THE CODIFICATION OF THE FRENCH CUSTOMS

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A RENEWED attack on central problems of English legal history can gain fresh perspective from the history of French law. France and England entered the later middle ages with a common fund of legal and political institutions. Much of the area that was to be included in modern France was united with England under a common sovereign; political institutions were shaped by the same basic forces into similar forms of feudal organization; private law was largely composed of unformulated popular custom, remarkably similar even in detail. As early as the thirteenth century the tendencies toward divergence, both in law and government, had made themselves apparent. But we have even now no connected account of the processes by which this divergence occurred, or of the numerous parallels that persisted in later history. We know the main stages of political development by which in England a feudal monarchy was slowly transformed into a constitutional, parliamentary democracy and in France similar institutions had been molded by the eighteenth century into a centralized, bureaucratic state. As to private law, we know the methods by which the common law was constructed; and in France we know the end result, how six hundred years of continuous development were climaxed by the Napoleonic Code of 1804. The rest of the story must be filled in from scattered sources.

Only one chapter in this long narrative can be recounted here. The objective is to concentrate on one critical phase in a long development, the eighty years of the sixteenth century in which the customs of northern France were codified. The choice may be justified in part because the process of codification was itself inherently interesting, involving as it did the creation of some special legislative machinery, largely subject to popular control. More important is the light that may

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be thrown on the condition and content of French private law at this intermediate stage in its history. Likewise important were the effects of the codifications, incomplete and unsystematic as they were, on the later development of French private law. Incidentally involved are some central questions as to the relations between the political sovereign and private law, questions with which English law has been much concerned at various stages of its history. And finally, in any study of sixteenth century developments, it is difficult to avoid some reference to events in Germany, where local custom proved inadequate in this critical period and was rapidly submerged in the “reception” of Roman law.

**The Condition of French Private Law at the Year 1500**

The condition of French customary law at the start of the sixteenth century suggests the reasons why codification was attempted. Approximately two-thirds of the area included in modern France was governed by rules which still rested largely in oral tradition. Attempts had been made earlier to formulate the customs of particular districts, through private treatises that enjoyed a high authority and, more rarely, through official or semi-official codification.

1 The division between the pays de coutumes and the pays de droit écrit is familiar, and it is only with the districts governed by customary law that this article is concerned. The pays de droit écrit was a large and prosperous area, the northern limit of which included the district surrounding Bordeaux, and passed along the northern border of Périgord and Limousin, then north of Lyons, ending on the east in the region of Geneva. The survival of Roman law throughout this area hampered the growth of local customary law, and official codifications were less common. But the contrast between pays de coutumes and pays de droit écrit should not be exaggerated. There appeared in the pays de droit écrit some important legal institutions comparable to those of the pays de coutumes. Caillemer, “Les Idées Coutumières et la Renaissance du Droit Romain dans le Sud-Est de la France,” Essays in Legal History, ed. Vinogradoff, 174 (1913). In some districts, particularly in the southwest, codifications appeared in the sixteenth century. Furthermore, the reception of Roman law in this area was selective, with a high degree of adaptation to local conditions, as is suggested in the interesting biography by OuRЛИАС, ÉTIENNE BERTRAND (1937). When one considers that Roman law had high persuasive authority even in the pays de coutumes, it appears that the difference between the two areas cannot be described as more than an important difference of degree. 2 CHÉNON, Histoire Générale du Droit Français 331-334 (1929).

2 Of private compilations, the most important were the Coutumes de Beauvaisis, by Phillipe de Beaumanoir (finished in 1283); the Établissements de Saint Louis (about 1272); the coutumiers of Normandy (1194-1220 and 1254-1258); the coutumier of Berry (about 1312); and the custom of Brittany (1312-1325). 1 CHÉNON, Histoire Générale du Droit Français 553-562 (1926).

