CIVIL CODE REVISION OFFICE

report on THE QUÉBEC CIVIL CODE

Volume II COMMENTARIES

Tome 2, Books 5 to 9

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THE QUÉBEC CIVIL CODE

Volume II, Tome 2

COMMENTARIES

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TRANSLATION

Elisabeth Cowan
Donald Hughes
Colin Roberts
Rita Daguillard
Margret Ponze Grenier
Lorraine Gaboury Ladouceur
Everett Melby
Eric Oxford
Kelly Richard
Earl Straus
Elisabeth Tompson
Hal Winter

REVISION AND COORDINATION

R. Clive Meredith
Mary Plaice

Design: Gill Plasse

A production of the

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BOOK FIVE

OBLIGATIONS

INTRODUCTION

Very few legislative changes have been made since 1866 in that part of the Civil Code (Articles 982 to 1202) which governs obligations (1). This perhaps explains, at least in part, the unquestionable obsolescence of certain rules which no longer correspond to the juridical reality transformed by upheavals in the social and economic life of Québec.

In the first place, the 1866 Civil Code reflects an economic philosophy of liberalism, or *laisser-faire*. It was a matter of principle for the State not to intervene in economic relations between individuals, particularly since the relative stability of money at that time was itself a guarantee of stability in these relations.

In the second place, the juridical spirit of the time saw any contractual obligation as an immutable law to which the parties had consented. This law, as long as it resulted from free and enlightened consent, was, in the temper of those times, right by definition. "*Qui dit contractuel, dit juste*". It seemed inconceivable that an imbalance of economic power between the parties could affect the free play of contractual freedom and thus thwart the just nature of the agreements.

For a little more than a century, experience has shown that frequently, through recourse to what Saleilles has called the "*contrat d'adhésion*" (2), the economically strong were able to dictate their conditions to the economically weak, so that very often the only freedom available to the latter was a choice between submitting to the humiliating conditions laid down by the parties with whom they had contracted, or doing without goods and services which might be essential to them.

From an economic standpoint, and on the basis of juridical morality, it was the State's duty to intervene in order to maintain equity in the juridical relations between its citizens, or even to re-establish equity. The Québec Legislator decided to assume this responsibility through a variety of measures, the most important of which is perhaps the legislative programme dealing with protection of consumers (3) and tenants (4). This concern is also reflected in the proliferation of administrative bodies entrusted with verification and control of prices of certain essential services.

This development has not been confined solely to the realm of contractual relations. In the field of legal obligations and civil responsibility, social changes and developments in jurisprudence have led to a strengthening and reinforcement of duties, so as to ensure improved

indemnification for victims. A number of specific statutes which complement the Civil Code (5) reflect this preoccupation.

It was thus necessary to take economic and social developments into account and to submit a draft which would faithfully reflect these developments.

Revising does not necessarily mean upsetting everything and disregarding historical continuity. The main basic principles behind the 1866 codification, such as consent, contractual liberty and responsibility based on fault, have certainly been affected by social change, although it does not follow that they should be put on the shelf. A genuine and realistic reform consisted more in a careful and critical examination of principles, in the light of juridical experience and existing economic and social conditions, than in simply rejecting them. Surely, the principle of freedom of contractual relations must remain, except where application of this freedom, in a given specific social and economic context, would give rise to abuses which society could not tolerate. Thus, the restrictions of a certain formalism or the imposition of an imperative content could become an effective means of re-establishing contractual equilibrium in favour of the weaker party, or at least of compelling him to become fully aware of the obligation he is assuming. Similarly, increased power given to the courts to intervene in the contractual process, can re-establish "*justice contractuelle*" (6) in cases where clauses appear excessive, abusive or exorbitant, or when, as the result of circumstances beyond the control of the parties, fulfilment of the obligation would entail excessive prejudice for either party.

Also two other important elements had to be taken into account. First of all, a Civil Code can only contain rules of general application, with some degree of stability, reflecting an overall legislative policy. It is not intended to regulate every situation to the last detail nor tackle merely passing problems; this is left to statutory legislation. It would have been pointless to attempt to incorporate into the Code all the rules in Québec legislation which govern contractual and legal obligations.

In the second place, the law on obligations is the veritable keystone of all the rules of civil law. It determines the concept and formulation of provisions bearing on a whole range of specific juridical acts, such as those of sale, lease and hire, and mandate. It also has a bearing on such varied fields of law as those governing persons and families, property and security. Accordingly, it was necessary to consider the impact of the proposed solutions in these different fields.

The reform of the general theory of obligations followed a two-fold

plan: first it dealt with the juridical content of the rules; then it examined the structure of the law on obligations.

THE JURIDICAL CONTENT OF THE REFORM

The content of the legislative reform is explained in the notes accompanying each of the Draft Articles; the main lines and principal characteristics of the revision are summarized here.

In Title One, the law on the sources of obligations has undergone important changes. With regard to contracts, it was thought advisable to provide rules on offer and acceptance and on contracts between persons not present. Since the 1866 Code has no specific rules in this respect, the courts had to clarify the situation. The solutions advanced by the courts were not necessarily followed; it was sometimes decided to follow current practice and to formulate it into simple rules.

Moreover, given the importance today of contracts with a predetermined content and of contracts of adhesion, and in the face of governmental concern for the protection of weak and disadvantaged persons in contractual relationships, it was thought advisable to include a series of measures intended to re-institute some measure of social justice in these relationships. As a first step, it was sought to revive a long-standing civilian tradition by re-introducing into Québec law the concept of lesion between persons of major age; it would now result from a serious imbalance in the obligations due to the exploitation of one of the parties by the other.

In keeping with this general policy, the courts have also been granted a certain power of review regarding contracts. According to Article 75, the courts would henceforth have the right, in exceptional circumstances, to review any contract whose execution would cause undue prejudice to one of the parties as a result of unforeseen events that could not be attributed to that party. Here again, this power applies only in exceptional cases and is limited by strict conditions.

The Draft submits any forfeiture of a term to a prior written notice of thirty days. During this time the debtor may remedy the defect thereby preventing the forfeiture of the term, save only in the cases of bankruptcy or insolvency, which bring about of right forfeiture of the term.

The Draft imperatively subjects resolutive clauses to the general rules on resolution of contracts which provide in particular that the creditor is not entitled to resolution if the inexecution is of little importance, and that if the creditor is entitled to resolution, restitution must be made in full.

The Draft makes major restrictions to the clauses and notices excluding or limiting responsibility.

Finally, the Draft penalizes abusive clauses by allowing them to be annulled or reduced.

A policy of contractual stability and of respect for commitments was also sought. Thus, the rules on default were drawn up in such a way as to give the debtor one last chance to execute his obligation.

In chapter I of Title One on contracts, having made a study of Québec positive law and foreign legislation, it was decided to abolish the cause as a necessary condition to the formation of a contract.

This measure was seemingly justified by the fact that the so-called objective cause is so little used in Québec positive law and it was considered that this concept was sufficiently compensated for by other provisions relating to the object of obligations, to consent, to the object of a contract, to formalism, to revision for unforeseen events, to abusive clauses, to the exception of inexecution, to resolution, to impossibility of execution and to indivisibility, so as to fulfill the traditional role played by the concept of cause.

The subjective cause, on the other hand, seems more of a concept determining the framework within which contractual freedom can be exercised, rather than an element peculiar to the formation of a contract which therefore is not on the same footing as consent, object, capacity, and of form when required on pain of nullity.

For this reason, Article 8, like Article 13 of the Civil Code, embodies this concept sufficiently, making it a general limit to the principle of contractual freedom rather than a "technical" element of formation of the contract.

It was thought wise, however, to codify the rules laid down by the courts in matters of nullity of contracts. An attempt was made to sanction the classical distinction between absolute nullity and relative nullity; it was also attempted to resolve the problem of the effect of nullity of one clause on the entire contract. Finally, in the section on nullity, the rules on confirmation and ratification, which are in the chapter on proof in the Civil Code, were included (a. 1214 C.C.).

The rules governing transfer of ownership are found mainly in the chapters on *Sale* and *Gifts*, and those on fruits and risks of the thing in the Book on *Property*.

With respect to chapter II, two important observations must be made.

First of all, the rules of the section on the obligations which result from personal conduct toward others, which convert into legal obligations those now set forth in Articles 1053 to 1056c C.C., have undergone important changes. In a period when, with reason, stress is being laid on recognition of human rights (7), it seems appropriate to indicate in a Civil Code that the exercise of a right involves respect for the rights of others. For this reason it was necessary to outline the fundamental duties of every person, not in the Sibyllin form of "fault", but in the form of positive rules to govern the behaviour of citizens toward their neighbours. Thus, Article 94 lays down the basic general obligation to act toward others with the prudence and diligence of a reasonable person (a new designation of the "prudent administrator"). This is the rule of general law, whose violation causing damage entails civil responsibility of the author, and recourse to the different remedies available to the victim (a. 254). These include execution in kind, in circumstances warranting it, even by way of injunction to prevent a breach of an obligation, or execution by equivalence, meaning payment of damages.

There are two kinds of provisions which follow the general rule (aa. 95 to 103). The first are designed to give specific expression to the fundamental rule in certain particular situations. Other provisions depart from this rule, either by increasing the obligations of debtors, an obligation of result, or sometimes an obligation of warranty, or by modifying the rules of evidence for the benefit of the victim through the establishment of legal presumptions of fault.

Thus, all the duties of a person must be determined according to the principle laid down in Article 94, unless they fall under other provisions of the Draft or other special provisions of the law. The Draft combines duties relating to acts of persons, acts of others, and acts relating to things.

There are also certain important changes in relation to the Civil Code (8). Thus, under Article 95 a person incapable of discernment may be held civilly responsible in cases where the victim otherwise would not be indemnified. Moreover, Article 102 is intended to give a victim direct recourse against a manufacturer for any defect in the design, manufacture, preservation or presentation of a product. Finally, the obligation of security imposed on a person having custody of a thing would henceforth be an obligation of result, entailing responsibility of the debtor in the event of inexecution, unless a fortuitous event can be proven (a. 100).

Secondly, traditional law on *negotiorum gestio* has been slightly amended so as not to encourage unwarranted and improper interference

in the affairs of others. It will be noted that the recourse of the administrator against the person whose affairs are administered is limited to the extent of the profit which the administration has brought the owner when his interests did not require the action to be taken. Also, the rules formulated by both doctrine and jurisprudence respecting unjustified enrichment have been codified.

The main characteristic of Title Two on the modalities of obligations is an attempt to simplify the rules governing conditional obligations, and term obligations. In the second case, it was even deemed wise to extend to every term obligation the rule of a previous written notice of thirty days in order to benefit from forfeiture of the term. This was done on the strength of Article 67 and following of the *Consumer Protection Act* (9). Moreover, in order to bring the law into line with reality and with current practice, and to put an end to certain controversies in jurisprudence, the presumption that obligations are not solidary, as provided in Article 1105 C.C., has been reversed in the rules on solidary obligations and it is proposed that all persons who owe the same debt are presumed to be solidarily responsible toward the creditor, save an undertaking to pay a sum of money.

Title Three which deals with protection of the rights of the creditor prior to payment, contains rules on conservatory actions, Paulian actions and indirect actions. With regard to Paulian actions, it was considered advisable to make a review of the entire legislative policy. It was felt that creditors should be protected not only against fraudulent debtors, but also against those who neglect their creditors' interest. The Draft has therefore dropped, as an essential condition for recourse, any intention of fraud on the part of a debtor who becomes insolvent. Recourse, however, is restricted by supplementary conditions designed to check possible abuses arising from too generous application of this right. Henceforth, to uphold any action, the judge must be assured that the creditor has incurred serious damage as a result of an act performed by the debtor. Thus, the creditor would be protected against any act by a negligent debtor which would make that debtor insolvent, when such an act would harm the creditor.

In Title Four, dealing with voluntary execution of obligations, it was attempted to recast the rules of payment in a clearer and more synthesized manner. The few changes which have been made to present substantive law have been dictated by the development of juridical practice in this field, and by analysis in jurisprudence. This title, then, covers the general rules of payment, payment with subrogation, delegation of payment, tender and deposit, and finally imputation of payment. With regard to

tender and deposit, it was considered necessary to draw up detailed rules and to bring the Code into line with existing practice, so as to modernize and simplify the mechanism.

In Title Five, concerning inexecution of obligations, it was considered essential to set down more precisely than does the present Code the rules concerning the different recourses open to creditors in cases where the debtor, through his fault, fails to execute his obligations.

The system of putting in default has been modified to bring it more in line with reality and with a general policy of encouraging voluntary execution of obligations. From now on, as a general rule, the creditor should in all cases warn his debtor to execute the obligation, then grant him a reasonable period of time in which to do so. The putting in default will thus be to the effect that the creditor is demanding execution of the obligation, failing which he will avail himself of one of the recourses when the period of time expires; he thus gives the debtor one final chance to execute his commitment.

It was thought useful to generalize the recourse in reduction of obligations, which until now has been restricted to certain contracts, particularly sale (a. 1501 C.C.) and lease and hire (a. 1610 C.C.), thereby enabling the creditor who has an interest there to maintain the contract while reducing his obligation when the debtor refuses to execute his, or executes it only partially.

Important changes have been made to the rules governing resolution. The Civil Code provides for only one type of resolution, namely judicial resolution (a. 1065 C.C.). In practice, however, it often happens that if a debtor does not execute his commitment the creditor will consider the contract resolved, have the contract executed by someone else, and then sue the defaulting debtor in damages. It was wished to give legal status to this practice, and thus it has been provided that, under certain conditions (aa. 275 and 276), the creditor might henceforth legally consider the contract resolved. Resolution would then operate of right and there would be no need to go to court.

The Draft gives detailed treatment to the recourse in damages resulting from inexecution through the debtor's fault of both contractual and legal obligations. Special attention should be given to Articles 300 to 303, which deal with clauses relating to limitation and exclusion of responsibility. These give recognition to existing law, although no one would henceforth be able to exclude or limit his responsibility for physical or moral harm caused to another person.

It was thought wise to allow review, within a certain period of time, of

any indemnities granted by judgment or determined by agreement for physical injury where there is a serious worsening in the condition of the victim.

The Committee on the Law on Obligations (10), in its study of the controversy in jurisprudence (11) over the meaning which should be given to the word "another" in Article 1053 C.C., felt obliged to propose a solution to the question of ricochet damage by restricting "the number of claimants to those who are liable to be the most affected" (12), such as the victim, the victim's spouse, his relations in the first degree or those who take their place, as well as the *de facto* consort in the absence of a spouse. A similar solution must also apply, as it does under Article 1056 C.C. in existing law, when personal injury causes the death of the victim (13). The Committee justified these solutions by its concern with avoiding "multiplicity of actions" (14).

On reflection, it seemed more appropriate to remove these restrictions in both cases and to permit any victim, whether "immediate" or "by ricochet", who can justify his right to reparation (15), to obtain reparation as regards damage from which he suffers directly. This is a question, really, of maintaining the existing rule of Article 1053 C.C. by giving to the word "another" its usual and natural meaning, as does today's prevailing jurisprudence (16) following the majority decision of the Supreme Court of Canada in *Regent Taxi Transport Co. Ltd. v. La Congrégation des petits frères de Marie* (17). Chief Justice Anglin, drawing on the doctrine (18) and jurisprudence (19) of the time, stated the following in this regard:

> "Accordingly, to narrow the *prima facie* scope of art. 1053 C.C. is highly dangerous and would necessarily result in most meritorious claims being rejected; many a wrong would be without a remedy ... The courts may be trusted to discourage unmeritorious claims". (20)

If that is the case in a matter of bodily injuries, why should it be othewise when a fault causes the death of the "immediate" victim? The present restriction in positive law to the general principle of general law can only be explained by the historical accident of the introduction in 1847 (21), into the Province of Canada, of a local version of an English statute of 1846, generally known as *Lord Campbell's Act* (22), which became - no one knows how (23) - Article 1056 of the Civil Code (24).

If such a provision could have some weight in the Province of Upper Canada in nullifying the Common Law rule forbidding recourse for reparation of a damage resulting in the death of a person: *Actio personalis*

cum persona moritur (25), it had in the Civil law of Lower Canada the opposite effect of singularly restricting the application of the general principle of civil reparation of damage (26). The more so, since the recourse provided in Article 1056 C.C. is only granted if the "immediate" victim had not himself "obtained indemnity or satisfaction"; however, this indemnity resulting, for example, from a settlement, might well not completely compensate the relatives for the personal damage they suffer "resulting from such a death"; on the other hand, they might be refused any recourse if, through the exercise of the unrestricted freedom of willing as provided for in Article 831 C.C., the victim had left all his property - and particularly "the indemnity or satisfaction" received before death - to persons other than those mentioned in Article 1056 C.C.

It seems therefore preferable and more just to return to the general law and to assure every victim who is entitled to it, as the courts now do on the basis of Article 1053 C.C., of reparation for material or moral damage suffered by him, rather than to deprive certain victims in advance of a right acknowledged to be theirs under general law (27).

Reparation of an unjustly suffered damage constitutes one of the basic rules of the civil law on obligations; a creditor cannot be deprived of it without creating a system of discrimination that would be scarcely acceptable. Furthermore, the danger of a multiplicity of recourses is no greater in a matter of a fatal accident than when the victim survives the fault of the person who causes the damage.

Undoubtedly, the courts will have to give each case fair consideration when, for example, a victim receives an indemnity for loss of future gains before his death, and the relatives will claim an indemnity for loss of material support; the person who causes the damage cannot be penalized by being obliged to pay twice for any damage. The courts must also, according to the principles of civil responsibility, make certain that damage exists and that there is a direct causal relation between the damage and the event which caused the damage.

It is also desirable to note that there is no parallel to Article 1056 C.C. in many juridical systems with a civil law tradition (28).

In Title Six, which deals with the modes of extinction of obligations, the Draft seeks to simplify and clarify all the existing provisions contained in Articles 1138 to 1202 C.C.; it takes up successively compensation, novation, confusion, release, impossibility of execution and extinctive terms.

Finally, Title Seven provides rules, generally suppletive but often imperative in character, for the more important contracts in everyday life.

It will be noted in this respect that certain contracts have been "nominated" such as the contracts of employment, of enterprise and for services, and the arbitration agreement; that the contracts of gifts, of affreightment and of insurance have been inserted in the title and, as all other contracts, are clearly governed by the general theory of contract; that, moreover, the marriage contract is dealt with in the Book on *The Family* among the effects of marriage.

GENERAL STRUCTURE OF THE REFORM

It was also considered necessary to amend the general structure of the Book on *Obligations* so as to permit more logical insertion of new and different rules, continuing the reform already begun by the Codifiers of 1866 (29).

The structure of Title Third of Book Third of the Civil Code is subject to criticism from certain points of view. For this reason an outline is proposed consisting of seven titles dealing, in succession, with the following subjects:

Title One : Sources of Obligations
Title Two : Modalities of Obligations
Title Three: Protection of the Rights of Creditors
Title Four : Voluntary Execution of Obligations
Title Five : Inexecution of Obligations
Title Six : Extinction of Obligations
Title Seven: Nominate Contracts

In the first of these titles, it was thought wise not to retain the old classification found in Article 983 C.C., which defines five sources of obligations: contracts, quasi-contracts, offences, quasi-offences and the law alone.

In the first place, this classification places different concepts on the same footing. If a contract in itself constitutes the source of an obligation, an offence or a quasi-offence is essentially a violation of a pre-existing legal obligation such as the obligation of every person to act as a reasonable person, to supervise the behaviour of his children and to control things in his custody, the manufacturer's obligation to point out the risks involved in using a specific product, the obligation to guarantee others against harm caused by an employee, and so forth. The real and primary source of the obligation in this case is not the offence itself, but the law which imposes a duty of good conduct; violation of this obligation creates another obligation: to repair the damage caused.

The traditional classification of obligations, found in the Civil Code, stems from an essentially patrimonial view of obligations which were conceived as a means of acquiring property (30). Here an obligation is seen above all as a debt of a patrimonial nature. Obligations can be considered, however, as having a far broader scope, since they represent any legal bond which compels a debtor to do something or not to do something. Some obligations or juridical duties are sanctioned by law although they are not of a patrimonial nature. Such, for example, is the legal obligation to conduct oneself with prudence and diligence in society.

In the second place, there are also grounds for criticizing the traditional classification of contracts and quasi-contracts, and offences and quasi-offences. The first one (contract, quasi-contract) wrongly combines under one heading obligations which are different in origin; the second (offence, quasi-offence), since rationalized by Pothier, which takes into account the voluntary or involuntary nature of the act which causes the damage, had lost all practical value because in principle (31), reparation of damage is determined by the extent of the damage suffered by the victim, not by the intentional or unintentional nature of the act.

In the third place, Article 1057 C.C. names legal obligations as a fifth distinct source; this creates the erroneous impression that obligations other than contractual obligations, namely those arising from quasi-contracts, from offences or from quasi-offences, are not legal obligations.

Finally, the traditional classification of sources of obligations, arising from contracts and offences, has had unfortunate consequences. It seems to have been responsible for the fact that over a long period the notion of fault was conceived, examined and applied only within the framework of extra-contractual responsibility, thus very often preventing application of a system of contractual responsibility and thereby hindering scientific examination of the problem of the relations between the two kinds of civil responsibility.

There has thus been a return to the classification of sources of obligations based principally on the contract and the law, and mentioning however unilateral juridical acts.

In Title Four on *Voluntary Execution of Obligations*, all the rules on payment which are now scattered throughout the Code have been assembled. Payment above all is looked on as voluntary execution of an obligation and only secondarily as a means of extinguishing that obligation. It is in this sense that delegation of payment is dealt with, which is considered above all as a means of abbreviated payment. This reorganization explains why in Title Six on *Extinction of Obligations*, it

does not regulate payment, as do Articles 1139 and following of the Civil Code.

NOMINATE CONTRACTS

It was first thought that it might be advisable to combine at the beginning of the Title dealing with nominate contracts certain preliminary provisions specifically to protect contracting consumers, on the basis of the special legislation which now covers them. It soon became apparent, however, that given the general nature of the Civil Code, this was hard to do. Under the existing Code, any consumer protection legislation acquires an exceptional nature running contrary to the principles outlined in the Code. Under the Draft, however, this purely exceptional character of these statutes, which seek to protect contracting parties who are in a less strong economic or social position than the persons with whom they contract would disappear. The general theory of contracts, laid down by the Draft, provides a variety of measures "protective" of a contracting party and, in particular, a recourse to the contracting party who has suffered lesion (a. 37) or who has assumed an excessive obligation (a. 76). This new climate of contractual obligations naturally allows explanation and justification of special statutes intended to protect the weak. We shall now deal with each of the contracts with which the Code is specially concerned.

Furthermore, it will be noted that, in accordance with the principle of freedom of contract (a. 8), the provisions which determine the content of a contract are suppletive in character, unless the imperative nature of the rule results from the clearly expressed intention of the Legislator, either by an express provision or by equivalent terms.

Sale

From the very beginning of the study of sale, it was felt that, as far as possible, the many special rules governing sale in the Civil Code should be included within the general rules governing obligations.

Some of these rules are outdated, since they are based on the *Ancien droit* which obliged the vendor not to transfer ownership, but only to ensure the purchaser peaceable and useful possession (32). The change made here by the 1866 codifiers has not been logically and fully followed up, since a purchaser generally still cannot complain that a defect of title exists until threatened with eviction (33). It is felt that clear provision must be made to the effect that the vendor's first obligation is to furnish a valid title.

This new rule, which Langelier (34) had already advocated, and which is based on Anglo-Saxon law (35), would be more equitable and more practical, since it authorizes clarification of title even before trouble can begin. As a matter of fact, lenders already require clear titles. Under Article 359 the vendor would no longer be required, as in Pothier's time, to ensure only peaceable and useful possession of the thing sold; he must also undertake to guarantee the right of ownership, and thus to furnish valid title at the time the sale is made. Faribault (36) observes that Article 1519 C.C. allows for immediate recourse in cases of servitudes which are not apparent and which the vendor has not declared (37). He feels that recourse should also be allowed as soon as the purchaser suffers any prejudice, such as being prevented from borrowing by a lack of title. Immediate recourse is thus applied to all cases of non-execution, in matters both of sale and of other contracts. Since transfer of ownership operates as soon as consent is given, without delivery being necessary, useful and peaceable possession could no longer be the sole objective of the warranty. The Civil Code, however, has neglected the most important consequence of this change in the law on ownership, namely, the perfection of a real right transmitted in addition to mere peaceable possession. This must now be clearly stated. The present obligation of warranty now becomes more binding, by doing away with the limitations and particularities which deprived it of many of the usual requirements of the obligation of a vendor. By requiring the vendor to transmit a valid title, the Draft had to apply to sales the general rules of the Code (a. 1065 C.C.) governing inexecution of obligations. English law (38) and American law (39) require the vendor to furnish valid title, and the Convention on international sale of Goods (40) grants the purchaser recourse whenever the thing sold does not conform to the vendor's representations.

Adhering to its intention of applying to sale the general rules governing contracts, the special recourses open to evicted purchasers, the Code's restrictions on these recourses have not been retained. Accordingly, Articles 1510 to 1521 of the Civil Code have not been reproduced. In fact, Articles 1510 and 1511 C.C. create special recourses which Article 1512 C.C. limits in cases where the purchaser knew that there was defect in the title (41); Articles 1513 to 1518 C.C. deal with the amount of damages to be awarded to the purchaser according to the circumstances, and add nothing important to Articles 417 and 1065 C.C. Curiously enough, Article 1519 C.C. allows for immediate recourse in cases of servitudes which are not apparent and not declared; this article, therefore, is now unnecessary, since under the Draft, this rule would apply to all

cases of inexecution with the exception, already provided for in Article 1519 C.C., to the effect that no party may request resolution of the sale unless the inexecution of the other party's obligations causes him serious prejudice. Articles 1520 and 1521 C.C. deal rather with procedure and practice; any wise purchaser threatened with eviction will no doubt call his vendor in warranty and will not abandon without sound reason; if he does not call him in warranty, however, and even if he abandons, this must not have the effect of freeing the vendor because these things cannot harm him, being *res inter alios actae*. The Code acknowledges this in Article 1521 C.C., since it allows the purchaser to abandon and even to acknowledge the right of a third party to claim, while still retaining his right to justify himself against the vendor (42). The effect of failure to call in warranty must be identical to that of abandonment, or acknowledgement of charges. The same results would be obtained through general law; it is therefore recommended that these two articles be repealed.

In matters of sale of immoveable property, Articles 1536 C.C. and following, dealing with the *pacte commissoire*, allow the vendor to request resolution of sale for want of payment, only if there has been a stipulation to this effect (43).

These provisions have been rejected for the following reasons:

1. it seems illogical to grant resolution "in cases which admit of it" (Article 1065 C.C.), and to refuse it or at least require that it be stipulated in the event of the most serious inexecution on the part of the purchaser, namely failure to pay, thus forcing the vendor to have the property sold under judicial authority;

2. for all practical purposes, this stipulation is found in all notarial deeds for the sale of immoveable property, so there is no point in retaining a prohibition effective only in private sales, usually of little importance;

3. finally, the Book on *Obligations* contains new rules governing resolution of all contracts involving moveable and immoveable property (44).

As for latent defects, the report substantially reproduces the provisions of Articles 1522, 1523 and 1524 of the Civil Code, and broadens their scope. In fact, with the repeal of Article 1527 C.C., the situation reverts to the general rule of Article 1065 C.C.

The Code's provisions governing promises of sale have given rise to many difficulties (45). It is proposed that Article 1478 C.C. which provides that a promise of sale with *tradition* (delivery) is equivalent to

sale be repealed. It would then be the courts' task, according to the general rules of interpretation, to determine whether any agreement, accompanied or not by *tradition*, is actually equivalent to sale; in other words, the court must decide whether under the agreement the parties have decided to transfer and acquire ownership on a given date.

The Civil Code appeared to attach more importance than necessary to the sale of property belonging to other persons, both in the Title on Sale (a. 1487 and following C.C.) and in that on Prescription (a. 2268 C.C.). It very seldom happens that a merchant or dealer will sell property belonging to others, and it is not considered necessary to retain the advantage granted to the purchaser, to the detriment of the real owner, by compelling the real owner to reimburse the price when the claim is made. The Draft breaks with jurisprudential tradition (46). The purchaser's recourse against the vendor and, where necessary, against the acquirer in bad faith, must suffice.

No longer retained are Article 1488 of the Civil Code, which validates the sale of property belonging to others in commercial matters, and Article 1489 C.C. which deals with the sale of things lost or stolen. Any sale of property belonging to another would be subject to annulment at the request of the purchaser, provided the vendor has not become the owner of the thing before proceedings have been instituted. The real owner might always claim without offering to reimburse the price, unless the thing has been sold under judicial authority, as already provided in Article 1490 C.C. respecting things lost or stolen.

The theory of risk would now be subject to the rules on obligations or property.

The following is a summary of the differences between the provisions of the Civil Code and several new provisions of the Draft to govern the sale of immoveables.

1. a sale obliges the parties to proceed by way of an authentic deed *en minute* required by the rules on the publication of rights (aa. 390 and 391);

2. the vendor is responsible for any encroachment by himself or a third party, unless he declares it (a. 393);

3. the vendor is responsible for any violations of the law or regulations governing the construction or use of the immoveable at the time of the sale and which he has not declared (a. 394);

4. the vendor must furnish a title and certificate of search (a. 395);

5. the vendor must cause to be cancelled all registered rights which might diminish the right transferred to the purchaser (a. 396).

Section II contains five sub-sections that deal with special problems relating to certain kinds of sale.

Auction sales are dealt with in a first sub-section. Chapter VIII, concerning sale by auction, and chapter XI, respecting forced sales and transfers resembling sale, of the Civil Code, are combined. Based on the Louisiana Civil Code, the Draft has attempted to clarify the auctioneer's responsibilities.

Rules have been laid down in sub-section 2 to govern bulk sales, a subject which has been revised in the light of more recent legislation (47).

In sub-section 3, on sales of debts, the Draft contains legislation more favourable to the transferee than the present Civil Code which favours the transferor.

Sales of rights of succession and of litigious rights, provided for in sub-sections 4 and 5, are not basically changed. Exclusion from partition of a succession which is now covered in the Book on *Succession*, is dealt with in the rules governing sale of successions.

Gifts

The Draft simplifies the Civil Code provisions on gifts. It consists of two sections: one devoted to ordinary gifts *inter vivos*, and the other to gifts made by marriage contracts.

A new definition based on the notion of consensual agreement is introduced for gifts *inter vivos* which are dealt with in the title on nominate contracts rather than in the title on gifts *inter vivos* or by will; this makes possible the elimination of existing formalism, following an example set in certain foreign legislation (48).

Several consequences follow from the proposed definition. First of all, as a contract, a gift *inter vivos* falls under the general rules governing obligations, unless otherwise specified. The solemn character of gifts disappears, as does the formal rigidity based on a tradition hostile to liberalities. The provisions on acceptance and the formalities necessary to make a gift perfect, such as the notarial deed and registration, would be abolished with respect to gifts of moveable property. The exception concerning the *don manuel* would then lose its justification (49).

Special forms would nevertheless still be required for the transfer of ownership of certain property, especially registered shares of companies

and debentures of corporations. This would really not be an exception to the general rule, since these formalities would be required by the nature of the property and would apply to every kind of transfer, not only to gifts. The authentic deed would nevertheless be retained with regard to gifts of immoveable property. This rule differs from that for the sale of immoveable property (50). Publication for gifts of immoveable property would also be assured by registration (51). Articles 776, 787, 788 and 790 to 794 of the Civil Code would then become superfluous.

Provisions governing the time when the capacity to give and the capacity to receive are deemed to exist (a. 771 par. 1 C.C.) would also be dropped since, under the general rules governing obligations, both are assessed at the time of the contract (52).

Finally, several provisions based on the distrust of the codifiers in the matter of gifts have been abolished. This applies to the presumption of interposition of persons (a. 774 C.C.). Repeal by the *Act respecting Matrimonial Regimes* (53) of the prohibition against gifts between consorts has eliminated much of their *raison d'être.*

An attempt is made to clarify some of the obligations of the parties to a gift contract, such as those concerning delivery, receipt, or payment of the costs of the deed, which are missing from the Civil Code.

The most important reform in this respect is the more precise definition of the obligation of warranty in the second paragraph of Article 796 of the Civil Code. Account is taken of the current practice by which the donor of immoveable property does not pay off the hypothec or the servitude, and the donor of used moveable property is not bound to repair all the defects (a. 460 and following).

Nevertheless, warranty would exist, as in current law, in a case where the donee is evicted after having executed a charge which affected the thing, if the cause of the eviction is a defect in the right of ownership which was known to the donor and which was not assumed by the donee, and if this obligation is greater than the benefit which the donee has received (a. 462).

The normal rules governing obligations apply in matters of conditions. However, it is proposed that an impossible or illegal condition be treated as not written as is done with wills, rather than providing for nullity of a conditional gift.

The provisions of Articles 797 and following of the Civil Code which determine the scope of the donee's obligation for the donor's debts when

the gift is universal or by general title, are repeated in substance in Articles 469 and following.

Finally, the abolition of revocatory action for a gift by reason of ingratitude is proposed (aa. 811 to 815 C.C.). Although this decision was not unanimously accepted, the possibility of revoking a gift does not appear to be in keeping with the consensual or definitive character of a contract. Moreover, in practice, it does not occur very often and jurisprudence shows that the motives invoked by the petitioners are more frequently in the nature of family quarrels than of the serious kind mentioned in Article 813 C.C. (54).

The section on gifts made by marriage contracts subjects gifts *inter vivos* to the normal rules governing gifts, and gifts *mortis causa* to those governing wills.

Gifts made by marriage contracts would no longer be subject to registration as gifts, and the definition of Article 807 C.C. would no longer have any value; this would eliminate the problems caused up to now (55). The general rules on the publication of immoveable rights would nevertheless continue to be applied, as in the case of any other transfer of immoveable rights. Publication of the marriage contract is also assured through registration of the notice at the Central Register of Matrimonial Regimes (a. 1266b C.C.).

In response to the wishes expressed by several practitioners, the specific rules on gifts made by marriage contracts tend to substantially simplify existing provisions. They can only be made by future consorts, or by consorts in case of changes in the matrimonial agreements following marriage. The idea was to prevent gifts made by other persons from eventually complicating changes in the matrimonial regime. Similarly, only consorts and their children can be donees. This applies only to children in the first degree; the provisions of Book One on *Persons* (a. 30) set aside the present rule which includes grandchildren in the term "children".

In addition, the principle of the irrevocability of gifts *mortis causa* or of contractual institutions is reversed. These would be presumed revocable if made by particular title, unless otherwise specified (a. 488). They would always be deemed revocable, notwithstanding any contrary stipulation, when universal or by general title since they then take on the character of a will (a. 487). This reform takes into account a new social reality seen in the increasing instability of marriages. The risk of divorce makes overprotection of spouses undesirable, since it could result in the omission of gifts from the marriage contract. A similar situation was noted in the

Husbands and Parents Life Insurance Act (56). Insurance circles have noted that Québeckers systematically refuse to appoint their spouses beneficiaries of insurance policies because of the restrictions which irrevocability imposes on insured persons; in other provinces, however, where this situation does not exist, the tendency is just the opposite.

Lease of things

Many social and economic factors have contributed to the new growth in importance of the law on lease of things in the twentieth century: once essentially limited to the realm of immoveables, it is now used in relation to property of every description, to the point where the provisions of the Civil Code, their language now more than a century old, no longer reflect only one aspect, albeit important, of the contract of lease.

These recommendations have already been of assistance to the legislation in the in-depth 1973 amendment to the Civil Code which replaced Articles 1600 and following (S.Q. 1973, c. 74). These new articles are well-known to jurists and interested persons, especially since they are an extension of previous special legislation organizing the Rental Board and the lessee's protection.

At the time, these new articles of the Civil Code were inserted in a group which now differs from the general rules recommended by the Draft to govern obligations and contracts. This coordination required readjustments. The amendments, however, are small and based largely on the new provisions on contractual obligations. For example, resiliation of right of a contract following a notice, in the event of breach (a. 282 and following) has brought about suppression of more restrictive texts well-known in the Code, which tended to restrict the rights of parties to a judicial resiliation (a. 1610 par. 2 C.C.). Here this coordination required only the repeal of certain articles on lease to attain the general result of the new regime of contractual obligations.

Similarly, the lessor's privilege in Articles 1637 C.C. and following becomes a guarantee subject to the new rules of the Draft in matters of security on property.

Affreightment

The Civil Code contains provisions relating to affreightment, particularly Articles 2407 to 2460 in Book Fourth on Commercial matters.

It seemed that, by its nature, this type of contract should be inserted

among the other types of leases of things. This is why this contract is included among the special contracts.

The provisions of this chapter are in general suppletive in character and would thus apply only in the absence of express provisions in the contract. In this area, it is customary to use standard forms the content of which varies according to the nature of the operation envisaged by the parties.

Some nations have legislative provisions governing affreightment (57). Such provisions apply only where no contract exists setting forth the agreement of the parties. According to current practice in this field, the parties to contracts of affreightment generally adopt standard forms of contracts (voyage-charter: GENCON; - time-charter: NYPE and BALTINE), which set out in some detail the rights and obligations of the parties, although the parties may add to or modify the contracts by riders and addenda. The standard forms of contracts also take into account the customs and usage in force in this field.

Although in a contract of affreightment, the lessor undertakes, for remuneration, to place all or part of one or more ships at the disposal of the lessee, this does not mean that affreightment is closely related to lease except, to a certain extent, for charter by demise. Affreightment is a special contract which itself constitutes a legal form proper to maritime law, by reason of the rights and obligations incumbent upon each party and the risks inherent in maritime navigation.

Bearing in mind the special nature of this contract, it was felt that it should examine the basic concepts inherent in this kind of contract, and the related aspects of the situations it governs, that is, questions relating to maritime affreightment, particularly with respect to general average and to the authority and powers of masters.

In order to ensure some uniformity in the legislation presented, it seemed advisable to include in the chapter governing affreightment a section (section I) entitled *General provisions*, which covers certain shipping institutions which are non-contractual, but which are related to affreightment and form an inseparable part of it. Consequently, Articles 574 to 577 deal with the definition of a ship, masters and general average. The second section is devoted to the contract of affreightment itself, and governs, for each category of affreightment (charter by demise, time-charter and voyage-charter), the relations existing between lessors and lessees.

In order to reflect as faithfully as possible the nature of shipping usage in force, as well as the relations between the parties which generally

follow the spirit of standard forms of contracts, the Draft is based largely on current practice found both in French legislation and in the rules and usage incorporated in the standard forms contracts.

Accordingly, the repeal of Articles 2355 to 2467, and 2594 to 2612, but not of Articles 2389, 2391, 2392, 2393, 2401 and 2402 of the Civil Code is recommended.

Contract of transport

Articles 1665a and following of the Civil Code combine provisions on various contracts, under the general heading "of the lease and hire of work". This follows the provisions governing lease and hire of things. This combination is now too general since these contracts have acquired new and distinct importance and originality, especially following industrialization. Each now has a specific economic importance and a specific legal identity, so that the law now must take account of their special nature and lay down specific rules to govern each. For this reason, the Office deals separately in the Draft with the contracts of transport, employment and enterprise, and the contract for services.

The Commissioners of 1866 cannot be blamed if the existing provisions in the Civil Code governing transport are far behind present means of communication. Those Commissioners were drafting legislation to govern fewer and slower means of locomotion. In the last century, transport was still in many respects considered a hazardous adventure in which each contracting party assumed in all cases part of the risks involved. This is one of the main reasons why contracts for transport of persons are, to all intents and purposes, not regulated. This is also why Articles 1672 to 1682d of the Civil Code, dealing mainly with transport of merchandise, are so short.

Transport is now extremely important economically. It simplifies and accelerates trade, thereby providing a basis without which no modern society can progress. Because it also plays a part in developing tourism, it is a catalyst in the leisure society which is evolving so rapidly. Transport also figures in internationalizing relations between States and between individuals. For all these reasons, it deserves special attention from the legislator.

Of course, even though the law on transport is a particular type derived from the contract of enterprise, it needs separate regulation because of the many specific factors involved; these include the varied

means of locomotion available to travellers or shippers, the ever-increasing speed of these means of transport and, consequently, the ever-diminishing control which passengers have over their own safety in transit. Also worthy of note is the trend toward the marketing of means of transport of a large size and controlled more and more by electronics. Bear in mind the great quantity and variety of merchandise transported, with all the repercussions that these factors may have on carriers' behaviour. Consider also such innovations as "package tours" and container shipping.

These factors justify the need to give transport special consideration in law. It thus becomes important to adapt the law on contracts to a phenomenon which will obviously continue to develop rapidly.

In another connection, it is useful to note that the federal system, by the division of powers that it imposes, partially limits the legislative power of the province in the transport field. This results in many different overlapping bodies of legislation.

The province, however, controls a considerable field and for this reason realistic legislation is needed to govern contracts in the field of transport. To this end, the solutions offered by jurisprudence were studied and were retained when they appeared to be in agreement with the needs of modern transport. Many interesting techniques were borrowed from foreign legislation. In addition, there was close collaboration with the representatives of bodies interested in reform from both the carriers' and users' point of view. Furthermore, numerous specialists in surface, air and water transport were consulted.

Some members maintained that, because of its nature and distinctive character, air transport requires special regulation in line with international transport.

After much reflection, it was decided not to adopt special provisions to govern air transport for the following reasons. Firstly, if provisions respecting this particular type of transport were established, their field of application would have to be defined: would they affect only enterprises operating solely within the borders of Québec? If so, such companies as Air Canada, Nordair and Québecair, whose aircraft do not fly exclusively within Québec's air space might not be governed by the special provisions and might remain subject to federal regulations for both permits and transport rates and conditions. Is the mere fact that transport is done exclusively within the Province of Québec sufficient to make the Québec rules respecting air transport applicable in all cases? The Office felt it was

not within its mandate to solve this problem, although it had to be mentioned, and the need for uniformity in this field stressed.

As it appeared, the Draft provisions applicable to all modes of transport could fit admirably into the technical, economic and legal situation of air transport. Nevertheless, the Québec Transport Commission, if it so desired, could very well adopt special regulations respecting provincial air transport, as regards operating permits, tariffs, conditions of transport and limitations of liability.

All transport relations were considered as contracts (a. 605), even gratuitous transport (a. 606). This reconciliation between law and the nature of transport has been needed for a long time. A carrier for hire is subject to a regime of presumed liability or sometimes strict liability in both transport of persons (a. 614) and transport of goods (a. 631). The gratuitous carrier is not responsible unless proof is made of his failure to execute his obligation of diligence (a. 607); however, in cases where passengers are killed or physically injured, the gratuitous carrier is presumed liable (a. 607) as in matters of transport for hire (a. 614). In respect of transport of things, a gratuitous carrier is liable only when he is proven to have failed to execute his obligations as a prudent administrator.

The Brussels Convention of August 25, 1924 for the Unification of Certain Rules in Matters of Bills of Lading governs, on an international scale, the contractual relations between shippers and maritime carriers of goods. Since maritime transport is special because of its setting, the objects transported and the means of locomotion used, the International Convention was drawn up taking into consideration, on the one hand, maritime transport techniques and, on the other hand, the balance to be respected between the interests of shippers and those of carriers.

The Brussels Convention was ratified by a number of States, and it served as a model for domestic legislation. This absorption of international law by domestic law, a phenomenon of legal physics, is seen in such European countries as Italy, France, Belgium, Great Britain and the Scandinavian countries, and in North America. Striving for uniformity and to avoid insoluble conflicts of laws, Canada (58) adopted the provisions of the Brussels Convention in the domestic legislation, so that the rules applicable in domestic traffic and international traffic are absolutely parallel.

Uniformity of laws allows adoption of standard forms for transport contracts which are valid regardless of the quality of the carrier, the nationality of the ship, and the points of departure and of destination.

In present Canadian legislation on maritime transport, the provisions of the federal law, which reproduces the rules of the Brussels Convention of 1924 *verbatim*, apply to transport by ship carrying merchandise from a Canadian port to any other port, within or outside Canada (Paramount clause). This extends the rules governing purely maritime transport to cover any transport by water. These provisions, however, apply only when a bill of lading is issued.

Working on problems of transport within Québec, the Office, having heard testimony from persons who have a professional interest in transport by water (insurers, and representatives of shippers and owners), concluded that Québec legislation in this particular field of law should be brought into line with existing legislation in most countries and, in a word, closely follow international maritime legislation in force - namely the Brussels Convention of 1924 - broadening it to cover all transport by water.

The provisions retained have the advantage of meeting the economic requirements of transport and satisfying transport users, carriers and insurers.

It must be specified that the rules retained will apply only to transport by water within the territorial limits of Québec. When a bill of lading is issued, it must conform to the rules established, but these rules would also apply when no bill of lading is issued. Nevertheless, the parties would be free to make a contract in which they determine their obligations and liability in advance, provided that no bill of lading is issued and that the terms of the agreement reached are not contrary to public order.

The principal advantage of the rules proposed is that they would be interpreted in a uniform fashion. Real unification of law cannot be achieved just by establishing uniform standards. If no effort is made to ensure that they are interpreted in a uniform manner, a new split will gradually develop, destroying the desired uniformity of law. There is less risk of divergence or distortion in interpretation of these rules because Québec judges have already had to interpret them on many occasions and are familiar with them.

Consistency of interpretation might eventually have been lost if it had been decided to use terminology different from that of the Brussels Convention on which the proposed legislation is based; naturally, then, the rules proposed, except for a few expressions, are identical in form to those of international legislation. Moreover, certain States, including France in 1936 (59), attempted to retain a special vocabulary in this field and occasionally tried to change the style to make these texts more elegant

in their own language. The resulting different interpretations destroyed the uniformity necessary on the international level. To protect the interests of her people, France herself repealed the law in 1966 (60), replacing it by a text more directly based on the 1924 Brussels Convention.

These rules are worthwhile then, because on the one hand, they fit in with the great movements towards unification and coordination of law, and on the other hand, they simplify the work of those responsible for interpreting them.

The order of distribution and of presentation of the articles does not always follow, however, that established in the Brussels Convention or in Canadian legislation.

Contract of employment

Despite the generality of the rules which it embodies, the part of the Civil Code governing the lease and hire of services (a. 1677 C.C. and following) has lost all hold over a number of socio-economic phenomena in today's world. The terse rules set out in 1866 have been faced by the parallel development of a body of labour legislation meeting new and ever changing needs. The advent of collective agreements has reduced the constant risk of contractual inequality in labour relations where the principle of legal equality does not at all imply equal power at the bargaining table.

This juridical reality, developed outside the general law, was taken into account. It was thus deemed necessary to reconsider employment in a modern perspective; it was also thought proper to lay down certain principles which are the foundation of this parallel phenomenon, so that labour legislation and its effects could henceforth be looked upon as the natural extension of the general law; in this frame of reference, Article 669 indicates what is, in principle, the complementary character of decrees, ordinances and collective agreements, in accordance with Article 71 (a. 1024 C.C.).

On the whole, the Draft remains faithful to traditional principles; the provisions have been adjusted to the contemporary realities of labour relations; several jurisprudential rules have been included, and a few innovations have been thought necessary in view of a number of recent and legitimate considerations.

It will, moreover, be observed that the chapter on the *Contract of Employment* is henceforth severed from the civilian trilogy embraced in

the generic term "Lease and Hire of Work"; the contract is now seen as an institution distinct from the lease and hire of things - the analogy set out in the last century no longer corresponds in any way to the modern concept of employment. From this point of view, the Draft restores the importance of the relations of employment under general law.

Certain provisions contain new law. A presumption of non-gratuitousness in employment relations seemed necessary (a. 668); for the protection of female labour, pregnancy and childbirth during employment (a. 672), it was also necessary to realistically reconsider the effects of tacit renewal (a. 673), as well as the delicate machinery of notices for the termination of contracts of indeterminate duration (a. 675). The Draft also regulates certificates of employment (a. 676). Articles 681 and 682 set conditions for making valid non-competition clauses and make the employer responsible for proving such validity.

Articles 1697a and following C.C., which provide for a form of seizure, should be transferred to the Code of Civil Procedure. It did not seem necessary to retain the type of oath provided for in Article 1669 C.C. Article 1671 C.C., containing a reference, is repealed.

Contract of enterprise

When the authors of the Civil Code proposed Articles 1683 to 1697 in 1866, they could never have imagined the importance which contracts of enterprise would assume. Progress in technology and specialization of labour have given rise to many new professions. Commercial and industrial construction has grown quickly. On the other hand, contracts of enterprise are by no means restricted to the construction of immoveables. It would be useless to list all the contracts whose purpose is to carry out a specific work and whose chief characteristic is the autonomy of the contractor in the choice of methods and manpower.

The Civil Code, restricted chiefly to building or construction by "estimate and contract" had therefore become incomplete, and an effort was made to adapt it to present realities.

In pursuing this end, the associations and organizations affected were frequently consulted, and their collaboration proved most valuable.

The contract of enterprise thus becomes an autonomous agreement, separate from the trilogy found in Article 1666 of the Civil Code. Contracts of employment, contracts for services and contracts of transport are also governed by special rules (61).

It should also be noted that several of the suggested provisions apply to moveable or immoveable works.

Contract for services

The contract of enterprise gave rise to a problem in that, as conceived and defined by tradition and legal vocabulary, this contract covered many categories of agreement, with degrees of obligation which varied from one category to another. It was noticed that several of these contracts established an obligation of result, while others simply entailed a general obligation of prudence and diligence.

As this difference brought with it too many varied consequences, both in fact and in law, it was considered wise to redefine the contract of enterprise and limit it to agreements with no element of subordination between the parties and with achievement of a particular result as their object. From now on, any agreement comprising such juridical autonomy, whose object as regards the person offering his services (the provider of services) is the execution of obligations of means, would be characterized as a contract for services.

Such a rearrangement of the classification of contracts in this part of the Draft would remove, or at the very least diminish, some of the confusion resulting from traditional divisions. It has the advantage of reducing contract classification problems to a minimum, hence simplifying the application of rules of interpretation. It also clarifies the juridical position of agreements formerly found in a field whose demarcation was difficult.

Mandate

While it is true that confidence is still part of the nature of mandate, we must now recognize that interest also is involved. That is why mandate has become a contract by onerous title. This is the kind of mandate which is proposed, with stress on the role of representation in the performance of juridical acts alone (a. 707). It was also felt that it would be useful to adopt the principle of the validity of the disclosure of authority (a. 726).

Mandate purports to be a swift, accomodating contract; it was accordingly appropriate to maintain simplicity in its form. Still, there are some contracts that it is hard to conceive might be executed by representatives whose mandate is not formally recognized; such, for example, is the

case of marriage agreements, or contracts of gift or hypothec relating to immoveables (a. 709).

It was necessary as well to provide solutions to the much discussed problems of double mandate. It appeared that the principle of the double mandate need not be condemned when each of the mandators was aware of it. As for the rest, the solution of the problem which such a conflict of interest engenders is left to the judge who will examine the conduct of the mandatary (a. 712).

With respect to the undisclosed mandate, there are two theories: the French position, adopted by contemporary Québec jurisprudence, according to which the undisclosed mandator cannot proceed against the parties with whom his mandatary has contracted, unless he has been subrogated in the rights of his mandatary or has acquired such rights, and the English position, according to which the undisclosed mandator has a recourse against third parties, unless the third party has contracted *intuitu personae*. After study, the second position was preferred although not adopted *in toto*. A formulation was sought which would reconcile two objectives: to permit the mandator to exercise a recourse against third parties and, on the other hand, to protect the third party against any prejudice resulting from his unawareness of a mandate (a. 736).

The fact that the contract of mandate would now assume an onerous character would normally preclude any possibility of unilateral resiliation. The concept of confidence is nonetheless too intimately a part of the nature of this contract to consider abolishing the possibility of revocation. The right of revocation by the mandator and renunciation by the mandatary was thus granted, whether the contract be by onerous or by gratuitous title.

It is in these areas that the Draft makes innovations. As for the rest, no changes have been made to existing law, save in matters of form and in the arrangement of the existing articles.

In order to avoid prejudging situations which do not necessarily partake of mandate, such as those of attorneys, notaries, doctors, and architects, the Draft repeats none of the provisions contained in Articles 1732 and following concerning "advocates, attorneys and notaries" or those in Articles 1735 and following concerning "brokers, factors and other commercial agents". The new provisions of the contract of mandate will apply to these persons whenever they act as mandataries. In other instances, the professional activities of lawyers and notaries will be governed by the provisions relating to contracts for services, of enterprise, or of employment.

It was not considered necessary to retain in the Draft that category of mandatary known as a "factor", who has long since disappeared from the business world, because even if there remain certain companies called "factors", their agreements and standard contract forms in no way correspond to the legal notion of the factor as conceived in the Civil Code. The situation of commission merchants or consignment merchants apparently resembles most closely that of the factors of old, but the rules governing undisclosed mandate should suffice. In fact, Articles 731 and 736 will cover eventualities that may occur; Article 736 provides the mandator with a recourse against the cocontracting third party, even when that party is unaware of the quality of the person with whom he is contracting, although that person is provided with adequate means of defence. On the other hand, according to Article 731, the cocontracting third party has a recourse against the mandator for acts done by the mandatary, "unless under the agreement or by virtue of the usage of trade the mandatary alone is liable". This reservation should encourage "principals" and "commission agents" to divulge their respective qualities to third parties even before settlement of any contract. As far as brokers are concerned, there is no need for special regulations since the rules governing the double mandate would solve most of the problems encountered in this profession.

Partnerships

Although the contract of partnership has lost the importance it had when the Code was drawn up mainly because incorporation under the *Companies Act* (62) affords more advantages such as restricted shareholder liability, partnership is still frequently used in Québec as elsewhere.

It is felt, however, that the legal structure of partnership should be altered in order to increase its effectiveness, while maintaining protection of third parties. The main changes are given here:

1. Article 1830 C.C. states that it is the essence of partnership that it be for the common profit of the members (partners). Doctrine (63) interprets the words "common profit" as (pecuniary) gain or benefit. It appears that, on this point, our law is identical with Anglo-Saxon law. "Partnership is the relation which subsists between persons carrying on business in common with a view of profit. Business includes profession" (64). There is reason to widen the traditional notion of partnership, namely to apply the rules governing partnerships to all groups formed with a view to deriving common profit

even if such profit is not monetary, and does not necessarily entail gain or benefit for the members.

2. It is clearly established that a partnership possesses all the elements of juridical personality. The authors (65) indeed maintain that today, in effect, any partnership has juridical personality, even though this is still not made entirely clear in the Code of Civil Procedure (66). Full juridical personality will carry with it the capacity to act before the courts as either plaintiff or defendant without the partners themselves being necessarily implicated. Juridical personality would also entail the existence of a patrimony belonging solely to the partnership, as distinct from that which belongs to the partners, the end of undivided ownership by the partners of the property of the partnership, and other consequences to be mentioned later. Third parties can always take advantage of the partnership's distinct personality, although the partnership itself and the partners can do so only when the partnership has been registered according to law.

3. It is proposed that the distinction between civil partnerships and commercial partnerships be abolished, and that the rules hitherto applied only to commercial partnerships be applied to all partnerships, except for the special rules on limited partnerships and on associations, which will be dealt with further on. Civil partnerships are motivated by gain or profit to the same extent as commercial partnerships, and one does not see why the creditors of a so-called civil partnership, such as a law firm, should be protected to a lesser degree than those of a commercial partnership. Why should they be deprived of their solidary recourse against the partners and consequently exposed to the risk of one or more of the partners becoming bankrupt (67)?

Solidary liability of the partners for the debts of the partnership is retained, but only after discussion of the property of the partnership; this in no way prevents creditors from proceeding against both the partnership and the partners in the same action, with appropriate conclusions taken against each of them.

4. The Civil Code recognizes universal or particular partnerships and civil or commercial partnerships. Commercial partnerships are subdivided into general partnerships, anonymous partnerships, limited partnerships and joint-stock companies. It is proposed to retain only ordinary partnerships and limited partnerships, and to add associations.

The distinction between universal partnerships and particular partnerships seemed unnecessary, as did the provisions in the Code relating to them (68). The Code itself, in Article 1870 C.C., assimilated "anonymous partnerships" with general partnerships or partnerships under a collective name, so there is no need to retain an expression that, in any case, does not have the same meaning given to it in France and in other countries (69).

Nor was it felt that the "limited liability partnership" permitted by certain European codes (70) should be, for the moment, introduced into the Civil Code.

5. The effectiveness of the partnership should be increased by limiting the causes of automatic dissolution to the last two cases in Article 764, thus allowing the partnership to continue despite the withdrawal of one or more of the partners, and also, if there be express or tacit renewal, whenever the term agreed upon expires. This is a major change from the present system where, according to Article 1892 of the Civil Code, dissolution of right is the rule.

The interests of any withdrawing partner and of his successors are safeguarded by Articles 768 and following, in such a way that settlement of these interests does not necessarily entail the end of the partnership. The proposed change constitutes a marked improvement over the present law.

6. It was not thought necessary to reproduce the provisions on winding-up now contained in the Code: it seemed simpler and more practical to apply the rules of the *Winding-up Act* (71) to partnerships, amending this Act when necessary.

7. In the chapter on *Partnership*, the Code contains several lengthy provisions on the registration of partnerships and other subjects of an administrative nature. It is proposed that the provisions relating to registration be grouped in one statute, possibly the *Companies and Partnerships Declaration Act* (72).

8. The desirability of limited partnerships in the commercial and financial sectors, among others, justifies their retention, but the following changes should be made:

   a) the special partner's contribution would no longer be restricted to "cash payments", as provided for in Article 1872 C.C. and could even consist in services;

   b) the subsidiary personal liability of a special partner who performs an act of external management would be limited to that which results

from this act: this is contrary to Article 1884 C.C., although, if such acts are repeated, the special partner could be held liable for all the partnership's obligations (73);

c) according to the 1925 amendment (74) to Article 1880 C.C., the name of a special partner could still be included in the name of a limited partnership without entailing liability towards third parties; this can only be done, however, if the status of the special partner is clearly indicated and the name of the partnership includes the words "limited partnership".

9. Articles 790 to 800 dealing with associations are of new law. While there are many laws on particular associations such as trade unions and mutual benefit societies (75), the Civil Code does not yet contain any general provisions on associations which are neither partnerships nor corporations.

Though the words "association" and "partnership" are synonymous, it was thought best to retain the term "association", and to continue to distinguish between this and partnerships as such. It makes of an association a particular form of partnership with some similarity to limited partnerships but restricted to non-profit groups whose statutes provide for the admission of members other than the founders or organizers.

It was thought necessary to propose that associations, understood in this sense, be governed by the Civil Code by reason of its current usage. It is important to prevent use of such groups for the accumulation of property under the pretext of humanitarian or other goals in order to distribute it to a few people only.

It will be noted that:

a) in the event of liquidation, the members would not be entitled to share the property of the association;

b) where the property of the association is insufficient, the directors would be solidarily liable for debts during their term of office;

c) the ordinary members would not be liable for the obligations of the association beyond the subscriptions or membership dues agreed upon;

d) any member would be able to withdraw from the association at will;

e) any member could be expelled from it by the general meeting;

f) in the event of liquidation, the surplus assets would have to be used

for the purposes of the association; otherwise they would have to be transferred to the Public Curator.

These associations would ultimately be subject to the supervision of the Minister of Consumer Affairs, Cooperatives and Financial Institutions who would be able to request their dissolution for cause. However, this right would have to be exercised by action before the courts (76).

Deposit

In 1866, the commissioners considered it appropriate to allow deposit by gratuitous title only since they felt that any agreement to pay would transform the contract into a lease. The increase in juridical operations which imply an obligation of custody, whether by onerous or benevolent title, calls for a reconsideration of certain characteristic elements of deposit, notably the concept of gratuity. In fact, the essential elements of the contract of deposit have been altered through such factors as the appearance and generalization of contracts for storage, for parking and for the deposit of securities in banking institutions and with stock brokers; another factor is the increased use of cloak rooms and of baggage deposit.

Several provisions presently governing deposit have not been reproduced because they relate to the general theory of contracts, set forth in the Book on *Obligations*. This is the case of Articles 1800, 1801 and 1811 of the Civil Code. Other articles have been deleted, including Article 1795 C.C. which enunciates the essentially gratuitous character of deposit, Articles 1799 and 1813 C.C. which set up a distinction between voluntary deposit and necessary deposit, and Article 1797 C.C., since the notion of delivery is already included in the definition of the contract.

Sequestration

Sequestration is dealt with as a contract distinct from deposit; the rules governing it, however, remain substantially the same.

Contract of loan

Economic activity depends largely on credit for both the consumer and the producer. For this reason, loans, especially loans with interest, play an important part in juridical activity. Consequently, all aspects of loan contracts must be regulated by legislation.

The Civil Code's rules on loans are relatively restricted, however. While Section 92(13) of the *British North America Act* (1867) reserves legislative competence for the provinces in matters of ownership and civil rights, Section 91(19) gives the Canadian Parliament exclusive competence in the field of interest. Loan of money by onerous title can be governed only partially by provincial legislation.

Other provincial legislation also governs contracts of loan: for instance, the *Consumer Protection Act* (77) and the *Licenses Act* (78) respecting pawnbrokers, cover particular fields.

Notwithstanding these limitations, the Draft attempts to up-date the provisions of the Civil Code by adapting them to the economic and social changes which have taken place since 1866, while maintaining a specific reference to the *Consumer Protection Act.*

Certain rules derived from Roman law which no longer meet present needs have been deleted; this is the case of the rule according to which any person who lends a thing must necessarily be its owner, with a capacity to alienate.

Several provisions of the Civil Code have been deleted (e.g. aa. 1765 and 1785 C.C.). To expedite and simplify loan transactions, the Draft proposes that every loan in which the term is not predetermined be considered a loan on demand (a. 827).

Suretyship

One problem entailed in the revision of the law on suretyship was that of actually defining suretyship. Today, this term is often used to designate "*le dépôt d'argent ou de valeurs fait par une personne entre les mains d'une autre en vue de garantir certaines créances éventuelles*" (79). To begin with, then, it was necessary to correct an inaccuracy in Article 1929 of the Civil Code, and specify that Suretyship is really a contract.

A major change proposed is abolition of the benefits of discussion and of division. Since at present most contracts of suretyship contain clauses by which the parties renounce these benefits, it seemed more

realistic to propose the opposite rule to that of the Code; since this rule would only be suppletive, the parties would always have the possibility of including it by express stipulation. One consequence of the abolition of these rules is that there is no longer any reason to distinguish between legal and judicial sureties. Judicial sureties differed from legal sureties in that they could not avail themselves of the benefit of discussion (a. 1964 C.C.).

The three kinds of suretyship (conventional, judicial and legal) which differ in origin, would now be subject to the same rules.

The provision whereby solvency of the surety is determined on the basis of the immoveable property in his possession (a. 1939 C.C.) would be repealed. Since moveable property today is just as important as immoveable property, it can constitute an appreciable guarantee of solvency.

Insurance

The provisions concerning insurance of persons and damage insurance in the Draft differ little from existing law.

With respect to the presentation of the articles and to the terminology some changes were necessary to make the new provisions accord with the overall arrangement of the Draft.

However, although the provisions affecting insurance of persons and damage insurance have been in force since October 1976 only, comments received by the Civil Code Revision Office since that date convince it that certain substantive amendments were also necessary.

The main substantive changes are:

1. life annuities and annuities certain issued by insurers continue to be treated like life insurance but they would also be governed by the provisions of the chapter on *Annuities*;
2. the presumption of irrevocability in favour of spouses named as life insurance beneficiaries has been abolished;
3. the wording of the articles dealing with the transfer of insurance of things has been modified so that a new insured cannot be imposed on an insurer without his consent;
4. the rules governing the evaluation of the losses sustained by an insured has been modified so as to ensure the validity of the special

valuation formulas appearing in insurance contracts, particularly the replacement value formula;

5. the article granting to the insurer an automatic right of subrogation has been modified so as to validate waivers of subrogation signed by insureds before a loss has occurred;

6. the article stating that the insurer must pay interest granted under a court decision above and beyond the amount of insurance has been clarified so that the insurer is not responsible for the interest in respect of that part of the judgment which exceeds the amount of insurance.

On November 15, 1864, in their seventh report, the commissioners appointed to codify the Laws of Lower Canada in civil matters declared that there could be no doubt that the prevailing usage had given preponderance to the English doctrine with respect to marine insurance and that our policies are invariably in the same form as those in use in England (80).

This statement is even more accurate today than it was in 1864. It must be noted that in 1906, the British Parliament enshrined the rules governing marine insurance into the *Marine Insurance Act, 1906* (81), which accentuated the recourse to the English statute as a source of law.

The English *Marine Insurance Act* of 1906 is the Magna Carta of marine insurance in many countries. It was adopted almost word for word in several other Canadian provinces (82). Although in a general way the United States has not codified its rules governing marine insurance, great deference is given to this English statute and to the decisions of English courts (83).

French marine insurance was completely revised in 1967 (84) and the problems confronting the drafters of the new French marine insurance legislation were the same as those facing the Civil Code Revision Office.

The provisions of the Civil Code were based on *L'Ordonnance de la marine* of 1681 and were perfectly adapted to the sailing ships of the period. Out of the present state of modern ocean trade arose marine insurance contracts which look like small treatises providing for every possible situation, at least in those drafted in English.

The French reform produced a reasonably concise statute in which the main guiding principles of marine insurance are stated, only some of which are of public order; the act also consecrated the suppletive nature of most of the provisions. In fact, the basic rules proposed in the 1967 French

marine insurance legislation are, to a large extent, to the same effect as those of the 1906 English act and those which are proposed here.

The essential element of insurance covering objects is the geographical distribution of risks and this element is still more essential when these risks, taken individually, involve large sums of money. This is particularly true of marine insurance, and therefore the international nature of this form of insurance is not surprising. Marine insurance is international because its agents assume risks in various parts of the world and enter into re-insurance agreements with foreign insurers: consequently, it changes very little from one country to another, even those with other than Anglo-Saxon roots. The basic rules of marine insurance and, to a great extent, even the terms used in the contracts are the same the world over.

Two characteristics of marine insurance must be mentioned.

Firstly, marine insurance law is essentially based on policies, the phraseology of which is archaic but the meaning of which has often been defined in jurisprudence over the centuries (85).

Secondly, marine insurance differs from non-marine land insurance in that it does not tend to protect the same parties. On this point, we must adopt the commments of Maître Pierre Lureau, in his article "*La Nouvelle législation des assurances maritimes*" (86), who states that the rules of non-marine insurance are essentially rules for the "*protection de l'assuré vis-à-vis de l'assureur, rendue nécessaire dans la majorité des cas par le déséquilibre des forces économiques en présence: celle des sociétés d'assurance vis-à-vis de la multitude des usagers et par l'incompétence de beaucoup de ces derniers. La situation est en maritime inversée: généralement ceux qui en usent sont des commerçants avertis et la concentration actuelle des entreprises maritimes, qu'il s'agisse des flottes ou des sociétés exportatrices ou importatrices, leur confère une force telle que l'équilibre est réalisé, quand la balance ne penche pas en faveur des assurés au détriment des assureurs*".

For this reason, only five of the one hundred and sixty-five articles governing marine insurance in the Draft are of public order. On the other hand, more than one hundred and ten of the roughly one hundred and thirty-five articles governing non-marine insurance in the Civil Code would be of public order to one extent or another (87).

The background of Québec marine insurance is therefore essentially contractual law, in which contracts based on the English *Marine Insurance Act* of 1906 play an extremely important part.

In fact, although only a few of the rules of the Civil Code required amendment, many articles reflecting clauses used in most contracts had to

be added. The Civil Code includes seventy articles governing marine insurance, and the Office proposes one hundred and sixty-five. However, only seven provisions have been fundamentally amended. The Civil Code contains four provisions (aa. 2621, 2638, 2639 and 2644) stipulating annulment or reduction of contracts with forfeiture of one half of one per cent of the premium in favour of insurers. The elimination of all such forfeitures is proposed. Moreover, solutions differing from the Code are proposed for:

1. insurance of seamen's wages, prohibited in the Civil Code but allowed in the Draft;
2. barratry, a risk excluded from coverage by the Code but included by the Draft; and
3. double insurance.

In this last case, subsequent contracts are considered not executory in the Code, while the Draft, like the English *Marine Insurance Act* of 1906, proposes making all contracts valid. However, the benefits may not exceed the insurable value and there is no right of discussion on the part of the insurers against the insured.

Annuities

Annuities, called "rents" in the Civil Code, are governed by provisions scattered here and there throughout that Code. These provisions first appear in Articles 382 and 388 to 394 of Book Second of the Code. Articles 1593 to 1595 C.C. deal with alienation for rent, and an entire chapter of the Code, comprising Articles 1787 to 1793 C.C., is devoted to the constitution of rents; finally, the title on life rents comprises Articles 1901 to 1917 C.C.; rents are also governed by Articles 777, 2014, 2044, 2248 and 2250 C.C.

An attempt was made to consolidate all provisions governing this field under a single chapter. This task would be made easier by repealing a number of articles which have become obsolete or useless, and simplifying and standardizing the rules proposed.

Rents in perpetuity were held in high esteem under the *Ancien droit* because they allowed for the creation of income through the abandonment of moveable or immoveable capital, whereas loans upon interest were considered as usury and therefore prohibited. When the Code was drawn up, in 1866, loans upon interest had been legal for a long time, and in spite of this, the Codifiers did not totally abolish rents in perpetuity. They

limited themselves, following the example laid down in the law passed in 1859 (88), to providing that rents in perpetuity were in essence redeemable (aa. 389 and 1789 C.C.), and when applied to immoveables could not exceed ninety-nine years or the lifetimes of three persons consecutively, and that, once these terms had expired, the creditor of the rent could claim the capital. The Codifiers admitted that these provisions were vague and difficult to understand (89), but above all, they do not meet the needs of our society. Today, loans upon interest provide all that could be expected of rents with redeemable capital, and are not as complicated. The Draft is intended to dispel all misunderstandings and ambiguities concerning annuities, and to avoid any overlapping between the rules governing annuities and those governing loans upon interest; it is hoped that this will be done by completely abolishing rents in perpetuity. The same objections raised to the establishment of a substitution beyond the second degree justify prohibition of an annuity for a more extended period.

In the future, under the Draft, the term of any annuity constituted in perpetuity would be reduced to ninety-nine years, as would that of every annuity not constituted in perpetuity but still exceeding ninety-nine years. When the annuity expires, however, the capital would not be redeemable, since abandonment of capital is of the nature of an annuity, but not of a loan with interest (90).

There would no longer be any question of redemption of annuities in perpetuity, since these would be prohibited. However, according to Article 389 C.C., every ground rent or other kind of rent affecting an immoveable is redeemable at the option of the debtor and the expression "ground rent or other rent", unlimited as to term, seems to include life rents and other temporary rents and apparently permits their redemption. On the other hand, Article 394 C.C. provides that life rents and other temporary rents, at the termination of which no capital may be reimbursed, are not redeemable at the option of one party only. This conflict between the two texts no doubt led to a misunderstanding in this field which was highlighted by the Codifiers. There is no need to solve this problem, since it is felt that the right of volontary redemption must be abolished in all cases. For this reason, the proposed articles do not provide this exceptional option afforded in certain instances under the Code.

In other words, the only rents retained and designated "annuities" are life rents and other temporary rents at the termination of which no capital may be reimbursed, and which cannot be redeemed at the option of one party only.

Although the debtor of an annuity no longer has an option of

redemption, even where the annuity affects an immoveable, the Draft allows him to free both himself and his immoveable by appointing in his place an insurer authorized to sell annuities. This option is also afforded the owner of any immoveable which is used for the payment of the annuity. It was felt that, in the general interest, the owner of an immoveable affected by an annuity should be able to free it; this would lead to improved use of immoveables and the removal of obstacles to their development. This is not the same kind of redemption provided for in the Code, since the debtor does not touch the capital; this provision does, however, allow liberation of immoveables to the same degree as is allowed in Articles 389, 390 and 391 C.C.; indeed, it goes further, since under Article 390 C.C., it may be stipulated that redemption will not occur for thirty years. This option would be of public order and hence could not be waived.

This option exists in all cases, whether the annuity affects an immoveable or not (91).

Failing any agreement between the interested parties, the substitution would be made under the authority of the court. The general rule governing contracts, under which one party alone cannot amend any agreement freely made, also forbids substitution of another debtor for the original debtor of the annuity. It was believed that an exception should be made to this rule, in the general interest, particularly so as to provide for the liberation of immoveables used as security. The debtor of the annuity may well have a legitimate interest in appointing another debtor to replace him, even if there is no question of liberating the immoveable. However, the proposed substitution would in no way diminish the security and guarantee enjoyed by the creditor of the annuity.

Under Articles 1792 and 1908 C.C., the creditor of any rent secured by the privilege or hypothec of a vendor may demand that the forced sale of property affected by such privilege and hypothec be made subject to the rent. These provisions would be repealed and the sale would purge any annuity guaranteed by the immoveable sold, except as provided for in other statutes. The creditor of the annuity would be collocated for the value of his annuity, according to his rank, saving the right of subsequent creditors to receive the proceeds of the sale by furnishing security for the continued payment of the annuity. This provision of Article 1178 substantially reproduces Article 1914 C.C.

Thus, if the subsequent creditors do not provide security, the creditor of the annuity will receive a capital sum which the constituant had never intended him to have, and the annuity will be abolished. However, it was

not considered possible or practical to order, in the case of a forced sale, the reinvestment of the value of the annuity to which the creditor is entitled; it was felt preferable to retain the rule of Article 1914 C.C. on this point and to generalize it. The exception in Article 1916 C.C. did not seem justifiable.

The Code distinguishes constituted rents from ground rents, but later assimilates the one to the other in Article 389 C.C. According to the Civil Code, both are moveables (except for rents constituted before 1866 and the capital of rents redeemed during minority, aa. 382, 388 C.C.); both are redeemable, whether they affect an immoveable or not (aa. 389, 391 and 1789 C.C.); neither, if they affect an immoveable, may exceed ninety-nine years or the lives of three persons consecutively (a. 389 C.C.), and both can be perpetual, although subject to redemption. Even when the Code was prepared, there was scarcely any reason to retain the distinction. The Code still distinguishes constituted rents from life rents and other temporary rents. These are dealt with in two different chapters, although in Article 1901 C.C. it is stated that life rents "may be constituted".

These distinctions are not retained, since rents in perpetuity would be abolished and only life rents (annuities) and other temporary annuities would be retained.

There are three cases in which the creditor may claim the value of his annuity, the first being when the debtor does not furnish the promised security or ceases to furnish it, and the second when he becomes insolvent or bankrupt (92). The third case is that of the forced sale, or sale under execution, of the immoveable guaranteeing the annuity. Notwithstanding any agreement to the contrary, the rule of Article 1915 C.C. governing the manner of calculating the value of the annuity should be applied to these three cases. The annuity would be estimated as being the amount required by an insurance company to furnish an equal annuity for the future. Articles 1180 and 1181 which propose this rule also provide that, when the parties cannot agree, they may have their dispute settled by the court.

None of the other methods provided in Article 393 C.C. is retained.

One last comment about annuities issued by companies entitled to write annuities: Life annuities and annuities certain issued by insurers are subject to the provisions of this chapter and, at the same time, to the life insurance provisions of the chapter on *Insurance* (See Article 872). Similarly, benefits out of retirement pension plans are subject to the provisions of this chapter and, at the same time, to the provisions of Articles 930 to 955 of the chapter on *Insurance*. The need for uniformity

in the treatment of beneficiaries is the principal reason for the special treatment afforded to annuities issued by commercial establishments.

Gaming and Wagering

The problem for the contract of gaming and wagering was to work out a system of general law that would be adapted to the requirements of contemporary life, and also take into account the development of special legislation in the field. Consequently, the proposed articles recognize the validity of gaming or wagering that is authorized either by the Criminal Code or by special laws such as the Lotteries and Races Act (S.Q. 1969, c. 28). A special law, in fact, that sets up a body to issue permits and exercises suitable control can only have beneficial results. As a corollary to this, any gaming or wagering debt that is not regulated would be invalid in principle. The Draft thus makes explicit the implication of Article 1927, taken in conjunction with Article 1928, of the Civil Code.

Settlements

The revision of the laws governing the contract of settlement has led to no major changes in the Codal provisions, except with regard to nullity of transactions (a. 1203). A number of ambiguous provisions have been clarified and certain useless articles deleted.

It is recommended that Article 1920 of the Civil Code be repealed. If this article really conferred the effect of a final judgment upon a transaction, the creditor could of right resort to proceedings in execution of judgment, but this is not the case. While transaction is a contract that terminates litigation, this is the only point it has in common with a judgment, as it does not *ipso facto* become executory.

Arbitration

The institution of arbitration has been re-examined in the light of its increased importance in our modern society (93). After an attentive study of current legislation and decisions of jurisprudence, an attempt was made to clarify the juridical nature of arbitration in order to incorporate it into the Civil Code.

The emphasis to date has been on the procedural aspect of arbitration; it was sought rather to re-emphasize its contractual nature. Arbitration is above all a contract subject to the same general rules as all other contracts.

Because of the importance given today to its procedural nature, one can understand that the rules governing this contract are presently contained in the Code of Civil Procedure. And in two distinct titles: Arbitration (Book Seven, Articles 940 to 951 C.C.P.), and Arbitration by Advocates (Articles 382 to 394 C.C.P.).

It must be stressed that this Draft deals only with the contract of arbitration, namely the obligation by which the parties undertake to settle their disputes privately rather than by recourse to the public courts.

However, arbitration would still remain possible without a contract. In certain circumstances, several statutes (94) order recourse to arbitration while forbidding access to the courts. These kinds of arbitration could be governed *mutatis mutandis* by the provisions of the Draft.

It would seem that the procedure for arbitration by advocates does not deserve special treatment (95). The two series of articles in the Code of Civil Procedure are quite similar except that, among other things, the chapter on arbitration by advocates contains articles on remuneration (a. 391 and 392 C.C.P.). It is proposed that these provisions be combined in one chapter of the Civil Code. The articles proposed are broad enough to cover these two types of arbitration.

The Draft affirms the validity of the real *clause compromissoire* (96) or undertaking to arbitrate. Our courts have always recognized the conditional undertaking to arbitrate (97) (*Clause compromissoire préjudicielle ou préalable.*

With regard to validity, the definition given of arbitration is sufficiently broad that there is no reason to exclude or limit its application according to whether it deals with an existing or a potential dispute.

As to effectiveness, the basic problem remains the citizen's ability to oust the jurisdiction of the courts. It was not considered necessary to settle this question in absolute terms. Flexible rules adaptable to the needs of interested parties were preferred, but which would still be supervised by the courts. This means of avoiding conflict between the free choice of the interested parties and the social advantage of judicial power is instituted in Articles 1234 to 1239.

Introductory provisions

1

This article restates part of Article 1058 C.C. in more precise terms. For instance, the word "prestation" is frequently used in today's doctrine and jurisprudence and is preferable to the expression "something" used in Article 1058 C.C.

Also, the obligation to "give" is no longer mentioned. The words "to give" are ambiguous since they refer to a gratuitous act, to the handing over of the thing itself and to the obligation to transfer ownership. In the *Ancien droit* the concept of such an obligation was necessary because sale did not bring about any transfer of ownership by the sole effect of consent. In the present system, on the other hand, this is not the case (98).

It was considered preferable to do away with this category of obligations as such. From now on, the obligation to do something would be an obligation to hand over a thing or to perform a specific act which is personal to the debtor.

2

This article repeats in essence the provisions of Articles 1060 and 1062 C.C.

TITLE ONE

SOURCES OF OBLIGATIONS

3

Article 983 of the Civil Code provides that obligations arise from contracts, quasi-contracts, offences, quasi-offences and from the sole operation of the law. This classification was taken from Roman law by Pothier (99) and is well-known to be artificial and to constitute a source of confusion.

It would seem preferable to consider that every obligation arises either from the law itself, or from a juridical act; the juridical act most frequently encountered is the contract.

It was considered wise to acknowledge formally in the second paragraph that unilateral juridical acts, even if they occur relatively less frequently than bilateral ones, i.e. contracts, are also a source of obligations in the cases provided for by law (100).

CHAPTER I

OBLIGATIONS ARISING FROM CONTRACTS AND FROM UNILATERAL JURIDICAL ACTS

General provisions

4

This article is general and introductory; it defines contracts and inserts in the Code the rule generally accepted in Québec law (101) that a contract is a meeting of minds intended to produce juridical effects.

5

This article gives the classic definition of a unilateral juridical act and requires no special comments.

6

The effect of this article is to subject all contracts to the general rules on contracts laid down in this Book, subject to specific rules governing certain types of contracts, provided for in other parts of the Draft or in statutes.

It was considered preferable to insert this rule at the beginning of the general chapter on contracts rather than to follow the 1866 Code by using references inserted in the various titles concerning nominate contracts, for example: Article 1473 C.C. (sale), Article 1670 C.C. (lease and hire of work), Article 1921 C.C. (transaction).

7

This article embodies in the Draft Code an existing rule of law (102) and indicates that, saving provision to the contrary, the rules laid down for contracts must be applied to unilateral juridical acts (103), such as wills, acts of renunciation of rights, and so on (104).

8

This article expresses the rule, established in Québec law (105) of contractual freedom of the parties, subject to provisions concerning good morals, public order and imperative law.

The first paragraph of the article also emphasizes the fact that in principle the rules governing contracts are only suppletory in character.

The second paragraph repeats the provisions of Article 13 C.C. and leaves it to jurisprudence to define and specify what constitutes good morals and public order, as it has always done (106). Moreover, it inserts

in the Draft Code the general rule of positive law under which pursuit of an illegal purpose nullifies a contract (107).

It seemed useful in the third paragraph, however, to protect contracting parties in good faith by forbidding anyone who pursued an illegal objective to invoke his own turpitude to apply for nullity of the prestation (108).

Section I

Formation of contracts

General provision

9

This article partially restates Article 984 C.C.

The expression "meeting of minds" was preferred to the word "consent", as that term is ambiguous and can mean either the assent of each contracting party individually or the agreement between the two minds (109).

Moreover, it was thought advisable to include among the conditions for forming a contract the requirement to adhere to the form, if one is required as a necessary condition of validity (110).

Finally, it should also be noted that no reference is made to cause, since, as specified in the introduction to this Book, cause would no longer be required as an essential condition for the formation of a contractual obligation.

§ - 1 Capacity to contract

10

With respect to the rules concerning the capacity to contract, it was considered preferable to refer to those established on this subject in the Book on *Persons* (111). These general rules are closely related to the status of persons, and also affect not only contracts but every juridical act.

§ - 2 Meeting of minds

I - Offer and acceptance

11

This article restates the principle already expressed in Article 988 C.C., according to which manifestation of the will to contract may be express and, at times, even tacit (112). This rule has often been confirmed by jurisprudence (113).

12

The object of this article is to distinguish a true offer from a mere "invitation to contract" or from the simple preliminary negotiations which do not contain all the essential elements of the contract to be made (114).

This distinction, already being made in present-day business, has been drawn by jurisprudence which contains a number of decisions as to the specific nature which any offer must exhibit (115).

If the offer is sufficiently specific, the person to whom it is made can accept it with a knowledge of what is involved, and thus may conclude the contract according to the rules set out below.

13

This article introduces later provisions which supply one set of rules for offers made to specified persons (private offers) and another for offers made to unspecified persons (general offers), namely offers made to the public.

14

The purpose of this article is to preclude any possibility of ambiguity which could arise where an offer to a specified person and an exclusive offer are considered to be one and the same thing.

It was not intended that the offerer be necessarily and exclusively bound to contract with the first person receiving his offer, merely because such offer was made to a specified person. The offerer should be entitled to make the same offer to others. This is just a simple presumption which naturally will allow for evidence to the contrary.

15

The purpose of this provision is to favour business offers regarding things determinate only as to kind, and to bring the law into harmony with business practice. It seemed advisable to insert here the rule whereby any person who makes an offer is relieved of it as soon as the stock of merchandise offered to several individuals has been exhausted (116), even if he did not indicate in his offer what quantity was available.

In this respect, moreover, penal law is responsible for penalizing abusive and fraudulent offers.

16

Any offer received by a person may or may not be accompanied by a specific term. It was therefore necessary to determine the period of time during which the juridical effects of an offer will last.

In the first paragraph, it was thought preferable to protect the offerer by allowing him to revoke the offer any time before receipt of acceptance.

The second paragraph conforms to the rule of Québec jurisprudence (117). An offerer who sets a term for acceptance cannot retract his proposal until after the term has expired (118).

In the third paragraph, to avoid any ambiguity, the rule was laid down that any person who makes an offer may revoke his offer before it reaches the person to whom it is made (119). The person to whom it is made cannot benefit from it before he receives it. In any event, since the person to whom the offer is made is not yet aware of it, he cannot be harmed by the revocation.

17

This article governs the specific matter of lapses of offers. Firstly, when an offer is not accompanied by a term, the acceptance must be received within a reasonable period, or else it lapses.

Secondly, if an offer is accompanied by a term, it lapses when the term expires before the offer is accepted (120).

Finally, acceptance made after an offer has lapsed will be considered belated (121). Rules to govern this situation will be established in a subsequent article (122).

18

This provision, which has no counterpart in the Civil Code, is intended to dispel any uncertainty as to the persistence of an offer after the person who makes it or the person to whom it is made dies or his juridical capacity changes (123).

It was thought preferable in all cases to consider death or change of legal capacity of the offerer or of the offeree as a cause for having such offer lapse. The fact is, death or change of juridical capacity can change the character of the negotiations even where an offer is not conceived specifically in consideration of a particular individual.

For example, the survivor may not be disposed to place the same confidence in the heirs or successors of the deceased person with whom he was dealing. Also, the delays usually involved in settling successions may

be of great importance to the value of the proposed contract for the survivor.

The second paragraph provides an exception to the rule in cases where an offer is already inserted in a contract, as the parties could foresee these possibilities when they concluded the contract containing the offer.

19

Contracts between persons not present (124) and contracts by correspondence have been the source of abundant jurisprudence (125) which has by turn adopted the theories of information (126), reception (127) and expedition (128).

If the courts have on the whole endorsed the solution proposed by the Supreme Court in *Charlebois v. Baril*, this decision still presents certain problems of interpretation which it is hoped the Draft will have settled.

In this case, the Supreme Court opted for the theory of reception where offer and acceptance were not made by the same means. On the contrary, when the two future contracting parties have used the same means of communication, the theory of expedition subsists. To simplify things, one rule was made to cover both situations. Of these two theories, that chosen seemed to present the least practical inconvenience. It seemed wise to protect the offerer and to enshrine the theory of material reception of the offer.

20

This article embodies in the Code the principle laid down and generally accepted by Québec jurisprudence (129) that mere silence does not imply acceptance, save in particular circumstances (business practices, prior business relations, and so on) (130).

21

The object of this article, based on foreign law (131), is to cover promises of reward.

It seems that, in such a case, the offerer should be obliged, as a matter of good faith, to respect his offer, even if the person who would benefit is unaware of its existence when he returns the object or performs the act, and so cannot have been a party to a contract. Performance of an act or return of an object is then equivalent to acceptance of an offer of reward, regardless of whether the person who did so knew of the offer or not. French doctrine supports this rule (132).

22

In an effort to establish as complete a system of rules as possible to govern offer and acceptance, it seemed desirable to lay down this rule which is unquestionably of particular value in contracts between persons not present.

Acceptance which does not comply with the terms of an offer, or is late, is in turn considered an offer made by the person to whom the original offer was made; therefore, it is subject to the rules governing offers, provided in the preceding articles (133).

French writers endorse this solution (134). Some recent Civil Codes contain similar provisions (135).

23

The purpose of this article is to dispel any lingering doubts surrounding the maintenance of an offer after refusal by the person to whom it is made. It expresses the rule that rejection of any offer before expiry of a given term liberates the person who makes the offer.

In other words, if the person to whom an offer is made rejects it before the term expires, its offerer may consider such rejection final and is not required to hold his offer open until the period of time originally contemplated expires, to allow the person to whom the offer is made to change his mind.

24

The object of this article is to specify what recourses are open to a person to whom an offer is made, when the offerer breaks his promise to conclude the contract or to grant him preference. If such an undertaking is violated with a third party in bad faith, the contract so made cannot be set up against the beneficiary of the promise; if, on the contrary, the third party is in good faith, the beneficiary of the promise may, on general principles, sue for damages the person who broke his promise.

As mentioned in the second paragraph, the article also applies to preference pacts or promises of first option.

Still, it seemed useful to allow for certain exceptional cases, particularly that provided for in Article 356.

25

This article is intended to limit the abuses entailed by certain standard contracts whereby one party consents to be bound in advance by

clauses or regulations made by the other party which, although the contract refers to them, are not attached to it (136).

When such a clause is not commonly used, the party invoking it must furnish proof that the other party was aware of the clause when the contract was entered into.

It was felt that, given the importance of this provision, it should be imperative to avoid its remaining a dead letter because of contractual derogations from it which some persons would certainly provide.

26

This article has become necessary in the context of current practice.

The first paragraph enables parties to make a contract before they have reached agreement on every point in it; their intention to be bound, evident from their agreement on certain parts of the contract, is sufficient but necessary. This rule thus follows the traditional principle according to which there can be no contract without true concurrence of minds.

In the event of litigation, the reserved points which the parties have agreed to settle later will be submitted to the authority of the court which will complete the agreement, taking into account the nature of the matter and usage, unless the parties have obviously provided for other means (arbitration, for example) in an agreement.

This provision is based on foreign legislation (137) and is explained by modern doctrine (138).

II - Qualities of Consent

27

This article expresses the general rule respecting the existence and integrity of consent, two indispensable conditions for valid contracts (139).

28

This article repeats the substance of the last paragraph of Article 986 C.C. (140).

29

This article lists error, fear and lesion as the traditional defects of consent. Fraud itself is not a defect of consent, since consent is affected only by errors arising from fraud (141). It is thus dealt with under the general heading of error, either simple or induced by fraud. Similarly,

consent is not vitiated by violence *per se*, but rather by the fear such violence engenders (142).

Finally, it was decided to follow the example of the 1866 Code by retaining lesion as one of the defects of consent, even though, on a strictly doctrinal level (143), this point may be highly debatable.

30

This article respecting simple error, which is based on Article 992 C.C. and on jurisprudence (144), specifies cases in which error constitutes a defect of consent.

Simple error vitiates consent in the three cases indicated here, namely where it bears on the nature of the contract, the identity of the object, or a principal consideration for the undertaking.

It was not considered necessary to repeat the error bearing on substance provided for in Article 992 C.C., because jurisprudence has covered under this heading errors bearing on the identity of the thing and errors bearing on the principal consideration of the undertaking, as the case may be.

The omission in the text of any reference to error with regard to the economic value of payments is intentional. In contemporary positive law, such an error is not considered a defect of consent. By the terms of this Draft, however, this type of error may sometimes be governed by the articles dealing with lesion.

Finally, the rule admitted in Québec law has been retained, whereby to give access to the recourses provided for by law, error need not be excusable (145).

31

This article repeats Article 993 C.C. which it clarifies and expands. Error provoked by fraud nullifies consent, not the fraudulent act itself. On the other hand, this article retains as a defect of consent not only error produced by fraud, which leads a person to contract, but also that which leads a person to contract for different conditions (146).

The second paragraph specifies that fraud by a third party, of which the contracting party is actually or presumably aware, becomes his own fraud.

32

In principle, mere silence and concealment do not constitute fraud (147).

Under certain circumstances, however, they may become fraudulent, and this distinction, made by jurisprudence, is here inserted in the Draft Code (148).

33

This provision is a newer, more precise, statement of the provisions of Article 994 C.C.

34

This article restates in a new, more general form the traditional rule of Article 995 C.C. which provides that in ascertaining whether fear has had a determining influence on consent, the judge must take into consideration the circumstances peculiar to the case, the personal characteristics of the contracting party (age, education, character, and so on), and the circumstances resulting from the relations between the person posing the threat and the victim of fear (149). It was thought best to use the general expression "condition of the persons" so as not to restrict the court's appraisal merely to the factors listed in Article 995 C.C.

35

This article retains in particular the traditional concept of reverential fear and legal constraint (150), but in line with recent tendencies in jurisprudence, it broadens the scope of Articles 997 and 998 C.C. (151).

36

This article substantially repeats Article 996 C.C. (152).

37

It has become common, in modern society, for certain contracts to be used by one party as a means of actually exploiting the other, taking advantage of an unfavourable position (poor economic condition, inexperience, senility, and so on). This is often the case with standard contracts and with contracts of adhesion, to mention but two examples.

In the face of such flagrant abuses at a time when governments are increasingly concerned with consumer protection, it was thought essential to reverse the decision made by the Commissioners in 1866 to exclude lesion between persons of major age, since social and economic conditions have changed. But a legislative policy still had to be devised which would reconcile protection of citizens' contractual rights with legal stability of contracts. It was therefore thought preferable to allow lesion between persons of major age, but only in certain circumstances, so as to avoid unduly impairing contractual stability.

This article is thus limited in scope, since lesion results not only from disproportion between the prestations (an objective concept), but also from one party's exploitation of the other (a subjective concept). To invoke lesion, a contracting party must in fact show that there is a serious disproportion between the prestations under the agreement. Once that is established, in order to avoid placing an impossible burden of proof on the plaintiff, a presumption would arise to the effect that such disproportion results from exploitation by the other contracting party of the plaintiff's condition or of circumstances. Proof to the contrary can be made, of course, as the other party may show that no exploitation exists. Thus only in these precise circumstances, to be assessed by the courts, can lesion vitiate consent.

So, the concept of lesion as adopted here is one based on the presumed weakness of the consent of the injured party, and is not an objective concept as in French law (153).

Recognition of lesion is part of a tendency in modern legislation to protect one party against exploitation by the other (154). In view of the consistent violation of the principle in Article 1012 C.C., it has become necessary to bring the law into line with present conditions as other statutes have already done (155).

Finally, the proposed Draft is preferred to that of Section 118 of the *Consumer Protection Act* (156) because the Draft's broad terms make it applicable to the whole field of contracts.

38

This article is of general application and provides the series of recourses available in cases of defect of consent.

The first paragraph reproduces the general rule and consecrates the sanction generally applied to a contract when the consent of one party is not free and enlightened: action in nullity. It also seeks to echo certain jurisprudence which has developed primarily with respect to error provoked by the *dol incident*, allowing the contracting party who is a victim to maintain the commitment but apply for a reduction of his obligation.

The rule set down in this respect by the Court of Appeal in *Bellerose v. Bouvier* (157) and subsequently followed (158) was thus considered realistic. It was decided to broaden the scope of the article so it can preserve contractual ties when circumstances warrant it. The courts are thus responsible for weighing the circumstances.

The second paragraph deals more particularly with cases in which a

defect of consent is imputable to the other contracting party, for example, where it results from violence or fraud. This article inserts in the Draft the rule accepted by jurisprudence (159) to the effect that the victim also retains a recourse in damages.

The general sanction, then, is still nullity, with or without damages. In certain circumstances, however, reduction of obligations may provide a more realistic, better balanced solution in the interest of victims of defects of consent.

39

This article inserts in the Code a rule accepted by Québec doctrine and jurisprudence to the effect that inexcusable error renders the person who makes it responsible in damages (160).

40

This article also enables a defendant, in cases of lesion, to avoid nullity by making up the difference created by the lesion, by way of either a monetary supplement or a reduction of his debt. In this way, it was sought, on the one hand, to avoid the practical difficulties which could result if only one sanction existed, and on the other hand, to afford greater freedom of action to the courts in rectifying unjust or unfair situations brought about by lesion, while at the same time maintaining the existence of the contract and so preserving the stability of contractual ties.

§ - 3 Object of the contract

41

This article, which does not require special comment, adopts the essence of Article 1022 C.C. although in a new form.

§ - 4 Form of the contract

42

This article consecrates the theory of consensualism under which, in principle, contracts are not subject to any specific form (161).

Yet, the evolution of modern legislation (162) shows that it is no longer accurate to hold that Québec contract law is purely and solely consensual. Certain forms may be required for various purposes, notably those of validity, evidence, publicity, efficiency and administrative control. This is conveyed in the drafting of the article, by the use of the expression: "as a general rule".

43

This article is merely a direct consequence of the fundamental principle laid out in Article 42, and also completes the provisions of Article 9.

It was thought advisable to favour the validity of contracts. Seeing that, if the law required a particular form without specifying any sanction, the contract would remain valid between the parties.

In the opposite case, when form is required for the very validity of the act, the contract is obviously nullified.

44

This rule is new law, and merely expresses what is generally followed in practice.

45

This rule is intended to do away with difficulties affecting the agreement to contract. This agreement will now be considered independent from the proposed contract, as far as form is concerned, and need not follow the form required for that contract.

46

In practice, parties frequently bind themselves to give their contract a form not required by law for its validity. This is merely an exercise of contractual freedom.

To promote validity of contracts, it was considered preferable to create a presumption to the effect that, in such cases, form is not required on pain of nullity. The most commonly accepted jurisprudential interpretation (163) is thus inserted in the Draft and a rule is applied to the will of the parties which is similar to that applied to the will of the legislator (a. 43) when the sanction resulting from failure to respect form is not specified.

Section II

Nullity of contracts

General provisions

47

This article confirms the fundamental principle according to which nullity of a contract is the usual sanction for not observing the conditions necessary for formation to which reference is made in Article 9.

48

In retaining the criterion of public interest for absolute nullity, existing positive law has been inserted in the Draft Code (164). Moreover, the terms "absolute nullity" and "relative nullity" have been preserved, these having found their way into current legal terminology (165).

The second paragraph specifies that since the courts are guardians of public interest, they must pronounce absolute nullity *proprio motu* even if it were not pleaded or invoked by parties to the suit (166). This solution renders useless any recourse to the theory of the nonexistence of contracts, recently invoked by the Supreme Court of Canada (167).

The third paragraph sanctions a traditional rule (168): any person having an interest in doing so may invoke absolute nullity, since this nullity is intended to protect public interest.

Finally, the fourth paragraph sets a rule which is a logical result of the absolute nature of nullity. No contract which is null may be confirmed, since such confirmation would confer juridical existence upon a thing which is not entitled to such existence because it is against the public interest (169).

49

On the other hand, nullity is relative when it sanctions a rule established in the private interest, because, in such a case, the real basis of the nullity is the protection of this interest (170).

This article sets out defects of consent as examples of grounds for relative nullity; this is done because in these cases the law seeks to protect the victim.

It was decided, moreover, that a contract concluded by a person incapable of discernment (171) should be sanctioned by relative nullity, thus ending a controversy (172).

The second paragraph inserts in the Draft Code the rule which states that relative nullity must be invoked and pleaded. Judges, who protect public order, must *proprio motuu* penalize any juridical acts which are absolutely null. They are not obliged to do so, however, when the cause of nullity is merely relative and affects only private order.

The third paragraph carries over the third paragraph of the preceding article by including in the Draft the rule according to which relative nullity may be invoked only by the person in whose interest it is established.

Finally, the fourth paragraph lays down the rule of existing positive law (173) under which a contract struck by relative nullity may be confirmed, unlike a contract which is absolutely null (174).

§ - 1 Effects of nullity

50

This article sets out first the principle of the retroactive effect of nullity, and second, that of the restoration to the original position (175), both at present acknowledged by positive law (176).

51

This article is new law, and deals with partial nullity and confirms the idea that nullity of one or more clauses in any contract need not necessarily entail disappearance of the whole contract. It appeared more logical and much more practical to admit that, in principle, only the clauses concerned disappear and the others remain (177).

In certain circumstances, nullity of a clause may still entail nullity of the entire contract. This is so particularly in cases when, because of the very nature of the agreement, it appears that the contract would not have been made without that clause, or that it should be considered an indivisible whole.

This text seeks to satisfy certain preoccupations of jurisprudence regarding this matter (178).

52

This article deals with methods of restoration to the original position. It was thought wise to specify that restoration to the original position could be done by equivalence when doing so in kind would lead to serious inconvenience; in this way, any doubt as to the interpretation of the word "impossible" in the text is dispelled.

The third paragraph is intended to avoid a possible ambiguity. It was considered fair that equivalence be assessed at the time it must take place.

53

This text establishes the rule according to which no person may demand nullity unless he offers to give back to the other party what he has received under the contract (179).

Restitution is carried out according to the rules of Article 52; thus, the words "return to the other party whatever he has received" refer to either restitution in kind or restitution by equivalence.

Usually, anyone who applies for nullity must offer to make restitution when he makes his application in nullity, thereby showing his good faith. However, in order to avoid dismissal of the action in nullity by reason of a mere oversight, this might be remedied any time before judgment.

54

Here, the rule provided in Article 1011 C.C. is set out in more direct terms and its application is extended to all persons declared protected persons by law. In this regard, reference should be made to the Book on *Persons*, to determine which persons are protected.

On the other hand, the third paragraph of this article imposes full restitution, even upon protected persons who render restitution in kind impossible by their fraud (180).

55

With respect to the right to restoration to the original position, jurisprudence until now has apparently distinguished between immoral and illegal contracts, allowing restoration to the original position in the second case, but not in the first (181). Very often, invoking the maxims: "*nemo auditur propriam turpitudinem allegans* or *in pair causa turpitudinis cessat repetitio*", the courts have refused to oblige each party to return what he had received to the other. It was felt that the law needed to be clarified on this point and that a second immorality should not be added to the first. If restitution is prohibited in such cases, one party may profit unduly. From now on, restoration to the original position should take place in every case.

It was considered useful, however, to provide for a possible exception. The court could refuse to apply the general rule when, in the particular circumstances of a case, allowing restitution would have the effect of procuring an undue advantage. The rule is intended both to penalize bad faith, while at the same time preventing any rigid application of the rule from indirectly providing an unjustified advantage. Like the exception, the rule is intended to establish better justice between parties to contracts which are null.

56

This article again tempers the rule of retroactivity regarding attribution of fruits. It seemed desirable to link this attribution to the acquirer's good faith (182).

57

This article tempers the rule of the retroactive effect of nullity. It seemed wise to specify, with regard to nullity of a title of acquisition, whether the acquirer or the alienator must assume the risks of loss.

58

This article sets forth the general rule under which nullity has effect not only as regards the contracting parties, but also as regards third parties.

§ - 2 Confirmation

59

This article confirms a well established jurisprudential rule which has developed within the framework of the interpretation of Article 1214 C.C.

Confirmation of a contract affected by relative nullity may result from an express or tacit act of will (for example, voluntary execution by the debtor of an obligation which can be annulled) (183).

It was thought desirable not to preserve the formalistic rule in Article 1214 C.C. which set out the formal conditions of express ratification; moreover, it was preferable to use the word "confirmation" rather than "ratification", in accordance with both French and Québec doctrine (184).

The object of the second paragraph is to make it harder, as has occasionally been done in jurisprudence (185), to confirm acts which do not clearly demonstrate the party's intention; so, the mere fact that a party aware of a defect lets some time pass before invoking it should not be interpreted by the courts as an unequivocal will to confirm.

Hereafter, it would be necessary to show that acts from which confirmation is concluded are unequivocally indicative of a will to confirm.

60

In accordance with existing positive law (186), this article sets out the main effect of confirmation: any confirmed contract is deemed valid from the day on which it is made. Thus, confirmation retroactively does away with any defect which affects the agreement (187).

61

The purpose of this article is to dispel all doubt as to the effects of confirmation by one of the contracting parties when several of them were entitled to invoke relative nullity. Since confirmation is a voluntary act, it can produce effects only as regards the party who does it.

