.L. 376 (S.C.); *Yelle v. Crevier*, [1962] Q.B. 654.

(197) See *Taller v. Kwechansky*, [1964] P.R. 99 (S.C.).

(198) See *Charron v. Montreuil*, (1936-37) 40 P.R. 297 (S.C.).

(199) See *Chatelle v. Chatelle*, (1912) 21 K.B. 158.

(200) See Article 499 of the Book on *Property*.

(201) See Section 24.

(202) See, on this subject, *Leduc v. Frères de la Charité*, (1910) 11 P.R. 138 (S.C.); *Morel v. Brown*, [1960] S.C. 100; *Delorme v. Tétrault*, (1923) 61 S.C. 454; *Bouchard v. Bastien*, (1910) 19 S.C. 507.

(203) See J. PINEAU, *op. cit.*, No. 300, p. 240; P.B. MIGNAULT, *op. cit.*, t. 2, p. 283; G. TRUDEL, in *Traité de droit civil du Québec*, 1942, t. 2, p. 402; L.P. SIROIS, *op. cit.*, No. 533; J.-L. BAUDOUIN, *Les obligations, op. cit.*, No. 195, p. 111; but see *Augé v. Forget et Lupien*, [1967] S.C. 412.

(204) See *Dubois v. Lussier*, [1949] R.L. 388 (K.B.); see, also, in the Supreme Court, (sub nom. *Rosconi v. Dubois*), [1951] S.C.R. 554, notes by Taschereau, J., p. 573.

(205) See *Warren v. Béland*, [1964] S.C. 129.

(206) J.-L. BAUDOUIN, *op. cit.*, No. 196, p. 112.

(207) See, on this subject, *Grégoire v. Heppel*, [1951] K.B. 229.

(208) Amended by the *Act to amend the Public Curatorship Act and the Mental Patients Protection Act*, S.Q. 1974, c. 71.

(209) This article replaces the former a. 2593a C.C., by reason of the adoption of the *Act Respecting Insurance*, S.Q. 1974, c. 70.

(210) See *Savard v. Metropolitan Life Insurance*, [1971] S.C. 631.

(211) See *Owad v. Poliskewycz*, [1967] S.C. 234.

(212) See Section 4(1); see, also, the Book on *The Family*, Article 241.

(213) See P. AZARD and A.F. BISSON, *op. cit.*, No. 56, p. 77.

(214) Alberta's *Family Relief Act*, R.S.A. 1970, c. 134, s. 3, is to this effect.

(215) See G. TRUDEL, *op. cit.*, t. 1, p. 336.

(216) See, for example, *Répertoire de droit civil*, 2nd ed., Paris, Dalloz, mise à jour 1973, *Vo* Absence, No. 181.

(217) See the Book on *Succession*, Article 349.

(218) In Manitoba, *Child Welfare Act*, S.M. 1974, c. 30, s. 110 (1); in Saskatchewan, *Infants Act*, R.S.S., 1965, c. 342, s. 27; in Ontario, *Infants Act*, R.S.O., 1970, c. 222, s. 17. Apparently, in Alberta, the Public Trustee administers all the property himself: *Public Trustee Act*, R.S.A. 1970, c. 301, s. 7.

(219) See the Book on *Succession*, Article 343.

(220) See the Book on *Property*, Article 517.

(221) On this subject, see *Bessette v. Pelletier*, [1957] S.C. 13.

(222) See Article 587 of the Book on *Property*.

(223) *Ibid.*, a. 590, see a. 310 C.C.

(224) The obligation to send the Public Curator a copy of the account was inserted in Section 31 by the *Act to amend the Public Curatorship Act and the Mental Patients Protection Act*, S.Q. 1974, c. 71, s. 12.

(225) See Article 592 in the Book on *Property*.

(226) Amended by L.Q. 1974, c. 71, s. 13.

(227) R.S.Q. 1964, c. 272.

(228) See also the *Canada Business Corporations Act*, S.C. 1975, c. 33, s. 10(5) and (6).

(229) See the Book on *Property*, Article 509.

(230) See the *Canada Business Corporations Act*, s. 16(2)-(3) and 18.

(231) S.Q. 1964, c. 287.

(232) R.S.Q. 1964, c. 276.

(233) R.S.Q. 1964, c. 271.

(234) See Section 97(1); see, also, Articles 359, 360 and 361 C.C.

(235) See Article 291 and *Royal British Bank v. Turquand*, (1856) 119 E.R. 886.

(236) *Company Law Reform* (1962), *Jenkins Report*, Cmnd 1749, 1962, par. 85(d).

(237) See, also, *Company Law Reform*, *op. cit.*, par. 85(b) and (c); *Company Law Reform*, (Dep't. of Trade & Industry, 1973, Cmnd 5391), p. 14, Nos 36-37.

(238) (1975) 5 N.R. 271.

(239) R.S.Q. 1964, c. l.

(240) See, specifically, *Cité de Montréal v. Plante*, (1923) 34 K.B. 137; *Hébert v. Cité de Thetford-Mines*, [1932] S.C.R. 424; *Roy v. City of Thetford-Mines*, [1954] S.C.R. 395; *Cie Tricot Somerset Inc. v. La Corporation du village de Plessisville*, [1957] Q.B. 797. See, also, L. GIROUX, *Municipal Liability for Police Torts in the Province of Quebec*, (1970) 11 C. de D. 407.

BOOK TWO

THE FAMILY

INTRODUCTION

Québec's family institutions were already several centuries old when they were consolidated in the 1866 Code. These institutions embodied a certain concept of conjugal union based on the legitimacy of the marriage bond, on marital authority, and on the wife's dependence and submission and on paternal authority.

Since the beginning of this century, the family unit has been basically transformed following the social upheavals caused by accelerated scientific progress and by urbanization. The primary change has undoubtedly been the evolution of the family from a larger unit, including all the relatives, to the so-called "nuclear family" which comprises only the father, mother and children (1). The progressive disintegration of the patriarchal concept of the family is seen in the emancipation of married women and in the liberation of children from the authority of the head of the household (2).

This evolution has not been an entirely smooth one (3). Nevertheless, the institution of the family in its various aspects remains of primary importance: "*Les observateurs ont déjà parlé de la dissolution de la famille. Nous admettons maintenant que la famille ne disparaît pas; en fait, elle change, s'adapte et se façonne de nouveaux cadres, mais toujours elle conserve les fonctions essentielles d'intégrer ses membres dans la société, de socialiser les enfants et de stabiliser les relations entre l'homme et la femme*" (4).

A complete reform of family law was begun in Québec during the nineteen-sixties, and parts of this reformed law have already come into force. These include the declaration, in 1964 (5), of the principle of the legal capacity of married women; the solemnization of civil marriage, in 1969 (6), and, in the same year (7), a major reform of matrimonial regimes; in 1970 (8), certain rights were granted to natural children and to their parents, and finally in 1971 (9), the age of majority was lowered and provision was made for the legitimation of adulterine children through their parents' subsequent marriage.

These partial reforms must be viewed within the broader context of the work being done by the Civil Code Revision Office (10), with a view to providing Québec with modern law and structures to govern families.

From the beginning, two important characteristics should be noted.

First of all, the proposals disregard the constitutional problem. This problem results from a situation which is rather complex. On the one

hand, most of the provisions pertaining to family law were actually incorporated into the Civil Code in 1866, one year before the proclamation of the British North America Act (11). On the other hand, the Constitution of 1867 provided for a sharing of legislative powers between the Federal Parliament and the provincial legislatures. For instance, according to paragraph 26 of Section 91 of the B.N.A. Act, marriage and divorce were placed under federal jurisdiction, whereas, under Section 92, the solemnization of marriage (par. 12) and property and civil rights (par. 13) remained under provincial jurisdiction. Moreover, under Section 129 of the B.N.A. Act, the laws in force in 1867 were to remain in force until amended by the competent authority.

Thus, today, the Civil Code contains some provisions which clearly come under federal jurisdiction and others which are unquestionably under that of the provinces.

Still others, such as separation as to bed and board, fall into an ill-defined no-man's land (12).

Finally, other questions raise special problems as to legislative authority, according to whether they are considered autonomous matters or treated as accessory measures to a divorce suit. This applies to decisions concerning custody of children, to support (alimentary pensions), and in the opinion of some authors, to liquidation of financial connections between consorts (13).

Thus, this question is exceedingly complex, and even the specialists on constitutional law do not all agree (14).

In any event, no real family law reform can be imagined without first acquiring an overall concept of the subject and co-ordinating its different aspects into a logical whole; a comprehensive Draft was needed corresponding to what family law of the future could be.

On the other hand, unanimity is difficult to reach on any reform which has such an impact on everyday life, influenced as it is by each person's firm convictions. This is why the comments resume the controversy caused by some provisions, both within the Office (15) and among the persons and organizations who offered their comments. The Office received many and varied opinions. The Draft was revised in the light of these opinions.

Considering the fact that family law, perhaps more than any other law, must strive to reflect the realities of everyday life, the Civil Code Revision Office ordered a considerable amount of research made into Québec law and comparative law, as well as sociological research on the

economic, moral, family and social problems which separated couples must face (16). This research was assisted by a grant awarded by the Vanier Institute of the Family and the Québec Social Affairs Department.

Consultations were also held with a number of persons specialized in marriage problems, in filiation (17), and in adoption (18), as well as psychiatrists and social workers (19).

This Draft is based on the principle of legal equality of consorts, a principle which served as a basis for the 1964 draft on the legal capacity of married women (20), which was proclaimed in the *Charter of Human Rights and Freedoms* (21). This principle is the basis of all relationships between consorts. Far from being detrimental to family unity, such equality tends to strengthen it by requiring complete co-operation between the consorts in the moral and material supervision of the family. It does, of course, entail a redefinition of their respective roles, not only within the family but in society as well (22).

This collegiality obviously presumes recourse to an outside arbitrator whenever the consorts or the parents cannot agree on decisions to be made. In certain quarters, it was felt that the Draft would give rise to a *ménage à trois* in which the judge would have the power of decision (23). Although entrusting a judge with the task of settling differences between consorts, rather than giving one consort precedence over the other, might be seen as restricting the couple's autonomy, the disavantages of such a situation are amply compensated for by the advantage of creating a partnership in which both consorts are equally responsible for the harmony and stability of the family they have founded.

Moreover, there is no great need for concern over court interference in family affairs, because this Draft has been prepared within the framework of a parallel reform of the administration of family law, to be brought about by the establishment of a Family Court (24) provided with specialized auxiliary services. It is to be hoped that such a court will encourage settlements between consorts under the best conditions, whether through conciliation or through more enlightened court decisions which take into consideration the particular nature of the conflict. Although the establishment of this court is not a *sine qua non* condition for putting the proposed family law reform into force, it should ensure its more effective application. Moreover, the Draft provides for conciliation between consorts in every domain possible.

The Draft is based as well on two other important principles: the abolition of all discrimination between illegitimate and legitimate

children (25), and protection of the interest of children in all decisions concerning them (26).

Finally, an effort was made to establish procedures for putting proposed policies into practice effectively.

Besides recognizing these main guidelines, namely children's interest, equality of consorts and of parents, and conciliation, the Draft is intended to adapt family institutions to the realities faced by modern Québec families, and, where necessary, to simplify them.

So, in Title One, having clarified a few points in chapter I, on the legal value of promises of marriage, it is intended to simplify the conditions required for contracting marriage (chapter II). Two major reforms should be noted in this field: first, the minimum age for contracting marriage is raised to eighteen (27), a change proposed in the light of comparative law and justified by the excessively high failure rate of premature marriages (28), and second, prohibitions of marriage are reduced to a few major impediments, mostly of a biological nature.

The procedure for opposing marriage has been both broadened and simplified.

Chapter IV, covering solemnization of marriage, attempts to adapt the formalities necessary for solemnization to the modern system of acts of civil status, proposed in the Draft (29). Fundamentals such as the public nature of the ceremony and the conditions of competence of the officiant remain unchanged. However, the publication of marriage banns which is deemed ineffective would be abolished. Verification of the consorts' capacity to contract marriage is tightened in order to restrict the number of invalid marriages as much as possible.

In the chapter devoted to them, an attempt has been made to make the provisions on nullity of marriage consistent with those relating to impediments to marriage, by specifying in each case whether the nullity is of an absolute or a relative nature. Moreover, the general desire to avoid the unpleasant consequences of the nullity of marriage for the children involved has been respected. Also, the consequences of nullity with respect to matrimonial regimes and gifts between consorts have been clarified.

The effects of marriage are presented as a single subject with three main sections: the respective rights and duties of the consorts, protection of the family residence, and matrimonial regimes (30).

The rights and duties of consorts are based largely on Articles 173 and following of the Civil Code, which were amended when the *Act respecting the legal capacity of married women* (31) and the *Act respecting*

Matrimonial Regimes (32) were adopted. The intention was to clarify the existing articles and extend equality of consorts to cover those areas where it was not complete, particularly as regards the choice of the family residence, which is still now the husband's right (a. 175 C.C.), and the obligation for household expenses, still predominantly the husband's responsibility (a. 176 C.C.).

The obligation to contribute to the household expenses has been extended to *de facto* unions. It seemed that in this area the Civil Code, like social law (33) should take realities into account. *De facto* unions, though perhaps more tenuous, are often as stable as marriages. It was therefore deemed advisable to offer solutions to the legal problems such unions inevitably create, and to regulate the rights and duties of *de facto* consorts with regard to third parties and, to some extent, with regard to each other.

The proposed introduction of *de facto* unions in the Civil Code has been the object of numerous and varied comments. Most of them favoured introducing some regulation governing the effects of *de facto* unions. On the other hand, the extent of regulation is highly controversial. Some favour giving personal commitment greater importance. Others wish to avoid any institutionalization of the *de facto* unions, and merely to settle some specific problems; and they fear that the vocabulary used in the Draft, for instance "*de facto* consorts" instead of "concubines" and "*de facto* unions" instead of "concubinage", might cause *de facto* unions to be viewed as an institution recognized by civil laws.

In the light of these comments, it was considered advisable to retain a minimum regulation concerning the effects of *de facto* unions, particularly the contribution toward household expenses or the presumption of a *de facto* husband's paternity.

Also it seemed wise to discard the prohibition of gifts beyond support. This prohibition seems excessive when a donor has no legitimate consort, and the provision under which contracts intended to create or perpetuate a *de facto* union are declared contrary to public order is quite sufficient. The legitimate consort of any donor, like other creditors for support, may exercise a Paulian action to have the gift annulled (34).

Moreover, it seemed impossible to limit the definition of *de facto* unions to persons who are able to marry. On the other hand, a certain continuity and stability were deemed essential for any *de facto* union. Although pension laws and certain others require a period of seven years (35), no duration was set, since it would necessarily have been arbitrary.

Finally, the expression "*de facto* union" was retained as it is in

current use and does not carry with it the pejorative meaning that concubinage has acquired.

With regard to management of the family patrimony it seemed more practical to allow either consort to obtain a judicial mandate to administer the property of the other, whenever the other is prevented from doing so. No such procedure exists at the moment.

A draft dealing with protection of the principal family residence, submitted to the Minister of Justice in 1971 (36), is included in the chapter pertaining to the effects of marriage. Essentially, this draft attempts to check the right of either consort to dispose, contrary to the interests of the family, of the building which serves as the principal family residence or to dispose of his right in the lease, and also to remove any furniture he owns from the conjugal domicile.

The technique advocated is not entirely new, since Article 1292 of the Civil Code forbids a husband common as to property to sell, alienate or hypothecate any immoveable property of the community and furniture in use by the household, without the concurrence of his wife. A similar provision forbids the wife to alienate the immoveables and furniture in use by the household, which are reserved property, without the concurrence of her husband (a. 1425a C.C.).

The Draft extends to all matrimonial regimes the protection already granted under community of property. However, it covers only furniture in use by the household, and the building used as the principal family residence. In order to inform third parties surely and effectively that a certain immoveable is being used as the family residence, registration of a declaration of residence is required against such immoveable.

All the provisions in the chapter concerning the effects of marriage should be of public order, to constitute a true "primary regime" governing all consorts. Nevertheless, it seemed desirable to make an exception regarding the contribution to household expenses so as to allow consorts to determine it in their matrimonial agreements.

Chapter VIII, devoted to matrimonial regimes, has a two-fold objective:

1. to review, some years after they came into force, the articles respecting partnership of acquests which might have given rise to certain difficulties of interpretation;
2. to reflect, in all the provisions of the Civil Code respecting matrimonial regimes, the principle of equality between consorts.

First, the Draft attempts to clarify certain provisions respecting the

characterization of the property of consorts married under the regime of partnership of acquests. Installment purchases, proceeds from insurance policies (37) and retirement pensions, as well as intellectual ownership rights, in particular, have given rise to difficulties which have been taken up by doctrine and are mentioned in the comments on the draft articles.

The advisability of retaining Article 1266h C.C. which considers the proceeds of an "alimentary allowance" to be an acquest (38) was also considered; however, in the absence of any dispute on the issue, it seemed preferable to leave the text as it now stands.

The date on which any modified matrimonial regime comes into effect was also stipulated (39).

The most significant modification concerns the technique of compensation in partnership of acquests, which has been changed to make it more favourable to acquests in practice.

The principal reform made to the regime of community of property is to bring it into line with the concept of equality of consorts.

At present, under the regime of community of property, the two consorts assume different roles which they are not free to determine themselves once the regime has been chosen. On the one hand, the husband is necessarily the administrator of the community and he must ask his wife's consent before performing certain acts (a. 1292 C.C.); on the other hand, the wife may renounce the community (a. 1388 and following C.C.) according to certain procedures, and manages the proceeds of her work (a. 1425a and following C.C.).

Two possibilities were considered.

The first consists in making the community a partnership administered by the consorts simultaneously. In this manner, acts of administration performed by one partner would bind the other, while the participation of both partners would be necessary to perform acts of alienation.

The second possibility consists in allowing the consorts to choose an administrator for the common property when the regime takes effect, indicating this in their contract, and allowing a change of administrator during the regime, provided that the requirements proper to the conventional change of regime after marriage are respected. In this case, the administrator would render an account on demand, and the spouse could not renounce the community. Under this formula, the concept of reserved property would also disappear.

Both these solutions have disadvantages. Joint administration seemed little suited to the needs of everyday life. On the other hand, under

the second formula, the spouse of the administrator has little protection against possible bad administration. His only recourse is to apply to the court for judicial separation of the property, and such an application could endanger the marriage itself.

After long consideration, it was finally decided to adopt the option of choosing the administrator of the community, but to reserve to the spouse of the administrator the right to renounce the community and accumulate reserved property.

This solution does not give both consorts identical roles. Nevertheless, it seems the fairest for a regime which is merely conventional and which, moreover, the consorts may adapt as they wish, within the limits established in Article 69 in the Book on *The Family*.

Because of this basic change in the administration of the regime, many articles of the Code had to be amended by replacing "the wife" by "the spouse of the administrator".

For the remainder, the amendments made to the articles on community of property are intended to simplify the regime or solve problems of interpretation or terminology.

Finally, the proposals in the Book on *Succession*, to abolish the rule in Article 624c of the Civil Code and to increase the share of the surviving spouse, rendered the institution of the usufruct of the surviving spouse unnecessary.

A few transitional provisions now in the Civil Code have also been removed from the Draft. They are mentioned in one of the schedules.

A final remark is necessary: chapter VIII is part of the complete reform of family law and some of the proposed amendments are merely the consequence of the revision of the Civil Code chapters respecting the obligations arising out of marriage, and the rights and duties of the consorts respectively. Thus, Articles 1262, 1263, 1341, 1434 and 1435 referring to minority, tutorship and curatorship have been amended or even deleted as a result of the reforms proposed in the Draft.

A long chapter deals with the relaxation and dissolution of the marriage bond. It seemed preferable to deal with separation as to bed and board and with divorce together, especially since the measures incidental to these two institutions and their effects are already combined in the Civil Code. Moreover, it did not seem necessary to provide for grounds for separation as to bed and board which differ from those for divorce, considering that both cases required remedies for painful matrimonial

situations in which cohabitation had become impossible, rather than the infliction of penalties on the guilty consort.

Although there are characteristics common to both institutions, it seemed advisable to retain separation as to bed and board which, since it does not abolish the marriage bond, offers a solution better adapted to persons who still hope for reconciliation or who, for religious or moral reasons, do not wish to resort to divorce.

The question also arose as to whether there was sufficient reason to provide, as does the French Civil Code (40), for automatic conversion of separation into divorce upon the request of either consort; it was finally decided that the advantages were not important enough to warrant this rule being retained.

The results of the sociological research made under the direction of the Civil Code Revision Office (41) led to favour divorce as a remedy. It was concluded that, above all, the court must have broad discretion and be supplied with all possible means to help solve the problems which consorts must face during proceedings for separation or for divorce (42). "*Il n'y a pas de loi du divorce idéale, mais on peut obtenir des progrès dans les relations humaines et conjugales si l'on a le souci pragmatique des conséquences et si l'accent porte sur l'aspect problème-solution plutôt que sur l'évaluation des responsabilités*" (43).

With this in mind, it seemed indispensable to accept to some extent, agreements between consorts in a *de facto* separation. Articles 237 and following specify the conditions under which such agreements may be considered valid.

The grounds for divorce and for separation as to bed and board have been greatly simplified (a. 240 et s.). The expediency of providing for divorce by mutual consent was discussed and, following deliberation, it was decided to impose, under judicial control, a one-year delay.

Only the details of provisional and accessory measures were improved. A radical change, however, was made as regards the effects of divorce and of separation as to bed and board on gifts between consorts. It was considered unfair to deprive either consort of the gifts *inter vivos* provided for in his marriage contract (a. 208 C.C.); such gifts, generally provided for under a regime of separation as to property, constitute compensation for his renunciation of a regime which might prove more favourable at the time of liquidation, such as community of property or partnership of acquests. No court may deprive any consort of his share of the community or of the other's acquests, regardless of the circumstances of the divorce or the separation.

Finally, some provisions of the *Divorce Act* have been omitted because they will appear elsewhere in the Draft Civil Code, or because they cannot be transferred into provincial law as they now stand. This is the case, for example, of Sections 14 and 15, concerning the legal effect throughout Canada of divorces and provisional and accessory measures. Such measures could remain in a federal statute or yet again be the object of agreements for reciprocal enforcement with the other provinces in order to facilitate recognition and enforcement of divorce decrees and provisional and accessory measures as much as possible throughout Canada.

The title devoted to filiation reflects the culmination of a long evolution towards the recognition of equality of rights among all children, regardless of circumstances of birth (44). The proposed reforms are intended to consecrate this principle which seems generally accepted today.

One chapter deals with the establishment of filiation, both paternal and maternal, with disavowal, and with proof of filiation. It was thought desirable to insert a second chapter into the Civil Code containing provisions to govern adoptive filiation.

To remedy as much as possible what is considered an injustice to children born out of wedlock, the current legal distinctions between legitimate children, legitimated children, natural children, and incestuous or adulterine children have been eliminated.

With respect to establishing the bond of filiation, the Draft retains, for the purpose of facilitating the proof of paternal filiation, the presumption that the father of any child born to a married woman is the husband of the mother. It also proposes that birth, and not conception, during marriage, be taken as the basis for this presumption (45).

A similar presumption of paternity would apply in *de facto* unions to the man cohabiting with the mother when the birth takes place.

Since the presumption of paternity is necessarily arbitrary, it appeared that it could be of either a biological or a psychological nature. Is it in fact not reasonable to believe that a man who marries a pregnant woman, or who starts living with her, is the father of her child or, at least, that even if he is not the father, he agrees to treat the child as his own? Consequently, the presumption of paternity would apply as much to a child born less than one hundred and eighty days after the solemnization of the marriage or the commencement of the *de facto* union as to a child born after this time.

The Draft also provides more flexibility in the rules on disavowal and

allows a mother the possibility of contesting her husband's paternity, or that of her *de facto* consort. It also takes into account the effect of artificial insemination on the different rules.

The establishment of filiation regarding children born out of wedlock is facilitated, since it would be proven in the same manner as that of legitimate children, namely, by entering the names of both parents on the act of birth, or, failing such an act, by uninterrupted possession of status.

Concerning the effects of filiation, the Draft continues the reform, begun in 1969 by the *Adoption Act* (46), which rules that an adoptive child becomes, in all respects and with respect to all, the legitimate child of the person who adopts him, and which grants to any child whose filiation is established all the rights currently granted only to legitimate or adoptive children.

Adoption, as another form of filiation, is given its rightful place in the Civil Code; this is done in the other Civil law countries (47).

Current law on the matter which had already been reviewed on the basis of a draft prepared by the Civil Code Revision Office, has been revised. In the opinion of professionals in the social service centres whose task it is to administer this law - the old adoption societies - some of its provisions create practical problems which the Draft is intended to solve, in an effort to establish a delicate balance between the child's own interests, those of the original family, and those of the adoptive parents.

It is therefore proposed that adoption may take place merely with the consent of the parents. This innovation would do away with the period of *de facto* abandonment established in current law as regards a child no longer wanted by his parents or whose parents are no longer able to care for him; such period is one year in the case of a legitimate child and six months for a natural child. A delay for withdrawing consent, followed by a period for an application for legal recovery, would allow the blood parents to protect their own interests and would at the same time shorten the period of time during which the adoptive parents would remain at the mercy of a change of heart on the part of the original parents. This provision is intended to prevent, as far as possible, the painful disputes which sometimes occur at present (48).

Conditions respecting the adopting and adopted persons are also made somewhat more flexible, taking into account the fact that no adoption can take place unless in the child's own interest, which is determined by the court in accordance with the Title on *Juridical Personality* (49). Specifically, the conditions pertaining to identical religion and to identical sex between the adopted child and the adopting

parent, where only one person is adopting, have been abolished since these are two of the many criteria taken into consideration by the judge in assessing the child's own interest. Next, the elimination, as far as possible, of cases of "tacit abandonment", quite numerous in fact, was dealt with. Here, the children cannot be adopted because their parents, even though no longer taking care of them, have not indicated any intention of abandoning them. A legal declaration of adoptability on request of a social service centre or of the person entrusted with the care of the child could bring an end to this state of uncertainty.

It also seemed necessary to regulate the effects of adoption in situations where it arises through the action of a new spouse of the child's mother or father. It appeared in certain cases justifiable to retain visiting rights for the divorced spouse and rights of succession for the child in his original family.

Finally, an effort was made to simplify and clarify adoption procedure. One important change, the right of appeal, has been added.

It appeared desirable to gather together in one special title all the rules concerning the obligation of support, at present scattered throughout the Civil Code.

It is difficult to explain why such rules are included in the chapter on *Effects of Marriage*, since the obligation of support which results from marriage is not the only one of its kind. An obligation of support also exists between parents and natural children, and it was considered wise to institute a limited obligation of support between *de facto* consorts.

The obligation of support was adapted to the evolution of the family and of social laws. It seemed impossible to ignore the fact that the State takes it upon itself to direct income distribution much more fully and efficiently than it did in the last century. Consequently, it was considered opportune to reduce the circle of persons entitled to support. This is now limited to parents and children in the direct line, consorts between themselves, divorced consorts or consorts whose marriage has been annulled, if the court so decides, and, in a more restricted way, to de facto consorts.

The Title on *Parental Authority* completely changes the principles behind the present chapter of the Code on paternal authority which seems to give the parents all the rights and the children all the duties. The suggested changes are in keeping with the spirit of the *Declaration of the Rights of the Child*, adopted by the United Nations (50).

This entire Title must be read in the light of Article 24 of the Book on

Persons, which provides that "every child is entitled to the affection and security which his parents or those who act in their stead are able to give him, in order to ensure the full development of his personality".

Paternal authority has given way to parental authority. This change, which moreover reflects the progress in existing law (51), results from the principle of equality of consorts, recognized in the Draft and confirmed in the *Charter of Human Rights and Freedoms* (52). The rights which parents share in full equality are vested in them only to ensure that they fulfil their duties. This is a new formulation of the concept of authority, not a weakening of that concept.

As Dean Ph. Garigue wrote:

> "*La nécessité de maintenir une relation entre les générations est l'argument principal pour établir des règlements ou des législations qui maintiennent la relation parentale et la valorisent*" (53).

If parents abuse their authority, all or part of that authority could be taken away from them. To this end, the Draft has provided for forfeiture of parental authority, or withdrawal of some of its inherent rights, thereby introducing into the Civil Code a solution outlined in statute law, notably in the *Youth Protection Act* (54).

An examination was also made of the possibility of allowing a child's parents, and consequently his brothers and sisters, to benefit from the usufruct of his property, as is done in some foreign countries (55).

Some consider that family solidarity is a good argument in favour of such usufruct and that, in practice, people tend to consider it normal for the usufruct on a child's property to benefit his family. In addition, Article 1426 C.C. already provides a legal usufruct, in favour of the surviving spouse, on property which devolves to the children following dissolution of the community of property or of the partnership of acquests.

Others expressed grave doubts concerning such a measure, especially in cases where the children's property consists of indemnities for physical injury. In such cases, at least, it seemed imperative to them that the income not spent on the child's support be added to capital which might otherwise depreciate rapidly in times of inflation. Nor was it felt that Article 1426 C.C. should be subject to generalization. In fact, where the surviving spouse is concerned, the question is one of an inheritance intended for the family; this is not so as regards any indemnity or other property which a child could receive personally.

Finally, four possible solutions were studied:

1. to make all property of children, without distinction, subject to usufruct in favour of the parents;
2. to exclude indemnities for physical injury from such property;
3. to let the court decide which part of the child's property would be affected by the usufruct of the parents;
4. to do away with all notion of legal usufruct for parents on their children's property.

The fourth solution was finally adopted.

TITLE ONE

MARRIAGE

CHAPTER I

PROMISES OF MARRIAGE

1

Although there was some doubt as to whether or not an institution whose former popularity has markedly diminished should be included in the Civil Code, it seemed useful to attempt to resolve certain contradictions in doctrine and jurisprudence relating to the effects of broken engagements (56).

According to some jurisprudence, it seems that no engagement has any juridical value and that no promise of marriage as such gives rise to any contractual obligation whatsoever (57), whereas other decisions grant damages when engagements are unfairly broken (58).

In order to protect the total freedom of consent to marriage, no broken engagement should in itself allow recourse for damages, either contractual or delictual.

This article merely inserts in the Civil Code the principle of absolute freedom of consent to marriage. No one who has promised to take a certain person as his spouse is legally bound by that promise, nor, consequently, may he be forced into the planned marriage by such a promise.

2

This article inserts into the Code the rule, adopted by jurisprudence, under which damages are awarded to an intended consort whose engagement has been unfairly broken (59).

This is an application of the theory of abuse of right (a. 9 of the Book on *Persons*).

The proposed rule provides that the indemnity will be payable by the intended consort who is at fault, namely the one who breaks the engagement unfairly or who, by his deeds, gave the other party just cause to break it.

3

This article is new law and renders ineffectual any promise by an intended consort to pay a stipulated lump sum indemnity should the engagement be broken; it seemed necessary to guarantee both intended consorts the unrestricted freedom to end the engagement.

It seemed advisable to leave to the court the appreciation of the damage unfairly suffered by one intended consort rather than to allow the parties themselves to determine beforehand what the indemnity will be.

4

This article establishes the right of an intended consort or a third party who makes a gift in contemplation of marriage to take such gift back when the proposed marriage is not solemnized (60).

The object of this article is to avoid any situation in which a favoured intended consort profits at the expense of the other by breaking their engagement.

It seemed fair to allow the donor to request restitution of the goods given, such as furniture or the engagement ring, since, if the marriage does not occur, the consideration which motivated the gift no longer exists.

Presents of little value, however, are excluded from the application of this rule.

5

Any action for restitution of a gift, and any action for damages founded on the breaking of an engagement, must be instituted within one year. It appeared desirable, in the interest of the intended consort and third parties who gave gifts, to ensure swift settlement of any disputes which may arise when an engagement is broken. The delay provided is a "delay of forfeiture" which, according to the distinction set down in the Book on *Prescription*, can be neither interrupted nor suspended.

CHAPTER II

CONDITIONS REQUIRED FOR CONTRACTING MARRIAGE

6

This article states the principle that any intention to marry must be enlightened and serious. It replaces the rule of Article 116 of the Civil Code which is perhaps too absolute in that it supports the theory of inexistence of marriage when one consort fails to give consent (61). An attempt was made to clarify the ambiguity resulting from this theory. Since the appearance of marriage has been created and registered in the acts of civil status, the nullity of such marriage must be officially declared.

The requirement of free and enlightened consent implicitly refers to the defects of consent recognized in marriage, which will be discussed in the chapter on *Nullity of Marriage* (62). The characteristics of the agreement required in this case are consistent with those necessary for establishing any contract (63).

7

It seemed necessary to define the object of the consent given by the intended consorts.

8

The proposed article lays down an unequivocal prohibition, and would thereby terminate the controversy as to whether a marriage contracted by an interdicted person during a lucid interval is valid (64).

It refers to the new conception of interdiction, under which tutorship is reserved for any person of major age "whose mental faculties are impaired or who is physically incapable of expressing his will" to the point where he is "incapable of acting himself", and "requires representation in the exercise of his civil rights" (65).

No person put under tutorship, then, would be capable of consenting to a marriage.

9

This article substantially changes the conditions relative to age in marriage. The age at which a man may marry, fourteen years, and that at which a woman may marry, twelve years under Article 115 C.C., has been changed to eighteen years in both cases. Since eighteen years is the age of majority, there is no longer any necessity to provide for parental consent.

The age stipulated in the Code is based on Canon law, which considers only biological capacity. This criterion would seem to be insufficient today, considering the proportion of marriages which have failed because the parties were too young (66).

The second paragraph of this proposed article allows the court to grant a dispensation by reason of age when a future spouse is more than sixteen years old. Since the Draft is clearly intended to discourage marriages between persons under eighteen years of age, it seemed preferable to entrust the decision to a judge rather than to the parents themselves.

Some people who commented on the Draft would have preferred to see the possibility of dispensation removed, while others wished that, in cases of pregnancy, the marriage could be authorized, regardless of the age of the girl. These divergent views recall the various proposals existing in this field in the other Canadian provinces (67).

In view of these differing opinions, it seemed preferable to retain the flexibility of the first proposal.

When the court gives judgment, the parents, the tutor and any person who has custody of the minor should be summoned, since generally these are the people most qualified to advise the court as to the expediency of permitting the minor child to marry and as to the chances of success of the proposed marriage.

On the other hand, to oblige the court to obtain their opinion may cause serious inconvenience, for example in cases where the interested persons cannot be reached; therefore, the term "summoned" was used intentionally.

10

This article restates the provisions of Article 118 C.C.

11

This proposed article is taken from Articles 124, 125 and 126 of the Civil Code which it simplifies considerably.

The impediments to marriage between relatives in the direct line, whether the relationship is by blood or by adoption, have been retained.

The initial Draft allowed marriage between adopted children without restriction provided they were not brother and sister by blood. The provision was amended following comments in favour of prohibiting such marriages. It seemed desirable, nevertheless, to provide for the possibility of a dispensation, since people with grown children may marry

and adopt their spouse's children. These children, the issue of the previous marriages of the new couple, might wish to marry, not having been brought up together.

It would be equally permissible for persons allied in the collateral line to marry, if the marriage which produced the alliance had been annulled or dissolved by death or by divorce. The present prohibition against marrying, after divorce, a person related by alliance (a. 125 and 126 C.C.), seemed to arise from an intention to penalize the divorced consort.

CHAPTER III

OPPOSITION TO MARRIAGE

12

There was some question as to the need to retain the procedure for opposition to marriage since this procedure seems to be very little used in practice: no decisions appear to have been published on this matter in Québec jurisprudence.

It nevertheless seemed preferable not to do away with the possibility of opposition lodged on the grounds of impediment, because this could avoid subsequent annulment of the intended marriage.

Since the number of impediments to marriage has been reduced to only those impediments which seemed to be of a truly serious nature, it was deemed advisable to increase the number of persons allowed to lodge opposition to any marriage compromised by such an impediment.

This proposed article substantially changes current law. It replaces the lengthy enumeration and the order of priority of persons entitled to oppose solemnization of marriage, as outlined in Articles 136 and following of the Code.

It seemed advisable to allow any interested person to oppose a marriage, since any valid reason for opposition can only be based on a legally recognized impediment to marriage. The number of such cases has been sharply reduced in order to retain only those which directly relate to public order: these are the existence of a previous undissolved marriage, incest, lack of proper age or of dispensation, and the placing of a person of major age under tutorship.

A procedure for screening frivolous oppositions is provided in the articles following.

Finally, the article grants the Minister of Justice the personal right to

lodge an opposition: this could eventually make it possible for persons who do not wish to act directly to do so through the Minister.

This stipulation is indispensable; Articles 98 and 99 of the Code of Civil Procedure give the Minister the right to intervene in any proceedings which concern the application of a provision of public order, but do not give him the right to actually initiate proceedings.

13

The first paragraph of this article, of new law, attempts to solve the problem faced by a minor who has difficulty finding a representative when he opposes the marriage of his father, his mother or his tutor.

On the other hand, there is no need to require a judicial authorization to allow a minor to act in defence against any opposition to his marriage.

14

This article is a reference provision similar to Article 144 of the Civil Code.

15

This article restates the principle contained in Article 147 C.C., sanctions an abuse of right (68) and is intended to reiterate that any act of opposition is governed by the general rules of civil liability.

It was not considered advisable to exempt parental authority from general law.

CHAPTER IV

THE SOLEMNIZATION OF MARRIAGE

16

This article repeats Article 128 of the Civil Code, and also reflects the reform proposed in the draft articles on acts of civil status (69). These acts would be centralized under the Registrar of Civil Status, who would be the sole officer of civil status, to whom declarations of birth, marriage and death would be sent. Marriage, therefore, would no longer be solemnized by an "officer of civil status", but by a person legally vested with this power according to the rules set forth in the following article.

Article 134a C.C., pertaining to the place of solemnization of civil marriages, has not been included, since its provision is of regulatory nature.

17

This article changes nothing in present law. The results of the reform brought about by the *Act respecting civil marriage* (70) seem to be satisfactory.

Article 158 C.C., which provides a penalty for any celebrant who violates the rules pertaining to solemnization of marriage, has been omitted. This provision is of a statutory nature. What is needed is legislation respecting solemnization of marriage, which would contain all details of this nature.

18

This article merely simplifies the drafting of the rule set out in the second paragraph of Article 129 C.C.

Obviously, a prothonotary whose function it is to solemnize marriage cannot refuse to do so for religious reasons. A clergyman, on the other hand, is justified in expecting the intended consorts to be of his religion and to respect its requirements.

Article 127 C.C. would be eliminated, and, in point of fact, recent jurisprudence (71) has finally decided that religious impediments are not part of the Civil Code, thus choosing, after much hesitation (72), to follow the Privy Council's decision in this matter (73).

19

This provision reiterates the principle in Article 65 of the Civil Code and combines it with Section 12 of the *Regulation respecting the solemnization of civil marriage* which lists the supporting documents the prothonotary must receive as evidence from the intended consorts (74).

The officiant's obligation to verify the age, identity and marital status of the parties is intended to avoid solemnization of marriages to which some impediment might exist.

Moreover, after examination of the regulation mentioned above, the hope was expressed that costs of solemnizing civil marriages could be reduced.

20

This article is new law. Although the need for marriage preparation and premarital medical examination, emphasized in briefs submitted to the Civil Code Revision Office, is indisputable, it did not seem advisable to set them as conditions for marriage. It seemed excessive to prohibit a marriage as a penalty for failing to fulfil these conditions.

21

It was felt that the present delay of twenty days for publication purposes allows the consorts a salutary period for reflection while at the same time providing for an adequate delay in which any possible opposition could be officially lodged.

On the other hand, the present method of posting up does not seem to constitute an effective means of publicity.

Other possible means of publicity, such as the publication of a notice in the newspapers, or the forwarding of a notice to the families of the intended consorts, do not guarantee sufficient effectiveness to outweigh their drawbacks: the costs of publishing in newspapers are often high, and it might be difficult to reach members of the family.

Consequently, it seemed simpler to do away with publication but to retain the delay for purposes of reflection.

This delay could be shortened, moreover, for reasons the weight of which the judge would evaluate, such as serious illness or imminent departure.

Finally, nothing prevents any minister of religion from continuing to give notice of solemnization, by publication or by other means, if he so desires.

22, 23

These articles extend to religious solemnization the formalities provided for in Article 134b C.C. Regardless of the formalities required by different religions, it seemed desirable to have at least some ritual common to all. The act of marriage now drawn up by the officer of civil status is replaced by the declaration of marriage.

The chapter relating to acts of civil status mentions what the declaration must contain (75).

Under the proposed article, each consort must participate personally in the ceremony. It seemed inopportune to retain marriage by proxy at a time where intended consorts can attend their own marriage, thanks to the speed and ease of communications. This form of marriage, unknown in the other provinces, seemed to be of a kind to encourage simulated marriages (76).

CHAPTER V

PROOF OF MARRIAGE

24

This provision adopts the rule contained in Article 160 of the Civil Code, but expands its scope. That rule concerns the claiming of the status of consort and the civil effects of marriage. The proposed reform requires that the act of marriage be filed in any action where the existence of a marriage is alleged.

According to the provisions for the reform of civil status, a declaration of marriage established by the officiant becomes an act of marriage as soon as it is signed, dated, and entered in the register of civil status (77).

The lack of a marriage certificate may be compensated for by a court decision (78).

The second paragraph provides that possession of status compensates for any defects in the form of an act.

CHAPTER VI

NULLITY OF MARRIAGE

25

This article combines all the causes of absolute nullity, even though some of them are of a temporary nature, as appears in the article following. Sub-paragraph 1 adopts the principle of Article 116 of the Civil Code, but it was thought preferable to speak of "absence of discernment" rather than of "absence of consent". In fact, consent given by a future consort whose faculties are impaired certainly remains consent although it is not valid since the person lacks discernment (79).

Sub-paragraph 2 provides for the case of a person placed under tutorship (80), who marries in spite of the prohibition of Article 8. Contrary to what is provided in the first sub-paragraph, here the cause of nullity automatically exists as of the time the person concerned is placed under tutorship, and it is not necessary to prove lack of discernment at the time of marriage.

Sub-paragraph 3 covers cases of bigamy and recognizes the rule in judicial decisions, not laid down in the Code, which has extended absolute nullity of marriage to include bigamy (81). There was some question

whether bigamous marriage could become valid once the previous marriage had been annulled, or dissolved by divorce or by death, provided that the consorts lived together. This would obviate their need to subsequently marry anew. However, this cause for annulment seemed too serious to create an exception which would concern only marginal cases.

Sub-paragraph 4 also creates a new cause for absolute nullity. It seemed indispensable to entirely prohibit marriage by persons under sixteen years of age, without possibility of any ratification. This article should be read with reference to Article 9 on the conditions required to contract marriage.

Sub-paragraph 5 must be read with reference to Article 11. It adopts the rule of absolute nullity set out by Article 152 of the Civil Code.

26

This article of new law is based on comments on the Draft. It is founded on the idea that a person may be temporarily lacking discernment or put under tutorship when the marriage takes place. If the cause of nullity disappears and the spouse of the person cured does not show his desire to terminate the marriage, the spouse is considered to have confirmed it after a certain length of time has passed.

27

This article sets out three causes of relative nullity of marriage.

Sub-paragraph 1 envisages cases where consent is given not freely but under a threat of physical or moral violence. This is the sense of Article 148 of the Civil Code. It was considered preferable to retain this rather than make any specific reference to violence because this flexibility permits the court to ascertain whether or not consent was in fact free, depending on the circumstances of each case. Thus, the judge will be able to measure the degree to which the consent was freely given and to consider the age, personality and condition of the person whose consent was not freely given (82).

Error as to identity of the spouse must be interpreted restrictively as concerning that person's civil identity. This deals with those fairly rare cases where one person passes himself off as another. The courts might perhaps accept error as to physical identity in the exceptional case where a transsexual had concealed his condition from his spouse.

Sub-paragraph 3 provides for cases in which a person claims to have some essential characteristic that he does not possess or, on the other hand, conceals some essential and undesirable characteristic, thereby

leading the future consort into error. This wording was carefully chosen to put an end to a controversy in judicial decisions regarding the interpretation of "error as to the person" mentioned in Article 148 of the Civil Code. In fact, this wording has been interpreted by the courts in two ways. The broad interpretation of this expression includes error as to some essential quality of such importance that the misled spouse would not have contracted marriage had he known of the situation before marrying (83). On the other hand, there is a tendency to interpret the phrase "error as to the person" restrictively. Error can vitiate consent only when it concerns the person himself, not his qualities, unless the quality in question can in some way constitute personality (84).

Error as to essential qualities was considered insufficient; it was felt that for one consort to apply for annulment it was necessary that this error have been induced by fraud on the part of the other.

Finally, the last paragraph of the article adopts the rule now in force (a. 149 C.C.). Continuous cohabitation constitutes tacit confirmation of marriage. Moreover, the continuous nature was considered essential, since where there is no cohabitation the wronged consort is undisturbed: it could not be presumed that the violence had ceased or the error had been discovered if the consorts were not living together.

28

It was deemed desirable to entitle either spouse to seek nullity of a simulated marriage since there is no reason to oblige any "simulator" to be bound by a marriage to which he did not really consent. Nevertheless, since there is an appearance of marriage, if the consorts cohabit for more than one year after the marriage is celebrated, they are presumed to have intended to create a household, and can no longer apply to have their marriage annulled.

The proposed rule tends to confirm present judicial decisions which allow annulment of simulated marriages (85).

On the other hand, the courts have rejected applications for annulment where consorts sought to obtain certain effects from their marriage (86).

This jurisprudence seemed more in line with the principle according to which marriage is based on the consent of the consorts expressed in Article 7 than with the sanction adopted by the courts of the Common Law provinces, which generally refuse to annul marriages whose form is valid, particularly "immigration marriages" (87).

29

This article greatly expands Article 117 of the Civil Code by providing that impotence, regardless of the reason for it, is a cause for nullity of marriage.

The inclusion of psychological impotence among causes for nullity of marriage reflects a growing tendency in judicial decisions (88).

Moreover, it seems fair to entitle the impotent person himself to apply for the nullity of the marriage.

It did not seem necessary to retain the delay of three years, provided for in Article 117 of the Civil Code, after which nullity can no longer be applied for. As long as a marriage is not consummated, application may be made to have it declared null.

Also, this article differs from Article 243, under which failure to consummate a marriage constitutes grounds for divorce. In that case, the failure to consummate the marriage must have lasted throughout a period of cohabitation of at least one year; it must be caused by illness or disability, but need not necessarily be the result of impotence.

30

This article deals with the case of adolescents between sixteen and eighteen years of age who marry in violation of Article 9 which requires them to apply for judicial dispensation. The right to seek annulment is reserved not only for the consorts themselves, but also for persons who are most able to look after the minor's interests.

Since, under Article 9, the court has full discretion to grant or refuse dispensation to intended consorts sixteen to eighteen years of age, it seemed advisable to grant the court the same discretion to annul a marriage contracted without judicial dispensation.

The last paragraph is based on the rule of sub-paragraph 1 of Article 153 of the Civil Code.

31

This article reproduces Article 156 of the Civil Code almost verbatim. Since solemnization of marriage is of public order, it seemed necessary to make this nullity absolute. Nevertheless, considering that the public nature of the ceremony is determined by a number of elements - the presence of witnesses and of members of the family, and free access for all to the place of solemnization - and since the officiant could be incompetent because of purely administrative and technical reasons, it seemed desirable to leave some discretion to the judge.

It should be noted that the proposed article in no way prohibits the solemnization of a marriage *in extremis* provided that the ceremony is in some degree public.

32

It seemed necessary to make it clear that annulment of marriage does not affect the rights of the children as regards either their parents or their parents' family. This article is in answer to a general wish to eliminate the rule under which children of marriages declared null cease to be legitimate if both consorts have acted in bad faith (Articles 163 and 164 C.C. *a contrario*) (89).

In the same way, the parents retain all their obligations with respect to their children, even if the exercise of the corresponding rights is modified by the granting of custody under Article 40.

33

This article of new law rules that consorts are no longer required to prove good faith. The presumption of Article 2 in the Book on *Evidence* (a. 2202 C.C.) will apply in this field, as claimed in part by doctrine and by judicial decision, and this text will end a controversy (90).

This provision likewise is intended to do away with complications caused by uncertainty as to a putative marriage when the question is raised a few years after annulment, for instance upon the sale of an immoveable. It equally ends all debate as to when judgment on the putative marriage must be sought (91). Finally, it obviates any hesitation as to the possibility of renouncing a putative marriage (92).

34

This article sets out the principle according to which a marriage between consorts in good faith is considered to exist until declared null by court decision. This article adopts and clarifies the rule of Article 163 of the Civil Code, which has also been ratified by judicial decision (93).

35

This article is based on Article 164 C.C. which provides that if only one consort is in good faith, the marriage produces its "civil effects" as regards that consort.

Thus, the consort in good faith may either request application of the matrimonial regime or seek liquidation of property on the basis of a *de facto* partnership. Most authors agree that the consort in good faith "*peut demander la liquidation du régime matrimonial sur la base d'une société de*

fait, ce qui ne l'autorise cependant pas à demander l'application des dispositions du contrat de mariage qui lui sont favorables, quitte à imposer à son conjoint la liquidation sur la base d'une société de fait pour le surplus; il doit accepter toutes les conventions matrimoniales ou les rejeter en bloc" (94).

Thus, under the regime of community of property, the consort in good faith will take back either his share of the community, or the contributions made to it by him. Similarly, under the regime of partnership of acquests, the consort in good faith may either take back his share of the acquests of his spouse, by giving his spouse the share which reverts to him from his own acquests, or merely retain all his acquests.

36

This is the corollary of the preceding article.

There was some debate as to whether, when a marriage is annulled on grounds of bigamy, a special system could be provided whereby property would be shared by the first spouse of the bigamous consort and his second spouse in good faith (95). It seemed inopportune to impose any arbitrary rule which might prove prejudicial to one of the parties. It was considered preferable to leave appraisal of this question to the discretion of the court.

37

This article differs from the present law in that it sets up a different regime to govern gifts *inter vivos* and gifts *mortis causa.*

The first are retained for consorts in good faith in keeping with tradition, the only change being that the court may defer their payment. In fact, this stipulation seemed desirable in cases where the immediate execution of an exigible gift could seriously compromise the financial position of the spouse in bad faith.

On the other hand, when the marriage contract provides that the gift lapses if the marriage is annulled, this clause should, of course, be respected.

38

Gifts *mortis causa* are governed by special rules since the Draft in the chapter on *Gifts* provides that all gifts *mortis causa* contained in marriage contracts be presumed revocable unless the contract makes express provision to the contrary (96).

Even in this case, it seemed necessary that the court consider the circumstances and possibly reduce or annul a substantial gift when, for

example, the marriage has lasted for only a very short while whereas the gift should normally not become exigible for many years.

39

This article follows the traditional rule by which a consort in bad faith loses all rights to gifts granted to him by his spouse or by third parties in consideration of his marriage.

40

It seemed desirable to regulate the relations between consorts, and between parents and children, both during and after proceedings in annulment of marriage.

The proposed article maintains jurisprudence which includes the right to support among the effects of marriage (97).

The rules governing divorce are applicable *mutatis mutandis* to annulment of marriage, except that no consort in bad faith has any right to support after annulment has been pronounced.

CHAPTER VII

EFFECTS OF MARRIAGE

Section I

Rights and duties of consorts

41

This article substantially reproduces Article 173 of the Civil Code. Moreover, it sets forth the basic principle of equality between consorts, which subtends all family law reform since 1964. The *Act respecting the legal capacity of married women* represented the first step in introducing such equality into the Civil Code, and later the *Act respecting matrimonial regimes* continued this development with respect to financial relations between consorts (98). The principle of equality was reaffirmed in the *Charter of Human Rights and Freedoms.*

Steps were taken to complete this work by conferring on the consorts the status of equal partners as regards all decisions respecting the family. This trend towards equality is found elsewhere in modern legislation, notably in France (99) and in the laws of New York (100). It is also found in the recommendations of the Ontario Law Reform Commission (101)

and in the general movement undertaken to improve the role of women in all spheres of activity (102).

The principle of equality permeates this entire Book, although it seems wise to lay down this principle clearly since it can serve as a guide in interpreting the law.

The obligation to live together, presently laid down in Article 175 of the Civil Code, is redrafted in the third paragraph of the proposed article in such a manner as to be compatible with the principle of equality of consorts.

This obligation applies to both consorts; the Book on *Persons* proposes the abolition of legal domicile in the case of married women (103).

On the other hand, consorts are released from this obligation by a petition for divorce or for separation as to bed and board (Article 249), and where a separation agreement exists (Article 237 et s.).

42

This article substantially repeats Article 174 of the Civil Code. It is intended to establish the principle of complete equality of consorts in the moral and material control of the family. It lays down only a general principle, however, since the pecuniary obligation of consorts as regards their children is set out in the chapter relating to the obligation of support.

The article also initiates the transition from paternal authority to parental authority (104).

If the consorts disagree, either one may apply to the court, according to the principle stated in Article 67.

43

This article introduces an exception to the principle that consorts must make decisions together, or, failing this, be authorized by the court.

It is intended to prevent one consort from being unable to exercise a right because his spouse is away or temporarily incapable of participating in the control of the family.

It seemed impossible to specify the reasons for which a consort is unable to express his will, since there may be an infinite number of these, such as illness, a prolonged trip, and so on.

The ability to act alone is strictly limited, however, to cases of emergency, and to the daily needs of the household. It does not enter into

play when the spouse's consent is required under a rule of the matrimonial regime. Article 50 provides for this hypothetical case.

44

This article adopts the principle in Article 177 C.C. and adds to it a reference to the provisions relating to family residence; under these, no consort enjoys absolute power over either the furniture or the family residence, even if he owns them.

This provision does not in any way limit the right of one consort to institute proceedings against the other for any reason whatever.

An article in the original Draft, respecting the capacity of spouses of minor age, has been deleted, because Article 111 of the Book on Persons provides that the marriage of a person of minor age terminates his minority.

45

This article reproduces Article 178 C.C. The husband, for example, could entrust the administration of property in the community to his wife, even if, by choice of the consorts, he is the administrator of the community (105).

Article 51 of the initial Draft provided, moreover, that no consort who acts expressly as mandatary of his spouse becomes personally liable. This provision seemed unnecessary since it arises from general law.

46

This provision, of new law, fills a gap deplored by doctrine (106). It creates a temporary judicial mandate to permit either consort to administer his spouse's property when the spouse cannot manifest his will because he is incapable or is not present. Such a measure eliminates the need for the appointment of a tutor (107), under present law a curator, when incapacity is temporary (108).

The second paragraph of the proposed article leaves the greatest discretion to the court in specifying the nature and exercise of the powers so conferred.

The third paragraph permits withdrawal of the mandate when the spouse is again in a position to manifest his will.

47

This article, embodying the principle of equality of consorts, sets forth a rule recognized by jurisprudence (109) which has thus interpreted the husband's obligation to supply his wife with the necessities of life, an

obligation provided for in Article 176 of the Civil Code, and the wife's obligation, laid down in Article 174 C.C., to co-operate with her husband in providing for the maintenance of the family.

Such a provision governs only reciprocal contributions made by the consorts themselves, since the rights of third persons are governed by Articles 48 and following.

The expression "expenses of the marriage", equivalent to "household expenses" or "expenses of the family", is not defined, since any list would probably be incomplete. Moreover, jurisprudence has established the meaning of these expressions (110).

Finally, as suggested in some comments, it was considered advisable to specify that the contribution to the household expenses may be made in kind.

Failing agreement between the consorts respecting this contribution, either consort may seize the court, under the principle of Article 67 (111).

48

This article acknowledges the power of either consort to perform alone any act where current household needs are concerned, notwithstanding the principle of collaboration established in Article 42.

The notion of "current household needs" rests on the inevitably subjective criterion of need which is acknowledged by jurisprudence, taking account of the means of the consorts and of their social position (112).

It was not considered necessary to repeat the particular reference made to medical and surgical care in Article 180 C.C. since jurisprudence considers medical care as part of support (113). Moreover, since consorts would exercise parental authority jointly, hospitals would no longer be able to plead lack of paternal authorization in refusing surgical treatment to a child brought in by its mother (114).

The second paragraph deletes the domestic mandate conferred on married women by Article 180 C.C.

When the original report was drafted and the comments on it examined, there was considerable discussion as to whether consorts should be solidarily liable for household debts. In the end, solidary liability was rejected. Contrary to a frequently-stated opinion, it cannot be said that joint and several liability supports equality between consorts. It seems rather to threaten the contribution in kind introduced in Article 47. A consort who contributes to the expenses of the marriage by his activity

in the home might find himself liable for all the debts contracted by his spouse when he has no income to meet them.

It was therefore considered preferable for the contracting consort to commit himself personally and to commit his spouse only in proportion to that spouse's means.

49

De facto unions strongly resemble *de facto* partnerships which may be dissolved at will (1 1 5). Before separation, debts for household expenses must be paid and the legally responsible consort should be entitled to ask the other to pay his share. Moreover, suppliers may institute proceedings against one *de facto* consort for debts contracted by the other, but only in proportion to what he can contribute.

50

This article reproduces Article 182 C.C. Its object is to allow either consort to sidestep the other's power of control. For example, any consort administering the community and authorized by a judge could alienate immoveable property of the community without the concurrence of his spouse.

This has nothing to do with the judicial mandate provided for in Article 46 which relates to the administration of the property of spouses generally, and is far broader in scope.

The first paragraph anticipates all situations: not only that in which refusal is without cause and contrary to the interests of the consort's family, but also that in which a consort required to give his consent is unable to manifest his intention by reason of illness or of being away.

51

This article is almost a textual reproduction of Article 181 C.C.; the expression "provision", however, has been used instead of "agreement" in order to accommodate the case of judicial mandate.

52

The first paragraph of this article reproduces that of Article 183 C.C. The exceptional case, where one spouse would not have full powers over his own property, is provided for in the following chapter dealing with the protection of the family residence.

The second paragraph reproduces the spirit of Article 184 C.C., although restricting its interpretation. The presumption deals only with concurrence or consent and does not derogate from the ordinary rules

concerning alienation of things belonging to other persons. It would seem illogical for a sale by a married person of property belonging to a third party to be null (116), whereas that same sale would become valid if the property belonged to his spouse.

Consequently, given the presumption of undivided ownership in cases of separation as to property and of partnership of acquests (117), any third party who purchases property from a married person will have to require proof of ownership by the contracting party if he wishes to contract safely.

It seemed unnecessary to repeat the period provided in the second paragraph of Article 183 of the Civil Code. The three-year prescription provided for personal suits in the Title on *Extinctive Prescription* seemed sufficient (118).

Section II

The family residence

53

This article applies the principle of the equality of consorts in respect of the choice of the principal family residence. It is not applicable in the case of the secondary residence.

In the event of disagreement, either consort may appeal to the court, under Article 67.

At such time, the judge may issue any orders he deems appropriate in the interest of the family. These would concern primarily such matters as support and custody of the children.

54

The legislation enacted June 18, 1964, respecting the legal capacity of married women (119) restricted the power of consorts to dispose of household furniture in some cases. The proposed article generalizes the protection already extended to consorts common as to property (Article 1292 C.C.) (120).

In order to ensure that the family retains the use of the furniture, it appeared sufficient to vest in both consorts the powers enjoyed by the owner of such moveables or the administrator of the community.

The proposed article extends the protection of "household" furniture to all furniture used by the family (121).

However, in order not to impose awkward restrictions on an abandoned consort, the second paragraph allows such a consort to dispose alone of the furniture in use by the family. Desertion implies an intention to cease living together, so the temporary departure of one consort would not enable the other to act alone.

In some comments on the Draft, a recourse to the court was suggested to oblige any consort who wishes to dispose of furniture to provide proof of desertion. It was considered that such an obligation would be an excessive burden for the consort and would, in most cases, be disproportionate to the value of the furniture in question.

55

In order to provide effective protection for furniture, the *Report on the Protection of the Family Residence* (122) had proposed exclusion of the presumption of power which, according to Article 184 C.C., is enjoyed by the consort who presents himself alone to enter into an act concerning moveable property which he holds personally.

In the light of comments received, the problem of protecting third parties was reviewed, and it seemed that the other contracting party who acts in good faith should suffer no damage because of some misunderstanding between the consorts.

Thus, the presumption of power established in Article 184 C.C. is maintained. Consequently, only the other contracting party who is in bad faith and the acquirer by gratuitous title would be open to an action in nullity, which would be the penalty for violating the principle of concurrence of wills laid down in Article 54.

The plaintiff consort is entitled to have the furniture seized before judgment and to demand its restoration under sub-paragraph 5 of Article 734 of the Code of Civil Procedure.

56

Considering the possible psychological importance to young children of the physical milieu in which they have lived, it appeared necessary to allow the court, in cases of separation as to bed and board, divorce or annulment of marriage, to attribute the ownership of furniture in the family residence and used by the family, to one of the consorts, according to the conditions it considers appropriate (123).

The court will decide the matter, with due consideration for the interest of the family or of either spouse; in other words taking into

account such factors as the respective situations of the consorts, and the age of the children.

It was felt necessary to specify that occasionally one spouse may have an over-riding interest, in order to govern special cases in which, for example, the furniture of the family residence is dictated by the profession which such spouse practises in his home.

57

It was considered useful to specify the exact meaning of the word "furniture" by excluding certain objects included in the definition given in Article 396 C.C. (124).

58

This provision is intended to retain for the family the enjoyment of leased premises. The lessee would not be able, without the consent of his spouse, to enter into any act which would deprive the family of its habitual residence. The family is assured enjoyment of its home until the expiry of the term agreed upon (fixed lease) or of that provided by law (indeterminate lease).

59

This provision is the counterpart, as regards immoveables, to Article 54. The protection of the immoveable used as the principal family residence is not as complete, however, since its implementation depends on either consort registering a declaration of residence against the immoveable.

Also, in the light of comments received, the definition of the principal family residence has been limited to immoveables of a residential nature (one-family home, duplex or triplex), to avoid damaging the credit of owners of commercial immoveables.

The second paragraph extends the protection to cases - rare enough in practice - where the principal family residence is occupied by virtue of a real right other than ownership.

The formalism may very well make this protection less effective; it is justified, however, by the need to protect third parties and not to damage the owner's credit.

No registration of a declaration of residence can prevent a consort who owns a multiple dwelling from leasing a part of it which is not used as the family residence.

60

This article provides a right of action in nullity, when Articles 58 and 59 are infringed, for the consort whose spouse is vested with the right by which the principal residence is assured and has disposed of it without the consent of his consort.

It appeared advisable to replace the system of inopposability suggested in the Preliminary Report (125) by a regime of nullity. To benefit from inopposability, the spouse necessarily had to remain on the premises. If he or she were temporarily away or had had to leave the family residence for fear of ill-treatment, the protection would no longer exist. Moreover, in the case of a sublease agreed to by the lessee of the family residence, the new lease could be invoked against him but not against his spouse who remained on the premises. Finally, the choice of nullity as a sanction for lack of consent on the part of the spouse is consistent with Article 52.

It is also worth noting that Articles 58 and 60 provide for different rules depending on whether the consort is the lessee or the owner of the principal family residence. In the first case (a. 58), any act entered into without the consent of his spouse by a consort who is a lessee may be annulled. In the second case, annulment may only be obtained if a declaration of residence has been registered against the immoveable.

Prescription of the action in nullity or resiliation would be governed by the ordinary rules of prescription of personal rights.

61

The contents of the declaration of residence must be in line with the provisions of the Book on *Publication of Rights*.

Under the original Draft, the Registrar was obliged to inform the spouse that the declaration of residence had been registered. Following some comments, it seemed preferable not to require this notice, since it could cause discord in the family if the consort who registered the declaration had not informed his spouse.

62

This article refers to Article 96 of the Book on *Publication of Rights* for the cancellation of the registration of a declaration of family residence in cases which should not give rise to contestation.

63

This article refers to Article 99 of the Book on *Publication of Rights* for those cases where the cancellation might require judicial arbitration.

64

The purpose of this article is to foster stability of the family home in the interest of the children, and to improve the position of the spouse entrusted with their custody, who sometimes has difficulty finding new lodgings.

The attribution of the right to the lease confers on its new holder all the rights and obligations of the original lessee.

It seemed necessary, however, to protect the rights of the lessor, as far as possible, with respect to the original lessee.

It was also necessary to limit the period of the obligation of the original lessee who will not be bound beyond the term agreed to or prescribed by law.

65

Provision has already been made, within the context of the legislation dealing with the new legal matrimonial regime (126), for preferential attribution of the dwelling house on dissolution of that regime by the death of one of the consorts (a. 1267c C.C.). The privilege would henceforth be extended to all regimes; the immoveable subject to partition may, in effect, be either an acquest, common property, or property held in undivided ownership.

There is a general tendency in legislation to extend the judge's power to redistribute the consorts' property between them, without regard to the right of ownership (127).

It was not intended, however, that upon a simple change of matrimonial regime (a. 1265 C.C.) or a judicial separation of property (a. 1440 et s. C.C.), one consort be entitled to request that the family residence be attributed to him. Preferential attribution is only possible, therefore, in the event of a partition arising upon death, divorce, separation as to bed and board or annulment of marriage. Only a consort may avail himself of this; his heirs may not.

Unless there is an amicable agreement between the copartitioners, any indemnity due eventually is payable in cash, in accordance with the general law governing obligations.

66

This exceptional measure would make it possible to avoid immediate execution of a judgment of eviction for a limited time, when circumstances are difficult. This privilege is accorded to the spouse whatever the nature of the right by which the family residence is assured (lease, right of use, usufruct, ownership, and so on).

Section III

General provisions

67

One of the great problems in recognizing the principle of equality between consorts arises from the choice of means for resolving possible disputes between them. Recourse to the court is surely not an ideal solution, and some consider that it only envenoms conflicts between consorts. Nevertheless, consorts must be able to call upon an arbitrator outside the family. This judicial arbitration is, of course, only the last resort, and consorts may apply to marriage counsellors and other services which might help them solve their own problems. Moreover, recourse to the court will be better adapted to the special nature of family conflicts once the Family Court is created (128). Such a court would have conciliation services to help consorts solve their problems without necessarily having to institute legal proceedings.

Even in cases where action is taken, under the second paragraph the judge is obliged to try to bring the parties to an agreement. In this respect, he could apply to the court's special services.

68

This article makes the provisions governing the effects of marriage and the protection of the family residence imperative upon marriage. No contrary agreement of any kind is admitted. Under the original Draft, only the protection of the family residence was imperative, but the comments received showed sound reasons for extending the scope of the article to cover the whole primary regime.

One exception was made, however, with respect to contributions to the expenses of the marriage. It was thought preferable to allow consorts to organize the contribution to the expenses of the marriage as they pleased, particularly by mentioning each one's contribution in their marriage contract, with the clear understanding that the general obligation to assist

between consorts would apply whenever one spouse was unable to make his promised contribution (129). There are some, however, who would have much preferred making the obligation to contribute to the expenses of the marriage imperative. They held that this is an elementary moral obligation, and that it is dangerous to allow one person to hope to try and shirk it simply because, when the marriage took place, his spouse was irresponsible enough to take all the household expenses upon himself.

CHAPTER VIII

MATRIMONIAL REGIMES

Section I

General provisions

69

This article retains the substance of Articles 1257, 1258 and 1259 C.C. and adapts them to the reforms proposed in other parts of the Draft. Thus, one consort would be able to renounce the reserve provided for in the Book on *Succession* (130).

The expression "obligations arising from marriage" in Article 1259 C.C. has been replaced by "effects of marriage". There cannot be any departure or deviation from the rights and duties of marriage imposed by Articles 173 to 184 of the Civil Code, such as cohabitation, aid and succour, and so forth, nor from the obligations provided in Articles 165 to 172 of the Civil Code (131).

The expression "effects of marriage" is in keeping with a chapter of this Code which brings these different provisions together (132).

In order to avoid an apparent contradiction between the first two paragraphs of the text, the word "other" in the second paragraph applies to stipulations which "would be contrary to the provisions of the law and to public order and good morals".

Finally, the third paragraph takes into account the language used in the Book on *Persons*, in the chapter on *Protected Persons*.

70 and 71

These articles embody Article 1260 of the Civil Code, but take into account the practice of some consorts of adopting the regime of partnership of acquests even though they draw up a marriage contract.

The question was raised as to whether it would not be appropriate to point out that this provision applies only to consorts married after July 1, 1970. The idea of inserting dates in the body of the text was ruled out, however, and the different transitional provisions are no longer incorporated in the text, but inserted in a schedule.

72

This article repeats Article 1261 of the Civil Code, and specifies the time when the change of regime comes into force between the parties.

Without this specific mention, there is new grounds for controversy. Three possibilities must be considered in fixing the beginning of a regime which has been changed with regard to the consorts.

1. the day of the marriage, it being understood that a contractual change would be retroactive (133);
2. the day when a new contract is made (134);
3. the date of the judgment for homologation (135).

Legal practice seems to favour the final solution (136).

73 and 74

These articles repeat Articles 1262 and 1263 C.C., taking into account the proposals of the Draft with respect to protected persons (137).

75

This article reproduces and completes Article 1264 C.C.

76

This article reproduces and completes Article 1265 C.C.

The first paragraph clearly sets forth that any modification or change in a matrimonial regime may deal with only a specific item of property, and change its status. Thus, it would be possible to apply to the court to homologate a new contract in which a gift that had been agreed to in a previous contract would simply be cancelled.

The second paragraph specifies that even gifts *mortis causa* may be changed thus providing an answer to certain questions, and to some opinions to the contrary (138).

It did not seem necessary to make any specific mention of the notion of family interest. Fears that family courts might interpret family interest too narrowly (139), as seems to be the case in France (140), hardly seem justified in the light of existing practice (141).

77

This article is a modified version of the first paragraph of Article 1266 of the Civil Code. It takes into account the change proposed in Article 83 of the Civil Code by the Draft, which abolishes the legal domicile of married women (142).

The second paragraph of Article 1266 C.C. and Article 1266a C.C. have been transferred to the Code of Civil Procedure.

78

This article is a more complete formulation of Article 1266b of the Civil Code.

It appeared that the parties themselves should assume the responsibility of registration, and that there was no reason to impose this obligation on the notaries.

79

This article is designed to assure protection of the rights of third parties, and to do so without repeating the rule at different places in the Code.

Section II

Partnership of acquests

§ - 1 Composition of the partnership of acquests

80

This article repeats Article 1266c of the Civil Code; it enlarges its scope, however, by including the principle that consorts may adopt a partnership of acquests after marriage, as is now provided for in Article 76.

The proposed text eliminates the problem of characterizing property, which might arise at the time when a change of regime takes place. For, in the event of a change from community property to partnership of

acquests, the common property, once divided, should become acquests under Article 1266c of the Civil Code (143).

This solution is not entirely compatible with the principle stating that a change produces effects between consorts on the day of homologation of the contract, and is not retroactive (144).

Thus, throughout the text, the expression "at the time of marriage" has been replaced by "at the beginning of the regime", and "during the marriage" by "during the regime".

81

This article is the same as Article 1266d of the Civil Code, taking into account the remarks made under Article 80.

82

This article is a differently worded version of Article 1266e of the Civil Code; the remarks made under Article 80 apply here as well.

The fourth sub-paragraph was changed to make it agree with Article 930 of the Book on *Obligations*.

The sixth sub-paragraph was added to fill a gap.

83

This article makes some substantial additions to Article 1266f C.C.

The second paragraph was drawn up in a way that would facilitate the characterization of property bought on the instalment system, which today constitutes an almost insoluble problem (145).

The third paragraph deals with the whole problem of insurance policies, and particularly the type of life insurance benefits payable to legal heirs. The consort as beneficiary is covered by Article 82.

The suggested article was adopted following consultation with Mtre. Camille Charron (146) and Mtre. Luc Plamondon (147), and takes into account the decision in *Beaudet v. Dame Lussier* (148) and the controversy this decision provoked (149).

The third paragraph also removes doubts as to any retirement pensions and annuities which the consort might redeem in advance. An *a contrario* interpretation of the second paragraph of Article 1266h C.C. might be construed to mean that annuities and retirement pensions would always be acquests (150).

84

This article is based on Article 1266g of the Civil Code.

The second paragraph has been amended so as to avoid a situation in which a spouse, by acquiring various shares at different times, amasses considerable private property at the expense of the acquests (151).

85

This article is a differently worded version of Article 1266h of the Civil Code.

There was a question whether references to credits and support should not have been removed from this article, so as bestow private character on both the right and the proceeds from it. The essentially personal nature of support, on which savings can be made only with difficulty, would argue for this. In the absence of any real problems raised by this article, it seemed preferable to retain the *status quo.*

Given the periodic nature of payment of annuities and retirement pensions, it seemed only equitable that the exemption from compensation provided for support and disability pensions under Article 1266h of the Civil Code should apply to them as well (152).

86

This article is the same as Article 1266i of the Civil Code, using the terminology used in Articles 18 and following of the Civil Code.

87

This Article repeats Article 1266j of the Civil Code, amending it so as to incorporate all property into the acquests when the value of the accessory is equal to that of the principal.

88

This article has been added to resolve the problem of successive constructions, which has been raised in doctrine (153).

89

This article is a re-statement of Article 1266k of the Civil Code.

It specifies that new securities which have been acquired on the basis of a private right are themselves private property, but takes into account the fact that certain contemplated transactions can be undertaken with income from initial securities.

90

This article amends Article 1266 I C.C. It is based on Article 25 of the French Law of March 11, 1957 on literary and artistic ownership (154). The suggested provision is intended to terminate the existing doctrinal controversy on intellectual rights of ownership as opposed to proceeds and income (155).

91

This article is a re-worded version of Article 1266m of the Civil Code.

92

The text is a re-drafted version of Article 1266n of the Civil Code, in which care has been taken to eliminate the confusion that designates as an undivided acquest any property, whether private or an acquest, over which neither consort can justify exclusive ownership; the new text does not change the nature of the property, even if neither consort can justify exclusive ownership.

§ - 2 Administration of property and liability for debts

93

This text repeats the first paragraph of Article 1266o of the Civil Code, replacing the word "concurrence" with "consent", and specifying its extent.

94

This article, which substantially repeats the second paragraph of Article 1266o C.C., has been amended to make it conform with Article 930 of the Book on Obligations.

95

The text embodies Article 1266p of the Civil Code.

§ - 3 Dissolution and liquidation of the regime

96

This article repeats Article 1266r of the Civil Code, with the specific mention that it is not the partnership of acquests that is terminated, but the "regime of partnership of acquests".

Sub-paragraph 2 takes into account the provisions of the Draft with respect to absence (156).

97

This article is a more precise formulation of Article 1266s of the Civil Code.

98

This article embodies the substance of Article 1266t of the Civil Code. The second paragraph specifies that when the regime of partnership of acquests is dissolved, the acquests consist of two masses: the wife's acquests and the husband's, and not a single mass as implied in Article 1266t C.C. (157).

99

This article is a differently worded version of Article 1266u of the Civil Code. The obligation to register a renunciation is laid down in the Book on *Publication of Rights.*

100

This article is a revision of Article 1266v of the Civil Code.

101

This article amends Article 1266w of the Civil Code.

It specifies that concealment can apply to the acquests of the person concealing, as well as to those of the spouse (158).

Consideration was also given to the penalty for concealment and it seemed that an imposed acceptance of the spouse's acquests would primarily prejudice the spouse. On the other hand, an imposed renunciation on the part of the concealing consort would seem too severe. Consequently, renunciation was limited to the loss of the person's share of the concealed property, unless of course the spouse renounces the acquests; otherwise, the concealed acquests would be left without an owner. The penalty of the loss of the benefit of emolument has been added as there seemed to be a gap on this subject in existing law.

102

This article is the same as Article 1266x of the Civil Code.

103 and 104

These articles embody Article 1266y of the Civil Code, but specify that Articles 101 and 102 apply to heirs as well, since Article 1266y does not make it clear that Articles 1266w and 1266x also apply to them (159).

105

This is a slightly amended version of Article 1266z of the Civil Code. It was decided to abolish the expression "legal assigns" since it goes without saying that a deceased consort's legal assigns have all his rights.

106

This article repeats the first paragraph of Article 1267 C.C.

107 and 108

These articles are a modified version of the provisions of the second paragraph of Article 1267 of the Civil Code.

The question has been raised whether it would not be appropriate to modify the method of calculating compensation, which today seems very definitely to favour the debtor patrimony, meaning in most cases the mass of private property (160). Several proposals have been made. The first was to adopt the rule of proportionality in making the calculations (161). The second would be to consider a loan from the mass as a loan from a third party, with repayment of only the amount borrowed. The rule of simplicity would point to the second solution, while the logic of the very system of partnership of acquests would argue in favor of the first (162).

A third possibility would be to reverse the rule of Article 1267 of the Civil Code, which would then more frequently play in favour of the acquests. In the final analysis, the third solution seemed the most equitable.

109

This article repeats the second paragraph of Article 1267a C.C.

110

This article embodies the first paragraph of Article 1267a of the Civil Code.

111

This article embodies the third paragraph of Article 1267a of the Civil Code.

112

This article contains the substance of Article 1267b of the Civil Code, but eliminates any mention of the legal assigns for the reasons given in the commentary on Article 105.

The text has been refined to avoid any confusion between partnership of acquests and any form of community.

113

This article is a differently worded version of Article 1267c of the Civil Code.

The Book on *Succession* provides for a similar rule in favour of the inheriting spouse (163). The rule in force now applies even if he does not inherit.

114

A similar rule is provided for in the Book on *Succession* (164).

115

This article is a modified version of Article 1267d of the Civil Code.

116

This article repeats the second paragraph of Article 1267d, *in fine*, of the Civil Code.

Section III

Community of property

117

This article repeats the first two paragraphs of Article 1268 of the Civil Code.

It seemed unnecessary to repeat the third paragraph of the article which states that "the provisions governing community of moveables and acquests are applicable to consorts who, on the First of July 1970, were married under the regime of legal community", since there is a transitional provision governing this situation.

§ - 1 Community of moveables and acquests

I - Assets and liabilities of the community of moveables and acquests

118

This article is an amended version of Article 1272 of the Civil Code.

The first amendment specifies the composition of the community when the regime comes into effect and not "on the day when the marriage

is solemnized", in order to take into account the right of the consorts to change the regime during their marriage.

The second amendment affects sub-paragraph 3, and determines the status of the income derived from the private property. Three possibilities were considered at length:

1. the income from the private property immediately enters the community;
2. the income from the private property is private;
3. the income from the private property enters the community only when such property becomes savings (165).

Although none of these solutions was accepted unanimously, the first seemed likely to end the unjustifiable discrimination between the treatment of the income from the wife's private property under Article 1297 of the Civil Code, and that of the income from the husband's private property under sub-paragraph 3 of Article 1272 of the Civil Code (166).

119

This article repeats the first paragraph of Article 1273 of the Civil Code, replacing the term "joint acquest" by the expression "acquests".

120

This article repeats the second paragraph of Article 1273 C.C.

121 and 122

These articles, which simplify Articles 1275 and 1276 of the Civil Code, are intended to end the considerable confusion to which their interpretation has given rise (167).

Immoveable property received by gratuitous title while the regime lasts is private property, regardless of whether it was transmitted by intestate succession or testamentary succession, or by gifts *inter vivos* or *mortis causa*, by any person, unless the donor or the testator gave express indication to the contrary. If, on the contrary, the gift is made jointly to both consorts, of course the property should enter the community, saving stipulation to the contrary (168).

123

This article is a simplified version of Article 1277 of the Civil Code. It seemed unnecessary to limit the principle to cases where immoveable property is given by an ascendant when the preceding article removes the distinctions respecting the source of the immoveable property.

124

This article substantially repeats Article 1278 of the Civil Code, replacing the expression "during marriage" by the expression "during the regime", as has already been done.

125

This article substantially repeats Article 1279 of the Civil Code, while bringing it into line with Article 84.

126

This article, of new law, extends to community of property the scope of a rule which already exists in partnership of acquests, in the fourth sub-paragraph of Article 82.

Moreover, this rule used to apply to life insurance contracted under the *Husbands and Parents Life Insurance Act* (169).

It also seems advisable that the same rules govern partnership of acquests and community of property.

127

This article, of new law, establishes a rule similar to that in Article 89.

128

This article, of new law, is based on the rule governing partnership of acquests in Article 87.

It deviates from existing law, under which Articles 413 and 414 of the Civil Code apply to accessories of private immoveable property, and make such accessories private property regardless of their value compared to that of the immoveable (170). This result seemed unfair, and it was considered preferable to bring community into line with partnership of acquests.

129

This article is the counterpart of Article 88.

130

This article establishes a rule, with respect to community, which is similar to that in Article 85 governing partnership of acquests.

With regard to retirement pensions, although the personal nature of the right seems undoubted (171), the absence of compensation deviates from existing law (172).

In fact, it seemed that the requirement of compensation could place a

consort in a difficult position if the pension fund was his only property and he could not dispose of it.

131

This article extends to community the rule in Article 90.

132

The second sub-paragraph of the proposed article repeats Article 1279a of the Civil Code, in amended form.

The first, third and fourth sub-paragraphs follow existing doctrine and jurisprudence, and are intended to eliminate the confusion concerning professional equipment (173).

133

This article is an amended version of Article 1280 of the Civil Code.

Sub-paragraph 4 of the proposed article is based on Article 1282 C.C. and is intended to establish a correlation between the assets which enter into the community and the debts which correspond to them. Thus, if a consort has only debts and no assets when the marriage takes place, the debts remain private property. The following article governs the obligation to creditors.

134

This article replaces Article 1281 of the Civil Code; it governs the recourses of creditors with respect to the payment of liabilities incurred before the regime was adopted, and authorizes the creditors to sue for payment of private debts out of the property of the community if the private property is insufficient. In this case, the community will be entitled to compensation.

Moreover, the proposed article abolishes all discrimination between the debts of the husband and those of the wife.

135

This article repeats Article 1284 of the Civil Code.

136, 137 and 138

These articles amend Article 1285 of the Civil Code.

139

This article extends the scope of the first paragraph of Article 1285 to cover successions which fall to both consorts; this should have been done

in the 1970 reform, since the distinction between moveable and immoveable successions falling to the wife had been removed (174).

140

This article repeats Article 1289 of the Civil Code.

141, 142 and 143

These articles provide a slightly amended version of Article 1290 of the Civil Code.

The concept of "profit" in Article 1290 C.C. has been replaced by that of "pecuniary advantage", since the community may profit, in the broad sense, from the use or enjoyment of a thing without gaining any pecuniary advantage from it.

144 and 145

These articles slightly amend the first two paragraphs of Article 1291a of the Civil Code.

146

This article repeats the third paragraph of Article 1291a of the Civil Code; it has been separated from that article since it also refers to the cases considered in Articles 138, 142, 143 and 145.

147

This article is a more precise formulation of Article 1291b of the Civil Code.