Official or semi-official publications appeared in Anjou and Maine as early as 1246, and fragments of the custom of Vexin Français in 1235. There are records of publications in Anjou (1411); in Poitou (1417); and in Berry (1450). 1 BRISaud, Cours d'Histoire Générale du Droit Français 362, note 2 (1904).
plying customary law had produced an increasing volume of "notorious and approved" customs, of which the courts in effect took judicial notice. For purposes of litigation, however, it was still necessary in most instances to employ the procedure of local inquest, the *enquête par turbe*, in which inhabitants of the particular district would testify to their recollection of local practices. This reliance on lay testimony in the formulation of legal rules had not precluded the development of a professional class of trained lawyers, whose influence was steadily increasing. But in the absence of a system of judicial reporting, the expansion and doctrinal development of customary law could not proceed without some more permanent and reliable statement than local inquests supplied.

Confusion was increased by the divergences between customs in different districts and the growth of local variations. The Parlement of Paris and its provincial counterparts, unlike the central courts in England, had not fused the great mass of customary rules into a unified "common law," whose supremacy over local custom was constantly extended. It is true that the main institutions of the *pays de coutumes* revealed a basic similarity, but in matters of detail there were numerous and important discrepancies. Even within particular districts local variations appeared, particularly in the northeast of France, where the codifications were to reveal a rich growth of highly localized customs. Both as to general customs, extending throughout whole dis-

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4 The organization of provincial Parlements, modeled on the Parlement of Paris and exercising similar powers as appellate courts of last resort, had commenced with the Parlement of Normandy, whose independence dates from 1315 though the title of Parlement was not assumed until later. During the fifteenth century were organized the Parlements of Toulouse, Grenoble, Bordeaux, Dijon, and Provence. Between 1515 and 1775 eight other Parlements were organized, of which the most important was the Parlement of Brittany. 1 Chénon, *Histoire Générale du Droit Français* 875-879 (1926); 2 ibid., 500-504 (1929). The Parlement of Paris retained, however, its predominant influence. If one excepts the provinces of Normandy and Brittany, each of which had its own Parlement, the jurisdiction of the Parlement of Paris can be described as almost coextensive with the limits of the *pays de coutumes*, extending to the south even into the *pays de droit écrit*.

5 It has been estimated that at the end of the Ancien Régime there were 65 general customs and about 300 local customs. 2 Chénon, *Histoire Générale du Droit Français* 322 (1929). Even these terms are relative. The customs of Normandy and Brittany had the widest geographical scope, and local variants were few and unimportant. To the northeast the customs were centered in the municipalities and the process of codification was enormously complicated by claims of local autonomy from numerous small communities. Between these two extremes there was a wide range of variation. It should not be forgotten that the process of codification itself drastically reduced the number of local customs, and that at the year 1500 the situation was far more confused than it was in 1789.
drects, and local variants, uncertainty prevailed as to the territorial limits within which they applied. Such multiplicity and diversity were not necessarily fatal, as events later proved. But they greatly retarded the processes of adjustment to new social and economic conditions in a century of rapid and fundamental change.

If these processes of adjustment could not be accelerated, French law might readily have followed the same course as German customary law. Indeed, a contemporary observer, surveying the legal systems of France and Germany at about the year 1500, would have seen important differences but many striking similarities. In both areas the law consisted largely of custom, unformulated, vernacular, and localized to a high degree. The study of Roman law, continuous among educated classes since at least the thirteenth century, had supplied a background of ideas, which were used increasingly to interpret and supplement local customary rules. Both in France and in Germany a “reception” was in process. How far it would be carried would not depend on the will of a royal legislator nor on the degree of popular attachment to ancient legal institutions. The preservation of native elements in either country would depend on how well the legal system as a whole could be made to function in the expanding society of the sixteenth century.