Section III

Interpretation of contracts

62

This article adopts the idea contained in Article 1013 C.C., according to which the court must not adulterate on pretext of interpretation any contract the sense of which is clear (188).

The second paragraph expresses the idea that formalism takes second place to the determination of the true intent of the parties (189).

63

This article consolidates the rules of Articles 1015, 1016 and 1017 C.C. It was thought advisable to include in the Draft Code the rule, followed in judicial decisions (190), according to which the conduct of the parties following conclusion of an agreement may be referred to in the interpretation (191).

64

This article reproduces in a less complicated form the rule of Article 1014 C.C. (192).

65

This article reproduces the rule set out in Article 1018 C.C. (193).

66

This article reproduces in a simpler form the rule contained in Article 1021 C.C.

67

This article reproduces the rule set out in Article 1020 C.C. concerning express clauses in contracts.

68

This article reproduces in substance Article 1019 C.C.

69

It was considered advisable to consecrate in this article a rule of equity to the effect that in contracts drafted by or for one party, the agreement, in case of doubt, must be interpreted in favour of the person who adhered to it, be he creditor or debtor. This is especially so with regard to contracts of adhesion (194) and standard contracts.

Section IV

The effect of contracts between parties and in relation to third parties

General provisions

70

This article consecrates the general rule, acknowledged in Québec law (195), which states that every contract is a law to which the parties submit themselves (196). It completes Article 8.

The draft of this text was inspired by examples found in other Codes, such as Article 1134 of the French Civil Code, Article 1901 of the Louisiana Civil Code, Article 38 of the French-Italian Draft, and Article 1731 of the Ethiopian Civil Code, and Article 147 of the Egyptian Civil Code.

Allowance was made, however, for the possible application of contrary provisions of the law.

71

This article re-words the rule in Article 1024 C.C. on the obligational content of contracts. This rule has been used frequently in jurisprudence (197) and received favourable comments in doctrine (198).

72

This article reproduces the rule in Article 1023 C.C. in another form, and sets out the principle of the relative effect of contracts.

73

This new provision, based on Articles 1028 and 1030 C.C., confirms the accepted principle according to which universal successors and successors by universal title are bound by contracts made by their predecessor, since they continue his juridical personality, unlike successors by particular title.

Allowance is made for the application of contrary rules resulting from the nature of the contract, the law or the will of the parties (199).

74

This article reproduces and completes the third paragraph of Article 1022 C.C.

75

The first paragraph of this article reaffirms the principle of the binding effect of contracts and maintains the present rule of Québec law (200), according to which the debtor is not freed merely because execution of the contract has been rendered more difficult or more onerous; if the debtor is to be freed because execution is impossible, such impossibility must truly be the result of a fortuitous event.

The second paragraph is new law. It consecrates in the Draft the possibility of judicial review where there has been *imprévision*, namely, in circumstances which do not constitute a truly fortuitous event because they do not make it absolutely impossible but merely more difficult to execute the commitment. A few comments must be made on this subject.

In the first place, the words "exceptional circumstances" are at the beginning of the text to stress that the rule must only be used in truly extraordinary situations. The use of the expressions "excessive prejudice" and "unforeseeable circumstances" reinforce this idea and limit judicial discretion.

In the second place, this rule is seen as representing, in effect, the complement of a general legislative policy, which is intended to establish better justice and equity in contractual relations. The provisions relating to lesion protect at the time the contract is formed; those of *imprévision* protect at the time the obligation is executed.

Finally, as a result of legislative evolution in recent years, for example in consumer protection and in the lease of things (201), where the courts may review an agreement because of lesion, adoption of such a rule of principle seems more acceptable to Québec law.

76

This article is based on certain modern legislation intended to counter exploitation of parties to the contract (202). It allows the court to penalize abusive contractual clauses by annulling or reducing the obligations so assumed. Nullity of the clause is governed by Article 51.

§ - 1 Transfer of ownership

77

It was considered preferable, with regard to the rules governing transfer of ownership by contract, to refer to the chapters on *Sale* and *Gifts* since it is mainly by contracts of sale and gift that ownership is transferred.

§ - 2 Fruits and risks attached to things

78

The most logical place to find the rules governing fruits produced by a thing and risks attached to things is mainly in the Book on *Property*.

§ - 3 Simulation

79

This article sets forth the rule implicitly laid down in Article 1212 C.C., under which contracting parties may disguise their actual agreement or even conceal it from third parties insofar as the objective pursued by the parties is legitimate and is not intended to contravene the law, public order and good morals (203).

This is a direct consequence of the principle of contractual freedom laid down in Article 8.

80

The principle of contractual freedom applies here. The contracting parties are bound by the agreement which they actually wanted to conclude; neither party may invoke the apparent contract against the other. This rule is already acknowledged in positive law (204).

81

This article inserts in the Draft the currently acknowledged rule according to which a third party in good faith who is unable to have the disguised contract, namely the actual agreement made between the parties, invoked against him (Article 1212 C.C.), may invoke it himself, if it is in his interest to do so (205).

82

If a conflict arises between third parties in good faith where some of them wish to avail themselves of the apparent contract and the others invoke the actual contract, preference is given to the former.

It was thought right to adopt a strict rule here which clearly establishes the rights of each and is advocated by all contemporary doctrine, both in Québec (206) and in France (207).

§ - 4 Third party obligation

83

This article, which complies with judicial decisions (208) and with the classical doctrine (209) on third party obligations (a. 1028 C.C.), requires no particular comment.

84

This article provides the logical consequence of failure by the promisor to fulfil the commitment he has undertaken.

§ - 5 Stipulation in favour of another

85

Considering the rapid increase in the number of stipulations in favour of another, notably in the field of life insurance, it was thought right to insert in the Draft the rules evolved by judicial decisions based on Article 1029 C.C. (210).

There was no need to reproduce the conditions expressed by that article according to which stipulations in favour of another are valid only if they constitute conditions of a contract which a person makes for himself or conditions for a gift.

Today, it is acknowledged that stipulations in favour of another can exist by themselves, and that the moral interest of the stipulator must suffice.

86

This article reproduces the rule of jurisprudence creating a direct right in favour of the beneficiary (211).

87

This article specifies that the third party must exist at the time the stipulation is made, not only when it opens in his favour, since otherwise it would lapse. The law provides for certain exceptions to this, particularly with respect to gifts, annuities, substitutions and insurance.

88

In order to eliminate problems of evidence, it was believed preferable to make stipulations irrevocable only from the time when the third party beneficiary has made known to the stipulator or to the promisor his intention to accept.

In this text is established the very broad and informal interpretation which judicial decisions have given to the word "signification" in Article 1029 C.C. (212).

89

The interpretation by jurisprudence of certain clauses directing or delegating payment as being stipulations in favour of another has made this article necessary (213). In fact, it may happen that a promisor has a certain interest in the stipulator not revoking the stipulation. In such a case, the stipulator's right is limited to the promisor's interest in maintaining it.

90

Here, the aim was to preserve the principle of the exclusively personal nature of the right of revocation.

The second paragraph of the article merely expresses the logical consequence of the rule contained in the first.

Finally, it was thought advisable to specify in the last paragraph that this rule is only general (and subject to legislative derogation) and suppletive in character.

91

The purpose of this article is to complement the preceding article and to clarify the rules respecting revocation of stipulations.

In principle, this revocation takes effect when the promisor becomes aware of it. However, when it is contained in a will, death alone is sufficient to give it effect.

92

Stipulation in favour of another gives rise to a direct right in favour of the third party beneficiary against the promisor. It is natural that the successors of the third party beneficiary obtain this right and validly accept the stipulation. It also seems natural that this acceptance could intervene even after the stipulator or the promisor dies, since revocation is no longer possible after the stipulator dies, his successors having assumed the charge of the stipulation.

These provisions are merely suppletive. Exceptions are made where the law, the will of the parties or the nature of the contract have an effect to the contrary.

93

In existing law on matters of stipulations in favour of another, the promisor can invoke against the beneficiary the exceptions which he could have set up against the stipulator. The reverse is true in matters of delegation of payment (a. 1180 C.C.), and this situation allows for debate on the legal characterization of a situation as regards the solution in view.

Considering, on the one hand, that such a difference between the regimes governing two closely related stipulations is no longer justified, and, on the other hand, that the rule prevailing in matters of delegation of payment is too strict, this Draft reverses the solution put forth in Article 1180 C.C. and applies it to stipulations in favour of another and to delegation of payment, since under the Draft, the regime governing these two institutions would be the same (214).

CHAPTER II

OBLIGATIONS ARISING FROM THE LAW

Section I

Obligations arising from behaviour towards others

94

This principle found in Article 1053 C.C. is here expressed as a legal duty. Breach of this duty constitutes on the part of the debtor an inexecution, through his fault, of the obligation and entitles the creditor to the recourses provided for in Article 254.

"Capable of discernment" is a more modern equivalent of the expression "capable of discerning right from wrong", and has already been used in the drafting of Articles 20 and 21 C.C.

The words "prudence and diligence" denote an obligation of prudence and diligence (obligation of means) acknowledged by both doctrine (215) and jurisprudence (216). The judge appraises the obligation of diligence and any fault resulting from a violation of such obligation by examining the defendant's conduct *in abstracto*, that is in

the light of the external circumstances existing at the time the damage was caused.

There seemed no need to clarify the meaning of the word "others", but rather to let the court decide. In civil liability claims it will be the victim who establishes the existence of the general conditions of such liability (217). The law on evidence requires that the claimant in any suit for damages establish the existence of the three elements which determine civil liability: fault, namely violation by the defendant of his obligation, damage and the existence of a causal relationship between fault and damage. This proof should be sufficient to allow any claimant to win his case.

Finally, by imposing a legal obligation of behaviour, this article allows better understanding of the various recourses open to creditors (218) in cases of inexecution or threat of inexecution of an obligation, particularly recourse for execution in kind where possible, even through an injunction (219), in order to prevent violation of the obligation (220).

95

This article is new and sets forth an exceptional measure. "Incapable of discernment" is used in this Draft to indicate both the person who suffers from mental derangement and the *infans*, whose mental development is insufficient to allow a free and enlightened will.

Several codes acknowledge this principle to varying degrees (221). Since an obligation of diligence cannot be imposed on either a mentally deranged person or an *infans*, the court is given the power to require them to provide compensation for damage which they cause to other persons (222). It has been decided to give innocent victims preference over "innocent" persons who commit an offence without realizing the harmful consequence of their act. The court is given broad discretion in the matter, but must still take the article's subsidiary rule into consideration.

This article does not grant immunity to anyone who, willingly or by his own negligence, renders himself incapable of discernment, for example through use of drugs; such persons are at fault for bringing about their own lack of discernment (223).

96

The legal obligation of good-neighbourliness, set forth in Article 1057 C.C., is further defined in this article as an obligation not only of diligence, but really one to refrain from causing any *gênes intolérables* (224), regardless of whatever measures have been taken to eliminate such inconveniences.

This obligation has long been acknowledged by Québec law (225), which has referred to it either as an abuse of right or, as in Common Law, a "nuisance" (226). It has recently been correctly defined as a specific legal obligation, distinct from both the obligation set forth in Article 1053 C.C. and the concept of fault implied by that article (227).

Thus, this article compels all persons, and not only landowners, not to inconvenience their neighbours. This obligation holds even if there is no fault and regardless of any administrative authorization (228). It seemed preferable to provide not only for neighbourhood inconvenience but also for the quality of the environment (229).

97

The Book on *The Family* expressly acknowledges equality of consorts and proposes that paternal authority be replaced by parental authority (230). The consequence of this must be determined with respect to parental obligations covering the upbringing and supervision of children.

However, when parental authority has been assigned to one parent, the other parent could claim exemption by proving that the damage did not result from inexecution of his duties and if neither parent can claim exemption, their obligation would be solidary in accordance with Article 158.

This does not substantially amend the present system of liability. Positive law already acknowledges a simple presumption of fault and allows the person at fault to claim exemption by establishing that he has adequately brought up and supervised his child (231).

By legislating parents' personal obligations, this provision attempts to end the controversy now existing as to whether the child must have committed a fault in order for his parents to be held responsible (232). Here they would be presumed responsible for all damage caused by their minor child, whether or not a fault has been committed. Exemption from liability would depend on establishing that no causal relationship exists between the damaging act and their upbringing and supervision of the child. This exemption would of course be more easily established if the child hadcommitted no fault.

98

This article substantially repeats the third and fifth paragraphs of Article 1054 C.C., but broadens their scope to cover all those to whom the exercise of parental authority has been delegated (233) or attributed (234), or who have been entrusted with supervising a person incapable of discernment (235). The means of exoneration for parents also apply here,

namely evidence of proper education and adequate supervision with respect to the fact which caused the damage (236).

It should, however, be noted that this obligation exists only when the person exercising supervision is under their authority (237).

In many cases, children are entrusted to a guardian while parental authority is not delegated. Here the guardian would have to prove that he supervised the child well and that the act which caused the damage could not be attributed to a lack of supervision. Playground supervisors, directors of camps or sporting establishments, children's care centres, and so forth would be subject to this provision, outside any contractual relationship (238).

It was felt that the responsibility should be made less strict when guardians assume this duty without remuneration. In these cases, it seems reasonable not to impose a presumption of fault and not to consider them responsible unless fault on their part is proven.

99

This article establishes positive law which, under the seventh paragraph of Article 1054 C.C., obliges an employer to guarantee third parties against faults which cause damage and are committed by his employees in the performance of their duties (239).

100

This article is intended to amend positive law (240) by imposing on the custodian of a thing an obligation - an obligation of result - to take all the steps necessary to prevent the thing from causing damage.

In the face of evidence provided by the plaintiff that the damage he suffered results from an autonomous act of the thing of which the defendant had custody, the defendant would no longer be able to exonerate himself by proving that he had used all reasonable means to prevent the act which caused the damage. He would have to prove the exact cause of the damage and show that it was a fortuitous event (241).

The word "thing" is used in its broadest sense. All things used by man are part of progress because they extend man's action; they are also increased sources of danger for man and, in this respect, it seems difficult to make subtle distinctions between various types of things, such as gas, liquids, and things which are more or less dangerous (242). The word "things" also includes animals covered by Article 1055 C.C. (243). Since the obligation of the custodian of a thing would become an obligation of

result, as is the case in existing law regarding keepers of animals, there is no longer any need to provide a separate article.

The damage must have been caused by the "autonomous act" of the thing. The act which caused the damage must be attributed to the dynamism of the thing itself or, in other words, it must occur without direct human intervention (244).

Finally, the custodian of the thing is the one who exercises the power of supervision, control and direction of it (245).

101

This article partially amends existing law as stated in Article 1055 C.C.

As positive law now stands, victims must prove that ruin of a building results from either a defect of construction or a lack of upkeep (246). Today, this burden seems extremely heavy. If, nevertheless, the victim succeeds in making such proof, the owner is held responsible even if the defect of construction or lack of maintenance cannot be imputed to his fault (247).

Under the proposed article, the plaintiff would have to prove that the damage he suffered was caused by the ruin of the building owned by the defendant. Then, to exonerate himself, the defendant would have to show that the damage did not result from a defect of construction or from a lack of maintenance.

This provision creates a presumption of responsibility for the owner and constitutes an exception to the general rule expressed in the preceding article. It is not the custodian, but the owner who is obliged to repair. Moreover, we are no longer dealing with damage caused by the autonomous act of a thing, but with all damage caused by the ruin of a building. Nevertheless, the owner could exercise recourse against the individual responsible for the damage, who could be the person who built the building, who occupies it or to whom its upkeep has been entrusted.

It was decided to give the word "ruin" the meaning it has acquired in jurisprudence which interprets Article 1055 C.C. as total or partial disintegration of all or part of a building (248).

The second paragraph of this article is new law. It was sought to settle the problem caused by the retroactivity generally attached to nullity or resolution of contracts. The owner responsible for the damage caused by the ruin of his building will be the one who has the quality of owner at the time of the ruin, regardless of the retroactivity.

102

This article, of new law, is intended to protect the public effectively from hidden defects in manufactured products, by imposing an obligation of warranty on the person who manufactures all or part of the thing, and on the person who distributes that thing as his own.

In existing law, this obligation of the manufacturer, to the extent that it does not constitute a contractual obligation of a manufacturer-vendor (249), falls legally in the field of application of the extracontractual regime based on Article 1053 C.C. (250), even though the manufacturer's obligation has been based on the custody of the thing (251).

Formerly, in a society of artisans where the manufacturer sold his product directly to the consumer, consumers were effectively protected by the contractual regime of warranty against hidden defects, governed by the chapter on *Sale* (252). But since many intermediaries have begun to spring up between the manufacturer and the consumer, situations often arise where manufacturers give a contractual warranty to a person (any one of the middlemen) to whom it is not really intended.

It is felt that, when dealing with the manufacturer's obligation, it is no longer suitable to make any distinction according to whether his responsibility is contractual or extra-contractual. In both cases, the obligation of warranty against hidden defects must be the same, thereby giving the victim, who did not buy the product from the manufacturer himself, an effective direct recourse against the manufacturer.

The second paragraph compels manufacturers to provide with their product an indication of the risks and dangers entailed in its use. Of course, the manner in which these risks and dangers are indicated may vary according to whether a manufacturer intends his product to be used by the public, by specialists or by wholesalers (253). If a product is intended for the public, the risks and dangers about which consumers must be warned are those which may ordinarily arise in daily life (254).

A manufacturer who has not fulfilled this obligation must compensate for any damage which results from his omission.

A manufacturer then has an obligation of warranty with respect to any dangers which the user could not himself detect, since, once the damage has been proven to be connected to the inexecution of the obligation, the obligation includes no possibility of exoneration.

103

It seemed reasonable to compel a victim seeking reparation from a manufacturer for the damage he suffered to advise him within ninety days after the act which caused the damage, either by a judicial demand or by any other written notice, on pain of forfeiture of his rights.

The manufacturer would thus be in a better position to prepare his defence.

If the victim does not inform his debtor within ninety days after the act which caused the damage, he still retains his recourse if he provides the court with a reasonable excuse for his delay.

Section II

Management of the affairs of another

104

This article establishes the characteristics proper to management of the affairs of another, which distinguish it clearly from mandate.

It repeats in a new form the main requirements of Articles 1043 and following of the Civil Code: no knowledge of the management on the part of the beneficiary and no legal obligation to act on the part of the manager.

Management of the affairs of another is therefore regarded as a voluntary interference in the affairs of another, and arises neither from a contractual obligation nor from any specific legal duty (255).

105

The first paragraph of this article establishes the principal obligation imposed on every manager. Once he has begun his management, he must continue it until his principal is in a position to carry it out himself or until the business can be abandoned without risk of loss. This is essentially the substance of Article 1043 C.C., although this article is worded differently.

The second paragraph removes existing confusion as to the responsibility of the manager's heirs. Given the *intuitu personae* nature which the management generally assumes, it was considered fairer not to impose on the heirs an obligation as heavy as that binding their predecessor, simply on the pretext that they lawfully continue his legal personality. Consequently, their responsibility is limited to acts immediately necessary to

avoid loss, and they must continue the management only if they are aware of it and are able to act.

106

This article expresses in a new form the rule of Article 1044 of the Civil Code, which as yet has given rise to no jurisprudential or doctrinal controversy (256).

107

In addition to the rules on conduct laid down in Section II, the manager will henceforth be subject to the obligations of an administrator of the property of others entrusted with simple administration, as they are defined in the Book on *Property*. This is new law.

108

This article substantially repeats the rule in the second paragraph of Article 1045 C.C. (257).

109

This article is intended to protect the contingent rights of third parties who have contracted with a manager. Obviously, third parties must first apply to the principal in such cases. These parties will have recourse against the manager for the remainder only to the extent to which the principal is not liable with respect to the third parties under the provisions which follow: this constitutes the new protection which this article grants to third parties.

This article does not protect the administrator from any claims by third parties, and fits into general policy on management of the affairs of another which endeavours to discourage irresponsible interference in other people's affairs.

110

This article inserts in the Draft Code the present overall concept of the law on management of the affairs of another, based on Article 1046 C.C. (258).

When read with the following article, this text establishes a distinction in the scope of the principal's obligations, using as a criterion the degree of interest for undertaking the management. If the administration has been undertaken in the principal's interest, even if the desired result has not been obtained, the principal must reimburse the manager for all necessary and useful expenses, assume all necessary and useful obligations

contracted in his name by the manager and, finally, compensate the manager for all damage caused him by reason of the management.

111

On the other hand, if the management was not essential in the principal's interest, he is only liable to the extent of the real profit he gained from such management.

This distinction is intended to avoid encouraging too much interference in other persons' affairs, even by managers in good faith.

112

This article inserts in the Draft the rule, now accepted, which states that the necessity or usefulness of any expense must be assessed as at the time when that expense was incurred. In other words, a beneficiary may be bound to reimburse the manager for expenses which appeared necessary or useful when they were incurred, even if later, their usefulness or necessity is no longer evident, particularly in cases where the thing on which they were incurred has been destroyed subsequently (259).

113

This article completes the provisions of the preceding articles: it provides that the third party has the right to rely on the situation as he sees it and to consider the manager his real debtor. Not being party to the relation between the manager and the third party, the principal cannot be bound to assume any obligation towards a third party which the manager has undertaken in his own name. Nevertheless, this rule does not prevent the manager from being reimbursed for necessary or useful expenses under Article 110.

These principles are quite accepted in present law (260).

114

The purpose of this article, which is new law, is to protect the manager and provide him with practical means of ensuring that his claims will be honoured, by giving him the right to retain moveable property until the principal repays him what he is due. This is a special application of Article 596 of the Book on Property.

115

This article is new law and is intended to promote fairness in relationships between managers and beneficiaries.

In order to prevent unjustified enrichment, this article allows the

manager to remove any improvements he himself has made but for which he is not entitled by law to claim reimbursement from the principal. This right, however, carries a two-fold restriction. On the one hand, the thing must be restored as it was before the management was begun, since otherwise the beneficiary would suffer. On the other hand, the principal reserves the right either to retain the improvements by paying their cost or their current value, or to compel the manager to remove them.

Section III

Recovery of things not due

116

This article restates the provisions of Articles 1047 and 1048 C.C.

Every payment presupposes the existence of a debt. It is therefore normal that anyone who has paid by error (261) without being required to do so be able to demand repayment of that money or recovery of the object of the payment.

117

This article deals with the modes of restoration. As in matters of nullity (a. 52) and resolution (a. 279) it was considered wise to specify that restoration could be made by equivalence when it would be impossible or seriously inconvenient to make it in kind as provided in the first paragraph.

118

This text restates and completes the provisions of the second paragraph of Article 1048 C.C., and constitutes an exception to the general rule of Article 116; the intention here is to protect the creditor in good faith against claims by a person who has made a payment by error when, after payment has been made, the creditor has destroyed proof of the debt, allowed it to be prescribed, or deprived himself of security, in which cases he would have no valid recourse. Since he has acted in good faith, it would be unfair to penalize him by forcing him to repay what he received, when he could no longer be considered to be in his original situation *vis-à-vis* the real debtor. In this case, the person who paid by error may exercise the right of recovery only against the real debtor (262).

119

The purpose of this article is to apply the theory of the risks involved in the loss of a determined thing to situations resulting from recovery of payments made by error. It restates in a modified form the rules established in Article 1050 C.C.

Responsibility for risks subsequent to a loss depends on whether the person receiving the object is in good or bad faith. Logically, if he is in good faith, he should under no circumstances be held responsible for the loss, even if it results from his own action. He must nevertheless transfer to the owner his right to any indemnity, or the indemnity itself if he has already received it, so that he does not profit unjustly at the expense of the owner.

120

This text does not include the last condition set forth in Article 1050 C.C., by virtue of which a person in bad faith who receives the object need not be held responsible for the risks if he is able to prove that the thing would also have perished in the hands of the owner. This rule has never been put to practical application and the very existence of bad faith justifies maintaining the general rule.

121

This article governs cases in which a person who receives a thing in error subsequently alienates it. Even if he is in good faith, he must repay what he has received for the thing. If in bad faith, he may be compelled to repay the value of the thing at the time it is restored, so as to avoid any injury to the other party that could result from alienation at too low a price. This restates and completes the text of Article 1051 C.C.

122

The rule in this article is but a mere confirmation of that now in Articles 1047 and 1049 C.C. in a different form. It thus remains true to the general principle whereby only a possessor in good faith owes the interest or fruits yielded by the thing he holds.

123

It was deemed advisable to restate the rule set forth in Article 1052 C.C. and to specify that this is a case of necessary expenses.

124

In order to be thorough, it was deemed useful to include in this section certain rules inspired by the rules on accession.

Any person in good or bad faith who restores a thing may always either leave the improvements he has made or have them removed.

If he removes them, however, he must restore everything to its original condition.

If he leaves them, and is in good faith, he is entitled to an indemnity, to be calculated according to the appreciated value at the time of restitution (263).

125

A person who is bound to restore an object he has received, but which was not due him, is granted the right to retain that object as a guarantee of reimbursement of expenses. This is an application of the principle in Article 596 of the Book on *Property*.

126

With respect to recovery, protected persons are in a similar position to protected persons in the event of restoration following nullity of their undertakings. For this reason, reference is made to Article 54.

Section IV

Unjustified enrichment

127

This article inserts in the Draft one of the basic rules pertaining to unjustified enrichment, recognized in both doctrine (264) and jurisprudence (265), to the effect that any person who profits unjustifiably at the expense of another person must indemnify that person to the extent of the enrichment so gained.

This principle is justified by the fact that if the person who has suffered loss could always claim the full amount of the profit gained, then when his own loss amounts to less than the first person's unjustified profit, he himself would unjustifiably be profiting at the expense of the first person. The empoverished person may claim the amount of either the other's profit or his own loss, whichever is less.

128

This article codifies current jurisprudence (266). The right to take legal action in a case of unjustified enrichment is granted only when the profit gained is still in existence at the time the demand is made (267).

However, an exception is made to penalize bad faith on the part of the person who profits (268).

129

This article is new law, and constitutes an exception to the rule set forth in the preceding article, so as to better protect the rights of the party who suffers loss in cases where, in good faith, the person who profits has gratuitously disposed of the profits gained in favour of a third party. In this case, the empoverished person has a direct recourse against the third party. If, however, the alienation is made in bad faith by the person who profits, the rule set forth in the preceding article applies.

130

This article merely states a rule which is presently acknowledged in doctrine (269) and jurisprudence (270), namely, that the provisions of the section on unjustified enrichment are of a subsidiary nature.

TITLE TWO

MODALITIES OF OBLIGATIONS

CHAPTER I

OBLIGATIONS WITH A TERM

131

The intent was to establish a positive definition of a term rather than simply make a comparison with the condition, as is done in Article 1089 C.C. The classic definition of the suspensive term is given (271). As for extinctive terms, since they are only one means of extinguishing obligations, determined by law or by the persons concerned, they are regulated in the Title on *Extinction of obligations.*

132

It was thought useful to draft this article in order to insert into the Draft the present general rule (272) regarding calculation of periods of time, which holds that the day *ad quem* is counted, but not the day *a quo.* Obviously, this rule applies when a period must be calculated, and not when the obligation is exigible on a determined date.

133

This article, of new law, is intended to eliminate possible problems in interpreting the word "certain" as it appears in the draft definition of the term. The parties might have, in good faith, considered an event in the future as certain whereas objectively it was not so: for example, the debtor stipulates that he will pay on the day a certain ship arrives in the Port of Montreal; the ship later sinks and never completes its journey. In such cases, it is deemed preferable to respect the real intent of the parties, to treat the assumed obligation as a term obligation, and so to make it exigible on the day when the event should normally have taken place.

134

This article repeats the rule of Article 1091 C.C. (273) more precisely. In principle, a suspensive term is stipulated in favour of the debtor since such a term is generally intended to allow him to delay the execution of his obligation.

Nevertheless, according to the law, the agreement or circumstances a

term may occasionally be stipulated in favour of the creditor or of both parties at the same time.

135

This article completes the provisions of the preceding one. Any person in whose favour a term is stipulated is free to waive the advantage which it gives him.

There has been no difficulty in allowing this rule in doctrine (274) and jurisprudence (275).

136

This article is intended merely to insert into the Draft a rule accepted in doctrine (276) and jurisprudence (277) to the effect that an obligation to pay "when possible" or "when the ship comes in" is really an obligation with a term, because it constitutes a firm commitment, not a conditional one.

In this regard, the basis is Article 1783 C.C. dealing with the contract of loan, which allows the court to determine a term with due regard for the circumstances.

This provision, then, generalizes the rule already set by Article 1783 C.C., and extends it to every obligation with a term.

137 and 138

These articles repeat the substance of Article 1090 C.C. and need no particular comment.

139

This article inserts into the Draft a rule quite accepted in Québec positive law to the effect that a creditor affected by a term is in the same position as one affected by a condition as regards supervision of his contingent rights (a. 1086 C.C.) (278).

Since the debt has already been incurred and the creditor has a contingent right to execution of the obligation, he must be able to take the steps useful to preserve his rights (279).

140

This article restates and completes the provisions of Article 1092 C.C. (280).

141

This article establishes first of all that the forfeiture of the term occurs not only when the debtor reduces the surety given but also when he does not provide the surety promised to the creditor. Although the second of these cases is not spelled out in Article 1092 C.C., it has been recognized by jurisprudence (281).

This article also generalizes a rule taken from the *Consumer Protection Act* (282) to the effect that the debtor does not lose the benefit of the term until thirty days have expired after receipt of a written notice to that effect from the creditor. The debtor may always remedy his defect during this period.

142

This article is new law. It is intended to prevent parties from making provision in their contracts for automatic forfeiture of the term except in cases already provided for in Article 140.

All cases of forfeiture provided for by the contract are subject to the preceding article. This rule seemed necessary to counter the abuses brought about by an increasingly generalized practice of automatic forfeiture, making it impossible for the debtor to rectify the situation.

143

It was deemed wise to provide for this rule specifically in order to do away with any ambiguity which might have arisen as the result of certain decisions (283).

It seems, in fact, that forfeiture of a term should be a personal thing, since in principle codebtors have no control over their reciprocal acts and it cannot be claimed that between them there exists any true representation of interests in this regard.

CHAPTER II

CONDITIONAL OBLIGATIONS

144

This article, which requires no special explanation, restates more simply the provisions of Article 1079 C.C.; it also eliminates the incorrect use made of the word "dissolution" in that article.

145

This article partially restates the provisions of Article 1080 C.C.; it sets forth the qualities which every condition must have.

146

This article completes the preceding one and specifies the sanction of an obligation subject to such conditions.

147

This article restates differently the provisions of Article 1081 C.C. A purely facultative suspensive condition renders any obligation dependant upon it null, since in such cases, there is no real intention to make a commitment.

On the other hand, any condition which is simply facultative, whose fulfilment does not depend entirely on the will of one of the parties, remains valid, as does any purely facultative resolutive condition. These rules are accepted by doctrine (284) and have been applied in jurisprudence (285).

148

This article restates the provisions of Article 1082 C.C. and therefore does not require any particular comments (286).

149

This article completes the preceding one and restates in a different way the provisions of Article 1083 C.C. The term "period of time" is used to show clearly that the interval may be express or implied (287).

150

This article, which requires no special explanation, merely restates the rule set forth in Article 1084 C.C., which has been applied repeatedly by the courts (288).

151

This article reproduces the substance of Article 1086 C.C. and is similar to that adopted in the chapter on *Obligations with a term* (289).

It allows the creditor to see that his rights are preserved in spite of the conditional nature of the obligation.

152

It was deemed advisable to restate more specifically the rule established in Article 1085 C.C., by virtue of which the conditional creditor's

right, though only contingent, remains nevertheless transferable and transmissible (290).

153

This article defines the main effect of suspensive conditions and of resolutory conditions implicit in Article 1079 of the Civil Code. It codifies the general rule by virtue of which the fulfilment of a suspensive condition renders an obligation pure and simple, and thus payable, whereas fulfilment of a resolutory condition extinguishes the obligation.

This, then, complements the article in which conditional obligations are defined (291).

154

It was considered wise to retain the traditional rule of retroactivity of conditions, laid down in Articles 1085 and 1088 of the Civil Code, which has frequently been applied in jurisprudence (292).

155

This article tempers the rule of retroactive effect of fulfilment of the condition, and thus amends Articles 1087 and 1088 C.C.

CHAPTER III

SOLIDARY OBLIGATIONS

Section I

Solidarity among debtors

156

This article gives the classic definition of solidarity between debtors, which allows the creditor to require complete execution of the obligation from only one of them.

157

This article repeats the substance of Article 1104 C.C., but more clearly. This rule has caused no difficulties of interpretation (293).

In the interest of dispelling all doubt, it was deemed wise also to

specify that an obligation can be solidary even when assumed successively by the debtors (294).

158

Part of this article is new law in relation to the provisions of the Civil Code. Under the present system, solidary liability between debtors, as defined in Article 1103 C.C., is not presumed except in commercial matters, as stated in Article 1105 C.C. Legislation has also established this obligation of right in certain situations, particularly in matters of offences and quasi-offences and in several statutes (295).

It was thought to be more realistic and more practical to adopt the principle consecrated by practice to the effect that each of the several debtors under the same obligation is presumed to have wished to become indebted for the whole, and hence a solidary debtor of the creditor.

Generalization of the rule of solidarity is proposed as general law, the parties remaining free to put it aside by stipulation to the contrary. It was thought that this would help adapt the law to present economic and legal conditions, and to modern usage.

This rule, moreover, does not constitute a precedent in civil law, since certain foreign Codes have already taken steps in this direction (296).

159

This article makes a specific exception in contractual matters when a sum of money has to be paid. It seemed preferable not to presume in such cases that the parties wished to assume a solidary obligation. In such a case, each debtor would be bound for his share only, unless the undertaking provides to the contrary.

160

In a solidary obligation, the debtors may represent each other *vis-à-vis* their creditor. Anything done by one of them is deemed to have been done by all the others. This idea appears in Articles 1109, 1111 and 2231 of the Civil Code.

Article 1109 C.C., however, limits the principle with regard to payment of damages in cases where the object is lost. The proposed article extends the idea of mutual representation beyond the rule in Article 1109 C.C. In future, no distinction would be made between an obligation concerning the prestation itself and obligation for damages between debtors at fault or in default and those who are not.

In this regard, an effort is made to preserve the creditor's interests in

cases when the debtor through his fault fails to execute the obligation. It seemed illogical for the creditor to lose the benefit of solidarity for an obligation to repair the prejudice suffered as a result of inexecution of the principal obligation, while the main purpose for stipulating the solidary nature of the principal obligation was precisely to grant him recourse for the whole against any one of his solidary debtors.

161

This article repeats Article 1103 C.C. in different terms, thereby completing Article 158.

162

Since Article 1107 of the Civil Code has not given rise to any problems of interpretation, it was thought best to retain it, and amend only its drafting.

This article consecrates one of the legal effects of solidarity between debtors towards their creditor. This creditor may exact the total payment from any one of the debtors, at his choice, and such debtor cannot plead the benefit of division.

163

This article restates in a different form the rule set forth in Article 1108 C.C.

164

This article is substantially a re-statement of Article 1112 C.C., but eliminates the second paragraph of that article, which seems to have become superfluous because of the terminology in the first paragraph.

Certain foreign Codes (297) have found it advisable to enumerate the different personal means available to any debtor sued, and those common to all solidary codebtors. It was not thought advisable to adopt this practice since, on the one hand, it seems to add nothing to the rule, and on the other hand, it might prove detrimental to the rule's flexibility.

165

This article is new to the law on solidarity; it applies to solidarity the contents of Article 1959 C.C. on Suretyship (298). It was thought desirable, and indeed only fair, to generalize the principle which states that when one debtor has a right of subrogation, the creditor should not be able to destroy the effectiveness of that right through his own action, thereby affecting his debtor's legal situation. Rather, the creditor should be held responsible for the consequences of his own act. Therefore,

whenever a creditor deprives one of his solidary debtors of a right or of security from which that debtor could have benefited by way of subrogation, the debtor would be discharged up to the amount of that security or that right.

166

In view of the principle stated in Article 156 of this chapter on solidarity, providing that solidarity is the rule whenever several debtors under the same obligation commit themselves *vis-à-vis* the same creditor, it seemed useful to remind the debtor in this article that he may use the rules of civil procedure (aa. 168 and 216 C.C.P.) to call his codebtors in warranty in the action (299).

167

This article is a reproduction of the substance of Article 1114 C.C.

168

This article restates the rule in Article 1115 C.C. and completes the rule stated in the preceding article.

169

This article repeats the rule in the last paragraph of Article 1115 C.C.

170

This article does not substantially amend Article 1116 C.C. As in the articles pertaining to the division of debts, the main concern was to give specific legal effect to clear intention on the part of a creditor, hence the requirement of a discharge.

It was also considered unnecessary, in a modern context, to presume, as does the last part of Article 1116 C.C., that a creditor gives up his right after a certain period of time has elapsed.

171

This article is intended to stop the effects of solidarity between the heirs or legatees of a solidary debtor, and requires no special comment save to the effect that, under Article 3 of the Book on *Succession*, the heir means both the legal and the testamentary heirs.

172

This article restates in another form the provisions of the first paragraph of Article 1118 C.C., which have been constantly applied in jurisprudence (300).

The second paragraph of Article 1118 C.C., which has not been included here, is treated specifically in a separate article (301).

173

This article, which has no equivalent in the Civil Code, springs from the need for more specific provisions in the rules pertaining to the contribution of solidary debtors. It writes into the Draft Code the principal rules established by jurisprudential tradition (302):

1. in the payment of a contractual debt, distribution is effected in the usual manner, according to each debtor's respective interest in the debt;
2. in the case of damages (in contractual or delictual matters) the contribution is determined according to each person's share of the responsibility;
3. finally, should these criteria not be sufficient for determining each debtor's respective share, the rule calls for equal contribution by each debtor (303).

174

The rule set by this article merely completes that established in the preceding article and aims at eliminating a possible source of confusion. In contractual matters, whenever the interest is exclusively that of one of the debtors, the others are not obliged to contribute to the debt even if each remains solidarily liable for the full debt with regard to the creditor.

This is a more complete drafting of the rule found in Article 1120 of the Civil Code, which has been applied repeatedly in jurisprudence without raising any specific problems (304).

175

A debtor sued by a creditor may raise any exceptions which are common to all the solidary debtors. Thus, it was deemed advisable to make that debtor bear the burden of his own negligence by allowing the codebtors, sued for their share by a debtor who has paid the creditor, to plead these same exceptions with respect to that debtor.

176

This article restates and clarifies the solution offered in the second paragraph of Article 1118 C.C. The burden of the insolvency of one codebtor is distributed by equal contribution among all the other codebtors, save when their interest is not equal.

Thus, if one of the solidary debtors has an interest in the debt which is double that of the other, they both support the insolvency in the same manner.

Each remaining debtor, then, will have to pay an additional amount in proportion to the value of his debt in relation to the total value of the debt less the insolvent debtor's share.

When a creditor has discharged one of the debtors of his solidary obligation, the question is then raised as to whether the creditor or the debtor is obliged to make up the loss resulting from this insolvency. It seemed fair to retain the same rule since the creditor takes a risk whose consequences he must bear by renouncing solidarity with regard to one of his debtors.

This text is also based on rules established for such cases in Articles 1214 and 1215 of the French Civil Code, which are consistent with the Draft (305).

Section II

Solidarity among creditors

177

Although it seemed desirable, in a modern context, to presume solidarity among debtors, it was felt that the present rule should be maintained whereby solidarity among creditors must be stipulated (306).

178

This article restates in another form the rule of Article 1100 C.C. pertaining to the principal effect of solidarity among creditors.

179

This article requires no particular explanation. It merely completes the provisions of the preceding article.

180

This article restates in another form the contents of Article 1101 C.C.

181

This article lays down provisions to cover solidarity among creditors, which are identical to those in Article 171.

CHAPTER IV

DIVISIBLE OBLIGATIONS AND INDIVISIBLE OBLIGATIONS

182

This text establishes the basic rule of divisibility of obligations, to which exception is rarely made. Only the object of the obligation can, in principle, determine whether or not indivisibility is possible.

A specific reference to the stipulation of indivisibility was deemed useful.

183

This article restates in another form the principle laid down in Article 1127 C.C.

The principal effect of indivisibility, namely the fact that it is transmitted to the heirs, is thus retained. The main argument in favor of retaining indivisibility was its advantage at the time of liquidation of successions.

184

This article reflects both an attempt at innovation and a respect for tradition.

In making indivisible obligations subject to the rules on solidarity, the general trend found in many modern codes has been followed (307). Naturally, this was possible only because the principle of presumption with regard to solidary obligations had already been established.

CHAPTER V

ALTERNATIVE OBLIGATIONS

185

This article sets forth the definition of an alternative obligation as established in doctrine (308) and jurisprudence (309).

It was thought wise to give a definition at this point to avoid any possible confusion with other types of obligations, such as facultative obligations.

This definition emphasizes the particular nature of alternative

obligations, under which each individual prestation contains a power of release.

186

This article restates in a different form the rule contained in the last part of Article 1093 C.C., and extends it to the creditor.

187

This article is a repetition of Article 1094 of the Civil Code and requires no further comment. It has been indirectly applied by Québec jurisprudence (310).

188

The object of this article is to protect a debtor dealing with a creditor who fails to exercise an option belonging to him. It is important to allow the debtor who wishes to extinguish the obligation, to do so, thereby releasing himself.

If putting the creditor in default proves unsuccessful, the option is transferred, as it were, to the debtor who may then discharge his debt by executing any one of the prestations.

189

This article redrafts the rule in Article 1095 C.C.

190

This article simplifies things by grouping into one single article the provisions of Articles 1095, 1096, 1097, 1098, and 1099 C.C.

CHAPTER VI

FACULTATIVE OBLIGATIONS

191

It was decided to enunciate rules on the question of facultative obligations in order to eliminate a certain confusion which seemed to exist, especially between this type of obligation and alternative obligations.

In matters of alternative obligations, the prestations are all placed on an equal footing and the debtor is bound with regard to all of them.

In a facultative obligation, however, only the principal prestation is

due, although the debtor may release himself by executing another. Thus, these two prestations are not placed on an equal footing.

The result of this hierarchical relationship, notably, is that the debtor is released once it becomes impossible for him to execute the principal prestation; thus, a facultative obligation does not then become an obligation pure and simple.

These solutions and these principles have been consistently explained in doctrine (311).

192

This article constitutes a corollary to the preceding article and sets forth the main effect of facultative obligations, whereby they may be distinguished from alternative obligations (312).

TITLE THREE

PROTECTION OF THE RIGHTS OF CREDITORS

General provisions

193

It was thought logical and desirable to transfer most of the contents of Articles 1980 and 1981 C.C. to this title dealing with measures for protecting the creditors' rights. The provisions dealing with contribution by creditors, however, are not transferred.

194

This article enunciates the principle which holds that, before any obligation is executed, the creditor has various means at his disposal to ensure protection of his rights. This article completes the preceding one which dealt with the creditor's right of "common pledge".

The two principal measures are the indirect action and the Paulian action. However, this article is not restrictive; any creditor who realizes that the debtor is carrying on transactions with an intent to defraud (313) him could, according to this article, take measures necessary for upholding his rights.

CHAPTER I

INDIRECT ACTION

195

This article repeats Article 1031 C.C. on indirect recourse (314), under which a creditor may exercise his debtor's rights and actions, except for those rights and actions which remain exclusively attached to his person.

The principles of indirect action have often been applied in Québec jurisprudence (315) without serious difficulty.

196

This article, of new law, is contrary to the present rule of positive law which holds that indirect recourse is possible only if a creditor shows that the debt owed him is certain, liquid and exigible (316).

It was thought best to apply to indirect recourse the rule governing

recourse to Paulian action. The reasons for this are given below in connection with Article 202 on Paulian actions.

CHAPTER II

PAULIAN ACTION

197

This article states the basic conditions necessary for the Paulian or revocatory action.

In this respect, some of the general rules enacted in Articles 1032 and following C.C. have been retained to the exclusion of the element concerning fraud.

Elimination of fraud as a condition for exercising the Paulian action is justified partly by reason of the complexities of proving such intention and partly by a wish to protect the creditor not only against fraud by his debtor, but also against that debtor's negligence.

The article subjects this recourse to the existence of a "serious prejudice", to give the court a certain power of assessment in the case of term debts and conditional debts, which might in future allow exercise of this right.

This article, however, tries to be more precise. On the one hand, it affirms the rule, disputed in doctrine, which holds that revocatory recourse is not truly a recourse in relative nullity, but merely one which makes it impossible to invoke an act against the suing creditor (317). On the other hand, it confirms that, for this recourse to be available, the debtor must be insolvent (318).

198

This article simplifies the rules established in Articles 1033 and following C.C. These rules, which come from the *Ancien droit*, set up, in language which sometimes gives rise to confusion, a complex regime of presumptions allowing demonstration of "Paulian fraud".

Rather than construct the regime on the basis of a simple technique of evidence, the new article eliminates any reference to these presumptions and establishes the conditions for recourse directly and objectively. The article repeats the distinction made by present law between an act by onerous title or preferential payment, and an act by gratuitous title or payment made under a contract or other act by gratuitous title (319).

This article deals only with acts by onerous title or preferential payments. In such cases, a creditor may avail himself of this recourse only if his debtor's cocontractor knew that the debtor was insolvent. This constitutes a simplified and slightly amended version of the rule in Articles 1035 and 1036 C.C., since such knowledge implies a presumption of intent to defraud.

In future, where acts by onerous title are concerned, only the third party's knowledge of the insolvency would count. In this case, it was considered important to protect cocontractors in good faith.

199

In the case of an act by gratuitous title or of any payment made under such an act, the opposite rule applies: the fact that a third party was unaware of the debtor's insolvency does not preclude recourse to Paulian action. A creditor should be protected, as he is under Article 1034 C.C., in preference to a cocontractor or to a person who has received payment, because such a cocontractor or person having given no value in exchange, withdrawal of what he has received does not really diminish his property, but merely leaves a gap.

200

Moreover, to avoid any fraud likely to arise from excessive use of the concept of natural obligations, it seemed desirable to consider any undertaking to pay, or any payment made under such an obligation, as an act by gratuitous title for the purposes of the Paulian action.

201

This article retains the rule in Article 1039 C.C., often applied in jurisprudence, which holds that a creditor must prove that his debt existed prior to the act disputed (320). At the time of the undertaking, the debtor's patrimony constitutes the creditor's pledge, and the creditor thus may not complain that any previous acts have diminished the patrimony. Such acts could not, by definition, have caused him prejudice, because he was satisfied with the already diminished patrimony. An exception, however, is made in favour of the subsequent creditor when the debtor has performed a deliberately misleading act (321).

202

This article amends present law and broadens the traditional field of recourse to Paulian action. According to present doctrinal and jurisprudential tradition (322), which is in line with French law on this point

(323), no creditor of a term debt or a conditional debt may benefit from a revocatory action.

This exclusion is justified by the fact that, in both cases, the creditor has merely an eventual right. Considering modern economics, this requirement is out of date. Although in law it is true that a creditor of a term debt or of a conditional debt has only an eventual right, it is hard to see why, because of a mere technicality, he cannot protect his rights. This is particularly true here where a debtor might be able to withhold the benefit of his debt from the creditor. Since a creditor is required to prove serious prejudice, this should give the courts effective control in this field over possible vexatious or trivial recourses.

203

This article takes into account the rule expressed in Article 1040 C.C. and the abundant jurisprudence to which that article has given rise (324).

It inserts into the Draft two rules worked out by the courts. The period of one year after cognizance of the prejudice is one of forfeiture and not one of prescription. For this reason, the expression "on pain of forfeiture" is used (325).

The second paragraph inserts into the Draft the most commonly accepted jurisprudential interpretation, to the effect that when a trustee institutes proceedings, the period begins on the day of his appointment (326), regardless of when the prejudice became known (327).

It was not necessary to keep the expression "or any other representatives".

204

This article clarifies one point in the general regulation of revocatory actions. The fact that one of the debtor's creditors exercises this recourse does not prevent the other creditors from stepping in, or protecting their own rights and interests by other procedures.

TITLE FOUR

VOLUNTARY EXECUTION OF OBLIGATIONS

CHAPTER I

PAYMENT IN GENERAL

205

This article restates more succinctly the provisions of Article 1139 C.C. Here, "payment" does not merely refer to the remittance of a certain amount of money, but rather to the execution of any obligation to do or not do something.

206

This article restates the rule found in the second paragraph of Article 1140 C.C. In cases of voluntary execution of a natural obligation, the debtor is not permitted to demand recovery of what he has paid the creditor. This rule has not given rise to any difficulties of interpretation in doctrine (328) or in jurisprudence (329).

207

This article consecrates a principle which is generally accepted in doctrine (330) and jurisprudence (331). No demand may be made for forced payment of a natural obligation; yet it has been decided that a natural obligation would be considered civil in cases where the debtor acknowledged his obligation and committed himself to execute it; then, the creditor would have the right to demand payment.

This article determines when a "natural" obligation becomes "civil".

208

This article is a repetition of the substance of Article 1143 C.C.

209

This article is a repetition of Article 1148 C.C., which has raised no difficulties in current law and which has been applied a few times in jurisprudence (332).

210

This article restates, in slightly different form, the provisions of Article 1151 C.C. (333).

It is presumed that, in such cases, both parties intended the thing delivered to be of average quality; this consecrates commercial practice (334).

211

This article combines in a single article all rules pertaining to the indivisibility of payments. For this reason, the proposed article restates the principles set forth in article 1149 C.C.

212

This article restates the provisions of Article 1144 C.C. with some slight modifications as to form.

213

This article restates in another form the provisions contained in Article 1146 C.C.

214

This article restates the provisions of Article 1145 C.C. with some slight modifications as to form.

215

This article restates Article 1147 C.C.

216

This article is new law and contains the general rules pertaining to payment under protest. It is intended to make clear the consequences provided for in the first paragraph of Article 1140 C.C. in cases of payment of a debt not due.

It often occurs that payment is demanded of a debtor who, although quite convinced he owes nothing, realizes that failure to pay would result in serious prejudice to himself. It was decided that, in such cases, the debtor may pay under protest, that is, execute the obligation while at the same time declaring that he owes nothing, and that such payment cannot therefore be taken as tacit or express recognition of the fact that payment is due or that the debt exists.

The expression "compelled to pay" is used on purpose, to emphasize

the fact that the provisions of this article must be applied very strictly by the courts. There are two main reasons for this.

First of all, payment under protest brings about a shifting of the burden of proof: the right of recovery arises in favour of the payer unless the person who has received the payment proves that such payment was in fact due. This article must not be allowed to be used otherwise than as originally intended, namely to allow a *solvens* to avoid prejudice for the sole purpose of shifting the burden of proof. Secondly, an indirect consequence of payment made under protest is the avoidance of resolution or of the exercise of an exception of inexecution.

There have been jurisprudential decisions to show that payment made under protest is accepted practice (335).

217

This article restates the rule established in Articles 1141 and 1142 C.C.: the payment may be made by any person, and the creditor must accept it, except in *intuitu personae* contracts, where it is to the creditor's interest that the obligation be executed by the debtor himself as, for example, in contracts for services.

218

This article repeats and simplifies the provisions relating to the place of payment, found in Article 1152 C.C. Since these rules are not imperative, the parties may agree otherwise.

219

This article restates the rule of article 1153 C.C. with some slight modifications as to form. This rule allows the creditor to receive the full amount of what is owed him without having it reduced by expenses incurred in the execution of the obligation (336).

220

This article is new law and consecrates the fundamental right of any debtor to demand written proof of the payment he has made and to require the remittance of the negotiable title which the creditor holds. This rule is to be applied generally, and not only in cases of execution of pecuniary obligations.

CHAPTER II

PAYMENT WITH SUBROGATION

221

This article is a new version of Article 1154 C.C.

222

This article states the guiding principles already recognized in the Civil Code in matters of conventional subrogation. For reasons of clarity, it was judged preferable to deal individually with each rule in Article 1155 C.C.

This first article deals with conventional subrogation, which may be authorized either by the creditor or by the debtor.

In both cases, however, it was felt that the principle should be maintained whereby such subrogation must be express and in writing.

The articles which follow provide the rules applicable to each type of subrogation.

223

This article repeats the provisions of the first sub-paragraph of Article 1155 C.C. which deals with conventional subrogation, authorized by the creditor, of a person who pays in the debtor's place (337).

These provisions have been applied in jurisprudence and have not given rise to any particular difficulties (338).

224

This article is a less formal version of sub-paragraph 2 of Article 1155 C.C. No need was seen to continue requiring a notarial deed, originally necessary to make full proof as against third parties, but this problem may be settled under the new provisions on registration of deeds. Nor is a notarial deed required in cases of conventional subrogation by a creditor. It was thought preferable to make the rule standard, so as to simplify formalities of the operation and to bring law into line with practice.

225

This article lists the cases of legal subrogation. It repeats the substance of Article 1156 C.C. subject, however, to certain amendments in form or substance. Paragraphs 3 and 4 of Article 1156 C.C. remain unchanged in the Draft. The last paragraph of the article was added simply for

reference, since many other examples of legal subrogation are given in special statutes (339).

The first paragraph of the proposed article repeats the provisions of the first paragraph of Article 1156 C.C., but broadens their application. It was thought useful not to limit subrogation only to cases of hypothec but to every kind of real security.

The second paragraph proposes a double extension of legal subrogation to any person who acquires property (not just immoveable property) and whose payment is guaranteed by a security (and not just by a hypothec) (340).

This formula was considered suitable because, on the one hand, immoveable property no longer represents the main source of wealth, and, on the other hand, considering usual commercial practice, there is no reason to limit the rule only to traditional security.

Finally, it is suggested that the fifth case of legal subrogation recognized in the Code (341), respecting the redemption of rents or debts by either consort with the moneys of the community, be removed, partly because it is ineffective, but above all because it could endanger the rights of third parties.

226

This article repeats the first part of Article 1157 C.C. while broadening the effect of subrogation to include not only sureties but all persons who guarantee the debt. This extension can be applied to anyone who has provided a real security as a guarantee.

227

This article redrafts the provisions of the second sentence of Article 1157 C.C.

CHAPTER III

DELEGATION OF PAYMENT

228

This proposed definition makes innovations on several points. It reflects a desire to make delegation of payment an autonomous institution and so to abandon the concept in the 1866 Code which deals with the subject only within the framework of novation, in Articles 1173 and following C.C.

Firstly, there is no longer any reference to novation in this definition. Of course, delegation of payment can still serve as a technical basis leading to novation if the old obligation is extinguished and a new one created. However, it will then be unnecessary to refer to delegation of payment to govern this situation: the rules on novation will suffice.

Secondly, to facilitate matters, all reference to simple indication of payment has been removed. As long as a delegate has not personally committed himself as regards a payment, the question of delegation does not arise. At the most, there may be a mandate to pay or to receive payment. If, however, a delegate commits himself personally as regards a payment, there is delegation; and if, moreover, the former bond of obligation is extinguished as well and a new one created, the rules of novation apply.

Thus, delegation of payment is viewed as an autonomous institution above all in the form of a simplified payment according to the means described in the article. For this reason, the rules governing it appear in this title instead of in the Title on *Extinction of obligations* (342).

229

This article sanctions the principal effect of delegation of payment: when a creditor-delegatee agrees to delegation, a second debtor is added as a guarantee for payment of the debt (343); the delegator remains bound and the delegate commits himself personally towards the creditor (344).

Obviously, this legal effect can come into play only in matters of delegation of payment and not as regards novation which, by definition, extinguishes the former bond of obligation. Here again, the article encourages the idea of delegation as an autonomous institution by eliminating the concepts of "perfect" and "imperfect" delegation. From now on, there would be two separate institutions: delegation of payment and novation. Each would have its own rules.

230

This article is intended to put an end to the difficulties arising in doctrine (345) and jurisprudence (346) concerning the effects and nature of two similar institutions: delegation of payment and stipulation in favour of another.

Right now, the two principal differentiating factors are, on the one hand, the moment from which the beneficiary or delegatee finds himself invested with a direct right against the promiser or delegator, and on the other hand, the regime governing inopposability of exceptions.

After study, it was thought possible to combine both regimes according to that of the stipulation in favour of another, particularly since the amendments to the rules governing cases in which exceptions cannot be invoked, in the rules on stipulation in favour of another (347), remove the traditional differences between these two institutions (348).

Consequently:

1. the delegatee's direct right against the delegate comes into being when the delegate agrees to commit himself personally;
2. delegation of payment may be revoked as long as the delegatee has not advised the delegate or the delegator of his willingness to accept it, and the delegator cannot revoke it to the prejudice of the delegate who has an interest in maintaining it;
3. finally, the delegate might from now on invoke exceptions against the delegatee which he could have brought against the delegator, if he had not known of them when delegation took place. Of course, this solution will come into play only in matters of delegation of payment, and not in matters of novation where extinction renders useless any provision which deals with the invoking of exceptions attached to the former obligation.

CHAPTER IV

TENDER AND DEPOSIT

231

The intention with regard to tender and deposit is to simplify the current rules in the Civil Code (349) and to bring them into line with current practice, so as to establish a clear, functional system.

This article restates in a different form the essentials of Article 1163 C.C. except the rules on capacity which are laid down in the Book on *Persons*, and that relating to payment in money, which is governed by the statutes.

232

As a general rule, an offer to execute or to pay is made by presenting the thing due to the creditor. This constitutes tender. In some cases, a mere notice may have the same effect as tender (350). In both cases, however, a creditor who refuses a valid tender without any lawful right prejudices the debtor's fundamental right to a release by way of payment. He must then

be considered in the same position as a debtor who is in default to execute an obligation. For this reason, in the Draft, unlawful refusal to accept a valid tender is equated with default. The principal effect of this is to be found in the rule of Article 235 pertaining to the transfer of risks. Also, it goes without saying that a debtor under a synallagmatic obligation may avail himself of a resolution of right of the contract.

Thus, tender, and sometimes a mere notice, become ways for the debtor to declare his creditor in default and to benefit from all the legal advantages deriving from this.

233

This article is new law. According to the rules on putting in default, the debtor is in default of right when he makes clear to the creditor his intention not to execute the obligation. Inversely, when the creditor notifies his debtor in no uncertain terms that he intends to refuse the execution of the obligation, it is difficult to see why the debtor should still be obliged to make tender, which would require unnecessary costs and expenses.

It was deemed much more reasonable to dispense the debtor from so doing, thus putting the creditor in default of right. The wording of this article also makes it applicable where refusal is indicated before the obligation becomes exigible.

234

The intention of this article is to solve the problem created when a creditor, being away from his domicile, prevents the debtor from making a tender. Hitherto this problem had been only partially treated in Article 1162 C.C.

In order to avoid paralysis of the system, the first paragraph provides that the creditor is in default when the debtor cannot, on the one hand, find the creditor despite diligence, and, on the other hand, when that debtor is in a position to make the payment under the conditions provided. The second paragraph specifies that the debtor would bear the burden of proving that the conditions were met.

These restrictions seem to give adequate protection to the interests of the creditor, while at the same time allowing the debtor to benefit from the effects of a tender made to a creditor who cannot be found.

235

This article is new law. It seemed useful to specify the consequences of default with respect to the creditor.

236

This article restates the provisions of Article 1164 C.C. pertaining to cases where a thing is payable at the debtor's residence or place of business, saving the requirement of a notice in writing. Since in such cases the thing cannot be "physically presented" to the creditor, notice that the debtor is ready to execute the obligation must have the same effect as tender.

However, the expression "at the debtor's domicile, residence or place of business" is used to render the French: "*chez le débiteur*".

It was deemed advisable to extend this provision to cover cases involving payments to be made where the thing is. Here as well, it is difficult to see how the thing could be physically presented since, theoretically, it is already at the place of payment.

To avoid unfair advantage being taken of the situation, however, it is incumbent upon the debtor in both cases to prove that his offer is genuine by showing that he was capable of making the payment at the prescribed time and place.

237

This article is, in part, new law with regard to the second and third paragraphs of Article 1165 C.C. and covers a particular case, where not only the thing is difficult to transport, but the debtor has doubts as to whether the creditor will accept it. The problem then becomes one of deciding whether or not a debtor should be compelled to carry out a transport which is difficult and might entail heavy expenditure or excessive care, and whose outcome is uncertain.

It was deemed fair to allow the debtor to make sure of the cocontracting party's exact intentions and thus to eliminate any doubt, by forcing the creditor to state his position clearly. The debtor's notice has the effect of tender if the creditor fails to answer.

Still, the debtor must be capable of proving that his intention is genuine by showing that he would have been in a position to make the payment.

In cases where the debtor has no grounds for believing that his creditor will refuse the payment, physical presentation of the thing due remains the general rule, even if the thing is difficult to transport, since the contract which binds the two parties must be respected, subject, however, to the general exception provided in a preceding article (351), where the creditor has made clear his intention to refuse the thing.

238

This article is also new law and aims at giving much more flexibility to debtors whose creditors are in default.

Deposit, even at the risk of the creditor, does not always constitute the most desirable solution for either party. For this reason, the Draft allows the debtor to request the court to decide on the most appropriate conservatory measures to be taken in any particular situation.

However, this possibility obviously does not affect the debtor's recourse against a creditor in default.

239

This article stems from a desire to up-date the procedure for making tender. Today, certified cheques, like those drawn by a bank, constitute a normal and convenient means of payment and make it possible to avoid carrying large sums of money (352). It was felt desirable to recognize their validity as tender.

The article recognizes cheques drawn or certified "by a bank or any other financial institution doing business in Québec". This aims at avoiding the creation of a monopoly in favour of chartered banks and at allowing savings and credit unions, and other financial institutions recognized in Québec, to carry out this operation.

The security of the transaction is thus protected, since the financial institutions doing business in Québec are already recognized by the government for purposes of deposit insurance.

Certified cheques and cheques drawn on banks or other financial institutions, which are the best known and most frequently used means of payment today, are the only instruments recognized in this article. Other means of payment could be envisaged for the same purpose (such as bank orders or other negotiable instruments) if justified by new elements brought to light in this matter.

240

Working from the principle that the Civil Code often describes the way in which an obligation may be executed, as is the case, for example, in the obligation of a seller to deliver (353), it seemed desirable to insert into the Draft rules of substantive law laid down in the Code of Civil Procedure (354). The proposed article has been included with this in mind, and if adopted, would render Articles 187 and 188 C.C.P. useless.

241

On the other hand, it was considered more logical to retain the provisions of the Code of Civil Procedure as regards tenders made in court during legal proceedings. Therefore, this article is merely a reference to Article 189 C.C.P.

242

This article restates in another form the principle of retroactivity of legally offered tenders, contained in the first paragraph of Article 1162 C.C.. This rule only applies, however, where the thing due is not a sum of money. Tender of a sum of money is covered in the following article.

243

When the thing due is a sum of money, only the actual deposit of the money makes it possible to determine whether or not the tender is genuine. As long as the debtor has not deposited the sum, the interest, when applicable, continues to run in favour of his creditor (355).

Deposit, then, is the criterion for determining the seriousness of any offer of payment and the payment should logically be considered to start on the day of the deposit.

The rule by which any interest owed by the debtor ceases to accrue from the day of the deposit can be easily explained, because the creditor may indeed withdraw the sum deposited without prejudicing his claim to the remainder.

The debtor will owe the interest on any remainder not offered as payment if the sum actually deposited is subsequently found to be only a part of what was due. This is merely a specific application of the rules governing partial payment (356).

Such is not the case when a deposit is conditional and made in court in the course of legal proceedings. Then, the creditor may not withdraw the deposited sum without prejudicing his right to the remainder. The rule containing this provision is found in Article 190 C.C.P., and it was decided to maintain it because some tenders are conditional for the purpose of obtaining execution of the creditor's obligations (in transfers of title, for example).

However, it does not seem desirable to extend this provision to cover all conditions involving deposits, especially not those which aim at "buying peace", by the obtaining of a final discharge (357).

To this end, it is recommended that the following be added as a second paragraph to Article 190 C.C.P.: "No deposit made on condition

that the creditor sign a final discharge is considered a conditional offer for the purposes of this article."

This reasoning, of course, only applies where legal proceedings are involved. If, before the proceedings start, the creditor withdraws a sum which has been deposited on condition that a final discharge will be given, he accepts the settlement, thereby giving up his claim to any remainder. If he intends not to give up his claim, he need only initiate legal proceedings. If the debtor renews his tender, even by offering it on the condition that he will obtain a final discharge, the creditor may withdraw the sum deposited without prejudicing his claim to the remainder; this would be governed by the above-mentioned proposed second paragraph of Article 190 C.C.P.

If, on the other hand, the debtor chooses not to renew his offer of tender during the legal proceedings initiated against him by the creditor, this means that he wishes to contest the main issue of the suit, and the court may then authorize him to withdraw the sum deposited.

This article, besides amending the Code of Civil Procedure, also justifies recommending that the second paragraph of section 66 of the *Deposit Act* be repealed in order to avoid unnecessary repetition (358).

244

This article defines deposit and specifies how deposits must be made, during proceedings or not.

245

Part of this article is new law. It enumerates the most usual and frequent cases of deposit. This list is not restrictive, and makes new provision for the cases covered in the second paragraph of Article 1162 C.C., and in section 68 of the *Deposit Act* (359).

246

This article restates in substance the contents of Article 1166 C.C., while broadening its scope. In future, no debtor could withdraw the sum deposited during proceedings or otherwise without authorization by the court.

However, in order to avoid any contradiction with the *Deposit Act* (360), the last lines of Sections 67 and 69 of that Act, beginning with the words ... "saving the right of the depositor ..." should be repealed.

247

The rule proposed here expands the scope of Article 1167 C.C. If the tender has been declared valid, the debtor is released, as are his codebtors and his sureties.

On the other hand, before the tender can be declared valid or be accepted, the possibility of withdrawal by the debtor with the consent of the creditor had to be established. In cases of this sort, however, it was essential to preserve the rights of the codebtors, the sureties and other third parties.

Because this withdrawal is the result of an agreement and not of a court ruling, it is reasonable not to allow the rights of these persons to be adversely affected.

248

This article introduces into the Draft Civil Code the problem of the costs of deposit, which is now covered in the Code of Civil Procedure (361).

It is therefore suggested that Article 191 C.C.P. be repealed, since the beginning of that article deals with a situation covered under the heading of payment and rendered unnecessary by this proposed article.

CHAPTER V

IMPUTATION OF PAYMENT

249

In this article, the essence of Article 1158 C.C. remains unchanged.

250

This article, of new law, constitutes the first exception to the general principle stated in the preceding article. It is intended to prevent any debtor from unilaterally depriving his creditor of the benefit of a term (362).

251

This article constitutes another restriction of the debtor's right of free imputation (363). Basically, Article 1159 C.C. remains unchanged.

252

Article 1160 C.C. remains basically unchanged by this article. This article sanctions the principle of imputation by a creditor when the debtor does not exercise his right (364). Nevertheless, it was not thought advisable to retain the last part of the sentence of that article which seems useless and adds nothing to the proposed rule.

253

If the parties fail to make a choice, the legal regime of imputation applies (365). The rules in Article 1161 C.C. were retained in a slightly different, simplified form, because they are logical.

TITLE FIVE

INEXECUTION OF OBLIGATIONS

General provisions

254

This general article, which restates the provisions of Article 1065 C.C., merely enumerates the different recourses a creditor has at his disposal when his debtor fails to execute an obligation.

First mentioned is the right to execution in kind, considering this to be the usual and normal recourse and one of the creditor's basic rights.

Recourse to damages was mentioned last because it may be exercised alone as the principal recourse or, on the contrary, it may accompany the exercise of another recourse, such as resolution or resiliation or execution in kind.

Finally, it should be pointed out that the right to reduction of obligations, formerly allowed in the case of certain contracts (366), would heraafter constitute a general recourse.

255

Under this article, the creditor may change his mind and choose to exercise a right other than that which he first decided to exercise. For this reason the article clearly establishes that exercise of one right by the creditor does not entail *ipso facto* renunciation of any other right.

It was thought better, however, to refuse to allow the creditor the right to change his mind as long as his first demand is pending, so as to avoid in practice the confusion which might result for the debtor from two contradictory recourses which may cause him prejudice.

256

This article writes into the Draft and at the same time generalizes the rule pertaining to the exception of inexecution within the context of synallagmatic obligations; this rule has been accepted by the legislator (367), by doctrine (368) and by jurisprudence (369).

This exception allows the debtor of an obligation the legal right to refuse to execute the obligation as long as the creditor under the same obligation, who is also the debtor under the correlative obligations, does not execute or offer to execute his own obligation.

CHAPTER I

PUTTING IN DEFAULT

257

It is deemed advisable, as a general policy, to encourage as much as possible the execution of obligations. One of the means used to do this is to allow a debtor who delays or fails to execute his obligation to be pressured by his creditor.

It is considered that, in this respect, putting the debtor in default is of primary importance, and it was decided to make this a basic measure affecting all recourses open to a creditor in matters of inexecution.

Henceforth, when a debtor is put in default, this would be intended as notification to the effect that the normal time set for execution has elapsed, and that he is being granted a further reasonable extension of time in which to execute his obligation.

To ensure that this technique is respected, and not avoided through contractual stipulations to the contrary, it was decided to recognize only those exceptions provided in legislation and enumerated in the articles following.

258

This article, which completes the previous one, is intended to penalize impetuous creditors who impose on their debtors a period of time which is too short for the execution of an obligation, with regard to the nature of that obligation and to circumstances.

In such cases, the debtor is not bound by the fixed period, but must nevertheless execute the obligation within a reasonable time.

259

The first article of the chapter on *Putting in Default* does not have the effect of excluding all conventional stipulations on this matter; rather, it excludes only those respecting its elimination or its unreasonable character.

Therefore, when both parties have agreed upon the period for putting in default at the time the contract is signed, the term fixed by agreement is presumed reasonable.

260

This article determines how a debtor is put in default. An attempt has been made to allow for a maximun of flexibility in the matter.

A debtor is usually put in default by a written or oral extra-judicial demand sent him by his creditor, providing, of course, this demand can be proven (370).

Current law (371) recognizes that the institution of legal proceedings has the effect of putting the debtor in default and this rule has on occasion been applied in jurisprudence (372).

261

However, if the creditor has directly taken legal action, his action is equivalent to putting in default. Any execution by the debtor within a reasonable period would be considered valid. By acting thus, the creditor acts at his risk since if the debtor executes his obligation, he must pay the costs incurred by his recourse to the courts.

262

This article inserts in the Draft all current positive law on this matter, and combines the exceptions to the principle set forth in Article 257. These specify the situations in which a creditor need not put his debtor in default, because the debtor is already in default by the sole effect of the law.

This happens whenever there is an emergency or an urgent danger, when the debtor has violated an obligation not to do, or whenever the debtor has let the time during which the obligation could have been usefully executed elapse. In these cases, it would be useless to put the debtor in default by a notice. This last exception has been recognized by law (373) and sanctioned in jurisprudence (374).

The debtor is also considered in default of right, even when the obligation is not exigible, if he has made it clear to the creditor that he intends not to execute the obligation or if execution of the obligation has become impossible through his own fault. These exceptions have also been recognized in jurisprudence (375).

In order to prevent any creditor from invoking these exceptions too readily or from taking refuge behind some *clause de style* in this respect, the last paragraph makes him responsible for proving that one of these cases has occurred, notwithstanding any declarations or stipulations to the contrary.

263

This article does not necessitate any special explanation. It is only intended to clearly provide that execution of an obligation cannot be demanded as long as the obligation itself is not yet exigible; at the same time the second paragraph of this article coordinates the rule with that laid down in paragraphs 4 and 5 of the preceding article.

264

This article remains consistent with the general policy on solidarity; it was decided to recommend at least partial elimination of the secondary effects of solidarity attached to the mutual representation of interests among solidary debtors (376). In this particular case, it was thought that the legal fiction of such representation should not be pushed in proceedings for putting in default lest an unjust situation be created with regard to the other debtors who would thereby be put in default, without even being aware of it.

265

With regard to solidarity among creditors, it has been decided, on the other hand, to retain the notion of representation among cocreditors. Consequently, this article stipulates that if the debtor is put in default by one of the solidary creditors, this affects all the others.

This position, as opposed to that taken in regard to solidary debtors, was taken for the following reason: the putting of a debtor in default or the taking of conservatory measures by a creditor causes no prejudice to the debtor while still benefiting all the creditors.

It was deemed advisable to consecrate, in the same article, a more general rule, accepted by doctrine (377), which states that any other conservatory act, in the general sense of preserving the rights of the creditors, performed by one of them, benefits the others.

266

This article outlines the two principal effects of putting the debtor in default: on the one hand, the creditor has the right to claim damages for any delay in the execution of the obligation and, on the other hand, the debtor is responsible for any fortuitous event.

Nevertheless the logical and fair consequence of the grant of a reasonable term to the debtor in default to execute an obligation is that the debtor is not responsible for moratory damages or for fortuitous events except when the period expires, unless he is in default of right.

This article, then, repeats, adapting them to the new provisions on putting in default, the rules now partly contained in Articles 1077, 1200 and 1202 C.C.

CHAPTER II

EXECUTION IN KIND

267

The object of this article is to emphasize the principle under which obligations are usually to be executed in kind.

This principle is limited by the extent to which a court can compel a debtor to execute his obligation, and so render a judgment which can be executed. For this reason, the proposed article repeats the phrase in Article 1065 C.C.: "in cases which admit of it" (378).

In this regard, there was much hesitation as to the problem of determining whether it was worthwhile to define these cases in the text and enumerate them: the obligations to do and not to do when they do not require any personal act of the debtor.

Upon consideration, it was considered more reasonable to leave the concern for defining such cases to the courts, since each case involves particular characteristics. Any rule too rigid in this matter would, by its lack of flexibility, risk causing injustice.

268

This article sanctions a current practice by which, when the debtor refuses to execute an obligation (379), the creditor may execute it or have a third party execute it at the debtor's expense, without judicial authorization, and then sue in damages (380).

269

In cases where a creditor intends to avail himself of his right to recourse for execution in kind, it was thought preferable specifically to oblige him to advise his debtor of this fact in a formal notice of default; being warned that his creditor intends to exercise this option, the debtor may take all the steps necessary, under the circumstances, specifically, those measures relating to the preservation of the object.

270

When, on the other hand, an obligation consists of not doing a certain thing, it has been decided to keep legal authorization compulsory, so as to avoid abuses.

The same applies to the choice of the demolisher; it was deemed useful to retain the rule in Article 1066 C.C. which leaves this choice to the court's discretion (381).

271

This article inserts into the Draft the effect of an action to have a deed passed. When a debtor refuses to sign such a deed, the judgment of the court is equivalent to his signature and so confers a valid title on the creditor.

This rule is accepted by jurisprudence (382) and should be applied generally. For this reason, it was not thought opportune to distinguish in this respect between the various types of deeds (sale, hypothec and so on).

CHAPTER III

REDUCTION OF OBLIGATIONS

272

It was considered useful to grant the creditor this new recourse in case of a debtor's inexecution, through his fault, when the creditor himself is obliged toward that debtor.

The article will allow him to exercise generally a right which he now enjoys only in certain contracts (383). It may be in a creditor's interest to retain the undertaking while reducing his obligation, when his debtor refuses to execute his own, or only partly executes it (384). The article is intended to sanction this interest and remains faithful to the basic policy of encouraging execution of obligations above all.

273

This article needs no particular comment. It lays down a rule which is useful to the debtor and under which the creditor must, when putting the debtor in default, notify him of the recourse which the creditor intends to exercise.

CHAPTER IV

RESOLUTION OF CONTRACT

274

This article states the recognized principle that resolution of a contract may be sought only in the case where the debtor, through his fault, fails to execute his obligation.

Moreover, in order to bring positive law into line with practice, this text sanctions the rule that a creditor is entitled to resolution of the contract, a right which creditors reserve for themselves by the exercise of resolutory clauses, and not merely to the right to apply for its resolution before the courts.

It was decided, in effect, to recommend adoption of a system of resolution of right, which is explained in more detail in the following articles.

The Civil Code provides that, in principle, saving exceptional cases (385) resolution is judicial (386).

In practice, however, creditors increasingly tend in spite of everything to treat a contract as resolved and sue their debtor in damages. Very often, legal action takes too long; creditors, particularly merchants, need to know immediately what is to become of their contract.

Consequently, it was considered preferable to allow a creditor to consider his contract resolved without it being necessary for the court to actually pronounce resolution. Some jurisprudence has already sanctioned this right under certain circumstances, for example when a debtor has unequivocally indicated his intention not to execute his obligation (387).

275

This article is intended to ensure that no creditor could use inexecution of minor importance as a pretext to obtain resolution and so free himself from a contractual bond which he considered inconvenient.

On this point, the rules already developed by dominant jurisprudence (388) are merely sanctioned. The article does not allow the parties to agree otherwise by contract.

276

This article provides a rule which is useful for the debtor: the creditor must warn him of the recourses he intends to exercise.

277

In order to preserve the interests of the debtor and, above all, to promote normal execution of obligations, the exercise of the right of resolution is subject to the prior formality of putting in default accompanied by a reasonable period of time for execution (389). If, upon expiry of this period, the debtor has not yet executed his obligations, the creditor may then regard the contract as resolved of right, without it being necessary for him to take judicial action in order to have this fact established.

278

This article requires little comment. In the first and second paragraphs, it states the rule of the retroactive effect of resolution, consecrated by doctrine (390) and jurisprudence (391), and outlines the result of this effect: reciprocal restitution of the prestations or restoration of the parties to their original situation.

The third paragraph allows a creditor who has availed himself of resolution to limit this rule in cases of partial execution, by retaining what he has already received, provided he pays the equivalent.

279

This article is intended to render the traditional rules governing restoration to the original position more supple and to clarify those developed by the court.

For want of specific texts on the question, jurisprudence has occasionally maintained the principle that no judge could pronounce resolution if restoration to the original position in kind was impossible (392).

By this rule, the court may effect restoration by equivalence, and the proposed text is identical to that which was recommended on the subject of nullity (a. 52).

280

This article consecrates the rule under which resolution completely abolishes all acts done in the meantime, not only with regard to the parties to the contract but also with regard to third parties, subject, of course, to contrary provisions of law.

281

This article is in the chapter on resolution, in order to eliminate the confusion which might arise from a strict, exegetical interpretation of the articles. The article establishes that the rules in the chapter on resolution

apply to resolutory clauses, notwithstanding any agreement to the contrary.

Again, it was thought to ensure that the rights resulting from the right of resolution as well as the protective measures provided by legislation for debtors, not be reduced to nothing in certain contracts of adhesion by standard resolutory clauses.

CHAPTER V

RESILIATION OF CONTRACT

282

This article lays down the accepted principle to the effect that no contract can be resiliated unless the inexecution of the obligation is due to the fault of the debtor.

On the other hand, since resiliation only affects contracts which are executed successively and blocks the rule of retroactivity, it was decided to place this subject in a separate chapter, apart from resolution.

283

As for resolution, it was decided to establish a rule promoting maintenance of the contract where the debtor through his fault fails to execute his obligation. The inexecution being of little importance it is better to maintain the contract rather than to entitle the creditor to resiliation. Because of the imperative nature of this rule, the parties cannot agree otherwise.

284

This article lays down a rule which is useful for the debtor: the creditor must warn him, when putting him in default, of the recourse which he intends to exercise.

285

As was done in the case of resolution, it was decided to recommend resiliation of right thereby codifying an increasingly generalized practice.

In a growing number of cases, in practice, creditors consider the contract resiliated and sue their debtors for damages. Frequently, the periods for proceedings in an urgent situation are too long and the creditor, especially if he is a merchant, needs to know immediately, and for certain, what will become of the contract.

286

This article constitutes an exception to the rule of retroactivity which is also found in the rules governing resolution and nullity.

Indeed, it is impossible purely and simply to erase the effects produced in the past by a contract executed successively, so that restoration is generally impossible. This is particularly true with respect to contracts of lease, partnership and employment.

For this reason, it seemed more logical to abolish, for the future only, the obligations of parties to resiliated contracts.

287

It was considered proper that the rights resulting from the right to resiliation and the protective measures which the legislator grants the debtor not be reduced to nothing, particularly, in certain contracts of adhesion, by clauses more or less imposed on one of the parties.

CHAPTER VI

DAMAGES

General provisions

288

This article reproduces the idea contained in Article 1065 C.C.

It shows that recourse in damages may be exercised by a creditor as a principal action against a debtor who is at fault, or else, it may accompany the exercise of another recourse provided for in this title such as, for example, execution in kind or resolution.

Also, no creditor who intends to claim damages need warn his debtor in the putting in default.

Finally, it is perhaps useful to recall that considering the new plan followed, the rules contained in this chapter apply equally well in contractual matters and in cases of breach of legal obligations.

289

This provisison lays down the classical rule that damages awarded for breach of contractual or legal obligations are really only compensation for damage actually sustained and not a penalty for any fault committed (393).

290

It was considered necessary to derogate from the rule in the preceding article when the harm is intentional and directed toward the person or his property. There are two main reasons for this.

The first reason is that, in such cases, because of the special nature of the injury, any assessment based solely upon reparation of the damage may not be adequate.

Secondly, in these cases, society should not tolerate any attitude by a person who deliberately or without considering the consequences of his actions, harms persons or the property of another while knowing that he will be able in some way to compensate for this injury by paying a sum, frequently a very small one, calculated solely with a view to reparation of the actual damage.

The text of this article, moreover, was inserted in Section 49 of *The Charter on Human Rights and Freedoms* (394) which also provides for punitive damages in cases of intentional injury to the rights or freedoms of others.

291

Can the debtor's obligation to pay damages be affected by any payment due by a third party to the debtor? This question arises with recurring frequency.

In the case of insurance, Article 2494 C.C. (395) clearly sets out that civil responsibility cannot be altered or affected by the effect of insurance contracts.

It seemed fairer to give a general scope to this rule and to establish that any person who causes damage cannot invoke the fact that his creditor has received indemnity from other persons (396), whether gratuitously, as for example an employer who continues, although not obliged to do so, to pay an indemnity to the victim during his disability, or onerously, as for example an insurer who pays an indemnity to an insured person (397).

292

Out of concern for more effective protection for victims, it was believed best to rejuvenate the fourth paragraph of Article 1056b C.C. Various abusive practices have made this rejuvenation necessary (398).

The text specifies the persons with regard to whom the rule applies. It extends inopposability to the victim's heirs; it does away with the need to prove lesion; it extends to every act causing damage, regardless of the

regime, whether contractual or delictual, and finally, it applies to every declaration, whether written or verbal.

Section I

Damage

§ - 1 Nature of damage

293

It was considered appropriate to confirm the principle, today firmly acknowledged by jurisprudence (399) and doctrine (400), according to which the damage subject to reparation may be material or moral, such as damage resulting from injury to honor or reputation, aesthetic prejudice, pain and suffering.

294

This article, which requires no particular explanation, takes up the classical rule respecting the two components of damage, set out in Article 1073 C.C. (401).

§ - 2 Assessment of damage

I - Legal assessment

295

The rules laid down in Articles 1074 and 1075 C.C. are rearranged in one article (402).

The principle of direct damages is reaffirmed and given a general field of application.

The rule of foreseeable damages is retained only in contractual matters, except in cases of intentional or gross fault by the debtor.

As a consequence, in cases of breach of a legal obligation by a debtor, reparation may extend to all foreseeable or unforseeable damages, provided they are direct. Thus, the courts would retain in this field the wide power of assessment which the law now bestows on them.

296

This article attempts to rectify a situation which is unfair for the victim and it was believed appropriate to make an exception, in cases of damages for physical injury, to the absolute principle of *res judicata*.

There are frequent cases where a victim's condition changes noticeably after a judgment or a settlement, so that the indemnity awarded no longer corresponds to reality.

This article is intended to allow the victim to apply for a review of the indemnity if his condition worsens seriously.

It was not considered wise to provide for the same rule in cases of improvements, for the following reasons: firstly, since our courts pay indemnities in the form of capital, it would be difficult to claim back this capital from the victim; secondly, allowing review by reason of improvements would possibly result in victims making no attempt to improve their condition.

It was felt necessary, however, to restrict this right to a certain period of time, so that the debtor would not remain in a constant state of uncertainty.

297

It was thought advisable to lay down the same rule regarding the time at which interest begins to accrue on sums due for inexecution of contractual or legal obligations, contrary to the provisions of the first paragraph of Article 1056c C.C.

However, in matters of physical injury, it was wished to keep unscrupulous debtors from delaying payment because interest rates which they might derive by placing the sums due on the market would exceed those which they would have to pay to the victims.

Rather than thus imposing a higher rate calculated, for example, at the commercial or Bank of Canada discount rates which appears difficult because, on the one hand, of the constitutional questions which the issue may present, and, on the other hand, the uncertainty resulting from the fluctuation of these rates, the following solution is proposed: the court could have the interest accrue from the date of the harmful act, without prejudice to its right to award the supplementary indemnity provided for in the third paragraph which, in substance, reproduces the last paragraph of Article 1056c C.C. (403).

298

The first two paragraphs of this article are prompted by Article 1077 C.C.

The third paragraph, on the other hand, is new law. Henceforth, creditors who suffer damages other than those resulting solely from their debtor's delay in paying debts which involve money could, by availing

themselves of the general principles of full reparation, require compensation for such damages (404) separate from the interest alone. A special stipulation to this effect would be required, however, in the case of a contractual obligation. This rule seemed fairer. Such a rule has been adopted elsewhere by some of the modern foreign codes (405).

299

This article reproduces Article 1078 C.C., except for its third paragraph which is dealt with in the Book on *Persons*.

II - Conventional assessment

I. Clauses and notices excluding or limiting responsibility

300

The Civil Code contains no general provisions on clauses to limit or exclude responsibility.

The validity of such clauses in contractual and extra-contractual matters as regards damages to property and to the person has been covered in an impressive array of judicial decisions (406).

It was felt that certain rules must be laid down on the subject.

This article takes up the idea expressed many times in judicial decisions (407). No debtor can shirk responsibility which arises from his gross fault and, *a fortiori*, that resulting from his intentional fault or his fraud. For one person to be able voluntarily to harm another purposely or by gross fault would be contrary to public order.

Use of the expression "from...fault"" and not merely reference to one's own fault, indicates that it was also wished to provide for the case of responsibility for the fault of others, such as that of employers for the fault of their employees.

301

This article renders illegal any clause intended to annul or restrict responsibility for personal harm even if it results from a slight fault, subject to the express provision of law.

Considering the example already given by the Legislator in matters of hospital or medical contracts (408), and of labour contracts (409), it seemed preferable not to follow what was decided by the Supreme Court in this regard in an already old decision (410) and to establish the

principle that respect for human beings must be placed above considerations of private interest.

302

This article, which embodies in the Draft Code the rule established in this regard by judicial decisions (411), is intended to govern situations in which the contract itself does not refer to any extrinsic clause (412). In such a case, a party who wanted to annul or limit his responsibility by means of notices or signs will bear the burden of proving that the other party knew of them when the contract was made. Assessment of this proof is left to the discretion of the courts.

303

This article is intended to govern a situation which frequently occurs in the extra-contractual field: limitation or exoneration of responsibility by public notices in anticipation of possible damage.

The sole effect of such notices is to give warning of danger (413). Thus, they in no way alter the general law on responsibility. The court must always determine whether the fact of having given warning of danger relieves the person who has given that warning of all responsibility, involves a sharing of responsibility, or has no effect on responsibility because the warning given is insufficient (414).

2. Penal clauses

304

Damages which may be due in the event of inexecution of obligations may be conventional in nature.

This proposed definition of the penal clause differs somewhat from that proposed in Article 1131 C.C. First of all, reference to the notion of primary and secondary obligations has disappeared. Use of this notion was doubtful and could have led to confusion in ascertaining whether obligations so agreed upon were facultative or alternative. This amendment renders Article 1132 C.C. unnecessary, a situation already envisaged in the section on nullity (415).

The remainder of this definition is particularly intended to stress the conventional side of such a clause. Use is made of the term "penalty" to clarify the fact that penal clauses can entail obligations which are not merely pecuniary; for example, such clauses can have the character of a *dation en paiement* (giving in payment).

305

The rule set out in this article confirms existing law. Since this particular case pertains to damages of a conventional nature and the main purpose of penal clauses is to avoid possible contestation on the proof of damage actually suffered, it was considered best explicitly to provide for this principle, which is drawn from judicial decisions (416).

306

It was considered wise to recall that penal clauses are subject to Article 76.

307

This article takes up the provisions of Article 1133 C.C.

308

This article deals with the situation referred to in Article 1135 C.C.

It was believed best to use the expression "to the extent to which" in such a way as to indicate clearly that reduction need not always be proportional to execution, and that the court retains some latitude to assess such cases.

Moreover, this article must not be interpreted as being the sole provision authorizing the court to reduce penal clauses. Besides this specific provision, of course, there is the general law governing judicial review by reason of abusive clauses (417), lesion (418) or for "*imprévision*" (419).

309

This article restates the provisions of Article 1134 C.C.

It was not considered necessary to reproduce the last part of the final sentence of this text, since, under the articles governing default, the default of a debtor under an obligation not to do a thing occurs of right by the mere fact of violation of the obligation.

310

For some years, there has been a proliferation of contractual clauses intended to have the debtor pay the costs of debt collection. A large number of judicial decisions is devoted to this problem; some of these decisions maintained that they constituted valid penal clauses (420), while others assert that these could not truly constitute penal clauses, since the latter are stipulated to compensate inexecution of obligations and not costs of suit (421).

To eliminate any such doubt, and also for reasons of general equity, it was considered best to prohibit any use of such clauses.

Section II

Apportionment of responsibility

311

The purpose of this article which is new law is to lay down the principles of reparation in the event of damage resulting from concurrent or common fault (422).

This article sets down the rule, traditionally followed by Québec jurisprudence (423), which provides that responsibility is divided on the basis of the "seriousness" of the faults which contributed to the damage.

It is appropriate to point out that this general text is designed for application as much in the contractual as in the extra-contractual field.

This case must be considered separately from one where several persons cause separate damages to the same victim, reparation of which is determined in accordance with the usual rules governing responsibility (424).

312

This article was born of the same concerns for equity as the foregoing one, and expresses an attitude consistently seen in judicial decisions (425). No creditor who is in a position to avert increased damage caused by his debtor's inexecution may claim repayment for what is due solely because of his own negligence or bad faith. He must minimize the extent of the damage he can suffer.

This rule also applies as much in the contractual as in the extra-contractual field.

313

To complete the codification of the principal rules drawn from judicial decisions in matters of damages, it seemed best to attempt to regulate the problem arising when damage is caused by several faults none of which is known to be the "cause", since it is possible for each to be so designated (426).

Considering the change made to the effects of solidarity, and the leading judicial decisions (427), it was considered appropriate to provide for solidarity, so as to assure protection for victims, even if, technically

speaking, this could be difficult to justify on the theoretical level, given the separate nature of each fault committed.

TITLE SIX

EXTINCTION OF OBLIGATIONS

CHAPTER I

COMPENSATION

314

This article restates with some modifications as to form the provisions of Article 1187 and of the second paragraph of Article 1188 C.C. without substantially changing the notion of compensation (428).

315

This article repeats the conditions necessary for compensation, found in Article 1188 C.C., which have often been applied in jurisprudence (429). However, since absence of liquidity should not present an insurmountable obstacle to compensation, a means of making that condition more flexible is proposed in the following article.

316

This article allows either party to apply for judicial liquidation of a debt in order to plead it as compensation, but requires that such application be subject to the rules of the Code of Civil Procedure.

However, the possibilities for that right appear greatly restricted by the condition of "related source" imposed by Article 172 C.C.P.

For purposes of facilitating payment by compensation, it is suggested that Article 172 C.C.P. be amended so as to make the condition of relatedness less rigid; this would allow the court more latitude for liquidating certain debts. To this end, the following text is proposed to replace Article 172 C.C.P.:

"The defendant may plead, by defence, any ground of law or fact which shows that all or some of the conclusions of the demand cannot be granted.

He may also, by defence, constitute himself cross-plaintiff in order to invoke any claim related to the principal demand.

He may also, if authorized by the judge, make any claim not related to the principal demand. Such authorization is granted only if it appears that

the cross demand and the principal demand can be examined together without needless delay as regards the principal demand.

The court remains seized of the cross demand even when the principal demand is discontinued."

317

In practice, remittance expenses, which are the general expenses for execution of any obligation, may be unliquidated. The aim of this article is to avoid this being seen as an obstacle to compensation.

In order to avoid any such conclusions, maintenance in a new form of the principle found in Article 1193 C.C. is suggested.

318

This article restates and clarifies the provisions of Article 1189 C.C. A period of grace granted by the court or by law does not in itself prevent compensation (430). Such is not the case as regards any new period granted by a creditor to a debtor, which period must be characterized as a new contract between the parties. This changing of the date of the obligation's exigibility is also a change in one of the conditions necessary for compensation.

319

This article amends Article 1190 C.C. (431) in several ways.

It has first been suggested that the case of a debt resulting from an act done with intention to harm be added to that article's list; by its very nature, such an act should not allow for compensation so that a natural tendency does not develop for private justice. Certain foreign Civil Codes include similar provisions (432).

Moreover, concern for fairness has dictated that the third case listed in Article 1190 C.C. be extended to include all debts exempt from seizure.

Finally, the introductory paragraph of that article has been amended in that the notion of "cause and consideration" no longer appears in the present draft on obligations.

For the rest, this article is similar to Article 1190 C.C. (433).

320

This article substantially reproduces Article 1195 C.C. and, therefore, requires no special explanation (434).

321

This article repeats the provisions of the third paragraph of Article 1191 C.C. with respect to solidarity among codebtors.

322

The second paragraph of Article 1101 C.C. sets forth all general cases of extinction of obligations with regard to solidary creditors through means other than actual payment. The example used is that of release of a debt.

This article does not change the basis of that rule, but places it in a different context of legislative policy; hereafter, each means of extinction of obligations would be governed by its own set of rules, including certain rules governing solidarity among cocreditors.

This article is consistent with this new approach and applies the principle contained in the second paragraph of Article 1101 C.C. to compensation with regard to solidarity among cocreditors.

323

This article restates the first paragraph of Article 1191 C.C.

324

This article restates the second paragraph of Article 1191 C.C. (435).

325

This article restates the provisions of Article 1192 C.C. Whether or not a debtor is aware of any exception attached to the compensation is of little importance, as long as he intervenes in the transfer of the obligation, and thereby guarantees, as it were, payment of the debt. This is not the case when the debtor does not accept transfer of the debt, as stated in the second paragraph (436).

326

This article restates Article 1196 C.C.

327

It was felt desirable to make a principle of this rule, which is implicit in several of the current provisions concerning compensation (437). Since compensation is an "abridged double payment"' neither party may renounce such compensation to the prejudice of the acquired rights of third parties.

328

This article illustrates the principle set forth in the preceding article, although an exception is made for cases where there is really no renunciation, since the debtor was not aware, when paying his debt, of the existence of the claim which would have allowed compensation.

Article 1197 C.C. (438) is here rewritten in a simpler form based on the Egyptian Civil Code (439).

CHAPTER II

NOVATION

329

This article repeats the provisions of Article 1169 C.C. (440).

It is appropriate, however, to point out that the rule set down in Article 1172 C.C. has been inserted in the second paragraph of this article.

330

This article repeats the provisions of Article 1171 C.C. (441).

331

This article sets down the principle of the extinctive effect of novation (442). The absolute nature of this effect extends, of course, to all guarantees attached to the debt. As a result, this text, which has its source in Article 356 of the Egyptian Civil Code, would favourably replace Articles 1176, 1177 and 1178 and the third paragraph of article 1179 C.C. All the provisions set forth in these articles are merely consequences of the extinctive effect of novation, and thus need not be repeated.

However, the second paragraph of the article goes into more detail than does Article 1176 C.C. as to the rules governing the real security attached to the old debt; in each case, such security must be the object of agreement if it is to apply to the new obligation, especially in the case of security furnished by third parties. The first paragraph of the article is sufficient to cover personal security.

Moreover, this extinctive effect is peculiar to novation and will permit differentiation of novation from such institutions as delegation of payment (443). Henceforth, each would have its own rules.

Thus, it seems that Articles 1173, 1174, 1175 and 1180 C.C. no longer have any place in the chapter on novation.

332

This article rephrases the contents of the first and third paragraphs of Article 1179 C.C. (444).

333

This article corresponds to the general policy of inserting into their respective chapters all the consequences which the various modes of extinction of obligation could have on ties of solidarity among cocreditors. That is why this article deals with the consequence of such a mode of extinction when it arises on the initiative of a solidary creditor. As to the substance, the article merely makes more explicit the rule set down in Article 1101 C.C.

CHAPTER III

CONFUSION

334

This article repeats the first sentence of Article 1198 C.C. (445).

The second sentence of that article has been deleted, because it is merely a special application to confusion of the general rules of law.

335

This article reproduces the first paragraph of Article 1199 C.C.

336

This article rephrases the second paragraph of Article 1199 C.C.

337

This article simplifies and renders more general the principle contained in Article 1113 C.C. (446). It appeared logical to insert in the chapter on *Confusion* all its effects, including those which apply in the case of obligations involving complex conditions (447). The article applies in matters of solidarity among codebtors.

338

The second paragraph of Article 1101 C.C. combines into a single text, on solidarity among cocreditors, the consequences of the extinction of obligations, otherwise than by real payment (448).

This article restates the idea contained in the second paragraph of Article 1101 C.C. but transfers it to this chapter. The Draft thus follows

the legislative policy already established as regards other modes of extinction.

CHAPTER IV

RELEASE OF DEBT

339

This article alters some small points in the first paragraph of Article 1181 C.C. The principles nevertheless remain the same and, as a result of present positive law, they should still be applied, especially in matters which touch on necessity of consent (449).

340

This article takes up, in another form, the idea contained in the second paragraph of Article 1181 C.C. (450). It seemed preferable to amend the text by clearly creating a presumption of release of a debt when a creditor voluntarily returns to his debtor the original title to an obligation. Since, by this act, the creditor divests himself of his principal means of proof, it must be presumed that he intends to extinguish the obligation, saving proof to the contrary (451).

341

This article repeats the substance of Article 1183 C.C. (452).

342

This article repeats the principles of Article 1184 C.C. (453).

343

This article merely transposes into the present chapter the rule applicable in matters of solidarity among cocreditors and which is contained in the second paragraph of Article 1101 C.C.

344

Starting from the general principle that release or renunciation of security does not entail release of debts guaranteed by such security, it appeared desirable to extend the rule set down in Article 1182 C.C. not only to all real security, but also to personal security.

Thus, by its general nature, this article sets down a principle which, in its application, covers the situations provided for in Article 1182 C.C. and in the second paragraph of Article 1185 C.C. (454). The first paragraph of

Article 1185 C.C., moreover, is deleted. When a principal obligation is extinguished, the security which guarantees it is also extinguished, whatever the mode of extinction of the obligation.

345

This article merely rephrases the specific rules contained in the third paragraph of Article 1185 and in Article 1186 C.C. (455).

CHAPTER V

IMPOSSIBILITY OF EXECUTION OF OBLIGATIONS

346

This article, which does not call for any particular explanation, reproduces some of the provisions of Article 1200 C.C., in a new form (456).

The principle of discharge of a debtor by a fortuitous event is clearly set down there. Still, the debtor must satisfy all the requirements of the article in that he must prove the fortuitous event, and he must not be in default of execution nor have bound himself by agreement for any risk (457).

347

This article reproduces, in a different form, the provisions of Article 1202 C.C. and extends them to all cases of inexecution of obligations by reason of a fortuitous event. The maxim *Res perit debitori* is affirmed anew, thus recognizing the civilian tradition in doctrine (458) and judicial decisions (459): no debtor discharged by fortuitous event can demand execution of the obligation by a creditor, since the creditor then would bear the risk.

348

This article discloses the consequences as regards contracts of the impossibility of execution brought about by a fortuitous event.

Where it is absolutely impossible to execute an obligation, the discharge of one of the parties and the impossibility for him to demand that the other party execute his obligations both entail termination of the contract and a resolution or resiliation of right (460).

On the other hand, if there is only partial impossibility of execution due to a fortuitous event, it appeared desirable, in the manner of Article

1768 of the Ethiopian Civil Code, to submit the dispute to arbitration by the court. By assessing the circumstances of the case, the court will be able to ascertain the fairest solution for the parties to the contract, namely resolution, resiliation or proportionate reduction of obligations (461).

CHAPTER VI

EXTINCTIVE TERMS

349

This article merely sets out the rule on the effect of extinctive terms already provided for in Article 1138 C.C. This rule seemed desirable in order to complete the general scheme for the grounds of extinction of obligations.

TITLE SEVEN

NOMINATE CONTRACTS

CHAPTER I

SALE

Section I

Sale in general

§ - 1 General provisions

350

Like Article 1472 C.C., this article gives the classic definition of sale.

Stress is laid on the fact that the essence of any sale is a transfer of ownership. The vendor would no longer be subject to the obligation as presently imposed on him by the Civil Code since, under the Draft, he will be required to furnish valid title at the time of the sale; if this obligation is not executed, the purchaser would have legal recourse since he would no longer be bound to wait until his possession is disturbed.

351

Because it is so general, this article even renders superfluous the provisions of the Code dealing with *dation en paiement*, alienation for annuity payments and exchange. The Office recommends, then, that Articles 1592 to 1599 C.C. not be reproduced.

352

Article 1484 C.C., which corresponds to this article, has been generalized.

353

This article, of new law, completes the protection mechanism of the preceding article. These two articles thus set forth a general rule which affects any sale in which the purchaser or the vendor has conflicting interests by reason of his functions in relation to the object of the sale or of the price.

354

The sole exception to the general rule expressed in the two preceding articles results from public auction made under judicial authority. What we have here, then, constitutes a generalization of the exception presently found in the second paragraph of Article 1484 C.C. The option formerly reserved to tutors and curators is extended to all those entrusted with the property of another. The only person with conflicting interests is the public officer entrusted with carrying out the sale.

355

The nullity which results from Articles 352 and 353 is relative and cannot be invoked by those who are the object of the prohibition (462).

356

This rule, of new law, constitutes an exception to Article 24. Although the right of pre-emption or of preference appears in registered writings, it does not constitute a real right and cannot be set up against a third party acquirer. If the beneficiary of such a clause is ignored and suffers injury, his recourse is restricted to damages against the vendor and against the purchaser in bad faith.

This solution would facilitate clarification of titles, especially in matters of immoveable property.

357

This article proposes a general sanction for sales of things, both moveable and immoveable, belonging to another person. Regarding sales of moveables, the article is completed by Article 387. Present legislation on the sale of things belonging to another person has led to much uncertainty and controversy (463). It seemed desirable to provide that only the purchaser may invoke nullity of such a sale and that he will no longer be able to do so if the vendor acquires ownership before the action. Article 1488 of the Civil Code says: "if the seller afterwards becomes owner of the thing", but does not determine the time when this validation is possible. Nor will he be able to do so if the owner has lost his right, following prescription or otherwise.

Article 387 moreover provides that the real owner may always claim back his moveable property, unless it has been sold by judicial sale or unless the acquirer can set up prescription against him.

These two articles - 357 and 387 - would lead to the repeal of Article 1489 C.C. and of the first part of Article 1488 C.C. From now on, any owner would be able to revendicate, even in commercial matters, without

being bound to make reimbursement. No purchaser who has been harmed and divested would be able to strike back except at his vendor under the ordinary rules governing inexecution of obligations.

The last part of Article 1487 C.C. which makes any recourse in damages by a purchaser conditional on his ignorance of any defect in the vendor's title has not been retained. The general rules on inexecution of obligations would suffice.