148

This article is an amended version of Article 1294 of the Civil Code.

149

This article repeats Article 1291c of the Civil Code.

II - Administration of the community of moveables and acquests, and effect of the acts of consorts

150

This article replaces the first paragraph of Article 1292 of the Civil Code and establishes the principle that the consorts choose the administrator of the community.

151

This article repeats the principle of the unity of administration, which appears in the first paragraph of Article 1292 of the Civil Code.

152

This article repeats the second paragraph of Article 1292 of the Civil Code.

153

This article repeats the third paragraph of Article 1292 of the Civil Code.

154

This article defines the word "consent" used in Articles 152 and 153.

155

This article repeats the fourth paragraph of Article 1292 of the Civil Code.

156

This article, of new law, subjects the consort who administers the community to the obligations of an administrator of the property of others (175).

157

This article repeats Article 1293 of the Civil Code.

158

This article replaces Articles 1303, 1304 and 1307 of the Civil Code.

159

This article repeats the rule in Article 1305 of the Civil Code, and adapts to the regime of community the rule provided for the partnership of acquests in the second and third paragraphs of Article 83.

160

This article substantially repeats Article 1308 of the Civil Code with amendments as to form.

III - Dissolution of the community

161

This article substantially repeats Article 1310 of the Civil Code with amendments as to form.

IV - Acceptance of the community

162

This article is an amended version of Article 1338 of the Civil Code.

Doubts arose regarding the option granted to the spouse of the administrator to renounce the community. Some would have preferred to see the consorts enjoy the assets of the community and bear its debts equally without either of them being able to escape the regime. Along the same lines, the opinion was expressed that reserved property should be suppressed. These reforms are justified only in the case of joint administration by the consorts. This formula, as explained in the introduction, was however abandoned. If the community is administered by only one consort, the other should be able to renounce the community by retaining the proceeds of his work in the event of faulty administration.

163

This article is an amended version of Article 1339 of the Civil Code.

164

This article repeats Article 1340 of the Civil Code, taking into account the fact that any consort would necessarily be either of major age or deemed of major age (176). Article 1341 of the Civil Code thus becomes unnecessary.

165

This article repeats Article 1342 of the Civil Code.

166

This article repeats Article 1343 of the Civil Code with amendments as to form.

167

This article repeats Article 1344 of the Civil Code.

168

This article repeats Article 1345 of the Civil Code.

169

This provision is based on the rule in the second paragraph of Article 99 on partnership of acquests. The obligation to register, laid down in Article 1353a C.C., is in Article 13 of the Book on *Publication of Rights.*

170

This article repeats Article 1346 of the Civil Code.

171

This article repeats Article 1347 of the Civil Code.

172

This article repeats Article 1348 of the Civil Code with slight amendments.

173

This article is a slightly amended version of Article 1349 of the Civil Code.

174

This article repeats Article 1351 of the Civil Code, co-ordinating it with Article 100.

175

This article provides a simplified version of Article 1352 of the Civil Code.

176

This article repeats Article 1353 of the Civil Code.

V - Partition of the community

177

This article replaces Articles 1354 and 1357 sub-paragraph 1 of the Civil Code.

178, 179, 180 and 181

These articles replace Articles 1355, 1356 and paragraphs 2 and 3 of Article 1357 of the Civil Code, and repeat the solution proposed in Articles 106, 107 and 108 for compensation in the regime of partnership of acquests.

182

This article determines the manner in which the pretakings and returns must be made, and is based on the rule in Article 112 governing the partnership of acquests.

183 and 184

These articles are based on Article 1358 of the Civil Code.

185

This article is based on Article 1359 of the Civil Code.

186

This article substantially repeats Article 1360 of the Civil Code.

187

This article repeats Article 1361 of the Civil Code.

188

This article repeats Article 1362 of the Civil Code.

189

This article is based on Article 1363 of the Civil Code.

190

This article is based on Article 1364 of the Civil Code and brings it into line with Article 101.

191

This article repeats Article 1365 of the Civil Code.

192

This article repeats Article 1366 of the Civil Code.

193

This article repeats Article 1367 of the Civil Code.

194

This article repeats Article 1369 of the Civil Code.

195

This article provides an amended version of Article 1370 of the Civil Code. Under it, an inventory is no longer required, and the spouse may make proof of his emolument by any means.

196

This article repeats Article 1371 of the Civil Code.

197

This article repeats Article 1372 of the Civil Code.

198

This article repeats Article 1373 of the Civil Code.

199

This article repeats Article 1376 of the Civil Code.

200

This article repeats Article 1377 of the Civil Code.

201

This article repeats Article 1378 of the Civil Code.

VI - Renunciation of the community and its effects

202

This article repeats Article 1379 of the Civil Code.

203

This article repeats Article 1381 of the Civil Code.

204

This article is based on Article 1382 of the Civil Code, and adapts it to the new view of the community.

205

This article is based on Article 1383 of the Civil Code, and adapts it to the new view of the community.

§ - 2 Principal clauses that may modify the community of moveables and acquests

I - The community reduced to acquests

206

This article repeats Article 1389a of the Civil Code with some slight amendments as to form.

II - The right to take back free and clear what was brought into the community

207

This article substantially repeats Article 1400 of the Civil Code, amending it to take into account the community of property as it is proposed in the Draft; the second paragraph, which merely gave examples, has been deleted.

III - Clauses by which unequal shares in the community are assigned to the consorts

208

This article provides a simplified form of Article 1406 of the Civil Code.

209

This article provides a simplified version of Article 1407 of the Civil Code.

210

This article provides a simplified version of Article 1408 of the Civil Code.

211

This article repeats Article 1409 of the Civil Code.

212

This article is an amended version of the first paragraph of Article 1410 of the Civil Code.

213

This article redrafts the second paragraph of Article 1410 C.C.

214

This article provides a simplified version of the first paragraph of Article 1411 of the Civil Code. The reform of the law on gifts (177) makes the second paragraph unnecessary.

IV - Community by general title

215

This article repeats Article 1412 of the Civil Code.

§ - 3 Reserved property

216

This article repeats the first paragraph of Article 1425a of the Civil Code, amending it to take into account the administration of the community of property as it is proposed in the Draft. The reasons for retention of reserved property are given in the comments on Article 162.

217

This article repeats part of the second paragraph of Article 1425 of the Civil Code.

218

This article repeats part of the second paragraph of Article 1425a of the Civil Code.

219

This article defines the word "consent" used in Articles 217 and 218.

220 and 221

These articles repeat the fifth paragraph of Article 1425a of the Civil Code, with amendments as to form.

222

This article repeats the provisions of Article 1425e of the Civil Code.

223

This article repeats the provisions of the first paragraph of Article 1425f of the Civil Code.

224

This article repeats the second paragraph of Article 1425f of the Civil Code.

225

This article repeats the third paragraph of Article 1425f of the Civil Code.

226

This article repeats the provisions of Article 1425h of the Civil Code.

Section IV

Separation as to property

§ - 1 Conventional separation as to property

227

This article substantially repeats Article 1436 of the Civil Code with amendments as to form.

228

This article repeats Article 1437 of the Civil Code.

229

This article repeats Article 1439 of the Civil Code with amendments as to form.

§ - 2 Judicial separation as to property

230

This article replaces Articles 1440 and 1441 of the Civil Code.

On the one hand, it entitles the consorts married under community of property to apply for separation as to property. In fact, the principle of equality of consorts requires that the administrator of the community be able to apply for separation when his or her spouse manages his own reserved property badly.

On the other hand, the proposed article broadens the grounds for separation as to property to include endangering the interests of the family or of those of the consort making the application.

231

This article repeats the first paragraph of Article 1442 of the Civil Code. The second paragraph was deleted because it was considered inadvisable to allow the effects of a judgment granting separation as to property to be delayed if the judgment is not executed.

232

This article repeats the first paragraph of Article 1445 of the Civil Code.

The second paragraph seemed unnecessary. In fact, a creditor may always exercise an indirect action (178).

233

This article substantially repeats Article 1446 of the Civil Code, with amendments as to form.

234

This article substantially repeats Article 1449 of the Civil Code, with amendments as to form.

CHAPTER IX

DISSOLUTION OF MARRIAGE

235

This article repeats Article 185 C.C., adding two particular points.

It is logical for marriage to end upon a declaratory judgment of death since such a judgment is pronounced only when the court is convinced that a person is dead. Although the Civil Code does not say so, the authors believe that the spouse of the consort who has disappeared can remarry after such a judgment has been delivered (179).

Declaratory judgments of absence are provided for in the new provisions proposed to regulate absence (180).

CHAPTER X

SEPARATION AS TO BED AND BOARD, AND DIVORCE

Section I

General provision

236

This article deviates only slightly from existing law. It combines in one provision the principles similarly set out in Articles 208, 212 and 213 of the Civil Code.

A new concept, however, appears in the suggested provision, that of agreements made between the consorts. Although dissolution of the marriage bond as such must not be left to the mutual wishes of the parties, it nevertheless seemed desirable to encourage them to settle their problems, as much as possible, by mutual agreement, provided such settlements are always submitted to the court (181).

The court will take all the circumstances into account, particularly the contribution of each consort to the welfare of the family.

The conduct of the parties mentioned in Article 212 of the Civil Code does not appear in the list of criteria which are to guide the court in its various decisions. It seemed that insistence on conduct fitted very poorly with the philosophy of divorce as a remedy. The conduct of the consorts may, however, be one of the circumstances which the judge must take into account. Thus, the conduct of a person as a parent must be examined in the light of the child's interest. If a person is being supported by a *de facto* consort, this fact also will be taken into account when the amount of the payments for support is being set (182).

Section II

Agreements in cases of de facto separation

237

Since separation agreements are often seen in practice (183) it seemed desirable to insert rules in Québec legislation to govern them. These agreements are regarded with suspicion, however, whenever they

seem to encourage divorce or separation as to bed and board, or to alter any obligations resulting from marriage (184). The Court of Appeal declared in 1968: "*La convention doit être tenue pour nulle dans la mesure où elle vise à modifier les obligations que la loi impose aux époux*" (185).

On the other hand, such agreements are perfectly acceptable and occur very frequently in areas under Common Law, especially in the other provinces of Canada, in the United States and in England (186). Such agreements allow the consorts to recognize a common desire to live apart without giving this desire the final nature conferred by a court decision.

It was thus considered wise to make such agreements acceptable while subjecting them to the authority of the court and limiting their effects (187).

It seemed desirable to limit agreements between consorts in cases of *de facto* separations to those relating to custody of the children and to expenses of the marriage, including support.

It seemed unnecessary to define the expenses of the marriage, which are left to the interpretation of the court (188).

As the law now stands, the court often takes account of agreements between consorts as to support, expenses of the marriage and custody of the children in its decision relating to these different areas (189) even if it does not follow them to the letter (190).

It is understood, however, that no matrimonial agreement may be changed unless such a change is made under the articles of the Draft.

238

The consorts may avail themselves of an agreement only if they have prepared it in writing and have had it homologated by the court. Verbal agreements are difficult to prove and dangerous in that they might bind a less-educated or more easily influenced consort to agreements unfavourable to him. Moreover, anything which is to be homologated must be in writing. Once the agreement is homologated, it becomes executory.

A judge may, of course, refuse to homologate an agreement which would be contrary to public order or one which would charge a consort with obligations clearly out of proportion to his means. For example, no such agreement could contain any unilateral renunciation of a right (191).

A refusal by a judge would be in line with the procedure provided in Article 875 of the Code of Civil Procedure.

In his appraisal of such agreements, the judge would be guided by the

principle set forth in Article 236, and by that of the child's interest, which appears in Article 25 in the Book on *Persons*.

239

The power to amend agreements between consorts is consistent with the principle by which support and decisions relating to custody of children can always be varied (192).

Section III

Grounds for separation as to bed and board and for divorce

240

This and the following articles provoked many varied comments, ranging from reproaches for encouraging the destruction of the family to reproaches for delaying the open solution of divorce by mutual consent. Some regretted that the idea of fault did not completely disappear; others consider that it should have been retained as in existing law and even strengthened. In the face of such great diversity, it seemed advisable to retain the spirit of the original Draft while making all the improvements in details which seemed to be generally acceptable.

This article establishes an essential principle, namely that divorce and separation as to bed and board are remedies for marriage breakdowns.

Under the original Draft, divorce or separation was granted when "cohabitation has become intolerable". The observation was made in some comments that what may be tolerable for one will be intolerable for another, and that the same difficulties might arise in this context as occur in evaluating physical, and above all, mental cruelty (193). Moreover, emphasizing the "impossible" state of cohabitation would merely make the task of the court more complicated. Cohabitation may be physically possible even when a marriage has broken down completely and the consorts have no intention of being reconciled.

Article 241 mentions the most frequent situations in which a marriage may be assumed to have failed but it seems unrealistic to claim to list all the grounds for divorce or for separation, whether peremptory or not, within the terms of a law, as do Articles 186 and following of the Civil Code and Sections 3 and 4 of the federal *Divorce Act* (194). The fact that the jurisprudence hesitates regarding certain grounds for divorce or for separation, such as cruelty or grievous insult, clearly shows that human

psychology makes any restrictive enumeration or interpretation impossible (195).

241

The proposed article sets down the three main causes leading to the absolute presumption of marriage breakdown. This is in no way a restrictive list, but simply a series of irrebuttable presumptions. When a marriage has broken down for any reason, divorce or separation must be granted.

The presumptions in the proposed text include offences which one spouse may commit against the other or against the children: adultery, refusal of succour or assistance, cruelty, outrage, ill-usage and grievous insult, and refusal to cohabit.

The second sub-paragraph helps to clarify existing law by requiring that only one spouse intend to cease cohabitation.

This provision has the advantage of avoiding hesitations as to the distinction between separation and desertion. According to certain court decisions, the first should be characterized by the intention of both consorts to put an end to the marriage (196).

It was considered advisable to specify two cases in which separation of consorts is inevitable, although involuntary: incurable illness and imprisonment. The second case already appears in the *Divorce Act* (197), with slightly different terms and conditions.

It seemed appropriate to investigate the advisability of reducing the three-year period. Since this proposal met with strenuous opposition, it was agreed to leave the period unchanged (198).

There is a change to existing law with respect to desertion, since a consort who has deserted his spouse may seek a divorce only after the desertion has lasted for five years (199).

Sub-paragraph 3 of this article strikes a compromise between the opinion of those who support divorce by mutual consent and that of those who strongly oppose such a possibility. The first feel that there is no point in safeguarding a marriage once it is established that the consorts no longer wish to live together; this, they feel, constitutes the best evidence of marriage breakdown. On the contrary, the other members sense a considerable risk that divorce by mutual consent will undermine the stability of marriage. The delay of one year provided for in this article compels the consorts to take time to reflect, so that hopefully this period will help avoid hasty decisions, and pressure from one spouse to wring

consent from the other. Nevertheless, certain reservations were expressed about the provision as proposed.

242

This article has its source in Article 4(1)(c) of the *Divorce Act*. This is a case, not of mere separation, but of absence within the meaning of the Civil Code. A special provision seems to be called for, because it cannot be maintained that a marriage has broken down when cohabitation no longer exists in view of the absence of the spouse.

"Inability to locate" a spouse implies that the applicant has made serious effort to find him (200).

243

This article has its source in Article 4(1)(d) of the *Divorce Act*, with four important differences. First of all, either consort may apply for the divorce or the separation. It seems that impotence caused by illness or disability places the impotent consort in a situation such that he also might wish to terminate his marriage. On the other hand, refusal to consummate marriage is not mentioned here. This in effect is treated as dereliction of a duty resulting from marriage, which is covered by sub-paragraph 1 of Article 241.

Moreover, it appeared useless to require that the consorts be separated when the application is submitted (201).

Finally, the proposed article specifies that the consorts must cohabit throughout the period of one year so that they have time together to find out whether or not there is medical or psychiatric treatment which could cure the impotent spouse.

244

This article specifies the condition under which the court may grant a divorce or separation: the court must be convinced that the marriage has broken down. There is no question of allowing consorts to terminate their marriage because it is going through a "bad patch" or because, on the spur of the moment, one consort decides to seek a divorce.

The fact that evidence of marriage breakdown is required makes a very clear distinction between divorce for which consorts apply jointly, as provided in the preceding article, and divorce by mutual consent, as it exists in some foreign legislation which does not oblige the consorts to provide any justification (202).

The only case vaguely similar to mutual consent is the presumption of

marriage breakdown provided in sub-paragraph 3 of Article 241, but the decision to apply for a divorce by consent must have withstood one year of reflection.

The second paragraph helps clarify the principle of Section 9(1)(a) of the Divorce Act and Article 813 of the Code of Civil Procedure. Existing law in no way prohibits taking the admissions of a party into account "*mais il défend au tribunal de rendre jugement seulement sur la foi des pièces de la contestation écrite qui comporte des aveux ou sur un consentement à jugement*" (203). The court may pronounce a judgment only after investigation.

Section IV

Conciliation

245

Much importance is attached to conciliation in the Draft. Conciliation should not be considered only as an effort towards reconciling the consorts, in cases where this is possible, but also, and above all, as a means of inducing the consorts to come to an agreement in all areas where they can do so.

The *Divorce Act* gives great prominence to conciliation, drawing in this respect on suggestions of the Special Joint Committee of the Senate and House of Commons which prepared this legislation (204).

It provides for conciliation in three instances: the advocate must ascertain that conciliation is appropriate (s. 7); the judge must do the same (s. 8); finally, if the consorts become reconciled, the decree *nisi* does not become absolute (s. 13). On the other hand, the Civil Code is less specific and merely considers that reconciliation of consorts is indispensable for a subsequent action in separation as to bed and board (a. 199 C.C.). This was a serious gap which had to be filled (205).

Whatever the legal requirements, their effectiveness is doubtful considering the lack of sufficient reasonably qualified conciliation services (206). This is why it was considered necessary to develop a detailed conciliation procedure to be administered by services especially designed for this purpose, hopefully within the framework of a family court (207).

This provision repeats the principle of Section 8 of the *Divorce Act*, with the addition that the judge must ascertain that the procedure for

conciliation, provided for in the articles following and in the Code of Civil Procedure, has been followed.

246

The first paragraph of the proposed text repeats the rule in Section 8 of the *Divorce Act* which states that the court must adjourn proceedings if it appears that there is a possibility of reconciliation between the consorts.

It seemed desirable to provide that the court indicate a date until which the suit is adjourned rather than, as under the present act, to provide for adjournment *sine die*, allowing either spouse to apply to have the proceedings resumed after fourteen days.

Although Article 247 provides that reconciliation of the parties terminates the proceedings, it seemed inadvisable to oblige the court to reject the application if it appeared that, at some point, one party forgave the other, as is the case under Section 9(1)(c) of the *Divorce Act*. No effort must be spared to encourage reconciliation, and this goal is not reached if the parties fear that they will be denied a divorce simply because the judge is not convinced that no reconciliation has taken place (208).

Sub-paragraphs 2 and 3 repeat the principle set down in paragraph (f) of Section 9(1) of the *Divorce Act*, except for the fact that here we are dealing with adjournment rather than with refusal to grant the divorce. This measure was judged more realistic, and moreover, it is in keeping with judicial decisions. Generally, the courts have hesitated to reject a petition for divorce when external circumstances such as extreme poverty, or sickness, made it particularly burdensome for one of the spouses. Instead, they have tried to find an appropriate remedy for the situation (the transfer of health insurance to the benefit of a hospitalized spouse (209) or of a hypothec in favour of the wife on a house belonging to her husband, and leave for her to live in it (210).

Finally, the last paragraph provides for the possibility of appointing a qualified person to undertake conciliation. This provision already appears in subsection 1 of Section 8 of the *Divorce Act*. Nevertheless, the

proposed article is drafted in broader terms and the appointment of a marriage counsellor is only one step the court can take.

247

This article is based on Articles 196 and 197 of the Civil Code which apply only to separation as to bed and board. In present law, reconciliation is an obstacle to any action for separation as to bed and board, regardless of the stage at which such reconciliation occurs. The principle is retained, but a statement in writing is required in order to avoid the great difficulties which now exist with regard to evidence whenever one consort contends that there has been reconciliation and the other disputes this (211).

The last paragraph of the article deviates from Section 9(2) of the *Divorce Act*, under which no conduct which has been forgiven may be invoked again. The rule in Article 197 of the Civil Code, according to which former grounds for separation may be used to support a new application provided new facts exist to justify such application, seemed more realistic.

248

Even if the grounds put forward by the petitioner are not sufficiently serious to warrant the court's granting a separation as to bed and board or a divorce, it might be worthwhile for the consorts to live separately long enough to calm down. This pause for reflection is, moreover, already implicit in Article 198 of the Civil Code. It was considered desirable to specify that the court may make certain corollary orders adjusting the life of the consorts (respecting support, custody of the children) during such a period of separation.

Section V

Provisional measures

249

This article simplifies the existing law, especially the second paragraph of Article 200 of the Civil Code, and Article 820 of the Code of Civil Procedure, by eliminating the requirement that the wife submit a motion

requesting leave to move to a place other than that of her domicile or to remain in her matrimonial home without her husband. Under the proposed formula, the obligation to cohabit is automatically terminated upon presentation of the motion, without prejudice to the provisional measures in the next article concerning possible occupation of the family residence.

250

This article does not alter existing law as regards the family residence; it is simply a consequence of the foregoing article. This provision allows the judge to order the occupation of the family residence during the proceedings in the best interests of the family, thereby consecrating present jurisprudence (212).

The proposed text, however, is more precise than the present law insofar as the use of furniture is concerned. In contrast to Article 814 of the Code of Civil Procedure which provides for the possibility of a seizure of moveable property which belongs to one spouse but is in the hands of the other, the proposed text provides for a measure which is independent from the ownership of the furniture. It is intended to avoid situations where one consort, having provoked the departure of the other, takes advantage of that departure to liquidate all the family furniture.

The final destination of this furniture will be decided upon when the decision granting divorce or separation as to bed and board is rendered, in accordance with Article 56 which allows the court to award the furniture of the family residence even to the consort who is not its owner.

251

This article basically simplifies Article 200 of the Civil Code in the light of the general principle, stated in Article 25 of the Book on *Persons*, of the interest of the child.

This article gives broad powers to the court in the sense that people other than the mother or father may be awarded custody of the children, and visiting rights may be awarded to grandparents (213).

The procedure to be followed would be provided within the framework of the family court or in the Code of Civil Procedure.

252

This article also adopts part of Article 200 of the Civil Code and makes provision for the awarding of an allowance for legal costs. This provision in no way alters the present law nor the jurisprudential rules according to which, "*en principe la pension alimentaire pendant l'instance*

en séparation de corps doit comprendre, en plus des aliments, une certaine somme pour permettre à l'épouse de payer les déboursés du procès, lorsque les moyens du mari le permettent. Dans des cas particuliers, une demande de provision peut être faite, en tout état de cause, à la condition qu'elle soit justifiée par les circonstances et par les besoins de l'épouse" (214).

It should be noted that the allowance may be modified as provided in Article 257.

Section VI

Accessory measures

253

This article must be read in conjunction with Article 236 which outlines the principles to be followed by the judge in every decision concerning separation as to bed and board or divorce. It is completed by the articles following which set out the terms of the accessory measures listed.

None of these provisions alters the present law. The proposed text establishes a fairly clear distinction between support due to children under an obligation of support, which always exists regardless of the state of the marriage, and support between consorts under Article 337; an obligation of support exists between divorced consorts, but under Article 256 (215), this obligation may nevertheless disappear, should the court so decide. Fulfilment of the obligation of support may take many forms, such as payment of an allowance for retraining or rehabilitation.

The article sets out the principal accessory measures, although others exist which provide for distribution of furniture (a. 56), transfer of the right to the lease (a. 64) and allocation of the family residence (a. 65).

The reference at the end of the article to maintenance of children, "even those of major age", permits a spouse to join to his own application an application for support regarding a child of major age, thereby eliminating unnecessary proceedings (216).

254

This article reproduces the second part of the first paragraph of Article 212 C.C. Sums intended for the children may include, in addition to support, paid in periodic instalments or in a lump sum, specific amounts intended for specific expenses such as surgical operations,

prostheses, vacations and so forth. The existing jurisprudence provides examples (217).

This article is intended to put an end to the uncertainty concerning the judge's power under the *Divorce Act* to award both periodic support and a lump sum (218).

As some comments suggested, it would have been desirable to propose that the court be able to index support payments. Without an official index, it seemed impossible to find an indexation formula.

Finally, it should be noted that, while it may perhaps be desirable for the separation judgment or agreement to state in detail how the different amounts paid by one spouse to another are to be used, such a list would likely have serious tax implications (219).

The trustee's powers and obligations are defined in the Titles on *Trusts* and on *Administration of the Property of Others* (220).

255

This article specifies that accessory measures may be taken at any time after divorce or separation as to bed and board is ordered. As a result, it tends to do away with jurisprudential confusion (221) as regards the possibility of applying for support after the divorce decree; the solution adopted by the Court of Appeal is adopted (222). Furthermore, a draft amendment to the *Divorce Act* runs along these lines (223).

256

This article is limited to divorce.

Although in principle, there exists an obligation of support between divorced consorts, as provided under Article 337, cases may arise where there is absolutely no justification for retaining any bond between consorts. For example, if the marriage has lasted a fairly short time and both consorts are young and able to work, it may be more equitable to award the wife a lump sum to allow her to return to work, and not to burden the husband with the possibility of a financial obligation ten or twenty years after the divorce. Jurisprudence has already recognized this possibility (224). Nevertheless, some doubt persists as to the judge's right to declare such a decision final and it was felt that this doubt should be done away with (225).

The possibility of declaring all right to support extinguished combined with that of applying for support after the divorce has been decreed, in other cases, even though not awarded by judgment, seemed more flexible and equitable than the present system.

257

Accessory measures can always be amended; this is in accordance with the principles of Article 213 of the Civil Code with an obvious reservation as regards the extinction of the right to support which would make no sense if it could be modified. This amendment is left entirely to the discretion of the judge who may not only alter the amount of the pension, but also order payment of a lump sum instead (226).

The proposed article also contains an innovation respecting provisional measures in divorce; at present, these apparently cannot be reviewed by the court which rendered the decision and can only be reviewed on appeal.

258

The proposed text even permits the review when the measures involved are subject to appeal, in order to avoid a situation where one spouse uses delays in appeals to postpone a necessary review.

Section VII

Effects of separation as to bed and board and of divorce

259

The principle here is taken from Articles 185 and 206 C.C. Consorts wishing to remarry must file a certificate of non-appeal as required by Article 19 and the twenty-day period provided for in Article 21 allows time for appeal before the new marriage.

It was not considered necessary to retain the two stages of current divorce decrees: the decree *nisi* and the decree absolute, since sub-paragraph 3 of Section 13 of the *Divorce Act* has very rarely been applied.

At any rate, divorce decisions would be subject to appeal and retraction as are any other decisions (227).

The elimination of these two stages is also justified by the number of cases where the consorts try to avail themselves of sub-paragraph 2 of Section 13 of the *Divorce Act* to shorten the three-month period between the decree *nisi* and the decree absolute (228).

260

This is a simplification of Articles 206 and 207 C.C.

The question of the domicile of the wife separate as to bed and board is dealt with in the Book on *Persons* (229).

261

This article is a restatement of the first paragraph of Article 208 C.C. There was some discussion as to whether it would not be easier to provide that separation as to bed and board should also entail dissolution of the regime. This would have created problems since any reconciliation and reunion of the separated consorts terminate the effects of separation; dissolution would leave reconciled consorts with no matrimonial regime.

The words "where applicable" were added to cover cases in which consorts separate as to bed and board are already separate as to property.

262

This article is based on the first paragraph of Article 211 of the Civil Code. In the original Draft, retroactivity of the effects of dissolution to the day of the application was proposed in order to avoid fraud. Comments received noted that such retroactivity could adversely affect the very consorts it was intended to protect, since there may be a considerable period between the date of the application and the date on which the property is divided. For this reason existing law is retained.

The rights of third parties are protected by the registration in the central register of matrimonial regimes of a notice of the judgment, under Article 1266a of the Civil Code (230).

263

This is a simplification of Article 216 C.C.

264

This article is intended to amend Article 208 of the Civil Code. First, it provides that the court, if necessary, must decide what becomes of gifts, in order to remove existing confusion as to the time when the court may make such decisions (231).

Secondly, it seemed that gifts *inter vivos* agreed to in the marriage contract should be maintained wherever the contract makes no stipulation to the contrary. It would seem unfair to allow consorts married under the regime of community of property or that of partnership of acquests to be entitled to their share while those married under a regime of separation as to property would be denied theirs.

At any rate, gifts now tend more and more to carry resolutory clauses applicable in case of divorce (232). It was felt that prohibition of such clauses was not advisable, since otherwise provision might no longer be made for gifts in marriage contracts. Some doubts were expressed, nevertheless, as to whether these clauses were not contrary to public order.

Gifts *mortis causa* are governed by special rules. It was suggested they be presumed revocable, unless otherwise provided in the marriage contract (233).

It would be inadvisable for a consort to be bound by gifts *mortis causa* which he has stipulated as irrevocable, because divorce or separation as to bed and board could occur shortly after the marriage. The court has thus been given the discretion to reduce or nullify such gifts, according to the circumstances.

265

This article simplifies the wording of Article 217 C.C.

TITLE TWO

FILIATION

CHAPTER I

FILIATION BY BLOOD

Section I

Establishment of filiation

266

Although the first paragraph of this article is based on Article 218 of the Civil Code, this Draft makes no mention of the child's legitimacy, but merely establishes the presumption of paternity with regard to the husband of the child's mother.

Moreover, this article makes birth, and not conception during wedlock, the starting point for presumption of paternity. This rule, frequently seen in foreign legislation, is intended to benefit the child (234), and though arbitrary, is justified by the implicit acknowledgment of paternity when the marriage takes place.

Article 218 C.C. stipulates that for presumption of conception during marriage, one hundred and eighty days must have elapsed between the date of marriage and that of the birth of the child. This is entirely arbitrary and not consistent with modern medical facts (235).

This proposed article does not seem too severe for the husband, since he may use any means to establish the fact that he is not the child's father.

The second paragraph of this article, which is new law, creates a presumption of paternity with regard to the man who is living with the mother when the birth takes place. This presumption may be refuted by any means of evidence which can establish that the man in question is not the child's father.

267

It appears closer to reality to presume that if the child is born more than three hundred days after separation as to bed and board the husband is not the father. This solution does not follow current jurisprudential

decisions which maintain presumption of paternity even in cases of separation as to bed and board (236).

268

Conflicts of paternity arising from a mother's remarriage within less than three hundred days after dissolution or annulment of a previous marriage are to be resolved in favour of the second husband.

This preference is due to the high probability that the second husband is actually the child's father, especially where the previous marriage has ended in divorce. It is seemingly in the child's own interest that he be integrated into the new family, where he would more likely find a healthy and stable environment in which to develop. This also avoids disavowal proceedings being initiated for the sole purpose of clarifying the child's situation (237).

269

Where presumption of paternity does not apply - namely, when the child is not born during his mother's marriage or within three hundred days following dissolution of such marriage - paternal filiation may, as in present law, be either voluntarily declared by the father or imposed on him by the court.

The major innovation here is not in the means of acknowledgment, but rather in its effects, which as will be seen, are to be the same for all children, regardless of circumstances of birth.

270

Acknowledgment of paternity need not be made in any special form, and may be either written or verbal. Its effects are enumerated in Article 272.

271

This is the counterpart to the preceding article and provides for cases where Article 266 does not apply. The mother may acknowledge her maternity in cases where there is doubt as to whether she gave birth or doubt as to the child's identity. This is a case where the attestation of delivery provided in the reform of acts of civil status does not take place (238).

272

The principle contained in Article 241 C.C., by which mere acknowledgment of paternity or maternity binds only the person who makes the claim, is restated here. It seemed unwise to allow a person to acquire

rights with respect to a child and to obligate the members of his family, by merely making an admission. Status of persons comes under public order, and no person has the right to create or affect another's status by a mere declaration (239).

273

Voluntary acknowledgment should constitute proof with regard to third parties if made in an official manner or corroborated by a third party, especially the other parent. Thus this article provides for cases where a parent signs the declaration of birth. Signature of the act of birth is a consecrated form of acknowledgment under jurisprudence (240). Continuous contribution towards the child's support was deemed an indication sufficient to prove the seriousness of an acknowledgment which, accordingly, can be invoked against anyone. Finally, recognition by the other parent and confirmation by the attestation of delivery also appeared sufficient corroboration of the truth of any acknowledgment.

274

The intention of this new article is to eliminate multiple acknowledgments and conflicts as to filiation.

Any person wishing to lay claim to a child whose filiation is already established must initiate proceedings to contest the child's status, which may only be done where it is not prohibited by Article 284.

Section II

Disavowal and contestation of paternity

275

The first paragraph is based on the principle found in the Civil Code by which a husband may disavow his wife's child, meaning that he may rebut the presumption of paternity. The articles following set forth the circumstances under which such disavowal is permissible.

The second paragraph is new law, in line with what would be the new legal situation of children. Since all children are to enjoy the same rights, it is unnecessary to continue to grant any superiority to so-called "legitimate" status. It seemed useful, then, to allow a mother to show that her child is not hers by her husband; this might make it possible for the child to later regain his true family. This solution was prompted by a reform in French Law (241) and exists in other legislation as well, particularly Polish Law (242).

The scope of the rule was extended to cover *de facto* unions, since the presumption also operates in that case.

276

The limitations imposed on circumstances and means of proof of disavowal by Articles 219 and following of the Civil Code are here removed. Disavowal of children presumed to have been conceived during marriage is presently restricted to cases when union is impossible or when birth has been concealed.

Since presumption of paternity would be based on the birth of the child born during marriage, and given regard for biological facts, it seemed unwise to restrict the means of evidence (243).

In line with Article 266, the scope of the rule has been extended to cover *de facto* unions.

277

The period of two months allowed for disavowal in Article 223 C.C. seemed too short and has been extended to one year.

However, it seemed necessary to maintain a fairly short period to ensure certainty of filiation, and at the same time to provide for cases where it is impossible for the husband or the *de facto* consort to know of the birth (244).

278

This restatement of the principle found in Article 225 C.C. stipulates in addition that the other parent be a party to the action. It is obvious that both parents have an interest in any contestation of their child's filiation.

This new provision establishes an exception to the rule which makes both parents of any minor child his *ex officio* representatives (245). In the present case, the appointment of an *ad hoc* tutor is imperative because the child's interests would necessarily conflict with those of one of the parents.

279

This article provides, as does Article 224 C.C., for the institution of an action by the heirs of the presumed father (or by analogy, of the wife) who has died within the period prescribed for disavowal or contestation of paternity.

There is considerable controversy as to whether or not to maintain Article 224 C.C. Some feel that the child would have no rights in the succession if the dead man were not his father, and that if the presumed

father's death occurred within the period allotted for disavowal, his heirs should be entitled to establish the truth.

Others consider disavowal or the mother's contestation of paternity as actions directly concerning the presumed father and the child's mother. If, then, they should die before instituting an action for disavowal or contestation, any doubt should benefit the child, and not the heirs, since they only contest the child's filiation for financial reasons. The heirs of either the husband or the mother could, however, continue any action instituted by the deceased.

Even upholders of the first theory felt that the time allowed the heirs for instituting proceedings should be strictly limited. Article 224 C.C., however, currently extends this period up to the time when either the child takes possession of the presumed father's property or the heirs are disturbed in their possession of it. This might happen long after the child's birth, especially, if the presumed father was not aware of the situation.

280

It seemed advisable to make provision for cases of artificial insemination. No consorts or de facto consorts who avail themselves of this method by mutual agreement should be allowed to change their minds and contest their child's filiation (246).

281

It seemed indispensable that the strictest confidentiality surrounding artificial insemination be reinforced by an impossibility of basing an action for status or for contestation of status on the grounds of insemination.

Section III

Proof of filiation

282

The provisions of Articles 228 and 299 C.C. are extended to all children, as has been done in jurisprudence (247).

283

This is a restatement of Article 230 C.C., with a style change.

284

This is a restatement of Article 231 C.C. although it provides that any presumed father may still exercise his right to disavowal and any mother her right to contest her husband's paternity, within the prescribed period.

285

This article endeavours to end the controversy in existing law as to whether or not a child's status may be contested if the conditions specified in Article 231 of the Civil Code are not met (248).

This action differs from those for disavowal and contestation of paternity since they may be instituted even if the act of birth is consistent with the possession of status, but they must be instituted within a certain period. The action provided for here is not subject to prescription because it is an action for status (249).

286

This article is drawn from the same concern as is Article 281.

287

Proof of filiation in actions for establishment of status is dealt with in the same manner as in Article 232 C.C.; this article adopts jurisprudential solutions (250).

The "commencement of proof in writing" mentioned in Article 232 C.C. has been shortened to "commencement of proof". Jurisprudence has accepted, as commencement of proof in writing, admissions by the person concerned (251), photographs (252), the judgment of a lower court dismissing the action (253), and a court decision in an action for hospital costs (254).

The concept of "commencement of proof" is defined in the Book on *Evidence* (255).

288

This is a generalization of Article 234 C.C. which gives recognition to certain solutions in jurisprudence (256).

289

As does jurisprudence, this article recognizes that, out of respect for the inviolability of the human person, no one may be forced to provide a

specimen of his blood (257). Nevertheless, an unjustified refusal, obviously given by a person in an effort to evade his responsibilities, should not be able to harm the child.

290

The rule found in Article 236 C.C. is changed to limit to three years the period allotted the heirs for establishing the filiation of a child who did not do so himself. They may act regardless of the age at which the child dies; under present law, the right of action is extinguished when the child dies more than five years after becoming of age. It seemed that the heirs may have reason to establish filiation even where such a child dies after the age of twenty-three years.

Section IV

Effects of filiation

291

This article establishes the basic principle of this reform: all children, regardless of circumstances of birth, are to be on an equal footing and to enjoy equal rights with regard to their parents and their parents' families.

The traditional distinction between legitimate and natural children would thus be abolished.

This would eliminate the current rule by which a natural child's only family relationship is with the parent who acknowledges him, and which makes him unable to inherit *ab intestat* (258).

Application of this new principle, of course, depends on fully established filiation. Article 272 makes it clear that unilateral acknowledgment is insufficient.

CHAPTER II

ADOPTION

Section I

Conditions for adoption

292

By substantially repeating Section 2 of the *Adoption Act*, this article states the basic principle which expresses the whole purpose of adoption.

To assess the interests of the child, the court uses the criteria listed in Article 25 of the Book on *Persons*.

293

The proposed article is based on Section 3 of the *Adoption Act*.

While recognizing that any person of major age has the right to apply to adopt a child, this article takes into account the argument of those adoption specialists who hold that children should be adopted by married couples living together rather than by unmarried persons or persons separated or divorced (259). Consorts will have to apply jointly for adoption (260).

There are cases, however, where it is legitimate to allow consorts, even separated or divorced, to adopt a child jointly, when they raised the child before their separation or divorce.

The suggested provision removes the anomaly in Section 3 of the Act under which no person separated as to bed and board or separated *de facto* may ever adopt a child alone whereas a divorced person may do so, being considered an unmarried person. Any person of major age, then, who fulfils the conditions provided by law, may adopt a child by himself. On the other hand, two unmarried persons living together could not jointly adopt a child.

An adopted child and the single person adopting would no longer need to be of the same sex. At present, moreover, this condition may be dispensed with when an adopted person and the person adopting are related or if the person adopting is a widower or widow who had already adopted the child *de facto* before his spouse died.

Also, the adopted person would no longer need to be of the same religion as at least one of the adopting persons. The child's sex and

religion are two criteria which the judge must consider when he assesses the child's interests, as provided for in Article 25 of the Book on *Persons*. Consequently, no special provisions are required.

294

This article allows the court to grant adoption with regard to the two persons adopting when one of them dies before judgment is pronounced, but after the motion has been presented. This is a case in which the court has complete discretion, since the death of one of the persons adopting may change the circumstances of the adopting family and affect the advisability of the adoption.

295

This article, of new law, is intended to allow posthumous adoption, particularly in cases where a child has been adopted *de facto* by two consorts one of whom dies before the motion for adoption is presented.

In cases where there was a clear intent to adopt, there seemed to be no reason to deprive the child of the advantages which he would have enjoyed if he had been adopted by both consorts; one such advantage is the establishment of filiation with regard to the deceased consort.

On the other hand, it seemed inadvisable to allow posthumous adoption by a single adopting person. First of all, it would probably be too difficult to prove the deceased person's intent without the corroboration of a surviving consort. Moreover, there would be no one left to take care of the child.

296

This article substantially repeats Article 4 of the present law. It confirms the broad discretionary power which the court enjoys at present in order to make adoption easier in cases where a child is received into a family where he can develop happily.

The suggested provision allows no special exception to the required age difference in cases where the adopted person is the child of the person adopting. Since the revised version of the Title on *Filiation* puts all children on the same footing, and gives them identical rights, whatever the circumstances of their birth may be, there is no longer any reason to grant any child a filiation other than that which is already his own.

297

This article, of new law, introduces two major innovations in the system of adoption: the possibility of legitimate parents agreeing to the

adoption of their child, and the creation of a procedure for declaration of eligibility for adoption.

It was considered that parents should be able to agree immediately to the adoption of their child (261). It seems preferable to permit consent rather than to await expiry of the twelve-month period for abandonment now required by Section 7d of the Act.

Moreover, in every case where parents do not consent, adoption could take place only if preceded by a judicial declaration of eligibility for adoption and provided the child meets the conditions necessary for such a declaration under Article 307.

At the moment, the interpretation of the facts leading to tacit abandonment is left to adoption societies which are thereby entrusted with the difficult task of making a decision which results in the original parents losing their rights. Adoption societies are thus caught in the middle of conflicts between the interests of the parents by blood, the child concerned, and the persons hoping to adopt (262). Although social service centre professionals are best equipped to assess whether or not a child has been abandoned, this is sometimes a difficult decision and they are sometimes subjected to pressure from people who wish to adopt a child.

It is therefore useful to have a court declare abandonment, since this would protect the rights of the original parents (by blood) and, at the same time, protect persons adopting from any claim on the part of the parents by blood.

298

This article is based on Sections 6a, 7b and 7c of the *Adoption Act*. It is intended to ensure responsible consent of the two parents when filiation is established with regard to both.

Under the proposed complete revision of the law on tutorship, parents are of right their children's representatives in all civil acts (263), so there is no need to provide for any consent other than that of a parent exercising parental authority.

There must be serious reasons for any parent being unable to make his will known and, eventually, efforts must be made to find the distant parent.

Deprivation of parental authority (264) would deprive the parent of custody of the child and of all his rights over him, including the right to consent to his adoption.

Consequently, it seemed advisable no longer to allow the court to

disregard an unwarranted refusal to consent to an adoption. No refusal is unwarranted unless the parent is unworthy enough to deserve to be deprived of his parental authority (265).

299

This article follows logically from the preceding article, and is based on the present rule concerning the consent of the father or the mother of a natural child (s. 6a of the *Adoption Act*).

300

This article must be read in conjunction with the reform of parental authority and tutorship (266). Since, under future law, parents would be of right representatives of their children, the tutor could consent to the adoption only when the parents are deceased, have been deprived of parental authority or are legally unable to consent to the adoption. It seemed logical that the tutor to the child's person, who replaces the parents, should be able, like them, to consent to the adoption in the interest of the child, when he no longer desires or is no longer able to take care of the child himself.

301

This article is new law. It was considered that all parents or tutors who wish to have a child adopted must consult a social worker before giving their consent to adoption. On the one hand, this measure is intended to try to bring the child and its original family together, and, on the other hand, it seeks to limit private adoptions and to protect parents from possible pressure.

The requirement that consent must be given in the presence of a professional social worker arises from the same concern.

There was also some question as to whether it would be advisable to set a period of a certain number of days after birth during which the mother could not consent to adoption (267).

This measure would have been intended to protect the mother from making a hasty decision when not yet completely recovered from the delivery, and possibly without all the factors necessary to assess her own situation from the moral, social and financial points of view.

The adoption specialists consulted brought up the point that such a period would cause serious problems. If it is too short, it is useless; if it is too long, it exceeds the period of the mother's hospitalization and increases the danger of creating an unstable situation where tacit abandonment of the child could be indefinitely prolonged.

It seemed preferable to provide a period for withdrawal of consent during which parents, duly advised of their rights, could reverse their decision and take their child back by way of a simple written application (268).

302

This article, of new law, provides for legal delegation of parental authority to the social service centre or to the person to whom a child is given. Such a measure seemed indispensable, because from the time the parents consent to adoption to the time such adoption is in fact granted, decisions concerning the child may have to be made. Someone must be able in fact to exercise parental authority during this period.

303

The decision to leave a child seemed too important not to allow parents or tutors a period for reflection during which they may change their minds. Such a period exists, moreover, in other legislation (269).

This period is not provided for in the present Act and "*les tribunaux, semble-t-il, admettent difficilement un changement d'idée, surtout si l'enfant a déjà été placé dans un foyer en vue de son adoption*" (270). Nevertheless, serious difficulties may still arise if parents by blood claim their child before adoption is granted (271).

It thus seemed preferable to provide for a period during which consent may be withdrawn almost without formalities, followed by an application for judicial return (see Article 305), after which the child may no longer be claimed. Once these periods have expired, therefore, the parents adopting are protected from any dispute.

Although under Article 298 both parents must consent to adoption, either of them may withdraw his consent alone. The child will be returned to the parent who expressed a wish to take it back.

The second and third paragraphs compel the centre or the person who undertook the adoption to return the child on a simple request.

There was some question as to whether a special procedure should be provided for cases in which there could be doubts as to the conditions of well-being or morality offered to the child by his original family.

Nevertheless, it seems that Article 367 offers the social service centres sufficient recourse if they fear that the family's living conditions endanger the child's health, safety or morality.

304

This article, of new law, provides for cases where a child is voluntarily returned by the social service centre, or by the person who undertook the adoption, after the period of thirty days and before the child is placed for adoption. When this return is voluntary, it seemed unnecessary to have to resort to legal proceedings to have the child returned.

305

This article, of new law, provides for a period of sixty days during which a judicial application for return of a child is admissible. The period begins after expiry of the period provided for withdrawal of consent; such withdrawal occurs with no formality other than a written notice.

The period for instituting an action for the return of a child is a period of forfeiture, which means that its expiry implies extinction of the right (272).

The child is returned only after the court has examined the family situation. The court decides in the child's best interests.

The suggested provision fulfils the general wish to encourage keeping children in their natural families. It also has the advantage of reducing to three months the present period of six months during which parents adopting may fear action by the original family.

306

This article allows the judge to order the social service centre to make a real effort towards rehabilitation. Return to the natural family will obviously be more easily decided if there is a period of observation in every case where conditions do not seem ideal.

307

This article lists every case where children may be judicially declared eligible for adoption. It is based on Sections 6b, 7a, 7d and 7e of the *Adoption Act*, which deal with children who may be adopted without their parents' consent. This article covers children without parents, children who have been abandoned *de facto* by their parents, and those whose parents are unable to take care of them under the conditions provided for in sub-paragraph 4 of the article. In this last case, the opinion of a psychiatrist is required, since mental illness is to be established. This article applies even to children provided with a tutor.

Sub-paragraph 5 refers to the new procedure governing deprivation of parental authority (273).

308

This article, of new law, provides that only a social service centre or the person who has received a child may apply for a judicial declaration of eligibility for adoption.

Accordingly, when the child is received by his grandparents or by another member of his family, they alone may apply to have him judicially declared eligible for adoption.

309

This article, of new law, provides for a situation in which parents or tutors have withdrawn their consent in writing, but have not taken the child back. If they abandon the child *de facto* after another change of mind, this abandonment must not be allowed to continue indefinitely merely because some document exists in which consent to adoption is withdrawn.

310

This article is based on Section 7d of the *Adoption Act*. Considering that one of the objectives of judicial declaration of eligibility for adoption is protection of the rights of the parents by blood, it is understandable that the court should ascertain that such parents will not resume custody of their child.

The child's interest, which must be the very foundation of adoption, would be ill served if he found himself denied the possibility of returning to his original home in acceptable circumstances.

A notice of the motion for declaration of eligibility for adoption is served on the parents or the tutor to give them warning of such motion (274).

311

This article, of new law, is the counterpart of Article 302. It endeavours to avoid cases where, for a certain time, no one has legal custody of a child. It is based on Article 350 of the French Civil Code.

312

The first paragraph of this proposed article repeats Section 8 of the *Adoption Act*. The second paragraph provides for quite rare cases in which a child of eighteen finally finds a family ready to adopt him and can thus acquire filiation. It is perfectly obvious that these are highly exceptional cases and that this provision could not serve as a pretext for adoptions of convenience or those undertaken for purely financial or fiscal purposes.

313

This article substantially repeats, in part, Section 9 of the *Adoption Act.*

314

This article repeats Section 9 of the *Adoption Act in fine.* The second paragraph was added to put an end to certain confusion regarding the effect of refusal by a child more than fourteen years old.

315

This article substantially repeats Section 11 of the *Adoption Act.*

Section II

Placement for adoption, and judgments

316

This article combines Sections 13, 15 and 16 of the *Adoption Act.* The major innovation is that no child can be placed for adoption except upon parental or tutorial consent or following a judicial declaration of eligibility for adoption. In the second case, the adopting parents are completely sheltered from any claim to the child which its parents by blood may make. In the first case, adopting parents acquire this status only after expiry of a period of ninety days from the day of consent; during this time, consent may be withdrawn or a motion for the return of the child may be lodged.

317

The proposed article deals with the notice to the Minister of Social Affairs, provided for in Section 16 of the *Adoption Act*, but makes additional provision for a notice to the social service centre to enable the centre to inquire into the advisability of adoption and to report on it. This provision, then, permits stricter control of private adoptions.

318

This article, of new law, provides that no child, once placed, may be given back to his parents by blood or to his tutor except where consent to adoption is withdrawn or following a motion for his return.

The second paragraph provides for a case where a child is recognized by his father or his mother, voluntarily or judicially, after being placed for

adoption. Such recognition would not retroactively change the circumstances which qualified the child for adoption at the time he was placed. This provision has its source in Article 352 of the French Civil Code.

319

The proposed article is new law. It provides for situations where placement would cease, particularly by the will of the persons adopting, by their disappearance, or by the refusal of the court to grant adoption. In this case, the child may again be returned and if he is recognized after he is placed, such recognition would produce all its effects, notwithstanding the preceding article.

320

This article permits the social service centre to exercise supervision the results of which will be used as a basis for the report on the advisability of adoption provided for in the following article.

321

The proposed article combines Sections 14 and 25 of the *Adoption Act*. The trial period of six months permits the social service centre to observe how a child is treated in his future family so as to take this aspect into account in its report on the advisability of adoption.

Since the judge is not bound by this report, the third paragraph authorizes him to require any other evidence.

The question of confidentiality of these reports by the social service centres was raised, especially in cases where adoption is refused or where the person adopting would lodge an appeal after losing the case. On the one hand, it seems most desirable that the reports be confidential to safeguard the social workers' freedom of action; on the other hand, these reports contain certain factors against which the parties would eventually wish to defend themselves.

It was finally decided to grant access to the report to the parties, but to provide measures intended to protect social workers from any action for damages which could arise from an unfavourable report (275).

Section III

Effects of adoption

322

This article takes up the rule in Section 38 of the *Adoption Act*. The requirement of final judgment is made necessary by the introduction in the Draft of the possibility for appeal.

323

This article provides for an exception to the rule set out in the preceding one. It was considered necessary, in the exceptional case provided for in Article 294, to have the effects of adoption date back to the presentation of the motion, so that the child may have his filiation established with regard to the two persons adopting and eventually benefit from his successoral rights with regard to the *de cujus*. This situation differs from posthumous adoption, provided for in Article 295. In this case, the effects of adoption are not retroactive to the day of the death of the *de cujus* and the person adopted has no successoral rights in respect of the deceased.

324

This proposed article specifies that any adopted child ceases to belong to his original family. This consequence of adoption is not clear in the *Adoption Act*, since Section 38 of that act sets out the general principle according to which the parents, tutor or guardian of the adopted child lose all rights with regard to him and are released from all obligations towards him; it does not add, however, that the child himself loses all rights *vis-à-vis* his original family. Doubts have therefore persisted, particularly as to the right to inherit (276).

The suggested provision is based on certain foreign legislation in which the double principle of entrance into the adopting family and of severance of all ties with the original family is clearly expressed (277).

The reference to prohibitions of marriage fills a gap in present law which makes no provision for them, although they obviously should be retained for reasons of public order (278).

325

The first paragraph of the proposed article is a consequence of the preceding one. As Section 38(a) of the *Adoption Act* already states, the adopted person has all the rights and all the duties of a child of the person adopting.

The second paragraph draws attention to the fact that the adopted person is completely assimilated into the family of the person adopting and that accordingly the relatives of the person adopting have all the duties towards the adopted person that they would have towards any other child of the person adopting. Section 38(a) of the present Act, which is to the same effect, is not sufficiently clear since, before 1969, adoption did not establish any ties between the adopted person and the relatives of the person adopting. Several statutes in Canada contain this stipulation (279).

326

According to experts, a goodly number of children adopted in Québec are adopted by a new spouse of their father or mother; these adoptions are special in that they take place "within the family". Accordingly, the child knows his family of origin, and, in practice, bonds are by no means always broken. It seemed that this need not be done in all cases.

If bonds were to subsist with the family of origin, there could of course be no question of sharing parental authority; this should belong entirely to the persons adopting.

Most of the experts on adoption consulted were in favour of a rule permitting the court to maintain the child's successoral rights as regards his family of origin. They saw no reason, in effect, why a child should be deprived of such rights when relations with this family are not actually broken off.

327

Visiting rights for a divorced parent raise some problems. Some fear that the exercise of this right would disturb the child.

Nevertheless, on the basis of an examination of certain judgments rendered in the Common Law provinces which refused to grant an adoption, at first sight commendable, because adoption would have

deprived the other parent of visiting rights, it seemed desirable to maintain these rights in exceptional cases (280).

328

Given that, in principle, adoption breaks the bonds with the family of origin, adoption by the spouse of the father or mother ought not to break bonds with the latter and his family. This stipulation avoids any person having to adopt his own child in order to avoid such breaks.

329

This article restates the principle of Section 38(c) of the *Adoption Act*.

Procedural provisions would regulate tutors' rendering of account (281).

330

This provision substantially reproduces Section 40 of the *Adoption Act* while changing its drafting.

This provision, of transitional law, follows the basic principle that laws apply only for the future. The concept of acquired rights is broader than the reservation in Section 40 of the *Adoption Act*, which mentions only the property to which the child might become entitled during the first adoption.

Section IV

Confidentiality, offences, and penalties

331 and 332

These articles take up the principle in Section 31 of the Adoption Act and broaden it somewhat. Mention of the Public Curator has been added to provide for cases where he is called upon to verify the account rendered by the tutor of the adopted person.

Confidentiality of adoption records is of the utmost importance, since the adopting family must not be disturbed by inappropriate claims on the part of the original family; these could gravely compromise the stability of the child.

This is why the need to obtain court authorization has priority over other provisions, such as the principle according to which every person must have access to records pertaining to him, as provided in the *Act respecting health services and social services* (282).

The question was examined as to whether or not an adopted person should be allowed to seek out his original family after he has become an adult. In view of the inadequate data available, it seemed premature to make a decision on this point (283). It was considered wise to propose a very flexible system which allows the court to decide.

333

This article reproduces the substance of Section 42 of the *Adoption Act*.

334

This article reproduces the principle in Section 44 of the *Adoption Act*. The second paragraph has been added in order not to deprive social service centres of charitable donations made by certain individuals in gratitude for services rendered. Such contributions are allowed under the *Act respecting health services and social services* (284).

335

This article substantially reproduces Section 43 of the *Adoption Act*. It also provides for a notice to the social service centre as added in Article 317, and increases the fine from one hundred to two hundred dollars.

TITLE THREE

THE OBLIGATION OF SUPPORT

336

The proposed article represents a substantial change to the present rules. In effect, it seemed wise to restrict the number of persons who benefit from the obligation of support. Such a reform reflects the evolution of society, and more particularly that of the family which has undergone a transition from a family within its widest meaning to a "nuclear family". Social legislation is also tending to alter interaction between individuals, since social assistance ensures needy persons a minimum amount.

Among other points, there was some question as to whether it was necessary to place one consort under an obligation to support the children of his spouse. This obligation, which exists in certain Common Law jurisdictions (285), is unknown in Québec Law today (286).

Such an obligation apparently corresponds to a definite moral responsibility. Nevertheless, it was considered hardly desirable to burden a new consort with overly weighty legal obligations.

There was much controversy concerning such an obligation in cases of divorce. Some felt it grossly unjust to compel a divorced spouse to pay support to children who are not his own. Others could not agree that a father or mother might be deprived of the right of divorce for fear of seeing their children denied financial support, particularly since, under the *Divorce Act*, any person for whom the consorts act *in loco parentis* is considered the "child" of those consorts (287).

Finally, in the face of all these hesitations, the measure was abandoned, although very desirable in theory. It seemed too complicated in practice to be the basis of a general rule.

337

It seemed advisable to adopt the principle embodied in Section 11 of the *Divorce Act* and in Article 212 of the Civil Code by establishing that, in the absence of a court decision to the contrary under Article 256, an obligation of support exists between divorced consorts. It was sought to put an end to controversies in doctrine as to a future obligation of support between consorts whose marriage has been annulled. Some Québec authors follow their French counterparts and hold that the obligation of support is not one of the "civil effects" of marriage (288). It was

considered preferable to follow the case law and provide for support in favour of the consort in good faith (289).

338

This provision is new law, corresponding to the proposal to give limited effect to *de facto* unions. It was believed necessary, in principle, to restrict the right to support, as regards *de facto* consorts, to the period of cohabitation. This right seemed indispensable for establishing a certain contribution toward household debts. On the other hand, it seemed an exaggeration to impose on *de facto* consorts an obligation to provide future support. The court will determine whether exceptional circumstances, such as the long duration of the *de facto* union, the age, the state of health and lack of resources of the abandoned consort justify payment to him of support by his spouse.

339

The proposed article follows a recent decision which allowed the mother, in this case the legitimate mother, to bring an action to obtain support for her child, although she had not formerly been appointed the child's tutor (290).

These decisions, which propose a desirable solution in practice, are contrary to the strict legal principles of the present law on tutorship. This has been revised by the proposals under which the father and mother become of right representatives of their children (291).

No action could be taken by the tutor, or by the person or institution having custody of the child, except in a subsidiary manner where, for example, the father and mother are deceased, or it is impossible for them to have custody of their child.

340

The first paragraph of this article repeats the principle of Article 169 C.C. This does not constitute the only standard on which the judge may base his decision, since in divorce, separation as to bed and board, and annulment of marriage, the court must consider all the circumstances of the parties (see Article 236). Nevertheless, this is the basic principle applicable to all support, although obviously, in accordance with jurisprudence, each party's ability to work affects the evaluation of his needs and means (292).

The second paragraph strays from the general rules pertaining to evidence before the courts (293), in particular Article 1203 of the Civil Code, according to which the plaintiff must prove that the debtor is able to

pay. Jurisprudence, however, has apparently shifted the burden of proof in this matter on some occasions (294).

It seemed more equitable to follow this example, given that it is often difficult for a person entitled to support to establish his debtor's income with precision. This could even cause prejudice to the debtor, as when the employer of the person owing support is called as a witness, and such person runs the risk of losing his employment.

341

This proposed text extends the rule which now applies to all actions for support in cases of divorce and of separation as to bed and board, and particularly in cases of annulment of marriage.

There need be no fear that this principle will create difficulties in ascertaining paternity, since the child's right to claim support from his father is subordinate to judicial recognition of paternity.

No child, therefore, may exercise his right to support until his filiation has been recognized, so claims for recovery of support paid out need not be feared.

342

The specifications found in the proposed text correspond to the terms and conditions for obtaining support after divorce and for the same reasons (see Article 254).

343

The intention of this text is to protect persons entitled to support who do not benefit from any judicial hypothec. It permits the judge to request the person owing the support to furnish any kind of security, such as an insurance policy, a title and so forth. These solutions have been accepted by jurisprudence (295).

344

This text amends Articles 171 and 172 of the Civil Code. The rule in Article 171, according to which the court may order a person to take into his home another person to whom he owes support, if he proves that he cannot pay that support, seemed too strict as regards the person owing the support, especially in city life today. The possibility of replacing support by payments in kind is limited to cases where the debtor offers to take the creditor into his home. Even in this case, the circumstances must justify it. No person may be compelled to live with his children if such an arrangement becomes a source of conflict (296).

Finally, payments in kind may amount to only a part of the support owed, and the court is empowered to provide for both.

345

The purpose of this proposed text is to allow any person entitled to support to summon the debtor most accessible to him; at the same time, this debtor may have a recourse against his codebtors. The article, then, is intended to facilitate payment of support. This implies doing away with the principle establishing a hierarchy of persons owing support, a notion which has been approved by judicial decisions (297). This discontinuance is even more easily explained since the number involved in this hierarchy is quite restricted.

346

Under the original Draft, the court could pronounce solidarity as regards any person who owes support and is able to pay it in full. After re-examining the question, it was considered preferable to remain faithful to the absence of solidarity supported by jurisprudence (298).

347

While accepting the classical principle under which support may be altered, the proposed text is restricted to support awarded by judgment, since the possibility of retroactively changing support fixed by an agreement between the parties seemed open to criticism. To the support fixed by judgment must also be added any support agreed to between the consorts and homologated by the court.

As in the case of accessory and provisional measures in divorce and separation (aa. 257, 258), it seemed wise to provide for review, notwithstanding appeal, in order to discourage persons owing support from using the appeal as a dilatory measure.

348

This article repeats the principle in paragraph 4 of Article 553 of the Code of Civil Procedure. The debts mentioned are specific obligations of the person who owes the support (299).

The second paragraph of the proposed article embodies jurisprudential solutions regarding actions by persons who have supplied recipients of support with the necessities of life (300). This refers for example to money owed to a grocer for food, or to debts for dental care.

349

This provision attempts to terminate the existing controversy regarding the maxim to the effect that support cannot accumulate.

Some judgments seem to follow this maxim strictly (301), while others ignore it completely (302). Still others acknowledge the nuances involved in such matter, by distinguishing between, on the one hand, support granted by judgment, which in principle is not prescribed unless the person entitled to the support renounces it, and, on the other hand, support which was not ordered by a judicial decision. If a person entitled to support does not claim such support, it may be thought that he does not need it (303).

The original Draft provided a period of six months for support which was not awarded by judgment. This period was extended to one year following suggestions made in comments on the Draft.

TITLE FOUR

PARENTAL AUTHORITY

350

This article is based on Article 243 of the Civil Code. It specifies, however, that parental authority terminates not only when the child becomes of age, but also when he marries.

Future consorts should reach the age of eighteen years in order to marry in conformity with the proposal in this Draft (304). Only in exceptional cases may a minor over sixteen years of age obtain judicial dispensation allowing him to marry. In such a case, it seems natural that if a married minor is able to leave home he should be released from his parents' authority and enjoy full capacity with regard to administration of his property.

Moreover, because the age of majority has been lowered to eighteen years, and considering the increased rights granted to minors in general, it is proposed that emancipation as an institution be abolished.

351

This article is new law and provides a glimpse of the new orientation of parental authority. We are no longer dealing with paternal authority which retained, at least in the letter, the ancient Roman concept of the rights accorded to parents. Parents have rights, but these rights are vested in them merely to allow them to better execute their obligations towards their children.

Doctrine has emphasized several times that, as far as parents are concerned, these are not so much rights as duties (305).

352

This article repeats Article 242 of the Civil Code changing the wording.

353

The first paragraph of this article is new law and states some of the main attributes of parental authority. The main attribute, custody, is the source of the other rights, and is not restricted to the sole idea of cohabitation of parents and children under the same roof. All the means and measures having to do with exercising the other prerogatives of parental authority, such as supervision, upbringing, and so forth, are

subject to custody, and it is indeed difficult to think of custody in any other way.

Under existing law, parents have authority over the person of their children (306); under the proposed reform, they would also have power over their children's property.

The second paragraph of this article combines Articles 165 and 240 of the Civil Code, thereby showing that the reciprocal rights and obligations of parents and children do not come from marriage only, but from filiation, regardless of its source.

The third paragraph stipulates that the right to represent a child is an attribute of parental authority, and so confers of right on parents tutorship to the person of their children. It would thus become unnecessary to go through the formalities of appointing a tutor every time a child who still has both of his parents, or one of them, must be represented.

The right of moderate correction provided for in Article 245 C.C. seemed part of the right of supervision and therefore did not appear to warrant special mention.

354

This article is new law and corresponds to the now-accepted idea of equal rights between parents (307). Parental authority is exercised by both parents, neither of whom may claim priority rights.

Parents exercise their authority independently of the marriage bond. A person acquires parental authority merely by becoming a father or a mother. This solution is adopted in Article 245a of the Civil Code, which puts natural parents on the same footing as legitimate ones, provided such natural parents have acknowledged their children and have not abandoned them.

There are some who would have liked to make *de facto* custody of a child the basis of the right to exercise parental authority. They felt it inadvisable to always require parents who stop living together to apply to the court to decide as to their children's custody. The great number of *de facto* separations seems to indicate an obvious desire to avoid judicial proceedings.

It was felt, however, that parents have *ex officio* duties stemming from parental authority and that this juridical situation has a certain permanence despite the vicissitudes of conjugal life. One parent might very well be called upon to play a more active part at certain times than his spouse in exercising parental authority, especially when the other parent is

absent, away or ill. The impact of the *de facto* separation of parents on the exercise of parental authority does not seem basically different from any of these hypotheses. In any event, no such situation should allow a parent to relieve himself of his obligations. Unless parents living separately do not agree, the presumption in Article 355 would make it possible for one parent to perform alone the necessary acts of authority, and that parent will be deemed, with regard to third parties in good faith, to be acting with the consent of his spouse. It would then become necessary to go to court only in cases of conflict between parents in the exercise of parental authority.

355

Since parental authority is vested equally in the father and the mother, since acts of authority are performed almost daily, and since it is often difficult to know the will of both parents precisely, it seemed advisable to create an irrebuttable presumption, with regard to third parties in good faith, that any act of authority performed by one parent with regard to the child's person has been consented to by the other parent.

356

Even though the very right to parental authority is in principle inalienable, except in cases of consent to adoption (308), the exercise of that right may be delegated to other persons. This delegation may always be revoked, however, whether it be partial and temporary, as for example, when such authority is delegated to a teacher (309), or full and long-term.

357

This article, of new law, applies the policy already adopted concerning the respective rights and duties of the consorts with regard to the moral and material control of the family (310).

Since the exercise of parental authority is divided equally between both parents, neither parent may claim to have priority rights in decision-making. It therefore seems indispensable to have recourse to an arbitrator in cases of conflict.

The court would then be required to solve this kind of problem, basing itself on the principle of the interest of the child, which would constitute one of the fundamental rules of the new family law. The proposed article is part of a wider perspective of family law applied by a family court equipped with specialized auxiliary services, so as to normalize parent-child relations (311).

358

This article is based on Article 371-4 of the French Civil Code. This very flexible provision empowers the court to intervene when the child's welfare requires it. Particular thought was given to cases where for a few years a child is brought up by persons other than his parents and later is returned to them.

359

This article is new law and sets forth the fundamental principle that the right to parental authority is no longer a right which cannot be taken away from its holders. Until now, in fact, civil law has always held that the right to exercise paternal authority could be taken away from a parent, although that parent could never be deprived of the right of enjoyment of paternal authority. The *Youth Protection Act* (312) provides one form of withdrawal of the right to exercise paternal authority.

The proposed change is a logical consequence of the basic principle according to which the interest of the child takes priority over all other considerations, and this modification constitutes a recognition of the right of every child to be protected. Moreover, it is based on certain foreign laws which provide for deprivation of parental authority (313).

360

Since only the interest of the child can motivate as serious a decision as the deprivation of parental authority, it seemed necessary that any interested person be given the right to submit the motion; this includes the child himself, who is the principally interested person.

The question was raised whether the necessity of serving the action on the parents would not lead to excessively long periods before the motion could be heard.

Nevertheless, the opinion prevailed that this service was indispensable, since the parent might eventually be deprived of his rights over his child. In addition, the judge could take provisional measures before the final decision if the child were in danger (314).

361

This article concerns total deprivation of parental authority namely loss of the "right of enjoyment" of such authority.

This measure has the effect of abolishing all the parent's rights (315), but not those of the child, since no parent deprived of his authority is

relieved of his obligations towards his children; this is provided in Article 365.

Since deprivation is only ordered for very serious reasons, a restrictive list of which is given in Article 359, the courts will certainly not be called upon to pronounce such a judgment often (316). However, when this order is justified by the seriousness of the facts, it is considered advisable that the judgment might extend to all the children of the deprived parent.

362

The proposed article obliges the court to appoint a tutor or to confer parental authority on the parent who has not been deprived of it, provided he can exercise it.

363

This article makes it possible for the court to order only partial withdrawal. In such a case, some of the rights which stem from parental authority and have been misused are taken away from the parent.

Concerning the child's person, such rights could include custody, supervision, education, representation and so forth.

If, on the other hand, the parent has mismanaged his child's property, the right to legal tutorship of that property could be taken away from him. Such withdrawal could thus come about following a motion for deprivation of parental authority or for exclusion from some of its attributes, or following dismissal of a parent as tutor for the property (317).

364

Unlike deprivation of parental authority, which would extend to all of its attributes, withdrawal would affect only some of these attributes. A judgment ordering withdrawal would affect only the rights mentioned in it, and only the child involved.

365

This article states a fundamental principle of family law: the child never loses his rights, no matter what measure is ordered respecting his parents, or what circumstances such parents may be in.

366

This article follows the principle, generally accepted in family law, according to which any judicial decision may always be amended or revoked provided new facts justify such action.

Because of the importance of decisions in matters of parental authority, the court must have the power to fully or partially re-establish a parent's rights, when such parent proves himself worthy.

Obviously, however, once the child has been adopted, the rights of the original parent can no longer be re-established.

367

This article is based on Section 15 of the *Youth Protection Act*. It permits judges to take all necessary measures for the protection of a child, pending judgment as to deprivation of parental authority or withdrawal of certain rights, or even in the absence of any of these measures. In effect, such measures are the consequence of serious failure by a parent to execute his obligations. On the other hand, while a child may need protection, his parents may not necessarily be responsible for this situation.

The provision is set up so as to give judges as much power as possible in taking all necessary measures, such as placing the child in a reception centre or a foster home.

Since the child is in danger, it seemed indispensable to allow him to refer his case to the court himself, and to place himself under such court's protection. This measure is in response to the many criticisms made concerning the *Youth Protection Act*, which denies this right to the principally interested person (318). Any other interested person may also present the motion to the court.

It was thought necessary to incorporate in the Civil Code the judicial measures of protection now in statutory law. Those measures appear to be indispensable for a complete family law. Creation of family courts provided with the necessary auxiliary services would make it easier to take such measures (319).

368

This article conforms to the policy adopted by social workers who try to keep children in their family home as much as possible. It enables the courts to entrust custody of children, in some circumstances, to persons other than their parents; at present this can only be done with regard to *de facto* custody (320).

369

This article reflects the new philosophy of family law. The court is no longer merely an instrument for settlement of disputes; it becomes an instrument of rehabilitation. Obviously, in order to carry out this task, the court would have to be provided with indispensable auxiliary services (321).

Such an organization will permit the court to become a true protector of children (322).

370

This article is new law and is based on the principle, stated several times, that any decision concerning the family may be amended or revoked when new facts justify such action.

Any person entitled to request measures of protection, under Article 367, may request amendment or revocation of them.

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(1) See M. RIOUX, *Kinship Recognition and Urbanization in French Canadian Society*, the Carleton Library, No. 18, McClelland and Stewart Ltd, 1964, p. 376; M.A. TREMBLAY, *L'idéologie du Québec rural*, Montreal, Académie des sciences morales et politiques, 1973, p. 260.

(2) See Ph. GARIGUE, *Famille, science et politique*, Report prepared for the Law Reform Commission of Canada, March 5 1973, multicopied, p. 29 et s.

(3) *Ibid.*, p. 33 et s.; see, also, M. GORDON, *The Nuclear Family in Crisis; the Search for an Alternative*, New York, Harper and Row, 1972; R. TURNER, *Family Interaction*, New York, John Wiley and Sons, 1970, p. 415.

(4) See F. ELKIN, *La Famille au Canada*, April 1964, Congrès canadien de la famille, p. 8. With regard to the intensity and rapidity of changes of structures within Québec, see G. ROCHER, *Le Québec en mutation*, Montreal, Hurtubise HMH, 1973, p. 25 et s.

(5) S.Q. 1964, c. 66.

(6) S.Q. 1968, c. 82 and a. 129 C.C.

(7) S.Q. 1969, c. 77.

(8) S.Q. 1970, c. 62.

(9) S.Q. 1971, c. 85 and aa. 246 and 324 C.C.

(10) Five Committees in particular have been assigned to study these questions: the Committee on Matrimonial Regimes; the Committee on Civil Status; the Committee on Successions, the Committee on the Law

on Persons and on the Family and the Committee on Private International Law.

(11) R.S.C. 1970, Appendices, II, No. 5, p. 191.

(12) See G. BEAUDOIN, *La répartition des compétences législatives au Canada en matière de mariage et de divorce*, (1973) 4 R.G.D. 66.

(13) See *Zacks v. Zacks*, (1973) 10 R.F.L. 53 (S.C.C.); *Corbeil v. Daoust*, [1972] C.A. *374, conf.* [*1970*] *S.C. 642 (sub nom. A. v. B.)*; *Papp v. Papp*, (1970) 8 D.L.R. (3d) 389, (1970) 1 O.R. 331 (Ont. C.A.); Bray v. Bray, (1971) 15 D.L.R. (3d) 40 (Ont. H.C.); *Gillespie v. Gillespie*, (1973) 36 D.L.R. (3d) 421; *Jackson v. Jackson*, (1973) 8 R.F.L. 172 (S.C.C.).

(14) See F.J.E. JORDAN, *Federal Divorce Act (1968) and the Constitution*, (1968) 14 McGill L.J. 209; F. CHEVRETTE, *Etude juridique du partage des compétences dans le fédéralisme*, (1 and 2) Cours de droit constitutionnel canadien, Montréal, P.U.M. 1971, p. 138 et s.; A. TREMBLAY, *Les compétences législatives au Canada et les pouvoirs provinciaux en matière de propriété et de droits civils*, Ottawa, éd. de l'Université d'Ottawa, 1967, p. 122 et s.; P. GARANT, *Le déclin des pouvoirs ancillaires*, (1966-67) 8 C. de D. 104; D.J. MacDOUGALL, *The Constitution and Ancillary Relief under the Divorce Act*, (1969) 27 The Advocate 260; J.D. PAYNE, *Bill C-187*, (1968), 18 U. of N.B. L.J. 87; M. SHACTER, *Constitutional Aspects of the Divorce Act*, (1968) 28 R. du B. 495; P. BLACHE, *La doctrine du champ inoccupé se porte-t-elle mal?*, (1967) 2 R.J.T. 39.

(15) See, in particular, the *Report on the Family*, Part One, C.C.R.O., 1974, XXVI.

(16) Various studies were made within the framework of this research and were greatly helped by the advice of Mrs.Colette Carisse, sociologist and professor at the Université de Montréal. These studies included particularly: "*Enquête menée auprès de trente femmes séparées légalement*" by Michelle Dubuc, social worker, Montreal, C.C.R.O., September 1968 DC168; "*Enquête auprès du Bien-Etre et des agences du service social de Montréal*" by Cécile Laliberté, Montreal, C.C.R.O., December 1968 DC134; "*Sociologie de la séparation judiciaire des époux*" by Mtre.Jean-Paul Duquette, lawyer, Montreal, C.C.R.O., May 1970 DC171; "*La séparation de fait entre époux, enquête auprès de cinquante conjoints séparés*" by Mtre.René Boily, lawyer and social worker, C.C.R.O., June 1970 DC167; "*La loi québécoise d'exécution réciproque d'ordonnances alimentaires*", by Ethel Groffier, C.C.R.O., September 1970; "*Analyse de 235 dossiers de divorces prononcés en 1969*", by Ethel Groffier, Montreal, C.C.R.O., February 1971 DC128.

(17) One of the most interesting studies used by the Office was that made by the *Comité de la filiation* of the Université de Montréal's Faculty of Medicine, C.C.R.O. doc. DC72.

(18) Particularly, representatives of the Social Affairs Department of the Fédération des Services Sociaux à la Famille au Québec, of the Centre de

Services Sociaux du Montréal métropolitain, as well as directors of the various social service centres of the province.

(19) Moreover, the Office was greatly aided by the work, research and interviews done for the Committee on the Family Court.

(20) See the *Report on the Legal Position of the Married Woman*, C.C.R.O., Québec Official Publisher, 1968, No. 1, p. 4.

(21) S.Q. 1975, c. 6 s. 47.

(22) *La femme dans la société, Travaux du groupe d'ethnologie sociale*, C.N.R.S. 1967, c. V, presentation of equality within the couple by M. Huguet; see, also, J. WILSON, *Logic and Sexual Morality*, Harmondsworth, Middlesex, Penguin Books, 1965, pp. 223-228, translated in: A. MICHEL, *La sociologie de la famille*, Paris-La Haye, Mouton, 1970; G. ROCHER, *Les modèles et le statut de la femme canadienne française*, in *Images de la femme dans la société*, Paris, les éditions ouvrières, 1964, p. 202 et s.

(23) See G. BEAUPRE, *Papa, maman, le juge et moi*, and A. MAYRAND, *A propos du choix de la résidence familiale*, (Reply to Mtre. Beaupré), Barreau 1971, May, pp. 4-5; see, also, M.A TREMBLAY, *Le point de vue de l'anthropologue dans le droit, dans la vie familiale*, Livre du Centenaire du Code civil, Montreal, P.U.M., 1970, p. 86.

(24) See the *Report on the Family Court*, C.C.R.O., 1975, XXVII.

(25) This same principle prompted the recent recommendations made by several Canadian law reform commissions: see the Ontario Law Reform Commission, *Report on Family Law*, Part III, *Children*, Ministry of the Attorney-General, 1973, p. 29 et s.; Law Reform Division, Department of Justice, New Brunswick: *Status of Children Born Outside Marriage; Their Rights and Obligations and the Rights and Obligations of Their Parents, A Working Report*, 1974, p. 28 et s.; Family and Children's Law Commission of British Columbia, *The Children's Act*, 1976, Draft Model Act for Discussion, Supplement to the Fifth Report, 1975, Part II.

(26) In this respect, see Article 25 of the Book on *Persons*.

(27) Between sixteen and eighteen years with dispensation granted by the court; see a. 9.

(28) See statistics mentioned in the commentary on Article 9.

(29) See chapter V of the Book on *Persons*.

(30) See Articles 1257 et s. C.C. which have gone to make up the *Act Respecting Matrimonial Regimes*, S.Q. 1969, c. 77.

(31) S.Q. 1964, c. 66.

(32) S.Q. 1969, c. 77.

(33) *Quebec Pension Plan*, S.Q. 1965, c. 24, s. 105; *Pension Act*, R.S.C. 1970,

c. P-7, s. 32(6); *Canada Pension Plan*, R.S.C. 1970, c. C-5, s. 63; *Social Aid Act*, S.Q. 1969, c. 63 s. ld.

(34) See Article 188 of the Book on *Obligations.*

(35) See the statutes cited in footnote 33, except the *Social Aid Act.*

(36) See the *Report on the Protection of the Family Residence*, C.C.R.O., 1971, XII.

(37) See *Beaudet v. Dame Lussier*, (1973) 76 R. du N. 37. The doctrine has already had occasion to consider the question; see footnotes 145 and 146.

(38) See J. PINEAU, *La réforme des régimes matrimoniaux, quelques points d'interrogation*, (1973) 76 R. du N. 3, p. ll.

(39) Article 72 of the Book on *The Family* amends Article 1261 C.C.

(40) See Article 306 of the French Civil Code.

(41) See *supra*, footnote 16.

(42) On this point, see Canada Law Reform Commission, *Divorce, working paper 13*, Ottawa, 1975, p. 31 et s.

(43) "Divorce à l'américaine" in A. MICHEL, *Sociologie de la famille, op. cit.*, p. 196.

(44) *Adoption Act*, S.Q. 1969, c. 64; *An Act to amend the Civil Code respecting natural children*, S.Q. 1970, c. 62; *An Act to again amend the Civil Code*, S.Q. 1971, c. 85.

(45) This proposition has been formulated as well by the Ontario Law Reform Commission in its *Report on Family Law, op. cit.*, pp. 17 and 18 et s.

(46) S.Q. 1969, c. 64; see *Report on a Draft Law of Adoption*, C.C.R.O., IV, Québec Official Publisher, 1968.

(47) France, a. 343 et s. C.C.; Belgium, a. 343 et s. C.C.; Switzerland, a. 264 et s. C.C.; West Germany, a. 1741 et s. C.C.; Italy, a. 291 et s. C.C.

(48) See *Y v. Z*, [1975] S.C. 290; *X v. X*, [1975] S.W.C., 385; see a comment by R. JOYAL-POUPART, (1977) 37 R. du B. 96.

(49) See Article 25 of the Book on *Persons.*

(50) Resolution 1386 (XIV), adopted November 20 1959.

(51) See *Bockler v. Bockler*, [1974] C.A. 41; A. MAYRAND, *L'évolution de la notion de puissance paternelle en droit civil québécois*, in Mélanges offerts à R. Savatier, Paris, Dalloz, 1965, p. 621 et s.; E. DELEURY, M. RIVET, J.M. NAULT, *De la puissance paternelle à l'autorité parentale*, (1974) 15 C. de D. 742, p. 826 et s.; P. CIOTOLA, *Mariage - Minorité - Consentement d'un parent, (1973-74) 76 R. du N. 299.*

(52) S.Q. 1975, c. 6, s. 47.

(53) See Ph. GARIGUE, *Famille, science et politique, op. cit.*, p. 68.

(54) R.S.Q. 1964, c. 220, amended by S.Q. 1971, c. 48, and S.Q. 1974, cc. 42 and 59.

(55) Civil Codes: French, a. 382 et s.; German, a. 1649; Belgian, a. 389; Swiss, a. 292 et s.; Greek, a. 1517; Spanish, a. 160 et s.

(56) For a summary of the question, see J.-L. BAUDOUIN, *La responsabilité civile délictuelle*, Montréal, P.U.M., 1973, No. 170 et s.

(57) See *Samson v. Sohier*, [1944] S.C. 295; *Santis v. Campa*, [1960] S.C. 668; Audy v. Cantin, *(1939) 77 S.C. 187.*

(58) See, on this, A. MAYRAND, *Problèmes juridiques nés de la rupture des fiançailles*, (1963) 23 R. du B. 1; A. POPOVICI, *Essai sur la nature du recours pour rupture de promesse de mariage en droits québécois et italien*, (1969) 3 R.J.T. 53; J. PINEAU, *Mariage - séparation - divorce*, Montreal, P.U.M. 1976, No. 31 et s.