The organization of the imperial Kammergericht in 1495 is usually taken to mark the beginning in Germany of the “reception” of Roman law. The importance of this event has frequently been exaggerated. The “reception” of Roman law in Germany was in fact an immensely complicated process, occupying more than a century, prepared for long in advance, more complete in some areas than in others. Dates are significant only as marking stages in a continuous development, whose main tendencies were revealed only in retrospect. It seems unlikely that political agencies or political motives played an active part, and a political authority as feeble as that of the emperor was scarcely equipped to undertake a fundamental reform of German private law.6 If one could look to political leadership to initiate and conduct a “reception,” there was available in France an instrument far more effective than the German Kammergericht. The Grand Conseil, a judicial branch of the

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6 The disintegration of political authority in Germany was reflected in the limited appellate jurisdiction of the imperial Kammergericht. The dilatoriness and ineffectiveness of its procedure provided further handicaps, as is pointed out by Stüzel in a book review, 47 Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft, pt. 2, p. 1 at 25-46 (1907). In German literature the conventional accounts of the reception attribute the influence of the Kammergericht very largely to the personal prestige of its membership, giving added impetus to forces that were already strongly at work.
Privy Council, was organized on a permanent basis in 1497, only two years after the organization of the Kammergericht in Germany. With a developed procedure and extensive powers of appellate review, the Grand Conseil was far better prepared than the German Kammergericht to assume leadership in the reform of private law.

Analogies between France and Germany can easily be pushed too far. In the first place, no evidence has been found in original or secondary sources that the French Grand Conseil conceived its mission to be the development or reform of private law. It remained primarily an instrument of royal policy, fully competent in private litigation but confining its functions to a general supervision of the administration of justice and the advancement of political objectives of the Crown. The causes of this abstention of course lie deeper. The French monarchy had succeeded long before in establishing an efficient centralized court system, with trained personnel. A professional class of lawyers had had long experience in the analysis and application of French

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The separation from the Curia Regis of a definitely judicial branch, the Parlement of Paris, occurred in France toward the end of the thirteenth century. But the council around the king, as in England, retained judicial functions which it exercised occasionally through the fourteenth and fifteenth centuries. During the reign of Louis XI (1461-1483) there was a rapid development, though the records tell extraordinarily little of the process. After 1483 a series of continuous registers reveal that the judicial branch of the Privy Council had become a fully organized court of justice.

Access to the Grand Conseil was available either through ordinary appeal, the procedure on which the jurisdiction of the Parlements usually depended, or by way of évocation, an exceptional proceeding which involved an exercise of royal power to intervene in ordinary litigation. In either case it was clear that the jurisdiction of the lower court was completely superseded and the Grand Conseil was free to dispose of the case on the merits.

Evidence in support of this conclusion cannot be given here. It rests in part on an examination of the register of the Grand Conseil, starting Dec. 21, 1497, and continuing through June 16, 1502. Archives nationales, V5 1042. Abundant evidence to the same effect is found in the secondary sources of the sixteenth and seventeenth centuries. Supervision over the administration of justice was confined to cases of jurisdictional dispute between the various Parlements and claims of partiality (the so-called récusions de juges) which opened a wide avenue for intervention. In its later history the Grand Conseil was much concerned with the enforcement of the king's ecclesiastical policy and with disputes concerning royal finances. See further, 2 Chénon, Histoire Générale du Droit Français 531-533 (1929).

Similar questions arise as to the functions and objectives of the new judicial branch of the Privy Council which emerged toward the end of the sixteenth century.
customary law. Legal doctrine had become articulate, through published treatises and professional tradition. A continuous development of French law through existing agencies was possible, if materials already available could be sifted and redefined. That desperate need for doctrine, for a rational and plausible explanation of concrete results, which played so large a part in Germany, was not felt in the same degree. The French “reception” could be selective because the technical development of French customary law had already reached a higher level and was to be still further stimulated by the process of codification.