358

The Chamber of Notaries (464) considers that Article 1477 of the Civil Code should be repealed because of uncertainties involved in its application. In practice, it is difficult to determine whether an amount paid by a person promising to purchase constitutes an instalment on the price or allows either party the option of withdrawal (465). Seeking to avoid ambiguity, it is presumed that any amount so paid is in fact an instalment, and that consequently any promise of sale with payment of an instalment is a sale. An option of withdrawal would exist only if it were expressly provided.

§ - 2 Obligations of the vendor

I - General provisions

359

This article goes beyond the corresponding Articles 1491, 1492 and, above all, 1506 of the Civil Code. Not only would a vendor remain bound to what is required by warranty as provided in the Code, and not only would he have to furnish the purchaser with peaceable and useful possession of the thing sold, but above all, he would have to transfer ownership or, in other words, give the purchaser valid title. The definition proposed in Article 350 already includes this obligation which becomes the very essence of any sale, contrary to the provisions of existing law. The Civil Code is not sufficiently clear on this subject; it renders the warranty too restricted and too rigid. Anglo-American Law can be invoked as a precedent: "The obligation of the seller is to transfer and deliver and that of the buyer is to accept and pay in accordance with the contract" (466).

360

This article declares that exoneration of his own acts by a vendor is null; the essence of Article 1509 of the Civil Code is reproduced here.

361

This article renders null any stipulation of non-responsibility of the vendor as to defects in title or things which he knew or could not ignore.

There is an exception to this rule when purchasers buy at their risk and peril (467).

362

This article is useful in that it emphasizes the repeal of certain technical rules of the Civil Code, such as those found in Article 1525 C.C. The article grants the purchaser the ordinary recourses attached to inexecution of obligations, without it being necessary to classify the actions or name them, or still less to refuse a remedy because it might have been badly labelled. Under this article, an action *quanti minoris* does not differ from an action in damages (468).

So the purchaser may retain the thing even if it is worth less than the thing sold. He is not obliged to refuse it, but he may retain it and have its price reduced.

II - Guarantee of the right of ownership

363

This article specifies the vendor's obligation to guarantee the right of ownership, but adds that he is not bound to purge any rights of third parties which he has declared, such as servitudes, for example. The purchaser has no grounds for complaint, since he is deemed to have accepted such rights, saving the exception in the following article.

364

By way of exception to the preceding rule, a declaration by a vendor of the existence of a hypothec or other security encumbering the property sold would not entail acceptance of such charges by the purchaser; the purchaser would be bound only if he expressly assumed the charges. This rule conforms to usage.

365

Unless there is an agreement to the contrary, a vendor must surrender all title deeds which he holds. In the case of immoveables, this article is complemented by Article 395 which requires a copy of the title deed of acquisition and a certificate of search covering the past twenty-five years. This twenty-five-year period corresponds with that provided for acquisitive prescription.

366

This article provides direct and simultaneous recourse against warrantors and previous warrantors. It reproduces and generalizes Article 2062 C.C., just as Article 187 of the 1867 Code of Civil Procedure had done in other respects, although that article is not reproduced in the present Code of Civil Procedure (469).

III - Delivery

367

This is essentially a reproduction of Article 1493 of the Civil Code.

368

This restates the substance of Article 1498 of the Civil Code. It was felt unnecessary to specify that removal expenses be charged to the vendor, since this is provided in Article 379.

369

This article substantially reproduces Article 1499 of the Civil Code.

370

This reproduces the substance of Article 1503 of the Civil Code (470). It is suggested that the lengthy provisions of Articles 1500, 1501, 1502, 1504 and 1505 of the Civil Code not be repeated since they are implied in the rules governing obligations, and also since Article 397 reproduces their substance.

371

This is the substance of Article 1497 of the Civil Code. The infrequent use of the exception which provides that the purchaser may require delivery by giving security fully justifies its suppression.

372

This article reproduces the substance of Article 1495 C.C.

IV - Defects in the thing

373

This is the substance of Articles 1522 and 1526 of the Civil Code. The article specifies that these are defects which exist at the time of the sale (471). It is clear that this article also covers defects pertaining to the accessories.

374

This article repeats the substance of Article 1523 of the Civil Code and is intended to terminate a lengthy controversy as to whether a defect may be considered apparent if its discovery requires an expert (472).

It was felt that no careful purchaser should require the services of an expert (473).

375

This article states the different recourses offered to the purchaser.

376

Articles 1527 and 1528 of the Civil Code would be repealed. They are in opposition with the second paragraph of this article which proposes that the old distinction between the vendor's knowledge and his ignorance of the latent defects be abolished.

This is the substance of Article 1529 of the Civil Code, subject to the provision stipulated in the preceding article, that the vendor is responsible for all damages, whether he is aware of the defects or not. His responsibility would no longer be restricted, as it is now, to restoring the purchase price when he is unaware of the defects.

377

The Draft replaces the obligation to institute proceedings within a reasonable delay (474) (Article 1530 C.C.) by an obligation to give a written notice within ninety days after the defect is discovered. This provision seems preferable to that contained in the existing article because it affords equal protection to both parties and tends to avoid legal proceedings (475) through the second paragraph.

378

This article reproduces the substance of Article 1531 of the Civil Code.

§ - 3 Obligations of the purchaser

379

This article makes no basic change in the present law. It simply groups together the fundamental obligations of the purchaser, found in Articles 1495, 1532 and 1544 of the Civil Code.

380

This is the substance of Article 1533 of the Civil Code.

381

This is the substance of the second sub-paragraph of Article 1534 of the Civil Code. The first and third paragraphs are deleted because they repeat the general principles stated in the Book on *Obligations.*

382

This is the substance of Article 1479 of the Civil Code.

§ - 4 Special provisions concerning sale of moveable property

383

The first paragraph of this article repeats the rule laid down in Article 1025 C.C. regarding the *solo consensu* transfer of ownership of a certain and determinate moveable.

The second paragraph inserts in the Draft a rule admitted by present-day jurisprudence on sales of moveables sold as an entity (476). When an operation following the meetings of minds is required only to determine the price, transfer of ownership is effective immediately upon that meeting. The rule is different if the subsequent operation is intended to individualize the thing to complete its determination.

384

This article completes the preceding one, repeating the rule laid down in Article 1026 C.C. on transfer of the right of ownership of moveables that are not certain and determinate. It was thought preferable not to use the expression "legally notified" used in Article 1026 C.C., since it could create the impression that a certain formalism was required, which jurisprudence has in fact rejected (477). To comply with this jurisprudence, the expression "informed that the thing is certain and determinate" is used.

The purchaser, then, may be advised of the individualization because he was present when it took place (478) or because he was advised of it by telephone or otherwise (479).

385

This article reproduces the rule of the second paragraph of Article 1027 C.C. In these successive sales by one vendor, then, there is an

exception to the general rule governing sale of things belonging to another, laid down in Article 387.

386

This new rule validates sale in cases where the price cannot be determined under the agreement itself; the law then presumes that the parties have agreed that the price be that generally paid in similar circumstances. This rule has been frequently adopted in legislation (480).

387

This article amends existing law. The owner may revendicate without having to reimburse for the price he paid, as required in Article 1489 C.C. Revendication is no longer possible if the acquirer has acquired a title by the effect of prescription, or if the sale was made under judicial authority (481). In the exceptional case of a stolen automobile, the vendor is now obliged, by a security required under the Highway Code, to reimburse the purchaser in the event of revendication (482).

388

That part of Article 1544 C.C. which deals with resolution is substantially reproduced here and inserted in the new provisions on resolution (483).

389

This is the presumption of Article 1475 of the Civil Code, restricted to sale of moveable property (484).

The article creates a second presumption which is not provided for in Article 1475 C.C. If the duration is not determined, the condition is fulfilled when the purchaser has failed to make his refusal known within thirty days of receipt. A similar rule is found in other legal systems (485).

§ - 5 Special provisions concerning sale of immoveable property

390 and 391

Under these articles, and the Book on *Publication of Rights* in the event of a sale of immoveables, the parties must prepare an authentic deed *en minute*. It seems best to require a notarial deed whenever immoveable property is sold. This will not change general practice and will eliminate uncertainty and disputes (486).

Ownership is transferred at the time of the meeting of minds. But the

transfer would have no effect with regard to third parties without an authentic deed, given the requirements of the Book on *Publication of Rights.*

The traditional recourse to enter into a deed of sale is retained under Article 271 (487).

392

This article conforms to practice and is useful as suppletory law.

393

This article compels the vendor to advise the purchaser of any occupation by a third party of all or part of the property sold, so as to allow the purchaser to prevent the run of acquisitive prescription.

The vendor must still declare all encroachments by him so that the purchaser is not misled as to the quantity or quality of what he buys.

394

Since the offences mentioned in this article cannot be disclosed by title examination, it appeared necessary to mention them specifically and to hold the vendor responsible for them, regardless of his good or bad faith. Under the foregoing rules, the obligation arises at the time of sale, and the inexecution opens the door to immediate recourse without the purchaser being bound to await suit.

395

The parties can certainly agree to more or less, the article being suppletory; moreover, it is in conformity with usage. This clarifies Article 365 in matters of immoveables.

396

Again, this is a consequence of the obligation to transfer ownership and to provide valid title. The article specifies some of the purchaser's rights.

397

This article reproduces the essence of Articles 1500, 1501 and 1502 of the Civil Code.

Section II

Special rules governing certain sales

§ - 1 Auction sales

I - General provisions

398 and 399

These articles are based on Article 2601 of the Louisiana Civil Code.

Article 1564 of the Civil Code gives no definition of an auction sale.

400

Article 1567 C.C. requires the auctioneer to publish the conditions of the sale before the thing is put up for auction.

401

One problem which frequently arises at auction sales is that of knowing who is the vendor. By revealing the vendor's identity, the auctioneer could free himself from this personal responsibility; at the same time, the successful bidder would know the identity of the vendor who is his real cocontracting party.

402

Article 1567 C.C. provides that the contract is formed when the purchaser's name is entered in the sales register. Article 398 amends existing law by providing that the contract is concluded at the time of adjudication. Entry in the register would merely constitute evidence.

403

This article repeats the provisions at the beginning of Article 1568 C.C.

404

This article merely repeats Article 694 of the Code of Civil Procedure.

405

Here, the exception provided for in Article 1568 C.C. and Article 686d C.C.P. is restated.

406

This article seeks to end the long delays which can arise following auction sales. Since no time limit is imposed following the sale, the parties

are left free to reach an agreement. However, when either of them makes a formal request, it seems justifiable to impose a ten-day delay for passing an authentic deed.

This article is based on Article 2610 of the Louisiana Civil Code which gives a twenty-four-hour delay for passing an authentic deed.

407

This article, based on Article 2615 of the Louisiana Civil Code which sets out a general principle on mandate, is the counterpart to Article 401 respecting auctioneers where identical rules are set out.

II - Special provisions governing forced auction sales

408

In matters of forced sales, it was thought preferable to make reference to the rules set out in the Code of Civil Procedure. The Civil Code presently contains provisions respecting expropriation (Articles 1589, 1590 C.C.), in the title on forced sales. The repeal of these articles and of those which exist merely for reference purposes, such as Articles 1588 and 1591 C.C., is proposed.

409

This article repeats the provisions of Article 1586 C.C., except with respect to the benefit of discussion.

410

This is a reformulation of the principle set out in Article 1587 C.C.

§ - 2 Bulk sale

411

This article defines the object of a bulk sale. This definition repeats that given in Article 1569a C.C. and adds new elements. The object of this article is no longer restricted to trade. The new definition includes not only the sale of a commercial enterprise or of goods, but also that of any industrial or professional enterprise and of its tools and equipment (488). These provisions apply to sales affecting all or a substantial part of the enterprise or of its inventory, tools or equipment, which are made outside the vendor's regular course of business.

412

Because of the particular nature of auction sales, it was decided to insert this provision based on Section 6-108 of the Uniform Commercial

Code. Under that section, the formalities generally observed by any person who purchases an enterprise must also be observed by the auctioneer entrusted with selling it by auction.

413

This article substantially reproduces the provisions of Article 1569b C.C.; consequently the purchaser must obtain from the vendor a solemn or sworn declaration giving the name and address of each of his creditors. Since the adoption in 1914 of the Act (489), which changed the word "suppliers" to "creditors", doubts have arisen in doctrine and jurisprudence as to whether the declaration should mention all the vendor's debts or only those which have to do with the object of the sale.

According to dominant Québec jurisprudence (490), it now seems established that the declaration must mention all the vendor's creditors generally, and not only those to whom he owes money by reason of the goods which are the object of the sale (491). The article intends to maintain this jurisprudential interpretation.

As to when the purchaser must obtain the affidavit, and taking into account the various formalities which surround publicity of the sale and which must be completed before the sale itself, the rule in Article 1569b C.C. is amended by compelling the purchaser to obtain the affidavit before the sale.

414

This article is based on Section 8(1) of the Ontario statute (492). The purchaser will still be required to obtain from the vendor the declaration listing all the vendor's creditors as well as the amounts, terms and conditions of each debt. Evaluation of the debts will be made by referring to the amount entered in the vendor's declaration.

415

The formalities provided in this article apply only when the sale price or the part of it payable in cash is not sufficient to fully cover the claims set forth in the affidavit. Consent of the creditors to the sale must be obtained before the sale so that there can be no uncertainty as to the validity of the contract. Consultation of the creditors, then, protects the purchaser from any Paulian action which a creditor might institute and also protects the creditors' interests by allowing them to make sure that the enterprise which constitutes their common pledge would not be harmed by the proposed sale.

The second paragraph provides for appointment of a person to

distribute the proceeds of the sale. The creditors mentioned in the declaration select this person, and their selection must be approved by a majority of the creditors.

416

This provision concerns those of the vendor's creditors whose claim is secured. It constitutes a major departure from present law in that it restricts participation of secured creditors in the distribution of the sale price (493).

The article does not constitute an obligation, but leaves the secured creditor the choice of assessing his security or not, with all the consequences that this decision entails.

Thus, if the creditor does not file an assessment of his security with the purchaser, his claim will not be counted for purposes of distribution. Silence on the part of the creditor constitutes a presumption that he is satisfied with the protection provided by his security and that he renounces his right to participate in the proceeds of the sale.

When the creditor does evaluate his security and advises the purchaser, the creditor will be collocated when the price is distributed, but solely for that part of his claim which exceeds the assessment of the security.

417

This article deals with distribution of the proceeds of the sale when the price, or that part of the price payable in cash, is sufficient to fully pay all the vendor's creditors. The formalities to be observed in such cases are essentially the same as those provided in Article 1569d of the Civil Code.

A new provision is added to the existing formalities whereby, before paying the price, the purchaser must obtain the vendor's approval of all creditors' claims received, upon the expiry of the fifteen-day period. This formality is essential if the vendor is not to be harmed by fraudulent claims on the part of certain creditors, since the purchaser himself cannot know whether the claims filed with him are false or excessive.

The last part of the article contains a provision applicable when there is contestation between the vendor and a creditor as to the amount of the claim. In such cases, the article compels the purchaser to retain out of the sale price an amount equal to that of the contested claims, to pay the creditors mentioned in the affidavit and those whose claims have been approved by the vendor, and to give the balance to the vendor.

418

This article, which substantially amends the formalities surrounding distribution of the proceeds of sales when the price is insufficient, is based in particular on Section 9 of the Ontario statute (494). In these cases, it will no longer be incumbent on the purchaser to distribute the sale price among the creditors; this obligation will be imposed on a person appointed by the creditors, (a. 415) or, if no such person is so appointed, by the court (a. 422).

The purpose of this provision is to ensure better protection of the creditors' interests by allowing them, through the person appointed, to have a certain control over the distribution of the sale price.

419

This article lays down the formalities to be observed by the person entrusted with distributing the proceeds of the sale when the price is insufficient. These formalities are based on those provided in Article 724 of the Code of Civil Procedure and in Section 12 of the Ontario Statute (495).

420

Under this article, any purchaser who has satisfied the requirements imposed on him by law is freed from any responsibility as regards the vendor's creditors. These creditors do not have any recourse against the purchaser or against the property sold. However, as the second paragraph of the article specifies, the creditors retain their recourses against the vendor who remains personally liable to them.

421

This article sets out the sanctions provided for cases where a purchaser fails to observe the formalities imposed on him by law. The provisions set out in this article are based on Articles 1569c and 1569d of the Civil Code.

When a purchaser fails to satisfy the requirements imposed on him by law, the bulk sale cannot be set up against the vendor's creditors at the time of the sale; these creditors may seize the assets sold to the purchaser. The creditors also have a recourse against the purchaser. The purchaser's liability, however, is limited to the value of the assets received. This provision is consonant with the jurisprudence in this matter (496).

422

This article is based on Section 3 of the Ontario Act (497). The article enumerates the cases where, on motion by the interested persons, the court may exercise its jurisdiction as regards the provisions relating to sale.

423

This article lists the cases exempt from the application of the provisions relating to bulk sale.

The first involves the sale under judicial authority. Here, the enumeration contained in the last sub-paragraph of Article 1569e C.C. is taken up in general terms.

The second is drawn from the jurisprudence, notably D'Amours v. Darveau (498), where it was held that the formalities required for the validity of the sale of a stock in trade do not apply to sales of all the assets when a purchaser at the same time assumes all the vendor's liabilities.

The third case would repeal part of Article 1569e C.C. which requires waiver by all the creditors to suspend the application of the provisions governing bulk sales. The present provision acknowledges the creditor's right to waive the benefit of such provisions.

§ - 3 Sale of debts

424

This article repeats the provisions of Article 1574 C.C. Further, any interest accrued, contrary to Article 1575 C.C., is considered accessory to the debt.

425

This article is new law and is based on Ontario law which prohibits all salary transfers (499). This measure is in line with the general thinking on consumer protection which today dominates our legislation.

There is a middle course, however. Arrears in salary or support can be transferred.

426

This article repeats the principles set out in Articles 1510 and 1576 C.C., subject to certain changes as to form (500).

427

The substance of Article 1577 C.C. is reproduced (501).

428

By this provision of new law, it was wished to avoid the parcelling out of debts since, in similar circumstances, one debtor could be subject to many actions for a single debt, which would increase costs. Before instituting proceedings, any transferee purchasing part of a debt should consult his cotransferees so that their actions may be joined.

The purpose of this article is to prevent transferred debtors from being unexpectedly placed in a less favourable position.

429

This article confirms current practice.

430

This article reproduces the provisions of Article 1571 C.C., with minor changes as to form (502).

431

This article attempts to combine Articles 1571a and 1571b C.C. The article refers to the publication procedure outlined in Article 139 of the Code of Civil Procedure, without dealing with the mode of publication in the text of this article.

432

Under this article, in order for this sale to be set up against third parties, a copy or other evidence of the sale must be filed in the Central Register of Moveable Rights, in addition to what is required with respect to the transferee.

433

This provision is intended to protect debtors and sureties in good faith who pay even after the requirements of Articles 430, 431 and 432 have been met (503).

It was believed necessary even to make provision in this article for payments made to ostensible creditors, as provided in Article 1145 C.C.

434

This provision is new law. It is intended to discourage the practice of serving transfers of debts along with the action. No debtor would be

required to pay costs if he paid during the period allowed for appearance (504).

435

This article applies Article 432 to the surety (505).

436

The substance of Article 1572 C.C. is repeated, with a new provision to the effect that the debtor benefits from any other mode of extinction aside from payment.

437

The application of the provisions relating to a sale of debts should be extended to all gratuitous transfers of debts.

§ - 4 Sale of rights of succession

438

This article is the same as Article 1579 C.C., with certain changes in the wording (506).

439

This article rewords Article 1580 C.C.

440

This article is the same as Article 1581 C.C., with some changes in the wording.

441

Exclusion from partition of a succession is covered at present in the Title *Of Succession* in the Code (a. 710 C.C.). It seems more logical to deal with this subject together with the provisions concerning the sale of rights of succession, since it is linked here to the subject of litigious rights, dealt with in the following articles. This exclusion takes place only in cases of a sale of rights of succession.

§ - 5 Sale of litigious rights

442

This article is based on Article 1583 C.C.

443

This article reproduces the substance of Article 1485 C.C., except that the prohibition would no longer be restricted to those rights which fall under the jurisdiction of the court before which the persons mentioned perform their duties. This restriction is no longer justified. Nullity protects the cocontractor.

444

Article 1582 C.C. is repeated here; mention of "incidental expenses" was not deemed necessary since these are included in the costs (507).

445

This article repeats the first and third exceptions in Article 1584 C.C.

According to Faribault (508), these exceptions are justified because of absence of speculation. In line with this justification, the second exception in Article 1584 C.C. is not retained: *dation* made to a creditor in payment of what is due to him, because this hypothesis truly entails the idea of speculation.

The fourth exception in Article 1584 C.C. concerns sale of rights which are judicially acknowledged or established. Such rights lose their litigious nature, and when they are sold, the provisions governing sales of debts must be applied to the sale.

CHAPTER II

GIFTS

Section I

Gifts inter vivos

§ - 1 General provisions

446

The proposed definition of this article is intended to replace Articles 755, 777 and 791 of the Civil Code.

It specifies that a gift is a contract and not an act; the contractual nature of the gift makes any special mention of acceptance unnecessary (a. 791 C.C.).

As the transfer of ownership is carried out through the exchange of consent, it is also unnecessary to retain Article 795 of the Civil Code which asserts that delivery is not required.

Also, the provisions of the Civil Code regarding the irrevocable nature of gifts are not retained, since they do not specifically apply to gifts.

Finally, the general principle of Article 754 C.C. has not been retained; it has become useless by reason of the contractual nature of the gift; moreover, it is incorrect since other means exist by which property can be disposed of by gratuitous title. These include stipulation in favour of another, gratuitous services and release of debts.

447

This article is intended to terminate the apparent contradiction between Article 755 and the first paragraph of Article 777 C.C. on the one hand, and the sixth paragraph of Article 777 C.C. on the other, since it clearly states that a gift may also consist of an obligation; this confirms present law, which is less explicit (509).

448

This article confirms jurisprudence which holds that payment for services rendered or under a stipulation does not constitute a gift for that amount. There will only be a gift for the amount in excess of the value of the services or of the charge (510).

Finally, this article eliminates the necessity for Article 774 C.C. regarding interposition of persons, which has already lost most of its meaning following the repeal of the prohibition of gifts between consorts (511).

449

This article deals with alienation by gratuitous title in any form other than that of a gift. Examples are sales at a token price, release of a debt, or stipulation by gratuitous title in favour of another.

Commentators had some doubts as to the validity of such concealed gifts (512). Jurisprudence admits their validity provided that, as to form, they adhere to the rules of their apparent nature, and as to substance, they adhere to the rules on gifts (513). This distinction is no longer necessary in the Draft where the rules on form are reduced to a strict minimum, i.e., the requirement of an authentic instrument solely for gifts of immoveable property. It will be up to the court to look into the real nature of the contract, as it does at present (514), and to decide whether or not it is a gift.

450

This article deals with the case of a person who renounces a right without appointing a beneficiary under the renunciation. An example would be the renunciation of a devolved right not yet acquired, such as renunciation of the benefits of an insurance policy, or the eventual rights of a person named as a substitute. This provision has the advantage of dispelling any ambiguity which might arise.

However, under the preceding article, renunciation with appointment of a beneficiary could, in some circumstances, amount to a gift (515).

451

Under existing law, the promise of a gift is traditionally considered incompatible with the solemn nature of a contract and with the requirements of dispossession. It seems to contradict the maxim "*donner et retenir ne vaut*" (516).

Nevertheless, the rule in the second paragraph is intended to avoid the injustice arising from situations such as that in which a parent makes a promise of a gift to make one of his children work, but never fulfils his promise. Naturally, it must be a clearly established promise which the prospective donee can prove so as to obtain reimbursement for expenses

incurred and the value of services rendered. This provision is based on the Ethiopian Civil Code (517), and on equity.

452

This article repeats the rule in the first paragraph of Article 763 C.C., specifying that this is a case of relative nullity (518).

453

This article incorporates the principles of Articles 303, 789 and 792 of the Civil Code. It was sought to have as many people as possible authorized to consent to gifts made to incapable persons.

454

This article substantially repeats the rule in Article 773 C.C. (519).

455

This article retains the substance of Article 758 of the Civil Code, but changes the drafting.

456

This article confirms existing law which recognizes the validity of a gift whose exigibility is delayed until the death of the donor (520). This is a gift *inter vivos* which immediately affects the patrimony of the donor (521).

In practice, the difference between the two situations can depend on the intention of the donor, and on other circumstances (522).

457

This article is based on the second part of Article 778 C.C. It makes no mention of "future property", an unclear concept which authors identify only as being the opposite of "present property" (523). This concept is made superfluous as a result of Article 447.

458

This article strays from Article 816 of the Civil Code which provides that there can be no revocation for inexecution of obligations unless provision was made for it in the agreement (524).

Exclusion of the rules relating to annuities and hypothecs is explained by the principle of Article 1907 C.C., which applies to all annuities, whether for life or not (525).

459

This article repeats the substance of Article 762 C.C. The second paragraph is deleted.

§ - 2 Obligations of the parties

460 and 461

These articles restate the rule at the end of the first paragraph of Article 796 of the Civil Code, whereby the donor is deemed to give the thing only in so far as it belongs to him. They amend the rules in the second paragraph of Article 796 and in Articles 799 and 2062 C.C. in order to lighten the obligations imposed by the Civil Code on the donor with respect to the donee.

The fact that a donor transfers the property as it is, without discharging the hypothecs or servitudes affecting it, has been recognized. Moreover, commentators recognize that there may be implicit exclusion of warranty in such a case (526). This, however, is a question of the donor's act, and might fall under Article 796 C.C., if that article were to be interpreted literally.

Therefore, it seemed preferable to make the donee liable, like the donor, for the debts and charges affecting the thing given, with the donor only warranting eviction for that which exceeds the value of the gift, as specified in Article 462.

On the other hand, the parties would of course be responsible for their personal acts following the gift, in accordance with the rules of civil responsibility.

462

The first paragraph of this article is an application of the preceding articles.

The second paragraph narrows the scope of the second paragraph of Article 796 C.C. In effect, the donee would be entitled to reimbursement for expenses incurred, only if the donor was aware of the defect of ownership that caused the eviction and did not reveal it at the time of the gift. The third paragraph of Article 796 C.C. has not been repeated, since it is obvious that the parties may stipulate an obligation of warranty under the principle of freedom of contract.

The third paragraph, based on German law (527), clarifies existing law. In fact, commentators recognize that the situation where an evicted donee has executed a charge must constitute an exception to the principle

of absence of warranty, but they do not agree on the extent of such a warranty (528).

The article adopts the solution proposed by Professor G. Brière, whereby the donee would benefit from a warranty only in so far as he sustains a loss (529).

463

This article is a result of absence of warranty. It does not follow the rule recognized with respect to sale and stated in Article 1506 C.C. The gratuitous nature of a gift seemed incompatible with compelling the donor to reveal all the weaknesses of the thing given.

If, however, the defect were likely to constitute a danger to the donee, the donor would be responsible if he did not reveal such defect, because he would be violating an elementary obligation of prudence.

464

This article lays down a rule in the donee's favour. It is based on a similar provision in the law on sale (530).

465

Although the Code does not regulate the donor's obligation to deliver, it is recognized that most of the rules concerning delivery in sales apply to gifts (531). This article formulates this obligation and is based on Articles 1491 to 1493 C.C.

466

This article is based on the rule in Article 1495 C.C., under which the buyer pays the costs of removal. It seemed logical, in effect, in view of the gratuitous nature of a gift, that the donee should pay the removal costs.

467

This article is also based on the rules pertaining to sale (532) and sets forth a suppletive rule which the parties may amend.

§ - 3 Conditions and charges

468

This article does not follow the general rule in Article 146, whereby any condition that is impossible or contrary to public order renders null the obligation which depends upon it.

It seemed preferable to adopt a rule similar to that in the third

paragraph of Article 760 C.C. concerning wills, and to consider such conditions unwritten, as in French law (533).

The proposed article puts an end to the difficulty of interpreting the second paragraph of Article 760 of the Civil Code. In effect, according to certain doctrine, if the gift does not really "depend" on the condition, it is not affected by the nullity of such condition, while if the condition is the determining reason for the gift, nullity of the condition entails nullity of the gift (534). This interpretation leads to preventing the gift from being annulled, but it is too often difficult to determine and specify the extent to which the gift depends on the condition. Hence this generalization.

469

This article repeats in substance Article 797 C.C.

470

This article reproduces the first paragraph of Article 798 C.C. It was not considered necessary to repeat the second paragraph of that article which lays down the general rule on abandonment of hypothecated immoveables. Abandonment cannot affect the legal relations between donor and donee, which are governed by the contract.

471

This article reproduces Article 801 C.C.

472

This article replaces Article 802 C.C., and refers to the Book on *Succession* (535) which amends Articles 743 and 744 C.C., providing that separation of patrimony takes place of right in favour of both the creditors of the deceased and those of the heir.

473

This article repeats the rule in the first paragraph of Article 784 C.C., simplifying the wording.

§ - 4 Gifts with a charge in favour of a third party

474

The text of this article is new, but in accordance with existing law. The general rules on stipulation in favour of another, contained in the Book on *Obligations*, apply to gifts accompanied by charges (536), subject to this subsection.

475

The first paragraph of this article is new law. It expresses a suppletive rule concerning the revertibility of the benefits of the cobeneficiaries. It is based on analogous rules proposed by the law on Property and the law on Annuities. The first has made provision for the revertibility of a usufruct in favour of the surviving beneficiary (537), while the second has consecrated jurisprudence by presuming life annuities to be revertible in favour of the surviving consort (538).

The second paragraph is new but is in accordance with existing law.

476

This article lays down a suppletive rule to provide for cases of revocation or lapse of the charge imposed on the donee.

The choice here was two-fold: either to apply the rule for stipulation in favour of another and have the donor benefit from revocation or lapse (539), or to apply the principle *donner et retenir ne vaut* and have the donee benefit from it.

The second solution was adopted on the basis of a similar rule applicable to substitutions (540).

§ - 5 Moveable property

477, 478 and 479

These articles repeat the principle of the transfer of ownership, laid down, with respect to sale, in Articles 383, 384 and 385.

§ - 6 Immoveable property

480

Under this article, the contract of a gift of an immoveable would be valid only if attested to by an authentic deed. This contract is thus a formalistic one, contrary to the rule on sale (541), whereby consent to sell an immoveable or a simple writing requires the parties to obtain an authentic deed of sale. If either party fails to do so, the other is entitled to obtain a judgment transferring the title.

481

This article is new; and also refers to the rules on sale, governing the transfer of ownership of immoveables.

Section II

Gifts made by marriage contracts

482

This article specifies that gifts *inter vivos* made in marriage contracts are subject to the usual rules governing gifts. Under Article 489, which thus goes further than Article 817 C.C., these rules may not be set aside.

By subjecting gifts *inter vivos* made in marriage contracts to the usual rules on gifts, it is hoped to reduce the difficulties arising from the interpretation to be made of gifts of future property (542). No exception could make such gifts valid in a marriage contract if they could not be made in an ordinary contract.

The gift would be valid, then, if the donor undertook to acquire property, thus constituting himself the debtor of the donee (543) under the definition in Article 447. A gift made with a term would be valid under Article 456, even when the term is the death of the donor.

If, however, the donor intended to give the property left by him upon his death, the gift cannot be considered to be made *inter vivos*. The same applies when the donor's obligation is not sufficient to dispossess him. Under Article 486, such gifts may nevertheless be valid in a marriage contract as gifts *mortis causa*.

483

This article amends the rule in Article 822 C.C.

The rule concerning gifts is thus similar to that relating to the beginning of the matrimonial regime (544).

484

This article differs from Articles 818 and 820 of the Civil Code by severely restricting the number of persons who may make gifts in a marriage contract.

Gifts by persons other than consorts or future consorts seem increasingly rare. Moreover, gifts made by ascendants or other persons tend to complicate the changes in matrimonial agreements permitted under Article 1266 of the Civil Code.

Obviously, ascendants or other relatives may always benefit consorts by an ordinary contract of gift or by will.

It was considered necessary to specify consorts or future consorts

because the gift may be made either in the initial marriage contract or in any change in such contract.

485

This article replaces Article 819 C.C. and limits the number of donees to the consorts themselves and their children, whether illegitimate, issue of a previous marriage, children yet unborn or those who are issue of their marriage, in the case of a change in the matrimonial agreement.

"Children" includes adopted children and legitimated children, but here this term is restricted to children in the first degree; this is in line with the definition given in the Book on *Persons* (a. 30). In effect, the purpose is to prevent such difficulties as those caused by the interpretation of the word "child" in Article 980 C.C. (545).

486

This article repeats the principle of Article 758 C.C. which provides, as an exception to the rules on gifts and wills, that gifts *mortis causa* may be made in marriage contracts.

The second paragraph replaces the complex rules in Articles 824 to 826 of the Civil Code.

Thus, the rules relating to legacies would determine to what extent a gift *mortis causa* may be accompanied by a condition or by the donee's obligation to discharge the donor's debts.

487

This article, which is new law, runs counter to Article 823 of the Civil Code and is intended to satisfy practitioners opposed to any person definitely committing himself with respect to all his property in contemplation of death.

It is thus hoped to end the problems arising from the irrevocability of contractual institutions, particularly in cases of a second marriage (546).

Moreover, the Book on *Succession* provides that divorce and separation as to bed and board cause the spouses to lose their reciprocal rights to inherit (547). The surviving spouse could benefit no further from dispositions in contemplation of death made revocable in his favour before divorce or separation as to bed and board (548).

488

This provision is new law and is contrary to the presumption of irrevocability in the second paragraph of Article 823 of the Civil Code. The principle of the presumption of revocability stems logically from

Article 486 which subjects gifts *mortis causa* made in a marriage contract to the rules governing wills.

It seemed that the presumption of irrevocability is no longer in keeping with the fact that marriages have become less durable than when the Code was written in 1866, nor is it in keeping with the mutability of matrimonial regimes. Moreover, Article 208 of the Civil Code, which allows judges to annul gifts *mortis causa* in cases of divorce or of separation as to bed and board, definitely weakens the presumption of irrevocability.

The second paragraph applies existing law, but is restricted to gifts *mortis causa* or contractual institutions stipulated as irrevocable (549).

Neither the Code nor the Draft imposes any limit on the right to change a marriage contract under Article 1265 C.C. Gifts stipulated as irrevocable could thus be modified except for the consent to be obtained, if necessary, under Article 76 of the Book on *The Family* (the second paragraph of Article 1265 C.C.). The change in the regime would make the clause of irrevocability disappear if the parties so desired.

489

This article renders the preceding provisions imperative. It seeks to avoid any possible infringement by way of Article 1257 C.C.

CHAPTER III

LEASE OF THINGS

The new text of the chapter on the lease and hire of things has formed part of the Civil Code since 1973, and the modifications made in the Draft are minor and generally are made only to be consistent with the Draft Civil Code as a whole.

The commentaries on each of the articles appeared on the occasion of the presentation to the Legislature of the amendments to the Civil Code on this subject, namely Articles 1600 to 1665 C.C. We need mention here only the amendments made since 1973 and those required to insert this contract in the Draft Code.

496

The second paragraph generalizes the lessor's responsibility, without distinguishing whether he has or is presumed to have knowledge of hidden defects.

499

The second paragraph of Article 1609 C.C. has been removed because it simply repeated the general rules on obligations.

500

In effect, this article repeats Article 254, which is the general right of a contracting party in case of inexecution.

502

This article modifies Article 1612 C.C. by allowing the lessee to withhold rent rather than to compel him to seek judicial authorization when the lessor does not make the repairs and improvements to which he is bound.

Articles 1613, 1614 and 1616 C.C. are unnecessary, in view of the modification of Article 1612 C.C.

511

This article restates the second and third paragraphs of Article 1623 C.C.

515

This is an example of consistency with the new vocabulary of the Draft: the term "fortuitous event" suffices because it is synonymous with "irresistible force."

516

This article makes applicable the general rule of obligations in case of inexecution (a. 254).

519

This re-arrangement tends to make the text clearer.

523

The last paragraph generalizes the right to have the lease resiliated. The disturbed lessee may obtain the resiliation of the lease, as the lessor may obtain the resiliation of the lease of the author of the disturbance.

524

This article substantially repeats Article 1636 C.C.

534

This article proposes a slight modification to the text so as to emphasize that the lessee has a right to the recourses provided in the article, as is stated in the general theory of obligations.

549 and 550

The text is amended to emphasize the right of the lessor rather than the option he has of exercising the rights provided in the article.

551

The paragraphs have been replaced by a more general formula which emphasizes protection of the lessee.

CHAPTER IV

AFFREIGHTMENT

Section I

General provisions

574

The definition contained in this article confirms the principle that every means of transportation used for navigation must be considered as a ship.

575

This article sanctions a doctrine well established.

576

This is the complement of the preceding article.

577

This article establishes that general average arises out of either a sacrifice or an extraordinary expense, and the ship, the freight and the cargo contribute in general average rateably according to their respective value.

The second paragraph of this article confirms that the contribution in

general average is generally fixed by experts in this field according to their practice, in this case, that of the Great Lakes or the Rules of York and Antwerp in the case of international transport. It is to be noted that such practices are periodically revised by general average adjusters in order to keep pace with the changes required by the commerce.

Section II

The contract of affreightment

§ - 1 Provisions applicable to all contracts of affreightment

578

This article implies that a ship could be the subject of several simultaneous contracts of affreightment, for instance voyage-charter.

579

If hire has not been determined, arbitrators or the courts will determine it by taking into account the market at the time.

580

Unless the contract contains a stipulation to the contrary, the charterer may sublet the ship.

§ - 2 Kinds of affreightment

I - Charter by demise

581

The lessee, in the case of a charter by demise, becomes the "owner" during the period of the contract; he has the navigation and management of the ship as well as its employment and agency.

582

Because of problems particular to this trade, the obligation of the lessor regarding the delivery of the vessel is to exercise diligence. In the event that the parties agree as to a delay, such delay is usually expressed in terms of a period of time during which the delivery of the vessel must take place.

583

The purpose of this article is to avoid difficulties of proof; the period of one year reflects a commercial practice well established.

584

This article provides a rule which is the consequence of Article 581.

585

This article is the counterpart of Article 583; the lessee must see that the ship is well maintained during the period of the contract.

586

In general, the lessee hires and pays the crew. Also, he must properly insure the ship against the usual risks under contracts of insurance "hull and machinery" and "civil liability" (protection and indemnity).

587

The lessee must return the vessel in the same conditions as received, except for fair wear and tear; this is a question of fact. In practice, the lessee must comply with the requirements of the classification society of the vessel.

II - Time-charter

588 and 589

Contrary to a charter by demise, the lessor under a time-charter retains the navigation and management of the ship through the agency of his crew. The lessee gives instructions concerning the employment and agency of the ship.

590

The obligation of the lessor exists at the time of delivery of the vessel to the lessee.

The second paragraph of this article is the corollary of Article 582.

591

The purpose of this article is to impose upon the lessor the obligation to take a stand with respect to the instructions given by the lessee.

592

The first paragraph describes the general obligations of the lessee.

The second paragraph of the article stipulates that the lessee becomes

the owner of the fuel on board at the time of delivery of the vessel by the lessor.

593

This is the consequence of Article 591.

Such would be the case in the event that the lessee orders the vessel to proceed to an unsafe port.

594

If the ship is at the port of loading or discharge and may load or discharge, as the case may be, hire is payable even if the engines of the vessel do not work during the period of loading or discharge, provided it does not affect such operations.

595

This article repeats the principle of Articles 582 and 590.

III - Voyage-charter

596

Voyage-charter is totally different from the other kinds of affreightment. A voyage-charter does not concern the ship, but the loading capacity of the ship for the carriage of a cargo agreed upon.

597

This article deals with the three fundamental obligations of the lessor under a voyage-charter.

598

This article confirms the fundamental distinction which exists between a voyage-charter and a time-charter or a charter by demise.

599

The lessor under a voyage-charter is a carrier; accordingly, he assumes all the obligations which are imposed on a carrier of goods. In the absence of express provisions, the chapter on carriage of goods by water would apply (a. 643 and following).

600

The lessee must pay dead freight if he fails to execute the obligations prescribed by this article.

Unless the contract stipulates otherwise, the lessor or his agent must load, stow and discharge the cargo.

601

This is the counterpart of Article 579.

602

In the case of freight paid in advance, unless the contract stipulates otherwise, the lessee has a right of action for its recovery.

603

The lessee must pay the freight even if the cargo is delivered in a damaged condition, partly or totally, without prejudice, of course, to his right of action against the lessor for the damages.

The second paragraph of this article confirms the principle that if the ship cannot, for reasons not imputable to the lessor, complete the voyage agreed upon and if the cargo is delivered at another place than that stipulated in the contract, the lessee must nevertheless pay a reasonable compensation calculated in relation to the part of the voyage which has been completed.

604

This article gives the lessor a right of retention on the cargo.

The second paragraph of this article reproduces the "*Cesser*" clause, usually found in voyage-charter.

CHAPTER V

TRANSPORT

Section I

Provisions applicable to all means of transport

§ - 1 General provisions

605

The proposed definition underlines the purpose of contracts of transport. When the parties basically agree to change the physical location of property or of persons, this operation must be characterized as a contract of transport.

This broad definition allows inclusion of both gratuitous transport and transport for hire.

However broad the definition may be, a distinction may still be made between contracts of transport and closely related legal situations with an element of "displacement" as in the case of sale of goods to be delivered.

It will be up to the courts to decide as to the application of the proposed rules to unconventional means of transport such as ski-lifts, escalators, moving sidewalks and so forth (550). They have already been tempted to assimilate ski-lift contracts to carriage contracts (551).

Other situations are sometimes more difficult to analyse. For instance, should elevator transportation of lessees in a building be considered accessory to the contract of lease? If so, the rules governing contracts of lease will govern relations between the lessees and the owner of the building. There certainly cannot be any question of a contract of transport. The elevator is a convenience provided with the apartment, but the main object of the contract is the useful and peaceable enjoyment of the premises rented (552).

Towing contracts are equally difficult to limit and they are characterized according to the circumstances of each case. If the towing is done under a principal contract of enterprise under which the garage owner undertakes to make repairs, there is no contract of transport, since the main object of the whole operation is not the transportation of a thing, but rather its repair.

These few examples of mixed legal situations show the need to define the contract of transport, so that the appropriate rules can be applied.

606

While this article breaks with a legal tradition (553), it is intended to match the legal rule to existing realities. Since the Civil Code principally regulates the transport of goods, it was normal for most commentators to view the transport of persons as an extra-contractual situation governed by Articles 1053 and following of the Civil Code. This was the stand taken by jurisprudence at the end of the last century (554), encouraged by some commentators (555).

Contemporary doctrine (556), however, and more particularly the study of comparative legislation (557), show without any doubt that, to the extent that it presupposes an offer and an acceptance on the part of two persons having juridical capacity to contract, transport of persons must also be considered as a true contract. Some jurisprudence has begun to recognize this contractual aspect (558).

607

Since it has been deemed advisable to consider all agreements involving transport as contractual, gratuitous transport must also be considered in this light.

A gratuitous carrier of persons and of things would assume only, as a general rule, an obligation of prudence and diligence. Yet, this article maintains an important exception in the case of death or injury caused the passenger: it has been advisable to apply to gratuitous carriers the same obligations and responsibilities which exist in cases of hired transport. Accordingly, death or any injury suffered by a gratuitous passenger subjects such carrier to the presumption of liability and modes of exoneration provided for in Article 614.

608

It was thought suitable to provide for an exception to the carriers' obligations respecting delays. Proof of damage resulting from delay would bring into play a simple presumption of fault, from which the carrier would be able to exonerate himself by establishing absence of fault. He would not be required to prove a specific fact, such as fortuitous event.

609

Since professional transport is viewed as a public service, it was thought best to reproduce the substance of Article 1673 of the Civil Code.

610

In this article, the only limitation of or exemption from liability with respect to transport of persons or goods (merchandise or luggage) acknowledged is that allowed and established by legislation or by competent administrative authority. Neither contracting party should free himself from liability for damage to persons or to goods; this has almost become a social imperative. Public order could not tolerate such contractual freedom in this matter.

It is recommended in particular that the provincial legislature, and especially the Québec Transport Commission, adopt regulations to determine limitations or to provide exemptions from liability in all sectors of provincial transport, even for carriers not currently subject to such regulations. This would avoid repeated amendments to the Civil Code and would entrust a permanent, specialized body with the task of taking into account such variables as the cost of living.

To the extent that the competent body, namely the Québec Transport Commission, establishes regulations to govern conditions for transport, to

stipulate when a carrier may be exempted and to determine the limits of liability applicable to each means of transport, varying according to the object transported, any violation of such regulations would cause a carrier's liability to become unlimited. Any carrier would be free to increase his liability by stipulating a higher liability limit than that established by the regulations; establishment of a limit lower than that required, however, would have no effect and would result in unlimited liability for the carrier, as would stipulation of any means of exemption from liability not provided for in the regulations.

611

This article determines every client's general obligations both before and during transport. Any passenger who is not the contracting client becomes the beneficiary of a stipulation in favour of another (a. 85); his recourses are determined by the contract which contains a stipulation in his favour.

§ - 2 Provisions respecting transport of persons

612

The provisions applicable to the transport of persons specify first the duration of the contract.

It is traditionally accepted that the contract does not necessarily come into force when the vehicle is put in motion. In most cases, the contract is in force before that time.

In this respect, there was a choice, on the technical level, of being either specific or general. In the first case, every category of transport could have been arranged in a series, and the starting point of the contract specified in each case. However, because this matter is above all a question of fact, varying with each type of transport, it was believed advisable to leave it to jurisprudence to determine in each type the beginning and the end of the contract, thereby determining the duration of the carrier's liability. The circumstances are in fact too varied to allow any rigid text to prevent the necessary role of jurisprudence in this field. Although for most conventional means of transport, the carrier should normally be liable from the time the passenger gets into the vehicle until he disembarks, still, by reason of the nature of the contract and the category of passenger, jurisprudence has made carriers of school children contractually liable for longer periods. In *Schmidt v. Maurice* (559), it was stated, as an interpretation of Section 44 of the *Highway Code* (560), that the carrier

must ensure the safety of users of a vehicle "*en-deçà de l'embarquement et au-delà du débarquement*". This example aptly illustrates that it is preferable to allow the courts to evaluate the merits of each case according to the means of transport used and the conditions under which that transport is carried out.

613

This article clearly establishes that any onerous carrier would assume an obligation of result, that is, an obligation to convey the passenger to his destination. Unlike gratuitous carriers, who are only held to exercise reasonable diligence (561) - subject, however, to Article 614 in cases of injury to a passenger - no onerous carrier may exonerate himself from liability unless he proves that he was prevented by a fortuitous event from executing his obligation.

614

This article is new law and provides a regime of responsibility with regard to carriers of persons. After analysing foreign legislation, considering that, in the extracontractual field, third parties benefit under Section 3 of the *Highway Victims Indemnity Act* (562) from a presumption of liability (563) and having studied economic and technical data on transport, it was decided to impose an obligation of result on carriers for hire or gratuitous carriers of persons.

Carriers for hire thus agree to convey persons from one point to another; whether the transport is onerous or gratuitous, the carrier must convey his passenger to his destination safe and sound. This is the specific result that carriers must achieve. Consequently, for the presumption of liability to apply, the victim or his legal representatives would have to prove damage only. The defendant may rebut this presumption only by proving a foreign cause - proof that he acted with prudence and diligence would not suffice. Moreover, if the cause of the event which resulted in the damage were not discovered, the carrier would remain liable.

It is also important to note that no carrier would be exonerated unless the fortuitous event were external to the vehicle. He would be liable for any damage resulting from a defect in such vehicle, even a defect due to negligence on the part of the manufacturer or to faulty maintenance or repairs by a third party. He would likewise be held liable for damages

caused by his own state of health or that of the driver or of another employee. It seems only fair that, here, the carrier should assume all risks directly connected with the means of transport.

615

This article lays down an obvious rule. A carrier would be held liable, however, when a passenger establishes that the loss or damage results from the fault of such carrier or of one of his employees.

616

This article establishes a presumption of liability as regards luggage and effects left in the carrier's hands, and allows him the normal means of defence. However, a carrier would always be responsible in cases of simple theft or armed robbery of a passenger's luggage or effects; the same would hold true as regards transport of goods (564).

617

Successive transport means transport by several carriers. Combined transport involves successive transport, but with more than one means of transport. This article, which determines who is liable and against whom an action must be taken, reproduces in substance paragraph 2 of Article 30 of the Warsaw Convention.

§ - 3 Provisions respecting transport of goods

618

This article, like Article 612 on transport of passengers, establishes the duration of the contract. Under the Draft, transport begins when the goods are taken in hand by the carrier. Here again, the transport period does not begin when the vehicle used is put in motion. It certainly appears normal for the contract to begin when the carrier obtains legal custody of the thing to be transported, whether he picks up the goods from the shipper or whether the shipper delivers the goods to the carrier at the shipping point. In any event, regardless of how the goods are received, the rules governing transport will apply even if the carrier temporarily stores the goods after he receives them until they are shipped. Consequently, the Draft follows Article 1674 of the Civil Code.

Obviously, a contract of transport terminates upon delivery of the goods. The time of delivery, not to be confused with the arrival of the goods at their destination, is not clearly determined. It can vary according to circumstances (565). It is clear, however, that if the consignee controls the unloading of the goods and damage occurs during this operation, the

carrier cannot be held liable since the contract of transport ends when the consignee takes over the unloading.

Questions relating specifically to the obligation of delivery are governed by other Draft provisions (566).

619

This article defines a bill of lading whose main purpose is to prove the existence of a contract of transport. Bills of lading are considered a means of making proof and also obviously constitute a receipt for the goods.

The nature of contracts of transport was examined. Should such agreements become solemn contracts, or should the principle of freedom to use any form for the contract be maintained? After discussion, it was concluded that formalities imposed by the Civil Code might render contractual relationships in transport of goods altogether too rigid. In most cases, the Transport Commission requires that the carrier issue a bill of lading containing certain particulars. Form R.T. 200 repeats existing articles of the Civil Code, and bills of lading must at least refer to this form, the contents of which are an integral part of contracts of transport.

620

This article requires a minimum of particulars. The competent authority prescribing a bill of lading would not be able to eliminate the particulars mentioned in this article, because of their basic nature, but it obviously would be able to amplify or add items.

The Draft does not require specific mention of the freight. It appeared, in effect, that commercial usage sometimes made such a requirement impossible. Since rates vary according to many complex classifications, they are often calculated *a posteriori*. The freight must at least be determinable at the time of transport.

621

This article does not change existing law. It merely indicates the probative value of bills of lading. Among other things, bills of lading note the apparent condition and the quantity of the goods given to the carrier. In the event of damage, the bill of lading will make it easier to determine the legal position of both parties. Considering that the particulars contained in this provision constitute facts, it is normal to allow production of evidence to the contrary.

622

This article considers successive carriers as successors by particular title of the first carrier, and obliges them to assume all the obligations arising from the contract, while granting them the resulting rights as well. By instituting this fiction, this article avoids the numerous problems likely to arise when a transfer of goods occurs.

623

The question was raised as to the suppletive rule that should be adopted on the subject of negotiability. Should a bill of lading be presumed by definition to be a negotiable title like any other negotiable instrument? After enquiring into usage in surface transport and having found that most transport title documents are not negotiable, it was decided to bring the legal rule into line with the economic realities of transport. In that perspective, the basic rule is that no bill of lading may be negotiated, unless otherwise agreed, or unless laws or regulations provide for negotiability.

Although, in principle, bills of lading are not negotiable instruments, they may nevertheless be transferred according to the usual rules, a fact which this text need not specify.

624

Bills of lading are negotiated like any negotiable instruments.

625

This article is intended to protect carriers.

626

This article is in agreement with commercial practices.

627

This article, in agreement with usage and often inserted in some types of bills of lading, is intended to compel the carrier to advise the consignee that the goods have arrived. The purpose of the notice mentioned here is to advise the consignee and to give him a reasonable period within which to collect the goods that the carrier has not delivered to his place of business. Either the terms of the contract indicated that the goods would be picked up at the point of arrival, or there was nobody at the place of business when the goods were delivered, or else the consignee requested that the goods be delivered to another place.

It can consequently be asserted that the contract of transport ends

only when the time limit for removal of the goods provided for in the notice expires. The nature of the carrier's obligations will therefore vary (567).

628

This article is very useful when a consignee has disappeared or when, for some reason, he does not take delivery of a shipment. It seems normal in these cases for the carrier to request the shipper for instructions, since without these he cannot validly carry out his contract of transport.

The shipper has a fixed period of time in which to give his instructions. This prevents any arbitrariness or uncertainty which might be entailed by a merely "reasonable" period. Speed and safety are of the essence of transport.

The period is reasonable however, because in any case, the expenses of preserving the goods during this period would be assumed by the shipper.

If, in spite of all these formalities, the shipper does not answer, the carrier can, from then on, dispose of the goods and be paid from the proceeds of the sale, under the *Unclaimed Goods Sales Act* (568). It is suggested, moreover, that this legislation be revised in order to adapt it to current needs.

In emergencies, carriers could act immediately, without having to ask the cocontracting party for instructions.

629

Contracts of transport obviously terminate when the carrier cannot execute his obligation to deliver (a. 628) or after the consignee has been given a reasonable period of time in which to remove the goods (a. 627).

The contract of transport then becomes a contract of deposit which entails less onerous obligations for the carrier. To dispel any doubts, the Draft specifies that the expenses of safekeeping will be assumed by the shipper, subject to his recourse in damages against the consignee.

The rule proposed in this article is in accord with general practice (e.g. railway bills of lading).

630

Without prejudicing the shipper's own rights, this article vests the consignee with all recourses provided for cases of inexecution of contracts, and so averts needlessly complex and hazardous recourse to such procedures as stipulation in favour of another or mandate. It goes without

saying that consignees retain their recourse against shippers under the general law.

631

This article determines the nature and intensity of the principal obligation of hired carriers of goods. Like carriers of persons (a. 614), carriers of goods are subject to an obligation of result which consists in conveying the goods to their destination.

All damage to the goods during transport would burden the carrier with a presumption of liability which he could rebut only by proving an external cause, either a fortuitous event, fault of the cocontracting party, or a defect in the goods. The article is thus consistent with the rules laid down in Article 1675 of the Civil Code. No carrier could release himself simply by proving absence of fault.

This article, which renders carriers liable even in cases of armed robbery (569), makes Canadian law in this matter standard. The Act of God in Common Law is more limited in scope than the concepts of fortuitous event, irresistible force and act of a third party. The carriers themselves, because of the competitive market, suggested that the Civil Code be amended to this effect.

632

This article changes the substance of Article 1680 of the Civil Code on several points.

First, receipt of the goods without reservation does not carry with it an automatic waiver of the right of action. Considering the complexity and quantity of goods transported today, it was thought suitable to give consignees or shippers sufficient time to examine the apparent condition of the merchandise shipped. The period of ninety days allowed for giving notice of a claim was very favourably received both by carriers and by their clients.

The proposed ninety-day limit applies to both apparent and hidden damage. Significantly, this period begins when the merchandise is received and not when the holder becomes aware of the damage. Here again, an attempt was made to eliminate problems created by difficulties of proof or by the concept of reasonable delay. Definite rules are generally the best technique to ensure the safety and speed needed for transport contracts, even if they may prove arbitrary in marginal cases.

If written notice is not given within the period provided, consignees or shippers forfeit their right of action. This forfeiture is in accordance

with the laws and practices of many States (570). This is an application of Article 260.

633

This article specifies who is liable for damages, within the limits, obviously, of the preceding article. It thus disposes of the difficulties which can arise in practice when goods have been transported by several carriers.

Provision had to be made to the effect that the recourses can be brought against the cocontracting party. By adding that action can also be taken against the last carrier, however, it was sought to acknowledge a custom prevalent in Québec. This alternative can prove highly useful when the shipment in question comes into the province from outside.

Moreover, it was only natural to reserve the defendant's recourse against the person who really caused the damage.

However, if the carrier was chosen by the shipper, any recourse should rightly be brought against the cocontracting party only.

634

This article, of new law, is largely based on international legislation (571). It explains in simple terms the shipper's obligation with respect to the goods he is sending.

The article regulates both the contractual and extracontractual regimes of liability. Obviously, on the contractual level, carriers are provided with a recourse against shippers, but the article adds that any third party, such as another shipper or a passer-by, can proceed against the shipper responsible for the damage caused. For example, if a shipper sends explosives without declaring what they are and an accident happens, the carrier will sue him contractually, whereas the owner of other damaged goods will be able to proceed against the shipper on an extracontractual basis. If he cannot sue the person who really caused the damage because that person is unknown, this other shipper may also proceed against the carrier contractually. Moreover, in the example given, any third party who suffers damage because he was on the premises when the disaster occurred will naturally have a recourse against the shipper at fault.

Any prejudice suffered due to omissions or inaccuracies in a shipper's declaration renders him liable, even if the omission or inaccuracy is not a fault. Shippers, therefore, are obliged to warrant the accuracy of the information relating to the shipment.

635

This article embodies a well-established practice. It is however necessary that the carrier accept the declaration. The carrier can then require payment of an additional rate.

636

This article does not change the substance of existing law (a. 1677 C.C.), but amends its drafting. The second paragraph of Article 1677 C.C. was removed as unnecessary. Under the general rule of this article, no carrier is ever responsible for damage to any goods of exceptional value, or for the loss of such goods, unless the shipper or the passenger has revealed the nature of the goods to him, and made a declaration of value.

637

On occasion, a shipper may intentionally give inaccurate particulars as to the nature of the goods transported, so as to benefit from a reduced rate. On the other hand, he may, in his declaration, fraudulently raise the value of the goods far above their real worth in order to obtain a higher indemnity.

In all these cases, it was deemed advisable to penalize shippers by preventing them from claiming compensation from the carrier.

Moreover, the second paragraph sets forth a simple presumption which makes the shipper responsible for establishing that the falsification of the statement was unintentional.

638

This article does not change existing law (a. 1679 C.C.). Although, on the one hand, it implicitly recognizes the obligation of the other party to pay the transportation expenses, it also effectively protects carriers from risks of non-payment.

The freight is often set by competent authority (572). Rates vary according to many factors such as the distance to be covered, and the nature, weight and quantity of the goods. Expenses and accessory costs, such as parking, tolls and so on are added to the freight.

There are two main methods for paying the freight. The shipment can be made post paid (carriage free) or for payment on delivery (carriage forward). If the freight is to be paid at the destination, carriers can exercise their right to retain the goods to secure payment, and this right may of course be set up against any person who requests delivery.

639

This article is new law. Any carrier who fails to follow the shipper's instructions must necessarily assume all risks of non-payment; this rule is self-evident. To protect himself, the carrier would have to furnish proof that he unsuccessfully demanded payment from the consignee.

640

Obviously, no carrier is bound by any shipper's inaccurate declarations in determining costs. This rule applies even where the inaccuracy is unintentional.

Section II

Special provisions respecting transport by water

§ - 1 Transport of persons

641

In transport of persons by water, the carrier's obligations begin before the trip and continue throughout the journey. The carrier's liability is increased because he is transporting passengers and not goods, and because of the need to ensure the safety of such persons.

Both Articles 641 and 642 are substantially taken from Articles 3 and 4 of the Brussels International Convention on Carriage of Passengers by Sea, dated April 29, 1961 (573).

642

The first paragraph of this article establishes the carriers' liability on the basis of demonstrated fault. It was thought necessary to adopt a different system which, unlike the one which generally prevails in the law on transport, would maintain a presumption of liability, because life aboard ship allows a passenger extensive freedom of action, so that his own activity may often be the sole cause of the damage. This "hotel" aspect of sea voyages requires the adoption, as a basic rule, of an obligation of means on the part of the carrier.

It is different when the damage occurs as a result of a major sea disaster. Since in this situation it is very difficult to establish the carrier's fault, the burden of proof incumbent on the passenger must be mitigated; the passenger need only establish the damage, the accident and the causal connection. Together these elements would create a presumption of

liability from which carriers could free themselves only by establishing a fortuitous event or a fault of the victim. These rules are easily understood considering that maritime disasters arise more from the "navigation" aspect of the ship, contrary to the situation covered in the first paragraph.

§ - 2 Transport of goods

643

This article restates in substance paragraph 2 of Article V of the *Rules relating to bills of lading* (574). The reason for making Québec rules on transport of goods by water consistent with the 1924 Brussels Convention and the *Carriage of Goods by Water Act* are given in the introduction. The only basic difference remaining is that the Draft provisions apply, whether or not a bill of lading has been issued; Article 645 is commented upon in this respect.

644

This article restates the last sentence of the second paragraph of Article V of the *Rules relating to Bills of Lading.*

645

This article restates in substance Article I of the *Rules relating to Bills of Lading*, although it must be noted that the definition of a "contract of carriage" breaks with a principle consecrated by the 1924 Brussels Convention and applied to inter-provincial transport by the Canadian Parliament; according to this principle, rules concerning transport of goods by water apply only where the contract is covered by a bill of lading or other document constituting a title. Under current legislation and positive law, where no bill of lading is involved, a suit must be governed on the basis of the general law, suppletory in character, with particular reference to Articles 1672 and following and Articles 2407 and following C.C. It was deemed advisable to make the specific provisions on transport by water generally applicable, whether or not a bill of lading is issued.

From the viewpoint of comparative law, it is interesting to note that the French law of June 18, 1966 applies regardless of whether or not a bill of lading is issued (575).

For purposes of consistency, the expression "goods" replaces "merchandise".

646

This article restates in substance Article II of the *Rules relating to Bills of Lading.*

647

This article substantially reproduces Section 3 of the *Carriage of Goods by Water Act.*

648

This article corresponds to Article III.1. of the *Rules relating to Bills of Lading.*

649

This article corresponds to Article III.2. of the *Rules relating to Bills of Lading.*

650

This article corresponds to Article III.3. and 4. of the *Rules relating to Bills of Lading.*

651

This article corresponds to Article III.7. of the *Rules relating to Bills of Lading.*

652

This article corresponds to Article III.5. of the *Rules relating to Bills of Lading.*

653

This article reproduces in substance the first 3 paragraphs of Article III.6. of the *Rules relating to Bills of Lading.*

654

This article corresponds to the last paragraph of Article III.6. of the *Rules relating to Bills of Lading.*

655

This article corresponds to Article III.8. of the *Rules relating to Bills of Lading.*

656

This article corresponds to Article IV.1. of the *Rules relating to Bills of Lading.*

657

This article reproduces in substance Article IV.2. of the *Rules relating to Bills of Lading.*

The only major amendment to the form is seen in the new version of the fourth paragraph. The text does not mention the expression "Act of God" which is foreign to civil law concepts, but which is equivalent to a fortuitous event. It was therefore thought preferable to substitute the expression: "act constituting an event not imputable to the carrier".

658

This article corresponds to Article IV.3. of the *Rules relating to Bills of Lading.*

659

This article corresponds to Article IV.4. of the *Rules relating to Bills of Lading.*

660

This article corresponds to Article IV.5. of the *Rules relating to Bills of Lading.*

661

This article corresponds to Article IV.6. of the *Rules relating to Bills of Lading.*

662

This article reproduces in substance Article V.1. of the *Rules relating to Bills of Lading.*

663

The first paragraph of Article 61 reproduces Article VI.1. of the *Rules relating to Bills of Lading*; the second paragraph contains the principle found in Section 5 of the Carriage of Goods by Water Act.

The Protocol of signature of the 1924 Brussels Convention provides that any State may expressly reserve the right "to apply Article VI insofar as the National Coasting trade is concerned to all classes of goods, without taking account of the restriction set out in the last paragraph of that Article" (576). Although Canada did not ratify this Convention, it did adopt the international provisions governing internal transport, and availed itself of the reserve stipulated in the Protocol by providing in Section 5 of the Act respecting the carriage of goods by water that "Article VI of the Rules ... has effect as though that Article referred to goods of any

class instead of to particular goods and as though the proviso to the second paragraph of the said Article were omitted" (577).

664

This article corresponds to Section 6 of the *Carriage of Goods by Water Act.*

665

This article corresponds to Article VII of the *Rules relating to Bills of Lading.*

666

This article corresponds to Article VIII of the *Rules relating to Bills of Lading.*

CHAPTER VI

CONTRACT OF EMPLOYMENT

667

The definition in this article allows a clearer distinction to be made between the contract of employment and the contract of enterprise; the line of demarcation, sometimes so thin, between these two legal operations has given rise to problems both in jurisprudence and among doctrinal authors. If this definition, when correlated with that of the contract of enterprise, does not have the effect of regulating all cases with precision, it will nevertheless serve as a guide to the courts which heretofore have had, as their only legislative criterion, no more than Article 1666 of the Civil Code which, at one and the same time, embraced employment, enterprise and transport.

It will be observed that the term "lease and hire of services" is henceforth dispensed with to make way for a notion closer to contemporary reality.

The definition points up the main feature of the contract of employment: the master-servant relationship characterized by the power of control of the employer over the employee, with respect both to the end sought and to the means used; it matters little whether this right is in fact exercised by the person who is vested with it. Moreover, the definition specifies the essentially temporary nature of the contract of employment, and thus maintains the content of the first paragraph of Article 1667 of the Civil Code.

668

This article establishes a new principle of law; henceforth, if work is done for another, a presumption is created of the existence of a contract of employment, in respect of which the remuneration may be settled by the court should this prove necessary. This useful notion was developed by jurisprudence, at times through the use of the concept of quasi-contracts; the problem arises particularly in family relations. It goes without saying that this presumption is equally valid for other legal operations and will accordingly, from time to time, be repeated with regard to other contracts. Consequently, to rebut this relative presumption, the employer must establish the liberal intention of the employee.

669

The Draft takes into consideration all the legal phenomena which, directly or indirectly, affect the individual contract of employment. It was necessary to put an end to the unrealistic dichotomy between the individual contract and the collective agreement supported by many persons. Rather than as a phenomenon developed outside the Civil Code, all labour legislation would accordingly appear as an extension of the rules which the Code itself embodies. This, then is one case provided for in Article 71. Thus, the Draft recognizes that sometimes the content of the contract may be established by the terms of a collective agreement whose provisions secure greater advantages for the employee.

670

This article states that the contract of employment, like any agreement involving successive performance, is concluded for a fixed or an indeterminate period.

671

The Draft brings the law into line with present jurisprudence; the solutions developed by the courts are realistic. The employer has the obligation to take reasonable measures to prevent risk of damage. He must, in this regard, entrust his employee with tasks which do not exceed his competence and acquired experience (578). He must see that his directions as to the manner of carrying out the work are observed by the employee (579) and he must ensure that equipment and tools are in a good state of repair (580).

It was not thought proper to specify the intensity of the employer's contractual obligation; in view of the diversity of tasks and the responsibilities which they imply, it should be left to the courts to decide,

according to the circumstances of each case, whether the obligation is one of means or of result.

The adoption of this disposition will make possible a contractual recourse in the case of failure to execute the obligation therein imposed.

It was moreover appropriate to retain the provisions of the *Workmen's Compensation Act*.

672

It appeared reasonable to provide maternity leave in all contracts of employment.

673

This article reaffirms the principle of tacit renewal, permitted by the second paragraph of Article 1667 of the Civil Code and retained by jurisprudence in matters of employment (581).

This provision, modelled on that governing the lease of things, embodies the following elements: in the first place, tacit renewal can only be conceived as applicable to an initial contract with a fixed term; next, the renewal is repetitive, and the renewed contract itself becomes one for a fixed period, which eliminates the necessity of terminating it unilaterally by notice; lastly, it will be observed that the article does not require as a condition that the services have continued for an arbitrary fixed period of eight days.

674 and 675

These articles govern the termination of contracts of employment of indeterminate term; to this effect, Article 674 provides for the necessity of a notice of termination the details of which are spelled out in Article 675.

Article 675 generalizes the rule of Article 1668 of the Civil Code, which was restricted to certain categories of employees. Like the jurisprudence which has already extended the application of this provision (582), the article embraces all employment in which the indeterminate character of the term is a feature. The terms of the engagement (so much per week, and so forth), and not simply the dates of payment, will allow calculation of the period of notice. This latter criterion, even though guiding the search for terms and conditions, cannot, in itself, given its accidental character, govern the fixing of the period of notice; such is the rule as expressed in the second paragraph of the article. Apart from this, the article contains a specific provision regarding contracts for piece work and those by the hour, or by the day; in any such case, if the work has

continued regularly for six months, the parties would have a right to one week's notice.

The last paragraph of Article 675 provides for an extension of the period of notice, but goes no further than to sanction the established weight of jurisprudence (583). This rule of extended periods of notice has developed principally with respect to management staff, where the nature and responsability of the functions and the relative mobility in the sector are factors also taken into account by the courts (584). The theory of a reasonable notice gives the judge broad discretionary powers, but this is easily reconciled with the exceptional nature of certain situations in which equitable considerations must rule. This paragraph must be cautiously applied, since it tempers the general rules of the Draft which are applicable to most contracts of employment. Circumstances can be imagined, however, in which even outside the sphere of management staff, the application of this rule might occasionally be allowed.

676

This article, containing new law, meets real needs; only the employee has the right to obtain a subjective assessment of his work and behaviour from his employer.

677

This article reproduces the provisions of the first and second paragraphs of Article 1668 of the Civil Code, except as regards physical incapacity to work, which is one of the hypotheses to which Article 679 may apply.

678

The individual contract of employment subsists through total or partial changes in the legal condition of the enterprise; the successor succeeds to the rights and obligations of his predecessor. This provision is generally inspired by Section 36 of the Labour Code.

679

This article, which benefits both parties, again consecrates a rule of jurisprudence (585); in order to allow flexibility in the jurisprudence, any enumeration of just causes for resiliating the contract had to be avoided; the courts, which use as their principal standard the seriousness of the fault (586), must have complete discretion in this domain. The text makes clear, moreover, that resiliation for cause eliminates the need for giving a notice of termination, even in contracts of indeterminate duration.

680

It appeared reasonable to prohibit any renunciation of the indemnity arising from the situations envisaged by this article; the indemnity is, in effect, a vital element, like salary, and consequently is to be treated as an essential component of this contract. This article is one of public order.

681

This article, which restricts the traditional principle of contractual freedom, sanctions a rule developed entirely by the courts. The validity of the non-competition clause, however, is subordinated to requirements imposed by the equally necessary principle of freedom of employment: limitation as to time, as to place, and as to the kind of activity (587); the economic future of the contracting party must be protected (588); the fourth condition obliges the employer to establish the legitimacy of his interest throughout the period in which the stipulation is made operative.

It will be noted that, following the rules in effect in the Common Law provinces, the employer would have to prove the validity of the non-competition clause.

682

This article is a corollary of the article which precedes it, and requires no particular comment.

683

This article renders the two preceding articles imperative so as to ensure true effectiveness.

CHAPTER VII

CONTRACT OF ENTERPRISE

Section I

General provisions

684

This article defines the contract of enterprise. It highlights the chief characteristics of this contract, providing the criteria which allow it to be distinguished from similar agreements such as the individual contract of employment, the contract for services and even that of mandate. This

distinction has several practical repercussions. While the employer is liable toward third parties for damages caused by his employees in exercising their functions, this is not the case for the client since, under a contract of enterprise, the employer chooses whatever method of execution suits him. A client may resiliate a contract of enterprise, which an employer may not do when there is a contract of employment. Furthermore, the client, unlike the employer, has, in principle, no obligation of security to the contractor; he cannot be held liable for any accident which happens during the execution of the contract.

The word "contractor" has a wide interpretation. To conform to contemporary reality, the article no longer speaks of the "owner" of the work but rather of the "client". It will above all be noted that the definition insists particularly on two elements. On the one hand, the contractor's degree of autonomy is fundamental; indeed, it is generally admitted that the nature of the services rendered by the contractor leads to the supposition that he enjoys quasi-absolute independence, as regards his client, in the manner in which he executes his enterprise. Even if the client sets and determines the result aimed at by the contract and retains the right during its execution to see to it that the work complies with the contract, the contractor nonetheless assumes control of the enterprise and decides how the work is to be executed. In this regard, the contractor, in principle, has a choice as to the materials, manpower and more generally, the techniques used (589). In law, this independence and autonomy translate into the concept of absence of subordination. This notion has long been consecrated by the jurisprudence, and is determined, moreover, in relation to very specific principles (590).

On the other hand, the article retains the provision that the contract of enterprise aims at the carrying out of work. The contractor, within the meaning of this article, not only commits himself to take reasonable measures to achieve an end, but also assumes an obligation of result (591).

All formalism on the subject of enterprise has been abandoned, since such contracts, especially when they concern immoveables, take several forms. This merely consecrates jurisprudential progress. The price need not be fixed when the contract is concluded (592).

Finally, it should be recalled that professionals in the building field are not necessarily "contractors" except to the extent that an agreement reveals a true contract of enterprise.

685

Given the marked growth in residential construction, the purpose of this article is to subject the entire building industry to the rules of the contract of enterprise. It would be unrealistic not to apply to this sector the provisions of the Draft, especially Articles 687 to 689. This rule sanctions a development in both jurisprudence (593) and doctrine (594).

686

The contractor's principal obligation is to execute the work which he has promised, as regards both quality and quantity.

This is an obligation of result and the contractor can be freed from it only when he proves that the inexecution is caused by a fortuitous event or some action by the client.

Section II

Special provisions

687, 688 and 689

These articles are new law. Following analysis and consultation, it seemed advisable to partially change the ruling on liability provided in Articles 1688 and 1689 C.C.

It was first of all necessary to examine the problem of the solidary liability incurred by contractors, architects and engineers when work perishes or is likely to do so because of a relatively serious defect. On the one hand, jurisprudence has included engineers in the category of persons subject to the application of Article 1688 C.C. (595). On the other hand, our courts have broadly interpreted the word "building" to include all major works (596). Moreover, the mere threat of destruction allows the client to avail himself of Article 1688 C.C. (597).

Solidarity of debtors, which is rarely encountered in foreign law (598), seems at first unfair. Actually, nothing is more natural than that each be required to assume liability for his errors and that the decision in the client's favour be pronounced only against the person who caused the damage. The system of responsibility is relaxed in the case of enterprise by allowing each party to invoke his ordinary means of defence. Solidarity is retained only in the case where more than one debtor finds himself unable to rebut the liability imposed by Article 687.

Also, intervention by the client is common in certain types of enterprise. Here too, it is convenient to retain the fault or act of the client as a means of freeing the contractor, the architect or the engineer; indeed,

interference by the client during the execution deprives the contract of enterprise of its specific character (a. 688 3rd paragraph).

If, on the one hand, it is natural to alter the system provided in Article 1688 C.C., it appears, on the other hand, desirable that the expert, considering his participation, answer for his professional errors. Thus the interpretation which holds that a specialist assumes responsibility only if he is engaged by the client has not been retained. In this way, an architect who participated only by selling plans prepared in advance is answerable for the damage resulting from any error in the documents which he has supplied.

It will also be noted that the Draft makes no distinction as to the nature or the gravity of the defect in the work. The client will benefit from the rules of Articles 687, 688 and 689 whether what is involved is simply poor workmanship or an apparent defect, an ordinary latent defect or a defect affecting the stability and solidity of the work; this rule differs from Article 1688 C.C. As provided in the same article, specialists will also be responsible for damage resulting from the unfavourable nature of the ground.

As the law now stands, whether there be an apparent defect, a latent defect or an Article 1688 C.C. defect, the client has only to prove the existence of the defect in order to compel the contractor to set up his means of defence. In brief, the responsibility stipulated in Article 687 only slightly modifies the present rules of evidence.

It should also be recalled that these rules apply to moveables as well as to immoveables, save the exception provided in Article 688.

Since Articles 687, 688 and 689 constitute major departures from general law, it was thought advisable to amend Article 1688 C.C. by reducing the period of the legal warranty to three years. This reduction is all the more justified since it is proposed that all categories of defects be submitted to the same system.

These articles, which should be read in correlation with Article 690, are of public order, at least with respect to immoveables. Any incompatible clause would be without effect, especially clauses excluding or limiting liability. This imperative character, acknowledged under Article 1688 C.C., results from the necessity of ensuring public safety with respect to the building of immoveables. An exception is provided for temporary work.

690

Considering the particular nature of delivery in contracts of enterprise, it was thought advisable to dissociate delivery from acceptance as

regards both moveables and immoveables. The client is free to examine the object over a period of ninety days following material delivery or receipt of the work in order to seek out any apparent defects or poor workmanship. Any defect must be declared during this period under penalty of forfeiture of the client's right to demand the resumption or completion of the defective work.

As far as latent defects are concerned, they must be declared within the same period of time, but this period begins upon discovery of the defects. In this case, jurisprudence has long held that receipt does not constitute grounds for dismissing the client's action (599).

The period of ninety days may not be shortened by the parties although they may agree to a longer period.

To sum up the entire system, this article should be read in connection with Articles 687, 688 and 689. It will be seen that the period of legal liability is limited to three years (a. 687). It must then be determined whether the defect is an apparent or a latent one, regardless of whether or not the defect affects the stability of the immoveable.

In the case of an apparent defect, the client must, under penalty of forfeiture of his right, notify his cocontractor within ninety days following receipt of the work. Once he has taken this step, his right exists and is subject to the rules of prescription.

In the case of any latent defect, the client must, under penalty of forfeiture, declare such defect within ninety days after discovery. If he wishes to avail himself of Articles 687, 688 and 689, however, this defect must appear or be discovered within the three-year period for the legal guarantee provided in Article 687, since the builder, the architect and the engineer are freed from all damage resulting from a defect which occurs after that period.

691

This article terminates the uncertainty as to the right of a successor by particular title to take direct action against the party who contracted with his predecessor (600). The contractor is responsible not only to the client but also to anyone who later purchases the work, subject to the application of Article 687 which limits liability to a maximum period of three years and which begins with the receipt of the work by the original client.

692

This article ensures the protection of the client.

693

This article consecrates the rules of jurisprudence according to which the client may not invoke the exception of inexecution (a. 256) when the work has been substantially completed (601). The contractor then has a right to the price, and it is up to the client to demand that it be lowered or to claim back the cost of minor repairs.

This article provides a rule of new law. Since receipt does not entail acceptance (a. 690), the client may, after examining the object, retain a part proportional to the cost of the contract if he discovers minor defects or poor workmanship, or notices that secondary work has not been executed.

It sometimes happens, especially as regards immoveables, that while the contractor has substantially executed the work, he has not entirely executed his contract at the time of delivery. This rule of new law sanctions certain practices.

694

This article reproduces in a simplified form the provisions of Article 1687 of the Civil Code.

Section III

Termination of the contract

695

This article upholds the client's right to resiliate the contract unilaterally at will, a principle already maintained by Article 1691 of the Civil Code. True, this article departs from the concept of the binding effect of the contract, but this right should be retained because of the very nature of the contract of enterprise which is sometimes concluded *intuitu personae* or may entail heavy, indeed unnecessary, burdens for the client. The effect of this particular rule is mitigated in Article 1691 of the Civil Code, by the client's obligation to reimburse the contractor for actual expenditures (remuneration of personnel employed, purchase of materials, immobilization of materials, and so forth) and to pay him the value of the work completed at the time of the resiliation. Article 1691 of the Civil Code specifies moreover that the client must also indemnify the contractor

in certain circumstances. Although French jurisprudence allows the contractor to demand payment for loss of earnings, our courts, especially since the case of *Tidewater Shipbuilders Ltd v. Société Napthes Transports*, (602) have given this rule a relatively limited application. Indeed, the contractor may demand payment for loss of earnings only for contracts he has had to refuse because of this (603); he may not, under the terms of this jurisprudence, receive any anticipated profits from the resiliated agreement.

Equity justifies the change in this jurisprudential rule. The article specifies that the profits lost consist of the benefits of which the contractor is deprived, taking all circumstances into account. The contractor will thus no longer have his rights sacrificed by the exercise of the right to resiliate, which has been retained in the interest of the client. The client is henceforth treated like any debtor who has not executed his obligation.

It should also be noted that the right to resiliate is no longer limited to the case of contract work. Indeed, since under the proposed rule the contractor will in no way suffer damage because of the exercise of this right, it seems natural to generalize the application of the article to all forms of contracts of enterprise.

Moreover, this article retains the client's right of recourse to an injunction to prevent the contractor from continuing the work after resiliation of the contract (604). The client may always exercise his right to resiliate without having to justify his decision. Like Article 1691 C.C., the article is suppletive (605).

696

The first paragraph of this article is limited to substantially reproducing the first paragraph of Article 1692 of the Civil Code. In principle, the contract of enterprise is not concluded *intuitu personae*. It seemed unnecessary to repeat the end of the first paragraph of Article 1692 which lays down a general rule on contracts.

The remainder of this article combines the second paragraph of Article 1692 and Article 1693 of the Civil Code. It takes into consideration the case in which the personal qualities of the contractor constitute a principal consideration of the contract: in this case, the contract may be resiliated for the future if the client so wishes. This is why the proposed text speaks of resiliation rather than resolution.

The third paragraph of this article does not change the basic sense of Article 1693 C.C. This rule is imperative when the client resiliates the contract as provided for in the second paragraph.

If partial execution of the work is of definite advantage to the client, he must pay the contractor's successors for the value of the work and the material in proportion to the overall price which had been agreed upon. The indemnification is not the same as under Article 695.

697

This article repeats the rule of Article 1694 C.C.

CHAPTER VIII

CONTRACT FOR SERVICES

Section I

General provisions

698 and 699

These articles outline the characteristic traits of every contract for services: absence of subordination between the parties, and an obligation of means on the part of the one who provides the services.

A person who provides professional, technical or other services is legally independent of his client as regards execution of the contract. The specialized, technical nature of the work requested renders this autonomy natural and necessary. In most cases, the client would be unable to propose or supervise one work method in preference to another.

A contract for services is also characterized by the particular intensity of the obligation with which the professional or technician is entrusted: legally speaking, the expert need not accomplish any set objective; his obligation is merely to use reasonable means to attain the objective.

Although the contracting party has a choice as to the means for executing the contract, he must nevertheless exercise this freedom within the framework of the rules and usages of his discipline. His choice of means is not absolute: he must make his choice from among generally accepted methods, that is, from among those reasonable means a prudent administrator would use in the circumstances (606).

If the debtor of services has an obligation of diligence, this legal situation naturally makes the client responsible for proving not only that he has suffered damage but also that the professional or technician was at fault. The professional or technician will be held liable only to the extent

that he is proven to have failed in the duties imposed by the requirements and demands of his discipline.

Thus, it will be noted that a contract for services differs basically from a contract of employment through the absence of subordination; it also differs from a contract of enterprise because it only carries an obligation of means. In fact, a contract of individual employment presupposes the employer's right to supervise his employee, whereas a contract of enterprise, even if the contractor remains legally autonomous as regards execution, is characterized by an obligation of result, under the terms of which the contractor must in fact complete a task unless prevented from so doing by fortuitous event, irresistible force or fault of the cocontractor.

700

This article reveals the relatively personal nature of the contract for services. Presumably, a person who renders highly technical services and has only an obligation of means, is chosen by the client above all for his personal qualifications. His reputation, talent and aptitudes are important factors in entering into such a contract.

Therefore, the personalized nature of relations prevents the professional or the technician having another person execute the agreement in his stead.

Even if the contract or usage allows him to substitute a third party, the professional or technician remains responsible to the client for execution.

Nevertheless, there are situations in which a client will be forced by circumstances to make a double or triple contract; this can occur when a patient under a physician's care is hospitalized; he may be bound by both a medical contract and a contract with the hospital.

701

This article specifies the manner of determining remuneration. Consideration will be given to the value of the services when the contract does not state a precise remuneration. Payment is frequently established according to the obligatory rates applicable to certain professions. Such rates, then, apply to the agreement through Article 71.

702

This article in no way affects the agreement between the parties on how the remuneration will be paid.

Section II

Termination of the contract

703

This article emphasizes once again the personalized nature of the contractual relations in this agreement. Either party may end it of right provided the resiliation is reasonably justified: the expression "for just cause" does not refer to a fortuitous event. The circumstances will be left to the appreciation of the court. However, resiliation must occur under such circumstances as will cause the least serious possible damage to the cocontracting party; otherwise resiliation of the contract will give rise to the right to damages. For example, a physician or a lawyer who repudiates a contract must advise his client, and the client will thus be able to take the necessary steps. In an emergency, a professional who exercises his right of resiliation must see that the services he was rendering are provided by another.

704

This article requires no comment.

705

This article corresponds to Article 697 covering the contract of enterprise which in turn is based on Article 1694 of the Civil Code.

706

The rules proposed in this article are the natural consequences of premature termination of the contract. In the event of death, the successors will become the debtors or creditors of the obligations envisaged in the article.

CHAPTER IX

MANDATE

Section I

General provisions

707

It was considered desirable to define mandate in order to avoid, in so far as is possible, the indecisiveness which has marked the doctrinal and jurisprudential analyses of Article 1701 of the Civil Code. Considering that representation constitutes the very essence of mandate, the object of the contract could only be the performance of juridical acts and not of material ones, except incidentally. In this way, a clear distinction is made between contracts of mandate, of employment, of services and of enterprise, and likewise between mandate, which is a contract, and management of the business of another, which is a quasi-contract.

708

The principle of gratuitousness, established in the Civil Code of 1866, is the exception today. It was therefore considered appropriate to reverse it, and to make mandate a contract by onerous title, gratuitous only by exception.

The second paragraph simply incorporates the solutions already accepted in the case of remunerated mandate.

709

Overly strict formalism could become troublesome in the business world but it is reasonable to require that a mandate to execute certain contracts requiring particular forms should itself be drafted in the same form. This is the case, for example, of a mandate to sign a marriage contract or a deed of hypothec or gift of immoveables. This text is useful in that it dispels lingering doubts.

710

It was hoped to avoid what has become a classical confusion in the use of well-known expressions such as "general mandates", "mandates set out in general terms", "mandates set out in express terms" or "special mandates". Of course, these provisions have been coordinated with the new provisions on the administration of the property of others.

Articles 1704 and 1705 of the Civil Code have been omitted since the provisions are derived from the general theory on obligations.

711

This article reproduces the prohibition set forth in Article 1706 C.C. and extends it to all contracts, while also specifying that it is subject to relative nullity.

712 and 713

These articles are intended to end the debate on the problem of the legality of the double mandate. It appeared that double mandate should not be prohibited if each mandator is aware of it; nevertheless, it was fitting in each case to ensure the impartiality of the mandatary. Accordingly, a mandatary is required to have acted in good faith and in the best interest of the mandators. In wording these articles, it was thought necessary to emphasize the mandatary's obligation to advise the mandators (subject to well established commercial practices) and to distinguish clearly between two different situations: that in which the mandator was aware of the double mandate and that in which he was not. While in the first case, the mandator who suffers damage because of negligence on the part of the mandatary may obtain damages, in the second case, the court may, according to its assessment of the circumstances, pronounce the nullity of the act performed by the mandatary.

Section II

Obligations of the mandatary

§ - 1 Obligations of the mandatary towards the mandator

714

This article repeats the substance of the first paragraph of Article 1710 C.C., which gives rise to a simple obligation of means.

It is specified, nonetheless, that the mandatary must exercise his skill and care in the interest of the mandator.

715

This article differs from the interpretation generally given to the second paragraph of Article 1710 C.C. Actually, the liability of the gratuitous mandatary should be understood *in concreto* and not *in abstracto*, so that the mandatary who is less careful as regards his mandate

than as regards his own business is fully responsible and the court could in no way reduce the amount of damages (607). Article 715, on the other hand, adopts a provision similar to that of the second paragraph of Article 1045 C.C. which holds that the fault of the gratuitous mandator, like that of the business manager, must be understood *in abstracto*. Although the court may consider this fault clearly established, it may not condemn the gratuitous mandatary to make full restitution for the damage; it can reduce the amount of damages, contrary to the principle of civil liability which states that once fault has been established, restitution must be made in full.

716

This article substantially reproduces Article 1711 of the Civil Code.

717

Article 1714 C.C. is repeated here, adding a useful complement.

718

This article which mainly repeats Article 1713 C.C., obliges the mandatary to render an account at the end of the mandate. The parties may still, in accordance with Article 531 of the Book on *Property*, request a summary account during the mandate. The mandatory also has a right of retention when the object of his mandate is a specific thing.

719

This article amends the second paragraph of Article 1709 C.C., by extending the obligation of the mandatary to all emergency circumstances and not only to cases of extinction of the mandate by reason of the death of the mandator.

720

This article, by which it is intended to protect third parties and the mandator, repeats Article 1756 of the Civil Code.

§ - 2 Obligations of the mandatary towards third parties

721

This article reproduces Article 1715 C.C., but does away with the two exceptions mentioned therein, namely factors and masters of ships. The case of the factor or commission agent is governed by the general rules on mandate. When it is undisclosed, Articles 722 and 724 apply and when it

is disclosed, Articles 731 and 735 apply. The case of a master of a ship is governed by the rules on marine transport.

722

This article reproduces Article 1716 of the Civil Code.

723

This article reproduces Article 1717 of the Civil Code.

724

This article is to the same effect as Article 1719 of the Civil Code.

725

This article is to the same effect as Article 1718 of the Civil Code.

726

This article establishes the validity of the disclosure of authority and also allows secret mandates for a time. Nevertheless, contracting third parties should not be allowed to be harmed by the situation.

Section III

Obligations of mandators

§ - 1 Obligations of the mandator towards the mandatary

727

This article is to the same effect as Article 1720 of the Civil Code.

728

This article is to the same effect as Article 1722 of the Civil Code. It prohibits the mandatary from claiming excessive costs, since by assuming them, he becomes negligent.

729

This article is to the same effect as Article 1724 of the Civil Code.

730

This article reiterates Article 1725 C.C. The mandatary retains his right to indemnification for losses caused by the execution of his mandate. This seemed even more precise than the description in Article 2000 Fr. C.C. of losses sustained by reason of management.

§ - 2 Obligations of the mandator towards third parties

731

This article is to the same effect as Article 1727 of the Civil Code, with the omission, however, of the exception relative to factors.

732

This article determines the outcome of acts concluded with third parties by the person substituted for the mandatary. These acts do not bind the mandator to the third party if the substitution has been prohibited and the acts, therefore unauthorized, have caused him damage.

733

This article is to the same effect as Articles 1728 and 1729 C.C., a consequence of Article 719 (a. 1709, par. 2 C.C.). Termination of the mandate should harm neither the mandator, nor the third parties with whom the mandatary has dealt.

734

This article is to the same effect as Article 1730 of the Civil Code.

735

This article repeats Article 1731 of the Civil Code without, however, making reference to Article 99 (a. 1054 C.C.).

736

This article, which is new law, is to give the undisclosed mandator a recourse against third parties, just as they have one against him by virtue of Article 731. It also seeks to avoid any prejudice to third parties resulting from the decision of the mandator to remain undisclosed. It was also important to protect third parties exposed to a double recourse: that of the mandatary acting in his own name, and that of the mandator who could reveal his quality and demand execution.

This theory of the undisclosed principal is acknowledged in Common Law: Bowstead states that it has a commercial justification and others agree that it avoids duplication of proceedings (608). This solution had also been considered by Mtre T.-L. Bergeron, in a study devoted to the undisclosed mandate (609).

Section IV

Termination of mandate

737

This article substantially reproduces Article 1755 of the Civil Code.

738

This article reproduces Article 1757 of the Civil Code.

739

This article is the consequence of the possibility of the mandator's revoking the mandate despite its onerous character. It is only fair that the mandatary not suffer any damage in the event of revocation without cause.

740

This article reproduces Article 1758 of the Civil Code almost textually.

741

This article repeats the rule of Article 1759 of the Civil Code, and extends it to the remunerated mandatary.

742

Any mandatary who causes the mandator to suffer damage through an unjustified renunciation must pay the damages. If his mandate is by gratuitous title, however, such damages may be reduced, as stated in Article 715.

743

This article is an application of the principle set forth in Article 728.

744

This article is to the same effect as Article 1760 of the Civil Code.

745

This article is to the same effect as Article 1761 of the Civil Code.

CHAPTER X

PARTNERSHIPS

Section I

Partnerships in general

§ - 1 General provisions

746

Strictly speaking, Article 1830 C.C. does not define partnership but rather limits itself to naming two essential elements of partnership; these are common profit and the contribution of the partners.

The concept of partnership is broadened to include any group of persons associated for the pursuit of common profit or benefit, whether lucrative or not. It was also thought desirable to apply identical rules to all partnerships as constituted, except the special rules on limited partnerships and associations.

The proposed definition requires that at least two persons contract to create the partnership. This is existing law.

747

This article amends existing legislation. Civil partnerships would be governed by the same rules as commercial partnerships.

This would entail repeal of Article 1854 C.C.

748

This article confers legal personality upon partnerships. This goes farther than the Code of Civil Procedure (610) which does not always grant the benefits of personality to partnerships.

749

This article substantially reproduces Article 1835 C.C.

750

This provision clearly authorizes any partnership or company to become part of another partnership.

This article presumes amendment to Section 31 of the *Companies Act* (611).

§ - 2 Obligations and rights of the partners towards each other and towards the partnership

751

Apart from two exceptions, this article substantially reproduces Articles 1831 and 1848 of the Civil Code. It was not thought desirable to reproduce the prohibition against "lion's share" partnerships. This prohibition implicitly results from the definition; it would be sufficient to stipulate a minute share in the profits to render such prohibition illusory. Moreover, the article presumes that assets, profits and losses are divided in the same proportion, saving provisions to the contrary.

752

This article essentially retains the present rules of the first paragraph of Article 1839 and Article 1840 C.C. Since the partnership has a distinct personality and its own patrimony, there is no need to provide that the interest on the pledged contribution will run of right; the general rules on default will apply to this as to all other cases.

753

This article repeats the second paragraph of Article 1839 and Article 1846 C.C. Since the partnership and the partners are distinct persons, each with individual property, the rules found elsewhere in the Code will be followed in the assessment of the legal relations of interested persons vis-à-vis the property brought into the partnership, according to whether or not the contribution constitutes an alienation.

754

This article goes beyond Article 1842 C.C., to which it corresponds. Not only may a partner not deprive the partnership of what he promises to do for it or contribute to it, but he also will have to turn over to the partnership any profits he has realized, for himself or for a third party, in violation of his obligations.

This recourse is in addition to all other recourses in general law.

755

This article substantially duplicates Article 1847 C.C.

756

This article repeats Article 1853 of the Civil Code, although the wording is slightly changed.

757

This article is intended to replace Articles 1849, 1850, 1851 and 1852 C.C. governing in detail the relations between the partners.

Indeed, it seemed sufficient to lay down in the first paragraph a suppletive rule for the conduct of partnerships.

Any agreement to alter the contract or to discontinue the business must however be unanimous.

The question arose as to whether unanimity should be required in all cases and the present conclusion was arrived at because no dissident partner should be allowed to interfere with the business of the partnership on his own. He may withdraw, if the contract allows this, or request dissolution for a legitimate reason, under Article 772.

758

This article applies the beginning of Article 1884 of the Civil Code to all partnerships. Indeed, a similarity exists between an ordinary partner excluded from management and a special partner who, by definition, does not manage the partnership.

The second paragraph requires that the right to seek information be exercised in such a way as not to hinder the partnership and the other partners.

§ - 3 Relations of the partnership and the partners with third parties

759

This article amends Articles 1854 and 1855 C.C. and the most essential aspects of Article 1856 of the Civil Code. First of all, it establishes that with respect to third parties in good faith, each partner is an agent of the partnership for all things done in the ordinary course of business. Exclusion of any partner from the management cannot be detrimental to a third party who is not aware of it. Here the Draft, like the Civil Code, applies the rules governing mandate to partnerships.

This article goes farther than Article 1855 of the Civil Code, which restricts the liability of the partnership to cases where the partnership authorized the act either expresssly or by implication. Under the terms of this article, the presumption of authorization is always irrebuttable when the ordinary business of the partnership is involved.

It was not thought necessary to reproduce the second part of Article 1855 C.C., first of all because henceforth the partners would incur only a subsidiary liability for the debts of the partnership, and secondly because at the end of Article 1855 C.C. unjust enrichment is provided for, and this is dealt with elsewhere in the Draft.

760

This article reproduces Article 1867 C.C. with the coordinating clarification to the effect that the partnership is primarily, and the partners only subsidiarily, liable. The article adds that third parties may invoke not only the means of defence they have against the partnership, but also those which they may have against the partners personally, such as compensation. This provision is also found in Article 736 on the *Contract of Mandate*, in respect of the right of action of the undisclosed mandator.

761

This article derogates from the present law as set out in Articles 1854 and 1865 of the Civil Code. It extends solidary liability of the partners as it presently exists only in commercial partnerships to civil partnerships. This liability is always subsidiary, however, and only arises when the partnership does not have sufficient property to meet the debts of the creditors of the partnership. In brief, these creditors must discuss the property of the partnership before attacking the partners' personal property. Nothing, however, prevents the creditors from instituting proceedings against the partnership and the partners at the same time and taking appropriate conclusions against the latter.

At the end of the article, it is specified that no partner is held for debts incurred before his entry into the partnership or after his withdrawal, subject to the following article, and on condition that the partner's withdrawal has been published in conformity with Article 749.

762

This article substantially reproduces Article 1869 C.C. It was not thought necessary to mention nominal partners, since they are already included among other persons who give reason to believe that they are partners.

763

This article is identical in substance to Article 1868 C.C.

§ - 4 Termination of partnerships

764

This article departs from Article 1892 C.C. which gives a longer list of cases where partnership ends automatically, of right, compelling those partners who are able to continue business to institute liquidation proceedings, which often bring about unnecessary losses, and to form another partnership to continue the business of the old one.

The Draft retains only four reasons for the termination of right of a partnership, under the rules governing legal persons: upon expiry of the term, accomplishment of the partnership's object, and the fact that its object is illegal, or impossible to attain, a judgment terminating it and bankruptcy of the partnership.

In these cases, the partnership is liquidated as provided for in the last paragraph of the article.

Nevertheless, in the two first cases referred to in this article, dissolution can be avoided if the partners continue business after expiry of the period agreed upon or if they pursue objects other than those which have become unattainable or illegal.

765

In the two cases provided for in this article, the continued partnership is presumed to continue for an indeterminate period, thereby making it possible for each partner to withdraw following a three-month notice, in accordance with Article 771.

766

This article provides that no partnership ends simply because the number of partners is changed or one person is subtituted for another as a partner except in cases where only one partner would remain.

It should be recalled that, under Article 757, such changes require unanimity of the partners.

767

This article combines the causes of dissolution provided in sub-paragraphs 5, 6 and 7 of the first paragraph of Article 1892 C.C., and in the last paragraph of that article, which deals with seizure of a partner's share. Added to these are the cases of withdrawal and expulsion of a partner, provided for in Articles 771 and 772.

It is not always in the interest of the withdrawing partner or of his successors to necessarily wind up the partnership. It often happens that a partner's share has greater value if there is no immediate liquidation; at a forced sale, property is commonly sold at its lowest price.

This article constitutes a means whereby, in all the cases here provided for, the share of any partner who ceases to be a member of the partnership can be liquidated without putting an end to the partnership itself. Article 1894 C.C. already stipulates that a partnership is continued if one partner dies. The Draft also provides that a partnership may continue if a partner leaves and whenever one or several partners cease to belong to the partnership.

768

This article is new law. It establishes that the parties must diligently determine the value of the share belonging to the withdrawing partner.

769

It is suggested that continuation of the partnership and payment of the withdrawing partner's share may be achieved by evaluating such share, either by mutual agreement between the interested parties or, failing such agreement, by authority of the court.

770

The judgment obliges the other partners, who have agreed to continue the partnership, to pay the amount established.

The second paragraph of this article allows the court to postpone difficult or practically impossible assessment of contingent assets or liabilities, such as in the case of an action for damages or a bad debt.

771

This article includes the provisions of Articles 1833 and 1895 of the Civil Code.

772

The sixth paragraph of Article 1892 C.C. provides that if one of the partners is interdicted, the partnership ends; the Draft seeks to eliminate the inconvenience of such a rule. This article similarly repeats the cases referred to in Article 1896 C.C. In all cases, dissolution can generally be avoided by allowing the remaining partners to request expulsion of the impugned partner instead.

773

This article is new law.

774

This article is substantially the same as Article 1897 C.C.

775

This article reproduces the principle of the rule in the first paragraph of Article 1900 C.C. and extends it to all causes of dissolution.

The five exceptions in Article 1900 C.C. are deleted. The first, because the law and usage mentioned there will always retain their effect whether they are referred to or not; the second, because in the case cited, the third party cannot be in good faith, or even be harmed; the third and fourth, because the third party cannot be in good faith; finally, the fifth is removed because, by virtue of the principles previously set out, no person who is not or is no longer a partner may be held liable for the debts of the partnership unless such person has implied by word or deed that he was a partner.

776

From Article 1898 C.C., this article retains only the principle of sharing of net assets.

If the partners do not agree, there will be a liquidation on the terms of the following article.

Article 1899 C.C. becomes unnecessary. Given the personality of the partnership, its property must first be directed to paying its creditors; partners' creditors may seize their shares which are assessed after deducting the debts of the partnership. Moreover, there is no reason to maintain that particular creditors of the partners be preferred to the

creditors of the partnership with regard to the particular property of any partner. The property of the partner and his share in the partnership constitute his patrimony and the common pledge of all his creditors (612).

777

This article repeats Article 41 of the Book on *Persons* which maintains the partnership's legal personality for the purposes of liquidation; this allows the liquidator to act on behalf of the partnership to recover assets and permits the creditors to institute proceedings against the partnership itself. This is not an innovation, since jurisprudence holds that partnerships exist for the purposes of liquidation (613).

Section II

Limited partnerships

778

This article completes Article 747 by specifying that the rules of the foregoing section apply to limited partnerships, subject to the special rules which follow in Section II. It perpetuates the distinction made in the Civil Code between limited partnerships and other partnerships.

779

This article is based partly on Articles 1872 and 1873 C.C. It has been deemed preferable to discontinue the use of the word *gérant* in the French version to designate a general partner and to replace that word by the word *commandité*.

780

This article is new law. When limited partnership is not mentioned, the second paragraph creates an irrebuttable presumption that the partnership in question is ordinary.

781

This is not a defect in the name of such a partnership but only of the use of this name without the indication required in a particular deed. The sanction applies only to this act which is deemed to be that of an ordinary partnership.

782

Registration required by this article, which could be made in accordance with the *Companies and Partnerships Declaration Act*, removes the need to reproduce Articles 1875, 1876, 1877, 1878 and 1879 C.C.

783

Here a considerable change is made to existing law. Article 1872 C.C. requires that a special partner's contribution be "cash payments". Article 783 sets out that this contribution may consist of some form of property or even of services. A major reservation will be brought into Article 787 which prevents special partners from interfering in the management of the partnership and thus from dealing with third parties (615).

The new legislation will make limited partnerships much more useful and will be more in keeping with that of other provinces (616) without endangering the interests of third parties.

784

This article substantially reproduces Article 1882 C.C. However, the present rule is strengthened by the fact that the special partner's contribution becomes an indistinguishable part of the actual patrimony of the partnership and thus of the common pledge of its creditors.

Contributions by special partners are not loans and as such do not bear interest. Special partners may withdraw only their share of the profits. It is permissible to stipulate that in the division of profits, calculation of the share of a special partner takes the form of interest.

785

This article is substantially the same as Article 1883 C.C.

786

This article, like Article 1873 C.C., limits the liability of a special partner to the contribution furnished or agreed upon, except, obviously, for cases where he loses this privilege and assumes the ordinary responsibility of a partner.