(59) See *Internoscia v. Bonelli*, (1905) 28 S.C. 58; *Gagnon v. Sirois*, (1916-17) 23 R. de J. 109 (S.C.); *Boucher v. Boucher*, (1920) 58 S.C. 468; *Héritiers Sirois v. Parent*, [1954] Q.B. 91.

(60) See *Bessette v. Grenier*, [1961] S.C. 38; *Vézina v. Blais*, [1953] S.C. 48.

(61) See P.B. MIGNAULT, *Le Droit civil canadien*, t. 1, Montréal, Théorêt, 1895, p. 433 et s.; see, also, *Paré v. Bonin*, [1973] C.A. 875.

(62) See Article 27.

(63) See, in this respect, Article 29 of the Book on *Obligations.*

(64) See, in this respect, P.B. MIGNAULT, *op. cit.*, t. 2, p. 285 et s.; L.P. SIROIS, *Tutelles et curatelles*, Québec, Imprimerie de l'Action Sociale Ltée, 1911, No. 534; J. PINEAU, *La famille*, Montreal, P.U.M. 1972, No. 302.

(65) See Articles 180 and 181 of the Book on *Persons.*

(66) See *Le mariage des adolescents à Montréal*, Etude sociologique sur leurs chances d'ajustement marital, by M. TROTTIER and A. NORMANDEAU, March 1966, and various sociological studies done in the United States and in Great Britain cited in *Study of Certain Aspects of Family Law in Canada*, by B. GAUDET, Studies prepared for the Royal Commission of Inquiry on the status of women in Canada, Ottawa, Information Canada, 1971, No. 11, p. 59 et s.; see, also, Recommendation No. 102 of the Commission's Report, Information Canada, 1970; The United Nations Study accompanying the draft agreement on the minimum age for marriage, Doc. ECN6356; statistics furnished by the Law Reform Commission of Canada, January 1974.

(67) Ontario Law Reform Commission, Report on Family Law, Part II, Marriage, p. 53; Newfoundland Family Law Study, *Family Law in Newfoundland*, St. John's, 1973, p. 22.

(68) See Article 9 of the Book on *Persons.*

(69) See Articles 66 et s. of the Book on *Persons.*

(70) S.Q. 1968, c. 82.

(71) See *Ouellette v. Gingras*, [1972] C.A. 247, conf. *(sub nom. X v. G)* [1972] S.C. 72; *Bessette v. Meunier*, [1959] S.C. 283.

(72) See *Howard v. Bergeron and Kriklow*, (1941) 71 K.B. 154; *Dubé v. Ouellet*, [1966] S.C. 16; *Mathys v. Demers*, [1968] S.C. 172; *Burelle v. Grandmont et Procureur général de la province de Québec*, [1964] S.C. 314.

(73) See *Despatie v. Tremblay*, (1929) 47 K.B. 305 (J.C.P.C.); see, also, E. DELEURY and M. RIVET, *Droit civil, droit des personnes et de la famille*, Les Presses de l'Université Laval, 1973, p. 57 et s.; A.F. BISSON, *Chronique de droit familial*, (1971) 2 R.G.D. 31; J. PINEAU, *Mariage - séparation - divorce, op. cit.*, No. 68.

(74) O.C. 501, February 26 1969, O.G. March 8 1969, p. 1520.

(75) See Article 91 of the Book on *Persons.*

(76) See *Lanzetta v. Falco*, [1962] S.C. 593.

(77) See Articles 68 and 69 of the Book on *Persons.*

(78) *Ibid.*, a. 109.

(79) See *L. v. L.*, [1968] S.C. 480.

(80) See Articles 181 et s. of the Book on *Persons.*

(81) See *Owad v. Poliskewycz*, [1967] S.C. 234; J. PINEAU, *op. cit.*, No. 95.

(82) See Article 35 of the Book on *Obligations.*

(83) See *Weinstock v. Blasenstein*, [1965] S.C. 505; *Dussault v. Enloe*, [1965] S.C. 448; *Hivon v. Gagnon*, [1962] S.C. 399.

(84) See *Pagé v. Nantel*, [1945] R.L. 257 (S.C.); *Yorksie v. Chalpin*, [1946] K.B. 51; *Dorion v. Bussière*, [1967] Q.B. 416; *Richard v. Trudel*, [1968] Q.B. 983. See the comments by A.F. BISSON on these various decisions: *Chroniques de droit familial*, (1970) 1 R.G.D. 97.

(85) See *Lanzetta v. Falco*, [1962] S.C. 593; *Kemsies v. Field*, [1946] S.C. 232; *Ovadia v. Basette*, [1954] S.C. 337; *Dubé v. Ouellet*, [1966] S.C. 16.

(86) See *Jasenovic v. Nussinov*, [1966] Q.B. 774.

(87) See, on this, *Feiner v. Demkowicz*, (1974) 42 D.L.R. (3d) 165 (Ont. H. C.).

(88) See *S. v. G. and Attorney-General*, [1966] S.C. 388 and the judgments cited in this case.

(89) See *Clint v. Vaillancourt*, [1971] S.C. 205.

(90) See *Owad v. Poliskewycz*, [1967] S.C. 234; G. BRIERE, *Le mariage putatif*, (1959) 6 McGill L.J. 217, p. 220.

(91) See *Goodfellow v. Smith*, [1968] S.C. 427.

(92) See *Hivon v. Gagnon*, [1962] S.C. 399.

(93) See *Stephens v. Falchi*, [1938] S.C.R. 354.

(94) See G. BRIERE, *loc. cit.*, 217, p. 226; PLANIOL AND RIPERT, *Traité pratique de droit civil français*, 2nd ed., Paris 1952, t. 2, by A. Rouast, No. 333; AUBRY AND RAU, *Droit civil français*, 7th ed., Paris, 1962, vol. 7, by P. Esmein and A. Ponsard, par. 467, *No. 83; Nouveau répertoire de droit civil*, III, Dalloz, Mariage, No. 321 et s.; see, also, H.R. HAHLO, *Report on the Proprietary Consequences of a Putative Marriage*, C.C.R.O., 12 November 1973, p. 4 et s., DE21.

(95) See A. MAYRAND, *Les successions ab intestat*, Montreal, P.U.M., 1971, No. 145.

(96) See Articles 37 and 38 of the Book on *Obligations*.

(97) See *Berthiaume v. Dastous*, (1929) 47 K.B. 533 (P.C.); *Lolli v. Husolo*, [1947] S.C. 17; *Wilson v. Partridge*, [1959] S.C. 17; *Rogatko v. Levinstein*, (1933) 54 K.B. 538; for an assessment of this jurisprudence, see G. BRIERE, *loc. cit.*, p. 227; see, also, *Paré v. Bonin*, [1973] C.A. 875, p. 883 (Mr. Justice Deschênes), (1976) 10 N.R. 307; see, also, G. BRIERE, *Effets civils d'un mariage nul pour maladie mentale*, (1976) 36 R. du B. 410.

(98) See M. OUELLETTE, *La condition juridique de la femme mariée*, (1970) 5 R.J.T. 105, p. 189.

(99) See Article 213 C.C.

(100) See *General Obligations Law*, a. 3, s. 301 (1) and a. 5, s. 311.

(101) See Ontario Law Reform Commission, *Report on Family Law, Part IV, Family Property Law,* Toronto, Ministry of the Attorney-General, 1974, p. 3.

(102) See the *Report of the Royal Commission of Inquiry on the Status of Women in Canada*, Ottawa, Information Canada, 1970; *An Act to amend certain statutes to provide equality of status thereunder for male and female persons*, S.C. 1975, c. 66; in Ontario, *An Act to reform certain Laws founded upon Marital or Family Relationships*, 5th Session, 29th Leg., 24 Eliz. II, 1975.

(103) See Articles 60 et s.

(104) See Article 354.

(105) See Article 45.

(106) See G. BRIERE, *Le nouveau statut juridique de la femme mariée*, in Lois

Nouvelles I, Montreal, 1965, p. 7, on pp. 27 and 28; M. OUELLETTE, *La condition juridique de la femme mariée, loc. cit.*, p. 203.

(107) See Articles 180 et s. of the Book on *Persons.*

(108) See Perrier v. Perrier, [1970] C.A. 133; see, also, J. PINEAU, *Les régimes matrimoniaux*, Cours de Thémis, Montreal, 1972, p. 22.

(109) See L. v. B., [1970] S.C. 87; *Banque Royale du Canada v. Archambault*, [1970] S.C. 308.

(110) See G. BRIERE, *Les charges du mariage*, (1967) 2 R.J.T., 451, p. 452 et s. and the jurisprudence quoted by this author; see, also, the comments on Article 48.

(111) On this subject, see *Lapierre v. Trottier*, [1970] P.R. 309 (S.C.), published (sub nom. *JTL v. JRT*) in (1970) 1 R.G.D. 81. See, also, the comments of F. HELEINE (1970) 1 R.D.G. 113.

(112) See *The T. Eaton Co. Ltd v. Egglefield*, [1969] S.C. 15; *Dupuis Frères Ltée v. Gauthier*, [1970] R.L. 178 (P.C.); *Bouchard v. Lachance*, [1967] R.L. 128 (P.C.); *The Robert Simpson Montreal Ltd v. Dix*, [1971] S.C. 196; *Shuchat Fur Co. Ltd v. Pariseault*, [1972] C.A. 138.

(113) See *Silver v. Burgstaller*, [1969] S.C. 402 (P.C.).

(114) See Article 354.

(115) For the concept of *de facto* union, see Introduction.

(116) For alienation of another's property, see Article 357 of the Book on *Obligations.*

(117) See Articles 92 and 229.

(118) See Article 46 of the Book on *Prescription.*

(119) See Articles 1292 and 1297 C.C.

(120) The Ontario Law Reform Commission made similar recommendations respecting protection of furniture in its *Report on Family Law, Part IV, Family Property Law*, 1974, pp. 145 and 151.

(121) On household furniture, see Article 178 of the Book on *Succession*, and Article 278 of the Book on *Property*.

(122) C.C.R.O., *op. cit.*, a. 3.

(123) See F. BATES, *Behind the Law of Divorce, a Modern Perspective*, (1976) 7 Man. L.J. 39, p. 42 et s.

(124) This definition is not repeated, moreover, in the Book on *Property*.

(125) See the *Report on the protection of the Family Residence, op. cit.* aa. 6 and 9.

(126) *An Act respecting matrimonial regimes*, S.Q. 1969, c. 77, s. 27.

(127) In England, *Matrimonial Causes Act*, 1973, c. 18, s. 24; British Columbia, *Family Relations Act*, S.B.C. 1972, c. 20, s. 8; Saskatchewan, *An Act to amend the Married Women's Property Act*, S.S., 1975, c. 29.

(128) See the *Report on the Family Court*, C.C.R.O., 1975, XXVII, p. 157 et s.

(129) See, in this regard, E. CAPARROS, *La détermination conventionnelle de la contribution des époux aux besoins de la famille*, (1976) 17 C. de D. 603, p. 604.

(130) See Article 56.

(131) See J. PINEAU, *Les régimes matrimoniaux*, *op. cit.*, p. 18.

(132) See Articles 41 et s.

(133) See R. COMTOIS, *Les principales dispositions du Bill 10*, Chambre des Notaires, Cours de perfectionnement, Montreal, 1970, 120; *Le Bill 10 depuis le 1er juillet 1970*, (1970) 1 R.G.D. 227-228; *Les incidences fiscales de la Loi concernant les régimes matrimoniaux*, Chambre des Notaires, Cours de perfectionnement, Montreal, 1971, 115-116.

(134) See J.G. BERGERON, *Le praticien et certains aspects du changement conventionnel ou judiciaire d'un régime matrimonial pendant le mariage*, (1974) 5 R.D.U.S. 219, on p. 227.

(135) See E. CAPARROS, *Le problème de l'entrée en vigueur du nouveau régime lors d'une mutabilité conventionnelle d'un régime matrimonial*, (1973) 14 C. de D. 335; *Les régimes matrimoniaux au Québec*, in Commission de réforme du droit du Canada, Etudes sur le droit des biens de la famille, Ottawa, Information Canada, No. 65-67, pp. 55-57; M. LEGARE, *De la rétroactivité ou de la non-rétroactivité du changement de régime matrimonial*, (1975-76) 78 R. du N. 155-160 and the note by R. COMTOIS, (1975-76) 78 R. du N. 155.

(136) See *Godebois et Turcotte*, petitioners, S.C. (Québec, ll-093) June 28 1972 (Mr. Justice Beaudoin) published in (1974) C. de D. 887; *Pelletier et Bouchard*, petitioners, S.C. (Québec, ll-094) June 28 1972, (Mr. Justice Beaudoin) cited in E. CAPARROS, *Mutation conventionnelle du régime matrimonial: date d'entrée en vigueur*, (1974) 15 C. de D. 905.

(137) See Article 182 of the Book on *Persons* and Article 8 of the present Book.

(138) See G. BRIERE, *Les dispositions essentielles du Bill 10 sur les régimes matrimoniaux*, Lois Nouvelles II, P.U.M. 23, p. 35; R. COMTOIS, *Manuel du notaire*, Montreal, 1970, vol. I, No. 25, pp. 88-100; *De la donation par contrat de mariage*, (1972) 75 R. du N. 253, p. 260. See, also, Articles 487 et s. of the Book on *Obligations*; M. LEGARE, *Institution contractuelle irrévocable et mutation du régime matrimonial*, (1976) 79 R. du N. 117.

(139) See J.H. GOMERY, *Changes in the Matrimonial Regimes under Bill 10*, Junior Bar Symposium 1970-71, p. 38.

(140) See E.S. DE LA MARNIERRE, *La modification du régime et l'intérêt de la famille*, (1971) 74 R. du N. 166.

(141) See M. RIVET, *La popularité des différents régimes matrimoniaux depuis la réforme de 1970*, (1974) 15 C. de D. 613, p. 642 et s.

(142) See Articles 60 et s. of the Book on *Persons*.

(143) See J.G. BERGERON, *loc. cit.*, p. 230; E. CAPARROS, *Les régimes matrimoniaux au Québec*, *op. cit.*, p. 55 et s.

(144) See Article 72.

(145) See S. BINETTE, *La société d'acquêts; de la dissolution et de la liquidation du régime*, Chambre des Notaires, Cours de perfectionnement, Montreal, 1974, 7, p. 56 et s.

(146) See C. CHARRON, *L'assurance-vie payable "aux héritiers légaux" ne fait pas partie des biens communs ou acquêts de l'assuré*, (1973) 76 R. du N. 507.

(147) See L. PLAMONDON, *La société d'acquêts et l'assurance sur la vie*, (1970) 73 R. du N. 131, p. 248.

(148) See S.C. (District of Richelieu 21-059) 3 April 1973, published in (1973) 76 R. du N. 37, commentary by L. PLAMONDON, (1973) 76 R. du N. 41. See G. BRIERE, in (1974) 34 R. du B. 393.

(149) See S. BINETTE, Cours, *op. cit.*, p. 50; E. CAPARROS, *Les régimes matrimoniaux au Québec*, *op. cit.*, No. 86, p. 70; J. PINEAU, *op. cit.*, p. 59.

(150) See S. BINETTE, *loc. cit.*, p. 54.

(151) See S. BINETTE, *loc. cit.*, p. 54; E. CAPARROS, *Les régimes matrimoniaux au Québec*, *op. cit.*, No. 94, p. 76; J.G. BERGERON, *L'acquisition des biens avec des propres et des acquêts et la technique des récompenses sous le régime de la société d'acquêts*, (1975) 35 R. du B. 446, on p. 456 et s.

(152) See *L. PLAMONDON, La société d'acquêts et l'assurance sur la vie, loc. cit.*, p. 263.

(153) See the references under Article 84.

(154) D. 1957, 350.

(155) See, in particular, J. PINEAU, *Les régimes matrimoniaux, op. cit.*, p. 61; E. CAPARROS, *op. cit.* No. 88, p. 72; S. BINETTE, *op. cit.*, p. 37.

(156) See Articles 209 et s. of the Book on *Persons*.

(157) See J. PINEAU, *La réforme des régimes matrimoniaux, quelques points d'interrogation, loc. cit.*, p. 16; E. CAPARROS, *Les régimes matrimoniaux au Québec*, *op. cit.*, No. 138, pp. 107-108.

(158) See M.D. CASTELLI, *Recel et bénéfice d'émolument: Deux parents pauvres du nouveau régime*, (1974-75) R. du N. 371.

(159) See E. CAPARROS, *Les régimes matrimoniaux au Québec, op. cit.*, No. 143, p. 110.

(160) See E. CAPARROS, *ibid.*, No. 151, p. 115.

(161) See, for examples, J.G. BERGERON, *L'acquisition des biens avec des propres et des acquêts et la technique des récompenses sous le régime de la société d'acquêts, loc. cit.*, 446.

(162) Another solution would be to consider all enrichment of private property as acquests, as the Ontario Law Reform Commission proposed for a regime which is close to that of partnership of acquests. *Report on Family Law*, Part IV, *Family Property Law*, 1974, Recommendation No. 6, p. 58.

(163) See Article 194.

(164) See Article 199 paragraph 4.

(165) This is how A. COLOMER interprets Article 1403 of the French Civil Code, in *La suppression du droit de jouissance de la communauté sur les biens propres des époux ou: le danger d'innover*, D. 1966, c. 23.

(166) See J. PINEAU, *La réforme des régimes matrimoniaux, quelques points d'interrogation, loc. cit.*, p. 24; E. CAPARROS, *Les régimes matrimoniaux au Québec, op. cit.*, Nos. 197 and 212, p. 139 and 143.

(167) See A. MAYRAND, *Commentaires sur trois mots, "Succession, titre équipollent"*, (1957-58) 60 R. du N. 435.

(168) See R. COMTOIS, *Traité théorique et pratique de la communauté de biens*, Montreal, le Recueil de droit et de jurisprudence, 1964, No. 329 et s.

(169) R.S.Q. 1964, c. 296, s. 31 (now repealed by the *Act respecting insurance*, S.Q. 1974, c. 70); see R. COMTOIS, *Traité théorique et pratique de la communauté de biens, op. cit.*, No. 24.

(170) See *Proulx v. Deschamps*, [1965] S.C. 278.

(171) See R. COMTOIS, *Traité théorique et pratique de la communauté de biens, op. cit.*, No. 31; F. HELEINE, *Obligation alimentaire et régime communautaire,* (1968) 14 McGill L.J. 312, p. 317; *Lemster v. Matieshyn*, [1972] P.R. 1 (S.C.).

(172) See *Lemster v. Matieshyn,* [1972] P.R. 1 (S.C.); *Bilodeau v. Turcotte-Bilodeau*, [1972] S.C. 358. See F. HELEINE, *Pensions de retraite et régimes communautaires*, (1971-72) 74 R. du N. 97; E. CAPARROS, *Les régimes matrimoniaux au Québec, op. cit.*, No. 178, p. 131.

(173) See R. COMTOIS, *Traité théorique et pratique de la communauté de biens, op. cit.*, No. 33; J. PINEAU, *Les régimes matrimoniaux, op. cit.*, p. 82.

(174) See J. PINEAU, *La réforme des régimes matrimoniaux, quelques points d'interrogation, loc. cit.*, p. 31; for the state of the law before 1970, see R. COMTOIS, *Traité théorique et pratique de la communauté de biens, op. cit.*, No. 83a et s.

(175) See the Book on *Property*, Title Six.

(176) See Article 9 of the present Book and also Article III of the Book on *Persons.*

(177) See the Book on *Obligations.*

(178) See Article 186 of the Book on *Obligations.*

(179) See P. AZARD and A.F. BISSON, *Droit civil québécois*, t. I, Ottawa, 1971, No. 56 bis.

(180) See Article 209 of the Book on *Persons.*

(181) On this subject, see the Canada Law Reform Commission, *Divorce, op. cit.*, p. 33 et s.

(182) See, particularly, *Thibodeau v. Delisle*, [1975] C.A. 383; *Lajoie v. Therrien*, [1971] C.A. 493.

(183) See *Hébert v. Maheu*, [1973] S.C. 420; *Simoneau v. Dufour*, [1974] S.C. 343; *Marcotte v. Marcotte*, [1973] P.R. 120 (S.C.); *Ménard v. Ricard*, [1974] C.A. 157.

(184) See A. MAYRAND, *Conventions entre époux en prévision de leur divorce et conventions entre divorcés*, (1960) 20 R. du B. I.

(185) See *Jourdain v. Bradette*, [1968] Q.B. 604.

(186) See Bromley's *Family Law*, London, Butterworths, 1971, 5th edition, p. 134 et s.; A. LINDEY, *Separation Agreements and Antenuptial Contracts*, revised edition, New York, Mathew Bender & Co. Inc., 1968, annual revision; D.J. McDOUGALL, *Alimony and Maintenance* in *Studies in Canadian Family Law*, vol. I, edited by D. Mendes da Costa, Toronto, Butterworths, 1972, p. 283 et s.

(187) See A. MAYRAND, *Conventions de séparation entre époux*, (1970) 73 R. du N. 411.

(188) See the comments on Article 47.

(189) See *Marcotte v. Marcotte*, [1973] P.R. 120 (S.C.); *Desrosiers v. Desrosiers*, [1972] S.C. 503.

(190) See *Robitaille v. Cloutier*, [1973] P.R. 125 (S.C.).

(191) See *May v. Mayer*, [1970] P.R. 30 (S.C.); see, also, F. HELEINE, *Chronique de droit familial*, (1971) 2 R.G.D. 79, p. 28.

(192) See Articles 170 and 213 C.C. and on this subject, *Couvrette v. Whittall*, [1974] S.C. 609; *Stevens v. Stevens*, [1975] C.A. 113; *Létourneau v. Fortier*, [1975] S.C. 308.

(193) See, on this, *Gosselin v. Pelletier*, [1969] S.C. 515; *Webster v. McKay*, [1969] S.C. 132; *B. v. R.*, [1970] S.C. 212; *L. v. L.*, [1970] S.C. 222; *Vigneault v. Vigneault*, [1972] C.A. 666; *Souillard v. Sauvé*, [1972] C.A. 512; See G.S. CHALLIES, *Cruelty as a ground for divorce*, (1970) 16 McGill L.J. 113, on p. 115; see, also, P.A. CHAMPAGNE and Y. LEGER, *La cruauté mentale seule cause du divorce*? Montreal, Ed. de l'Homme, 1971, p. 48; M.M. GUMBERT, *Cruelty, Desertion, Separation and Analysis of the Common Law in Relation to Certain Sections of the Canadian* Divorce Act, *(1969) 29 R. du B. 210; D. MENDES DA COSTA*, The Divorce Act, 1968, and Grounds for Divorce Based upon Matrimonial Causes, *(1969) 7 Osgoode Hall L.J. 111, on p. 147; F. HELEINE*, Chronique de droit familial, *(1970) 1 R.G.D. 130. See, also, S. KHETARPAL*, Family Law, *(1975) 7 Ottawa L.R. 176, p. 178 et s.*

(194) R.S.C. 1970, c. D-8.

(195) See footnote 193.

(196) See *Kennedy v. Kennedy*, (1969) 2 D.L.R. (3d) 405 (B.C. Sup. Ct.); *Lachman v. Lachman*, (1970) 12 D.L.R. (3d) 221 (Ont. C.A.); *Brinnen v. Brinnen*, [1972] 7 R.F.L. 113 (B.C. Sup. Ct.). See, also, *Provençal v. Leclerc*, [1974] C.A. 27; M. RIVET, *Quelques notes sur le concept d'abandon en matière de divorce*, (1973) 14 C. de D. 677; *Baril v. Trudeau*, [1975] S.C. 305.

(197) Section 4(1)(a)(i) and (ii).

(198) See, however, the Canada Law Reform Commission, *Divorce, op. cit.*, p. 34 et s., and the amendment to the *Divorce Act* at present before the federal parliament (Bill C-224), 2nd Session, 30th Legislature.

(199) See the *Divorce Act*, s. 4(1)(e)(ii).

(200) See J.D. PAYNE, *Divorce Act, 1968*, (1969) 7 Alta L.R. 1; for examples of these efforts, see: *Leblanc v. Landry*, [1952] R.L. 126 (S.C.).

(201) See S. SKELLY, *Divorce Reform, A Reality*, (1969) 10 C. de D. 85, p. 93; J. PINEAU, *Coup d'oeil sur la loi nouvelle sur le divorce*, (1969) 10 C. de D. 61, on p. 68.

(202) For example, see the French *Loi du 11 juillet 1975*, a. 230 C.C.

(203) See *McGrath v. Drapeau*, [1967] S.C. 121; see, also, *Mainville v. Monfette*, [1957] Q.B. 795; *Giroux v. Ouellette*, [1972] S.C. 723; J.P. GREGOIRE, "*De la portée des admissions du conjoint accusé d'un délit conjugal*", (1972) 32 R. du B. 484.

(204) See the *Report of the Special Joint Committee of the Senate and House of Commons on Divorce in Canada*, Ottawa, June 1967, Queen's Printer, p. 152 et s.

(205) On this point, see C. L'HEUREUX-DUBE, *Le droit de ne pas divorcer*, (1969) 10 C. de D. 121.

(206) See J. PINEAU, *La Famille*, *op. cit.*, No. 384; D. MENDES DA COSTA, *Divorce*, in *Studies in Canadian Family Law*, *loc. cit.*, 359, on p. 382.

(207) See the *Report on the Family Court*, *op. cit.*, p. 171 et s. and 229 et s.

(208) For an illustration of such a situation, see *Trites v. Trites*, [1970] 9 D.L.R. (3d) 246 (N.S. Sup. Ct.).

(209) See *Lachman v. Lachman*, (1970) 12 D.L.R. (3d) 221 (Ont. C.A.).

(210) See *Ceicko v. Ceicko*, (1969) 5 D.L.R. (3d) 360 (Man. Q.B.).

(211) See *Jourdain v. Bradette*, [1968] Q.B. 604; *D. v. B.*, [1969] P.R. 159 (S.C.); *J. v. F.*, [1970] S.C. 576.

(212) See *Trudeau v. Ouellette*, [1972] S.C. 699; *Gervais v. Lévesque*, [1972] P.R. 425 (S.C.); *Nadeau v. Lavoie*, [1974] S.C. 338.

(213) See *Perreault v. Demers*, [1974] S.C. 530.

(214) See *Raymond v. Leclair*, [1970] C.A. 671; see, also, *Ouellet v. Rousseau*, [1972] S.C. 250.

(215) See *B. v. M.*, [1971] P.R. 419 (S.C.); *Gosselin v. Pelletier*, [1969] S.C. 515; *Shaffran v. Shaffran*, [1970] C.A. 1174, conf. [1969] P.R. 101 (S.C.). It should be noted that in the Canada Law Reform Commission's Report, *Les divorcés et leur soutien*, working paper No. 12, 1975, the Commission seemed to prefer the reverse of this principle. According to this report, no one is entitled to support after a divorce unless the court decides otherwise, p. 20 et s.

(216) See *Benoit v. Rainville*, [1973] S.C. 307.

(217) See, in particular, *B. v. L.*, [1970] S.C. 17.

(218) See *Kumpas v. Kumpas*, (1970) 71 W.W.R. 317 (Man. C.A.); *Ceicko v. Ceicko*, (1969) 5 D.L.R. (3d) 360 (Man. Q.B.); *Nash v. Nash*, [1974] D.L.R. (3d) 558 (S.C.C.); see D.J. MacDOUGALL, *Alimony and Maintenance* in *Studies in Canadian Family Law*, *op. cit.*, vol. 1, 281, on p. 321.

(219) See L. ST-ARNAUD, *Divorce et impôts*, (1975) 35 R. du B. 46; J.G. CARDINAL, *Pension alimentaire et entretien d'une résidence*, (1976) 78 R. du N. 435.

(220) See in the Book on *Property*.

(221) Against this possibility: *Todd v. Todd*, (1969) 5 D.L.R. 92 (B.C. Sup. Ct.); *Tremblay v. Tremblay*, [1971] S.C. 507, [1972] S.C. 458; *Redfearn v. Hemmings*, [1972] S.C. 313; *Lévesque v. Huot*, [1973] S.C. 411. In favour of this possibility: Whyte v. Whyte, (1970) 7 D.L.R. (3d) 7 (Man. C.A.).

(222) See *Vadeboncoeur v. Landry*, [1973] C.A. 351, (1976) 10 N.R. 469; *Thériault v. Tremblay*, [1973] C.A. 575 and the criticism by A.F. BISSON, *Chroniques régulières*, (1973) 33 R. du B. 156, 404. The Supreme Court has also touched on the problem: see *Zacks v. Zacks*,

(1973) R.F.L. 53 (S.C.C.); *Lapointe* v. Klint, [1975] 2 S.C.R. 539; *Ouimet v. Ouimet*, (1976) 7 N.R. 1; see G. BRIERE, La Cour Suprême et les demandes de pension alimentaire postérieures au divorce, *(1976) 36 R. du B. 247.*

(223) Bill C-97, first reading, January 15 1973; see, also, A. MAYRAND, *L'obligation alimentaire entre époux séparés ou divorcés depuis le Bill 8 et la loi fédérale sur le divorce*, Lois Nouvelles II, 1970, pp. 41-64.

(224) See *Shaffran v. Shaffran*, [1970] C.A. 1174, conf. [1969] P.R. 101 (S.C.).

(225) See D.J. MacDOUGALL, *op. cit.*, p. 325; *Guay v. Gadoury-Guay*, [1973] C.A. 720.

(226) See *Pakenham v. Blanchet*, [1973] S.C. 77; (rev., for a different reason, by [1975] C.A. 97).

(227) See, specifically, *Bernstein v. Lemcovitz*, [1974] P.R. 279 (S.C.).

(228) See the study by Judge Wright of the Ontario Supreme Court in *Baia v. Baia*, (1971) 1 R.F.L. 348 (Ont. Sup. Ct.).

(229) See Articles 60 et s.

(230) See, also, Articles 78 and 79.

(231) See *Marette v. Archambault-Marette*, [1975] S.C. 300; *Tremblay v. Vézina*, [1974] S.C. 521.

(232) See D. PELLETIER, *De la donation à cause de mort et du divorce*, (1971) 74 R. du N. 158; J. AUGER, *La clause du divorce dans les donations par contrat de mariage*, (1976) 79 R. du N. 80; *Sardano* v. *Lirette-Sardano*, (1974) S.C. 177.

(233) See Articles 37 and 38 of the Book on *Obligations.*

(234) Swiss Civil Code, a. 252; West German Civil Code, a. 1591.

(235) See A. MAYRAND, *La preuve de non-paternité*, (1965) 25 R. du B. 177, p. 181; see, also, Comité de la filiation, Faculté de médecine, Université de Montréal, *Problèmes médicaux relatifs à la filiation*, C.C.R.O., 1972, Doc. DC72.

(236) See *Massie v. Carrière*, [1972] S.C. 735.

(237) See *R. v. W. and M.*, [1963] S.C. 176; Comments by A. BOHEMIER, (1963) 47 Thémis 206.

(238) See Article 83 of the Book on *Persons.*

(239) See J. PINEAU, *La Famille, op. cit.*, No. 146; G. TRUDEL, in *Traité de droit civil du Québec*, Montreal, Wilson & Lafleur, 1942, t. 2, p. 127.

(240) See *Métivier v. Cloutier*, [1969] P.R. 280 (S.C.).

(241) See Article 318 C.C., loi 72-3, January 3 1972.

(242) See Article 69 of the Polish Civil Code.

(243) See *V. v. P.*, [1966] S.C 539; Comments by A.F. BISSON, (1967) 27 R. du B. 547. See, also, *Leruite v. Latreille*, [1973] S.C. 314.

(244) See *Cogo v. Ierancig*, [1964] Q.B. 749.

(245) See Article 353.

(246) See M.J. GEBLER, *Le droit français de la filiation et la vérité*, Paris, L.G.D.J., 1970, p. 151. G.W. BARTHOLOMEW, *Legal Implications of Artificial Insemination*, (1958) 21 Mod. L.R.; J.D. PAYNE, *Artificial Human Insemination*, (1958) Northern Ireland L.Q. 260; C.P.R. TALLIN, *Artificial Insemination*, (1956) 34 Can. Bar Rev. 1; D. MENDES DA COSTA, *Divorce*, in *Studies in Canadian Family Law*, 1972, vol. 1, p. 426; see, also, the British Columbia Draft *Children's Act 1976*, *op. cit.*, Part II, s. 10.

(247) See *The Canada Cement Co. v. Hanchuck*, (1917) 26 K.B. 434.

(248) See *Massie v. Carrière*, [1972] S.C. 735; *Leruite v. Latreille*, [1973] S.C. 314; G. MURE, *L'action en contestation de paternité légitime*, (1976) 6 R. de D.U.S. 321.

(249) See Article 47 of the Book on *Prescription*.

(250) See *L. v. L. and Harbour*, [1947] S.C. 209.

(251) See *S. v. F.*, [1945] S.C. 59; *Lafleur v. Lévesque*, (1938) 44 R.L. 86 (S.C.).

(252) See *L. v. L. and Harbour*, [1947] S.C. 209.

(253) See *Miller v. Lepitre*, (1887) 15 R.L. 254 (S.C.).

(254) See *Buteau v. Béland*, [1958] Q.B. 324.

(255) See Articles 67 and 68.

(256) See *R. v. W. and M.*, [1963] S.C. 176; *Walker v. Worthern*, [1947] R.L. 166 (S.C.); *Lafleur v. Lévesque*, (1938) 44 R.L. 86 (S.C.); *Lafrance v. Dickie*, [1958] S.C. 521.

(257) See *Cloutier v. Chrétien*, [1974] S.C. 433; for the importance of blood samples, see *S. v. S.*, [1973] S.C. 530.

(258) See *Turner v. Mulligan*, (1894) 3 Q.B. 523; *Filiatrault v. Meloche*, (1915) 47 S.C. 108.

(259) The Ontario Law Reform Commission suggests that no person other than spouses living together be permitted to adopt a child unless special circumstances justify such adoption. *Report on Family Law*, Part III, *Children*, 1973, p. 79 et s.

(260) On adoption procedures, see Schedule I.

(261) This is the case in the other provinces; see M. HUGHES, *Adoption in Canada*, in *Studies in Canadian Family Law*, edited by D. MENDES DA COSTA, *op. cit.*, 103, p. 120.

(262) See *Hélène G. v. Centre T.*, [1976] S.W.C. 2001.

(263) See Article 353.

(264) See Article 359.

(265) See *Cour de Bien-être social v. X.*, [1974] C.A. 372, conf. [1973] S.C. 534 (sub nom. *Ste-Marie v. Cour de Bien-être social).*

(266) See Articles 353 et s.

(267) This measure exists in some legislation: see Ontario's *Child Welfare Act*, R.S.O. 1970, c. 64, s. 73(1)(2); and Manitoba's *Child Welfare Act*, R.S.M. 1970, c. C-80, s. 86(2).

(268) See Article 303.

(269) Ontario: *Child Welfare Act*, R.S.O. 1970, c. 64, s. 73(1)(2); Manitoba: *Child Welfare Act*, R.S.M. 1970, c. C-80, s. 86(5)(6); Saskatchewan: *Family Services Act*, S. Sask. 1973, c. 38, s. 52(4); French C.C., a. 348-3.

(270) See M. LAUZON, *Réflexions sur l'adoption*, (1970) 5 R.J.T. 323, p. 328.

(271) See *N. v. A.*, [1957] S.C. 327; *Rémillard v. Desjardins*, [1954] Q.B. 587; *Hélène G. v. Centre T.*, [1976] S.W.C. 2001.

(272) See the Introduction to the Book on *Prescription.*

(273) See Article 359.

(274) See the rules of procedure, Schedule I.

(275) See the rules of procedure, Schedule I.

(276) See A.F. BISSON, *Chronique de droit familial*, (1970) 1 R.G.D. 91, Chronique No. 5, p. 96; A. MAYRAND, *Les successions ab intestat*, Montreal, P.U.M., 1971, No. 177.

(277) France: a. 356 C.C.; Ontario: *Child Welfare Act*, R.S.O. 1970, c. 64, s. 83 and 84.

(278) See Article 11.

(279) Ontario: *Child Welfare Act*, R.S.O. 1970, c. 64, s. 83(2); Manitoba: *Child Welfare Act*, R.S.M. 1970, c. C-80, s. 96; Alberta: *The Child Welfare Act*, R.S.A. 1970, c. 45, s. 60; British Columbia: *Adoption Act*, R.S.B.C. 1970, c. 4, s. 10.

(280) Re: Adoption Nos 08030681 and 66-240360, (1972) 6 R.F.L. 283 (B.C. Sup. Ct.).

(281) See the rules of procedure, Schedule I.

(282) S.Q. 1971, c. 48, s. 7.

(283) There is, in British Columbia, a proposal to allow an adopted person to be re-united with his original family when all the interested persons agree. See *The Children's Act, 1976, op. cit.*, Part VII, s. 7.

(284) S.Q. 1971, c. 48, s. 93.

(285) *For example, see in England:* Bromley's *Family Law, op. cit.*, p. 473; in Manitoba: *Wives, and Children's Maintenance Act*, R.S.M. 1970, c. W170, s. 3(1); and in British Columbia *Wives' and Children's Maintenance Act*, R.S.B.C. 1960, c. 409, s. 3.

(286) See *Villeneuve v. Villeneuve*, [1973] S.C. 409.

(287) See Section 2.

(288) See P.B. MIGNAULT, op. cit., p. 458; J. PINEAU, *La Famille, op. cit.*, No. 104; *contra*: G. TRUDEL, *in Traité de droit civil du Québec, op. cit.* t. I, 1942, p. 465.

(289) See *Berthiaume v. Dastous*, [1930] A.C. 79 (J.C.P.C.), (1929) 47 K.B. 533 (J.C.P.C.).

(290) See *Rishikof v. Neidick*, [1959] R.L. 321 (S.C.); *Gold v. Letovsky*, [1967] P.R. 277 (S.C.); *Lupien v. Hébert*, [1960] S.C. 542; see A. DEREK GUTHRIE, *Alimentary Obligations*, (1965) 25 R. du B. 525, p. 556.

(291) See Article 353.

(292) See *Rodier v. Rodier*, [1969] Q.B. 966; *Marshal v. Bekhor*, [1972] C.A. 689.

(293) See Article I of the Book on *Evidence*.

(294) See *Corporation du Comté de Brome v. Leduc*, (1926) 64 S.C. 296; *Cité de Longueuil v. Grisé*, [1933] R.L. 50 (S.C.); *Corporation de la paroisse de Ste-Anne de la Pocatière v. Lizotte*, (1935) 41 R. de J. 450 (S.C.).

(295) See *Lachman v. Lachman*, (1971) 2 R.F.L. 207 (Ont. C.A.); Coorsh v. Mallin, [1972] S.C. 127; *Schulte v. Schulte*, (1972) 6 R.F.L. 164 (Ont. Sup. Ct.).

(296) See *Boucher v. Garceau*, (1926) 32 R.L. 398 (S.C.).

(297) See *Sanche v. Sanche*, [1970] C.A. 139.

(298) See *Lachance v. Lachance*, [1962] S.C. 614.

(299) See A.D. GUTHRIE, *loc. cit.*, p. 543.

(300) See *Lonergan v. Girard*, (1929) 67 S.C. 88; *Larocque v. Pilon*, [1963] S.C. 298.

(301) See *St-Laurent v. Meilleur*, [1970] P.R. 282 (S.C.).

(302) See *Lutzman v. Lutzman*, S.C. (Montreal, 750-857) June 26 1969.

(303) See *Rufiange v. Renaud*, [1971] S.C. 128; *Galloway v. Legris & Dosco Montreal Work*, [1971] S.C. 796; *Poulin v. Camirand*, [1974] P.R. 231 (S.C.).

(304) See Article 9.

(305) See J. PINEAU, *La Famille, op. cit.*, p. 192 and 193; P.B. MIGNAULT,

Droit civil canadien, Montreal, C. Théorêt, 1896, t. 2, p. 145; E. DELEURY, M. RIVET, J.M. NAULT, *loc. cit.*, p. 821.

(306) See a. 243 C.C. And, on this subject, *Stevenson v. Florant*, [1927] A.C. 211, conf. [1925] S.C.R. 532; *Hubert v. Gélinas*, [1965] S.C. 35; *L.C. v. A.C.*, [1970] S.C. 41; *Coorsh v. Coorsh*, [1956] Q.B. 315, conf. [1956] S.C.R. VII.

(307) See *Bockler v. Bockler*, [1974] C.A. 41.

(308) See Article 298.

(309) See *Ruest v. Provencher*, [1968] R.L. 378 (P.C.).

(310) See Article 67.

(311) See the *Report on the Family Court*, C.C.R.O., 1975, XXVII, p. 49 et s.

(312) Section 15. See, also, *An Act respecting the protection of children subject to ill-treatment*, S.Q. 1974, c. 59.

(313) France: a. 373 et s. C.C.; Switzerland: a. 285 et s. C.C.; West Germany: a. 1673 et s. C.C.; Canadian Common Law provinces, in particular, Ontario: *Child Welfare Act*, R.S.O. 1970, c. 64, s. 26; Manitoba: *Child Welfare Act*, R.S.M. 1960, c. C-80, s. 12(4). See, on this subject, H.T.G. ANDREWS, *Family Law in the Family Courts*, Toronto, Carswell, 1973, p. 94 et s.

(314) See Article 367.

(315) It should be noted, in this regard, that new Article 245a of the Civil Code gives the exercise of paternal authority only when natural parents have not abandoned their child.

(316) See, in current law, the serious nature of the reasons for which the Social Welfare Court may take a child away from his mother, *Affaire X*, [1972] R.L. 379 (S.W.C.).

(317) See the Book on *Property*.

(318) See M. LIPPE, *La protection de la jeunesse et le projet de loi 65*, (1975) Criminologie 9, p. 12. The author has relied on the comments made by interested parties on this Bill.

(319) See the *Report on the Family Court, op. cit.*, p. 49 et s.; see, also, J. CHOQUETTE, c.r., *La justice contemporaine*, Gouvernement du Québec, 1975, Recommandation 3.7, p. 277.

(320) See *Perreault v. Demers*, [1974] S.C. 530; see, on this subject, E. DELEURY, *Les enfants du divorce sont-ils les enfants du mariage?*, (1976) 17 C. de D. 935.

(321) See Judge M. TRAHAN, *The Social Implications of Promoting Children's Rights*, in *The Legal Rights of Children*, The Canadian Mental Health Association, 1974, p. 81 et s.

(322) See the *Report on the Family Court, op. cit.*, p. 49 et s.

BOOK THREE

SUCCESSION

INTRODUCTION

The principal changes made to the law on succession concern the rights to inherit of the surviving spouse and, although to a lesser degree, of the children. In effect, it is in this field that existing law has been most severely criticized (1). On one hand, the changes concern the portion assigned to the surviving spouse in the legal succession of a deceased, and on the other hand, they concern the restrictions to be made with regard to the principle of unlimited freedom in making a will.

The new law increases the spouse's legal portion of the succession even when there are descendants, thereby entitling him to half of the succession (a. 41). When the deceased has no descendants, the spouse would receive the entire succession, thus excluding any ascendants or collaterals (a. 40). A spouse whose deceased consort is a minor can no longer be prevented from inheriting *ab intestat* from that consort (a. 624d C.C.) and there is no longer any obligation for the spouse to renounce his matrimonial advantages (a. 624c C.C.) in order to inherit.

It was also considered that equity requires taking into account *de facto* situations which are relatively common in our society, and giving persons living together in a stable and continuous manner outside marriage the right to inherit *ab intestat* (2). *De facto* consorts would have the same rights to inherit as married consorts, provided that at the time of death neither of such consorts is married to another person who could inherit (a. 42). A person will still be able to make a will in favour of his *de facto* spouse, as he could in favour of any other person, but within the limits of the freedom of willing (a. 240).

The principle of unlimited freedom of willing, included in the Civil Code of 1866, was not contested then and did not lead to serious misuse in practice. The social cohesion existing at the time was the safeguard of public order and good morals (3).

The rapid evolution of our society during the last few decades, however, has led to a need for measures to protect the immediate family of a deceased (4). Such measures, moreover, have been adopted by most countries which recognize freedom of willing (5). Using comparative law as a basis, various possible legislative solutions were examined, the main ones being the hereditary reserve and the support claim, and persons worthy of protection from excessive gifts made by the deceased.

Within the immediate family of the deceased, it was considered that the surviving spouse must be protected first, and in this respect, the hereditary reserve offers a more appropriate mechanism than the support claim on the succession. Indeed only the reserve ensures the minimum

right to inherit that it is sought to guarantee the spouse (6) without compelling him to go to court to prove his need, through proceedings which many would find odious. Moreover, it was observed with interest that the Commission charged with proposing reforms in family law in England has recommended in a recent report that the courts having to decide on the support claim of the surviving spouse against the succession of his deceased consort should no longer restrict themselves to the idea of need, but rather should consider whether the deceased has left a sufficient share of property to his spouse, taking into account, among other criteria, the contribution of such surviving spouse to the welfare of the family, particularly the running of the house (7). This recommendation indicates a tendency to consider that, up to a certain point, a spouse has a vested right to a part of the property of his deceased spouse, even though the English legal system does not allow for reserve. Reserve also makes it possible to remedy, at least in part, the distressing situation of a surviving spouse whose spouse dies without changing the will he had made, before his marriage, in favour of other persons. Moreover, the reserve is easier to include in a civil law system where the heir is seized of the property of the succession and entrusted with winding it up (8). Finally, within the limits proposed for its establishment, the reserve will retain the necessary balance between the spouse's interest and that of the other persons involved.

The surviving spouse is thus entitled to a reserve whose extent will vary depending on whether or not the deceased left any children. When there are children, the spouse's reserve will be a quarter of the succession; when there are none, it will be half the succession. These fractions actually represent half of what would have been the spouse's *ab intestat* portion, except in the cases where certain liberalities made by the deceased are fictitiously put back into the mass. This is dealt with later. As a rule, the reserve carries with it full ownership, but may nevertheless be discharged in usufruct or in the income of a trust, which should then relate, as the case may be, to one-half or all of the deceased person's property. For the purposes of calculating the reserve, all gifts made within three years prior to the death would be counted as part of the property of the succession (a. 63).

Since the reserve is a successoral right, it is seen as taking place independently of the spouses' matrimonial regime. The Civil Code Revision Office has adopted the legislative policy of considering the rights stemming from the matrimonial regime to be rights acquired at the time of the marriage or of any subsequent change in the matrimonial regime. Nevertheless, it is provided that spouses may renounce the reserve in their

marriage contract if they think that the reciprocal rights stemming from their matrimonial regime are sufficient. This possibility guarantees a relatively broad flexibility, particularly under the existing regime which recognizes the mutability of matrimonial agreements. Moreover, the legacies, gifts *mortis causa* made in a marriage contract and the capital insured by the deceased to the benefit of his spouse may satisfy the reserve if they represent in value that part of the deceased person's property to which the spouse is entitled (a. 77). The result in most cases, then, is that the will, the marriage contract and the deceased person's insurance will satisfy the reserve. Failing similar provisions, the spouse's *ab intestat* portion would be sufficient for the purposes of the reserve, except when gifts made to others by the deceased within three years prior to the death exceed in value that part of his property of which he was free to dispose. Finally, the legatees as a rule would have the choice of paying the reserve in kind or in value, in order that such payment should compromise execution of the provisions of the will as little as possible.

The fact that the reserve is a successoral right also means that the spouse is entitled to it only if he was qualified to inherit *ab intestat* from the deceased. In this respect, a new rule is proposed, according to which both separation as to bed and board, and divorce, terminate the right to inherit (a. 13) (9). In addition, the spouse must not be unworthy (a. 7). He may accept or renounce the reserve under the same conditions as for a succession or a legacy (a. 83 et s.).

Consideration was also given to granting a reserve to the children of the deceased. Reserve for descendants is a mechanism intended to keep property in the family (10). Since the concept of family patrimony is practically non-existent in our society (11), it did not seem appropriate to restrict, in favour of descendants, a freedom to make a will that seems, in practice, not to have been used to their detriment. The reserve would run counter to existing social tendencies which do not give children an absolute right to a part of their parents' succession. Moreover, a child left unprovided for by the death of one parent can usually obtain the support of the surviving parent. Concerning descendants, the Office suggests the rule maintaining the support claim against the succession which existed against the deceased in his lifetime (a. 79 et s.).

Maintenance of the support claim against the succession will avail all who were entitled to support from the deceased during his lifetime. The Book on *The Family* (12) acknowledges the existence of a support claim between consorts, between divorced ex-consorts, between *de facto* consorts, between relations in the direct line and between persons whose marriage has been annulled. All these persons might thus claim support

from the succession of the person owing support, even if they were heirs. A married spouse may combine the reserve and the support claim. A *de facto* spouse would have only a support claim on the succession (13).

Having selected the criterion of the deceased person's presumed affection as the principal basis of the rules to govern legal devolution, there is no longer a distinction between legitimate and illegitimate family. Blood ties alone, along with rank, would determine the right to inherit *ab intestat* (a. 41), except with regard to the spouse. Also, the principle of representation in wills has been adopted (a. 254).

In general, the articles on succession follow the present arrangement of the titles on succession and wills in the Civil Code, although the provisions on gifts are transferred to the Book on *Obligations* (14). In addition to the chapters on the hereditary reserve and the support claim on the succession, a chapter on the administration of the succession is added, which provides, in particular, for the appointment of an administrator by the court, even in cases of intestate succession. The powers of such an administrator will resemble those of an executor (a. 155 et s.).

Many provisions make other amendments to existing law which have a more limited application. Several of these changes were proposed by practitioners, and others are based on foreign legislation or on the *Avant-projet de Code civil* prepared by the Commission de réforme du Code civil français (15).

The existing rules relating to simultaneous death are replaced by a presumption of simultaneous death so that persons who die simultaneously cannot inherit from each other (a. 6).

The purpose of the amendments proposed by chapter IV is to rearrange the existing Chapter Fourth on Successions (aa. 641 to 683 C.C.) by combining in four sections those provisions of the existing Code which are confusing because of their sequence (16). It seemed particularly appropriate to add a preliminary general section dealing with the right of option and the prior right to make inventory and to deliberate. The rules of this chapter apply to legatees as well as to the heirs to intestate successions (17).

The period of time granted to the heir to accept or renounce a succession is extended to six months from the day the succession devolved to him (a. 87). In other respects, any heir who remains inactive during a period of five years from the time he became aware of his right to inherit forfeits his right to the succession (a. 91).

Chapter V is new. It introduces into our law the possibility of

entrusting the administration of a succession, which normally falls to the heirs, to a third party. Generally, an administrator will be appointed only if the deceased has not appointed an executor. Appointment of such an administrator tends to paralyze the seizin of the heirs. In principle, the administrator appointed by the court remains in office until partition.

An administrator may also be appointed when a succession devolves outside Québec, but includes property located inside Québec. Article 331 expressly authorizes this.

The principle of the unlimited obligation of the accepting heir with regard to the debts of the succession is maintained (aa. 169 and 170). However, the application of this obligation is mitigated by recognizing, on the one hand, that the option may be annulled on the same grounds as a contract (a. 93) (18) and, on the other hand, that the heir may restrict his liability to the value of the property received, if new facts come to light. It is up to the court to assess the seriousness of these facts (a. 173). Finally, payment of particular legacies is limited to the net assets of the succession (a. 174). On the other hand, the fruits and interest on the thing bequeathed will run from the opening of the succession even if it concerns a thing determinate only as to its kind (a. 310).

In matters of partition, the procedure for partition proceedings is simplified in order to render it less onerous (19). In particular, undivided heirs, even those represented by a tutor, are allowed to agree to set aside certain formalities (a. 188). Article 691 C.C., which prevents tutors or curators from demanding partition, would be repealed. Provision is made for a mechanism of preferential attribution when certain items of property are part of the mass to be divided. This will take place in favour of the spouse with respect to the family residence and the household furniture (a. 194) and in favour of any heir with respect to the family enterprise, the dwelling or the lease, under certain conditions (a. 199). Articles 207 and following establish that the successoral return of gifts and legacies takes place only when expressly stipulated.

Although the Civil Code mentions return of debts in Article 700, it specifies no rules. The Draft fills the gap. It is based on solutions proposed by doctrine and the French *Avant-projet* (20).

The new provisions would apply to all cases of partition, even in testamentary succession (21).

The declaratory effect of partition is retained. However, it is specified that this applies only between the copartitioners themselves in order, for example, to recognize the priority of the hypothecary creditor with regard

to the price of the licitation of the property if such property has not been attributed to the heir who granted the hypothec (a. 226).

The Title on *Testamentary Successions* retains only three kinds of wills; the two forms of privileged wills, namely the special form provided for the District of Gaspé and that for soldiers and seamen on active service (a. 255) are eliminated. The existing rules on the capacity of the testator are retained, although a minor sixteen years of age would be allowed to make a will, provided it is in authentic form (a. 248). The rules to govern wills before witnesses are based on those governing wills following the form derived from the laws of England, but the formalism concerning the express stipulations the will must contain is mitigated. These rules are also based directly on the draft uniform law governing the form of international wills (22). Thus, a new requirement is laid down: each unsigned page of a will bears the initials of the testator (a. 270). Illiterate persons would not be permitted to use this type of will (a. 272).

In revising the provisions concerning authentic wills, use was made of a draft prepared by the Chamber of Notaries. The new rules no longer require that authentic wills be read before witnesses. Except when the testator is incapable (aa. 265 and 266), a notarial will requires the presence of only one witness (a. 257). A legacy made to the spouse or relatives of the witness may no longer be annulled. On the other hand, a legacy made to any witness, even an additional one, may be annulled (a. 302). In addition, a new rule is proposed sanctioning authentic wills drawn up in a foreign language. In such a case, the notary must know the foreign language used by the testator and draw up a French or English version of the will which will make *prima facie* proof of its contents (a. 264).

In matters of legacies, a new rule is laid down which takes away all effect from the widowhood clause which may accompany a legacy made to the spouse.

The revision of the provisions relating to execution of wills has entailed several amendments to existing law. Article 329 allows the court to appoint an executor in practically all cases where the one designated by the testator could not fulfil his duties. In principle, execution becomes a remunerated office (a. 339). The executor's seizin is broadened to give him powers of administration and certain powers of disposal over all the property of the succession (a. 346). The seizin will last long enough to allow execution of the will, but it cannot exceed two years, unless extended following agreement by all the heirs or by leave of the court (a. 349). Article 351 enables the court to change the powers vested in the executor by the will, and even to terminate the execution. Executors must always

make an inventory of the property of the succession. This inventory must be in the form required of an heir who accepts with benefit of inventory, except, however, the authentic form (a. 343).

Although the Civil Code Revision Office has decided in favour of retaining substitution in its basic elements, it has also made far-reaching changes in its operation to counter the principal objection raised against substitution, namely that it hampers free circulation of property.

The institute is granted the broadest powers to make alienations by onerous title of the property of the substitution. Alienation is final, so that when the substitution opens, the substitute may not put the title of third parties in question by way of resolution of right. The institute, however, has certain obligations with respect to the substitute. Alienation, like any other act, must be the result of good administration, and be followed by investment of the price. The right of the substitute then refers to the object of the investment or, failing this, is resolved by a suit in damages (aa. 379 to 381 and 390 to 394).

The curator to the substitution would no longer exist. Administration by the institute is merely subjected to supervision by the Public Curator, who must receive an inventory of the property of the substitution and an annual report concerning any changes made to it (aa. 373, 374 and 375).

The specific rules governing registration of substitutions would be repealed (aa. 938 to 943 C.C.). These provisions are intended to warn third parties that such rights as they may acquire are subject to resolution at the opening. Such protection is no longer necessary once the definitive nature of their title is acknowledged. From the same point of view, registration of securities in the name of the substitution is no longer required.

The position in which the institute finds himself under existing law has been greatly improved with regard to the works for which he may claim reimbursement, since Article 395 considers him a possessor in good faith.

The prohibition against alienation is restricted to cases where it in fact constitutes a substitution (Article 361). Also retained are cases where the prohibition only requires that the consent of the usufructuary be obtained (a. 362). It is considered that outside these circumstances the inalienability clause is contrary to public interest.

TITLE ONE

PROVISIONS COMMON TO EVERY SUCCESSION

CHAPTER I

GENERAL PROVISIONS

1

This article replaces Article 601 C.C. The word "death" is substituted for "natural death". The 1866 Code distinguished between natural death and civil death; the latter has been abolished (23).

Means of proving death are governed by the chapter on *Acts of civil status* (24).

2

This article changes only the formulation of Article 600 C.C.

3

This article is taken from the first and last paragraphs of Article 597 C.C. Many articles of the Civil Code lead to confusion by using the word "heir" to designate only an heir to an intestate succession, although an explicit text exists (25). The other provisions of this Draft follow the definitions given in this article.

Article 596 C.C. merely gives the customary definitions of the word "succession". It seemed unnecessary and therefore has been omitted. The second paragraph of Article 597 C.C. has also been omitted, since it deals with gifts in contemplation of death, which are governed by the explicit provisions of the Draft on gifts (26). Priority of testamentary succession over intestate succession, mentioned at the end of the first paragraph of Article 597 C.C., has not been retained since a reserve has been introduced in favour of the surviving spouse. As a result, devolution of property will always be governed, at least in part, by law (27).

4

This article embodies Article 599 C.C. which abolishes the distinctions made in the old law regarding devolution of the property of the deceased; these distinctions were made according to the nature and origin of such property.

CHAPTER II

QUALITIES REQUIRED TO INHERIT

5

This article lays down the first requirement for inheriting. The drafting, which differs from that of Article 608 C.C., has been taken from Article 750 of the French *Avant-projet*. It excludes absent persons, since it is not certain that they exist at the time the succession opens.

The provision of the Book on *Persons*, which deals with children conceived but yet unborn, completes this provision (28).

Article 609 C.C., which provides that aliens may inherit, has not been retained in view of Article 3 of the Book on *Persons*: subject to specific limitations of the law, aliens enjoy the same rights as citizens.

6

This article replaces Articles 603, 604 and 605 C.C. and would repeal the presumptions of survival which they set forth. In opting for the presumption of simultaneous death in cases when it is impossible to determine whether one person has survived the other, the solution proposed is based on that contained in the Italian, Swiss and Ethiopian Codes, and in the French *Avant-projet* (29).

This article applies to all successions, whether intestate or testamentary, contrary to the existing situation with respect to the theory of simultaneous death (30).

The Conference of Commissioners on the Uniformity of Legislation in Canada (31) proposes the following solution to the problem of simultaneous death: for the purposes of his own succession, each person who has so died should be considered to have survived the others. The rule of this article offers the same practical advantages (the principal one being the avoidance of two consecutive transmissions of the same property) while at the same time it is technically simpler.

The ordinary rules of evidence apply in determining whether one person has survived the other. Article 36 allows representation in the case of simultaneous death.

7

This article replaces Articles 610 and 893 C.C. It brings together in the same article the causes for unworthiness to inherit in an intestate and in a testamentary succession.

Sub-paragraph 1 retains the rule to the effect that an heir must be found guilty of murder or attempted murder in order to be excluded from the succession of his victim (a. 610 sub-par. 1 C.C.). If a mentally deranged person commits murder and is not found guilty, he must not be excluded from the succession of his victim. The second sub-paragraph is borrowed from Article 813 C.C., which gives the basis for revoking gifts on grounds of ingratitude (32); the calumnious charge provided for in the second sub-paragraph of Article 610 C.C. can be an injury within the meaning of this sub-paragraph; it is not necessary to mention that it be a capital charge. Sub-paragraph 3 sets up a new basis for unworthiness. Sub-paragraph 4 takes up the last part of sub-paragraph 1 of Article 893 C.C. Sub-paragraph 5 is new and results from the recognition in the new family law of the causes for deprivation of parental authority (33).

The basis for unworthiness in sub-paragraph 3 of Article 610 and in Article 611 C.C. has been abolished. Failure of the heir to identify the murderer of the deceased may be justified.

8

This article is new, but conforms to existing law (34). The creditors of an heir cannot invoke the unworthiness of another heir in order to increase their debtor's share.

9

It seemed advisable to prescribe a relatively short period during which proceedings might be instituted.

10

This article is new. It establishes an irrebuttable presumption to the effect that the testator had pardoned the unworthy person if he remembers him in a later will. It does not seem necessary to require the testator to state explicitly that he is remembering the legatee despite the unworthiness, provided it can be otherwise established that he was aware of the unworthiness.

11

This article, which likens the position of an unworthy person to that of an apparent heir in bad faith, is more explicit than Article 612 C.C. Reimbursements owed by apparent heirs and the consequences of the acts they perform while in possession of the succession are governed by Articles 19 and 20.

12

This article replaces Article 613 C.C. Unworthiness is a personal penalty which must not affect the descendants of the unworthy person. The article accepts that principle with all its consequences and allows representation of the unworthy person by his descendants. Article 760 of the French *Avant-projet* is to the same effect.

13

Under existing law, former spouses, following divorce, lose the right to inherit from each other by intestate succession. This article also affects rights of testamentary succession by allowing for revocation of right of legacies made in favour of the spouse and contained in a will made prior to the divorce (35). Since according to Section 16 of the federal statute (36), the effects of divorce begin only with the decree absolute, a spouse ceases to be a spouse as of that date only.

This article is new in that it proposes to ascribe the same effects to separation as to bed and board as it does to divorce, with respect to the mutual rights of spouses to inherit. Even though separation as to bed and board does not break the marriage bond, the rule is retained here in view of the importance of the new right to inherit which this Draft recognizes for the surviving spouse (37).

14

This article is new, but it conforms to existing law which reserves for the consort in good faith the civil effects of a putative marriage (38). The marriage must nevertheless have been annulled after the death of the consort, if the surviving spouse in good faith is to have the necessary quality to inherit (39).

CHAPTER III

TRANSMISSION OF SUCCESSION

15

This article substantially repeats Article 607 C.C., thus retaining the principle of seizin. Seizin gives the heir the right to take possession of the succession and to exercise the rights and perform the acts connected with it (40).

Nevertheless, the powers which Articles 155 and following vest in the administrator of a succession can prevent the heir from exercising seizin.

Seizin of the testamentary executor, which gives him the right to take possession in order to administer and liquidate the succession, can also restrain the heir in exercising seizin. Article 95 also provides that an application can be made to have seals placed against the heir.

The modalities by which the heir is responsible for the debts and charges of the deceased are described in Articles 169 and following.

The words "when an heir inherits" at the beginning of the article refer to Articles 5 and following on the qualities required to inherit.

16

This article substantially repeats Article 607 C.C. *in fine*.

17

This article embodies the substance of Article 891 C.C. Seizin of a particular legatee is thus maintained. This question was a controversial one at the time of the 1866 codification, but the solution adopted has been justified as a natural consequence of the freedom to make a will (41).

Although the Draft proposes introducing a reserve in favor of the surviving spouse, it maintains the seizin of the particular legatee, since a particular legacy can represent an important part of the succession, and it is therefore useful that the particular legatee exercise the possessory actions of the deceased with respect to the object of his legacy.

18

This article is new.

The article expressly subjects actions for a petition to inherit to a prescription period of twenty-five years, thereby settling the controversial question in existing law, that is, a disagreement as to the real or personal nature of actions for petitions to inherit (42).

The reservation at the end of this article refers to Article 91 which proposes a delay of forfeiture with regard to the exercise of the right of option.

19

This new article fills a gap in the Civil Code which deals only partially with the consequences of acts committed by apparent heirs while in possession. In fact, the Code governs only payments made to apparent heirs by debtors of a succession (43).

The article recognizes that an apparent heir is a possessor and must return what he unjustly holds (44).

This article is based on Article 786 paragraph 1 of the French *Avant-projet.*

20

This article is new, and based on the first paragraph of Article 787 of the French *Avant-projet.* With respect to acts of administration, it generalizes the solution provided in Article 870 C.C., by which a release obtained in good faith from an apparent heir may be set up against the true heir.

The solution retained with respect to acts of alienation ensures protection of third parties acquiring in good faith (45), especially in matters of immoveables.

21 and 22

These articles are also based on the French *Avant-projet* (46).

TITLE TWO

INTESTATE SUCCESSION

CHAPTER I

DEVOLUTION OF SUCCESSION

23

This article replaces Articles 598 and 606 of the Civil Code. Devolution of a succession which takes place according to law is called intestate succession rather than legitimate succession.

Section I

Regular succession

24

This article substantially repeats Article 614 C.C.

25

This article is new law and is an application of Articles 30 and 31 of the Book on *Persons*. For the purposes of succession, it definitively eliminates all distinctions respecting relationships which exist within or without marriage. Blood and adoption are the only criteria of relationship. This rule applies in the direct descending and ascending lines, as well as in the collateral line.

With respect to adoption, the article removes the ambiguity which seems to remain despite the general terms of Section 38 of the *Adoption Act* (47). Any adopted person may inherit from the relations of the person adopting, both in the direct line and in the collateral line.

26

This article repeats the first sentence of Article 615 C.C.

27

This article repeats the second sentence of Article 615 C.C. and the first paragraph of Article 616 C.C.

28

This article repeats the second paragraph of Article 616 C.C.

29

This article substantially repeats the third and fourth paragraphs of Article 616 C.C.

30

This article repeats Article 617 C.C., omitting the examples.

31

This article re-drafts the rule in Article 618 C.C., omitting the examples.

Section II

Representation

32

This article repeats Article 619 C.C. almost exactly.

Representation is extended to testamentary successions, as provided in Article 254.

33

This article amends Article 620 C.C. to take account of new cases where representation may occur, namely simultaneous death and unworthiness (48). The new drafting also takes into account the new definitions of "children", "grandchildren", and "descendants" (49).

34

This article repeats Article 621 C.C.

35

This article amends the rule in Article 622 C.C. Representation in favour of the descendants of privileged collateral relatives of the deceased is extended without limit. It thus takes place in the same way as in the direct descending line, that is to say not only when it is needed to allow someone to inherit, but also when it merely serves to determine the share of descendants in the same degree, when all the brothers and sisters are represented (50).

36

This article is new. It is in line with the first paragraph of Article 624 C.C. regarding persons represented who die first. It also allows representation in cases where deaths are simultaneous, since the existing presumptions of predecease in Article 603 and following are replaced by a presumption of simultaneous death (51). With respect to the representation of an unworthy person, the article lays down a rule contrary to that in Article 613 C.C. which prohibits representation (52). In cases of unworthiness, then, there might be representation of a living person.

Finally, with respect to representation of absentees, this article lays down the existing rule which is not explicitly expressed in the Code (53).

37

This article reproduces and completes the second paragraph of Article 624 and the beginning of Article 654 C.C. The first paragraph of Article 624 is not repeated since, under the preceding article, a living person who has been declared unworthy may be represented.

The provision which corresponds to the rest of Article 654 C.C. is stated further on (54).

38

This article repeats Article 623 C.C.

39

This article extends the obligation of the representative to return that which the person represented would have had to return, to any representative in the direct or collateral line. It is based on Article 716 C.C., which covers a presumption of interposition of persons. The rules for successoral return are stated in Articles 207 and following.

Section III

Order of devolution of succession

40

This article replaces Article 624a, the second, third and fourth paragraphs of Article 624b, and Article 624d C.C. It states the new rule that a spouse excludes all other heirs, if the deceased died without issue.

This provision also reverses the rule in Article 624d C.C. which

excludes a surviving spouse from the succession of his consort, if such consort died a minor.

41

This article replaces the first paragraph of Article 624b and the second paragraph of Article 625 C.C. It increases from one-third to one-half the share of a spouse who competes with descendants, and gives him the option to inherit the usufruct of the whole.

Thus the nature and extent of the descendant's right to inherit depends on the option of the spouse, who must exercise it within the conditions granted to any heir to accept or renounce a succession (55).

42

This article is new law.

The Book on *The Family,* acknowledges the existence between *de facto* spouses of obligations to support (56). This article grants the right to inherit between *de facto* spouses, when cohabitation is terminated by death.

Much social legislation already takes into account the situation which exists between *de facto* consorts (57).

The second paragraph, however, restricts the *de facto* spouses' right to inherit; it does not exist when one of them has a spouse by marriage who could himself inherit (58).

43

This article substantially repeats the first paragraph of Article 625 C.C.

44

This article repeats the substance of the third paragraph of Article 625 C.C.

45

This article combines the provisions in Articles 626, 627 and 631 C.C. Apart from changes to the form of the existing texts, this article takes account of Article 35 which allows unlimited representation of brothers and sisters of the deceased. All descendants of the brothers and sisters of the deceased become privileged collateral descendants.

The parents and the natural or adopted brothers and sisters have the same right to inherit as does the legitimate family (59).

46

This article is new, but it is in line with existing law and follows from Articles 624a and 632 C.C. (60).

47

This article is in accordance with existing law and is taken from Articles 626 and 627 C.C.

48

This article restates the rule in Article 632 C.C., extending it to all the descendants of the brothers and sisters of the deceased, who benefit from representation in the same way as do the issue of the deceased (61). Thus, a brother excludes his own descendants, but not those of his represented brother. Moreover, if all the brothers and sisters have previously died, their descendants will nevertheless come to inherit by representation, so that the partition may be made by roots, rather than by heads.

49

This article makes changes in the form of Article 633 C.C. It also takes into account representation, which is permitted with regard to all the descendants of the deceased person's brothers and sisters (62).

50

This article changes Articles 628 and 629 and the first paragraph of Article 634 C.C. It eliminates the rule of scission as it is known in existing law. When there is no spouse, issue or privileged collaterals, this rule divides the succession in two, one part going to the paternal and the other to the maternal line; ascendants in each line inherit in preference to the collaterals in the same line.

This article divides the succession equally between the ordinary ascendants and the ordinary collaterals who all form the same order of succession. Thus, the ascendants are entitled to the entire succession, but only if there are no maternal or paternal collaterals capable of inheriting. As the law now stands, the ascendants exclude all the collaterals from their line (63).

The portion accruing to the ascendants, as well as that of the collaterals, is nevertheless divided between the maternal and paternal lines, according to the articles following.

Legal right of return which takes place in favour of any ascendant in return for what he gave the deceased is abolished. (Article 630 C.C. would be deleted).

51

This article changes Article 629 C.C. Partition between the paternal and the maternal lines takes place with regard to the portion devolving to the ascendants and not with regard to the whole succession.

52

This article is the counterpart of the preceding article concerning ascendants. The portion devolving to the collaterals is divided between the paternal and maternal lines. This provision replaces the second paragraph of Article 634 C.C.

53

This article completes the preceding one. Since there is no representation with regard to ordinary collaterals, the closest one excludes the most distant one. This provision replaces the third paragraph of Article 634 C.C.

54

This article restates the second paragraph of Article 635 C.C., completing it.

55

This article reproduces the first paragraph of Article 635 C.C.

Section IV

Irregular succession

56

This article replaces Article 636 C.C. and would amend the law by making the State a true heir. In existing law, the State seemingly (64) partakes only under a regalian right, whose practical consequences in private international law can be troublesome where a succession comprises moveable property.

The State, however, does not have seizin; it must obtain possession (65).

57

This article repeats Article 639 C.C.

58

This article repeats Article 640 C.C., except for a change in the form so as to take into account the new rule making the State an heir.

CHAPTER II

THE SPOUSE'S RESERVED SHARE

Section I

Attribution of the reserve

59

This article is new law. It restricts the freedom of willing in favour of the surviving spouse; the principle of this freedom is set forth in Article 240 (66). This provision responds to widely expressed wishes that measures be introduced to protect spouses from being totally disinherited (67). Moreover, such measures have been adopted in Common Law countries where freedom of willing exists.

Reserve is granted of right to a spouse who has the quality required to inherit (68), whatever was his matrimonial regime with the deceased, subject to his acceptance or renunciation, like any heir (69). The second paragraph excludes any provision to the contrary, except such as are made by marriage agreement so future consorts would be able to renounce their reserve in their marriage contract. Such renunciation is particularly useful in the case of a second marriage and may make it possible to prevent the property of a deceased first spouse from going to the family of the second consort of the surviving spouse.

Some say that it is illogical for there to be a reserve for the spouse, whatever the matrimonial regime between the consorts, since, according to the regime, the survivor's "economic" share may be more or less considerable. However, the patrimonial rights resulting from a marriage agreement are acquired at the time of the marriage (or of a subsequent change) and are not the same as inheritance rights. If the consorts may choose their matrimonial regime and make any other agreements allowed by a marriage contract, this is part of their contractual freedom. There is

no reason to subject these rights to return or to a renunciation of the right to inherit when the succession devolves.

A legacy to a spouse is not a provision to the contrary and takes the place of the reserve, if it is at least equal in value (70). The same applies to certain gifts and stipulations in favour of the surviving spouse (71).

This article is based on Article 884 of the French *Avant-projet.* Although the rules for reserve only operate when the deceased has made liberalities *inter vivos* or by will which harm such reserve, they are included in this Title because reserve is a legal right of succession.

60

This article is new. The first paragraph states the principle of a reserve of ownership the size of which varies according to whether or not the deceased leaves descendants.

61

This article restricts the exercise of the right to a reserve by giving those who are its debtors the choice of paying in kind or in value. However, Article 74 states that if payment of the reserve gives rise to a reduction of the gifts made by the deceased, such reduction must always be made in value.

The reference to Article 194 has to do with the preferential attribution of which the spouse can avail himself only when he comes to the deceased's intestate succession.

62

This article is new. It makes it possible for the testator to discharge his spouse's reserve in usufruct or in income. To replace a reserve, the legacy could be made in the form of a substitution or trust, provided, if it is a trust, that the right to the income is absolute.

Section II

Disposable portion and reduction of gifts and legacies

63

This article is new law. It sets forth the rule that no one may diminish the amount of the reserve by gifts *inter vivos* or *mortis causa.* As regards gifts *inter vivos*, however, only those made during the three years preceding the death are considered as likely to reduce the reserve.

This article is drafted in such a way as to include gifts made to children by marriage contract (72). In principle, then, these gifts may be reduced in the same conditions as other liberalities unless the spouse with a reserve has expressly renounced, in accordance with Article 59.

This article is based on Article 890 of the French *Avant-projet.*

64

This article is new law and is based on Article 891 of the French *Avant-projet.* It states that the right to apply for reduction of gifts and legacies belongs only to the heir with a reserve. Setting aside the creditors of the deceased, the donees and legatees are not qualified to apply for reduction, nor do they have any interest in doing so (73).

Prescription for the action in reduction would be three years commencing at the time the succession devolves (74).

65 and 66

These articles are new law and are based on Article 892 of the French *Avant-projet.* They describe the way of forming the mass for calculation which makes it possible to calculate what part of the property the deceased could have disposed of by will or by gift. The determination of the disposable portion varies depending on the type and size of the spouse's reserve, according to Articles 60, 61 and 62.

The mass for calculation is larger than the mass of the succession if the deceased made gifts *inter vivos* during the three years preceding his death. The mass for calculation is also greater than the mass of the succession when insurance payments are included in it under the third paragraph. The mass of the succession includes all the property, independently of legacies, and of gifts *mortis causa* made in a marriage contract. However, the debts of the succession must be deducted before the gifts *inter vivos* are added fictitiously, because the creditors of the deceased are not entitled to be paid out of the property given: the preceding article specifies that reduction does not benefit such creditors. The term "Insurance Contract" includes annuity contracts used by life insurance companies (75).

Reduction of liberalities differs from return of gifts and legacies, which is dealt with in chapter VIII of this Title. Reduction is intended to reconstitute the patrimony of the deceased, in order to give the spouse his reserve, while return is a mechanism intended to maintain equality among heirs. This difference affects the date of assessment of the gifts: in matters of return, this is done at the time of partition, while, for reduction, the value at the time of the death is taken into account. Moreover, any gifts

stipulated as returnable and made more than three years before the death are not part of the mass used to calculate the reserve. Like return, however, reduction of liberalities does not affect third parties, particularly the debtors of the succession. The calculation is made strictly between heirs and donees. These articles then, do not conflict with Article 2550 C.C. which provides that any insured amount payable to a specific beneficiary does not form part of the insured person's succession.

67

This article is new and reproduces Article 893 of the French *Avant-projet.* It excludes moderate gifts of support from the calculation of the mass.

68

This article is new and is taken from Article 894 of the French *Avant-projet.* It sets forth a simple presumption of disguised gifts with regard to certain acts ostensibly by onerous title when made with a descendant of the deceased.

Although this presumption facilitates the evidence of the heir with a reserve in the most common cases of disguise, that heir may not avail himself of it if he consented to the alienation.

69

This article is new. It sets forth another presumption of disguised or indirect gifts in cases of alienation, hypothec or other charge in return for a ridiculous price. This presumption is effective no matter whom the deceased contracted with. However, only the value of what exceeds the price actually paid must be added to the mass.

70

This article is new. The first paragraph reproduces Article 895 of the French *Avant-projet.* It sets up the order in which gifts are reduced when they exceed the disposable portion.

The second paragraph makes a necessary clarification with regard to the designation of a beneficiary, which partakes of both gifts and legacies.

71

This article is new and reproduces the text of Article 896 of the French *Avant-projet.* It is the corollary of the preceding article: since the gifts are only reduced after the legacies, such legacies cannot be fulfilled if the gifts exhaust all of the disposable portion. A beneficiary under an insurance contract, or one who receives an annuity, must then return to

the heir with a reserve all the money paid under that contract or that annuity.

72

This article is new. It sets forth the manner whereby the legatees contribute toward payment of the reserve. Article 61, moreover, gives these legatees the choice of paying the reserve in kind or in value.

73

This article allows the testator to determine the order of the reduction of the legacies if they exceed the disposable portion.

74

This article is new and reproduces Article 898 of the French *Avant-projet*. It allows only reduction of the gifts in value. Thus, the heir with a reserve has only a right of claim against the donee.

75

This article, also new, is based on the second paragraph of Article 901 of the French *Avant-projet*.

76

This article specifies the date when interest begins to accrue on the amount payable to satisfy the reserve.

Section III

Imputation of liberalities made to spouses

77

This article is new. Failing any provision to the contrary, a legacy to the spouse is considered made to give the spouse his reserve. The legacy is therefore imputed first on the spouse's reserve. The second paragraph also establishes a presumption that the liberalities mentioned there have been made as payment of the reserve.

78

This article is new. It specifies which moneys paid under an act *inter vivos* are considered as satisfying the spouse's reserve. Failing express stipulation, gifts *inter vivos* are considered made so as not to be included in his share of the succession.

CHAPTER III

CONTINUATION OF THE OBLIGATION OF SUPPORT

79 and 80

These articles are new law. The adoption of a reserve in favour of the surviving spouse has not eliminated all recourse to claims on the succession for support.

Article 79 ensures continuation of the support claims of persons who could legally claim support from the deceased while he was alive, even if they were not actually receiving support from him at the time of his death. A married spouse will thus be able to cumulate his reserve and his recourse to support.

Article 80 provides a period of forfeiture.

81

This article is new. It provides that persons entitled to support may only receive support once the creditors of the succession and the spouse with a reserve have received their share.

The persons entitled to support may, during the lifetime of their debtor, oppose any gifts made by such debtor which defraud them of their rights. Unlike the heir with a reserve, they may not have the gifts reduced after the donor's death. This heir's position is different since his rights are established only at the time of death.

82

This article is new. It refers to the rules applicable to support claims *inter vivos* (76).

CHAPTER IV

ACCEPTANCE AND RENUNCIATION OF SUCCESSION

Section I

The right of option and the prior right to make inventory and to deliberate

83

This article reproduces Article 641 C.C. It upholds the principle that transmission of the patrimony of the deceased is not obligatory.

84

This article reproduces Article 642 C.C. It upholds the principle of freedom of option although this principle is subject to certain exceptions, as in the case of a succession devolving to a minor or an incapable person. As a rule, this type of succession is accepted with benefit of inventory (77). The other exception is the case of a concealed succession (78).

85

This article replaces Articles 301 and 643 C.C. The tutor's right to renounce the succession is restricted to the case where it is evident that the succession is insolvent.

86

This article changes only the form of Article 658 C.C. (79).

87

This article partly replaces Articles 664 and 666 of the Civil Code and amends them. It retains the essence of Article 789 of the French *Avant-projet.*

The period during which the heir may not be compelled to make a choice is extended from three months and forty days to six months. This period is the same whether or not the heir makes inventory.

Under this provision, the period for making a choice runs from the time the succession devolves to him rather than when the succession is opened (a. 664 C.C.). For the first-rank heir, the period will begin when

the succession opens, and for the second-rank heir, it will begin when the first-rank heir renounces.

88

This article substantially repeats Article 669 C.C.

89

This article changes Article 667 C.C. with respect to form. It provides, as in existing law, that the period for making a choice may be prolonged by the court. It adds the provision of Article 669 C.C. to the effect that an heir who has been sued and to whom the court has not granted an additional period becomes a pure and simple heir. The same applies to an heir who has neither renounced nor accepted with benefit of inventory during the period granted by the court.

90

This article is new, and provides that a spouse who is presumed to accept loses the option given him by Article 41, to opt between his right in ownership or in usufruct.

91

This article amends existing law by providing for a period of forfeiture with regard to the exercise of the right of option. Upon the expiry of the five-year period, an heir who has not made a decision and who is not considered to have done so can no longer become an accepting heir.

The period of forfeiture runs from the time the heir became aware of his rights (80).

92

The first paragraph of this article amends Article 648 C.C., but only as to form. The second and third paragraphs replace Article 649 C.C. This amends existing law which makes provision for beneficiary acceptance in the case of disagreement among heirs. The accepted solution is more equitable even though it constitutes an exception to the rule of the indivisibility of the option (81).

93

This article replaces Article 650 C.C. It explicitly recognizes that, like acceptance, renunciation may be impugned in accordance with the general rules concerning Obligations (82).

The discovery of a will which was unknown at the time of the option

is one example of a circumstance which gives rise to action in nullity, particularly on the grounds of error (83).

94

The first paragraph of this article is taken from Article 666 C.C.; the second replaces Article 668 C.C. This article explicitly extends the provisions concerning expenses to the beneficiary heir (84). As for expenses incurred after expiry of the period for making a choice, it is left to the court to decide whether or not they will be chargeable to the succession.

95

This article is new but confirms existing law whereby any interested person may have seals affixed when the inventory of the succession has not been made, although there is no explicit text to this effect in the Civil Code (85). Articles 901 and following of the Code of Civil Procedure govern the procedures for affixing seals.

96

This article specifies the effect of the conservatory measures with regard to the interested persons among themselves and imposes a period for payment of the debts and legacies. These measures will ensure the effectiveness of the benefit of separation of patrimonies (86).

97

This article reproduces Article 681 C.C. and charges to the succession any expenses for a security that the beneficiary heir may be called upon to supply (87).

98

This article is new. It expressly gives interested persons the right to examine the inventory made by the heir.