THE ORGANIZATION OF MACHINERY

The impulse toward codification of the customs came in the first instance from the king. In a celebrated ordinance of 1454 Charles VII ordered that the customs, usages and rules of practice of every district in the kingdom were to be reduced to writing by the local inhabitants, brought before the king, and examined by his Council or by the Parliament with a view to publication. The response was disappointing, and which survived under the title of Conseil Privé till the end of the Ancien Régime, exercising most of the functions which had been assigned to the Grand Conseil a century earlier. A study of the original registers of the Conseil Privé for the first six months of 1601 (ARCHIVES NATIONALES, VI 1172-1173) confirms the evidence from secondary sources and indicates that the Conseil Privé did not undertake the active and systematic improvement of private law. The Conseil Privé, like the Grand Conseil, was a fully organized court with a permanent personnel, an elaborate procedure, and unquestioned power to supersede the ordinary courts. In spite of the range and variety of its activities, the Conseil Privé remained essentially a branch of the central executive.

10 Even private and unofficial compilations of customary law could provide a bulwark against the tide of Roman doctrine, as is suggested by the history of Saxon law, whose independence can be traced very largely to the influence of a private treatise, the Sachenspiegel. SCHRODER-VON KUNSBERG, LEHRBUCH DER DEUTSCHEN RECHTSGESCHICHTE 873 (1922). Similar compilations had appeared in France as early as the thirteenth century and continued to exert a widespread influence. Above, note 2.

11 This is not the place to undertake an answer to the much debated question of the causes of the German “reception.” In any movement of opinion on so extensive a scale the causes were necessarily complex. But there was surely significance, whether as symptom or as cause, in that insatiable public demand for crude popularized restatements of Roman doctrine, a major phenomenon of the sixteenth century. STINTZING, GESCHICHTE DER DEUTSCHEN RECHTSWISSENSCHAFT 77-84 (1880). A similar need for more sophisticated doctrine must have played some part in the increasing resort to arbitration before Romanist doctors and in the consultations of the doctors by the lay judges of the popular courts. Ibid., 53-54.

12 Ordonnance de Montils-les-Tours of April, 1453, art. 125. 9 RECUEIL GENERAL DES ANCIENNES LOIS FRANCAISES 252-253 (1825): “ordonnons, et décernons, déclarions et statuons que les coutumes, usages et stiles de tous les pays de nostre royauyne, soyent rédigéz et mis en escrit, accordz par les constumiers, praticiens et gens de chacun desdiz pays de nostre royauyne, lesquelz coutumes, usages et stiles ainsi accordez seront mis et escritz en livres, lesquelz seront apportez par-devers nous, pour les faire veior et visiter par les gens de nostre grand conseil, ou de nostre parlement et par nous les décréter et conformer. . . .”
The only result was the official publication of the custom of Burgundy under the authority, not of the king, but of the Duke of Burgundy.¹⁸

The initiative was more vigorously assumed by Louis XI (1461-1483), the son of Charles VII. The Memoirs of Phillipe de Commynes reveal the king’s interest in the project and suggest a much more ambitious plan to unify the divergent local customs into a single authoritative text.¹⁴ A personal letter from the king discloses his plan for a systematic comparison of French customs with those of Italy,¹⁵ and by letters patent in 1481 he instructed local officials to proceed at once with the preparation of texts, which were to be approved and authorized by the king.²⁰ This exhortation had as its only result the drafting of preliminary texts in four districts.²¹ After the death of Louis XI similar pressure was exerted by his successor, with the result that meetings were held in at least ten districts for the purpose of drawing up

¹³ ¹ Brissaud, Cours d'Histoire du Droit Français 363 (1904); ² Boûrdot de Richebourg, Nouveau Coutumier Général 1193 (1724) (hereafter cited simply as de Richebourg).

¹⁴ ² Mémoires de Phillipe de Commynes, Mandrot ed., bk. 6, c. 5, p. 37 (1903): “Des à cette heure là [i.e., after the battle of Guinegate in 1479] delibera de traicter paix avecques ce due d'Autriche. . . . Aussi desiroit fort que en ce royaume l'on usast d'une coustume et d'ung poyz et d'une mesure, et que toutes ces coustumes fussent mises en francoys en ung beau livre, pour éviter la cautelle et la pillerye des advocatz, qui est si grande en ce royaume que en aultre elle n'est semblable. . . .”