787

This article reproduces part of Article 1884 C.C.

In virtue of the principle laid down in Article 758, any special partner may examine the progress of the partnership's business.

788

This article substantially reproduces the second part of Article 1884 C.C., which renders any special partner who does any business with third parties liable for the partnership's debts. This liability, however, is restricted to the acts of the special partner. Article 1884 C.C. made no distinction and the inevitable conclusion is that by doing one individual act a special partner became liable for all the debts of the partnership, past, present and future.

By the terms of the proposed article, it will be up to the court to decide, according to the number and importance of his acts, whether a special partner is to be held liable in the same manner as a general partner. This provision is taken from the Article 28 of the *Loi sur les sociétés commerciales* of the French *Code de Commerce.*

It must not be forgotten that when a special partner is said to be liable for the debts of the partnership, he is liable only in a subsidiary fashion, as is an ordinary partner. This flows generally from the fact that the ordinary rules governing partnerships apply to limited partnerships.

789

Further to a 1925 amendment (617), Article 1880 C.C. allows the inclusion of a special partner's name in the name of the partnership. This provision is retained, however, on condition that it be indicated that the name included in the firm name is that of a special partner. It will not be sufficient to give notice of this fact by registration. The special partner is then liable in the same way as an ordinary partner.

Section III

Associations

790

It was thought timely to distinguish between partnerships and associations, even though in French the two words are synonymous. The French law of 1901 on associations made this distinction (618). As defined in the Draft, an association would be a special form of partnership, subject to its own rules. Any other group of people formed for a common goal or profit would be an actual partnership, governed by the rules set out in the previous sections.

The Civil Code does not govern associations, although many special groups are governed by numerous statutes (619).

This legislation on associations seemed necessary for two main reasons:

a) to protect members of associations who do not take part in their administration;

b) to prevent the fraudulent organization of associations for the profit of certain members.

791

This article provides that only some of the articles on partnership will apply to associations. This restrictive application of the general provisions is based on the absence of gain sought by the association members.

792

This article provides general guidelines for the organization of an association although it imposes no strict rules. The internal rules will be laid down in the by-laws.

793

It was thought necessary to provide some rules relating to the operation of associations in the absence of other rules in the by-laws.

794

This article creates an irrebuttable presumption in favour of third parties that each director is a mandatary of the association.

Conversely, an ordinary member or ordinary partner, meaning one who is not a director, is not deemed to be a mandatary and consequently will not incur liability as regards third parties, unless he takes part in the management of the association's business, and is not affected by Article 760.

795

This article imposes on the founding members of an association, pending appointment of the regular directors, on the directors themselves, and on any member who in fact conducts its affairs, the liability of ordinary partners, which is solidary, but subsidiary.

796

This article creates a very exceptional arrangement for ordinary members.

797

This article expressly lays down the right of any member to withdraw from an association, subject to paying what he owes. The first paragraph of this article is imperative.

798 and 799

Since the members cannot profit from any accumulated property, this article provides that, in cases of dissolution, such property will be used for the purposes of the association. This operation may take place under authority of the court; by virtue of the *Winding-up Act*, the Public Curator will be seized with the property.

800

This article adds another to the cases of termination in Article 764. Contrary to Article 757, this decision need not be unanimous (see a. 791).

CHAPTER XI

DEPOSIT

Section I

General provisions

801

The definition allows a distinction to be made between deposit, loan and lease of things. The object of the contract of deposit is the custody and conservation of the property deposited, while in loan and in lease the cocontracting party seeks the enjoyment of the object, even though certain obligations of custody are derived therefrom accessorily.

Although remunerative deposit is a variation of the contract traditionally known as "lease and hire of services"; it is nonetheless true that this juridical operation is sufficiently specialized to be subject to specific rules predicated upon the obligation of custody.

The definition retains the real character of the contract of deposit.

802

This article abolishes the essential characteristic of gratuity seen in simple deposit (Article 1795 C.C.), traditionally considered a gratuitous

contract. The increase in remunerated contracts such as storage and parking have made it necessary to readjust the rule.

It was deemed necessary to create a presumption of gratuity since, effectively, in a great many "deposits", such as the deposit of articles in cloak-rooms, no direct expenses are required from the depositor. Moreover, it is relatively easy to prove the existence of a custom or agreement to the contrary.

Section II

Obligations of the depositary

803

This article provides that the depositary's principal obligation is to care for the property deposited with prudence and diligence. The obligation to care for the property deposited includes that of preservation.

804

This article repeats the rule embodied in Article 1803 C.C.

This principle is easily understood since the object of the contract is the custody of the property deposited, not its use. If the depositor authorizes the depositary to use such property occasionally or continually, then depending on the circumstances and on whether the agreement is by gratuitous or onerous title, the rules governing loans for use or lease and hire should be applied.

805

This article fixes the conditions of the gratuitous depositary's liability; he is liable for all damage to the property deposited, but the depositor must establish fault. The depositary by gratuitous title, therefore, is only under an obligation of means.

Moreover, the liability may be mitigated, at the discretion of the court, by a reduction of the indemnity normally due.

806

Gratuitous deposit, unlike deposit by onerous title, imposes upon the depositary an obligation of result, for the breach of which he cannot liberate himself except by proving a cause beyond his control. The proposed rules take into account the onerous nature of the contract which implies increased duties for the depositary: since he is remunerated for his custody, he must pay more attention in exercising it.

807

Articles 1814 to 1816 of the Civil Code have been simplified; the innkeeper's liability has been attenuated while an effective recourse has been retained for the client. These provisions are thus brought into line with legislation adopted abroad, and with the *European Convention on the Liability of Hotel Keepers Concerning the Property of their Guests* (December 17th, 1962).

Generally speaking, the debtor is subject to a presumption of liability from which he can liberate himself only by proving a cause beyond his control (par. 1). This liability cannot exceed five hundred dollars for each person who lodges in the hotel (par. 2).

Nevertheless, if the effects have been expressly entrusted to the innkeeper, the innkeeper's liability is unlimited.

This article increases the number of persons who may avail themselves of it, since the mere fact of lodging in a hotel is a sufficient prerequisite; the exercise of this recourse is no longer restricted only to travellers.

The third paragraph of this article specifies that hospitals and convalescent homes are subject to these rules.

808

This article repeats the rule of the first paragraph of Article 1804 of the Civil Code which does not give rise to any difficulties. Obviously, the identical property must be returned.

809

This article amends the present rule in Article 1810 of the Civil Code. While it repeats the principle that the depositary must return the thing on demand, it has retained a single exception, namely cases where a term has been agreed upon in the depositary's interest. The end of Article 1810 of the Civil Code was not reproduced because it conforms to general law.

810

This article sets out the generally accepted rule that the property deposited must be returned to the depositor or to a person who presents a certificate issued by the depositary, whether this be a warehouse receipt, a bill of lading or some other document.

811

This article reproduces and completes Article 1808 of the Civil Code.

812

This article repeats the substance of Article 1807 C.C. Because the depositary has the custody and not the use of the property deposited, he has no right to any profits or revenues from it.

However, if the contract has as its object a sum of money, the depositary need return only the capital, because he is under no obligation to make it productive. Interest will be exigible only when the debtor is in default.

813

The first paragraph of this article in no way modifies the present rules except as to form. In point of fact, it was superfluous to state that the parties must respect the agreement, if, indeed one exists, with respect to the place of restoration (Article 1809 par. 1 C.C., a derogation from Article 1152 C.C.). Costs of restitution are still charged to the depositor.

The second paragraph deals with remunerated deposit. Although the depositor in a gratuitous deposit must take delivery of the property deposited where it is at the time it is restored, since gratuitous deposit is a contract made in the exclusive interest of the depositor, the rules are necessarily reversed due to the onerous character of this contract. It is natural that the depositary be liable for the restitution costs.

Section III

Obligations of the depositor

814

This article enumerates the principal obligations of the depositor. It reproduces the substance of Article 1812 of the Civil Code, but adds the obligation to pay the remuneration in the case of onerous deposit. The article speaks of loss which the thing has caused the depositary rather than "losses that the deposit ... may have caused" in order to retain only damage resulting from the custody of the thing.

The depositary has the right to retain the thing deposited to secure payment of these obligations.

815

This article is new law. Because deposit is sometimes remunerated, the depositary may find himself prejudiced by a premature return at the request of the depositor.

He thus preserves his right to remuneration, according to the original agreement, even if the period was shortened at the request of the depositor.

By the same token, the depositary may claim for any other direct and foreseeable damage which he suffers as a result of a premature withdrawal. This rule also applies in matters of gratuitous deposit.

CHAPTER XII

SEQUESTRATION

816 to 822

Contrary to what is provided in the Civil Code, sequestration would no longer be considered a variation of the contract of deposit, but would constitute a separate contract.

The Draft is marked by major departures from the Civil Code with respect to sequestration. On the one hand, remunerated sequestration is no longer likened to a contract of lease, as Article 1822 of the Civil Code would have it. On the other hand, from the moment that deposit by onerous title is admitted (Article 802), remunerated sequestration is governed by the rules on deposit, subject to the requirement of the presence of several depositors with varying interests.

What sets the sequestrator apart from the depositary is his power of simple administration in addition to that of custody of the thing. Article 819 entrusts him with this and is completed by the provisions on administration of the property of others. These provisions outline these powers. These powers should be coordinated with respect to judicial sequestration by amending Article 745 C.C.P. so that it speaks of "simple" and not "pure" administration.

CHAPTER XIII

LOAN

Section I

General provisions

823

This article is an amended version of Article 1763 of the Civil Code. The definition of loan for use shows the real character of a loan: the contract is perfect only by delivery of the object.

It seemed undesirable to change the real nature of the contract, since delivery is considered an essential part of its formation. Recent foreign legislation (620) also maintains the real character of loans for use.

The proposed definition also emphasizes the gratuitous nature of the contract.

824

This article is an amended form of Article 1777 of the Civil Code. It defines loan for consumption which is treated as a special category of loan, by reason of the very nature of its object. This particularity engenders a contractual regime somewhat different from that governing *commodatum* (a. 837) or loan for use.

Like loan for use, loan for consumption is a real contract. It can only relate to consumable moveables.

825

The loan of money is also a real contract. Nevertheless, the validity of the promise to lend or to borrow, governed by Article 828, has been taken into account.

826

This article combines the provisions of Articles 1776 and 1781 C.C. A person who makes a loan has only an obligation of warranty limited to the hidden defects of which he is aware.

827

This article amends Articles 1773 and 1783 C.C.

828

Any promise to lend binds the person who makes it even if the loan is not made. All the same, this is an unnamed contract, and failure to execute it gives rise only to payment of damages.

Section II

Loan for use

829 and 830

These articles reproduce the substance of Article 1766 C.C., consideration being taken of the Title on *Administration of the Property of Others* (aa. 487, 492 and following of the Book on *Property*).

The purpose for which the thing is intended is established primarily according to the terms of the agreement itself. If the agreement is incomplete on the matter, criteria of facts must be considered.

831

This article repeats Articles 1771 and 1775 C.C. in a simplified form.

Since the borrower has the use of the thing, he assumes the normal maintenance costs, but anything in excess is borne by the lender.

832

This article repeats the substance of Article 1767 C.C. and sanctions excessive use.

833

This article repeats and completes Articles 1773 and 1774 C.C.

834

This article amends the drafting of Article 1768 of the Civil Code.

835

This article amends only the drafting of Article 1769 of the Civil Code.

836

This article sanctions jurisprudence according to which the borrower has a direct right of action against the author of the damage, even if the right of action is not transferred, since the borrower's principal obligation is to return the object to the lender (621).

The lender also has sufficient interest to institute the appropriate procedures, whether or not he is the owner.

Section III

Loan for consumption

837

This article is based on the rule in Article 1778 C.C.

Section IV

Loan of money

838

This article repeats the substance of Article 1779 C.C., with some changes in drafting.

839

This rule is new law. It eliminates the gratuitous nature of loans of money.

Unless there is agreement to the contrary, every loan of money bears interest at the legal rate (622) from the receipt of the money by the borrowers.

840

This article repeats the rule of Article 1786 C.C., which is an application of Article 1159 C.C.

841

It was not deemed advisable to propose at this time the insertion into the Draft of the provisions of the *Consumer Protection Act* relating to loan of money. It seemed useful, however, to mention that important provisions are to be found in it in this respect.

CHAPTER XIV

SURETYSHIP

Section I

General provisions

842

This definition corrects the inaccuracy of Article 1929 C.C. which defines suretyship as an act rather than as a contract.

A *porte-fort* who promises execution of an obligation is likened to a surety.

843

The purpose of this article is to repeal all distinctions between the various kinds of suretyship. At present, two distinctions are made between the three kinds of suretyship, which are legal, judicial and conventional. The first distinction is that judicial suretyship does not enjoy the benefit of discussion; this article suggests that this benefit be repealed. The second distinction is that any sufficient pledge can be substituted for judicial or legal suretyship. The authors Roch and Paré (623) are of the opinion that the provision in Article 1963 C.C. has general application, even if the article is in the chapter on legal and judicial suretyships. The substance of Article 1963 C.C. is contained in Article 850.

Thus the different types of suretyship are subject to uniform rules.

844

This article retains the substance of Article 1933 C.C. In the second paragraph, the word "debt" is replaced by "principal obligation", since the object of any suretyship is no longer limited to existing debts, but may also apply to future obligations.

845

This article repeats the second paragraph of Article 1932 C.C. on the object of suretyship which can be a natural obligation or one from which the debtor can release himself by a personal exception. Since the principle in the first paragraph of Article 1932 C.C. is general, that paragraph is not reproduced.

846

This article is based on Article 1057 of the Lebanese Code and is intended to permit revolving credit. Our jurisprudence recognizes suretyship for future debts (624).

The only condition required for the validity of this suretyship is that the obligation can thereby be determined.

847

This article retains the provisions of Article 1934 C.C. regarding suretyship contracted without the knowledge of the debtor; it was thought wise to add what has already been stated by the authors (625), that a person may become surety even against the wishes of the debtor. In this event, however, the surety, according to Article 856, does not have all the recourses against the debtor as he would if he had committed himself with the debtor's consent.

848

This article retains in part the provisions of Article 1935 C.C. It was considered advisable, however, to add that suretyship must be in writing. This requirement merely consecrates existing practice, while at the same time facilitating proof of the contract and avoiding contestation.

849

This article is based on Articles 1938 and 1940 C.C. It is emphasized, however, that throughout his commitment the surety must have property in Québec and must be domiciled in Canada.

850

This article retains the provisions of Article 1963 C.C. and extends its application to all suretyship. Since this privilege is contained in the section on legal and judicial surety, it could be assumed (626) that a conventional surety could not avail himself of it; it was considered useful and practical to allow the debtor who must provide surety to execute this obligation in other ways, provided the creditor derives the same advantages from them.

851

This article is intended to eliminate any uncertainty as to the procedure to be followed in the cases envisaged in the two preceding articles.

Section II

Effects of suretyship

§ - 1 Effects between creditor and surety

852

This article repeats the substance of Article 1941 C.C., bearing in mind the abolition of the benefit of discussion in suretyship.

853

The existing rule in the Civil Code does not correspond to economic realities. It is up to the surety far more than to the creditor to establish and verify the solvency of the debtor. Moreover, most suretyships today contain clauses renouncing the benefit of discussion. It therefore seemed imperative to bring the law into line with reality. A contrary stipulation is always possible.

Articles 1942 and 1944 C.C. would consequently be repealed.

854

The benefit of discussion should be conventional. The surety who wishes to exercise the benefit of discussion must advance the costs of the necessary expenses, and indicate which property can be seized. The term "seizable" property seemed to extend the application of the second paragraph of Article 1943 C.C., which imposes certain restrictions on the kind of property which can be seized.

§ - 2 Effects between debtor and surety

855

This article retains the substance of Article 1948 C.C.

The second paragraph of Article 1948 C.C. is not reproduced since it expresses a rule of general law.

856

This article retains the substance of the first paragraph of Article 1949 C.C. and extends the rule to cover suretyship contracted against the debtor's will. The second paragraph is repealed because it needlessly repeats a rule of general law.

857

This article repeats the substance of Article 1952 C.C., with some changes as to style.

858

This article retains part of the substance of Article 1953 C.C. The fifth paragraph of Article 1953 C.C. is dealt with in Article 862.

859

This article retains the first part of Article 1961 C.C. The second part of that article, concerning suretyship with the consent of the debtor, is dealt with in the fourth sub-paragraph of the preceding article.

§ - 3 Effects between sureties

860

This is a reference article.

Section III

Extinction of suretyship

861

This article is proposed to put an end to the unjust situation which can arise when a surety dies and his heirs are bound to continue the suretyship. This is based on the judgment in *Banque Canadienne Nationale v. Soucisse* (627).

862

This provision entitles the surety to free himself after five years, if the suretyship is for an indefinite period or amount. The article is based on the fifth paragraph of Article 1953 C.C. and on Article 1954 C.C.

The parties can always bind themselves for a longer period when that period or the amount is specified in the contract.

863

This article retains the provisions of Article 1959 C.C.

864

This article repeats Article 1960 C.C.

CHAPTER XV

INSURANCE

The provisions concerning insurance of persons and damage insurance have formed part of the Civil Code since 1976. We need mention here only the amendments required by the Draft.

872

This article reproduces Article 2473 C.C. except that, in the second paragraph, the problem of the interaction between the chapter of the Civil Code on annuities and the chapter on insurance on annuities issued by life insurers has been solved.

873

This article reproduces the principle of Article 2474 C.C. but extends it to all forms of insurance.

876

This article is similar to Article 2476 C.C. except that it has been made clear that the insurer is bound by his acceptance of the application even though such acceptance may have been communicated to the insured subsequently.

877

Article 2477 C.C. has been modified to take into account that policies are often preceded by a very short document, commonly called a cover note. Such cover note binds the parties while awaiting the issue of the policy itself. All the components of the insurance contract are not in the cover note but it is often provided that the provisions of the policy to be issued form part of the cover note.

878

The text of Article 2478 C.C. could lead to the belief that a written application was necessary for all forms of insurance. This is not true and

the text of Article 878 recognizes more clearly that there are no written applications in some forms of insurance.

882

The second paragraph of Article 2482 C.C. has been slightly changed to take into account that, in several forms of insurance, the rider evidencing a reduction in the liabilities of the insurer is not always countersigned by the insured. However, in such cases, these riders must be preceded by a written request by the insured to modify the contract and the insureds are thus as fully protected as if they had signed the rider itself.

885 and 886

The French version of these articles has been modified so as to render uniform the French version of the English word "material".

The third paragraph of Article 2486 C.C. has been omitted as it is but an instance of the general theory of defects of consent (aa. 31 and 32).

889

This article reproduces Article 2489 C.C. in order to clarify the position of the parties when there has been a breach of the warranty but when such breach had been remedied before the loss was sustained.

894

The change made in Article 2503 C.C. was to substitute the word "application" for the word "policy" because the representations made by the insured or the life insured are in fact in the application and not directly in the policy.

899

The changes made in the Book on *Persons* brought about a slight change in the second paragraph of Article 2508 C.C.

906

This article modifies Article 2515 C.C. so as to make it clearer that it applies only to misrepresentations of facts other than those bearing on the age of the life insured. Misrepresentations of the age of the life insured are governed by Articles 902 to 904 only.

907

This article specifies, as does Article 876, that the acceptance of the application by the insurer binds the insurer even though the insured may be made aware of the acceptance only subsequently.

The Title of paragraph V has been changed to reflect more accurately its contents.

919

The article modifies the first paragraph of Article 2528 C.C. by adding to it the words "and other benefits" so as to insure that all benefits available to insureds be covered by the paragraph. Effectively, the old wording was such that the article did not apply to advance values and cash surrender values.

920

Because life insurance is basically not an indemnity contract and because nearly the whole spectrum of accident and sickness contracts are not indemnity contracts either, it has been found preferable to eliminate entirely from the field of insurance of persons the right to any subrogation in favour of the insurer.

928

This article restates Article 2538 C.C. and the title which heads it to speak of nullity rather than prohibited operations.

929

This article restates Article 2539 C.C. to make it clear that the Superintendent involved is the Superintendent of Insurance.

937

It was found useful to state, as in the case of legacies, that the accretion rules operate between cobeneficiaries and cocontingent owners and to eliminate representation.

953

This article modifies Article 2558 C.C. in order to state the effect of an assignment or of a hypothec of insurance on the right of the contingent owner.

957

This article has been added in order to clarify the situation of the insured and that of the insurer when, at the time of the loss, the amount of the insurance is less than the true value of the property.

961

This article modifies the first paragraph of Article 2566 C.C. in order to reduce the obligation of the insured. His primary obligation would now

be only to reveal changes in the risk which are material and which result from his own actions. This paragraph is also modified in order to invite insurers to list in the contract changes in the risk which are most likely to influence the insurer in his assessment of the risk involved and, therefore, where the need to notify the insurer of the change is the greatest.

Other changes would be made in the other paragraphs of Article 2566 C.C. The insurer who receives notice of a change in the risk does not need any particular provision to govern its rights. The insurer always has the right, under the following article, to have the contract cancelled upon a fifteen-day notice and he will avail himself of this right if he believes that the new risk is such that he does not want to underwrite it.

962

This article proposes changing Article 2567 C.C. so as to allow the insurer to send the cancellation notice to the last known address.

971

This article restates Article 2576 C.C. making it permissive and not of public order because in fact insurers permit that, in many situations, the insured waive before a loss is incurred his right to a recourse against the third party at fault.

972 and 973

These articles modify Articles 2577 and 2578 C.C. because the wording could lead one to believe that an insurer could become contractually bound to an insured whom he has never known before. To a certain extent, insurance contracts are *intuitu personae* and it is not reasonable to impose on an insurer an insured with whom he had not chosen to contract.

978

This article rewords Article 2583 C.C. in order to make it clear that special valuation formulas contained in policies are valid, particularly the replacement value clauses.

The article also clarifies the effect of a valued contract on the parties.

1000

This article modifies Article 2605 C.C. in order to limit the liability of the insurer, with respect to the interest on the judgment, to that part of the interest which relates to the amount of insurance. The interest on that part of the judgment which exceeds the liability of the insurer must be borne by the insured.

Section IV

Marine insurance

§ - 1 General provisions

1001

The first paragraph of this article serves two purposes:

1. to indicate that, where a voyage is partly on land and partly at sea, marine insurance may nevertheless cover the whole of the voyage;
2. to indicate that a voyage in inland waters, which are not the high seas, may nevertheless be covered by a marine insurance contract.

The second paragraph acknowledges that, by tradition, ships in the course of building or repairing and the launching of ships are covered by marine insurance contracts.

1002

This article specifies the three main categories of marine insurance; the insurance of tangible assets, such as the ship or the goods, the insurance of monetary gains, such as the freight, and civil liability insurance.

It is noted that the word *facultés* is the one used in French in maritime law and in marine insurance to designate cargo (see a. 1005).

1003

Because the rules governing insurance on ships are not quite the same as those governing insurance on goods, it was necessary to specify which objects form part of the ship and not part of the cargo.

1004

Experience has shown the need for the definition outlined in this article.

1005

The purpose of the first paragraph of this article is to specify that the ship, although moveable property, is not covered by the expression "moveables".

The second paragraph reproduces a traditional rule on the meaning of the word "goods".

1006

It should be noted that this article is not limitative but only lists the better known maritime perils.

Insurance policies still reproduce all the elements of this list.

1007

The two paragraphs of this article are definitions which appear in all marine insurance contracts.

1008

The first paragraph of this article underlines a basic difference between the word *baraterie* in the French language and its English counterpart "barratry". A definition of the English word "barratry" was necessary because marine insurance covers effectively more than the ordinary meaning of the word "barratry" in English. No definition of the French term was necessary because the extended definition given to the word "barratry" in English in fact covers the normal meaning of the French word *baraterie.*

The second paragraph is dictated by tradition and experience.

1009

This article must be read in conjunction with section II on the various types of losses.

1010

This article introduces, in the application of the provisions of marine insurance, an English rule of interpretation, called the *ejusdem generis* rule.

§ - 2 Insurable interest

I - Necessity of interest

1011

This article reproduces a rule common to both marine insurance and damage insurance, the nullity of contracts made without any insurable interest.

1012

This article enunciates a rule which is fundamentally different from the rule in force for damage insurance. It is possible to enter into a contract of marine insurance at a time when the insured does not have any

insurable interest but when he expects to acquire one. The second paragraph of the following article confirms this point.

The second paragraph underlines however that the insured must acquire his interest before any losses are incurred, except for insurance applied for on a "lost or not lost" basis. This last form of insurance is not as popular nowadays as it used to be because of better communication facilities between ships and ports.

1013

The three paragraphs of this article list examples of situations where it will be considered that the marine insurance contract is null.

II - Cases of insurable interest

1014

This article is the general principle used to determine whether or not there is an insurable interest.

1015

This article specifies that the insurable interest of the insured need not be an absolute one.

1016

This article is a non limitative enumeration of seven cases of insurable interest.

III - Extent of insurable interest

1017

This article recognizes that many insurance contracts are applied for on behalf of a third party. The person applying for the insurance is not truly the insured but he is acting on behalf of the owner of the property. This often occurs when the person who applies for the insurance for the benefit of a third party expects to become owner himself of the insured property.

1018

This article is an application of the *res inter alios acta* rule.

§ - 3 Transfer of insurance

1019

Marine insurance policies may be transferred while the transfer of a damage insurance contract can only be made with the consent of the insurer.

1020

This article states the right of the insurer to oppose to the new owner all of the defences which the insurer had against the initial insured.

1021

This article specifies the modalities of a transfer.

1022

This article limits Article 1019 in stating that the transfer of the insurance must precede or at the very least coincide with the end of the insurable interest of the insured in the property.

The second paragraph specifies that transfers of policies after a loss has occured are not covered by the preceding rules.

1023

This article enunciates a rule which is similar for damage insurance; the transfer of the ownership of the property does not of itself entail the transfer of the insurance. The same exception is made, however, with respect to transmissions by operation of law or by succession.

§ - 4 Measure of insurable value

1024

The principal purpose of this article is to specify that the insurance value is determined at the beginning of the insurance and not at the time of loss.

1025

This article allows, in determining the insurable value of a ship, inclusion in its true value of the disbursements made to make the ship fit for the voyage contemplated by the contract.

1026

Freight is in fact the cost of transporting the property.

1027

As in the case of the insurable value of a ship, this article specifies that the insurable value of goods is their insurable value at the beginning of the trip, i.e., their cost, but that the owner may take into account the expenses incurred to prepare the goods for shipping.

1028

This article specifies that in all cases, that is, the insurable value of ships, freight and goods, account may be taken of the insurance charges on the subject matter at risk.

§ - 5 Proof and ratification of the contract

1029

This article introduces a very strict rule of proof in marine insurance. The production of the policy is essential to establish that an insurance contract exists.

1030

This article qualifies somewhat the strict rule of the preceding article in allowing, for instance, proof that the true content of the contract is not properly reproduced by the policy. The article also allows the use of the cover notes or slips if the insured was first able to prove that a policy was indeed issued but that it has been lost. When the insured is not able to establish that a policy was delivered by the insurer, he does not have the right to use the slips or cover notes to make proof of the existence of a marine insurance contract.

1031

This article is to be read with Article 1017. The person on whose behalf the insurance was applied for may ratify the contract although he may learn of the insurance only after the loss has occurred.

§ - 6 Contract and policy

I - Usage

1032

This article specifies that, in marine insurance, one must take into account not only the custom of marine insurance but as well the custom of the trade involved in the marine insurance contract.

II - Subscription

1033

This article acknowledges that many marine insurance contracts are underwritten by several insurers. Although only one policy may be issued for all of the insurers involved, the signature of each one of them to a policy constitutes a different contract between each insurer and the insured. This point is particularly important in the case of abandonment of the property. Such abandonment must be signified to each of the insurers.

III - Kinds of contracts

1034

This article lists the principal categories of marine insurance policies and it must be noted that the type of contracts listed in the first paragraph may be combined with those listed in the second. For example, one may have a voyage policy either on a valued basis or on an unvalued basis.

1035

It is important to know in a voyage contract whether the ship or the goods are insured while in harbour or only insured once the voyage begins, i.e., when the ship leaves port. There is insurance at the port itself, that is, before the precise moment of departure, only if the contract says so.

1036

In a time policy, the insured is covered only for the period stipulated in the contract, whether or not the voyage contemplated in the policy be over or not at the end of the period.

1037

Valued policies are frequent in marine insurance on goods while, in damage insurance, they are most of the time limited to objects which are difficult to evaluate, such as art works. The agreed value binds the parties

and neither the insurer nor the insured have the right to attempt to reevaluate the insured property.

The second paragraph of this article specifies however that, where the damage to the property is such as to give possibly rise to a constructive total loss, the agreed value is not conclusive for the purpose of determining whether or not the insured has the right to use Article 1106 on constructive total losses.

1038

This article states that the liability of the insurer may never exceed the sum insured. Within that limit, the loss sustained by the insured is calculated in accordance with Articles 1024 to 1028 on the determination of the insurable value.

1039

Floating contracts covered by this article only involve goods. They are used by large concerns who ship goods frequently. The contract will describe in general terms the type of shipping involved and the points of departure and arrival but the details specific to each voyage will only be given to the insurer at the time when they are known by the insured.

1040

The first two paragraphs of this article enunciate two basic rules for floating contracts, one that the declaration must be made in the order of the shipping of the goods and that the insured must declare all consignments and indicate the value. The insured does not have the right to decide that one consignment will be covered and another one will not be.

1041

The value of the goods contained in the declaration binds the assured and the insured when it is made by the insured before loss or arrival is known.

§ - 7 Rights and obligations of the insured

I - Payment of the premium

1042

The setting of the amount of the premium is very complex at times and often occurs only after the voyage is undertaken. If the insured property should arrive in port in safety before the parties have agreed on the premium, it would be too easy to the insured to plead that there was no contract between the parties because they had not agreed on an essential

element of the contract, that is the amount of the premium. This article is intended to prevent such an abuse.

1043

Under the first paragraph of this article, the broker is personally liable for the payment of the premium. On the other hand, the broker may sue the insured for the payment of the premium.

In return, the insurer is liable to the insured whether or not the insurer has in fact been paid by the broker.

1044

The first paragraph of this article is particularly important when one remembers that an insurance contract may only be proven by the production of the policy.

The second paragraph of this article gives the broker a right of retention of the policy, even where the premium for the policy specifically involved has already been paid.

1045

This article should be read in conjunction with Article 1043. Because the broker is liable for the premium, the insured has the right to the policy benefits when the policy is issued acknowledging that the premium has been paid, whether or not the premium has in fact been paid by the broker to the insurer.

II - Disclosures and representations

1046

Because marine insurance contracts are sometimes applied for at a time when the ship and the goods are at sea and where it is, therefore, impossible for the insurer to check the accuracy of the information supplied to the insurer, there is, therefore, a duty on the part of the insured, the only one with true knowledge of the situation, to declare the risk with the utmost good faith.

1047

The obligation of the insured so to declare the risk under this article is similar to the obligation of the insured in other forms of insurance.

1048

Under the first paragraph of this article, the insurer cannot raise as a defence a misrepresentation or a nondisclosure when the circumstances involved would only diminish the risk. Similarly, the insured is not bound

to make any representations with respect to the seaworthiness of the ship because, under the terms of Article 1066, there is an implied warranty of the seaworthiness of the ship for the insured adventure.

The second paragraph of this article enunciates a rule common to all forms of insurance.

1049

The first paragraph of this article reproduces again a rule common to all forms of insurance; an insurer is only allowed to raise a misrepresentation or a nondisclosure as a defence when such misrepresentation or nondisclosure would have materially influenced the judgment of a reasonable insurer.

However, the second paragraph of this article qualifies the first paragraph when the representation is made on expectation or belief.

1050

The first paragraph of this article specifies that the person applying for the insurance on behalf of a third party is himself subject to the same obligation to declare the risk properly.

Moreover, under the second paragraph, agents are deemed to know facts which, in the ordinary course of business, ought to have been known to them.

However, where the insured himself only learns of a material fact too late to communicate it to his agent, the insurer may not invoke such a misrepresentation or nondisclosure.

1051

This article illustrates the importance of custom in marine insurance in deeming all the parties to know all the facts which in the ordinary course of business they should have known.

1052

This article allows the insured and their agents to modify their representations before the contract is entered into.

1053

The rule on nullity enunciated by this article is similar to the rule in the other forms of insurance.

1054

This article avoids a procedural battle as to whether or not a nondisclosure or misrepresentation is a question of fact or a question of law.

1055

This article specifies that the insured must declare not only circumstances of which he has personal knowledge, but also circumstances of which he knows.

III - Warranties

1056

Warranties, called *engagements* in the French language, play an important role in marine insurance. They are undertakings by the assured that a particular state of facts exists or does not exist. There are also undertakings to do something or not to do something or that certain conditions shall be fulfilled.

The second paragraph specifies that when the insured states that a particular state of facts exists or does not exist, this necessarily includes an undertaking that this state of facts will stay the same.

1057

Warranties may be express or implied but there are, in marine insurance, implied warranties only in the cases of Articles 1062, 1063, 1066, 1069 and 1070.

1058

The general rule on misrepresentations and nondisclosures is that they could cause the nullity of the contract only if the misrepresentation or the nondisclosure is material. This is not so for warranties which must be complied with exactly.

The second paragraph of this article specifies the penalty for noncompliance with a warranty: the insurer is discharged from liability.

1059

This article lists situations where noncompliance with a warranty is excused.

1060

Insureds are not allowed to use as a defence the fact that they have remedied the breach of warranty. The rule in marine insurance is thus different from the rule in damage insurance.

1061

There is no mandatory wording for express warranties.

Moreover, under the third paragraph of this article, express warranties do not exclude necessarily the application of the implied warranties under Articles 1062, 1063, 1066, 1069 and 1070.

1062

There is no implied warranty that the ship or the goods are neutral. However, if there is an express warranty on the neutrality of the ship or of the goods, this article specifies that there then is an implied warranty that the neutrality exists at the beginning of the voyage and that it will be maintained during the voyage.

1063

This article establishes a second implied warranty following from the express warranty on the neutrality of the ship. The insured must have aboard ship all the documents necessary to establish the neutrality.

1064

Under this article, there is no implied warranty as to the nationality of a ship.

1065

This article specifies that when there is a warranty that the insured property is in good safety or well on a particular day, it is not necessary that it be so for the whole of that day. It is only sufficient that it be well or in good safety at one point during the given day.

1066

One will remember that under this article, a voyage contract could cover the insured not only from the time the ship left port, but also while the ship was in port. The seaworthiness of the ship is always an implied warranty in a voyage contract and the seaworthiness applies not only at the time the ship leaves port but, if the ship is covered while in port, it must also be seaworthy for the risk which attaches while in port.

The third paragraph of this article states that the seaworthiness of the ship is determined at the beginning of each portion of the trip because the

seaworthiness for one portion of a trip is not necessarily the seaworthiness required for another portion of the trip.

1067

In time contracts, it is not possible for the insured to warrant the seaworthiness of the ship.

However, if the insured knows the unseaworthiness of the ship, the insurer is not liable for any loss attributable to such unseaworthiness.

1068

The seaworthiness of a ship is determined taking into account the ordinary perils of the sea in the adventure contemplated. It will be noted that marine insurance contracts often contain clauses on navigation in the St. Lawrence river at certain times of the year because of the presence of ice-floes.

1069

Because the insured is not always in a position to determine if goods can travel by sea or not, this article states that there is no implied warranty on the part of the insured as to the seaworthiness of goods.

In a voyage contract covering goods, the insured must be satisfied that the ship itself is seaworthy to carry the goods involved.

1070

There is an implied warranty as to the legality of any marine adventure.

IV - Notice and proof of loss

1071

This article requires that the insured notify the insurer immediately of any loss likely to involve the insurer.

1072

Following notice of loss, it falls on the insurer to ask the insured to supply him with more details and to justify his claim by furnishing the necessary vouchers.

1073

Anybody who in a notice of proof of loss makes a deceitful representation to the insurer loses his rights to any of the proceeds.

§ - 8 Rights and obligations of the insurer

1074

This article allows an insurer not to deliver the policy if he has not been paid the premium.

1075

The general rule is that an insurer is only entitled to the premium if the risk has begun. Consequently, if no risk ever attaches, the insurer must refund the premium to the insured. However, there is no obligation to refund when there has been fraud or illegality on the part of the insured.

1076

The first paragraph of this article is but an application of the general principle of Article 1075.

The second paragraph solves the situation where the risk is not apportionable and has attached but for a portion of it.

1077

There is a full refund when the risk has never attached and a partial refund when the risk has partially attached.

The second paragraph of this article covers the special situation of property insured "lost or not lost". The premium, generally speaking, is then fully the property of the insurer unless the insurer already knew of the safe arrival by the time the contract was entered into.

1078

Under Article 1012, contracts could be entered into at a time when the insured did not have any insurable interest but was hoping to acquire one. This article requires that the premium be refunded when, effectively, the insured never acquires the hoped-for insurable interest.

However, when there is some gaming or wagering on the part of the insured, he is not entitled to a refund of the premium. This is an application of the fraud or illegality clause of the first paragraph of Article 1075.

1079

Where the interest was defeasible and did terminate, there is no refund of premiums, even if it terminates before the end of the contract.

1080

Over-insurance under an unvalued contract gives rise to a proportional refund of the premium.

1081

This article applies the rules of the preceding article on the apportionment of the refund when there are several insurance contracts.

1082

This article deprives the insured of his right to request the refund of premiums when he knowingly proceeded to over-insure his property.

§ - 9 Voyage

I - General provisions

1083

In a voyage contract, it is not essential that the ship be at the point of departure at the time the contract is entered into. There is, however, an implied warranty on the part of the insured that the ship will be at the point of departure within a reasonable time.

Under the second paragraph, if the marine adventure has not begun within a reasonable time, the contract can be annulled on the request of the insurer unless the insured can demonstrate that the delay was due to circumstances known to the insurer at the time the contract was entered into.

1084

The insurer is not liable for any loss when the ship sails from a place other than the place of departure specified in the contract or when it sails for a destination other that the one specified in the contract. It should be noted that the destination of a ship is known from the time it leaves port and is determined in accordance with marine usage. It has no bearing that its route, from the time it leaves port, be the same at least for a portion of the trip as the route it would have taken had it sailed for the right destination. Effectively, the ship that sails from Montreal to Southampton or Le Havre will follow exactly the same route for a few days of the trip. However, if the voyage policy only covered a Montreal-Southampton voyage and it sailed for Le Havre, the contract can be annulled at the request of the insurer.

II - Change of voyage

1085

In a voyage policy, the insurer ceases to be liable whenever there is a decision taken about changing the voyage. If the insurer can show that the decision to change the destination of the ship has been taken, his liability terminates although the actual change in the destination could have been implemented only some time after.

III - Deviation

1086

Shipping lanes are well-known and respected by all and the insurer has a right to expect that ships sailing from one given point to another will follow the expected itinerary stipulated in the contract or, where no such itinerary is stipulated, the normal route according to marine usage.

Deviation differs from a change in voyage however in that an intent to deviate is not sufficient. The liability of the insurer will only cease if and when there has been an actual deviation.

1087

The rule requires that ships follow a certain order when they have several ports of call. It is not necessary that the ship go to all ports of call, but the route followed must meet the normal route for those ports in which it does call.

If there is inexecution of this obligation there is a deviation and the liability of the insurer ceases.

1088

When there is a voyage contract, for instance, from Montreal to several ports in the Mediterranean Sea, without these ports being specifically identified, the rule requires that the ship call on these ports in their geographical order.

IV - Delay

1089

In a voyage contract, the insurer is entitled to assume that coverage will not be unduly extended by the insured. There is, therefore, an obligation of diligence on the part of the insured. There is no such obligation in a time contract because delays by the insured can only prejudice him.

V - Excuses for delay or deviation

1090

This article allows deviations and delays when the contract so states or when they have become necessary in order to execute an implied or express warranty under the contract.

1091

Deviations and delays are also permitted when caused by circumstances beyond the control of the master of the ship or when they become necessary for the safety of the subject-matter insured. The obligation on the part of the insured to minimize damages requires, for instance, that the ship deviate from its normal course when a storm of exceptional gravity is expected in the area.

1092

This article allows deviations and delays when the life or health of human beings are involved. Deviations or delays are not allowed when only a ship or goods belonging to a third party are endangered.

1093

Under this article, the insurer is still liable when the deviation or delay is caused by the barratrous conduct of the master or the crew, provided barratry was one of the perils insured against.

1094

The ship must resume its normal course as soon as the cause excusing the deviation or delay ceases to be operative.

1095

The article states that, under special circumstances, the insurer will be liable when the voyage is interrupted at intermediate ports.

§ - 10 Losses and abandonment

1096

This article states the basic rule that an insurer is liable only for losses directly caused by a peril insured against.

1097

The insurer is not liable for losses resulting from the willful misconduct of its insured. The misconduct or negligence of the master of the crew

does not relieve the insurer from its liability if the loss results from a peril insured against.

1098

Delay per se is not a maritime risk although the delay could have been caused by maritime risk. Rotting of perishable goods is a typical example of loss caused by delays.

1099

This article is in part an application of the general principle that only perils of the sea are covered by marine insurance.

1100

The loss sustained by the insured can be either the total loss of the subject-matter insured, be that a ship or goods, or damages caused to the property insured.

1101

Actual total loss does not require a definition but Article 1106 gives a definition of constructive total loss.

1102

It is not often easy to establish whether there has been a total loss or a partial loss, particularly when a constructive total loss is involved, and this article protects the insured if he behaved as though there had been a total loss. If it is established subsequently that there was only a partial loss, he will nevertheless have the right to claim for partial loss, if partial losses are covered by the contract.

Marine insurance contracts may cover only total losses and not partial losses. The abbreviation commonly used is "F.P.A." which means free of particular average. Most of the time, contracts covering only total losses are nevertheless written as "F.P.A. except" meaning that the policy does not cover particular average except for certain specified partial losses listed in the contract.

1103

It occurs at times that goods will reach their destination, but it is not possible to identify them precisely anymore. This will occur for instance with bottles of wine where the label has come off. Such situations give rise to a claim for partial losses only.

1104

The article defines an actual total loss and the more overt case is obviously the total disappearance of the property insured.

1105

When the ship has disappeared and no news has been received of it within reasonable time, there is a presumption that there has been an actual total loss of both the ship itself and of the goods on board.

1106

This article defines constructive total losses.

1107

This article lists some cases of constructive total losses and the basic principle is that there is a constructive total loss when the costs of repairing the property are greater than the value it would have once repaired.

1108

General average contributions are an integral part of marine insurance and this article is but an application of this notion.

Basically, in marine insurance, it is considered that the ship, the goods and the freight are engaged in a common venture and if the ship or the goods suffer damages but such damages have been incurred for the benefit of all, all must contribute to that loss. If, during a storm, it becomes necessary to unload the ship of part of its cargo so that the ship itself and the balance of the cargo reach port safely, it would be unjust for the owner of the goods thrown overboard to support alone the loss. The owner of the goods thrown overboard has the right to request a contribution on the part of the other interested parties and this is where the expression "general average contribution" comes from.

1109

If the damage to the property insured is such that the insured has a right to consider that there has been a constructive total loss, he has a choice. He can retain the ownership of whatever is left of the property insured and request from his insurer a payment for a partial loss. He can instead proceed to abandon the property insured to the insurer and request a settlement as a total loss.

1110

The insured who elects to abandon the property must give notice of abandonment to the insurer. The reason for the notice of abandonment is found in Articles 1115 and 1118.

1111

There are no requirements of form or of substance for a notice of abandonment but it must be made clear that the insured intends to abandon the property unconditionally.

1112

This article requires that the insured make up his mind diligently about deciding to abandon or not to abandon the property.

1113

Notices of abandonment are not necessary, when, in any event, nobody could have taken any advantage of whatever might be left of the property.

1114

A re-insurer is not entitled to a notice of abandonment.

1115

Although the insured has a right to abandon the ship in order to claim as a constructive total loss, the insurer is not bound to accept the abandonment.

1116

Although there is no requirement of former substance about the acceptance of the abandonment by the insurer, the silence alone of the insurer does not constitute acceptance.

1117

If the insurer accepts the abandonment, the abandonment becomes irrevocable, the liability of the insurer is deemed to have been admitted and the notice of abandonment is deemed to have been sufficient.

1118

Abandonment is tantamount to the transfer of the property from the insured to the insurer.

This consequence of abandonment is a primary reason why insurers

will often refuse the abandonment. If the insurer becomes the owner of the property, the insurer will be liable for damage which the abandoned property could cause. This is particularly true when ships have sunk or are stranded and are a menace to marine navigation.

1119

This article specifies the rights of the insurer who has accepted the abandonment of a ship.

1120

The refusal by the insurer to accept the abandonment does not prevent the insured from being paid as though there were a total loss, but on condition that the notice of abandonment had been given properly.

1121

This article is to be read with Article 1118. If the insurer refuses the abandonment, the insured remains the owner of the object with all attendant rights and obligations.

§ - 11 Partial losses and various charges

1122

The classification of losses and charges in marine insurance is of great importance and it is necessary to distinguish at the beginning between particular average and general average. Particular average losses are covered by Article 1122 and general average is covered by Articles 1126 and 1127.

1123

Expenses incurred for the safety or preservation of the property insured are generally not included as particular average losses.

It should be noted that what is covered by this article are the expenses other than general average expenses or salvage charges.

1124

Salvage charges are deemed to be particular average losses but the special definition of salvage charges given by the following article should be noted.

1125

In marine insurance, it is necessary to distinguish the position of the salvor acting without a contract of salvage and the salvor acting under a contract of salvage. Expenses for the services of a salvor acting without any contract of salvage are particular average losses and are covered by Article 1122. Expenses incurred by a salvor under a contract of salvage are not considered particular average losses. They might be considered particular charges or general average charges depending on the circumstances in which they were incurred.

1126

General average losses can consist of either expenses incurred to prevent a loss or a sacrifice incurred to prevent a loss. To hire a salvor is to incur expenses. To throw overboard part of the goods is a sacrifice.

1127

Expenses or sacrifice will only be considered general average losses when certain conditions are fulfilled: that it be incurred intentionally, that it be incurred in time of peril and that its purpose be the preservation of the property insured in a common adventure.

1128

General average losses are called such precisely because they must not be supported only by the person directly involved. Because the expense or sacrifice was incurred for the benefit of all, all must contribute.

1129

When the goods or the ship of the insured has not been directly damaged, but he is called upon to contribute to a general average loss, he may only seek payment from the insurer for his share of the loss.

However, if it is the property itself of the insured which has been affected, he has the right to claim settlement in full from his insurer, the latter being then entitled to turn around and claim from the other parties their contributory share.

1130

This article logically follows the preceding article stating the obligation of the insurer to indemnify its insured for general average contributions.

1131

This article limits the liability of the insurer where the expense or sacrifice was not incurred for the purpose of avoiding a peril insured against or not relating to measures taken to prevent it.

1132

Because the property involved in a common venture, although of different kinds, could be owned by one and the same person, this article states that the computation of the contribution from everybody must be calculated as though each item or property involved was owned by different owners.

§ - 12 Measure of indemnity

1133

Because the true value of the property can fluctuate greatly between the time the contract is entered into and that when the loss is incurred, it was important to set the basis of the calculation of the indemnity. The measure of indemnity is calculated by reference to the insurable value in the case of an unvalued contract and by reference to the agreed value in the case of a valued policy.

1134

This article states that the insurer's share is proportional to the proportion between the amount of the insurance and the value of the property.

It should be remembered that in marine insurance, there is never under-insurance because of the provisions of Article 1168. If, in actual fact, an insured has requested insurance for an amount smaller than the true value of the property, he is deemed to be his own insurer for the difference. Therefore, it could be said that in marine insurance there is always insurance for an amount equal to the true value of the property.

This article serves the purpose of dividing, between the insurer and the insured, or between the various insurers, the indemnity to be paid to the insured.

1135

The total loss of the property gives rise to a full indemnity. This full indemnity will be the insurable value in the case of unvalued contracts and the agreed value in the case of valued contracts.

1136

Where there is a partial loss of freight, the proportion of freight loss is first calculated and this proportion is applied to the insurable value in the case of an unvalued contract and to the agreed value in the case of a valued contract.

1137

This article sets out the method of calculation of the indemnity in the case of damage to a ship, whether the ship be sold or not in its damaged condition.

1138

It is important often to distinguish in marine insurance between damages to every item of property insured and by opposition to the situation where some of the items are intact while others have disappeared altogether. In this last case, there is a total loss of a part of the property insured. This article gives the rule on the apportionment of this loss in order to calculate the indemnity to be paid under a valued contract.

1139

This article is to the same effect as the preceding article but where a non-valued contract is involved.

1140

This article should be read jointly with the following article. It should be remembered that the loss sustained by the insured is calculated as of the date of the loss and according to the values of the property at the time of the loss. These values may not be the same as the insurable values at the time the contract was entered into.

Let us, as an example, take the case of goods which arrive in port in a damaged condition. If all the goods had been sound, they would have been valued at one thousand dollars. In their damaged condition, they are valued effectively at six hundred dollars. It can, therefore, be stated that the goods have suffered a forty per cent depreciation loss. If the contract involved is a non-valued contract and the value of these goods in their sound condition at the time the contract was entered into was eight hundred dollars, the insured will have the right to recover from his insurer forty per cent of eight hundred dollars, that is, three hundred and twenty dollars. If the contract involved was a valued contract and the sum fixed in the policy had been set at nine hundred dollars, the insured would have the right to recover from the insurer forty per cent of nine hundred dollars, that is, three hundred and sixty dollars.

1141

This article sets out certain rules to be followed in calculating the value of the indemnity and of certain of its components.

1142

It occurs on occasion that goods of different species are covered under a single contract and that a single aggregate valuation was given for all of the goods. It becomes necessary at times to apportion this valuation to each species and this article gives the method of proceeding in such cases. For instance, if trucks and motorcycles have been shipped and valued at one thousand dollars and it becomes necessary to know what is the insurable value of the trucks in relation to the insurable value of the motorcycles, this article sets out the method of proceeding. If the insurable value of the trucks at the time the contract was entered into was nine hundred dollars and that of the motorcycles was three hundred dollars, the insured value of one thousand dollars will be proportionally rated nine twelfths of one thousand dollars, being considered the insured value of the trucks, and three twelfths of one thousand dollars, being considered the insured value of the motorcycles.

1143

If it is necessary to proceed further in the apportionment of the valuation given by the preceding article and it becomes necessary to know what is the insured value of each truck and each motorcycle, it will be sufficient to apportion the insured value given for the whole of the trucks, for instance, and which is in fact seven hundred and fifty dollars (nine twelfths of one thousand dollars) and to prorate this seven hundred and fifty dollars over the number of trucks.

1144

If a group of goods of different species has been valued collectively and it has become impossible to determine with precision what were the quantities, qualities or value of each one of the goods at the time the contract was entered into, the values will be determined by extrapolation of the values of the goods left on arrival. If, at the time the contract was entered into, there were a certain number of trucks and a certain number of motorcycles but nobody knows exactly how many of each, the number of trucks and motorcycles on arrival will be counted. If, for instance, ten trucks and three motorcycles arrive at port, it will be assumed for the purposes of this article that the number of trucks in relation to the number of motorcycles at the time the contract was entered into was also in the

ratio of ten to three. The same formula is used to apportion the value of the goods.

1145

This article sets out the respective liabilities of the insurer and the insured where property is insured for its full contributory value or where it has been insured for less than its contributory value and a general average loss is sustained.

1146

In liability insurance, the loss sustained by the insured is evidently the amount that he is called upon to pay to the third party.

1147

The complexity of the situations arising in marine insurance being impossible to determine precisely, this article allows extrapolation from the previous provisions to apply them to new situations.

1148

This article specifies that the rules given for the determination of the insurable value and the indemnity which follows from it have no bearing on certain other fundamental issues in marine insurance such as over-insurance or the existence of an insurable interest.

1149

Where the property is insured "F.P.A." that is free of particular average, the insured does not have the right, as the initials indicate, to be indemnified for anything else but total losses of the subject-matter insured. However, an exception is made for general average sacrifices because, if there had not been the sacrifice, there could have been a total loss. The insurer is therefore liable to pay an indemnity in the case of a general average sacrifice. The same is also true where, although there is only one contract, the risk can effectively be apportioned and there is a total loss of a portion of the subject-matter insured.

1150

Even where the goods are insured "F.P.A.", the insurer is nevertheless liable to salvage charges and other special charges such as particular charges and charges incurred under the suing and labouring clause.

If the "F.P.A." clause was a modified one so that the insurer was liable for particular charges but only on condition that they equal at least,

for instance, eighty per cent of the insurable value of the subject-matter, he must also indemnify the insured for the losses outlined above.

1151

Where the insurer is only liable to indemnify the insured where the particular charge is at least equal to eighty per cent, for instance, of the insurable value, the insured is not allowed to take into account his contributions for general average loss in order to claim having obtained the required percentage.

1152

As in the preceding article, it is not permitted to the insured to take into account, in the calculation of his losses in order to decide whether or not he has reached the required percentage, to take into account particular charges and expenses incurred to establish and to prove his loss.

1153

Although the contract sets out a maximum amount of liability for the insurer, the total of the sums to be paid by an insurer with respect to the same subject-matter could exceed the sum fixed in a contract to the amount of insurance when there has been several consecutive losses and for each one of them, the insurer was called upon to make good.

1154

This article is a particular application of the principle set out in the preceding article where damage to property is followed by its total loss. Let us suppose, for example, property valued at one thousand dollars and which is first damaged for three hundred dollars and afterwards is totally lost. The insured cannot recover from the insurer both the sum of three hundred dollars for particular average and the sum of one thousand dollars as a total loss. He will, however, have the right to collect both amounts if the claim for three hundred dollars had already been made good by the insurer by the time the total loss occurred.

1155

The purpose of this article is to ensure that the liability of the insurer under the suing and labouring clause is separate and distinct from his liability under the two preceding articles.

1156

This article complements the preceding one and states that the liability of the insurer under the suing and labouring clause constitutes a separate and distinct clause.

1157

The suing and labouring clause does not cover losses mentioned in the preceding articles.

1158

The duty of cooperation by the insured with his insurer in the measures to be taken to avert or minimize the loss is set out in this article.

§ - 13 Subrogation

1159

The total loss of the subject-matter insured gives two rights to the insurer: firstly, to be subrogated in the rights of the insured against third parties and secondly, the right to become the owner of whatever is left of the property insured.

1160

Where the insurer only pays for a partial loss, he does not have the right to become the owner of whatever is left of the property insured.

He is however entitled to subrogation up to the amount of the indemnity paid by him.

§ - 14 Double insurance

1161

This article defines over-insurance.

1162

This article states that all the contracts involved where there is over-insurance are nevertheless operative.

This is contrary to Article 2640 C.C. under which contracts take effect according to the moment they were entered into and the insured must seek indemnity from the first insurer.

1163 and 1164

The insured, because several insurers are involved, is not entitled to receive more than what he would have received had there been only one insurer.

1165

The insured who collects from the insurers an amount in excess of what he is entitled to receive under the preceding rules is deemed to own such sums for the benefit of the insurers and will have to remit to them, according to their respective rights.

1166

Where there is over-insurance resulting from several insurance contracts, each insurer is held proportionately in relation to the amount for which he is liable under his own contract.

1167

If an insurer pays more than his share, he is entitled to be reimbursed by the others.

§ - 15 Under insurance

1168

The insured is deemed to be his own insurer whenever he decides to insure the object for an amount less than its insurable value.

§ - 16 Mutual insurance

1169

It occurs on occasion that several persons agree to insure one another against marine losses. This is particularly true for liability insurance under marine insurance contracts.

1170

As in damage insurance (aa. 997 and 998), the third party injured has a direct right of action against the insurer.

1171

The rights and obligations of the parties to a mutual insurance agreement are effectively the same as if there had been a contract of marine insurance.

CHAPTER XVI

ANNUITIES

Section I

General provisions

1172, 1173 and 1174

These articles reproduce the substance of Articles 1787 and 1788 C.C., in the chapter on the constitution of rents; they also substantially reproduce Article 1901 C.C. which deals with life rents. The definition will apply as much to life annuities as to those created for some other term, regardless of how they are constituted.

Article 1172 substitutes "periodic instalments" for "annual interest". In fact, the prestation need not be annual, provided it is periodic. Prestations may also be in kind, although this occurs less frequently. There is no need to preserve the second paragraph of Article 1787 C.C. which provides that annuity rates are subject to the rules governing loans upon interest. The two contracts differ in that the capital of an annuity is not redeemable, whereas the capital of a loan always is. Besides, interest legislation is within the competence of the Federal Government, whereas annuities are not.

1175

This article is drawn from Article 1911 C.C. on life rents, but it would henceforth apply to all types of annuities.

1176

This article is based on Article 1907 C.C. and extends its application to all annuities, whether for life or not.

1177

This article entails the repeal of Articles 1792 and 1908 C.C. and suggests that in no case may the creditor request that the forced sale be made subject to the charge of his annuity. It was believed there was no reason to treat the creditor otherwise than as an ordinary hypothecary creditor or another holder of a real right purged by the order.

1178

Since oppositions to secure charges by annuity creditors would be abolished, provision must now be made for payment of their claims. This article makes provision for a new scheme for collocating creditors in that it renders universally applicable Article 1914 C.C., which now applies only to life rents. The words "by a voluntary sale followed by confirmation of title" have not been retained, since this procedure has been done away with under the Code of Civil Procedure (628).

1179

This article reproduces the substance of Article 1790 C.C. and applies it to both life annuities and non-life annuities.

1180

The article prescribes a unique means of evaluating annuities in all cases where the creditor is supposed to receive their value. Article 1915 C.C. has been generalized so as to apply to all annuities, whether for life or not.

It was believed necessary to prohibit any contrary stipulation because, aside from other reasons, if the parties were allowed to stipulate an evaluation exceeding the real value, any recourses open to the creditors of the debtor could be rendered illusory.

1181

This article provides for cases of disagreement, where the court settles the dispute upon motion.

1182 and 1183

The right of unilateral redemption by the debtor would no longer exist, since the proposed text makes no mention of it. Like any other obligation, an annuity subsists according to the agreement of the parties. Since annuities are generally established for a long term and since they can affect immoveables, it was necessary to strike a compromise. The option to redeem has been done away with and replaced by a new option to substitute, in favour of the creditor. Under this option, any debtor may appoint an authorized insurer in his place, provided he pays the price required for future annuity service.

Article 1183 accords the same option to the owner of an immoveable hypothecated for payment of the annuity.

If the parties do not agree under these two articles, the court would

decide as to the modalities of exercising this option, upon motion by the debtor.

It is believed that this new legislation would be very useful for several reasons:

1. it allows for free disposition of immoveables, which seems necessary for progress and general prosperity;
2. the rights of the creditor are fully protected and the intention of the person who established the annuity is respected in the sense that the annuity is continued for the future and its value is not given back to the creditor who, according to the intention of that person, especially when the annuity is established by gift or by will, is perhaps little qualified to administer it wisely and to preserve it;

This option was moreover granted by Mr. Justice André Nadeau in a similar situation (629).

The usefulness of these articles is less evident, perhaps, when the annuity does not affect an immoveable, but it is believed that a case could arise in which a debtor would have a legitimate interest in freeing himself from the obligation of an annuity, as for example in the case of suretyship; moreover, the creditor will certainly be as well protected after the substitution.

The provisions of these articles cannot easily be applied when dealing with annuities in kind and not in money. It was not considered necessary to provide special means for liberating debtors in such cases; this will be done according to the particular circumstances involved in each case.

1184

It was deemed advisable to specify that the creditor, who is a beneficiary under the annuity, may be neither a party to the contract nor even the annuitant.

1185 and 1186

Designations of beneficiaries for annuities other than a party to the contract seldom occur when annuities contracts between individuals are involved. In the few instances where that might occur, the general provisions of stipulations in favour of another should apply.

However, designations of beneficiaries in commercial annuities are frequent and these nominations have all the appearance of designations of beneficiaries under life insurance contracts. It was thought preferable to insure uniformity of treatment between designations of beneficiaries

under life insurance contracts and similar designations under pension plans.

Section II

Special provisions governing life annuities

1187

This article substantially reproduces the provisions of Article 1902 C.C. and the first paragraph of Article 1903 C.C.

1188

This article substantially reproduces Article 1905 C.C. It is proposed that the substance of Article 1906 C.C. be repealed since it gives rise to more disputes than it settles.

1189 and 1190

These articles provide that no life annuity may be constituted for a period longer than three consecutive lifetimes or ninety-nine years. They are based on Article 391 and on the second paragraph of Article 1903 C.C. No capital may be repaid when the annuity expires. This provision is of public order.

Article 1190 provides for a two-fold contract: a life annuity combined with a minimum-term annuity despite the death of the annuitant. This is another contract frequently seen in practice.

1191

This article proposes as a suppletive rule a solution generally acknowledged by doctrine (630).

1192

The solution here proposed is already acknowledged in jurisprudence (631).

1193

This article essentially reproduces Article 1910 C.C.

1194

This is the essence of Articles 1912 and 1913 C.C., subject to Article 1190.

Section III

Special provisions governing term annuities

1195

This article distinguishes life annuities from other temporary annuities which are not based on the life of a person.

1196

The Civil Code still permits constitution of rents in perpetuity provided they do not affect immoveables. This article would no longer allow this; all annuities would be temporary and the article provides that non-life annuities cannot last for more than ninety-nine years.

CHAPTER XVII

GAMING AND WAGERING CONTRACTS

1197 and 1198

Articles 1927 and 1928 of the Civil Code regulate "gaming and wagering contracts", with a distinction being made between games "of chance" and those described as "games of skill".

In the first case, the law forbids forced execution of a gaming debt or wager. However, a player who pays voluntarily cannot claim recovery, except in the obvious case of deceit on the part of the winner. In the second instance, the operation is legitimate, but the court can prevent payment if it considers the amount to be excessive.

Denial of the right of action in Article 1927 of the Civil Code has been examined by legal doctrine and jurisprudence. There are those who claim that gaming and wagering contracts contain a natural obligation. Thus the debtor, by voluntarily executing his obligation, has transformed it into a civil obligation and no longer has the right of recovery. Others believe that these contracts are immoral by definition: if on this basis the winner has no right to compel execution of the contract, neither can the loser recover the sum he has knowingly paid, since he inevitably runs up against the rule *In pari causa turpitudinis, cessat repetitio.*

Article 1197 in principle prohibits all gambling and wagering contracts; it is clear, however, that it does not prevent a leisure organization or promoter from giving a reward or a prize to the winner of an event, for here the only uncertainty, the only risk, lies in the person of the

participant, and the person offering it naturally is under an obligation. The article merely prohibits gaming among the players on the outcome of the game, as well as wagering by third parties on this outcome.

Even if the validity of gaming or wagering depends on the existence of a special law, provision had to be made for regulating illegal situations. A choice had to be made between imposing a complete ban on wagering while permitting recovery, or retaining the *status quo* of Article 1927 C.C., exactly as it stands or with amendments. It was felt necessary to retain denial of right of action for both discharge and recovery: whoever willingly pays a gaming debt or wager when he is under no obligation to do so should not be able to go back on his decision. However, and this is where Article 1198 brings some relief, if the amount paid is excessive, and if the court considers the circumstances justify it, the court may then allow partial reimbursement of what has been paid. This move was responsive to the modern trend to penalize lesion, even among persons of major age (632).

CHAPTER XVIII

SETTLEMENTS

1199

The text of Article 1918 C.C. permits settlement in which concessions are not necessarily reciprocal.

Certain authors (633), basing themselves on the interpretation of the corresponding article of the French Civil Code (a. 2044), have maintained that there can be no settlement unless the parties make reciprocal concessions. The explanation for this interpretation, contrary to the letter of the Code, is that the Codifiers went astray on this point. It appears, however, from a reading of their report, that the change was deliberate: "Article 1 follows Article 2044 C.N., but contains a condition essential to the contract not expressed in that article, namely: that concessions or reservations must be made by one or both of the parties contracting." (634). The principle has been upheld that a settlement may be made by unilateral concessions.

Even if a unilateral concession may be construed as gratuitous, there being no counter prestation, the parties clearly do not have to observe the formalities of gifts, because the liberality is indirect.

1200

This article repeats the first part of Article 1921 C.C., with only a small stylistic change. The French text has been altered in the interests of consistency of the vocabulary by substituting the word *nullité* for the word *rescision*.

The remainder of Article 1921 C.C. is merely a reference to the general principles of obligations, which it is hardly necessary to repeat in this article. The same is true of Article 1919 of the Civil Code, dealing with the capacity of the parties (635).

1201

This article reproduces the rule in Article 1922 of the Civil Code, with the same amendment to the French text as that indicated in the preceding article. The party entitled to seek nullity of the settlement is entitled to invoke nullity of the title. Thus, if the nullity of the juridical act on which the parties transacted was absolute, both of them may seek to have the transaction annulled.

1202

This article substantially reproduces, but in altered form, Article 1923 of the Civil Code, except in so far as the sanction is concerned: relative nullity would seem sufficient for the purpose.

1203

This article enables a party to demand the nullity of the settlement whenever a judgment has been rendered, even though theoretically the dispute no longer exists if the judgment is final.

Article 1924 of the Civil Code affirms the validity of the settlement only when the judgment may be appealed, on the reasoning that the settlement then has an object.

It was thought preferable to stress the parties' awareness of the judgment rather than the object of the settlement, namely whether or not the decision may be appealed.

1204

This is the rule expressed in Article 1925 C.C., with minor changes of style.

1205

This article reproduces Article 1926 C.C. and indicates the procedure to be followed.

It was not considered necessary to institute proceedings to correct a simple error of calculation. The procedure provided in Article 453 C.C.P. is expeditious.

It was considered wise to specify that the error could be other than one of calculation.

CHAPTER XIX

ARBITRATION

Section I

General provisions

1206

The proposed definition considers both existing conflicts entrusted to arbitration, and potential disputes which the parties, by an undertaking to arbitrate, commit themselves to bring before an arbitration tribunal.

Before the Code of Civil Procedure was promulgated in 1966, the undertaking to arbitrate was considered null as contrary to public order (636). Article 951 of the new Code of Civil Procedure provides only that "an undertaking to arbitrate must be set out in writing." In this matter, the commissioners entrusted with reform of the Code of Civil Procedure reported as follows: "The validity of this clause, it is true, raises a problem which is not one of procedure but one of substantive law, and which belongs to the legislator or to the judge to settle; but the Commissioners have considered it wise to provide for the day when it will be determined" (637).

By using the term "existing or eventual dispute", firm support is given to the validity of the undertaking to arbitrate. The reference to exclusion of the courts in the article should dispel any doubt.

1207

The preceding article determines the usual limits of arbitration; since it is subject to the general rules on contracts it may bear on anything which is a contractual object. It was deemed useful to repeat those parts of Articles 394 and 940 of the Code of Civil Procedure. It was not deemed necessary to withdraw from arbitration support granted by gift or legacy.

1208

Since this contract removes the dispute from the jurisdiction of the courts, it was felt necessary, in order to protect the parties, to require that arbitration agreements be set out in writing (638).

This is not, however, a requirement for the validity of the agreement (a. 43). A party who has taken part in the arbitration cannot plead that the arbitration agreement was not set out in writing.

1209

This article is based on the European Convention on Arbitration (639). It is intended to prevent the dominant party from imposing his own arbitrators.

This provision is necessary, particularly to offset certain clauses in contracts of adhesion.

1210

The purpose of this article is to end the hesitation of the courts which sometimes dismissed or suspended proceedings when there was a valid arbitration stipulation (640). It is deemed preferable to adopt the rule dismissing the proceedings. Such dismissal could be pleaded within the framework of the fourth paragraph of Article 165 C.C.P. which provides that an action must be rejected if the suit is unfounded in law.

This solution reproduces that adopted by the European Convention (641).

Section II

Arbitration procedure

§ - 1 Appointment of arbitrators

1211, 1212 and 1213

These articles repeat in part the provisions of Articles 383 and 941 C.C.P., and provide that notice of arbitration must be given to the opposing party.

This notice might henceforth be given by the ordinary means of service and also by registered or certified mail, without the authorization of the judge or of the prothonotary required by Article 138 C.C.P.

1214 and 1215

These articles reproduce in part Article 951 C.C.P.

The procedure for appointing arbitrators, when this is not provided for in the agreement, is based on the Ethiopian Code (a. 3332) and on usage in the German Federal Republic (642).

1216

This article is needed to avoid repetition in subsequent articles.

1217

Given the *intuitu personae* nature of the role of the arbitrator, it is necessary to adopt an article respecting his replacement since, if no means of replacement is provided in the contract, it could be inferred that arbitration could not take place.

1218

This article repeats the provisions of Article 942 C.C.P.

1219 and 1220

These articles substantially reproduce Article 946 C.C.P. Service of the motion is not mentioned, since this is a general rule of procedure.

1221

This is a reproduction of the first two paragraphs of Article 943 C.C.P. Minutes are no longer required since, in this case, the award is final and without appeal. Requiring minutes would run counter to the spirit of the article which seeks to leave the parties free to determine procedure.

1222

In addition to repeating the third paragraph of Article 943 C.C.P., it was thought advisable to confer on arbitrators the power to swear witnesses.

Nonetheless, the problem arose as to what penalty should be imposed on persons who refuse to obey the subpoena. A decision was needed as to whether to give the arbitrators the right to compel the witnesses to appear, or to provide that they refer the case to the court for such an order. The second solution was adopted on the basis of an opinion given by Montpetit, J., in *Malek v. Parent et Fraternité des policiers de Ville Mont-Royal Inc.* (643).

1223

It is believed that, rather than lay down many rules to provide for the death or the change of capacity of any party, as does Article 945 C.C.P., it is preferable in all cases to apply the general rules of civil procedure relating to continuance of suit.

1224

While revising arbitration contracts, this fundamental question was fully debated, and the Committee responsible for this chapter submitted two versions of the article.

The first version repeated the first paragraph of Article 948 C.C.P. It had the disadvantage of not specifying the recourse of the parties when the arbitrators did not follow the rules of law. If the parties were allowed to lodge an appeal, they would have been subject to a jurisdiction that they had hoped to avoid by arbitration.

The second version upheld the opposite principle under which the arbitrators are not obliged to decide according to the rules of law unless the parties so desire. This solution has the advantage of being very flexible and conducive to agreements.

A study of opinions submitted following public consultation showed that the second solution was best.

§ - 2 Arbitration award

1225

It was deemed advisable to allow the arbitration tribunal to make provisional or interlocutory awards in order to facilitate hearings and to avoid complicating procedure.

1226

This article repeats the second paragraph of Article 948 of the Code of Civil Procedure.

It seemed wise to compel the arbitrators to render an award and also to make provision for cases where an arbitrator is incapable of signing. Article 948 C.C.P. does not do this.

1227

This article is based in part on Article 941 and Article 944 paragraph two of the Code of Civil Procedure.

1228

This article determines what happens when there has been no useful arbitration. The parties remain obligated to refer the dispute to an arbitration tribunal again, unless there is an agreement to the contrary.

1229

This article refers to the provisions of the Draft on prescription of judgments.

1230

This article is based on the first part of Article 23 of the European Convention providing a uniform law on Arbitration (644), and the second paragraph of Article 473 C.C.P. with respect to judgments.

This proposed article rejects Article 387 C.C.P. which, like Article 949 C.C.P., compels the arbitrators to file the original of the award at the court office. Most of the time, the parties will determine the means of sending the award.

1231

The award is generally the result of an arbitration contract and binds the parties to that contract as soon as it is made. From that time, the award has the same binding force as the contract, although it will only become executory by homologation.

1232 and 1233

The parties must execute the award within fifteen days. Once this period has expired, they may apply for homologation of the award if forced execution is required. In other cases, homologation is of no use.

Section III

Motion for homologation or for annulment

1234 and 1235

These articles give the court a right to examine the arbitration award. However, the court may not alter the award but may only declare it null, completely or partially, for one of the reasons provided.

1236

The fact of preventing the court from examining the substance of a dispute when an arbitration award is homologated or annulled is as much

a part of the essence of such a jurisdiction as is the prohibition against appeal. The entire chapter devoted to arbitration is based on the presumption that the parties intended to settle their dispute without recourse to the courts.

This, moreover, is the meaning of Article 950 C.C.P.

1237

This article groups the provisions of the seventh paragraph of Article 483, and Article 520 C.C.P.

Since arbitration is intended to be flexible by nature, the arbitrators must be free to reconsider their decisions and to correct any omissions or clerical errors in the award.

Judicial authorization is required so as to avoid any doubt in the exercise of this option.

1238

Article 393 of the Code of Civil Procedure in the chapter on arbitration by advocates allows an appeal from the decision. This article imposes the contrary solution for all types of arbitration. Indeed, there would be no question of establishing different rules according to whether the arbitrators are advocates or not.

1239

This article substantially repeats the first paragraph of Article 950 of the Code of Civil Procedure.

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(1) Particularly Articles 986, 986a, 1011, 1040a to 1040e, 1056a to 1056c, 1149, 1202a to 1202l C.C.

(2) See, in this regard, P.-A. CREPEAU, *Contrat d'adhésion et contrat type*, in *Problèmes de droit contemporain*, 1974, p. 67; A. POPOVICI, *Les contrats d'adhésion: un problème dépassé?*, ibid., p. 161.

(3) See particularly Article 1040c C.C. and the *Consumer Protection Act*, S.Q. 1971, c. 74.

(4) See the *Act respecting the lease of things*, S.Q. 1973, c. 74, amending Articles 1600 et s. C.C.

(5) For example, the *Workmen's Compensation Act*, R.S.Q. 1964, c. 159; and more recently the *Highway Victims Indemnity Act*, R.S.Q. 1964, c. 232 and the *Crime Victims Compensation Act*, S.Q. 1971, c. 18.

(6) See J. CARBONNIER, *Droit civil*, Thémis, 6th ed., Paris, P.U.F., 1969, t. 4, No. 36.

(7) The Office's Committee on Civil Rights had prepared a Declaration of Civil Rights which was to have been placed at the beginning of the Draft Civil Code (see the *Report on Civil Rights*, C.C.R.O., IV, 1968). However, at the request of Mtre J. Choquette, Q.C., at that time Minister of Justice, this declaration was inserted in a *draft Bill concerning human rights and freedoms* submitted to the Minister of Justice by Mtre. F.R. SCOTT and the President of the Office in his private capacity on July 25, 1970. In this respect, see Sections 1 to 8 and 49 of the *Charter of Human Rights and Freedoms*, S.Q. 1975, c. 6 and Article 18 C.C.

(8) In this case, it was not thought appropriate to study responsibility resulting from highway accidents, since a special Committee had been set up in the Department of Financial Institutions for this very purpose: *Report of the committee of inquiry on automobile insurance*, Government of Québec, 1974. See also a more recent outline of government policy in *Automobile Insurance Reform - Government proposal*, 1977.

(9) S.Q. 1971, c. 74.

(10) See the *Report on Obligations*, C.C.R.O., 1976, XXX, a. 278, pp. 354 to 356.

(11) See, in this respect, *Regent Taxi Transport Co. Ltd v. La Congrégation des petits frères de Marie*, [1929] S.C.R. 650; *Lister v. McAnulty*, [1944] S.C.R. 317; *La Reine v. Sylvain*, [1965] S.C.R. 164; *Overnite Express Ltd v. Beaudoin*, [1971] C.A. 774; *Hôpital Notre-Dame de l'Espérance v. Laurent*, [1974] C.A. 543; *Sebaski v. Weber*, [1972] S.C. 557.

(12) See, in the *Report on Obligations*, *op. cit.*, the comments on Article 278, p. 357.

(13) *Ibid.*, a. 279 and comments, p. 357.

(14) *Ibid.*, p. 357.

(15) See Articles 94 and 295.

(16) Thus, Mr. Justice Mayrand could state in *Hôpital Notre-Dame de l'Espérance v. Laurent*, [1974] C.A. 543, at p. 548: "Il me semble qu'il ne faut pas enlever au mot autrui son sens normal et général pour le restreindre à la victime physique d'un acte fautif ... Il me paraît également conforme aux principes de notre droit civil qu'une personne puisse exiger réparation du préjudice personnel que lui cause un cocontractant ou l'auteur d'un délit en blessant son conjoint...". Similarly, Mr. Justice Owen stated in the name of the Court, in *Elliot v. Entreprises Côte-Nord Ltée*, [1976] C.A. 584, at pp. 586 and 587. "Taken in its ordinary everyday meaning the word "another" as used in Article 1053 C.C. means any person at all to whom damages are caused by the fault of any person capable of discerning right from wrong ... For almost fifty years we have been subjected to sterile discussions by jurists as to whether the word "another" in 1053 C.C. is restricted to the immediate victim of the delict or quasi-delict. Today it can be said that the question still remains open. In my view the time has come to dispense with all the subtle and technical arguments that have been put forward to justify the

opposing meanings sought to be given to the word "another" in Article 1053 C.C. The purpose of all the mental agility expended in attempting to restrict the clear meaning of this word "another" has been to control or prevent the apprehended flood of claims by a large number of people based on one delictual act or omission. Such control can be exercised, without distorting the ordinary meaning of the word "another" by restricting the damages which can be recovered as the result of a delict or quasi-delict to that which is an immediate and direct consequence of the delict or quasi-delict in accordance with the terms of Article 1075 C.C."

(17) [1929] S.C.R. 650, at p. 655.

(18) F. LANGELIER, *Cours de droit civil de la Province de Québec*, Montreal, Wilson & Lafleur, 1907, t. 3, p. 468; P.B. MIGNAULT, *Le droit civil canadien*, Montreal, C. Théoret, 1901, t. 5, pp. 333 to 334.

(19) *Larrivé v. Lapierre*, (1890) 20 R.L. 3 (S.C.) Mathieu J., *Sheehan v. Bank of Ottawa*, (1920) 58 S.C. 349.

(20) See the following, also favouring a natural interpretation of Article 1053 C.C.: J.L. BAUDOUIN, *La responsabilité civile délictuelle*, Montreal, P.U.M., 1973, No. 100 et s., p. 80 et s. (hereinafter referred to as *Responsabilité*); A. et R. NADEAU, *Traité pratique de la responsabilité civile délictuelle*, Montreal, Wilson & Lafleur, 1971, No. 635, p. 595; D. FORTIN and Y. CARON, *Sens et portée du mot "autrui" dans l'article 1053 du Code civil*, (1959-60) 34 Thémis 105; see also, C. PERRAULT, *Qui est autrui?* (1966) 26 R. du B. 368; M.A. TANCELIN, *Théorie du droit des obligations*, Québec, P.U.L., 1975, No. 410 et s., p. 273 et s.

(21) See 10-11 Vict., 1847, c. 6.

(22) See 9-10 Vict., 1846, c. 93 (Imp.).

(23) The Codifiers did not retain this provision and did not mention it in their report: see a. 73 et s. of *Title on Obligations*, First report, p. 56 et s., and the comments on these articles, on p. 12. Nor is it included in the resolutions passed during study of the Draft by the provincial legislature: 29 Vict., c. 41 and the attached schedule. See on this subject, P.B. MIGNAULT, *op. cit.*, t. 5, p. 340; B. SCHECTER, *The Origin and Development of the Law Relating to Damage for Loss of Life in Québec*, (1938-39) 17 R. du D. 77; also the notes of Jetté J. in *Jeannotte v. Couillard*, (1894) 3 B.R. 461, at p. 470 et s.; notes of Pigeon J. in *Pantel v. Air Canada*, [1975] 1 R.C.S. 472, p. 476.

(24) See the original edition of the *Civil Code of Lower Canada*, according to the amended roll deposited in the office of the clerk of the Legislative Council as prescribed by 29 Vict., 1865, c. 41. The existence of Article 1056 C.C. is also confirmed by 31 Vict. 1868, c. 7, s. 10.

(25) See in this regard, Lord Ellenborough's famous declaration in *Baker v. Bolton*, (1808) 1 Camp. 493: "In a civil court the death of a human person cannot be complained of as an injury"; preamble to *Lord Campbell's Act*, 9-10 Vict. 1846, c. 93 (Imp.). Also, *Salmond on the Law of Torts*, 16th ed., by R.F.V. HEUSTON, 1973, p. 597 et s.

(26) See in this regard, B. SCHECTER, *loc. cit.*; J. L. BAUDOUIN, *Responsabilité*, No. 663, p. 425; G.V.V. NICHOLLS, *The Responsibility for Offences and Quasi-Offences under the Law of Québec*, Toronto, Carswell, 1938, p. 105. Also *Ravary v. G.T. Rly Co. of Canada*, (1862) 6 L.C.J. 49 (Q.B. - 1860); *Jeannotte v. Couillard*, (1894) 3 Q.B. 461 (Q.B. and S.C.); *Hunter v. Gingras*, (1922) 33 Q.B. 403, p. 405 (notes by Lamothe C.J.).

(27) See, on this point, G.V.V. NICHOLLS, *op. cit.* p. 105. Also, in the recent case of *Marier v. Air Canada*, S.C. (Montreal, 796, 776) 14 May 1976, [1976] S.C. 847, the Superior Court granted, in law, an application for reparation of a prejudice suffered by the plaintiff, a divorcee receiving an alimentary pension, as the result of the death of her ex-husband, victim of an air transport accident. The application could certainly not have been granted on the basis of Article 1056 C.C., the plaintiff no longer being a "consort", and yet this was a matter of an illicit *ricochet* interference with her alimentary debt, and the court, drawing on the lack of application of one of the conditions under Article 1056 C.C., was able to recognize her right to reparation for a prejudice suffered on the basis of the system of general law under Article 1053 C.C. See also *Marier v. Air Canada*, [1971] S.C. 142.

(28) In particular, see, in French law, B. STARCK, *Droit civil - Obligations*, Paris, Librairies Techniques, 1972, t. 2, No. 125 et s., p. 63 et s.; R. SAVATIER, *Traité de la responsabilité civile en droit français*, 2e ed., Paris, Librairie Générale de Droit et de Jurisprudence, 1951, t. II, No. 539 et s., p. 107 et s.; Ph. LETOURNEAU, *La responsabilité civile*, MAZEAUD and A. TUNC, *Traité théorique et pratique de la responsabilité civile*, Paris, Montchrestien, t. 1, 6 ed., 1965, No. 275 et s., p. 361 et PAGE, *Traité élementaire de droit civil belge*, Brussels, Etablissements *ilité civile*, Paris, Montchrestien, t. I, 6 ed., 1965, No. 275 et s., p. 361 et s.; G. MARTY and P. RAYNAUD, *Droit civil*, Paris, Sirey, 1962, t. II 1st vol., No. 381 et s., p. 360 et s.; No. 384, p. 364 et s.; in Belgian law, H. de PAGE, *Traité élementaire de droit civil belge*, Brussels, Etablissements Emile Bruylant, t. 2, 3rd ed., 1964, No. 950 et s., p. 947 et s.; in Swiss law, see a. 45 par. 3 *Code des Obligations* and, on this subject P. ENGEL, *Traité des obligations en droit suisse*, Neufchâtel, Editions Ides et Calendes, 1973, No. 123, p. 350 et s.; in South African law, R.G. McKERRON, *The Law of Delict*, Capetown, Juta & Co. Ltd, 1971, 7th ed., p. 149 et s. See, however, certain civil law systems which restrict the right to reparation to certain close relatives, who are enumerated: a. 844 C.C., German Federal Republic; a. 495 C.C., Portugal; a. 2315 C.C., Louisiana; a. 1406 C.C., the Netherlands; a. 2095 C.C., Ethiopia; a. 460 C.C. R.S.F.S.R.; a. 446 C.C., Poland.

(29) The Codifiers indeed felt it necessary to remove Articles 1063 to 1078 C.C. from the chapter on contracts where the corresponding Articles (aa. 1136 to 1155) of the French Civil Code are today, to apply them to all obligations, whether contractual or extracontractual. Thus Article 1065 C.C. should normally be the legal basis for contractual and extracontractual responsibility - see A. and R. NADEAU, *op. cit.*, No. 10, p. 7, No. 35,

p. 23 et s. However, it has become the custom to base extracontractual civil responsibility on Articles 1053 et s. C.C. and contractual civil responsibility on Article 1065 C.C. In this regard, it seems reasonable to consider that since the title on inexecution of obligations (a. 254 et s. of the Draft) is clearly distinct from the title on sources of obligations (a. 3 et s. of the Draft); it could be applied in all cases of inexecution, whether their origin be contractual or legal.

(30) See, specifically, Article 583 C.C.: "Ownership in property is acquired by prehension or occupation, by accession, by descent, by will, by contract, by prescription, and otherwise, by the effect of law and of obligations".

(31) See, however, the second paragraph of Section 49 of the *Charter of Human Rights and Freedoms*, S.Q. 1975, c. 6 and Draft Article 290. It should be noted that these provisions apply whether the defendant's responsibility is contractual or extracontractual.

(32) See, on this subject, *Oeuvres de Pothier*, by M. BUGNET, Paris, Videcoq, 2e éd., 1861, t. 3, p. 1.

(33) See L. FARIBAULT, in *Traité de Droit civil du Québec*, t. II, Montreal, Wilson & Lafleur Ltée, 1961, No. 253, p. 229.

(34) See F. LANGELIER, *op. cit.*, t. 5, pp. 52 and 53.

(35) See HALSBURY, *The Laws of England*, 3rd ed., London, Butterworth & Co. Ltd, 1960, vol. 34, No. 72, p. 46.

(36) See L. FARIBAULT, *op. cit.*, t. II, No. 297, p. 266; No. 302, p. 273.

(37) See, on this subject, *Cayer v. Boivin*, [1966] S.C. 400.

(38) See HALSBURY, *op. cit.*, vol. 34, No. 72, p. 46.

(39) See Uniform Commercial Code, s. 2-301; W.D. HAWKLAND, *Sales and Bulk Sales*, 2nd ed., Joint Committee on Continuing Legal Education, ALI-ABA, 1958, p. 38.

(40) See, also, *Diplomatic Conference on the Unification of Law Governing the International Sale of Goods*, The Hague, published by the Ministry of Justice of the Netherlands, Government Printing Office, 1966.

(41) See *Bombardier v. Williamson & Crombie et al.*, [1950] K.B. 681.

(42) See, M. POURCELET, *La Vente*, Cours de Thémis, Montreal, 1974, p. 108.

(43) See, on this subject, M. FARIBAULT, *Réméré et clause résolutoire*, (1941) I R. du B. 117; P. MARTINEAU, *De la résolution d'une vente immobilière pour défaut de paiement de prix*, (1958-59) 61 R. du N. 255; M. POURCELET, *op. cit.*, pp. 141 and 142.

(44) See Article 274.

(45) See, on this subject, W.M. MARLER, *The Law of Real Property*,

Toronto, Burroughs, 1932, p. 189; J. PINEAU, *A la recherche d'une solution au problème de la promesse de vente*, (1964-65) 67 R. du N. 387.

(46) See, on this subject, *Industrial Acceptance Corporation v. Couture*, [1954] S.C.R. 34; *Fortin Foundry Ltd v. Palmer Brothers Ltd*, [1960] S.C. 324.

(47) See, in particular, *The Bulk Sales Act*, R.S.O. 1970, c. 52; *Uniform Commercial Code*, s. 6-108.

(48) See Article 516 et s. German Federal Republic Civil Code; a. 239 et s. Swiss *Code des obligations*; a. 2427 et s. Ethiopian Civil Code.

(49) For the controversy over the kind of property under this heading, see G. BRIERE, *Quelques observations sur le don manuel*, (1963) 45 Themis 24; P. CIOTOLA, *Le don manuel en droit privé québécois ou la libéralité incomprise*, (1973) 76 R. du N. 143.

(50) See Article 390.

(51) See Article 6 of the Book on *Publication of Rights*.

(52) See Article 10.

(53) S.Q. 1969, c. 77.

(54) See *Grenier v. Grenier*, (1924) 36 K.B. 172; *Farand v. Paulos*, (1905) 28 S.C. 200; *Paquette v. Girard*, (1951) R.L. 427 (S.C.); *Hardy v. Nolin*, (1932) 53 K.B. 359; *Roy v. Houle*, (1928) 34 R.L. 448 (S.C.); *Gilot v. Colin*, (1930) 48 K.B. 464. But see also cases in which ingratitude was considered sufficient cause by the court: *Ouellette v. Jakoby*, [1960] S.C. 292; *Hass v. Segal*, [1975] C.A. 323, conf. [1973] S.C. 185.

(55) See G. BRIERE, *L'art de ressusciter l'institution contractuelle non enregistrée*, (1968-69) 71 R. du N. 238; G. BRIERE, *Régimes matrimoniaux*, Chroniques régulières, (1972) 32 R. du B. 270; (1974) 34 R. du B. 518; R. COMTOIS, *Des donations par contrat de mariage*, (1972) 75 R. du N. 253; J.-G. CARDINAL, *Défaut d'enregistrement des donations par contrat de mariage*, (1955-56) 58 R. du N. 89. Also, *Leduc v. Bouchard*, [1974] S.C. 307.

(56) R.S.Q. 1964, c. 296; this statute was repealed by the *Act respecting insurance*, S.Q. 1974, c. 70; (see a. 2547 C.C.).

(57) See, specifically, the French *loi du 18 juin 1966*, and the *décret no 66-1078 du 31 décembre 1966: affrètement et transport maritime*.

(58) R.S.C. 1970, c. C-15. Also the United States: 46 U.S.C.A., par. 1300-1315.

(59) *Loi du 2 avril 1936 relative au transport des marchandises par mer, J.O. 11 avril 1936.*

(60) *Loi du 18 juin 1966 sur les contrats d'affrètements et de transport maritime, J.O. 24 juin 1966.*

(61) See, Article 605 et s. (transport), Article 667 et s. (employment) Article 698 et s. (services).

(62) *Companies Act*, R.S.Q. 1964, c. 271.

(63) P.B. MIGNAULT, *op. cit.*, t. 8, p. 182; H. ROCH and R. PARE, in *Traité de droit civil du Québec*, Montreal, Wilson & Lafleur, 1952, t. 13, p. 338; N. L'HEUREUX, *Précis de droit commercial de la province de Québec*, Québec, Les Presses de l'Université Laval, 1972, p. 115.

(64) *Halsbury's Laws of England*, *op. cit.*, vol. 28, No. 925 to 928, p. 483.

(65) P.B. MIGNAULT, *op. cit.*, t. 8, p. 186 et s.; H. ROCH and R. PARE, *op. cit.*, t. 13, p. 336 et s.

(66) See Articles 60 and 115 C.C.P.; see, also, Articles 1836, 1837, 1838, 1843, 1844 and 1899 C.C.

(67) See, on this subjet, *Pérodeau v. Hamill*, [1925] S.C.R. 289.

(68) See Articles 1858 to 1863 C.C.

(69) In this matter, see Article 73 of the *Loi No. 66-537 du 24 juillet 1966 sur les Sociétés Commerciales*, French *Code de Commerce*; a. 620 of the Swiss *Code des Obligations*.

(70) See, especially, Article 34 of the *Loi sur les sociétés commerciales*, French *Code de Commerce*.

(71) R.S.Q. 1964, c. 281.

(72) R.S.Q. 1964, c. 272.

(73) See, on this subject, Article 28 of the *Loi sur les sociétés commerciales*, French *Code de commerce*.

(74) S.Q. 1925, c. 76.

(75) See, especially, *Amusement Clubs Act*, R.S.Q. 1964, c. 298; *National Benefit Societies Act*, R.S.Q. 1964, c. 299; *Cruelty to Animals Prevention Societies Act*, R.S.Q. 1964, c. 300.

(76) This power of inquiry and supervision would have to be provided for in a special statute applicable to groups regulated by this Department.

(77) S.Q. 1971, c. 74.

(78) R.S.Q. 1964, c. 79.

(79) H. de PAGE, *op. cit.*, t. VI, No. 832, p. 793.

(80) See the sixth and seventh Reports of the Codifiers, *Civil Code of Lower Canada*, Québec, Georges E. Desbarats, 1865, t. III, p. 244.

(81) 6 Edw. VII, c. 41, (Imp.).

(82) See by way of example, *The Marine Insurance Act*, R.S.O. 1970, c. 260; *Insurance Act*, R.S.N.S. 1967, c. 148, Part IX.

(83) G. GILMORE and C.L. BLACK, *The Law of Admiralty*, Brooklyn, The Foundation Press, 1957, p. 51.

(84) Loi no 67-522 du 3 juillet 1967 sur les assurances maritimes, J.O. 4 juillet 1967.

(85) See P. FERRAND, *Assurances maritimes*, J.Cl. Comm., former Articles 332 to 392, fasc. C2, 1972.

(86) (1968) 20 Dr. Marit. 261.

(87) See Article 891.

(88) *An Act respecting ground rents, constituted rents and life rents*, R.S.L.C. 1861, c. 50.

(89) Report of the Codifiers, *op. cit.*, t. I, p. 364.

(90) See Article 1172.

(91) See, also, the comments on Article 1182.

(92) See the first two paragraphs of Article 1790 C.C.

(93) J.E.C. BRIERLEY, *International Trade Arbitration: The Canadian Viewpoint*, in Canadian Perspectives on International Law and Organisation, Toronto, University of Toronto Press, 1974; by the same author, *Aspects of the promise to Arbitrate in the law of Québec*, (1970) 30 R. du B. 473; *Arbitrage conventionnel au Canada et spécialement dans le droit privé de la province de Québec*, Doctoral thesis, Université de Paris, 1964; EMILE COLAS, *Clause compromissoire, compromis et arbitrage en droit nouveau*, (1968) 28 R. du B. 129; JULES DESCHENES, *Arbitration by advocates*, (1963) 23 R. du B. 175; PHILIPPE FERLAND, *La controverse au sujet de la validité de la promesse d'arbitrage, appelée la clause compromissoire*, (1973) 33 R. du B. 136; by the same author, *L'arbitrage sans action en justice dans la province de Québec* (1971) 31 R. du B. 69; WALTER S. JOHNSON, *The Clause Compromissoire, its validity in Québec*, Johnson, Montréal, 1945; L. KOS. RABCEWICZ-ZUBKOWSKI, *Arbitration in the Code of Civil Procedure of Quebec*, (1968) 3 R.J.T. 143; CHATEAUGUAY PERRAULT, *Clause compromissoire et arbitrage*, (1945) 5 R. du B. 74.

(94) See as examples the *Agricultural Abuses Act*, R.S.Q. 1964, c. 130, s. 17; and the *Professional Syndicates Act*, R.S.Q. 1964, c. 146, s. 20.

(95) J.E.C. BRIERLEY, *Arbitrage conventionnel au Canada et spécialement dans le droit privé de la province de Québec*, *op. cit.*, p. 133 et s.; J. DESCHENES, loc. cit., p. 175.

(96) PHILIPPE FOUCHARD in his thesis *L'arbitrage International*, Paris, Dalloz, 1965, points out that only two jurisdictions are opposed to the *clause compromissoire*: that of Tangiers and that of Québec (p. 58, note 12); see on the clause compromissoire "réelle" before the 1966 Code of Civil Procedure: validity of this clause: *Beinhaker v. Louis Donolo Inc.*, [1972] P.R. 298 (P.C.); nullity of the clause: *Vinette Construction Limitée*

v. Dame Dobrinsky et autres et Brassard, [1962] Q.B. 62; *National Gypsum Company Inc. v. Northern Sales Limited*, [1964] S.C.R. 144; *Singer Plumbing and Heating Co. v. Richard*, [1968] Q.B. 547; *Sun and Sea Estates Ltd v. Aero-Hydraulic Corporation*, [1968] P.R. 210 (S.C.); under the 1966 Code of Civil Procedure: validity of the clause: *Morin v. The Travelers Indemnity Co.*, [1970] S.C. 84; *Le Syndicat de Normandin Lumber Ltd v. Le Navire Angelic Power*, [1971] F.C. 263; *Ville de Granby v. Desourdy Cons. Ltée*, [1973] C.A. 971; *Gaz Métropolitain Inc. v. Imperial Oil Ltd*, S.C. (Montreal -05-005796-73) 13 December 1973; *Société québécoise d'exploitation minière v. Hébert*, [1974] C.A. 78; *La Commission scolaire régionale des Bois Francs v. J.H. Dupuis Ltée*, [1975] C.A. 759; nullity of this clause: *Rex Rotary International Corp. a/s v. Scandinavian Business Machines Ltd*, S.C. (Montreal 741-392) February 1 1968, (1969) 10 C. de D. 797; *Daoust v. La Compagnie d'Assurances Elite Inc.*, [1969] S.C. 377; *Borenstein v. Trans-American Investment and Development Co. Ltd et Langenauer*, [1970] S.C. 192; *Syl-Ester Wood Products Corp. Ltd v. Doyon*, [1972] C.A. 677; *Greenspoon v. Miller*, C.A. (Montreal 09-000484-72) 30 November 1973.

(97) See: before the adoption of the Code of Civil Procedure, 1966, *Boisvert v. Plante*, [1952] Q.B. 471; following adoption of the Code of Civil Procedure 1966: *Mobilcolor Productions Inc. v. Gula et al*, [1968] P.R. 22 (S.C.); *Syl-Ester Wood Products Corporation Limited v. Doyon et al*, [1972] C.A. 677; *Greenspoon v. Miller*, C.A. (Montreal 09-000484-72) 30 November 1973.

(98) In this respect, see P.B. MIGNAULT, *op. cit.*, t. 5, p. 178; J. CARBONNIER, *op. cit.*, t. 4, No. 143, p. 525; J. FLOUR and J.L. AUBERT, *Les Obligations*, Paris, Armand Colin, 1975, vol. I, No. 41 et s., p. 30.

(99) See *Oeuvres de Pothier*, 2nd ed. by M. BUGNET, Paris, Cosse et Marchal, 1861, t. 2, No. 2, p. 3.

(100) See J. FLOUR and J.L. AUBERT, *op. cit.*, vol. I, No. 482 et s., p. 370; A. WEILL and F. TERRE, *Droit civil, Les obligations*, 2nd ed, 1975, No. 25 et s.

(101) See, specifically, P.B. MIGNAULT, *op. cit.*, t. 5, p. 181.

(102) See, for example, Article 759 C.C.

(103) See J. FLOUR and J.L. AUBERT, *op. cit.*, vol. I, No. 485 et s., p. 373.

(104) In matters of wills, see *McEwen v. Jenkins*, [1958] S.C.R. 719, rev. [1955] Q.B. 785; *Thibodeau v. Thibodeau*, [1961] S.C.R. 285, rev. [1960] Q.B. 960; *Klein v. Klein*, [1967] S.C. 300.

(105) See Articles 1022 and 13 C.C. and in this regard, A. WEILL and F. TERRE, *op. cit.*, No. 49 et s., p. 48 et s.

(106) See, specifically, *Christie v. York Corp.*, [1940] S.C.R. 139, conf. (1938) 65 K.B. 104; *Cameron v. Canadian Factors Corp. Ltd.* [1971] S.C.R. 148, rev. [1966] Q.B. 921; *Hecke v. Cie de Gestion Maskoutaine Ltée*, [1972] S.C.R. 22; *Gooding v. Edlow Investment Corp.*, [1966] S.C. 436.

(107) See *Tremblay v. Chartrand*, [1957] B.R. 456; *Langelier Ltée v. Demers*, (1928) 66 C.S. 120; *L'Espérance v. Dubreuil*, [1969] R.L. 531 (P.C.).

(108) See *Roy v. Beaudoin*, (1922) 33 B.R. 220.

(109) See P.B. MIGNAULT, *op. cit.*, t. 5, p. 197.

(110) See Article 43 et s.

(111) See Articles 112, 113 et s. and 189 et s. of the Book on *Persons*.

(112) See also Article 20.

(113) See, specifically, *Suburban Enterprises Inc. v. Prévost*, [1955] Q.B. 389; *Albion Construction Co. v. Moreau*, [1956] Q.B. 830.

(114) See J. FLOUR and J.L. AUBERT, *op. cit.*, vol. 1, No. 139 et s., p. 97; A. WEILL and F. TERRE, *op. cit.*, No. 134, p. 149.

(115) In this respect, see *Butler v. Mechanical Equipment Co. of Canada Ltd*, (1912) 7 D.L.R. 77 (K.B.); *Association Pharmaceutique de la Province de Québec v. T. Eaton Co. Ltd*, (1931) 50 K.B. 482; *Beaudoin v. Rodrigue*, [1952] K.B. 83.

(116) See, on this subject, G. MARTY and P. RAYNAUD, *op. cit.*, t. 2, vol. 1, No. 100, p. 82; M. PLANIOL, G. RIPERT and J. BOULANGER, *Traité de droit civil*, Paris, Librairie Générale de Droit et de Jurisprudence, 1957, t. 2, No. 324, p. 132.

(117) See, especially, *Beaudry v. Randall*, [1963] S.C.R. 418, conf. [1962] Q.B. 577; *Renfrew Flour Mills v. Sanschagrin Ltée*, (1928) 45 K.B. 29.

(118) See J.L. BAUDOUIN, *Les Obligations*, Montréal, Les Presses de l'Université de Montréal, 1970, No. 83, p. 57 (hereinafter referred to as *Obligations*).

(119) *Beaugency v. Farargy*, [1969] S.C. 496.

(120) See *Godin v. Leblanc*, [1970] S.C. 46.

(121) See *Cité de Québec v. Delage*, [1957] S.C. 114; *Beaugency v. Farargy*, [1969] S.C. 496.

(122) See Article 22.

(123) See, in this respect, P.B. MIGNAULT, *op. cit.*, t. 5, p. 181; G. TRUDEL, in *Traité de droit civil du Québec*, Montréal, Wilson & Lafleur, 1946, t. 7, p. 49. See, in French law, H., L. and J. MAZEAUD, *Leçons de droit civil*, 5th ed., M. de Juglart, t. 2, vol. 1, No. 135, p. 112.

(124) See J. FLOUR and J.L. AUBERT, *op. cit.*, vol. 1, No. 162, p. 112.

(125) See, in this matter, J.L. BAUDOUIN, *Obligations*, No. 85 et s., p. 59 et s.

(126) *Underwood and Son Ltd v. Maguire*, (1897) 6 Q.B. 237.

(127) *Charlebois v. Baril*, [1928] S.C.R. 88.

(128) *Magann v. Auger*, (1902) 31 S.C.R. 186.

(129) See, on this subject, *Grace and Co. Ltd v. Perras*, (1922) 62 S.C.R. 166, conf. (1921) 31 K.B. 382; *Suburban Enterprises Inc. v. Prévost*, [1955] Q.B. 389; *Létourneau v. Noiseux*, [1963] S.C. 217; *Commissaires d'écoles pour la municipalité scolaire de Montréal-Sud v. Lord et al.*, [1965] S.C. 205; *Durand v. Crédit St-Laurent Inc.*, [1966] S.C. 282; *Garneau Turpin Ltée v. Gravelle*, [1969] R.L. 498 (P.C.).

(130) See J. FLOUR and J.L. AUBERT, *op. cit.*, vol. 1, No. 156, p. 108.

(131) See Article 657 of the German Federal Republic Civil Code; Article 1689 of the Ethiopian Civil Code; Article 8 of the Swiss *Code des Obligations*.

(132) See, especially, H., L. and J. MAZEAUD, *op. cit.*, t. 2, vol. 1, No. 366, pp. 312 and 313.

(133) See J. FLOUR and J.L. AUBERT, *op. cit.*, vol. 1, No. 154, p. 107.

(134) See, on this subject, J. CARBONNIER, *op. cit.*, t. 4, No. 15, p. 57; H., L. and J. MAZEAUD, *op. cit.*, t. 2, vol. 1, No. 138, p. 117; M. PLANIOL, G. RIPERT and J. BOULANGER, *op. cit.*, t. 2, No 332, p. 134.