99

This article substantially reproduces Article 650a C.C.

Section II

Pure and simple acceptance

100

This article maintains existing law, while amending the form of Article 644 C.C. Acceptance has no real retroactive effect; it confirms the position of an heir to whom the property of the deceased has been transmitted instantly at the time of death (88). Consequently, there is no real retroactivity save with respect to renunciation.

101

This article replaces Article 645 C.C. The definitions of express and tacit acceptance in that article have been omitted. The articles following establish presumptions of tacit acceptance.

102

The first paragraph of this article substantially repeats the rule in Article 646 C.C., using a new formulation. The second paragraph is new and allows any person able to inherit to obtain court authorization to perform any act which goes beyond simple conservation of the property, when required by exceptional circumstances in the interest of the succession.

103

This article repeats Article 665 C.C., amending it, however, with respect to formalities of sale. The new article allows sale by mutual agreement, while, in existing law, only a judge may authorize such sale; failing authorization, a judicial sale takes place (89). Sale of perishable goods or of property which is expensive to preserve constitutes an act of conservation only (90).

104

This article repeats Article 647 C.C., except for a few modifications in drafting.

105

This article is drawn from Articles 659 and 670 C.C. It imposes pure and simple acceptance on any heir who is guilty of successoral concealment. Article 191 also provides that the person who makes such concealment is deprived of any share in the partition of the property he concealed.

Article 105 expands existing law by considering as a case of successoral concealment the abstraction or misappropriation of property of the succession subsequent to renunciation (91). An heir guilty of concealment is deemed to have accepted, either because he has not exercised his option or has accepted with benefit of inventory,or because he has renounced.

106

This article is new. It adds to existing law a presumption of acceptance of a succession in cases of dispensation from making inventory. Such dispensation does not, however, free the administrator or the executor who are still obliged to make inventory (92).

Section III

Renunciation

107

This article substantially repeats Article 656 C.C.

108

This article substantially repeats the beginning of Article 651 C.C.; it adds a necessary reference to the period of forfeiture.

109

This article repeats the second part of Article 651 C.C., specifying that the notarial deed must be *en minute* so that it bears a specific date.

110

The first paragraph repeats Article 652 C.C.

The second paragraph proposes a different drafting of Article 653 C.C., the existing formulation of which is imprecise and has given rise to controversy (93). Article 821 of the French *Avant-projet* proposes a text similar to that of this paragraph.

111

This article omits the first part of Article 654 C.C., which excludes representation of renouncing heirs. Article 37 suffices to this effect.

112

This article repeats the essence of Article 657 C.C. which, however, has been amended to take into account the new period of forfeiture of the right of option. A retraction, moreover, is subject to the same condition with respect to form as that of a renunciation: it must be by notarial deed *en minute* or by judicial declaration.

113

The first paragraph of this article substantially repeats that of Article 655 C.C. The text is simplified by removal of a reference to rescission of the heir's renunciation which is superfluous anyhow, since at the end of the next article it is stated that acceptance by creditors does not benefit the heir.

The second paragraph is new and explicitly allows creditors the right to exercise the option of their debtor when he allows the period to expire, in fraud of their right (94). The third paragraph determines the period for the exercise of the recourses of creditors.

114

This article repeats the second paragraph of Article 655 C.C.

Section IV

Acceptance with benefit of inventory

115

This article substantially repeats Article 660 C.C. Article 661 C.C. is transferred to the Book on *Publication of Rights.*

116

This article repeats the provision in Article 683 C.C.

117

This article is new. It adds to existing law a cause for forfeiture of the benefit of inventory. Article 105 provides that benefit of inventory is forfeited in cases where property of a succession is concealed or misappropriated. Under the present article, the beneficiary heir must keep the

property of the succession physically distinct from his own property. For example, he must keep money from the succession in a separate account.

118

This article substantially repeats Article 662 C.C.

119

This new provision imposes a period during which beneficiary heirs are bound to make inventory on pain of forfeiting the benefit of inventory. This period may be added to those granted to all heirs to exercise their option (95), according to the date of beneficiary acceptance. The court may extend it.

120

This article proposes a more flexible form of inventory than that provided in Article 917 C.C.P., with respect to the personal effects and the universalities included in a succession. The authentic form remains obligatory (96).

121

This article is new. Article 98 gives any interested person the right to consult the inventory of the property of the succession.

The notice must be given in a form sufficient for purposes of registration.

122

This article replaces Article 663 C.C. with a less restrictive provision. The beneficiary heir may be forced to provide a security on application by one interested person alone and no longer by the majority of the creditors, as is the case in existing law.

The court determines the amount of the security and is no longer restricted to the value of the immoveable property and to the price of the alienated immoveable property. In principle, the cost of the security is charged to the succession (97).

123

This article is substantially the same as Article 671 C.C., though the text is changed to take account of the criticisms made of the existing text (98).

124

This article lays down the principle in Articles 672 and 673 C.C. to the effect that the beneficiary heir is charged with the administration of the succession. He is entrusted with simple administration, the powers and obligations attached to which are specified in the Book on *Property* (99). It lists the kinds of acts necessary and useful to preserve the property, including the power to make and change investments.

125

This article is new and introduces the articles following.

126

This article replaces the first paragraph of Article 676 C.C. with some changes; even before he completes the inventory, the heir may publish the notice making his quality known; this notice must be sent to the other heirs and to the known creditors.

Publication of the notice is made in conformity with a new Article 920a (100) which it is proposed to include in the Code of Civil Procedure.

127

This article retains the two-month period which the heir must allow to elapse before he can pay the creditors out of the price of the property sold.

128

Article 674 C.C. subjects all sale of moveable property to the formalities of a public sale. This article exempts the beneficiary heir from these formalities whenever he alienates moveable property which might depreciate or which is expensive to preserve. Nevertheless, every sale must be preceded by the notice required under Article 126.

The second paragraph of this article retains the second paragraph of Article 674 C.C.

129

This article amends the first paragraph of Article 675 C.C., by allowing sale of immoveable property, not only in the case of need, but also when that sale is advantageous. Every alienation, however, must be preceded by the publication required by Article 126 and must be made under the conditions of Article 922a and following C.C.P. (101).

The second paragraph of Article 675 C.C. is not retained.

130

This article is new, but is in keeping with current doctrine on the subject (102). The penalty for failure to observe the formalities required for alienation of property of the succession is not nullity of the sale, but forfeiture of the benefit of inventory. Under existing law, however, the creditors are only entitled to recourse for damages against the beneficiary heir.

131

This article suggests a different provision from that of the third paragraph of Article 676 C.C. It obliges the heir to make payments only in compliance with the orders of the court as soon as creditors or legatees present themselves, even without actions, seizures or contestations.

However, all the interested parties may agree as to an order of priority to avoid payment in court.

132

This article replaces the second paragraph of Article 676 C.C. The beneficiary heir may pay the creditors and legatees without formalities only if none of them has presented himself during the period, saving the exemption which the interested parties may give under the preceding article.

Under this article, the beneficiary heir pays the creditors and legatees without distinction, in the order in which they present themselves.

133

This article is new, and is taken from Article 811 of the French *Avant-projet*. Creditors and legatees who have presented themselves within the two-month period and have been neglected in the settlement have recourse of right, the former against the creditors and legatees paid at their expense, and the latter against the other legatees.

134

This article is in keeping with existing law, although the text is different from that of Article 680 C.C. Late creditors and legatees have recourse only against the remainder of the succession, if any, when the heir has complied with the formalities governing benefit of inventory. They may also have recourse against the particular legatees.

The creditors forfeit their recourse against the beneficiary heir, however, if they present themselves later than six months after the

discharge (103). Their recourse against legatees paid to their detriment is prescribed according to the normal rules by three years (104).

135

This article is the same as Article 676a C.C. except for a change as to form.

136

The text of this article is new, and is based on Article 809 of the French *Avant-projet*. It contains a change from existing law in which a hypothec confers a preferential right on the price only in the case of a judicial sale (105).

137

This article incorporates Article 678 C.C. but specifies that the heir may render an amicable account "at any time". However, this provision, which is placed before that which provides for a judicial account in the event of a dispute, becomes the general rule and not the exception, as is the case in existing law (106).

138

This article is new.

139

This article is taken from sub-paragraph 2 of paragraph 1 of Article 677 C.C. There is a change, however, from existing law. Article 677 requires the beneficiary heir to render an account in court, unless the interested parties agree to submission of an amicable account. Articles 137 and 139 have the effect of reversing this rule - a judicial account is to be rendered only if there is a contestation. Moreover, the formalities and terms imposed on the heir are imposed at the discretion of the court.

140

This article replaces sub-paragraph 1 of paragraph 1 of Article 677 C.C. Renunciation of benefit of inventory need no longer be in notarial form.

141

This article is taken from the last paragraph of Article 677 C.C. It differs from that text in that it specifies that the discharge is granted either by the court or by all the interested parties.

142

This article amends Article 679 C.C. It reduces to six months the period of time during which creditors who present themselves after discharge may demand payment out of the property which remains to the beneficiary heir. The six-month period is one of forfeiture and not a prescription period as appears to be the case under existing law (107).

143

This article is the same as the second paragraph of Article 672 C.C.

144

This article is taken from the first paragraph of Article 672 C.C. and conforms to existing law.

145

This article substantially repeats Article 682 C.C.

146

This article is new. Article 633 C.C. only allows the court to deprive the beneficiary heir of the administration of the property which is then deposited with the court and not left in the hands of an administrator.

The French *Avant-projet* proposes a similar provision in Article 815.

147

This article is new. Contrary to Article 802 of the French Civil Code, the Civil Code does not allow the beneficiary heir to absolve himself of the administration. The French *Avant-projet* has a similar provision in Article 816.

Delivery of the property to a third party does not, of itself, result in the heir losing the benefit of inventory.

148

This article is new and defines the powers and obligations of the administrator entrusted with winding up the succession in place of the beneficiary heir. It reproduces Article 817 of the French *Avant-projet*.

Section V

Vacant successions

149

This article amends Article 684 C.C. in accordance with the change made in the period for exercising an option (108).

This article retains the presumption that the succession is vacant when the known heirs have renounced. It modifies the circumstances under which vacancy occurs in the event of absence or inaction on the part of the heirs: at the end of six months following the six-month period for exercising the option, vacancy is presumed if there are no heirs or if they take no action.

150

This article repeats Article 685 C.C.

151

This article incorporates the substance of the first paragraph of Article 686 C.C. The provision of the second paragraph is included in Article 149.

152

This article amends Article 687 C.C. To have the curatorship set aside, the heir need merely establish his quality satisfactorily. Under existing law, action before the court is required (109).

The text of this article takes into account Article 56, which makes the State an heir.

153 and 154

These articles, like Article 688 C.C., subject the administration of the Public Curator to the rules and formalities governing the benefit of inventory.

CHAPTER V

ADMINISTRATION OF SUCCESSIONS

155

This article is new. The motion for appointment of an administrator may even be made by a particular legatee.

The third paragraph of Article 924 C.C. provides that the court may appoint an executor only when all the heirs are not domiciled in Québec (110).

156

This article is new; it sets out the procedure for dismissing an administrator.

157

This article refers to the provisions governing the administration of property of others, which distinguish between three levels of administration, and set limits for the powers of each (111).

In principle, the functions of the administrator terminate upon partition. However, if all the heirs can agree as to the partition (112), they may authorize the administrator to make it for them.

158

This article and Articles 160 and 161 impose certain prior obligations on the administrator, thereby bringing his administration more into line with that of the beneficiary heir. The inventory he is required to make must be in notarial form (113).

159

This article is new.

160

This article is new and refers to Article 122.

161

This article is new; it is necessary because of the compulsory nature of the formalities attached to benefit of inventory. A similar provision is made for the testamentary executor (114).

CHAPTER VI

UNDIVIDED OWNERSHIP AMONG HEIRS

162

The general rules on undivided ownership are included in the Book on *Property* in the Draft (115). The rules governing partition proper, which are of general application, remain in the Book on *Succession* (116).

163

This article is new. The consequences of the principle of divisibility of the debts of a succession are expressly laid out so as to clarify existing law, where there is debate as to how to reconcile Articles 703, 746 and 750 C.C. which suggest that debts are part of the undivided ownership, and Article 1122 C.C. which asserts that the obligation is divided between the heirs of the creditor and of the debtor (117).

Article 228 completes this provision by extending the declaratory effect of partition to the debts which are part of it, either because they have not been settled with each of the heirs before that date, or because they are indivisible.

164

This article is new.

165

This article is new. Collection of debts of the succession goes beyond custody of the property. The heir must therefore be authorized by the court to do this, if he wishes to avoid performing an act which only an heir can perform (118).

166, 167 and 168

These articles are new. The new chapter on undivided ownership in the Book on *Property* recognizes two allowable grounds for a stay of partition: express consent of the undivided owners, valid for a period of five years, and a court order if the application for partition is made at an unsuitable time (119).

In the matter of successoral undivided ownership, a third ground for maintaining undivided ownership with respect to certain property is added. It deals with the case of an enterprise managed by the deceased or by his consort, or shares in such an enterprise and the family dwelling. Compulsory maintenance of undivided ownership can then be applied for, when there are no descendants by the surviving spouse, if he is a joint owner of the undivided property, or by any heir if the deceased has left minor children.

These provisions are taken from Article 829 of the French *Avant-Projet*.

CHAPTER VII

LIABILITIES OF THE SUCCESSION AND SEPARATION OF PATRIMONIES

169

This article embodies the substance of the first and second paragraphs of Article 735 C.C. (120).

170

This article replaces Articles 736 and 737 C.C. It is more precise than they are, in that it speaks of an obligation for debts rather than a contribution.

171

This article repeats the substance of the fourth paragraph of Article 735 C.C., although the particular legatee's obligation with regard to the hypothecary debt is not laid down here. It is covered by Article 177.

172

This article is based on Article 738 C.C. However, two new restrictions are provided in the articles following: the case of an heir who discovers important new facts (a. 173), and payment of particular legacies, which is due only out of the assets of the succession (a. 174).

173

This article is new law. It mitigates the harshness of the rule of liability for debts *ultra vires successionis*, when the heir accepts purely and simply.

This provision differs from that in Article 93, where the heir requests the cancellation of his option. Article 173 is intended only to restrict the liability of the accepting heir.

174

This article is new. It reproduces Article 965 of the French *Avant-projet*, but adds that the contribution to the payment of particular legacies is made proportionately among the heirs, as for debts.

175

This article is new. The heirs are no longer responsible for particular legacies except *intra vires successionis*. This article, together with the

preceding one, equitably settle the controversy concerning the extent of the heir's obligation with regard to particular legatees (121).

176

This article is new, but in accordance with existing practice.

177

This article broadens Article 739 C.C. so as to cover even particular legatees (122). Article 741 C.C., which allows a particular legatee to recover from the heirs what he had to pay to free the immoveable bequeathed to him, is restated in Article 324.

178

This article is new and is taken from the French *Avant-projet* (123). Under Article 116 of the Code of Civil Procedure, the heirs may be summoned collectively during the two years following the death. The present article extends the recourse against the property of the succession up to partition; this change is necessary, since many cases are now provided where undivided ownership can be maintained (124).

179

This article is taken from the French *Avant-projet* (125) and replaces Article 740 C.C., which is restricted solely to hypothecary debts. It is completed by the following article.

The beneficiary heir's right is derived from Article 123.

180

This article restates the provision in Article 742 C.C., applying it to all debts. It is based on Article 883 of the French *Avant-projet*.

181 and 182

These articles replace Article 743 C.C. and make two important changes in the mechanism of separation of patrimonies.

Under the first change, such separation becomes automatic, that is, it operates in favour of all the creditors of the succession. Thus, in determining the order of collocation, there will no longer be a distinction between the "separatist" creditors and those who did not avail themselves of the separation. The second innovation extends the benefit of such separation to the personal creditors of the heir, who are also entitled to be paid in priority out of the heir's personal property. Article 744 C.C. would thus be deleted (126).

The benefit of separation of patrimonies belongs only to those

creditors of the heir whose claim pre-dates the devolution of the succession. Those whose claim is subsequent are only paid out of the heir's property after the aforementioned creditors and concurrently with the unpaid creditors of the succession.

183

This article restates the last part of Article 743 C.C. changing it as indicated by jurisprudence; the words "as long as the property exists in the hands" are interpreted as referring to a right of ownership (127).

CHAPTER VIII

PARTITION AND RETURN

Section I

Partition

184

This article repeats the first paragraph of Article 693 C.C. except changes as to form. The scope of this article is broader, however, considering the repeal of Article 691 C.C. There may be partition by agreement even when a minor or an incapable person is involved who must however be represented by a tutor.

185

This article is new and is taken from the French *Avant-projet* (128). It nevertheless complies with existing law, which recognizes that partition by agreement may be completely informal (129). The reserve which is made of the rights of the surviving consort refers to Article 194 which allows such consort to choose the property that will make up his share.

186

This article is new, but is in accordance with existing law (130). The French *Avant-projet* contains a similar provision in Article 833.

187

This article repeats Article 692 C.C. (131).

The concurrence required of the consort of an undivided heir common as to property does not prevent partition from being made by agreement. This is a change from existing law.

188

This article replaces the second paragraph of Article 693 C.C., and Article 709 C.C. Judicial partition replaces voluntary judicial partition and partition proceedings. This method will be used when partition by agreement is impossible, because of disagreement between the undivided heirs or if one of them is absent. A tutor representing a minor or an incapable person is fully qualified as regards the formalities respecting which the undivided heirs may agree in relation to the partition.

It is suggested that Articles 808 to 812 C.C.P. be amended so as to simplify judicial partition proceedings and make them less onerous.

189

The first paragraph of this article restates the 3rd paragraph of Article 693 C.C. and the second restates Article 895 of the Code of Civil Procedure.

190

This article is new; it broadens existing law, which only allows partial partition if it is justified by exceptional circumstances (132). In the second paragraph, it is recognized that there may be forced undivided ownership with regard to certain property (133).

This article is taken from the French *Avant-projet* (134).

The declaratory effect of partition applies to acts of partial partition (135).

191

This article is taken from Article 659 C.C. and from the French *Avant-projet* (136). It completes Article 105 which declares that any heir guilty of concealing property of a succession is deemed a pure and simple heir.

192

This article replaces Article 705 C.C. Article 811 C.C.P., as proposed, provides that the notary in charge of the partition makes up the shares and may appoint as an assistant one of the undivided heirs or an expert.

193

This article amends existing law (aa. 705 *in fine* and 706 C.C.) by providing that shares need not be drawn by lots, when the undivided heirs can agree as to their allotment. Shares may thus be allotted even in the

case of judicial partition. This article is based on Article 839 of the French *Avant-projet.*

194

This article is new. No heir may oppose the exercise of this right by the surviving consort. The right of preferential attribution is exercised on the mass to be partitioned to the exclusion of property bequeathed by particular title.

195

This article substantially repeats Articles 702 and 707 C.C.

196

This article is new. It adds a useful specification not found in the Civil Code (137).

197

This article substantially repeats Articles 703 and 704 C.C. It reproduces Article 840 of the French *Avant-projet.*

198

This article maintains the principle of the right to partition in kind mentioned in Article 697 C.C. Moreover, Article 202 specifies that only property that cannot be conveniently apportioned or attributed is to be sold. Article 809 C.C.P. must therefore be amended again so as to allow the court to order licitation, and not partition in kind.

While article 194 permits the surviving consort to impose his choice concerning the property which is to make up his share, this article only grants the other heirs the right to request that certain items be attributed to them. Ultimately, the court decides the matter. However, Article 199 gives all heirs certain rights with regard to the enterprise in which they were participating at the time of the death.

199 and 200

These articles are new and are based on Article 842 of the French *Avant-projet.*

The right to demand preferential attribution of an undertaking, an immoveable or a lease necessitates a restriction to the existing rule, which requires equality among copartitioners. This right belongs to every heir in the circumstances specified by this article, subject to opposition by the copartitioners. The court decides as to the opposition and is given full

latitude with regard to the terms and conditions of payment of the balance.

Nevertheless, Article 200 provides a measure of equity with regard to the copartitioners by giving them a part of the profit gained by the beneficiary of an attribution who alienates, within three years following partition, the property which was the object of the preferential attribution.

These articles apply to the surviving spouse. However, where the family residence is involved, Article 194 allows the spouse to include it in his share and the coheirs cannot object.

Articles 166, 167 and 168 provide for the continuance of undivided ownership resulting from death in circumstances similar to those mentioned in these articles.

201

This article makes a single provision of the rules applying to immoveables (a. 733 par. 1 C.C.) and to moveables (a. 734 C.C.). The method of assessment provided here applies only to property which is part of the undivided ownership. The rule for assessing property subject to return is laid down in Article 214.

The second paragraph is new and allows the copartitioners to determine as between themselves the value of the property to be apportioned, even in the event of judicial partition.

202 and 203

These articles replace Article 698 and part of Article 697 C.C. They amend existing law by dealing in the same way with moveables and immoveables.

Property of the succession is sold only if the sale is necessary for payment of debts or if partition cannot be made in kind. The undivided heirs may decide together as to the necessity of such sale, its form, and the person to be entrusted with it. If there is disagreement as to any or all of these questions, the court decides the matter.

204

This article replaces Article 745 C.C., proposing a different wording. It entitles creditors to intervene in a partition, at which they may demand to be present.

205

This article repeats Article 711 C.C., except for the amendment in the second paragraph which states that the titles are delivered to the heir who has the greatest value in, and not the greatest part of, the property.

206

This article is new. Under it, each heir may obtain a copy of the deeds which he may need because of what he has inherited. The cost of such copy is shared.

Section II

Returns

§ - 1 Return of gifts and legacies

207

Under former law, as absolute equality between heirs was sought, the obligation to return constituted an essential element for maintaining such equality. Since under our law, which in principle carries out the will of the deceased, maintenance of equality no longer has the same importance, the Draft proposes to reverse the existing presumption and require the return of gifts and legacies only when such return has been expressly stipulated. Thus, return could occur in either testamentary or intestate succession.

This article replaces Article 712 C.C.. Articles 714, 715 and 716 C.C., which establish presumptions of interposition of persons, would be deleted, as would Articles 719, 720 and 721 C.C., which specify what property must be returned.

Article 39 determines the extent of the obligation to return imposed on heirs who inherit by representation.

The obligation to return is distinct from the reduction of gifts and legacies which occurs when these liberalities infringe upon the reserve (138).

208

This article repeats Article 717 C.C., making the changes required because of the introduction of the rule under which the obligation to make a return must have been stipulated.

209

This article amends Article 713 C.C. only as to form.

210

This article repeats Articles 718 and 723 C.C.; however, it restricts the word "legatees" to particular legatees only, since return may occur in testamentary succession and in intestate succession.

211

This article amends existing law by eliminating the distinction between moveables and immoveables, and by stating the rule that return is made by taking less. It replaces Articles 724, 725, 726 and 728 C.C.

212

This article restricts the right of the heir to opt for return in kind; it replaces the first paragraph of Article 731 C.C.

The French *Avant-projet* proposes a similar article (139).

213

The first two paragraphs of this article substantially repeat Article 701 C.C. The third paragraph is new, but is in line with existing law (140).

214

This article and the one following establish the way in which property subject to return is assessed. The distinction in Articles 733 and 734 C.C. between moveables and immoveables is eliminated.

The first paragraph of this article amends existing law with respect to moveables returned as gifts: the last part of Article 734 C.C. establishes their value at the time of the gift.

The second paragraph, which governs cases where the property given has been alienated, is new.

The third paragraph is in line with existing law, save with respect to bequeathed immoveables which, under the second paragraph of Article 733 C.C., must be assessed according to their condition when the succession devolves.

The last paragraph does not appear in the Code, but is in line with existing law (141).

215

The preceding article establishes that bequeathed property and property remaining in the succession are assessed according to their condition at the time of partition. Article 215, therefore, applies only to property given which must in principle be assessed according to its condition when the gift is made. Moveables are treated like immoveables.

The first two paragraphs are in line with existing law with respect to necessary expenditures, the cost of which must be taken into account (142). With respect to unnecessary expenditures, this article is more generous than existing law under which the person returning is treated in the same way as an emphyteutic holder.

This article replaces Articles 729 and 730 C.C. It is similar to Article 856 of the French *Avant-projet.*

216

This article reverses the existing rule in Article 727 C.C. which exempts from return compensation collected under an insurance contract. Moreover, it applies to moveables and not merely to immoveables.

The term "fortuitous event" includes superior forces and actions of third persons.

Article 857 of the French *Avant-projet* is to the same effect.

217

This article is based on Articles 729, 730, 732, the second paragraph of Article 733, and Article 734 C.C.

As is the case under existing law (143), expenditures and compensation are settled in a similar manner, whether the return is made in kind or by taking less. The right of retention is governed elsewhere in the Draft (144).

218

This article completes the second paragraph of Article 212. It is substantially similar to the second paragraph of Article 731 C.C.

219

This article repeats Article 722 C.C., except for amendments in drafting.

§ - 2 Return of debts

220 and 221

These articles are new. Return of debts is one means of settling accounts between coheirs. It is intended to cover not only debts owed to the deceased, but also those between coheirs, which result from indivision.

Return of debts allows the coheirs of a debtor to avoid having to share with his other creditors.

Return of debts is not the same as return of gifts which must be expressly stipulated. Debts must be returned, unless the deceased person has released his heir from the debt.

Debts, even those not yet due, are the subject of partition, subject to the following article.

222

This article is new, and under it copartitioners retain the benefit of the terms of their contracts when the amount of their debt exceeds the value of their share of the succession.

223

This article is an application of compensation which may nevertheless take place, even if one of the debts is not payable at the time of partition (145).

224

This article is new. Since the return, and not the payment of debts is in question here, this return logically should be made by taking less. Moreover, Article 726 C.C. states the same rule with regard to the return of money.

Doctrine is to the effect that return cannot be made in kind, that is, by the real payment of the debt (146). Moreover, it seems that the personal creditors of a person returning could not be prohibited from objecting to such a payment. Two old cases have, however, imposed return in kind (147).

225

This article is new. The rule under which the debt is assessed at the time of partition is intended to maintain equality among the copartitioners. The time of assessment then should be the same as that for the return of gifts. The French *Avant-projet* proposes the same solution (148).

Section III

Effects of partition

§ - 1 The declaratory effect of partition

226

The first paragraph of this article is new; the second paragraph incorporates the substance of Article 746 C.C. The principle of the declaratory effect of partition is thus maintained.

The third paragraph is new. It is an application of the declaratory effect which, in principle, renders invalid acts performed or rights granted by a joint heir over property which has not been attributed to him in the partition. This rule is in keeping with existing law; the same is true of the exceptions provided (management of affairs and acts performed in agreement with all the joint owners) (149). The exception in Article 218 concerns return in kind, with the consent of joint heirs, of property affected with a real right by the returning heir. This exception already exists in current law (150).

The last paragraph is new. It removes from the declaratory effect the juridical relations of an undivided owner with his successors, and the relations of the latter amongst themselves. In particular, this derogation ensures protection of the rights of the hypothecary creditor when the affected property has not been attributed to the grantor, by allowing him to be paid by preference from the share of the price received by the grantor (151). It also has the effect of not disturbing the content of the community which might exist between an undivided owner and his spouse, regardless of the property attributed to the undivided owner.

Article 747 C.C., which defines as partition every act which puts an end to undivided ownership, is included in the Book on *Property* (152).

227

This article is new law. It raises an important exception to the principle of declaratory effect, particularly when undivided ownership is extended (153).

228

This article is new, and confirms the solution usually advanced to resolve the difficulties of reconciling Articles 703, 750 and 1122 C.C. (154). Thus, the hereditary debts which have not been paid during the

undivided ownership, with each heir for his share, go into the partition and are subject to its declaratory effect.

The provisions of Article 163 complete this article.

§ - 2 Warranty of copartitioners

229

This article incorporates the substance of the first paragraph of Article 748 C.C. The second paragraph is new and is based on a similar provision in the chapter on *Sale* (155).

230

This article embodies the last paragraph of Article 750 C.C. The first paragraph of this article, which states the same rule, has not been retained.

The second paragraph of Article 750 C.C., providing a special rule for warranty in the matter of annuities, has been dropped.

231

This article repeats the second paragraph of Article 748 C.C.

232

This article repeats Article 749 C.C., adding a rule respecting the date as of which the loss caused by the eviction must be assessed.

The rule ordering assessment of the loss from the time of the partition flows from the very purpose of the obligation of warranty, which is to preserve the equality which the partition is intended to establish among the copartitioners. This rule is in keeping with existing law (156).

The *Avant-projet de Code civil* contains the same rule in Article 871.

233

This article is new. It reduces the period for prescription with regard to actions in warranty to three years; under existing law, this period is thirty years (157). Such period for extinctive prescription is generally proposed for all personal rights or recourses (158).

In principle, the period runs from the time of the eviction, unless the debtor is insolvent; under the second paragraph, it then begins with partition.

234

The last paragraph of Article 2014, and Article 2104 C.C., would not be retained, because this article abolishes the privilege of copartitioners (159).

Section IV

Nullity of partition

235

This article corresponds to the first paragraph of Article 751 C.C. The word "rescinded" has been replaced by "annulled" which applies to all grounds for nullity, while rescission is directed mainly at lesion.

The second paragraph of Article 751 C.C. has not been retained, since the Book on *Obligations* makes lesion a cause for nullity of contracts, even between persons of major age (160).

236 and 237

The last paragraph of Article 751 C.C. is retained here which gives the court more leeway to order only a supplementary partition, whatever the grounds for the action in nullity.

238

This article repeats Article 752 C.C., except for slight drafting changes. The same rule is proposed in Article 232 for actions in warranty.

239

This article repeats Article 753 C.C., adding that it applies to all actions for nullity of a partition. This refinement is necessary to counteract the present interpretation of Article 753 C.C., which limits its application to cases of lesion (161).

TITLE THREE

TESTAMENTARY SUCCESSIONS

CHAPTER I

WILLS

Section I

General provisions

240

This article replaces Article 831 C.C. The text differs in form from that article, and is based rather on Article 902 of the French *Avant-projet.* It refers to the hereditary reserve which places a restriction on the freedom of willing (162), when the deceased leaves a consort who is an heir.

In principle, the capacity to make a will is conferred when a person reaches major age, although a will made by such a person can be set aside if it is proven that the testator was not of sound mind when the will was signed. This is a question of fact (163).

241

This articlè is new; it explicitly gives effect to the clause of a will appointing an executor, when all the other provisions of the will would be without effect, or when the will contains no other provision.

This article, together with the preceding one, make no mention of provisions which might be contrary to public order and good morals. However, Article 300 declares these conditions to be not written.

242

The first two paragraphs of this article replace Article 756 C.C. They leave out the definition of a will given in the preceding article, and only state the principle of revocability.

The third paragraph repeats the first part of Article 898 C.C. (164).

243

This article repeats the last part of Article 898 C.C.

244

This article substantially repeats the text of Article 899 C.C. Disinheritance, however, cannot affect the rights of an heir with a reserve (165).

245

This article renders ineffective the so-called "widowhood" clause sometimes used by testators to deprive spouses of all rights to the succession if they re-marry. This article is new (166). It applies to the right to inherit under testamentary or intestate succession.

This provision does not invalidate the conditions of widowhood laid out in special statutes (167).

246

This article amends Article 835 C.C. only as to form.

247

This article replaces the second and third paragraphs of Article 834 C.C. It ties in with Article 180 and following of the Book on *Persons*.

248

This article lays down a new rule which amends Article 833 C.C. This rule follows the principle laid down in the Book on *Persons*, that a minor is capable of making a contract (168).

249

This article repeats the provision of Article 841 C.C. in a different form.

250

This article embodies the substance of the first paragraph of Article 834 C.C.

251

This article embodies Article 837 C.C., but does not list the persons incapable of making a will.

252

This article incorporates the text of Article 836 C.C., but replaces the word "corporations" by "legal persons".

253

This article simplifies and clarifies Article 838 C.C. It lays down the rule that a legatee must exist and be capable of receiving at the time of the death. This rule admits of two exceptions: substitution, where the substitute need exist only at the time of the opening of the substitution or of his right if the substitution is of two degrees, and trusts where only the first beneficiary of the income must exist at the time the trust is constituted. The qualities required to inherit are those listed in Chapter II, Title One.

This article amends existing law with regard to legacies subject to a suspensive condition, requiring that such a legatee exist and be capable at the time of death (169).

A legacy to a child to be born, interpreted as entailing an implied substitution, remains possible under the rules governing substitutions (170).

Article 839 C.C., which abolished the presumptions of undue influence in former law with respect to legatee-testator relationships, has not been kept.

254

This article is new law. It reverses the rule in Article 937 C.C. which prohibits representation in legacies unless the testator explicitly or implicitly desired it. Nevertheless, representation would occur only in favour of persons who would be entitled to profit from it in cases of intestate devolution, namely the testator's descendants and his privileged collateral relatives (171).

The rule governing representation in wills completes the new definitions proposed for the words "children" and "grandchildren", replacing Article 980 C.C. (172).

Representation may occur with respect to universal legatees, legatees by general title, and those by particular title.

Section II

Forms of wills

255

As in Article 842 C.C., this article lists the recognized types of wills. Wills described in existing law as being in the form derived from the laws of England become wills made in the presence of witnesses, and the rules governing them are amended.

The two existing forms of privileged wills are discarded. The first form, provided for the District of Gaspé, was abolished on May 1 1955 (173). Consequently, Article 848 C.C. would be deleted.

The second form is provided for in Article 849 C.C. which lays down a special rule in favour of men on active military service and mariners at sea. When the Code was drafted, English law imposed no formality with regard to wills of military men or mariners disposing of moveable property; wills bequeathing immoveables were subject to ordinary rules. This exception with respect to immoveables, however, was repealed in England in 1918 (174). Also, when the Code was drafted, certain formalities were required when a military man or a mariner disposed by will of his wages, bounties, booty and other amounts payable by the Admiralty. These restrictions were abolished in 1953 (175).

Article 849 C.C., which is considered superfluous in view of the limited requirements of holograph wills or wills made in the presence of witnesses, would thus be repealed.

256

This article substantially repeats Article 855 C.C. It retains the principle that no one may deviate from the rules of form which the law declares obligatory.

§ - 1 Authentic wills

257

This article is based on Article 843 and on the first paragraph of Article 844 C.C.; it was proposed by the Chamber of Notaries (176).

The principal amendment made to existing legislation touches the reading of the will, which need no longer be done before the witness. This formality is replaced by a declaration of the testator to the effect that the

will contains his wishes, and that it has been read to him, as provided under the third paragraph of the article.

Also under this article, only one witness need attest to an authentic will, even if he is not a notary. Two witnesses are still required, however, when a will is to be accompanied by exceptional formalities (177).

258

This article is new and replaces the express mention of observance of the formalities provided in the latter part of Article 843 C.C. Thus, observance of the formalities will be presumed, save for the exceptional formalities in the cases provided in Article 265, which are expressly mentioned.

This article follows the recommendations made by the Chamber of Notaries (178).

259, 260 and 261

These articles substantially repeat Article 844 C.C., except for the last paragraph which is omitted. There is no need to specify that an authentic will must mention the date and place, since it must be notarial and *en minute* (179).

262

This article is substantially the same as Article 845 C.C.

263

This article is new. Under existing law, a notary who draws up a will may be appointed executor provided he receives no benefit or remuneration for this work (180).

264

This article is new law; it is based on Article 913 of the French *Avant-projet.*

This article is in line with existing law in that it acknowledges that for an authentic will to be valid the notary must understand the language of the testator (181). A mechanism is provided to allow authentic wills when the notary knows the foreign language used by the testator. The authentic nature of the will does not apply to the translation by the notary. Proof may be made against the translation according to the ordinary rules on evidence, particularly by expert appraisal.

265

Like Article 847 C.C., the first paragraph of this article lists the cases where receipt of notarial wills is subject to exceptional formalities, and adds the case of testators unable to sign.

The second paragraph repeats the fifth paragraph of Article 847 C.C. The observance of the exceptional formalities is maintained.

266

This article replaces Article 847 C.C., except for the first paragraph which is repeated in the following article, and part of Article 843 C.C.

The exceptional formalities consist of the presence of two witnesses and the reading of the will by the notary or the testator in the presence of the witnesses. The other ordinary formalities are still required.

The last paragraph, based on Article 843 C.C., concerns the declaration of a testator who is unable to sign; this must be made in the presence of the witnesses (182). It follows that if such testator is mute, he cannot make a will in authentic form. The same is true of testators who are deaf and blind, whether or not they are able to sign.

The article repeats the text submitted by the Chamber of Notaries (183).

267

This article repeats the first paragraph of Article 847 C.C., in positive form.

§ - 2 Holograph wills

268

This article repeats the essence of Article 850 C.C., the second paragraph of which has been omitted as being unnecessary.

269

This article is new and is intended to counter certain jurisprudence which has recognized the validity of typewritten "holograph" wills (184).

Article 854 C.C. has been omitted. The questions it raises are in the field of evidence and of assessment by the court and are subject to general law. Even the requirement of a signature at the end of a will has been flexibly interpreted (185).

§ - 3 Wills made in the presence of witnesses

270

This article replaces the first paragraph of Article 851 C.C. The will in the presence of witnesses replaces that made in the form derived from the laws of England. The form of the will described in this article differs sufficiently from that used in England to justify this change of name.

The existing formality of this kind of will is reduced in that it no longer requires express mention of the testator's request of the witnesses and that of the formal attestation of the witnesses; jurisprudence has decided that such formalities could be inferred from the facts (186).

This article explicitly acknowledges that writing by a mechanical process is admissible. Wills may be written by a third person, but a third person may no longer affix the signature of the testator. It seems abusive to authorize third persons to sign when the testator need only make his mark. Moreover, it was considered that any testator who cannot even make his mark should make an authentic will, since only that form of will offers sufficient guarantees that his wishes have been respected.

The fourth paragraph is new; it sets a requirement which appears necessary in view of the ease with which a third person could replace parts of a will made up of several pages and written by a third person or typewritten.

271

This article repeats the second paragraph of Article 851 C.C. with new drafting. It refers to Articles 259, 260 and 261.

272

This article is contrary to Article 852 C.C., which allows any person, literate or not, to make a will in a form derived from the laws of England, provided that person is able to demonstrate in the presence of witnesses his intention to make a will, and provided he can recognize his mark or his signature (187). It was felt that only authentic wills offer sufficient guarantees for illiterate testators.

This article is drawn from the French *Avant-projet* (188).

273

This article is also more restrictive than Article 852 C.C., under which mutes may make wills in the English form, provided they are able to show their wishes in any manner whatever, without being restricted to a

handwritten statement. This written statement replaces the verbal declaration mentioned in Article 270.

Section III

Probate of wills

274

This article repeats Article 857 C.C. Article 856 C.C. is omitted, since its provisions are included in the Book on *Evidence* (189).

Article 341 obliges the executor of a will to have the will probated.

275

This article repeats Article 858 C.C., save for amendments of form. Wills are probated according to Article 896 and following of the Code of Civil Procedure.

276

This article restates Article 861 C.C., but changes the wording.

Article 862 C.C. is not reproduced. It contains a procedural rule stated in Article 293 of the Code of Civil Procedure.

Section IV

Revocation of wills

277 and 278

These articles are new, but in accordance with existing law.

279

The first paragraph of this article partly replaces the first paragraph of Article 892 C.C. It amends existing law by not restating paragraph 2 of Article 892 C.C., thus requiring that express revocation be made in an act having the form of a will. There would no longer be any conflict between this provision and the one in Article 283, under which a will which is null because of informality has no effect (190).

The statement retained in the second paragraph, which recognizes that a general revocatory clause is equivalent to express revocation, is intended to prevent generalization of the contrary interpretation given by the Supreme Court of Canada in a specific case (191).

280

This article is new, but in accordance with existing law (192).

281

This article and the next one enumerate cases of tacit revocation. The article substantially restates the third paragraph of Article 892 C.C., adding the case of tacit revocation to which this provision refers and which is found in the third paragraph of Article 860 C.C. The act of a third person, equivalent to revocation in the same circumstances, is added to the fortuitous event (193).

282

This article restates, in different wording, the first paragraph of Article 892, Article 894 and the first paragraph of Article 895 C.C. This text is taken from the French *Avant-projet* (194).

At the end of the second paragraph, mention is made of the lapse of the new provision rather than the incapacity of the legatee or his refusal to accept, as in the first paragraph of Article 895 C.C. This enumeration is not considered restrictive and extends to all cases of lapse (195). Lapse is dealt with in Article 293 and following.

283

This article restates the second paragraph of Article 895 C.C. in a separate provision, since it lays down a general rule applicable to express or tacit revocation.

284

This article restates the essence of the fourth paragraph of Article 892 and Article 897 C.C., proposing a text that is different, but is in accordance with existing law. Thus, the mention of the resolutory condition is in accordance with doctrine (196).

285

This article changes only the form of Article 896 C.C.

CHAPTER II

TESTAMENTARY DISPOSITIONS

Section I

Various kinds of legacies

286

This article reproduces Article 863 C.C.

287

This article gives a more precise definition of a universal legacy than does the first paragraph of Article 873 C.C. In effect, a universal legatee does not receive the entire succession, although it is possible for him to do so (197). Actually, his emolument may be considerably reduced depending on the size of the particular legacies.

A legacy of the bare ownership of the entire succession is considered a universal legacy, because it can confer the right to the entire succession (198).

288

This article changes the definition, given in the second paragraph of Article 873 C.C., of a legacy by general title.

It would settle the controversy over the nature of legacies of usufruct, which are never universal (199). Such legacies are by general title if they affect all the property of the succession, an aliquot share of that property or one of the universalities which constitute a legacy by general title. Any other legacy of usufruct is by particular title.

This article also settles the problem caused by the existing text, that is, whether the list of the universalities given there is intended to provide examples or is restrictive. Only the legacies of the two universalities mentioned are by general title.

This article again amends the second paragraph of Article 873 C.C. concerning the legacy of all the private property. Such a legacy cannot be

by general title, since the Civil Code only recognizes division of property when it is made of moveables and immoveables (200).

289

This article repeats the third paragraph of Article 873 C.C.

290

This article reproduces the last paragraph of Article 873 C.C.

291

This article reproduces the text of Article 864 C.C. except for some slight changes as to form. Article 241 recognizes the validity of the appointment of an executor in a will that provides for no legacies; the executor may thus act with regard to the entire succession, even if all or some of it devolves *ab intestat*.

292

This article repeats the provisions of Article 840 C.C., changing the wording.

Section II

Lapse, resolution and nullity of legacies

293

This article changes the text of Article 900 C.C. and adds the exception of representation (201).

294

This article is taken from Articles 901 and 904 C.C. It is in accordance with the existing provisions.

295

This article repeats Article 903 C.C., extending its scope to include the case of loss occurring after the death, but before the fulfilment of the suspensive condition. This extension of the existing provision is in accordance with doctrine (202).

The second paragraph does not concern lapse since the legatee is the owner of his legacy when the loss occurs. The usual rules governing liability are then applied.

296

This article repeats Article 865 C.C., except for slight changes as to form.

297, 298 and 299

These articles replace Article 868 C.C., which they amend in certain respects.

Article 297 resembles the first paragraph of Article 868 C.C., but specifies that the rules for accretion, which are merely rules for interpreting the testator's intention, concern only particular legacies (203). In matters of universal legacies, if there are several legatees, each of them is always entitled to receive the entire succession. The same applies with regard to legatees by general title - each of them can receive the entire succession or the aliquot share bequeathed to all of them (204). Accretion, then, results from the nature of such legacies.

Article 298 corresponds to the second paragraph of Article 868 C.C., changing only the text.

Article 299 amends the fourth paragraph of Article 868 C.C. by not mentioning that accretion only takes place if the thing is indivisible. The existing rule does not follow the *Ancien droit* in which the legacy of one thing to several persons in separate bequests represented the stronger case and gave rise to accretion, whether or not the thing was divisible (205).

300

This article is taken from Article 760 C.C. and is in accordance with existing law (206).

Article 869 C.C. is deleted. Provisions allowing the establishment of a trust for purposes of public interest are provided in the chapter on *Trusts* (207). As for legacies for charitable purposes or for the obligation compelling the executor to make certain charitable gifts, also dealt with in Article 869 C.C., the ordinary rules for legacies with a charge or for testamentary execution are applied, subject to this article.

301

This article is new and is based on Article 955 of the French *Avant-projet.*

This provision considers as not written any clause by which the testator subjects execution of a legacy to the legatee's non-contestation of the will. Existing law validates the penal clause when the testator intended it to prevent unnecessary or vexatious proceedings. It annuls such clause

when the testator sought this to ensure execution of a will that he knew to be null. In this case, nullity of the will entails nullity of the penal clause (208).

302

This article replaces Article 846 C.C. and amends the existing rule with regard to witnesses. A legacy made to the spouse of a witness or to his close relatives is no longer declared null.

The second paragraph of the article is new. It adds to existing law the specification that the rule in the first paragraph is valid with regard to all witnesses, even if they are not all required for the validity of the will. This is a controversial question in existing law (209).

The third paragraph corresponds to the second paragraph of Article 846 C.C. to which is added a reference to the trustee; correlation is also made with Article 339 which makes execution an onerous charge.

The first paragraph of the article specifies that nullity of a legacy does not affect the validity of the will itself. This rule is in line with existing law (210).

303

This article repeats the rule in the first paragraph of Article 853 C.C. The more flexible rule, which the notary's presence allows to be used in the case of an authentic will, does not apply to a will made before witnesses.

304

This article changes only the wording of Article 902 C.C. (211). Article 131 in the Book on *Obligations* defines the term and Article 149 in the same Book adds that any term that cannot happen or that is not fixed is equivalent to a suspensive condition.

305

This article replaces the second paragraph of Article 893 C.C.

306

This article replaces the first paragraph of Article 893 C.C. It refers to the general rules concerning unworthiness to inherit, which are part of the common provisions applicable to every succession. Article 7 includes the causes of resolution of legacies on the grounds of ingratitude, mentioned in the first paragraph of Article 893 C.C. (212). Unworthiness entails

resolution of the legacy rather than revocation, since it must be pronounced.

It is not necessary to repeat the third and fourth paragraphs of Article 893 C.C. which abolish the presumptions of revocation; those led to controversy in the *Ancien droit* in cases where children were later born or where enmity arose between the testator and the legatee.

307

This article restates the essence of Article 881 C.C., but considerably simplifies the text.

CHAPTER III

THE EFFECT OF TESTAMENTARY DISPOSITIONS

Section I

General provisions

308

This article replaces Articles 866, 867 and 874 C.C. It is in accordance with existing law (213).

309

This article repeats part of Article 891 C.C. It is in line with existing law governing legacies of certain and determinate things (214).

310

This article replaces Article 871 C.C. It amends existing law, under which this rule applies only to legacies of certain and determinate objects, while the interest arising from other legacies accrues only after the debtor of such legacy is put in default (215).

311

This article replaces Article 888 C.C., and repeats its basic rule.

312

This article is new and is based on the French *Avant-projet* (216).

313

This article is new and is based on the French *Avant-projet* (217).

314

This article replaces Articles 882 and 883 C.C.

It merely states a rule for interpreting testators' wishes. The situation at the time of death provides the basis for establishing whether there is undivided ownership and for assessing the deceased person's share in the thing bequeathed. Article 284 states the rule governing the testator's alienation of the thing bequeathed.

Section II

Payment of debts and of legacies

315

This article substantially repeats Article 875 C.C. The rules concerning payment of debts are stated in Article 169 and following.

316

This article repeats Article 876 C.C. with a few concordance amendments, such as the reference to hypothecs which may be on moveable or immoveable property (218). With regard to the distribution of debts between bare owners and usufructuaries, the reader is referred to the Book on *Property*, which retains the solutions in existing law (219).

This article also takes into account the fact that a legacy of a usufructuary is never a universal legacy (220).

317

This article amends only the form of Article 877 C.C.

318

This article repeats Article 880 C.C., omitting the first paragraph and amending the fourth.

The provision in the first paragraph of Article 880 C.C. appears in

Article 174, which states that particular legacies are paid only from the net assets of the succession.

319

This article amends only the form of Article 884 C.C.

320

This article repeats Article 885 C.C., except for the reference to property of heirs liable for payment, since according to Article 174 particular legacies are payable only from the net assets of the succession.

321

This article replaces Articles 879 and 886 C.C. It maintains existing law, except with respect to the separation of patrimonies which, under Article 181, occurs of right and in favour of the personal creditors of the heir, as in favour of those of the succession. Article 172 determines the extent of the heir's obligation with regard to the creditors of the succession. Article 174 determines such extent with regard to the particular legatee.

322

This article repeats the first paragraph of Article 887 C.C., amending its drafting. The rules governing separation of patrimonies are stated in Articles 181, 182 and 183.

The second paragraph of Article 887 C.C. has been deleted in view of the new rule in Article 174 which limits the responsibility of heirs towards particular legatees to the net assets of the succession. Moreover, the preceding article obliges the creditors to discuss any heir who is personally liable before having recourse to reduction of a particular legacy.

323, 324, 325 and 326

These articles substantially repeat Articles 889 and 741 C.C. However, Article 323, which replaces the first paragraph of Article 889, is drafted differently, to take into account its interpretation in jurisprudence (221).

327

This article amends only the form of Article 890 C.C. The reference to legacies to servants is unnecessary, since servants have the quality of creditors.

CHAPTER IV

TESTAMENTARY EXECUTION

Section I

Appointment of executors

328

This article replaces Articles 905 and 923 and the first paragraph of Article 924 C.C. Article 330 replaces the last paragraph of Article 905 C.C.

This provision is generally in line with existing law. In principle, executors are appointed by the testator, although he may entrust the court or the judge with the appointment. This is a slight amendment to existing law, since the fourth paragraph of Article 905 C.C. and the second paragraph of Article 924 C.C. are more restrictive. The testator may not entrust this task to any third party, except to an executor he chose himself.

The second and third paragraphs of Article 905 C.C. are considered superfluous and therefore have been omitted. The text of Article 328 is, in part, based on Article 971 of the French *Avant-projet.*

329

This article replaces the second paragraph of Article 924 C.C. It is broader than the existing provision, under which the testator must have manifestly intended someone other than the heir to be his executor. Under the article, this intention is presumed whenever a will provides for the appointment of an executor.

Procedure by motion is in line with existing law (222).

330

This article repeats the last paragraph of Article 905 C.C., except for amendments to form and the reference to the following article.

331

The first paragraph of this article replaces the third paragraph of Article 924 C.C., and broadens its field of application. Appointments may be made when there is no executor, provided that, under Article 155, the motion establishes that the appointment is in the interest of the succession. The provisions of Chapter V of Title Two governing the administration of

successions (Article 155 and following) then apply to the chosen administrator.

The second paragraph is new and fills a gap in existing law. In this case, administrators are seized only of property situated within Québec, regardless of whether or not the succession, which devolved outside Québec, has an executor.

Section II

Capacity and acceptance of executors

332

This article repeats the first paragraph of Article 907 C.C.; the second paragraph is deleted because existing procedures for emancipation have been discarded (223). It also substantially repeats Article 909 C.C.

333

This article replaces Article 908 C.C., while retaining its general rule (224). The fact that, in principle, legal persons cannot act as testamentary executors is covered in the Title on *Legal Persons* (225).

334 and 335

These articles repeat the first paragraph of Article 910 C.C., adding that acceptance may be express or tacit. This reference is in line with existing law, however, since the fourth paragraph of Article 910 C.C. provides for cases of presumed acceptance, although that provision has been deleted.

336

The reference to the provisions governing administration of the property of others permits deletion of Articles 911, 917 and 920 C.C. (226). These provisions enumerate the circumstances which terminate the administration.

Article 911 C.C. is amended by the Title on the *Administration of the Property of Others*, which allows administrators to renounce their office for reasonable motives without having to obtain court authorization. Articles 917 and 920 C.C. are also substantially repeated.

337

This article repeats Article 912 C.C., except for a few amendments as to form. This is a suppletive provision.

338

This article replaces the fifth paragraph of Article 910 C.C. It amends existing law by allowing the court to order provision of security.

The second paragraph is new in that it adds a case where executors are allowed to renounce their office (a. 911 C.C.).

339

This article replaces the second paragraph of Article 910 C.C. It amends existing law under which, in principle, the duties of an executor are performed gratuitously. This rule is no longer in keeping with reality and the change has been made in reply to many recommendations to this end.

Moreover, the article makes a distinction between professional and other executors with regard to the manner of determining remuneration, since it is impossible to speak of usual practice except in the case of the professional executor.

340

This article repeats the third paragraph of Article 910 C.C., changing its formulation.

Section III

Obligations of executors

341

The substance of this article is in accordance with existing law although its wording is different from that of Article 919 C.C. It is completed by the articles following.

The last paragraph of the article refers to chapter II of the Title on *Administration of the Property of Others*, which deals with the rights and obligations of administrators. Except in cases of incompatibility, these provisions apply to executors.

Article 922 C.C. is not repeated, since Articles 126 and 171 and following of the Book on *Persons* provide for testamentary tutorship.

342

This article restates a provision found in the second paragraph of Article 913, in Article 915 and in the first paragraph of Article 919 C.C. The fact that the inventory is not completed does not affect the executor's

other obligations in the meantime, namely those restricted to acts of a conservatory nature and those requiring dispatch (227). The rule of the majority, applied to execution whenever there are several executors (228), would then be set aside.

343 and 344

These articles replace Article 916 C.C. They amend existing law whereby the executor is not required to make inventory if the testator or the heir has exempted him from doing so.

Moreover, they specify that the inventory must be made according to the rules applying to benefit of inventory. These rules are stated in Article 120 and in Articles 913 and following of the Code of Civil Procedure. An exception is, nevertheless, made to the provision which requires that the inventory be in authentic form (229).

345

This article is new. It lays down a provision similar to that in Article 161 with regard to the administrator appointed by the court. While Article 343 concerned only the form of the inventory, this article covers the other obligations of the beneficiary heir (230).

Section IV

Powers of the executor

346

The first paragraph of this article replaces the first paragraph of Article 918 C.C. It amends existing law by giving the executor seizin of all property of the succession, not only of the moveables; testators almost never follow this rule. Legal seizin thus entitles the executor to obtain possession and to claim from the heirs all the property of the succession (231).

This provision also broadens the powers stemming from the executor's seizin. While Article 918 C.C. considers the executor the legal depositary, the fifth and sixth paragraphs of Article 919 C.C. allow him to pay the debts only with the consent of the heir or with leave of the court. The same applies to the alienation of furniture where there is not enough money to pay the liabilities of the succession.

Simple administration confers on the executor the power to perform these acts alone. It also allows investments to be made and compels the

administrator to collect the fruits of the property he is administering (232). The article thus solves the problem in existing law of deciding whether the executor may collect the fruits accrued after the succession devolves, since they are not technically part of such succession (233).

Since the executor is seized of all the property, any act of alienation he may perform extends to the immoveables as well as to the moveables. In addition to cases where the funds are insufficient to pay the claims, the mere administrator may also alienate by onerous title when the property is perishable or when this is required for the conservation of its value or to maintain it in good condition (234).

347

This article replaces Article 913 C.C. except the second paragraph which is repeated in Article 342. It makes the executor subject to the rules in the Title on *Administration of the Property of Others*. As an administrator, the executor must act with the prudence and diligence of a reasonable person or a professional administrator, as the case may be. If several administrators must act together, they have a solidary obligation. This applies in a general manner to all their obligations. Thus is eliminated the distinction apparently made by the fourth and fifth paragraphs of Article 913 C.C. which is a source of difficulty (235). The Title on *Administration of the Property of Others* introduces the rule of majority when there is more than one administrator. The first paragraph of Article 913 C.C. is thus amended.

348

This article is taken from the first paragraph of Article 919 C.C. It restricts the powers of the executor before the inventory to those of custody of the property of another person, namely, any act necessary to the conservation of such property. Such custody does not authorize other acts requiring dispatch, as in the first paragraph of Article 919 C.C. (236). These acts are therefore expressly mentioned in this article.

349

This article amends the second and fourth paragraphs of Article 918 C.C. First of all, it extends the legal duration of seizin to two years, specifying that it may be shorter if the will is executed before the period expires. On the other hand, it no longer allows stipulation of a longer period, although the heirs or the court may prolong the seizin beyond the two years. This innovation is intended to prevent the executor from misusing his office by unduly prolonging execution, bearing in mind that it is proposed that, as a rule, such office be remunerated (237).

350

This article replaces Article 921 C.C., amending it to bring it up to date with the changes made in existing law by the preceding articles with regard to the extent and duration of seizin, and to the obligation to make inventory. In other respects, the freedom of the testator is expressly restricted to the stipulations permitted by law (238).

351

This article is new law. It is based on Article 978 of the French *Avant-projet* and Article 1027 of the French Civil Code concerning termination of execution.

The motion to have the seizin changed may be made by an executor whose administration could be hampered by the restrictions imposed by the testator. This new provision is based on the German Civil Code (239).

352

This article repeats the provisions of Article 914 and of the fifth and seventh paragraphs of Article 919 C.C., but gives a different wording.

The third paragraph applies to testamentary succession the rule of equity laid down for intestate succession.

353

This article proposes that the rules governing intestate succession be used as suppletive rules concerning partition (240). This article is in accordance with existing law, which recognizes the general application of the rules for indivision and partition, found in the Title on *Intestate Succession* (241). However, it imposes an additional obligation on the executor who must take the wishes of the heirs into consideration, if the testator has not indicated the manner of making the partition.

CHAPTER V

SUBSTITUTION

Section I

General provisions

354

This article replaces Article 925 C.C. It defines only substitution proper, that is, fiduciary substitution. The definition retains the basic elements of substitution, namely an act by gratuitous title which includes two successive gifts, and a time period (242).

The traditional distinction between vulgar substitution and fiduciary substitution is not maintained. Vulgar substitution is not true substitution, but a sub-order of institution. Two essential elements are lacking: the successive order and the time period. Moreover, the distinction is no longer of interest. Article 926 and the last paragraph of Article 933 C.C. state that where there is a legacy, vulgar substitution is always presumed included in fiduciary substitution. With regard to gifts, this must be expressly stipulated. But, in the case of a legacy, if an institute cannot accept, this means that there is a lapse and Article 367 specifies that a lapse with respect to the institute profits the substitute. In a gift, there can be no question of lapse with respect to the donee who is an institute, since he must be party to the contract (243).

The words "donee" or "legatee" seem sufficient to establish that substitution may be made by gift in an ordinary contract or in a marriage contract, and by will. Article 934 C.C. is therefore deleted.

By using the word "previously", it is proposed that the date of opening may not be subsequent to that of the institute's death (244).

The article replaces the words "charged to deliver it over" in the third paragraph of Article 925 C.C. by "is obliged to remit". The second expression seems to describe better the new situation in which the institute and the substitute are placed, considering in particular the powers of alienation which the institute is recognized to have.

355

This article repeats the first part of Article 931 C.C. The rest of that article, which obliges the institute to sell corporeal moveable property and to invest the price, is deleted. Thus, corporeal moveables are subject to the

same rules as any other property of a substitution (245). No valid reason was found to oblige the institute to sell property which generally has little value.

356

This article repeats the substance of Article 927 C.C.

357

This article is new, although it does not change existing law, under which all substitutions are necessarily established in a writing, since they must be registered.

358

This article repeats the substance of Article 928 C.C., adding to the reference to usufruct a reference to trusts and to the prohibition against alienation (246). Thus, the provision in the first paragraph of Article 968 C.C. is incorporated into this article and is not repeated elsewhere.

359

This article states provisions which are substantially those of the second and fifth paragraphs of Article 929 C.C.

360

This article repeats Article 976 C.C. with slight amendments in form. Thus, the word "heir" has been omitted, since no prohibition may be imposed on an *ab intestat* heir unless such heir is constituted a legatee at the same time.

The prohibition against making a will constitutes in fact a *de residuo* substitution which differs from that governed by Article 952 C.C. (247) only in that the substitute has a less problematical right: he loses this only if the institute has in his lifetime alienated property subject to the prohibition against making a will.

361

This article is new. It makes an important change to existing law. It is felt that, in general, any prohibition against alienation which is not equivalent to a substitution is contrary to public interest. Moreover, inalienability clauses are removed with a view to attaining the same objective as that pursued in matters of security on property, where the Draft proposes that unseizability clauses have no effect in a gratuitous act, save with respect to needs in matters of support (248).

The article abolishes Article 968 and following of the Civil Code,

referring to the "prohibition to alienate", except for the first paragraph of Article 968 (249) and for Articles 976 and 980 C.C. Article 976 C.C. is repeated in Article 360. The meaning to be given the words "children and grandchildren" in Article 980 C.C. is dealt with elsewhere (250). It seemed unnecessary to reproduce the rules on interpretation in Articles 973 and 974 C.C.

The prohibition against alienation which constitutes a substitution does not prohibit the institute from accomplishing the acts of alienation allowed under Article 379. Like substitution itself, the prohibition only requires investment of the price. Article 354 provides that substitution must be created in an act by gratuitous title, which excludes any inalienability clause in an act by onerous title.

362

This article is new. It covers an exceptional case where a prohibition against alienation seems justifiable.

Here, the prohibition against alienation does not constitute a substitution. It is intended to ensure better enjoyment of the right of usufruct, use or habitation held by a third party. The stipulation of inalienability has only a relative effect, since alienation may always take place with the consent of the third party.

363

This article repeats the substance of Article 932 C.C. In line with existing law (251), it adds that stipulation of more than two degrees does not entail nullity of the substitution; it ends of right at the second degree.

364

This article is new, but in line with existing law (252). It serves to introduce the article which follows.

365

This article is new law. It provides an exception to the rule in the preceding article which states that the degrees are calculated by head and not by root.

The article is intended to resolve the problem which arises when the grantor wished his property to be transmitted first of all to concurrent institutes. Should each person who receives be counted as one degree, thereby causing the opening to take place before the substitutes appointed by the grantor have received the property? Under existing law, this certainly seems to be the case (253), although the contrary opinion has

been supported strongly (254). The article settles the question by not requiring calculation of a degree when, on the death of an institute, his share is to go to the surviving institutes. It also specifies that transmissions between co-institutes cannot harm substitutes for whom, failing stipulation, there would be an opening on the death of each institute.

366

The first paragraph of this article is in line with existing law. It replaces the first and second paragraphs of Article 933 C.C. and simplifies their drafting. The first paragraph of Article 948 C.C., which refers to the rules of undivided ownership in matters of succession, is removed. The general provisions respecting co-ownership and partition are found in the Book on *Property* (255) and would apply to all cases of undivided ownership. Under this article, the rules on this subject contained in the chapter on *Undivided Ownership Among Heirs* (256) apply to substitution.

The second paragraph is new. It provides an exception to the rule proposed with respect to legacies, which introduces representation as in *ab intestat* succession (257). In principle, the new rule, which reverses that in Article 937 C.C., applies to substitution. The exception with respect to institutes is intended to ensure that opening cannot thereby be considerably delayed.

The assimilation of testamentary succession to *ab intestat* succession with respect to representation also disposes of a doubtful point in existing law, where there is stipulation of representation (258). Representation takes place with respect to the substitute only if he is in the descending line or in the privileged collateral line of the grantor.

The article does not, however, prohibit application of the rules proper to gifts with respect to the formation of the contract, the capacity of the parties, and the form of the act. The same is true for the rules governing marriage contracts. Gifts which include a substitution must first be valid as gifts, otherwise the stipulation of substitution can have no effect (259).

367

The first paragraph of this article states the existing rule that the institute profits from the lapse of the substitution and so becomes the final owner. This rule is incidentally included in the fourth paragraph of Article 930 and also in Article 957 C.C., which has been deleted. Its scope is reduced, however, by allowing representation to have effect with respect to substitutes (260).

The second paragraph simplifies the rule in Article 926 C.C. which holds that, in a will, vulgar substitution is always included in fiduciary

substitution. The new article has the same effect of prohibiting any lapse of the stipulation in favour of the institute from affecting the right of the substitutes to receive.

The second paragraph excludes substitution made by gift, since in this case there can no longer be lapse with respect to a donee who is an institute (261). Compendious substitution (262), which occurs in a gift when it is stipulated that, if there is no fiduciary substitution, there will be vulgar substitution, and which is defined in the second paragraph of Article 926 C.C., therefore disappears. The last paragraph of Article 933 C.C. is also deleted for the same reasons.

368

This article makes changes in Article 930 C.C. which arise from acknowledgment of the consensual nature of gifts (263).

The article repeats existing law with respect to the irrevocability of the benefit of the substitute if he is the child of the institute (264). It differs from existing law by no longer allowing the donor to reserve for himself the right to operate revocation in his favour. Moreover, it sets the order of preference for cases where the grantor has not indicated who is to profit from the revocation he makes.

Like a will, testamentary substitution is revocable.

The first paragraph of Article 930 C.C., which applies the principle of irrevocability of gifts made by marriage contract to the substitutions which are included in it, disappears (265).

369

The first paragraph of this article repeats the rule stated in the second part of the second paragraph of Article 935 C.C.

The second paragraph is new; under it, an institute may be granted the right to distribute the property of the substitution among the substitutes. This right is recognized by jurisprudence (266) and is interpreted as allowing exclusion of certain substitutes.

370

This article repeals the first part of the second paragraph of Article 935 C.C. which allows donors, in marriage contracts, to reserve for themselves the right subsequently to substitute property given by them.

It seemed unnecessary to repeat the last paragraph of Article 935 C.C. which states that, in a second gift, the donee may agree to the substitution of property he received in a first gift.

The first paragraph of this same article is not repeated, since it contains a provision which necessarily arises from the definitive nature of the contract.

371

This article replaces Article 952 C.C. Like it, it deals with *de residuo* substitution, although it uses a different formulation which takes into account the general powers of alienation on condition of reinvestment which are granted to institutes (267).

De residuo substitution is considered, in our law, as true substitution (268). The grantor may specify the extent to which the institute may use the capital. It was not considered necessary to reproduce the rule of interpretation along these lines contained in Article 975 C.C. When a grantor has not limited the right of use, the institute may perform any gratuitous or onerous act (269), without being obliged to reinvest. The substitute then has no right to anything which the institute has been able to acquire with the proceeds of the alienation (270).

Article 360 deals with another form of *de residuo* substitution constituted by the prohibition against making a will.

Section II

Substitution before opening

372

This article incorporates the substance of Article 944 C.C.

373

This article replaces Article 945 C.C. The office of curator to the substitution would no longer exist; supervision would be entrusted to the Public Curator who is already responsible for supervising tutors and other administrators of the property of incapable persons. Under Article 374, the institute must inform the Public Curator of the substitution.

Possible intervention by the Public Curator constitutes a compromise between the existing situation where the role of the curator to the substitution is badly defined, and it often happens that the grantor relieves the institute from making the appointment, an introduction of a truly effective private curatorship which would be a burdensome responsibility, and in practice could preclude any activity by the institute (271).

374 and 375

These articles,which amend Article 946 C.C., compel the institute to make an inventory of the substituted property, and to make any changes to such inventory as may be required by his alienation and reinvestment of the property.

The period for making the inventory has been set at two months from the time the gift is made or the legacy is accepted; this is to conform to the law on succession, which gives the heir a period of six months after the decease to come to a decision, and an additional two months to make the inventory if he is a beneficiary heir (272).

Under existing law (273), the grantor can exempt the institute from making an inventory. Since these articles are of public order, the institute is always compelled to do so even in a *de residuo* substitution, saving the exceptions mentioned in the first paragraph. Given the increased powers of alienation granted to the institute and his obligation to reinvest (274), it seems necessary that the contents of the substitution always be known.

376

This article replaces the first two paragraphs of Article 947 C.C. It retains the institute's obligation to preserve the substituted property. The institute also remains responsible for the debts chargeable to income. The second paragraph, however, amends Article 947 C.C. by giving the institute the right to be reimbursed for payments made on debts which fell due before the opening, but which exceeded the duration of his right. This change puts the position of the institute in line with that of the usufructuary who is entitled to reimbursement in proportion to the duration of his usufruct (275).

377

This article replaces part of the third paragraph of Article 947 C.C. It retains the institute's right to collect the accrued debts of the substitution, but repeals the obligation to secure the consent of the curator before paying any debts of the substitution and before receiving the money due.

378

This article replaces Article 949a C.C.

379

This article is new and makes a major change in existing law. It gives the institute, acting on his own, all power to alienate by onerous title. Third parties who contract with the institute have a title opposable to the

substitute, who would not be able to invoke resolution of right, as can be done in current law. This article thus has the effect of repealing Articles 949, 951, 953 and 953a of the Civil Code.

The change which this article makes to existing law is in response to the principal objection raised against substitution, namely that it makes substituted property unavailable. It also raises the problem of protection of the rights of substitutes. Certain means of protection are proposed: the Public Curator is given the right to oversee the substitution; the institute must make use of the proceeds of the alienation; the substitute has conservatory recourses in the event of bad administration or of deterioration (276). Also, the substitute is entitled to keep abreast each year of changes made in the inventory of the property of the substitution (277).

The last paragraph of the article makes the provision one of public order. The grantor therefore cannot restrict the power of the institute to alienate, even by way of a prohibition against alienation (278).

380

This article requires the institute to invest all the collected capital derived from the substituted property. This obligation exists in current law and is stated principally by the second paragraph of Article 948 C.C. Nevertheless, it occupies an important place in the Draft, because of the powers of alienation granted to the institute.

Under the article, the investment need not be made in the name of the substitution, as is now provided in the last paragraph of Article 931 C.C. There did not seem to be any point in retaining this requirement because, on the one hand, mention of the substitution does not prevent the institute from alienating what has been reinvested, and, on the other hand, it cannot raise any doubts as to the title of a third party who acquires in good faith. Furthermore, the institute must render an account of his reinvestment (279). He need not secure consent or authorization for any investments he makes.

381

This article is new, and enjoins the institute to act prudently and judiciously. This obligation is a consequence of the new provisions which enable the institute to alienate substituted property definitively and which remove the right of the substitute to the thing itself coming from the grantor.

The obligation to act as a prudent administrator compels the institute to obtain a fair price for the alienations to which he gives his consent. The second paragraph of the article gives him the benefit of a presumption of

good administration provided he restricts himself to recognized investments.

382

This article is new. Under existing law, a gift or any alienation made by the institute cannot be resolved before the opening, since the substitute cannot oppose the substitution before that date (280). This article removes any effect from an act of alienation by gratuitous title made by the institute. Any interested person may invoke its inefficacy, even before the substitution opens.

383

This article is new. As an owner, the institute is not compelled to insure his immoveable property; he must do so by reason of his obligation to preserve the substituted property (281).

384

This article is new. It creates a presumption of fault on the part of the institute if substituted property is damaged. This presumption is a corollary of the institute's obligation to preserve substituted property (282).

385

This article replaces Article 955 C.C. and combines, in one provision, the various sanctions provided against the institute, giving the judge the power to choose that which best suits each case. Thus, the judge will not rule that the institute forfeit his rights if there is no substitute, since forfeiture is in favour of the latter (283).

The second paragraph embodies the substance of the second paragraph of Article 956 C.C.

386

This article is new. It lays down the principle, in keeping with existing law, that the creditors of the institute may be paid out of the rights of their debtor in the substitution (284). The purchaser does not then acquire any more rights than the institute himself possesses.

387

This article replaces Article 950 C.C. and amends existing law. Article 950 C.C. states that any judicial sale of substituted property is resolved of right, in favour of the substitute, at the opening. The judicial sale is then subject to the same rules as any other alienation (285). The

proposed article makes the same parallel, in view of the extended powers of alienation accorded the institute, in recognizing the definitive character of a judicial sale made without opposition (286). There is reason, however, to reserve the right of the substitute to oppose the seizure; since the institute does not receive the proceeds from the sale which might result, he cannot invest them.

Opposition by the substitute can be in any of the forms provided by the Code of Civil Procedure, so that the seizure would be limited only to the rights of the institute (287).

388

This article embodies the substance of the first paragraph of Article 956 C.C.

Article 956 C.C. has been interpreted as not allowing the substitute to make a pure and simple renunciation of a substitution before the opening (288); this article adds the words "or renounce", so as to do away with this interpretation.

Section III

Substitution after opening

389

The first paragraph of this article amends Article 961 C.C., but only as to form.

The second paragraph is new and covers the case where the institute is a legal person. In that case, the term of the substitution cannot exceed twenty-five years (289).

The third paragraph of this article would have the effect of abolishing Article 963 C.C., because it prohibits setting the opening of the substitution after the death of the institute. Article 963 C.C. could prolong a substitution indefinitely, since it is considered that delivery from the institute to his heirs while waiting for the opening is not counted as a degree of substitution (290).

390

This article retains the substance of Article 965 C.C., with the addition that, at the opening, the institute, his heirs or his legal representatives must render an account to the substitute and remit the property to him.

391

This article is new. It specifies that property acquired with the proceeds of the alienation of substituted property is also part of the substitution.

The second paragraph specifies that if it is impossible to remit the property because of some action by the institute, he must turn over its value on the day of the opening.

392

This article, drawn from a provision on mandate, requires the heirs or legal representatives of the institute to continue whatever is necessary as a result of acts performed by the institute, or whatever cannot be put off without risk of damage (291).

393

This article repeats the substance of Article 962 C.C.

394

This article is a new law. It has indeed appeared that, in view of their common enjoyment of the substituted property, the co-institutes should each be held for the total obligation relating to accounting.

395

This article replaces Article 958 C.C. The authors think that the present rule providing for reimbursement to the institute at the opening is not sufficiently favourable, and dissuades him from improving the substituted property (292). Moreover, the reference to Articles 581 and 582 C.C. is not without ambiguity regarding the reimbursement due to the institute for repairs, since the holder of an emphyteutic contract is entitled to no indemnity for any major or minor repairs he has been obliged to make (293). It was thought advisable to liken the institute to a possessor in good faith.

396

This article embodies paragraph 5 of Article 947 C.C. with some changes as to form.

397

This article substantially repeats the fourth paragraph of Article 947 C.C. Major repairs are added in order to allow some reimbursement when such repairs cannot be considered improvements (294).

The criterion of "equitable reimbursement" will make it possible to

take depreciation into account, along with the personal circumstances of the institute.

398 and 399

These articles repeat Article 966 C.C., changing the wording.

400

This article repeats Article 967 C.C., except for some changes in the wording. The word "unborn" has been omitted, however, since the institute conceived but yet unborn is in the same situation as a minor.

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(1) See H. TURGEON, *La succession légitime dans la province de Québec*, Montreal, Imprimerie Saint-Joseph, 1959, p. 151; C. CARISSE, *La liberté de tester: le point de vue du sociologue*, in *Le droit dans la vie familiale*, Livre du centenaire du Code civil, t. I, Montreal, P.U.M., 1970, p. 109; L. PRATTE, *L'intervention législative et la liberté de tester: la leçon du droit comparé, ibid.*, p. 119; A. MAYRAND, *Les successions ab intestat*, Montreal, P.U.M., 1971, p. 394; A. COSSETTE, *Le droit civil des années 1970*, (1970-71) 73 R. du N. 594, p. 607.

(2) See A. MAYRAND, *op. cit.*, p. 394.

(3) See A. MOREL, *Les limites de la liberté testamentaire dans le droit civil de la province de Québec*, Paris, Pichon et Durand-Auzias, 1960.

(4) See J. TURGEON, *Rétablissement de la légitime sous une forme moderne*, (1955) 15 R. du B. 204; C. CARISSE, *loc. cit.*; L. PRATTE, *loc. cit.*; L.P. PIGEON, *Nécessité de restreindre la liberté de tester*, in Travaux de l'Association Henri Capitant, Montreal, Eugène Doucet, 1961, t. XII, 1958, p. 667; T.-L. BERGERON, *De la liberté de tester, ibid.*, p. 675; M. LEGARE, *La liberté absolue de tester, un principe à réaliser*, (1975) 78 R. du N. 218.

(5) See *Testators Family Maintenance Act*, in *Model Acts Recommended from 1918 to 1961*, Conference of Commissioners on Uniformity of Legislation in Canada, 1962, p. 314: eight Canadian provinces have adopted similar laws; see the new draft adopted in 1974, *Dependents' Relief Act*, Proceedings of the Fifty-fifth Annual Meeting of the Conference of Commissioners, 1973, Schedule K, p. 253 et s.; see also, for England, *Family Provision Act*, 1966, c. 35 and the first law of its kind adopted in New Zealand, *The Testator's Family Maintenance Act*, 1900, 64 Vict., c. 20; J. RENAUD, *Le statut civil du conjoint survivant dans la pratique et en droit comparé*, Brussels, Ets Emile Bruylant, 1970, p. 303 et s. and 507 et s.

(6) The West German Civil Code, a. 2303, the Swiss Civil Code, a. 471 and the Italian Civil Code, a. 542 grant a reserve to the surviving spouse.

(7) See *Family Law, Second Report on Family Property: Family Provision on*

Death, The Law Commission, London, Her Majesty's Stationery Office, 1974, Nos 16, 28 and 34.

(8) See Article 15 which maintains the rule of the heir's seizin; see, also, F.R. SCOTT, *The Law of Successions in the Quebec and in the French Civil Codes*, in *Le droit civil français*, Livre-souvenir des journées de droit civil français, Paris-Montreal, 1936, 177, p. 178; L. PRATTE, *loc. cit.*, p. 128.

(9) See H. TURGEON, *op. cit.*, p. 152.

(10) See H., L. and J. MAZEAUD, *Leçons de droit civil*, Paris, Montchrestien, 1966, t. 4, vol. 2, No. 876 et s.

(11) See A. MOREL, *Un exemple de contact entre deux systèmes juridiques: le droit successoral du Québec*, in les Annales de l'Université de Poitiers, nouvelle série, Nos 4-5, 1963-64.

(12) See Articles 336 et s. of the Book on *The Family*.

(13) See the *Dependants' Relief Act*, *loc. cit.*, s. 1 (d) (vi) which proposes a similar provision.

(14) See Articles 446 and following.

(15) See Part II, Book II, Paris, Sirey, 1962.

(16) See A. MAYRAND, *op. cit.*, No. 259.

(17) See Article 308.

(18) See Articles 29 and 37 of the Book on *Obligations* which include lesion between persons of major age as grounds for nullity.

(19) See Schedule IX.

(20) See A. MAYRAND, *op. cit.*, No. 367 et s.; G. BRIERE, *Les successions "ab intestat"*, Cours de thémis, 4th ed., Montreal, P.U.M., 1972, p. 163 et s.; the *Avant-projet de Code civil*, *op. cit.*, Articles 860 to 863.

(21) See A. MAYRAND, *op. cit.*, No. 371.

(22) See the Schedule to the *Convention providing a Uniform law on the Form of the International Will*, Diplomatic Conference on Wills, Washington, D.C., 26 October 1973.

(23) See the *Act to abolish civil death*, S.Q. 1905-06, c. 38, s. 1.

(24) See Articles 68 and 95 of the Book on *Persons*.

(25) See A. MAYRAND, *op. cit.*, No. 18; *Montreal Trust & Hickson v. M.N.R.*, [1964] S.C.R. 647; *Allan v. Evans*, (1900) 30 S.C.R. 416; *Dame Dorais v. Viens*, [1970] S.C. 19, p. 21.

(26) See Articles 446 et s. of the Book on *Obligations*.

(27) See R. COMTOIS, *Les présomptions légales de survie*, (1965) 11 McGill L.J. 202, p. 216.

(28) See Article 29.

(29) See: Italian Civil Code, a. 4; Swiss Civil Code, a. 32 par. 2; Ethiopian Civil Code, a. 6; *Avant-projet de Code civil*, *op. cit.*, a. 749 par. 1.

(30) See, on this subject, A. MAYRAND, *op. cit.*, No. 38.

(31) See *Proceedings of the Fifty-third Annual Meeting of the Conference of Commissioners on Uniformity of Legislation in Canada*, 1971, *Survivorship Act*, Appendix V, p 412.

(32) See G. BRIERE, *Les libéralités*, Cours de Thémis, 6th ed., Montreal, Revue juridique Thémis, 1975, p. 128.

(33) See Articles 359 et s. in the Book on *The Family*.

(34) See P.B. MIGNAULT, *Le droit civil canadien*, Montreal, Théorêt, 1897, t. 3, p. 287 et s.; L. FARIBAULT, *Traité de droit civil du Québec*, Montreal, Wilson & Lafleur, 1954, t. 4, p. 165.

(35) See, however, *Dunbar v. Murray*, (1940) 78 S.C. 458.

(36) See the *Divorce Act*, R.S.C. 1970, c. D-8.

(37) See Articles 40, 41 and 60; see, also, Article 264 in the Book on *The Family* which completes this article.

(38) See Article 163 C.C.

(39) See P.B. MIGNAULT, *op. cit.*, t. 3, p. 357; G. BRIERE, *Les successions "ab intestat"*, *op. cit.*, p. 30 and 31; G. TRUDEL, in *Traité de droit civil du Québec*, *op. cit.*, t. 1, p. 465; *Cathcart v. The Union Building Society*, (1864) 15 L.C.R. 467 (S.C.); *Hickman v. Legault*, [1961] S.C. 192; *Stephens v. Falchi*, [1938] R.C.S. 354.

(40) See A. MAYRAND, *op. cit.*, No. 46; J.C. SMYTH, *Seizin in the Quebec Law of Succession*, (1956) 3 McGill L.J. 171.

(41) See A. MOREL, *L'apparition de la succession testamentaire*, (1966) 26 R. du B. 499, p. 520; J.C. SMYTH, *loc. cit.*, p. 179 et s.

(42) See A. MAYRAND, *op. cit.*, No. 234.

(43) See Article 870 C.C.

(44) See Article 76 in the Book on *Property*; see, also, Article 107 C.C. which is repeated in Article 217 in the Book on *Persons*.

(45) See P.B. MIGNAULT, *op. cit.*, t. 1, p. 314 et s.

(46) See Article 787 par. 2.

(47) See the *Adoption Act*, S.Q. 1969, c. 64; A MAYRAND, *op. cit.*, No. 122 and 132.

(48) See Article 36.

(49) See Articles 30 and 31 in the Book on *Persons*.

(50) See G. BRIERE, *Les successions "ab intestat"*, *op. cit.*, p. 25 and 26.

(51) See Article 6.

(52) See Article 12.

(53) See P.B. MIGNAULT, *op. cit.*, t. 1, p. 310 et s.; H. TURGEON, *op. cit.*, p. 28; A. MAYRAND, *op. cit.*, No. 118.

(54) See Article 111.

(55) See Article 87 et s.

(56) See Article 338.

(57) See the *Quebec Pension Plan*, S.Q. 1965, c. 24, s. 105; *Social Aid Act*, S.Q. 1969, c. 63, s. 1d; *Pension Act*, R.S.C. 1970, c. P-7, s. 32 (5) and (6); *Canada Pension Plan*, R.S.C. 1970, c. C-5, s. 63 (1).

(58) See Article 13.

(59) See Article 25.

(60) See A. MAYRAND, *op. cit.*, No. 168.

(61) See Article 35.