That royal officials actively prosecuted the project is indicated by a financial record of 1480, which recites a payment to Pierre Chappon, clerc, for a voyage made for the purpose of transmitting the royal command to local officials throughout the kingdom, directing them to send copies of the local customs to the king “pour en faire une coustume nouvelle.” Published by L. Delisle, ¹⁸ Nouvelle Revue Historique de Droit Français et Étranger 555 (1894).

¹⁵ “Monsr du Bouchaige, vous savez bien le desir que j’ay de donner ordre aux coustumes, au fait de la justice et de la police du royaume. Et pour ce faire, il est besoing d’avoir la maniere et les coustumes des autres pais. Je vous prie que vous envoiez querir devers vous le petit Fleurentin, pour savoir les coustumes de Fleurance et de Ven­­ize, et le faictes jurer de tenir la chose secrete, afin qu’il vous dye mieulx et qu’il le mette bien par escript.” Letter of Aug. 5, 1481, in ⁹ Lettres de Louis XI, ed. Vaesen and Charavay, 59-60 (1905). I am indebted to M. Olivier Martin for calling my attention to this letter.

¹⁶ Letters to the bailifs of Vermandois and Sens, dated Aug. 18, 1481. ¹ Varin, Archives Législatives de la Ville de Reims 651-652 (1890). I am indebted to M. Olivier Martin for calling my attention to this letter.

¹⁷ Meetings for this purpose were held in 1481 in Vermandois—¹ Varin, Archives Législatives de la Ville de Reims 654 (1890); Troyes—³ de Riche­­bourg 267; and Berry—Klimrath, Études sur les Coutumes 6 (1847). In Poitou there was apparently a text drawn up in this period, for Dumoulin refers to some customs of Poitou that had been printed in 1486. ⁴ de Richebourg 775, note a.
or revising preliminary texts. None of these texts, however, was officially published. The work of codification was at a standstill.

The main obstacle was the inaction of the central government. It had clearly been contemplated by Louis XI that the texts should be reviewed by his own Council before publication. Letters of Charles VIII in 1493 had merely provided that royal commissioners would collect them and carry them before the king. In 1496 a commission of judges of the Parlement of Paris was appointed, to study the texts and report its opinion on any difficulties they might contain. Its report was then to be examined by a larger commission, presided over by the first president of the Parlement. This machinery was soon found to be unworkable, chiefly because the members of the Parlement were fully engrossed with the ordinary judicial business of the court.

Behind these problems of procedure there still lay undecided a fundamental problem of French public law. Where, in the last analysis, did the power reside to declare, and possibly to modify, the customs? Reliance on the local inquest for proof of customary law in ordinary litigation might suggest a principle of local autonomy. On the other hand, the king's power to amend or abrogate customary law had frequently been exercised in the late middle ages, and in the customary

18 Troyes in April, 1493-4—3 de Richebourg 267; Nivernais from June 23 to July 10, 1490—Boucomont, "Le Coustumier des Pays de Nivernoys et Donziow," 21 Nouvelle Revue Historique de Droit Français et Étranger 770 at 770-771, 820 (1897); Chaumont in April, 1493-4—3 de Richebourg 371; Ponthieu in January, 1494-5—1 ibid., 81; Lorris-Montargis in 1493—3 ibid., 829, note; Sens in March, 1495-6—3 ibid., 484, note; Boulenois in 1493-4—1 ibid., 40; Melun in 1494-5—Klimrath, Études sur les Coutumes 7 (1847); Amiens—ibid.; and Clermont en Beauvaisis in 1496—Testaud, "La Coutume du Comté de Clermont-en-Beauvaisis," 27 Nouvelle Revue Historique de Droit Français et Étranger 250 ff. (1903).