(135) See, for example, Article 1694 of the Ethiopian Civil Code.

(136) See J. FLOUR and J.L. AUBERT, *op. cit.*, vol. 1, No. 181, p. 124.

(137) See Article 1695 Ethiopian Civil Code; aa. 1 and 2 Swiss *Code des Obligations*; *Travaux de la Commission de révision du Code civil français*, 1966-67, aa. 134 and 138; 1968-69, aa. 693 and 704.

(138) See, especially, M. PLANIOL, G. RIPERT and J. BOULANGER, *op. cit.*, t. 2, No. 335, pp. 134 and 135.

(139) See J.L. BAUDOUIN, *Obligations*, No. 98, p. 66; G. TRUDEL, *op. cit.* t. 7, p. 106.

(140) See J.L. BAUDOUIN, *Obligations*, No. 180, pp. 106 and 107; P.B. MIGNAULT, *op. cit.*, t. 5, p. 195.

(141) In this respect, see J.L. BAUDOUIN, *Obligations*, No. 125, p. 77; P.B. MIGNAULT, *op. cit.*, t. 5, p. 221.

(142) See, specifically, J.L. BAUDOUIN, *Obligations*, No. 137, p. 84.

(143) In this respect, see G. TRUDEL, *Lésion et contrat*, Montreal, Les Presses de l'Université de Montréal, 1965.

(144) See, particularly, *Pagnuelo v. Choquette*, (1904) 34 S.C.R. 102; *Rawleigh Co. Ltd v. Dumoulin*, [1926] S.C.R. 551, conf. (1925) 39 K.B. 241; *Faubert v. Poirier*, [1959] S.C.R. 459; *La Banque Royale du Canada v. Savouro Inc.*, [1974] S.C. 208.

(145) See *Rawleigh Co. Ltd v. Dumoulin*, [1926] S.C.R. 551; *Faubert v. Poirier*, [1959] S.C.R. 459, rev. [1956] Q.B. 551.

(146) See *Lortie v. Bouchard*, [1952] 1 S.C.R. 508.

(147) See, particularly, J.L. BAUDOUIN, *Obligations*, No. 127, p. 78; G. TRUDEL, *op. cit.*, t. 7, p. 183.

(148) On this subject, see *La Cie J.A. Gosselin Ltée v. Péloquin*, [1957] S.C.R. 15; *Hardy v. Dallaire*, (1925) 63 S.C. 83; *Gingras v. Larose*, (1939) 77 S.C. 394.

(149) See *La Reine v. Melanson*, [1966] Ex. C.R. 995; *Mac Farlane v. Dewey*, (1871) 15 L.C.J. 85 (Q.B.); *Kerr v. Davis*, (1889) 5 M.L.R. 156 (Q.B.); *Gravel v. Traders General Insurance Co.*, [1964] S.C. 48.

(150) See *Mac Farlane v. Dewey*, (1871) 15 L.C.J. 85 (Q.B.); *Gravel v. Traders General Insurance Co.*, [1964] S.C. 48; *Grover's Chain Stores Ltd v. Sauvageau*, [1967] S.C. 166.

(151) In this respect, see *J.J. Joubert Ltée v. Lapierre*, [1972] S.C. 476.

(152) See, specifically, *St-Hilaire v. Turcotte*, (1926) 40 K.B. 262; *Giroux v. Vinet*, (1903) 24 S.C. 1.

(153) See in this regard J. CARBONNIER, *op. cit.*, t. 4, No. 36 and 37, p. 119 et s.; J. FLOUR and J.L. AUBERT, *op. cit.*, vol. 1, No. 238 et s., p. 173 et s.; A. WEILL and F. TERRE, *op. cit.*, No. 197 et s., p. 217 et s.

(154) See G. TRUDEL, *Lésion et contrat*, Montréal, Les Presses de l'Université de Montréal, 1965, p. 89.

(155) See, specifically, Article 1040c and 1056b par. 4 C.C.; s. 118 of the *Consumer Protection Act*, S.Q. 1971, c. 74; *Public Service Board Act*, R.S.Q. 1964, c. 229, ss. 17, 18 and 19; *Securities Act*, R.S.Q. 1964, c. 274, ss. 35g and 60; *Minimum Wage Act*, R.S.Q. 1964, c. 144, ss. 13 and 14. In Ontario, *The Unconscionable Transactions Relief Act*, R.S.O. 1970, c. 472, s. 2; see also, a. 138 German Federal Republic Civil Code; a. 21 Swiss *Code des Obligations*.

(156) S.Q. 1971, c. 74.

(157) [1955] Q.B. 175.

(158) See *Bellemarre v. Dionne*, [1961] Q.B. 524; *Manseau v. Collette*, [1955] S.C. 2; *Mercier* v. *Saucier*, [1960] S.C. 305; *Roy v. Dubreuil et al.*, [1964] P.R. 403 (S.C.).

(159) See, on this subject, *Pinkus Construction Inc. v. McRobert*, [1968] Q.B. 516; *Brisson et al. v. Lepage et al.*, [1969] Q.B. 657.

(160) See in this respect J.L. BAUDOUIN, *Obligations*, No. 116, pp. 73 and 74; P.B. MIGNAULT, *op. cit.*, t. 5, p. 218; G. TRUDEL, *op. cit.*, t. 7, p. 160; *Rawleigh Co. Ltd v. Dumoulin*, [1926] S.C.R. 551; *Church v. Laframboise*, (1916) 50 S.C. 385; *North Montreal Land Centre Ltd. v. La Prévoyance*, (1924) 30 R.L. 256 (S.C.).

(161) See J. CARBONNIER, *op. cit.*, t. 4, No. 9, p. 33 et s., No. 41, p. 135 et s.; A. WEILL and F. TERRE, *op. cit.*, No. 114 et s., p. 122 et s.

(162) See, for example, the *Consumer Protection Act*, S.Q., 1971, c. 74.

(163) *Marto-Construction Inc. v. Mikola Sosiak et al.*, C.A. (Montreal-09-793-745) 5 June 1976, conf. [1974] S.C. 474; *Gooding v. Edlow Investment Corp.*, [1966] S.C. 436.

(164) On this subject, see *Martel v. Martel et Beaulieu*, [1967] Q.B. 805; *Bergeron v. Proulx et le Procureur Général de la province de Québec*, [1967] S.C. 579.

(165) See in French law, J. CARBONNIER, *op. cit.*, t. 4, No. 48 et s.; J. FLOUR and J.L. AUBERT, *op. cit.*, vol. 1, No. 326 et s., p. 245; A. WEILL and F. TERRE, *op. cit.*, No. 285 et s.; p. 319 et s.

(166) See *L'Association St-Jean-Baptiste de Montréal v. Brault*, (1900) 30 S.C.R. 598; *The Consumers Cordage Co. v. Connolly*, (1902) 31 S.C.R. 244, at p. 296; *Antoine Guertin Ltée v. Chamberland Co. Ltd*, [1971] *S.C.R. 385, at p. 403; Lessard v. Labonté et al.*, [1963] S.C. 247.

(167) *Agricultural Chemicals Ltd v. Boisjoli*, [1972] S.C.R. 278. See in this regard H., L. and J. MAZEAUD, *op. cit.*, t. 1, vol. 1, No. 356, p. 385; A. WEILL and F. TERRE, *op. cit.*, No. 291, p. 323.

(168) See, specifically, J.L. BAUDOUIN, *Obligations*, No. 256, p. 146.

(169) See, on this subject, *The Montreal Investment and Realty Co. v. Sarault*, (1919) 57 S.C.R. 464, conf. (1915) 24 K.B. 249; *Coutu v. Gauthier*, (1933) 54 K.B. 183.

(170) On this subject, see J.L. BAUDOUIN, *Obligations*, No. 255, p. 145.

(171) See, particularly, Articles 114, 190 and 191 of the Book on *Persons*.

(172) See, on this report, P.B. MIGNAULT, *op. cit.*, t. 5, p. 196; G. TRUDEL, *op. cit.*, t. 7, p. 96 et s.; *Rosconi v. Dubois*, [1951] S.C.R. 554; *Martel v. Martel et Beaulieu*, [1967] Q.B. 805; *Grégoire v. Heppel*, [1951] K.B. 229; *Normandin v. Nadon*, [1945] R.L. 361 (S.C.).

(173) See J.L. BAUDOUIN, *Obligations*, No. 259, p. 148.

(174) See, especially, *The Montreal Investment and Realty Co. v. Sarault*, (1919) 57 *S.C.R. 464, conf. (1915) 24 K.B. 249; Coutu v. Gauthier*, (1933) 54 K.B. 183.

(175) See J. CARBONNIER, *op. cit.*, t. 4, No. 49; J. FLOUR and J.L. AUBERT, *op. cit.*, vol. 1, No. 359 et s., p. 280.

(176) To this effect, see *Lortie v. Bouchard*, [1952] 1 S.C.R. 508; *Tourangeau v. Leclerc*, [1963] Q.B. 760.

(177) See J. FLOUR and J.L. AUBERT, *op. cit.*, vol. 1, No. 357, p. 277.

(178) In this respect, see *Cameron v. Canadian Factors Corp. Ltd*, [1971] S.C.R. 148, at p. 156 et s.

(179) On this subject, see *Lortie v. Bouchard*, [1952] 1 S.C.R. 508, at p. 519 and

520; *Paterson v. Wembley Garage Ltd*, (1931) 37 R.L. n.s. 379 (S.C.), at p. 385; *Piché v. Bertrand*, [1946] S.C. 218. at p. 219.

(180) See *Garage Maurice Girard Ltée v. Hénault*, [1963] S.C. 253; *J.P. Charbonneau Auto Ltée v. Therrien*, [1967] R.L. 251 (P.C.).

(181) See, in this regard, G. WASSERMAN, "*Répétition de l'indu" arising from contracts based on illegal consideration*, (1952) 12 R. du B. 172; *L. v. B.*, [1954] S.C. 45; *Courteau v. Viau*, (1920) 58 S.C. 257; *Guay v. Vézina*, (1920) 58 S.C. 104; *Hébert v. Sauvé*, (1932) 38 R.L. n.s. 410 (S.C.); *Charles v. Lauzon*, [1967] R.L. 170 (P.C.).

(182) *Léonce Martel v. Georges-Henri Tremblay*, [1975] C.A. 586, conf. [1973] R.L. 248 (C.P.); *Bernard v. La Corporation de la paroisse de St-Ambroise*, [1968] S.C. 402; *Les Entreprises Jean M. Saurette Inc. v. Russell Marois*, [1975] S.C. 91.

(183) See *Cie J.A. Gosselin Ltée v. Peloquin*, [1957] S.C.R. 15, conf. [1954] Q.B. 674; *Tremblay v. Les Pétroles Inc.*, [1961] Q.B. 856; *Tourangeau v. Leclerc*, [1963] Q.B. 760; *Bernatchez v. Vaillancourt*, [1964] Q.B. 860; *Pouliot v. Gauthier*, [1970] C.A. 409.

(184) On this subject, see A. NADEAU and L. DUCHARME, in *Traité de droit civil du Québec*, Montreal, Wilson & Lafleur, 1965, t. 9, No. 421 and 422, p. 319; J. FLOUR and J.L. AUBERT, *op. cit.*, vol. 1, No. 339 et s., p. 262 et s.; H., L. and J. MAZEAUD, *op. cit.*, t. 2, vol. 1, No. 309, p. 266.

(185) In this respect, see *Rodden v. Sauriol*, (1918) 24 R.L. n.s. 421 (C.Rev.); *Laventure v. Vaillancourt et al.*, (1936) 42 R. de J. 276 (S.C.).

(186) See A. NADEAU and L. DUCHARME, *op. cit.*, t. 9, No. 434, p. 326.

(187) See, specifically, *Hôtel Commercial de Bagotville Inc. v. Boily*, (1970) 11 C. de D. 815 (S.C.), p. 825 et s.

(188) See, on this subject, *Consumers Acceptance Corp. v. Robitaille*, [1963] Q.B. 540; *Merit Business and Realty Co. v. Goldberg*, [1965] Q.B. 33.

(189) See, in this regard, J. CARBONNIER, *op. cit.*, t. 4, No. 66 p. 214; J. FLOUR and J.L. AUBERT, *op. cit.*, vol. 1, No. 392 et s., p. 305 et s.

(190) See, especially, *Grace and Co. v. Perras*, (1922) 62 S.C.R. 166, conf. (1921) 31 K.B. 382; *Belisle v. Marcotte*, [1957] Q.B. 46.

(191) See, on this subject, J.L. BAUDOUIN, *Obligations*, No. 288, p. 160.

(192) See *Browning v. Cie Masson Ltée*, (1915) 24 K.B. 389; *Guillemette v. Bazinet*, [1950] R.L. 119 (S.C.).

(193) See *Bellavance v. Orange Crush Ltd and Kik Co.*, [1955] S.C.R. 706, conf. [1953] Q.B. 573; *Traders General Insurance v. Segal*, [1963] Q.B. 740.

(194) See, on this subject, *Daoust v. Cie d'assurances Elite Inc.*, [1969] S.C. 377; *Garneau Turpin Ltée v. Gravelle*, [1969] R.L. 498 (P.C.).

(195) See J.L. BAUDOUIN, *Obligations*, No. 275, p. 156. See also J. CARBONNIER, *op. cit.*, t. 4, No. 51; J. FLOUR and J.L. AUBERT, *op. cit.*, vol. I, No. 374, p. 294 et s.

(196) See, especially, *Zusman v. Tremblay*, [1951] S.C.R. 659.

(197) See, especially, *McCarthy v. The Thomas Davidson Manufacturing Co.*, (1900) 18 S.C. 272; *Dattner v. Guardian Insurance Co. of Canada*, [1958] S.C. 212; *Issenman et al. v. Westcrest Development Inc.*, [1961] S.C. 656; *Smith v. Savard*, [1962] S.C. 625.

(198) See, on this subject, P.-A. CREPEAU, *Le contenu obligationnel d'un contrat*, (1965) 43 Can. Bar. Rev. 1.

(199) See, especially, *Cie d'aqueduc du Lac St-Jean v. Fortin*, [1925] S.C.R. 192; *Marcotte v. Darveau*, [1956] S.C. 197.

(200) See, on this subject, *Verona Construction Ltd v. Frank Ross Construction Ltd*, [1961] S.C.R. 195, conf. [1959] Q.B. 674; *Terminal Construction Co. Ltd v. Piscitelli*, [1960] Q.B. 593; *Vézina v. D.*, [1961] S.C. 245.

(201) See, on this subject, Article 1664h C.C.; *Consumer Protection Act*, S.Q. 1971, c. 74, s. 118.

(202) See Article 1040c C.C.; *Consumer Protection Act*, S.Q. 1971, c. 74, s. 118. See in Ontario, *The Unconscionable Transactions Relief Act*, R.S.O. 1970, c. 472, s. 2.

(203) See, specifically, *Bélanger et al. v. Bélanger*, [1968] S.C. 588.

(204) See, specifically, *Conover v. Commercial Acceptance Corp. Ltd*, [1950] K.B. 116; *Lafontaine v. Lafontaine*, [1952] K.B. 685; *Bélanger et al. v. Bélanger*, [1968] S.C. 588. See on this subject J. CARBONNIER, *op. cit.*, t. 4, No. 39; J. FLOUR and J.L. AUBERT, *op. cit.*, vol. I, No. 382, p. 300.

(205) See *Boulanger v. Caisse Populaire de St-Sylvère*, (1936) 60 K.B. 538.

(206) See J.L. BAUDOUIN, *Obligations*, No. 302, p. 165; P. TURGEON, *Contre-lettre et simulation*, (1953) 56 R. du N. 178, at p. 189.

(207) See G. MARTY and P. RAYNAUD, *op. cit.*, t. 2, vol. I, No. 281, pp. 249 and 250; H., L. and J. MAZEAUD, *op. cit.*, t. 2, vol. I, No. 824, pp. 789 and 790; M. PLANIOL, G. RIPERT and J. BOULANGER, *op. cit.*, t. 2, No. 614, p. 230.

(208) See, specifically, *Allaire v. Boivin*, (1929) 47 K.B. 462; *Marmette et Lefaivre v. Commercial Investment of Québec Inc.*, [1962] Q.B. 95.

(209) In this respect, see P.B. MIGNAULT, *op. cit.*, t. 5, p. 272 et s.

(210) In this respect, see J.L. BAUDOUIN, *Obligations*, No. 324 et s., p. 174 et s.

(211) See *Hallé v. Canadian Indemnity Co.*, [1937] S.C.R. 368; *Minister of National Revenue v. Massawippi Valley Railway Co.*, [1961] Ex. C.R. 191.

(212) See, specifically, *Borris et al. v. Sun Life Assurance Co. of Canada*, [1944] K.B. 537; *Marchand v. The Mutual Life Assurance Co. of Canada*, [1968] S.C. 215.

(213) To this effect, see *Proulx v. Leblanc et Lebel*, [1969] S.C.R. 765, conf. [1969] Q.B. 461.

(214) See Article 230.

(215) See J.L. BAUDOUIN, *Responsabilité*, No. 61, p. 52, No. 64, p. 54; P.A. CREPEAU, *Le contenu obligationnel d'un contrat*, (1965) 43 Can. Bar Rev. 1; A. and R. NADEAU, No. 62, p. 49; M. TANCELIN, *op. cit.*, No. 375 et s.; R. DEMOGUE, *Traité des Obligations en général*, Paris, Rousseau, 1923, t. 3, No. 242; G. MARTY and P. RAYNAUD, *op. cit.*, vol. 1, t. 2, p. 396; H. and L. MAZEAUD and A. TUNC, *op. cit.*, t. 1, p. 504; M. PLANIOL and G. RIPERT, *op. cit.*, t. 6, pp. 702 and 703; R. SAVATIER, *op. cit.*, t. 1, p. 208.

(216) See *Ouellet v. Cloutier*, [1947] S.C.R. 521, p. 527; *Eaton v. Moore*, [1951] S.C.R. 470, p. 479; *Garberi v. Cité de Montréal*, [1961] S.C.R. 408, p. 410; *O'Brien v. Procureur Général de Québec*, [1961] S.C.R. 184, p. 187; *Thériault v. Gravel*, [1961] S.C.R. 114, pp. 116 and 117; *Delisle v. The Shawinigan Water and Power Company*, [1968] S.C.R. 744, p. 751; *Villemure v. Hôpital Notre-Dame*, [1973] S.C.R. 716; *Mercier v. Morin*, (1892) 1 Q.B. 86, p. 94; *L'Oeuvre des terrains de jeux de Québec v. Cannon*, (1940) 69 K.B. 112, p. 114; *Massé v. Gilbert*, [1942] K.B. 181, p. 190; *Cité de Québec v. Barbeau*, [1948] K.B. 307, p. 317; *Cité de Sherbrooke v. Dawson*, [1951] S.C.C., published in (1968) 14 McGill L.J. 698, pp. 708 and 716; *Laphkas v. Ryan*, [1950] K.B. 695, p. 698; *X v. Mellen*, [1957] Q.B. 389, p. 416; *Labe v. Kamateros*, [1971] C.A. 496, p. 499; *Provost v. Petit*, [1969] S.C. 473; *Skyline Holdings Inc. v. Favorite Sportswear Inc.*, [1975] S.C. 1247; *Dussault v. Hôpital Maisonneuve Inc.*, [1976] S.C. 791.

(217) J.L. BAUDOUIN, *Responsabilité*, No. 104, p. 82; *Regent Taxi v. Congrégation des petits frères de Marie*, [1929] S.C.R. 650; *Montreal Tramways Co. v. Léveillé*, [1933] S.C.R. 456; *Lister v. Mc Anulty*, [1944] S.C.R. 317; *The Queen v. Sylvain*, [1965] S.C.R. 164; *Potvin v. Gagnon*, [1966] Q.B. 537; *Hôpital Notre-Dame de l'Espérance v. Laurent*, [1974] C.A. 543; *Elliot v. Entreprises Côte-Nord Ltée*, [1976] C.A. 584; *Nolet-McKenzie v. Proc. gén. du Québec et Vallières*, C.A. (Montreal 09-000443-747) 24 Nov. 1976; *Sebaski v. Weber Construction*, [1972] S.C. 557; *Therrien v. Gunville*, [1976] S.C. 777.

(218) See Article 254 et s. on inexecution of obligations.

(219) See Articles 751 to 761 C.C.P.

(220) *Lachance v. Cauchon*, (1915) 24 K.B. 421; *Acme Vacuum Cleaner Co. Ltd et al. v. Acme Vacuum Cleaner Co. Ltd*, [1953] Q.B. 188; *L'Association internationale des débardeurs, local 375 v. Lelièvre*, [1966] Q.B. 155; *Pelchat v. Carrière d'Acton Vale Ltée*, [1970] C.A. 884.

(221) See, particularly, Article 489-2 C.C. Fr. (January 3, 1968); Article 829 of

the German Federal Republic Civil Code; Article 350 of the Ethiopian Civil Code; Article 352 of the Hungarian Civil Code; Article 2047 of the Italian Civil Code; Article 122 of the Lebanese Civil Code and Article 428 of the Polish Civil Code.

(222) See, in this respect, R. SAVATIER, *Le risque, pour l'homme, de perdre l'esprit et ses conséquences en droit civil*, D. 1968 Chron. 109.

(223) See, in this respect, J.L. BAUDOUIN, *Responsabilité*, No. 39, p. 34; A. and R. NADEAU, *op. cit.*, No. 75, p. 57.

(224) J. CARBONNIER, *op. cit.*, t. 3, No. 57, p. 200.

(225) J.L. BAUDOUIN, *Responsabilité*, No. 80 et s., p. 62 et s.; A. and R. NADEAU, *op. cit.*, No. 213 et s., p. 233; *Drysdale v. Dugas*, (1896-97) 26 S.C.R. 20; *Canada Paper v. Brown*, (1922) 63 S.C.R. 243; *Montreal Street Rly Co. v. Gareau*, (1901) 10 Q.B. 417; *Cimon v. Bouchard*, (1919) 25 R. de J. 308 (S.C.).

(226) See, in this respect, R. COHEN, *Nuisance, A Proprietary Delict*, (1968) 14 McGill L.J. 124.

(227) *Katz v. Reitz*, [1973] C.A. 230, conf. S.C. (Montreal - 719,611) February 21, 1969.

(228) *Produits Yamaska Inc. v. Lemoyne*, C.A. (Montreal - 12283) October 26, 1970, referred to in J.L. BAUDOUIN, *Responsabilité*, No. 84, p. 65.

(229) See the *Report on Property*, C.C.R.O., 1975, XXXVIII, a. 66. This article is based on Article 1225 of the Ethiopian CivilCode and on Article 679 of the Swiss Civil Code.

(230) See Title Four of the Book on *The Family.*

(231) See *Alain v. Hardy*, [1951] S.C.R. 540; *Foley v. Marcoux*, [1957] S.C.R. 650, conf. [1957] Q.B. 512; comments by A. MAYRAND, (1958) 18 R. du B. 270; *Marcil v. Hétu*, [1967] S.C. 64.

(232) See, in this respect, J.L. BAUDOUIN, *Responsabilité*, No. 256, p. 182; A. and R. NADEAU, *op. cit.*, No. 363, p. 358.

(233) See the Book on *The Family*, Article 356.

(234) See the Book on *The Family*, Articles 354, 362.

(235) Under Section 7 of the *Public Curatorship Act*, S.Q. 1971, c. 81, the Public Curator has powers over the person and property of the patient, but he does not have custody, much less supervision, of that person.

(236) See *O'Brien v. Procureur général de la province de Québec*, [1961] S.C.R. 184.

(237) See, on this subject, J.L. BAUDOUIN, *Responsabilité*, No. 286, p. 197; *Fleury v. Commissaires d'écoles de Saint-David*, [1950] S.C. 33.

(238) See *Grieco v. Externat classique Sainte-Croix*, [1962] S.C.R. 519;

Desrochers v. Van Wagner, [1963] Q.B. 774; *Duchesne v. Patronage Roc Amadour*, [1956] S.C. 147.

(239) See *Central Vermont Railway Co. v. Bain*, (1921) 2 A.C. 412; *Curley v. Latreille*, (1920) 60 S.C.R. 131; *Governor and Gentlemen Adventurers of England v. Vaillancourt*, [1923] S.C.R. 414; *Québec Liquor Commission v. Moore*, [1924] S.C.R. 540; *Moreau v. Labelle*, [1933] S.C.R. 201; *Lussier v. Gingras*, [1972] C.A. 413; *Standard Structural Steel Ltd v. H.S. Construction Co.*, [1961] S.C. 72. See, on the subject, J.L. BAUDOUIN, *Responsabilité*, No. 394 et s., p. 253; A. and R. NADEAU, *op. cit.* No. 396 et s., p. 381; M. TANCELIN, *op. cit.*, No. 310 et s.

(240) See, in this regard, J.L. BAUDOUIN, *Responsabilité*, No. 402 et s., p. 261; A. and R. NADEAU, *op. cit.*, No. 428 et s., p. 416; M. TANCELIN, *op. cit.*, No. 321 et s.; *Québec Railway, Light, Heat and Power Co. v. Vandry*, [1920] A.C. 662; *City of Montreal v. Watt and Scott*, [1922] 2 A.C. 555; *M. and W. Cloaks v. Cooperberg*, [1959] S.C.R. 785.

(241) This supports the opinion of Mr. Chief Justice Fitzpatrick in *Doucet v. Shawinigan Carbide Co.*, (1909) 42 S.C.R. 281, at p. 290. See also, *Cité de Lachine v. Roy*, [1972] C.A. 487; *Légaré v. Québec Power Co.*, (1939) 77 S.C. 552.

(242) On this subject, see *Québec Railway, Light, Heat and Power Co. v. Vandry*, [1920] A.C. 662; *Canadian Vickers v. Smith*, [1923] S.C.R. 203; *Lacombe v. Power*, [1928] S.C.R. 409; *Jalbert v. Cité de Sherbrooke*, [1962] S.C.R. 94.

(243) On this subject, see *Backer v. Beaudet*, [1973] S.C.R. 628.

(244) On this subject, see *Lacombe v. Power*, [1928] S.C.R. 409; *Pérusse v. Stafford*, [1928] S.C.R. 416; *Terminal Rly v. Lévesque*, [1928] S.C.R. 340; *Delisle v. Shawinigan Water and Power*, [1968] S.C.R. 744; *Trottier v. Lefebvre*, [1973] S.C.R. 609. In this respect, see the recent decision of the French *Cour de Cassation*, April 23, 1971 (*Cozette v. Régnier*) J.C.P. 1972.II.17086, note J. Bore.

(245) See, on this subject, J.L. BAUDOUIN, *Responsabilité*, No. 427, p. 277; P.-A. CREPEAU, *Liability for damage caused by things, a civil law point of view*, (1962) 40 Can. Bar Rev. 222, p. 236; A. and R. NADEAU, *op. cit.*, No. 461, p. 440; *City of Montreal v. Watt and Scott*, [1922] 2 A.C. 555; *Cohen v. Coca Cola Ltd*, [1967] S.C.R. 469; *Tondreau v. C.N.R.*, [1964] S.C. 606.

(246) See on this subject J.L. BAUDOUIN, *Responsabilité*, No. 483 and 484, p. 313; A. and R. NADEAU, *op. cit.*, No. 521, p. 487; *Sévigny v. Boismenu*, [1963] Q.B. 323; *Bouchard v. Tremblay*, [1970] Q.B. 305.

(247) In this respect, see *Cité de Québec v. Picard*, [1972] S.C.R. 227.

(248) See, on this subject, J.L. BAUDOUIN, *responsabilité*, No. 478, p. 310; P.-A. CREPEAU, *Liability for damage caused by things, a civil law point of view, loc. cit.*, p. 237; A. and R. NADEAU, *op. cit.*, No. 520, p. 486;

Blais v. Lemieux, (1921) 30 K.B. 410; *Collin v. Vadenais*, (1928) 44 K.B. 89.

(249) See, on this subject, *Gougeon v. Peugeot Canada Ltée*, [1973] C.A. 824.

(250) See, particularly, *Ross v. Dunstall*, (1922) 62 S.C.R. 393; *London and Lancashire Guarantee and Accident v. Cie F. X. Drolet*, [1944] S.C.R. 82; *Legault v. Chateau Paint Works Ltd*, [1960] S.C. 567; *St-Hyacinthe Express v. General Motors Products of Canada Ltd*, [1972] S.C. 799.

(251) On this subject, see *Coca-Cola Ltd v. Cohen*, [1966] Q.B. 813, notes by Brossard J. p. 835.

(252) See Articles 1522 et s. of the Civil Code.

(253) See *Trudel v. Clairol Inc. of Canada*, [1972] C.A. 53.

(254) See *Gauvin v. Canada Foundries and Forgings Ltd*, [1964] S.C. 160.

(255) See J.L. BAUDOUIN, *Obligations*, No. 378, p. 203; L. FARIBAULT, in *Traité de droit civil du Québec*, Montreal, Wilson & Lafleur, 1957, t. 7 bis, No. 76, p. 62; P.B. MIGNAULT, *op. cit.*, t. 5, p. 309.

(256) See J.L. BAUDOUIN, *Obligations*, No. 387, p. 207; L. FARIBAULT, *op. cit.*, t. 7 bis, No. 116, p. 85; P.B. MIGNAULT, *op. cit.*, t. 5, p. 310.

(257) In this respect, see J.L. BAUDOUIN, *Obligations*, No. 388, p. 207; L. FARIBAULT, *op. cit.*, t. 7 bis, No. 119 et s., p. 88 et s.; P.B. MIGNAULT, *op. cit.*, t. 5, p. 311.

(258) See J.L. BAUDOUIN, *Obligations*, No. 390 et s., p. 208.

(259) In this respect, see J.L. BAUDOUIN, *Obligations*, No. 392, p. 208; L. FARIBAULT, *op. cit.*, t. 7 bis, No. 146, p. 104; P.B. MIGNAULT, *op. cit.*, t. 5, p. 314.

(260) See, particularly, P.B. MIGNAULT, *op. cit.*, t. 5, p. 312; J. CARBONNIER, *op. cit.*, t. 4, No. 116, pp. 427 and 428.

(261) See *Ross v. the King*, (1903) 32 S.C.R. 532, at p. 537.

(262) See *Anglehart v. Chenel*, [1950] S.C. 307.

(263) See, specifically, P.B. MIGNAULT, *op. cit.*, t. 5, p. 329.

(264) See, on this subject, G.S. CHALLIES, *The Doctrine of Unjustified enrichment in the Law of the Province of Québec*, 2nd ed., Montreal, Wilson & Lafleur, 1952, p. 148 et s.; A. MOREL, *L'évolution de la doctrine de l'enrichissement sans cause*, Montreal, Thémis, 1955, p. 123.

(265) See, especially, *Lauréat Giguère Inc. v. Cie immobilière Viger Ltée*, C.S.C. 30 Jan. 1976, (1976) 10 N.R. 277 (S.C.C.); *Cie de Péribonka Ltée v. Gaudreault*, (1921) 31 K.B. 214; *Côté et Levasseur v. Curé de la paroisse de St-Valère*, (1940) 69 K.B. 189, p. 212.

(266) See, especially, *Regent Taxi and Transport Co. v. Congrégation des Petits*

Frères de Marie, [1929] S.C.R. 650, p. 690 et s.; *Barnhardt v. Canadian Bank of Commerce*, [1952] S.C. 265, p. 274.

(267) See, on this subject, G.S. CHALLIES, *op. cit.*, p. 151; P.B. MIGNAULT, *L'enrichissement sans cause*, (1934-35) 13 R. du D. 157, p. 163 et s.

(268) C. PERRAULT, *Des quasi-contrats et de l'action "de in rem verso"*, (1938-39) 17 R. du D. 579, p. 586.

(269) See, on this subject, J.L. BAUDOUIN, *Obligations*, No. 433, p. 226; L. FARIBAULT, *op. cit.*, t. 7 bis, No. 65, p. 52.

(270) See *Excel Entreprises Ltée v. Park Avenue Chevrolet Ltée*, [1965] Q.B. 926, p. 927; *Laporte v. Labelle et al.*, [1968] Q.B. 28, p. 29; *Bédard v. Bédard Transport Cie Ltée*, [1960] S.C. 472, p. 475.

(271) See J.L. BAUDOUIN, *Obligations*, No. 595, p. 317; L. FARIBAULT, *op. cit.*, t. 8 bis, No. 121, p. 95.

(272) See, especially, L. FARIBAULT, *op. cit.*, t. 8 bis, No. 133, pp. 101 and 102.

(273) See, on this subject, *Excel Entreprises Ltée et Messier v. Deschatelets*, [1960] Q.B. 781, p. 788 et s.

(274) See J.L. BAUDOUIN, *Obligations*, No. 597, p. 318; L. FARIBAULT, *op. cit.*, t. 8 bis, No. 136, p. 103; P.B. MIGNAULT, *op. cit.*, t. 5, p. 455.

(275) See, especially, *La Société permanente de construction des artisans v. Ouimet*, (1888) 14 Q.L.R. 81 (Q.B.).

(276) See, especially, L. FARIBAULT, *op. cit.*, t. 8 bis, No. 134, p. 102.

(277) See, on this subject, *Binette v. Globensky*, (1933) 71 S.C. 111; *Poli v. Salaska*, (1933) 39 R. de J. 310 (S.C.); *Cardiec v. Vaillant*, [1969] S.C. 284; *Les Prévoyants du Canada v. Poulin*, [1970] S.C. 34.

(278) See, especially, L. FARIBAULT, *op. cit.*, t. 8 bis, No. 139, p. 105.

(279) See, on this subject, J. CARBONNIER, *op. cit.*, t. 4, No. 61, p. 202.

(280) See *Deslongchamps-Dionne v. Péloquin et Dumais*, [1962] S.C.R. 285, conf. [1960] Q.B. 1106; *In re Hamel: Trottier v. Mathieu*, [1964] Q.B. 831; *Gravel v. Amorosa et al.*, [1971] S.C. 255; *Gravel v. Joncas et al.*, [1971] S.C. 301.

(281) See, on this subject, *Deragon v. Dupuis*, [1955] Q.B. 193.

(282) S.Q. 1971, c. 74, ss. 68 and 70.

(283) See *Gravel v. Amorosa et al.*, [1971] S.C. 255; *Allard v. Lebel*, [1972] S.C. 260.

(284) See, especially, J.L. BAUDOUIN, *Obligations*,No. 605 and 606, pp. 322 and 323.

(285) See *Bernard v. Paquin*, [1954] Q.B. 273; *Proulx v. Forcier*, [1967] S.C.

674; *Gravel v. Cité de Chomedey*, [1969] S.C. 23; *Lemire v. Laroche*, [1971] S.C. 673.

(286) See, on this subject, L. FARIBAULT, *op. cit.*, t. 8 bis, No. 49 et s., P.B. MIGNAULT, *op. cit.*, t. 5, p. 441.

(287) See, on this subject, L. FARIBAULT, *op. cit.*, t. 8 bis, No. 56, p. 42; P.B. MIGNAULT, *op. cit.*, t. 5, p. 440 and 441.

(288) See, especially, *Sherburn Investment Corp. v. L.T.D. Realties Inc.*, [1966] Q.B. 100; *Tessier v. Godin*, [1970] C.A. 20; *Interstate Realties Inc. et al. v. Laurentide Realties Co. Ltd*, [1971] C.A. 835.

(289) See, on this subject, Article 139.

(290) See, on this subject, L. FARIBAULT, *op. cit.*, t. 8 bis, No. 79, p. 60; P.B. MIGNAULT, *op. cit.*, t. 5, p. 443.

(291) See, on this subject, Article 144.

(292) See, especially, *Grange v. Mc Lennan*, (1884) 9 S.C.R. 385; *Wilfrid Bédard Inc. v. Assistance Loan and Finance Corp.*, [1966] Q.B. 113; *Beaver Hall Investment Ltd v. Ravary Builders Supply Co. Ltd*, [1963] S.C. 388.

(293) See, on this subject, J.L. BAUDOUIN, *Obligations*, No. 634, p. 339; L. FARIBAULT, *op. cit.*, t. 8 bis, No. 236, p. 173.

(294) See, on this subject, *Proulx et al. v. Leblanc et al.*, [1969] S.C.R. 765, conf. [1969] Q.B. 461.

(295) See, on this subject, a. 1106 C.C.; see also: *Workmen's Compensation Act*, R.S.Q. 1964, c. 159, s. 10; *Industrial and Commercial Establishments Act*, R.S.Q. 1964, c. 150, s. 20; *Minimum Wage Act*, R.S.Q. 1964, c. 144, s. 26.

(296) See, for example, a. 1896 of the Ethiopian Civil Code; a. 1294 of the Italian Civil Code.

(297) See, especially, a. 1900 Ethiopian Civil Code; aa. 26, 27 and 28, *Lebanese Code des obligations et contrats.*

(298) See, on this subject, *Marmen v. Boudreault*, [1955] Q.B. 686; *La Commission du salaire minimum v. Langlois et al.*, [1967] S.C. 518.

(299) See, on this subject, *Harbec v. Corporation de la Paroisse de St-Antoine de Richelieu*, (1926) 64 S.C. 567; *Lévesque v. Arbec Construction et Campbell Brothers et Thompson Ltd et al.*, [1964] S.C. 24.

(300) See, especially, *The King v. Canada Steamship Lines Ltd*, [1927] S.C.R. 68; *Thériault v. Huctwith et al.*, [1948] S.C.R. 86; *Blumberg and Consolidated Moulton Trimmings Ltd v. Wawanesa Mutual Insurance Co.*, [1962] S.C.R. 21, conf. [1960] Q.B. 1165.

(301) See Article 176.

(302) See, especially, *Blumberg and Consolidated Moulton Trimmings Ltd v.*

Wawanesa Mutual Insurance Co., [1962] S.C.R. 21, conf. [1960] Q.B. 1165; *Federation Insurance Co. of Canada v. La Cité de Granby*, [1969] Q.B. 116.

(303) See, on this subject, L. FARIBAULT, *op. cit.*, t. 8 bis, No. 322 et s., p. 235 et s.; *Hôpital Notre-Dame de l'Espérance v. Laurent*, [1974] C.A. 543; *Coutellier v. Hervieux et al.*, [1974] S.C. 240.

(304) See, especially, *Martel v. Hôtel-Dieu St-Vallier*, [1969] S.C.R. 745; *Standard Structural Steel Ltd v. H.S. Construction Co.*, [1961] S.C. 72; *La Commission du salaire minimum v. Langlois et al.*, [1967] S.C. 518.

(305) See, on this subject, G. MARTY and P. RAYNAUD, *op. cit.*, t. 2, vol. 1, No. 789 et s., p. 791 et s.; M. PLANIOL and G. RIPERT, *Traité pratique de droit civil français*, 2nd. ed., Paris, Librairie Générale de Droit et de Jurisprudence, 1954, No. 1094, p. 468 and No. 1096, p. 470.

(306) See L. FARIBAULT, *op. cit.*, t. 8 bis, No. 206, p. 155; P.B. MIGNAULT, *op. cit.*, t. 5, p. 475.

(307) See a. 431 German Federal Republic Civil Code; a. 1917 Ethiopian Civil Code; a. 494 Greek Civil Code; a. 1317 Italian Civil Code; a. 380 Japanese Civil Code.

(308) See, especially, P.B. MIGNAULT, *op. cit.*, t. 5, p. 463.

(309) See, on this subject, *Wilfrid Bédard Inc. v. Assistance Loan and Finance Corp.*, [1966] Q.B. 113; *Teinturerie Québec Inc. v. Lauzon*, [1967] Q.B. 41; *Continental Discount Corp. v. Perreault*, [1967] S.C. 396.

(310) See, especially, *Wilfrid Bédard Inc. v. Assistance Loan and Finance Corp.*, [1966] Q.B. 113.

(311) See, on this subject, J.L. BAUDOUIN, *Obligations*, No. 619, p. 330; P.B. MIGNAULT, *op. cit.*, t. 5, p. 473.

(312) See the comments on Article 191.

(313) See, on this subject, *Duchesne v. Labbé et Nolin*, [1973] C.A. 1002.

(314) See, on this subject, P.B. MIGNAULT, *op. cit.*, t. 5, p. 285 et s.; G. TRUDEL, *op. cit.*, t. 7, p. 423 et s.

(315) See, especially, *Laferrière et al. v. Gariépy*, (1922) 62 S.C.R. 557; *Deschesnes v. Wawanesa Mutual Insurance Co.*, [1950] S.C. 141.

(316) See, on this subject, J.L. BAUDOUIN, *Obligations*, No. 442, p. 236. In French law, see J. CARBONNIER, *op. cit.*, t. 2, p. 797; H., L. and J. MAZEAUD, *op. cit.*, t. 2, No. 969, p. 818.

(317) See, on this subject, L. BAUDOUIN, *Le droit civil de la Province de Québec, modèle vivant de droit comparé*, Montréal, Wilson & Lafleur, 1953, p. 532; P.B. MIGNAULT, *op. cit.*, t. 5, p. 295; G. TRUDEL, *op. cit.*, t. 7, p. 468.

(318) See Articles 1035 and 1036 C.C.

(319) See Articles 1034, 1035, 1036 and 1038 C.C.

(320) See, on this subject, *Fortier v. Brault et al.*, [1942] K.B. 175; *Nadeau: Lamarre v. St-Amour*, [1956] Q.B. 286; *In re Normandin: Inns v. Dominion Structural Steel Ltd*, [1959] Q.B. 14; *In re Sénécal: Marcotte v. Sénécal*, [1963] Q.B. 172.

(321) P.B. MIGNAULT, *op. cit.*, t. 5, p. 294.

(322) See, on this subject, J.L. BAUDOUIN, *Obligations*, No. 458, p. 244.

(323) See, especially, M. PLANIOL, G. RIPERT and J. BOULANGER, *op. cit.*, t. 2, No. 1420, p. 533.

(324) See, on this subject, *Gauthier v. Gagné*, (1925) 38 K.B. 370; *Brien v. Brunet*, [1952] S.C. 365.

(325) See, in particular, J.L. BAUDOUIN, *Obligations*, No. 459 and 460, p. 245.

(326) See, on this subject, *In re Matthews: Freed v. Kenilworth Corp.*, [1969] S.C. 252.

(327) See *Grobstein v. Banque Canadienne Nationale and Butler*, [1963] Q.B. 215; *Bissonnette v. Bank of Nova Scotia and Leclair et al.*, [1964] Q.B. 918; *In re Monette: Mercure v. Vary et al.*, [1970] C.A. 480; *Blais v. Shaw*, [1971] C.A. 5.

(328) In this respect, see J.L. BAUDOUIN, *Obligations*, No. 23, p. 13; L. FARIBAULT, *op. cit.*, t. 8 bis, No. 438 et s., p. 321 et s..

(329) In this respect, see A. VINETTE, *La cause et les obligations naturelles*, (1972) 13 C. de D. 195, at p. 224.

(330) See, particularly, L. FARIBAULT, *op. cit.*, t. 8 bis, No. 10, p. 13; J. CARBONNIER, *op. cit.*, t. 4, No. 2, p. 10.

(331) See *In re Ross: Hutchison v. The Royal Institution for the Advancement of Learning*, [1932] S.C.R. 57, conf. (1931) 50 K.B. 107, conf. (1930) 68 S.C. 354; *Pesant v. Pesant*, [1934] S.C.R. 249; *The Royal Institution for the Advancement of Learning v. P. Lyall and Sons Co. et Currie*, (1937) 62 K.B. 125.

(332) See, specifically, *Cie de sable Union v. Warren*, (1915) 24 K.B. 111; *P.L. Lortie Ltée v. Vohl*, (1926) 41 K.B. 561; *Tremblay et al. v. Université de Sherbrooke*, [1973] S.C. 999.

(333) In this respect, see L. FARIBAULT, *op. cit.*, t. 8 bis, No. 529 et s., p. 385 et s.; P.B. MIGNAULT, *op. cit.*, t. 5, p. 550.

(334) See, specifically, *Bolduc v. Poulin*, (1934) 57 K.B. 98.

(335) On this subject, see *Golden Eagle Refining Co. of Canada Ltd v. Murphy Oil Co. Ltd*, [1970] C.A. 106, upheld by the Supreme Court of Canada in an unpublished decision [1970] S.C.R. v; *Premier Mouton Products Inc.*

v. the Queen, [1959] Ex. C.R. 191; *Bissonnette v. La Corporation de St-Joseph de Soulanges*, (1915) 21 R.L. n.s. 215 (Rev. C.); *Carrier v. La Cité de Salaberry-de-Valleyfield*, (1937) 75 S.C. 301; *Betty Brite of Canada Ltd v. Patrice Loranger Ltée*, [1971] S.C. 252.

(336) See *La Corporation des Obligations Municipales v. La Ville de Montréal-Nord*, (1921) 59 S.C. 550, at p. 553.

(337) On this subject, see J.L. BAUDOUIN, *Obligations*, No. 527, p. 276; L. FARIBAULT, *op. cit.*, t. 8 bis, No. 563, p. 410.

(338) See, specifically, *Payer v. De Tomasso*, [1956] Q.B. 106.

(339) See, specifically, the *Hospital Insurance Act*, R.S.Q. 1964, c. 163, s. 9; the *Workmen's Compensation Act*, R.S.Q. 1964, c. 159, s. 7, par. 3.

(340) In this regard, see Article 1971b of the Ethiopian Civil Code.

(341) See the fifth paragraph of Article 1156 C.C.

(342) On this subject, see M. PLANIOL and G. RIPERT, *op. cit.*, t. 7, No. 1271 et s., p. 676 et s.

(343) See Article 1977 of the Ethiopian Civil Code.

(344) See, specifically, *Proulx v. Leblanc et Lebel*, [1969] S.C.R. 765.

(345) See, in this respect, L. LESAGE, *Etudes sur la novation, la délégation et la stipulation pour autrui*, thesis, Université Laval, Québec, 1941.

(346) See, specifically, *Proulx v. Leblanc et Lebel*, [1969] S.C.R 765.

(347) See Article 93.

(348) In this respect, see M. PLANIOL and G. RIPERT, *op. cit.*, t. 7, No. 1279, pp. 682 and 683.

(349) See Articles 1162 to 1168 C.C.

(350) See Articles 236 and 237.

(351) See Article 233.

(352) On this subject, see *Lebel v. Allard*, [1973] C.A. 471, conf. [1972] S.C. 260.

(353) See Article 1492 et s. C.C.

(354) See Articles 187 and 188 C.C.P.

(355) *Sirois v. Hovington*, [1969] Q.B. 97.

(356) In this respect, see *Schwartz v. Kravitz et Pearl Assurance Co. Ltd et al*, [1973] S.C. 53.

(357) See, specifically, *Miles v. Van Horne Sales Ltd*, [1969] P.R. 85 (S.C.).

(358) R.S.Q. 1964, c. 64. Since 1970, Sections 49 to 78 of the *Finance Department Act*, R.S.Q. 1964, c. 64, constitute a separate Act entitled the

Deposit Act, (See the *Financial Administration Act*, S.Q. 1970, c. 17, s. 88). The *Finance Department Act* has become the *Financial Administration Act* (S.Q. 1970, c. 17).

(359) R.S.Q. 1964, c. 64. See, in this respect, the *Financial Administration Act*, S.Q. 1970, c. 17, s. 88.

(360) *Ibid.*

(361) See Article 191 C.C.P.

(362) In this respect, see J.L. BAUDOUIN, *Obligations*, No. 497, p. 263; L. FARIBAULT, *op. cit.*, t. 8 bis, No. 618, p. 453; P.B. MIGNAULT, *op. cit.*, t. 5, p. 575.

(363) In this respect, see J.L. BAUDOUIN, *Obligations*, No. 497, p. 263; L. FARIBAULT, *op. cit.*, t. 8 bis, No. 619 et s., pl 454 et s.; P.B. MIGNAULT, *op. cit.*, t. 5, p. 575.

(364) See, specifically, *Lemieux v. Robert*, (1941) 79 S.C. 136.

(365) On this subject, see J.L. BAUDOUIN, *Obligations*, No. 499 et s., p. 264 et s.; L. FARIBAULT, *op. cit.*, t. 8 bis, No. 628 et s., p. 460 et s.; P.B. MIGNAULT, *op. cit.*, t. 5, p. 576 et s.

(366) See, especially, Article 1526 C.C. (sale), Article 1610 C.C. (lease and hire of things).

(367) See, especially, Articles 1496, 1597, 1812 C.C.

(368) See L. FARIBAULT, *op. cit.*, t. 7 bis, No. 346, p. 237; J. CARBONNIER, *op. cit.*, t. 4, No. 84, p. 283 et s.

(369) In this matter, see *Lebel v. Les Commissaires d'écoles pour la municipalité de la ville de Montmorency*, [1955] S.C.R. 298, conf. [1954] Q.B. 824; *Interprovincial Lumber Co. Inc. v. Matapedia Co. Ltd*, [1973] C.A. 140.

(370) See Article 1067 C.C.

(371) See Article 1067 C.C.

(372) See, especially, *Coté et La Caisse Populaire de Montmorency Village v. Sternlieb et Clarfeld*, [1958] S.C.R. 121, conf. [1956] Q.B. 111; *Gagnon v. Séguin*, [1952] Q.B. 528.

(373) See Article 1068 C.C.

(374) *La Cie d'Aqueduc de la Jeune Lorette v. Turner*, (1922) 33 K.B. 1.

(375) See, especially, *Lécuyer v. Limoges*, (1932) 52 K.B. 400; *Deauville Estate Ltd v. Tabah*, [1964] Q.B. 53; *Cyr v. Lecours*, (1915) 47 S.C. 86.

(376) In this regard, see the Egyptian Civil Code, a. 293; Franco-Italian draft, a. 134; Lebanese *Code des obligations et contrats*, a. 38.

(377) In this matter, see L. FARIBAULT, *op. cit.*, t. 8 bis, No. 219, p. 163; P.B. MIGNAULT, *op. cit.*, t. 5, p. 477.

(378) On this topic, see *Pitre v. Association Athlétique d'amateurs*, (1911) 20 K.B. 41; *Lombard et al. v. Varennes et Théâtre National*, (1922) 32 K.B. 164; *Sternlieb v. Cain et al.*, [1962] Q.B. 440; *Amyot v. Antonin Dion Construction Inc.*, [1972] S.C. 351; *Tremblay et al. v. Université de Sherbrooke*, [1973] S.C. 999.

(379) See *Rothpan v. Drouin*, [1959] Q.B. 626; *Pichette v. Bouchard*, [1957] S.C. 18; *Belcourt Construction Co. v. Max Ornamental Iron Works Ltd*, [1973] S.C. 663.

(380) See, also, J.L. BAUDOUIN, *Obligations*, No. 548, p. 289.

(381) See, especially, *Lachance v. Brissette*, (1930) 49 K.B. 321; *Ouellet v. Thibault et al.*, [1951] K.B. 550.

(382) See, especially, *Lebel v. Les Commissaires d'écoles pour la municipalité de la ville de Montmorency*, [1955] S.C.R. 298, conf. [1954] Q.B. 824; *Tétreault et Lussier v. Gagnon*, [1962] S.C.R. 766, conf. [1961] Q.B. 195; *L'Industrielle Cie d'assurance sur la vie v. Place Coulonge Inc.*, [1971] C.A. 267.

(383) See, for example, Article 1501 C.C. (sale) and Article 1610 C.C. (lease and hire of things).

(384) On this topic, see *Autobus Sept-Iles Ltée v. Guimond*, [1971] C.A. 731; *Durolam Ltée v. Rousseau*, [1969] S.C. 313; *Kraus et al. v. Nakis Holding Ltd*, [1969] S.C. 261; *Betty Brite of Canada Ltd v. Patrice Loranger Ltée*, [1971] S.C. 252; *Girard v. J.D. Chevrolet Oldsmobile Ltée*, [1973] S.C. 263.

(385) See, for example, Article 1544 C.C.

(386) See Article 1065 C.C.

(387) In this matter, see *Verona Construction Ltd v. Frank Ross Construction Ltd*, [1961] S.C.R. 195, conf. [1959] Q.B. 674; *Interprovincial Lumber Co. Inc. v. Matapedia Co. Ltd*, [1973] C.A. 140; *Zaccardelli v. Hébert*, [1955] S.C. 478.

(388) On this point, see *Rouleau v. Power et al.*, (1927) 42 K.B. 416, p. 422; *Brunet v. Berthiaume*, (1902) 21 S.C. 314.

(389) See Articles 257, 258 and 259.

(390) In this respect, see J.L. BAUDOUIN, *Obligations*, No. 351 et s., p. 187; L. FARIBAULT, *op. cit.*, t. 7 bis, No. 350, pp. 241 and 242.

(391) See, especially, *Fassio v. Langlois*, [1958] Q.B. 787; *Larin v. Brière et al.*, [1965] Q.B. 800.

(392) See, especially, *La Corporation de la Ville de Grand'Mère v. L'Hydraulique de Grand'Mère*, (1908) 17 K.B. 83; *Lemay et al. v. Turgeon et al.*, [1955] R.L. 295 (S.C.).

(393) See, especially, *Chaput v. Romain*, [1955] S.C.R. 834; *Lamb v. Benoit, Forget et Nadeau*, [1959] S.C.R. 321.

(394) S.Q. 1975, c. 6.

(395) Article 2494 C.C. replaces Article 2468 C.C., which was renumbered in *An Act respecting insurance*, S.Q. 1974, c. 70.

(396) In this matter, see J.L. BAUDOUIN, *Responsabilité*, No. 115 et s., p. 90 et s.

(397) In this matter, see *Morissette et al. v. Lemieux et Contra*, [1943] K.B. 602; *Hovanic v. Kemp et Yvan et Lapre*, [1954] Q.B. 555; *Weir v. Boisvert*, [1970] S.C. 50.

(398) In this matter, see *Chabot v. Canadian International Paper Company*, [1966] S.C. 11.

(399) See, especially, *Chaput v. Romain*, [1955] S.C.R. 834, at p. 841; *Yacknin et Montgomery v. Robert et Ulrich*, [1972] S.C. 163, at p. 169.

(400) In this matter, see J.L. BAUDOUIN, *Responsabilité*, No. 160 et s., p. 124 et s.; A. and R. NADEAU, *op. cit.*, No. 577, p. 540 and No. 582, p. 545.

(401) In this respect, see *Findlay v. Howard*, (1919) 58 S.C.R. 516; *The Mile End Milling Co. v. Peterborough Cereal Co.*, [1924] S.C.R. 120.

(402) In this respect, see J.L. BAUDOUIN, *Responsabilité*, No. 100, p. 80; P.B. MIGNAULT, *op. cit.*, t. 5, p. 341 et s., p. 421; A. and R. NADEAU, *op. cit.*, No. 37, p. 24 et s.

(403) In this subject, see the *Revenue Department Act*, R.S.Q. 1964, c. 66, s. 53.

(404) See, in this respect, *Les immeubles Fournier Inc. v. Construction St-Hilaire Ltée*, [1975] 2 S.C.R. 2, rev. [1972] C.A. 35; *Pothier Ferland v. Sun Life Assurance Co. of Canada*, S.C.C. April 29th 1974; *contra*, YVES CARON, *Clauses d'indemnité et clauses pénales: Limite à la liberté contractuelle*, in *Cours de Perfectionnement de la Chambre des Notaires*, November 1974.

(405) See a. 288, Civil Code German Federal Republic; a. 345 of the Greek Civil Code; a. 301 of the Hungarian Civil Code; a. 1224 of the Italian Civil Code.

(406) See, especially, *The Glengoil Steamship Co. and Robert Gray v. Pilkington et al.*, (1898) 28 S.C.R. 146; *La Reine v. Grenier*, (1900) 30 S.C.R. 42; *Vipond v. Furness, Withy and Co.*, (1917) 54 S.C.R. 521; *McColl Frontenac Oil Co. Ltd v. Vézina*, [1949] K.B. 588; see also, L. DUCHARME, *La limitation contractuelle de la responsabilité civile: ses principes et son champ d'application*, (1957) 3 C. de D. 39.

(407) On this subject, see *Commissaires du Havre de Québec v. Swift Canadian Co., (1929) 47 K.B. 118;* Laiterie Artic Ltée v. Dominion Electric Protection, [*1972*] *C.A. 244;* Stern v. Marcotte, *(1941) 79 S.C. 191;* Gagnon v. Canadian Petrofina Ltée, [*1959*] *S.C. 666;* Coronation Foods Corp. v. Lasalle Warehousing and Transfer Ltd, [*1965*] *S.C. 633.*

(408) See *Health and Social Services Act*, S.Q. 1971, c. 48, s. 90.

(409) See *Workman's Compensation Act*, R.S.Q. 1964, c. 159, s. 16.

(410) See, especially, *La Reine v. Grenier*, (1900) 30 S.C.R. 42.

(411) See *Canadian Transfer Co. v. Boyce*, (1923) 34 K.B. 309; *Girard v. National Parking Ltd*, [1971] C.A. 328; *Jolicoeur v. Dominion Express Co.*, (1919) 55 S.C. 455; *Israel v. Champlain Coach Lines Ltd*, (1939) 77 S.C. 145; *Garage Touchette Ltée v. Metropole Parking Inc.*, [1963] S.C. 231.

(412) See Article 25.

(413) See, especially, *Dumoulin v. Lachapelle et Bibeault Ltée*, [1960] S.C. 688.

(414) On this subject, see A. and R. NADEAU, *op. cit.*, No. 690, p. 639.

(415) See Article 51.

(416) In this matter, see *The Canadian General Electric Co. v. The Canadian Rubber Co.*, (1916) 52 S.C.R. 349; *Boretsky et al. v. Amherst Bowling Recreation Inc.*, [1965] S.C. 521.

(417) In this matter, see Article 76; also, *Cameron v. Canadian Factors Corp. Ltd*, [1971] S.C.R. 148, rev. [1966] Q.B. 921.

(418) See Article 40.

(419) See Article 75.

(420) To this effect, see *Delisle Auto Rouyn Ltée v. McNicoll*, [1962] S.C. 75; *Garage Central d'Amos Ltée v. Bouchard*, [1962] S.C. 371; *The Great West Life Assurance Co. v. Codere et al.*, [1971] S.C. 541.

(421) *City Buick (MTL) Ltd v. Andriano*, [1961] S.C. 546.

(422) On this subject, see J.L. BAUDOUIN, *Responsabilité*, No. 222 et s., p. 156 et s.; A. and R. NADEAU, *op. cit.*, No. 537, p. 500 and No. 543, p. 505.

(423) See, especially, *Dugas et General Waste and Wares Ltd v. Chevrier*, [1972] S.C.R. 285; *St. Lawrence Corp. Ltd v. N.M. Paterson and Sons Ltd*, [1970] C.A. 1129.

(424) See, in particular, *Hôpital Notre-Dame de l'Espérance v. Laurent*, [1974] C.A. 543; *Coutellier v. Hervieux et al.*, [1974] S.C. 240.

(425) See, in particular, *The Mile End Milling Co. Ltd v. Peterborough Cereal Co.*, [1924] S.C.R. 120; *Benoit v. Pilon*, (1927) 42 K.B. 57; *Boutin v. Paré*, [1959] Q.B. 459; *Holbrook v. Gordon*, [1968] S.C. 37; *Beaulieu v. Ford et al.*, [1969] S.C. 569.

(426) In this matter, see A. MAYRAND, *L'énigme des fautes simultanées*, (1958) 18 R. du B. 1.

(427) See *Saint-Pierre et al. v. McCarthy*, [1957] Q.B. 421; *Labelle et Labelle v. Charette*, [1960] Q.B. 770; *Gauthier v. Bérubé et al.*, [1960] S.C. 23; *Pilon v. Aubry et al.*, [1973] S.C. 439.

(428) See P.B. MIGNAULT, *op. cit.*, t. 5, pp. 625 and 626.

(429) See, especially, *Charron-Picard v. Tardif*, [1961] S.C.R. 269; *Paramount Fabrics Ltd and North American Textile Sales Corp. v. Imperial Bank of Canada*, [1961] Q.B. 602; *The Bank of Nova Scotia v. Ravick et Great-West Life Assurance Co.*, [1968] S.C. 42.

(430) In this regard, see H., L. and J. MAZEAUD, *op. cit.*, t. 2, vol. 1, No. 912, p. 897 and No. 1149b, p. 1059.

(431) In this regard, see J.L. BAUDOUIN, *Obligations*, No. 680 et s., pp. 366 and 367.

(432) In this matter, see a. 393 of the German Federal Republic Civil Code; a. 450 of the Greek Civil Code.

(433) See, especially, *Commercial Acceptance Corp. v. Tournay*, [1964] Q.B. 896.

(434) On this topic, see L. FARIBAULT, t. 8 bis, No. 778 and 779, pp. 611 and 612; P.B. MIGNAULT, *op. cit.*, t. 5, p. 640.

(435) See, especially, L. FARIBAULT, *op. cit.*, t. 8 bis, No. 765, p. 597.

(436) See, especially, *Carrier v. Galienne*, [1963] S.C. 692.

(437) See Articles 1192 to 1197 C.C.

(438) On this topic, see L. FARIBAULT, *op. cit.*, t. 8 bis, No. 781 et s., p. 614 et s.

(439) See Article 369 of the Egyptian Civil Code.

(440) In this respect, see J.L. BAUDOUIN, *Obligations*, No. 646 et s., p. 350 et s.; L. FARIBAULT, *op. cit.*, t. 8 bis, No. 675 et s., p. 505 et s., No. 696 et s., p. 524; P.B. MIGNAULT, *op. cit.*, t. 5, p. 591 et s.

(441) See, especially, *Rémy et al. v. Gagnon*, [1971] C.A. 554; *Gaudreault v. Mercantile Property Corp. et Gaudreault*, [1972] C.A. 165.

(442) On this topic, see M. PLANIOL, G. RIPERT and J. BOULANGER, *op. cit.*, t. 2, No. 1768 et s., p. 639 and 640.

(443) In this matter, see Article 228 et s.

(444) See J.L. BAUDOUIN, *Obligations*, No. 656, pp. 354 and 355; L. FARIBAULT, *op. cit.*, t. 8 bis, No. 712, pp. 542 and 543; P.B. MIGNAULT, *op. cit.*, t. 5, pp. 607 and 608.

(445) On this topic, see P.B. MIGNAULT, *op. cit.*, t. 5, p. 655 et s.

(446) On this subject, see L. FARIBAULT, *op. cit.*, t. 8 bis, No. 302, p. 221; P.B. MIGNAULT, *op. cit.*, t. 5, pp. 495 and 496.

(447) See, especially, *Gingras v. Payette*, [1955] R.L. 385 (S.C.).

(448) In this regard, see M. PLANIOL and G. RIPERT, *op. cit.*, t. 7, No. 1301, p. 713.

(449) On this topic, see J.L. BAUDOUIN, *Obligations*, No. 667 et s., p. 360 et s.

(450) See, especially, P.B. MIGNAULT, *op. cit.*, t. 5, pp. 617 and 618.

(451) See, especially, *Groulx v. Dufour*, (1922) 60 S.C. 557.

(452) See L. FARIBAULT, *op. cit.*, t. 8 bis, No. 729, p. 555.

(453) *Ibid.*, No. 730, p. 557.

(454) In this matter, see L. FARIBAULT, *op. cit.*, t. 8 bis, No. 728, p. 554, No. 732, p. 559; P.B. MIGNAULT, *op. cit.*, t. 5, p. 620 and 622.

(455) In this regard, see P.B. MIGNAULT, *op. cit.*, t. 5, p. 623 and 624.

(456) See, especially, *Canit Construction Québec Ltd et A. Janin et Cie Ltée v. The Foundation Co. of Canada Ltd*, [1972] C.A. 81.

(457) On this subject, see J.L. BAUDOUIN, *Obligations*, No. 355, p. 188 and 189.

(458) See J.L. BAUDOUIN, *Obligations*, No. 358, p. 190; L. FARIBAULT, *op. cit.*, t. 8 bis, No. 804, p. 637; P.B. MIGNAULT, *op. cit.*, t. 5, p. 671. See in French law: H., L. and J. MAZEAUD, *op. cit.*, t. 2, p. 901.

(459) See, especially, *Canit Construction Québec Ltd et A. Janin et Cie Ltée v. The Foundation Co. of Canada Ltd*, [1972] C.A. 81; *Stan-Jar Holdings Co. Ltd v. Lot 82 Inc.*, [1966] S.C. 174; *Guy St-Pierre Automobile Inc. v. Lavallée*, [1964] S.C. 353; *The Canada Trust Co. v. Florence Shop Inc.*, [1962] S.C. 66; *Vachon v. Cotton*, [1953] S.C. 167.

(460) On this subject, see *Vachon v. Cotton*, [1953] S.C. 167; *The Canada Trust Company v. Florence Shop Inc.*, [1962] S.C. 66.

(461) In this respect, see M. PLANIOL and G. RIPERT, *op. cit.*, t. 6, No. 413, p. 562 and 563.

(462) This article should end the doctrinal controversy over the nature of the nullity in Article 1485 C.C.: see, on this subject, H., L. and J. MAZEAUD, *op. cit.*, t. III, No. 827, p. 701; L. FARIBAULT, *op. cit.*, t. II, No. 161, p. 140; M. POURCELET, *op. cit.*, p. 37.

(463) See P.B. MIGNAULT, *op. cit.*, t. 7, p. 57; M. POURCELET, *op. cit.*, pp. 45 to 47: Y. CARON, *La vente et le nantissement de la chose mobilière d'autrui*, (1977) 23 McGill L. J. 1.

(464) Chamber of Notaries, *Rapport de la Commission de révision du Code civil*, (1959) 62 R. du N. 455.

(465) See, on this subject, L. FARIBAULT, *op. cit.*, t. II, p. 107; T. R. HOULE, *De la convention d'arrhes*, (1976) 36 R. du B. 153; *Proulx v. Villiard*, [1950] K.B. 52; *Weldrick v. Maheux*, [1948] K.B. 579; *Mercure v. Caisse Populaire St-Bonaventure*, [1973] S.C. 632; *Daoust et al. v. Comber*, [1961] S.C. 159; *Moquin et Vida Inc. v. Suto et al.*, [1958] S.C. 480.

(466) See *Uniform Commercial Code*, s. 2-301; see also s. 2-312.

(467) See in support: K.C.T. SUTTON, *The Reform of the Law of Sales*, (1969) 7 Alta L. Rev., No. 1, p. 130; German Federal Republic Civil Code, aa. 443, 460, 463 and 476; Swiss *Code des Obligations*, aa. 192 and 199; *Uniform Commercial Code*, s. 2-302.

(468) See *Girard v. Dessert*, (1915) 48 S.C. 508.

(469) See, in this respect, L. FARIBAULT, *op. cit.*, t. II, p. 243; *Dupuis v. Hébert*, [1956] Q.B. 434.

(470) See, specifically, *Hornstein v. Constant*, [1967], Q.B. 446; *Couillard v. Vallières*, [1962] Q.B. 93; *Issenman et al. v. Westcrest Development Inc.*, [1961] S.C. 656.

(471) See J.W. DURNFORD, *What is an apparent defect in the contract of sale?* (1964) 10 McGill L.J. 60; *Blais v. United Auto Parts Ltd*, [1944] K.B. 139; *Houle v. Paquette*, [1961] S.C. 197.

(472) See, on this subject, *Levine v. Frank W. Horner Ltd*, [1962] S.C.R. 343; *Monsanto Oakville Ltd v. Dominion Textile Company Limited*, [1965] Q.B. 449; *Dallaire v. Villeneuve et Clermont Automobiles Incorporée*, [1956] Q.B. 6; *David v. Manningham*, [1958] S.C. 400; *Hanakova v. Girard*, [1957] S.C. 344; *Bourcier v. Donohue*, [1956] S.C. 25; *Perron v. Morin et al.*, [1957] R.L. 522; *Cormier v. Papy*, [1955] R.L. 106.

(473) See J.W. DURNFORD, *Apparent defects in sale revisited*, (1964) 10 McGill L.J. 341; J.J. GOW, *A Comment on the Warranty in Sale against Latent Defects*, (1964) 10 McGill L.J. 243; by the same author, *A Further Comment on Warranty in Sale*, (1965) 11 McGill L.J. 35.

(474) See, on this subject, J.W. DURNFORD, *The Redhibitory Action and the Reasonable Diligence of Article 1530 C.C.*, (1963) 9 McGill L.J. 16; *Millar v. Charbonneau*, [1970] C.A. 25; *Vulcanisation Eclair Inc. et al. v. Canadian Tire and Repair Company*, [1970] C.A. 965; *Chartier v. Bolduc*, [1968] Q.B. 787; *Boisjoly et Boisjoly Ltée v. Zukauskas*, [1964] Q.B. 318; *Chodos v. Brault*, [1964] Q.B. 846.

(475) See, in this regard, German Federal Republic Civil Code, a. 466; Ethiopian Civil Code, aa. 2292 and 2293; Swiss *Code des obligations*, a. 201; in Canada: *The Sale of Goods Act*, R.S.O. 1970, c. 421, s. 34; in the United States: Uniform Commercial Code, s. 2-607.

(476) See *Cohen v. Bonnier*, (1924) 36 Q.B. 1; *Tardif v. Fortier*, [1946] Q.B. 356.

(477) See, in this respect, *Lévesque v. Tremblay*, [1947] K.B. 684.

(478) See *Joyal v. Beaucage*, (1921) 59 S.C. 211.

(479) See *Lévesque v. Tremblay*, [1947] K.B. 684.

(480) See, in particular, German Federal Republic Civil Code, a. 453; Ethiopian Civil Code, aa. 2306 and 2307; Swiss *Code des obligations*, a. 212; *Diplomatic Conference on the Unification of Law governing the*

International Sale of Goods, op. cit., a. 57; *The Sale of Goods Act*, R.S.O., 1970, c. 241, s. 9; Uniform Commercial Code, s. 2-305.

(481) See Article 1490 C.C.

(482) See the *Highway Code*, R.S.Q. 1964, c. 231, s. 23.

(483) See L. FARIBAULT, *op. cit.*, t. II, No. 387, p. 357; *The Mile End Milling Company v. Peterborough Cereal Co.*, [1924] S.C.R. 120; *Interprovincial Lumber Co. Inc. v. Matapedia Co. Ltd*, [1973] C.A. 140; *Loyal Oil Co. Ltd v. Cousineau*, (1926) 41 K.B. 300; *Whitehead (Laisterdyke) Ltd v. Eastern Woollen and Worsted Mills Ltd*, [1955] S.C. 31; *Gauthier v. Provencher*, [1966] R.L. 572 (P. C.).

(484) See *Mercier v. Watson Jack-Hopkins Ltd*, [1961] S.C. 251.

(485) See, in particular, German Federal Republic Civil Code, aa. 495 and 496; *The Consumer Protection Act*, R.S.O. 1970, c. 82, s. 33; see, in Québec, *Consumer Protection Act*, S.Q. 1971, c. 74, s. 52.

(486) See *Léo Perrault Ltée v. Blouin*, [1959] Q.B. 764; *Raymond de Rosa Inc. v. Dupuis*, [1958] Q.B. 94; *Breuer v. Boyer*, [1952] Q.B. 273; *Hardy v. Huberdeau*, (1921) 30 K.B. 211; *Cousineau et Gagnon v. Cousineau*, (1914) 23 K.B. 309; *Ouimet v. Guilbault et al.*, [1972] S.C. 859; *Benoit v. Alie*, [1960] S.C. 39; *Lynch v. Bouchard et al.*, [1960] S.C. 384; *Métivier v. Vermette et Cie*, (1930) 68 S.C. 552; *Greaves et al. v. Cadieux*, (1916) 50 S.C. 361.

(487) See, on this subject, L. FARIBAULT, *op. cit.*, t. II, No. 102, p. 98.

(488) This article includes elements that jurisprudence has refused in interpreting Article 1569a C.C.: *Charette et la Cie de Bois Bédard Ltée v. Damphousse et Hébert*, (1924) 37 K.B. 315; *Charbonnel v. Puech et Giorsetti*, (1936) 74 S.C. 397; *Système Comptant Ltée v. Centre d'achat Méthot Inc.*, [1976] S.C. 617.

(489) *An Act to amend the Civil Code respecting bulk sales of merchandise*, 4 Geo. IV, c. 63, s. 1.

(490) See *In re Savas: Hamel v. Savas et George's Soda Bar Inc.*, [1961] S.C. 322; *Verroeulst v. Guérin et al.*, [1969] Q.B. 782; *Montreal Abattoirs Ltd v. Picotte*, (1917) 52 S.C. 373.

(491) See *Montreal Abattoirs Ltd v. Picotte*, (1917) 52 S.C. 373.

(492) *The Bulk Sales Act*, R.S.O. 1970, c. 52.

(493) See, in this respect, L. FARIBAULT, *op. cit.*, t. II, p. 456.

(494) *The Bulk Sales Act*, R.S.O. 1970, c. 52, s. 9.

(495) *Ibid.*

(496) See *Verroeulst v. Guérin et al.*, [1969] Q.B. 782; *Morin v. Morin*, [1954] Q.B. 590; *In re Savas: Hamel v. Savas et George's Soda Bar*, [1961] S.C. 322; *Dame Girard v. Bérubé*, [1973] S.C. 1053.

(497) *The Bulk Sales Act*, R.S.O. 1970, c. 52.

(498) [1933] S.C.R. 503; *Mathieu v. Martin et al.*, (1923) 29 R.L. n.s. 111 (S.C.).

(499) See *The Wages Act*, R.S.O. 1970, c. 486, s. 7(6).

(500) See M. POURCELET, *op. cit.*, pp. 182 and 183.

(501) See, on this subject, *Lamy v. Rondeau*, [1927] S.C.R. 288; *Allard v. Lebel*, [1972] S.C. 260, conf. by [1976] C.A. 471.

(502) See *The Sherwin-Williams Co. of Canada Ltd v. Boiler Inspection and Insurance Company of Canada Inc.*, [1950] S.C.R. 187, conf. by [1951] A.C. 319; *Lakeview Estate Inc. v. J. Chas. Martel Inc.*, [1965] Q.B. 419; *Simard v. McColl Frontenac Oil Co. Limited*, [1959] Q.B. 828; *Le Procureur Général de la Province de Québec v. Irving Oil Inc.*, [1972] S.C. 665; *Progressive Insurance Co. of Canada v. Tanguay*, [1957] S.C. 367; *New Hampshire Fire Insurance Co. v. Pépin*, [1954] S.C. 292.

(503) See *Simard v. McColl Frontenac Oil Co.*, [1959] Q.B. 828.

(504) Which is in conformity with decided cases: *Progressive Insurance Company of Canada v. Tanguay*, [1957] S.C. 367; *Lachance v. Giroux*, (1936) 42 R.L. n.s. 11 (S.C.).

(505) See, to that effect, *Chauret v. Joubert*, [1923] S.C.R. 3; *Perras v. Spitzer*, [1962] Q.B. 964; *Desgroseillers v. McHugh et Chénier*, [1968] S.C. 643; *Bellevue Acceptance Corporation v. Dodaro*, [1963] P.R. 227 (S.C.); *Taillon v. Desormeaux*, [1957] S.C. 84.

(506) See M. POURCELET, *op. cit.*, p. 190.

(507) See L. FARIBAULT, *op. cit.*, t. 11, No. 532, p. 504; M. POURCELET, *op. cit.*, p. 197.

(508) See L. FARIBAULT, *op. cit.*, t. 11, No. 534, p. 507.

(509) See *Dorval v. Préfontaine*, (1905) 14 K.B. 80, at p. 87; *Labrie v. Gilbert*, [1973] S.C. 134.

(510) See *Messier v. Béique*, [1929] S.C.R. 19.

(511) See *An Act respecting matrimonial regimes*, S.Q. 1969, c. 77, s. 27.

(512) See, in particular, in support of nullity, P.B. MIGNAULT, *op. cit.*, t. 4, p. 83 to 88; in support of validity, J.E. BILLETTE, *Traité théorique et pratique de droit civil canadien, Donations et testaments*, Montreal, 1933, t. 1, No. 348 et s.; J.L. BAUDOUIN, *Obligations*, No. 669, p. 361.

(513) See *Brault v. Perras*, (1939) 66 K.B. 110; *Giguère v. Jacques*, [1955] S.C. 140; *Goodman v. Legault*, (1924) 36 Q.B. 238; *Bernard v. Farrier*, [1952] S.C. 131; *Charlebois v. Charlebois*, [1974] C.A. 99 and comments of G. BRIERE in (1975) 35 R. du B. 231; see, also, M. CASTELLI, *L'obligation de rapporter et le dédale des avantages indirects*, (1975) 16 C. de D. 709.

(514) See *Messier v. Béique*, [1929] S.C.R. 19; *Laurendeau v. Sauvageau*, [1957] S.C. 106.

(515) See, for example, *Grenier v. Bonnier*, [1958] Q.B. 537; comments by A. MAYRAND, Renonciation transmissive - Donation - Acceptation tacite, *(1959) 19 R. du B. 84 and R. COMTOIS*, Acceptation implicite, article 788 C.C., *(1958-59) 61 R. du N. 169;* Décarie v. Lemieux, *[1961] Q.B. 840;* Goodman v. Legault, *(1923) 36 K.B. 238;* Legault v. Legault, *(1924) 37 K.B. 335.*

(516) See G. BRIERE, *Les libéralités*, 4e éd., Montreal, Cours de Thémis, 1972, p. 68.

(517) See Article 2435 of the Ethiopian Civil Code.

(518) See J.-G. CARDINAL, *L'acte judiciaire du mineur*, (1959) R. du B. 273; see, also, P. AZARD and A.F. BISSON, *Droit civil québécois*, Ottawa, Editions de l'Université d'Ottawa, 1971, t. I, No. 147, p. 249 et s.; *Brousseau v. Hamel*, [1968] Q.B. 129; see, however, *Tantalo v. Klaydianos*, [1970] S.C. 331 (P.C.).

(519) See also Article 357 on the sale of a thing belonging to another.

(520) See *Report of the Codifiers*, *op. cit.*, t. II, p. 150; R. COMTOIS, *Essai sur les donations par contrat de mariage*, Montreal, Le Recueil de droit et de jurisprudence, 1968, p. 132; see, also, *Rémillard v. Couture*, [1955] S.C. 162; *Reford v. National Trust Company*, [1968] Q.B. 689; *Garland, Son and Co. v. O'Reilly*, (1911) 44 S.C.R. 197.

(521) See *Goyette v. Dionne*, (1928) 44 K.B. 15; *Tremblay v. Roy*, [1971] P.R. 289 (P.C.); *Beneficial Finance Company of Canada v. Lang*, [1967] S.C. 219; see also R. COMTOIS, *Les critères de distinction entre la donation entre vifs et la donation à cause de mort*, (1968) 9 C. de D. 720.

(522) See, on this subject, *Rochon v. Rochon*, (1929) 45 K.B. 170; *Pesant v. Pesant*, [1934] S.C.R. 249, rev. (1933) 54 K.B. 38; *Gariépy v. Succession Pilon*, S.C. (Montreal-752.313) 25 June 1969, (1969) 15 McGill L.J. 465; *Lerner v. Blackburn*, [1971] S.C. 385 and comments from C. CHARRON in (1972) 32 R. du B. 422.

(523) See J.E. BILLETTE, *op. cit.*, No. 421; G. BRIERE, *op. cit.*, p. 74; H. ROCH, in *Traité de droit civil du Québec*, Montreal, Wilson & Lafleur, 1953, t. 5, p. 114 et s.

(524) See, for example, *Allard v. Leblanc*, [1964] S.C. 148.

(525) See Article 1176.

(526) See J.E. BILLETTE, *op. cit.*, No. 531; G. BRIERE, *op. cit.*, p. 108.

(527) See Article 526 C.C. German Federal Republic.

(528) See P.B. MIGNAULT, *op. cit.*, t. 4, p. 136, which describes various solutions.

(529) *Op. cit.*, p. 108; also J.E. BILLETTE, *op. cit.*, No. 533.

(530) See Article 365.

(531) See G. BRIERE, *op. cit.*, p. 105; J.E. BILLETTE, *op. cit.*, No. 525.

(532) See Article 1479 C.C.

(533) See Article 900 French C.C.

(534) See J.E. BILLETTE, *op. cit.*, No. 80; G. BRIERE, *op. cit.*, p. 40; see also *Weingart v. Stober*, (1919) 57 S.C. 321 (Rev. C.) and (1922) 60 S.C. 55 (Rev. C.).

(535) See Article 181.

(536) See Article 85 et s.

(537) See Article 144 of the Book on *Property.*

(538) See Article 1192.

(539) See L. LESAGE, *op. cit.*, p. 176.

(540) See Articles 367 and 368 of the Book on *Succession.*

(541) See Article 390.

(542) See A. BOHEMIER, *Les donations consenties par contrat de mariage et la maxime "Donner et retenir ne vaut"*, (1964-65) 67 R. du N. 229 et s. and 285 et s.; G. BRIERE, *Le problème toujours nouveau des donations de meubles de ménage par contrat de mariage*, (1964) 49-52 Thémis 225; R. COMTOIS, *Essai sur les donations par contrat de mariage*, *op. cit.*, p. 50; *Des donations par contrat de mariage*, (1972-73) 75 R. du N. 253, at p. 258; *Donations par contrat de mariage des biens à venir - opposition à la saisie par l'épouse maintenue*, (1974-75) 77 R. du N. 443.

(543) See *Dame Lerner v. Blackburn*, [1971] S.C. 385; see the comment by C. CHARRON in (1972) 32 R. du B. 422.

(544) See Article 72 of the Book on *The Family.*

(545) See, especially, *Bernard v. Amyot-Forget*, [1953] 1 S.C.R. 82; *Fredette v. Bégnoche*, [1957] S.C. 473; *Carignan v. Gervais*, [1967] S.C. 335; *David et al.*, [1963] S.C. 305; see also R. COMTOIS, *Le sens du terme "enfant" dans les dispositions à titre gratuit*, (1963-64) 14 Thémis 37; D. N. METTARLIN, *Simple Legacy: "To My Children"*, (1966) 12 McGill L.J. 65.

(546) See, on this subject, R. COMTOIS, *Quand l'institution contractuelle ne révoque pas l'institution contractuelle*, (1975) 78 R. du N. 33.

(547) See Article 13 of the Book on *Succession.*

(548) *Ibid.*, Article 264 of the Book on *The Family.*

(549) See, for example, *Martin v. Prévost*, [1971] C.A. 39.

(550) With regard to the use of cable cars, chair lifts, and ski-lifts, see, in Québec law, *Arvida Ski Club Inc. v. Boucher*, [1952] Q.B. 537 which

seems to equate a ski-lift contract with a transport contract; *Gagné v. H.J. O'Connell Ltd. et al.*, [1961] Q.B. 344 which imposes an obligation of means on every ski-lift operator.

(551) On this subject, see R. JOYAL-POUPART, *La responsabilité civile en matière de sports au Québec et en France*, Montreal, Les Presses de l'Université de Montréal, 1975.

(552) On this subject, in Québec law, see *Lavoie v. Shatsky*, (1940) 68 K.B. 514; in French law, see, Paris, lère ch., 21 fév. 1952, D.1952.J.239, rev. by Civ. 2e sect., 23 juin 1955, D.1955.J.653; Civ. 2e sect., 15 juillet 1954, D.1954.J.680; also, M. VISMARD, *Délits et quasi-délits*, J.-Cl. Resp. civ. IV, fasc. XXVI-a.

(553) *McLean v. Pettigrew*, [1945] S.C.R. 62.

(554) *The Canadian Pacific Railways Company v. S.J. Chalifoux*, (1894) 22 S.C.R. 721.

(555) P.B. MIGNAULT, *op. cit.*, t. 4, p. 385.

(556) P.A. CREPEAU, *Le contenu obligationnel d'un contrat*, (1965) 43 Can. Bar. Rev. 1; L. MORIN, *De la responsabilité dans les transports*, in Premier Congrès international de l'Association H. Capitant, Québec, 1939, p. 325 et s.; A. et R. NADEAU, *op. cit.*, No. 166, p. 175.

(557) R. RODIERE, *Droit des transports*, tome III, ler fascicule, Paris, Sirey, 1960, p. 44 et s.; also *Law of Transport*, in International Encyclopedia of International Law, vol. XII, p. 35 et s.

(558) *Bystrzycki v. Montreal Transportation Commission*, [1967] S.C. 522; *Marier v. Air Canada*, [1971] S.C. 142; *Surprenant v. Air Canada*, [1973] C.A. 107; *Marier v. Air Canada*, [1976] S.C. 847.

(559) [1965] S.C. 416.

(560) R.S.Q. 1941, c. 142, am. by S.Q. 1959-60, c. 67, ss. 2 and 38; now, R.S.Q. 1964, c. 231, s. 53, subsection 2-c.

(561) See Article 607.

(562) R.S.Q. 1964, c. 232.

(563) *Lessard v. Paquin et al.*, [1975] 1 S.C.R. 665; *Côté v. Dickson*, [1969] Q.B. 367; *Tremblay v. Dufour*, [1970] C.A. 386; *Voyer v. Macpes Construction Ltée et al.*, [1966] S.C. 123; *Friedland v. Feig*, [1971] S.C. 583; *Martel v. Jensen*, [1973] S.C. 474.

(564) See Article 631.

(565) *Pilkington Bros v. C.P.R.*, [1958] S.C. 251; *Canadian Northern Railway Co. v. Greenshields Ltd*, (1921) 30 Q.B. 302.

(566) See Articles 627, 628 and 629.

(567) See Article 629.

(568) R.S.Q. 1964, c. 316.

(569) Contrary to present positive law consecrated by jurisprudence: *Belmont Textile Co. v. Husband Transport Limited*, [1971] S.C. 232; *Mercerie Gilbert Ltée v. Compagnie des Chemins de fer nationaux*, [1970] S.C. 207.

(570) *International Convention relating to the carriage of goods by railways*, (C.I.M., Bern, Feb. 25, 1961), 1965, Bulletin législatif Dalloz, No. 10, p. 259, a. 46; *Convention for the unification of certain rules relating to International carriage by air*, R.S.C. 1970, c. C-14, schedule I, s. 26, par. 4; in matters of rail transport, see General Order T-5, Appendix A, Section 4, Feb. 1, 1965 and General Order T-43, Appendix A, Section 6B, Sept. 18, 1967, Canadian Transport Commission; bills of lading in the field of truck transport in other provinces: *Motor Carrier Act*, R.S.N.S. 1967, c. 190, Regulations, Prescribed Conditions of Carriage, s. 11; the *Public Commercial Vehicles Act*, R.S.O. 1970, c. 375, Schedule A, s. 13.

(571) See, in particular, the *International Convention for the unification of certain rules of law relating to Bills of lading*, Brussels, August 25, 1924, League of Nations, Treaty series, v. CXX, 1931-1932, No. 2764, p. 157; *Convention for the unification of certain rules relating to international carriage by Air*, R.S.C. 1970, c. C-14, Schedule I, s. 10.

(572) *Smith Transport Limited v. IN-TRA-CO Inc.*, [1974] S.C. 265.

(573) *International Convention for the Unification of Certain Rules of Law Relating to the Carriage of Passengers by Sea*, in Le Droit Maritime français, vol. 13, 1961, p. 396.

(574) R.S.C. 1970, c. C-15, Schedule: *Rules relating to bills of lading*. While the legislation in this section is not commented on, because of the concordance between the proposed texts and Canadian and International Law, explanations on each article may be found in M. POURCELET, *Le transport maritime sous connaissement*, (Droit canadien, anglais et américain), Montreal, Presses de l'Université de Montréal, 1972.

(575) See R. RODIERE, *Traité général de droit maritime, Affrètements et transports*, Tome II, Paris, Dalloz, 1968, No. 392, p. 14.

(576) See M. POURCELET, *Le transport maritime sous connaissement*, *op. cit.*, p. 212.

(577) R.S.C. 1970, c. C-15, s. 5.

(578) *Canadian Shade Tree Service Ltd v. Diabo*, [1961] Q.B. 501.

(579) *Whitton v. Jesseau*, [1962] S.C. 309.

(580) *Duquette v. Boucher*, [1958] R.L. 367.

(581) *Alexander M. Stewart v. Hanover Fire Insurance Co.*, [1936] S.C.R. 177.

(582) *Beaumont v. Weisor Ltée*, [1961] R.L. 551; *Cooney v. Drew*, [1956] R.L. 96.

(583) *Asbestos Corp. Ltd. v. W. Cook*, [1933] S.C.R. 86; *Alexander M. Stewart v. Hanover Fire Insurance Co.*, [1936] S.C.R. 177.

(584) *Columbia Builders Supplies Co. v. Bartlett*, [1967] Q.B. 111; *Mailhot v. La Ville de St-Vincent-de-Paul*, [1965] R.D.T. 555.

(585) *Dupré Quarries Ltd. v. Dupré*, [1934] S.C.R. 528.

(586) *Martel v. Dozois*, [1960] S.C. 344.

(587) *Beneficial Finance Co. of Canada v. Ouellette*, [1967] Q.B. 721.

(588) *The Standard Electric Time Co. of Canada Ltd v. Finagel and Faraday Products*, [1965] S.C. 532.

(589) In fact, it has been noted that the client sometimes intervenes directly in the execution of the work and thereby imposes his decisions, thus depriving the contractor of his initiative. This reality was taken into account when formulating the system of responsibility (see the third par. of a. 688). Unjustified interference by the client would henceforth have the effect of freeing the party he contracts with.

(590) See *Québec Asbestos Corporation v. Gédéon Couture*, [1929] S.C.R. 166; *Hill-Clarke-Francis Ltd v. Northland Groceries Ltd*, [1941] S.C.R. 437; *Gravel v. Déziel*, [1965] S.C. 257.

(591) See Article 699 concerning the contract for services.

(592) *Hill-Clarke-Francis Ltd v. Northland Groceries Ltd*, [1941] S.C.R. 437.

(593) *Gagnon v. Latouche*, [1963] S.C. 417.

(594) J.W. DURNFORD, *The Liability of the Builder, Architect and Engineer for Perishing and other Defects in Construction*, (1967) 2 R.J.T. p. 161, on p. 206.

(595) See *Canadian Electric Light Co. v. Pringle*, (1920) 29 K.B. 26.

(596) See *Reid v. Birks*, (1911) 39 C.S. 133; *Lapointe v. Perkins*, (1927) 43 K.B. 168; *Bolduc v. Houle*, [1962] S.C. 416.

(597) See *Gauthier et al. v. Séguin et Trépanier*, [1969] Q.B. 913.

(598) See In Canada, only Québec retains this system. See J.W. DURNFORD, *Mechanics Liens in Québec*, in D.N. Macklem et D.I. Bristow, *Mechanics Liens in Canada*, 2nd ed., Toronto, Carswell, 1962, p. 272 et s.; W.S. JOHNSON, *Responsibility of Architects, Engineers and Builders*, Montreal, Wilson & Lafleur, 1955.

(599) See *Turcotte v. Lavoie*, [1950] K.B. 161.

(600) See *McGuire v. Fraser*, (1908) 40 S.C.R. 577; (1908) 17 K.B. 449; *Marcotte v. Darveau*, [1956] S.C. 197; *Williams v. Gilbert*, [1967] S.C. 458.

(601) See the rules established by the following judgments: *E.A. Robinson Oil*

Burners Ltd v. M. Bélanger Ltée et Dame Roux, [1956] Q.B. 318; *Gelsthorpe v. Larouche*, [1964] Q.B. 816.

(602) See (1926) 40 K.B. 151, confirmed by [1927] S.C.R. 20.

(603) See *Gauthier v. St-Laurent*, [1958] Q.B. 114.

(604) See *La Caisse Populaire Desjardins de Repentigny v. Tétreault Frères Ltée and La Compagnie d'Assurance canadienne générale*, [1965] S.C. 115.

(605) See *La Corporation de l'hôpital St-Ambroise de Loretteville v. Cambrai Construction Inc.*, [1962] Q.B. 134, conf. by [1963] S.C.R. 391.

(606) On notarial liability: see P.Y. MARQUIS, *La responsabilité notariale et l'assurance de responsabilité*, Cours de perfectionnement de la Chambre des Notaires, 1966, Université de Montréal, pp.132 to 149. On medical and hospital liability: see A. BERNARDOT, *La responsablité médicale*, Sherbrooke, Revue de droit de l'université de Sherbrooke, 1973; P.A. CREPEAU, *La responsabilité civile du médecin et de l'établissement hospitalier*, Montreal, Wilson & Lafleur, 1956. On liability of advocates: see A. and R. NADEAU, *op. cit.*, No. 291 to 303; H. ROCH and R. PARE, *op. cit.*, t. 13, p. 102 et s.

(607) For a similar opinion F. LANGELIER, *op. cit.*, t. 5, p. 295; H., L. and J. MAZEAUD, *op. cit.*, t. 2, No. 687; G. MARTY and P. RAYNAUD, *op. cit.*, t. 2, vol. 1, No. 344. *Contra*: P.B. MIGNAULT, *op. cit.*, t. 8, p. 18; H. ROCH and R. PARE, *op. cit.*, t. 13, p. 48.

(608) BOWSTEAD, *On Agency*, 13th ed., 1968, p. 272; J.-L MONTROSE, *The Basis of the Power of an Agent in Cases of Actual and Apparent Authority*, (1938) 16 Can. Bar Rev., p. 756, at p. 770; *Restatement of the Law*, 2nd ed., *Agency 2nd*, 1958, vol. 1, No. 186 et s., 302 et s.; HALSBURY, *op. cit.*, vol. 1, 1952, p. 215 et s.

(609) T.-L. BERGERON, *Du mandat dissimulé*, Etudes juridiques en hommage à M. le juge Bissonnette, 1963, p. 101; *Contra*: C.A. SHEPPARD, *Le mandat clandestin n'a pas de recours contre le tiers*, (1962) 44 Thémis 209.

(610) See Article 60 C.C.P.

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

(612) See Article 1981 C.C.

(613) See H. ROCH and R. PARE, *op. cit.*, t. 13, p. 482 and cases cited.

(614) R.S.Q. 1964, c. 272.

(615) See, also, Article 786.

(616) See, especially, *The Partnership Act*, R.S.A. 1970, c. 271; *The Limited Partnerships Act*, R.S.O. 1970, c. 247.

(617) *An Act to amend Article 1880 of the Civil Code*, S.Q. 1925, c. 76.

(618) See the French *Code de Commerce.*

(619) See, especially, *Amusement Clubs Act*, R.S.Q. 1964, c. 298; *National Benefit Societies Act*, R.S.Q. 1964, c. 299; *Cruelty to Animals Prevention Societies Act*, R.S.Q. 1964, c. 300.

(620) For example, see Article 1875 of the French C.C., and Article 1813 of the Italian Civil Code.

(621) See *Perreault v. Therrien*, (1936) 74 S.C. 481; *Kirouac v. Ruel*, (1941) 70 K.B. 350; *Delorme v. Anocencio*, [1960] R.L. 202 (S.C.).

(622) The interest rate is set by *The Interest Act*, R.S.C. 1970, c. I-18.

(623) H. ROCH and R. PARE, *op. cit.*, t. 13, p. 684.

(624) See *Banque Canadienne Impériale de Commerce v. M.B.C. Cosmetic Ltd and Chapuis*, [1972] S.C. 497.

(625) H. ROCH and R. PARE, *op. cit.*, t. 13, p. 602.

(626) See F. LANGELIER, *op. cit.*, t. 6, p. 162; but *contra*, see H. ROCH and R. PARE, *op. cit.*, t. 13, p. 684.

(627) [1970] S.C. 116, reversed in appeal for other grounds. See [1976] C.A. 137.

(628) See *Commissioner's Report*, cited in Code of Civil Procedure, ed. Wilson & Lafleur Ltée, comments on Book Five, pp. 287 and 288.

(629) See *Hutchings v. Hindle*, [1973] S.C. 51.

(630) See, in this matter, H. de PAGE, *op. cit.*, t. 5, p. 331; M. PLANIOL and G. RIPERT, *op. cit.*, t. II, No. 1219, p. 570.

(631) See, to this effect, *Plouffe v. St-Louis et Nadon*, [1956] S.C. 193; *Bourque v. Tellier*, [1943] S.C. 248; H. ROCH and R. PARE, *op. cit.*, t. 13, p. 511.

(632) See, for example, aa. 1664r, 1040c et s. C.C.; *Consumer Protection Act*, S.Q. 1971, c. 74, s. 118.

(633) See P.B. MIGNAULT, *op. cit.*, t. 8, p. 302 et s. As to French law, see JACQUES DE GAVRE, *Le contrat de transaction en droit civil et en droit judiciaire privé*, Brussels, Etablissements Emile Bruylant, 1967, p. 21 et s.

(634) See *Reports of the Codifiers*, *op. cit.*, t. III, p. 36.

(635) See JEAN-MARIE PAQUET, *L'erreur dans les transactions*, (1959-1960) 33 Thémis, p. 54.

(636) See *National Gypsum Co. Inc. v. Northern Sales*, [1964] S.C.R. 144; Rex Rotary International Corp. v. Scandinavian Business Machines, *(1969) 10 C. de D. 797;* Vinette Construction Ltée v. Dobrinsky, *[1962] Q.B. 62.*

(637) Commissioner's Report, Book Seven, Articles 940 et s.

(638) E. COLAS, *loc. cit.*, p. 133.

(639) Article 3, *European Convention providing a uniform law on Arbitration*, Council of European States, European treaties and conventions Series, No. 56, 1966.

(640) See *Mobilcolor Inc. v. Gula*, [1969] B.R. 169; Townsite Builders Ltd. v. Nicol, [1958] P.R. 251 (S.C.); *Mastercraft Leather Goods Ltd v. Black Sea and Baltic General Insurance Co. Ltd*, [1966] P.R. 94 (S.C.).

(641) See a. 4 of the *European Convention providing a uniform law on Arbitration*, *op. cit.*

(642) E. J. COHN, *Manual of German Law*, Volume II, 2nd revised edition, 1971, London, Oceana Publications Inc., p. 251, No. 9.141.

(643) [1972] S.C. 229.

(644) *European Convention providing a uniform law on Arbitration*, Council of European States, European treaties and conventions Series, No. 56, 1966.

BOOK SIX

EVIDENCE

INTRODUCTION

Establishment of the truth, without jeopardizing the stability of legal relationships, should be the prime concern of any rules on evidence.

This quest for truth might well be expedited in a system allowing litigants to make their case in any way they see fit, the judge enjoying absolute discretionary powers, but only at the expense of such stability. Any assessment of the probable outcome of a lawsuit would be impossible, were the judge to render decisions based solely on personal conviction, unrestrained by other considerations. Insecurity would be the inevitable product of such uncertainty, with no assurance for any legitimate claimant that his claim would in fact withstand those challenges to which it may be subjected. Since it is the weight of supporting evidence which determines the validity of a claim, the law is responsible for establishing the rules of evidence, for assessing its probative value and for determining its admissibility before the courts.

The law should also beware of leaning too far in the opposite direction. In the quest for truth, the restrictions imposed on judge and litigants alike by draconian rules of evidence would tend to constitute an obstacle, rather than an asset.

Thus, any rules on evidence should be firm, but not inflexible; in order to reconcile the requirements of both truth and due process, however, flexibility must be exercised without inconsistency.

Generally speaking, our system of evidence already contains these elements; it was nevertheless felt that changes are required in some areas. The object of the more important changes envisaged is both to fill the gaps in our rules of evidence by enshrining in a code certain basic principles commonly applied before the courts, which up to the present have derived from usage and, at the same time, to stress the importance of testimony as evidence.

Under the existing sytem, only a statement made by a witness testifying during the proceedings is valid testimony. Any other statement is deemed hearsay and is thus not admissible. In certain circumstances, there are exceptions to this rule, but since most of these derive from English law, they are not well known. While maintaining the principle of the inadmissibility of hearsay, our Draft envisages a greater flexibility and coherence in applying exceptions and is designed to make out-of-court statements more frequently admissible as evidence, provided their probable veracity can be assessed, taking into consideration the circumstances in which they were made.

A similar approach was adopted in the area of admissibility of testimony. The exclusion of testimony is retained in certain cases, but under more flexible rules of exception. Whereas under the existing system, freedom of evidence applies only in commercial matters, our proposals would extend it to cover the entire field of economic activity. A wider concept is also proposed for establishment of commencement of proof.

The Draft consolidates the rules of evidence into three chapters. The first would deal with general provisions, the second with the making of proof and the third with the admissibility of means of proof.

In addition to the rule governing burden of proof (a. 1), chapter I includes rules governing relevance and judicial notice.

The principle of the admissibility in evidence of any fact relevant to the issues is maintained (a. 4). Two important exceptions, however, attenuate this principle. The power of the court to rule inadmissible any evidence of doubtful importance is recognized, if such evidence is likely to confuse the issues or cause serious prejudice to the opposite party (a. 6). But, more important, the court may *proprio motu* refuse evidence illegally obtained, taking into account the nature of the offence (a. 5).

Between the extremes of exclusion in principle and unrestricted admission of illegally obtained evidence, a middle-path solution was finally chosen. Though there may be cases where, because of the seriousness of the offence against public order, rejection of illegally obtained evidence seems to be required in order to discourage the parties from using improper methods to gather evidence to support their case, situations can be envisaged where rejection of such evidence procured by reprehensible means would seem unduly harsh and not in the best interests of justice, as where one party uses the offence committed to prevent the court taking cognizance of evidence to which the opposite party was in any case entitled. The rule proposed, which is flexible, allows the court to reserve the penalty of rejection of evidence for those cases which really deserve it.

The Draft also consecrates the principle that the court must take judicial notice of the law in force in Québec and of any fact so notorious as not to give rise to reasonable dispute (a. 8), as well as the law of the other provinces or territories of Canada, provided it has been duly pleaded (a. 9). The aim of this latter provision is to bring Québec law into line with Supreme Court practice and with practice prevailing in federal matters. Moreover, the Draft introduces a new provision under which the court may take judicial notice *proprio motu* of the content of foreign law, provided it has been pleaded (a. 10). In the cases where the law of another

province or of a foreign State has not been pleaded or cannot be determined, the Draft preserves the present rule under which the internal law of Québec is applied (a. 11).

Chapter II deals with how proof is made. Rules governing the conditions and probative value of all types of evidence are consolidated as follows: writings, testimony, presumptions and admissions (a. 12).

Dedicated to documentary evidence, section I deals in separate subsections with legislation, authentic writings, semi-authentic writings, private writings and finally, unsigned documents, records and private papers.

Practice governing authentic writings has been preserved, but with changes in form. Thus the Draft adds to the list of principal authentic writings (a. 15) definitions of authentic writings (a. 14), of authentic copies (a. 20) and of authentic extracts (a. 22). The distinction between the probative value of authentic writings in general (a. 17), that of acts of civil status (a. 18) and that of notarial instruments (a. 19) is drawn more precisely in separate articles. Finally, the Draft specifies that improbation is required only when contesting those facts which the public officer had the duty to note (a. 23).

In the area of semi-authentic writings, it is proposed that the special rule under the Code regarding certain foreign public documents, such as decisions of foreign courts and acts of civil status, be extended to all foreign public documents (a. 24), as well as to duly issued copies of these documents (a. 25). It is suggested, however, that any party may deny these documents, without being obliged to put up the funds to cover the cost of a rogatory commission to evaluate their authenticity. It is proposed that the semi-authentic status of powers of attorney made outside Québec, in the presence of a witness and accompanied by his affidavit, be maintained (a. 26).

As far as private writings are concerned, more detailed rules are proposed; these include a definition of this special category of writing (a. 29), and specifications on what constitutes an individual's signature (aa. 30 and 31).