(62) *Ibid.*

(63) See H. TURGEON, *op. cit.*, p. 156.

(64) See A. MAYRAND, *op. cit.*, No. 198 et s.; by the same author, *Le Souverain est-il héritier?*, (1967) 2 R.J.T. 557.

(65) See Article 16.

(66) See Article 831 C.C.

(67) See H. TURGEON, *op. cit.*, p. 151; A. MOREL, *Les limites de la liberté testamentaire*, *op. cit.*; J. TURGEON, *loc. cit.*; C. CARISSE, *loc. cit.*, p. 109; L. PRATTE, *loc. cit.*, p. 119.

(68) See Articles 5 et s.

(69) See Articles 83 et s.

(70) See Article 62.

(71) See Article 78.

(72) See Article 485 of the Book on *Obligations* which provides that only spouses and children may receive gifts made by marriage contracts.

(73) See H., L. and J. MAZEAUD, *op. cit.*, t. 4, vol. 2, No. 927 et s.

(74) See Article 49 of the Book on *Prescription.*

(75) See Article 2473 par. 2 C.C.

(76) See Articles 336 et s. of the Book on *The Family.*

(77) See the article following.

(78) See Article 105.

(79) See par. 2 of Article 1061 C.C. and Article 59.

(80) See the *Avant-projet de Code civil*, *op. cit.*, a. 795.

(81) See H. TURGEON, *op. cit.*, p. 157; see A. MAYRAND, *op. cit.*, p. 181; P.B. MIGNAULT, *op. cit.*, t. 3, p. 390; see, also, the *Avant-projet de Code civil*, *op. cit.*, a. 793.

(82) See G. BRIERE, *Les successions "ab intestat"*, *op. cit.*, p. 69 and 75.

(83) See A. MAYRAND, *op. cit.*, No. 213.

(84) See P.B. MIGNAULT, *op. cit.*, t. 3, p. 437.

(85) See Article 901 C.C.P.; see, also, P.B. MIGNAULT, *op. cit.*, t. 3, p. 433; A. MAYRAND, *op. cit.*, No. 50.

(86) See Articles 181 and 182.

(87) See Article 122.

(88) See A. MAYRAND, *op. cit.*, No. 208; P.B. MIGNAULT, *op. cit.*, t. 3, p. 372; C. PERRAULT, *De l'acceptation d'une succession*, (1944) 4 R. du B. 163.

(89) See Articles 921 and 922 of the Code of Civil Procedure.

(90) See A. MAYRAND, *op. cit.*, No. 217.

(91) See A. MAYRAND, *op. cit.*, No. 228.

(92) See Articles 158 and 343.

(93) See A. MAYRAND, *op. cit.*, No. 247 et s.; *Rosenbush v. Rosenbush*, [1971]S.C. 112.

(94) See A. MAYRAND, *op. cit.*, No. 252.

(95) See Article 87 et s.

(96) See a. 916 C.C.P.

(97) See Article 97.

(98) See A. MAYRAND, *op. cit.*, No. 276; G. BRIERE, *Les successions "ab intestat"*, *op. cit.*, p. 103.

(99) See Articles 487 et s.

(100) See Schedule II.

(101) See Schedule II.

(102) See P.B. MIGNAULT, *op. cit.*, t. 3, p. 455 et s.; A. MAYRAND, *op. cit.*, No. 283.

(103) See Article 142.

(104) See Article 49 in the Book on *Prescription.*

(105) See Article 2016 C.C.; but see also Article 411 et s. in the Book on *Property*, which modifies the regime of hypothecary recourses.

(106) See Articles 677 par. 1, sub-par. 2 and 678 C.C. and Article 139.

(107) See A. MAYRAND, *op. cit.*, No. 289.

(108) See Article 87.

(109) See A. MAYRAND, *op. cit.*, No. 299.

(110) See Article 331.

(111) See Articles 487 et s. in the Book on *Property.*

(112) See Article 184 et s.

(113) See Article 916 C.C.P.

(114) See Article 345.

(115) See Articles 181 et s.

(116) See Article 201 in the Book on *Property.*

(117) See P.B. MIGNAULT, *op. cit.*, t. 3, p. 619 et s.; L. FARIBAULT, *op. cit.*, t. 4, pp. 387 and 573; G. BRIERE, *Les successions "ab intestat"*, *op. cit.*, p. 168; A. MAYRAND, *op. cit.*, Nos. 319 and 425.

(118) See Article 102 and comments.

(119) See Articles 197, 198 and 200 in the Book on *Property.*

(120) See, however, Articles 123 and 173.

(121) See A. MAYRAND, *op. cit.*, No. 393 et s.

(122) See Article 171.

(123) See the *Avant-projet de Code civil, op. cit.*, a. 881.

(124) See Articles 162, 166 and 167.

(125) See the *Avant-projet de Code civil, op. cit.*, a. 882.

(126) See A. MAYRAND, *op. cit.*, No. 410: separation has a unilateral effect; P.B. MIGNAULT, *op. cit.*, t. 3, p. 600, is, however, of the opinion that separation of patrimonies also has an effect in favour of the heir's creditors.

(127) See A. MAYRAND, *op. cit.*, No. 407.

(128) See the *Avant-projet de Code civil, op. cit.*, a. 832.

(129) See A. MAYRAND, *op. cit.*, No. 303; G. BRIERE, *Les successions "ab intestat"*, *op. cit.*, p. 139.

(130) See P.B. MIGNAULT, *op. cit.*, t. 3, p. 490; A. MAYRAND, *op. cit.*, No. 304.

(131) Replaced by *An Act respecting matrimonial regimes*, S.Q. 1969, c. 77, s. 14.

(132) See *Pearson v. Pearson*, (1928) 44 K.B. 338; *Denis v. Denis*, [1957] S.C. 32.

(133) See *Jobin v. Brassard*, (1934) 40 R.J. 451 (S.C.).

(134) See the *Avant-projet de Code civil*, *op. cit.*, a. 837.

(135) See Article 226.

(136) See the *Avant-projet de Code civil*, *op. cit.*, a. 838.

(137) See A. MAYRAND, *op. cit.*, No. 328.

(138) See Articles 63 et s.

(139) See the *Avant-projet de Code civil*, *op. cit.*, a. 853.

(140) See A. MAYRAND, *op. cit.*, No. 356.

(141) See G. BRIERE, *Les successions "ab intestat"*, *op. cit.*, p. 162; A. MAYRAND, *op. cit.*, No. 366.

(142) See A. MAYRAND, *op. cit.*, No. 363.

(143) See A. MAYRAND, *op. cit.*, No. 366.

(144) See Article 84 in the Book on *Property*.

(145) See Articles 314 and 315 in the Book on *Obligations*.

(146) See A. MAYRAND, *op. cit.*, No. 369; G. BRIERE, *Les successions "ab intestat"*, *op. cit.*, p. 165.

(147) See *Hémond v. Ménard*, (1888) 16 R.L. 472 (S.C.); *Latour v. Latour*, (1898) 4 R.L.N.S. 412 (S.C.).

(148) See *Avant-projet de Code civil*, *op. cit.*, a. 863.

(149) See G. BRIERE, *Les successions "ab intestat"*, *op. cit.*, p. 169 et s.; A. MAYRAND, *op. cit.*, No. 428 et s.

(150) See Article 731 par. 2 C.C.

(151) This new provision would confirm the decision handed down in *Perras v. Banque provinciale du Canada*, [1956] Q.B. 731, in which the court decided that a hypothec granted by an undivided owner on immoveable property sold by licitation and awarded to a joint undivided owner has been redeemed by the act of partition, but that the creditor retains the right of preference on the price; see also *Re Quintal et al. v. Banque Jacques-Cartier*, (1901) 10 Q.B. 525, to the same effect.

(152) See Article 201.

(153) See Articles 181 et s. in the Book on *Property.*

(154) See G. BRIERE, *Les successions "ab intestat"*, *op. cit.*, p. 168 and 169; A. MAYRAND, *op. cit.*, No. 425; *Marceau v. Lefaivre*, [1955] Q.B. 489.

(155) See Article 360 in the Book on *Obligations.*

(156) See P.B. MIGNAULT, *op. cit.*, t. 3, p. 630; *MacDougall v. Prentice*, (1885) 8 L.N. 163 (J.C.P.C.).

(157) See A. MAYRAND, *op. cit.*, No. 433.

(158) See Article 49 in the Book on *Prescription.*

(159) See also the Book on *Property*, Introduction: note on privileges.

(160) See the Book on *Obligations*, Articles 29 and 37.

(161) See P.B. MIGNAULT, *op. cit.*, t. 3, p. 640 et s.; A. MAYRAND, *op. cit.*, No. 437.

(162) See Articles 59 et s.

(163) See Article 246; P.B. MIGNAULT, *op. cit.*, t. 4, p. 246 et s.; G.S. CHALLIES, *Conditions de validité du testament au Québec et en France*, (1960) 20 R. du B. 373, p. 375; *Craig v. Lamoureux*, [1920] A.C. 349; *Thibodeau v. Thibodeau*, [1961] R.C.S. 285; *Protestant Board of School Commissioners of the Village of Ayer's Cliff v. Wilson*, [1954] Q.B. 169; *Touchette v. Touchette*, [1974] C.A. 575; *Bedic v. Bozikovic*, [1975] C.A. 484; *Meskinis v. Rabell*, [1975] C.A. 657.

(164) See Article 487 in the Book on *Obligations.*

(165) See Article 59.

(166) See *Forsyth v. Williams*, 2 R.J.R.Q. 416 (S.C. 1850).

(167) See *Canada Pension Plan*, R.S.C. 1970, c. C-5, s. 62; *Canadian Forces Superannuation Act*, R.S.C. 1970, c. C-9, s. 13 (2); *Quebec Pension Plan*, S.Q. 1965, c. 24, s. 122 et s.

(168) See Article 113 in the Book on *Persons.*

(169) See *Rolland v. Rolland*, (1931) 51 K.B. 228, p. 242.

(170) See G. BRIERE, *Les libéralités*, *op. cit.*, p. 140; M. FARIBAULT, *Traité théorique et pratique de la fiducie*, Montreal, Wilson & Lafleur, 1936, No. 164 et s.

(171) See Articles 33 and 35.

(172) See Article 30 in the Book on *Persons.*

(173) See the *Act respecting the receiving of authentic acts in the counties of Bonaventure and Gaspé*, S.Q. 1953-54, c. 64.

(174) See the English *Wills (Soldiers and Sailors) Act*, 1918, 7 and 8 Geo. V, c. 58, s. 3.

(175) See the English *Navy and Marines (Wills) Act*, 1953, 1 and 2 Eliz. II, c. 24.

(176) See the *Projet d'articles concernant le testament authentique soumis par la Chambre des Notaires*, July 13, 1973, Article 1; C.C.R.O., doc. BBC50.

(177) See Articles 265 and 266.

(178) See the draft of the Chamber of Notaries, *op. cit.*, a. 1 par. 2.

(179) See G. BRIERE, *Les libéralités*, *op. cit.*, p. 144.

(180) See *Roy v. Larue*, (1938) 64 K.B. 522; *contra*, M. FARIBAULT, *op. cit.*, No. 199.

(181) See *McLennan v. Dewar*, (1868) 13 L.C.J. 102 (Q.B.); G.S. CHALLIES, *loc. cit.*, p. 387; R. COMTOIS, *L'interprète est-il admissible dans les actes notariés?*, (1956) 59 R. du N., p. 99 and 466.

(182) See *Dame Gendron v. Dame Duranleau*, [1942] S.C.R. 321; *Faustin Cie Ltée v. Harrow Homes Inc.*, [1966] S.C. 93.

(183) *Loc. cit.*, Article 6.

(184) See H. ROCH, in *Traité de droit civil du Québec*, *op. cit.*, t. 5, p. 323; G.S. CHALLIES, *loc. cit.*, p. 391; *In re Aird*, (1905) 28 S.C. 235; *In re Rouleau*, S.C. (Hull, 550-14-00261-75); *contra*: *Desroches v. Viau*, [1971] S.C. 264, p. 275.

(185) See *Larose v. Eidt*, [1945] S.C. 276; *Dame Cunningham*, (1918) 20 P.R. 236 (S.C.).

(186) See *Wynne v. Wynne*, (1921) 62 S.C.R. 74; *Young v. Sutherland*, (1934) 56 K.B. 309; *Hannah v. Brereton*, (1901) 23 S.C. 98; *Audet v. Tremblay*, [1974] C.A. 585.

(187) See G. BRIERE, *Les libéralités*, *op. cit.*, p. 153.

(188) See the *Avant-projet de Code civil*, *op. cit.*, a. 916.

(189) See Article 14.

(190) See P.B. MIGNAULT, *op. cit.*, t. 4, p. 402 et s.; *Langlais v. Langley*, [1952] 1 S.C.R. 28.

(191) See *Bégin v. Bilodeau*, [1951] S.C.R. 699.

(192) See P.B. MIGNAULT, *op. cit.*, t. 4, p. 402 et s.

(193) See G. BRIERE, *Les libéralités*, *op. cit.*, p. 197.

(194) See the *Avant-projet de Code civil*, *op. cit.*, a. 936.

(195) See G. BRIERE, *Les libéralités*, *op. cit.*, p. 192; P.B. MIGNAULT, *op. cit.*, t. 4, p. 404, note (c).

(196) See P.B. MIGNAULT, *op. cit.*, t. 4, p. 416; G. BRIERE, *Les libéralités*, *op. cit.*, p. 195.

(197) See G. BRIERE, *Les libéralités*, *op. cit.*, p. 166; C. CHARRON,

L'accroissement et le legs universel et à titre universel, (1975) 35 R. du B. 364; *Valiquette v. Trust général du Canada et al.*, [1970] S.C. 579.

(198) See P.B. MIGNAULT, *op. cit.*, t. 4, p. 351; H. TURGEON, *Essai sur les legs*, (1952) 55 R. du N. 145, p. 150.

(199) See P.B. MIGNAULT, *op. cit.*, t. 4, p. 354; H. TURGEON, *Essai sur les legs*, *loc. cit.*, p. 164; G. BRIERE, *Les libéralités*, *op. cit.*, p. 167.

(200) See P.B. MIGNAULT, *op. cit.*, t. 4, p. 353; see Article 3 in the Book on *Property*.

(201) See Article 254.

(202) See P.B. MIGNAULT, *op. cit.*, t. 4, p. 435; G. BRIERE, *Les libéralités*, *op. cit.*, p. 200.

(203) This is, moreover, in accordance with existing law: see P.B. MIGNAULT, *op. cit.*, t. 4, p. 332; G. BRIERE, *Les libéralités*, *op. cit.*, p. 203; C. CHARRON, *L'accroissement et le legs universel ou à titre universel*, *loc. cit.*, pp. 365 and 371; U. JORON, *Substitution, accroissement*, (1937-38) 40 R. du N. 308; H. TURGEON, *Essai sur les legs*, *loc. cit.*, pp. 149 and 177.

(204) See Articles 287 and 288.

(205) See P.B. MIGNAULT, *op. cit.*, t. 4, p. 328 et s.

(206) See A. MOREL, *Les limites de la liberté testamentaire*, *op. cit.*, No. 106; A. MAYRAND, *Conflit de deux libertés: liberté de religion et liberté de tester*, (1963) 65 R. du N. 383; *Klein v. Klein*, [1967] S.C. 300.

(207) See, in particular, Article 600 in the Book on *Property*.

(208) See P.B. MIGNAULT, *op. cit.*, t. 4, p. 15 et s.; A. MOREL, *Limites de la liberté testamentaire*, *op. cit.*, No. 121; *Evanturel v. Evanturel*, (1874) 1 Q.L.R. 74 (J.C.P.C.); *McNamee v. Tétrault*, (1893) 4 S.C. 203; see, however, *Leclerc v. Leclerc*, [1975] C.A. 792.

(209) See J.-G. CARDINAL, *Témoin parent avec le légataire universel*, (1957) 59 R. du N. 504; *Dion v. Dion*, [1951] S.C. 416; Dame Poirier, [1959] S.C. 644.

(210) See P.B. MIGNAULT, *op. cit.*, t. 4, p. 289; *Brassard-Barrette*, [1972] P.R. 296 (S.C.); *Denault v. Belouin*, (1933) 55 K.B. 192.

(211) See *Thoreson v. National Trust Co. Ltd*, [1955] Q.B. 298.

(212) See the comments on Article 7.

(213) See P.B. MIGNAULT, *op. cit.*, t. 4, p. 320.

(214) See P.B. MIGNAULT, *op. cit.*, t. 4, p. 376 et s.

(215) *Ibid.*, p. 345.

(216) See the *Avant-projet de Code civil*, *op. cit.*, a. 968.

(217) *Ibid.*, a. 969.

(218) See Article 304 in the Book on *Property.*

(219) *Ibid.*, a. 139.

(220) See Articles 286 and 287.

(221) See A. MAYRAND, *op. cit.*, p. 349; P.B. MIGNAULT, *op. cit.*, t. 4, p. 390 et s.; *Harrington v. Corse*, (1883) 9 S.C.R. 412; *Pénisson v. Pénisson*, (1883) 9 Q.L.R. 122 (Q.B.).

(222) See *Ewing v. Ewing*, [1950] K.B. 511.

(223) See the Introduction to the Book on *The Family.*

(224) See the *Trust Companies Act*, R.S.Q. 1964, c. 287, s. 2 par. 7, which authorizes certain corporations to act as executors.

(225) See Article 252 in the Book on *Persons.*

(226) See Articles 574 et s. in the Book on *Property.*

(227) See G. BRIERE, *Les libéralités, op. cit.*, p. 183; R. COMTOIS, *L'exécuteur testamentaire*, [1967] R.J.T. 533, p. 540; *Cook v. La Banque de Québec*, (1893) 2 K.B. 172; see also, Article 348.

(228) See Articles 336 and 567 in the Book on *Property.*

(229) See Article 916 of the Code of Civil Procedure.

(230) See Articles 121 et s.

(231) See *La Banque Canadienne Nationale v. Coulombe*, [1966] Q.B. 780.

(232) See Articles 499 et s. in the Book on *Property.*

(233) See R. COMTOIS, *L'exécuteur testamentaire, loc. cit.*, p. 539; *St-Aubin v. Crevier*, (1905) 28 S.C. 392; P.B. MIGNAULT, *op. cit.*, t. 4. p. 461.

(234) See Article 499 in the Book on *Property.*

(235) See P.B. MIGNAULT, *op. cit.*, v. 4, p. 459; G. BRIERE, *Les libéralités, op. cit.*, p. 189 et s.

(236) *Ibid.*; see *Wasserman v. McNeill*, [1957] Q.B. 651 (acts of mere administration).

(237) See Article 339.

(238) See G. BRIERE, *Les libéralités, op. cit.*, p. 182.

(239) See Article 2216 C.C. (G.F.R.).

(240) See Articles 184 et s.

(241) See A. MAYRAND, *op. cit.*, No. 302.

(242) See P.B. MIGNAULT, *op. cit.*, t. 5, p. 8; concerning the meaning of the word "substitution" used alone, see also M. THEVENOT D'ESSAULE

DE SAVIGNY, *Traité des substitutions fidéicommissaires*, annotated by M. MATHIEU, Montreal, A. Périar, 1889, No. 26 et s. and No. 219.

(243) See Article 446 in the Book on *Obligations*, which proposes that a gift become a consensual contract.

(244) See Article 389.

(245) See Articles 379 et s.

(246) See *Décarie v. Légaré*, [1975] C.A. 805 (Notes of Mayrand J.). *Cogné v. Trust Général du Canada*, [1969] Q.B. 591.

(247) See Article 371 which replaces Article 952 C.C.; P.B. MIGNAULT, *op. cit.*, t. 5, p. 149.

(248) See Article 277 in the Book on *Property*.

(249) See the comments on Article 358.

(250) See Article 30 in the Book on *Persons*.

(251) See P.B. MIGNAULT, *op. cit.*, t. 5, p. 24; *Langelier v. Perron*, (1896) 10 S.C. 333.

(252) See P.B. MIGNAULT, *op. cit.*, t. 5, p. 24; M. THEVENOT D'ESSAULE DE SAVIGNY, *op. cit.*, No. 348 and 362.

(253) See P.B. MIGNAULT, *op. cit.*, t. 5, p. 24; M. FARIBAULT, *La fiducie dans la province de Québec*, Montreal, Wilson & Lafleur, 1936, No. 174; *Barclay's Bank Ltd v. Paton*, (1934) 56 K.B. 481 (dissident judges); H. TURGEON, *Jurisprudence*, (1935) 37 R. du N. 324, p. 327; *Masson v. Masson*, (1911) 20 K.B. 1.

(254) *Masson v. Masson*, (1912) 47 S.C.R. 42; *Barclay's Bank Ltd v. Paton*, *ibid.* (judges in the majority); *Cogné v. Trust Général du Canada*, [1969] Q.B. 591.

(255) See Articles 181 et s. in the Book on *Property*.

(256) See Articles 162 et s.

(257) *Ibid.*, a. 254.

(258) In this respect, see D.N. METTARLIN, *A simple legacy: "To My Children"*, (1966) 12 McGill L.J. 65, p. 69 et s.

(259) See P.B. MIGNAULT, *op. cit.*, t. 5, p. 25; G. BRIERE, *Les libéralités*, *op. cit.*, p. 235.

(260) See Article 366.

(261) See Article 600 in the Book on *Property*.

(262) See P.B. MIGNAULT, *op. cit.*, t. 5, p. 2 et s.

(263) See Articles 446 et s. in the Book on *Obligations*.

(264) On this subject, see *Meloche v. Simpson*, (1898) 29 S.C.R. 375.

(265) See Article 487 in the Book on *Obligations.*

(266) See *McGibbon v. Abbott*, (1885) 8 L.N. 267 (J.C.P.C.); *Lussier v. Tremblay*, (1952) 1 S.C.R. 389, p. 406; *Décarie v. Légaré*, [1975] C.A. 805 (Notes of Mayrand J. unreported).

(267) See Articles 379 and 380.

(268) See P.B. MIGNAULT, *op. cit.*, t. 5, p. 91 et s.; *The Minister of National Revenue v. Smith*, [1960] S.C.R. 477.

(269) See *Burdett v. Décarie*, [1963] S.C.R. 35.

(270) See *Fortin v. Robichaud*, [1972] C.A. 140.

(271) See P.B. MIGNAULT, *op. cit.*, t. 5, p. 59 et s.; J.-G. CARDINAL, *Substitutions, Pouvoirs de l'exécuteur testamentaire*, (1959) 61 R. du N. 293; P. PAQUETTE, *De la curatelle à la substitution*, (1949) 52 R. du N. 61.

(272) See, on this subject, Articles 87 and 119.

(273) See P.B. MIGNAULT, *op. cit.*, t. 5, p. 65.

(274) See Articles 379 and 380.

(275) In this connection, see Article 136 in the Book on *Property.*

(276) See, especially, Articles 373, 380 and 385.

(277) See Article 374.

(278) See Article 361.

(279) See Article 375.

(280) See Article 949 C.C.; P.B. MIGNAULT, *op. cit.*, t. 5, p. 68 and 84; F. LANGELIER, *Cours de droit civil*, Montreal, Wilson & Lafleur, 1907, t. 3, p. 287.

(281) See F. LANGELIER, *op. cit.*, t. 3, p. 282.

(282) See Article 376.

(283) See P.B. MIGNAULT, *op. cit.*, t. 5, p. 61.

(284) See *Spain v. Badeau*, [1961] Q.B. 825.

(285) See Article 949 C.C.

(286) See Article 379.

(287) See Articles 596 et s. C.C.P. for seizure of moveable property and Articles 674 et s. for seizure of immoveable property.

(288) See P.B. MIGNAULT, *op. cit.*, t. 5, p. 114 et s.

(289) See Article 143 in the Book on *Property.*

(290) On this subject, see, P.B. MIGNAULT, *op. cit.*, t. 5, p. 123; *Barclay's*

Bank Ltd. v. Paton, (1934) 56 Q.B. 481, (Rivard and St.-Germain JJ. dissenting); M. THEVENOT D'ESSAULE DE SAVIGNY, *op. cit.*, No. 1118.

(291) See Article 745 in the Book on *Obligations* and Article 1709 C.C.

(292) See P.B. MIGNAULT, *op. cit.*, t. 5, p. 70 et s.; F. LANGELIER, *op. cit.*, t. 3, p. 304.

(293) On this subject, see G. BRIERE, *Les libéralités*, *op. cit.*, p. 247.

(294) See Articles 76 et s. in the Book on *Property*.

BOOK FOUR

PROPERTY

INTRODUCTION

The amendments proposed in this Book are based largely on the principles of civil law, doctrine and Québec jurisprudence, the requirements of trade and business, and also on foreign experience when it was found suitable for current problems raised in Québec. Because these documents are so up-to-date, they suggested applicable solutions for certain problems in Québec.

The principal suggested modifications to the law of Property as found in Book Second of the Civil Code are the following:

1. the new definition of the word "property" in Article l seems more in keeping with juridical logic. A classification error is remedied that originated in Roman law and has been preserved down the centuries. Property consists of the personal and real rights of a person, and constitutes the assets of the patrimony;
2. the distinction between immoveables by nature and by destination has been done away with. This division unnecessarily complicates the existing law on property. The first chapters try to simplify the system by laying down clear rules;
3. the provisions dealing with Crown property and government water control, among others, disappear. Because of their special nature, these provisions fall under administrative, not civil, law;
4. Title Two is new in that it removes the general provisions concerning possession from the Book on *Prescription.* It seemed logical to include possession in the Book on *Property*, without, however, neglecting references to the law on prescription. Articles 29 and following govern more particularly the effects of possession;
5. Title Three, governing the right of ownership, contains a somewhat modified definition of that right (a. 34). The term "absolute" is removed; it seemed preferable to describe ownership as being as complete a right as it is possible to have over a thing;
6. Articles 41 and 42, on the use of watercourses, are in compliance with juridical practice and current social trends. These articles set forth the rights of riparian owners without, however, discounting the rights of the general public over watercourses;
7. the definition of the right of ownership contained in Article 34 of chapter I, Title Three, states that this right must be exercised "within the limits and under the conditions established by law".

This chapter contains some of these limits and restrictions; the

list is not an exhaustive one, since other restrictions on the exercise of the right of ownership might be found in special laws.

In the Code, some of these restrictions are designated as "natural servitudes" or "servitudes established by law"; the provisions relating to this category of restrictions are contained in Title Four on *Real Servitudes*. In fact, the prohibitions regulated in particular by Articles 501 to 544 C.C. are not actually real servitudes, but constitute the general law on ownership, and specify certain limits for the normal and ordinary exercise of the right of ownership (1).

It seems preferable, then, not to designate these restrictions or limitations as servitudes. In this way, several provisions now found under the Title on *Real Servitudes* have been transferred to chapter II of the Title devoted to the right of ownership;

8. the distinction between direct views and oblique views has disappeared as regards the distance required for each (a. 61). Nevertheless, it seemed important to defend the right to privacy; the Draft protects these fundamental rights (a. 59 et s.). These articles follow current trends by expressing the distances in metres rather than in feet;

9. section VIII of chapter II, Title Three, concerning *Access to another person's land* (a. 69 et s.), is new law. It allows one neighbour to cross the other's land if this intrusion is unavoidable in order to make repairs on his own land;

10. Title Four, *Dismemberments and Modifications of the Right of Ownership*, makes no basic changes in substantive law. However, mention must be made of certain points clarified in chapter I on *Usufruct*. The opinion has been expressed that usufruct of debts should be covered in the Civil Code (2). This case is now dealt with in Articles 109 and 113, subject to contractual derogations which may be stipulated. Article 114 deals with the right to increase the capital subject to usufruct, a right which belongs exclusively to the bare owner;

11. Articles 127, 128 and 129 oblige the usufructuary to insure the object of his usufruct against fire and other risks, unless the bare owner has released him from such obligation. If part of the thing is lost, he must repair such partial loss out of the indemnity received from the insurer. If the entire thing is lost, he may enjoy the indemnity until the usufruct expires; he must then return the capital to the bare owner. In cases where dispensation is granted, the usufructuary and the bare owner may both insure the thing on their own behalf;

12. chapter III of Title Four, on *Real Servitudes*, amends the definition of

a servitude to render it more explicit than that given in the present Code. Article 158 specifies that a servitude is a charge which affects an immoveable, not one imposed on a person.

Article 163 lists the various means of establishing the right of servitude, and adds to this list prescription;

13. the Draft chapter on *Indivision* is in three sections. One deals with general principles, the second with co-ownership of ships and the third with co-ownership of immoveables established by declaration, called "condominium".

The basis of the long-established principle that no one can be compelled to remain in undivided ownership has been retained. However, the Code makes no allowance for cases of individuals who wish to remain co-owners, nor for rules to be followed throughout a forced undivided ownership. These gaps have been filled.

The provisions of the Civil Code dealing with co-ownership of immoveables remain unchanged except with respect to the terminology adopted in the rest of the Draft.

The section is entitled "Condominium" to specify the meaning of the constitution and to stress its specific nature;

14. very little change is made in existing law dealing with emphyteusis, except for Article 250 which clarifies the rights of the holder. It seemed desirable to put an end to the arguments caused by varying interpretations of the expression "emphyteusis carries with it alienation". To do so, it is acknowledged that an emphyteutic holder has a full but "temporary" right of ownership of the thing throughout the term of the contract. This right remains conditional, however, since it is in no way binding on the owner who recovers his immoveable when the emphyteutic contract expires, free of all charges or rights which the holder could have created;

15. finally, the last chapter of Title Four provides new articles on the right of superficies. A first section deals with the concept of the right of superficies. The second section contains rules on construction leases which constitute the most frequently used mode of establishing a right of superficies. It appeared useful to provide certain specific rules in view of their practical application and of the necessity of distinguishing superficies from emphyteusis (3).

Some members felt that no special provisions respecting the right of superficies were necessary. Others felt the right of superficies dealt with a special situation which absolutely required inclusion in the Civil Code. The proposed articles point the way towards a

solution to the problems to which the right of superficies might give rise.

Title Five deals with real security.

The law on security on property, as it now stands in the Civil Code, appears as a simple but incomplete set of rules.

Credit techniques have developed until now within the framework of the Civil Code's rules governing security; to these rules, however, sections on pledge of agricultural and forest property, commercial pledge and pledge of universalities of claims have been added. Even so, on comparison with similar laws in neighbouring jurisdictions, the law in this area can only be seen as requiring reform in depth.

Two weaknesses of existing law are often criticized: these are the absence of any generally applicable security on moveables without dispossession, and lack of flexibility in recourses available to privileged or hypothecary creditors. The hypothecary action is still the only acknowledged recourse for any hypothecary creditor. Creditors have attempted to solve this problem by way of various conventions such as clauses for *dation en paiement*, for transfer of rents, for transfer of insurance, for taking possession, and so on. Although Articles 1040a and following have in part eliminated the injustices caused by abuse of some of these clauses, all of them go beyond the rules on privileges and hypothecs, and they are insufficient to solve all difficulties and to grant a choice of appropriate measures to creditors whose debtors are in default.

The reform of the Law on Security on Property was undertaken on the basis of a number of general principles:

1. the necessity for reforms in the law on moveable security within the Québec Civil Code, as a logical sequence to the proposed changes concerning pledge of agricultural and forest property and commercial pledge;
2. a need for extending application of real security on moveables with regard to both dealers and consumers must be accompanied by measures which would take the underprivileged into consideration, reduce injustices and, at the same time, ensure some measure of protection for unsecured creditors; the *Consumer Protection Act* (4) was passed before the Civil Code Revision Office completed its work, so this goal has for the most part been attained outside the limits of the Civil Code;
3. a re-examination of the concept and application of privileges;
4. the necessity of reforming the system of registration of real rights,

particularly to adapt it to the proposed hypothec on moveable property (5);

5. the need for a revision of hypothecs on immoveables, especially with regard to the number of hypothecary recourses open to a creditor, and to his exercise of them;

6. the fact that any reform of the law on security on moveables should take into account both Section 9 of the American *Uniform Commercial Code*, and the Canadian provinces' *Uniform Personal Property Security Act* (6) so that the new rules established to govern real security on moveable property might be consistent with the North American system and general business practice;

7. a wish that the law on real security on moveable property relate as closely as possible to the institutions and principles of civil law and that the style and terminology should reflect the spirit of this system, whatever the innovations and in spite of the various foreign sources.

An effort was made to rethink the system of real security in a general context rather than simply change or increase existing provisions so as to insert new procedures into existing provisions. Any provisions deemed obsolete or unsuitable have been changed or eliminated.

The order and even the wording of current Civil Code articles have been maintained as much as possible, out of respect for jurisprudential interpretations of certain terms and concepts. It is hoped that problems of continuity between existing law and the proposed rules will thus be avoided.

The principal changes to the Civil Code which result from the present Draft are divided into two categories: basic changes and certain other changes deemed important.

Four basic changes have been suggested by this Draft to the rules governing security on property:

1. first, all forms of real security have been grouped together, thus integrating all such security (pawning, hypothecs and privileges) both horizontally and vertically with other contractual techniques having similar purposes (conditional sales, sales subject to redemption, and others), all now included under the single concept of hypothec. Horizontal integration means the application of hypothecs to moveable and immoveable property. Vertical integration means the consolidation of the effects of various techniques for creating real securities into one single security, namely, hypothec. The Draft governs all means of creating real securities, whether stipulated by law or used in practice, under one heading, thus standardizing the

effects of such techniques and any recourse resulting from them. The designations of all the various forms of security found in current Québec law would hereby be replaced by a single term: hypothec.

The principal result of this standardization is that all persons holding security on property would be granted similar rights and recourses regardless of the basis or cause of their original rights. This Draft is consistent with the reform which has swept the United States and is now reaching Canada, and corresponds as well to a tradition well-known in civil law.

Three types of hypothecs are retained, namely conventional, judicial and testamentary hypothecs. Elimination of legal hypothecs and of privileges is also recommended;

2. the second basic change proposed by the Draft is that certain provisions should be of public order and allow of no derogation. It seemed illogical in certain respects to allow contractual derogations which would endanger the very rights the law seeks to protect. Regardless of the form of the contract, the parties, stipulations or the number of deeds used, every stipulation intended to grant or reserve a creditor rights to ensure payment of an obligation, or to maintain a creditor's rights to that effect, would be deemed a hypothecary stipulation. This presumption, established in Articles 281 to 285, is considered essential to any set of legal provisions which seeks above all to ensure protection for the debtor while allowing the creditor to know exactly what his own rights are; it will benefit third parties as well;

3. the third basic modification is the inauguration of a universal system of real security on moveables. Repeal of Article 2022 C.C. prohibiting hypothecs on moveable property is recommended in the Draft. The other main provisions of the Civil Code affected are those of the Title *Of pledge*, including pledge of agricultural and forest property and commercial pledge, and those of the *Special Corporate Powers Act* (7) and the *Bills of Lading Act* (8). Besides being well integrated into the Title on *Security on Property* in the new Code, this system of security on moveable property corresponds closely to rules known both in the United States (*Uniform Commercial Code*) and in the other Canadian provinces (*Uniform Personal Property Security Act*). The concept of hypothec makes this consistency possible, since a hypothec constitutes only a "charge" on the affected property which gives its holder the right to follow and the right of preference, as do the Security Acts in other jurisdictions. Indeed, the elimination of the chattel mortgage (which granted a title to the affected property) has brought the

Anglo-American system of security on property into line with the civilian system of hypothecs.

Widespread use of hypothecs on moveable property might slow down or impede free circulation of goods, but this problem is closely linked to the effectiveness of the publication system which will have to be established. Modern technology makes such a system possible. In the future, purchase of moveable goods will necessitate consultation of a computerized registry to determine whether hypothecs exist. However, such consultation would not be required when transacting with a trader dealing in similar articles: according to Article 479, if such a dealer disposes of hypothecated goods in favour of a third party in good faith, the hypothec is extinguished, even if the purchaser was aware of its existence. This broad exception to the right to follow property and the effectiveness of the mechanized publication system which will have to be created seem to provide a satisfactory solution to this first problem.

A consumer may be endangered by his own access to hypothecs on moveable property. This new security could tempt him to take on more debts than his means allow. His creditor, encouraged by the additional security, would make it easier for him to do so. The proposed system, however, should not add to current problems caused by the widespread use of various means of financing (e.g. conditional sales). Once the *Consumer Protection Act* (9) is adjusted to the new security, it must remain the primary source of consumer protection. However, debtors will be better protected than before under the Code because of limits placed on recourse open to hypothecary creditors.

The principles of the publication system which will make this hypothec on moveables possible are to be quite simple. The use of computers should obviate any major difficulties created by the extensive volume of published information and the need for its accessibility in all parts of the province. Registration will be person-oriented. It will not be necessary, as is the case with immoveables, to know whether or not a certain piece of moveable property is hypothecated; the question will rather be whether a certain debtor has granted hypothecs on moveable property and then, if necessary, whether the hypothec has been granted on the moveable which interests the researcher. No research will be possible without the debtor's name; it is impossible to identify and number every moveable in the province for consultation purposes. The debtor's name would be the key to the whole system; sale of a hypothecated moveable would also have to be registered to give any third party

who subsequently transacts with the purchaser the possibility of carrying out his research as to the name. This requirement is set forth in Article 382. Failure to observe this provision would result in loss of the benefit of the term for a debtor and possible dispossession of property for a third party.

The use of new computer methods would adequately solve the problem - until now thought impossible to solve - of registration of moveable property; the advantages permitted by any universal regime of moveable property outweigh the few drawbacks (10);

4. the fourth basic change concerns the recourses of hypothecary creditors, who currently are entitled to only one basic recourse, namely, hypothecary action; when he has made provision for them, he may also avail himself of certain rights, such as those derived from a *dation en paiement* clause. The Draft raises the number of hypothecary recourses to four and makes them available to all hypothecary creditors who respect the prescribed conditions. These four recourses are: taking possession, sale other than judicial sale, taking in payment, and the hypothecary action followed by judicial sale. Most of the provisions of Articles 1040a and following C.C. are thus included in the Title on *Security on Property*. Any creditor may avail himself of the recourse he chooses, even successive recourses.

This Draft contains certain other changes of definite importance, although only the principal ones will be discussed here.

All privileges would be abolished, whether created by the Civil Code or otherwise. The reasons for this are set forth in an explanatory note.

Hypothecs have been re-classified, and would now be general or special, floating or attached to present or future goods or property. This classification, which is contained in part in the *Special Corporate Powers Act* (11), was not clearly expressed in the Civil Code; it will be useful mainly in business (see aa. 293, 294, 326 and 334).

Current rules on indivisibility and extinction of hypothecs often have drawbacks with respect to successive financing or credit openings. Under present law, only with difficulty can a hypothec be granted to ensure payment of sums which may fluctuate. This situation is changed by Articles 300 and 335 to 337, which also provide that a hypothec may be valid even if, when the hypothec is constituted, the creditor has not paid the debtor the required sum.

It would still be forbidden to hypothecate another person's things, even moveable goods, except where the grantor subsequently becomes the owner of such things (a. 309).

The Draft includes provisions concerning hypothecs affecting shares of the capital stock of corporations (see aa. 311, 400 and 401).

Article 316 provides that the hypothec on an immoveable automatically entails a hypothec, in favour of the creditor, on the rents and on the insurance covering such immoveable.

Hypothec of wages, salaries, fees or other means of remuneration would be prohibited, as is hypothec of goods not liable to seizure (see a. 319).

The newest and most complex provisions are certainly those concerning hypothecs of claims, rights and incorporeal property. Since these are of a particular kind, these hypothecs require a series of special provisions, particularly with respect to publication. Those detailed provisions render Québec law on incorporeal property comparable to corresponding Canadian and American law (see aa. 338 to 345, 389 to 399). The rules in Articles 1570 and 1571 C.C. are partly restated.

The Draft also contains provisions allowing hypothecary claims to be transferred through negotiation of hypothecary titles (called a memorandum of hypothec) provided the formalities prescribed in Articles 346 to 352 are respected. Any holder of a hypothecary claim may thus, as an exception to Articles 1571 and 2127 C.C., avoid the formalities of the deeds of transfer, registration, and notification when transferring such claim to a third party.

A hypothec might be published in two ways: by registration, or, as regards certain moveable property, by giving the creditor possession. In some cases, a published hypothec would require putting the creditor in possession (as with negotiable titles). As for immoveables, registration would be the only valid means of publication. The provisions governing publication and, particularly, registration of hypothecs are rather complex because of the great variety of situations covered. In particular, flexible provisions on registration are required to govern the different terms and conditions of hypothecs and the times at which the parties may make changes in a hypothecary contract. These provisions are found in Articles 375 to 384. Hypothecs would take effect between the parties even without publication, although they would have to be published to be set up against third parties.

Other provisions govern cases when the creditor in possession of hypothecated claims collects the proceeds. Articles 384 to 388 and 406 to 410 set forth the rights of the parties in such cases. These provisions do not differ essentially from those which govern pawning contracts, but they add certain specifications concerning "transfer of secured claims".

Under chapter VII, most provisions applicable to hypothecary recourse are of public order, so the parties cannot derogate from them by agreement (a. 458).

It will be noted that *dation en paiement*, one of the current means of hypothecary recourse granted to creditors, has been replaced by *prise en paiement* (taking in payment); *prise* (taking) seemed more correct than *dation* (giving), since this right of the creditor is now legal and no longer depends on the will of the debtor. However, an important specific condition is attached to this taking in payment. Article 441 provides that any creditor who receives the property receives it free of all hypothecs registered after that of the creditor who exercises the recourse, saving the right of subsequent creditors or of the debtor to require a judicial sale. Giving in payment with retroactive effect would thus be maintained, but subject to this important restriction.

Articles 1202a to 1202*l* C.C. have been included in the Title on *Security on Property*. These provisions are applied when goods are judicially sold as a result of hypothecary action; it seemed appropriate to place them with the rules governing a creditor's exercise of this action. These provisions, which appear in Articles 446 to 457, have been simplified.

The provisions applying to the rank of hypothecs were hardly changed. The rank is generally determined by priority of publication, either through registration or through possession by a creditor. Whenever there is a conflict between a moveable security published by registration and one published by a creditor's possession, the creditor claiming priority would have to prove his right and the time of publication. In this, the Draft follows North American solutions, and confirms existing Québec law.

Very little innovation is made concerning extinction of hypothecs. However, the Draft proposes that the exceptions provided for in Article 2081a C.C. with respect to the period of validity of the registration of certain hypothecs on immoveables be repealed.

Moreover, the period of validity for registering hypothecs on immoveables is reduced to twenty-five years, consistent with the Draft's provisions respecting prescription; the period of validity for publishing hypothecs on moveable property is set at five years (see aa. 472 to 486).

Article 479 has already been pointed out as providing for extinction of any hypothec on moveables when the goods affected by such hypothec are acquired in good faith from a trader dealing in similar articles in the normal course of business. Extinction occurs regardless of whether the sale was retail or wholesale, whether the hypothec was published at the time or

whether the buyer was aware of such hypothec. This provision protects persons who purchase from traders, making it unnecessary to consult the registers relating to the publication of hypothecs.

The preceding paragraphs emphasize only some of the important changes made by this Draft in the rules governing real security. For the others, additional comments will be found alongside each proposed article.

This introduction is completed by a note on the question of privileges in Québec law.

Note on abolition of privileges

Over the past hundred years, the Québec Legislator has made too much use of privileges. Not content with the privileges listed in the Civil Code, principally in Articles 1994 and 2009 C.C., he has in fact made use of special statutes to adopt some two hundred other special privileges, most of which deal with the rights of the Crown or of particular corporations, notably municipalities.

During this period, some of the privileges expressly provided in the Civil Code have become almost obsolete, tithes for example, while some others gave rise to a considerable amount of jurisprudence. This was the case particularly with the workmen's privilege which has, moreover, undergone repeated legislative amendments, each of which seemingly created in turn more problems than it solved.

The existing system of privileges gives rise to far more criticism than praise. Considering the many existing privileges, many persons and bodies demand the creation of new privileges for themselves or for their members, which would allow them to compete with existing privileges and even to ensure themselves a higher rank.

While there might be a temptation to reply favourably to these requests, most of which seemed perfectly justified, it was deemed preferable, however, to analyse the situation as a whole, and attempt to determine why privileges should exist in our law.

Once again, Roman law and the *Ancien droit* provided the most eloquent and adequate answer: a privilege is motivated by fairness and common interest. All other reasons are based solely on arbitrary motives and on value judgments.

But what motives could justify the existence of privileges in modern society? We no longer live in a period in which social dimensions are restricted, capital scarce and legal and political structures relatively

limited. Goods and services are produced, circulated and distributed at a pace and by methods which are very different from those which existed when the 1866 Code was drafted. Credit and advertising methods have also been developed; techniques which were formerly restricted to traders are now available to all or nearly all citizens.

Would it not be true to say that every creditor deserves a privilege? From the point of view of fairness, it is in fact quite difficult to decide between them: why should a person who sells household appliances be preferred to someone who supplies foodstuffs or clothing? What distinction can be made between the various people who provide goods or services, and how can they be preferred to those who provide only credit or a loan of money to make possible the purchase of such goods or services? The categories of privileges in the Civil Code would seem no longer to correspond to the demands of present day economic life.

In this context, it would have been easy to simply lengthen and, in some cases, shorten the list of privileged creditors. However, a new problem would have arisen, namely, the determination of the rank of these persons. Moreover, unless we are to list all the different types of debts, analyse them and rank them in order of preference, it would seem unjust and illogical merely to grant preference to some and deny it to others. It would be equally unjust to consider only some claims and attribute a privilege only to a small number of them, and to declare the remainder unsecured. The mere fact of ranking creditors constitutes a form of discrimination which is not acceptable beyond the first or second rank.

Today, emphasis is on equality, contrary to what was the custom in the nineteenth century. All creditors are expected to be equal and to divide their debtor's property among themselves in proportion to their claim. This statement does not necessarily eliminate all notions of preference among creditors. Conventional security must retain its place in modern economic activity. What is found arbitrary are legal preferences, attributable to the mere quality or cause of the claim.

There is no reason to retain the concept of privilege as a legal real right and it is recommended that it be simply abolished.

It seemed preferable, rather, to emphasize the concept of patrimony according to which a debtor's property is the common pledge of his creditors, as provided in Article 1981 C.C. The advantage of conventional security over legal security, e.g. privilege, is that it is subject to formal rules of publication and is not given preference retroactively.

Moreover, it was realized that some privileges exist by reason of the fact that real security on moveable property without dispossession by the

debtor is prohibited (a. 2022 C.C.). However, adoption of a set of general rules to govern hypothecs on moveable property is recommended.

Another highly disputable aspect of the law on privileges is their priority over hypothecs and the order established to determine their rank in relation to each other. This rank is fixed arbitrarily by the law, with the result that a creditor who has met all the requirements to publish his right may, at any time, find himself subjected to the rights of a third party to whom the law grants a higher rank, even if this right came into being later than his own.

Privileges are a source of uncertainty. In the interest of well-balanced economic activity, it seems preferable that a person should know, at the time he becomes a creditor, what rights are attributed to him and where he ranks among the other creditors.

A possible compromise might be reached by retaining certain privileges like "legal hypothecs", but subjecting them all to the requirement of publication, so that these legal hypothecs rank with regard to third parties on publication only. This rule was adopted in 1964 with reference to privileges of the Crown upon immoveable property (second paragraph of a. 1989 C.C.). The advantage of this solution is that some creditors could acquire preference without having to so stipulate, but subject to the rules of publication. Nevertheless, this solution does not remove the objections mentioned above: drawing up a list of privileged creditors is a discriminatory operation.

Let us review the principal privileges provided in the Civil Code, first concerning immoveables, then concerning moveables.

Immoveables

1. Law costs: law costs may be divided into two categories: those paid towards the administration of justice and those paid to creditors (or to their lawyers) which relate to the various costs listed in Article 714 C.C.P. As for the first category, it does not seem to be a healthy policy for the State to ensure its own payment before the other creditors are paid. This is not a new idea, and has already been proposed by the Study Committee on Bankruptcy and Insolvency Legislation (12). Justice should not profit when creditors (whose only means of being paid is execution of their debtor's property) remain unpaid. The State may resort to other means. The basis of such a privilege is rejected and its repeal is recommended.

   In the costs which are paid to a party or to his lawyer, a form of discrimination in favour of this creditor is seen and retaining it is not

recommended. Why should these costs be privileged while the costs of many other creditors are not? The cost of seizure and execution represents for the creditor an expense similar to any other he incurs in his claim and there is no reason to give him a preference respecting costs which he does not have with respect to the capital and interest of his claim. Furthermore, in matters of hypothec, Article 2016 of the Civil Code provides that costs are covered by the hypothec.

As for lawyers, who benefit from this privilege much more than their clients, it is not felt that they should be protected any more than other professionals who may just as easily incur costs on their clients' behalf. Lawyers who use a privilege for payment of their fees are in the same position as people who provide credit. Why should lawyers benefit from a privilege while lenders do not? Lawyers may decline to work on credit and claim an advance of money from their clients if they choose to do so.

Therefore, abolition of this privilege is recommended.

2. Expenses incurred in the common interest: the above comments may also be applied to expenses incurred in the interest of all the creditors. Judging by the restrictive court interpretations given this privilege (13), it is found of no special importance and thus its repeal is recommended, allowing, however, for the creditor's right of retention when necessary.

3. Expenses for final illnesses and for funerals: abolition of these two privileges is recommended, with no further comments.

4. Expenses of tilling and sowing: the questions of manual workers' salaries will be discussed in detail in the analysis of construction privileges. Maintaining the privilege for tilling and sowing expenses is not deemed necessary; on the one hand, this privilege has seldom been used, and, on the other hand, it is restricted by Article 2010 C.C. (additional value). Moreover, the other recommendations, especially those pertaining to conventional hypothecs on crops, render it superfluous.

5. Rates and assessments: privileges for taxes, rates and assessments also appear unjustified in view of the other solutions offered by law for these claims. The recourse called "sale of immoveables for taxes", provided for in existing legislation, seems far more effective than such privilege. As a remedy, sale for taxes, whether to the highest bidder for the whole or for the smallest portion, is a generally accepted local custom (14). Therefore, the following is recommended:

(a) that privileges for assessment of churches, presbyteries and cemeteries be abolished;

(b) that privileges for school taxes and municipal taxes and assessments be abolished, provided these organizations maintain their right to sale for taxes;

(c) that the Code of Civil Procedure be amended in such a way that sheriff's sales (and forced sales) do not effect discharge of municipal and school taxes. Paragraph 4 of Article 696 C.C.P. should refer, not to any privilege, tax and assessment, but to the "right to sell for taxes with regard to all municipal and school taxes and assessments of any kind";

(d) that the *Cities and Towns Act* (15) and the *Municipal Code* (16) be amended so that sales for taxes do not effect discharge of the hypothecs encumbering the immoveables sold. The purchaser will take the property subject to hypothecs.

6. Mutual fire insurance companies (17): pure and simple abolition of this rarely used and seemingly unjustified privilege is recommended (18).

7. Seigneurial dues: pure and simple abolition of this privilege is recommended.

8. Privilege respecting participation in the debts of a co-ownership (19): abolition of this privilege is recommended; its existence is discriminatory and its effect could as well be achieved by the stipulation of a conventional hypothec in the declaration of condominium, allowing for such hypothec to be completed from time to time by the registration of a notice to that effect (20).

9. Construction privileges: construction privileges have undoubtedly given rise to the greatest number of difficulties in Québec law. The original versions of Articles 2013 and 2103 C.C. have been amended several times (21). A great number of judicial decisions involve these articles. It could even be said that construction privileges are now more a source of conflicts and suits than a real security for those entitled to them (22). Even in 1933, Giroux was severely criticizing hypothecary loans on property under construction:

"*Le prêt hypothécaire sur propriété en construction est rendu impratiquable... La bonne foi du prêteur n'est pas protégée, toute négligence ou toute erreur de jugement met en péril ses droits... Avec un tel régime légal, est-il surprenant qu'il n'y ait plus de prêts sur propriétés en construction?... Le législateur, par sa loi sur le*

privilège, a tué, pendant la période de construction, le crédit du propriétaire." (23)

The history of construction privileges in Québec law can be compared to a perpetual tug of war between privileged creditors and hypothecary creditors. After having suffered many inconveniences, as described by Giroux, hypothecary lenders discovered the conditional (retroactive) *dation en paiement* as a means of neutralizing the effect of privileges created subsequent to their hypothec.

The privilege comes into existence at the beginning of the work (subject to eventual registration). The "beginning of the work" has been determined by jurisprudence as the moment the applicant for the privilege begins to fulfil one of the obligations he has contracted; this has made it possible for jurisprudence to thwart the expectations of many a financial backer, even where faith has been placed in a conditional *dation en paiement* clause (24). So, today, as Giroux (25) pointed out more than forty years ago, privileges are more a hindrance to the normal course of business than an effective remedy for a need which, although a real one, is not as essential as one may sometimes be led to believe.

Moreover, the construction privilege can be rendered illusory by the recognition of the retroactive effect - to the date of registration - of the *dation en paiement*, if the work has started after such registration. These decisions have prompted hypothecary creditors and financial backers to seek new techniques and strategies to obtain a security which could resist construction privileges. This led to the appearance of a new type of supplier of funds, the temporary lender who, for a higher price than the regular backer, finances construction of the building, but under close daily supervision, to make sure he is not left to bear the consequences resulting from any mismanagement or misutilisation of funds by contractors, subcontractors or suppliers of materials.

Here is a typical case: a general contractor receives funds by contract from an owner or from a financial backer; he contracts with subcontractors and suppliers of materials, but does not manage to pay what he owes them in full nor does he tell the owner or backer about it. The unpaid subcontractor or supplier is obliged to register a privilege on the building under construction, which immediately stops all new advance of funds and blocks credit openings, completely paralysing all construction work. For work to be resumed, the unpaid creditors must be paid, and this often involves sums in addition to

those already forwarded to the general contractor for the same purposes, all at the owner's or backer's expense.

The security awarded the subcontractor or supplier through his privilege prompts him to grant fairly long-term credit to the general contractor or to the cocontracting party, who in turn finances himself at the backer's expense by accepting such credit. The person who ultimately bears the burden of the privilege has no control over the credit operation. Credit terms granted during the last few years have reached seemingly unreasonable proportions.

The disadvantages, as listed by Giroux (26), of the privileges granted subcontractors and suppliers have constantly multiplied since.

Construction privileges have lost their purpose and basic usefulness and have often become tools for financial negotiations which do not help their beneficiaries; it seems unreasonable to suggest that they be maintained. Moreover, financial backers who have been able to maintain some authority, such as government institutions, e.g. the Central Mortgage and Housing Corporation, now generally demand that the privilege be renounced or priority assigned beforehand.

A general contractor's insolvency or irresponsibility is often forced upon the owner or backer by construction privileges; such privileges can, at this time, favour fraud and irregular dealings to the detriment of those whose essential function it is to furnish funds for building construction. In many cases, the persons who enjoy such privileges could otherwise take the necessary measures for protecting themselves in other ways (27).

(a) Workman's privilege: the workman's privilege is certainly the most justifiable and the least misused. However, its application is restricted to a twenty-day period. This privilege does not however appear justified in view of construction decrees, legislative provisions on minimum wage, union activity in this field and weekly salary payments in these cases.

The worker's recourse should be exercised at other levels, as for instance in employment contracts. Thus, besides laws and regulations governing construction sites and works, there might be reason to provide in the sections on contracts of enterprise, services or employment, for a worker's claim to be exercised not only against the cocontracting party, but also against the person benefiting from such worker's labour, namely the general contractor or, if need be, the owner of the building (28).

Moreover, the Code of Civil Procedure could declare certain claims such as those of construction workers as being preferential for ranking purposes, as does Section 7 of the *Bankruptcy Act* (29). This would be a "personal" preference rather than a real right on property, but it would achieve similar results. The salary period to be covered could be kept at twenty (20) days. The best place for these amendments would be Articles 578 and 715 C.C.P. As in the *Bankruptcy Act* (s. 107 (1)), payment of such "preferred" creditors would be subject to the rights of holders of claims "guaranteed" by hypothec. And so the workman's privilege would no longer be useful.

(b) Supplier's privilege: several difficulties arise from the supplier's privilege (30).

These difficulties are often caused when suppliers, because of the legal privilege granted them, agree to excessive credit delays which are uncalled for given the normal course of business activity. Contractors take advantage of this and avail themselves of the credit granted them at the owner's or the financial backer's cost. Giroux insists that: "*le crédit n'est pas de l'essence de la vente et l'emploi des matériaux achetés n'est pas un élément du contrat de vente, c'est seulement un motif pour l'acheteur de contracter. Les fournisseurs réclament donc des sûretés pour le crédit qu'ils ont volontairement accordé à leurs acheteurs; ils veulent se faire protéger contre l'insolvabilité des clients qu'ils ont cru solvables.*" (31). And this is done, we might add, at the expense of the third party owner or the financial backer.

Problems concerning competition and credit needs will not be solved by elimination of privileges for suppliers of materials. But competition and credit would operate in the normal course of business and would rely neither on the privilege in question nor on the owner's or backer's tolerance, negligence or ignorance of the situation. A contractor should not be able to finance his work exclusively with funds advanced by the owner, using credit gained through the supplier's privilege. This is usually possible through bank discounts. Moreover, it is deemed unfortunate that certain backers prohibit contractors from transferring their claims for payment of advances of funds to a third party, e.g. a bank.

Finally, it is recommended to maintain the supplier's right to revendicate the goods sold, but not incorporated into the construction (a. 2013e C.C.; see Article 288).

(c) Contractors' and subcontractors' privilege: the time required for completion of the work and the amount of money involved would appear to make the contractor's and subcontractor's privilege more important than the others. Yet, these persons are in a better position to protect themselves. A contractor may easily stipulate a conventional hypothec in his contract with the owner. Any subcontractor dealing directly with the owner can do likewise or, if dealing with the general contractor, he may demand periodic payments, subrogation, or transfer of the contractor's rights against the owner (including his conventional hypothec).

In practice, the parties' efforts to avoid the consequences of privileges have proven more costly and bothersome than advantageous, and the required procedure, statements, certificates, inspection of the construction site and supervision guarantee neither that claims are well established nor that the creditor will not have to pay twice. These disadvantages could be solved in the contract. Therefore, abolition of these privileges is recommended.

(d) Architects' privilege: the architect's privilege is discriminatory: current law gives no privileges to any other professionals, e.g. engineers, contributing to construction work. However, extending privileges to everyone who contributes to the work would seem to add to present dissatisfaction.

(e) Other recourses in the construction field: while abolition of construction privileges will not necessarily solve all problems, it would be an improvement, allowing free competition without harming those holding privileges under current law.

Moreover, the contract could at times make up what is lacking.

The use of the right of ownership or of the law relating to real security has proven inadequate to create a system of exception or of protection for the "small" supplier or subcontractor; this can be done in other ways. Such other ways could be instituted through the Code of Civil Procedure or through special legislation such as the *Deposit Act* (32).

(f) Alternative solution: the comments received by the Office following publication of the *Report on Security on Property*, paved the way for an open and frank discussion of the problems and difficulties involved in financing the construction of buildings. Actually, the comments received and the discussions themselves failed to convince the Office that there was any need

to make exceptions to the proposed rules on real security. The recommendation is thus maintained that all types of privilege be abolished and that, if necessary, problems arising from the financing of construction be settled otherwise than by the use of legal security.

Still, it is felt that, if any exception is to be made (which is not here recommended), the articles following would make it possible to bring a modified solution to a problem which apparently, as we have said, should not be settled in the Code under the heading of security on property. These articles, then, are submitted as a compromise solution which would make it possible to bring this sector into line with the rest of the Draft.

If they were to appear in the section on hypothecs, they would be inserted after Article 461, so we have numbered them 461a to 461h.

461a However, a hypothec in favour of any of the persons mentioned in the second paragraph of Article 314 ranks before any other hypothec, provided the conditions in Articles 461b to 461g are fulfilled.

Comments

This article is new. It provides an exception to the rule of Article 461 that hypothecs on immoveables rank according to the date of their registration. A hypothec granted in favour of an architect, an engineer, a contractor, a supplier of materials, a workman or a subcontractor on an immoveable on which construction work, demolition, repairs or alterations are carried out by them ranks before any other hypothec, even if the other hypothec is published first. However, the preference provided for by the article is limited to the market value of the work done and the materials supplied, and applies only if the person benefiting from the preference fulfils the other conditions of Articles 461c to 461g.

The preference granted by these articles replaces the construction privilege of Articles 2013 C.C. This is the sole exception to the principle by which hypothecs are given priority according to their date of publication and hypothecary creditors are considered equal.

461b The preference is granted only up to the limit of the market value, at the time they are so used, of labour or materials used in the immoveable or in its construction.

Comments

The idea of market value of the labour and materials to measure the amount of the preference seemed preferable to the idea of additional value used in the matter of construction privileges in Articles 2013 and following C.C. It would be easier and more equitable to determine the market value of the labour and materials than to refer to the "value added to the immoveable". The market value, an idea current in business today (if only for fiscal reasons) would be determined by taking into consideration the time when the labour or materials are supplied, and not when the work is finished or when a valuation is made. A creditor who is entitled to a preference may claim only up to the value of what he has supplied.

461c The hypothecs which are entitled to the preference contemplated in 461b rank equally, proportionately, without regard to their date of publication.

For the amount in excess, they are ranked in accordance with Article 461.

Comments

This article states the rank of hypothecs in favour of the persons mentioned in the second paragraph of Article 314, when more than one of them are entitled to the preference considered in Article 461a. The present article states that these hypothecs rank equally, without regard to their dates of publication.

If the amount of the hypothec exceeds the amount of the market value of the labour and materials, the part of the hypothec in excess is ranked according to the date of its publication.

The existing principle of classification of creditors (e.g. workers, suppliers, contractors and architects), applied in Articles 2013 and following C.C., has not been retained. Since construction is a common adventure, it did not seem useful to discriminate between the various participants.

461d The preference only exists with respect to the creditor whose hypothec is published if the hypothec which is entitled to the preference is published within ninety days of the date on which the contract for supplying labour or materials was signed.

Comments

This article is new. It provides for an exception to the usual rule under which there is no time limit for registration of a real right. Since Articles 461a and following establish a preference in favour of the persons mentioned in the second paragraph of Article 314, it seemed necessary to require that the hypothecs entitled to this preference be registered within a time limit short enough to enable financial backers to be as well informed as possible of the state of the hypothec on the immoveable. A hypothec which is not registered within the time limit specified in Article 461e is not entitled to the preference considered in Article 461a, and is ranked according to the date of its publication under the usual rule of Article 461.

461e The preference only exists, with respect to the creditor whose hypothec is published, for the price of the labour and materials supplied after a written notice has been served on that creditor or delivered to him by registered or certified mail.

The notice mentions the nature of the work or of the materials to be supplied, an estimated amount based on the plans and specifications or on the contract under which the person is supplying the labour and materials, the fact that this amount may be revised, if need be, the date of that contract, and the names of the parties.

A single notice may be given on behalf of all the interested parties.

Comments

This article is based on Articles 2013e and 2013f C.C. Although it is no longer a matter of privilege (i.e. preference constituted solely by law), but rather of preference as to rank granted to a conventional hypothec, the preference procedures must be strictly regulated.

The difficulties experienced in the construction industry often arise because the funds intended to pay for the cost of work do not always reach those who took part in the construction. Articles 461a to 461h tend to facilitate the bringing together of the various parties concerned and to allow all to protect their interests in some manner. The formal notice given by the creditor to the financial backer who holds a hypothec on the immoveable is still the most direct method of establishing this communication.

However, the present article goes further than the Civil Code by compelling a person who wishes to take advantage of the preference to give notice of the estimated cost of the work, based on the plans and

specifications or on his contract (with the general contractor, for example).

461f A creditor who has received the notice contemplated in Article 461e may withhold the necessary amounts from the sums which he must advance, in order to pay the debts of the persons from whom he received the notice, or to make the deposit contemplated under Article 310 and obtain cancellation of the hypothec of those persons.

Comments

This article is based in part on Articles 2013e and 2013f C.C. This provision enables a financial backer to free himself from the preference granted under Article 461a by paying the debt of the beneficiary of that preference. It also makes a change by allowing for the possibility that a creditor might make the deposit considered under Article 310 and thus have the other party's hypothec struck off.

461g Any stipulation by which the holder of a hypothec renounces the preference in rank provided for under Article 461a, and that by which creation of such a hypothec is prevented, and any penalty clause accompanying these, have no effect.

Comments

This article is new. It seems desirable to deprive of any juridical effect the stipulation by which anyone would attempt to renounce the preference of Article 461a or to compel the holder to renounce it.

This provision seems necessary in view of the current practice to require in advance either a renunciation of construction privileges or a transfer of priority. In fact, the extreme provisions of Articles 461a to 461h are justified only by the impasse which results from the unequal position in which persons involved in financing or carrying out construction may find themselves. These provisions would be much less useful if they were not imperative.

461h Moreover, this Title applies to the hypothecs of the persons mentioned in the second paragraph of Article 314, if not inconsistent with Articles 461a to 461g.

Comments

This article is new. Since Articles 461a to 461g establish an exceptional regime for the persons mentioned in the second paragraph of Article 314 who hold hypothecs, it seems necessary to state that, except in the cases provided for in Articles 461a to 461g, the general rules applicable to all hypothecs apply to them.

(g) Vendor's privilege: the vendor's privilege is often considered the prototype of privilege, because the security thus granted the vendor is supposed to facilitate the circulation of moveable or immoveable property. This reasoning appears exaggerated.

First, the creditors of the same person would be far more "secured" if they all enjoyed a privilege. Consider the case of a lender. Lending a debtor $20,000 involves as great a risk as selling him a $20,000 house, since the borrower might squander the money and not be able to pay back his creditor on time. The law grants the lender no privilege, yet the seller is entitled to one. Why?

Secondly, the vendor does not necessarily contribute any more than the other creditors to enriching the debtor's patrimony. If a $20,000 house is in fact purchased, but the price is not paid, both the purchaser's assets and his liabilities are increased by $20,000. the patrimony is in no way increased. A loan of $20,000 would have the same result. The vendor can indeed contribute to the debtor's well-being through the sale by perhaps procuring property which is necessary or useful to the debtor, but the lender often does the same. Since the vendor is not alone in increasing the debtor's well-being, he should not be entitled to privileges. Many other creditors, including the lender, also contribute to such well-being without privileges.

The vendor's privilege is deemed unjustified. It may be that a vendor has gained advantages over a lender by virtue of the traditional rules forbidding loans with interest. Conventional hypothec, which might be stipulated in all cases by a vendor, would serve the same purposes as privilege and can be adjusted to meet the parties' needs.

Article 2100 C.C. meets with no favour. This article grants retroactive effect to any vendor's privilege registered within thirty (30) days of the sale; this period seems a source of difficulty and confusion which favours negligence on the part of vendors. Registration of the contract before paying the funds owed, practiced by some, seems to maintain the advantages of retroactivity while eliminating its disadvantages.

Thus, abolition of the vendor's privilege and of the rule in Article 2100 C.C. governing thirty-day retroactivity is recommended (33).

Adoption of Article 463 is recommended to eliminate any doubt as to the validity of a vendor's conventional hypothec when the purchaser's property is affected by a general hypothec.

Article 2050 C.C., having become unnecessary, would thus be abandoned.

The recommendation pertaining to vendors applies just as well to the donors, copartitioners, coheirs, and colegatees mentioned in Article 2014 C.C.

(h) Claims for improvements: right of retention: the right of retention occurs more frequently with regard to moveables than to immoveables, although the Civil Code provides for a few cases of retention of immoveables (34). The right of retention on immoveables is sometimes replaced by privilege on immoveables (35).

The rule of Article 419 C.C., which allows pure and simple retention of property which has been improved, is found to be even simpler than the privilege. A judicial sale does not affect the right of retention of vigilant creditors and, in this sense, such right is more powerful than a privilege. It was deemed necessary and practical to retain this right of retention and Article 286 consecrates it.

(i) Domestic servants and employees of railway companies: privileges of domestic servants and of manual labourers can be easily compared to those of construction workers (36). The privilege itself is of no great assistance to these people. It is felt that the system of preferential payments of all the debtor's goods, in cases of bankruptcy, for a given number of work-days, e.g. 20 work-days or one pay period, whichever is the longest, constitutes a simple solution. If such preferential rights are restricted to claims of manual workers and support claims, there is no danger of a suborder of general privileges being created.

Restrictive interpretation of the Code entails discrimination with respect to labourers and servants. It would be preferable to extend the preference, in cases of bankruptcy, to all of the debtor's manual workers, regardless of their type of employment (see also *infra,* on employees, privilege on moveables).

(j) Minors and interdicted persons: since legal hypothecs of minors and interdicted persons are obsolete in practice, it is recommended that they be abolished.

It would appear more advisable to obtain a guarantee through a

surety or through liability insurance than to use legal hypothecs or privileges.

(k) Other forms of privilege and legal security: most other privileges result from special laws ensuring payment of various debts, such as taxes and special duties. The above comments on tax payments apply to the majority of such privileges.

All privileges resulting from the *Special Corporate Powers Act* (37) should also be abolished; equivalent provisions are to be found in the Draft, especially in the sections on general and floating hypothecs.

Abolition of all forms of privileges which can adequately be replaced by personal recourses, sales for taxes and the other rights provided for by law is strongly recommended.

Moveables

Since conventional hypothecs on moveables would be introduced into the Civil Code, privileges on moveables, even if they were retained, would lose their importance. Let us review them again one by one.

1. Law costs: the comments concerning privileges on immoveables for law costs apply here. The problems, however, are more pointed in matters of moveables; a great many seizures and sales of moveables take place which barely yield what is necessary to pay only the costs of the seizure and sale (38).
2. Expenses incurred in the interest of all the creditors: the comments concerning privileges on immoveables for these expenses apply here.
3. Municipal taxes: here, we are dealing with privileges on moveables for certain municipal taxes, a recourse which in no way seems justified.
4. Wages of servants and salaries of railway company employees: the legislative policy outlined in respect to servants and employees does not rest on privileges, but rather on preferences to be granted to them on the general mass of debtors' property in case of failure. It is proposed that "guaranteed" creditors, namely those who hold hypothecs on a debtor's property, be first allowed priority in realizing their claims; then, when all the debtor's other property is distributed, to allow certain creditors, like domestic servants and manual workers, to be paid in preference to others (39).

It is believed that all manual employees ought to be able to benefit from this preference, whatever their type of employment, for

the shortest of the two following periods: one pay period or twenty days.

There is hardly any reason for privileges as regards persons hired for fishing, farming (tillage and seeding costs), wood cutting, theatre exhibitions (*sic*) and circuses. Considering the strength of union action in most trade bodies, privileges of these creditors no longer appear appropriate remedies.

5. Vendors: the vendor's position has already been analysed in the section on privileges on immoveables; these explanatory notes apply as well to privileges of vendors of moveables.

According to Articles 281 and 282, any right and any security stipulated by a vendor in order to ensure payment of a price becomes a hypothec. It follows that contractual resolution or rescission presently provided for in the Civil Code would no longer benefit a vendor who henceforth would have to resort to the rights and recourses granted to hypothecary creditors. The right of unpaid vendors to retain sold property is retained, however, and made subject to the rules governing the right of retention.

As for the vendor's right of revendication, reference is made to this in the explanatory notes on Articles 288 and 289.

6. Donors, copartitioners, coheirs and co-exchangers: the philosophy behind this privilege is similar to that behind vendors' privileges and the same recommendations are made in this regard.

7. Right of retention: the Civil Code places on equal footing the claims of those who have rights of pledge and of retention (a. 1994 sub-par. 4) in order to settle among them (a. 2001).

Since the Draft replaces the right of pledge by hypothecs on moveable property, the privilege of pledgees would thus disappear.

It is recommended to abolish privileges granted to persons holding a right of retention, since such right, as readjusted in Articles 286 and 287, seems sufficient to ensure protection of the creditor (40).

Finally, a creditor who has a right of retention would always be able to obtain a conventional hypothec from his debtor; this would permit him to bring about judicial sales himself in order to be paid according to his rank. In most cases, creation of hypothecs on moveables will be that much easier since creditors are put in possession of the property. This possession will apply as much to the validity of rights of retention as to the validity of conventional hypothecs on moveable property which creditors would be able to

stipulate. The small degree of formalism regarding hypothecs on moveables favours this solution.

8. Lessors: lessors' privileges are outdated today as a legal remedy and should be abolished. On the one hand, it has been pointed out that seizure of household furniture yields very little (41). On the other hand, not all moveable property used by a person or a family for personal or domestic purposes should normally be seizable. The exceptions presently provided for in the Code of Civil Procedure should be extended (42).

   As for commercial leases, conventional hypothecs could be gainfully stipulated, and thus take the place of privileges.

9. The Crown: the comments with regard to the Crown's privileges on immoveables apply to its privileges on moveables; it is recommended that these privileges be abolished.

10. Owners of property lent, leased, pledged or stolen: the privilege in Article 2005a C.C. is quite unusual. It comes into play only as regards moveables, because as far as immoveables are concerned, owners of property seized *super non domino* can always assert their rights at the useful time. This privilege is, at the least, curious because if the owner's right to establish his right of ownership is recognized, this owner is implicitly acknowledged as always being the owner of the property. Thus, it seems preferable to acknowledge the simple right to revendicate where necessary, or to permit the owner to recover all proceeds of the sale if it is considered that sale by auction confers ownership on bidders. The rules governing the right of ownership should come into play here, even in matters of moveables.

    Actually, Article 2005a C.C. does not really create a privilege; it aims to improve lessors' privileges on property found in leased premises.

11. Ownership of copyrights and other similar rights: a suggestion was made to the Office that a privilege be granted to certain persons who hold copyrights on property or are entitled to royalties or fees as artists participating in musical, literary, cinematographic or other works.

    Since most of these rights arise from agreements, it does not seem necessary to create a special privilege to ensure payment of the rights and claims of such persons. Personal obligations will often be assumed by owners of the property, and it is not clear that these obligations must necessarily be passed on to subsequent purchasers of the property in the absence of any express stipulation. It is believed,

rather, that there are grounds for making use of conventional hypothecs on moveables the publication of which would ensure as much protection to these creditors as any legal privilege.

12. Persons entitled to support: are there grounds for creating a privilege for support? It is recommended that, where there is bankruptcy, these claims enjoy patrimonial preference upon a debtor's mass of property to the same extent as claims by manual employees.

    It is believed that, in cases of failure by the debtor, claims for support should be subordinate to those of employees and workers described above. In effect, given the similarity between these two claims and the position of the manual worker (whose salary goes first of all for food and lodging), it is believed that, in fairness, he must be preferred to the other ordinary creditors. In view of the necessary nature of their claims, manual employees thus should be preferred to persons to whom a debtor owes support (43).

    Persons owed support would still be able to enjoy judicial hypothecs, should the occasion arise, and even conventional hypothecs which could be contracted in their favour in order to ensure payments for support. Stipulations for conventional hypothecs might easily be made in agreements or partitions in the wake of separations or divorce.

13. Tithes: privileges for payment of tithes no longer have any justification, and their abolition is recommended.

14. Funeral expenses: whatever the historical reasons for such privileges, for the reasons given above, it is not believed that these privileges, nor those for the "mourning of the widow" (see a. 2002 C.C.), need be retained.

15. Expenses of last illness: the advent of health insurance and hospitalization insurance enables to recommend pure and simple abolition of these privileges including doctors', druggists' and nursing fees.

16. Suppliers of provisions: these suppliers are presently included within the definition of domestic servants (a. 2006 C.C.) and enjoy a privilege as regards their supplies for the last twelve months. Since it has been recommended that privileges of domestic servants, as those of vendors, be abolished, it is believed that these privileges should be eliminated as well.

17. Merchant vessels, cargo and freight: maritime privileges on merchant vessels, their cargo and freight would also be repealed, subject in certain cases to the *Canada Shipping Act* (44).

18. Other privileges: the laws of Québec contain dozens of other

privileges which, as it has already been mentioned, aim mainly at ensuring fulfilment of claims belonging to the Crown or to municipal and school corporations. Total abolition of these privileges is recommended. The grounds indicated above justify this recommendation, the more so since, in most cases, sales for taxes constitute a powerful, adequate remedy for these needs. Finally, many of these claims relate to permits, licences and other "privileges" whose suspension or cancellation constitute a real remedy.

Privileges resulting from the *Special Corporate Powers Act* (45) discussed above, would be abolished and replaced by specific provisions of the Draft on hypothecs (46).

The next Title on *Administration of the Property of Others* contains the provisions common to all forms of administration, and reproduces the rules at present found in the chapters on *Mandate*, *Deposit*, *Execution of Wills*, *Administration of Estates*, *Corporations* and in the Title on *Trusts* (including some general provisions of the *Companies Act*) (47).

The principal aim of the Draft is to combine these rules under a single Title so as to avoid repeating them under each individual Title or chapter, or considering mandate as the typical contract on administration of the property of others. The provisions peculiar to each contract or situation will be set out under their respective Titles. Moreover, the Draft codifies rules that are applied in practice, though not enunciated in the Civil Code.

Since the Draft is intended to govern administration proper, it contains no special rules devoted to the rights and recourses of beneficiaries of administration. It nevertheless contains certain provisions relating to the general recourses of the beneficiary. The rights and recourses which interested persons may exercise either against administrators or in their stead will be found, *inter alia*, in the provisions on mandate, deposit, trusts, succession and protected persons, and in the *Companies Act*.

The Title on the *Administration of the Property of Others* is intended to determine the obligations of administrators, though it lists some of their rights. Moreover, if all administrators are subject to the same general obligations and to the same rules of conduct, they do not all have the same powers. Thus, in the case of mandate, reference must be made to the contract to ascertain the extent of the powers, although the basic obligations of mandataries remain the same regardless of their powers. The rules which apply to each situation will specify the exceptions, as well as the respective rights and powers of interested persons.

The classification of obligations and powers into three categories: (a) custody, (b) simple administration, (c) full administration, (Article 487)

corresponds to the classical division of the kinds of administration. This division would serve as a basic reference for contracts and other cases of administration created by law. Administrators' powers might well differ according to circumstances. Thus, an administrator who has only one act to perform will not have the same powers as one who has a function to fulfil.

The Title on the *Administration of the Property of Others* thus constitutes the common denominator of all these situations and enunciates the obligations which administrators must respect.

The codification proposed is based on the provisions of the Civil Code, to which are added several rules which have been used in practice or applied by jurisprudence. Several of these rules are also derived from recent legislation respecting various special types of administrators, notably trustees and corporate directors. There was then little hesitation in resorting to foreign laws to extract from them basic principles which could then be formulated within the context of the Civil Code.

Three main categories for the administration of the property of others exist in the present law:

1. custody or detention: deposit (a. 1795 C.C.); pledge (a. 1968 C.C.); carriers (a. 1672 C.C.); innkeepers (a. 1814 C.C.);
2. possession with use:
   (a) simple use: loan for use (a. 1762 C.C.); lease of things (a. 1605 C.C.); usufruct (a. 443 C.C.); use and habitation (a. 487 C.C.);
   (b) use with alienation: emphyteusis (a. 567 C.C.); consumable things: loan for consumption (a. 1778 C.C.); quasi-usufruct (a. 452 C.C.);
3. possession with use of the rights of others, for the benefit of others: sequestration (judicial and conventional) (a. 1818 C.C.); mandate (a. 1701 C.C.); testamentary execution (a. 905 C.C.); tutorship (a. 249 C.C.); curatorship (a. 337 C.C.); judicial advisers (a. 349 C.C.); trust (a. 981a C.C.).

The initial virtue of the Draft thus lies in the elimination of similar or corresponding provisions. This method seemed preferable to the use of a standard contract to which the provisions concerning individual contracts would refer. Although deposit and mandate are obviously of a general nature, they cannot be adapted to all situations. A number of references in the Civil Code disclose this:

1. a. 290: tutors administer; compare article 290 with articles 1484 and 1706 C.C.;

2. a. 441q and following: administrators of property in co-ownership act "as administrators"; a series of articles similar to those on mandate and trust is repeated;
3. a. 918: testamentary executors are "seized as legal depositaries" with powers similar to those of mandataries;
4. a. 981b: trustees are "seized as depositaries and administrators" with full powers;
5. a. 1851: partners have a power of management;
6. a. 1972: creditors hold things pawned "as a deposit";
7. the provisions on deposit and mandate refer to each other as well.

In the light of these provisions, it can be seen that the Civil Code deals with "administration" of the property of others without, however, precisely defining this expression. For want of anything better and according to the principles of interpretation, reference is generally made to the provisions of the Title on *Mandate*, to Article 1064 C.C. and to the other general rules to the extent to which they are applicable.

In certain cases, such as the interpretation of Section 80 of the *Companies Act*: "The affairs of the company shall be managed by a board ...", the absence of special provisions applicable to these situations and of a general heading on the administration of the property of others has created serious problems of interpretation and application of existing laws.

The need for simplification of the various existing provisions and for unification of the concepts and terminology used supports the requirement of general rules on the administration of the property of others. An example is the obligation to act as a prudent administrator (the obligation of prudence and diligence of the Draft). Over and above the principle set out in Article 1064 C.C. on the keeping of a thing as a prudent administrator, this idea is found in practically all parts of the Civil Code: a. 290 (tutors); 339-343 (curators); 441r (administrators of property in co-ownership); 464 (usufructuaries); 490 (use); 581 (emphyteusis); 919 (testamentary executors); 949-955 (institutes under a substitution); 981b (trustees); 1617 (lease); 1710 (mandate); 1766 (loan for use); 1802 (deposit); 1814 (innkeepers); 1819 (sequestration); 1972-1973 (pawning).

Examples could also be given, *inter alia*, of the obligation to render account found in almost all of the above-mentioned cases, the obligations resulting from deterioration or abuse, the obligation to return property, the obligation to make it productive, the right of retention, judicial supervision, solidarity or the rule of the majority.

No claim is made to resolve all the problems of administration raised in jurisprudence under the Civil Code. In fact, the difficulties met with in the past were often occasioned by a lack of precision in the Code and by the confusion generated by the very term "administration" which was used in various senses. It is hoped, however, that the use of the three categories of "custody", "simple administration" and "full administration", with an all-encompassing definition of the aims pursued and the incidental powers of administrators, would eliminate most of the difficulties encountered until now.

The Title on *Trusts* amends existing law by considerably broadening the scope of application of trusts. The limited use permitted of trusts in existing law is very frustrating, especially in business circles.

The integration into a civil law context of an institution so closely associated with the very evolution of English law gives rise to many problems centered on the fact that each system of laws has its own concept of ownership. Indeed, it is difficult to reconcile the civilian concept of ownership with the trust, which is essentially the product of the distinction between Law and Equity (48). Moreover, the introduction by special legislation (49) of provisions introducing various forms of trusts has given rise to extremely varied interpretations (50).