19 In the letters patent of Aug. 18, 1481 (cited above, note 16), the royal officials named in the letters were ordered to have the customs of their districts reduced to writing and sent before "the members of our Grand Conseil, wherever it may be."

20 Letters of Jan. 28, 1493—3 de Richebourg 267.

21 The appointments were made on Jan. 19, 1495-6, according to the recital in letters of March 15, 1497-8. 4 de Richebourg 639.

22 Letters of March 15, 1497-8, 4 de Richebourg 639: "If it were necessary to observe the said formality of communicating with one of the presidents and others of our judges, it would be very difficult to put an end to the task, in view of the great and continual burdens on our said court."

28 The customs of Toulouse were drawn up by local officers and sent to the royal council in 1283. The council approved all but 20, placing in the margin opposite the rejected articles non placet or deliberabimus. Langlois, Le Règne de Philippe III, p. 292 (1887).

The Olia, reports of cases decided by the Parlement of Paris in the late thirteenth and early fourteenth centuries, contain several examples of customs abolished by the king's authority. 1 Les Olia 530, no. 12; 1 ibid., 497, no. 19; 1 ibid., 562, nos. 12, 13; 1 ibid., 563, no. 14; 2 ibid., 163, no. 28.
regions of Belgium a similar power was reserved by the Holy Roman Emperor through the sixteenth and seventeenth centuries. The decline of representative institutions in France had already invested the king with independent legislative authority, which was being exercised on a constantly wider scale. In the early meetings of local assemblies in France there seems to have been serious uncertainty as to their relations with the central government. It is true that the preparation of preliminary texts was from the first entrusted to the population of each district. But where dispute arose within a local assembly as to what the custom was, or where a desire appeared to change an unjust or obsolete rule, it was common for the estates to appeal to the king.

24 In the Belgian publications it was usual to insert a clause reserving to the Emperor the right to “change, correct, modify, and reform, restrict and interpret the said customs and usages whenever this is found by us in our said Council to be expedient and necessary to do.” 1 De Richebourg 366, 343, 276, 257, 254, 729, 952, etc. The same reservation was made by the Duke of Burgundy in the publication of the custom of Burgundy in 1570. 2 ibid., 1181. See also, 1 Brissaud, Cours d'Histoire du Droit Français 364 (1904).

25 1 Chenon, Histoire Générale du Droit Français 524-531 (1926); 2 ibid., 345-350 (1929).

26 This procedure was clearly proposed by the ordinance of 1454 (above, note 12) and by the royal letters of Jan. 28, 1493-4 to the bailli of Troyes: “We order and direct you ... that ... after calling together our own attorneys and solicitors, clerks and other officers, and members of the clergy, nobles, bourgeois, and persons familiar with the customs, of good reputation and renown, in sufficient numbers, and after taking from them their solemn oath ... you inquire and cause to be inquired well and diligently of and concerning the truth and effect of the said customs ....” 3 De Richebourg 267-268. Similarly in letters of March 15, 1497-8. 4 ibid. 638.

27 At Chaumont in 1494 an article concerning appeals from manorial courts was disputed in the assembly and a note added: “let the King and his Council provide in this matter, as he shall think proper.” 3 De Richebourg 378.

At Reims in 1507 an article on the seisin of executors was attacked by persons demanding its reformation, but the estates could not agree. A note at the end says: “And therefore, may it please the King our lord and his noble and prudent Council, to provide concerning this at his pleasure.” 1 Varin, Archives Législatives de la Ville de Reims 681-682 (1890).

At Peronne in 1507 there were two articles referred to the disposition of the royal commissioners. 2 De Richebourg 599, 619. At Auxerre in 1506 a large number of disputed articles were “remitted to the members of the Court [i.e., the Parlement of Paris] and others having power to draw up, decree and determine the said customs.” 3 ibid. 591.