Concerning the dating of private writings, it is proposed that, while maintaining the principle that no private writing makes proof of its date against third persons, an exception be established, not with regard to commercial documents as is the case under the Code, but with regard to documents related to acts repeated in the course of a regular activity. In all other circumstances, moreover, any method of establishing proof of the

date is authorized. This means that testimony establishing the date of any private writing becomes admissible.

With certain changes in form, it is proposed that the existing rules governing private registers and papers be retained. Under a new provision, however, any unsigned writing which is not the draft of an instrument makes proof against its author (a. 35).

The principal objective of section II, which is entirely new and deals with testimony, is to establish rules governing the admissiblity of hearsay evidence. It was deemed advisable to relax our existing rules of evidence in this area to some extent following the trend both at the federal level (1) and in England and the United States. Our proposals, moreover, are drawn on the English *Civil Evidence Act* of 1968 (2).

The proposed definition of testimony is broad enough to cover both depositions given during the actual hearing of a case, and out-of-court statements (a. 40). This definition reads as follows: "Testimony is any statement by which a person asserts the existence of facts of which he has had personal knowledge".

In principle, however, the Draft requires that if testimony is to constitute evidence, it must be offered in a deposition made in the action, according to the rules of the Code of Civil Procedure (a. 41).

There are two sets of exceptions to this principle. The first relates to statements by a person who does not appear as a witness (aa. 42-43) and the second to previous statements by a person who does appear as a witness (a. 44). Although in both cases the statement is admissible only under very strict conditions, the Draft proposes that these be even more rigid in the first case, since here admission of the statement is subject to prior authorization from the court, upon motion and after due notice to the opposite party. Such prior authorization is not required in the case of a previous statement by a person who appears as a witness.

It will be noted that our proposal allows for introduction as evidence of records and files kept in the course of a regular activity without requiring those who kept them to be called as witnesses, subject, however, to prior authorization from the judge upon proof that the documents present sound reasons to judge them reliable (a. 43).

The Draft not only establishes admissibility conditions for out-of-court statements, but also stipulates certain requirements concerning the proof of such statements. Thus it is required that any statement made in a writing be proven by production of the writing and that an oral statement be proven by deposition of the person who made it or of those who had

personal knowledge of it (a. 46). As a departure from this rule, it is permitted that a tape recorded statement may be proven by this method, provided its reliability is separately proven (a. 47). It is also provided that, under certain conditions, any statement reduced to writing by a person other than the declarant may be proven by filing that writing (a. 48).

With some minor changes, the existing rules on presumption are maintained under section III. The same applies to admissions, dealt with in section IV. In the latter case, the Draft includes certain clarifications concerning the probative value of admissions. It is stipulated, in effect, that only a judicial admission by the party himself or his specially authorized mandatary is fully binding and irrevocable (a. 64).

As already pointed out, the Draft proposals concerning admissibility of means of proof, dealt with in chapter III, involve important changes. In this area, the present Code maintains a dual system based on a distinction between civil and commercial matters. In commercial matters, the principle of freedom of evidence prevails. Where civil matters are concerned, the system is centered around the principle of exclusion of testimony, obliging the parties to any juridical act to reduce it to writing.

The Draft envisages a general consolidation of the rules governing admissibility of means of proof. The basic principle is that all means are admissible, except those expressly excluded by the law (a. 65). Exceptions include the proof of a juridical act, proof contesting a writing, proof of a juridical act noted in a writing and proof of the contents of a writing.

Where proof of a juridical act is concerned, the Draft proposes that, between the parties, testimony is inadmissible to make proof of any juridical act whose object has a value in excess of four hundred dollars (a. 66). This means that testimony remains admissible where one party must prove such an act against a third party and vice versa.

Even between the parties, testimony is admissible in four cases (a. 67). First of all, when proof is to be made against a person of a juridical act entered into by him in the course or for the purpose of a commercial or other enterprise. The aim of this provision is to extend freedom of recourse to testimony - at present restricted to commercial business - to all areas of economic activity. The other cases are: when it has been physically or morally impossible to obtain written proof, when written proof cannot be produced, and when there is commencement of proof.

The concept of commencement of proof replaces that of commencement of proof in writing. Such a commencement of proof can result from a writing, from testimony given by the opposite party and even from a fact whose existence has been clearly shown (a. 68).

In the area of contradiction of writings, the Committee proposes to maintain the existing rule which excludes proof by testimony but with two important reservations: the first would limit this exclusionary rule to the parties to the juridical act evidenced by the writing in question; the second would by exception permit testimony where there is a commencement of proof (a. 69).

Under Article 71, Article 1204 C.C. is adopted under a revised form which requires that, in proving a juridical act noted in a writing, such proof be made by production of the writing or of a copy which in law is equivalent to such writing. This proposal allows for easier introduction of secondary evidence by permitting all methods of proof where, without bad faith on the part of the claimant, the document cannot be produced (a. 72).

Finally, the Draft confirms the rule that the court may not *proprio motu* raise any objections resulting from the general rules governing the admissibility of evidence (a. 73).

CHAPTER I

GENERAL PROVISIONS

1

This provision is a substantial reproduction of Article 1203 C.C. It determines the person on whom the burden of proof lies.

2

This article redrafts Article 2202 C.C., under which good faith is presumed. Since the purpose of this presumption is essentially to exempt the person in whose favour it exists from proving his good faith whenever, under law, juridical consequences depend on it, it was considered wise to clearly specify this exemption and to clearly indicate that this is an exception to the general principle of Article 1 which holds that anyone who wishes to claim a right must prove the facts upon which it is based. It is felt that only an express provision of law can oblige any party to prove his good faith.

3

This article inserts in the Code a jurisprudential rule governing the degree of evidence required in civil cases. Contrary to what occurs in criminal matters, where proof beyond reasonable doubt is required, the rule in civil matters is that of preponderance of probabilities. This rule is applied in jurisprudence even when a criminal act must be proven in civil matters (3). Since some doubts were expressed as to the wisdom of this solution (4), it was felt useful to provide for it expressly.

4

This article expresses a principle which has developed in practice and is of constant application (5). Either party is allowed to prove any fact which may influence the resolution of the issue (6). Facts which tend to demonstrate the existence or extinction of the right claimed are clearly relevant (7), as are those which lead to the presumption of the existence of such a fact (8).

The rule as stated is subject to the exceptions found in the two articles which follow.

5

The admissibility of illegally-obtained evidence was the subject of prolonged debate. One of the various legislative options considered was, naturally, the *status quo.*

In current practice, evidence is not refused merely because it has been obtained illegally (9). To be admissible, such evidence need only be relevant. One of the members of the Committee on the Law of Evidence favoured this solution, maintaining that the essential aim of the rules of evidence is to facilitate the establishment of the truth and not to assist the criminal courts in their allotted task of punishing offences, even those committed for the purpose of obtaining evidence. The other members did not agree: a threat of criminal proceedings did not seem to them likely to check illegal practices in obtaining desired evidence.

The surest deterrent is definitely to declare illegally-obtained evidence inadmissible. Yet this option was not retained as it was felt that the punishment would likely be disproportionate to the illegal act committed and might unduly hinder the establishment of truth.

Considering the need for flexibility in this area, it was finally deemed preferable to allow the courts to decide whether or not to admit the evidence, with due consideration for the gravity of the offence.

It was felt that such a legislative attitude would prevent illegal acts, while at the same time allowing the courts to adjust the sanction to the seriousness of the offence.

6

This limits the scope of the rule of relevance set forth in Article 4. As in current law (10), the court is granted the power to reject even relevant evidence if any of the conditions stipulated here are realized. Thus, on the basis of the proposed text, the judge could refuse evidence of similar acts.

Since the court could not make use of its discretion except to refuse proof of facts of doubtful importance, evidence of facts constituting the very basis of the right claimed could not be excluded.

7

Here, the Draft consecrates a legally acknowledged principle (11). It seems normal to dispense both parties from having to prove anything of which the court takes judicial notice.

8

This article inserts in the Code a rule of current law (12).

It establishes the court's obligation to take judicial notice of the law in force in Québec, as well as of notorious facts.

The French expression "*droit*" is preferable to "*loi*" since legislation is not the only source of the law (*droit*). Very often the legislator uses a

statute merely to outline certain general principles, and empowers the executive or a specific body to adopt the regulations defining the scope of that statute. These regulations are certainly a source of law and under this article the court must take judicial notice of them *proprio motu*; under the same article, it would also be obliged to take notice of the rules of law defined by jurisprudence.

The term "in particular" indicates that the article is not restrictive.

9

This article is intended to make Québec law consistent with the practice of the Supreme Court of Canada.

Under the present regime, in matters falling under the jurisdiction of the provinces, *proprio motu* judicial notice must be restricted to the law in force in Québec. It follows that the law of the other provinces is considered foreign, and must be proven (13). On the other hand, the Supreme Court considers that it takes notice of the law of each different part of Canada, provided that law has been pleaded (14); this means that the law of another Canadian province, rightly considered foreign in first instance, becomes *lex fori* before the Supreme Court - hence a conflict.

It is thus proposed that Québec adopt the practice followed by the Supreme Court (15); if adopted, this solution would exempt Québec plaintiffs from having to prove the law of another Canadian province provided they plead it. This measure is required to avoid unpleasant surprises for the opposite party.

The article allows the court, however, if it deems it expedient, to require the person who invokes the law of another province to prove it.

10

Under existing rules, the foreign law must be pleaded and proven (16). It is considered that the parties should still be compelled to plead foreign law although the prevailing opinion is that the parties' obligation should be tempered with regard to proving the foreign law, by allowing the court to notice it judicially if it feels it has the means necessary to do this.

11

This article gives Québec law a subsidiary vocation in cases where the foreign law, be it that of another province or that of a foreign State, has not been proven or when it is impossible for the court to establish its content (17). It was thought necessary to reject the fiction, allowed in Québec practice, of presumption of identity (18).

CHAPTER II

HOW PROOF IS MADE

12

This article lists, in accordance with Article 1205 C.C., the different ways of making proof. "The oath of the party" is omitted in accordance with the statute of 9 January 1897(19), which repealed Articles 1246 to 1256 C.C. governing this type of evidence.

Section I

Proof by writings

§ - 1 Copies of statutes

13

This article establishes the probative value of copies of statutes in force in Canada. This provision is based on the first two paragraphs of Article 1207 C.C., but with amendments. The expression "acts of the Imperial Parliament, of the Parliament of the Province of Canada, and of the Parliament of the Dominion of Canada" was replaced by "statutes which have been or are in force in Canada", which is both more concise and more correct. The word "*actes*" used in the French version of Article 1207 C.C. is an erroneous translation of the English "acts".

It was felt preferable not to include copies of statutes in the list of authentic writings, as does the 1866 Code (Article 1207 C.C.), since statutes are subject to judicial notice and cannot be proven.

It was deemed necessary, however, to determine their probative value.

"Statutes which have been or are in force in Canada" is sufficiently broad to cover the cases mentioned in the first two paragraphs of Article 1207 C.C.

§ - 2 Authentic writings

14

This definition is valid for both public and private authentic writings.

To be considered authentic, a public or a private writing must be

received before or certified by a competent public officer in accordance with the laws of the Legislature of Québec or of the Parliament of Canada, and the formalities required in each case must have been observed.

However, it was not felt desirable to list the specific formalities for notarial instruments, found in Articles 1208 and 1209 C.C. These should be included in the *Notarial Act* rather than in the Book on *Evidence*, which is more general.

15

This article reproduces most of the list found in Article 1207 C.C., but with a simpler wording. The term "in particular" denotes that this list is not restrictive.

On the other hand, the second and third paragraphs of Article 1207 C.C., which confer authenticity on copies of the laws of the Parliament of Canada and of the Legislature of Québec, are not included, since, as has already been explained (see notes to Article 13), the probative value of copies of statutes is the subject of a separate article.

The seventh and eighth paragraphs of Article 1207 C.C., which confer authenticity on documents and official announcements published by the Québec Official Publisher, were also eliminated, since sub-paragraph 7 of this article, which confers authenticity on official copies of and extracts from the documents mentioned there, seems to imply this status.

16

It was felt necessary to consecrate expressly a presumption of authenticity respecting any writing which appears to comply with the provisions of law.

This is useful because such a writing may be admitted without the necessity of proving the quality, competence or capacity of the public officer who received it; this rule appears in Article 1207 C.C. with respect to public authentic writings, but is also valid for those which are private (20).

This presumption may be contested without improbation, in accordance with the second paragraph of Article 23.

17

This article emphasizes the fact that the primary function of an authentic writing is to make proof with respect to all persons of all assertions of facts by the public officer empowered to note them. It

complements Article 23, which stipulates, in accordance with current law (21), that improbation is only necessary when facts of this nature are to be contested.

18

Certain acts of civil life are so important that they must be kept track of; this is why acts of civil status are kept. In order that these acts play their role fully, they must make proof with regard to all, of the facts entered in them.

The proposed article is intended to enshrine this rule.

19

This article restates Article 1210 C.C. but restricts it to notarial instruments.

It specifies that notarial instruments make proof not only of the enunciations listed in Article 17, but also of the juridical act which they set forth, namely the terms of the instrument or whatever the parties had in mind, which constituted the object of that instrument.

Notarial instruments also make proof of any of the parties' declarations which directly relate to them.

This article consecrates the interpretation by jurisprudence of Article 1210 C.C., by stipulating that proof is made "against all persons". Indeed, Article 1210 C.C. seems to restrict this probative value to the parties' heirs and legal representatives. The Supreme Court has upheld Mignault's opinion (22) that all facts set forth in an authentic instrument have probative value, unless proven otherwise, both as between the parties and with respect to third parties (23).

It was thought preferable to leave it to specific statutes to determine the probative value of other authentic writings.

20

This article restates and generalizes Article 1215 C.C.

Since the public officer has the duty of noting that an authentic copy is true to the original, such copy must be contested by improbation, as stated in Article 23.

21

This article restates the provisions of Articles 1215, 1217, 1218 and 1219 C.C. in the form of a list.

It was felt necessary to broaden the first two paragraphs to cover

copies of all authentic writings, whereas Articles 1215 and 1217 C.C. mention only copies of notarial instruments.

22

The rule set forth in Article 1216 C.C. is hereby extended to apply to extracts of all authentic writings.

23

This article is intended to consecrate the jurisprudential interpretation of Article 1211 C.C. (24) by which improbation procedures are required only where declarations by the public officer concerning facts he himself must note are being contested.

The other elements of an authentic writing may be contested by any legal means of proof - improbation is unnecessary.

This is the case, for instance, when the public officer's quality or signature, or the competency of a witness, are being contested, as is stated in the second paragraph of the article.

§ - 3 Semi-authentic writings

24

It was thought advisable to consider all foreign public documents as semi-authentic, whereas Article 1220 C.C. considers as such only certificates of secretaries of foreign States, wills probated abroad, judgments and acts of civil status.

Yet the probative value of semi-authentic documents would remain unchanged: such documents would make proof of their contents without proof of the seal, signature or authority of the public officer being necessary. This article should be interpreted in the light of Article 28 which completes it.

This new rule makes Article 1220 C.C.'s list unnecessary, except with regard to powers of attorney, which are dealt with in Article 26.

25

This provision completes the preceding article by granting copies of foreign public instruments the same value as the original.

26

It was deemed useful to retain a specific rule of evidence for powers of attorney made outside the province in the presence of a witness and accompanied by an affidavit (a. 1220 par. 5 C.C.).

A list of public officers empowered to receive such an affidavit is contained in the *Courts of Justice Act* (25) and it was not deemed necessary to include such a list here.

Powers of attorney executed outside the province often pose a special problem: though normally made under private signature, they must provide the parties using them adequate security as to the fact that they are authentic.

The present system is deemed essential and ought to be maintained to ensure protection of persons who have reason to use a foreign power of attorney.

Of course, this provision in no way prevents application of the general rule of Article 24 for powers of attorney received by a public officer outside Québec.

27

This provision substantially reproduces sub-paragraph 7 of Article 1220 C.C.

The filing of a foreign document with a notary to enable him to issue copies can be useful, when, for example, it is difficult or impossible to obtain copies from the country whence the document came, or when a foreign document must be made to conform to our provisions governing registration of real rights.

28

This provision specifies that the presumption of regularity which Articles 24, 25 and 26 establish with respect to semi-authentic documents may be denied in accordance with the Code of Civil Procedure (Articles 89 and 90 C.C.P.). The burden of proof then falls on the person who wishes to use such a document. The provision complies with the judicial interpretation of Article 1220 C.C. (26).

Adoption of Articles 24 to 28 would greatly broaden the field of semi-authentic documents. The list found in Article 1220 C.C. would be replaced by a general principle based on the ostensible authenticity of a foreign document. It is thus recommended that we abolish the first paragraph of Article 90 C.C.P. which requires for denial of a semi-authentic document a "deposit in the office of the court of an amount sufficient to cover the costs of the commission to be charged with checking the authenticity of the document."

This formality would become too onerous under the more liberal concept of semi-authenticity.

§ - 4 Private writings

29

It was felt necessary to define "private writings" so as to consecrate the Québec practice by which such writings are subject to no formalities (27).

This provision requires that, as their name indicates, private writings be signed by the parties. More than a mere formality, this requirement is an essential condition resulting from the nature of such writings; their probative value depends on it (see Article 32 and the explanatory notes).

30

This provision completes the preceding article by defining "signature".

The definition is very general, so as to include under private writings not only documents signed by hand by the person who makes them, but also documents on which any "mark" indicating the person's consent is made.

31

This provision consecrates a current rule of positive law, whereby a document signed for a party by a third party is considered a valid private writing if such signature was authorized by the party and the authorization is proven (28).

32

This provision substantially restates Article 1223 C.C., under which private writings do not in themselves constitute proof of their existence. The authenticity of the signature must be proven by the person who invokes the writing, as stated here in the first paragraph.

The second paragraph provides, as does Article 1223 C.C., one of the means of proving the existence of a private writing. Failing denial under oath in accordance with Article 89 C.C.P., the person against whom the writing is set up is presumed to tacitly recognize it.

33

This is a restatement of Article 1222 C.C.

Any private writing proven to exist has a probative value similar to that of an authentic writing, but only with respect to those against whom it is proven. The same terminology is used in Article 19 and in this article to

point out the limited scope of proof made by private writings, compared to notarial instruments which have probative value with respect to all.

34

The first paragraph restates the rule of Article 1225 C.C., but limits its scope to private writings.

Article 1226 C.C. states that private writings of a commercial nature "are presumed to have been made on the day they bear date." One may question the merits of this provision, since there is nothing to indicate that the date of a writing will necessarily be exact merely because a commercial matter is concerned. However, in both civil and commercial matters, such a presumption would seem reasonable in respect of acts repeated in the course of a regular activity; if these acts are attested to by writings, it may be supposed that the date of each writing is correct. Hence the rule in the second paragraph.

§ - 5 Unsigned writings, private registers and papers

35

This provision seemed necessary to ensure that the definition given private writings and the importance placed on the signature would not completely invalidate unsigned writings.

This is applicable, for instance, to unsigned letters or notices in newspapers.

Article 38 provides that any person who invokes such a writing must prove that it was well and truly made by its author.

36

This provision restates the beginning of Article 1227 C.C.

It was not felt necessary to maintain that article's two sub-paragraphs, since they are really only applications of the rule set forth in the beginning of the article.

Insofar as testimony is deemed admissible in Articles 42, 43 and 44, private registers and papers could constitute testimony in favour of the person who drew them up, which is the reason for the exception stated in this article.

37

This is a substantial restatement of Article 1228 C.C., but it was not felt necessary to retain that article's stipulation that the title must have

remained in the creditor's possession or the copy in the debtor's possession; the person against whom it is set up need only demonstrate why the release may not be set up against him.

38

This article sets forth an application of the general rule relating to burden of proof (see Article 1).

Just as the existence of a private writing must be established by proving the signature it bears (see Article 32), so must the authorship of a writing covered by Articles 35, 36 and 37 be proven by the person who invokes it.

39

This article establishes a differentiation between private writings, which under Article 69 may not be contested by testimony, and these other writings, which may be contested by any means.

Section II

Testimony

40

This definition of testimony takes into account an element deemed essential, namely personal knowledge of the facts related by the person who asserts their existence.

Testimony normally concerns facts, although in exceptional cases an expert's opinion may be considered testimony; both are covered in the following provisions.

It was deemed preferable not to give any special meaning to the term "expert", but rather to leave this to jurisprudence (29).

41

This provision is intended to consecrate the principle by which hearsay evidence is inadmissible.

This rule, which is not explicitly laid down in the Civil Code, is, according to recent jurisprudence (30), based on Article 1205 C.C., which in turn refers to the provisions of the Code of Civil Procedure concerning the giving of testimony (31).

One exception is hearsay mutually accepted by both parties.

42

This provision is new law and sets forth the first exception to the rule of inadmissibility of hearsay evidence for statements made out of court by persons who do not appear as witnesses.

Such statements constitute testimony within the meaning of Article 40, but are theoretically inadmissible under Article 41, since they are not "given by deposition in the course of the action".

Current law on this matter, based on English law (32), never accepts such declarations (which are really hearsay) as evidence, except in specific cases pointed out by jurisprudence (33).

Following foreign legislation (34), the court is allowed to accept hearsay as testimony under the conditions set forth in this Draft, especially when there is sound reason to consider the statement truthful.

Still, it was felt necessary to impose prior judicial authorization so as not to cause prejudice to the opposite party.

Paragraph 1 of this article refers to draft Articles 403a and 403c C.C.P., which should be added to the Code of Civil Procedure and which are found in Schedule II of this Report; they contain the procedure for court authorization.

43

This makes the preceding article more flexible with respect to statements made in the exercise of a regular activity and recorded in a register. The admissibility of previous statements is not dependent on the fact that the declarant cannot appear. Yet the procedure indicated in Article 42 must still be followed.

This exception has been made for a practical reason. If the declarant does appear, he can usually only rely on the declarations he has recorded in the register. Thus, it was felt advisable to accept hearsay evidence in such cases, without any necessity to prove that the declarant cannot possibly appear.

44

A second exception is here proposed to the rule forbidding hearsay evidence, concerning previous statements by a person who subsequently appears as a witness.

One of the main reasons which justifies the rule forbidding hearsay evidence to make proof is certainly the fact that the opposite party cannot verify its accuracy by cross-examination (35). If a declarant appears as a

witness and can be cross-examined about his previous statements, it seems excessive to prohibit hearsay evidence. This was the reasoning which led to formulate the rule which appears in the first paragraph.

In an effort to keep judicial debates oral, it was nevertheless felt necessary to make sure the exclusionary rule would apply to a "statement given in another proceeding"; this is the object of the second paragraph of the proposed article.

45

This provision, which changes existing law, is intended to settle cases of contradictory statements by a witness.

Under existing law, when a party is allowed to prove that a witness made a previous statement inconsistent with his testimony, the previous statement can only serve to affect the witness' credibility.

The proposed rule makes both statements testimony; it applies even when the previous statement is included in testimony given in other proceedings, a fact which constitutes an exception to the second paragraph of the preceding article (36).

46

Articles 46, 47 and 48 govern proof of statements made out of court, when such statements are admissible under Articles 42, 43, 44 and 45.

The rules governing proof vary according to whether the statement is written or verbal: when it is in writing, the Draft requires that this writing be filed; when it is verbal, proof may be made only by means of testimony during the proceedings, given either by the declarant or by someone who personally had knowledge of the statement.

Proof by double hearsay evidence is thus prohibited.

47

This exception to the rule in the preceding article was considered necessary, in view of the increasing use made of modern techniques, such as tape recordings or others.

It was felt necessary to make admissibility as proof of these technical methods subordinate to separate proof of the accurate reproduction of the statements so filed.

48

Also an exception to Article 46, this article provides that any document which contains a statement recorded by someone other than the declarant may be offered as proof.

This exception has been limited, however, to cases where the special conditions set down in the two paragraphs of the article which ensure the reliability of the writing exist.

49

This provision results from the new rules allowing exceptions to the prohibition of hearsay evidence. It specifies that any person who makes a statement out of court, which is admissible as proof, may have his credit impeached in the same way and for the same reasons as a witness who testifies in proceedings under Articles 295, 310 and 314 C.C.P.

50

This provision expressly consecrates the rule of positive law concerning the probative value of testimony (37).

Section III

Presumptions

51

It was thought useful to define presumptions in a provision which is substantially drawn from Article 1349 of the French Civil Code.

52

This article substantially repeats Article 1239 C.C.

Nevertheless, new terminology has been introduced to qualify presumptions: absolute presumptions are those which the Code calls *juris et de jure;* they are irrebuttable; simple presumptions are those which may be rebutted by proof to the contrary.

53

This provision of new law is intended to specify the meaning of these two expressions used frequently in the Draft Civil Code.

54

This article is a slightly amended version of Article 1240 C.C.

First, it specifies that no admission may be allowed to rebut an

absolute presumption unless the presumption is not of public order. Moreover, this is how doctrine interpreted the reservation respecting admissions in Article 1240 C.C. (38).

The mention of oaths in Article 1240 C.C. has been removed, because of a statute passed in 1897 (39) which abolishes decisive oaths (*le serment décisoire*).

55

The rule in Article 1241 C.C. is retained in this article, with slight amendments to the form.

56

This article substantially repeats the rule in Article 1242 C.C.

Section IV

Admissions

57

It was thought necessary to propose a definition of admission based on doctrine (40) and jurisprudence (41).

Thus it is recognized that admissions may deal only with facts, and not with law (42).

To constitute an admission, moreover, a statement must be against the declarant's interest, for only on this condition may it serve as proof against him.

58

The proposed article consecrates existing law (43) and applies to both judicial and extrajudicial admissions.

It is generally accepted that an admission may sometimes result from the conduct of a person, if proof is made of his unequivocal intention to admit.

59

It was deemed necessary to emphasize that, in principle, no admission may result merely from a person's silence (44).

In this respect, however, it should be noted that legislation has provided a few cases of admissions resulting from silence alone, hence the reservation provided in the proposed article (45).

60

It was considered useful to define judicial and extrajudicial admissions, taking into account the interpretation, given in Article 1243 C.C., which mentions these two kinds of admission without defining them (46).

Thus, any admission made during a civil suit by one party must be considered an extrajudicial admission if it is offered as proof in another suit (47).

61

The first paragraph of this article recognizes the rule of existing law respecting admission made by a mandatary during his mandate, requiring that if an admission by a mandatary is to be set up against his principal, it must come within the limits of his powers or relate to his management (48).

The second paragraph is new law. According to existing law, statements made by a mandatary after his mandate expires cannot be set up against the principal (49). Since frequently the ex-mandatary is the only person who has personal knowledge of the fact to be proven, it was considered desirable to make this rule more flexible and to authorize examination of the ex-mandatary as a witness, even in cases where proof by testimony is prohibited, and to allow this statement to serve as an admission or as commencement of proof against the principal. It must be emphasized that, under such circumstances, an admission by the ex-mandatary would not necessarily make proof against the principal, since in fact this is a case in which the probative value of the admission would be weighed by the court under Article 64.

62

This article substantially repeats Article 1243 C.C., as regards the principle of indivisibility of admissions and the exceptions to this principle.

63

This provision is intended to confirm expressly the interpretation of Article 1244 C.C., according to which the procedures admissible for proving extrajudicial admissions depend on the nature of the facts which is their object (50). Thus, it was considered that proof by testimony of an extrajudicial admission is admissible in matters which can be proven by testimony (51) and prohibited in matters where proof in writing is required (52).

64

The first two paragraphs of this article substantially repeat Article 1245 C.C.

In the first paragraph, however, it was considered necessary to specify that only an admission by a specially authorized mandatary could make complete proof against the principal, drawing in this matter from Article 1356 C.C. fr., which specifies that "*l'aveu judiciaire est la déclaration que fait en justice la partie ou son fondé de pouvoir spécial.*"

The second paragraph substantially repeats the second paragraph of Article 1245 C.C.

The third paragraph is new law. Referring to extrajudicial admissions and to judicial admissions which do not come from the opposite party or his mandatary specially authorized for such purpose, it settles an argument in jurisprudence as to the probative value of extrajudicial admissions. Some decisions (53) and some authors (54) have declared that Article 1245 C.C. applies to extrajudicial admissions, but this interpretation is not based on Article 1245 C.C. and is by no means approved by all (55). In fact, some prefer the restrictive interpretation given in France to Article 1356 C.C., which does not apply to extrajudicial admissions, since their probative value is left to the discretion of the judge (56).

CHAPTER III

ADMISSIBILITY OF MEANS OF PROOF

65

Contrary to the present Code, which regulates admissibility of means of proof through testimony, the Draft devotes a separate section to this question. The basic principle of this section, stated in this article, is the freedom of proof; as such it modifies existing law, which is based on the principle of prohibition of proof by testimony (57). This principle is accompanied, however, by a certain number of exceptions stated in the articles following, which are intended to maintain several rules of existing law.

66

This provision gives the first exception to the principle of freedom of proof stated in the preceding article, which is intended to retain the prohibition of proof by testimony in Article 1233 C.C., while limiting its

scope where a juridical act must be proven whose object has a value of more than four hundred dollars. On this point, the limitation is that the prohibition comes into play only between the parties to a juridical act; consequently, not only could third parties have recourse to proof by testimony against the parties, as is the case now (58), but, contrary to what exists now (59), the parties would have this same right against third parties.

67

This article repeats the exceptions to the prohibition of proof by testimony outlined in Article 1233 C.C., and amends them in some cases substantially. These exceptions have been regrouped under four headings.

The first concerns acts entered into in the course or for the purposes of an enterprise. This exception is intended to broaden the scope of the rules of freedom of proof to cover the whole sector of economic activities. In existing law, these rules are restricted to commercial affairs alone. Indeed, the regime of exception of commercial law does not extend to activities of co-operatives (60) and other non-profit organizations (61), nor to activities of the liberal professions (62) or of craftsmen (63) or agricultural activities (64). Only recently, moreover, has jurisprudence extended it to real estate activities (65).

It was thought preferable to adopt a distinction based on the manner in which the act was entered into rather than one based on the nature, commercial or otherwise, of the act. For this reason, the idea of commercial matters is replaced by that of enterprise.

Enterprise supposes an organization with a view to carrying out an economic activity. This organization may be by the grouping of persons or by use of property towards the accomplishment of this activity. As these facts are easily verifiable, the idea of enterprise seems a relatively easy criterion to apply.

Although the idea of enterprise has until now been used very little in Québec Civil law, it is well known in French law (66).

The second exception, intended to make testimony admissible when it has been physically or morally impossible to obtain proof in writing, merely maintains existing law as expressed in paragraphs 4 and 5 of Article 1233 C.C. (67).

The third exception covers the case of a claimant who for some reason is absolutely unable to produce written proof of his right. It corresponds to the rule laid down in paragraph 6 of Article 1233 C.C. (68). However,

unlike existing law under which admissibility of testimonial proof depends on proof that the writing has been either unexpectedly lost or kept by the opposite party or by a third party, the Draft merely requires that the claimant establish that it was impossible for him to produce the writing and that this was not due to bad faith on his part. Contrary to the general rule, the claimant must prove his good faith; in this case, the usual presumption of good faith does not work in his favour.

The fourth exception authorizes testimony when there is a commencement of proof. It corresponds with paragraph 7 of Article 1233 C.C. The concept of "commencement of proof" provides a broader notion than commencement of proof in writing, as Article 68 shows, and for this reason the expression "commencement of proof" was considered more exact.

The Draft expresses existing law by specifying that commencement of proof must make the alleged juridical act appear probable (69).

68

The Civil Code mentions commencement of proof by writing, but gives no definition; the jurisprudence has outlined it by rules which it was felt advisable to codify in this article.

The first paragraph of this article states a recognized rule, according to which either a writing (70) or the testimony (71) of the party against whom it is invoked may serve as a commencement of proof.

The second paragraph of the article broadens the traditionally accepted idea of commencement of proof by writing. It was felt wise to follow a liberal jurisprudence (72) which tends to admit that a commencement of proof may arise from circumstantial evidence.

In the *Sirois v. Parent* decision, Mr. Justice Gagné said (73): "*Il est bien reconnu que ce commencement de preuve peut résulter d'un fait matériel clairement établi dont on peut déduire l'existence probable, sinon absolument certaine, d'une convention.*"

Following this jurisprudence, the article requires clear establishment of the fact from which commencement of proof arises.

69

This article repeats the rule in Article 1234 C.C., with two important changes. First of all, it renders testimony admissible when there is a commencement of proof. Presently, the jurisprudence interprets the expression "in any case" in Article 1234 C.C. as excluding testimony, even in cases of commencement of proof by writing (74). In an effort to

liberalize the law on evidence, a more flexible rule is here proposed, which conforms to that followed in France (75).

The second change limits the scope of the prohibition to the parties to the juridical act evidenced by the writing, with the result that, in suits involving third parties, testimony is fully admissible not only in favour of such third parties, as is the case now (76), but also in favour of the parties to the juridical act (77).

70

This article is in line with the manner in which jurisprudence has interpreted Article 1234 C.C., to the effect that the interpretation of a writing or the demonstration of the nullity of the juridical act attested to by it does not contradict that writing (78).

71

The best evidence rule, found in Article 1204 C.C., is repeated here, taking into account the restrictive interpretation which the courts have given to it (79).

It seems reasonable to hold that, in spite of the generality of its terms, the basic object of Article 1204 C.C. is to grant priority to written proof over any other means of proof, when proving a juridical act attested to by a writing or the content of a writing. It was considered useful to retain this rule alone.

Since, in certain cases, the Draft, like existing law, for that matter, grants the same value to a copy as to an original (80), it was thought fit to emphasize that the best proof is made as much by the original as by the copy which legally replaces it.

72

This article has the same effect as the second paragraph of Article 1204 C.C.; it authorizes secondary proof in exceptional cases. However, it gives more precise specification of the conditions required for this exception to come into play. It is to be noted that these conditions are the same as those allowing proof by testimony, under the third paragraph of Article 67. This similarity exists because the third paragraph of Article 67 is merely a specific application of the rule of exception made by this article.

73

This article maintains a well-established rule in Québec law, according to which a court must not intervene *proprio motu* to reject inadmissible

evidence when a party who is present or duly represented has failed to object (81).

This rule should be maintained for practical reasons. This rule applies the adversary system to questions of evidence by obliging any party who believes that an irregularity of proof has been committed to raise the matter by an appropriate objection made at the proper time. In this way, the opening of new debates on questions of proof before the Appeal Court is prevented, since the absence of an objection renders the proof offered admissible.

Obviously, the rule in this article does not come into play when an irregularity of proof affects public order, for in this case the court must reject it *proprio motu*. Nor does it apply to an action tried in the absence of the party who might raise the objection. Thus, the article subjects the prohibition preventing the court from intervening *proprio motu* to the failure of the party to object. This means, in particular, that in default cases where the trial takes place in the defendant's absence, the judge must himself require observance of the rules; this is the practice today (82).

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(1) A similar line of thinking has been adopted by the Law Reform Commission of Canada, which proposed that the rules of evidence governing hearsay be relaxed in federal cases, while emphasizing certain admissibility conditions such as the opportunity for cross-examination of the witness, as well as assessment of veracity of declarations resulting from the circumstances under which statements were made: Law Reform Commission of Canada, *Report on Evidence*, Ottawa, Queen's Printer, 1975, aa. 27 to 31.

(2) 17-18 Eliz. II, c. 64.

(3) *Maryland Casualty Co. v. Rolland Roy Fourrures Inc.*, [1974] S.C.R. 52; *Industrial Acceptance Corporation v. Couture*, [1954] S.C.R. 34.

(4) See, in particular, the notes by Casey J. in *Rolland Roy Fourrures Inc. v. Maryland Casualty Co.*, [1971] C.A. 793 and the comments by Deslauriers J. in *Dame Rioux-Therrien v. L'Alliance et L'Assurance-vie Desjardins*, [1972] S.C. 213.

(5) This is implicitly stated by Article 168 C.C.P., *in fine*: "The defendant may also ask for the striking out of allegations which are immaterial, redundant or libellous."

(6) See *Martin Transports Ltd v. Cardinal*, [1943] K.B. 344.

(7) See A. NADEAU and L. DUCHARME, *La preuve en matières civiles et commerciales*, in *Traité de droit civil du Québec*, t. 9, Montreal, Wilson & Lafleur, 1965, No. 73, p. 50.

(8) See, on this subject, *Lessard v. Le curé et les marguilliers de la Fabrique de St-Georges*, [1946] P.R. 137 (S.C.); *Tremblay v. Highway Paving Co. Ltd*, (1944) 48 P.R. 309 (S.C.); *New York Central Railroad Co. v. Cartier*, [1961] Q.B. 910.

(9) See *Tourigny v. La Compagnie Royal Exchange Assurance*, [1971] C.A. 864; *Dame Dumont v. Les héritiers Laliberté*, [1971] C.A. 635.

(10) See A. NADEAU and L. DUCHARME, *op. cit.*, No. 75 et s., p. 51 et s.; *Jean v. White*, [1950] P.R. 215 (S.C.); *Johnson v. Canadian Kaolin Silica Products Ltd.*, [1947] R.L. 422 (S.C.).

(11) See A. NADEAU and L. DUCHARME, *op. cit.*, No. 33 et s., p. 23 et s.; F. LANGELIER, *De la preuve en matière civile et commerciale*, Montreal, Théorêt, 1895, No. 16, p. 7.

(12) See A. NADEAU and L. DUCHARME, *op. cit.*, No. 35, p. 24; F. LANGELIER, *op. cit.*, p. 8.

(13) See A. NADEAU and L. DUCHARME, *op. cit.*, No. 36, p. 25; F. LANGELIER, *op. cit.*, No. 19, p. 8.

(14) See, in this respect, *Logan v. Lee*, (1907) 39 S.C.R. 311; *Canadian National Steamship Company Ltd v. Watson*, [1939] S.C.R. 11; *The Upper Ottawa Improvement Company et al. v. The Hydro-Electric Power Commission of Ontario*, [1961] S.C.R. 486, p. 502.

(15) Certain Canadian provinces have already adopted this attitude: *The Judicature Act* (Alberta), R.S.A. 1970, c. 193, s. 32(s); *An Act Respecting Witnesses and Evidence* (The Manitoba Evidence Act), R.S.M. 1970, c. E150, s. 31.

(16) See, on this subject, J.G. CASTEL, *La preuve de la loi étrangère et des actes publics étrangers au Québec*, (1972) 32 R. du B. 338; *Giles v. Jacques et Primeau v. Giles*, (1887) 31 L.C.J. 266 (Q.B.).

(17) See H. BATIFFOL and P. LAGARDE, *Traité de droit international privé*, 6th ed., Paris, L.G.D.J., 1974, t. 1, p. 436 et s.

(18) See, on this subject, J.G. CASTEL, *loc. cit.*, p. 354.

(19) *An Act to amend the Civil Code*, 60 Vict., c. 50, s. 21.

(20) See A. NADEAU and L. DUCHARME, *op. cit.*, No. 314, p. 233; F. LANGELIER, *op. cit.*, No. 376, p. 160.

(21) See *Charron-Picard v. Tardif*, [1961] S.C.R. 269; *Shoiry v. Les Placements Moberge Inc.*, [1968] Q.B. 378.

(22) See P.B. MIGNAULT, *Droit Civil Canadien*, t. 6, Montreal, C. Théorêt, 1902, pp. 21 and 22.

(23) See *Corporation de la paroisse de St-Joseph de Coleraine v. Colonial Chrome Co. Ltd.*, [1933] S.C.R. 13, p. 20.

(24) See *Charron-Picard v. Tardif*, [1961] S.C.R. 269; *Shoiry v. Les Placements Moberge Inc.*, [1968] B.R. 378.

(25) R.S.Q. 1964, c. 20, s. 223 et s., as amended by 13-14 Eliz. II, c. 17, s. 30.

(26) See *Lanoie v. Gendron*, (1937) 43 R.J. 245 (S.C.), with respect to presumption of regularity of semi-authentic documents; *Lord v. Lord*, [1947] S.C. 309: improbation is not required to deny semi-authentic documents.

(27) See A. NADEAU and L. DUCHARME, *op. cit.*, No. 349, p. 271; F. LANGELIER, *op. cit.*, No. 416, p. 179.

(28) See P.B. MIGNAULT, *op. cit.*, t. 6, p. 40; A. NADEAU and L. DUCHARME, *op. cit.*, No. 350, p. 272; F. LANGELIER, *op. cit.*, No. 421, p. 182.

(29) See, on this subject, *Gold v. Reinblatt*, [1929] S.C.R. 74; *St. Jean v. Bergeron*, (1908) 10 P.R. 304 (S.C.); *Fournier v. Fournier*, (1940) 44 P.R. 173 (S.C.).

(30) See *Royal Victoria Hospital v. Morrow*, [1974] S.C.R. 501.

(31) See Articles 294 et s. C.C.P.

(32) See *Royal Victoria Hospital v. Morrow*, [1974] S.C.R. 501.

(33) See A. NADEAU and L. DUCHARME, *op. cit.*, No. 201 et s., p. 139 et s.; F. LANGELIER, *op. cit.*, p. 117 et s.; *Phipson on Evidence*, 11th ed., London, Sweet and Maxwell, 1970, No. 631 et s., p. 268 et s.

(34) England: *Civil Evidence Act*, 17-18 Eliz. II, c. 64; U.S.A.: *The Federal Rules of Evidence*, 1973.

(35) See J.H. WIGMORE, *A treatise on the Anglo-American System of Evidence in Trials at Common Law*, in *Wigmore on Evidence*, 3rd ed., Boston, Little, Brown & Co., 1940, t. 5, p. 1 et s., par. 1360 et s.; *Phipson on Evidence*, *op. cit.*, No. 647, p. 278; A. NADEAU and L. DUCHARME, *op. cit.*, No. 199, p. 138.

(36) This new rule is quite to the same effect as the one we find in the *Civil Evidence Act*, 1968, (England); see, to that effect, *Phipson on Evidence*, *op. cit.*, No. 1537, p. 638.

(37) See *Maryland Casualty Co. v. Roland Roy Fourrures Inc.*, [1974] S.C.R. 52; *Latour v. Grenier*, [1945] S.C.R. 749, p. 761; *Boivin v. Marchand*, [1960] Q.B. 575.

(38) See A. NADEAU and L. DUCHARME, *op. cit.*, No. 551, p. 445; P.B. MIGNAULT, *op. cit.*, t. 6, p. 100; F. LANGELIER, *op. cit.*, No. 152, p. 61.

(39) *An Act to amend the Civil Code*, 60 Vict., c. 50, s. 21.

(40) See A. NADEAU and L. DUCHARME, *op. cit.*, No. 594, p. 501; F. LANGELIER, *op. cit.*, No. 23, p. 11; P.B. MIGNAULT, *op. cit.*, t. 6, p. 117; L.P. TASCHEREAU, *Les méandres de l'aveu*, (1967-68-69) Rev. de dr. comp. de l'ass. québécoise pour l'étude comparative du droit, 141, p. 144 et s.

(41) See *Kowal v. New York Central Railroad Co.*, [1934] S.C.R. 214, p. 221; *Abran v. Perkins Electric Limited*, [1931] S.C.R. 636, pp. 638 and 639; *Comtois v. Liddell*, [1943] S.C. 1.

(42) See *La congrégation du T.S. Rédempteur v. The School Trustees for the Municipality of the Town of Aylmer*, [1945] S.C.R. 685, p. 711; *Les Prévoyants du Canada v. Poulin*, [1973] C.A. 501, p. 506.

(43) See A. NADEAU and L. DUCHARME, *op. cit.*, No. 597 et s., p. 504 et s.; L.P. TASCHEREAU, *loc. cit.*, p. 160 et s.

(44) See, specifically, *Grace and Co. v. Perras*, (1921) 62 S.C.R. 166.

(45) See, for example, Articles 89, 403, 411 and 413 C.C.P.

(46) See A. NADEAU and L. DUCHARME, *op. cit.*, No. 611, p. 518; F. LANGELIER, *op. cit.*, No. 30, p. 14; P.B. MIGNAULT, *op. cit.*, t. 6, p. 118; L.P. TASCHEREAU, *loc cit.*, p. 178 et s.

(47) See *Haineault v. Rondeau*, [1961] P.R. 429 (S.C.).

(48) See A. NADEAU and L. DUCHARME, *op. cit.*, No. 604, p. 511; P.B. MIGNAULT, *op. cit.*, t. 6, p. 119; F. LANGELIER, *op. cit.*, No. 42, p. 19; L.P. TASCHEREAU, *loc. cit.* p. 206 et s.; *Linval Acceptance Corporation Ltée v. Branchaud*, [1972] C.A. 552; *Laliberté v. Turcotte*, [1946] K.B. 208.

(49) See *Baril v. Read Motors*, (1929) 46 K.B. 174; *Knox v. Boivin*, (1893) 4 S.C. 311; *Pinsonneault v. Desjardins*, (1879) 24 L.C.J. 100 (Q.B.).

(50) See A. NADEAU and L. DUCHARME, *op. cit.*, No. 613, p. 520.

(51) See *Royal Victoria Hospital v. Morrow*, [1974] S.C.R. 501, p. 510; *Grimaldi v. Restaldi*, [1933] *S.C.R.* 489 ;*Skeene v. Dontigny*, (1926) 41 K.B. 544.

(52) See *Forest v. Parent*, [1949] R.L. 1 (S.C.); *Pelletier v. Guidi*, (1913) 19 R.L. n.s. 464 (C. of R.).

(53) See *Witzling v. Grobstein*, (1935) 59 K.B. 266, p. 272; *Sigouin v. Ouellette*, [1949] S.C. 48.

(54) See F. LANGELIER, *op. cit.*, No. 137, p. 55; P.B. MIGNAULT, *op. cit.*, t. 6, p. 125; L.P. TASCHEREAU, *loc. cit.*, p. 179.

(55) See A. NADEAU and L. DUCHARME, *op. cit.*, No. 632, p. 541; *Arsenault v. Union Insurance Society of Canton Ltd.*, [1961] Q.B. 59, notes by Owen J., p. 68.

(56) See DALLOZ, *Encyclopédie juridique*, Rép. de dr. civ., 2nd ed., 1974, t. 5, see *Preuve*, by G. GOUBEAUX and P. BIHR, No. 1200 et s., p. 91; AUBRY and RAU, *Droit civil français*, Paris, Librairie Technique, 1958, t. 12, by P. ESMEIN, No. 751, p. 106.

(57) See a. 1233 C.C., *in fine*, based on the *Ordonnance de Moulins* of 1566 and repeated in the *Ordonnance de Procédure Civile* of 1667.

(58) See *Laliberté v. Langelier*, (1900) 9 Q.B. 398, p. 404; *Freudenthal v. Bigras*, (1929) 47 K.B. 340, p. 343; *Chandler v. Federal Alcohol Distillery Limited*, (1930) 49 K.B. 47.

(59) See *Rioux v. Rioux et Frères*, [1969] Q.B. 333; *Laliberté v. Langelier*, (1900) 9 Q.B. 398, p. 404; *Chandler v. Federal Alcohol Distillery Limited*, (1930) 49 K.B. 47.

(60) See *La Caisse Populaire de St-Roch de Montréal v. Palence*, [1967] R.L. 442 (C.P.).

(61) See *Beaubien et Bibeau v. L'Union Economique d'Habitation*, [1947] S.C. 33.

(62) See *Pérodeau v. Hamill*, [1925] S.C.R. 289, p. 296.

(63) See *Click v. Acme Waterproof Mfg. Co.*, [1963] R.L. 382 (S.C.).

(64) See *New York Central System v. Sparrow*, [1957] Q.B. 808.

(65) See *Colonia Development Corp. v. Belliveau*, [1965] Q.B. 161; *Desrochers v. The Royal Trust Co.*, [1969] Q.B. 1128.

(66) See, specifically, P. DURAND, *Rapport sur la notion juridique de l'entreprise*, in *Travaux de l'Association H. Capitant*, Paris, Dalloz, 1947, t. III, p. 49; P. DIDIER, *Esquisse de la notion d'entreprise*, in *Mélanges Voirin*, Paris, L.G.D.J., 1967, p. 209; M. DESPAX, *L'entreprise et le droit*, Paris, L.G.D.J., 1957; J. HAMEL and G. LAGARDE, *Traité de droit commercial*, Paris, Dalloz, 1954, t. I, No. 206, p. 242.

(67) See A. NADEAU and L. DUCHARME, *op. cit.*, No. 450, p. 345; F. LANGELIER, *op. cit.*, No. 535 et s., p. 228 et s.; C.E. DORION, *De l'admissibilité de la preuve par témoins en droit civil*, Montreal, Whiteford & Théorêt, 1894, No. 43 et s., p. 49 et s.

(68) Although a recent decision interpreted paragraph 6 of Article 1233 in this way: *Montreal Trust Company v. Potvin*, [1973] S.C. 397, this interpretation is not safe from all criticism: L. DUCHARME, *La preuve de la perte par cas fortuit d'un document peut-elle s'inférer de recherches infructueuses faites pour le retrouver?*, (1973) 33 R. du B. 414.

(69) See *Robertson v. Quinlan*, [1934] S.C.R. 550; *Johnson v. Buckland*, [1937] S.C.R. 86.

(70) See *Robertson v. Quinlan*, [1934] S.C.R. 550.

(71) See Article 319 C.C.P.

(72) See *Sirois v. Parent*, [1954] Q.B. 91, pp. 95 and 102 (promise of marriage).

(73) *Ibid.*, p. 102.

(74) See *Bury v. Murray*, (1894) 24 S.C.R. 77; *Matte v. Matte*, [1962] Q.B. 521.

(75) See Article 1341 C.C. fr.

(76) A. NADEAU and L. DUCHARME, *op. cit.*, No. 504, p. 402; F. LANGELIER, *op. cit.*, No. 612, p. 259; P.B. MIGNAULT, *op. cit.*, t. 6, p. 86.

(77) According to certain decisions rendered in federal tax cases, present law would be to this effect: *M.N.R. v. Thibeault*, [1962] Ex. C.R. 273, p. 282; *M.N.R. v. Ouellette et Brett*, [1971] C.T.C. 121; M. REGNIER and G. COULOMBE, *L'article 1234 C.C. en matière fiscale*, (1971) 31 R. du B. 472.

(78) See, on this subject, *Matte v. Matte*, [1962] Q.B. 521; G.R.W. OWEN, *Testimony to Contradict or Vary Writings*, (1957-58) 4 McGill L.J. 1; A. NADEAU and L. DUCHARME, *op. cit.*, No. 492, p. 390; and No. 496, p. 395.

(79) So it was decided that a. 1204 C.C. was not the basis of the prohibition of hearsay evidence in our law: *Royal Victoria Hospital v. Morrow*, [1974] S.C.R. 501.

(80) See Article 20 respecting authentic copies and Article 25 respecting semi-authentic copies.

(81) See, on this subject, *Schwersenski v. Vineberg*, (1892) 19 S.C.R. 243; *Gervais v. McCarthy*, (1904) 35 S.C.R. 14; A. NADEAU and L. DUCHARME, *op. cit.*, No. 248 et s., p. 170 et s.

(82) See *Les immeubles Murdock Ltée v. Simonato*, [1962] S.C. 575; *Lepage v. Gagnon Frère de Roberval Ltée*, [1969] P.R. 362 (S.C.); A. NADEAU and L. DUCHARME, *op. cit.*, No. 256, p. 175.

BOOK SEVEN

PRESCRIPTION

INTRODUCTION

The first problem dealt with in the reform of the law on prescription was whether a separate title should be maintained to contain all the rules governing both kinds of prescription.

One solution would have been to include the provisions concerning acquisitive prescription in the Book on *Property*, since usucapion constitutes one means of acquiring the right of ownership; in that event the rules governing extinctive prescription would have been included in the Book on *Obligations*, since extinctive prescription constitutes one means of extinguishing obligations. This kind of arrangement, however, would not have taken into account the rules common to both kinds of prescription. It seemed preferable, therefore, to follow the order set out by the Codifiers of 1866.

The Draft's Book on *Prescription* should contain all the rules of civil law governing this subject. At present, the provincial statutes contain many provisions which derogate from the Civil Code, such as the rules established in the charters of several municipalities, which are different from those in the Code. It is considered that all these exceptions should be repealed and that in this area only one set of rules be recognized, namely those of the Civil Code. These rules would apply without distinction to both individuals and legal persons, whether public or private.

The preliminary notice occasionally required before suing municipalities and certain public officers ought to be dealt with in the Code of Civil Procedure; the periods within which such notices must be given should also be standardized.

An effort has been made to simplify the rules in the Book on *Prescription*.

Several provisions of Title XIX of the Civil Code are foreign to prescription and are inserted in other parts of the new Draft Code. Other articles have been struck out because they are no longer of any use.

Several enumerations of actions subject to various extinctive prescriptive periods are unnecessary and are taken out since the Draft provides for only one period for extinctive prescription in the area of personal rights: three years.

It was also thought desirable to re-arrange the articles on prescription. These have in fact been distributed among three titles dealing with provisions common to both kinds of prescription (renunciation and

interruption), to the matters peculiar to extinctive prescription. Transitional provisions concerning the application of the new law to any prescription begun under the Code are inserted in a schedule (1).

The principal changes brought about by the Draft may be summarized as follows:

1. Prescription runs against everyone: individuals, the Church, the State, and incapable persons, except as regards claims to be exercised against their legal representatives; they also run against one consort in favour of the other. The only cause of suspension retained by the Draft is the actual impossibility of acting. This innovation will result in greater security for title searches of property and will allow prescription to play a greater role.

2. There would be fewer prescriptive periods than in the Code. In the area of acquisitive prescription, three types are recognized:

   a) a twenty-five-year prescription is that allowed by general law; it replaces the thirty-year prescription;

   b) as regards immoveable property, a shortened prescription of ten years in favour of any possessor in good faith and with title;

   c) as regards moveables, a shortened prescription of three years in favour of any possessor in good faith.

   There would be two kinds of extinctive prescription:

   a) a ten-year prescription for extinction of real rights other than ownership;

   b) a three-year prescription regarding personal rights and claims.

3. Under Article 549 of the Civil Code, real servitudes cannot be created by prescription. Article 30 breaks new ground on this point and provides that dismemberments of the right of ownership - usufruct and real servitudes - can be acquired by prescription.

4. Under the 1866 Code, only the right of ownership can be acquired through the shorter ten-year prescription when the possessor has title and is in good faith. Under Articles 30 and 41, dismemberments of the right of ownership, including emphyteusis, might also be established by ten-year prescription.

5. Article 2268 of the Civil Code concerning the three-year prescription relating to moveable property is substantially changed (Article 45). Several distinctions established by this article of the Code are abandoned in the interest of simpler and clearer solutions.

6. As the law now stands, relative real rights, for example usufruct, are extinguished by non-use for thirty years except in the case provided for in Article 2251 C.C. where prescription is ten years. Article 48 proposes a ten-year prescription for the extinction of all real rights, save ownership, without the requirement of good faith on the part of the person prescribing.

The Civil Code of 1866 makes no reference to the distinction between prescriptive periods and forfeiture periods. All periods in this Book would be periods of prescription. Those provided in other Books of the Draft would be periods of forfeiture only if they are clearly identified as such in the texts establishing them.

TITLE ONE

PRESCRIPTION IN GENERAL

CHAPTER I

GENERAL PROVISIONS

1

The first paragraph reproduces the substance of the first paragraph of Article 2183 C.C. and gives a general definition which applies to both kinds of prescription.

The definitions of each of the two kinds of prescription given in the second and third paragraphs of Article 2183 C.C. will be reproduced at the beginning of the titles devoted to each kind.

2

This article combines in a single text Articles 2188 and 2267 C.C., which are complementary.

Article 2267 C.C. refers to Articles 2250, 2260, 2261 and 2262 C.C.; these four articles now cover all cases of extinctive prescription of five years or less; the proposed Draft avoids reference to these articles.

The Draft recognizes two categories of extinctive prescription: first, a ten-year prescription for the extinction of real rights other than that of ownership, and second, a three-year prescription in respect of personal rights and claims.

3

This article reproduces the substance of Article 2240 of the Civil Code. It specifies the day when prescription begins, according to the circumstances. The first day is not counted if it is not complete (e.g. if prescription begins in the afternoon) but will be if it is complete (e.g. the day following that when a debt becomes exigible).

4

This text reproduces the substance of Article 2246 C.C.

As an example of the application of the rule in this provision, consider the vendor who sues his purchaser for the price of goods sold. The purchaser, in his defence, pleads compensation since the vendor owes him an amount represented by a promissory note. Even if the note is

prescribed, compensation is a valid defence and the action will be dismissed provided the note was not prescribed when the vendor's account became due. This would not apply, however, were the note already prescribed when the account became exigible.

CHAPTER II

RENUNCIATION OF PRESCRIPTION

5

This article reproduces Article 2184 C.C.

6

This article is new. As the law now stands, it is not certain whether the parties may agree upon a period shorter than that provided in the Code (2). In the interests of uniformity and safety in transactions, prescription periods should be considered of public order and therefore not subject to change by agreement.

7

Article 2185 C.C. is reproduced in the French text; the English wording is slightly amended.

8

This article reproduces Article 2186 C.C.

9

This is a substantial reproduction of Article 2187 C.C.

CHAPTER III

SUSPENSION OF PRESCRIPTION

10

This article enunciates the principle whereby prescription runs against all, including the State.

Moreover, it reproduces only part of Article 2232 C.C.; suspension of prescription will be dealt with in the articles which follow.

11

The first paragraph of Article 2232 C.C. mentions impossibility in fact and impossibility in law of acting. Cases of impossibility in law are dealt with in the second paragraph of Article 2232 C.C. and in the articles following. For the reasons given above, it is proposed that these various cases of impossibility in law be no longer recognized and that impossibility in fact be retained alone, in principle, as a cause of suspension of prescription.

12

It was, however, felt desirable to maintain specifically suspension of prescription in cases where an unborn child, a minor or a person of major age under tutorship may have a right of action to assert against their legal representatives, thereby limiting the scope of the second paragraph of Article 2232 C.C.

13

This article reproduces the first paragraph of Article 2237 C.C.

14

The text reproduces the provisions in Article 2239 C.C. Changes have been made in the wording, however, to render it consistent with Articles 25 to 29.

CHAPTER IV

INTERRUPTION OF PRESCRIPTION

15

This article reproduces Articles 2222 of the Civil Code.

16

This article reproduces Article 2223 C.C.; the words "of acquisitive prescription" are added since this provision applies only to this kind of prescription.

17

Real rights, other than ownership, are extinguished by non-use (aa. 479 and 562 C.C.). Supposing a person who holds a right has not exercised it for some time and prescription is running against him, if he

subsequently performs an act in exercise of that right, prescription is then interrupted naturally.

18

This article describes both types of causes of civil interruption.

19

This article repeats the rule in Article 2224 C.C.; the sixty-day period, however, begins on the day the period for prescription expires rather than that when the demand is filed.

20

This article names another cause of judicial civil interruption, and generalizes the rules contained in the fourth paragraph of Article 2224 of the Civil Code.

21

This article is based on Article 2226 C.C. and enumerates the cases where proceedings cannot interrupt prescription.

The provision in Article 2265 C.C. has been included in the article and the period concerned has been reduced from thirty to fifteen years.

The determination of a prescriptive period is always somewhat arbitrary; it was thought that in the circumstances a period of fifteen years is reasonable.

The following situation is anticipated: a creditor sues his debtor, thereby interrupting prescription; the creditor fails to follow up the proceedings and the defendant does not bother to obtain peremption of suit. If both parties remain inactive for a certain time, it is natural that after a certain period (15 years is suggested here) the suit be considered no longer effective.

22

The text reproduces the substance of the second paragraph of Article 2224 of the Civil Code. It adds the case of a settlement between the parties which benefits from the interruption caused by the demand. The settlement in turn will constitute a recognition of debt which interrupts prescription for the future.

23

The source of this text is Article 2228 C.C. It is proposed that the rule in that article be maintained as regards cases where the interruption results from a judicial demand. The proposed rule differs from the

solution contained in Article 2228 C.C. in cases where interruption results from causes other than legal proceedings.

24

This provision reproduces Article 2227 C.C. Only the form of the article is changed.

25

This article repeats the rule of the first paragraph of Article 2230 and the first paragraph of Article 2231 C.C. The principle of interruption of prescription for the entire debt is maintained in matters of both types of solidarity, active and passive.

26

This article reproduces, with certain changes, the first part of the third paragraph of Article 2230 and the first part of the third paragraph of Article 2231 C.C. The references made to hypothecs in the Code are unnecessary, since the solutions provided are merely an application of the general principles regarding hypothecs.

27

The comments on the preceding article also apply here. The rule proposed reproduces the solutions now contained in the second sentence of the third paragraph of Article 2230 and in the first sentence of the fourth paragraph of Article 2231 C.C.

It is also proposed to drop the last sentence of the third paragraph of Article 2230, and the last sentence of the fourth paragraph of Article 2231 C.C. These two provisions contain merely an application of the general principles contained in the Book on *Obligations* and are implied in the text of the article.

28

The rule of Article 2264 C.C. is retained. However, the reference to novation is eliminated, since novation extinguishes the former debt and there can be no question of prescription in such a case.

The thirty-year period in Article 2255 C.C. is reduced to twenty-five years.

29

The thirty-year period in Article 2265 C.C. is reduced to twenty-five years.

TITLE TWO

ACQUISITIVE PRESCRIPTION

CHAPTER I

GENERAL PROVISIONS

30

This article defines acquisitive prescription and replaces the second paragraph of Article 2183 C.C. It innovates in allowing acquisitive prescription of certain real rights other than ownership.

31

This is a substantial reproduction of the first paragraph of Article 2201 of the Civil Code; the second paragraph, which refers to certain articles complementary to this proposition, is unnecessary because the determination of what things are not objects of trade does not belong to the law of prescription. In consequence, the explanatory articles to which the second paragraph of Article 2201 C.C. refers ought also to be repealed.

32

Article 549 prohibits acquisition of real servitudes by prescription. Article 30 makes an innovation in this respect. This article clarifies things by specifying the nature of the immoveables on which it is possible to acquire servitudes by prescription.

CHAPTER II

CONDITIONS REQUIRED FOR ACQUISITIVE PRESCRIPTION

33

Acquisitive prescription is only one effect of possession; the only provisions governing possession which have been retained here are those which deal specifically with prescription.

34

This article repeats Article 2200 C.C., leaving out the words "saving the case of interversion of title". If interversion of title is possible for the original possessor, it is all the more possible for his universal successors.

35

This article reproduces the substance of the first paragraph of Article 2203, and Article 2204 C.C. The formulation of the rules, however, is changed.

36

This article reproduces the substance of Articles 2205 and 2208 of the Civil Code.

37

This is a simplified version of Article 2206 C.C. The reference in Article 2206 to ten and thirty-year prescriptions is pointless.

38

Save for the addition of the words "or judicially declared", this article reproduces the substance of the last paragraph of Article 2203 of the Civil Code. These words were added to take account of Articles 70 and following, inserted in the Civil Code in 1969.

39

This provision reproduces the substance of Article 2207 C.C. The last paragraph expressly states that when a substitution is opened there is interversion of title *pleno jure* in favour of the institute, so he may commence prescription at that time.

CHAPTER III

PERIODS FOR ACQUISITIVE PRESCRIPTION

40

This provision replaces Article 2242 of the Civil Code. It is proposed to reduce from thirty to twenty-five years the period required by general law for acquisitive prescription. The drafting of this article differs from that of Article 2242 C.C.; all that remains here is to make provision for the period required.

41

This provision replaces Article 2251 of the Civil Code from which only the provision concerning acquisitive prescription is retained. Extinctive prescription will be covered in an article in the Title on *Extinctive Prescription.*

According to Article 2251 C.C., only the right of ownership can be established by way of ten-year prescription; under the proposed text, a right of usufruct or a right of real servitude may also be acquired by shorter prescription, in conformity with Article 30.

The shorter ten-year acquisitive prescription requires good faith on the part of the possessor. Since the presumption of good faith is one from which different effects may flow in addition to those related to prescription, Article 2202 of the Civil Code is transferred to the Book on *Evidence* (a. 2).

42

This article corresponds to Article 2253 of the Civil Code.

43

This article corresponds to Article 2254 C.C., although the formulation is amended to take account of doctrinal writings on this matter. Article 2254 C.C. speaks of titles which are null by reason of informality; doctrine maintains that any title which is null by reason of a defect of substance produces the same consequences. Moreover, even though the article speaks without distinction of titles which are null, doctrine holds that only titles which are absolutely null produce the effect stated in Article 2254 C.C. (3).

44

This text substantially reproduces Article 2257 of the Civil Code.

45

This article replaces Article 2268 of the Civil Code, and embodies the following features:

1. the principle of a shorter three-year prescription in favour of possessors in good faith of moveable property is retained. As in the Civil Code, this prescription is still based on dispossession of the owner and not on possession by the present possessor. The three years for prescription begin to run at the time the owner loses possession. This refers to a loss of juridical, not merely physical, possession. So a lessor continues to have legal possession through his lessee. If the

lessee sells the moveable property to a third person, prescription would run against the lessor from the time of the sale (when he loses juridical possession) and not from the time the lease begins, when he handed over the physical holding of the property to the lessee;

2. the proposed article makes no mention of possessors in bad faith; these are governed by Article 40 which fixes at twenty-five years the period provided under general law. The subsequent articles provide for cases of shorter prescription: these include ten-year prescription as regards immoveables whose possessors in good faith hold title (Article 41), and three-year prescription as regards moveables when the possessor is in good faith (Article 45);
3. the proposed article omits the last paragraph of Article 2268 C.C. which provides that "the stealer or other violent or clandestine possessor of a thing and his successors by general title, are debarred from prescribing by Articles 2197 and 2198". This provision is unnecessary because the case with which it deals is already governed by Article 26 of the Book on *Property*;
4. as long as prescription is not complete, the owner may always revendicate the thing of which he has been dispossessed. The principle of instantaneous acquisition by a possessor in good faith who acquires a thing in a market, from a person who deals in similar articles, and so on, has not been retained. This principle is contained in the third paragraph of Article 2268 C.C. It matters little whether the present possessor acquired the thing in the circumstances provided for by the third paragraph of Article 2268 C.C. or in other circumstances. It matters little whether the thing has been lost, stolen, or taken away from its proprietor without loss or theft. In all cases, the owner may claim it back. The sole exception to this rule applies in cases where the thing has been sold under the authority of justice;
5. the owner who is allowed to claim back his thing from the possessor need not reimburse the possessor the price paid;
6. the Civil Code makes a distinction, as regards revendication, between cases where the owner has lost a thing or has had it stolen, and other cases; this distinction is not retained by the proposed Draft. The solutions remain the same, whatever the cause of the owner's dispossession.

TITLE THREE

EXTINCTIVE PRESCRIPTION

46

This article proposes a more specific definition of prescription than that in the third paragraph of Article 2183 C.C. The text is based on Article 1451 of the Austrian Civil Code.

47

This article expands Article 235 C.C., which applies only to children. Jurisprudence provides that actions relating to the status of a person cannot be prescribed, unless there is provision to the contrary (4).

48

At present, real rights are extinguished by non-use for thirty years, save in the case of Article 2251 C.C., which provides for ten-year prescription. A uniform extinctive prescription of ten years is proposed, without good faith being required on the part of the person who prescribes.

49

In its preliminary report, the members of the Committee on the Law on Prescription had adopted the following provision (5):

"All personal rights and claims are prescribed by five years. Nevertheless, claims in damages arising from offences and quasi-offences are prescribed by two years."

The following explanatory note accompanied this article (6):

"The Committee seeks with this text to make uniform the periods of extinctive prescription by establishing the period of five years as the period of the general law, and in recognizing one exception: the period of two years as regards offences and quasi-offences.

This solution shortens delays in some cases. Thus, claims for contractual damages at present prescribed by thirty years, will henceforth be subject to a five-year prescription. On the other hand, actions in damages for bodily injuries are prescribed by one year; they would become subject to a prescription of two years."

Upon further reflection, it was felt that the existence of different periods in contractual and delictual or quasi-delictual matters might possibly lead to difficulties and uncertainties, particularly in the field of

professional liability. The technical distinction between the two regimes of liability would be less important if both were subject to the same prescriptive period. Moreover, a further step would thereby be taken towards simplicity and uniformity, sought throughout this Draft. The new text therefore settles upon a single period of three years in regard to the extinctive prescription of personal rights and claims.

50

This article contains a general principle. The rule applies to all kinds of actions, including recursory actions since this action gives rise to a new right in favour of the person who benefits from it, and thus to a new period for prescription (7).

51

This article contains a rule to govern cases where damage appears progressively. The second paragraph proposes a new rule intended to create an absolute prescription from the date of the act which caused the damage.

This solution is based upon certain foreign legislation, in particular Article 442 of the Polish Civil Code and Article 172 of the Egyptian Civil Code.

52

This article repeats Article 2266 of the Civil Code.

53

This text repeats part of Article 2258 C.C. The period for the actions mentioned in Article 2258 C.C. is reduced from ten to three years, which is the period of general law for extinctive prescription (a. 49).

The indication has been retained of the time at which prescription starts with regard to actions for annulment of contracts by reason of violence, fear, error, or fraud.

54

This article repeats the third paragraph of Article 2203 C.C. In the Civil Code, this rule is laid down in a provision dealing mainly with acquisitive prescription. It is suggested that this rule be inserted in the Title on *Extinctive Prescription.*

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(1) See Schedule V.

(2) P.B. MIGNAULT, *Le droit civil canadien*, Montreal, Wilson & Lafleur,

1916, t. 9, p. 340. Contrary view: *Levis Woodoor Inc. v. Zurich Co. d'assurances*, [1973] P.R. 225 (P.C.).

(3) See, on this subject, P.B. MIGNAULT, *op. cit.*, t. 9, pp. 499 and 500; H., L. and J. MAZEAUD and M. DE JUGLART, *Leçons de droit civil*, Paris, Montchrestien, 1969, t. 2, vol. 2, 4th ed., No. 1503.

(4) *Bergeron v. Proulx*, [1967] S.C. 579.

(5) See the *Report on the law on Prescription*, C.C.R.O., 1970, XI, a. 51.

(6) *Ibid.*, p. 76.

(7) See, in particular, *Canadian Home Insurance v. Morin*, [1970] S.C.R. 561; *Transport Indemnity v. Paquin*, [1972] S.C. 704; *Montreal Tramways v. Everfield*, [1948] Q.B. 545; *Excess Insurance Co. Ltd. v. Boutin & al.*, [1973] P.R. 380; *Morin v. Joudrey*, [1957] Q.B. 173.

BOOK EIGHT

PUBLICATION OF RIGHTS

INTRODUCTION

Revision of Title Eighteenth of Book Third of the Civil Code, *Of Registration of Real Rights* is not a task limited to the field of legal theory. A number of other elements, all of them equally important, must be taken into consideration. These include:

1. co-ordination of the legal principles laid down in the other Books of the Draft;
2. reform, or at the very least up-dating, of the cadastre;
3. organization of the registry offices and of procedures for deposit and preservation of registers;
4. organization of the administrative structure responsible for administering the publication system and for co-ordination with essential services (e.g. the cadastre);
5. installation of mechanical devices to speed up and simplify the system's operations and the consultation of registers; and
6. the legal effects of publication of rights, and the establishment of rights and recourses for persons who might suffer damage from the system.

In November 1969, Order in Council 3516 directed "*que l'Office de révision du Code civil soit chargé d'étudier la possibilité d'instituer un système d'enregistrement central, universel et mécanisé*". This directive, renewed in 1970 (O.C. 417, 11 November 1970) was followed up by a letter from the Minister of Justice, dated 29 July 1971, stating, in the name of the Cabinet, that among other things, the Office should undertake "*l'étude et la préparation d'un nouveau système d'enregistrement des biens mobiliers et immobiliers*" (1).

At the time these terms of reference were laid down, it was understood that the Office would concentrate mainly on a study of the legal questions and the effects they might have on the administrative structure, without undertaking any study of the costs which the recommendations would entail.

This Report has observed the spirit of that directive. However, it should be noted that, in this field, the proposed reforms imply - to a greater extent than in any other area of the administration of justice - a thorough shake-up of administrative structures and a substantial modification in procedures and in the consequences of the publication of immoveable rights.

If the principles of the Report are to be accepted, the administrative and physical reforms that are implied must be carried out.

Adoption of this Report will require specifically:

1. establishment of a central office for the registration of rights, with branch offices (apparently not as many as the present registry offices);
2. retraining of personnel, with some inevitable transfers;
3. training of highly qualified registrars who would be able to make decisions regarding the validity of titles;
4. installation of a computer and communications network that would guarantee speed and efficiency in publication and consultation.

The scope of these decisions goes very much beyond the mandate of the Civil Code Revision Office. They must be carried out, however, if Québec is to be provided with a modern publication system comparable to those now being set up in neighbouring States.

Since, for the reasons given above, no studies on costs and profitability have been made, it has been impossible to draw any conclusions on the subject. The reading of reports in other jurisdictions, however, has proved to be convincing (2).

Québec's present system of registering real rights should not be entirely discarded, even in this age of reform and mechanization. This system, in fact, is one of the best in the world when compared to the North American and European systems where, in some instances, there is no cadastre, no index of immoveable property, and no rules governing the opposability of published rights.

It is especially striking to note that, despite all the freedom the present system gives the parties, there have been no instances of serious or recurring abuse or irregularities. Registers are used voluntarily: most of the deeds do not have to be registered, though they may be. On the other hand, fictitious or erroneous rights may be registered without being subject to control (except perhaps in the case of cancellation). Within its own limitations, the regime of freedom and flexibility has worked well, even if it does have its defects and if its real efficiency in the framework of modern technology can be questioned.

The main defects or inconveniences of the system of registering real rights are listed below:

1. failure to up-date the cadastre, with a resulting proliferation of parts

of lots, and inherent difficulties in consulting the index of immoveable property and in checking plans; the amendment to Article 2175 C.C. (3) made a start in solving a problem that never should have been tolerated; the third paragraph of Article 2175 C.C., however, has remained a dead letter;

2. the many distinctions the Civil Code makes with respect to the opposability of titles (e.g., onerous or gratuitous titles, titles acquired from the same person, cf. aa. 2085, 2089, 2098 par. 2 and 7 C.C.), as well as terms of grace permitted for the registration of certain rights;

3. absence of probative force of registered titles. The main inconvenience in this is found in the need, justified or not, for practioners constantly to research the same titles (often at great expense), going back to the moment of creation of the cadastre or even beyond, regardless of the number of operations affecting the lot in question. Ownership of an immoveable can never be determined once and for all at any specific time; even given the exceptions to the discharge made by it (cf. a. 696 C.C.P.), a sheriff's sale does not allow establishment of the validity of a title; ratification of a title is no longer to be found in the Code of Civil Procedure. In the normal course of immoveable transactions, the only guarantee for the validity of a title is the opinion of a practitioner;

4. administrative inefficiency of the present registration system. In a number of localities, the index of immoveable property is not kept up on a daily basis, and frequently the index of names is several weeks or months behind (and often useless because of the format and the chronological order of the entries), and certificates of search can be obtained only after much waiting.

Added to these main defects of the system is a long list of inconveniences, some of which arise from the physical organization of the registry offices (e.g., the list of books and the index, difficulties in consultation), and others of which, even more numerous, relate to the substance of the law (4).

Some of these inconveniences can be reduced only by legislation: this is of course what should be done, for instance, with respect to rights exempted from registration, to conflicts between a donee and a purchaser for value, and to the rights of a person who holds a promise of sale. But other aspects of the system of publication of rights cannot be solved simply by rules of law.

A reform of the system must be carried out on three different and

concurrent levels: the legal aspect, the administrative aspect and the material and technical aspect.

From the legal point of view, this Draft attempts to develop a theory of publication of rights that would be simpler and better structured than that in the present Civil Code. The Draft is based on the principle that every person should be able to rely on the registers as they stand at any given time, in the belief that what is recorded there is true, that nothing else can be set up against him except what is recorded there, and that nothing that might be entered afterwards will take priority or have any prejudicial effect on what is already published. This principle can be described simply as "absolute confidence" in the titles.

Errors, which would be rare, but always possible, would be borne by the State. A person who has been harmed because he relied in good faith on the registers could submit a claim for damages to an Indemnity Fund, financed by contributions made by each person using the system. It would be organized under a Registration Act (5).

Several other subsidiary rules are needed to complete the principle. The Registrar (6) would not be able to complete publication of an immoveable right unless this right fitted into a chain of titles already established by prior publication (the only exception to this rule would be a case where there is no chain of titles, as in prescription where a confirmative judgment is required); the Registrar would issue a certificate attesting to the right which has been published. This certificate would make proof of the right and there would be no need to refer to former titles to establish it (7).

Among other subsidiary rules laid down in the Draft may be noted:

1. retention of the rule that publication of rights is a way of setting up the rights as against third parties, and not an essential requirement to the creation or the transfer of these rights (aa. 1 and 88) (8), except in such cases as provided by law (e.g. a. 14);
2. distinction between publication of immoveable rights and publication of moveable and personal rights (aa. 1, 31 and 32);
3. a clearer statement of the principle that knowledge of an unpublished right does not make good the failure to publish (a. 2);
4. the rule of general opposability of published rights, and also of opposability, by and against any person, of failure to publish (aa. 3 and 4);
5. ineffectiveness of any stipulation forbidding the right to publish (a. 5);

6. the rule that all immoveable rights are subject to the formality of publication; only two exceptions are retained: land taxes (aa. 6 and 8) and servitudes created by destination of the owner before this Code comes into force (a. 12);
7. obligation to publish the title of acquisitive prescription (a. 9);
8. simplification of the rules governing rights subject to the formality of publication (aa. 6 to 15);
9. regulation of the system of prenotation of rights (aa. 16 to 25);
10. requirement of the authentic form for certain deeds subject to the formality of publication, and the responsibility of the officiating notary (aa. 26, 27 and 28);
11. publication of the chain of titles (cf. *infra* and a. 50);
12. revision and simplification of the rules governing deposit *in extenso* of the deed and deposit of a memorial (aa. 33 to 40);
13. obligation of the Registrar to analyze titles that are deposited and to issue a registration certificate confirming the validity of the title (*supra* and aa. 49 to 57), and the obligation to enter the titles that are prescribed in the index of immoveables (a. 51);
14. changes to the rules on the description of immoveables, the deposit of plans, and the re-registration of immoveable rights following changes in the cadastre (aa. 65 to 81) (9);
15. necessity for a clear description of registered rights (a. 82);
16. relative effect of judgments in nullity and others affecting the title (a. 91);
17. simplification of rules on the priority order of rights (aa. 89 and 90);
18. changes in the rules on cancellation (aa. 94 to 108);
19. simplification of the rules on forced sales (aa. 109 to 116);
20. abolition of the administrative rules in the Civil Code, and the recommendation that a Registration Act be drawn up.

From the administrative point of view, the proposed reform, very simply, calls for a complete reorganization of the registry offices. This involves:

1. establishment of a central office for filing all data normally found in the index of immoveables;
2. establishment of branch offices where documents presented for

publication would still be deposited and kept, and from which data will be fowarded to the central office;

3. appointment of a new officer, the Registrar who, in addition to the functions of present Registrars, would analyze titles and issue certificates confirming the validity of titles;
4. creation of an Indemnity Fund to be used to indemnify victims of errors in the certificates or titles (provision is made for a procedure to revise the certificate (a. 57).

With regard to the material and technical aspects, it seems plain that the administration of registry offices is no longer possible without mechanical aids and electronic computers. These technical means are used more and more in neighbouring jurisdictions and even in the province; there is no reason why they should not be used in matters relating to registration.

In fact, the speed and volume of operations leave no choice about the methods; they would have to be used no matter which administrative structure were chosen, and even without the procedure of a certificate from the Registrar. On the other hand, it would not seem reasonable to contemplate the use of electronic communications without first carrying out the legal and administrative reforms that would establish beyond any question the validity of the published titles. The costs involved in these material changes would not be justified if the modifications did not achieve absolute legal certainty.

Technical modernization of the registry offices must be matched with a parallel reform of the cadastre; in this way complete co-ordination between the two services would be ensured. The final product would then be of great value for those using the data on immoveables, including several government departments. Integration of government services, mentioned in the *Report on Registration*, Part One: Of Persons (10), could then be fully realized.

The Civil Code Revision Office looks on the reform as a global operation comprising three parts; this report provides the substantive legislative support, and points out the administrative and technical reforms which seem indicated.

It appears absolutely necessary that Québec proceed with both the material and the legal reform of its system for publishing rights; there is no question as to the need for a modern register equipped with the most advanced scientific means. A study of the ways of achieving this should be undertaken without delay.

CHAPTER I

PRELIMINARY PROVISIONS

1

This article retains in part Article 2082 C.C. and describes the general objectives of publication; the effects of publication are governed by other articles of the Draft (11) which deals with publication of both moveable and immoveable rights. Publication will be done with respect either to the creation of rights or to their modification or extinction.

2

This article is the substance of Article 2085 C.C., but in more general terms; the second and third paragraphs of Article 2098 C.C. have been dropped.

This article eliminates the distinction between an acquirer for value and a donee, and that in the second and third paragraphs of Article 2098 C.C. relating to persons who acquire for value from the same vendor and to donees. The general rule of the Draft seeks to make publication the absolute rule for establishing priority.

Knowledge of a right (and *a fortiori* lack of knowledge) does not prejudice a seizing third party, against whom a transfer of unregistered property (seized *super non domino*) could not be set up, as under existing law (12).

3

This article is new; it seeks to eliminate the notion of "good faith" based on the sole fact of having failed to consult the public registers.

Since it is not possible to require anyone to consult the registers constantly, this presumption takes effect only at the time a third party acquires or publishes his right. This solution conforms to jurisprudence (13).

4

This article is drawn from Article 2086 C.C. with the *proviso*, however, that, contrary to present law, any interested person may set up failure to publish; Article 2088 C.C. is abolished as obsolete (14).

5

This article is new; publication of a right subject to this formality becomes a fundamental right. In a universal system of publication, it

seemed desirable not to deprive those who have the right to it, of the benefits of a regime of publication of rights, and therefore to forbid any derogation from it.

CHAPTER II

SCOPE OF PUBLICATION

6

This article is based on the first paragraph of Article 2098 C.C. and on Article 2083 C.C. Two exceptions are made to this rule: land taxes (a. 8) and servitudes constituted by destination of the owner before this Code comes into force (a. 12).

The Civil Code has no general provision like this article. Several articles, however, have this cumulative effect: Article 2083: real right subject to be registered; Article 2084: exemptions; Article 2098 paragraph 1: transfer of ownership (including use, habitation, usufruct and emphyteusis) must be registered; Article 2098 paragraph 3: transmission by will must be registered; Article 2099: mining rights; Article 2100: vendor; Article 2101: resolution, rescission (et al.); Article 2102: resolutory clause (a. 1536 C.C.); Articles 2103 to 2107; privileges; 2108 and 2109: substitutions; Articles 2110 to 2112: wills; Article 2116: dower; Articles 2116a and 2116b: servitudes; Articles 2117 to 2120: legal hypothecs of minors; Article 2120a: future immoveables (cf. Security); Article 2121: judicial hypothecs (cf. Security); Articles 2122 to 2125a: interest (see aa. 85 to 87); Article 2126: renunciations (dower, legacy, etc.); Article 2127: transfer of claims (cf. Security); Article 2130 paragraph 6: hypothecs (cf. Security); Articles 2175 and 441b: co-ownership by declaration.

Other rights are not expressly mentioned, but are nevertheless covered by the definition, such as the right of superficies, the right to cut timber, mining rights and hunting and fishing rights (15).

It will be noted that, contrary to the first paragraph of Article 2098 C.C., "immoveable right" is used instead of "ownership", as is done in the Book on *Property* (16). This broader expression will avoid any ambiguity (see Article 2083 C.C. "real right"). Thus, the first paragraph of Article 2098 C.C., which only mentions "ownership", covers both ownership and its dismemberments (usufruct and others).

Moveable rights are subject to the formality of publication only by express provision of the law: this applies as well to security on moveable

property (see aa. 376, 378, 382 and 383 of the Book on *Property*; see also Article 13.

The articles referring to privileges are no longer necessary, since the abolition of privileges is recommended in the Note on privileges, found in the Introduction to the Book on *Property*. Articles 2099 (17), 2100 (18), the second paragraph of Article 2101 (19), 2102 (20), 2103 (21), 2104 (22), 2105 (23), 2107 (24), 2116 (25), 2117 (26), 2118 (27), 2119 (28) and 2120 (29) would be deleted.

Article 2106 C.C. would be repealed. The preference granted by separation of patrimonies is not of the same nature as a "privilege", but consists in isolating the patrimonies of the persons in question so that their respective creditors may be paid before the property is combined.

Since the patrimonies are separated by the operation of law and there is no longer any need to request such a separation to be entitled to it, establishing that certain property belongs to one patrimony rather than to another (e.g. succession and heir) will be mainly a question of evidence.

The Book on *Succession* (30) repeats Articles 743 and 879 C.C., to make the separation of patrimonies general. Articles 398 and 399 of the Book on *Succession* repeat Article 966 C.C. Article 1990 C.C. would be repealed by the Title on *Security on Property* since privileges and preferences have been abolished.

Judicial hypothecs and their registration are governed by the Book on *Property* (aa. 365, 366, 367, 368 and 369).

The second paragraph of Article 2121 C.C. also refers to claims of the Crown "to which any tacit hypothec or privilege is attached by law". The Title on *Security on Property* recommends abolition of all such legal privileges and hypothecs. Article 380 of the Book on *Property* provides the procedure for publishing conventional hypothecs by subsequent notice.

Articles 2120a and 2127 C.C. are repeated in the Book on *Property* (see aa. 294, 326, 381 and 383).

7

This article is new, but in line with existing law.

The minutes setting boundaries constitute or complete the new title of each of the parties and, once registered, may be set up against third parties (31). The article seemed necessary to cover cases where the setting of boundaries would not constitute a transfer, but only a declaration of ownership.

A Registration Act should also provide that the cadastre may be amended following deposit of the minutes determining the boundaries.

8

This article provides an amended version of paragraph 1 of Article 2084 C.C.

The privilege for taxes on immoveables (aa. 2009 and 2011 C.C.) should be repealed. The right to have property sold for taxes does, however, remain; Article 8 provides that this right need not be published (as an exception to Article 6).

9

This article is new. It fills a gap in the first paragraph of Article 2098 C.C. (see also Article 2183a C.C. (judicial recognition) and Article 806 C.C.P.).

Commentators and jurisprudence disagree as to whether or not third parties acquiring by prescription are obliged to publish their right (32). With a complete registration system in view, it is difficult to justify allowing any right (of ownership or otherwise) not to appear in the public registers. If those rights were not registered, how could the chain of titles be established? (See also Article 50 par. 2).

10

Notwithstanding the general nature of Article 6, it was considered advisable to repeat here an amended version of the first paragraph of Article 2101 C.C.

In view of the principles governing publication, stated in the preceding articles, all retroactive terms of grace provided by the Civil Code for registration of real rights (e.g. thirty days for vendors, thirty days for judgments) must be abolished. Moreover, anyone who applies for a judgment in nullity may avail himself of the rules on prenotation (33).

11

This article provides an amended version of Articles 2108 and 2109 C.C. See also Articles 371, 378, 379, 380 and 382 of the Book on *Succession*. The institute has only a personal obligation to return the property when the substitution opens; the substitute has only an eventual right. The institute may definitively lease, alienate or hypothecate, by onerous title without the substitution affecting the right of third parties. He may not, however, transfer by gratuitous title; hence the importance of registering the substitution. The institute is usually bound to invest, but he

may be excused from doing so. Since the prohibition against alienation that cannot be regarded as a substitution is without effect (34), a specific rule covering this case should be provided.

12

This article amends Articles 2116a and 2116b of the Civil Code (see also Articles 163 and 164 of the Book on *Property*).

Legal servitudes (cf. Article 165 of the Book on *Property*) are not included here.

Under Articles 6 and 12, servitudes constituted by destination of the owner are subject to the formality of registration. It seemed necessary to specify the rules governing these; Article 6 covers servitudes in general, like all other rights.

It was considered preferable to subject all servitudes to the formality of publication, including those created by destination of the owner (which generally will be registered when one of the immoveables concerned is alienated by the owner), in spite of the disadvantages which may result from doing so. Uniformity of the regime and safety of titles provide compensation for the increased formality. Even under existing law, it is customary to register these servitudes in many cases. However, to require registration of all servitudes created by destination of the owner before the Code comes into force would not be just.

13

This article substantially repeats Article 2126 C.C.

Registration of acceptance with benefit of inventory (a. 115 of the Book on *Succession*) does not constitute a rule of opposability, but really a rule of acceptance of a right. If the acceptance is not registered, not only may the benefit of inventory not be set up against third parties but it is null.

14

This article is based on Article 61 of the Book on *The Family*. See Articles 53 to 66 of the same Book as to the consequences of registering the declaration.

15

This article substantially repeats Article 2129a C.C., and is completed by Articles 65 and following.

It should be re-examined when the *Cadastre Act* is revised.

CHAPTER III

PRENOTATION

16

This article introduces the general principle of prenotation into the Civil Code, although it is not unknown in Québec law (35). It was, however, applied only in a limited manner. Articles 883 and following of the Civil Code of West Germany provide an example of regulations governing prenotation (36). This article and the following bring prenotation into line with our law (37). Allowing publication of motions or suits respecting a registered real right makes it possible for third parties to be affected by this right as soon as it is published.

17

This article lists the cases in which there may be prenotation; these cases are laid down very broadly. No explicit reference has been made to separation as to bed and board, nullity of marriage (Articles 815 C.C.P. and 1443 C.C.) or divorce (Section 10 of the *Divorce Act*), since these cases are already covered in the list (38).

18

This article repeats parts of Articles 2111 and 2112 C.C.

19

This article is new and lays down the method required for prenotation. Any act consenting to prenotation, any judgment authorizing it, or any notice of a hypothecary action should be accompanied by the certificate of registration provided for in Article 29 and following.

20

This article is new and establishes the conditions for obtaining a prenotation authorized by the court. The parallel with the Code of Civil Procedure governing injunctions should be noted.

21

This article is new; it creates a presumption of publication resulting from prenotation (which is the very purpose of prenotation). If the immoveable right is published only after the period provided expires, the effect of its publication is governed by the general rules and has no effect from the moment of prenotation, which then lapses. No mechanism is

provided for renewing prenotation, and the period for validity of prenotation is determined. If the parties register a new prenotation, the right will be deemed published from that time (without retroactivity). It is a question of protecting a right temporarily but not of perpetuating a possibly temporary situation (see also the following article).

22

This article completes the preceding article with respect to certain special cases. Considering the uncertainty respecting the duration of judicial proceedings, a special rule was needed to govern such cases.

23

This article completes Articles 21 and 22 by granting some discretion to the court or to the parties to provide for a shorter period of validity for prenotation. It is understandable that a person making a promise of sale may wish to give his purchaser time by granting him the advantage of prenotation, but he may also have his reasons for limiting the period of validity of prenotation.

24

This article makes an exception to the list in Article 17. It derives from the general rules on succession (e.g. a. 1061 C.C.).

25

This article is self-evident. Hypothecary credit requires precise knowledge of the charges affecting any property.

CHAPTER IV

MODALITIES OF PUBLICATION

Section I

Preliminary conditions for publication

26

This article is new, but is based on Section 41 of the *Notarial Act* (39).

This provision follows naturally from the principal recommendation respecting the system of registration. Under the law, the notary is already obliged to ascertain the identity of the parties. It seems logical to oblige him also to ascertain their capacity and their powers, and the validity of the act, a duty which enhances his role as a public officer.

A notary who does not fulfil this obligation runs the risk of ordinary civil sanctions (damages caused by his fault), in addition to the disciplinary sanctions provided by the *Notarial Act*. This provision also applies to land-surveyors who are, among other things, entrusted with preparing minutes regarding the determination of boundaries.

27

This article is new law and falls within the context of the proposed rules on publication, under which the State certifies titles to property. To facilitate the issue of the certificate, the documents presented for registration must undergo preliminary verification.

This article is concerned with acts and documents which are not in authentic form. See the comments on Article 28 with respect to these acts.

28

This article subjects to the requirements of an authentic form those acts whose purpose is to create, to extinguish or to transfer an immoveable right. From now on, these acts would have to be received by a notary if they are to qualify for publication.

It seemed necessary to require authentic form for several reasons: the probative value which it confers on the document; the protection which it provides for the parties and for third parties, as a result of the fact that the act requires both professional and specialized drafting and can be preserved permanently.

Section II

Mechanism of publication

§ - 1 General provisions

29

This article is new. Considering the various means for publishing certain rights, this provision is justified; see the Book on *Property* respecting publication by taking possession or by serving notice.

30

This article repeats Article 2087 (in a simplified form) and Article 2129b C.C.

31

This article repeats part of Article 2092 C.C. The duties of the Registrar are supplemented by the a[redacted]
the registry offices will be governed b[redacted]

32

This article is new. The central register of personal and moveable rights will have to be established by statute to allow registration of those rights which, under present law, is made only "by name" in the register of names. This will apply particularly to hypothecs on moveables contemplated in the Book on *Property* (40).

33

This article repeats the first and second paragraphs of Article 2131 C.C. with modifications.

This article has been retained in order to avoid the needless repetition in the Code and the illogical terminology resulting from the use of "deposit" and "memorials" when, in fact, the memorial is also deposited.

§ - 2 Registration by deposit of documents *in extenso* or of extracts

34

This article is partly new; it replaces the words "registration by deposit" contained in several articles of the Civil Code, such as Articles 661, 2111, 2112, 2116, 2120a, 2121, 2125, 2125a, 2129a, 2153 and 2172 C.C. (Articles 624c, 2013e, 2026, 2103, 2106, 2107, 2117, 2119, and the second paragraph of Article 2121 would be deleted in the new Code: see the commentary following Article 6).

§ - 3 Registration by deposit of a memorial

35

This article is new. It is derived in part from the second paragraph of Article 2131 C.C. (see Article 37 as to the contents of memorials).

The acts referred to in this article include, in particular, leases, judgments, powers of attorney and private writings.

36

This article is new. It adds greater flexibility to the system by allowing the court discretion whenever, considering the content of the document in question, it would be preferable not to publish by deposit *in extenso* especially where rights have lapsed or become extinguished (41).

37

This article repeats the second and third paragraphs of Article 2139 and the beginning of Article 2136 C.C.

38

This article repeats certain articles of the Civil Code: the first paragraph: the first paragraph of Article 2137 C.C. (the second paragraph of Article 2137 C.C. is deleted); the second paragraph: the third paragraph of Article 2136 and the first paragraph of Article 2139 C.C. (the procedure of acknowledgement and of proof of memorial by oath is dropped); third paragraph: the fourth paragraph *in fine* of Article 2139 C.C.

39

This article repeats Article 2138 C.C.

40

This article repeats Article 2138a C.C.

§ - 4 Registration procedure

41, 42 and 43

These articles repeat Articles 2140 and 2133 C.C., which they amend with respect to the single original or copy of documents whose publication is required. This proposal will have to be supplemented by a Registration Act which will determine the exact procedure for registration. The recommendation to reduce the number of duplicates submitted for registration from two to one was made by certain registrars, although others would have preferred that more duplicates be required so that one of them could be sent to the municipality concerned. The single original or copy, accompanied by the schedule required by Article 44, would be processed by computer, and this should suffice to supply the desired information.

44 and 45

These articles are new. They derive in part from Article 2139 C.C.

The schedule mentioned here is of prime importance in the computerized registration system. This document would eventually stand in lieu of the "analysis" made at the registry office and would supply the computerized index of immoveables (this technical mechanism would be described in a Registration Act and its regulations).

The identification number mentioned in paragraph 1 of Article 45 is that indicated in the *Report on Registration*, Part One: Of Persons (42).

46 and 47

These articles repeat and simplify the fourth, fifth and sixth paragraphs of Article 2098 and Article 2110 C.C. (43).

The heir must publish the declaration with due dispatch since only from the time of publication are his rights protected (however, see Article 22 relating to prenotation); only those heirs whose names appear in the declaration are covered. The executor or the administrator of the succession will have to see that the names of the interested persons appear in the declaration.

Third parties will always be able to rely on the registers without fearing that a declaration by one heir may be contradicted by a later one made by another, as the retroactivity period in favour of heirs would be abolished (Article 2110 C.C.). Third parties, therefore, can consider the first published declaration of transmission as valid. However, this provision must be also read with Article 50 which requires publication of the author's title (e.g. an heir who sells to a third party).

In this formalistic system of publication, the apparent heir must prove his right of ownership in the property of the succession. Thus, in an intestate succession, an heir in lower degree will have to prove that the heirs of higher degrees have renounced, are dead or are not otherwise entitled to inherit. In a case of testate succession, the provisions of wills must be followed. If a later will is discovered, third parties in good faith who acquire rights in the meantime will require protection (44).

The Book on *Succession* does not encourage a systematic judicial probate of wills. The procedure retained here, in conformity with the other provisions of the Draft, requires the officiating notary to ascertain the identity, quality and capacity of the parties and thus to establish the heirs' title. This procedure should be as effective as compulsory judicial probate which is always merely relative, as in cases of wills which are withheld or hidden or where the heirs cannot be found.

48

This article repeats Article 2135 C.C., which had been redrafted in 1948; it permits the avoidance of doubts with respect to errors which slip into these documents.

49

This article is new. It is derived from the first paragraph of Article 2132 and from the first paragraph of Article 2134 C.C.; Articles 2141 to 2144 and Article 2147 C.C. would be deleted.

This article obliges the Registrar to decide on the legal validity of the documents submitted for registration. This is the key-stone of the new system. Where appropriate, the Registrar may refuse a deposit if he cannot establish a link between the titles deposited.

50

This article repeats and expands the rule in Articles 2089 and 2098 C.C. (see Article 3 of the French *Décret* of 4 January 1955).

The third paragraph repeats the seventh paragraph of Article 2098 C.C. The amendment made by the first paragraph of Article 50 constitutes one of the most important changes in the present system of registration; it requires that the Registrar make sure that the rights of the predecessors in title have been published before he registers any later rights, and that he ascertain the validity of the rights in question; an end is thus put to the laxity of the Civil Code which, in effect, permits uncontrolled registration of any deed transferring ownership, whether with or without rights, as long as the form was respected (although this did not apply to discharges). The Registrar would be responsible for determining the state of the titles and for issuing the appropriate certificates (Article 49 and following).

The exceptions provided for in the second paragraph apply in the cases of leases and of rights acquired without title (the judgment obtained in such a case will provide for it). The case of hypothecs being different is governed by Article 462 of the Book on *Property*.

Articles 89 and 90 settle the questions of priority as between the various published rights.

51

This article enables interested persons to be assured that entries are made in the index of immoveables on the same day the documents are deposited, even if the Registrar is not yet able to issue the certificate provided for in the Draft; the special entry indicates this. Article 34-3 of the French *Décret* of 14 October 1955 contains a similar provision.

52 and 53

These articles, which complete the preceding article, are new.

Article 52 establishes the priority of a right to which special reference

is made when the certificate is issued later; Article 53 provides for the contrary and indicates the procedure to be followed when the Registrar refuses to issue the certificate.

54

This article is new in part. It also repeats Article 2145 C.C.

55

This article is partly new. It is also based on the first paragraph of Article 2134 C.C.

The registration certificate becomes a formal act of the Registrar; he attaches it to the documents submitted and keeps a copy of it at the registry office, as would be prescribed by a Registration Act, to form part of the public registers.

56

This new provision is necessary in any modern system of registration, merely to avoid litigation and delays.

57

This article is new.

This provision flows from the preceding Articles and follows from the proposed system of registration. Third parties must be able at all times to rely on the public registers and on the registration certificate.

Anyone whose rights are affected by an error may request the court to correct the error, without, however, prejudicing the rights of those who have relied on the registers. The Indemnity Fund established by a Registration Act would be used to indemnify the victims of errors (see Article 92).

58

This article is new. Given the various stages required in publishing a right, it seemed necessary to specify exactly when registration is complete. This article must be read with Article 51 (see the comment on that article).

59

This article repeats the fifth paragraph of Article 2127 C.C. (With respect to the first four paragraphs of Article 2127 C.C., see, also, the second paragraph of Article 1155 C.C. and Article 383 of the Book on *Property*).

60

This article provides that decisions made by the Registrar may be appealed. The procedure for appeal would be contained in a Registration Act. Anyone who avails himself of an appeal will be able to register a prenotation of such procedure entered, with leave of the court.

§ - 5 Renewal of registration

61, 62 and 63

These articles repeat the third and fourth paragraphs of Article 2131 C.C.

64

This article repeats the fourth paragraph of Article 2081a C.C.

Such a provision must be retained in order to lessen the need to register hypothecary acts again; whenever such an act is registered, the twenty-five year period provided for in Article 474, or the five-year period provided in Article 475 of the Book on *Property* begins again.

Section III

Plans and books of reference

65

This article repeats and amends the first paragraph of Article 2168 C.C. (the second, third *in limine* and fifth paragraphs are deleted). Article 2176a C.C. would be repeated in part in a Registration Act. The second paragraph of this article would be deleted if the third paragraph of Article 2175 C.C. is put into force throughout the province.

66

This article repeats but amends the third paragraph of Article 2168 C.C.; it takes account of the innovations made in the schedule.

67

This article is new and based on Article 2042 C.C.

68

This article repeats the fourth paragraph of Article 2168 C.C.

69

This article is new; it is based on the fourth paragraph of Article 2168 C.C., which is applied to hunting, fishing and mining rights.

70 and 71

These articles substantially repeat Section 15 of the *Cadastre Act* (45).

These articles complement the preceding articles and are more appropriately placed in the Civil Code than in the *Cadastre Act.*

72 and 73

These articles repeat Article 2175 C.C. as follows: the first paragraph of Article 72: the first paragraph of Article 2175 C.C., which is to be complemented by a Registration Act; the second paragraph of Article 72: the third paragraph, in reversed form, of Article 2175 C.C.; Article 73: the fourth paragraph of Article 2175 C.C.

74

This article repeats the second paragraph of Article 2175 and completes the preceding article by providing for redivision.

75

This article repeats Section 17 of the *Cadastre Act* with changes to the form; the second paragraph of that section is deleted, given the following articles.

76

This article is new. It is intended to ensure concordance between cadastral documents when modifications are made.

77

This article is new. It replaces Article 2172 C.C. and Section 18 of the *Cadastre Act*; Article 2172a C.C. is deleted. The article imposes an obligation on the State to renew the registration of published rights where cadastral changes are made. This outcome follows from the general proposed regime and makes it possible to avoid the delays and drawbacks

in existing law (46). The provision is complemented by Article 79, which permits holders of rights to require registration on their own, and by Article 80, which provides a recourse against the Indemnity Fund where the Registrar is at fault. Articles 77 to 80 together offer a solution which can harmonize all points of view.

78

This article is new. It complements the foregoing one by specifying the rights of holders of rights.

Article 2173 C.C. would thus be deleted.

79

This article allows the holder of a right to see himself to the renewal of publication of a right.

80

This article is new. It states the right of the holder to file his claim with the Indemnity Fund. Once the six-month period provided for in Article 77 has expired, third parties may rely on the register with absolute certainty.

81

This article repeats the third paragraph of Article 2174 C.C. (the first and second paragraphs of Article 2174 C.C. would be placed in a Registration Act).