When trusts are examined in a civil law context, it becomes immediately apparent that the rights exercised by the trustee concerning the property placed in trust are not those of an owner, in the classical sense of the term, even though the trustee may have all powers of administration and alienation. The beneficiary cannot be the owner either, since he is more in the position of a creditor *vis-à-vis* the trust. As for the grantor, it is essential that he divest himself of the property he places in trust. By suggesting that property placed in trust constitute a patrimony distinct from the personal patrimony of the trustee, it is sought to ensure the autonomy of such fiduciary patrimony and to assure its permanence whatever be the identity of the trustee (51).

The proposed broadening of the law on trusts is restricted to trusts constituted explicitly (*Express Trusts*). It does not introduce in Québec law the English theory of trusts arising by operation of law (Resulting Trusts and Constructive Trusts) (52). Civil law has the appropriate mechanisms for regulating most of the situations which lie at the source of the trust, such as mandate, management of affairs, co-ownership, the rules relating to the transfer of ownership and those governing evidence, and the recommendations on administration of the property of others.

It is generally believed in existing law that any trust must be attested to in writing (53). It is not recommended, however, that a writing be

necessary for the validity of the trust, although it could be required by the rules governing the contract which creates the trust. Moreover, any testamentary trust must be in one of the forms required for a will, and in practice the rules on evidence may render a writing necessary.

Under existing law, it is acknowledged that an unlimited faculty of option may be conferred on a trustee charged with using property bequeathed to him for charitable or other lawful purposes (Article 869 C.C.). This exceptional rule is extended to trusts established for the same purposes by gifts *inter vivos*. It is not proposed, however, to introduce it in trusts constituted by gratuitous title for a purpose of private interest. As to trusts constituted for the benefit of a donee or a legatee, a provision is suggested acknowledging the right of the grantor, the trustee and even a third party to determine the share of the beneficiaries when the deed expressly provides for this.

The rules relating to trustees and the administration of trusts would be the same for all kinds of trusts. These rules as a whole are in accordance with existing law or with practice and are mainly laid down in the Title on the *Administration of the Property of Others*, which is referred to.

As to the duration of a trust, the Draft considers each trust differently depending on whether it is constituted for the benefit of a donee or a legatee, or for a purpose of public or private interest. As regards the first kind, the same rule would be applied as is applied now in substitution. It is proposed that the second kind of trust may be perpetual. Trusts for a purpose of public or private interest would be under the supervision of the Public Curator. This rule would not apply, however, to trusts constituted by onerous title.

The Title on *Trusts* recommends, *inter alia*, adoption of an express provision to the effect that the donor may reserve the right to receive all or part of the revenue of the trust or the capital, a presumption of the beneficiary's acceptance, the suppletory rules on the devolution of the beneficiary's interest in the event of lapse or of the property of the trust when the trust ends, and the possibility of going to court in order to change the provisions of a trust deed or to terminate a trust.

As for the rest, the provisions applicable are those of general law on the capacity to contract, the law on obligations, on evidence and on the publication of real rights.

TITLE ONE

NATURE AND KINDS OF PROPERTY

1

This article is new law. The insertion of a definition of the word "property" into the Civil Code is intended to correct a classification error that has been perpetuated down the centuries. The word "property", in fact, has been customarily used to designate both things and rights, the former being qualified as "corporeal property" and the latter as "incorporeal property". This system presents rights and things as two parts of the same entity when, in fact, they are two absolutely distinct concepts which, logically, should not be joined under the same generic heading.

This faulty terminology results from the confusion in old Roman law between the right of ownership, and the thing owned. In actual fact, the right of ownership is incorporeal as are the other real rights to which things are subject. On the other hand, however, things are subject not only to the right of ownership, but to other real rights as well.

R. von Jhering explains how this classification error came about (54):

> *"Un vestige de cette conception ancienne... existe encore dans la classification des choses en "res corporales" et en "res incorporales"... La propriété y figure comme "res corporalis", alors que tous les autres droits se trouvent rangés dans la seconde catégorie. On ne peut, à mon avis, contester la fausseté de cette assimilation de la propriété avec son objet. La propriété est une "res incorporalis" au même titre que les autres droits réels, et, en droit, lorsqu'on la transfère, ce n'est pas la "res corporalis" qui est transmise c'est le droit, la "res incorporalis". Néanmoins cette erreur de classification a une base historique: elle est l'expression très adéquate de la conception du droit ancien... qui, dans la propriété, confondait la chose et le droit."*

The same idea is expressed by René Savatier (55):

> *"Nous avons quelque scrupule à parler encore de biens corporels. Depuis Jhering, les juristes savent pertinemment qu'en réalité, tous les biens s'analysent, pour eux, en des droits, donc en une notion incorporelle. C'est par un raccourci, par une élision, que, dans un patrimoine, on compte comme des biens une maison ou un bijou, car le patrimoine ne comprend à l'analyse, que des biens incorporels, des droits. Ce qu'il faut seulement noter, c'est que ces droits s'exercent tantôt sur des objets concrets: des choses*

corporelles, tantôt sur des objets abstraits: une créance, un monopole d'exploitation, une part sociale."

The article gives a definition of "property" which is more in conformity with legal reasoning: property consists of personal and real rights, which make up the assets of the patrimony.

2

This article completes and explains the definition given in the preceding article (56).

CHAPTER I

MOVEABLES AND IMMOVEABLES

3

This article repeats Article 374 C.C., amending it to take into account the comments made on Article 1.

4

This article contains a residuary provision creating a presumption which is reversed by the express provisions of the Civil Code. This presumption thus dispels any doubts which may arise with respect to classification of property and things.

5

Articles 5 to 9 list the cases in which the law provides that things and property are of an immoveable nature.

It deals first with immoveable things, then with immoveable rights.

Article 375 C.C. and the four categories of immoveables that it defines would be discarded. As regards things, the category of immoveables by destination has been done away with.

Article 376 C.C. has been slightly amended: the word "buildings" has been replaced by the expression "buildings and works", which has a broader scope than "buildings". The word "buildings" has been broadly interpreted in jurisprudence which has regarded as "buildings" such works as bridges, pipes, telephone systems, and systems for the distribution of electricity, for example (57). The expression "buildings and works" describes more precisely the nature of these constructions which are attached to the ground.

Article 376 C.C. is further amended by deleting the words "by their nature". In effect, the different categories of immoveables listed in Article

375 C.C. are abolished, and since there is only one type of immoveable, the qualification "by their nature" is no longer of any use.

Article 377 C.C. would be repealed; the works listed in that article are included in the definition in the article.

6

The first paragraph of the article reproduces the substance of Article 378 C.C.

The second paragraph is new. It is based on the draft of the *Commission de réforme du Code civil français* (a. 5) and on the Ethiopian Civil Code (a. 1133).

The words themselves, "minerals" and "plants" among others, are used here in their usual sense, since they are not qualified.

7

The first paragraph of this article reproduces existing law, according to which moveable things incorporated into an immoveable lose their individuality and become part of the immoveable by nature into which they are incorporated.

The second paragraph, and some of the provisions which follow, are intended to revise the theory of immoveables by destination contained in Articles 379 and 380 C.C. Some elements of this theory have been retained. As the law now stands, immoveables by destination include not only moveable things which have been attached to an immoveable by nature while retaining their individual character, but also things which have simply been placed on an immoveable by nature. Jurisprudence has broadly interpreted the theory of immoveables by destination, to the extent that railway carriages and industrial or commercial trucks are sometimes considered immoveables (58). The Draft does away with immoveables by destination and treats things which are physically attached to land, to a building or to a work as integral parts of an immoveable. Things which are merely placed on an immoveable retain their moveable character. Removal of immoveables by destination leaves only moveable and immoveable property.

At present, the law requires that to become immoveable by destination, a moveable thing must be attached to an immoveable by nature, or placed thereon, by a person who is the owner of both the immoveable by nature and the moveable thing. Moreover, the owner must have attached or placed the thing, in the words of the Code, "for a permanency". Accordingly, the tenant of an immoveable could never make a moveable thing which he owned an immoveable by destination; similarly, the owner

of an immoveable can never transform a moveable thing belonging to a third party into an immoveable by destination. However, in both these cases, the moveable thing becomes an immoveable by nature if it is incorporated into the immoveable and loses its individuality even though, in the first case, the person responsible for the incorporation was a tenant, or, in the second, he was not the owner of the thing incorporated.

The new text stipulates that the things must be physically and permanently attached to the immoveable; if a thing has been attached to an immoveable by a person other than the owner of the immoveable, it would seem difficult to maintain that the thing had been attached permanently, so that it would not become an integral part of the immoveable. On the other hand, an attempt is made to protect the existing rights which third parties may have to the things which are attached to an immoveable ("without prejudice to the existing rights of third parties in such a thing"). According to this provision then, the owner of a thing which has been physically attached to an immoveable belonging to another person could, in most cases, have his right of ownership recognized, thereby preventing the thing from becoming an integral part of the immoveable.

8

This is a reproduction of the second paragraph of Article 386 of the present Code, with slight alterations in the drafting. The first paragraph of Article 386 C.C. has not been retained.

9

This article governs immoveable rights. Thus, we are concerned with what Articles 375 and 381 C.C. term immoveables by reason of the objects to which they are attached.

The article contains a general provision which effectively replaces the enumerations found in Article 381 C.C. The new provision is partly based on Article 9 of the draft of the *Commission de réforme du Code civil français* (59).

The category "immoveables by determination of law" is not retained: Article 382 C.C. would be repealed.

10

The things mentioned in this article are generally considered in law to be immoveables by destination (Articles 379 and 380 C.C.).

Since the category "immoveables by destination" is no longer used and only physical attachment is retained as a standard for determining what things are an integral part of an immoveable, it seems then necessary

that the above provision be adopted to emphasize the fact that moral or intellectual attachments, now recognized in Article 379 C.C., are not retained as such standards.

11

This article is new; it is based on Article 7 of the draft of the *Commission de réforme du Code civil français* and Article 1128 of the Ethiopian Civil Code.

This solution is also recognized by the doctrine which considers that the debt of the creditor is incorporated in the instrument which establishes it; the right is transferred when the instrument is remitted; some confusion exists between the right of the creditor and the instrument asserting that right; the instrument is a moveable thing (60).

12

This article is new; it is based on Article 7 of the draft of the *Commission de réforme du Code civil français* (61) and on Article 1129 of the Ethiopian Civil Code. It is intended to avoid any doubt from the fact that the physical consistency of these various forms of energy, such as electricity, gas, and heat, is not as evident as in things which can be seen or touched.

Chapter Second of Book Second of the Civil Code concludes with Articles 395 to 398 which define such expressions as "moveables", "furniture", "moveable property", and "moveable things", which in particular seem unnecessary (62) and, in line with the example set by the Ethiopian Code and the draft of the *Commission de réforme du Code civil français*, the Draft proposes that they be abolished since they do not bind the judges who, even in the face of similar provisions, will always seek to know the true intention of the parties (63).

CHAPTER II

THINGS IN THEIR RELATION TO THOSE WHO HOLD RIGHTS TO THEM OR WHO POSSESS THEM

13

In substance, this article reproduces Article 585 of the present Code; it is the first of a series of provisions devoted to things considered in relation to appropriation: things not capable of being appropriated, things capable of being appropriated but which are not appropriated, either because they never were appropriated or because the appropriation

has ceased; the latter example refers to things which have been abandoned by their former owner.

The air, the sea and water are customarily provided as examples of the common things referred to in the article. It is not necessary to provide such examples in legislation; moreover, these things are regulated by administrative laws and laws of public order.

However, the expression "laws of public policy" seen in Article 585 C.C. has not been retained in the text of the article because of its very precise meaning in civil law.

14

This article serves as a link between the preceding article and Articles 15 and 16.

15

This article gathers into one text the rules stated in Articles 588, 589, 590, 591, 592, 593, and 594 C.C. These provisions are incomplete and refer, for the most part, to various statutes.

The new text summarizes in a simple statement the principle which emerges from the various provisions contained in Articles 588 C.C. and following, and provides at the same time for the application of special laws.

16

This article complements the preceding one, repeating existing law. An owner who has not voluntarily abandoned a thing belonging to him but, on the contrary, has involuntarily lost it, continues, in principle, to have the ownership of that thing. He will cease to be its owner upon the accomplishment of the prescription. Certain special statutes govern the method of disposal of effects which have not been claimed by their owner, such as the *Post Office Act* and the *Customs Act* (64).

17

This article repeats the substance of Article 586 C.C.

18

This article combines in one article the propositions contained in Articles 401 and 584 C.C. It is in accordance with present doctrinal authority which states that immoveables cannot be ownerless; only moveables abandoned by their owner may have no owner (65).

19

The first paragraph of this article substantially repeats Article 405 C.C. The second paragraph adds a reference to possession.

TITLE TWO

POSSESSION

CHAPTER I

THE NATURE OF POSSESSION

20

The first paragraph of this article amends Article 2192 C.C. in line with the strict meaning given "possession" and "holding". It is based on Article 20 of the draft of the *Commission de réforme du Code civil français* (66).

The second paragraph repeats the substance of Article 2194 C.C.

In everyday language, "possession" refers sometimes to legal possession which, as such, produces effects, and sometimes to mere holding. In this chapter and throughout the draft Civil Code, "possession" indicates only legal possession and is never used to indicate precarious or natural *de facto* possession; the term "detention" will be used exclusively in the latter case.

21

The first paragraph of this article repeats the substance of Article 2195 C.C. The second paragraph is new although it is in line with existing law (67).

22

This article substantially repeats Article 2196 C.C.

23

This article reproduces Article 2193 C.C. with slight changes in form.

24

This article repeats the substance of Article 2199 C.C.

25 and 26

These articles repeat the substance of Article 2198 C.C., amending it to eliminate the distinction between the possessor's successors by particular title and those by universal title, and specifying the rules applicable to all defects of possession.

27

This article re-formulates the definition of possession in good faith, given in Article 412 C.C. The new definition, based on the draft of the *Commission de réforme du Code civil français* (68), is preferable to that given in Article 412 C.C. Since good faith is presumed, there is no need for a definition as descriptive as that in Article 412 C.C.

28

This article is based on Article 2202 C.C. However, the second paragraph of that article is omitted since it lays down an ordinary rule of evidence (a. 2 of the Book on *Evidence*). Moreover, if there are effects attached to all types of possession and additional effects attached to possession in good faith, it is obvious that possession may be in bad faith.

The presumption can thus be rebutted by proof to the contrary without it being necessary to stipulate this expressly.

CHAPTER II

EFFECTS OF POSSESSION

29

This article lays down a rule that is an application of the general principles of evidence (69). This provision derives from Article 25 of the draft of the *Commission de réforme du Code civil français.*

This chapter indicates what the effects of possession are. Some of these are not governed by any detailed rules and are covered fully and exclusively in this chapter. Other effects of possession are governed by detailed rules either in other parts of the Civil Code or other legislation; this applies in the case of the theories of prescription and of possessory actions. As to the effects of the second kind, this chapter only mentions them, with reference to the other legislation covering them.

30

This article mentions one effect of possession.

31

This article indicates one of the effects attached to all types of possession and refers to the Books on *Prescription* and on *Publication of Rights* (70) for the detailed rules in this regard.

32

This article refers to the possessor's recourses with respect to improvements made.

33

This article gives effects of possession in good faith. The second paragraph of Article 411 C.C. would be deleted since the possessor becomes the owner of the fruits. No account is taken of the fruits in calculating the amount which represents the improvements to which the possessor is entitled.

TITLE THREE

THE RIGHT OF OWNERSHIP

CHAPTER I

NATURE AND SCOPE OF THE RIGHT OF OWNERSHIP

34

This article takes up the definition given in Article 406 C.C. with some changes based on Article 832 of the Italian Civil Code and Article 641 of the Swiss Civil Code.

The word "absolute" has been replaced by "to the fullest"; ownership is thus defined as the fullest right that can be had over a thing, subject to the provisions of law.

35

This article substantially reproduces Article 408 of the existing Code which introduces two chapters devoted to accession over what is produced by a thing and over what becomes united and incorporated with a thing. The second chapter governs a means of acquiring the right of ownership. It is suggested that "accession" be used only when the owner of a thing becomes the owner of a thing which belongs to another person and is incorporated with his own. The cases covered in the first chapter are based more on the question of the extent of the right of ownership.

Given the generality of Article 408 of the existing Code and the present article, it seems useless to retain Article 409 C.C. which refers to ownership of fruits produced by a thing.

As to costs of production, the article substantially repeats Article 410 C.C.

36

This article lays down a general rule: the risks of the thing are linked to the right of ownership - *res perit domino.* The possessor, whether in good or bad faith, is not bound for any loss or deterioration of the thing unless caused by his fault.

37

This article substantially repeats Article 414 C.C., which enforces the application of the ancient maxim *cujus est solum ejus debet esse usque ad coelum et usque ad inferos* (71).

This principle, however, must take account of the fact that it could effectively be limited by special laws or public order. The second paragraph of the article conveys this character.

38

This article recognizes that, quite apart from legal derogations to the rule of accession, these may also be conventional derogations, as in the case of a declaration of condominium or of the creation of a right of superficies, both of which are governed by special provisions (72). The article also recognizes the possibility that a certain space be the object of an alienation. The concepts of ownership of space and of the vertical *cadastre* are thus introduced in the law (73).

39

This article replaces Articles 528 and 529 C.C. It complements Article 37 and outlines the rights of the owner. It should be pointed out that exceptions may be made to permit air traffic, for instance, or the installation of works necessary for public utilities services.

It did not seem necessary to retain Article 529 C.C., which is a follow-up to a provision in which it is stated that no owner may maintain trees beyond a certain distance from the property dividing-line.

40

This article takes up, in substance, Article 502 C.C. It states more specifically that a spring constitutes an integral part of any piece of land and is subject to the normal exercise of the right of ownership.

41

This article details the rights of riparian property owners, but stipulates that this right may be subject to particular conditions set by special laws.

This article amends Article 503 C.C. and gives express recognition to a principle that has hitherto been recognized in practice.

42

This article is new. The public has a general right of use over watercourses so there must be legal access to them whether by public

highway or along a right of way granted by the riparian owners. There is also the case of an owner who wishes to travel on parts of a watercourse elsewhere than in front of his land. Those who exercise this general right of use should not hinder the special right of use granted to the riparian owners, nor should they install themselves on the riparian property by reason of this right of use.

CHAPTER II

LIMITATIONS AND RESTRICTIONS ON THE RIGHT OF OWNERSHIP

Section I

Expropriation

43

This article repeats Article 407 C.C. with the addition of a reference to the procedure of expropriation.

Section II

Boundaries

44

This article repeats Article 504 C.C., replacing the rule that the boundary can be determined by mutual consent or through the intervention of judicial authority by a mere reference to the Code of Civil Procedure (74).

Section III

Flowing water

45

This article amends Article 501 C.C., but only as to form.

46

This article repeats the substance of Article 539 C.C.

Section IV

Fences

47

This article replaces Articles 505 and 520 C.C. It establishes that an owner has the right to build a wall or other division at his own expense; this principle is not contained in the existing Code. It should also be mentioned that there can be exceptions to this rule; indeed, it is normal that municipalities, for reasons of urban planning or aesthetics, adopt their own by-laws on this question. The possibility of the owner compelling his neighbour to contribute to the cost of a common separation is in accord with existing provisions.

48

This article repeats and generalizes the rule laid down in Article 527 C.C. It appeared advisable, contrary to Article 527 C.C., to maintain the presumption of common ownership, even in cases where only one of the properties is, in the words of Article 527 C.C., "enclosed". The presumption may be rebutted, in which case the neighbour may acquire common ownership of the wall which belonged exclusively to his neighbour.

49

This article repeats Articles 523, 524 and 525 C.C. with modifications as to form. See the explanatory comments on Article 48.

Section V

Common ownership

50 and 51

These articles are new law.

Any two neighbouring owners may agree to build a wall that will be commonly owned, and to share the expense; the overlapping is voluntary in this case, and is not a legal right.

However, where only one owner builds, the foundation slabs are not included in the description of the wall and may overlap on the neighbouring land; the reason for permitting this is that the foundation slabs are buried below ground and could not usually harm the neighbouring property.

52

This article amends Article 518 C.C., which allows acquisition of common ownership not only of a wall under construction, but also of a fence-wall (75). The article limits this possibility to cases of buildings.

53

This article clarifies the term "wall" which is often designated as being a work of brick, stone or masonry; there is no reason, however, for refusing the option to acquire common ownership when the construction is a wooden building.

54

This article repeats Article 510 C.C. It maintains the presumption of common ownership with regard only to a wall used to support buildings. Article 511 C.C., which describes marks indicating that a wall is not common, is not repeated.

55

This article repeats the substance of Articles 514 and 519 C.C. The indications of Article 514 C.C. as to the depth to which joists and beams may be placed are omitted.

56

This article combines Articles 512 and 513 C.C. in a single provision; only the wording has been changed.

57

This article combines Articles 515 and 516 C.C. The present terms are retained, except for the reference to the right of view, made in the last paragraph of Article 515 C.C. It does not seem necessary to retain this limitation.

58

This article repeats Article 517 C.C. with slight changes.

Section VI

The right of view

59

This article alters only the wording of Article 533 C.C.

60

This article amends Articles 534 and 535 C.C. It removes the restrictions as to the height at which the lights are allowed, in view of the new rule whereby lights cannot be transparent.

61

The first paragraph of this article repeats Articles 536 C.C. The second paragraph inserts solutions proposed by doctrine regarding solid doors and stoops (76).

62

This article is new. If a wall or fence is high enough to prevent a person seeing into his neighbour's property, there is no reason whatever for prohibiting views at a distance of less than two metres. If this obstacle is demolished, the prohibition takes effect once more, and an owner who maintained views at a distance under two metres for many years because an obstacle prevented his seeing into his neighbour's property could not invoke prescription once this obstacle is removed (77).

63

This article reproduces Article 538 C.C.

Section VII

The right of way

64

This article repeats Article 540 C.C.

Although Article 540 C.C. grants the right of way only to the owner of enclosed land which has no access to a public road, jurisprudence has accepted that insufficient access for use of such land, like difficult or impassable access, constitutes enclosure (78).

65

This article repeats the solutions of Articles 541 and 542 C.C. The new wording is drawn from Article 694 of the Swiss Civil Code, Article 682 of the French Civil Code and Articles 1221 and 1222 of the Ethiopian Civil Code.

66

This article repeats Article 543 C.C., changing the wording.

67

This article is new. It is based on Article 1224 of the Ethiopian Civil Code.

68

This article repeats Article 544 C.C., except with regard to reimbursement of the indemnity, which is no longer required.

Section VIII

Access to another person's land

69

This article is new. It is based on Articles 1216 and 1218 of the Ethiopian Civil Code.

70

This article replaces Article 428 C.C. It is based on Article 1219 of the Ethiopian Civil Code and on Article 700 of the Swiss Civil Code.

CHAPTER III

ACQUISITION OF THE RIGHT OF OWNERSHIP

71

This article repeats the substance of Article 583 C.C. It lists the means of acquiring ownership; the final words of the article imply that this list is not restrictive, and that special laws can provide for the transfer of ownership otherwise than by the means expressly listed in Article 583 C.C.

The reference in Article 583 C.C. to the acquisition of ownership by the effect of obligations has been discarded; indeed, ownership cannot be transferred by obligations; the right of ownership is conveyed by contracts which, moreover, create such obligations as that of delivery.

The Book on *Property* deals only with acquisition of ownership by occupation or by accession.

72

This article repeats Articles 408 and 413 C.C., changing the wording of Article 413 C.C. in order to make it clear that accession is a means of acquiring the right of ownership.

Section I

Accession of immoveables

73

This article is new and prepares the way for the divisions to follow.

§ - 1 Artificial accession

74

The rule in Article 415 C.C. has been retained with re-wording based on the comments of Messrs. Mazeaud (79).

The article includes the three presumptions:

1. constructions situated on or below the ground of a property are presumed to have been built with materials belonging to the owner of the property;
2. the constructions are presumed to have been built by the owner of the property himself;
3. constructions situated on or below the ground of a property are presumed to belong to the owner of the property. This presumption is applied even if either of the first two presumptions has been rebutted. The owner of a property who erected constructions of materials which at the time did not belong to him is the owner of these constructions; this implies that he has become the owner of the materials used. The owner of a property on which a third party has erected constructions is the owner of the constructions. In these instances, the third presumption plays even if one of the first two has been rebutted.

The first two presumptions can be rebutted by proof to the contrary, as provided in Articles 416 and 417 C.C. Article 416 governs cases in which the owner of the land has done the building with materials which do not belong to him. Article 417 governs situations in which the building has been done by someone other than the owner.

The third presumption is an application of the ruling contained in Article 413 C.C., which states that accession makes the owner of a thing the owner of all that is united or becomes incorporated with such thing. This presumption can itself be rebutted if it can be shown that an attempt was made to prevent accession, as, for example, when the parties to a contract make an agreement to prevent application of the rules governing accession, and, especially, the application of the rule provided for in Article 413 C.C.

75

This article amends the wording of Article 416 C.C. to specify more clearly that this is a question of application of the theory of accession, as defined by Article 72.

76

The various terms of Article 417 C.C. will be dealt with in several provisions of the Draft. The proposed article again outlines the principle of accession and gives a detailed definition of the term "improvements".

By definition, sumptuary expenses and those incurred for purposes of

embellishment do not fall within the meaning of the word "improvements", since they add no value to the property (80). The same applies to maintenance expenses.

77

This article is based on the second and third paragraphs of Article 417 C.C.

78

This article repeats part of the second and third paragraphs of Article 417 C.C.

79 and 80

These articles retain the substance of the solutions set forth in Article 417 C.C.

81

This article is new. Doctrine recognizes three categories of expenditures: maintenance expenditures, expenditures on improvements, and a third category, known as sumptuary expenditures; these are works which do not increase the value of the property and are only of interest to the person who executed them (81).

82

This article is new. If the person who made the improvements is a holder and occupies the immoveable with the owner's authority, the two parties may possibly have determined in advance the kind of improvements which the holder may make; sometimes, as in the case of a contract for the rental of a thing, the provisions of the Code regulating the contract which instituted the holding also determine what will become of the improvements. In the other cases, existing law provides that Article 417 C.C. is applied by analogy. It is therefore desirable to include a provision which consecrates the solutions provided by doctrine (82). Since the holder knows that he can never become the owner, he can be considered a possessor in bad faith.

83

This article repeats in substance Article 418 C.C., taking account of the preceding articles (83).

84

This proposed provision recognizes the possessor's right of retention, although in an altered form. This provision deals solely with the

relationship between the owner and the possessor (or the holder) who made the improvements. This wording makes it possible to omit the reference in Article 419 C.C. to the case of surrender in a hypothecary action. This question is taken up elsewhere in the Title on *Security on Property* (84).

§ - 2 Natural accession

85

This article repeats the substance of Article 420 C.C. Articles 420 to 427 C.C. cover natural phenomena which sometimes occur along watercourses. The distinction between navigable and floatable rivers and those which are not is not retained. All watercourses are subject to the same regime.

86

This article reproduces the first paragraph of Article 421 C.C. The second paragraph of that article has been omitted.

87

This article reproduces Article 423 C.C., except that the words "river or stream, whether navigable or not" have been replaced by the word "watercourse".

88

This article replaces Article 424 C.C. The rule of this article is extended to all owners of the bed. The bed of a river may in fact belong to one individual, as a result of a land grant made before 1918, for example.

This article also takes account of the abolition of the distinction between navigable and non-navigable rivers.

89

This article repeats Article 426 C.C. in substance.

90

This article amends Article 427 C.C. The proposed solution is recognized in existing law only as regards watercourses which are not part of the public domain. In other cases, the old bed belongs to the State. The proposed article seems more equitable in regard to the riparian landowners.

Section II

Accession of moveables

91 and 92

These articles are based on Articles 429 to 441a C.C.

93

This article takes up part of Article 441 C.C.

This provision is completed by rules on the right of retention contained in the Title on *Security on Property* (85).

TITLE FOUR

DISMEMBERMENTS AND MODIFICATIONS OF THE RIGHT OF OWNERSHIP

CHAPTER I

USUFRUCT

Section I

General provisions

94

This article combines Articles 443 and 446 C.C. in a single provision. This gives a definition of the right of usufruct as provided in Article 443, with some amendments based on Article 1309 of the Ethiopian Civil Code and Article 745 of the Swiss Civil Code.

The proposed definition takes note of the fact that the right of usufruct may be established not only on corporeal things but also on incorporeal things, such as personal rights.

The Draft does not repeat the distinction it was sought to make in the Civil Code with regard to the unlimited classification of real rights (86). Hunting, fishing and other rights should be considered either as usufruct (e.g. real rights conferring a benefit which is personal and thus for life or temporary) or as servitudes (real rights affecting land to the benefit of other land). There should be no question of new classifications (87).

95

This article repeats Article 444 C.C. but is more explicit in its description of the methods by which the right of usufruct is established. It seems preferable to specify that this right may result from a contract or a provision of a will, rather than to provide that it is established by the will of man, as does the present Code. Similarly, prescription should be indicated as one method of establishing this right.

96

This article is new; it mentions an essential element of usufruct.

97

This article is based on Article 547 of the Louisiana Civil Code (88).

98

This article is based on Article 548 of the Louisiana Civil Code.

Section II

Rights and obligations of the bare owner

99

This article, which defines the bare owner's obligation, repeats the substance of the first paragraph of Article 462 C.C.

100

This article repeats part of Article 463 C.C. The obligation to make inventory is imposed by Article 123.

101

This article repeats Article 483 C.C. It expands the solution to every case where a bare owner transfers the right he holds.

Article 484 C.C. is omitted. It only applies the rules on Paulian action to special cases.

Section III

Rights of the usufructuary

102

This article is new. It gives a general description of the rights of the usufructuary which is based on Article 1311 of the Ethiopian Civil Code and Article 755 of the Swiss Civil Code.

103

This article gives a general description of the right to use a thing.

104

Since Article 452 C.C. has given rise to problems of interpretation (89) it was decided to clarify the rule on the basis of Article 1327 of the Ethiopian Civil Code.

105

This article is new law, based on the new Article 568 of the Louisiana Civil Code. The usufructuary's right to dispose of things which deteriorate gradually is not absolute. Its exercise assumes that the usufructuary has acted as a prudent administrator.

106

This article is more precise than Article 447 C.C., which stops short of stating that the usufructuary acquires the ownership of the fruits he reaps (90).

107

This article amends Article 449 C.C., and does not repeat the distinction between natural fruits and industrial fruits which is not necessary since both are subject to the same rules. They are all considered natural fruits as opposed to civil fruits.

108

This article adds to Article 449 C.C. a general definition of civil fruits.

109

This article deals with extraordinary profits, such as premiums assigned upon redemption of a preferred share or a bond (91). These profits cannot be regarded as fruits, since they are yielded sporadically. Payment of these sums is rather assimilated to payment of capital, and compared to a debtor's reimbursement of his debt.

The solution proposed in the article is taken from Article 1348 of the Ethiopian Civil Code.

110

This article substantially repeats Article 450 C.C.

111

This article is based on the second paragraph of Article 450 C.C.

112

This article retains the rule in the first paragraph of Article 451 C.C. although the drafting is slightly changed.

The second paragraph of Article 451 C.C. which is not necessary is not repeated, since rents are dealt with under the general category of "civil fruits".

Article 453 C.C. would be repealed.

113

This article is new. It provides an express rule relating to usufruct of debts (92).

This question could arise particularly as regards a usufruct affecting a person's entire property, including debts not yet payable.

This case must be dealt with in the same manner as that of a usufruct affecting a universality which contains consumable things, such as sums of money. The usufructuary may use these sums provided he returns them at the end of the usufruct; similarly, he should collect the capital of the debt for which he is held accountable when his right expires.

114

This article is new and is based particularly on Article 1349 of the Ethiopian Civil Code.

115

This article is new. It is intended to prevent any manoeuvres on the part of the bare owner who could, for example, systematically refuse to declare dividends which could be of benefit to the usufructuary.

The second paragraph provides a reservation: the bare owner would be entitled to vote on any measures to change the structure of the capital, since such measures affect his right.

116 and 117

These articles state a simplified version of the rules in Articles 455 and 456 C.C.

118

This article substantially reproduces Article 460 C.C.

119

This article repeats the substance of Article 461 C.C.

120

This article repeats, in a more general provision, the rules in Articles 458 and 459 C.C.

121

This article repeats the substance of Article 457 C.C.

122

The first paragraph of this article corresponds to the second paragraph of Article 462 C.C.

The second paragraph provides a more general version of the rule in the third paragraph of Article 462 C.C., to allow the usufructuary to remove or destroy the improvements and constructions carried out by him on the thing subject to his right of usufruct, unless the bare owner wishes to preserve them, and pay an indemnity in an amount to be agreed upon by the parties.

Section IV

Obligations of the usufructuary

123

This article maintains the obligation to make an inventory, imposed by Article 463 C.C., unless the usufructuary is exempted therefrom by the constituent deed or by any subsequent deed. However, clarification is made as to the sanctions entailed if the usufructuary fails to meet this obligation or is late in doing so.

124

The first paragraph of this article repeats Article 464 C.C., replacing "*caution*" by "*sûretés*" in the French version so as to allow different kinds of "*sûretés*". The second paragraph is new.

125

This article slightly alters the drafting of Articles 465 and 467 C.C., but the solutions are identical.

126

This article repeats the rule in Articles 466 C.C. and 747 C.C.P.

127

This article is new. Provisions similar to this article and that following are found in Articles 1045 and 1046 of the German Civil Code and in Article 767 of the Swiss Civil Code. This rule confirms current practice in insurance matters; it is sufficiently flexible, however, to allow a certain freedom of action to both the bare owner and the usufructuary. Consequently, usufruct will not necessarily terminate because of total loss of the thing since the usufructuary will then be able to enjoy the indemnity received.

128

This article is new. It completes the preceding one by bringing about subrogation of the property insured by the amount of such insurance and by specifying the obligations of the usufructuary in case of total or partial destruction of the thing.

129 and 130

These articles are new. They provide the suppletive law applicable to cases where the usufructuary is not obliged to insure the thing which is subject to the usufruct. See also the comments on Articles 127 and 128.

131 and 132

These articles are based on Article 468 C.C. to which they add a reference to maintenance costs.

133

This article repeats Article 469 C.C. and adapts it to modern reality. The last paragraph of Article 469 C.C. has been dropped.

134

This article is new and is based on Article 1338 of the Ethiopian Civil Code.

135

The first two paragraphs are based on Article 1339 of the Ethiopian Civil Code and Article 579 of the Louisiana Civil Code.

The third paragraph is new and is also based on the new Article 579 of the Louisiana Civil Code. It fills a gap.

Article 470 C.C. would be removed.

136

This article repeats and amends Article 471 C.C. The second paragraph of Article 471 C.C. distinguishes between the extraordinary charges which exist at the time the usufruct begins, and those imposed later. The usufructuary must make periodic payments only with regard to the contributions imposed after the beginning of the usufruct. It seems more just to require the usufructuary to meet the payments which fall due within the duration of his right, regardless of whether the charge was imposed before or during the usufruct.

137

The first paragraph of this article is new. It is based on Article 1340 of the Ethiopian Civil Code.

The second and third paragraphs repeat the rules in Article 473 C.C., taking into account the doctrinal clarifications regarding the time when the usufructuary by particular title may demand reimbursement for a debt that he has paid (93).

138

This article amends Article 472 C.C. to incorporate the rule under which the usufructuary who withdraws all or part of the "active income" of an estate is obliged to sustain the "passive income" in proportion to what he receives. Article 472 C.C. gives two examples of "passive income", namely life rents and support. In keeping with the general principle, any interest on debts of the estate not immediately due must be added to this (94).

139

This article repeats Article 474 C.C., although the wording has been changed slightly, in particular to take account of the definition of a legacy of usufruct given in the Book on *Succession* (95).

140

The first paragraph of this article repeats the substance of Article 475 C.C. The second paragraph completes this article and provides for cases where the proceedings affect both the usufructuary and the bare owner.

141

This article reproduces Article 476 C.C. with a few amendments as to form.

142

This article is new, and based on Article 454 C.C.

Section V

Extinction of usufruct

143

This article replaces Articles 479 and 481 C.C. It amends the first paragraph of Article 479 C.C., which provides that usufruct is normally for life; consequently, a usufruct constituted for a fixed number of years would end if the usufructuary died before the term expired. Nevertheless, as this feature is of the nature and not of the essence of the right of usufruct, according to the 1866 Code, it would be possible to include an explicit clause in the instrument constituting the usufruct, providing that, in such a case, the usufruct could continue for the benefit of the usufructuary's heirs, until expiry of the term agreed upon. French law is different, and stipulates that a right of usufruct is essentially for life. The first paragraph of the proposed article retains the solution set forth in French law and also found in the Ethiopian and Swiss Civil Codes (96).

The term of thirty years provided for in Article 481 C.C. is reduced to twenty-five years under the second paragraph (97).

144

This article is new. It seemed logical not to presume partial extinction of a joint usufruct when one usufructuary dies (98).

145

This article repeats Articles 479 and 482 C.C.; since these two provisions deal with the same question, they have been combined in a single article.

146

This article repeats the substance of the third and fourth paragraphs of Article 479 C.C.

147

This article repeats the last paragraph of Article 479, and Article 485 C.C.

148

This article repeats the substance of Article 486 C.C.

149 and 150

These articles repeat Articles 477 and 478 C.C. Since these provisions refer to the loss of the object of the usufruct, they are inserted in the section dealing with the extinction of the right of usufruct.

151

This article repeats Article 480 C.C. in a slightly amended form.

CHAPTER II

USE AND HABITATION

152

This article repeats Article 487 C.C.

153

This article is new. It seems desirable to insert a general provision here to the effect that the rules governing the right of usufruct also apply to use and habitation, which actually constitute usufruct on a smaller scale.

This proposed provision makes it possible to discard Articles 488, 489 and 490 C.C., which repeat rules on usufruct. Articles 491 and 492 C.C. are also done away with; the first provision goes without saying while the second is simply a transitional text.

154

This article repeats Articles 494 and 497 C.C.

155

This article repeats the substance of Articles 493 and 495 C.C.

156

This article is new. It is based on Article 1355 of the Ethiopian Civil Code and Article 777 of the Swiss Civil Code; it is a clarification intended

to prevent certain disputes that might arise in relations between the bare owner and the holder of the right of habitation.

157

This article repeats Article 498 C.C. with some changes in drafting.

CHAPTER III

REAL SERVITUDES

Section I

General provisions

158

The first paragraph of this article repeats in a more explicit wording the definition in Article 499 C.C. The second paragraph is new. It describes the nature of the charge imposed on the owner of the servient land. The article is based on Article 1359 of the Ethiopian Civil Code and Article 730 of the Swiss Civil Code.

Article 546 C.C. would be repealed.

It has already been stated in the chapter on *Limitations and Restrictions on the Right of Ownership* that the Draft designates as "real servitudes" only those servitudes which Article 500 C.C. calls "servitudes established by the act of man".

In actual fact, real servitudes may be established by man or by the law. The second kind, legal servitudes, constitute an exception to the normal regime of the law on property, for example, charges created by zoning by-laws and limitations affecting immoveables near airports (99).

Since these legal servitudes are created by many laws, it will suffice in this chapter to insert a general provision merely alluding to such legislation.

159

This article is new. It is taken from Article 1360 of the Ethiopian Civil Code.

160

This article is new, and is based on Article 1361 of the Ethiopian Civil Code. It again clarifies the definition of a real servitude.

As is the case for any real right, opposability of real servitudes depends on the rules of publication.

161

This article repeats Article 547 C.C.; the wording only is changed.

162

This article amends the wording of Article 548 C.C. to improve the text. The definition of these two types of servitudes seems sufficiently clear; illustrative examples, such as those provided in Article 548 C.C., appear unnecessary.

Section II

Establishment of servitudes

163

This article is new. The present Code contains no enumeration of the ways in which a right of servitude is established. The proposed text introduces the various provisions to follow.

All real rights, including real servitudes, are acquired by the effect of prescription; this changes the rule in Article 549 C.C.

164

This article repeats Article 551 C.C. This means of acquiring servitudes is preserved; the wording of this provision is altered so as to describe the means of acquisition more fully. Publication of this kind of servitude is governed in the Book on *Publication of Rights* (100).

165

This article is new.

Section III

Rights and obligations of the dominant owner

166

This article repeats the substance of the second paragraph of Article 545 C.C.

167

The substance of the first paragraph of Article 552 C.C. is maintained in this article, although the example given in the second paragraph is omitted.

168

This article repeats Articles 553 and 554 C.C. The wording is slightly altered.

169

This article repeats Article 555 C.C., changing the wording. It also makes it possible for the owner of the servient land to abandon only that part of the land over which the servitude is exercised.

170

This article repeats Article 556 C.C. and clarifies its drafting. In effect, the first paragraph of Article 556 C.C. deals with the case of material division of a dominant immoveable. The second paragraph appears to illustrate the first, whereas in fact it deals with a different situation, that in which a dominant immoveable becomes the object of a right of co-ownership.

171

This article is the corollary of the preceding article.

172

This article repeats Article 558 C.C., slightly altering its drafting.

Section IV

Rights and obligations of the servient owner

173

This article repeats the substance of Article 557 C.C.

174

This article is new. This provision is desirable to describe more fully the situation of a servient owner.

Section V

Extinction of real servitudes

175

The wording of Article 561 C.C. is altered in this article, but the rule remains unchanged.

176

This article is new. It completes the rules governing real servitudes.

177

This article replaces Article 562 C.C. It refers to Article 48 of the Book on *Prescription* which fixes at ten years the period for extinctive prescription of real rights other than that of ownership.

178

This article repeats the substance of Article 563 C.C.; only the drafting is altered.

179

This article repeats Article 564 C.C.

180

This article amends Articles 559 and 560 C.C., which provide that prescription does not run when exercise of the servitude is impossible. It seemed more logical to adopt the proposed solution, considering the possibility of a prolonged interruption or of indefinite duration by reason of the state of the thing. The existing rule maintains an element of uncertainty in the titles.

CHAPTER IV

INDIVISION

Section I

General provisions

181

This article is new. It adds a new section on indivision.

182

This article is new. It contains a suppletory rule which seemed useful.

183

This article is new. It should be specified that a co-owner's rights are more restricted than those of an ordinary owner in that, as long as the former is exercising his rights, he must bear in mind the concurrent rights of the other co-owners.

184

This article is new. It lays down rules which can facilitate administration of undivided property.

185

This article is new.

186 and 187

These articles are new.

It is necessary to provide for a form of delegation for the administration of undivided property. If all the co-owners are agreed, delegation is possible without other difficulties. But it might be better if an administrator could be appointed in the event (among other possibilities) that a co-owner be far away, hence the procedure before the court.

188

This article is new and provides the rules for dismissal of an administrator.

189

This article is new.

The administrator appointed by the co-owners may perform acts of administration, without, however, changing the destination of the undivided property.

Any acts which exceed his mandate must be previously authorized.

190

This article is new.

191

This article is new.

192, 193 and 194

These articles replace Article 710 C.C. on successoral withdrawal and are also found in matter of corporations.

Article 192 makes it possible to protect undivided owners against alienation by one of them to a third party.

The right of pre-emption makes it possible to retain the undivided portion within a given group of undivided owners. It also makes it possible, in the long run, to avoid useless disputes and actions for partition, not to mention the pressure which third parties acquiring undivided shares could exert on the initial undivided owners.

The stringent sanction in Article 194 is intended to ensure that the provision is effective.

195

This article is new.

The first two paragraphs are in line with current practice; the final paragraph specifies that the right of pre-emption for which the preceding articles provide applies to judicial sales.

196

This article is new.

197 and 198

These articles repeat the rule of Article 689 C.C. but expand the option of maintaining undivided ownership, of which the undivided owners may always avail themselves.

The reference to the right to partition, which cannot be prescribed, replaces Article 690 C.C.

Publication of this agreement is expressly required since there is no question here of a real right on an immoveable.

199

This article renders imperative the rules in Articles 197 and 198 on the right of partition.

Articles 197 and 198 have already broadened the rule in Article 689 C.C.; it seemed desirable to limit the exceptions to this fundamental right.

200

This article repeats part of paragraph 2 of Article 689 C.C. If the court decides that a demand for partition is inopportune, it may stay the proceedings and impose certain interim measures on the parties.

201

The first paragraph of this article is new and based on Article 651 of the Swiss Civil Code. The second paragraph repeats the substance of Article 747 C.C. The third paragraph is a reference to the Book on *Succession*, where the rules respecting partition are retained.

Section II

Particular provisions relating to co-ownership of ships

202, 203 and 204

These articles reflect the well known usage in favour of the use of the ship, in cases of joint ownership, while protecting, however, the interests of the minority.

205

This article confirms that it is common practice to have joint ownership of a ship and, unless there is an agreement between the co-owners, licitation can take place.

Section III

Condominium

General provisions

206 to 247

Articles 441b to 442p C.C, inserted in 1969 (S.Q. 1969, c. 76), are repeated with some slight amendments which have become necessary to adapt them to the Draft as a whole. The Office had prepared Draft articles on condominium which would have amended the Code considerably, but was unable to complete it within the required time.

Still, it is to be hoped that the articles of the Code dealing with co-ownership of immoveables will eventually be amended to take account of the development of the institution.

CHAPTER V

EMPHYTEUSIS

Section I

General provisions

248

This article repeats the substance of Article 567 C.C.

It was decided not to use the term "lease" which refers to personal rights, while emphyteusis is a real right.

The article endeavours to provide a precise definition of emphyteusis; it assembles the essential elements of the emphyteutic contract, which distinguish it from other related contracts, such as rights of superficies and the contract of lease and hire.

The words "subjecting himself ... to such other charges as may be agreed upon" which appear in Article 567 C.C. have been deleted, since they arise from the agreement. Additional charges may always be stipulated.

249

This article retains the rule laid down in Article 568 C.C.; it specifies, however, that one essential element of any emphyteutic contract is the stipulation of a term longer than nine years.

250

This article repeats the substance of Articles 569 and 570 C.C., specifying that the holder has a temporary right of ownership. Since the holder has the rights of an owner, he may perform all acts respecting the immoveable; these need not be listed.

251

The first paragraph of this article repeats the substance of Article 571 C.C. The second and third paragraphs are new, and result from the regime of emphyteusis.

Section II

Respective rights and obligations of owner and holder

252

This article does not create any new law, but substantially reproduces the first paragraph of Article 573 C.C.

253 and 254

These articles repeat the substance of Article 574 C.C.

The obligation to pay an annual rent constitutes one of the essential elements of the contract of emphyteusis. Although, in principle, this is an annual payment, the parties may provide that it be payable in instalments. The rent need not be paid in money.

If the holder does not pay the rent for three years, the owner may apply for resiliation of the contract. This cancellation does not occur of right; the owner must apply to the court. To avoid resiliation, the holder may pay the rent due, and the costs of the proceedings, at any time before judgment is rendered.

255

This article repeats Article 575 C.C. in more general terms, to take account of emphyteusis within an urban context. The holder must suffer partial loss of the thing, while total loss terminates the contract (101).

256

This article amends Article 576 C.C. in answer to criticism lodged against its drafting (102).

While the holder is not responsible for the hypothecs affecting the immoveable, Article 576 C.C. may be interpreted as providing to the contrary.

257

This article substantially repeats Article 577 C.C., with respect to improvements; the obligation concerning repairs is dealt with in Article 259.

258

This article substantially repeats Article 578 C.C. The holder is under obligation not to deteriorate the immoveable; he must also use it in the manner of a prudent and diligent person.

259

This article is based on Article 577 C.C. It specifies the holder's obligation to keep not only the immoveable, but also the improvements in good repair.

260

This article is new.

Section III

Termination of emphyteusis

261

This article contains the same basic provisions as paragraphs 1, 2 and 3 of Article 579 C.C.

The fourth paragraph of the article is new; it seemed wise to add the fourth paragraph in order to specify that, when the qualities of owner and holder are united, this mode of extinction of obligations does not affect the rights of third parties.

Paragraph 4 of Article 579 C.C. is not repeated. Abandonment is no longer a cause of termination of emphyteusis. Article 580 C.C. is also deleted.

262

This article substantially repeats Article 581 C.C. The words "good condition" mean that the holder has seen to the normal upkeep of the thing, but also assume that normal wear of the thing may have diminished its initial value.

263

This article repeats the essential elements of Article 582 C.C. It merely refers to Articles 76 and following rather than describe the holder's situation as does the present article.

Moreover, it is specified that it is referring to improvements which are merely useful, since the cost of necessary improvements is always payable by the holder who has undertaken to make repairs.

CHAPTER VI

THE RIGHT OF SUPERFICIES

Section I

General provisions

264

This article and those that follow propose new provisions governing the right of superficies. The provisions sanction the solutions elaborated by doctrine and jurisprudence (103). In principle, the right of superficies is acquired like the right of ownership, that is, by contract, succession or prescription (104). The Civil Code deals only very briefly with the right of superficies in Article 415 (105).

The article recognizes the superficiary's actual right of ownership when constructions or plantations exist at the time the right of superficies is constituted, or his eventual right of ownership in the case of bare land. This right of ownership exists concurrently with that of the owner of the immoveable. Each must exercise his right in accordance with the rules of ordinary law and in such a manner as not to impede the other in the exercise of his rights. Thus as far as possible the provisions respecting the limits and restrictions on the right of ownership apply to the superficiary and the owner of the immoveable, who may be regarded as neighbours.

265

This article recognizes that the owner's immoveable is to a certain extent subservient to the superficiary immoveable (106). The extent of the subservience is likely to vary according to specific circumstances. By "owner" is meant the person who grants a right of superficies on the soil, the sub-soil or a building.

266

Article 266 lists the causes recognized as being able to terminate the right of superficies (107).

267

It seemed advisable to recognize as a suppletive provision the particular nature of the right of superficies by allowing the superficiary to take back his buildings, works and plantations at his own expense, and even, where applicable, allowing the owner to require him to do so.

Section II

Construction lease

268

This article describes a construction lease and brings out its essential characteristics (108). A construction lease is one means of granting a right of superficies. The rules in Section I are applicable subject to those in this section and without excluding those governing leases, failing provisions in this chapter or in the contract. It is basic to a construction lease that the lessee's ownership right in the structures he erects not be restricted except to the extent permitted by this section or by the provisions governing condominium as the case may be. The *Constitut or Tenure System Act* (109) does not apply to land that is the object of a construction lease. Its application is excluded, either by Section 18 of the Act which recognizes that a lease may expressly derogate from it or by Article 267 which settles the question of constructions failing stipulations in the lease.

269

Aside from the servitudes indispensable to the use of the right of superficies, which exist of right in favour of the superficiary (110), the article authorizes the lessee under a construction lease to constitute servitudes on the immoveable of the owner, even in favour of third parties.

This exceptional rule seems justified because throughout the lease it is generally the lessee who enjoys the full use of the immoveable and at the end of the lease these servitudes are extinguished.

270

A construction lease contract must specify the term of the lease on the immoveable on which the right of superficies is established (111). The same maximum period has been retained as for emphyteusis without its being considered necessary to establish a minimum term.

The article also precludes application of Article 1641 C.C., which provides that a lease on an immoveable may be tacitly renewed. The settlement to be made between the lessor and lessee with respect to constructions will take account of the value of occupancy by the lessee since the end of the lease.

271

The construction lease is necessarily a contract by onerous title. It is not incompatible with the concept of right of superficies that a lessee commit himself to building (112).

272

It seems useful to introduce here the concept of a variable rent (113).

273

This article states a suppletive rule.

274

This article considers a hypothesis different from that provided for in the first paragraph of Article 266. The latter refers to the case in which the actual immoveable affected by the right of superficies is lost. Here it is a question of the destruction of the structures erected by the lessee (114).

275

This article authorizes the lessee to dispose of his lease without having to obtain the consent of the lessor. This derogates from the general rule governing leases (115).

TITLE FIVE

SECURITY ON PROPERTY

CHAPTER I

PRELIMINARY PROVISIONS

Section I

Common pledge of creditors

276

This article substantially reproduces Article 1980 C.C. and adds the words "by law".

This change stems from the restriction of exemption from seizure to those cases prescribed by law (aa. 552 and 553 C.C.P.). Exemption from seizure stipulated by agreement should not normally be set up against third parties without court authorization. Article 277 contains this recommendation.

277

This article restates and amends sub-paragraph 3 of the first paragraph of Article 553 C.C.P.

First of all, this sub-paragraph is substantive and should therefore be in the Civil Code. Secondly, no exemption declared arbitrarily by a donor or a testator should be set up against third parties without some judicial control, and provided the property willed or given is in fact support. Given the general theory of patrimony and creditors' common pledge, it seems unnecessary to allow donors and testators to withdraw the property they transmit from the common pledge of creditors.

Article 553 C.C.P. must be amended accordingly. Sub-paragraph 3 of its first paragraph, which is to become part of the Civil Code under the proposed article, could be replaced by the following:

"3. Rights exclusively attached to the debtor's person;" and sub-paragraph 4 of paragraph 1 of Article 553 C.C.P. could read as follows:

"4. Necessary support granted judicially which may, however, be seized for a debt of support."

278

This article replaces sub-paragraphs 1 and 2 of the first paragraph of Article 552 C.C.P.

Comments received by the Civil Code Revision Office tend to show that these sub-paragraphs are ineffectual, in spite of having been amended in the 1965 revision of the new Code of Civil Procedure, and apparently still create practical difficulties, particularly in cases of general seizure. Most seized debtors seem unaware of their right to exemption from seizure of up to one thousand dollars worth of property; also, bailiffs often carry out evaluation without the participation of the persons concerned.

Moreover, seized household furniture would normally be insufficient to pay the seizing creditor after the seizure and sale expenses are subtracted.

The article broadens the rule of exemption from seizure of household furniture. Certain household appliances such as television sets, refrigerators and electric washing machines are now generally considered necessary for domestic life and should be considered exempt. Because of the rapid depreciation of such property, it is felt preferable to allow the debtor to retain possession of it rather than having it sold for a very small price. This rule should apply regardless of the origin of the seizor's claim, even when such seizor is the seller of the seized property. Luxury items, however, remain seizable.

Sub-paragraphs 1 and 2 of the first paragraph of Article 552 C.C.P. (and the end of the first paragraph of Article 652 C.C.P.) should be changed accordingly.

The article provides no amount with respect to exemption from seizure. Although this method is not perfect, it strikes a balance between total exemption and the determination of what could be called luxury furnishings. The sum of one thousand dollars now provided for by paragraph 2 of Article 552 C.C.P. is clearly not sufficient. At the present time, even five thousand dollars would not seem enough. It seemed preferable, then, to leave to jurisprudence the care of specifying, according to the circumstances, what constitutes a luxury article, and to broaden the basic exemption as far as possible.

279

This article restates the last idea in Article 1981 C.C., the first one being enunciated in Article 193 of the Book on *Obligations*.

280

This is a restatement of Article 1982 C.C. without the reference to privileges.

The term "privilege" has been eliminated (116). Pledge is now called hypothec: a hypothec where the creditor has possession.

Section II

Presumption of hypothec

281, 282, 283 and 284

These articles are new law.

The purpose of Article 281 is to reduce to a single concept, a hypothec, all accessory rights which can be created on property to protect or guarantee fulfilment of a principal obligation. Article 1982 of the Civil Code contains the germ of this idea. This article sets forth that the only causes of preference are privileges and hypothecs, thereby pointing out that no one may be "preferred" by the effect of another agreement. However, jurisprudence has often sanctioned causes of preference other than privileges or hypothecs, either by giving effect to simulated acts which were considered not fraudulent, or by construing the case in question as not being a cause of preference, but rather the product of a *sui generis* contract (117). Judicial interpretation of many a conditional sales contract, or of sales accompanied by conditional repurchase agreements illustrates this practice well (118). The Supreme Court, for example, preferred to regard *dation en paiement* clauses stipulated in hypothecary loans as in the category of payments, thereby acknowledging them as a mode of fulfilment of obligations rather than as in the category of "guarantees" which creditors arrange for security of reimbursement (119). In matters of moveable property, however, as soon as third parties are harmed by the agreement made, the court declares that it cannot be set up with respect to them if there has been no real dispossession.

The proposed articles are intended to put an end to this situation. Hypothecs, which are now extended to moveables and accompanied by more recourses in favour of creditors - whether the debtor dispossesses himself of the property or not - should in fact govern all situations where a creditor lays claim to particular rights to his debtor's property for the purpose, admitted or not, of ensuring payment of what is due. According to Article 282, this rule must be applied even if the apparent effects of agreements entered into are to remove the property in question from the

debtor's patrimony in order to ascribe to the creditor the absolute or conditional ownership of it.

Articles 281 and 282 also apply to conventional resolutive clauses, and to legal resolution of a contract by reason of the purchaser's failure to fulfil his obligations. In such cases, creditors may exercise only the rights and recourses which the hypothec grants them. In actual fact, this puts creditors in a better position than does simple resolution, since they are not obliged to return to the debtor what they have received from him (hypothecs do not entail a return in the same condition) if they exercise one of the hypothecary recourses.

Creditors may thus exercise any hypothecary recourse, including taking in payment, without having to compensate the debtor. They must, however, comply with the formalities required for the exercise of such recourse.

It seemed preferable to adopt this solution since it is similar to the conventional "resolutive clauses" which exist at present, and by virtue of which creditors retain "as liquidated damages" what they have already received from their debtors. Repeal of Articles 1536 and 1543 C.C. is proposed in the Book on *Obligations* and this proposition is in line with the provisions of this Book (120).

Contracts of sale and other contracts could be resolved for reasons other than the purchaser's failure to fulfil his obligations. In such cases, dissolution cannot cause prejudice to third party purchasers and creditors whose right has been made public, if the cause of dissolution was not apparent.

Other adjustment provisions will be needed to bring the new regime on hypothecs on moveable property into line with the *Consumer Protection Act* (121) respecting instalment sales. In these cases, transfer of ownership would no longer be deferred, but creditors could exercise the hypothecary recourses provided for in the Civil Code, subject, however, to the requirements of the special Act (122), adapted to the new regime.

The words "rights to property" which appear in Article 281 and are used generally throughout this Draft, are intended to replace "in or upon property", found particularly in Article 2090 C.C. and indicate that every right, whether a principal real right ("in"), or an accessory real right ("to") is covered by the definition. Moreover, such rights are to a specific property or a universality, a fact which distinguishes Article 281 from Article 279 which deals with the general and common pledge of all creditors. Article 281 covers real rights.

These articles obviously strike at the freedom of contract; their stringency may occasionally constitute a constraining factor preventing certain agreements which in themselves would not be at all objectionable. This decision seemed necessary, however; the stringency of certain foreign laws respecting the prohibition of *dation en paiement* agreements (123) and of the exercise by a creditor of his recourses is well known. The watchfulness of the courts of Common Law and Equity is also well known; these courts have constantly reduced the rights of creditors to those of hypothecary creditors, irrespective of the wording of the agreements involved (Once a mortgagee, always a mortgagee) (124), acknowledging thereby that a debtor has a right called "equitable interest" which permits him to exercise "equity of redemption", namely the right to be able to repurchase his property at the price of the claim, even if the terms of the contract prevent this. Similarly, the *Uniform Commercial Code* (125) and the *Personal Property Security Act* (126) transform into a security interest the rights any creditors hold in virtue of assignments, chattel mortgages, pledges, chattel trusts, trust deeds, equipment trusts, trust receipts, conditional sales, liens or other securities. It did not seem possible or desirable to proceed otherwise.

Under this Draft, creditors acquire a fairly broad spectrum of new rights and recourses. On the other hand, debtors are better protected. The balance sought with respect to the contracting parties would be too easily upset if it were possible to obtain something that is really only a right of preference and security under pretext of agreements other than hypothecs and thereby to escape its rules. As a result, the proposed Articles are rules of public order (see Article 285).

These articles apply universally and absolutely whatever be the apparent effects of agreements carried out to ensure payment of obligations.

Thus, sales reserving vendors' ownership until full payment of price, or sales where transfers of ownership are conditional on payment of price, would fall under their authority. Of course, these articles aim only at agreements carried out to ensure payment of an obligation. They do not cover ordinary leases. No lessor remains the owner of the property merely to ensure acquittal of an obligation; he has had the ownership of his property, he is holding on to it and he does not intend to give it away. It is not to ensure payment of the rent that the lessee leaves ownership with the lessor; the lessee only wants to lease. By the same token, these articles are not aimed at servitudes which are charges imposed on one property for the benefit of another and not rights accessory to a principal obligation.

Article 282 clearly specifies that this principle is applicable even if, by their names, numbers and formal appearances, agreements made by persons are intented to confer other than hypothecary rights. The second paragraph of this article sets out a few examples of these agreements which could only lead to hypothecs. A person wishes to sell property to another and to retain ownership of the property until full payment. As a result, he decides to "lease" the property to the other person at a rental equal to the purchase price in capital and interest, with the obligation for the other to purchase the property when the lease expires. These articles would make the "lessee" the owner with a hypothec in favour of the "lessor".

In some contracts of lease (e.g. leasing or leaseback), the parties make the creditor owner of the property, and the debtor merely the lessee. This gives creditors the advantage of being able to claim a deduction for depreciation and the debtor the advantage of being able to deduct "rental" payments in calculating his income for tax purposes. These contracts often contain a clause providing for an option to buy the property in favour of the lessee at the end of the lease and for a maximum price.

The second paragraph of Article 282 specifies that a leasing agreement is not affected by these provisions unless it constitutes a legal reserve in favour of the lessor, made for the purpose of securing execution of an obligation. This is not usually the objective of such an agreement. Nevertheless, some of them, whose express purpose is to guarantee payment of an obligation, may fall under the jurisdiction of Articles 281 and 282. If these articles were applied, the contract would not be invalidated, but in determining the rights and recourses of the parties, such application would render the lessee owner of the property and would grant the lessor only a right of hypothec. This distinction would be important in determining who owns the property (for example, in cases of bankruptcy). Considering the many recourses granted to hypothecary creditors, however, they should not suffer any prejudice from this rule, even in cases of bankruptcy (as secured creditors).

Difficulties of interpretation which could arise in special cases involving "leasing" were of course considered. Some of the comments submitted to the Civil Code Revision Office reminded it of this. However, after examining the attitude shown in this regard elsewhere in the United States and in Canada (127) the proposals did not seem to endanger leasing any more than it would elsewhere. The contrary seemed more the case.

The recourses that creditors would in future enjoy make it less necessary than under existing law for the creditor to hold a title of ownership.

Article 283 sets out certain consequences which application of these rules can entail with regard to third parties. A creditor has claimed to have ascribed to himself a right of ownership on property which actually is only affected by a hypothec. Perhaps he will wish to sell this property to third parties. This sale will have no effect as regards the debtor who always remains owner of the property provided the agreement or deeds have been registered; a thing belonging to another person has been sold in favour of a purchaser who cannot be in good faith. If the deeds have not been registered, the ordinary rules governing sale of things belonging to another would apply. Where it is impossible for a debtor to reclaim his property, he may always avail himself of the recourses in general law and of the recourses and rights of any debtor as regards a hypothecary creditor who has sold property otherwise than by judicial sale (see Articles 435 and 438). These articles apply to him since, through the effect of Articles 281 and 282, the parties to the action are considered hypothecary creditors and debtors.

285

This provision is justified by the importance of the articles contained in Section II. For reasons already explained, the presumption created in Articles 281 and following must be subject to stringent application.

Section III

Right of retention

286

Considering the presumption of hypothec created in Section II (a. 281 and following), and the recommendation that all privileges be abolished, it was necessary to separate the right of retention from the rest of the Title and to specify its scope. Articles 419 and 441 of the 1866 Code consecrate the right of retention in certain cases. Moreover, these provisions are revised and amended while leaving their substance intact (aa. 84 and 93).

The proposed article must thus provide that the rules respecting presumption of hypothec do not apply here, and that any person who has a right of retention may keep the property until he is paid; this security

does not constitute a hypothec. However, retention occurs only for payment of costs of preservation and of necessary repairs or improvements in cases where the person retaining is entitled to reimbursement. These cases are provided for elsewhere in the Draft.

The Civil Code is particularly generous in matters of right of retention. Not only does it grant this right to many persons, but it also provides the order and rank of collocation among persons who could have simultaneous rights of retention on the same property (a. 2001 C.C.; this fact is quite surprising since the right of retention is based on physical possession of property). Persons who incur loans for use, consignees, depositaries, hotel-keepers, mandataries, repairmen, carriers and pledging creditors all benefit from it (128). The various Civil Code Revision Office committees which studied these questions in the field of nominated contracts generally agree that the question of the right of retention be dealt with in the Title on *Security on Property*. In several cases, these committees expressed the opinion that some rights of retention could be eliminated.

The right of retention, a legal rather than a conventional security, should not exist except under the provisions of Article 286.

This section appears in the preliminary provisions of the Title on *Security on Property* and thus does not come under the authority of the general provisions governing hypothecs.

Furthermore, a creditor who has a right of retention would still be able to stipulate a conventional hypothec on the property of which he has detention (129). Publication of such a hypothec will generally be made by putting the creditor in possession and the rank of this hypothec will be determined according to the ordinary rules. The creditor will then be able to choose between availing himself of conventional hypothecary recourses or of his right of retention.

The right of retention also applies in the case of immoveables when the law so provides (130).

287

This article is new law.

It has often been asked whether a person who has a right of retention could retain the property until he is paid, without instituting proceedings for forced execution. In this sense, the relationship between the right of retention and the privilege which it implied presented difficulties of interpretation (131).

A person who has a right of retention should not enjoy a privilege or a legal security which allows him preference on the proceeds of judicial sale, if he chooses to give up property which he is entitled to retain. Moreover, his right of retention may be set up against anyone and subsists even in the event of seizure or of the exercise of any hypothecary recourse. This does not mean that the person retaining may hinder the normal course of execution of the rights which third parties have on such property. He may, however, require seizure to be made subject to his right; the purchaser will have possession only when he has reimbursed the person retaining for the amounts to which he is entitled (132).

The rule on involuntary dispossession by creditors also inserts current jurisprudence into the Draft (133).

A hypothecary creditor who has published his hypothec by possession does not obtain a right of retention by this mere fact. For such creditors, possession is only a means of publishing their hypothecs and they cannot set it up against seizure by third parties; instead, they must be paid in their hypothecary rank.

Section IV

The vendor's right of revendication

288 and 289

These articles substantially repeat Articles 1998 and 1999 C.C. respecting the vendor's right to claim; the second substantially repeats Article 2000 C.C. The privilege of vendors is no longer mentioned.

The vendor's right of revendication constitutes a perfectly legitimate claim; it should not be considered a hypothec. It is a swift means of restoring the parties to their original state, as if the sale had not taken place.

The term has been extended to thirty days in every case; this amendment allows avoiding mentioning bankruptcy, a charge justified by fairness. Why should the vendor have a better right if the purchaser goes bankrupt? The Study Committee on Bankruptcy and Insolvency Legislation (134) recommends that a similar provision be added to the *Bankruptcy Act*.

It is proposed to amend the Code with respect to the right of revendication when property is sold or seized while the creditor and the

property respect the conditions prescribed. In such cases, vendors retain the right to claim the property.

This provision allows repeal of the fourth paragraph of Article 2013e C.C. respecting the right of revendication enjoyed by a supplier of materials. Such a supplier is really merely a vendor and will enjoy the right to claim like any other vendor, on the same conditions.

CHAPTER II

GENERAL PROVISIONS

290

This article substantially reproduces Article 2016 C.C., but contains important changes in form.

Hypothec is no longer defined as a real right; rather, only the concept of the property's appropriation for payment of an obligation has been maintained. Hypothec is the only main real security presently defined as a real right in the Civil Code. In fact, neither pledge nor privilege is so defined. Hypothec is an accessory right which, according to the Draft, may affect either a real right (e.g. ownership of property) or a personal right (e.g. a claim). Designating it as a real right was therefore thought to be artificial.

This article takes into account the right to follow which results from the hypothec. Right of preference is not referred to, but all the recourses open to a creditor are generally mentioned; these are not restricted to preference with respect to the proceeds of judicial sale of the hypothecated property.

291

This article repeats Article 2018 C.C.

292

This article makes only two changes in Article 2019 C.C. First, as abolishing legal hypothec as a hypothecary security is recommended, any mention of it is omitted. Secondly, testamentary hypothec, already acknowledged in Article 2045 C.C., was added since it is not really a conventional hypothec, being created by the unilateral will of a testator. Testamentary and judicial hypothecs will be governed by special rules.

293

Classification of hypothecs is continued by this reference to the special case of floating hypothec.

The term "floating hypothec" is used constantly in practice to describe the juridical effects of various articles of the *Special Corporate Powers Act* (135) and some agreements contained in trust deeds, although this expression appears nowhere in legislation and is rarely used in current jurisprudence. The name itself comes from the "floating charge" of Common Law, where floating hypothecs, which do not definitively affect property until crystallization of such hypothecs, which usually coincides with a debtor's failure to fulfil his obligation, are distinguished from "fixed" hypothecs. Fixed hypothecs affect the property as soon as they are validly created, whereas floating hypothecs remain suspended until crystallization.

The introduction of this concept into the series of general provisions would solidly establish the classification of hypothecs and introduce the special provisions on floating hypothecs found in subsequent chapters (see Articles 328 et s.).

294

This article is new, although it does not change current law. The integration of provisions of the *Special Corporate Powers Act* (136) into the Civil Code and acknowledgement that hypothecs could now be created on the totality of present and future property make this article necessary.

Hypothecs may be special or general. The word "also" is intended to show that general hypothecs are restricted and may not be created by everyone. These restrictions and particularities will be discussed in a subsequent section (see Articles 326 et s.). With regard to future immoveable property, a declaration of hypothec will also have to be registered against each lot (see Article 326).

So, any universality, such as accounts receivable, a fleet of trucks or a business concern, may be hypothecated (137).

295

This substantially reproduces Article 2037 C.C., but omits the reference to special provisions regarding *Fabriques*; these provisions no longer seem justified.

Article 309 would make this rule less rigid.

This article repeats the idea in the sixth paragraph of Article 1484

C.C. (138); it covers in particular the ordinary causes of incapacity governed by the Civil Code.

296

This article is based on the second paragraph of Article 1966 C.C. and is extended to all forms of hypothec.

297

This article is based on Articles 2017 and 1976 C.C.

It substantially reproduces the first three paragraphs of Article 2017 C.C. as well as the first paragraph of Article 1976 C.C. The second paragraph of Article 1976 C.C. seemed to repeat general principles of law and was eliminated. The fourth paragraph of Article 2017 C.C. is restated in Article 300.

The expression "improvements or increase by alluvion" in Article 2017 C.C. has been replaced by the seemingly more general and more appropriate "accretions and improvements to, and increases".

298

This article is almost identical to that of Article 2017 C.C. "Publication" replaces "registration" and the word "legitimately" is added to denote expenses protected by the hypothec. It seemed advisable to allow the court a certain discretion in deciding which expenses incurred by the creditor are covered by the hypothec, especially since new recourses to hypothecary creditors are granted. The word "legitimately" aims at restricting creditors' incurring unnecessary or superfluous expenses rather than at limiting honest exercise of their rights and recourses.

299

This article is substantially a repetition of Article 2046 C.C., except that the term "conventional" has been deleted. This rule becomes one of general application.

300

This article repeats the fourth paragraph of Article 2017 C.C., making it subject to Article 335 which makes an important exception.

The concept of payment is used here in its broadest sense. It covers all forms of obligation: payment of money, and obligations to do or not to do.

301

This article is new law, and inserts current practices (for example, loans for construction, credit openings and bond issues) into the Draft. American law contains a similar principle (139).

The article allows a creditor to ensure his hypothec's priority and rank with respect to subsequent creditors. He might thus have priority for sums he paid only after advances made by a subsequent creditor. This is justified since any subsequent creditor would have been able to know of this priority when making his payments or granting his own hypothec.

This article will eliminate any possible doubts as to hypothecs granted when bonds are issued, before the funds are raised or loaned or even before the creditors are known, and those granted as a result of other types of loans before the amounts are advanced.

302

The first paragraph is almost a textual reproduction of the first paragraph of Article 2044 C.C. The second corresponds to the last part of the French Civil Code's Article 2132, changed only to allow the debtor to avail himself of Article 337, a procedure by which he may correct the creditor's declared sum by means of a declaration accompanied by a statement of the debt expressly provided by the creditor for this purpose.

The creditor advises third parties of the extent of his interest through this declaration. This article does not consider cases where the debtor's obligation is merely eventual but those where the exact amount for which the hypothec is granted might be impossible to determine when it is granted. The creditor's declaration must comply with Articles 380 and 381.

303

This article restates the second paragraph of Article 2044 C.C. (140), adding the reference to wills.

304

This article substantially reproduces Article 1992 C.C. and extends it to all hypothecs.

The rule of Article 2022 C.C., by which moveables are not subject to hypothecation, is hereby implicitly repealed.

305

This article is a concordance provision setting forth the prohibition of hypothec on property exempt from seizure.

Paragraph 2 of Article 552 C.C.P. provides that, notwithstanding sub-paragraphs 2, 3, 4 and 5 of the first paragraph of the article, the property there described is nevertheless subject to seizure for the sum of money due on its price, or when it has been pledged or pawned. This Draft retains this exception with regard to sub-paragraphs 3, 4 and 5 of paragraph 1 of Article 552 C.C.P., but not with regard to sub-paragraph 2 (Article 278 states this rule); Articles 322 and 327 reflect this approach. Paragraph 2 of Article 552 C.C.P. will have to be amended to mirror this change, by replacing the words "pledged or pawned" by "hypothecated".

306

This article expands the principle contained in Article 2043 C.C.; the rule is completed by the following articles, especially those governing hypothecs on the property of others (Article 309) and those governing hypothecary priority which rank the various creditors (see particularly Articles 459, 460 and 462). The rule is also applicable to hypothecs on future property.

Moreover, this article supposes that the hypothec was validly granted (e.g. Articles 295, 309, 459 and 460); Article 320 is an exception to this rule.

307

This article restates the substance of Article 2038 C.C., adding concordance amendments in line with the law on obligations.

308

This article completes the provisions of the preceding articles and confirms the rule which seems to prevail in current law (141). This article will avoid doubts as to the extent of hypothecs granted in the cases mentioned.

309

This article completes the rule set forth in Draft Article 306 which determines when a hypothec begins to affect the hypothecated property; the proposed article, on the other hand, like Article 1488 C.C., declares such hypothec null if the grantor has not since become the owner of the property.

Articles 306 and 309 are completed by Articles 459, 460 and 462 respecting publication and rank of hypothecs granted on a thing which belongs to another person. The condition imposed by the present article with the words "unless the grantor subsequently becomes its owner (of such property)" is intended to deal with situations which in fact arise: for

instance, the person lending money to a buyer often requires publication of the deed constituting the hypothec even before advancing the money. Hence, the rank of such hypothecs must be established with respect to the rights which the vendor of the property could grant in the meantime. If a person who grants a hypothec on another's property does not become the owner of such property, the hypothec remains null under the proposed article.

A hypothec on a thing belonging to another is not valid in other cases (e.g. one created by a merchant dealing in similar things), in accordance with the rules proposed in matters of sale and prescription.

310

This article is new law. It completes Article 100 of the Book on *Publication of Rights*, allowing the creditor to retain the hypothec on the amount he deposits and to remain a "secured" creditor within the meaning of the *Bankruptcy Act* (see comments on Article 100 of the Book on *Publication of Rights*).

311

This provision fills a void in present legislation and limits the preceding article's extent.

Theoretically, a corporation which issues securities remains foreign to any hypothecary act between the holder of the securities and his creditor. Redemption, conversion or other transformation of such shares is normally done either by a notice mailed to the holder at the address found in the corporation's books, or by publication in the newspapers with an indication of the shares which are the object of the operations.

According to this article, the creditor must allow for the planned transformation to take place in spite of the hypothec. The procedures to be followed by the parties are also indicated.

The creditor may still enjoy a hypothec on any shares issued or received at the time of this transformation, a fact which constitutes an exception to the rule prohibiting real subrogation (see a. 477).

The last paragraph allows the creditor to proceed with the necessary formalities. The parties must appoint a mandatary to act for them if the creditor cannot or will not act himself.

312

This provision somewhat restricts the scope of general hypothecs on claims. If a creditor holds a general hypothec on all of one person's debts,

doubts could arise as to the effects of such hypothec under this article. If another creditor sells, or causes to be sold, any property of his debtor, a claim will result on the sale price of that property. To avoid confusion, the article provides that this claim will not be covered by a general hypothec. The second paragraph creates another exception with respect to sums paid under an insurance policy.

313

This article entails repeal of Article 1978 C.C., which gives priority to "the laws and usages of commerce". That article has become unnecessary and even harmful to the aim of inserting in the Draft Code all appropriate rules on real security and especially of grouping civil and commercial laws together under one title. Yet usage was still deemed desirable as suppletive rule and is retained in Article 63 of the Book on *Obligations*.

Moreover, jurisprudence has shown that Article 1978 C.C. has almost never been invoked (142).

CHAPTER III

CONVENTIONAL HYPOTHECS

Section I

Hypothecs on immoveable property

314

This article repeats the substance of Article 2040 C.C. The rule requiring strict formality is retained, except as provided for in the second paragraph. Although the requirement of a notarial deed in matters of hypothecs on immoveable property has been criticized, this provision must be retained to protect the parties and third parties.

The second paragraph presupposes a general context in which privileges have been eliminated. It seemed desirable to enable those who enjoy construction privileges under existing law to avail themselves of conventional hypothecs which may be swiftly published without formality. Such hypothecs could thus be granted by deed under private signature.

Deeds granting hypothecs nevertheless remain subject to Articles 315 and 380, which list the information which must appear in such deeds.

Article 301 allows hypothecs to be registered quickly, if necessary, in this or other cases.

315

This article eliminates disparities which existed between Articles 2042 and 2168 C.C. The first is done away with while the second is repeated and completed in the Book on *Publication of Rights*. Designation of lots would be consistent in all acts.

316

According to current practice, notaries are accustomed to inserting stipulations of transfer of rents in all their deeds of hypothec; these stipulations appear even when the immoveable property affected is not rented by the owner when the hypothec is granted.

These formerly conventional stipulations are now legal. However, the parties may always decide otherwise by agreement.

In the same way, insurance policies covering buildings become hypothecated of right in favour of the creditor.

Since this article deals with hypothecs on claims, as distinct from hypothecs on immoveable property, reference is made to the application of the provisions respecting hypothec of claims and recovery of sums.

So, although the cause of the hypothec on a claim resulting from insurance or from rents arises from the hypothec on the immoveable property itself, the procedures from publishing hypothecs on rents and insurance remain subject to the rules established for the publication of the latter. Specifically, notice should be served on lessees or on the insurers.

Between different creditors who have acquired hypothecs on rents or on insurance, the rules of priority will be those governing hypothecs of claims, not those which govern publication of hypothecs on immoveable property.

Section II

Hypothecs on moveable property

317

This article repeats some of the provisions respecting the form of security on moveable property in commercial or agricultural pledge, or pledge on forest land (Articles 1979b and 1979f C.C.). An imperative provision, it applies generally to all hypothecs on moveable property.

The second paragraph deals with pledge which is treated in the Draft as a hypothec where the creditor is put in possession. Although the French solution whereby all pledges must be established by a writing is attractive, it seemed preferable to retain the solution in the existing Code and not to make writings an essential condition for the existence of hypothecs on moveable property when such hypothecs are published by giving creditors possession (as opposed to registration), as such possession serves precisely to establish the rights of creditors on the property, with regard both to third parties and to the debtor. Where creditors are not in possession, obviously a written document is required whereby the hypothec may be published.

The parties may decide whether the deed of hypothec on moveable property is to be a notarial one or under private signature even without witnesses. This procedure has proven satisfactory in cases of commercial pledge. There are additional provisions concerning the form and content of this writing in the chapter on *Publication of hypothecs* (Articles 379 et s.).

318

This article is based on the second paragraph of Article 1979f C.C. In cases of hypothecs on moveables, the property affected must be described in such a way as to identify them. Moveable property cannot always be identified by a number.

319

This article is new.

Québec jurisprudence is seemingly opposed to pledge of salaries or fees not yet earned (143).

The article allows hypothec of salary owing (for work already done or services rendered) but not yet paid; this is a hypothec on an existing claim. Also, any employee is free to authorize his employer or his banker, as his mandatary, to pay part of his salary to his creditor. The debtor (employee) may revoke this authorization at will and it creates no security in favour of the creditor.

320

This article is new.

Québec courts object to any ordinary creditor seizing, to satisfy his claim, redemption value of a life insurance policy belonging to his debtor. The reason given is that the option to redeem belongs to the debtor alone and that no creditor should be able to exercise it (144).

However, the motive which inspires these decisions no longer holds when a debtor voluntarily hypothecates the redemption value of his policy. He is then presumed to renounce the benefits derived from the fact that this purely personal right is unseizable. Moreover, the beneficiaries who have acquired rights in the policy must have agreed to his hypothec. Therefore, this article is less permissive than Article 2556 C.C. (on *Insurance*).

321

This article is new law.

It covers principally hypothecs on natural resources not yet removed or extracted from the land in which they are found; such resources include standing timber, minerals and gas or oil not yet extracted.

According to the general rules, any creditor who has a hypothec on the land in which these resources are found also has a hypothec on the resources. He will thus have recourse against his debtor if the debtor extracts them from the land without his consent; the debtor would thus diminish the security which he had given to his creditor, since once extracted, the property will be freed from the hypothec by reason of the change in its nature (see Article 477).

Any creditor who wishes to acquire a hypothec on such resources, a hypothec which would take effect only on the date when they obtain a distinct entity, will be able to publish immediately, exactly as if the resources had already become moveable. As long as they are not extracted, they are not charged by the hypothec and the hypothecary creditors of the land will be preferred.

Where several creditors acquire a hypothec taking effect on the date when such resources become moveable property, the creditor among them who publishes his hypothec first has priority.

This rule does not apply to the fruits of harvests or to other property which, although attached to the immoveable, will now be considered moveable property under Article 6.

322

This article repeats certain provisions of present law found in Article 1979a C.C. and in Section 22 of the *Special Corporate Powers Act*. Use of special hypothecs on future property has traditionally been limited to persons engaged in a commerce or an activity which requires that some of their property be given as security for their debts. The provision is

intended to protect debtors who are not merchants and prevent them from burdening property they may hold in the future.

The second paragraph modifies this rule, however, to allow consumers to hypothecate moveable property which they are in the process of acquiring, although the hypothec does not become valid until the consumer becomes the owner of the property (see Article 309). Basically, this paragraph was necessary to avoid disturbing the widespread practice of buying on credit: anyone who provides credit will be able to obtain a hypothec on the property, the purchase of which he finances.

323, 324 and 325

These articles are new law.

They are intended to replace the provisions of the Civil Code respecting hypothecs on ships and on their cargo. Consequently, Articles 2374 to 2382 (mortgage and hypothecation of vessels), 2383 to 2388 (privilege upon vessels) and 2693 to 2711 C.C. (bottomry and respondentia) would be repealed.

The rules on hypothecs presented in this Draft apply to all property, including ships. Considering the concurrent provisions of the *Canada Shipping Act* (145), however, it was thought preferable to grant the federal legislation priority. Hence, all ships are covered by this provision, even those whose registration is not required under the federal act. Thus, the parties would, in this case, be able to choose whether they wish to proceed under the rules of the Civil Code, or to have the ship registered and to proceed under the federal legislation. Any security published before such registration would, however, subsist even if the ship were registered later; the ship would then be registered "as is", that is, subject to the security affecting it at that time.

With respect to freight or cargo, the security granted under the Civil Code would subsist even after the property is placed on board, but it will then rank after the preferences granted under the federal legislation (damage, salaries). There would then be no conflict of rank between these securities.

Privileges on ships, cargo and freight would be repealed, subject to the provisions of the federal legislation where they are applicable.

Section III

General hypothecs

326

This article is new law.

It settles the question of description and designation of property as regards general hypothecs.

Generality of description would not, with respect to immoveable property (present or future), remove the necessity of registering a declaration stating the specific designation of each lot affected, upon or subsequent to the granting of a hypothec (146). As regards moveable property, a general description of all the property or of the universality will be sufficient. Such a general description suffices to cover both present and future property (see also Article 321).

327

This article, parallel to Article 322, applies to general hypothecs on moveables. It contains the same restriction, and is consistent with Articles 1979a and 1979e C.C. and Section 22 of the *Special Corporate Powers Act.*

It seems desirable to allow any merchant or person engaged in one of the activities mentioned in the article to grant a general hypothec on moveable property used in earning his livelihood, but in order to prevent a detrimental proliferation of hypothecs, this must not be extended to all debtors in general. American and Ontario law contain similar rules (147).

Extension to immoveables of the restriction found in Articles 322 and 327 was not deemed necessary since most individuals do not possess vast numbers of immoveables.

Section IV

Floating hypothecs

328

This provision is new law.

The floating hypothec, now used mainly by corporations for borrowing on bonds, could hereafter be used by any person mentioned in Articles 322 and 324, who may avail himself of a special hypothec on future moveable property, and of a general hypothec on moveable property. Such a person would be able to grant a floating hypothec on his property

(including a business concern), regardless of the borrowing modalities (and even without a trustee).

A choice had to be made between two solutions respecting the grantor's rights up to the time of crystallization of a floating hypothec. According to the first possibility, the grantor maintains ownership of his property and the absolute right to alienate it until crystallization. According to the second, the grantor may only alienate the property in the normal course of his business dealings, and any other alienation causes the floating hypothec to be considered an ordinary hypothec with respect to third party acquirers. The creditor of a floating hypothec then only gives the grantor power to act within normal business dealings. Thus, a grantor who has hypothecated a fleet of trucks could alienate some of them in his normal business dealings and replace them with others. Any third party acquirer would then take the trucks free from all hypothecs with respect to this creditor. On the other hand, a floating hypothec on claims would not allow its grantor to turn his claims over to a third party free from such floating hypothec, since this alienation would not be deemed part of the creditor's normal business dealings.

The first solution has been retained. Under the proposed rule, creditors of floating hypothecs may not restrict a grantor's right to alienate his property to third parties or to constitute an ordinary hypothec on property already affected by a floating hypothec. Under the rule of priority, an ordinary hypothec granted subsequent to the floating hypothec, and published before the crystallization of such floating hypothec, would rank first, as does a second floating hypothec crystallized before the first, both cases being subject to Article 330. In fact, the creditor of a floating hypothec may not claim hypothecary rights with respect to third parties before the crystallization. A third party acquirer can then have the hypothec cancelled. If this is not the result he desires, he need only take an ordinary hypothec. If he fails to do so, no floating hypothec granted in his favour constitutes a defect in the title (under the first paragraph) with respect to third party acquirers.

The particular nature of this subject seems to necessitate the use of the words "alienate" "hypothecate" and "dispose of" in the first paragraph, to show clearly that the article covers all these operations. Otherwise, the word "alienate" would have been sufficient.

If the grantor alienates or disposes of the property before crystallization, the floating hypothec is extinguished, in accordance with Article 481.

As for "crystallization", see the comments under Article 329.

The second paragraph of this article, however, is intended to grant additional protection when the debtor sells his business as a whole (according to the definition of bulk sale in paragraph 1 of Article 1569a C.C.) (148) or, when the debtor is a corporation, when amalgamation or reorganization takes place. Without this paragraph, debtors could remove all their property from the creditor's security.

329

This article is new law.

It would have been possible to provide that crystallization takes place merely by the fact of the debtor's default as is seen in certain trust deeds, and as some foreign courts have decided. This has the disadvantage, however, of leaving the parties in doubt and of not protecting third parties. Hence, the procedure found in the present article was preferred. It is simple and allows a creditor to bring about the change from floating to ordinary hypothec, by means of a notice (149).

The word "crystallization", taken directly from Common Law terminology, has been retained. It is well adapted to the French language and describes the creditor's position exactly.

From the moment of crystallization, the hypothecary creditor's rights are identical to those of any hypothecary creditor, subject to the provisions following.

There is very little risk of the creditor too hastily causing crystallization (with respect to bond issues, the tendency is rather the reverse). If, however, creditors were in fact too hasty, they could be held responsible for the damages so caused to their debtors.

330

This article is new law.

This provision establishes a floating hypothec's rank after crystallization. The second paragraph is based on Section 25 of the Special Corporate Powers Act.

Thus, registration is required both for a floating hypothec's title deed, required to publish the hypothec, and for the notice of crystallization provided for in Article 329. This article allows the creditor holding a floating general hypothec preference as to taking in possession over any hypothecary creditor who publishes his hypothec only after the floating hypothec is published (valid and registered). Under current law, this right has been upheld by jurisprudence even against trustees in bankruptcy (150). This position has been adopted in view of Section 25 of the *Special*

Corporate Powers Act. This is mainly a question of interpreting the provisions governing bankruptcy, but given their similarity to existing legislation, there is no reason to believe that the new provisions will be interpreted differently with respect to the *Bankruptcy Act.*

Since one of the creditor's primary aims is to take possession of the entire hypothecated business, it was essential to provide for this right over all other creditors, even those with rank prior to crystallization. This preference will not, however, have effect with respect to creditors who have published their hypothec before the general floating hypothec was registered. In such cases, it will be up to creditors of general floating hypothecs to require that the property be free of any hypothec when their right is granted.

Hypothecary creditors who take possession of hypothecated property act as simple administrators of another's property. Article 431 completes Article 330 to this effect (151). Article 431 refers expressly to the debtor's business or enterprise, since this article is mainly intended to deal with this case. Section 25 of the *Special Corporate Powers Act* is absorbed into the varying mechanisms created by this Draft and should be repealed.

331

This article is new law.

This constitutes another exception in favour of creditors who hold floating hypothecs and who, though limited by Article 328, may still act upon seizure of property affected by a floating hypothec to crystallize their hypothec; this allows them to be among those ranked after judicial sale of such property. But the crystallization must affect all the property, not only the property seized; a different solution would make the distinction between the floating and the ordinary hypothec a purely academic one; if the creditor could enjoy priority with regard to third parties in both cases, it would be as though he had priority over them by virtue of an ordinary hypothec. Until crystallization, a floating hypothec by its very nature grants less effective rights than an ordinary hypothec.

The fact that a creditor of a floating hypothec crystallizes his hypothec on all property subject to such hypothec may have serious consequences for his debtor and for the other creditors. Such an action might sometimes cause the debtor's bankruptcy. Considering, however, the flexibility of hypothecary recourses and the fact that the notice of default may be waived after it has been given (cf. Article 334), it may be assumed that interested creditors will act in such a manner as to protect

their common interests. On the other hand, if a debtor is insolvent, it is preferable to act swiftly than to run a greater risk by waiting.

332

This article is new law.

Crystallization gives the creditor all the rights and recourses of an ordinary hypothecary creditor, but only on the property the grantor still possesses.

333

This article is new law.

This provision is parallel to Article 332.

Upon crystallization, the creditor acquires the rights of an ordinary hypothecary creditor to all affected property still in the debtor's patrimony. The last sentence of the article points out that, as might have been doubted, the hypothec continues to operate as a general hypothec with regard to all property acquired after crystallization.

334

This article is new law.

The creditor who has crystallized the hypothec may eliminate the effect of such crystallization, thus causing the hypothec to become a floating one again without affecting his own future rights.

By registering a cancellation, the creditor may erase the effect of crystallization for the future if the debtor has made good his default or the creditor is otherwise satisfied. The parties return to the condition existing before crystallization.

Section V

Hypothecs securing payment of renewable obligations

335

This article is new law. It creates an exception to the rule respecting the accessory nature of hypothecs set down in Article 300.

This article fills a void in current law (152). Under Article 2081 C.C. the hypothec is extinguished. In many cases, however, both parties would like the amount of the obligation to be advanced to the debtor again, even after total or partial payment of the debt, while still benefiting from the original security. This is the case with credit lines, for example.

Thus the article allows for stipulation, in the deed granting the hypothec, that the debtor may take on a new obligation for an amount not greater than the one mentioned in such deed; the hypothec then subsists even after total or partial payment of the obligation. Registration gives adequate notification to prevent third parties from taking for granted the hypothec's extinction merely because the debtor has made payments to his creditor. The rule was formulated in general terms to allow any person to avail himself of its provisions, in accordance with this article.

336

This article is new law.

It completes Article 335 and allows the debtor to obtain *mainlevée* of the hypothec when, contrary to the original deed, the creditor refuses to lend additional sums.

337

This article is new law.

It is also connected with Article 335 and allows debtors to terminate the effect of Article 335 and to reduce the amount of the hypothec when they no longer wish to borrow from the same creditor. Registration accompanied by a statement, from the creditor himself, of the debt owed him will avoid debtors' unilateral declarations. Foreign laws contain similar provisions (see, for example, Article 3055 of the Ethiopian Civil Code and Section 9-208 U.C.C.).

Section VI

Hypothec on debts

338

This article is based on and consistent with Article 1974 C.C., but is more explicit as to capital.

The parties may, however, derogate from the article in their agreement.

The debtor must pay interest to the creditor who has a hypothec on the debt, unless the deed or notice served upon the debtor carries a stipulation to the contrary. Thus, the deed granting the hypothec should stipulate whether the creditor or the grantor collects the interest; if the creditor allows the hypothecary debtor (grantor, creditor of the hypothecated debt) to continue to collect it, the debtor of the hypothecated debt

must receive notification to this effect (according to the rules governing transfer of claims - e.g. service).

The first paragraph creates an obligation for the creditor. If he wishes to free himself from it, he must proceed in accordance with Article 339 (concerning revocation of the delegation, see also Article 341).

The rules governing imputation appear in Article 405.

339

Though it is new law, this article inserts in the Draft Code what has usually been included in contracts between parties. Obviously, a hypothecary creditor may choose not to burden himself with collecting the hypothecated debts, but he then loses his security on the sums (capital or fruits) collected by his debtor or by any other person authorized by such debtor.

Many creditors prefer not to collect debts hypothecated in their favour immediately (as with assignment of rents or of universality of book debts), intervening only when their claims are in danger. These contractual arrangements should be respected.

Where third parties seize the hypothecated debts in the hands of the hypothecary debtor (the seizure is equivalent to a transfer of a claim under Article 637 C.C.P.), the hypothecary creditor will not have priority over the seizing creditor as regards the sums thus collected by the latter. He could, however, under Article 341, serve notice that he has withdrawn authorization to collect, and thus set up his right against any seizing third party or second transferee of the debt.

340

See comments on the preceding article.

341

The article is new law and is connected with the preceding articles.

This provision only applies where the creditor, when giving notice of the hypothec to the debtor of the hypothecated debt, had authorized the debtor to continue payments to the original creditor (the debtor of the hypothec).

Any creditor's decision to withdraw authorization previously given his hypothecary debtor to collect the debts should be publicized by service of a notice, so the debtors will thereafter pay the hypothecary creditor directly.

Such service could be carried out according to Article 139 C.C.P.,

which allows publication in newspapers, or else by registered or certified mail.

342

The article is new law.

Any creditor who collects the debts, by law or by consent of the parties, has authority to grant release or to take any measures necessary to ensure protection of his rights under such claims.

Even a creditor acting as the administrator of another person's property is not compelled under the article to institute proceedings for the collection of amounts due while the hypothec is in force, although he must inform his debtor of the occurrence of default. It is essential to prevent creditors from contractually avoiding this responsibility.

Of course, any creditor who institutes proceedings involving the debts will be subject to the oppositions or exceptions which debtors assigned may set up against transferees of debts. Article 395 provides that Article 325 of the Book on *Obligations* applies in matters of hypothec on debts.

343

This article is new law.

Hypothec of a debt breaks down, to a certain extent, the right to such a debt. The debtor remains the owner and the creditor obtains a right to security. Only the debtor who owns the debt should theoretically be able to sue or take measures for recovery, as happens with hypothecated immoveables where only the owner may take action. Current practice with respect to transfer in guarantee show that some court decisions have attributed the right to action to transferees under Articles 1570 and following C.C., whereas others have allowed debtors who transferred debts in guarantee to sue the debtor since pledge does not deprive debtors of their rights (153).

There are then various possible situations. A creditor could collect the debt under the abovementioned principles, in which case he should logically not be deprived of the judicial means necessary to collect any sum due on such debt. Or, on the contrary, the creditor has contractually given the debtor the right to collect, and in that case, the hypothecary debtor should also logically be empowered to collect the hypothecated debts himself.

For these reasons, a precise, unequivocal and, as one hopes, fair rule had to be adopted. The court which has ruled against the debtor of the

hypothecated debt will order payment made to the hypothecary creditor according to the general principle, unless the payment goes to the hypothecary debtor by contract. Furthermore, it appeared useful to provide that no impleading of either party would be too late if made before judgment; thus, no debtor sued might allege extinctive prescription at the time the party concerned is impleaded (154).

344

The article is new.

The principle by which the creditor's interest in the hypothecated property may not exceed the limits of his rights is consecrated here. Moreover, the creditor is liable for his actions through his function as administrator of another person's property (155). He acts here as the debtor's legal mandatary, hence his obligation to return the surplus.

The article prevents stipulation of any *commissoria lex* or other clause tending to liquidate in advance such possible damages as the creditor might suffer.

345

The article repeats the rule of Article 325 of the Book on *Obligations* (a. 1192 C.C.), applying it to hypothecs of debts. Opposability of the hypothec may result from the means of publication provided by this Title, based on Article 1571d C.C.

Section VII

Memorandum of hypothec

346

This section is new law. It answers a need, felt in practice, for a means of transferring hypothecary debts by removing the transfer from the application of the rules provided for in Articles 1571 and 2127 C.C. Hypothecary claims are payable to order or to bearer and are set down in a memorandum negotiable by delivery.

Transfer of such hypothecary debts and each subsequent transfer can thus take place without service or registration.

The system of memorandum of hypothec exists particularly in Belgium and in France. This practice first developed without benefit of legislation (156), although it is now covered by a special statute in France (157).

In Québec law, given the stringent rules which apply to transfers of claims and to registration of these transfers (Article 2127 C.C.), it was not possible for such a practice to take root without express legislative amendments.

The article thus makes it possible for the parties to have their obligations set down in a deed. This would be a copy or a duplicate of the act constituting the hypothec, which would be negotiable; it would be called a memorandum of hypothec. The second paragraph provides that these agreements cannot take place when hypothecs must be published by giving the creditor possession, since only giving another creditor possession of the property could maintain publication of the hypothec.

The third paragraph provides that the debt so set up may only be transferred by a transfer of the memorandum. Therefore, the article provides an exception to the rule in Article 383 (Article 2177 C.C.) concerning registration and service of a transfer.

Registration of the act makes it possible for third parties to be aware of the existence of this restriction. The notary cannot give out more than one copy of the deed (a. 349).

347

The article is new.

This provision governs the form of deeds of hypothec on moveables with respect to agreements for memoranda of hypothec. In matters of moveables, authentic deeds would be used in all cases, whether *en minute* or *en brevet*.

348

This article is new law.

It is necessary to regulate the number of copies or originals to ensure that there will be only one memorandum of hypothec in circulation. The notary bears this responsibility.

It seemed unnecessary to specify in the Code how and where the words "memorandum of hypothec" are to appear on the memorandum; so no mention is made of this in the Draft. Logically, notaries will make this note either in the margin of the first page, or on the back of the memorandum, making sure that it is obvious.

The registration certificate is mentioned on the memorandum as provided in Articles 54 and 55 of the Book on *Publication of Rights*.

349

The article is new.

This provision reproduces the idea expressed in the preceding article, but applies it to authentic deeds *en minute*, whether they deal with hypothecs on moveables or with those on immoveables. Here, again, the notary is responsible for the number of copies to be issued and the formal identification of the memorandum of hypothec. In all cases of hypothecs on immoveables, the deed must be *en minute*.

See the comments on the preceding article concerning the note to appear on the memorandum.

350

This article is new.

It compels the notary to issue the memorandum to the creditor because the creditor is the first to hold it.

351

This article is new.

This provision permits avoidance of the requirement in Article 2127 C.C. in matters of registration of transfer of debts. In effect, the initial registration of the creation of a memorandum of hypothec is deemed to avail any person who later could have an interest in it. Each endorsement or transfer of memoranda may be made without individual registration being required.

352

The article is new.

This provision allows the parties to divide the amount of the claim into as many fractions as they wish, notwithstanding Articles 348 and 349, which require that only a single memorandum be issued. In this case, each fractional memorandum represents one portion of the total obligation and the sum of the portions equals the total amount of the obligation; it is negotiable separately.

If fractional memoranda are to be issued, the creditor and the debtor must agree to this; also, each fractional memorandum must be separately and consecutively numbered, and the deed and each memorandum must indicate the number of fractional memoranda and the amount of each. All these precautions are taken to protect debtors and to ensure authenticity of titles.

In particular, use of fractional memoranda may facilitate the granting of hypothecs where there are several creditors, as for example in matters of construction (sub-contractors and suppliers).

353

The article is new.

This article provides that the holders of fractional memoranda enjoy, in proportion to the amount of their memoranda, the rights attached to the titles which they hold. They share these rights concurrently, and no right of preference exists between them.

Any holder of a fractional memorandum who alone wishes to exercise a hypothecary recourse will be restricted to judicial sales (governed by Articles 447 to 450). At collocation, each holder of a fractional memorandum will be paid what is owed to him, in proportion.

It would have been impossible to allow any single holder of a fractional memorandum to exercise other hypothecary recourses, because of conflicts which could have arisen between him and the other holders of fractions; some might have wished to take possession of the property, and others to take it in payment or to sell it by agreement. Thus, the article requires unanimity among them or, failing this, that they have recourse to judicial sale.

Nothing in the article, however, prohibits the debtor from paying one holder of a fractional memorandum before being sued or before receiving notice of common exercise of another recourse.

354

The article is new.

This provision describes how *mainlevée* or discharges are obtained when memoranda of hypothec have been issued. The provision allows for two cases: in the first, the initial creditor furnishes a memorandum which has not been endorsed, and in the second, a memorandum which has been transferred. The holder of the memorandum is qualified to grant *mainlevée* or discharge. To this effect, he must furnish a notary with the unendorsed memorandum or with a memorandum bearing the endorsements necessary to prove his rights. The notary is responsible for ascertaining the state of the memoranda and, after he receives *mainlevée* or a discharge by an authentic deed, he mentions partial or total *mainlevée* or discharge on the memorandum. In the latter case, he cancels the memorandum.

355

But for this article, it might be wondered whether presentation of cancelled memoranda to the Registrar was not necessary in order to obtain cancellation.

356

The article is new.

This provision covers cases where memoranda have been lost or destroyed. A fairly stringent procedure is imposed for their replacement, derived from Sections 156 and 157 of the *Bills of Exchange Act* (158).

357

The article is new.

It is intended to govern the problem of the place of payment when memoranda of hypothecs have been issued. Since memoranda are negotiable and there is no service of transfers of debts, the debtor must not suffer from the fact that he does not know the identity of the holder of the debt.

358

The article is new.

It provides for cases where payment is made in anticipation, in relation to the modalities of payment stipulated in the deed of hypothec. If a debtor makes his payments in anticipation, he must require that a reference to such payments be inscribed on the memoranda of hypothec. Otherwise, since the deeds are negotiable, he could be compelled to pay a second time by a subsequent transferee in good faith.

359

The article is new.

This provision governs the modalities of transfer of memoranda of hypothec.

It is fairly difficult to foresee whether endorsements will be made primarily to order or to bearer. Both are provided for, however, in order to ensure optimum flexibility of negotiability.

360

The endorsement must be pure and simple. Since those documents are negotiable, it is not reasonable to allow endorsements to be subject to conditions. In the same way, partial endorsements are null, because of the

difficulties to which they could give rise. Of course, when part of a claim has been paid, the endorsement for the balance does not really constitute a partial endorsement.

Interest will be divided out *pro rata temporis*, on the day of assignment, between the transferor and the transferee of the memorandum.

361

The article is new.

By the mere fact of the transfer, the transferee becomes the holder of the debts described in the memorandum and is thus entitled to the hypothecary rights and recourses which attach thereto. This effect takes place without registration or service on the debtor.

Since memoranda of hypothec are negotiable, it follows that there cannot be set up against the new holder any exception or means of defence based on relations between the debtor and a previous title holder or between the debtor and the original creditor. This rule derives from Article 1192 C.C.

362

The article is new.

This provision is related to that in Article 357 concerning the place provided for payment of debts; it is necessary because the debtor cannot know, from one time to the next, who holds the memorandum of hypothec. There must then be a meeting point at which he can communicate with his creditor. The article, moreover, provides a procedure for changing this election of domicile, and contains provisions which apply in cases of fractional memoranda.

363

The article is new.

This provision completes the preceding one by allowing tender followed by deposit, at the creditor's elected domicile, to be made when, under Article 357, it is stipulated that payment is to be made directly to the holder. In other cases, of course, tender will be made at the places agreed upon in the constituent deed.

364

This provision provides a remedy for failure to comply with Articles 357 and 362. It seemed preferable to nullity.

CHAPTER IV

JUDICIAL AND TESTAMENTARY HYPOTHECS

Section I

Judicial hypothecs

365 and 366

The articles repeat Article 2034 C.C. The third paragraph of Article 2034 appears in Article 367.

As to interest and costs, see the comments on Article 298.

367 and 368

The articles substantially repeat the third paragraph of Article 2034, Article 2035, the first two paragraphs of Article 2036 and Article 2121 C.C.

The first paragraph of Article 367 repeats the essence of Article 2035 C.C., specifying that a judicial hypothec may affect all the debtor's moveable and immoveable property, present or future.

The second paragraph deals with the procedure for publishing and registering judicial hypothecs. To be registered, the judgment must be accompanied by the declaration provided for in Article 380 (159). When a debtor's property includes property which may be subjected to a hypothec publishable only by putting the creditor in possession (i.e. negotiable titles), the latter property cannot be affected by a judicial hypothec.

369

The article repeats the substance of the third paragraph of Article 2036 C.C., amending the drafting only slightly.

370

The article is new, although it confirms an interpretation given to existing law.

Considering that the holder of such a judicial hypothec benefits from an executory judgment, he need not be compelled to resort to hypothecary action if his debtor still possesses the property. The creditor will simply be able to exercise his hypothecary recourse by going ahead with seizure and judicial sale of the property (160).

Section II

Testamentary hypothecs

371

Although an authentic deed *en minute* is required to create a hypothec on immoveable property, it is preferable to allow creation of such a hypothec in a will which otherwise complies with the rules respecting the form of wills (Articles 255 and following of the Book on *Succession*).

372

The article substantially repeats existing law (Article 880 C.C.).

Article 880 of the Civil Code provides that the right to a legacy is not accompanied by a hypothec on the property of the succession, although the testator may secure it by a particular hypothec regardless of the form of the will, subject, as regards the rights of third parties, to registration of the will. The proposed article thus reproduces existing law. Testamentary hypothecs must be special; they must be attached to specific property and not to all the testator's property or to any universality of the same.

373

The article is new law.

Article 2110 of the Civil Code provides that testamentary hypothecs take effect when the succession devolves by their registration within six months from the death of the testator, if he dies in Canada (or within three years following such death if it occurs outside Canada). Generally, all delays granted for registration of real security should be removed. Respecting third parties, testamentary hypothecs should be made public in the same manner as conventional hypothecs. In practice, it will be up to the testator who creates a testamentary hypothec to entrust administration of his succession to an executor or to any other person who will be able to see that this hypothec is made public. The registration system should be able to allow any person to inform himself immediately and with certainty of the hypothecary state of property.

Article 2110 C.C. would then be repealed. Articles 2111 and 2112 C.C. appear in the Book on *Publication of Rights.*

374

This article is new law.

It sets out the procedure to be followed for publishing testamentary

hypothecs, mentioning the declaration which comprises the points indicated in Article 381.

CHAPTER V

PUBLICATION OF HYPOTHECS

Section I

General provisions

375

Part of this article is new.

The first paragraph retains existing law by requiring that hypothecs on immoveable property be published by registration.

There is new law in the second paragraph. With respect to publication by taking possession, the second paragraph retains existing law respecting the contract of pledge. As for the possibility of publishing a hypothec on moveable property by registration, the exceptions which already exist on the subjects of agricultural and commercial pledge, pledge of forest lands, and security on moveable property, created under the *Special Corporate Powers Act* (161), have been broadened. The rule of Article 2022 C.C. would be repealed and recognition would be granted to the principle of publication by registration in matters of hypothecs on moveable property. The procedures for publication of hypothecs appear in subsequent sections.

In matters of hypothecs on moveable property, considering that the article recognizes two methods of publication, the parties will be able to change the method of publication without suffering by so doing. In such cases, it will be sufficient if publication, by either method, is continued without interruption. Moreover, some hypothecs on moveable property are subject to special rules of publication under subsequent articles. The parties then may no longer choose the method of publication. Floating hypothecs must always be published by registration, since hypothetically, no creditor is interested in being put in possession of the affected property.

The two traditional means for publishing real security are registration of the deed granting the hypothec, and surrender of the affected property into the possession of the creditor. They are the safest and the easiest to regulate.

The Draft rejects any idea of exempting any hypothec from the necessity of publication.

Other methods for publishing hypothecs

Respecting conventional security on moveable property, the "notice filing" method is used under the *Bank Act* (162), the *Uniform Commercial Code* (163) and the *Uniform Personal Property Security Act* (164), among others. This method has the advantage of being simple and quick, since it requires that only a minimum number of items be mentioned in the registration. Under the *Bank Act*, the names of the debtor and the bank suffice; other statutes require a description of the affected property as well.

Creditors thus enjoy the advantage of not having constantly to describe the affected property or the amounts for which successive hypothecs are created.

The main disadvantage of this method is that it does not allow third parties to obtain full information by consulting public registers; only creditors and debtors can provide these details. Moreover, notice filing is not always followed by creation of a hypothec (or other security), not to mention the risk it involves of deceiving third parties and harming the debtor who must then obtain *mainlevée* (with the consent of the creditor named in the notice, or by order of the court).

As far as banks are concerned, the disadvantages of notice filing are greatly diminished by reason of the limited number of these institutions, their many branches and their willingness to communicate information, and also by the restrictions imposed by Section 88 of the *Bank Act* respecting property which may be affected in this way. These are all circumstances which are not found in most cases. It was felt that generalization of this procedure could lead to serious disadvantages and abuses. This has happened in the United States, where Section 9-402 has often been criticized. Profiting from American experience, the Canadian drafters of the *Uniform Personal Property Security Act* have limited notice filing to cases of hypothecs of inventories and of accounts owing.

The Draft contains provisions allowing for similar results without institutionalizing notice filing. So, general hypothecs (on inventoried property and accounts receivable, for example; see Articles 294, 326 and 327), hypothecs ensuring payment of successive debts and credit openings (Articles 335, 336 and 337) may be published by registration of notices and declarations to this effect subsequent to the act constituting the hypothec (Articles 380 and 381).

Other methods of publication could still be used in certain cases, but they would require administrative intervention by government and in turn raise questions of legislative policy.

Motor vehicles provide the most striking example. Some countries require that each vehicle carry a notebook containing not only the name of the owner and the identification of the vehicle, but also a chronological list of its various owners. It is possible to require that the hypothecs affecting these vehicles also be noted in the owner's notebook. Since this notebook is essential to alienate the property, the hypothecs indicated therein would be made public *ipso facto.*

Some foreign systems also require that plates identifying the creditor be placed on property affected by hypothecs on moveable property.

The hypothecary right could also be entered on a title or document, as in cases of negotiable instruments or of documents representing incorporeal property.

Although these procedures could be acceptable and even desirable, they do not seem adequate to replace the other means of publication provided in the Draft (registration or giving the creditor possession). They could be added, as additional means of protection. The central registration system which is advocated (165) remains the best means to ensure uniform and universal publication of all hypothecs. There must be no exceptions and third parties must not be forced to do a great deal of research to determine the hypothecary state of property. All security must be subject to the same conditions of publication.

376

The article is new.

There is a provision similar to this article in the *Ontario Personal Property Security Act* and in the Draft *Uniform Personal Property Security Act* (1971 version, adopted by the Conference of Commissioners on Uniformity of Legislation in Canada) (166). That provision reads as follows (s. 47(5)): "Where the collateral is other than instruments, securities, letters of credit, advices of credit, negotiable documents of title or goods to be held for sale or lease with respect to which a notice of intention has been registered, the security agreement shall not be registered after thirty days from the date of its execution."

This provision is intended to protect ordinary creditors who, after granting a debtor credit, could find hypothecs set up against them of which they were unaware when they dealt with the debtor, because such hypothecs were not registered.

In its third report, the Ontario Law Reform Commission stated: "Your Commission is strongly of the opinion that a holder of a security interest should not be permitted to withhold registration indefinitely. The view of your Commission is that such a provision would be unfair to ordinary creditors, who would, while extending credit, have no way of knowing that the security interest was outstanding, subject to perfection at the will of the security holder. In addition, such a provision could be used as an instrument of fraud." (167).

However, under Ontario law, a creditor may apply to the court, when the thirty days expire, to obtain authorization to register despite the expiration of the time. Hence, only the creditors who make such application to the court will be protected. Article 376 goes further and makes the thirty-day period a period for forfeiture. Registration within thirty days has *no retroactive effect* - the hypothec ranks only from the date of its registration.

However, a hypothecary creditor who has not registered within thirty days may still obtain his debtor's signature on a new contract; if registered, this contract may be set up against ordinary creditors from the date of registration.

The exceptions provided in Section 47(5) of the Ontario Act have not been retained in order to avoid the complexity of a regime of exceptions (168).

377

The article is new.

There is nothing in the Civil Code about the effect of unregistered hypothecs on the parties. Article 2130 C.C. states that "no hypothec has any effect without registration ..." But, it is generally held that registration constitutes a protective measure for third parties, established in their interest. Jurisprudence seems to consider that an unregistered hypothec is nevertheless valid between the contracting parties (169).

Since a published hypothec may be set up against third parties, a hypothec which is not published but is otherwise valid, must logically have effect between the parties. By deciding otherwise, it would make publication of the hypothec an essential condition for its existence.

Of course, the term "third party" includes ordinary creditors who could invoke lack of publication as against the grantor of this hypothec.

378

A hypothec which has not been published may not be set up against third parties. Also, if a condition required for its validity is no longer fulfilled, or if publication has been interrupted or has ceased, it may no longer be set up against third parties and loses its rank.

Section II

Publication of hypothecs by registration

379

The article recalls that the Book on *Publication of Rights* applies subject to this Title.

380

The article is new.

The Draft provides that, in certain cases, one party may complete or amend a deed of hypothec by registering a notice to this effect. The article determines the form which such a notice or declaration must take to qualify for registration.

Formalities have been reduced to a minimum and, in every case, this notice or declaration may be a private writing. A copy must, however, be given to the other party.

This procedure is not foreign to the Civil Code. It exists with respect to judicial hypothecs in Article 2121 C.C. (see a. 367).

This article mainly concerns the following notices and declarations: notices of hypothecs on moveable property that is still immoveable (Article 321), of crystallization of floating hypothecs (Article 329), of cessation of crystallization (Article 334), of reduction of hypothecs (Article 337), of judicial hypothecs (Article 367), or of transfer or subrogation (Article 383), as well as notices of exercise of hypothecary recourses, i.e. taking possession (Article 426), sale by agreement (Articles 432-433), taking in payment (Article 439), and hypothecary action (Article 446).

381

The article is new. It is based partly on Article 2120a C.C.

This provision completes Article 380 respecting cases where a subsequent declaration is needed to publish a hypothec (e.g. Article 302).

The Draft provides that, in certain cases, a hypothec may be valid even if the deed does not contain a description of the property affected. Notwithstanding the lack of description, the hypothec may still be registered, but it may only be set up against third parties from the date of registration of a notice containing a description of the property. There is a reference to Article 380 respecting the contents of this declaration.

Thus, a general hypothec could be published immediately on the existing property which it affects and which it describes. But a hypothec on future immoveable property will not be published until the declaration mentioned in this article is registered, as provided in Article 2120a C.C. (see also Article 326).

This procedure is also used in other circumstances, mainly in cases of testamentary hypothecs (Article 374), and of conditional claims or claims of undetermined value (Article 302).

382

The article is new.

Since publication of hypothecs on moveable property rests mainly on the names of the parties to the deed, it could become totally ineffective if the owner of the hypothecated moveable property were to sell that property to a third party. The article prescribes that a transfer of such moveable property must be registered so that the name of the owner may be found.

It seemed preferable not to render unregistered sale or alienation absolutely null since this would unduly hinder the circulation of moveable property. For this reason, loss of the benefit of term was retained as the penalty. In such a case, the sale is valid, but the hypothec also remains valid, allowing the creditor to follow the moveable property, and to exercise his rights and hypothecary recourses regarding any person who has such moveable property in his possession. The penalty provided in the article thus allows the creditor to demand what is owed him as soon as the debtor alienates the moveable property, and if necessary, to exercise his rights of recourse at once.

On the other hand, certain sales of property bring about extinction of the hypothec, as in cases of a sale made by a dealer in similar wares (170), a sale having the effect of a sheriff's sale (171), and a sale made by the grantor of a floating hypothec before it is crystallized (172).

383

The article substantially repeats Article 2127 C.C. (173).

Apart from certain amendments to the drafting, the main change to Article 2127 C.C. is made in the third paragraph, which states that if the formalities prescribed are not observed, the subrogation, or transfer, is without effect against third parties and not only against subsequent transferees who have fulfilled the formalities (Article 2127 C.C.). Consequently, the creditor who first completes the formalities prescribed will have the priority resulting from the deed of transfer or subrogation (174).

Article 351 relating to a memorandum of hypothec is an exception to this article; in such a case, registration and notice are not required.

The first paragraph of the article refers expressly to the possibility of a conditional transfer, thus conforming with jurisprudence (175).

See also the comments on Article 394.

Section III

Publication of hypothecs on moveable property by putting the creditor in possession

384

This is a restatement of certain provisions of Articles 1966 and 1970 C.C.

The parties themselves must determine whether the hypothecated property will be put in the creditor's possession or remain in the debtor's possession, except, obviously, where the law requires dispossession of the debtor.

The giving of the hypothecated property to the creditor constitutes sufficient publication with respect to third parties; in such cases, registration formalities seemed unnecessary.

The creditor may be put in possession himself or through a third party agreed upon by the parties. The concept of a "third party" remains the same as under existing law (Articles 1966 and 1970 C.C.). This cannot be by fictitious possession by the grantor or the debtor, who are not really third parties within the meaning of this article. If the debtor or the grantor were put in possession, the hypothec would not be published (unless registered).

If the creditor transfers his claim, he must remain in possession of the property, since he is responsible for the care of such property. He then must obtain the consent of the debtor, or act as specified in Article 388, in which case he remains solidarily responsible for the care of the property. If the creditor transfers his claim while remaining in possession of the property, the debtor must still be notified, according to the rules on sale of debts.

The "possession" mentioned here is not the same as that mentioned in the Law on Property (e.g. possession useful for prescription); the exception, however, is justified for historic reasons and does not lead to confusion.

385

The article is new.

It might have been enough to provide that possession by a third party is valid from the time such person is informed of the existence of the hypothec. It was preferred, in view of the subsequent problems of evidence (e.g. to establish the rank of the hypothec), to have third parties receive written proof of the hypothec.

386

The article restates a provision of Article 1970 C.C.

Publication of a hypothec no longer has effect when the third party or the creditor gives up possession of the property; the hypothec then loses its rank and can no longer be set up. The articles following temper this rule.

387

The article is new.

It provides an exception to the preceding article, allowing a creditor to restore hypothecated property to his debtor or to a third party temporarily, while retaining possession within the meaning of this section, provided this is done for one of the reasons stated in the article. Generally, these reasons are essential to normal business dealings. Temporary dispossession for useful purposes has already been recognized by jurisprudence (176).

Interruption of prescription takes place only when loss of possession is voluntary. Given the serious consequences of loss of possession, it seems unjust to make the creditor bear the consequences of a situation he did not desire. Therefore, under the article, he maintains his rank and preference

and may revendicate the property. Current law on the right of retention has acknowledged this right (177).

The exception provided for in the third paragraph is justified because hypothecs governed by Articles 389 and 394 must be published by putting the creditor in possession. Obviously, no creditor may avail himself of such exceptions when the hypothecated property is a negotiable instrument.

388

The article is new.

A hypothecary creditor may hypothecate his own hypothecary debt and, in the case of a creditor in possession of the property, he may transfer such possession to his own creditor to publish the hypothec which he grants.

This agreement, however, may in no way prejudice the right of the grantor of the original hypothec, who may recover his property by paying what he owes on the first debt. The first creditor's obligations to his debtor are the same as if he had retained possession. His position with regard to the second creditor is that of the hypothecary grantor; thus, he may take back the property because he has fulfilled his obligation or because the creditor misuses the property, or for any other legitimate reason.

The first creditor must, under the article, notify the constituent when giving up his property in favour of a third party so that such transfer does not interrupt his own possession. Any creditor who does not give this notice loses the effect of his hypothec's publication and rank with respect to third parties. If the hypothec is forfeited, the grantor may recover his property.

The second creditor, then, takes the place of the first (who has turned possession over to him), and enjoys the first creditor's rights and obligations respecting the hypothecated property. If, however, the debtor of the first debt pays the first creditor, such debtor will have the right to take back his property, even if the second creditor has not been paid by the first. Such first creditor cannot transfer more rights than he has.

Finally, this provision allows the original hypothecary debtor a solidary recourse against the first and second creditors according to their obligations with respect to the care of the property. This first creditor has only fictitious possession with respect to such debtor, whereas the second creditor's possession is real. A solidary recourse for the debtor avoids the need for multiple suits.

The creditor in possession may thus, under Articles 384 and 388:

1. give possession to a third party, with the consent of the debtor;
2. transfer his debt to a third party, in which case the debtor must be notified according to the rules on the sale of claims. A distinction must be made as to whether the creditor remains in possession of the property, or a third party is given possession, in which case the debtor must be notified in advance and the creditor remains solidarily responsible with such third party for the care of the property;
3. hypothecate his debt in favour of a third party to whom he gives possession. In that case, the creditor must notify the debtor in advance, but he remains solidarily responsible with such third party for the care of the property.

Section IV

Publication of hypothecs on debts and other incorporeal moveable property

389

The article is new.

It concerns a category of property where possession is primordial as regards third parties. It was imperative to require publication by possession with regard to negotiable instruments. Although the incorporeal right apparent on the title could theoretically exist independently, in reality only the holder can effectively claim the rights so recorded. Negotiable instruments made to bearer have come to be known as actually corporeal, and not incorporeal, moveable property. The article deals with the right itself, incorporeal moveable property, and is characterized according to the title which attests to it. Negotiable instruments are also governed by this article.

An exception to this article is made for floating hypothecs, which are designed to enable the debtor to continue to administer his business as if his property were not hypothecated, and to be free to alienate such property. The debtor's normal business dealings would be needlessly hindered, or any floating hypothec on his property made impossible, were he compelled to turn over to the creditor the titles recording the rights so affected. This exception no longer holds when the creditor crystallizes the floating hypothec.

390

The article is new.

This provision is based on the *Uniform Commercial Code* (178) and the *Ontario Personal Property Security Act* (179).

It was deemed useful to extend the ordinary rules governing publication of certain hypothecs since this could allow short term credit for merchants without these merchants or their creditors feeling restricted by the formalities of giving possession or of registration; nor is it wise to clutter the registration procedure with entries which last only a few days. The debtor might not yet possess the title, or might not yet be able to let it go. This rule protects the creditor against ordinary creditors, giving him ten days from the time he advances funds to his debtor to take possession of the certificate (registration being prohibited here). The creditor's hypothec is good even where the debtor goes bankrupt, provided the creditor can prove his claim.

391

The article is new, although partly based on current law (Article 1571 C.C.). The Civil Code now acknowledges pledge of debts (Articles 1966, 3rd paragraph, and 1974 C.C.). Pledge, however, mainly concerns corporeal property and pledge contracts result in the creditor's physical possession of the property. The Civil Code's other provisions give only relative importance to pledge of debts.

Under Article 1578 C.C., pledge of debts is made by transfer of debt (Articles 1570 et s. C.C.), unless such debts are recorded in a negotiable instrument (Article 1573 C.C.). Through Articles 391 and following, this procedure is adapted to fit the system of hypothec on moveables. These articles require that the creditor be given possession to publish the hypothec.

Any transfer of debts to which Articles 281 and following might apply would be deemed a hypothec on debts. This is consistent with current jurisprudence which, in spite of some dissenting opinions, holds that transfer of debts in guarantee constitutes pledge only and does not allow creditors the right of absolute ownership of such debts (180).

Allowing publication of a hypothec merely by giving the debtor a copy of the deed of the hypothecated debt would have created a third means of publishing a hypothec (besides registration and giving the creditor possession). It was deemed preferable to adopt the principle of Article 1571 C.C. by which giving a copy of the deed granting the hypothec on the debt grants the hypothecary creditor possession. It was

not felt necessary to require in addition that the debtors be notified, since they are sufficiently informed by the copy of the deed they receive. Of course, the creditor must prove that he gave such copy to the debtors.

"Possession" here differs slightly from the conventional notion which affects only real rights (181). In a broader sense, possession denotes manifestation of an individual's control or power over a thing or property, and this is what is meant by Article 1571 C.C. when it says that the "possession" of the transferee of a debt is not "available" with respect to third parties until certain conditions are fulfilled; it is in this sense that the expression has been used.

With hypothecs on debts, publication by registration only is ineffectual because registration does not really constitute sufficient notification for the debtor. In cases of universalities of debts, the rule of Article 393 would be followed.

The reference in the second paragraph to the provisions applicable to sale of debts makes giving possession possible when the debtor is not a resident of Québec or cannot be found (182).

392

This article restates the rule in Article 1573 C.C., which has already been used in Article 389 as regards publication of hypothecs on certain incorporeal moveable property.

A debt recorded in a negotiable instrument cannot be dissociated from the recording document itself; this right is thus deemed moveable corporeal property, whose possession is, in practice, of the greatest importance. Possession of the document is equivalent to title, and any transfer of the rights recorded in the document takes place upon mere delivery of the document.

A floating hypothec may be published as such without delivery of the documents or negotiable securities to the hypothecary creditor.

393

This article is consistent with Article 1571d C.C.

Under Article 1571d C.C., the service and delivery which gives a creditor useful possession with regard to third parties operate merely by the registration of the deed transferring the universality of debts. Moreover, no transferee creditor may set up his rights with respect to discharged debts against any third party before publication of a notice of such registration in the newspapers (or served on debtors personally). The

same rule holds here, and applies to hypothecs on a universality of debts (183).

It is certainly difficult to reach the debtors concerned by registration and publication in the newspapers; transferees often choose to notify them individually, although in certain cases notifying each debtor of the hypothec becomes expensive or impractical. Thus, the possibility of publishing a hypothec on a group of debts by registration remains a desirable and necessary alternative, especially useful for security granted for long term financing, where the creditor does not intend to exercise strict control over the security that constitutes his guarantee. Alongside personal notice and notice by publication in newspapers exists a third method consisting of depositing a copy of the deed in the central register of moveable rights, as suggested in Article 432 of the Book on *Obligations* (184).

This article also replaces Section 26 of the *Special Corporate Powers Act* pertaining to registration of security on debts.

394

This article is based on Article 2127 C.C.

It applies to hypothecs on debts and restates the more general principle of Article 383 covering all cases of subrogation and transfer of hypothecary claims.

This provision, which extends the rule of Article 2127 C.C., applies to transfer of hypothecary claims and covers hypothecs on debts already secured by hypothec.

Registration and delivery of the registration certificate hereby become necessary for publication of a hypothec, not only with regard to the subsequent transferees as was provided in Article 2127 C.C., but with respect to all. The distinction in Article 2127 C.C. between "third parties" and "subsequent transferees" has given rise to difficulties of interpretation and is not maintained (185).

Article 2127 C.C. endangers the position of the transferred claim's debtor, who upon mere notification of a first transfer is compelled to pay the first transferee (Article 1571 C.C.), although the second transferee, who registers and gives due notice, acquires priority over the first. The problem stems from the expression "against subsequent transferees" in the third paragraph of the article. This implies that the transfer may be set up against all except any subsequent transferee who satisfies all the necessary requirements. A debtor may thus still be sought after by a

second creditor even though he has made a valid payment. Careful debtors, then, always await registration and notification.

395

This is a coordinating article. It is needed since Article 1192 C.C. only refers to transfers; such transfers are deemed to be hypothecs when they are granted to ensure execution of an obligation (Article 281). See also Article 342 concerning the collection of hypothecated debts.

Section V

Publication of hypothecs on corporeal things represented by bills of lading

396

The article is based on several Civil Code articles (see Articles 1573, 1578, 2421 and 2711 C.C.) and on the *Bills of Lading Act* (186).

Bills of lading or warehouse receipts, issued upon storage or transport of merchandise, unlike bills of exchange, entitle their holder not to a sum of money but rather to possession of the thing described on them. The owner of the stored or shipped things may thus carry on all normal business transactions (such as sale or hypothec), even though the property is not in his possession.

This document may be negotiable or non-negotiable. If negotiable, it may be subject to operations independent of the things it represents and separate from such things, hence the possibility of conflicts between various persons claiming rights to the things directly or through the document.

Only the person who delivers the document to the warehouseman or carrier may obtain the merchandise. Articles 396 and following are intended to regulate hypothecs granted on such things. These provisions cover all property for which an instrument has been issued and conversely all instruments which constitute receipts for merchandise, whether or not the property has been given to a third party under a contract for shipping, storage or any other agreement.

A hypothec on corporeal things represented by a bill of lading, a receipt or other instrument might be published by normal means, by registration or by putting the creditor in possession of the goods in question. However, a negotiable instrument allows publication of the hypothec on the things it represents by delivery of this instrument to the

creditor. This is, of course, a hypothec on the property itself and not on the bill. The hypothec on the property can thus be published by the delivery of the instrument recording such property, provided the instrument is negotiable. If it is not, the fact that it is in the creditor's possession will serve no purpose in publishing the hypothec.

Articles 389 and 396 should be examined comparatively, since they are intended to govern different situations. Article 396 covers only hypothecs on corporeal things represented by a negotiable instrument. The other articles concern hypothecs on incorporeal moveables and on debts.

397

The article completes Article 394.

In normal business practice, as acknowledged by the *Bills of Lading Act*, a creditor who wants to secure things represented by a negotiable bill of lading usually demands possession of the bill, receipt or other document.

Here, taking of possession by the creditor is a means of publication of the hypothec, and the creditor is presumed to take possession of the things themselves by acquiring possession of the negotiable bill. The preceding article acknowledges this practice but allows publication of the hypothec by registration (this article is consistent with Section 9-304(1) U.C.C.).

The article points out the advantage of this procedure compared with the other methods of publication; a hypothec published by delivery of the instrument to the creditor has priority over a hypothec granted directly on the things, even if the latter is granted or published before the hypothec granted on the instrument, unless that hypothec is published before such instrument is issued.

Creditors should obtain delivery of the instrument to publish this hypothec since any hypothec published by registration is liable to be overridden by that of the creditor in possession of the instrument. Registration is done at the creditor's own risk.

The word "negotiable" at the beginning of the article must be insisted upon, since under the preceding article, delivery to the creditor when the hypothec is created may be useful in publishing this hypothec only when the instrument is negotiable.

398

The article is new law.

It is based on similar provisions of the *Personal Property Security Act*

(187) and of the U.C.C. (188) and restates the principle enunciated in Article 390 so as to extend its application to corporeal moveable property represented in an instrument.

It seemed useful to extend ordinary rules governing publication of hypothecs to allow a merchant to obtain short-term credit without the hindrance which the formalities of giving possession or of registration could cause him or his creditor, especially since registration procedures should not be cluttered with entries which are valid only for a few days. Moreover, the debtor might not yet possess the title representing the merchandise, or he might be incapable of giving up such title at the time the hypothec is granted.

Thus, under the proposed article, the creditor is protected with respect to ordinary creditors for a period of ten days from the time he has advanced funds to the debtor without having to register his hypothec or take possession of the title. If the debtor goes bankrupt, such hypothec is valid, provided of course the creditor can prove its existence. Here, a written document will be required for all practical purposes; this is consistent with the U.C.C. (Section 9-304(4)).

The third paragraph of the article confirms the general rule of rank concerning hypothecary creditors. There is no retroactive effect; rank is conferred from the moment of publication only.

399

The article is new law and stems from the same sources as the preceding article (189).

This provision restricts the rule that temporary dispossession does not affect the hypothecary creditor's rights (190).

This rule only benefits a creditor who takes possession or registers his hypothec within ten days (191).

Any third party who takes possession in the meantime has priority. The first creditor's hypothec, although not forfeited, may not be set up against the holder (or second creditor) who has not agreed to it.

This article and the preceding one only apply between traders. This restriction seemed to make listing the purposes for which a creditor may give up possession of the title, as does the U.C.C., unnecessary.

Section VI

Publication of hypothecs on shares of capital stock

400

This article is new.

A hypothec on the shares of a corporation's capital stock must be published by delivery of the certificate to the creditor.

The company is not concerned with the rights granted by a stockholder on his paid-up shares, and is only obligated to holders registered in its books or to holders of securities.

Jurisprudence acknowledges that any pledge of shares made by giving the creditor possession is sufficient and valid even if the company is not notified of such pledge. Article 401 confirms jurisprudence by allowing hypothecs on shares to be published without notice to the issuer (192).

Specific provisions were necessary to govern shares issued by corporations. Shares are not rights against third parties and are not necessarily negotiable; the other provisions concerning hypothec of debts or rights against third parties are not entirely applicable.

401

The article is new.

The comments pertaining to this article's first paragraph are given under the preceding article.

The second paragraph subjects any transfer of shares resulting from a creditor's hypothecary recourse to the rules of the *Companies Act* (193) or to the by-laws of the company in question. Reference is made in this respect to Sections 40 and 68 of the *Companies Act* and to Articles 617 and following C.C.P.

A hypothecary creditor who seizes shares of a private company's capital stock takes such shares with all their restrictions, which must appear on the share certificate. Thus, the creditor is easily aware of them, and must accept any required approval by the other shareholders of the transfer of such shares or any right to pre-emption mentioned on the certificate. He may not obtain more rights in these shares than the stockholder had himself.

CHAPTER VI

EFFECT OF HYPOTHECS

Section I

General provisions

402

This article restates Article 2053 C.C.

"Debtor" is replaced by "grantor", since the person who grants the hypothec might not be the debtor; "person in possession" is used because the hypothecated property may be moveable or immoveable. "Rights" is used to show that rights other than that of ownership may be hypothecated, as may debts.

In the case of hypothecs on moveable property published by putting the creditor in possession, the creditor's right of ownership is not lessened; he does, however, lose physical control of the property which restricts his ability to dispose of it.

If hypothecs on moveable property are published by registration, the grantor can dispose of such property, provided he complies with the provisions of Article 382. The hypothec still remains, except in the cases provided for in this Draft (194).

403

This article substantially reproduces Article 2054 C.C.

The idea of normal use of the property has replaced the "view of defrauding", since the courts have often deduced or presumed fraudulent intention from the mere fact of deterioration (195), and since this new criterion seems more equitable. The rights of the holder of the hypothecated property cease when he makes use of such rights in such a way as to cause harm to his creditor.

The narrow concept of physical destruction has been replaced by the broader notion of deterioration of value, which is both fairer and consistent with jurisprudence (196).

404

This article is substantially a reproduction of Article 2055 C.C.

The creditor's other recourses are mainly set out in Article 412.

405

This article is a restatement of provisions found in Articles 1967 and 1974 C.C.

These provisions, taken from the rules on pledge, would then apply to all hypothecs, both those on moveables and those on immoveables. This runs parallel to the principles of general law and needs no further comment.

Articles 338 and following, in respect of hypothecs on debts, establish the creditor's right to collect the fruits and the means to effect this right. The present article deals only with imputation.

Section II

Hypothecary creditor in possession of hypothecated property

406

This article replaces the part of Article 1972 C.C. which constitutes the creditor a depositary; it refers to the concept of administration of the property of others (197).

407

The first paragraph restates the first paragraph of Article 1975 C.C.

This provision is applicable to hypothecs published by voluntarily giving a creditor possession. Articles 429 and 430 apply to the taking of possession as a hypothecary recourse.

Under Article 1975 C.C., a debtor can reclaim possession of his pledge; the creditor is compelled to make restitution and thus lose his privilege. The grantor may now still reclaim the property, but any hypothec which is published by registration may subsist where permissible. Under the second paragraph, the penalty imposed on the creditor at fault is less severe.

The third paragraph makes the creditor's obligation with respect to the property a question of public order.

408

This article is a restatement of the second paragraph of Article 1976 C.C.

A creditor's heir becomes a third party holding property for another (see also Article 297 on indivisibility of hypothecs).

409

This article restates the rule of Article 1974 C.C. with a change as to fruits and proceeds yielded in kind. They would be restored to the grantor, failing any other previous agreement.

This article is a statement of the general principle which has already been applied to hypothecary claims (see Articles 338, 339 and 405).

410

The article is new.

This article governs cash repurchase of hypothecated shares. Here, the money received is imputed in the same manner as cash received by a hypothecary creditor for his debtor, saving any agreement to the contrary.

CHAPTER VII

HYPOTHECARY RECOURSES

Section I

Provisions common to all hypothecary recourses

411

The article is a partial restatement of Article 2057 C.C.

Action in declaration of hypothec has been maintained as a recourse for the hypothecary creditor, since it can prevent extinctive prescription of a hypothec by any holder who acquired the hypothecated property without having assumed the hypothecary claim (198).

412

This article replaces Article 2057 C.C., which gives creditors two recourses, hypothecary action and action to interrupt prescription.

The hypothecary action mentioned in Article 2057 C.C. is provided in paragraph 3 of the proposed article: a right to judicial sale which gives priority for payment from the proceeds.

The other recourses mentioned are new. The clauses for "*dation en paiement*" found in most current hypothecary contracts should become

legally regulated recourses since they are unquestionably useful; moreover, since hypothec is to be the only acknowledged form of security, the recourses it offers should be increased in number and made more flexible. Similarly, the sale of the hypothecated property by mutual agreement has been added to the creditor's recourses which he may exercise of right, regardless of the nature of this property. This right is perhaps more rarely found in current contracts concerning immoveables, yet it was not deemed advisable to restrict it to hypothecs on moveables only.

These recourses are open to the creditor of a liquid, exigible debt (see Article 413), as soon as the debtor is in default.

The article covers the recourses provided for a debtor's default but does not exclude any other rights the creditor may have on hypothecated property, such as the right to demand damages if the property is deteriorated or is destroyed (Article 404), or the right to insure his interest in the property (Article 2571 C.C.).

The right to take in payment would be extended to all hypothecs, thus amending existing law which forbids such taking in payment in matters of agricultural or commercial pledge (Articles 1979d and 1979i C.C.).

The creditor still retains his rights and personal recourses against the debtor, namely to demand execution of obligations and to claim damages resulting from inexecution (199).

All the hypothecary recourses will be in the articles which follow.

413

Article 2058 C.C. gives any person who has a liquid and exigible claim the right to institute a hypothecary action.

This is really the same rule except as regards taking possession. Often, a creditor may have to take possession of a non-liquid, non-exigible pledge in order to protect it - when, for example, a debtor leaves the property unguarded or the holder or debtor allows the property to deteriorate. Accordingly, the new rule has been drawn up in two parts - no recourse is possible unless the debtor is in default (Article 412), and except as regards actions in taking of possession, the claim must be liquid and exigible. Thus, taking possession is consecrated as a conservatory measure not necessarily leading to liquidation of the creditor's rights.

414

This article is a reminder that a floating hypothec becomes an ordinary hypothec when it crystallizes; this particular hypothec exists

precisely so that, before crystallization, the creditor may not hinder the debtor's use or alienation of the hypothecated property.

415

This article restates a principle found in Articles 2016 and 2056 C.C. The hypothec follows the property and recourses are exercised against the person who has possession.

416

This article substantially reproduces Article 2059 C.C.

417

Of Articles 2065 to 2073 C.C., only the last two were deemed necessary (Article 2072 C.C. is restated in Article 422).

French law has eliminated all exceptions found in the other articles, either because they are unjustified or because they repeat general rules of law.

Article 2073 C.C., which it seemed necessary to retain with changes, maintains the priority the creditor had before becoming the owner of the property. One of the changes is that, in such circumstances, the person in possession may prevent the creditor from exercising the recourse of taking possession or of taking in payment, in order to force a sale and thus be paid.

As under existing law, this article does not apply when the previous creditor has taken the property free of subsequent hypothecs (see aa. 440 445).

418

This article restates and adapts Article 2074 C.C. Several hypothecary recourses are possible without legal proceedings. Thus, the prohibition of sale applies the moment the recourse is exercised. As regards taking in possession, sale by agreement and taking in payment, this is upon registration of the notice. In the case of judicial sale, dealt with in Article 2074 C.C., it is difficult for a third party, who is a purchaser, to know when proceedings were instituted, unless he verifies this at the last minute with the court clerk. The registered notice, then, would apply in these cases, as in all others. If a creditor who institutes hypothecary proceedings wishes to benefit from the article, he may register a notice of such proceedings.

The purchaser's right to deposit the amount owed the creditor has been retained.

419

This article is a restatement of Article 2076 C.C.

Some Draft provisions do give a creditor the right to the fruits yielded by the property, although he may have waived such right. The creditor is hereby granted the right to claim fruits yielded during the period indicated, regardless of any previous agreement or renunciation.

420

Several hypothecary recourses may be exercised extra-judicially; this necessitates specifying the period of time during which the debtor, or any other person concerned, pays the creditor. The first paragraph of the article resembles the first paragraph of Article 1040b C.C., which deals with *dation en paiement* in a similar manner.

Taking of possession (recourse for possession and not publication of a hypothec by possession) entails neither sale nor change of ownership of the property, which continues to be a pledge. Nothing then prevents repossession by the giver at any time after payment. Article 1040b's rule holds both for sale by mutual agreement and for taking in payment. The Code of Civil Procedure was followed as regards judicial sales.

Article 433 would set a time limit for any creditor exercising the recourse of sale by private agreement.

Judicial decisions have determined that no omission or breach mentioned in the notice of default constitutes real default until notice is served, and that repayment of the entire sum exigible under a forfeiture of term clause by reason of default is unnecessary (200). Since the text has not been substantially altered here, this interpretation should still hold.

The second paragraph repeats almost textually the second paragraph of Article 1040b C.C.

421

The Civil Code establishes the rank of hypothecs according to priority of registration (Articles 2047 and 2130 C.C.). This Draft establishes such rank according to priority of publication (see aa. 459, 460 and 461), which has the same effect.

The article aims at allowing the creditor who ranks first to have priority in all hypothecary rights (not only in matters of collocation). For example, the creditor who ranks first could still exercise the right to claim possession of property already taken in possession by a second creditor.

422

This article substantially reproduces Article 2072 C.C.

The main change is the replacement of the "privilege" of Article 2072 C.C. by a real right of retention; this stems from the recommendation that all privileges be eliminated. The proposed article uses the same terms as Article 84 (Article 419 C.C.). The reference to Article 419 C.C. in the Title *Of Privileges and Hypothecs* has been eliminated; the double reference in Article 2072 C.C. is no longer necessary.

The right to retention provided in this article is also subject to Article 287.

423

This article restates Article 2049 C.C., omitting the provision to the effect that the property must belong to the same debtor. Third parties may indeed have affected property to the debtor's debt; it was decided that the fact that the property might be owned by a person other than the debtor should not in itself invalidate the rule.

Since "property" may be both moveable and immoveable, a creditor is free to exercise his hypothecary recourses against immoveable property without previously having the moveable which may be hypothecated to him sold. Should a creditor first seize and discuss the hypothecated moveables, and only execute against the immoveables in the event of insufficiency (as Article 572 C.C.P. and paragraphs 2 and 3 of Article 2009 C.C. seem to indicate)? This procedure was not considered compulsory. In fact, indivisibility of hypothecs gives the creditor a choice as to which property he will subject to his recourse. Since the value of the moveables will probably not cover the claim, it seemed more practical to give the creditor an option. "Concurrently or in succession" emphasizes the creditor's free choice of hypothecary recourses as long as the debt remains unpaid (or not extinguished). He need not make his choice at the moment of the debtor's default.

The right granted to creditors by this article is considerable. It stems in effect from the principle of the indivisible nature of hypothec (*tota est in toto et tota in qualibet parte*). Even if there is only a small part of the claim left, the creditor may hypothecarily seek out all the affected property, or one or several parts of such property. However, the debtor may profit from the periods of time granted him by law to find the money needed to pay his creditor. This rule is severe, but it consecrates a real right, the hypothec, and is not innovative.

424

This article restates Article 2078 C.C. "Surrender", which may not take place if a creditor does not exercise his hypothecary action, has been replaced by "sale or taking in payment".

The second paragraph of Article 2078 C.C. would be repealed, all the more so since the repeal, in the new Code of Civil Procedure, of the procedure giving effect to it (see Articles 1067 and 1988 of the former Code of Civil Procedure, and the mention in paragraph 4 of Article 704 of the new Code of Civil Procedure).

425

The article is new.

It is a coordinating article which concerns hypothecs on undivided parts of property.

Article 192 and following provide in effect that any undivided co-owner has a right of pre-emption as regards the undivided portions held by those with whom he shares co-ownership.

The proposed article is intended to extend this right to cases where a creditor exercises his hypothecary recourse. The procedure conforms to that established by Articles 432 and 439.

An amendment should also be made to the Code of Civil Procedure to specify that conditions drawn up under judicial sales must mention the co-owners' right to pre-emption.

Section II

Taking possession

426

The notice mentioned in this article constitutes the initial step in the exercise of the recourse; once it is given and registered, the creditor may exercise the right to take possession: either the debtor gives up possession immediately, or he refuses to give it, in which case the creditor will have to avail himself of his rights by motion.

It was not thought necessary or desirable to require the creditor to take action before the courts in cases where the debtor does not object to the taking of possession: the exercise of this recourse is thus facilitated; in matters of moveables, any other solution would have been plainly undesirable. This is in line with the step taken by the Legislature in

enacting Article 1040b C.C., which did not require that creditors' titles of ownership be judicially confirmed.

Notices are necessary since they point out to the debtor that the creditor does not intend to waive his rights; registration is needed to notify third parties who could have objections to the taking of possession or themselves have some rights to exercise. In a more general sense, third parties have an interest in knowing that the creditor possesses *ès qualité* the property of debtors in default. As for the content of the notice, reference should be made to Article 380 which specifies the basic contents of the notices dealt with in this Title.

The present article requires that the notice be given to the "person in possession". Article 1040a C.C. requires that it be given to the "holder of the immoveable as proprietor thereof (whose rights) are then registered". Since we are dealing with taking possession, it is preferable that the notice be sent to him who has possession since, according to the definition given in the Title on *Possession*, the person in possession possesses as an owner. It should be of little importance, then, to know whether that person's rights are registered or not. In cases of doubt, a prudent creditor will give notices to all those who appear to be "possessors" of the property.

It is necessary that the other hypothecary creditors be notified of exercise of such recourse.

427

No delay is provided in the present article nor in the preceding one to comply with the notice of taking of possession once it is registered. Possession is taken by common agreement, and if the debtor refuses, the creditor, on motion, may apply to the court to order it.

428

This article is new.

As regards moveable property, the creditor will obtain, when he exercises his recourse, both detention (physical control) and possession (juridical control) of the property.

A creditor does not acquire detention of the property by taking possession of an immoveable; it is sufficient for his purposes that he acquire legal control and be able to administer the property. In this, hypothecs are different from pledges of immoveables where the creditor possesses and uses the immoveables for himself, or from the mortgage of the "*Ancien droit*". So the creditor will be in the position of pledgees today who, according to Articles 1972 and 1803 C.C., are only depositaries and

cannot use the things for themselves. Under Article 431, the hypothecary creditor in possession is deemed an administrator of the property of another. There is, thus, no personal enjoyment. Trustees of debentures issued in virtue of Section 25 of the *Special Corporate Powers Act* are currently in a similar position.

429

The taking of possession is a conservatory recourse exercised by the creditor either prior to another recourse or at the same time. Often, it can be used to facilitate exercise of his other recourses. However, it is hard to see why any creditor should be able indefinitely to retain property over which the debtor did not wish to allow him possession in the first place. This is clarified in the article.

430

See the explanatory notes under the preceding article.

431

The Civil Code constitutes pledgees depositaries. The approach here is similar; the creditor becomes subject to the rules governing administration of the property of others. These rules assign creditors various duties as to preservation and as to rendering of accounts.

The second paragraph partially repeats Section 25 of the *Special Corporate Powers Act*. The creditor of a general hypothec on an enterprise may operate this enterprise as an exception to the rule on simple administration (201).

As the administrator of another person's property, a hypothecary creditor who has taken possession may be dismissed from this office by the court, on a motion by any interested person, in accordance with Article 582. If a successor must then be appointed, the provisions relating to sequestrators should apply (202). In a general way, the judicial sequestrator takes on the office of a receiver-manager in Common Law jurisdictions (203). It did not seem necessary to specifically provide for the replacement of dismissed creditor-administrators, in view of the general provisions on deposit and sequestration and on the administration of the property of others. Certain foreign laws forbid any trustee who represents a bondholder to act as both a trustee and a receiver-manager (204). This is a problem peculiar to trusts (205); a creditor who acts for himself may, notwithstanding a possible conflict of interests (between himself, his debtor, and the other creditors), exercise the recourse of taking possession and of administration.

Section III

Sale other than judicial sale

432

This article is new, and is based on Articles 1979c, paragraph 1, sub-paragraph 2, and 1979i, sub-paragraph 2, C.C.

The hypothecary creditor enjoys the recourse of selling the hypothecated property at an auction or at a private sale to realize his liquid and payable claim. Juridically, this is less stringent than the recourse of taking in payment. The greater includes the lesser; using this reasoning, the courts have already validated the agreement by which a pledging debtor stipulates that his creditor may sell the pledge in case of default (206); they maintain that, since Article 1971 C.C. allows a *commissoria lex* clause, it would be even more likely to allow this agreement. In practice, this right to sell may settle many difficulties and avoid many costs.

Any creditor who takes it upon himself to sell has a considerable responsibility. This right must be regulated, and that is the object of this section.

The article establishes procedure similar to that in Articles 1040a and 1040b C.C.

The first paragraph specifies that creditors must register not only the notice but also a statement of service of such notice.

The creditor who avails himself of this recourse acts as an administrator of another's property and hence as a legal mandatary of the person in possession. The first paragraph mentions "the person against whom the recourse is exercised", so the creditor then will have to look for the owner of the property against whom he exercises the recourse, or the holder of the rights in the property if a right other than ownership is in question.

See the comments on Article 426.

433 and 434

As soon as seventy days, or twenty-one days, as the case may be, expire after the notice is registered, the creditor may sell the property and give title as if the debtor himself had sold it (the selling creditor acts as legal mandatary). Article 437 requires that the creditor declare himself as such to the third party who is the purchaser.

Understandably, the purchaser takes the property subject to the other real rights which affect it at the time.

He also takes it subject to other hypothecs which may affect it at the time the notice is registered. All hypothecs are liquidated at a judicial sale (Article 718 C.C.P.); the opposite rule is retained here. All previous or subsequent creditors are protected since, under the article, the purchaser becomes personally obliged towards them. It seemed precarious, dangerous and even impossible to make the creditor proceeding with the sale an officer of justice charged with liquidation and collocation of the other hypothecary claims. This solution may render this recourse less attractive where property is heavily hypothecated (e.g. beyond its value) in favour of third parties. However, it seems preferable to allow this inconvenience rather than to resort continually to retroactive effect. Actually, a creditor who exercises this recourse acts as the legal mandatary of his debtor. It would be illogical to give private sales the effect of a sale by sheriff. Moreover, the disappearance of privileges will facilitate this recourse to sales other than judicial sales.

On the other hand, the debtor can prevent sale by paying his creditor that which was the object of default within the period provided in Article 420. It is important that a notice be registered to the effect that payment has been made in order to advise third parties. A ten-day period for registering the necessary indications is therefore provided here; the failure, in fact, might only be made up on the fifty-ninth day after registration of the notice. Thus, the creditor can only sell seventy (60+10) days after such registration.

The second paragraph requires that, once the period provided is over, the creditor must give a new notice, according to Article 432. After this new notice, he will have to wait through another period required by the first paragraph of the proposed article to exercise his recourse.

The third party who purchases becomes personally liable for the debts for which the possessor of the property is himself liable.

435

The article is based on Articles 1979c and 1979j C.C.

The creditor retains the value of his claim, capital, interest and costs, then returns the remainder, if any, to his debtor. Since according to the hypothesis in Article 434, the third party in possession has not paid any debts other than that of the creditor who made the sale, the remainder does not have to be deposited in court for the payment of the other creditors. The rule of Article 1979j C.C. is retained here.

436

This article is new.

Some commercial usage established by the rules of various stock exchanges would be unduly disturbed if this article were not included.

437

This article burdens creditors with the responsibilities of legal mandataries. The Title on *Administration of the Property of Others* applies.

Besides declaring his status to the purchaser, the creditor must also make the declarations required of a vendor, meaning he must state the hypothecs and obligations affecting the property sold. There is no personal warranty, since the creditor acts as legal mandatary, but the regular rules on sale should be applied.

438

Any hypothecated property sold otherwise than by judicial sale must be sold for a price which is not disproportionate with the market value of the property. The creditor is liable for the damages resulting from the sale.

Any debtor who feels himself wronged must prove that the "market value" of the thing was substantially higher than the price obtained in the circumstances, especially considering the other hypothecs affecting the property.

The debtor sued for the remainder of the debt may plead compensation and obtain the damages referred to in the article.

Section IV

Taking in payment

439

See the comments on Article 432.

Briefly, taking possession in payment must be effected according to the procedures which govern the exercise of *dation en paiement* agreements under existing law.

The Draft makes taking in payment a recourse available of right in all cases of hypothec; the exceptions created in Articles 1979d and 1979i C.C. have no equivalent.

440 and 441

These articles are drafted in the same spirit as Articles 1040a and 1040b C.C.

Giving in payment is no longer considered here as an accessory means of payment independent of hypothecary guarantee, but as an attribute of hypothecary law. Creditors might "take in payment" under their hypothec, regardless of the agreement.

Originally, the Draft recommended purely and simply that the recourse of taking in payment, which corresponds to the rights derived from *dation en paiement* clauses, have no retroactive effect, and that the creditor become the owner, subject to all registered hypothecs. Doubts were raised as to whether the addition of Articles 1040a and following, some years ago, went far enough in tempering the injustices which could arise from the retroactivity stipulated in these clauses.

Following representations made to the Civil Code Revision Office, a less stringent solution is proposed.

A creditor who exercises this recourse would take the property free of all hypothecs which rank after his own. However, a subsequent creditor or the debtor may require judicial sale of the property hypothecated. In the latter case, the creditor will have to judicially sell the immoveable, which will protect any subsequent creditors. They may avail themselves of one of two recourses in the case of notice of taking in payment: either they may remedy the default or they may require a judicial sale. There is one reservation, however, in Article 445: the suing creditor may always, by paying the subsequent creditor who required the sale, continue proceedings for taking in payment. If, however, it is the debtor who has protested, the creditor may not take in payment unless the court allows it, and on the conditions which it imposes.

It seemed important to allow the court to protect the debtor who, although unable to remedy the default, could lose an immoveable worth more than the amount due to the suing creditor; the court, among other conditions which it might attach to a judgment, could for instance, allow taking in payment provided the creditor gave the debtor an amount which is reasonable in the circumstances.

The option to oppose the taking in payment is itself subordinate to the condition of advancing to the suing creditor the costs he must incur for the judicial sale and secondly of registering a notice of appearance before the expiry of the sixtieth day following registration of the suing creditor's notice. These measures should discourage futile or dilatory oppositions.

This compromise solution seemed to give added value to the recourse of taking in payment, without completely impoverishing the debtor or the subsequent creditors.

There is no real retroactivity here; Article 441, in fact, declares that the creditor will be deemed the owner from the time the sixty-day notice is registered. By the effect of law - the second paragraph of Article 441 - the hypothec subsequent to his own is extinguished (see a. 486). The creditor and the debtor in case of taking in payment are not the parties who must be restored to the original situation; instead of remitting to the debtor what he has already received (208) the creditor may retain it (209).

If the possessor of the property has made improvements, Article 422 will apply; if the possessor is personally bound for the debt, he may not claim anything; otherwise, he is entitled to a right of retention.

442

See the comments on Article 436.

443

The first paragraph states existing law: the taking of property in payment extinguishes the obligation (210).

The fact that the creditor takes the hypothecated property in payment obviously cannot release the debtor from his personal obligation towards other creditors to whom he may have granted a hypothec on the same property. This article, however, stipulates that if a creditor who has taken the hypothecated property in payment pays off the claim of another hypothecary creditor, voluntarily or of necessity, he may not have himself subrogated and claim the amount from the debtor: this amount was guaranteed by hypothec on property which he took in payment. The debtor himself is released by such payment; he does not profit unduly by it, since he has lost his property. The creditor is not penalized since, because he has taken the property, the payment he makes corresponds to the value he has already acquired.

444 and 445

See the comments on Articles 440 and 441.

Section V

Judicial sale

§ - 1 Hypothecary action

446

This article substantially repeats Article 2061 C.C. This recourse may be exercised equally well against a holder as against a debtor who still holds the property. The last phrase really applies only to third parties who are holders, since the debtor cannot, by surrender, release himself from his obligation to pay.

Surrender was retained, but after some hesitation. The rights of suing creditors and purchasers can be assured even without surrender. The Code of Civil Procedure contains sufficient provisions to allow the purchaser to take possession after a judicial sale. Surrender, however, constitutes a means of bringing pressure to hasten payment.

447

This article is an amended version of Article 2075 C.C. and provides a sanction for third parties who do not surrender property.

The second paragraph of Article 2075 C.C. was considered unnecessary and has been removed. It refers to Articles 2054 and 2055 C.C., which appear as Articles 403 and 404, but adds nothing to them.

448

This article is new.

Surrender of moveable property supposes physical abandonment of the property to judicial authority.

Article 540 C.C.P. applies in such cases.

449

This article, which repeats part of Article 2077 C.C., refers to Article 541 C.C.P.

450

This article repeats part of Article 2077 C.C.

§ - 2 Discharge of debtor

451

Articles 1202a to 1202*l* C.C. were adopted in 1938 (211) and inserted into the Code in 1947.

These articles have since given rise to very few published judicial decisions (212).

They constitute a means of extinction of obligations under Article 1202b C.C., where the creditor purchases the hypothecated immoveable property.

A debtor may be released only if he requests this expressly. Release procedures under paragraph b) of Article 1202b and under Article 1202d C.C., for example, often require complex calculations (213).

The rule in the article, based on the immoveable property's market value at the time of the adjudication, after deduction of any hypothecary claims which have priority over the purchaser's, is simpler and more expeditious, though still substantially consistent with sub-paragraph a) of Article 1202b C.C. Regardless of subsequent events, the debtor is released for the sum of the market value less any priority claims. The rules of paragraphs b) and c) of Article 1202b C.C. were not retained. Any fluctuation in the property's market value is thereafter the purchasing creditor's gain or loss, since he has become the owner of the immoveable. The debtor no longer need worry about the property, or any subsequent operations it may undergo.

The concept of market value is new to the Civil Code, but not an innovation. Such value should normally be calculated in most cases to determine the owner's capital gain or loss at the time the adjudication is made, for tax purposes. Thus, this same value may be used for this article, which refers to the property's market value and not to the cost of replacing it or to its value after depreciation. This article and those which follow it apply only to immoveable property.

The creditor's position is even stronger than in cases of taking possession in payment, since he receives the property and remains the debtor's creditor for any amount exceeding the market value. If the immoveable property is not in a good state of repair, its market value will

fall accordingly. The creditor must verify this assessment before purchasing the property. Articles 453 and 454 govern cases of related persons and collusion.

452

This article substantially reproduces Article 1202c C.C.

453

By adding the reference to relatives in the second degree to the provisions of Article 1202f C.C., the article greatly reduces the possibility of collusion. The presumption *juris tantum* in Article 1202g C.C. with regard to these relatives here becomes an irrebuttable presumption.

Since the word "partner" has no special definition, it is taken here to mean, as it generally does, a member of a partnership. Article 454 governs collusion.

454

This article amends Article 1202g C.C. to simplify the presumption resulting from collusion between creditor and purchaser (see comments on Article 453 as to relatives by blood or by marriage mentioned in paragraph 2 of Article 1202g C.C.).

455

The article is new.

It replaces Article 1202h C.C., which has become obsolete since the adjudication automatically releases a debtor (Article 451).

Only a creditor's refusal to grant discharge may justify a debtor's motion to the court.

456

This article substantially reproduces and simplifies Article 1202i C.C. (214).

457

This provision is new; yet it is not foreign to the Code; see the second paragraph of Article 1040b of the Civil Code, which appears in the second paragraph of Article 420.

Since this article and the second paragraph of Article 420 both deal with the capital, interest and expenses of the debt, the calculation provided for in Article 1202d C.C. is unnecessary. The amount of the debt will be determined according to the circumstances (e.g. the contract), unless the

debtor is entitled to have it reduced (e.g. by application of Article 1040c C.C.: aa. 37 and 76 of the Book on *Obligations*) (215).

Section VI

Imperative provisions

458

This article indicates certain Draft provisions which are to be deemed of public order. See comments under each article.

CHAPTER VIII

RANK OF HYPOTHECS

459

Suggested amendments to the Civil Code respecting privileges and hypothecs have required the inclusion of several new provisions in this chapter on hypothecary rank, although certain rules of the Civil Code have been maintained where applicable. The recommendation that privileges and legal hypothecs be abolished has simplified the order of preference of security on property. This Draft establishes the hypothecary rank from the moment of publication, whether by putting the creditor in possession or by registration.

This chapter also includes rules on subrogation and transfer of debts or rank, since both are legal operations which can affect the rank of hypothecs.

These provisions aim at establishing the hypothecary rank not only for collocation on judicial sale, but also for the exercise of other hypothecary recourses (cf. Article 421).

Conventional, testamentary and judicial hypothecs would all rank from the date of publication. Where conflicts may arise between creditors who have published by different means (by taking possession of the property or by registration), priority between them would be established according to the rules of evidence. Priority of registration would be established according to the day, not the hour or minute. This is consistent with current law (Article 2130 C.C.). When the hypothecs are published on the same day, they rank equally and in proportion to the creditors' claims (216).

460

This article provides for hypothecs on another person's moveable property. Since this hypothec may be valid because the constituent becomes the owner of the thing (in accordance with Article 309), a rule of preference must be provided for the creditors who might have acquired a hypothec from this same grantor. However, the right of third parties is maintained. This rule adopts Article 2043 C.C.

461

This article restates the rules of Article 2130 C.C.

This is the corollary, as regards immoveable property, of the preceding article. Unlike hypothecs on moveables, those on immoveable property may be published only by registration.

Moreover, the Draft allows valid granting and registration of hypothecs whose deeds lack some of the information required by law; these hypothecs must subsequently be completed by a notice (under Article 381) in order to be set up against third parties. The proposed article provides that such hypothecs rank from registration of the notice rather than of the deed.

462

The rule in Article 2043 C.C. is hereby extended to persons not in possession as owners, and the seventh paragraph of Article 2098 C.C. is restated as well.

A hypothec granted by a person on immoveable property he does not own has no effect until the grantor's title is registered. Priority among several creditors who have acquired from the same grantor before his title of acquisition is also covered (217).

The article completes Articles 306 and 309 (see these articles).

463

The article is new.

This is a final vestige of the vendor's legal preference. Abolition of all privileges required that, for the sake of effectiveness, the priority of a conventional hypothec stipulated by a vendor be ensured over any general hypothec granted by a purchaser on all his property.

Since the vendors' privilege would be abolished, there is no need to retain Articles 2099 and 2100 C.C., which grant a delay (60 and 30 days respectively) for registering sales (and similar contracts); moreover, in

existing practice, the vendor of immoveable property also generally stipulates a hypothec, to which the thirty-day delay does not apply.

The parties must publish their rights diligently and the law must discourage delay on their part. Many creditors, vendors and purchasers (for cash) habitually have their titles registered before complete release of their payment or advance; this Draft inserts this practice in the Code in the common interest.

464

The article restates Article 2051 C.C. and adds express reference to Article 716 C.C.P.

Article 716 C.C.P. grants any amount due to a creditor who is subjected to a condition (in the event such condition occurs) to the subsequent creditor, provided he furnishes security. It also states what becomes of that amount if he fails to furnish security, or in the absence of any subsequent creditor.

465

This article restates the rule found in Article 717 C.C.P.

This substantive provision, although inferred in Article 717 C.C.P., is not found in the Civil Code. It seemed desirable to insert it so as to allow creditors of undetermined or unliquidated claims to enjoy priority according to their rank. However, Article 717 C.C.P. provides that the amount estimated by the prothonotary as being sufficient to satisfy the claim will be retained by the Minister of Finance until determination or liquidation of the claim.

466

The article repeats Article 718 C.C.P. almost entirely.

This rule appears substantive rather than procedural in character and should be in the Civil Code. Upon a creditor's exercise of the recourse of judicial sale, any other debt with a term becomes immediately exigible and is collocated according to its rank.

467

This provision is intended to eliminate a doubt which seemingly persisted with respect to the content of the book of charges. Judicial sale is intended to purge the hypothecs (*inter alia*) and a request cannot be made that the sale be made subject to them.

468

This article is a substantial reproduction of Article 2048 C.C.

Tacit transfer of rank, provided for in part of Article 2048 C.C., is criticized on the ground that no person is ever presumed to renounce his rights; it has been removed.