CHAPTER V

EFFECTS OF PUBLICATION

Section I

Beneficiaries of publication

82

This article repeats Article 2093 C.C. and makes it more demanding (47). Registered rights will have to be "described" rather than merely "referred to". To avoid the problem created by the reference in one act of rights established in another unregistered act (48), Articles 49 and 51

require that rights be entered in the index of immoveables. The "schedule" provided for in Article 44 would list these rights (e.g. hypothecs, usufructs, leases).

83

This article repeats Article 2095 C.C., adding an exception (Articles 2096 and 2097 C.C. would be deleted).

This rule complements that in Article 9 with respect to publication of rights affected by prescription. It provides that when the owner of an immoveable sells it while a third party possesses it with prescription as his aim, publication of the sale interrupts prescription with regard to the possessor. This exception is justified by the proposed regime and confirms the force of the right of ownership. No owner can be expected to exercise constant physical control over his property; the sale of it constitutes (by publication) sufficient manifestation of the exercise of his right.

84

This article repeats Article 2091 C.C. and broadens its scope. Article 2090 C.C. would be deleted (49) as Article 2023 C.C. would be by the Title on *Security on Property*.

This provision applies as much to moveables (e.g. hypothecs on moveables) as to immoveables (see, also, Article 2074 C.C., which is repeated in Article 418 of the Book on *Property*).

85

This article repeats Articles 2122 and 2124 C.C.

The Title on *Security on Property* makes no distinction between vendors and other creditors; the same rule applies to all. The period provided, not to exceed three years, matches that provided in Article 49 of the Book on *Prescription*.

86

This article repeats Article 2123 C.C.

In a concern for consistency and in accordance with the rules proposed for prescription, the period with regard to annuities has been shortened to two years, plus the current year.

87

This article repeats Articles 2125 and 2125a C.C., the style of the former being slightly altered.

The notice will follow the form prescribed by Article 380 of the Book on *Property,* which replaces Article 2125a C.C.

Section II

Opposability and rank of rights

88

This article repeats a concept which, while it already exists, is not expressed so simply (e.g. Articles 1025, 1027, 2085 and 2098 C.C.).

Article 377 of the Book on *Property* is to the same effect.

89

This article provides an amended version of part of Article 2083 C.C. (the last sentence of Article 2083 C.C. would be deleted).

This provision constitutes one of the basic rules governing publication of real rights, although it adds nothing new. It is completed, in particular, by the following article. Article 378 of the Book on *Property* contains a similar rule which applies particularly to hypothecs on moveables (see, also, Article 382 and the third paragraph of Article 383 of the Book on *Property*).

90

This article repeats the third and fifth paragraphs of Article 2130 C.C.; the first paragraph of Article 2130 C.C. would be repealed (see the Title on *Security on Property*). The second paragraph of Article 2130 C.C. would also be repealed (see the Title on *Security on Property* and this Report, which do away with terms of grace); the fourth paragraph of Article 2130 C.C. is repeated in the second paragraph of Article 461 of the Book on *Property*; the sixth paragraph of Article 2130 C.C. is repeated in Articles 377 and 378 of the Book on *Property*.

The rule of priority is based on the Civil Code (par. 5 of Article 2130 C.C.). The Title on *Security on Property* repeats the rules governing hypothecs.

The Office received several suggestions to the effect that the precise moment of registration be specified (e.g. hour, minute, serial number). It was considered advisable to discard these, mainly because it would be physically impossible to be able constantly to verify the condition of a title (e.g. the index of immoveables). Entries are made in the indexes and

books several hours after they are submitted. Moreover, the administrative problems caused by such a method and the particular problem of acts submitted by mail led to adoption of the rule of the whole day rather than that of the precise time. Since any solution of this problem will be unsatisfactory from some point of view, the Office retained the solution provided in this article.

Section III

Protection of third parties

91

This article is intended to dispel any doubt on the effect of nullity and other modes of extinction of titles with regard to third parties (50).

The rights of third parties could not be affected by any change to a right of ownership unless the defect is indicated on the published titles. Nullity and other changes principally have no effect except as between the parties (see Articles 58 and 280 of the Book on *Obligations*) but if the property has been transferred to a third party, he should not suffer prejudice if the defect was not shown on the registers.

92

Under this article, any person who relies on the registers has recourse against the Indemnity Fund in reparation of the damage sustained in the cases provided for in the article.

A choice had to be made between evicted owners (e.g. sale of another's property), and third parties in good faith. In line with other titles in the Draft Code, this Draft grants preference to real owners. This solution moves away from that retained in countries which favour the Torrens system, but is part of a regime of protection of the right of ownership. No one loses by it, since the victim can always claim against the Indemnity Fund. Thus people may always rely on the registers, without the risk of losing all.

The Indemnity Fund which pays the victim would have a subrogatory recourse against the person who commits the error, if any. If the Registrar is at fault, he will be considered an agent of the Crown and will be governed by the rules applicable to such cases (51).

Recourse to the Indemnity Fund would be governed by a Registration Act.

93

This article completes the preceding article by providing for recourse against the Indemnity Fund in reparation of damage caused by the Registrar (see, in particular, Articles 49 and following concerning the duties of the Registrar).

CHAPTER VI

CANCELLATION

Section I

Formalities and effects of cancellation

94

This article repeats the first paragraph of Article 2148 C.C., extending its application to any registration. See Articles 474 and 475 of the Book on *Property*, respecting the period for validity, and Article 455, respecting cancellation of hypothecs.

95

This article is new law and institutes *proprio motu* cancellation of extinguished hypothecs.

96

This article allows for the cancellation of the registration of a declaration of family residence in cases which should not give rise to contestation (see Article 62 of the Book on *The Family*). An application for cancellation must be accompanied by the supporting documents which the Registrar may require under Article 44.

97

This article repeats the second paragraph of Article 2148 C.C.

The fourth paragraph of Article 2148 C.C. would be deleted. The creditor is not bound to see to the registration of the discharge; the debtor (or the holder of the rights concerned) will do this. According to general law, the creditor may be responsible for any costs and damages resulting from his refusal or negligence if he does not consent to the discharge.

98

This article is a simplified version of Article 2149 C.C. (See Article 805 C.C.P.).

99

This article repeats Article 2150 C.C.; it also allows for the judicial cancellation of the registration of a declaration of family residence, as is contemplated in Article 63 of the Book on *The Family* (52).

100

This article is new. It clarifies section 70 of the *Deposit Act* (53), allowing not only total, but also partial cancellation of a hypothec in cases of partial deposit only. This article provides that cancellation may also take place, even if the parties disagree as to the claim. The Title on *Security on Property* (54) provides that the creditor has hypothec on the amount so deposited in the same manner as on the property affected by the hypothec in his favour which is the object of the cancellation. This hypothec allows him, among other things, to set up his right as against the trustee in bankruptcy should his debtor become bankrupt (55).

101

This article completes Article 805 C.C.P. by providing a means of cancelling a prenotation in the cases provided for above.

102

This article produces a simplified version of the fourth and fifth paragraphs of Article 2151 C.C. (56). See Article 95 with respect to hypothecs cancelled *proprio motu* by the Registrar and Article 209 (absence) and Article 102 (declaratory judgments of death) of the Book on *Persons*.

103, 104 and 105

These articles present a simplified version of Articles 2152 and 2152a C.C.

They require an express reference to the acts affected by the cancellation, and to the lot numbers. This reference becomes important in cases where a loan or sale is followed by acts of total or partial transfer of claims. Cancellation must then have effect only for what each creditor has received.

106

This article incorporates Article 2153 C.C. (the reference to consent is added); see also Articles 10 and 91.

107

This article repeats Article 2154 C.C.

108

This article is new. It completes Articles 57 and 92 with respect to the consequences of an erroneous cancellation. See also Articles 56 (*proprio motu* correction) and 95 (*proprio motu* cancellation in certain cases).

This rule conforms to existing law which permits annulment of a cancellation (cancellation of a cancellation). Third parties, however, must be able to rely on the public registers and not suffer from any subsequent cancellation. "Good faith" here means lack of collusion or participation in the erroneous or defective cancellation. (This question is not easily solved in existing law (57) unless one acknowledges the formalism of registration (58)).

Section II

Judicial sales and other forced sales

109

This article repeats the substance of Articles 2155 and 2156 C.C.

110

This article repeats Article 2157 C.C. with certain changes as to form (mention of the conventional dower is dropped).

A Registration Act would govern the manner in which the cancellation would actually be entered in the registers.

111

This article repeats Article 2157a C.C.

112

The form of this article is new.

Article 2161d C.C. primarily governs procedure, but it does contain elements of substantive law, referred to in the Civil Code; it should be incorporated in a Registration Act (59). This law should provide that the sheriff must forward these notices to the Registrar for registration.

113

This article is a simplified version of Article 2161g C.C.

114

This article incorporates Article 2161h C.C., and is based on paragraphs 2 and 4 of Section 551 of the *Cities and Towns Act* (60).

115

This article incorporates Article 2161i C.C. with some modifications as to form and changes in procedure.

116

This article embodies Article 2161k C.C. and is based on Sections 561 and 568 of the *Cities and Towns Act*. Section 568, moreover, provides for reactivation of hypothecs which had been extinguished by sale for taxes (61).

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(1) See the *Report on Registration*, Part One: Of Persons, C.C.R.O., 1974, XXV, which is the first part of the *Report on Registration*.

(2) See, particularly, the *Report on Land Registration*, Ontario Law Reform Commission, Department of Justice, Toronto, 1971.

(3) S.Q. 1971, c. 83.

(4) See C. CHARRON, *La publicité foncière au Québec - qualités et défauts*, (1972) 74 R. du N. 251.

(5) See Article 92 et s.

(6) The term "*Conservateur des registres*" would be, in French, a welcome substitute for the questionable "*registrateur*".

(7) A similar procedure already exists in certain districts in Eastern Québec, *Certain Electoral Districts Land Titles Act*, R.S.Q., 1964, c. 321, see, in particular, s. 4, where the Minister of Lands and Forests may acknowledge the validity of a non-contested title. This procedure, however, cannot be compared to the reform proposed here.

(8) See, also, the rules in other parts of the Draft, e.g. Sale, Security, Gifts, Succession, Matrimonial Regimes, Obligations.

(9) It will eventually be necessary to provide rules to govern replacement or

regrouping of lots; this could be done under a Registration Act (see also a. 2174a C.C.).

(10) *Op. cit.*, pp. 196-198, 215-217, 283-301.

(11) See Article 3 and Articles 82 et s.

(12) See *Dufresne v. Dixon*, (1890) 16 S.C.R. 596.

(13) See *Craft Finance Corp. v. Belle-Isle Lumber*, [1966] S.C.R. 661, conf. [1966] Q.B. 135. The article also takes into account judicial practice with respect to the Paulian action, in which it was ruled that the creditor was not presumed to have knowledge of registered acts: *Lemay v. Dufresne*, (1908) 18 K.B. 132; *Robineau v. Charbonneau*, [1964] S.C. 165; *Roy v. Gosselin*, [1965] S.C. 286.

(14) The Crown is normally included under the term "person": see *J.E. Verrault & Fils v. P.G. Québec*, (1975) 5 N.R. 271, but it seemed useful to repeat this here.

(15) See *Matamajaw Salmon Club v. Duchaine*, [1921] 2 A.C. 426.

(16) See Article 9.

(17) Article 2099 C.C. would be repealed, because terms of grace are eliminated; holders of mining rights would have to register such rights like any other.

(18) The first paragraph of Article 2100 C.C. would be repealed, with the other terms of grace. The part of the second paragraph granting a term of grace is repealed as a result of the recommendations in the Title on *Security on Property*. The stipulation of *dation en paiement*, failing payment of the price, is equivalent to a hypothec; taking in payment relating to hypothec is possible only if the hypothec has been published.

(19) The second paragraph of Article 2101, and Article 2102 C.C. would be repealed in part because terms of grace are eliminated. Moreover, the chapter on *Sale* recommends repeal of Article 1536 C.C. and of sale by redemption, which would, in most cases, be covered by the provisions of the Title on *Security on Property*. Generally, since third parties enjoying registered rights cannot suffer from any concealed cause of resolution of registered rights (cf. *infra*, Article 91), these articles are not needed; even if a stipulation of redemption existed which was not covered by the provisions of the hypothec (e.g. stipulation which does not ensure payment of an obligation), this stipulation should be registered to be set up against third parties.

(20) Article 2102 C.C.: see footnote (19).

(21) Article 2103 C.C. would be repealed in view of the repeal of construction privileges.

(22) Article 2104 C.C. would be repealed in view of the repeal of copartitioners' privileges. (There may be a conventional hypothec between them).

(23) Article 2105 C.C. would be repealed since the coheirs' and colegatees' privileges would be abolished.

(24) Article 2107 C.C. would be repealed in view of the repeal of privileges.

(25) Article 2116 C.C. would be deleted: the legal usufruct of the surviving spouse would be abolished (cf. the chapter on Matrimonial Regimes); Section 98 of the 1969 *Act respecting matrimonial regimes* provides that dowers established before 1 July 1970 remain subject to the former provisions of the Civil Code.

(26) Article 2117 C.C. would be repealed in view of the repeal of legal hypothecs of minors.

(27) See, *supra*, footnote (26) (Article 2118 C.C. would be deleted).

(28) See, *supra*, footnote (26) (Article 2119 C.C. would be deleted).

(29) See, *supra*, footnote (26) (Article 2120 C.C. would be deleted).

(30) See Articles 181, 182, 183 and 321.

(31) See J.G. CARDINAL, *Bornage à l'amiable*, (1958) 61 R. du N. 212, pp. 213 and 216; M.L. BEAULIEU, *Le procès-verbal de bornage de concert comme titre, son enregistrement*, (1958) 61 R. du N. 265.

(32) Some hold that title by prescription need not be registered: *Deschênes v. Boucher*, [1961] Q.B. 771, p. 776; J.W. DURNFORD, *Prescription as a mode of acquisition of immoveable property*, (1965) 67 R. du N. 491, p. 577; R. COMTOIS, *Commentaire* in (1959) 61 R. du N. 505. Others would prefer to have titles by prescription registered: *Tremblay v. Paquette*, [1959] S.C. 32; see also Articles 771 and 806 C.C.P.

(33) See Article 16 et s.

(34) See Article 361 of the Book on *Succession*.

(35) E.g. Articles 815 C.C.P. and 1443 C.C., respecting the nullity of marriage, and separation as to property and as to bed and board; Article 1040a C.C., on the right to become the owner of immoveable property; Article 2161d C.C., on notice of judicial sale; Section 52 of the *Bankruptcy Act*, R.S.C. 1970, c. B-3.

(36) See P. ROCHE, *La prénotation, ou inscription provisoire, est-elle compatible avec le système français de publicité foncière*?, (1965) 63 Rev. trim. dr. civ. 22.

(37) See also Article 411 of the Book on *Property*.

(38) As an example, see the French *Décret du 14 octobre 1955*, a. 34-3.

(39) S.Q. 1968, c. 70, as amended.

(40) See Article 317 et s.

(41) See C. CHARRON, *La publicité foncière au Québec - Qualités et défauts*, (1971-72) 74 R. du N. 251, p. 266.

(42) C.C.R.O., 1974, XXV. See the Draft on the Population Register, p. 76.

(43) See, also, Articles 6 and 18 and Article 373 of the Book on *Property* concerning testamentary hypothecs.

(44) See Article 92.

(45) R.S.Q. 1964, c. 320.

(46) See *Troysco Mines Ltd v. Comtois*, [1957] Q.B. 149.

(47) Article 2094 C.C. would be repealed; Article 64 repeats the fourth paragraph of Article 2081a C.C.

(48) See *Grenon et al. v. Alma & Jonquière Ry Co.*, [1965] S.C. 1, p. 5.

(49) This provision was no longer useful in the light of the rules on the Paulian action in Article 197 et s. of the Book on *Obligations* and by the *Bankruptcy Act,* R.S.C. 1970, c. B-3.

(50) See, in particular, *Payette v. Baird*, (1940) 78 S.C. 371; *Lighthall v. Craig*, (1885) 1 M.L.R. (Q.B.) 275; *Banque d'Epargne v. Viau*, [1976] S.C. 901; *Rousseau v. Placements l'Argentenaye Inc.*, [1974] S.C. 61.

(51) See Article 295 of the Book on *Persons.*

(52) See also Articles 57 and 92.

(53) R.S.Q. 1964, c. 64, amended by S.Q. 1970, c. 17.

(54) See a. 310 of the Book on *Property.*

(55) In the absence of a moveable hypothec on the amount deposited, the creditor is regarded as an ordinary creditor: see *Universal Stone Inc. v. Rovira*, [1973] C.A 1089.

(56) See Articles 26 and 27 with regard to the form of such acts.

(57) See *Latulippe v. Grenier*, (1898) 13 S.C. 157 (C. de Rev.); *Owens v. Bedell*, (1892) 19 S.C.R. 137.

(58) See P.B. MIGNAULT, *op. cit.*, v. 9, pp. 281-83; L. LESAGE, *De la nullité des radiations*, (1933) 35 R. du N. 309; C. CHARRON, *loc. cit.*, (1972) 74 R. du N. 251, p. 270; *Gingras v. Poulin*, (1927) 43 K.B. 262; *Morin v. Vallée*, (1940) 68 K.B. 194. If a third party who has registered his right after an erroneous cancellation is protected, this injures the initial creditor whose rank is affected by this error. This situation is particularly serious when other rights have been registered after the first, but before the erroneous cancellation. For example: (i) on May 1, A registers a hypothec of $10,000; (ii) on May 10, B registers a hypothec of $8,000; (iii) on May 15, A's hypothec is cancelled by mistake; (iv) on May 20, C registers a hypothec of $6,000; (v) on May 25, the mistake is corrected and the cancellation of A's hypothec is annulled. The proposed rule would have the effect of putting C's hypothec in a preferred position to A's, while B's would remain at the same time (i) in a preferred position to C's but (ii) in a subordinate position to A's; this would make

collocation practically impossible. The article would nevertheless allow A to claim from the Indemnity Fund, should there not be sufficient funds to pay him; the Fund could always be subrogated to A for recovery of the money from the personal debtor (or the person responsible for the fraud). This rule confirms the absolute validity of the registers, and the need to protect third parties, while at the same time ensuring the injured party recourse to the Indemnity Fund because of the error.

(59) The same applies to Articles 2161f and 2161j C.C. (mention of notices on the certificates).

(60) R.S.Q. 1964, c. 193.

(61) Article 2161*l* C.C. would be deleted.

BOOK NINE

PRIVATE INTERNATIONAL LAW

INTRODUCTION

There is no longer any question of Québec's need for a body of private international law rules which is as complete as possible. Since the Second World War, thousands of people have settled in Québec while retaining ties abroad. The increasingly important human and commercial relationships, both national and international, which Québec maintains with her neighbours, give rise to a multitude of legal problems which require rapid and definitive solution. The development of international trade, upon which the future of our country largely depends, requires rules of private international law which, while clear and precise, must be flexible enough to allow new and fresh solutions when necessary.

Unfortunately, the Civil Code of 1866 and the Code of Civil Procedure of 1965 contain only a small number of provisions relating to conflicts of laws and conflicts of jurisdictions. There are a few general rules in the Preliminary Title of the Civil Code (Articles 6, 7 and 8) and some special rules scattered throughout the Code itself (e.g. Articles 135, 2189 and 2190) and the Code of Civil Procedure (e.g. Articles 178 to 181). Thus, since 1866 and from a very modest base, it has been the courts of Québec which have been responsible for the development of this branch of the civil law. They have not sought to innovate or to conform to international developments, but simply to explain the contents of the articles of the Civil Code and of the Code of Civil Procedure.

Codification of private international law has been a subject of interest to Québec jurists for many years, since it was soon realized that the uncertain and fragmentary character of these rules did not support the growth of interprovincial and international trade. For this reason, the Civil Code Revision Office did not hesitate to undertake the revision of the Québec private international law system by a critical examination, not only of the rules in force in Québec, but also those applicable in the other provinces of Canada, as well as in the United States, France and the other countries with which Québec trades. It was also felt necessary to examine drafts prepared by foreign and international organizations, especially the French Civil Code Reform Commission and The Hague Conference on Private International Law to which Canada has belonged since 1968. The rules proposed in the Draft thus reflect the traditions of Québec, the economic and social interests involved, as well as efforts towards world-wide unification of private international law.

This Book contains not only rules governing conflicts of laws, but also rules dealing with conflicts of jurisdictions (e.g. jurisdiction of courts and

recognition and enforcement of foreign decisions), now found in the Code of Civil Procedure. This solution seems preferable to that of scattering the rules of private international law throughout the Civil Code and the Code of Civil Procedure, according to subject matter, as is the case today. The task was therefore to gather together all the widely dispersed provisions dealing with private international law.

Certain topics whose internal, material rules of law fall within federal legislative jurisdiction were also examined in order to propose corresponding choice of law rules, although in full awareness of the constitutional difficulties which they might raise. In addition, immunities from jurisdiction and execution, an area which falls within both the federal and the provincial fields were also considered.

Finally, in order to suggest any amendments which seem necessary, a study was made of the provisions which, in a number of special statutes, deal with problems of private international law.

To a considerable extent, the Draft confirms existing jurisprudence, where it is well established. It also reproduces provisions of the French draft legislation completing the Civil Code in matters of Private International Law where such provisions are compatible with Québec law. There are, however, many innovations. A number of provisions are based on texts adopted by The Hague Conference in areas where Québec case law is often silent or divided. In the absence of clearly established norms, the legislature must act and in order to promote uniformity, it was natural to propose the solutions adopted at The Hague. The same is true as regards certain rules which reflect the solutions adopted in other Canadian provinces. It should be noted, however, that the texts proposed are sufficiently flexible to permit evolution, through the work of the courts.

In some areas where ideas have not yet crystallized, it was felt that it would be better, in order not to inhibit the courts, to propose no legislation. Excessively rigid formulas could slow down the dynamism of private international law. For this reason, the rules contained in this Draft do not cover all areas of private international law.

This Draft deals with conflicts of laws, conflicts of jurisdictions, recognition and enforcement of foreign decisions, procedure, and immunities from jurisdiction.

Its first chapter contains general provisions on the application of laws, characterization, renvoi, public order and evasion of law.

The first paragraph of Article 1 clearly indicates that local law is generally applicable, although in some cases, by virtue of the rules of

private international law, a foreign law may be designated for application. This principle is universally recognized.

The second paragraph of Article 1 emphasizes that the rules of private international law in the Civil Code may be affected by international treaties binding upon Québec under existing constitutional law. In the future, all of Québec's non federal private international law rules would be found in the Civil Code and in certain special statutes which also incorporate the provisions of certain international treaties expressly approved by Québec in fields of provincial jurisdiction. Actually, it is not always possible or advisable to insert in the Civil Code new provisions contained in international treaties.

Article 2 settles the special problems of application of laws in States comprising several territorial units with separate legal systems.

Article 3, which deals with characterization, consolidates the jurisprudential solution in favour of the *lex fori*, except with respect to property where the law of the situs is made applicable. However, the initial characterization is by the *lex fori* which determines, for instance, whether a debt is involved and where it is situated. The only characterization governed by the *lex situs* is the characterization of property as moveable or immoveable. This constitutes a modification of the rule found in the second paragraph of Article 6 of the Civil Code, and is justified by the fact that the judgment must be enforced at the place where the property which is the object of the litigation is actually situated.

The principle of renvoi, adopted by the Court of Appeal in the famous case of *Ross v. Ross* (1), has been rejected since, on the international level, renvoi does not in practice coordinate the various conflict rules. In the Ross case, a question of form was involved where renvoi is traditionally rejected. The complications and subtleties which arise when perfect coordination of the involved legal systems is sought seem out of proportion to the object of the problem and do not lend themselves to application by the courts. No logical solution exists to the problem of renvoi. A choice must be made, bearing in mind the aim to be achieved, which is to provide litigants with rules that are clear, precise and easy to apply. For this reason, it was decided to propose that, in all cases where a Québec judge must apply a foreign law, he must apply it to the exclusion of the foreign private international law rules.

Article 5 on public order affirms a principle well established in Québec, particularly in paragraph 2 of Article 6 of the Civil Code. It also adopts the distinction between domestic and international public order; the latter can be less demanding.

Article 6 recognizes the application in Québec of the rule *fraus omnia corrumpit*. The fraud in question relates to the connecting factor, and is possible only to the extent to which the parties are free to change the circumstances constituting the connecting factor. When, in order to evade the imperative law of Québec, the parties, or one of them, modify these circumstances so that another law will apply, the Québec judge will disregard such manoeuvres, set aside the foreign law, and apply Québec law.

It was thought preferable not to present a general rule with respect to incidental or preliminary questions since, according to the authors who have examined this matter, each case turns on its facts. The courts must be free to answer these questions.

Chapter II is devoted to conflicts of laws. Articles 7 to 19 deal with the law applicable to physical and legal persons.

With respect to the status and capacity of physical persons, Article 7 provides for the general competence of the law of the domicile, as does presently the fourth paragraph of Article 6 of the Civil Code. Domicile thus continues to play a major role, serving as the connecting factor in several Québec private international law rules. Domicile, however, is understood as the place where a physical person habitually resides. This definition has been adopted in the Draft, in the Book on *Persons*. This constitutes an important and beneficial change in the classic definition of domicile, and takes account of the ease with which people circulate today and the difficulty involved in proving the intention to make a given place a principal establishment within the meaning of Article 80 of the Civil Code.

Article 9, dealing with the conditions required to contract marriage, confirms existing law. As for the effects of marriage, it seems normal, in principle, to subject them to the law of the domicile common to the consorts at the time when such effects are at issue. The same is true for legitimation by marriage, also governed by the law applicable to the effects of marriage.

By submitting the protection of incapable persons to the law of their domicile, Article 17 adopts a generally recognized rule. In cases of urgency, however, when it is difficult to apply the foreign law, the *lex fori* applies on a provisional basis.

It is well established in Canada that legal persons are subject to the law of the place where they are created although they must also conform to the law of the place where they carry on any activity.

The first paragraph of Article 20 restates the traditional rule found in Article 7 of the Civil Code, by virtue of which the form of acts is submitted to the law of the place where the acts are performed. In order to avoid any controversy over the nature of this rule, several subsidiary rules were adopted in the subsequent paragraphs, which in some cases clearly indicate the optional character of the rule *locus regit actum.* In fact, this article is based on the first Article of The Hague *Convention on the Conflicts of Laws Relating to the Form of Testamentary Dispositions* (2). The last paragraph of the article is identical to the last paragraph of Article 1208 of the Civil Code.

Article 21 confirms the principle whereby the parties are free to select the law applicable to juridical acts of an international character. In the absence of express designation, the judge must apply the law of the State which, considering the nature of the act and the surrounding circumstances, is most appropriate to it. Here was abandoned the substance of Article 8 of the Civil Code which gives pre-eminence to the law of the place where the act is passed. However, this does not mean that such a place does not play an important role in the determination of the law applicable.

It was felt that special rules are necessary to govern the international sale of corporeal moveable objects, and, in order to attain international uniformity the provisions of The Hague *Convention sur la loi applicable aux ventes à caractère international d'objets mobiliers corporels* have been adopted (3).

No need was felt, however, to adopt special rules relating to trusts.

Special rules are proposed to determine the matrimonial regime of persons who marry without concluding marriage agreements. The traditional rule, which requires application of the law of the husband's domicile at the time of the marriage, is applied only if the wife has the same domicile; otherwise the law of their first common domicile is applicable. This new rule emphasizes in private international law the equality of consorts, which it is wished to propose throughout the field of private law.

With respect to changes to matrimonial regimes, it is logical that they be submitted first to the law of the domicile common to the consorts, since it is the society in which these consorts live which is most concerned with their matrimonial status.

Arbitration and contracts of insurance are covered in special provisions.

Article 31, dealing with extra-contractual civil responsibility, departs from both the jurisprudential solution, of English origin, which combines the *lex fori* with the *lex loci delicti*, and the traditional solution, seldom applied in Québec, which requires the application of the *lex loci delicti* and adopts the principle of the application of the law of the domicile of the plaintiff at the time when the act which caused the damage occurred. The aim is to ensure that innocent victims can always obtain that to which they are entitled in the society in which they live. However, to avoid any possible injustice, the second paragraph of Article 31 allows the defendant to raise a defence, according to the law of the place where the act which caused the damage occurred, provided he was domiciled there, based on the lawfulness of the act which caused the damage and the fact that he is under no obligation to repair. However, if the defendant is a manufacturer whose product has caused damage, he cannot rely on this defence unless he establishes that he could not reasonably have foreseen that the product or his own products of the same type would be marketed in the State where the plaintiff is domiciled. A stricter rule in matters of civil responsibility arising from the manufacture of goods was felt necessary.

Property rights in individual objects or things would still be governed by the law of the place where the property is actually situated. With respect to international sales of corporeal moveable objects, a subject of great importance to Québec because of the extensive international commerce, more precise rules were deemed necessary. Here again, the provisions of The Hague *Convention sur la loi applicable au transfert de la propriété en cas de vente à caractère international d'objets mobiliers corporels* were adopted (4).

Articles 39, 40, 41 and 42, on security on moveable property, constitute new law and are intended to solve the problems which arise when moveable property affected by security is moved from one State to another.

Articles 43 and 44, dealing with succession, conform to Québec tradition and continue to affirm the principle of division of the inheritance.

It was felt desirable to facilitate proof in Québec courts. According to Article 45, when a court before which a case is pending applies a foreign law to the substance of the case, by virtue of Québec private international law rules, it must also consult the rules of that law relating to the burden of proof and their probative value. However, if the Québec rules place fewer restrictions on the methods of proof and their probative value, the Québec rules must prevail.

In the area of prescription, it was decided to set aside the complicated and oft-criticized rules of Article 2190 of the Civil Code. The rule in Article 46 is simple and clear. The law applicable to the merits of the case governs prescription. This rule is already recognized in part by Article 2189 of the Civil Code with respect to immoveables.

Article 47 embodies the traditional rule, already found in paragraph 2 of Article 6 of the Civil Code, to the effect that procedure is governed by the law of the forum.

Chapter III deals with conflicts of jurisdictions.

The Code of Civil Procedure contains no special provisions dealing with conflicts of jurisdictions in private international law. Articles 68 to 75 of the Code of Civil Procedure, which deal with the place where proceedings are instituted, are mainly concerned with judicial districts within Québec. By analogy, the courts in some cases have extended these rules to cover international situations. To remedy this state of affairs and to distinguish between international and domestic jurisdiction, it seemed necessary to provide rules applicable exclusively to situations containing a foreign element. Article 48, dealing with the jurisdiction of Québec courts in matters involving personal rights of a patrimonial nature, restates present practice. It should be noted, however, that the residence of the defendant no longer exists as a ground of jurisdiction, since domicile is now defined in terms of habitual residence. Possession of property in Québec is no longer sufficient for the purpose of establishing international jurisdiction. Finally, the third paragraph recognizes a choice of forum agreement.

The jurisdiction of Québec courts in insurance matters is broadened. Thus the mere fact that an insurance contract is concluded in Québec would give jurisdiction to Québec courts.

In matters relating to real rights, Article 50 adopts the solution of Article 73 of the Code of Civil Procedure. As to matters of succession, Article 51 reproduces the provisions of Article 74 of the Code of Civil Procedure.

The articles which deal with jurisdiction in matters of personal rights relating to the status of persons contain several innovations. With respect to incapable persons, Article 52, while recognizing the primacy of the court of the place of domicile, gives jurisdiction to Québec courts in cases of urgency or major inconvenience.

In cases of nullity of marriage, divorce, separation as to bed and board, and judicial separation, Articles 53 and 54 recognize jurisdiction

based on the domicile of one of the consorts only. This rule is derived from the fact that a married woman may acquire a domicile of her own. Furthermore, in matters of nullity, Article 53 recognizes the jurisdiction of the court of the place where the marriage is celebrated. It seemed normal that when a marriage is celebrated in Québec, our courts should retain the right to adjudicate upon a matter which is so closely connected with public order.

By virtue of Article 55, the jurisdiction of Québec courts in matters of nullity of marriage, divorce and separation includes jurisdiction with respect to accessory measures, with the exception of matters involving custody or parental authority. In these last two cases, Article 59 provides that jurisdiction is based on the child's domicile or presence in Québec.

The jurisdiction of Québec courts in matters of support is founded on the domicile of either party to the action. It seemed that in this area, for reasons of a social nature, some deviation should be allowed from the rule which has traditionally founded jurisdiction on the defendant's domicile or residence.

The rules of jurisdiction applicable in matters of filiation and adoption must be in the best interests of the child, and this is why, in Articles 57 and 58, jurisdiction is founded on the child's *de facto* residence. The same is true in cases of custody and parental authority, where the mere presence of the child is a sufficient basis for establishing jurisdiction.

Chapter IV deals with recognition and enforcement of foreign decisions.

The Civil Code and the Code of Civil Procedure presently contain a number of rules which are out of date. Articles 178 to 180 of the Code of Civil Procedure and Article 1220 of the Civil Code would thus be replaced by the provisions of The Hague *Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters* (5). This Convention makes it easier to recognize and enforce foreign decisions, thereby encouraging the development of international trade.

The proposed texts do not distinguish, as do Articles 178 to 180 of the Code of Civil Procedure, between decisions rendered outside Canada and those rendered in the other provinces. However, it must be emphasized that recognition and enforcement are not automatic, since the defendant may plead certain defences, especially the lack of jurisdiction, according to Québec criteria, of the foreign court which rendered the decision, or fraud in the procedure in the original court.

Article 63 contains a very important rule, namely that Québec courts would no longer examine the merits of any foreign decision.

Article 65, which lists the grounds, recognized in Québec, of jurisdiction of foreign courts, does not depart from the rules now in force. Similarly, by virtue of the first paragraph of Article 67, the jurisdiction of the court of origin may not be recognized when Québec law confers upon its courts exclusive jurisdiction, either by reason of the subject matter or by virtue of an agreement between the parties, to decide upon the question which gave rise to the foreign decision.

The articles dealing with recognition of decisions relating to the status and capacity of persons contain very liberal provisions, and correspond in part to those relating to the jurisdiction of Québec courts. Thus, by virtue of Article 74, foreign decisions in matters of nullity of marriage will be recognized in Québec if, at the time of the action, either consort was domiciled within the jurisdiction of the authority seized, or the marriage was celebrated within that jurisdiction.

A major innovation would consist of recognizing decisions rendered by an authority which founded its jurisdiction on the nationality of either consort or of the child whose filiation has been established (Articles 74, 75, 76). The fact could not be ignored that in many States the jurisdiction of courts in matters of status and capacity is based on the common nationality of the parties or the nationality of one of them.

A more liberal provision is contained in Article 77 which permits recognition of an adoption where such recognition is effected by an authority competent according to its own criteria. This rule is absolutely necessary if one wishes to pursue a realistic social policy and facilitate to the maximum the adoption of abandoned children. Only in the case of decisions dealing with the custody of children and with parental authority can Québec courts make a revision, if the interest of the child requires it.

It will be noted that the articles dealing with the recognition of foreign decisions in matters of status and capacity use the expression "authority" seized instead of "court" seized; this is done because in some cases a foreign decision may be rendered by an administrative or a religious authority.

The articles dealing with obligations to support terminate the uncertainty that exists with respect to periodic payments. A foreign decision ordering the periodic payment of support may be recognized and declared enforceable for payments due and accruing. If the decision relates to several claims which can be dissociated, any one or more of these may be separately recognized or enforced.

Finally, under Article 82, foreign decisions in matters of status and capacity have effect in Québec without exequatur except in cases where they order restraint on persons or execution upon property.

Chapter V deals with the recognition and enforcement of foreign arbitration awards. The Draft articles are based on the Convention adopted in 1958 by the United Nations and presently in force in many States (6).

The final chapter deals with the immunity from civil jurisdiction and execution which is enjoyed by foreign States and sovereigns, international organizations, diplomatic agents and consular officers.

Some of the provisions of the Vienna Conventions and, with respect to foreign States and sovereigns, the jurisprudence of the Québec Court of Appeal were adopted. These articles adopt the distinction between acts *jure imperii* and *jure gestionis*.

PRELIMINARY CHAPTER

APPLICATION OF LAWS

1

This article, of new law, recognizes that internal Québec law prevails where no rules of private international law call for the application of a foreign law. Québec judges must apply domestic law unless some rule of private international law - which comes into operation when juridical relations contain a foreign element - requires them to apply a foreign law.

Private international law is composed not only of rules contained in the Civil Code and the Code of Civil Procedure but also of rules found in the provincial or federal statutes, including provisions of international treaties incorporated therein. Thus, when one applies a rule of private international law contained in the Codes, one must always make sure that, in each specific case, it has not been amended or set aside by a binding treaty.

The article states general, universally accepted rules with respect to the application of laws (7).

2

The purpose of this provision is to avoid any ambiguity in the application of the rules of private international law in federal States. It is based on some of the Hague Conventions (8).

CHAPTER I

GENERAL PRINCIPLES

3

The legal system whose conflicts rule is applicable must furnish the necessary characterizations. It is not possible to resort to a foreign law to characterize the nature of the case when it is this characterization which requires the eventual application of the foreign law. Characterization by the forum has the merit of bringing out the national character of private international law rules. Québec judges must apply Québec private international law rules and must therefore interpret these rules in the light of the juridical concepts of the forum. Naturally, in the case of a foreign constitution unknown to the forum, the court will be required to examine

it within the context of the legal system under which it developed, then classify it in one of the categories of the forum (9).

The first paragraph states a principle already applied by Québec courts (10). It puts an end to the doctrinal controversy surrounding the solution of the problem of characterization (11).

The second paragraph constitutes an exception to the general rule relating to property and amends the existing law. If characterization is according to the *lex fori*, as required by paragraph 2 of Article 6 of the Civil Code, and the moveable or immoveable property is situated outside Québec, it will be impossible to deal with that property if the characterization of the place of its actual situation has been ignored. It is considered that characterization of property as moveable or immoveable belongs to the *statut réel*, meaning the law of the place of its situation. The justification for this exception is to be found in the fact that it is necessary to enforce the judgment where the property is situated.

However, the initial characterization may be required according to the *lex fori* which, for instance, will indicate if a debt is involved and where it is situated. The only characterization governed by the internal law of the situs is the characterization of property as moveable or immoveable.

4

This article departs from Québec jurisprudence which in *Ross v. Ross* (12), adopted the simple renvoi theory: when a conflicts rule of the forum refers to a foreign law, the totality of that law must be considered, its private international law rules as well as its internal rules, and the renvoi which that law would make to Québec law must be accepted (13).

By rejecting renvoi, the article conforms to present tendencies. In most international treaties relating to private international law, the law applicable is the internal law of the State designated by the conflicts rule (14).

The complications and subtleties which arise when coordination of the involved legal systems is sought (15) - this being the reason generally given in favour of renvoi - seem out of proportion to the object of the problem and do not lend themselves to easy application by the courts. The theory of renvoi also increases the uncertainty of the parties with respect to their respective obligations. The designation of the internal law has the merit of being simple and of avoiding prolonged and expensive litigation. Québec's private international law rules are enacted without taking foreign rules into account. Their object is to determine the cases in which

foreign laws will be applied. There is no reason to require that foreign law decide which of the laws in presence be applied.

5

Public order is the problem child of private international law. It is encountered in all areas of the subject, and to give any definition of it which would act as a clear standard in assessing different cases is impossible. Any list of cases in which public order applies would be incomplete and dangerous since it would not take into account the special circumstances of each specific case. Thus, it seemed preferable not to provide such a definition, and to leave to the courts the task of crystallizing this notion.

However, this article specifies the scope of the notion of public order, with respect to which the present Civil Code contains no general provision. True, Article 13 C.C. partly fills this gap, and public order is also mentioned in Article 6 C.C., but the reference in both cases is only to internal public order. No distinction is made between domestic and international public order. Modern doctrine acknowledges, however, that such a distinction must be made (16) and jurisprudence makes the same admission (17). The distinction is adopted by this article.

In some cases, the judge will recognize a situation validly created abroad even if it could not have been created in Québec. In principle, public order must not impair vested rights. Thus, the reaction against a provision contrary to public order is not the same, depending upon whether it is a question of the acquisition of a right in Québec, or one of allowing a right acquired abroad, in the absence of fraud, to have effect in Québec. In order to prevent a right acquired abroad in the absence of fraud from having effect, public order must be more draconian in nature than in the case of the exclusion of a foreign law the application of which would lead to acquisition of a right in Québec. This is why the text uses the expression "manifestly incompatible". It was hoped to emphasize that the courts must resort to public order only in serious cases, namely where the application of a foreign law or the recognition or enforcement of a foreign decision would affect the fundamental principles of Québec law or morality.

6

This article clarifies jurisprudence (18) and is based upon a principle contained in Article 135 of the Civil Code, whose scope it enlarges. The fraud in question here has to do with the connecting factor. It is possible only when the parties are free to modify the circumstances that constitute

the connecting factor, such as, for example, the place where an act is passed. Such modification must be intended and realized solely in order to evade the obligatory provisions or prohibitions contained in the internal law of the forum.

Evasion of foreign law is not taken into consideration. This is indicated by the words "in order to evade the imperative rules of the court seized of the case".

By virtue of this article, Québec judges would ignore the change of connecting factor which would call for the application of the foreign law or confer jurisdiction on a foreign court, and would apply Québec law (19).

CHAPTER II

CONFLICTS OF LAWS

7

This general rule is well established in Québec. The Draft does not change the rule of positive law, but simplifies the wording of paragraph 4 of Article 6 of the Civil Code. Domicile is still the connecting factor, but now defined as habitual residence, according to Article 60 of the Book on *Persons*.

By substituting, in the definition of domicile, the notion of habitual residence for that of principal establishment, as found in Article 79 of the Civil Code, it becomes no longer necessary to seek out the person's intention to establish a principal establishment in a particular place. A study of Québec jurisprudence indicates that the greatest difficulties the courts have encountered in matters of domicile relate to proof of the intention of the person whose domicile it is sought to establish at a particular time, especially in matters related to succession (20). In the case of both testate and intestate successions, it is difficult to determine with certainty what was the deceased's intention with respect to his domicile, either at the time of his death or when he made his will. The courts must conduct a strict and always complicated analysis of any intention which, in the end, is made manifest above all by external acts, without being able to reach any certainty with respect to the true intention of the deceased. When the person whose domicile must be established is alive, the search for this intention is just as difficult, since in giving testimony the individual will tend to make self-serving declarations.

By adopting habitual residence as the criterion for domicile, it

becomes no longer necessary to establish intention, which is the subjective element of domicile. Proof of domicile is made easier since habitual residence may be proven objectively by relying on simple material facts (the place where a person lives, where he works, the length of time he has resided there and so forth). Finally, this represents a realistic approach. If a person, domiciled in Ontario until the age of twenty-five, then moves to Québec to spend the rest of his days there, and finally dies in Québec, it seems inconceivable that he be deemed to have always been domiciled in Ontario because he never had a firm intention to make a principal establishment in Québec. If the criterion of habitual residence were applied to this person, he would undoubtedly be domiciled in Québec.

If a person is to habitually live in a place, he must be subject to the laws of that place with regard to the exercise of his civil rights.

The concept of habitual residence enables Québec to subject to her laws a greater number of people who have elected to live in Québec and who have no valid reason for remaining subject to the laws of a foreign country with which they no longer have any substantial connection.

By eliminating the criterion of intention, it is also possible to reduce the possible cases of evasion of law.

Adoption of the notion of habitual residence does not sacrifice any of the security of legal relationships. On the contrary, it increases it, since a person cannot invoke his intentions in order to exempt himself from the laws of his new domicile. It is sufficient if the characteristics of habitual residence are present. The adjective "habitual" entails a certain permanence and prevents change of domicile being made too easily.

This does not mean that intention plays no role in the search for habitual residence. It was simply intended to eliminate intention as the essentiel element of domicile and to make it one of the many elements whose presence can facilitate determination of domicile (21).

8

The article, based on the French draft (22), lays down a new rule in contractual relationships. It seems fair to take into consideration excusable ignorance of foreign law. The text is specifically designed to protect commercial contracts.

It should be noted that, in order for the contract to be valid, it must have been concluded at the domicile of the capable person. Moreover, the onus rests upon the capable person to establish that he contracted without imprudence.

9

The first paragraph is concerned with the substantial validity of marriage, and establishes that each of the future consorts is governed by the law applicable to him or her. The judge should distributively apply the personal law of each consort. This rule is firmly established in a great many legal systems (23). The first paragraph of the article reproduces the provisions of Article 2292 of the French draft law completing the Civil Code with respect to matters of private international law (1967). It conforms to Québec law (24).

As to the effects of marriage, it is clearly evident that they can be subject to only one law.

10

The federal *Divorce Act* (25) is silent on the question of the law applicable to divorce, as are the Civil Code and the Code of Civil Procedure with respect to separation as to bed and board (26).

11

The first paragraph confirms the present law with respect to legitimate filiation (27) and also settles the problem of natural filiation.

In the second paragraph, the law in question, as indicated in Article 9, is that applicable to the effects of marriage at the time of celebration.

12

The first paragraph is intended to encourage adoption. The parties need only concern themselves with the conditions required by the place of adoption. This is one of the rare instances where forum shopping yields results for the benefit of all the parties involved.

The effects of adoption involve the status of a person, normally subject to the law of the domicile of the adopted person at the time these effects are at issue (28).

13

The court seized of the case must apply the *lex fori* in order to determine who is entitled to custody of minor children, since this court appears in the best position to assess the true interests of the child living within the limits of its territory. This policy respecting the child's interests is in accord with the provisions in the Book on *Persons* (29).

14

This new rule is based on the Hague *Convention on the Law Applicable to Maintenance Obligations towards Children*, concluded in 1956 (30), and the draft *Convention on the Law Applicable to Maintenance Obligations* (1973) (31).

15

This article contains an exception to the preceding rule. It is based on the draft *Convention on the Law Applicable to Maintenance Obligations*, prepared by the Hague Conference in 1973 (32).

16

This article, which provides a second exception to the rule of Article 14, adopts the view that in cases of divorce, separation as to bed and board or annulment, the obligation of support must be linked to the institution from which it may arise. This provision also is based on the draft *Convention on the Law Applicable to Maintenance Obligations* (1973) (33).

17

This article outlines a principle already recognized in Québec by Article 57 of the Code of Civil Procedure and by the fourth paragraph of Article 6 of the Civil Code (34).

The protection given by the law of the domicile may be purely legal, for instance if the parents are declared by law the *ex officio* administrators of property belonging to their minor children. In this case, their right to act in Québec must be recognized. The protection can also be judicial or administrative. In other words, the law of the domicile must determine the conditions for the creation, modification and cessation of the measures intended for the protection of incapable persons. It also governs their effects, both with respect to the minor and to the persons or institutions who have custody of him, and with respect to third parties.

18

To a certain degree, this article adopts the philosophy of Article 348a of the Civil Code, but only with respect to cases of urgency or serious inconvenience. It extends the application of that article to all persons, capable or incapable by the law of their domicile.

The second paragraph indicates in what circumstances the measures taken in Québec will cease, in order to protect third parties. The cessation of these measures is without prejudice to their definitive effects. The

measures of Québec law will cease to apply only when those taken at the domicile can be applied within Québec. Otherwise, the Québec measures continue to have effect.

19

The first part of the article lays down a rule that is well established in Québec (35), although our courts should also take Québec law into account if the activity which gave rise to the dispute was carried on in Québec. Similarly, if a foreign or Québec legal person carries on an activity outside Québec which gives rise to an action before our courts, these courts should take into consideration the limitations imposed upon this legal person by the law of the place where the activity was exercised.

These limitations or prohibitions may relate to the legal person's capacity to enjoy or to exercise rights.

20

This article is intended to replace Articles 7, 135, 776 paragraph 3, 857, 1208 paragraph 5, 1220, 2141, 2142, 2143 and 2144 of the Civil Code, as well as the rules found in the jurisprudence represented by the cases of *Berthiaume v. Dastous* (36), *Ross v. Ross* (37), and *Bellefleur v. Lavallée* (38), with respect to the form of juridical acts (39).

The rule *locus regit actum* thus becomes obligatory and exclusive in matters of marriage and in other matters directly connected with persons, and optional with respect to patrimonial acts.

The text also adopts the solutions of The Hague Conference in the *Convention on the Conflicts of Laws Relating to the Form of Testamentary Dispositions* (40). The options given in the article, as to the law applicable, are numerous and depend upon the nature of the patrimonial act. The purpose of the article is to enunciate rules favouring the validity of juridical acts of a patrimonial character by admitting the possible competence of several laws. The rule will also enable a testator to dispose of his entire patrimony in a single will.

This article recognizes the authority of diplomatic agents, consular agents and general representatives of Québec to receive juridical acts.

The last paragraph reproduces, with slight modifications, the provisions of the last paragraph of Article 1208 of the Civil Code. A Québec notary may receive acts in notarial form abroad and these acts will be authentic in Québec.

21

This article restates some of the rules contained in Article 8 of the Civil Code and would give legislative recognition to the solutions adopted by the courts (41). The principle of autonomy is well established in the Québec legal tradition.

When there is no express designation, the center of gravity theory is to be used to discover the applicable law (42). There is no longer any question of determining the implied or presumed will of the parties. To do so, the judge must consider the nature of the act, whether it is a will, a power of attorney, a gift, or whatever, as well as the surrounding circumstances, such as the place where the act was passed, the place of principal performance (if a contract is involved), the situs of the object of the act, the domicile, residence, nationality or place of business of the parties, the form in which the act was drafted, the currency used for payment, the language used, the content of the conflicting laws (when, for example, one law validates the act and the other invalidates it, the act could be governed by the former), arbitration or choice of forum clauses and finally the attitude of the parties after the passing of the act.

These indications should enable the courts to determine the legal system which, because of its relationship with the juridical act and the parties, is most intimately connected with that act and thus is best qualified to govern it. The relative importance of the factors and their classification will depend upon the nature of the juridical act involved, as they do not all have the same value and cannot all be decisive or sufficient in themselves to localize the act in a particular legal system. Some subordinate factors have a minimal influence and can only be used in conjunction with others which they confirm. It is a question to be left to the discretion of the courts.

It should be noted that the text applies to juridical acts of an international character. The parties are not free to refer to a law not related to their act unless that act contains a foreign element.

22

This article and those that follow adopt the rules contained in The Hague *Convention de 1955 sur la loi applicable aux ventes à caractère international d'objets mobiliers corporels* (43).

The first paragraph reiterates the rule stated in the preceding article.

The second paragraph is intended to create the climate of certainty which is necessary for the orderly development of international trade. No

search for the presumed intention of the parties is possible. Juridical security is essential in international trade.

The principal connecting factor is the domicile of the vendor. This has been adopted by various international organizations, such as the COMECON and the EEC in the general conditions contained in their contracts.

If the vendor has received the purchase order in the jurisdiction within which the purchaser is domiciled or has an establishment, the principle is reversed and the law of the purchaser is taken into consideration. This paragraph does not require any special comment. Since the sale is being concluded in the jurisdiction of the purchaser, he is entitled to believe that his law is applicable.

For similar reasons, the fourth paragraph provides for the application of the law of the State where sales are made on a stock exchange or at an auction (44).

23

This article contains another exception to the application of the vendor's law.

24

This article indicates what is meant by the sale of corporeal moveable objects, when such a sale is of an international nature.

25

The purpose of this article is to establish an exception to the rules of Articles 21 and following in requiring the application of the law applicable in Québec, whether federal or provincial, to govern a contract contemplated in the *Consumer Protection Act* (45).

This provision can of course only apply to contracts having an international character (46).

As a result, it is recommended that Section 8 of the *Consumer Protection Act* be repealed.

26

The first paragraph reiterates a well-established principle (47).

The second paragraph modifies the traditional solution, which favours the application of the law of the domicile of the intended husband at the time of marriage, since under existing law the wife automatically acquires her husband's domicile upon marriage (48). According to this

article, such law would apply only in cases where the intended wife already had the same domicile as her intended husband. Where there is no such domicile, the article adopts a new rule which requires application of the law of the first domicile of the consorts after the marriage. This jurisdiction is often better qualified to govern the matrimonial regime of consorts married without a marriage contract than is that of their common domicile at the time of the marriage. Recourse to the law of the first common domicile also reflects the implicit intention of the parties who have decided to settle elsewhere after the marriage, although at the time of celebration, they are uncertain as to precisely where. This intention finds its expression in the facts.

Finally, this rule protects third parties of the first common domicile who have reason to believe that the consorts are governed, with respect to their matrimonial regime, by the law of the place where they settled immediately after the marriage.

If the place of the first common domicile cannot be determined with certainty, or if the consorts never had a common domicile, the law of common nationality will be applied; if this cannot be done, the law of the place where the marriage was celebrated is to be applied (49).

The last paragraph lays down a new rule which allows consorts to change their matrimonial regime either voluntarily or automatically under the law of their common domicile or, if they have no common domicile, under that governing their regime (50).

27

The first paragraph of this article is intended to protect the insured in Québec who applies for insurance in Québec. By designating the law of the domicile of the insured at the time the contract is entered into, the insurer is in a position to know the nature of the applicable law, and the insured is necessarily more familiar with the law of his domicile.

With respect to the second paragraph, it was deemed reasonable that Québec law be made to apply to insurance on immoveables situated in Québec.

In group insurance of persons, there is a master contract between the insurer and, for example, an employer under which benefits are granted to the employees who participate in the group plan. Whatever may be the law governing the master contract, the rights and obligations of a participant and his beneficiary would be governed by the law of Québec if the participant was domiciled there at the time of his entry into the plan.

The rule laid down is unilateral. If the insured is not domiciled in Québec when the contract is entered into, the judge applies Article 21.

It will be noted that these provisions are imperative.

28

This article substantially reproduces Article 2498 C.C.

It will be noted that this provision is imperative.

29

This article consecrates the principle of autonomy of arbitration agreements, making them subject to the general rules applicable to juridical acts (51).

Arbitration *per se*, meaning the choice of the arbitrators, the procedure to be followed, and so forth, is governed by the law expressly designated by the parties, or by the rules they have chosen, such as the regulations of the International Chamber of Commerce. Otherwise, the law applicable to the arbitration agreement applies.

If the arbitration agreement exists and one of the parties ignores it and institutes proceedings before a Québec court, the law governing arbitration will determine the effect of that agreement upon the action, e.g. whether the proceedings must be stayed or whether the Québec court has jurisdiction.

30

This article codifies the traditional rule and reproduces the text of Article 2312 of the 1967 French draft law completing the Civil Code with respect to private international law (52).

31

According to the most authoritative case law, an action in civil responsibility can succeed in Québec only if the act which caused the damage would have been actionable according to Québec law and could not be justified by the law of the place where it occurred. This rule, which has its origin in English case law, was imposed upon Québec courts by the Supréme Court of Canada (53), which thus disregarded the traditional rule of the old French law subjecting extra-contractual civil responsibility to the law of the place where the act causing the damage occurred (*lex loci delicti*). The Civil Code contains no provision on this question, although some jurists have maintained that justification for the application of the traditional rule can be found in the third paragraph of Article 6 of the Civil Code (54).

If it is admitted, from a historical point of view, that the law applicable to extra-contractual civil responsibility should have been the *lex loci delicti*, this does not mean that this solution is the best (55).

It seemed preferable that civil responsibility, and particularly the assessment of damages be made according to the criteria of the society to which the victim belongs. The damage is actually suffered at the victim's domicile.

This does not mean that the *lex loci delicti* must never be taken into consideration in order to ascertain whether the act is lawful and whether the author of the damage is under an obligation to provide compensation.

Indeed, the second paragraph expressly provides that the defendant, provided he was domiciled where the act which caused the damage occurred, may successfully defend against the action by proving, in accordance with the law of that place, both the lawfulness of the act which caused the damage, and the absence of any obligation to repair.

It did not seem advisable to allow a defendant to exculpate himself by sole reference to the law of the *locus delicti* in view of its very often fortuitous character (56).

It is to be noted that the text uses the words: plaintiff and defendant and not: victim and person who caused the damage. In fact, it is not always the victim who sues the person who caused the damage. It could be the heirs of the victim who sue the father of the author of the damage.

It should also be noted that when a law imposes absolute objective responsibility, only the legal obligation to repair is involved, not the question of lawfulness of the act.

The American theory of the center of gravity was not retained; this calls for application of the law of the place which has the most substantial connection with the act that caused the damage, and the parties (57), since in the field of extra-contractual civil responsibility it is important for the parties to know quickly and easily the existence of the obligation to repair and the conditions attached to it. While this theory has some advantages, it entails the major inconvenience of subordinating the determination of the law applicable to the holding of a trial, and this leaves too much latitude to the judges in determinating the applicable law.

32

The first paragraph establishes a special and stricter rule for the manufacturer whose product has caused damage, since he cannot invoke the second paragraph of the preceding article unless he can prove that he

could not foresee that his products would be marketed at the victim's domicile (58).

The second, third and fourth paragraphs are drawn from The Hague Convention of 1972 (59) and define the expressions "products" and "manufacturer".

33

This article is intended to close the debate as to the meaning to be given the second paragraph of Article 6 of the Civil Code (60). From now on, moveable property *ut singuli* would be governed by the law of the place where it is actually situated. The article also adopts the provisions of the first paragraph of Article 6 of the Civil Code relating to immoveables.

34

This article and those which follow adopt the provisions of The Hague *Convention sur la loi applicable au transfert de la propriété en cas de vente à caractère international d'objets mobiliers corporels* (61).

The article provides for the application of the law of the contract of sale with respect to the enumerated matters. It ensures, as between the parties, the constant application of the law of the contract in spite of any changes in the situs of the property.

35

This article, based on The Hague Convention (62), adopts Article 3 of that Convention and deals with the transfer, vis-à-vis third parties, of ownership to the purchaser. It designates the *lex situs* of the objects at the time of the claim.

However, the second paragraph recognizes a title acquired by the purchaser by virtue of the law of the State where the property may have been situated prior to the claim.

The third paragraph is related to the preceding one by the expression "furthermore", and only comes into play where the purchaser has not yet acquired ownership by virtue of the law of one of the jurisdictions where the objects were previously situated (63). This paragraph designates the situs, in this case the place where the documents are received, as the connecting factor for the transfer of ownership only in cases where the documents represent the goods sold.

To sum up:

1. the judge before whom a claim is made must first determine the moment when the purchaser became the owner, and whether the

transfer of ownership took place by virtue of the law of one of the jurisdictions where the goods were situated before reaching the jurisdiction where they were the object of the claim, to the exclusion of the jurisdictions *in transitu* under Article 38;

2. in the negative, and if the goods are represented by documents, the judge must ascertain whether the documents were remitted to the purchaser, in which case the purchaser retains the ownership conferred upon him by the law of the jurisdiction where he received the documents;

3. if the purchaser has not acquired ownership by virtue of the law of one of the jurisdictions where the goods were previously situated, or has not yet received the documents, or if the documents do not represent the goods, the transfer of ownership will take place according to the law of the place where the goods are situated at the time of the claim, or according to the law of the place of shipment if they are *in transitu*, by virtue of Article 38 (64).

36

This article adopts Article 4 of The Hague Convention (65).

The law of the place where the objects are at the time of the claim governs the effects of an action in resolution or a clause of reservation of ownership. This same law will determine whether or not it is necessary to publicize the reservation of ownership clause in order to bind third parties.

It is proper that the rule in the preceding article, which envisages mainly the rights of the purchaser (as well as those of his creditors) vis-à-vis the creditors of the vendor and favours the purchaser by recognizing his acquired rights, be subject to the exception found in the article as it would be unjust to allow the purchaser's creditors, by virtue of the purchaser's acquired rights, to rely on Article 35 to the detriment of the unpaid vendor.

Thus, the *lex rei sitae* at the time of the claim will be applicable, and the purchaser's creditors will not be able to rely on another law, such as that of the place of a previous situs, or that applicable to the contract. On the other hand, the unpaid vendor cannot rely on any law other than that of the situs at the time of action. Since the article deals with conflicts between the unpaid vendor and the purchaser's creditors who most often will take action by seizure (this term must be taken in its widest meaning, i.e., as including bankruptcy), the law of the situation of the goods at the time of the first claim or seizure will be applicable.

The area of application of the *lex rei sitae* includes "security and the right to possession or ownership, particularly under an action in resolution or a clause of reservation of ownership", but the list is not all-inclusive, as it is prefaced by the words "such as" (66).

As to the reservation of ownership clause, it should be remembered that, as between the parties to the contract, this clause is governed by the *lex contractus*, as indicated by Article 34. However, with respect to third parties, it will only be effective, by virtue of the proposed article if it is recognized by the law of the place where the objects are situated at the time of the claim (67).

Documentary sale is covered by paragraph 2 of the article. This provision is intended to provide security for the holder of documents (usually a bank which advanced the funds) by requiring, in order to determine the competent law, that the claim be made on the same document which the bank holds, or on the goods (68).

37

This article reproduces Article 5 of The Hague Convention (69). It deals with the sale of property belonging to others (sale *a non domino*), and is another exception to Article 35.

Use of the expression *a non domino* presumes that a contract was made between a purchaser and a person in possession who was not the owner of the object sold, for instance, a thief or a depositary. The text first states the general rule to the effect that the law of the State where the objects are situated at the time of the claim governs the rights that the purchaser may set up against third parties. From a practical point of view, it is important for the purchaser and his creditors to know the law that will determine the protection he is entitled to in the event of a sale *a non domino*.

The second paragraph, however, creates an exception by recognizing the rights the purchaser previously acquired according to the law of the place where he was given possession. It should be noted that this paragraph only preserves rights acquired *a non domino* by virtue of the law of the State where the purchaser was given possession, whereas under paragraph 2 of Article 35 the purchaser preserves rights acquired by virtue of the law of any one of the previous locations of the thing.

According to the third paragraph, possession of goods prevails over that of documents.

38

This article reproduces Article 6 of The Hague Convention (70), which deals with goods in transit and which are therefore located in various places while being transported. Since it is difficult to determine their actual situation, the law of the State from which they were sent will be applied to them. The article does not cover sales *a non domino*: thus, if the purchaser *a non domino* obtained possession in a jurisdiction through which the goods passed in transit, this suffices to make the law of that place applicable.

39

This article is new law. It constitutes an exception to the general rule laid down in Article 33, and subjects to Québec law the hypothec created in Québec on moveable property situated abroad.

According to the rules in the Title on *Security on Property* (71), publication of a hypothec must be constant. So as to facilitate circulation of property, and in order that the grantor, the hypothecary creditor, and third parties, may benefit from a certain degree of security, it seemed necessary to temper the general rule laid down in Article 33 by special rules based to a certain extent on the *Uniform Commercial Code* (72), Ontario legislation (73), and the *Uniform Personal Property Security Act*, recommended by the Conference of Commissioners on Uniformity of Legislation in Canada (74). They have nevertheless been adapted to Québec civil law.

40

This article is new law. It allows a security created abroad to be published in Québec, although the publication will have effect only in the event that the property is brought into the province within thirty days; in this case, the effect of the publication would be retroactive to the date of publication, in accordance with the theory of conditional obligations (75).

41

This article, of new law, based on Article 9-103(1)(d) of the *Uniform Commercial Code*, is intended to avoid a break in continuity between publication abroad and publication in Québec. If a security on moveable property has already been published abroad, it will for a certain time be deemed to have been published in Québec, after which it will have in fact to be published in Québec. Obviously, however, publication in Québec in no way extends the period of validity of the security, as established abroad. If, for example, the parties have provided that the hypothec be

created for a term of thirty days, and the property is brought into Québec after twenty days, publication in Québec, whether fictitious or real, could not extend the effect of the hypothec beyond ten days. The effect accorded in Québec by publication can last no longer than the effect given by the foreign law, the law governing the creation of the hypothec.

The second paragraph establishes the period of time within which publication must be accomplished in Québec in order for the security to remain published under Québec law. The *Uniform Commercial Code* makes provision for a period of time of up to four months (76), while the Ontario statute and the uniform act mention sixty days (77). A thirty-day period seems sufficient to protect acquired rights. Failing publication in Québec, the security would be extinguished under the rule proposed in Article 476 in the Book on *Property*.

42

This article, which is new law, is based on Article 9-103(3) of the *Uniform Commercial Code*.

The provision constitutes an exception to the general rule according to which publication of security on moveable property is effected at the place where the property is actually situated. It deals with certain incorporeal moveables, most frequently debts, as well as corporeal moveables likely to be transported frequently across the border of a jurisdiction. This would be the case, for example, of commercial, agricultural or industrial equipment consisting of heavy machinery, construction equipment and heavy vehicles.

In these cases, it appeared easier, given the difficulties involved in determining the situs, to submit publication to the law of the grantor's domicile. Additional provisions, however, have been inserted to cover the situation in which the grantor changes his domicile, or in which the law of the grantor's domicile makes no provision for publication of hypothecs on moveable property by registration.

43

This article corresponds to existing law, as found in the second paragraph of Article 6 of the Civil Code (78). Obviously, in matters of succession, Article 21 governs the will, subject to any imperative provisions of the law of the domicile of the deceased.

44

This article is consistent with existing law, namely the first paragraph of Article 6 of the Civil Code. Here again, in matters of succession Article

21 is applied subject to any imperative provisions of the law of the actual situation.

45

This article is intended to put an end to the hesitations of jurisprudence (79). The choice of the law applicable to proof depends upon how the nature of proof is viewed. If it is a means to vindicate a disputed right before the courts, it possesses a substantive nature which, in the field of conflicts of laws, requires the application of the law governing the legal relationship to be proven. If, on the other hand, proof is considered as a method of convincing the judge, the procedural aspect prevails and the *lex fori* is applicable.

In accordance with civilian tradition, the burden of proof is linked to the substance of the case (80).

The conditions of admissiblity of proof and its probative value are also linked to the substance of the case. Thus, the judge must admit oral proof of purely verbal agreements, irrespective of the amount involved, when under the substantive rule governing the form of acts, these agreements were concluded in a country where the law does not require them to be in writing, and allows oral proof.

The second paragraph, however, creates a special regime by allowing application of the *lex fori*. This solution provides more adequate protection for the interests of the parties and adopts the principle *favor negotii*.

46

This article establishes a new rule, since Articles 2189, 2190 and 2191 of the Civil Code not only create many problems of interpretation, but impose a solution the merits of which are rather doubtful in matters related to moveable property (81). By submitting prescription to the law applicable to the substance of the case, the text does not abandon the principle adopted by Article 2189 in matters of immoveable property.

The article prevents forum shopping. There is no reason why prescription should depend upon the debtor's change of domicile, in particular upon his acquiring domicile in Québec (82). Prescription is part of the obligation. It is not essentially designed to protect the debtor; it has other functions. The debtor seems adequately protected by the law governing the contract, of which he was aware from the outset. Why should a change of his domicile free him from his obligations? Any law which creates a right should determine the period within which that right may be exercised. If the legal relationship involved is governed by a particular juridical regime, this regime must be followed in all its

particulars since these are part and parcel of the institution. In other words, prescription cannot be separated from the legal relationship to which it is attached (83). In the field of conflict of laws, it must be governed by the law applicable to this relationship even if, according to that law, prescription is considered a matter of procedure.

47

This article is consistent with existing law (84) and embodies a universally recognized principle (85).

CHAPTER III

CONFLICTS OF JURISDICTIONS

48

These rules are, to a certain extent, similar to those contained in Article 68 of the Code of Civil Procedure, dealing with the place where action is instituted, although they are intended to apply to situations involving a foreign element (86). Paragraph 1 adopts existing law (87).

On the international level, actions must be divided into several categories, namely, personal actions of a patrimonial nature, actions involving real rights and rights of succession, and actions involving personal rights relating to the status of persons.

In the case of personal actions of a patrimonial nature, the range of possible grounds of jurisdiction is quite broad.

It should be noted that the expression used in paragraph 2 is "cause of action", and not "whole cause of action". According to existing law the "whole cause of action" is interpreted as including all the facts which must be proven for the plaintiff to establish his rights (88). Thus, when a contract is concluded abroad but its inexecution occurs in Québec, the courts have refused to take jurisdiction on the ground that the whole cause of action did not arise in the province. In contractual matters, it would seem that it is essentially performance which matters primarily, and not the whole of the contractual relationship (89). In the above example, the cause of action arose in Québec. Since the word "whole" is done away with, Québec courts would be able to enlarge their jurisdiction.

It is also suggested that coordination with Article 68 C.C.P. be ensured by deleting the word "whole" in paragraph 2 of that article.

In delictual matters, it seems that the cause of action may be

considered as having arisen where the actionable material fact which caused the damage took place (90).

The third paragraph recognizes the validity of choice of forum agreements and conforms to The Hague *Convention on the choice of Court Agreements* (91).

The fourth paragraph is in conformity with existing law (92).

It was not felt necessary to retain, as grounds of jurisdiction, the presence of property in Québec or the fact that the contract was concluded in Québec. This was because of the fortuitous nature of these connecting factors in the area of international private law relations.

49

This article to a certain extent combines the provisions of paragraph 3 of Article 68, and of Articles 69 and 73 of the Code of Civil Procedure. Here, contrary to the provisions of the preceding article, jurisdiction is given to the court of Québec if the contract was concluded in the province. "Person concerned" in paragraph 2 means the insured, the subscriber and his assigns or the beneficiary. However, the third paragraph of the article is broader than Article 73 of the Code of Civil Procedure, since it refers to an insurable interest situated in Québec.

As to the jurisdiction of the court of the place where the loss occurs, the fourth paragraph enlarges the scope of Article 69 of the Code of Civil Procedure *in fine*, in that the jurisdiction of Québec courts is not restricted to cases of property insurance.

50

This article is consistent with Québec practice (93). It is based in part on Article 73 of the Code of Civil Procedure.

It was not considered necessary to adopt any special rule with respect to mixed actions, since it was felt that no such action could be instituted in Québec unless the courts had jurisdiction over both the personal and the real nature of the dispute.

51

This article corresponds to Article 74 of the Code of Civil Procedure and Article 694 of the Civil Code.

52

This article is based in part on The Hague *Convention concerning the Jurisdiction of Authorities and the Applicable Law with Respect to the*

Protection of Minors (94). It ensures concordance, as regards jurisdiction, with Articles 17 and 18.

Under paragraph 1, the general rule with respect to the protection of persons and their property is to give jurisdiction to the court of their domicile.

However, an exception is provided for in cases where it is difficult to organize this protection at the domicile or in the event of an urgency, for instance if there is doubt as to whether rights might be exercised because application of the foreign law or recourse before the authority of the foreign domicile would require a considerable period of time or would result in costs out of proportion to the rights claimed. Assessment of these circumstances must be left to the courts.

The text makes no reference to incapable persons or incapacities but simply to measures of protection of persons and their property.

53

This text partly adopts the rule in Article 70 of the Code of Civil Procedure. In accordance with the Book on *Persons*, by virtue of which each consort may henceforth acquire a separate domicile - defined in terms of habitual residence - it no longer appears necessary to include, as possible grounds of jurisdiction, either the residence of the married woman or the last common residence of the consorts.

The second paragraph runs counter to existing law (95) and recognizes Québec's interest in marriages solemnized in the province. It was considered proper that Québec courts should have jurisdiction to annul a marriage celebrated in Québec, all the more so since their decision would require that the registers of civil status in Québec be changed.

54

In matters of separation as to bed and board and separation as to property, this article abandons the solution provided in Article 70 of the Code of Civil Procedure and now reflects the fact that the wife may acquire a domicile separate from that of her husband.

In divorce matters, the rule proposes connecting factors which differ from those presently provided in Section 5 of the *Divorce Act* (96).

55

Accessory measures, such as dissolution of the matrimonial regime, gifts by marriage contract, and so forth, would be decided by the court seized of the principal action.

The article is based on Sections 10 and 11 of the federal *Divorce Act*. However, as regards the custody of children, reference must be made to Article 59, because the judge before whom the divorce action is pending should not be able to decide the question of custody if the child is neither domiciled nor present within the jurisdiction of the court. The judge must not only have all the elements of the case before him, but he must also be sure of being able to enforce his decision.

56

This article recognizes a new basis of jurisdiction; the jurisdiction founded on the domicile not only of the defendant but also of the plaintiff. This constitutes an exception to the general principle *actor sequitur forum rei*, and is explicable by the social nature of support and the urgency which accompanies it. Since the person to whom support is owed is often destitute, it seems unrealistic to compel him to bring an action abroad.

Paragraph 2 recognizes forum selection by the plaintiff when the defendant does not object to the court's jurisdiction. It deals solely with the principal demand.

57

The object of this article, in an area of importance to public order, is to give Québec courts broad jurisdiction based on the domicile, or even the *de facto* residence, of children in Québec.

58

This proposed rule is based on Section 18 of the *Adoption Act* (97).

59

This article should enable Québec courts to exercise more effective control over the protection of children, which is a matter of public order.

CHAPTER IV

RECOGNITION AND ENFORCEMENT OF FOREIGN DECISIONS

60

This article, and those which follow, are intended to replace Articles 178 to 180 of the Code of Civil Procedure, and provide a more complete set of rules to govern recognition and enforcement of foreign decisions. They are based, like the comments upon them (98), on The Hague

Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters (99). The text departs from the Convention, however, in that it was felt necessary to specify upon whom lay the burden of proof. The Draft creates a presumption of validity in favour of foreign decisions and obliges the defendant who contests such a decision to prove the existence of one of the conditions set forth in this article.

This article establishes the general regime of recognition and enforcement in Québec of decisions rendered abroad in civil or commercial matters. The foreign decision must have been rendered by an authority exercising judicial functions, regardless of the name or nature of such authority, provided the decision is rendered in a civil or a commercial matter.

The defendant may object to recognition or enforcement by raising certain grounds listed in the article, some of which have already been recognized in Québec law (100).

No foreign decision may have any more effect in Québec than it has in the jurisdiction in which it was rendered. This policy explains paragraphs 1, 2 and 3 of the article. Indeed, it would be difficult to give the exequatur to any decision still subject to normal review in the jurisdiction in which it was rendered. If a decision is not executory in the jurisdiction in which it is rendered, it should not be declared executory in Québec.

By virtue of paragraph 5, refusal of recognition or of enforcement may be based solely on fraud committed in the procedure, since by virtue of Article 63, the substance of the foreign decision could no longer be reviewed (101).

Paragraph 6, which is based on paragraph 3 of Article 5 of The Hague Convention (102), and which is intended to bring an end to the hesitations of jurisprudence (103), deals with conflicting judgments and *lis pendens*. It makes provision for cases in which a foreign decision conflicts with a Québec decision or with proceedings in Québec involving the same persons and the same object.

Recognition would be refused if a decision had been rendered in Québec, whether *res judicata* or not. Recognition would also be refused if the Québec action had begun before the action in the country where the foreign decision had been rendered.

When the foreign action is begun first, the foreign decision would have priority only if rendered before the Québec decision.

Although this article makes no mention of public order, recognition and enforcement of a foreign decision could be refused if that decision

were manifestly incompatible with Québec's international public order (Article 5).

61

This article establishes special rules to govern recognition and enforcement of decisions rendered abroad by default.

On the one hand, the burden of proving service or notification of the institution of proceedings would fall upon the plaintiff.

On the other hand, the defaulting party would be required to prove that, in view of the circumstances, he was not aware of the institution of proceedings because of the method of service, or that he did not have sufficient time to present his defence.

62

This article, based on paragraph 1 of Article 7 of The Hague Convention (104), amends existing law (105) which exhibits an excessive chauvinism. According to this article, the foreign court would no longer be required to apply the law which would have been applicable under Québec private international law rules. This solution conforms to recent developments which tend, on the international level, to facilitate as much as possible the recognition and enforcement of foreign decisions (106). In this way, Québec would respect the private international law rules of other countries.

63

This article, based on Article 8 of The Hague Convention (107), substantially amends Articles 178 and 179 of the Code of Civil Procedure and adopts a rule in force in the other provinces and territories of Canada (108) and in a number of foreign countries (109). It is now widely accepted, in order to promote the effectiveness of judicial decisions on an international level, that the enforcing court must not examine the merits of the foreign decision.

According to this article, the Québec judge would not be able to control the interpretation of the private international law rules applied by the foreign court, or its interpretation of the substantive law applied to the substance of the case, or the facts upon which it based its decision. Furthermore, the parties would no longer be able to present new claims, invoke new facts or produce new means of proof.

64

This article, which is drawn from Article 9 of The Hague Convention (110), is intended to avoid dilatory procedures in Québec that would indirectly involve a review of the substance of the foreign decision.

The Québec judge is bound only by the findings of fact on which the foreign court based its jurisdiction. He is not bound by the legal characterization of the facts by the foreign court. Even less is he bound by the interpretation of the rules of law applied by the foreign court in order to establish its international jurisdiction (111).

Only one exception is made to the proposed rule, that of a decision rendered by default, since in such a case the defendant had no opportunity to question the jurisdiction of the foreign court that gave the decision.

65

This article is based on Article 10 of The Hague Convention (112). The first condition for recognition and enforcement of foreign decisions is the existence of international jurisdiction. If, in accordance with Article 60, the defendant contests the jurisdiction of the court of origin, the Québec judge must determine whether the foreign court had jurisdiction, according to the criteria listed in this article.

These criteria are similar to those which a Québec court uses in order to establish its own international jurisdiction. For that reason, this article restates several of the jurisdictional grounds found in Articles 48 and following (113).

In the first paragraph, the rule *actor sequitur forum rei*, an expression of the position of favour which the law accords the defendant, is even more justified on the international level than on the domestic level. Legal persons are not expressly referred to because, in several legal systems, certain social entities have the capacity to sue and to be sued even if they have no juridical personality. The expression "defendant is not a physical person" includes not only legal persons but also any other social entity with judicial capacity.

For the defendant who is not a physical person, this paragraph provides two connecting factors: the place of incorporation and the place where the head office is situated.

The second paragraph deals with cases where a physical or legal person carries on an activity outside the place mentioned in the first paragraph. Disputes relating to such an activity may validly be brought before the court of the place where the establishment or branch office is

located. This formula covers every human activity, including the activities of non-profit legal persons. The text uses the words "at the time the proceedings were instituted", and this naturally refers to the original proceedings and not the exequatur proceedings in Québec. The law governing the original proceedings will determine the exact time when they were instituted.

The third paragraph confirms international jurisdiction *loci rei sitae*. The terms used are very broad, in order to cover not only real actions, but also personal actions relating to immoveables.

The fourth paragraph recognizes the jurisdiction of the *forum delicti commissi*. The text requires that the person who causes the injury be physically present in the territory of the State of the original court at the time when the acts which occasioned the damage occurred in that State. It is not necessary however, for the action to be brought against the person who caused the injury. The proposed rule departs from the text of The Hague Convention in that it covers not only corporeal or material damage, but all types of damage.

The fifth paragraph recognizes the jurisdiction of the contractual forum chosen by the parties, although upon a motion by the defendant, the Québec judge will refuse the exequatur if the case falls within his exclusive jurisdiction. It should be noted that the choice of forum agreement must be in respect of a specific legal relationship, although it is not necessary that it refer to an already existing dispute. The choice of forum agreement must be in writing.

The ground of voluntary appearance referred to in the sixth paragraph expresses a desire to confer jurisdiction in the forum on the condition that the defendant has contested on the merits without reservation. The text contains two exceptions which restrict the scope of the rule. According to the first, if the defendant has contested on the merits without reservation in order to resist the seizure of property or to obtain *mainlevée*, international jurisdiction will not be recognized. In such a case, time is of the essence and the defendant cannot be faulted for not raising the *exceptio incompetentiae internationalis* or some other similar exception. The second exception is the case in which Québec courts have exclusive jurisdiction.

By virtue of the last paragraph, if the plaintiff has selected the foreign court, he cannot complain if that court gives a decision in favour of the defendant. The institution of an action before a court of a given jurisdiction implies in principle the submission of the plaintiff to the international jurisdiction of that court and his agreement to be bound by

its decision. To challenge the international jurisdiction of a court after requesting and accepting its intervention would be contrary to good faith.

66

This article is based on Article II of The Hague Convention (114) and deals with counterclaims. A counterclaim has an independent existence and may therefore be adjudicated upon, in terms of international jurisdiction, independently of the principal claim.

Cases where international jurisdiction is based on the principal claim are excluded. From the point of view of international jurisdiction, the party who brought the action as a principal claim cannot be dealt with in the same manner as the party who made a counterclaim. The defendant who is sued must defend himself, and may do so by way of counterclaim. However, unlike the principal claim, the counterclaim does not imply a voluntary choice of the court seized of the case.

In the second paragraph, the judge who has jurisdiction to hear the principal claim acquires jurisdiction over the counterclaim on the condition that it arises out of the same contract or the same facts on which the principal claim was based (115).

67

This article, based on Article 12 of The Hague Convention (116) recognizes that, in certain cases and by virtue of Québec rules, the courts of Québec or those of a foreign jurisdiction have exclusive jurisdiction.

The last paragraph also recognizes the exclusive jurisdiction of arbitral tribunals.

68

This article lists the documents which a party who seeks recognition or applies for enforcement must file with the Québec court.

A complete copy means the whole text of the foreign decision.

The translation of a foreign decision may be certified as correct by a diplomatic or consular agent, a translator under oath or any other person authorized for that purpose in Québec or in the place of origin.

69

This article outlines the procedure to be followed in order to obtain recognition or enforcement of foreign decisions.

Partial recognition or partial exequatur is possible when the decision contains several claims that can be dissociated.

The last paragraph specifies the period of time within which a motion for exequatur must be brought before a Québec court (117). This period is to be distinguished from prescription of the title given by the foreign decision which, by virtue of Article 46, is governed by the law applicable to the decision, the foreign *lex fori*. The period does not apply to recognition but only to enforcement of foreign decisions. However, if at the time the motion for exequatur is made the foreign decision is no longer enforceable where it was given, it will not be enforced in Québec (118).

70

This article is based on Article 19 of The Hague Convention (119). A judicial settlement, which is somewhat related to a judgment by consent in English law, is still primarily a contract between the parties, sanctioned by procedure. In spite of its consensual character, this article assimilates such a settlement to a judicial decision. Such settlements are subject to the conditions of the preceding articles, to the extent that such conditions are applicable to them.

71

This article, based on Article 20 of The Hague Convention (120), is designed to avoid contradictory decisions.

The first condition for the exception of *lis pendens* is that the first action must already have been pending when the second action was instituted in Québec.

Whether the two causes of action are identical must be determined by the rules of Québec where the exception of *lis pendens* is raised. Once the exception is raised, the Québec court is not required to uphold it.

The second paragraph indicates that the principle of respect for foreign *lis pendens* stated in the first paragraph does not prevent Québec courts from ordering conservatory or provisional measures to be carried out within the province.

72

It is appropriate that the question as to whether a foreign decision ordering payment of a sum of money confers a right to interest be submitted to the law of the original court.

The law of the original court which transformed the obligation that gave rise to the action into a judicial obligation must determine whether the foreign decision confers the right to interest, the rate of any such interest and the time from which it begins to run.

73

The article is consistent with existing law, since according to the federal *Currency and Exchange Act* (121), a Québec court cannot order a debtor to pay a sum of money expressed in foreign currency.

Conversion into Canadian dollars would be made at the rate of exchange prevailing at the time the decision became executory in the jurisdiction in which it was rendered, since it is at that time that the amount awarded becomes due. This solution is identical to that of the different laws in force in the other provinces of Canada relating to the reciprocal enforcement of judgments (122).

74

It is appropriate that, by analogy, Québec recognize the jurisdiction of a foreign court if that jurisdiction is based on the same criteria as those mentioned in Article 53. However, in the third paragraph, the fact that in many countries jurisdiction in matters of nullity is based on the nationality of either consort had to be taken into account.

The article uses the word "authority" seized in order to include non-judicial bodies such as religious or administrative tribunals.

75

The first paragraph of the article conforms to the federal *Divorce Act* (123).

The second paragraph recognizes the jurisdiction of the courts of the State whose nationality either consort had at the time of the application, since in many countries jurisdiction is based on nationality.

This text also uses the word "authority" in order to include religious or administrative bodies.

76

The article recognizes decisions rendered on the same jurisdictional grounds as those used by Québec courts under Article 57. Nationality is added in order to take international practice into account (124).

77

This article is intended to encourage adoption. An adoption effected by an authority competent according to its own rules would be recognized in Québec unless contrary to the public order of the forum (125).

78

It seemed preferable that, to ensure the protection of children, Québec courts not be bound by foreign decisions if this is in the interest of the child. The article confirms a growing practice in this field (126) and conforms to Article 25 in the Book on *Persons*.

The grounds of jurisdiction are those of Article 59, which deals with the jurisdiction of Québec courts. However, in order to reflect international practice (127), it was felt necessary to ensure recognition of a decision rendered by the court of the State of which the child was a national.

79

This article confers upon the foreign court a jurisdiction identical to that exercised by Québec courts in such matters (128). Nationality is added so as to take international practice into account. Other examples of this policy are found, particularly in Article 75.

The text uses the word "authority" in order to include decisions rendered by non-judicial bodies.

80

This article makes a major change in existing law (129), in order to benefit those who have obtained a decision granting support. The article constitutes a departure from paragraph 4 of Article 60.

81

The purpose of this article is to establish the other terms and conditions for recognition and enforcement of foreign decisions in the matters contemplated in the text.

82

This article clarifies existing law. Decisions relating to the status and capacity of persons are not subject to the procedure of exequatur. This rule is followed in France and elsewhere (130). For example, any decision appointing a tutor or declaring a marriage null must be recognized of right without it being necessary to proceed by way of exequatur.

Only when this decision gives rise to measures of constraint against persons or of execution on property is the exequatur required.

Obviously, a decision rendered outside Québec relating to the status and capacity of persons may still be contested if it does not comply with the conditions outlined in the Draft.

CHAPTER V

RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRATION AWARDS

83

This article is based on Article 5 of the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, adopted by the United Nations Conference on International Commercial Arbitration, on 10 June 1958 (131). The provisions cover arbitration awards made outside Québec and awards made in Québec but which are "foreign" - strictly speaking - either because they are subject to the law of another country governing arbitration procedure, or because they are international in nature, particularly as they were made within the framework of an international institution of arbitration (132).

Paragraph 1 takes into account the provisions of Article 29: the law of the State where the award was made must not be retained to determine the validity of the arbitration agreement. This paragraph adopts the form of Article 9.1a of the *European Convention on International Commercial Arbitration*, of 21 April 1961 (133).

Paragraph 2 is based on paragraph 1b of Article 5 of the New York Convention.

Paragraph 3, drawn from paragraph 1c of Article 5 of the New York Convention, reflects the view that it was desirable to permit the dissociation of the provisions of an arbitration award, in order to favour partial enforcement.

Paragraph 4 is drawn from paragraph 1d of Article 5 of the New York Convention, and contains a provision which follows logically from paragraph 1 of Article 83.

Paragraph 5 is based on paragraph 1e of Article 5 of the New York Convention, and takes into account the provisions of Article 29.

84

This article is based on paragraphs 1a and 1b of Article 4 of the New York Convention and on paragraph 3 of Article 68.

85

It seemed that it was necessary to provide for a special procedure for the recognition and enforcement of arbitration awards in Québec. Just as foreign judgments are recognized and enforced by way of exequatur (a.

69), so arbitration awards should be recognized or enforced by way of motion for homologation, in accordance with Article 950 of the Code of Civil Procedure (134).

CHAPTER VI

IMMUNITY FROM CIVIL JURISDICTION AND EXECUTION

86, 87 and 88

These articles codify international custom regarding immunity from civil jurisdiction and execution (135), although this immunity cannot be enjoyed in the case of actions relating to a commercial activity. Article 86 adopts the distinction between acts *jure imperii* and acts *jure gestionis*, a distinction which is increasingly recognized (136).

89 to 99

Article 89 and those following contain the provisions, slightly amended, of the Vienna Conventions of 1961 and 1963 on diplomatic relations and on consular relations (137), which codify international custom.

100

It was felt desirable to decide as to the time from which the persons contemplated in this chapter enjoy these immunities.

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(1) (1893) 2 Q.B. 413, conf. by (1896) 25 S.C.R. 307.

(2) Concluded 5 October 1961; see, to this effect, in *Recueil des Conventions de La Haye*, edited by the Bureau Permanent de la Conférence de La Haye, Netherlands, 1973, p. 48 et s.; or in *United Nations Treaty Series*, 1964, vol. 510, p. 177 et s.

(3) Concluded 15 June 1955; see, to this effect, in *Recueil des Conventions de La Haye, op. cit.*, p. 12 et s.; or in *United Nations Treaty Series*, 1964, vol. 510, p. 147 et s.

(4) Concluded 15 April 1958; see, to this effect, in *Recueil des Conventions de La Haye, op. cit.*, p. 16 et s.

(5) Concluded 26 April 1966; see, to this effect, in *Recueil des Conventions de La Haye, op. cit.*, p. 106 or in (1966) 55 Rev. crit. dr. int. pr., p. 328 et s.; followed by a supplementary Protocol concluded in October 1966, in *Recueil*, The Hague, *op. cit.*, p. 124.

(6) *Convention on the Recognition and Enforcement of Foreign Arbitral Awards,* adopted in New York on 10 June 1958, in *United Nations Treaty Series*, 1959, vol. 330, p. 3 et s.

(7) See, especially, W.S. JOHNSON, *Conflict of Laws*, 2nd ed., Montreal, Wilson & Lafleur, 1962, pp. 4 to 7; J.G. CASTEL, *Conflict of Laws*, 3rd ed., Toronto, Butterworths, 1974, pp. 1 to 6; The American Law Institute, *Restatement of the Law, Second, Conflict of Laws*, 2d, St. Paul, Minn., American Law Institute Publishers, 1971, Nos 1 to 6, pp. 1 to 17; H. BATIFFOL and P. LAGARDE, *Traité de droit international privé*, 6th ed, Paris, Librairie générale de Droit et de Jurisprudence, t. 1, 1974, pp. 2-3; DICEY and MORRIS, *The Conflict of Laws*, 9th ed., London, Stevens & Sons Ltd., 1973, pp. 3 to 8.

(8) See, in particular, the Hague *Convention on the Law applicable to Products Liability*, 1972, in the Acts and Documents, Conférence de La Haye, 1972.

(9) See, on this subject, H. BATIFFOL and P. LAGARDE, *op. cit.*, t. 1, No. 294.

(10) See, especially, *Gauthier v. Bergeron*, [1973] C.A. 77; *McLean v. Pettigrew*, [1945] S.C.R. 62; (seems) *Pouliot v. Cloutier*, [1944] S.C.R. 284; *Agnew v. Gober*, (1910) 38 S.C. 313; *Samson v. Holden*, [1963] S.C.R. 373; *Lister v. McAnulty*, [1944] S.C.R. 317; *contra*, *Redshaw v. Redshaw*, [1942] S.C. 109.

(11) See, on this subject, J.G. CASTEL, *Propos sur la structure des règles de rattachement en droit international privé*, (1961) 21 R. du B. 181, p. 195; J.D. FALCONBRIDGE, *Conflict Rule and Characterization of Question*, (1952) 30 Can. Bar Rev. 103; W.R. LEDERMAN, *Classification in Private International Law*, (1951) 29 Can. Bar Rev. 3; A.H. ROBERTSON, *Characterization in the Conflict of Laws*, Harvard University Press, 1940.

(12) (1893) 2 Q.B. 413, conf. by (1896) 25 S.C.R. 307.

(13) On the renvoi in Québec law, see J. DESCHENES, *La théorie du renvoi en droit québécois*, in Mélanges Bissonnette, P.U.M., 1963, p. 265.

(14) See, especially, The Hague Conventions relating to: *la loi applicable aux ventes à caractère international d'objets mobiliers corporels*, concluded 15 June 1955, in *Recueil des Conventions de La Haye, op. cit.*, p. 12 et s.; or in *United Nations Treaty Series*, 1964, vol. 510, p. 147 et s.; *la loi applicable au transfert de la propriété en cas de vente à caractère international d'objets mobiliers corporels*, concluded 15 April 1958, in *Recueil*, The Hague, *op. cit.*, p. 16 et s.; *pour régler les conflits entre la loi nationale et la loi du domicile*, concluded 15 June 1955, in *Recueil*, The Hague, *op. cit.*, p. 24 et s.; *The law applicable to Traffic Accidents*, concluded 4 May 1971, in *Recueil*, The Hague, *op. cit.*, p. 142 et s.; see, also, P. FRANCESCAKIS, *La théorie du renvoi*, Paris, Sirey, 1958, No. 271.

(15) H. BATIFFOL and P. LAGARDE, *op. cit.*, t. 1, No. 304.

(16) See, especially, W.S. JOHNSON, *op. cit.*, p. 595 et s.; J.G. CASTEL, *Conflicts of Laws*, *op. cit.*, p. 115; H. BATIFFOL, and P. LAGARDE, *op. cit.*, Nos 365 and 366; DICEY & MORRIS, *op. cit.*, p. 71.

(17) See, to this effect, *Gauvin v. Rancourt*, [1953] R.L. 517 (Q.B.); *Stevens v. Fisk*, (1885) 8 L.N. 42 (S.C.C.).

(18) See, especially, in matters of marriage, *Durocher v. Degré*, (1901) 20 S.C. 456; *Pearson v. Barrett*, [1948] S.C. 65, where the recourse to the idea of fraud was not necessary; *F. v. G.*, [1951] S.C. 458; in matters of divorce, to confirm the subsidiary character of the exception: *Trottier v. Rajotte*, [1940] S.C.R. 203; in contractual matters, *Vita Foods Products v. Unus Shipping Co.*, [1939] 2 D.L.R. 1 (J.C.P.C.), where the choice of the applicable law was considered *bona fide* and legal.

(19) See, on this subject, J.G. CASTEL, *La fraude à la loi en droit international privé québécois*, (1964) 24 R. du B. 1.

(20) See, especially, *Johnstone v. Connolly*, (1869) 1 R.L. 253 (Q.B.); *McMullen v. Wadsworth*, (1889) 14 A.C. 631, conf. (1887) 12 S.C.R. 466; and, more recently, *Fonds d'indemnisation des victimes d'accidents d'automobile v. Dame Rahima*, [1969] Q.B. 1090.

(21) See, especially, Article 5 of The Hague *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*, *op. cit.*, p. 24 et s.

(22) *Projet de loi complétant le Code civil en matière de droit international privé*, in (1970) 59 Rev. crit. dr. int. pr., pp. 832 to 846; see, also, the Lizardi case, Req. 16 Jan. 1861, D.1861.1.193; S.1861.1.305 and a study on the question by P. GLENN, *La capacité de la personne en droit international privé français et anglais*, Paris, Dalloz, p. 110 et s.

(23) See, especially, a. 49 of the Portuguese Code; a. 13 of the Greek Code; a. 7c of the Swiss *Loi fédérale sur les rapports de droit civil des citoyens établis en séjour,* (25 June 1891); a. C.21 of the *Czechoslovakian Law on Private International Law and Civil procedure,* (4 December 1963); a. 14 of the *Polish Law on Private International Law*, (12 November 1965).

(24) See, on this subject, W.S. JOHNSON, *op. cit.*, p. 185; *Agnew v. Gober*, (1910) 38 S.C. 313 (C. Rev.); *Stephens v. Falchi*, [1938] S.C.R. 354; *Redshaw v. Redshaw*, [1942] S.C. 109.

(25) R.S.C. 1970, c. D-8.

(26) See, on this subject, J.G. FRECHETTE and H. DE MESTIER DU BOURG, *Le divorce en droit international privé canadien et québécois*, (1972) 3 R.D.U.S. 101; E. GROFFIER, *Le divorce dans le droit international privé canadien*, (1972) 1 Interlex 6, p. 7; J. TALPIS, *Valeur et efficacité des divorces en droit international privé québécois*, (1973) 14 C. de D. 625.

(27) See, especially, *Lefebvre v. Digman*, (1897) 3 R. de J. 194 (S.C.).

(28) This article restates, with some modifications, the provisions of Articles 2

and 3 of the *Preliminary Report on Conflicts of Laws and of Jurisdictions in Relation to Adoption*, C.C.R.O., 1969, VIII.

(29) See Articles 25 et s.

(30) See, to this effect, in *Recueil des Conventions de La Haye*, *op. cit.*, p. 32 et s.

(31) See, to this effect, in *Recueil*, The Hague, *op. cit.*, p. 218 et s.

(32) *Ibid.*, a. 7.

(33) *Ibid.*, a. 8.

(34) See, especially, *David v. Royal Trust*, (1926) 28 P.R. 155 (S.C.).

(35) See, on this subject, G. TRUDEL, *Traité de droit civil du Québec*, Montreal, Wilson & Lafleur, 1942, t. 2, p. 457; W.S. JOHNSON, *op. cit.*, p. 104.

(36) [1930] A.C. 79.

(37) (1896) 25 S.C.R. 307.

(38) [1957] R.L. 193 (Q.B.).

(39) For a statement of the question, see J.G. CASTEL, *De la forme des actes juridiques et instrumentaires en droit international privé québécois*, (1957) 35 Can. Bar Rev. 654.

(40) Concluded 5 October 1961. See, to this effect, in *Recueil des Conventions de La Haye*, *op. cit.*, p. 48 et s.; or in *United Nations Treaty Series*, 1964, vol. 510, p. 177 et s.

(41) See, on this subject, W.S. JOHNSON, *op. cit.*, p. 572; *Vipond v. Furness Withy and Co. Ltd*, (1917) 54 S.C.R. 521; *Bristol Aeroplane v. McGill*, [1963] Q.B. 829; *Fiorito v. the Contingency Insurance Co. Ltd*, [1971] S.C.I.

(42) See, as an example, *Smith Transport Ltd. v. IN-TRA-CO Inc.*, [1974] S.C. 265; *Imperial Life Ins. Co. of Canada v. Colmenares*, [1967] S.C.R. 443; *Drew Brown Ltd v. The Ship Orient Trader*, [1974] S.C.R. 1286.

(43) See, to this effect, in *Recueil des Conventions de La Haye*, *op. cit.*, p. 12 et s.; or in *United Nations Treaty Series*, 1964, vol. 510, p. 147 et s.

(44) See the comments on the Convention by PH. KAHN, in *Clunet*, 1966, p. 331 et s., and also the Report by L. JULLIOT DE LA MORANDIERE, in *Documents relatifs à la 7e Session de la Conférence de La Haye*, Imprimerie Nationale de La Haye, 1952, p. 24 et s.

(45) L.Q. 1971, c. 74.

(46) See Article 21.

(47) 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; J. TALPIS, *Les régimes matrimoniaux en droit international privé*

québécois, Cours de perfectionnement de la Chambre des Notaires, 1974, 231; E. GROFFIER, *Les conflits de lois en matière de régimes matrimoniaux au Québec et en France*, (1972) 1 Interlex 2 and 3; *Tétreault v. Baby*, (1940) 78 S.C. 280.

(48) See, on this subject, W.S. JOHNSON, *op. cit.*, p. 318; *Connolly v. Woolrich*, (1867) 11 L.C.J. 197 (S.C.); *Lister v. McAnulty*, [1944] S.C.R. 317.

(49) The subsidiary attachment of common nationality is a solution proposed by the draft convention on the law applicable to matrimonial regimes, adopted at The Hague in 1976; see *Conférence de La Haye de droit international privé*, Thirteenth Session, *Acte final*, 23 October 1976, p. 2.

(50) On the mutability of foreign matrimonial regimes, see A. POPOVICI, *De la mutabilité du régime matrimonial étranger*, (1975) 35 R. du B. 77.

(51) See, on this subject, Civ. 1ère, 4 July 1972, Hecht, Rev. crit. dr. int. pr. 1974, p. 82, n. Level; Civ. 7 May 1963, (1963) 52 Rev. crit. dr. int. pr. 614, note Motulsky-Caffaire Gosset; see, also, *Sinyor Spinners of Canada Ltd v. Leesona Corp.*, [1976] C.A. 395.

(52) See, to this effect, the second and third draft codifications, in (1970) 59 Rev. crit. dr. int. pr., pp. 832 to 846.

(53) See, especially, *O'Connor v. Wray*, [1930] S.C.R. 231.

(54) See, on this subject, P.-A. CREPEAU, *De la responsabilité civile extra-contractuelle en droit international privé québécois*, (1961) 39 Can. Bar Rev. 3; *Bussières v. Pélissier*, S.C. (Québec - 84,577) 23 May 1955; *Stonehouse v. Jackson*, [1974] S.C. 284.

(55) See, on this subject, J.G. FRECHETTE, *Des conflits de lois en matière de délit et de quasi-délit en droit international privé québécois*, (1973) 4 R.D.U.S. 55; E. GROFFIER, *La responsabilité civile du fait d'autrui en droit international privé québécois*, (1973) 33 R. du B. 362; J.G. CASTEL and P.-A. CREPEAU, *International Developments in Choice of Law governing Torts: Views from Canada*, (1971) 19 Am. J. of Comp. Law, p. 17.

(56) See, in particular, for a discussion of various solutions in *International Colloquium on the European Preliminary Draft Convention on the Law applicable to contractual and non contractual obligations*, ed. K. SIEHRS, Copenhagen, 1975, p. 42 et s.

(57) See, on this subject, J.H.C. MORRIS, *The Proper Law of a Tort*, (1951) 64 Harv. L. Rev. 881; *Babcock v. Jackson*, (1963) 12 N.Y. 2d 473, and the comments by J.G. CASTEL in (1964) 53 Rev. crit. dr. int. pr. 284.

(58) This paragraph is based on Article 7 of The Hague *Convention on the Law applicable to Products Liability*, 1972, in *Recueil*, The Hague, *op. cit.*, p. 192 et s. Nevertheless, it was felt inadvisable to adopt the entire Convention, but it was preferred to use the very simple rule contained in

Article 4a of the Convention (the law of the habitual residence of the victim).

(59) *Ibid.*, a. 2a) and 3.

(60) See, on this subject, W.S. JOHNSON, *op. cit.*, p. 509 et s.; J. TALPIS, *The law governing the domain of the "statut réel" in contracts for the transfer inter vivos of moveable property ut singuli in Quebec private international law,* (1970) 73 R. du N. 275, 356, 501, and, by the same author, *Search for a choice of law rule to govern the domain of the "statut réel" in contracts for the transfer inter vivos of moveables ut singuli in Quebec private international law*, (1973) 8 R.J.T. lll; see, also, *Gauthier v. Bergeron*, [1973] C.A. 77.

(61) Concluded 15 April 1958; see, to this effect, in *Recueil des Conventions de La Haye*, *op. cit.*, p. 16 et s.

(62) *Ibid.*

(63) See, to this effect, the Report of the proceedings of the first Commission on the draft *Convention de La Haye sur la loi applicable au transfert de propriété en cas de vente à caractère international d'objets mobiliers corporels*, by L. JULLIOT DE LA MORANDIERE, in *Actes de la 8e Session*, p. 294 et s.; and the comments by G. VAN HECKE, Rapporteur of the Convention, in *Actes et Documents de la 8e Session*, p. 6 et s.

(64) See, to this effect, the comments by M. PASCHOUD, in (1957) 4 *Nederlands Tidjschrift voor International Recht*, p. 254 et s.

(65) See, *supra*, footnote 61.

(66) See, on this subject, the comments on the Convention, *supra*, footnotes 63 and 64.

(67) *Ibid.*

(68) *Ibid.*

(69) See, *supra*, footnote 61.

(70) See the comments by L. JULLIOT DE LA MORANDIERE and the Report by G. VAN HECKE, *op. cit.*

(71) See Article 210 of the Book on *Property*.

(72) *Permanent Editorial Board for the Uniform Commercial Code*, Final Report, 25 April 1971.

(73) *Personal Property Security Act*, R.S.O. 1970, c. 344, s. 5 to 8.

(74) *Proceedings of the fifty-third annual meeting*, Jasper, 1971, s. 5 to 8.

(75) See, on this subject, Article 154 of the Book on *Obligations*.