469

The article amends Article 1986 C.C. for purposes of cross-reference. These amendments stem from a recommendation concerning a more explicit rule to govern subrogation. Article 227 of the Book on *Obligations* reads as follows:

> "A creditor who has been only partially paid may exercise his rights for the balance, in preference to the subrogate who has partially paid him."

The last paragraph of the article states the reverse of this rule, laying down the order of payment when subrogating creditors guarantee payment and hence renounce the priority allowed them by general law.

470

This article is a substantial reproduction of Article 1987 C.C.

471

This provision adds to Article 1988 C.C. a stipulation as to the remainder of the transferor's claim in cases of partial transfer; a gap in the 1866 Code is thus filled.

CHAPTER IX

EXTINCTION OF HYPOTHECS

472

The article substantially repeats the fifth paragraph of Article 2081 C.C.

This provision lays down a basic rule derived from the fact that hypothecs are mere accessories and that they subsist only as long as all or part of the principal obligation (see Article 300).

Article 335 provides that hypothecs subsist even if the principal obligation is extinguished, when the deed granting the hypothec provides

that the debtor may borrow again on the same warranty; this can occur if he is granted a credit opening, for example.

473

The Draft states that it is not essential to stipulate a specific term for a hypothec to be valid. A distinction must be made here between the validity of a hypothec as such and that of the registration of a hypothec, which is governed by Articles 474 and 475. If a hypothec is granted for a specific term, as may be the case for credit openings, for example, it becomes extinct when that term expires.

474

The article repeats an idea expressed in the first paragraph of Article 2081a C.C.

The period of twenty-five years corresponds to the longest period recommended in the Book on *Prescription* (218).

The exceptions provided in Article 2081a C.C. have been removed, particularly respecting annuities, emphyteutic dues, annuities substituted for seigniorial rights, rights created by a trust deed, or hypothecs guaranteeing a life-rent or a life-usufruct. Nor should new exceptions be created, even in favour of public bodies. The period of twenty-five years is necessary, even in these cases, in order to make it easier to search titles.

475

The article repeats the principle of the preceding article and applies it to hypothecs on moveable property. In this case, the period for extinction of hypothecs is five years. The five-year term, which was retained, conforms to the *Uniform Commercial Code* as revised in 1971 (219). The Ontario *Personal Property Security Act* (220) provides a term of three years. This provision constitutes a change from the provisions on agricultural and commercial pledges or pledge of forest land, where the time periods are fifteen and ten years respectively (221). Here again, consistency should prevail; it is unnecessary to provide an overly long period, in order to facilitate search of titles.

In this case, however, mention is made only of the period of validity of the hypothec and not of the term of the debt, which may be more than five years, depending on the agreement of the parties. In this respect, the Draft amends Articles 1979a and 1979e of the Civil Code by granting the parties more flexibility. As long as the hypothec on moveable property is renewed every five years, the parties may agree on a longer term for the debt.

The exception provided in the case of floating hypothecs is justified by the fact that such hypothecs are usually used for long-term financing, and also by the fact that the property may be alienated free of hypothec before crystallization.

476

The article is new law.

This provision is justified principally by the fact that hypothecs on moveable property may be published in two ways. For example, if a creditor loses possession of the property, he may register his hypothec, provided, of course, he is otherwise allowed to do so.

477

The article repeats the first and sixth paragraphs of Article 2081 C.C.

Most of the cases envisaged need no comment. Change of nature is a question of fact to be determined in each case. Consequently, if moveable property is hypothecated and later becomes immoveable, this change of nature will be sufficient to extinguish the hypothec. Moreover, if an immoveable is destroyed, Article 316 provides that there is a hypothec on the insurance policy covering it.

In cases of expropriation, the words "for public purposes" have been omitted; they are useless in practice, because expropriation may only take place for public purposes. Nor is it necessary to specify what becomes of the right of creditors, since this subject is dealt with in the *Expropriation Act* (222). Specifically, Section 54 of that act provides for the possibility of discontinuance of expropriation. In this case, the discontinuance is retroactive from the date on which the notice of expropriation was registered, and the hypothecary creditors then recover their rights as they existed at that time.

If the nature of hypothecated property changes, the hypothec is extinguished. This rule excludes real subrogation (replacing one thing by another). Foreign legislation (including American laws and the *Uniform Personal Property Security Act*) accept the notion of real subrogation, in the Common Law tradition. Thus, the sale price of hypothecated property may, in certain cases, itself be hypothecated as long as it remains identifiable in the receiver's possession. In general, the Civil law provisions forbidding real subrogation in matters of hypothec should be maintained (223). Article 311 provides exceptions for conversion or other transformation of shares of a corporation's capital stock. Article 316 provides a special rule to deal with insurance on immoveable property.

Property whose nature may change (construction materials, for example) should therefore be the object of a hypothec on moveable property, and then of a hypothec on immoveable property, if the creditor wishes to ensure himself of continued protection. Moreover, the inconvenience of such a procedure would be much reduced in view of the fact that the rules for immobilization by destination have been eliminated (224). The absence of immoveables by destination renders the rule in paragraph 1 of Article 1979h C.C. unnecessary.

When the nature of a thing changes, the immoveable property which becomes moveable ceases to be affected by the hypothec on immoveable property which affected it. Any rule contrary to that which was retained could lead to great difficulties. If a hypothec on immoveable property were to subsist on property which has become moveable, the possessor of such property would find that a hypothec about which he knew nothing could be set up against him. Hypothecary creditors (upon immoveable property) would only need to establish that the property had been immoveable and had constituted part of an immoveable which was hypothecated in their favour.

The parties will be able to agree to the contrary, but in this case they will have to subject themselves to the rules of hypothecs on moveable property; specifically, they will have to describe adequately that part of the property which is intended to remain hypothecated once it has become moveable, and they will have to respect the formalities prescribed for granting and publishing hypothecs upon moveable property (225).

The reverse rule also holds good, by reason of amendments to Book Second on *Property* in the Civil Code. Thus, any person who has a hypothec on moveable property which becomes immoveable by nature loses his hypothec, since the property has changed its nature. The problem of immoveables by destination no longer arises since the Draft recommends abolition of this category of immoveable.

This article does not, however, authorize the person in possession of an immoveable to remove, diminish the value of, or tear down all or any part of such immoveable or of the hypothecated structures. Articles 403 and 404 (Articles 2054 and 2055 C.C.) make provision for a sanction in such cases. The article deals rather with cases where, in the normal course of events, certain parts of an immoveable will be separated from it. The law on property will also have to be considered with reference to the concepts of moveable and immoveable property, and the presumptions linked with the nature of property.

478

The article substantially repeats the third paragraph of Article 2081 C.C.

479

The article is new.

This provision is based on similar rules in the *Uniform Commercial Code* (226), repeated in the *Uniform Personal Property Security Act* (227). This provision is intended to ensure that hypothecs granted by wholesalers to finance their inventories may not subsist when the goods pass to a retailer or to a consumer in the normal course of business. The text applies to both wholesale and retail sales and sets only one condition, namely the purchaser's good faith which may exist even if he knew of the hypothec. It matters little whether the hypothec so extinguished was published or whether the purchaser was aware of it. If the purchaser acts, however, only to extinguish the hypothec, with or without collusion on the part of the merchant, he is not in good faith, and the hypothec would subsist.

Moreover, the fact that the hypothec is extinguished under this rule would ordinarily lead to application of Article 1092 C.C. Should the term be forfeited merely because the hypothec is extinguished under the article? This result is prohibited by the second paragraph, unless the parties agree otherwise.

Of course, this article weakens the warranty of creditors who take a hypothec on an inventory, but can this be otherwise (228)? These warranties are intended rather to grant lenders a preference on merchandise in case of insolvency or bankruptcy; such merchandise could be sold in bulk.

480

A merchant who used this means to free himself of a hypothec he did not create could be sued for damages (229). This rule does not affect him if he could not have known of the hypothec.

481

The article is new.

Since anyone who grants a floating hypothec may, before crystallization, alienate any part of the property free of the hypothec, obviously, the hypothec should then be extinguished. Such extinction does not occur, however, in the cases governed by the second paragraph of Article 328.

As the hypothec is extinguished, its cancellation may be applied for.

482

The article substantially repeats the sixth paragraph of Article 2081 C.C. The exception respecting seigniorial rights and annuities has been removed as obsolete.

483

The article substantially repeats Article 2021 C.C.

This rule has been moved from the general section to the Chapter on *Extinction of Hypothecs*, since it governs extinction.

The reference to acts equivalent to partition has been replaced by a reference to declaratory acts of ownership in order to eliminate any ambiguity as to the nature of the acts concerned (230).

Articles 212 to 218 and 226 of the Book on *Succession* contain provisions relating to hypothecs at the time of partition (replacing Article 731 C.C.).

484

The article substantially repeats Article 1176 C.C. (231), which is really a rule governing extinction of hypothecs.

485

The article substantially repeats Articles 1177 and 1178 C.C. (232). Here again are rules governing extinction of hypothecs which should logically appear in this part of the Draft.

486

This article was added to ensure the operation of the mechanism provided for in Articles 440 to 445. Under these articles, the creditor who takes in payment takes the property free of subsequent hypothecs if there has been no opposition.

TITLE SIX

ADMINISTRATION OF THE PROPERTY OF OTHERS

CHAPTER I

MODES OF ADMINISTRATION

Section I

Preliminary provisions

487

The article replaces the distinction made by the Civil Code between acts of administration and acts "other than those of administration" (e.g. disposition). This new classification is intended to eliminate the vagueness in existing law with respect to the extent of the administrator's powers.

488

The word "beneficiary" is used here generically, since administration may take various forms. The "beneficiary" may be an heir, a mandator, a corporation, a trust or any other creditor of the obligations of an administrator.

489

This article specifies the extent to which the responsibilities of administrators apply.

490

This article proposes as a general rule that which is laid down in several individual cases (233).

491

This article proposes a suppletory rule.

Section II

Custody of the property of others

492

This article uses the word "custody" in its usual meaning, namely, the act of caring for and keeping a thing (234).

493

This article compels the person who has custody of the thing to perform the acts necessary for preservation. Articles 512 and 513 impose an obligation of diligence.

494

This article lays down rules of general law.

495

This article restates the general law and provides for cases where the custodian may make use of the property.

496

This article provides for cases where property yields fruits or must constitute the object of payment.

497

This article repeats the rule laid down in matters of deposit in Article 1810 C.C.

498

The first paragraph of this article is an application of the rule laid down in Article 218 of the Book on *Obligations*. The second paragraph makes provision for an exception to the rule of Article 219 of the Book on *Obligations* when custody is gratuitous.

Section III

Simple administration of the property of others

499

The article sets forth the general rules which apply to the second level of administration of the property of others. In simple administration, the concept is "to keep ... in a good state of repair", in contrast to custody which only requires acts of conservation.

500

Among the rights attached to the property the article refers, particularly, in matters of securities, to the right to vote and the rights of conversion and option.

501

The word "improvements" here means new construction and expenditures on luxuries which, at least with respect to the second, are prerogatives of the right of ownership. Maintenance repairs are covered in Article 499. Although a simple administrator is not required to make the property productive, good management requires that he invest any money he does not require for his administration.

502

Collection of fruits is in present law an act of pure administration, so it is natural that this right be imposed on a simple administrator.

503

In carrying out his duties, the administrator must continue to use the property for the purposes for which it is intended. Simple administration makes possible the concession of leases, but not emphyteutic contracts (235).

Article 431 makes an exception to the second paragraph of this article in favour of a creditor who has a general hypothec on a business or a trade. This rule repeats that in Section 25 of the *Special Corporate Powers Act* (236).

504 and 505

These articles are drawn in part from the sixth paragraph of Article 919 C.C. The administrator is not granted a general power of alienation. This can take place only in the conditions specified here.

506

The article allows for a situation different from that covered in the preceding articles. It assumes that there is money to invest or a portfolio of property and securities regarded as investments. Property entrusted to an administrator otherwise than as an investment cannot be alienated or changed otherwise than under Articles 504 and 505 (237).

Section IV

Full administration of the property of others

507

Full administration allows the administrator to perform any act bearing on the property administered. This applies, in particular, to trustees, tutors and directors of corporations. The contract of mandate is governed by its own rules (238).

In addition to ensuring its custody and good state of repair, the administrator must make the property productive. This obligation, however, does not compel him to make improvements, other than repairs, which do not fall within the scope of his responsibilities. To this end, each situation must be examined individually in order to determine the additional powers and duties of administrators.

508

This article is drawn from Article 981j C.C. The obligation of the administrator is one of diligence (obligation of means): he cannot be compelled to compensate for any loss suffered by reason of a decision made in good faith with care and diligence (239).

Subject to the terms of the instrument establishing the administration and the standards which apply to good management, the administrator may carry out any act of disposition by onerous title, including emphyteutic leases.

Trustees have generally been acknowledged as enjoying full powers of alienation in seeking out the interests of beneficiaries. The rule in this article covers all administrators to whom full power to alienate is entrusted. This rule does not leave any doubt as to its scope, being more direct than that in Article 981j C.C.

CHAPTER II

RIGHTS AND OBLIGATIONS OF THE ADMINISTRATOR

509

The definition in the article is formulated in very broad terms and covers, among others, tutors and curators, trustees and testamentary executors, mandataries, directors of corporations and managers of firms, managers of the thing of another, sequestrators, co-owners and the administrator of the community. It does not cover either emphyteutic holders, who are owners during the course of the contract, or institutes of substitutions who are owners until the substitutions open.

A person who "acts as an administrator" may be authorized to do so or may act without such authorization. Nor is it necessary for a person to be in possession of the property which he claims to administer in order to incur the liability of an administrator. Such would be the case of those persons who attempt to involve themselves in administering for others or who create the impression that they have the appropriate authority to so act.

510

The article lays down a new rule similar to that of Article 118 (majority) of the Book on *Persons*, which states that a minor who is a merchant, craftsman, professional person or salaried employee is considered to be of major age for the purposes of his business, craft, profession or employment. The rule of the proposed article applies even in cases where administration would be gratuitous (240).

There are express provisions which prevent minors from acting as executors or trustees (241).

511

This article approximates Article 453 C.C.P. on declaratory judgments. Its purpose is not to allow an administrator to seek approval or ratification of his acts by a court, but merely to seek clarification of his powers and obligations.

512

The article imposes a duty of loyalty upon administrators of the property of others; this means not only total fidelity in commitments assumed or in those imposed by law, but full allegiance to the principles of

honour and uprightness, and assumption of full responsibility for the interests of the beneficiary.

The obligation imposed by this article goes further than the obligations of the "prudent administrator" already provided for in Articles 290, 343, 441r, 981k and 1710 of the Civil Code. This obligation is somewhat similar to that imposed on trustees.

The general duty of loyalty imposed on an administrator obliges him, for example, to transmit to the beneficiary any pertinent information which may affect his decision to continue, change or terminate the administration.

A number of provisions in this chapter deal with the administrator's duty of loyalty. The end of the first paragraph of the article raises an important matter of legislative policy: must there be an "exclusive" duty or must administrators be permitted to possibly find themselves in conflict of interest situations? Conflicts of interest arise in many cases, the most apparent being those of gratuitous testamentary execution and trusts. In fact, executors or trustees are often heirs or legatees who must act for themselves as well as for others. The general rule must not be exclusive of the multiple interests of the administrator, as, for instance, in the case of mandate (242). The second paragraph attenuates its scope to protect administrators who are also beneficiaries.

513

This article repeats a principle already stated in Articles 1710, 1766 and 1802, *inter alia*, of the Civil Code (243).

The article, which imposes upon administrators an obligation of diligence, provides them with the necessary discretion to select the appropriate manner of administration. As well, they can refuse to perform acts which would entail too great a cost for the beneficiaries or outweigh the value of the property. Moreover, this decision could terminate the administration.

The article and the preceding state the administrator's general obligations; the articles which follow complement them.

514

This article complements Articles 512 and 527. It refers to the exercise of the powers conferred upon an administrator and prohibits him from drawing personal gain from these powers.

515

The article uses "interest" in a very general sense which is even wider than that of "right" and covers situations in which the administrator's "interest" can only be indirect.

516

This article deals with the liability imposed by law on administrators, who can always invoke the foregoing articles to show that they acted within the set standards, taking account of the circumstances. However, administrators cannot free themselves either from their obligation to act in conformity with the law or from the liability derived from it.

517 and 518

The purpose of these articles is to render more flexible the regime of administration with respect to providing security and making inventory. If neither the law nor the agreement imposes these obligations, the beneficiary may apply to the court for an order to this effect.

The Draft requires the executor to make inventory (244).

519

It was deemed advisable to allow the administrator to take out insurance, at the expense of the beneficiary, against the liability he incurs from his administration.

520

The article imposes on the administrator an obligation derived from good management.

521

The declaration demanded in the article need not be in any special form, saving, of course, the requirements of the rules on evidence.

Company law imposes a similar obligation upon administrators with regard to contracts made by corporations (245).

522 and 523

These articles deal with avoidance of conflicts of interest in the person of an administrator. The first paragraph of Article 522 repeats the rules in Articles 1484 and 1706 C.C.

These provisions apply generally, subject to special provisions which complement them by adding to them or derogating from them. In particular, this will apply to the *Companies Act* where the principles

relating to contracts between administrators and corporations are the object of special rules. However, this article will serve as a background by way of suppletive law.

Use of the words "directly or indirectly" in the second paragraph of Article 522 eliminates any need to embark upon definitions of dealings between related persons, and presumptions of arm's length. In each case, the question as to whether there is a breach of obligation is one of fact.

It seemed preferable in the third paragraph of Article 522 to provide only for relative nullity.

524

The article complements the preceding one by extending it to all contracts for which an administrator is responsible.

Special provisions will make exceptions to this rule, especially in the case of corporations when it will be necessary to specify the modalities of the execution of contracts.

The case of partnerships is different: if a partner, acting in that capacity, makes a settlement on behalf of the partnership. However, if the administrator acts only as a manager, the prohibition applies.

Here again, relative nullity seems to be imposed.

525

The article complements the preceding ones. It is taken from the last paragraph of Article 290 C.C., which prohibits tutors from accepting transfers of any rights or debts of their pupils.

The second paragraph also provides for relative nullity.

526

The article is a new application of the principle of avoiding conflicts of interest.

An obvious exception to the rule here is the case of the administrator of community property.

527

The article sets out the prohibition for the administrator to profit from the property he administers or that relating to the possibilities for gain which might present themselves to him during the administration. This is one application of the obligation of loyalty (see a. 591 et s. with respect to the sanctions of this obligation). The rule derives from corporate law and from Article 1803 C.C.

528

The article derives from Article 763 C.C. and is intended to quash any doubt resulting from this article, especially in the case of corporations. Authorization by the beneficiary is no longer required, provided the conditions imposed by the article are fulfilled.

The prohibition against disposing gratuitously extends to renunciation without valid counter prestation of rights belonging to beneficiaries (246); it also covers arrangements made in compromise (247).

In its application to corporations, this rule settles the question of gifts other than customary ones (e.g. charitable gifts), unless the administrators obtain prior approval from the shareholders.

529

The article makes an exception to the rule of Article 59 C.C.P., which provides that no one may plead on behalf of another person.

530

The article imposes an obligation derived from good management.

531

Annual accounting is required of several administrators, notably tutors (248).

As for final accounting (249), the form and formalities will be governed by usage. Article 589 provides remedies in both cases for abuses (see also Article 590 on the cost of accounts).

In certain cases, the law requires more stringent formalities in the rendering of accounts (e.g. intervention of the Public Curator in tutorship and curatorship).

532

This and the articles following are derived mainly from the *Uniform Principal and Income Act* (250). The rule of impartiality is known in Common Law as the "even hand rule" and demands that an administrator distribute the income and expenses of the administration among the various beneficiaries.

This rule applies whether there are several beneficiaries together who receive equally or unequally, several beneficiaries in succession, or several beneficiaries of whom some have rights to income and others have rights to capital.

This and the articles following provide a suppletive regime for the

administrator's obligation of impartiality. These provisions avoid difficulties in routine administration.

533

The article lays down a rule as to good management. It introduces the provisions which follow.

In addition, this provision is subject to the general obligation of an administrator provided *inter alia* in Articles 512 and 513.

534

The article specifies the scope of the right of the beneficiary to the income from the property administered.

535

The enumeration in this article is not exhaustive. Given the present silence of the law, it strives to establish a basis for interpretation by resolving some of the situations which present problems in existing law. Income accruing from natural resources (e.g. mines) has not been added, considering the rules which already exist in the chapter on usufruct.

536

This article matches the preceding article in respect of the concept of capital; here, as well, the enumeration is not exhaustive.

Sub-paragraph 4 lays down the rule governing dividends, based on the declaration made by the corporation (251).

537

This article introduces the articles following.

538

The article lists the expenses generally imputed to income; this classification is based on the practice of professional administrators and is derived from the *Uniform Principal and Income Act* (252).

Sub-paragraph 1 includes insurance premiums. In cases of damage insurance (e.g. fire), these premiums protect both the capital and the income. While insuring the capital, however, the policy provides just as much protection of the income, and current practice imputes this expenditure to the income alone.

539

Under the article, the administrator may distribute major expenses over a period of years so as to regularize the income. These expenses can

be imputable to income in any case, and include expenses for roof repair or for maintenance.

540

The article complements the preceding article in respect of expenses imputed to capital.

541, 542, 543, 544 and 545

These articles describe the principle of allotment of income and specify the time when this is done.

546

The article complements the preceding ones.

547

The article proposes a solution to a problem which frequently arises in corporate practice.

548

The article constitutes an additional application of the rule of impartiality.

549

The article lays down a rule which is followed in practice when the value of property diminishes.

550

The article does not call for any particular comment, except with respect to the sanction of the obligation which it creates for administrators. It seemed preferable to apply the regime of responsibility here (Articles 512 and 513), rather than to endeavour to draft a special rule. In American law, opinion is divided with respect to the sanctions arising from failure to fulfil the obligation in the proposed article (253).

CHAPTER III

INVESTMENT OF THE PROPERTY OF OTHERS

551

The article repeats Article 981q C.C.; derogations are provided for, either by law as in the case of institutes (254), or by the act, as is the case for trustees or executors.

552

The article repeats Article 981o C.C., but amends the beginning of it. It creates in favour of the administrator a presumption of good administration. The administrator who is bound to follow the limitations of the enumeration would be responsible for any loss resulting from an unauthorized investment (Article 560). The liability of the administrator who is not bound by the limitations of the present article would be governed by Articles 512 and 513.

553

The article repeats the second paragraph of Article 981o C.C.

554

The article repeats Article 981p C.C.

555

The article repeats Article 981r C.C.

556

The article repeats the rule in Article 981s C.C., eliminating the reference to institutes under substitutions.

557

The article substantially repeats Article 981t C.C. It refers to other provisions of law, and, specifically, to Article 513.

CHAPTER IV

RESPONSIBILITY OF THE ADMINISTRATOR

558

The article creates a presumption of fault against the remunerated administrator.

559

The article is drawn from Article 1710 C.C. The first paragraph is illustrative of the general law and introduces the exception contained in the second paragraph.

560

The article substantially repeats Article 981u C.C. (255).

561

The article appeared necessary since the issue is not always one of "damages". The recourse provided for here takes place subject to any penal sanctions which might be taken.

562

The article provides that an administrator may delegate only non-discretionary acts except by authorization of the act establishing the administration.

563

The article is drawn from Article 716 of the Book on *Obligations*.

564

The article repeats the substance of the rule on mandate, found in Article 1711 C.C.

565

The article is based on the first paragraph of Article 1711 C.C.

566

The article is based on Articles 981m and 1712 C.C.

567

The first paragraph sets forth the principle of the rule by majority in matters of administration of the property of others. This principle would apply to testamentary executors and trustees, thus amending existing law on testamentary execution (256).

However, majority rule does not apply when an act entrusts distinct responsibilities to each administrator, as there is then no joint administration.

The mechanism for dissent is new, and drawn from legislation applicable to corporations (257).

568

The article draws a new rule which makes it possible to by-pass stipulations in acts which otherwise may prove difficult or impossible to apply (258).

If there are only two administrators, they must, of course, work together; if there is disagreement, the judge may intervene.

569

The article is intended to prevent certain administrators from paralyzing the administration by opposition or obstruction, when an act or the law requires that they act unanimously or according to a special majority.

570

The article is based on Article 1715 C.C. See, also, Article 441w C.C. on co-ownership.

571

The article repeats the rule on mandate in Article 1716 C.C.

572

The article repeats the substance of the rule laid down in matters of mandate in the first paragraph of Article 1729 C.C. The "legal representatives" include not only successors but also testamentary executors and trustees.

573

The article repeats the substance of Article 1730 C.C.

CHAPTER V

TERMINATION OF ADMINISTRATION

574

The article is partly drawn from Article 1759 C.C., supplemented by the reference to the notice to co-administrators and others.

An administrator who renounces is justified if he considers that the administration requires costs which are too high considering the value of the property or the means of the beneficiary, or if he is required to give security or guarantee for their administration.

575

The article specifies the date on which administration ends.

576

The article is drawn in part from Article 1759 C.C.

The second paragraph especially provides for cases in which an administrator resigned at a time he knew to be favourable to the machinations of third parties, which in turn would be detrimental to the beneficiary. It also concerns cases in which directors are eager to resign when serious difficulties present themselves for the property or the business administered.

577

The article requires no specific comments.

578

The article states the particular grounds for termination of the administration of the property of others. The grounds for the extinction of obligations and the rules governing nominated contracts may also apply to administration of the property of others.

579

The article is new. Not only can an administrator be revoked in such circumstances, but he is required to resign on pain of personal liability.

580

The article is based on Articles 1713 and 1722 C.C.

581

The article is based on the rule in Article 1756 C.C. on mandate. This rule is standard when an administrator is selected by the beneficiary, as in the cases of mandate and of directors of corporations.

The law provides for several cases in which the administrator cannot be dismissed unilaterally by the beneficiary, for instance in tutorship and testamentary execution (259). In matters of trust, the trustee can only be revoked by a motion to the court (260).

582

The article repeats several provisions pertaining to special types of administration, such as Articles 917 and 981d C.C.

The court seized of a motion for dismissal may always, of its own

motion or on application, order sequestration of the property in conformity with Article 742 C.C.P. It is not necessary to specify this here.

583

The article is based on Article 1722 C.C.

584

The article is based on Article 1760 C.C.

585

The article is based on several provisions of the Civil Code which apply to administrators (e.g. Articles 920, 981e and the third paragraph of 1755 C.C.).

586

The article is based on Article 1761 C.C.

CHAPTER VI

RENDERING OF ACCOUNTS

587

The article does not prescribe any form for the account. The parties should normally agree, or follow the usual formalities of accountancy. If there is disagreement, Article 534 C.C.P. furnishes the solution as to the form the account should take: two parts and a recapitulation.

Subject to Article 589, a preliminary audit of the account is not required. It appeared preferable to follow current practice and usage, with court proceedings involving experts if such means are insufficient (see a. 589).

Article 530 deals with annual accounts, as distinguished from final accounts.

588

The article is drawn from the fourth paragraph of Article 913 and the first paragraph of Article 981m C.C. Article 566 imposes solidarity of the obligation.

589

The article adds to Article 587 in granting the beneficiary a right to an account in proper form. Two recourses are granted to him: a simple expert audit authorized by the court, and a formal judicial audit.

590

Despite the principle of the article, whether the administrator's expenses are allowable depends upon his sound administration (compare Articles 512 and 513).

Costs for rendering the account are included in the expenses of administration (261).

591, 592, 593 and 594

These articles are based on Article 1713 C.C.

595

The article specifies one aspect of the administrator's obligation of loyalty. It appears necessary to include this provision in addition to the general rule (a. 512), given its practical importance. In the case of corporations, the rules on "insider trading" would complement this rule.

The obligations created by Articles 591 to 595 are of strict law. Irrespective of his good faith, the administrator must give up all he has received and everything from which he has profited.

596

The article is based on the last part of Article 1713 C.C.

The right of retention is restricted to moveable property by reason of the very nature of the duties of administrators (retention of moveable property is governed by Articles 286 and 287).

597

The article is based on Article 1714 C.C.

When an administrator in some other capacity uses any of the money administered, a distinction will have to be made between his two qualities.

598

The article is based on Article 1724 C.C.

599

The article is based on Article 1726 C.C.

TITLE SEVEN

TRUSTS

CHAPTER I

GENERAL PROVISIONS

600

The article replaces Article 981a C.C., broadening its scope. It makes valid certain forms of trusts found in Common Law (express trusts) but not permitted under existing law (262), subject however to this title and to the provisions of the Draft.

A trust benefiting one or several persons is the same as the trust referred to in Article 981a C.C. A trust for a purpose of public interest is the same as that in Articles 869 and 964 C.C., although this trust apparently may be established only by will (263). The present article would confirm that this trust may be set up by gift (264). A trust for a purpose of private interest is one constituted for a particular purpose, such as the construction of a memorial monument. Article 607, however, extends its scope to cover trusts constituted for the establishment of a fund intended to ensure pension payments to employees, and other trusts by onerous title.

The meaning of "transfers" is explained in the following article which provides that a trust is established by contract or by will. Requirement of the transfer of property to constitute a trust would not prevent the grantor or a third party from increasing the capital of the trust by making later transfers of property by gratuitous or onerous title. In fact, the Draft confers all powers on the trustee and acknowledges that he can contract for the trust (265).

The property which the grantor conveys may be moveable or immoveable, corporeal or incorporeal. The transfer may in fact concern any part of the patrimony. The transfer may be simply in the form of a surety for the fulfilment of an obligation, such as the payment of employee pensions or the reimbursement of a loan contracted through a bond issue (266).

601

The article is based on Article 981a C.C. It provides that a trust may be established by will, by gratuitous contract, or by onerous contract. A

specific reference to the rules of the substance and form of the contract or will seems useful, considering the differing opinions given on the subject with regard to gifts in trust (267).

602

Acceptance by the trustee, a requirement laid down in the article, is, in accordance with existing law, based on Articles 981a and 981b C.C. (268). Moreover, acceptance by one trustee alone is sufficient. This provision is new (269). The second paragraph is needed to cover the time which, in the case of a testamentary trust, may pass between the constituent's death and the trustee's acceptance.

Since a trust is set up by contract or by will, it may be subject to a condition, a term or any other modality to which the Book on *Obligations* applies. The trust must be accepted in all instances. Before it is accepted, it has no existence. No distinction is therefore made between the creation and the constitution of trusts (270). When the trust is subject to a term or a condition, the trustee may take the necessary steps to ensure that it is executed, even before the fulfilment of the modality. Except in the case of testamentary trusts, transfer of property by the grantor and acceptance by the trustee take place, according to the role of consensualism at the same time (271).

603

The article is new. Although the property placed in trust constitutes a distinct patrimony, this does not change the relations under existing law between the various persons involved nor the powers of each over the property placed in trust. The articles following reproduce all the existing Civil Code provisions and the rules laid down by the courts.

The second paragraph specifies that the act constituting the trust governs the use to be made of the trust property. Article 623 deals with management of the trust by the trustee.

604

The article is new. The use of "in trust" to designate a given situation must be interpreted according to the circumstances of each case.

605

The article repeats the substance of Article 869 C.C. It retains existing law which allows a liberal interpretation with regard to identifying beneficiaries of gifts made for charitable purposes (272). The choice of these may be left to the trustee. Like any other trust, it is subject to Article 636.

It may sometimes be difficult to distinguish between a trust for a purpose of public interest and a trust for a person. For instance, a trust set up in favour of a legal person such as a university is a trust for a person. A trust constituted for an educational purpose such as the creation of a scholarship, of which the university would be the trustee, would be a trust for a purpose of public interest.

606

The article is new. Apparently, the words "or other lawful purposes" in Article 869 C.C. may not be interpreted as implicitly including a trust for a purpose of private interest (273). It does not seem justified to allow that, as in a trust of public interest, the purposes be only determined by the trustee.

607

The article is new. It combines all trusts constituted otherwise than in a gift or a will. The definition includes trusts established on the occasion of a bond issue, trusts concerning immoveable investments or securities, trusts establishing pension funds, and others.

The article extends the use of trusts beyond the scope allowed by existing law (274). This extension is primarily justified by the necessity of providing Québec residents with the effective means available elsewhere.

The Title on *Trusts* defines as a beneficiary the person who receives under a gift or legacy in trust. The second paragraph of the article extends the application of the provisions laying down the rights and recourses of beneficiaries to persons who receive payments or who hold shares under a trust for a purpose of private interest. However, the provisions concerning the existence, capacity and identification of the beneficiaries of a gift or legacy in trust do not apply to them.

CHAPTER II

TRUSTEES

608

The article is in line with existing law; it is based on Article 981a C.C.

In a trust constituted *inter vivos*, it is essential that a trustee accept the transfer. Article 612 provides for cases where the trustee appointed by the testator does not accept or must be replaced.

609

Although the article is new, it is in line with existing law under which no one unable to contract obligations may be a trustee (275). The Book on *Persons* (276) states that no corporation except a trust company may act as a trustee.

610

The article amends existing law under which, given the wording of Article 981a C.C., it is considered that a donor may not be a trustee.

Where donees are concerned, this provision is in line with existing law (277).

611

The article is new. It complies with existing law under which acceptance may result from acts performed by the trustee (278). Although it may seem preferable to require formal acceptance by the trustee, it was thought better to adhere to the present rule (tacit acceptance), given the difficulties which may arise when, without having formally accepted (in writing) a person acts *de facto* as trustee.

612

This article is substantially similar to Article 981c C.C.

CHAPTER III

BENEFICIARIES

613

The first paragraph of the article is taken from Article 981a C.C.

The second paragraph is based on the third paragraph of Article 777 C.C. and acknowledges that the grantor may designate himself as beneficiary of the trust by reserving the right to receive all or part of the income or capital of the trust.

614, 615 and 616

These articles amend existing law (279). They are based in part on Article 838 C.C. in that it provides that the beneficiaries of a trust (e.g. children to be born) must have the required qualities to receive when their right opens, not at the time the trust is established. This rule is extended to cover trusts established both by gift and by will. Article 615 also provides that if only one beneficiary in a class or a degree is qualified to receive, his

presence assures the opening of the right for all the beneficiaries in that category or degree (e.g. ensuring the right of other children to be born).

These rules are completed by those in Articles 632 and 633, which determine the duration of the trust and the final moment of opening of degrees and determination of beneficiaries.

617

The article is in accordance with existing law, although there is no equivalent in the Civil Code (280). The method of calculating whatever part of the income a beneficiary is entitled to is established in the act and it may be expressed, in particular, by way of a percentage of either income or capital.

618

The article is an attempt to specify the nature of the beneficiary's right, considering the controversies that arise on the subject, even in Common Law (281). It definitively rejects the theory which holds that the beneficiary is the real owner of the property while the trust lasts (282). Only when the trust ends can the beneficiary claim the property (see a. 630).

The beneficiary's right to intervene in the trust is limited to the right to demand what the act entitles him to, and to intervene only as far as the law permits (283). Also, in principle, the beneficiary incurs no responsibility with regard to the creditors of the grantor or of the trust. Under general law, however, the grantor's creditors may move to set aside the trust if its creation is to their prejudice.

The beneficiary may dispose of his right in the trust as he may dispose of any other property, subject to any formalities which may be required for the transfer. Moreover, the chapter on *Substitution* in the Book on *Succession* proposes that any inalienability clauses which do not constitute substitutions be deprived of any effect (284).

619

The article is new. The first paragraph repeats the provision in the second paragraph of Article 935 C.C. relating to substitutions. The second paragraph broadens with respect to the beneficiary and the third party the rule laid down in jurisprudence and interpreted as allowing certain beneficiaries to be excluded (285).

620

The article is new. The beneficiary's acceptance is not needed to constitute the trust. Acceptance of the transfer of the property by the trustee is sufficient to complete the transfer to the trust (286). Since the property is not transferred to the beneficiary but to the trustee, a rule can be laid down which presumes the beneficiary's acceptance. If the beneficiary renounces after he has accepted the benefits of the trust, his renunciation has effect for the future only, according to the usual rules governing resiliation.

621

The article is new law. It lays down suppletive rules governing devolution of the trust property in the absence of a beneficiary, thereby filling a gap in existing law (287). This provision is needed in view of the nature of the trust and of the rights of the beneficiaries to whom the usual rules of devolution cannot be applied.

This provision concerns only those trusts constituted by gratuitous title to the benefit of one or more persons (288).

The Book on *Succession* introduces representation with regard to legacies (289). This rule would apply to testamentary trusts.

622

The article is new law. It completes the preceding article.

CHAPTER IV

ADMINISTRATION OF TRUSTS

623 and 624

These articles propose a new drafting of the provisions found at present in Articles 981b, 981j and 981k C.C. They are completed by Article 618, which specifies that the beneficiary does not have a real right over the property of the trust. The trustee alone has the power to take possession of the property of the trust and to act validly with regard to it.

Article 624 refers to the provisions on administration of the property of others (290).

Under this Draft, administrators entrusted with full administration are authorized, subject to their obligation to provide good administration, to perform any kind of act with respect to the property they administer, including acts of alienation (291), except acts of disposal by gratuitous

title. They are restricted, however, to the investments listed in Article 981o C.C. (a. 551 et s.), saving express stipulation to the contrary. These rules would apply to trustees, unless the trust instrument has changed the scope of their powers.

Trustees, as administrators, are bound to act with the prudence and diligence of a reasonable person or, as the case may be, a professional administrator. They are subject to certain rules intended to prevent conflicts of interest. Remunerated administrators are responsible for any loss or damage caused to the property they administer. When several administrators carry out the same duties, they are solidarily liable.

625

The article is new law. It subjects any beneficiary who intervenes in the affairs of the trust to the same responsibilities as the trustee.

626

The article is new, except for paragraph 3 which refers to the Title on the *Administration of the Property of Others*, which in turn repeats Article 981d C.C.

The present article and the following ones clarify existing law with respect to the recourses which any beneficiary may exercise against the trust while it lasts (292). By reason of the moral interest which the grantor has in the execution of the trust, he is granted a power of intervention. This power does not affect the reality of his alienation.

627

The article is new. It provides the beneficiary with a recourse similar to that which Article 1031 C.C. grants to any creditor (293). Given the special nature of the beneficiary's rights, however, it appears useful to repeat the rule here.

628

The article is new. It allows the beneficiary to take action against his trustee's acts, by way of an action similar to the Paulian action (294).

629

The article is new law. It has often been noted that existing law provides for no supervision of the execution of trusts of public interest (295). The powers conferred on the Public Curator would allow him to organize adequate supervision of these trusts, the *Public Curatorship Act* being amended accordingly. This power would also extend to trusts set up by gratuitous title for a purpose of private interest (296).

630

The article substantially repeats Article 981*l* C.C.

631

The article refers specifically to provisions governing annual accounts, distribution of benefits and expenditures between capital and income, the power of delegation, the majority rule, the grounds for terminating an administration, and the obligation to render a final account. These provisions are based on Articles 981e to 981h, 981k and 981m C.C., on the rules governing mandate and on usage. The rule in the first paragraph of Article 981g C.C. is reversed, since administrators are remunerated, unless the trust deed provides otherwise.

CHAPTER V

DURATION OF TRUSTS

632

The article is new, but in accordance with the solution adopted by jurisprudence (297). It applies to trusts the provision in Article 932 C.C. concerning substitution.

The chapter on *Substitution* in the Book on *Succession* contains an express provision to the effect that the degree is calculated by heads and not by roots. An exception to this rule, however, is made when the grantor has stipulated that if one of several joint institutes dies, his portion must be added to that of his co-institutes (298). The second paragraph makes these provisions applicable to trusts and also clarifies existing law (299).

633

The article is new. It amends existing law by providing that first degree beneficiaries must begin to benefit within a maximum period of ninety-nine years after the trust is established (e.g. children or grandchildren to be born).

Moreover, it must be possible to determine the last degree beneficiary's quality (see Article 614) upon expiry of ninety-nine years after the establishment of the trust. This time period allows sufficient flexibility so that in ordinary circumstances (e.g. trust in favour of a consort, then children, then grandchildren), the beneficiaries may be easily determined. The rule in Article 616 does not apply in that case since only the

beneficiaries determined upon expiry of the ninety-nine years may receive. The others, if any, will be excluded.

634

The article is new law. With respect to trusts for a purpose of public interest, it answers a doubtful question in existing law since Article 869 C.C., which allows legacies for charitable purposes, specifies no time period (300).

As for trusts for private purposes, and trusts by onerous title, to which the same rules apply (301), perpetuity seems the only solution (302).

The proposed rule employs the only criterion which is appropriate, that of the time needed for the fulfilment of any intended purpose. It is tempered by Article 636, which allows the court to terminate the trust.

635

The article is new. It proposes a suppletive rule which determines what becomes of the property upon expiry of a trust constituted for the fulfilment of a purpose. The article also applies to trusts by onerous title (303).

636

The article is new law. It lays down in general terms the power conferred on the courts to terminate a trust prematurely or to amend the provisions of the deed constituting it (304).

Such amendments to trust deeds may deal for example with the number of trustees, the extent of their powers, or any other aspect of the trustee's administration.

637

The article is new; it gives the court all the discretion necessary regarding the manner with which these matters may be dealt. Specifically, the judge may take account of the grantor's intentions and consult the beneficiaries of the trust.

638

The article refers to the provisions which determine what will become of the trust property when the court terminates the trust.

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(1) See P.B. MIGNAULT, *Le droit civil canadien*, Montréal, Théorêt, 1897, t. 3, p. 12; Y. CARON, *Les servitudes légales sont-elles des servitudes*

réelles?, (1962) 42 Thémis 123; *Friedman v. Boulrice*, (1919) 56 C.S. 356, p. 364; *Duchesneau v. Poisson*, [1950] Q.B. 453.

(2) See, specifically, A. COSSETTE, *De la révision du chapitre de l'usufruit*, (1958) 60 R. du N. 255.

(3) See J.-G. CARDINAL, *Le droit de superficie*, Montréal, Wilson & Lafleur, 1957; P. MARTEL, *Le placement hybride*, (1969) 71 R. du N. 532.

(4) S.Q. 1971, c. 74; see Bill 7, 1976.

(5) See the *Publication of Rights*.

(6) Adopted by the Canadian Bar Association in September 1970 and by the Conference of Commissioners on Uniformity of Legislation in 1971 (see Proceedings of the Conference of Commissioners on Uniformity of Legislation in Canada, Ottawa, 1971).

(7) R.S.Q. 1964, c. 275, s. 22 et s.

(8) R.S.Q. 1964, c. 318.

(9) S.Q. 1971, c. 74.

(10) On moveable hypothec and North American law see: Y. CARON, "*L'article 9 du Code Uniforme de Commerce peut-il être exporté? Point de vue d'un juriste québécois*", in *Aspects of Comparative Commercial Law: Sale, consumer credit and secured transactions*, edited by Ziegel and Foster, McGill, 1969, c. 25, p. 374. This text, which was written before the Draft was prepared, reflects the policy adopted by the Office.

(11) Section 22

(12) See the *Report of the Study Committee on Bankruptcy and Insolvency Legislation*, Ottawa, 1970, par. 3.2.044, among others.

(13) See, for example, *Drouin et al. v. Charest*, [1952] Q.B. 1.

(14) See Title 24 of the Municipal Code; on this subject, see also A.J.O. BERGERON, "*Vente pour taxes*", (1959) 61 R. du N. 496.

(15) R.S.Q. 1964, c. 193, s. 565.

(16) See Article 745.

(17) R.S.Q. 1964, c. 295, s. 209.

(18) The *Insurance Act*, S.Q. 1974, c. 70, s. 445 and 447, already provides for the repeal of this privilege.

(19) See Article 442k C.C.

(20) See Article 242.

(21) See, on the legislative evolution of these texts, G. M. GIROUX, *Le privilège ouvrier*, Montreal, Albert Lévesque, 1933, pp. 18 to 31.

(22) See Y. CARON, *The Law of Construction privileges in Québec*, Mechanics' Liens in Canada, 3rd edition, Toronto, Carswell, 1972, c. 14, p. 421 et s.

(23) See G. M. GIROUX, *op. cit.*, pp. 36 to 38.

(24) See, in particular, *Louis Belle-Isle Lumber Inc. v. Craft Finance Corp.*, [1966] Q.B. 135, conf. by [1966] S.C.R. 661; *1900 Tower Ltd v. Cassiani*, [1967] Q.B. 787, conf. by S.C.C. 1 December 1967; *Assistance Loan and Finance Corp. v. Bourassa*, [1972] C.A. 631.

(25) See G. M. GIROUX, *op. cit.*, pp. 36 to 38.

(26) See G. M. GIROUX, *op. cit.*, pp. 39 to 42.

(27) The most practical means of minimizing the risks inherent in financing building construction would seem to be to compel the owner or financial backer to pay the construction costs himself. The general contractor then no longer holds the funds, but becomes merely an intermediary in charge of getting the work done. Upon his authorization, and upon proof of completion of the work, the backer pays the creditors (sub-contractors, suppliers and workers) directly. This procedure certainly entails the owner or financial backer's hiring an administrator or intermediary to carry out such supervision and make such payments; this should at least insure that the funds are used for paying the sub-contractors, thus minimizing the risk of collusion through use of the privilege. A sub-contractor or supplier might always, if his claim is considerable, require a conventional hypothec from the owner.

(28) The possibility of requiring a surety from construction contractors to ensure payment of workers seems about to become reality, if the reform set up by the Department of Labour is put in concrete form. Such requirement already exists in certain sectors.

(29) R.S.C. 1970, c. B-3.

(30) See G. M. GIROUX, *op. cit.*, p. 39, who considers this privilege to be the greatest weakness of this legislation along with the too expansive and unreasonable protection granted this category of creditors.

(31) See G. M. GIROUX, *op. cit.*, pp. 40 and 41.

(32) S.Q. 1970, c. 17, s. 88.

(33) See, *infra*, concerning registration; the above rule would apply to Article 2099 C.C. relating to the sale of mining rights. 156

(34) See Article 419 C.C.

(35) See Article 2072 C.C.

(36) See, *supra*, par. a).

(37) R.S.Q. 1964, c. 275, s. 22 et s.

(38) See the study of the Community Legal Services, *Service, seizure and sale*

- *A critical examination of the role and function of the Bailiff in the administration of justice, with recommendations for change*, October 1971, submitted to the Minister of Justice.

(39) Such preference has already been compared to the order of payment of bankruptcy creditors: guaranteed creditors, preferential creditors, ordinary creditors; see the *Bankruptcy Act*, R.S.C. 1970, c. B-3, s. 107.

(40) See, also, Article 422.

(41) See, "*Service, seizure and sale*", *op. cit.*

(42) See a. 552 C.C.P.; see, also, a. 652 C.C.P., which would be generalized, and a. 278.

(43) See, *supra*, par. 4, concerning order of distribution; see also the *Bankruptcy Act*, R.S.C. 1970, c. B-3, s. 107.

(44) R.S.C. 1970, c. S-9, and see Articles 323, 324 and 325.

(45) Section 22 et s.

(46) See the provisions relating to general and floating hypothecs, aa. 326 to 332.

(47) R.S.Q. 1964, c. 271.

(48) D.W.M. WATERS, *Law of Trusts in Canada*, Toronto, Carswell, 1974, p. 15, p. 929 et s.

(49) Articles 981a et s. C.C. (*Act concerning Trust*, S.Q. 1879, 42-43 Victoria, c. 29), and the *Special Corporate Powers Act*, s. 22 et s.

(50) See P.B. MIGNAULT, *op. cit.*, 1901, t. 5, p. 154 et s.; P.B. MIGNAULT, *A propos de fiducie*, (1933-34) 12 R. du D. 73; J.E. BILLETTE, *Traité de droit civil canadien*, Montreal, 1933, t. 1, No. 264; and *La fiducie*, (1933-34) 12 R. du D. 159; J. CASGRAIN, *La fiducie dans la province de Québec*, in *Le droit civil français*, Livre - Souvenir des Journées du droit civil français, 1934, Paris - Montréal, 1956, p. 239; M. FARIBAULT, *La fiducie dans la province de Québec*, Montreal, Wilson & Lafleur, 1936; R.-H. MANKIEWICZ, *La fiducie québécoise et le trust de Common Law*, (1952) 12 R. du B. 16; D.N. METTARLIN, *The Québec Trust and the Civil Law*, (1975) 21 McGill L.J. 175. See, for example, *Valois v. de Boucherville*, [1929] S.C.R. 234; *Curran v. Davis*, [1933] S.C.R. 283; *Laliberté v. Larue*, [1931] S.C.R. 7.

(51) The solution adopted by the Civil Code of Louisiana which directly transposed the concept of fiduciary ownership of the common law seemed unsatisfactory and insufficient in the light of the notion of ownership as it is known in the civil law of Québec (see, for example, Articles 1731 and 1781 of the *Louisiana Trust Code*).

(52) See, on this subject, D.W.M. WATERS, *op. cit.*, p. 277 et s.

(53) See C.-H. LALONDE, in *Traité de droit civil du Québec*, Montreal, Wilson & Lafleur, 1958, t. 6, p. 474; M. FARIBAULT, *La fiducie dans la*

province de Québec, *op. cit.*, No. 209 et s.; see also, the *Louisiana Trust Code*, a. 1752.

(54) See R. VON JHERING, *L'esprit de droit romain dans les diverses phases de son développement*, Trad. O. de Meulenaere, Paris, Librairie Marescq Ainé, 3rd ed., rev. 1886-87, t. 3, p. 130.

(55) See R. SAVATIER, "*Vers de nouveaux aspects de la conception et de la classification juridique des biens corporels*", (1958) 56 R.T.D.C. 2, No. 1.

(56) On the concept of ownership of a debt, see F. FRENETTE, *Chronique de Droit des biens*, (1973) 4 R.G.D. 91; *Ville de Montréal v. Cedar Towers Corporation*, [1972] C.A. 270.

(57) See, specifically, *A.P. Bélair v. La Ville de Ste-Rose*, (1922) 63 S.C.R. 526; *The Lower St. Lawrence Power Co. v. L'Immeuble Landry Ltée*, [1926] S.C.R. 655; *Cie de Téléphone Saguenay-Québec v. Ville de Port-Alfred*, [1955] Q.B. 855; see, also, W. de M. MARLER, *The Law of Real Property*, Toronto, Burroughs and Company (Eastern) Limited, 1932, No. 4.

(58) See *In re Amédée Leclerc Inc.: Thibault v. De Coster*, [1965] S.C. 266; *The Grand Trunk Railway Company of Canada v. The Eastern Townships Bank*, (1867) 10 L.C.J. 11 (S.C.).

(59) See the *Travaux de la Commission de réforme du Code civil*, 1946-47, Paris, Sirey, p. 999.

(60) See A. PERRAULT, *Traité de droit commercial*, Montreal, Albert Lévesque, 1936, t. II, No. 635 and 636; t. III, No. 44-bis and 719.

(61) See the *Travaux de la Commission de réforme du Code civil*, 1946-47, *op. cit.*, p. 999.

(62) See A. MONTPETIT and G. TAILLEFER, in *Traité de droit civil du Québec*, Montreal, Wilson & Lafleur, 1945, t. 3, p. 74; P.B. MIGNAULT, *op. cit.* 1896, t. 2, p. 448 et s.

(63) See the *Travaux de la Commission de réforme du Code civil*, 1946-47, *op. cit.*, p. 780.

(64) See the *Post Office Act*, R.S.C. 1970, c. P-14, s. 44 and the *Customs Act*, R.S.C. 1970, c. C-40, s. 80, 81, 128 et s.

(65) See, in this respect, M. PLANIOL and G. RIPERT, *Traité pratique de droit civil français*, 2nd ed., Paris, Librairie générale de droit et de jurisprudence, 1952, t. III, No. 63; L. FARIBAULT, in *Traité de droit civil du Québec*, *op. cit.*, t. 4, p. 29.

(66) See the *Travaux de la Commission de réforme du Code civil*, 1946-47, *op. cit.*, p. 1001.

(67) See P. MARTINEAU, *Les Biens*, Cours de Thémis, Montreal, Revue juridique Thémis Inc., 1973, p. 61 et s.; P.B. MIGNAULT, *Droit civil canadien*, *op. cit.*, t. 9, p. 371 et s.; see also Article 33 of the Book on *Prescription*.

(68) See the *Travaux de la Commission de réforme du Code civil*, 1946-47, *op. cit.*, p. 1001, a. 24.

(69) See P. MARTINEAU, *op. cit.*, p. 69; H., L. and J. MAZEAUD, *Leçons de droit civil*, Paris, Editions Montchrestien, 1956, t. 2, Nos 1468, 1634 and 1635.

(70) See Articles 9 and 83 of the Book on *Publication of Rights.*

(71) See A. MAYRAND, *Dictionnaire de maximes et locutions latines utilisées en droit québécois*, Montreal, Guérin, 1972, p. 35.

(72) See Articles 206 et s. and 264 et s.

(73) See R. SAVATIER, *La propriété de l'espace*, D 1965, chron. XXXV, p. 213.

(74) See Articles 762 to 769 C.C.P.

(75) See A. MONTPETIT and G. TAILLEFER, *op. cit.*, t. 3, p. 372.

(76) See A. MONTPETIT and G. TAILLEFER, *op. cit.*, t. 3, p. 424; F. LAURENT, *Les principes de droit civil*, 3rd ed., Paris, Librairie Marescq Ainé, 1878, t. 8, No. 43; M. PLANIOL and G. RIPERT, *op. cit.*, t. 3, No. 921; *Saint-Jean v. Strubbe*, (1905) 27 S.C. 266 (C. of R.), p. 272; *Touchette v. Roy*, (1877) 3 Q.L.R. 260 (C. of R.), p. 268.

(77) See Article 28 of the Book on *Prescription*; see also P.B. MIGNAULT, *Droit civil canadien*, *op. cit.*, t. 3, p. 123 et s.; A. MONTPETIT and G. TAILLEFER, *op. cit.*, t. 3, p. 429; P. MARTINEAU, *op. cit.*, p. 46; F. LAURENT, *op. cit.*, t. 8, No. 44; M. PLANIOL and G. RIPERT, *op. cit.*, t. 3, No. 921; *Touchette v. Roy*, (1877) 3 Q.L.R. 260 (C. of R.); *Carrière v. Rivard*, (1937) 75 S.C. 475; *Friedman v. Boulrice*, (1919) 56 S.C. 356; *Papineau v. Nichol*, (1917) 51 S.C. 436; *Harnois v. Comtois*, (1920) 57 S.C. 160 (C. of R.).

(78) See, specifically, *Voyer v. Dumas*, [1950] S.C. 383; *Tremblay v. Leclerc*, [1954] S.C. 383; *Morissette v. Prévost*, [1963] Q.B. 52; M. POURCELET, *Le fonds enclavé*, (1965-66) 68 R. du N. 250.

(79) See H., L. and J. MAZEAUD, *op. cit.*, t. 2, No. 1593.

(80) See Article 81, see, also, W. de M. MARLER, *op. cit.*, No. 88 et s.

(81) See P. MARTINEAU, *op. cit.*, p. 81; H., L. and J. MAZEAUD, *op. cit.*, 4th ed., t. 2, vol. 2, No. 1605; L. GUILLOUARD, *Traité de la vente et de l'échange*, 2nd ed., Paris, Pedone, 1891, t. 2, No. 667.

(82) P. MARTINEAU, *op. cit.*, p. 76 et s.

(83) See Articles 76 et s.

(84) See, *infra*, the comments on Article 93.

(85) With respect to the means of exercising the right of retention, see Article 286 et s.

(86) See *Duchaîne v. The Matamajaw Salmon Club*, (1921) 58 S.C.R. 222; (1921) 2 A.C. 426.

(87) *Ibid.* and see W. de M. MARLER, *op. cit.*, No. 67, 251 and 1019.

(88) See the *Civil Code of Louisiana*, J. Dainow, St-Paul, Minn., West Publishing, 1961, 1976 Pocket Part.

(89) See P.B. MIGNAULT, *Droit civil canadien*, *op. cit.*, t. 2, p. 556.

(90) See *Dassylva v. Dassylva*, [1953] S.C. 22.

(91) See A. COSSETTE, *loc. cit.*, p. 256.

(92) *Ibid.*

(93) See P.B. MIGNAULT, *op. cit.*, t. 2, p. 622; F. LAURENT, *Principes de droit civil, op. cit.*, t. 7, No. 18.

(94) The drafting of this article repeats the definition of the legacy by general title given in Article 288 of the Book on *Succession*.

(95) *Ibid.*

(96) French Civil Code, a. 617 et s.; Ethiopian Civil Code, a. 1322; Swiss Civil Code, a. 748 and 749; see, also, H., L. and J. MAZEAUD, *op. cit.*, 4th ed., t. 2, vol. 2, No. 1682.

(97) See Article 389 of the Book on *Succession*.

(98) See P.B. MIGNAULT, *Droit civil canadien*, *op. cit.*, t. 4, p. 324 et s.

(99) In this regard, see *Kraus v. Nakis Holding Ltd*, [1969] S.C. 261.

(100) See Article 12.

(101) See Article 261.

(102) P.B. MIGNAULT, *Droit civil canadien*, *op. cit.*, t. 3, p. 216.

(103) See H. TURGEON, *Droit de superficie*, (1953) 56 R. du N. 132; P.B. MIGNAULT, *Droit civil canadien*, *op. cit.*, t. 3, p. 184 note (e); J.-G. CARDINAL, *Le droit de superficie*, *op. cit.*, 1957; W. de M. MARLER, *op. cit.*, No. 130 et s.; *Tremblay v. Guay*, [1929] S.C.R. 29; *Cohen et Zalkind v. M.N.R.*, (1967) 67 D.T.C. 5175 (Exch. C.) *Leboeuf v. Douville*, [1969] Q.B. 472; *Morin v. Grégoire*, (1969) 15 McGill L.J. 103 (S.C.); F. HELEINE, *La loi au service de l'équité (Réflexions sur le jugement Morin v. Grégoire)*, (1973) 33 R. du B. 284.

(104) J.-G. CARDINAL, *op. cit.*, No. 79 et s.

(105) See also Article 521 C.C. (repealed by S.Q. 1969, c. 76, s. 3).

(106) J.-G. CARDINAL, *op. cit.*, No. 56 et s.

(107) *Ibid.*, No. 93 et s.

(108) J.-G. CARDINAL, *op. cit.*, No. 39 et s.; P. MARTEL, *Le placement*

hybride, (1969) 71 R. du N. 532, p. 540; see the French legislation on construction leases, Loi no 64-1247 of December 16, 1964.

(109) R.S.Q. 1964, c. 322.

(110) See Article 265.

(111) J.-G. CARDINAL, *op. cit.*, No. 45.

(112) P. MARTEL, *loc. cit.*, p. 540 et s.; J.-G. CARDINAL, *op. cit.*, p. 112.

(113) See Article 5 of the *Loi française sur le bail à construction*; P. MARTEL, *loc. cit.*, p. 550.

(114) See Article 7 of the *Loi française sur le bail à construction.*

(115) See Article 1619 C.C.

(116) See, in the Introduction, the Note on abolition of privileges.

(117) See G. LE DAIN, *Security upon moveable property in the Province of Québec*, (1956) 2 McGill L.J. 77 and the jurisprudence cited.

(118) See *Salvas v. Vassal*, (1897) 27 S.C.R. 68; *Garage Central d'Amos Ltée v. Lamarre*, [1955] Q.B. 725; *I.A.C. Corp. v. Marmette*, [1957] B.R. 861.

(119) See *Bissonnette v. Cie de Finance Laval*, [1963] S.C.R. 616; see also *Wilfrid Bédard Inc. v. Assistance Loan & Finance Corp.*, [1966] Q.B. 113.

(120) See, *infra*, comments on Article 440.

(121) S.Q. 1971, c. 74.

(122) *Ibid.*, s. 29 to 42, 67 to 71.

(123) See, for example, a. 2088 French C.C.

(124) On this subject, see MEGARRY and WADE, *The Law of Real Property*, 2nd ed., 1959, pp. 843 to 845, 847 and 848.

(125) U.C.C., s. 1-201(37).

(126) See, for example, U.P.P.S.A., Canadian Bar, Sept. 1970, s. 1(y).

(127) F.N. CATZMAN, A.S. ABEL, I.S.C. BAXTER, *Personal Property Security Law*, Toronto, Carswell, 1976, p. 33; Law Reform Commission of Saskatchewan, February 1976, *Proposals for a Personal Property Security Act*, pp. 1, 4, 7 and 8; Law Reform Commission of British Columbia, 1975, Debtor-Creditor Relationships Part 5, *Personal Property Security*, pp. 26, 27, 30 and 31. See also JOHN F. VARCOE, *Finance leasing, an analysis of the lessor's rights upon default by the lessee*, (1976) Canadian Business Law Journal, vol. 1, No. 2, p. 117.

(128) See Articles 441, 1679, 1713, 1723, 1770, 1812, 1816a, 1969 and 2001 C.C.

(129) In this case, the general rules governing conventional hypothecs would

apply. Such hypothecs will occur most frequently in cases where large items of moveable property, such as heavy machinery, are repaired.

(130) The following cases are provided for: a. 419 C.C. (repeated in Article 84); a. 732 C.C. (repeated in Article 217 of the Book on *Succession*); a. 2072 C.C. (repeated in Article 422). Articles 1539 and 1546 C.C. would be repealed under the chapter on Sale. Articles 417 (person in possession), 581 and 582 C.C. (emphyteusis) and 958 C.C. (institute under a substitution) do not provide for a right of retention, but rather for removal of improvements (or the possibility of leaving them where they are).

(131) On this subject, see *Morisset Ltée v. Castonguay*, (1940) 68 K.B. 128; *Laurentide Finance Co. v. Paquette*, [1967] S.C. 62.

(132) See, on this point, *Laurentide Finance Co. v. Paquette*, [1967] S.C. 62; *Atlas Thrift Plan Corp. Ltd v. J. Lussier et al.*, [1955] P.R. 181 (S.C.).

(133) See *Standard Credit Corporation v. G. Nadeau*, [1956] R.L. 127 (S.C.); see also *Hamel v. Gravenor et al.*, [1960] Q.B. 1223.

(134) See Report of the Committee, Canada, 1970, par. 3.2.045, (recommendation 34).

(135) See Sections 22 to 26.

(136) See Section 22 et s.

(137) On general and floating hypothecs, see, also, Articles 326 to 334.

(138) This also appears in the chapter on *Sale*, Article 357 of the Book on *Obligations*.

(139) See U.C.C., s. 9-204(1) and (5).

(140) See Articles 1914 C.C. and 719 C.C.P.

(141) This question does not seem to have arisen before our courts. The rule results from Article 2017 C.C., and inversely from Article 2038 C.C.

(142) It could have been invoked in the case of *Grondin v. Lefaivre et al.*, [1931] S.C.R. 102, in which the court decided that, under Article 1017 C.C., the rules and practice of the New York Stock Exchange applied to the parties' agreement. In almost every one of these cases, the parties found solutions to their suits in other rules of civil law.

(143) See *re Quintal*, (1968) 11 C.B.R. n.s. 47 (S.C.), in which pledge of future salaries is considered contrary to public order.

(144) See Article 1031 C.C.; *Jarry Automobile Ltée v. Medicoff*, [1947] S.C. 465; *Crown Life Insurance Co. v. Perras*, [1953] Q.B. 659; *Lauwers v. Tardif*, [1966] S.C. 79.

(145) R.S.C. 1970, c. S-9.

(146) By means of the declaration provided for in Article 381: this provision partially repeats Article 2120a C.C. See also, Article 294 respecting the

object of a general hypothec; and Article 381 on registration, and Article 431 on creditors taking possession.

(147) See, for instance, U.C.C., s. 9-204(4)(b); G. GILMORE, *Security Interest in Personal Property*, 1965, vol. I, No. II.6, p. 356.

(148) This definition is repeated in Article 411, of the Book on *Obligations*, in an amended form. It deals with sale (or other contract) of the whole or a substantial part of an enterprise and of its inventory, tools or equipment, which occurs outside normal business activities.

(149) See, to this effect, the *Canada Business Corporations Act* S.C. 1974-75, c. 33, s. 71(1) and in the *Ontario Business Corporations Act*, R.S.O. 1970, c. 53, s. 57(1)(c) (amended by S.O. 1972, c. 138, s. 16).

(150) See *Laval Transport Inc. v. Chartré et al.*; [1957] Q.B. 263; *Canadian Brass & Bedsteads v. Duclos*, (1916) 18 P.R. 206 (S.C.); *La Manufacture de sceaux et de boîtes de Trois-Rivières v. Béliveau*, (1921) 30 K.B. 389; *Canadian Footwear Co. Ltd v. T.G.C. et al.*, (1928) 10 C.B.R. 470 (S.C.).

(151) See *infra*, comments on Article 431.

(152) A recent amendment to Article 1979a C.C. helps rectify only part of this problem which nevertheless still exists.

(153) See *Compagnie d'Assurance Canadienne Mercantile v. Mongrain*, [1953] Q.B. 203; *Sirois v. Hovington*, [1969] Q.B. 97.

(154) See *Canadian Terrazo and Marble Company Ltd v. B. Kaplan Company Ltd*, [1966] S.C. 505, p. 508.

(155) See Article 406.

(156) See L. RAUCENT, *Des créances hypothécaires à ordre ou au porteur*. (1966) Revue pratique du notariat belge, No. 2519, p. 137.

(157) *Loi relative à certaines formes de transmission des créances*, France, Loi 76-519, 15 June 1976.

(158) R.S.C. 1970, c. B-5.

(159) In this case, Article 380 is equivalent to Article 2121 C.C.

(160) See *La Compagnie Gagnon (Chibougamau) Limitée v. Lapointe*, [1973] S.C. 254.

(161) Section 22 to 26.

(162) R.S.C. 1970, c. B-1, s. 88 and 89.

(163) Section 9-402.

(164) R.S.O. 1970, c. 344, s. 47(2), which restricts it to inventory or accounts.

(165) See, also, The *Report on Registration*, Part Two, Of Rights, C.C.R.O., 1976, XLVI.

(166) R.S.O. 1970, c. 344, s. 47(5); the section in the uniformity draft bears the

same number. This provision was not retained in the model uniform act of the Canadian Bar (September 1970).

(167) *Report No. 3*, 1965, pp. 8 and 9.

(168) See D.W. LEE, *Perfection by Registration*, (1969) 47 Can. Bar Rev. 420, pp. 460 to 465.

(169) See, *Chaput v. Hébert* (1932) 53 K.B. 47; *F. Dolan v. J.C. Baker et al.*, (1892) 1 Q.B. 392.

(170) See Article 479.

(171) See Article 482.

(172) See Articles 328 and 481.

(173) Paragraph 5 of Article 2127 C.C. is repeated in the Book on *Publication of Rights*, Article 59.

(174) See Article 394 which provides a rule of priority for hypothec on debts. Article 383 is more generally applicable.

(175) *Lemcovitz v. Laurentide Acceptance Corp.*, [1966] B.R. 160.

(176) See *Grobstein v. Hollander*, [1963] Q.B. 440.

(177) *Kuehne & Nagel (Canada) Ltd v. Polygraph-Export G.M.B.H.*, [1963] S.C. 679.

(178) Sections 9-304(4) and (6).

(179) R.S.O. 1970, c. 344, s. 26(1) and 26(3).

(180) See *Dupuis v. Savoie*, [1950] S.C. 361; *Benning v. Thibaudeau*, (1890) 20 S.C.R. 110; *Compagnie d'Assurance Canadienne Mercantile v. Mongrain*, [1953] Q.B. 203; *Sirois v. Hovington*, [1969] Q.B. 97.

(181) See a. 20; see also H., L. and J. MAZEAUD, *op. cit.*, t. 2, No. 1416, (1956 ed.) pp. 1112-1113.

(182) See Article 431 of the Book on *Obligations.*

(183) See also Article 341 of the present Book and 432 of the Book on *Obligations.*

(184) A central registration system allowing one single deposit to be valid for the whole province would simplify the procedure.

(185) See *Jankauskas v. Société Nationale de Fiducie*, [1963] R.L. 146 (S.C.); *Lamy v. Rouleau*, [1927] S.C.R. 288; *Pinsonnault v. Coursol*, (1909) 15 R.L. 55 (C.A.).

(186) R.S.Q. 1964, c. 318.

(187) R.S.O. 1970, c. 344, s. 26(1) and (2).

(188) Sections 9-304(4) and (6).

(189) *Personal Property Security Act*, s. 26(2) and (3); U.C.C., s. 9-304(5) and (6).

(190) See Article 387.

(191) Section 26 of the Ontario Act provides for a ten-day period; the U.C.C. allows a twenty-one day period.

(192) See *Paquin v. Dunlop et al.*, (1933) 71 S.C. 506; *Grondin v. Lefaivre*, [1931] S.C.R. 102.

(193) R.S.Q. 1964, c. 271.

(194) See Articles 479, 481 and 482.

(195) See *Laberge v. Gaudreault*, (1925) 63 S.C. 190; *Demers v. Strachan*, (1916) 50 S.C. 74 (C. of Rev.).

(196) See *Bélanger v. Lacroix*, (1893) 3 S.C. 479.

(197) See Articles 487 et s. of the Title on *Administration of the Property of Others.*

(198) This situation can occur not only with regard to the ten-year prescription (Article 2251 C.C.), but also with regard to the thirty-year prescription (Article 2242 C.C.). See Articles 40 and 41 of the Book on *Prescription.*

(199) See, for example, Articles 1065 and 1077 C.C. (repeated in the Book on *Obligations*, aa. 254 and 298).

(200) See *Re Nadeau: Canada Permanent Trust Co. v. Miller*, (1969) 15 C.B.R. 171 (S.C.); *Forte v. Coast to Coast Paving Ltd.*, [1972] S.C. 718.

(201) See Article 503.

(202) See Article 816 et s. of the Book on *Obligations.*

(203) See, for example, the *Canada Business Corporations Act*, S.C. 1974-75, s. 89-96.

(204) See *Business Corporations Act*, R.S.O. 1970, c. 53, s. 61.

(205) This matter should be taken up again in a future reform of the *Québec Companies Act.*

(206) See, for example, *Campbell v. Beyer*, (1906) 30 S.C. 86.

(207) See the *Consumer Protection Act*, s. 38 and 39, which continues, however, to apply.

(208) See the Book on *Obligations*, Article 278.

(209) This rule, however, is subject to an exception in virtue of the *Consumer Protection Act*, s. 38 and 39 (among others) in cases where a debtor has paid off at least two-thirds of his debt.

(210) See aa. 1138 and 1139 C.C. See Article 205 of the Book on *Obligations.*

(211) S.Q. 1938, c. 90.

(212) See, specifically, *Beaumont v. La Société de prêt et placement de Québec*, [1967] S.C. 262; *Caisse populaire de Scott v. Guillemette*, [1962] Q.B. 293; *Re Gagné: Lamarre v. Cité de Lévis*, (1940) 78 S.C. 117; *Galarneau v. Dufort*, (1938) 76 S.C. 399; *Inter Provincial Building Credits Ltd v. Pelletier et al.*, [1970] S.C. 94; *Labine v. Viau*, [1942] K.B. 406; *Royal Trust v. Degré*, [1943] S.C. 6.

(213) See, as an example, *Inter Provincial Building Credits Ltd. v. Pelletier et al.*, [1970] S.C. 94.

(214) See Article 1185 C.C. for correlation; see also Article 344 of the Book on *Obligations*.

(215) Moreover, Articles 1202a, d, j, k and *l* C.C. would no longer be useful and should be eliminated.

(216) These provisions appear in the Book on *Publication of Rights*, a. 90.

(217) See Article 2085 C.C. and the Book on *Publication of Rights*, a. 89.

(218) See Article 40 of that Book.

(219) See the *Final Report of the Permanent Editorial Board for the Uniform Commercial Code*, Philadelphia, 25 April 1971, s. 9-403(2).

(220) R.S.O. 1970, c. 344, s. 53.

(221) Articles 1979a and 1979e C.C. In cases of agricultural pledge or pledge of forest land, the term provided for credit openings is also five years.

(222) S.Q. 1973, c. 38.

(223) See *Grondin v. Lefaivre et al.*, [1931] S.C.R. 102; this judgment deals with a case of pledge, but nevertheless the principle is established.

(224) See the comment under Article 7 respecting aa. 379 and 380 C.C.

(225) See, also, Article 321.

(226) Section 9-307(1).

(227) Approved by the Canadian Bar Association, September 1970, s. 30(1).

(228) In Roman law, see the decision of Praetor Scaevola reported in D. 20.1.34, to the effect that no general hypothec on a business ("*taberna*") entails a right to follow on merchandise sold by the merchant.

(229) See *Traders Finance Corp. v. Landry*, [1958] Q.B. 120.

(230) See *Varin v. Guérin*, (1893) 3 S.C. 30; *La Banque St-Jean v. Nolin*, (1917) 51 S.C. 138.

(231) See Article 331 of the Book on *Obligations*.

(232) *Idem*.

(233) See, on this, the Book on *Obligations*, Articles 708 (mandate), 802 (deposit), 823 and 824 (loan); the Book on *Succession*, a. 339; the Book

on *Persons*, aa. 131 and 132; the *Canada Business Corporations Act*, S.C. 1974-75, c. 33, s. 120.

(234) See *Dictionnaire de droit Dalloz*: "II - *Obligation de celui qui a entre les mains la chose d'autrui de veiller à sa conservation*", and the references to the words *dépôt, gage, gestion d'affaires, louage, mandat.*

(235) See M. FARIBAULT, *Traité théorique et pratique de la fiducie*, Montreal, Wilson & Lafleur, 1936, No. 244.

(236) R.S.Q. 1964, c. 275.

(237) See Chapter III of the present Title governing investment of the property of others.

(238) See and compare general and express mandate: Article 710 of the Book on *Obligations.*

(239) See Articles 512 and 513.

(240) See Article 490.

(241) See Article 332 of the Book on *Succession*; also a. 609 of the present Book.

(242) See the Book on *Obligations*, aa. 712 and 714 (mandate).

(243) *Ibid.*, aa. 714 and 719 (mandate), 803 (deposit), 829 and 830 (loan).

(244) See the Book on *Succession*, a. 343; see also the Book on *Persons*, a. 224.

(245) See the *Canada Business Corporations Act*, S.C. 1974-75, c. 33, s. 115.

(246) See M. FARIBAULT, *Traité théorique et pratique de la fiducie*, *op. cit.*, No. 259.

(247) See P.B. MIGNAULT, *op. cit.*, 1896, t. 2, p. 235, note (a).

(248) See a. 587 on final accounting; see, also, a. 224 on condominium, and the Book on *Persons*, a. 143.

(249) See Article 587.

(250) American Law Institute, 1962 Revision, s. 8(a).

(251) See the problems cited on this subject in *Trust Général du Canada v. Maillet*, [1972] S.C. 342.

(252) *Op. cit.*, s. 13(a) and (b).

(253) See *Restatement*, Trusts 2d, No. 241; *Uniform Principal and Income Act*, *op. cit.*, s. 12(a) and (d), *contra.*

(254) See the Book on *Succession*, a. 380.

(255) See a. 551.

(256) See Articles 913 par. 1 and 981f C.C.

(257) See the *Canada Business Corporations Act*, s. 118(1) to (3).

(258) See the exception created in Article 166 of the Book on *Persons*.

(259) See Article 336 of the Book on *Succession* and Articles 151, 152 and 153 of the Book on *Persons*.

(260) See Article 636.

(261) See, also, Articles 517 to 521, 538 and 540, on the imputation of expenses, reparation of damage caused and insurance.

(262) See *Laliberté v. Larue*, [1931] S.C.R. 7, p. 18; M. FARIBAULT, *La fiducie dans la province de Québec*, *op. cit.*, No. 8 et s.

(263) See *Abbott v. Fraser*, (1876) 20 L.C.J. 197 (P.C.); *Valois v. de Boucherville*, [1929] S.C.R. 234.

(264) See *Mathison v. Shepherd*, (1909) 35 S.C. 29, p. 53 (C.Rev.); J.-G. CARDINAL, *Les hommes meurent, les fondations demeurent*, (1960-61) 63 R. du N. 431.

(265) See Article 623 et s. and also Article 507.

(266) See *Laliberté v. Larue*, [1931] S.C.R. 7.

(267) See P.B. MIGNAULT, *A propos de fiducie*, (1933-34) 12 R. du D. 73, p. 75; M. FARIBAULT, *La fiducie dans la province de Québec*, *op. cit.*, No. 210; G. BRIERE, *Les libéralités*, Montreal, Revue juridique Thémis Inc., 1975, 6th ed., p. 259; *Mathison v. Shepherd*, (1909) 35 S.C. 29 (C.Rev.); *Harwood v. Moncel*, (1923) 61 S.C. 497; *O'Meara v. Bennett*, (1929) 47 K.B. 286 (J.C.P.C.); *Curran v. Davis*, [1933] S.C.R. 283; *Taylor v. Royal Trust Company and Folt*, (1936) 74 S.C. 180; *Reford v. National Trust Co. Ltd*, [1968] Q.B. 689.

(268) See, on this subject, P.B. MIGNAULT, *A propos de fiducie*, *loc. cit.*, p. 73; *Curran v. Davis*, [1933] S.C.R. 283, p. 290 et s.; *Reford v. National Trust Co. Ltd*, [1968] Q.B. 689.

(269) See R.-H. MANKIEWICZ, *loc. cit.*, (1952) 12 R. du B. 16, p. 27, No. 22; M. FARIBAULT, *La fiducie dans la province de Québec*, *op. cit.*, No. 227.

(270) See *O'Meara v. Bennett*, (1929) 47 K.B. 286 (P.C.); M. FARIBAULT, *Trust Business in Quebec*, (1960-61) 63 R. du N. 383, p. 386; J. NADON, *Transfert des actions "in Trust"*, (1957) 17 R. du B. 217.

(271) See Article 446 of the Book on *Obligations*, which makes gift a purely consensual contract.

(272) See *Abbott v. Fraser*, (1876) 20 L.C.J. 197 (P.C.); *Valois v. de Boucherville*, [1929] S.C.R. 234; A. J. McCLEAN, *The Common Law and the Québec Trusts*, 1967 Centennial Edition, U.B.C.L.R. - C. de D. 333, p. 342 et s.; J.-G. CARDINAL, *loc. cit.*; M. FARIBAULT, *La fiducie dans la province de Québec*, *op. cit.*, No. 182 et s.

(273) See *Valois v. de Boucherville*, [1929] S.C.R. 234, p. 263 et s.

(274) See *Shmelzer v. Van Duyse*, [1964] P.R. 15 (S.C.); *Laliberté v. Larue*, [1931] S.C.R. 7, p. 18.

(275) See P.B. MIGNAULT, *Le droit civil canadien*, *op. cit.*, t. 5, p. 159 et s.; M. FARIBAULT, *La fiducie dans la province de Québec*, *op. cit.*, No. 189 et s.; G. BRIERE, *Les libéralités*, *op. cit.*, p. 260.

(276) See Article 252 of that Book.

(277) See G. BRIERE, *op. cit.*, p. 258.

(278) See M. FARIBAULT, *La fiducie dans la province de Québec*, *op. cit.*, No. 235.

(279) See *Mathison v. Shepherd*, (1909) 35 S.C. 29 (C.Rev.); *Harwood v. Moncel*, (1923) 61 S.C. 497; *contra*: *Tucker v. The Royal Trust Co.*, [1976] S.C. 895; M. FARIBAULT, *La fiducie dans la province de Québec*, *op. cit.*, No. 153 et s.

(280) See *Masson v. Masson*, (1912) 47 S.C.R. 42; M. FARIBAULT, *La fiducie dans la province de Québec*, *op. cit.*, No 304 et s.

(281) See D.W.M. WATERS, *The Nature of the Trust Beneficiary's Interest*, (1967) 45 Can. Bar Rev. 219.

(282) See R.-H. MANKIEWICZ, *loc. cit.*, No. 35 et s.

(283) See Articles 625, 627 and 628; see, also, *Curran v. Davis*, [1933] S.C.R. 283, p. 294.

(284) See Article 361 of the Book on *Succession*.

(285) See *McGibbon v. Abbott*, (1885) 8 L.N. 267 (P.C.); *Lussier v. Tremblay*, [1952] 1 S.C.R. 389, p. 406; G. BRIERE, *Les libéralités*, *op. cit.*, p. 260.

(286) See Article 602 and, on this subject, *Curran v. Davis*, [1933] S.C.R. 283; P.B. MIGNAULT, *A propos de fiducie*, *loc. cit.*, p. 75; *Louisiana Trust Code*, a. 1808.

(287) See D.N. METTARLIN, *loc. cit.*, p. 216.

(288) See Article 635.

(289) See Article 254 of that Book.

(290) See Article 507 et s.

(291) See J.-G. CARDINAL, *La fiducie du Code civil*, (1966) 26 R. du B. 522, pp. 527 and 531.

(292) See various opinions in *Dansereau v. Paquette*, (1940) 69 K.B. 90; *Erlanger v. Goldsobel*, [1961] Q.B. 437; M. FARIBAULT, *La fiducie dans la province de Québec, op. cit.*, No. 311 et s.; P. GRAHAM, *Some Peculiarities of Trusts in Québec*, (1962) 22 R. du B. 137, p. 145 et s.; R.-H. MANKIEWICZ, *loc. cit.*, No. 63.

(293) See M. FARIBAULT, *La fiducie dans la province de Québec*, *op. cit.*, No. 313; see, also, Articles 195 and 196 of the Book on *Obligations*.

(294) See Articles 197 et s. of the Book on *Obligations*; M. FARIBAULT, *La fiducie dans la province de Québec*, *op. cit.*, No. 128.

(295) See *Valois v. de Boucherville*, [1929] S.C.R. 234, pp. 243 and 273; M. FARIBAULT, *Trust Business in Quebec*, *loc. cit.*, p. 387; A.J. McCLEAN, *loc. cit.*, p. 343 et s.

(296) See Article 606.

(297) See *Masson v. Masson*, (1912) 47 S.C.R. 42; *Cogné v. Trust Général du Canada*, [1969] Q.B. 591.

(298) See Articles 364 and 365 of the Book on *Succession*.

(299) See M. FARIBAULT, *La fiducie dans la province de Québec*, *op. cit.*, No. 174 and the jurisprudence cited in it; *Cogné v. Trust Général du Canada*, [1969] Q.B. 591; P. GRAHAM, *loc. cit.*, p. 148.

(300) See M. FARIBAULT, *La fiducie dans la province de Québec*, *op. cit.*, No. 187 et s.; *Abbott v. Fraser*, (1876) 20 L.C.J. 197 (P.C.).

(301) See a. 607.

(302) See D.W.M. WATERS, *Laws of Trusts in Canada*, *op. cit.*, p. 265 et s. and p. 421 et s.

(303) See Article 607.

(304) The rule laid down in English law in *Saunders v. Vautier*, (1841) Cr. & Ph. 240; 4 Beav. 115; 41 E.R. 482 is not retained in the Draft. Court authorization is always required to terminate a trust.

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