(76) *Loc. cit.*, a. 9-103(3).

(77) See, especially, R.S.O. 1970, c. 344, s. 7(1).

(78) See, on this subject, W.S. JOHNSON, *op. cit.*, p. 459 et s.; A. COSSETTE, *Le droit international privé en matière de succession*, (1967) 70 R. du N. 237; J. TALPIS, *Les successions en droit international privé québécois*, Cours de perfectionnement de la Chambre des Notaires, 1975, 225; *Hawthorne v. O'Borne et Dion*, (1911) 40 S.C. 503. But see J.G. FRECHETTE, *Le sort des successions en droit international privé québécois et comparé: solution actuelle et solution proposée*, (1973) 4 R.D.U.S. 185.

(79) See, especially, for the *lex causae*: *Wilson v. Perry*, (1860) 4 L.C.J. 17 (S.C.); *Lefebvre v. Digman*, (1897) 3 R. de J. 194 (S.C.): *Lapotterie v. C.P.R.*, (1906) 12 R. de J. 159 (S.C.); and, for the *lex fori*: *Abbott v. Arnton*, (1918) 24 R.L. 236 (S.C.); *John Morrow Screw and Nut Co. v. Hankin*, (1918) 58 S.C.R. 74; for a statement of the problem, see J.G. FRECHETTE and H. LANGEVIN, *La preuve en droit international privé québécois*, (1974) 5 R.D.U.S. 186.

(80) See, to this effect, H. BATIFFOL and P. LAGARDE, *op. cit.*, t. 2, 1976, No. 706; LEREBOURS - PIGEONNIERE, *Précis de droit international privé*, 8th ed. by Y. LOUSSOUARN, Paris, Dalloz, 1962, No. 435; M. PLANIOL and G. RIPERT, *Traité pratique de droit civil français*, 2nd ed. by P. ESMEIN, Paris, Librairie générale de droit et de jurisprudence, 1952, t. 6, No. 464.

(81) See, to this effect, W.S. JOHNSON, *op. cit.*, p. 905-929; by the same author, *Voyage autour de l'article 2190 C.C.*, (1955) 33 Can. Bar Rev. 687; J.G. FRECHETTE, *La prescription en droit international privé*, (1972) 3 R.D.U.S. 121.

(82) See, on this subject, the notes by Brossard J. in *Scottish Metropolitan Assurance v. Graves*, [1955] S.C. 88.

(83) This is the solution in France: Civ. 21 April 1971, 2 judgments; J.C.P. 1971.II.16825 n. Level; Rev. crit. dr. int. pr. 1972, 74, n. P. LAGARDE.

(84) See a. 6 par. 2 C.C.

(85) See, on this subject, W.S. JOHNSON, *op. cit.*, p. 863; J.G. CASTEL, *Procedure and the Conflict of Laws*, (1970) 16 McGill L.J. 603; *Wilson v. Perry*, (1860) 4 L.C.J. 17 (S.C.); *John Morrow Screw and Nut v. Hankin*, (1918) 58 S.C.R. 74; *Palmer v. Newcommon*, [1960] P.R. 232 (Q.B.). See, also, H. BATIFFOL and P. LAGARDE, *op. cit.*, t. 2, No. 696 et s.; DICEY and MORRIS, *op. cit.*, p. 1099 et s.

(86) See, on this problem, J. DESCHENES, *Le mystère de l'article 75 du Code de procédure civile*, (1966) 26 R. du B. 565; see, also, *Ferme Bergeron v. Société agricole de Laurierville*, [1975] S.C. 837.

(87) See, especially, *McLellan v. Stevenson*, [1963] S.C. 16; *Assurances du Crédit v. Dell*, [1959] S.C. 309; *St-Pierre v. McGraw*, [1960] Q.B. 998.

(88) See, on this subject, W.S. JOHNSON, *op. cit.*, p. 1024 et s.; *Trowers and Sons v. Ripstein*, [1944] 4 D.L.R. 497 (J.C.P.C.).

(89) This would comply with the opinion expressed in *Meservier v. the Canadian Pacific R.R. Co.*, (1885) 11 Q.L.R. 161 (C. Rev.) and in *Nepean Motors Ltd v. Linval Acceptance Corp.*, [1973] C.A. 797, p. 800.

(90) See, to this effect, *Palmer v. Newcommon*, [1960] P.R. 232 (Q.B.); *Kondylis v. Greyhound*, [1973] P.R. 241 (S.C.); *Liman v. K.L.M. Royal Dutch Airlines*, [1974] C.A. 505.

(91) Concluded 25 November 1965; see, to this effect, in *Recueil*, The Hague, *op. cit.*, p. 96 et s. On this subject, see the dissidence of the Honourable Mr. Justice Mayrand in *Victoria Transport Ltd v. Alimport*, [1975] C.A. 415, p. 419.

(92) See, on this subject, W.S. JOHNSON, *op. cit.*, p. 996; *Alimport (Empresa Cubana Importadora de Alimentos) v. Victoria Transport Ltd.*, S.C.C. 5 May 1976, (1976) 10 N.R. 451; *Les Assurances du crédit v. Dell*, [1959] S.C. 309; *Lieff v. Palmer*, (1937) 63 K.B. 278, p. 284, notes by Rivard J.; *Massey Harris Co. v. Bélanger*, (1908) 9 P.R. 303 (S.C.); *Pilnik v. Numizinski*, (1899) 16 S.C. 231.

(93) See, especially, *Mazur v. Sugarman*, (1939) 42 P.R. 150 (S.C.); *Senauer v. Porter*, (1863) 7 L.C.J. 42 (S.C.); *Equity Accounts Buyers v. Jacob*, [1972] S.C. 676; *Union Acceptance Corporation v. Guay*, [1960] Q.B. 827.

(94) Concluded 5 October 1961, in *Recueil*, The Hague, *op. cit.*, p. 42 et s. and also, in *United Nations Treaty Series*, 1969, vol. 658, p. 145.

(95) See, especially, *Main v. Wright*, [1945] K.B. 105; see, *contra*, *Trott v. Parkes*, [1945] S.C. 1.

(96) R.S.C. 1970, c. D-8.

(97) L.Q. 1969, c. 64.

(98) See, on this subject, the comments by the Rapporteur of the Convention in *Actes et Documents de la Session Extraordinaire de la Conférence de La Haye*, 1966, p. 360 et s.

(99) See, to this effect, in *Recueil*, The Hague, *op. cit.*, p. 106 et s.

(100) See, on this subject, W.S. JOHNSON, *Foreign Judgments in Quebec*, (1957) 35 Can. Bar Rev. 911; P.-A. CREPEAU, *La reconnaissance judiciaire des jugements de divorce étrangers dans le droit international privé de la province de Québec*, (1959) 19 R. du B. 310, p. 315 and 321; *Blackwood v. Percival*, (1903) 23 S.C. 5; *Howie v. Stanyar*, [1944] S.C. 305; *Pacaud v. Pacaud*, (1911) 12 P.R. 318 (S.C.).

(101) See, in particular, *Powell v. Cockburn*, (1976) 8 N.R. 215.

(102) See, on this subject, in *Recueil*, The Hague, *op. cit.*, p. 106 et s.

(103) See, on this subject, J.G. CASTEL, *Quelques questions de procédure en droit international privé québécois*, (1971) 31 R. du B. 134; *Toulon Construction Inc. v. Rusco Industries*, [1973] P.R. 138 (C.A.); *Olympia and York Development Ltd v. Peerless Rug Ltd*, [1975] C.A. 445.

(104) See, on this subject, in *Recueil*, The Hague, *op. cit.*, p. 106 et s.

(105) See, on this subject, P.-A. CREPEAU, *loc. cit.*, p. 321; W.S. JOHNSON, *Foreign Judgments in Quebec*, (1957) 35 Can. Bar Rev. 911, and, especially, *Karim v. Ali*, [1971] S.C. 439, and the comments by A. POPOVICI, (1972) 32 R. du B. 229 and by E. GROFFIER, (1972) 1 Interlex, No. 7, p. 9.

(106) See, on this subject, *Actes et documents, Conférence de La Haye*, 1966, pp. 28 and 382; The American Law Institute, *Restatement of the Law, Second, Conflict of Laws, 2d*, St-Paul, Minn., 1971, No. 98, p. 298. See also the uniform laws prepared by the Conference of Commissioners on Uniformity of Legislation in Canada: *Uniform Foreign Judgments Act*, 1933, *Proceedings of Conference of Commissioners on Uniformity of Legislation in Canada*, p. 86; 1964, *op. cit.*, p. 107, adopted by Saskatchewan, R.S.S. 1965, c. 95 and New Brunswick, R.S.N.B. 1973, c. F-19; and *Reciprocal Enforcement of Judgments Act*, (1925) 10 Proc. Can. Bar Assoc. 327, 351; 1956, *Proceedings of Conference of Commissioners on Uniformity of Legislation in Canada*, p. 82; 1957, *op. cit.*, pp. 25, 26, lll; 1958, *op. cit.*, p. 90; 1962, *op. cit.*, p. 108; 1967, *op. cit.*, p. 22.

(107) See, on this subject, in *Recueil*, The Hague, *op. cit.*, p. 106 et s.

(108) See, on this subject, J.G. CASTEL, *Recognition and Enforcement of Foreign Judgments in Personam and in Rem in the Common Law Provinces of Canada*, (1971) 17 McGill L.J. ll; K.H. NADELMANN, *Enforcement of Foreign Judgments in Canada*, (1960) 38 Can. Bar Rev. 68.

(109) See, on this subject, H. BATIFFOL and P. LAGARDE, *op. cit.*, t. 2, No. 729; the Munzer case, Civ. 7 January 1964, and the comments by H. BATIFFOL, (1964) 53 Rev. crit. dr. int. pr. 344; DICEY and MORRIS *op. cit.*, p. 1018.

(110) See, on this subject, in *Recueil*, The Hague, *op. cit.*, p. 106 et s.

(111) See, especially, *Gauvin v. Rancourt*, [1953] R.L. 517 (Q.B.).

(112) See, to this effect, in *Recueil*, The Hague, *op. cit.*, p. 106 et s. See also, the comments by the Rapporteur, *op. cit.*, p. 360 et s.

(113) These grounds have already been used by Québec courts in establishing the international jurisdiction of foreign courts. See, especially, *Stacey v. Beaudin*, (1886) 9 L.N. 363 (S.C.); *Monette v. Larivière*, (1926) 40 K.B. 351.

(114) See in *Recueil*, The Hague, *op. cit.*, p. 106 et s.

(115) See, on this subject, the comments by the Rapporteur, *op. cit.*, p. 360 et s.

(116) See in *Recueil*, The Hague, *op. cit.*, p. 106 et s.

(117) This six-year period is also found in the *Ontario Reciprocal Enforcement of Judgments Act*, R.S.O. 1970, c. 402, s. 2(1).

(118) See a. 60 par. 3.

(119) See in *Recueil*, The Hague, *op. cit.*, p. 106 et s.

(120) *Ibid.*

(121) R.S.C. 1970, c. C-39, s. 11.

(122) See, on this subject, the *Uniform Reciprocal Enforcement of Maintenance Orders Act* proposed by the Conference of Commissioners on Uniformity of Legislation in Canada, Proceedings, 1946, p. 69; 1953, pp. 96-101; 1950, pp. 89-95; 1958, pp. 97-103; 1963, pp. 127-129 and 1970, pp. 338-340: s. 3 par. 3 and s. 6 par. 8.

(123) R.S.C. 1970, c. D-8, s. 6; see, on this subject, J. TALPIS, *Valeur et efficacité des divorces en droit international privé québécois*, (1973) 14 C. de D. 625; E. GROFFIER, *Le divorce en droit international privé canadien*, (1972) 1 Interlex 7.

(124) See, especially, on the application of Articles 14 and 15 of the French Civil Code, H. BATIFFOL and P. LAGARDE, *op. cit.*, t. 2, No. 670; H. BATIFFOL, P. FRANCESCAKIS and M. LE GALCHER-BARON, *Compétence civile et commerciale*, No. 41, in *Répertoire de droit international*, Dalloz, 1968.

(125) This article restates a. 4 of the *Preliminary Report on Conflicts of Laws and of Jurisdictions in relation to Adoption*, C.C.R.O., 1969. (Article 5 of this Report is no longer necessary in view of Article 5, dealing with public order). On *favor adoptionis*, see, especially, G. KENNEDY, *Adoption in the Conflict of Laws*, (1956) 34 Can. Bar Rev. 507; on problems of adoption in successoral matters, see A. MAYRAND, *Adoption et successibilité*, (1959) 19 R. du B. 409.

(126) See, to this effect, *Guindon v. Lemay*, [1973] P.R. 147 (S.C.); *Jones v. Jones*, [1975] S.C. 67; see, *contra*, *Quinn v. Goldman*, [1974] S.C. 515.

(127) See, especially, Articles 14 and 15 of the French Civil Code.

(128) See Article 56.

(129) See, on this subject, W.S. JOHNSON, *op. cit.*, p. 845; *Ryan v. Pardo*, [1957] R.L. 321 (S.C.); *Ellenberger v. Robins*, (1940) 78 S.C. 1.

(130) See, especially, H. BATIFFOL and P. LAGARDE, *op. cit.*, t. 2, No. 742 et s.; *Travaux du Comité français de droit international privé*, 1948-1952, Paris, Dalloz, séance du 21 mai 1952, p. 179 et s.

(131) See in *United Nations Treaty Series*, 1959, vol. 330, p. 3 et s.

(132) Taken from B. GOLDMAN, *L'arbitrage (droit international privé)*, No. 32, in *Répertoire de droit international*, Dalloz, 1968.

(133) See in *United Nations Treaty Series*, 1963-64, vol. 484, p. 349 et s.

(134) See, on this, Articles 1234 et s. of the Book on *Obligations*, which describe the modalities of the motion for homologation.

(135) See, on this subject, H. BATIFFOL and P. LAGARDE, *op. cit.*, t. 2, No.

693 et s.; P. BOUREL, *Immunités*, in *Répertoire de droit international*, Dalloz, 1968.

(136) See, on this subject, the notes by Laskin J. in *La République du Congo v. Venne*, [1971] S.C.R. 997, as those of the Justices of the Court of Appeal, and the authorities cited at [1969] Q.B. 818; see, also, L. KOS-RABCEWICZ-ZUBKOWSKI, *Immunité de juridiction; Etat ou gouvernement étranger; Exposition universelle de 1967*, (1968) 6 C.Y.I.L. 242.

(137) See in *United Nations Treaty Series*, 1964, vol. 500, p. 97 et s., and 1967, vol. 596, p. 263 et s.

SCHEDULE I

PROPOSED CHANGES TO THE CODE OF CIVIL PROCEDURE

BOOK ONE ON PERSONS

I - CODE OF CIVIL PROCEDURE: PROVISIONS WHICH THE DRAFT PROPOSES TO REPEAL

ARTICLE 865

Considering Articles 76 and 77 of the Book on *Persons*, this article should be deleted.

ARTICLES 872 to 876a

Considering the abolition of the family council, chapter V of Book Six would be unnecessary.

ARTICLE 878

Considering Articles 198 of the Book on *Persons* and 10 of the schedule on rules of procedure regarding dative tutorships and curatorships, this article would no longer be useful.

ARTICLE 880

Considering the abolition of the family council, this article would be repealed.

ARTICLE 882

Considering that the Draft removes the causes of interdiction mentioned in this article, it would be repealed.

II - CODE OF CIVIL PROCEDURE: PROVISIONS THAT THE DRAFT RECOMMENDS BE MODIFIED

Considering Article 108 of the Book on *Persons*, it is proposed that Article 864 C.C.P. be replaced with the following:

ARTICLE 864

Any motion to rectify an act of civil status is served on the Registrar of Civil Status and on the persons named in the act, with a notice of the date on which it will be presented.

COMMENTS

Article 108 of the Book on *Persons* mentions that substantial errors other than clerical errors in acts of civil status are rectified on motion.

This article repeats Article 864 of the Code of Civil Procedure, along with the amendments the new system imposes.

The motion is served on the persons named in the act, which seems a good way to identify the interested parties mentioned in Article 864 of the

Code of Civil Procedure. The Registrar of Civil Status replaces the depositaries of the registers.

Repeal of Article 865 C.C.P. is recommended above.

ARTICLE 864a

If there is no opposition following a period of ten days, the judge may order rectification.

If there is opposition, the judge may require any means of proof he deems necessary.

COMMENTS

Interested parties should be allowed to oppose a motion for rectification.

III - PROPOSED RULES OF PROCEDURE

Change of name

Considering Article 32 and following of the Book on *Persons*, the following rules of procedure are proposed:

ARTICLE 1

An application for a change of name is made by a petition to the Registrar of Civil Status.

Such petition sets forth:

1. the present surname and given names of the petitioner and the surname and given names he wishes to adopt;
2. the reasons for which the petitioner has applied for the change of name;
3. the petitioner's address and occupation when the petition is submitted, and during the five previous years;
4. the date and place of the petitioner's birth;
5. the surname and given names of both parents of the petitioner;
6. the surname and given names of the petitioner's consort, if need be;
7. if the petitioner is married, the date and place of his marriage;
8. the surname and given names of each of the petitioner's children and the date and place where each was born, indicating whose surnames would be changed by reason of the petition;
9. all other information required by the Registrar of Civil Status.

The petition must be signed by the petitioner.

COMMENTS

This article repeats Section 3 of the *Change of Name Act* (1) and specifies all the information which must appear in any petition for a change of name.

ARTICLE 2

A petition for a change of name must be accompanied by:

1. Authentic copies of the acts of civil status establishing the births and marriages mentioned in such records, or a declaration by the petitioner stating why he cannot obtain such copies;
2. a sworn declaration by the petitioner attesting that:
   a) he is a Canadian citizen;
   b) he has resided in Québec for at least one year;
   c) the petition is submitted in good faith and solely for the purposes mentioned;
   d) the declarations contained in the petition are true;
3. payment of the fees prescribed by regulation.

COMMENTS

This article reproduces Section 4 of the *Change of Name Act*, replacing the words "has been domiciled in the Province of Quebec" by "has resided in Québec".

ARTICLE 3

A notice of the petition for a change of name must be published once a week, for two consecutive weeks, in the Québec Official Gazette and in one French-language newspaper and one English-language newspaper published or circulating in the judicial district where the petitioner resides.

Such notice must indicate the surname, given names and address of each living person whose name would be changed by reason of the petition.

The Registrar of Civil Status may require any additional publication he deems appropriate.

The petitioner must furnish the Registrar with proof of the required publications.

COMMENTS

This article substantially repeats Section 5 of the *Change of Name Act*. The words "Minister of Justice" are replaced by "Registrar of Civil

Status'' since the Registrar would be responsible for deciding with regard to changes of names.

ARTICLE 4

Any interested person may object to the petition within thirty days following the last prescribed publication.

Upon expiry of such period, the Registrar of Civil Status receives and considers the application and hears any third parties; if he deems that there are sufficient grounds for the change of name and that such change is appropriate, he grants the petition with any changes he considers suitable.

COMMENTS

This article is based on Section 6 of the *Change of Name Act.*

It makes two major changes to existing procedure. First, it allows third persons to object to the petition, and to be heard by the Registrar of Civil Status. Secondly, the civil servant responsible would have the authority to render a decision on a change of name himself; as the law now stands, he cannot do this. The present procedure requires the Minister of Justice to make a recommendation to the Lieutenant-Governor in Council, who then issues an order authorizing the change of name; this procedure would be simplified.

ARTICLE 5

The petitioner, and third parties who have objected to his petition, may, within thirty days after the decision of the Registrar of Civil Status, apply to have that decision reviewed by a judge of the Superior Court.

Such judgment is final and without appeal.

The prothonotary or the clerk of the court immediately sends a copy of the judgment to the Registrar of Civil Status.

COMMENTS

This article, new law, allows review of any decision made by the Registrar of Civil Status.

An application for review would be made by a motion to a judge of the Superior Court or to a judge of the Family Court if this new court is created (2).

ARTICLE 6

Notice of the change of name is published in the Québec Official Gazette.

COMMENTS

This article reproduces Section 9 of the *Change of Name Act*. It is important that a notice be published whenever a name is changed, since names are a public matter.

ARTICLE 7

Any person may obtain a copy of the decision or judgment, as the case may be, granting or refusing a change of name, provided he pays the costs required by regulation.

COMMENTS

This article repeats the second paragraph of Section 9 of the *Change of Name Act*.

ARTICLE 8

Whenever a name has been changed, the Registrar of Civil Status appropriately amends the acts of civil status of the petitioner and, where necessary, those of each of his minor children whose surname has been changed.

If the petitioner is not able to supply the Registrar of Civil Status with copies of the acts mentioned in Article 2, the Registrar draws up new acts and enters them in the register.

COMMENTS

This article amends Section 10 of the *Change of Name Act* to take account of the proposals made in the chapter on *Civil Status*; from now on, according to these proposals, only one person would be responsible for keeping acts of civil status. It also takes into consideration the recommendations concerning changes in civil status acts (3).

Since any change of a person's name also affects his minor children, provided they do not object to such change, it is important to specify that the acts of civil status of these children will be amended accordingly.

Change of physical identity

Considering Articles 51 and following, the rules of procedure that follow are proposed:

ARTICLE 1

An application for a change of physical identity is made by petition to the Registrar of Civil Status.

Such petition sets forth:

1. the surname and given names of the petitioner and the given names he wishes to adopt;

2. the address and occupation of the petitioner when the petition is submitted and during the previous five years;

3. the date and place of the petitioner's birth;

4. the surname and given names of both the petitioner's parents;

5. the petitioner's sex at birth;

6. all other information required by the Registrar of Civil Status. The petition must be signed by the petitioner.

COMMENTS

This article is new law. Like a petition for a change of name, an application for a change of physical identity would be made to the Registrar of Civil Status.

The article also specifies which information must be included in a petition for a change of physical identity.

ARTICLE 2

A petition for a change of physical identity must be accompanied by:

1. a certificate from the medical authorities who performed the surgical operation mentioned in Article 51.

However, if such operation was performed outside Québec, the petitioner must also furnish a certificate from a physician qualified to practise in Québec, certifying that he has examined the petitioner and that the petitioner successfully underwent medical and surgical treatment intended to change the appearance of sex.

2. an authentic copy of the petitioner's act of birth or, failing this, a declaration by the petitioner stating why he cannot obtain such copy;

3. a sworn declaration by the petitioner attesting that:
   a) he is a Canadian citizen;
   b) he has resided in Québec for at least one year;
   c) the petition is submitted in good faith;
   d) he is not married;
   e) the declarations contained in the petition are true.

4. a copy of the judgment of divorce or of annulment of marriage, as the case may be, or of the certificate of death of his spouse;

5. payment of the fees prescribed by regulation.

COMMENTS

This article is the counterpart of Article 2. It enumerates the official documents that the petitioner must furnish in support of his petition.

This article is based on Section 4 of the *Change of Name Act*, as well as on the statutes of British Columbia (4) and Alberta (5).

ARTICLE 3

Upon presentation of the documents required by the foregoing articles, the Registrar of Civil Status draws up a new act of birth containing the appropriate changes.

COMMENTS

This article is new law. Upon presentation of the documents required by law, especially the medical certificate, the sworn declaration certifying to the required period of residence, and the petition for a change of physical identity, the Registrar of Civil Status would have no discretion to grant or refuse the requested changes to the act of birth; he would be obliged to draw up a new act of birth conforming to the petitioner's new physical identity, just as he would after receiving a judgment of change of status (6).

A transsexual person would thus have an act of birth in keeping with his new appearance. Moreover, if the interested person himself or a member of his family should wish to prove his former physical identity, he could obtain a copy of the original act with the changes or the entries added on it, according to the recommendations (7).

ARTICLE 4

A notice of the change of physical identity and of given names is published in the Québec Official Gazette.

COMMENTS

In order to assure protection of third parties, it seemed desirable that a notice of any change of a person's physical identity be published in the Québec Official Gazette.

Legal tutorships

Considering Article 163 and following of the Book on *Persons*, the following rules of procedure are proposed:

ARTICLE 1

The clerk of the court must transmit to the Public Curator, within ten days after it is rendered, every judgment deciding on the right to custody and every judgment ordering deprivation of parental authority, withdrawal of any of its attributes, or withdrawal of legal tutorship, so that such judgment may be filed in the central register of protected persons.

COMMENTS

This proposed article is intended to ensure that the Public Curator is notified every time a change is brought about in the normal exercise of parental authority. A judgment on the right to custody may be accessory to a divorce or a separation, or may simply be a judgment on the right to custody between two unmarried parents.

Obviously, any decision declaring deprivation of parental authority brings about loss of the right to custody, and the case here is one of a child in special need of protection.

Dative tutorships and curatorships

Considering Articles 168 and following and 180 and following of the Book on *Persons*, the following rules of procedure are proposed:

ARTICLE 1

The motion for appointment of a tutor or of a curator is made in the district where the person to be protected is domiciled.

The motion for appointment of a tutor to an absentee is made in the district where the absentee was last domiciled.

COMMENTS

The first paragraph of this proposed article takes up the principle of Article 249 of the Civil Code which states that tutorship begins in the place where the minor is domiciled, and of Article 877 of the Code of Civil Procedure which states that a motion for interdiction is made before the prothonotary of the district where the person to be interdicted has his domicile. In this respect, under existing law, the rules for curatorship to interdicted persons and to absentees are similar to those of tutorship to minors.

ARTICLE 2

The motion must mention:

1. the surname, given names, domicile and profession of the person proposed as tutor or curator;
2. the surname, given names, age and domicile of the minor or of the person of major age to be protected;
3. the surname, given names, domicile and profession of the petitioner.

COMMENTS

The motion must contain all information necessary for the smooth progress of the proceedings.

ARTICLE 3

The motion is served, with at least ten days' notice of the place, date and time of its presentation, on the ascendants, descendants, brothers and sisters of major age of the person to be protected, provided they are domiciled in Québec, on the Public Curator, on the person proposed as tutor or curator, and if need be, on the spouse of such person.

COMMENTS

This article is based on the second paragraph of Article 877 and on Article 878 of the Code of Civil Procedure, whose scope has been broadened.

Service is made on different members of the family of the protected person in order to enable them, if called for, to give their opinion on the choice of a tutor or even on the necessity of placing the person of major age under protection.

This form of indirect consultation of members of the family is intended to replace the first meeting of the family council.

The notice served on the consort of the person proposed as tutor is useful, since no person so proposed might accept the tutorship without the consent of his spouse.

ARTICLE 4

The motion for commencement of protection must also be served on the person to be protected, on a member of his family who is of major age, and, if need be, on the person who has custody of the person to be protected.

COMMENTS

This article incorporates part of Article 877 of the Code of Civil Procedure. The purpose of this provision is mainly to enable persons of major age threatened with placement under protection to defend themselves. Where minors are concerned, service of the motion gives them an opportunity to express their opinion on the choice of a tutor.

This objective cannot be met unless the person is capable of discernment. When he is not, service on a reasonable person of his family, or on the person who has custody of the person to be protected, serves the same purpose.

Court decisions have provided that failure to respect these formalities constitutes grounds for revising an interdiction (8).

ARTICLE 5

The judge may, on summary motion, appoint a person other than the

person proposed in the motion, provided that person has given his consent.

The judge may also appoint the Public Curator to be tutor or curator to any protected person.

COMMENTS

This article deals with two situations. The tutor proposed in the motion might withdraw, in which case the judge must appoint another; or the proposed tutor might not have the desired qualifications for the office. The judge is not bound, any more than under present law, to appoint the tutor whose name is proposed to him (9).

As occasionnally no one can be appointed tutor, either because the protected person has no family or because no one accepts the office, the Public Curator might be appointed.

ARTICLE 6

A motion for the dismissal of a tutor or a curator is submitted to the court of the place where such tutor or such curator is domiciled.

COMMENTS

It seemed logical that the motion for dismissal of a tutor or a curator be submitted at the domicile of the tutor or the curator since that is where the tutorship is based (10).

Moreover, it was deemed essential to adhere to the principle that every application in family matters be made by motion, despite the numerous court decisions requiring applications for dismissal to be made by action (11).

ARTICLE 7

The Public Curator must be impleaded in every motion for the appointment or the dismissal of a tutor.

If the Public Curator has not been impleaded, the prothonotary must suspend proceedings and inform him of the application.

COMMENTS

This article embodies the principle of Article 877a of the Code of Civil Procedure, and also expands it, since at present that article covers only motions for interdiction of persons who are mentally ill. The Committee wished the Public Curator to be impleaded whenever a tutor was appointed or dismissed.

ARTICLE 8

Every judgment appointing or dismissing a tutor or a curator, or revising a protective regime, must be forwarded without delay by the prothonotary to the Public Curator, to be filed in the central register of protected persons.

COMMENTS

This proposed article repeats section 10 of the *Public Curatorship Act* (12), making additional provision for the filing in the register of protected persons.

ARTICLE 9

Every judgment related to the commencement of protection must, within ten days after it is rendered, be served on the protected person of major age and, as the case may be, on his tutor or his curator.

COMMENTS

This article repeats Article 883 of the Code of Civil Procedure, making additional provision for service on the tutor or on the curator.

ARTICLE 10

Before the judge renders any judgment granting a motion for the commencement of a regime of protection, he must order the person to be protected to submit to a medical examination at a hospital centre which the judge chooses or by a psychiatrist or a specialist whom he designates, unless a certificate of incapacity from the director or professional services of the hospital centre where the sick person is treated has been filed.

Such examination takes place on the date, at the place and under the conditions fixed by the judgment ordering it, and, if the person to be protected so desires, in the presence of experts of his choice.

COMMENTS

All the necessary guarantees must be provided for the institution of a protective regime. In particular, a psychiatric examination or, in the case of physical incapacity, an examination by a specialist, seemed essential to enable the judge to hand down a decision.

A medical report, even a recent one, from a family physician did not seem to provide the necessary guarantees, since such a physician could be influenced by the patient's relatives.

ARTICLE 11

The provisions of the Code of Civil Procedure regarding proof before experts apply where appropriate to the medical examination ordered by the court under Article 10.

COMMENTS

The intention was that the medical examination conform to the rules on proof before experts, laid down in Articles 414 and following of the Code of Civil Procedure. These rules, and particularly those related to the grounds for recusation and the detailed and considered nature of the expert's report, ensure protection of the rights of the parties involved.

ARTICLE 12

The prothonotary must immediately transmit a copy of the judgment ordering the medical examination to the person to be protected and to a reasonable person in his family.

COMMENTS

The suggested provision is intended to inform the person who must undergo the examination, and his family, of the decision.

ARTICLE 13

The psychiatrist or the specialist who conducts the examination must make a written report to the court within the period of time fixed by the judgment.

Such report contains the considered opinion of the psychiatrist or the specialist as to the capacity of the person examined to appreciate the consequences of his actions, and as to the extent of his ability to administer his property, and, where need be, the necessity for his internment.

COMMENTS

This proposed article is based on Sections 7 and 8 of the *Mental Patients Protection Act* (13) adapted to fit the protective regime provided for in the Draft. Thus, since a person suffering only from physical handicaps may be placed under protection, specialists other than psychiatrists must be permitted to conduct the examination.

The report by the psychiatrist or the specialist must be substantiated, as called for by the *Mental Patients Protection Act* (14) and also the *Public Curatorship Act* (15) as regards the certificate of incapacity.

This justification is all the more important since the following article gives the person in question the right to challenge both the proof submitted by the applicant and the clinical report.

The report must specify not only the extent to which the person examined is capable of administering his property, but also his ability to appreciate the consequences of his actions.

ARTICLE 14

The report must be communicated to the person of major age for whom protection has been requested.

Such person may produce witnesses to challenge any proof submitted by the applicant and the psychiatric clinical report.

COMMENTS

This article takes up the principle of Article 879 of the Code of Civil Procedure which states that a person whose interdiction has been applied for may produce witnesses and challenge the proof submitted by the applicant.

There was much debate over the advisability of disclosing the medical report to the patient. Some insisted that the report be made available to the parties themselves. They were convinced that every person has the right to know of any diagnosis and recommendations concerning him which might be the basis for a judicial decision to deprive him of his freedom or to limit his exercise of that freedom (16).

Others feared that certain disclosures of the medical report could be detrimental to the health of the person who learns of them. They would have preferred to let the judge decide whether the report should be shown to the person in question.

In the final analysis, the rights of the defence prevailed and the principle of disclosure was accepted.

ARTICLE 15

Before rendering judgment, the court may require a new medical examination if it deems this appropriate.

COMMENTS

According to the rules of the Code of Civil Procedure on proof before experts (17), the judge is not bound to follow the recommendations of the specialist who has conducted the examination. Consequently, if the judge is not satisfied with the conclusions of the medical examination, he can order another one.

Absence

Considering Articles 205 and following of the Book on *Persons*, the following rules of procedure governing absence are proposed:

ARTICLE 1

Application for a declaration of absence is made by a motion to the court of the place where the absentee was last domiciled.

The Minister of Justice may join in one motion several applications for declaration of absence.

COMMENTS

This article is based on Articles 923 and 927 of the Code of Civil Procedure.

ARTICLE 2

No application for a declaration of absence may be granted until a notice has been published, in the manner set forth in Article 139 of the Code of Civil Procedure, requiring any person who may have rights against the absentee to submit his claim to the clerk of the court within the period specified.

COMMENTS

This article substantially repeats Article 925 of the Code of Civil Procedure while changing its drafting.

BOOK TWO ON THE FAMILY

I - RULES OF PROCEDURE RESPECTING OPPOSITION TO MARRIAGE

Considering Article 12 and following of the Book on *The Family*, the following amendments to the provisions of the Code of Civil Procedure are proposed:

ARTICLE 821 C.C.P.

Opposition to marriage is lodged by motion to a judge of the district where either consort has his domicile or of the district where the marriage is to be solemnized.

COMMENTS

This provision restates the substance of the first paragraph of Article 821 C.C.P.

ARTICLE 822 C.C.P.

Opposition is served on the intended consorts with a notice of one clear day from the date of its presentation.

COMMENTS

This provision restricts to the intended consorts the service mentioned in the second paragraph of Article 821 C.C.P. Currently, the officiant is prevented from solemnizing a marriage by mere service of the

opposition. Although the proposed reform will possibly hinder some last-minute oppositions, it is considered vital to prevent frivolous oppositions from indefinitely delaying solemnization.

ARTICLE 823 C.C.P.

The judge, before he decides as to an opposition, may summon any interested persons in order to hear their advice respecting the proposed marriage.

COMMENTS

Article 824 C.C.P. is simplified by this provision in that greater latitude is left to the judge, who may summon not only the future consorts, relatives or, failing them, friends, but any person whose advice appears useful.

Since, under the revision of the law on tutorship, the advice of a family council is no longer required, it has been deleted.

ARTICLE 824 C.C.P.

Whenever an opposition appears serious, the judge orders postponement of the marriage.

He instructs that a court hearing be held shortly thereafter.

COMMENTS

Current law is simplified by this provision, since the judge is allowed to dismiss frivolous objections immediately and to order postponement only where the opposition appears serious.

ARTICLE 825 C.C.P.

Before giving any order for postponement, the judge may require the opponent to furnish security, in an amount fixed by the judge, to guarantee payment of any costs and damages for which the opponent may be liable.

COMMENTS

Allowing the judge to require the opponent to furnish security is a means for discouraging frivolous motions, and is similar to that provided for injunctions, in Article 755 C.C.P.

ARTICLE 826 C.C.P.

Any order for postponement is served on the intended consorts and on the officiant.

COMMENTS

Service of an order for postponement informs the officiant that an

opposition to the marriage exists and is deemed serious by the judge. At this stage, only withdrawal of such opposition may allow solemnization of the marriage.

Penalties for officiants who violate postponement orders will be found in the law governing the celebration of marriage.

ARTICLE 826a C.C.P.

Only the final judgment allowing opposition may be appealed.

Such appeal takes precedence.

COMMENTS

Article 826 C.C.P. is changed so as to restrict any appeal to decisions which allow opposition, because it was considered needless to allow appeal by a persistent opponent whose motion had already been dismissed in the first instance.

II - RULES OF PROCEDURE RESPECTING HOMOLOGATION OF CHANGES IN MATRIMONIAL AGREEMENTS DURING MARRIAGE

Considering Article 76 of the Book on *The Family*, it is proposed to insert after Article 827 a new chapter containing the following provisions:

ARTICLE 827a

A motion for homologation of changes in matrimonial agreements during marriage, together with a notice of the date of submission, must be served on all the creditors of each consort and, if applicable, on all the persons still living who were party to the matrimonial agreements; a list of the creditors of each of the consorts and of the community must be annexed to the motion, with a balance sheet indicating the assets and liabilities of each of the consorts and of the community.

ARTICLE 827b

Notice of the motion and of the date and place of submission must also be published in the manner provided for in Article 139.

COMMENTS

Articles 827a and 827b reproduce the substance of the second paragraph of Article 1266 C.C., but the drafting has been amended.

ARTICLE 827c

The judgment of homologation must be served immediately by the prothonotary, or the clerk of the court that rendered it, on the depositary

of the original of the marriage contract and on the depositary of the original of any instrument modifying the matrimonial regime.

ARTICLE 827d

The depositary of the original is required to mention the judgment which was served on him on the original and on any copy he may make, indicating the date of the judgment, the number of the file, and the name of the district and that of the court.

COMMENTS

Articles 827c and 827d reproduce the first paragraph of Article 1266a of the Civil Code.

ARTICLE 827e

Articles 827c and 827d apply to any judgment which upholds an action for separation as to property, for separation as to bed and board, for nullity or annulment of marriage or for divorce, or which is pronounced under Article 264 of the Book on *The Family*.

COMMENTS

This article substantially reproduces the second paragraph of Article 1266a of the Civil Code. It is also based on Article 817 of the Code of Civil Procedure. It seemed appropriate to mention all the judgments ratifying a dissolution of or change in the regime.

III - RULE OF PROCEDURE RESPECTING MOTIONS FOR DIVORCE OR FOR SEPARATION AS TO BED AND BOARD

Considering Articles 236 and following, it is proposed to insert in Title III of Book One of the Code of Civil Procedure, the following rule:

ARTICLE 1

Either consort, or both consorts together, may apply for divorce or for separation as to bed and board.

COMMENTS

This article of new law did not appear in the original Draft. Under it, either consort may apply for divorce or separation as to bed and board, regardless of the occurrence which caused the marriage to break down, provided that such breakdown is proven to the satisfaction of the court as provided under Article 244.

It also seemed advisable, as suggested in certain comments, to allow both consorts to apply jointly, because, when divorce is inevitable, it should take place with as little antagonism as possible.

IV - RULES OF PROCEDURE RESPECTING CONCILIATION

Considering Article 245 and following of the Book on *The Family*, it is recommended that the following rules be inserted:

ARTICLE 1

Every plaintiff who applies for separation as to bed and board or for divorce must provide all the information required under the rules of practice.

COMMENTS

This article requires that before they submit any other application, the consorts provide the conciliation service with the information it needs for appraising their disagreement.

This is common practice in the family courts of several American States, especially those of Toledo (Ohio) and Detroit (Michigan) which were visited by certain members of the Committee on the law on Persons and on the Family.

In practice, the consorts will probably have to fill out a form prepared for the purpose.

ARTICLE 2

The prothonotary immediately forwards such information to the conciliation service of the court.

The conciliation service summons the parties forthwith in order to appraise the disagreement between them and, where possible, to facilitate a settlement of their dispute.

COMMENTS

This rule governs the internal organization of specialized auxiliary services. The prothonotary (who could be replaced by a special adviser once specialized auxiliary services are established) immediately forwards the form which the consorts have filled out, to the conciliation service so that this service may summon the parties as soon as possible.

ARTICLE 3

No case may be inscribed for proof and hearing unless the parties have attended an interview for appraisal.

However, if the defendant has failed to appear, or if the conciliation has failed, the case may be inscribed for proof and hearing.

COMMENTS

The problem of compulsory conciliation was highly controversial

(18) but with to principle and to the sanction the consorts should face for failing to appear before the conciliation service. Some hold that such a failure should result in the courts' being unable to hear the case, which, however, could be inscribed for proof and hearing if conciliation had failed because the defendant did not appear. This measure is intended to protect the plaintiff's rights and to prohibit the defendant from unduly delaying the proceedings.

There was even a minority which held that the recalcitrant party should be compelled, by court order if necessary, to attend the interview. It was felt that failure to comply with the court order should result in a fine or a jail sentence.

On the other hand, some were strongly opposed to the very principle of compulsory conciliation, being convinced that such conciliation would have no chance of success if the consorts did not enter into it voluntarily.

ARTICLE 4

Nothing said or written during any interview for appraisal or conciliation is admissible as evidence.

COMMENTS

The principle of confidential conciliation interviews already appears in Section 21 of the *Divorce Act*. However, the proposed article does not limit the application of this principle to interviews intended to reconcile consorts. Everything said during these interviews is to be kept confidential.

All facts revealed during the first interview for appraisal and, if necessary, any subsequent conciliation interviews, must be kept strictly confidential and in no way be entered into the court records, in order to assure the parties' absolute freedom in exposing the exact nature of their problems and to create a feeling of confidence between the parties and their adviser.

ARTICLE 5

No conciliation period ordered by the court may exceed thirty days, unless the consorts so agree by mutual consent or unless the judge orders such period extended for an additional term not to exceed thirty days.

COMMENTS

This article repeats the principle set down in subsection 2 of Section 8 of the *Divorce Act*, which states that adjournment cannot be prolonged indefinitely. Nevertheless, it seemed wiser to limit the conciliation period

to thirty days, except in cases where both consorts agree to its extension, which indicates hope of reconciliation.

The period of fourteen days provided for in the *Divorce Act*, after which either consort may have the proceedings resumed, was considered too short.

V - RULES OF PROCEDURE RESPECTING PROCEEDINGS IN CAMERA

It is proposed to insert in the Code of Civil Procedure the following rules:

ARTICLE 13 C.C.P.

All sittings of the court are public.

Nevertheless, the court orders that they be held *in camera* on conditions it specifies if it considers this reasonable in the interests of public order and good morals.

COMMENTS

This article repeats the principle in the first paragraph of Article 13 of the Code of Civil Procedure; as a general rule, public sittings of the court are a salutary measure.

In the French version, the expression "*l'ordre public et les bonnes moeurs*" was preferred to "*l'ordre public et la morale*". The term "*bonnes moeurs*" is already part of the legal vocabulary (19).

The phrase "on conditions it specifies" is intended to give proceedings *in camera* as much flexibility as possible. For instance, the court might wish to exclude the public but allow the press to follow the case (20).

ARTICLE 13a C.C.P.

Sittings are held *in camera* in matters of divorce, separation as to bed and board, nullity or annulment of marriage, custody of children, support, declaration, contestation or repudiation of paternity, parental authority, tutorship, curatorship, and in other similar matters, unless the court decides otherwise in consideration of the circumstances.

COMMENTS

This article was developed from the principle in paragraph 2 of Article 13 of the Code of Civil Procedure. The additions are intended to satisfy those in different fields who have often voiced the wish that disputes in family matters be settled *in camera*. This desire was expressed particularly strongly during interviews within the framework of the

sociological research on family dissension undertaken by the Civil Code Revision Office. It seemed preferable to specify which subjects deserve treatment *in camera* rather than to include them all under one expression such as "disputes in family matters". It seems reasonable to retain the general rule in proceedings in which there is no adversary, such as the appointment of a tutor, for example.

VI - RULES OF PROCEDURE RESPECTING ADOPTION

Considering Article 297 and following of the Book on *The Family*, it is proposed to insert in Book Six of the Code of Civil Procedure the following chapter concerning adoption:

Section I
Procedure for declaration of eligibility for adoption

ARTICLE 1

Every application for a declaration of eligibility for adoption is made, by a motion addressed to the court of the district in which the child resides, by the person or social service centre who or which has received such child.

COMMENTS

This article specifies the *ratione loci* competence of the court which hears the application for declaration of eligibility for adoption. The child resides with the person who has received him or with the social service centre where he is lodged since they alone may present such a motion.

ARTICLE 2

Every motion for a declaration of eligibility for adoption is served on the social service centre of the district in which the child resides, unless such centre is the applicant, on the parents if they are known, or on the tutor, as the case may be, with a notice of ten days indicating the place, date and time of its presentation.

The court may order the motion served on any other person it designates.

The motion is served in the manner provided in the Code of Civil Procedure.

COMMENTS

This article is intended to allow any person interested in a judicial declaration of eligibility for adoption to be summoned to the court. Obviously, the parents or the tutor must be summoned and the social

service centre which supervises the child during the trial period of adoption by the applicants must be notified.

Moreover, the suggested provision allows the court to hear any other member of the family or any person whose opinion the court might find useful.

In this manner, parents and tutors have an opportunity to submit that the child is not in the position described in Article 307, which could give rise to a declaration of eligibility for adoption; they may also oppose such a declaration.

ARTICLE 3

Every motion for a declaration of eligibility for adoption must be heard *in camera*, in accordance with Articles 13 and following of the Code of Civil Procedure.

COMMENTS

This Draft (21) suggests that Article 13 of the Code of Civil Procedure be amended to provide that sittings on family matters be held *in camera*.

ARTICLE 4

The court must take steps to ensure that persons who claim custody of a child or whose consent is required for the adoption of a child are not confronted with the persons adopting, and can neither identify nor be identified by them.

COMMENTS

The amendment to the proposed article is intended to reinforce the confidential nature of adoption. It was suggested in a comment on the original report which seemed particularly pertinent.

Section II
Adoption procedure

ARTICLE 5

Adoption is granted on an application by the person adopting, made by way of a motion to the court of the district in which he is domiciled, or, if the applicant is not domiciled in the province of Québec, to the court of the district where the person adopted is domiciled.

The motion may also be presented to the court of the district where the social service centre is located which was last entrusted with supervision or care of the child when he was placed for adoption.

COMMENTS

The proposed article reproduces the substance of Section 18 of the *Adoption Act.*

Domicile is defined as a person's habitual residence, and a child is domiciled in his parents' home or in the home of the person who has custody of him. If no judicial decision has been made respecting custody, the child has his domicile in the home of the person with whom he habitually resides (22).

This article is a provision of domestic law; the international jurisdictional competence of the courts in matters of adoption is governed by the Book on *Private International Law* (23).

ARTICLE 6

Consorts living together must apply for adoption jointly, unless one person adopting is the consort of the child's father or mother, or unless one consort is incapable.

COMMENTS

This article repeats the principle in Section 20 of the *Adoption Act* which holds that no person living with his consort may adopt alone. It also considers the fact that no person need adopt his own child when such child is adopted by his spouse.

The court, and the social service centre which reports on the timeliness of the adoption, will be responsible for assessing the effect of one consort's legal incapacity on the conditions which the adopting family offers the child.

ARTICLE 7

Every motion for adoption is served on the social service centre of the district in which the person adopted resides when he is placed for adoption, with a notice of ten days indicating the place, date and time of its presentation.

COMMENTS

This article is based on Section 21 of the *Adoption Act*, but the persons who should consent to adoption need no longer be summoned, since either the parents or the tutor have already consented to the adoption, or a judicial declaration of eligibility for adoption has been pronounced. The court need only determine whether the parents adopting are able to fulfil their role suitably; the report from the social service centre is essential for such an assessment. For this reason, the motion for adoption is served on the centre.

ARTICLE 8

Every motion for adoption is heard *in camera* in accordance with Articles 13 and following of the Code of Civil Procedure.

COMMENTS

The comments on Article 3 also apply here.

ARTICLE 9

The plaintiff may consult the report of the social service centre, provided for in Article 321 of the Book on *The Family*.

COMMENTS

It seemed essential to grant any person who presents a motion for adoption access to the report of the social service centre. Like any expert report, this document is part of the evidence (24).

ARTICLE 10

No civil action may be instituted, on the basis of an unfavourable report by the plaintiff, against any social worker or any social service centre.

COMMENTS

This article of new law is based on the *Youth Protection Act* (25), and is intended to protect social workers from any reprisals.

ARTICLE 11

No judgment dismissing a motion for adoption is a bar to any new application based on new facts.

COMMENTS

This article substantially repeats Section 27 of the *Adoption Act*.

ARTICLE 12

When the court grants adoption, it orders the child's tutor, if there is one, to present the final account of his tutorship to it, following a notice of at least ten days.

COMMENTS

This article of new law is intended to ensure that the child's tutor renders an account, since his tutorship will be assumed by the persons adopting. The account should be submitted to the court and not directly to the adopting parents, because no tutor should know the identity of the persons adopting.

ARTICLE 13

The clerk of the court forthwith sends the Public Curator a copy of the

final account of the tutorship, and a copy of the judgment granting adoption.

The Public Curator sends a copy of the final account to the persons adopting, and remits the property to them, subject to any warranty or surety which he deems necessary.

COMMENTS

Under this article, the Public Curator would be in a position to verify the final account of the tutorship and send it to the adopting parents.

This provision will obviously necessitate amendment of the *Public Curatorship Act* (26).

The child's property is subject to the supervision of the Public Curator (27).

ARTICLE 14

No duty or fee is payable to the public funds for any proceedings contemplated in this Division.

COMMENTS

This article substantially repeats Section 28 of the *Adoption Act*.

ARTICLE 15

The clerk of the court immediately sends a copy of the judgment of adoption to the Registrar of Civil Status.

COMMENTS

This article is based on Sections 30 and 32 of the Adoption Act.

The Registrar of Civil Status is responsible for drawing up a new act of birth for the adopted child and for ensuring that it contains only the information permitted by law (28).

ARTICLE 16

The clerk of the court must send, free of charge, to the social service centre which supplied the report provided for in Article 321 of the Book on *The Family*, a copy of the judgment granting or refusing adoption.

He also sends the Minister of Social Affairs a copy of any judgment granting or refusing a declaration of eligibility for adoption, the return of a child to his parents, or adoption.

COMMENTS

This article is a more precise version of Section 29 of the *Adoption*

Act. To the list provided therein, it adds that a copy of any judgment granting or refusing a declaration of eligibility for adoption, or the return of a child, must be sent to the Department of Social Affairs. This information is essential to allow the Minister to bring an appeal (see Article 16) and useful to assist in keeping the Department's statistics up to date. Quite obviously, the civil servants within that department are bound to the same respect for confidentiality as are those of the other services which deal with adoption (see Articles 331, 332 and 333 of the Book on *The Family*).

Section III
Appeal from judgments

ARTICLE 17

An appeal may be brought to the Court of Appeal on leave from two judges of such court, from any judgment granting or refusing a declaration of eligibility for adoption, return of a child to his parents, or adoption.

The motion must be made within ten days after the judgment is rendered.

The appeal takes precedence and is heard *in camera.*

COMMENTS

This article of new law institutes a procedure for appeal from judgments of adoption; the *Adoption Act*, on the contrary, does not provide for any appeal.

Some consultants considered appeal useless, since they felt that the procedure for judicial eligibility for adoption would guarantee sufficient protection of the rights of parents by blood. Persons adopting must not be able to protest against judgment granting adoption. If the judgment refuses adoption, they may present a new motion in accordance with Article 10.

Some other consultants agreed with those who drafted this that it might possibly be in the interests of the social service centre to be able to appeal from judgment refusing a declaration of eligibility for adoption or again from a judgment granting adoption despite a negative report from the centre.

Five other Canadian statutes provide for the possibility of appeal (29).

Finally, it seemed unfair to withhold the right of appeal from a person who feels he has been prejudiced by an error of the court. As a

compromise, it was agreed to accept appeals but only with leave to appeal. Such a procedure was considered preferable to that proposed by the Civil Code Revision Office in 1968, which suggested review of the judgment by three judges of the court which pronounced it. Besides leading to practical difficulties in remote districts, such a review could put these judges in an embarrassing position (30).

ARTICLE 18

The Minister of Social Affairs may lodge an appeal *proprio motu.*

COMMENTS

This article of new law allows the Minister of Social Affairs, on whom administration of the act depends, to lodge an appeal. Such a provision is necessary because the Minister of Social Affairs does not ordinarily have the right of appeal under the Code of Civil Procedure (Article 491 et s. C.C.P.).

BOOK THREE ON SUCCESSION

I - RULES OF PROCEDURE CONCERNING JUDICIAL PARTITION AND LICITATION

Considering Article 188 of the Book on *Succession*, it is recommended that the proceedings for voluntary judicial partition and the actions of partition provided in existing law, be replaced by one single mechanism. Articles 808 to 812 C.C.P. would be repealed and replaced by the following:

ARTICLE 808

The partition provided in Article 188 of the Civil Code is made before a notary chosen by all the interested parties or appointed by the court of the place where the succession devolves, either upon motion or upon action to such effect; all the joint undivided heirs must then be impleaded.

COMMENTS

Article 808 of the Code of Civil Procedure is replaced by a text which provides that when partition cannot be made by agreement, procedure for partition may be instituted by an action or upon simple motion, depending on whether or not there is contestation. The actual partition would be entrusted to a notary who may be chosen by the interested persons.

ARTICLE 809

In deciding the application, the court orders partition in kind, unless

it is shown that this cannot be done conveniently; in such case, there is licitation.

COMMENTS

Article 809 C.C.P. is amended in order to do away with any ambiguity concerning the heirs' right to partition in kind (31). Articles 198 and 202 state that partition in kind is the rule and licitation the exception.

ARTICLE 810

The notary carries out the partition, with the consent of the interested parties.

If necessary, he must prepare a report on the problems and on the respective allegations of the interested parties, and submit them for a decision to the court seized of the matter, upon motion by such notary or by any interested person. Procedure follows the forms prescribed by this Code.

COMMENTS

Article 810 in its new form entrusts partition to the notary generally. Article 812 provides that an expert may be appointed.

The article's second paragraph substantially reproduces Article 708 C.C.

The proposed article is based on the French *Avant-projet* (32).

ARTICLE 811

The shares are formed by the notary in the manner provided in Articles 194 to 203 of the Book on *Succession*; such notary may be assisted either by one joint undivided heir, chosen by the others, who accepts such office, or by an expert.

COMMENTS

The proposed article combines the provisions in Article 705 C.C. and the first paragraph of Article 810 C.C.P.

It puts the notary in charge of forming the shares and provides that he may be assisted by an undivided heir or an expert. The article is based on the French *Avant-projet* (33).

ARTICLE 812

When an expert opinion is required, the expert is appointed by the court, either upon motion by the notary or upon motion or action by any interested person.

Such expert proceeds in the manner provided in Articles 414 to 425 of this Code; he submits his report to the notary.

However, upon application by any interested person, such report must be homologated; such application may be contested.

The court which homologates the report appoints the notary, the prothonotary or some other person whom it designates to proceed with the selection of shares; a report on this operation must then be filed in the record.

COMMENTS

Article 812 substantially restates the second and third paragraphs of Article 810 C.C.P. However, it provides that the expert submits his report to the notary; such report is only homologated upon application.

The appointment of an expert is never required, as the court always decides the matter.

ARTICLE 812a

If, under Article 202 of the Book on *Succession*, the court orders licitation of moveable property, Articles 921 and 922 of this Code apply. The proceeds of the sale are divided among the persons entitled to them, after deducting the costs.

If the court orders licitation of one or more immoveables, such licitation is conducted by a notary appointed for the purpose or by the sheriff. On receiving a copy of the judgment, the notary or the sheriff must publish the advertisements and announcements required for the sale of immoveable property under execution, and serve a copy thereof upon the registrar of the registration division in which the immoveable is situated. Articles 665 and 674 to 732 apply where possible.

COMMENTS

Article 812a substantially repeats Article 811 C.C.P., except with regard to the possibility provided of entrusting a notary with the licitation procedure.

ARTICLE 812b

If the suit is for an account and a partition, the shares cannot be formed, nor can the licitation take place, until the notary, chosen by the interested persons or appointed by the court, has determined the accounts, the returns, the formation of the mass and the pretakings, and until his report has been homologated.

COMMENTS

Article 812b repeats Article 812 of the Code of Civil Procedure.

II - RULE OF PROCEDURE CONCERNING PUBLICATION OF A NOTICE BY THE BENEFICIARY HEIR

Considering Article 126 of the Book on *Succession*, it is proposed that the following article be added:

ARTICLE 920a

The notice provided for in Article 126 of the Book on *Succession* must be published once in the Québec Official Gazette, and also in accordance with Article 594 of this Code. Such notice must, in particular, indicate the registration mentioned in Article 103, and if necessary, in Article 121 of the Book on *Succession*.

COMMENTS

Article 920a is new. The manner of publication it proposes is more exacting than that provided in the first paragraph of Article 676 C.C. Publication must be made not only in the Official Gazette, but also in a French language newspaper and in an English language one, or in both languages in the same newspaper if it is the only one in the district. If there is no newspaper, publication may be done by posting up.

In addition to the indication of beneficiary acceptance, the notice must also include that of the closing of the inventory, if applicable.

III - RULES OF PROCEDURE CONCERNING ALIENATION OF IMMOVEABLES BY A BENEFICIARY HEIR

Considering Article 129 of the Book on *Succession*, it is proposed that Articles 885 to 895 C.C.P. be replaced by the following to be placed after Article 922 C.C.P.:

ARTICLE 922a

The motion by a beneficiary heir for authorization to sell an immoveable or a real right must set forth the grounds of the application and, where necessary, be accompanied by a certificate of the municipal assessment, if any, for the last five years.

COMMENTS

Article 922a repeats Article 888 C.C.P., but restricts its application solely to the beneficiary heir.

ARTICLE 922b

The judge must enquire as to the value of the immoveable or of the immoveable right; for such purpose, he may summon any person he considers appropriate.

COMMENTS

Article 922b repeats Article 889 C.C.P.

ARTICLE 922c

If the value of the immoveable does not exceed ten thousand dollars, the judge may authorize a sale by mutual consent for a price not less than that which he fixes.

If the value exceeds ten thousand dollars, the judge may refuse to authorize the sale, permit a sale by mutual consent if there is an obvious advantage or authorize the sale only after taking the advice of the coheirs and after ordering an assessment by an expert appointed by him, who must proceed according to Articles 418 to 421 of this Code; if there are several immoveables, such expert must assess them separately.

COMMENTS

Article 922c replaces Article 890 C.C.P. It provides more flexible provisions than does existing law. It raises to ten thousand dollars the value below which the judge may order the sale of the immoveable by mutual consent. When the value of the immoveable exceeds that sum, the judge may refuse the sale, or permit a sale by mutual consent or according to the expert assessment, and on the advice of the coheirs.

ARTICLE 922d

If the judge refuses to authorize the sale, he must indicate his reason for doing so; if authorization is granted, the judge determines the conditions of the sale, appoints the notary and fixes the upset price. The notary must, with respect to the notices of sale, fulfill the requirements of Article 594 of this Code.

COMMENTS

Article 922d substantially reproduces Article 891 C.C.P.

ARTICLE 922e

The sale takes place at the time and place fixed by the judge; if there is not a sufficient bid, the judge may fix a new upset price less than the first.

COMMENTS

Article 922e reproduces Article 892 C.C.P.

ARTICLE 922f

The person charged with the sale under the preceding articles must file in the office of the court a report of his proceedings. A copy of such

report and the judgment authorizing the sale must be annexed to the minute of the deed of sale.

COMMENTS

Article 922f reproduces Article 893 C.C.P.

BOOK FOUR ON PROPERTY

I - REPEAL OF CERTAIN PRIVILEGES

Since privileges for taxes, rates and assessments appear unjustified, in view of the other solutions offered, such as "sale of immoveables for taxes" which is a generally accepted custom (34), the Code of Civil Procedure will have to 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".

II - EXEMPTION FROM SEIZURE OF CERTAIN PROPERTY

Considering Articles 277 and 278 on seizure in the Book on *Property*, the following Code of Civil Procedure articles should be changed accordingly:

ARTICLE 553 C.C.P.

Sub-paragraph 3 of its first paragraph, which is to become part of the Civil Code under Article 277 of the Book on *Property*, could be replaced by the following:

"3. Rights exclusively attached to the debtor's person;"

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".

ARTICLE 552 C.C.P.

Sub-paragraphs 1 and 2 should be changed taking into account Article 278 of the Book on *Property*. The words "pledged or pawned" should be replaced by "hypothecated".

ARTICLE 652 C.C.P.

The end of the first paragraph should be changed.

III - RIGHT OF PREEMPTION

In view of the co-owners' right to preemption provided in Article 425, it is recommended that it be specified, in Article 811 of the Code of Civil Procedure, that conditions drawn up under judicial sales must mention the co-owners' right to preemption.

BOOK FIVE ON OBLIGATIONS

I - PROROGATION OF DELAY

Considering however, Articles 377 and 632, it is proposed than an Article 9a be added to the Code of Civil Procedure which would allow the judge to extend the period of notice.

II - TENDER AND DEPOSIT

Considering Article 240, Articles 187 and 188 C.C.P. would become useless.

Considering Article 243, it is recommended that a second paragraph be added to Article 190 C.C.P., to read as follows:

"No deposit made on condition that the creditor sign a final discharge is considered a conditional offer for the purposes of this article."

Considering that Article 248 will govern in the Civil Code the problem of deposit costs, until now dealt with in Article 191 of the Code of Civil Procedure, it is recommended that this article be repealed.

III - PAYMENTS BY COMPENSATION

Considering Article 316 which is intended to facilitate payment by compensation, it is suggested that Article 172 C.C.P. be amended and replaced by the following:

"The defendant may plead, by defence, any ground of law or fact which shows that all or some of the conclusions of the demand cannot be granted.

He may also, if authorized by the judge, make any claim not related to invoke any claim related to the principal demand.

He may also, if authorized by the judge make any claim not related to the principal demand. Such authorization is not granted unless it appears without needless delay as regards the principal demand.

The court remains seized of the cross demand even when the principal demand is discontinued."

IV - POWERS OF THE SEQUESTRATOR

Considering Article 819, the powers of the contractual sequestrator and the judicial sequestrator should be coordinated by amending Article 745 C.C.P. so that it speaks of "simple" and not "pure" administration.

V - PAYMENT OF WORKMEN

Considering that Articles 1697a to 1697d of the Civil Code provide a form of seizure by garnishment, they should be transferred to the Code of Civil Procedure.

VI - EXEMPTION FROM SEIZURE

Considering that it has been recommended that Articles 2552, 2554 second paragraph and 2561 C.C. be repealed, Article 553 C.C.P. should be amended by adding the following sub-paragraphs after sub-paragraph 7b:

7c) the benefits established in favour of a member of a mutual benefit association, his spouse, his ascendants or his descendants;

7d) the benefits derived from life insurance contracts where the beneficiary under the contract is irrevocable or is the spouse, or an ascendant or descendant of the owner or the participant.

VII - ARBITRATION

Considering the articles of the chapter on arbitration, it is suggested that the articles of the Code of Civil Procedure dealing with arbitration be revised (aa. 382 and following, 940 and following C.C.P.).

BOOK SIX ON EVIDENCE

I - SEMI-AUTHENTIC WRITINGS

Considering Articles 24 to 28, the repeal of the first paragraph of Article 90 C.C.P. is recommended.

II - TESTIMONY

Considering Articles 40 to 50, the following articles should be added:

ARTICLE 403a C.C.P.

The demand provided for in Article 42 of the Book on *Evidence* must be made by motion presented at trial.

A notice of at least ten days must be given to the opposite party, specifying the name of the declarant, the content and form of his statement, and the circumstances surrounding such statement.

ARTICLE 403b C.C.P.

Any party who wishes to avail himself of a statement contemplated in Article 44 of the Book on *Evidence* must give notice to such effect in accordance with the previous article.

ARTICLE 403c C.C.P.

The notice mentioned in the two preceding articles must be accompanied by a copy of the statement, if such statement is in writing, or by a transcription if it has been recorded by any technical means; the opposite party is entitled to require communication of the original in accordance with Article 401.

BOOK NINE ON PRIVATE INTERNATIONAL LAW

Considering Article 48, it is suggested, for better co-ordination, that the word "whole" be deleted in sub-paragraph 2 of Article 68 C.C.P.

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

(2) See the *Report on the Family Court*, C.C.R.O., 1975, XXVII, on p. 50.

(3) See Article 76 of the Book on *Persons*.

(4) *Vital Statistics (Amendment) Act*, S.B.C. 1973, c. 160, s. 3.

(5) *Vital Statistics Amendment Act*, S.A. 1973, c. 86, s. 3.

(6) See Article 76 of the Book on *Persons*.

(7) *Ibid.*, a. 82.

(8) See, on this subject, *Péladeau*, [1964] S.C. 584.

(9) See *Re Blackburn*, [1955] S.C. 389.

(10) See Article 136 of the Book on *Persons*.

(11) See *Letang v. Auclair*, (1892) 1 S.C. 241; *Vendetti v. L.*, [1947] P.R. 416 (S.C.); *Hyland v. McBrien*, (1923) 26 P.R. 190 (S.C.).

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

(13) S.Q. 1972, c. 44.

(14) *Ibid.*, s. 8.

(15) Section 6.

(16) See, on this subject, *Thibodeau v. Thibodeau*, [1961] S.C.R. 285.

(17) See Article 423 C.C.P.

(18) See, in Ontario, J. BAXTER, *Family Law Reform in Ontario*, (1975) 25 U. of T.L.J. 236, on p. 246.

(19) See specifically Articles 13, 831, 990 and 1062 of the Civil Code.

(20) For more details, see the *Report on the Family Court*, *op. cit.*, p. 252 et s.

(21) See *infra*, a. 8.

(22) See Articles 60 and 73 of the Book on *Persons*.

(23) See Articles 1 and 58.

(24) See the *Report on the Family Court*, *op. cit.*, p. 248.

(25) R.S.Q. 1964, c. 220, amended by S.Q. 1974, c. 59, s. 14k.

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

(27) See Article 226 of the Book on *The Family*.

(28) See Article 76 of the Book on *Persons*.

(29) British Colombia: *Adoption Act*, R.S.B.C., 1960, c. 4, s. 9; Nova Scotia: *Adoption Act*, R.S.N.S., 1967, c. 2, s. 13(1); Prince Edward Island: *Adoption Act*, S.P.E.I., 1969, c. 1,

Act, S. of Sask. 1973, c. 38, s. 64; Ontario: *County Court Act*, R.S.O. 1970, c. 94, s. 33; *The Judicature Act*, R.S.O., 1970, c. 228, s. 29. For a discussion of the expediency of appeal, see M. HUGHES, *op. cit.*, p. 163.

(30) See the *Report on a Draft Law of Adoption*, C.C.R.O., IV, 1966, a. 40 et s.

(31) See G. BRIERE, *Les successions "ab intestat"*, *op. cit.*, p. 144.

(32) See the *Avant-projet de Code civil*, *op. cit.*, annexe III, p. 189, a. 967.

(33) See the *Avant-projet de Code civil*, *op. cit.*, annexe III, p. 189, a. 968.

(34) See Title 24 of the Municipal Code; see also A.J.O. Bergeron, *Vente pour taxes*, (1959) 61 R. du N. 496.

(35) See Schedule I.

(36) See Schedule II, Book Five.

(37) R.S.Q. 1964. c. 35.

SCHEDULE II

PROPOSED AMENDMENTS TO STATUTES

BOOK ONE ON PERSONS

I - STATUTES LIKELY TO BE AFFECTED BY THE DRAFT CIVIL STATUS REGISTER ACT AND BY THE CHAPTER OF THE DRAFT DEALING WITH CIVIL STATUS

- *Public Health Protection Act*, S.Q. 1972, c. 42, s. 2d: object of the act; s. 38 et s.: "declaration" of birth, marriage, divorce, annulment of marriage and death.
- *Burial Act*, R.S.Q. 1964, c. 310, s. 1, replaced by s. 59, *Public Health Protection Act*, S.Q. 1972, c. 42.
- *Adoption Act*, S.Q. 1969, c. 64, ss. 32 to 37, s. 39.
- *Roman Catholic Cemetery Corporations Act*, R.S.Q. 1964, c. 308, amended by S.Q. 1966-67, c. 82; S.Q. 1969, c. 26, s. 44.
- *Church Incorporation Act*, R.S.Q. 1964, c. 305, s. 1.
- *Protestant Church Civil Status Registers Act*, R.S.Q. 1964, c. 311, amended by S.Q. 1966, c. 15.
- *Civil Status Registers Reconstitution Act*, R.S.Q. 1964, c. 313, amended by S.Q. 1966, c. 16.
- *Change of Name Act*, S.Q. 1965, c. 77, amended by S.Q. 1969, c. 26.
- *Interpretation Act*, R.S.Q. 1964, c. 1, s. 61, amended by S.Q. 1966-67, c. 14; S.Q. 1968, cc. 8 and 9; S.Q. 1969, c. 26; S.Q. 1970, c. 4.
- *Religious Corporations Act*, S.Q. 1971, c. 75.

II - STATUTORY PROVISIONS TO BE REPEALED OR AMENDED AS PROPOSED BY THE DRAFT

***Public Curatorship Act*, S.Q. 1971, c. 81.**

Considering Articles 197 and following, Section 6 of the *Public Curatorship Act* should be repealed.

Considering Articles 200, 201 and 202, Section 7 of this Act is no longer necessary.

Considering Article 203, Section 8 of this Act is unnecessary.

Considering Article 169, Section 17 of this Act is rendered unnecessary.

Considering it is proposed that the family council no longer exist, Section 23 of this Act should read:

"The Public Curator may, without judicial authorization, continue an undertaking already established, demand a partition or take part therein."

***Public Health Protection Act*, S.Q. 1972, c. 42**

Considering Articles 121 and 122, Section 36 of this Act should be repealed.

***Companies and Partnerships Declaration Act*, R.S.Q. 1964, c. 272**

Considering Article 242 and the proposed repeal of the provisions on registration of partnerships (aa. 1834 to 1835 C.C.), it is proposed that the provisions relating to registration be grouped in one statute, possibly the *Companies and Partnerships Declaration Act*.

BOOK TWO ON THE FAMILY

***Public Curatorship Act*, S.Q. 1971, c. 81**

Considering Articles 12 and 13 of the rules of procedure (35) governing adoption, this Act would call for amendments.

BOOK THREE ON SUCCESSION

***Public Curatorship Act*, S.Q. 1971, c. 81**

Considering Article 155 and following, Section 15a of that Act should be modified.

BOOK FOUR ON PROPERTY

***Municipal Code - Cities and Towns Act*, R.S.Q. 1964, c. 193**

Since privileges for taxes, rates and assessments appear unjustified, in view of the other solutions offered, such as "sale of immoveables for taxes" which is a generally accepted custom, Section 565 of the *Cities and Towns Act* and Article 745 of the *Municipal Code* should be amended so that sales for taxes do not effect discharge of the privileges and hypothecs encumbering the immoveables sold. The purchaser would take the property subject to hypothecs (under Article 428 of the Book on *Property*).

***Special Corporate Powers Act*, R.S.Q. 1964, c. 275**

Considering the varying mechanisms created in the Book on *Property*, particularly in Articles 330 and 431, Section 25 of this Act should be deleted.

***Public Curatorship Act*, R.S.Q. 1964, c. 314**

Considering the powers vested in the Public Curator by Article 629 of the Book on *Property*, the *Public Curatorship Act* should be amended to allow the Public Curator to organize supervision of certain trusts.

***Consumer Protection Act*, S.Q. 1971, c. 74**

Considering the provisions of the Draft, this law should be amended to conform to the vocabulary and concepts put forward in the Title on *Security on Property*.

BOOK FIVE ON OBLIGATIONS

***Deposit Act*, R.S.Q. 1964, c. 64**

Considering the proposed amendment to Article 190 C.C.P. (36), it is recommended that the second paragraph of Section 66 of the *Deposit Act* be repealed in order to avoid unnecessary repetition.

Considering Article 246 and to avoid any contradiction, Sections 67 and 69 *in fine* of the *Deposit Act* should be repealed, beginning at "...saving the right of the depositor..."

Considering that the list given in Article 245 is not restrictive, and covers cases covered in the second paragraph of Article 1162 C.C. and in Section 68 of the *Deposit Act*, this last Section should be repealed.

***Unclaimed Goods Sales Act*, R.S.Q. 1964, c. 316**

Considering Article 628 of the chapter on transport, it is suggested that the *Unclaimed Goods Sales Act* be revised in order to adapt it to current needs.

Transport Commission

Considering Article 610, it is recommended that the provincial legislature, and especially the Québec Transport Commission, adopt regulations to determine limitations or to provide exemptions from liability in all sectors of provincial transport, even for carriers not currently subject to such regulations. This would avoid repeated amendments to the Civil Code and would entrust a permanent, specialized body with the task of taking into account such variables as the cost of living.

***Companies Act*, R.S.Q. 1964, c. 271**

Considering Article 750 which authorizes a partnership or a company to become part of another partnership, it is suggested that Section 31 of the *Companies Act* be amended in order to permit this.

***Winding-up Act*, R.S.Q. 1964, c. 281**

Considering Article 777, it is suggested that the *Winding-up Act* be revised in order to adapt it to the new provisions of the contract of partnership.

***Municipal Code - Cities and Towns Act*, R.S.Q. 1964, c. 193**

Considering Article 1177, it is suggested that the advisability be examined of retaining Section 565 of the *Cities and Towns Act* and Article 745 of the *Municipal Code* under which annuities cannot be purged at sales for taxes.

BOOK SEVEN ON PRESCRIPTION

Considering that the Book on *Prescription* should contain all the rules that exist on this subject, these rules should also be applicable without distinction to all persons whether physical or moral: the State, municipalities, etc. All special rules on prescription in particular statutes should consequently be repealed.

BOOK EIGHT ON PUBLICATION OF RIGHTS

***Cadastre Act*, R.S.Q. 1964, c. 320**

Considering the new provisions of this Book, a revision of the *Cadastre Act* is necessary. A co-ordination will have to take place with Article 15 of Book Eight.

SCHEDULE III

STATUTORY PROVISIONS OF WHICH THE DRAFT PROPOSES THE ADOPTION

BOOK ONE ON PERSONS

I - CIVIL STATUS REGISTER

Considering Articles 66 and following, it is suggested that an Act regarding the Civil Status Register be adopted.

The object of this Draft is to centralize all acts of civil status in one central register to be called the register of civil status.

This Draft is closely related to the proposed reform of the Civil Code on acts of civil status. Because declarations are sent directly to the Registrar of Civil Status, this Registrar becomes the only officer of civil status in the province of Québec.

To ward off excessive centralization, the Draft provides that civil status offices be placed at the disposal of the public to provide the various declaration forms needed and assistance in filling out such forms, when necessary. Eventually, these offices could be located in the offices of the Family Court.

Draft Civil Status Register Act

SECTION 1

The Registrar of Civil Status shall be appointed by the Lieutenant-Governor in Council.

SECTION 2

The Registrar shall be responsible for the establishment, custody and administration of the register of civil status.

In addition to the duties assigned to him under the Civil Code, he shall ensure preservation of the acts he prepares and the documents transmitted to him.

He shall see that the information he receives is not divulged except in the cases and the manner provided for by law.

COMMENTS

The duties of the Registrar of Civil Status stem principally from the Civil Code provisions relating to acts of civil status.

Since, under the reform of the Civil Code, the officer of civil status, who receives acts, will no longer exist, and moreover, since it seemed indispensable to make one person responsible for all acts, it follows that there should be only one officer of civil status in the province of Québec responsible for the register of civil status. He will have to rely on the co-operation of deputies and assistants.

The confidentiality imposed in the third paragraph corresponds to Article 76 of the Book on *Persons* which provides that from the moment when a judgment of adoption, disavowal of paternity or admission of paternity or maternity is entered, the Registrar draws up a new act which does not include the information of the original, which has been subject to modifications.

SECTION 3

The Registrar shall establish civil status offices.

He there makes available to the public the forms necessary for the registration of civil status.

COMMENTS

In spite of the need to centralize all acts of civil status in one single new register, it seemed desirable to provide the public with easily accessible offices which would allow communication with the central register, a supply of the forms necessary for making declarations, and sources of other information. The Office suggests that the civil status offices be located in the offices of the Family Court.

SECTION 4

The functionaries and employees of the civil status service shall be appointed under the *Civil Service Act* and must take the oaths provided in Schedules A and B to that Act.

COMMENTS

The oaths provided for in this article are those by which every civil servant swears to fulfill his task faithfully and not to reveal anything that may come to his knowledge in the discharge of his duties unless directly authorized to do so.

SECTION 5

Direct access to the register shall be available only to the Registrar of Civil Status and the Population Registrar, and their employees in the discharge of their duties.

Nevertheless, for scientific or genealogical purposes, the Registrar may provide information contained in the register, subject to any conditions he considers necessary for the respect of privacy.

COMMENTS

The register of civil status must be consulted through requests for certificates or copies of acts, on the conditions provided by law. It was felt

that the Registrar should be given some discretion to facilitate access to the register for scientific or genealogical purposes.

SECTION 6

The Lieutenant-Governor in Council may make regulations to:

a) prescribe the forms necessary for the recording of civil status;

b) set fees for delivery of certificates or copies;

c) order all measures necessary for the establishment and operation of the register of civil status;

d) determine the method for communicating and preserving the registers of civil status in existence when this act comes into force;

e) prescribe the method of preserving acts of civil status;

f) determine procedure for providing information for scientific or genealogical purposes;

g) prescribe procedure for issuing copies of acts and certificates of civil status;

h) determine the location and method of operation of civil status offices;

i) order the establishment of the archives.

COMMENTS

As regards implementation of the register, the regulations must especially fix a date on which the register will become the sole valid source for issuing certificates and copies of acts of civil status, so that citizens will not have to apply indiscriminately either to the register of civil status or to the officers at present authorized to keep registers.

Should the register be computerized, it is easy to imagine a general programme for keeping the register with keyboard controls in the different civil status offices. The regulations could provide for a method for classifying the acts.

Moreover, in view of the communication necessary between the register of civil status and the population register, procedures for exchanging information and attributing identification numbers will have to be established, among other things.

Finally, administrative questions arise such as the internal organization of the register, the drawing up of acts of civil status and the establishment of relations between the Registrar and the various persons who must transmit documents to him (such as clerks and prothonotaries).

SECTION 7

Every person bound to make a declaration or an attestation and who does not execute or delays in executing his obligation to transmit any fact related to civil status is guilty of an offence and liable to a fine of up to one hundred dollars.

COMMENTS

Article 7 completes the provisions relating to acts of civil status in the Civil Code. As declarations are obligatory, it is only logical that there be penalties for offences.

SECTION 8

Any person who knowingly makes a false declaration is guilty of an offence and liable to a fine of up to five hundred dollars or to imprisonment for six months, or to both such fine and such imprisonment.

COMMENTS

The penalties provided under this article are harsher than in the preceding case. In fact, this article is concerned with forgery. False declarations include, of course, those made in attestations.

SECTION 9

Any functionary or employee of the civil status service who uses information contained in the register of civil status for purposes contrary to law, or divulges such information without being authorized to do so by law, is guilty of an offence and liable to a fine of not more than one thousand dollars or to imprisonment for one year, or to both such fine and such imprisonment.

SECTION 10

Proceedings for offences against this act shall be governed by the *Summary Convictions Act* (37). Part II of such Act shall apply.

II - CENTRAL REGISTER OF PROTECTED PERSONS

Considering the provisions relating to protected persons, provided in Articles 125 and following of the Book on *Persons*, the following Draft Bill is recommended:

Draft Bill on the Central Register of Protected Persons

SECTION 1

The Public Curator shall be responsible for the creation, custody and administration of the register of protected persons.

COMMENTS

It seemed advisable to entrust the Public Curator, already responsible for keeping the tutorship records under the Draft, with the register of protected persons.

SECTION 2

He shall enter, in the register, under the family name of each protected person, the judgments and documents transmitted to him under Articles 161 and 176 of the Book on *Persons* and Article 8 of the procedure regarding dative tutorships and curatorships (Schedule I).

COMMENTS

The various judgments and documents which the Draft stipulates are to be sent to the Public Curator will enable him to furnish any required information regarding protected persons, their protective regimes, the appointment of a tutor and the possibility of his dismissal and termination of the protective regime.

SECTION 3

Any interested person may obtain a certificate giving the family name and given names of the protected person, the protective regime, the tutor's name and the date on which the regime began.

COMMENTS

It seemed advisable to establish a list restricting the information accessible to the public. In actual fact, the judgment putting a person under tutorship may contain medical details the confidentiality of which must be assured.

SECTION 4

No other information contained in the register may be disclosed except as expressly provided by law.

COMMENTS

See under Article 3.

SECTION 5

Following consultation with the Public Curator, the Lieutenant-Governor in Council may make regulations to take any measure necessary for the establishment and operation of the register, and the manner of consulting it.

COMMENTS

This article does not call for any comment.

BOOK FIVE ON OBLIGATIONS

Associations

Considering Articles 790 to 800, it is suggested that associations should be subject to the Minister of Consumer Affairs, Cooperatives and Financial Institutions, who would be able to request their dissolution for cause. This power of inquiry and supervision on associations would have to be provided for in a special statute. However, this right would have to be exercised by action before the court.

BOOK EIGHT ON PUBLICATION OF RIGHTS

Considering the new provisions of Books Four and Eight, it is suggested that a special statute governing registration of real rights be enacted to implement these provisions.

SCHEDULE IV

FORMS

BOOK ONE ON PERSONS

I - ACT OF CIVIL STATUS: BIRTH

Considering Articles 70, 84 and 87, the following form is proposed:

I, Registrar of Civil Status, having received the following declaration:

1 - ATTESTATION OF DELIVERY (a. 84 of the Book on *Persons*)

child

sex date of birth place of birth

mother

surname given names address

physician or person who attended the mother

surname given names quality address signature

2 - DECLARATION OF BIRTH (a. 70 and 87 of the Book on *Persons*)

child

surname given names

father

surname given names address

declarant

surname given names address quality

relationship to child signature

Certify under my seal that this constitutes the act of the birth of:

surname given names

registered on: (date of registration)

under number: (registration number)

signature

COMMENTS

Because a copy of the attestation is given to the declarant, the declaration form does not reproduce the information already contained in the attestation, such as, for example, the sex of a child in a declaration of birth.

In fact, a declaration also includes the attestation since the declarant must transmit both to the Registrar (Articles 85 and 97 of the Book on *Persons*).

II - ACT OF CIVIL STATUS: MARRIAGE

Considering Articles 70 and 91, the following form is proposed:

I, Registrar of Civil Status, having received the following declaration

DECLARATION OF MARRIAGE (a. 70 and 91 of the Book on *Persons*)

date of marriage				place of marriage
wife				
maiden name	given names	address	date of birth	signature
husband				
surname	given names	address	date of birth	signature
officiant				
surname	given names	quality	signature	
witnesses				
1 - surname	given names	address	signature	
2 - surname	given names	address	signature	
if there be dispensation by reason of age date of judgment – number of court file				

Certify under my seal that this constitutes the act of marriage between

wife			**husband**	
maiden name	given names	and	surname	given names

registered on: (date of registration)
under number: (registration number)

signature

III - ACT OF CIVIL STATUS: DEATH

Considering Articles 70, 95 and 98, the following form is proposed:

I, Registrar of Civil Status, having received the following documents:

1 - ATTESTATION OF DEATH (a. 95 of the Book on *Persons*)

date of death		place of death
deceased person		
surname	given names	sex
physician		
surname	given names	signature

2 - DECLARATION OF DEATH (a. 79 and 98 of the Book on *Persons*)

deceased person			
date of birth			last address
surviving consort			
surname	given names		
declarant			
surname	given names	quality	address
relationship		signature	

Certify under my seal that this constitutes the act of death of

deceased person

surname given names

registered on: (date of registration)
under number: (registration number)

signature

BOOK TWO ON THE FAMILY

CONSENT TO ADOPTION

Considering Article 301, the following form is proposed:

ADOPTION Form for consent

I, the undersigned .....
(surname, given names, domicile)
father, mother, tutor of the child named .....
(surname, given names)
declare as follows:

I consent to the adoption of .....
whom I entrust to the ..... Social Service Centre.

I have given this consent in the presence of .....,
social worker at the ..... Social Service Centre,
who has explained to me my rights and obligations under the Civil Code. These are attached to this form, and I am aware of them.

I understand that within thirty days, that is until the .....
(date)

I may go back on my consent and take the child back without any formality or delay.

After the ....., I lose all right to take back the
(same date)
child and if I wish to resume custody of him (or her) I must apply to the ..... court.

I understand that the court will judge according to the circumstances and may refuse to let me have the child.

Ninety days from today, that is on the ..... I will lose all
(date)
right to reclaim the child.

....., ...
(place) (date)

BOOK FIVE ON OBLIGATIONS

Considering the amendments suggested to the contract of lease and hire of things, the form of the lease should be amended in the following manner:

SCHEDULE

Form

LEASE

Lessor

BETWEEN .....
(name)

.....
(address)

.....
(telephone number)
hereinafter called the lessor

AND .....
Lessee (name)

.....
(address)

.....
(telephone number)
hereinafter called the lessee

SECTION I

DESCRIPTION OF PREMISES, TERM OF THE LEASE AND RENT

Description of premises

The lessor rents, by this lease, to the lessee the premises situated at .....

.....

.....

known and described as follows: .....

.....

.....

Destination of premises

The premises will be used as a dwelling.

Term

The term of the lease will be ..... months, from the ..... day of ..... 19 ....., to the ..... day of..... 19 .....

Copy of the lease

A signed copy of the lease will be given by the lessor to the lessee within fifteen days of the signing.

Rent

This lease is made in consideration of the total amount of ..... dollars ($.....) that the lessee will pay to the lessor in equal and consecutive ..... (specify whether monthly, weekly or other) payments of ..... dollars ($.....) each of which will be paid in advance on the first day of each ..... (month, week or other).

(Add here every other clause pertaining to the payment of the rent or any other payment).

SECTION II

OBLIGATORY PROVISIONS

NOTICE: The Civil Code includes the articles of law applying to a contract of lease (Articles 490 to 573).

There are two kinds of articles in the Civil Code:

1) articles which can be waived or amended by mutual agreement between the lessee and the lessor by a clause in the lease;

2) obligatory articles with which the lessor and the lessee have to comply.

Any clause in a lease which would be inconsistent with an obligatory article of the Civil Code is void as regards the lessor and the lessee.

The following clauses (1 to 41) are the texts of the main obligatory articles found in the Civil Code.

Obligations of the lessor

Good condition and peaceable enjoyment

1 The lessor must deliver and maintain the dwelling in a condition fit for habitation and give peaceable enjoyment of it. (Article 539).

Repairs

2 The lessor is bound to make all repairs imposed on him by law or by municipal by-law respecting safety or sanitation.

The lessee has the same rights against the lessor in respect of these repairs as if the lessor had undertaken by a lease to make them. (Article 540).

Withholding of rent when repairs neglected

3 If the lessor fails to make the repairs and improvements which he is required to make, the lessee, without prejudice to his other rights and recourses, may withhold the rent until they are made. (Article 502).

Urgent and necessary repairs

4 The lessee must allow urgent and necessary repairs to be made.

He is nevertheless entitled to a reduction of rent, according to the circumstances.

He is also entitled to the resiliation of the lease if the repairs are such as to cause him serious prejudice. (Article 513).

Urgent and necessary repairs

5 After having informed or attempted to inform the lessor and if the latter does not act in due course, the lessee may undertake urgent and necessary repairs for the preservation or use of the immoveable leased.

Nevertheless, the lessor may intervene at any time to continue the work.

The lessor must reimburse the lessee for reasonable expenses thus incurred. (Article 528).

Right of visit

6 The lessee must permit the lessor to ascertain the condition of the thing.

The lessor must exercise this right in a reasonable manner. (Article 509).

In leases with a fixed term of a year or more, the lessee must allow the premises to be visited and signs to be posted, for leasing purposes, during the three months preceding the termination of the lease.

In leases with a fixed term of less than one year, the period is one month.

Where the lease is for an indeterminate term, the lessee is bound to that obligation from the time the notice is given in accordance with Article 518. (Article 529).

Right of visit, previous notice

7 Except in case of urgency and subject to his right to have a prospective lessee visit the dwelling under Article 529 (clause number 6), the lessor must give the lessee notice of at least twenty-four hours of his intention to visit the premises in accordance with Article 509 (clause number 6).

The lessor must also give notice of at least twenty-four hours of his intention to have the dwelling visited by a prospective purchaser. (Article 541).

Other recourses of lessee

8 If the lessor, through his fault, fails to execute an obligation, the lessee is entitled to exercise the recourses in Articles 254 and and following. (Article 500).

Obligations of the lessee

Proper use and cleanliness

9 The lessee must use the dwelling reasonably, and keep it clean. (Article 542).

Good conduct

10 The lessee must act so as not to disturb the normal enjoyment of other lessees of the same immoveable.

He is responsible to the lessor and the other lessees for damage which may result from a violation of this obligation, either on his own part or on that of persons he allows to have access to the immoveable.

The violation also entitles the lessor to ask for resiliation of the lease. (Article 523).

Recourse of lessee when disturbed

11 In the cases provided for in the preceding article (clause number 10), after putting the common lessor in default, the lessee disturbed in his enjoyment may obtain, if the disturbance persists, a reduction of rent or the resiliation of the lease, according to the circumstances.

He may also recover damages from the common lessor, unless the latter proves absence of fault on his part, saving the recourse of the lessor for repayment against the lessee at fault. (Article 524).

Subletting and transfer of lease

12 The lessee may not sublet all or part of the thing or transfer his lease without the consent of the lessor, who cannot refuse it without reasonable cause.

The lessor who does not answer within fifteen days is deemed to have consented.

The lessor who consents to the subletting or transfer of the lease can only require reimbursement of the expenses reasonably incurred. (Article 506).

Dangerous substances

13 The lessee may not, without the consent of the lessor, use or keep in the dwelling any substance which would constitute a risk of fire and have the effect of increasing the lessor's insurance premiums. (Article 543).

Fire

14 In the event of fire in the premises leased, the lessee is not liable for damages unless his fault, or that of persons whom he has allowed to have access to it, is proven. (Article 527).

Recourse of the lessor

15 If the lessee, through his fault, fails to execute an obligation, the lessor is entitled to exercise the recourses provided in Articles 254 and following. (Article 516).

Automatic extension

16 Every lease for a fixed term is, upon its termination, extended of right for the same period.

However, where the term is for more than twelve months, the lease may only be extended for a period of twelve months.

The parties nevertheless may agree to a different extension period. This article does not apply to the lease granted by an employer to his employee as an accessory to a contract of employment. (Article 544).

Notice of non-extension

17 A lessor who wishes to avoid the extension of the lease contemplated in the preceding article or to increase the rent or change any other condition for the renewal or extension of the lease must give notice in writing to the lessee.

A lesse who wishes to avoid the extension of a lease contemplated in the preceding article must give notice in writing to the lessor. (Article 545).

Period of notice

18 The notice contemplated in the preceding article must be given three months before the expiry of the term in the case of a lease for a fixed term of twelve months or

more; one month or one week before the expiry of the term in the case of a lease for a fixed term of less than twelve months according to whether the rent is payable by the month or by the week.

If the rent is payable according to another term, the notice must be given within a period equal to that term or, if it exceeds three months, within a period of three months.

These notices may not be given beyond a period exceeding twice that provided for in the preceding paragraphs. (Article 546).

Either party may, for reasonable cause and with the permission of a judge, give notice after the expiry of the period provided for in the first two paragraphs of this article, provided the other party does not suffer serious damage from this.

In the case of a lease contemplated by the fourth paragraph of Article 544, the lessor must give the lessee notice of at least one month to terminate the lease, whether the lease is for a fixed term or for an indeterminate term. (Article 547).

Resiliation of lease

Non-payment of rent

19 The lessor is entitled to resiliation of the lease for non-payment of the rent only if the lessee has delayed for more than three weeks. (Article 549).

Unsafe premises

20 The lessor is entitled to resiliation of the lease when the dwelling is ruinous and becomes dangerous for the public or for the occupants. (Article 550).

Death of lessee

21 The heir or legatee of a deceased lessee may resiliate the current lease.

He must notify the lessor in writing three months before the resiliation.

The notice must be given within six months after the death. (Article 552).

Abandonment of premises

22 If the lessee leaves the dwelling before the expiry of the lease, taking his moveable effects, the lessor may make a lease with a new lessee.

The new lease entails resiliation of the former, but the lessor retains his recourse in damages against the person who has left the premises. (Article 553).

Prohibitions

Payment of rent and deposit

23 The lessor may only require advance payment of rent for one term or, if the term exceeds one month, payment of one month's rent.

He may not require any other amount in the form of a deposit or otherwise. (Article 554).

Issue of cheques

24 The lessor may not require issue of a cheque or other post-dated instrument for payment of rent except for the final term or, if the term exceeds one month, for payment of the final month's rent. (Article 555).

Forfeiture of term and change of rent during the term of a lease

25 The following are without effect:

1. any clause to forfeit the term for payment of the rent

2. any clause in a lease for a fixed term of twelve months or less that would directly or indirectly increase the rent during the lease. (Article 556).

In a lease for more than twelve months, the parties may agree that the rent will be readjusted in relation to any variation of the municipal or school taxes affecting the immoveable, of the unit cost of fuel or electricity in the case of a dwelling heated or lighted at the cost of the lessor, and of premiums for fire insurance and liability insurance.

The readjustment may not be made during the first twelve months of the lease and may not occur more than once during each additional period of twelve months.

If the amount of the readjustment is contested, the parties may apply to the court by way of motion. (Article 557).

Exemption from liability and liability without fault

26 The following are without effect:

1. any clause of exoneration or limitation of the liability of the lessor

2. any agreement intended to render the lessee liable for damage caused without his fault. (Article 558).

Penal clause

27 Any penal clause in which the amount provided for exceeds the damage actually sustained by the lessor may be annulled or reduced. (Article 559).

Family increase

28 Any agreement to alter the rights of the lessee by reason of an increase in the number of members of his family is without effect, unless the space of the dwelling warrants it. (Article 560).

Purchase of moveables hypothecated in favour of third parties

29 Any agreement by which the lessee undertakes not to hypothecate in favour of third parties moveables furnishing the dwelling is without effect. (Article 561).

Locks

30 Locks allowing access to the dwelling may be changed only with the consent of the parties. (Article 562).

Good condition

31 Any agreement by which the lessee acknowledges that the dwelling is in good condition is without effect. (Article 563).

Offences

Remittance of copy of lease in writing

32 If the parties agree to a written lease, the lessor, within fifteen days after it is made, must give the lessee a copy of the lease reproducing, in full and in the manner indicated there, section II of the form attached as a schedule. (Article 564).

Remittance of a writing for verbal lease

33 If the parties agree to a verbal lease, the lessor, within three days after the agreement, must give the lessee a writing reproducing, in full and in the manner indicated there, section II of the form attached as a schedule. (Article 565).

Language of the lease

34 The lease and writing referred to in Articles 564 and 565 must be drawn up in French or in English, at the option of the lessee. (Article 566).

Type

35 The type used for the printed lease or writing referred to in Articles 564 and 565 must be of at least:

1. for marginal notes, for titles and for the word "notice" at the beginning of section II, twelve-point face on thirteen-point body bold-faced capitals;
2. ten-point face on eleven-point body for the remainder of the contract. (Article 567).

Discrimination against children

36 No person may refuse to make a lease with a prospective lessee or to maintain a lessee in his rights for the sole reason that he has one or more children, taking into account the space of the dwelling. (Article 568).

Offence and penalty

37 Any person who contravenes Articles 562 and 564 to 568 is guilty of an offence and is liable, in addition to the costs, to a fine of not more than five hundred dollars for each offence. (Article 569).

38 Any person who requires of the lessee any payment other than those authorized by Article 554 or 555 is guilty of an offence and is liable, in addition to payment of the costs, to a fine of not more than five hundred dollars for each offence. (Article 570).

Effects of offence

39 Contravention of any of the articles mentioned in Articles 554, 555, 562, 564 to 568 does not allow a person to demand the nullity of the lease. (Article 571).

Proceedings

40 Proceedings under Article 569 or 570 are instituted by any person authorized by the Attorney-General in accordance with the *Summary Convictions Act* and Part II of that act applies to them. (Article 572).

Reimbursement and damages

41 The court condemning a person accused of an offence mentioned in Article 569 or 570 to a fine may order, at the request of the victim, the accused to reimburse him any amount collected without right or to pay him the damages incurred by him as a result of the commission of the offence.

If the accused does not comply with the order within the period fixed by the court, the victim may have the order registered in the office of the competent civil court.

The order is then executed as any judgment of that court. (Article 573).

SECTION III

ADDITIONAL CLAUSES

(Include here any additional clause which may be agreed by the parties; for instance, snow removal, janitor service, heating, description of the premises and of the furniture, if any, etc.)

In witness whereof I have signed at .....

.....

.....

this ..... day of .....
19.....

.....	.....
Lessor	Lessee
.....	.....
Witness (if required)	Witness (if required)

SCHEDULE V

TRANSITIONAL PROVISIONS

The enactment of the Draft will require adoption of transitional provisions.

BOOK TWO ON THE FAMILY

Thus the present provision of Article 1268 paragraph 3 C.C. should be enacted as a transitional provision.

BOOK FIVE ON OBLIGATIONS

Considering the articles of the chapter on annuities, it is suggested that the following article be adopted:

Any annuity established before the coming into force of Articles 1 to 12 is governed by the laws which were in force prior to adoption of this Code.

BOOK SEVEN ON PRESCRIPTION

In the field of prescription the following might be appropriate:

1. the new provisions will apply to matters where prescription begun under the former law has not yet been completed;
2. prescriptive periods completed before the coming into force of the new Code are vested rights;
3. when a period of prescription which is still running has been reduced by the new law, it is completed according to the shorter of the two following periods: the period which remains to run according to the rules of the former law, or the period provided for by the law, reckoned from the time of its coming into force;
4. when the period running has been increased, the new provisions are immediately applicable and account is taken of the time elapsed before they came into force.

SCHEDULE VI

LIST OF PERSONS WHO HAVE PARTICIPATED IN THE REFORM OF THE CIVIL CODE

LIST OF COMMITTEE MEMBERS

Alain, Gérard
Alarie, Jean
Auger, Jacques
Baillargeon, Jean-Paul
Barry, Gerald
Baudouin, Jean-Louis
Baudouin, Louis *
Barnard, Edmund
Beaudry, Edouard
Beetz, Jean
Bélanger, Laurent E.
Belleau, Claude
Bishop, John
Blanchet, Georges
Bohémier, Albert
Boucher, Jacques
Bournoville, Evelyne
Brabant, Joseph A.
Brière, Germain
Brierley, J.E.C.
Brisset, Jean
Brossard, Ariste
Cantin-Cumyn, Madeleine
Cardinal, Jean-Guy
Caron, Maximilien *
Caron-Montpetit, Madeleine
Caron, Yves *
Casgrain, Jacques
Castel, Jean-Gabriel
Chapdeleine, Claude
Ciotola, Pierre
Clarkson, Ross T.
Claxton, John B.
Cleven, Bruce *
Clos, Michel
Comtois, Roger
Corriveau, Bernard
Côté, Pierre G.
Crête, Claude
Croteau, Etienne
Demers, Gilles
Demers, Robert
Deschênes, Jules
Desjardins, André
Desjardins, Yvan
Deslauriers, Ignace
DesRosiers-de Lanauze, Renée
Desrosiers, Pierre
Dompierre, Alain
Ducharme, Léo
Durnford, John W.
Escojido, André
Faribault, Marcel *
Fortin-Caron, Denyse
Fox, Francis
Fréchette, Jean-Guy
Fredette, Jean-Marc
Gauthier, Eloi
Gauthier, Maurice
Gauthier, Wilbrod P.
Girard, Grégoire
Goldstein, Yoine
Gonthier, Charles
Groffier-Atala, Ethel
Groleau, Claude
Guay-Archambault, Denyse
Guthrie, Derek
Guy, Marcel
Hamel, Jean-Yves
Hébert-Payette, Louise
Heleine, François
Hugessen, James K.
Jacoby, Daniel
Johnston, Donald J.
Laberge-Colas, Réjanne
Laflamme, Ghislain K.

* deceased

Lanctôt, Jacques
Langevin, René
Lauzon, Yves
Lavallée, Armand
LeDain, Gérald E.
Lepine, Normand
Lesage, André
Lette, Raymond
L'Heureux-Dubé, Claire
Lord, Danièlle
Mailloux, Michel
Marceau, Louis
Marcotte, Ronald
Marler, George C.
Marquis, Maurice
Marquis, Paul-Yvan
Martineau, Pierre
Masson, Donald
Mayrand, Albert
McCarthy, Gerald
Mettarlin, Daniel
Meyer, Perry
Miko, Jean
Milette, Roland
Moisan, Jean
Morel, André
Morin, Jacques-Yvan
Nolan, John
O'Donnell, Vincent
Ouellette-Lauzon, Monique
Ouellette, Yves
Patenaude, Luce
Paquette, Adrien
Paquette, Raymond
Payette, Louis
Pépin, Gilles
Périard, Paul
Pineau, Jean
Plamondon, Luc
Popovici, Adrian
Pourcelet, Michel
Prenoveau, Conrad
Renaud, Yvon
Rivet, Michèle
Robichaud, Jacques
St-Laurent, Edmond
Salomon, Nathaniel
Sand, Peter
Saunders, Ernest E.
Sinclair, Pierrette
Scott, F.R.
Smyth, Jerome C.
Tancelin, Maurice
Taschereau, Jacques
Taschereau, Louis-Philippe
Tennet, Ronald
Thibault-Robert, Louise
Thuret, Guy
Tôth, Thomas
Trotier, André
Trudel, Jean-Paul
Trudel, Gérard
Vallée-Ouellet, Francine
Vandal, Roland

* deceased

LIST OF RESEARCH ASSOCIATES

Barakett, Francine
Beaulieu, Louise
Bélisle, Jean-Pierre
Bergeron, André
Cantin, Marie-Josée
Carpentier, Jocelyn
Clendenan, Richard J.
Delisle, Yves
De Massy, Philippe
De Mestral, Armand
Dhavernas, Daniel
Drolet, Jean
Dumont, Hélène
Duquette, Jean-Paul
Dureault, Georges-H.
Dussault, Robert
Farinelli, Marcelle
Fleury-Tardif, Christiane
Gagnon, Claude
Gosselin, Roland
Hétu, Jean
Huard, André
Labrecque, Ernest
Laferrière-Leroux, Nicole
Lauzon, Louise-Marie
Letarte, Pierre
Létourneau, Jacques
Létourneau, Jean-Paul
Loignon, Pierre
Mailhot, Claude
Marcil, André
Massicotte, René
Morency, Francine
Nadeau, André
Nicholas, Michel
Nolin, Guy
Renaud, André
Reynolds, Louis
Richard, Ghyslaine
Thisdale, Louise
Tison, Serge
Vincelette, Denis

* deceased

LIST OF CONSULTANTS

Beaudoin, Pierre
Beltrami, Edouard
Caron-Gaulin, Hélène
Deschamps, Michel
Desjardins, Yvon
Desrosiers, Ulysse
Forgue, Lionel
Garrigue, Philippe
Glenn, Patrick
Gliserman, Irwin
Hudon, Jean-François
Kouri, Robert P.
Lussier, Rémi
Perron, Monique
Talpis, Jeffrey
Waters, Donovan
Wax, Stanley

* deceased

LIST OF TRANSLATORS

TRANSLATORS

Elizabeth Cowan
Donald Hughes
Colin Roberts
Rita Daguillard
Margret Ponze Grenier
Lorraine Gaboury Ladouceur
Everett Melby
Eric Oxford
Kelly, Ricard
Earle Straus
Elizabeth Thompson
Hal Winter

REVISION AND CO-ORDINATION

R. Clive Meredith
Mary Plaice

* deceased

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