28 Especially in the meetings in Boulenois in 1495. For example, article 82, allowing subleases, was left with this suggestion: “It would be desirable and expedient, if this is the pleasure of the King, that our said lord decree, ordain, and provide that from now on in the future all leases and rents be created and acknowledged in the courts of the feudal lords.” 1 De Richebourg 34. Article 95, under which some lords had been taking double rents from sublessees, was left with the comment: “And since this last usage has seemed to many experienced persons to be a right usurped by
Finally, in 1498, the important decision was reached that the customs should be published before local representative assemblies in each district, by vote of their membership. There is no evidence that this decision was dictated by a broad principle of local autonomy in matters of private law. Some such principle might perhaps have been formulated if local control had been directly challenged. It is impossible to say whether local particularism could have withstood a determined effort by the central administration to deprive local communities of effective influence. In fact, no such effort was made. The newly established *Grand Conseil*, to which the local assemblies had occasionally appealed, had directed its attention toward larger affairs of state. Even the judges of the Parlement who had been expressly commissioned by the king were too much occupied with the ordinary judicial business of the court.\(^9\) The letters patent of 1498 in which the final decision was announced explain this important concession in terms of greater convenience in the preparation of texts and the high evidentiary value of testimony by local residents.\(^8\)

The effect of this decision was not to eliminate the king's sanction entirely. An essential part in the machinery of publication was the group of royal commissioners, especially delegated by the king for the superior authority . . . to provide for and remedy these matters, it is and would be expedient that the pleasure of the King be to decree and provide which of the above mentioned methods be followed . . . in order that it be done and practiced hereafter in accordance with the decree and order of our said lord.\(^9\) Similarly with article 98, concerning the feudal dues exacted of widows after the deaths of their husbands.

One could, perhaps, spell out of this recital the assumption that the vote of the local assemblies should be decisive except where "difference and disagreement" appeared, so that royal interference would in any event be narrowly restricted. On the whole it does seem unlikely that anyone at this stage seriously considered the unification or fundamental reform of customary law through royal legislation. On the other hand, the extent of local autonomy and the methods by which it should be maintained were still wholly undefined. In this state of confusion, expediency pointed toward an abdication in favor of the local assemblies. Expediency here can be taken to include a fundamental indifference of the central administration toward the issues raised by strictly private-law disputes, so long as the revenues or political authority of the Crown were not involved.
purpose of presiding over and directing the last stages of publication. As a result, then, of this ingenious compromise, a legislative instrument was created which enlisted royal authority for the authentication of the final text but which reserved to local assemblies the essential control over the legislative process.

Eight years later the formal publications began. The customs of Melun, Ponthieu, and Sens were officially published in 1506 by royal commissioners in the presence of local assemblies. The period from 1507 through 1510 was one of vigorous and fruitful activity. The customs of fourteen districts, mostly in the north central area, were reduced to writing and formally published. The culminating point was publication of the custom of Paris in 1510. During the next decade the movement shifted to the south and west, penetrating even into the pays de droit écrit with publications in the district surrounding Bordeaux. From 1521 through 1552 the work progressed more slowly, though the important customs of Nivernais, Berry, and Brittany were published in this period. Then, under the leadership of Christophe de Thou, first president of the Parlement of Paris, the campaign was vigorously resumed. At the death of de Thou in 1582 substantially all the customs of the pays de coutumes had been formally published.

81 From the outset in 1506 the actual work of publication was done by a group of two or three royal commissioners, who attended meetings of the local estates in each district. As late as Sept. 18, 1509 (3 DE RICHEBOURG 410-411) royal letters patent refer to a larger central commission with undefined powers of review, but there is no evidence that this commission participated actively at any time and after 1509 it wholly disappears.

82 See, for example, the comment of Bourdot de Richebourg, in his note to the 1509 custom of Orleans: “la redaction d’une Coutume étant considérée comme un cas Royal, le peuple ne pouvant en France se faire de Loix sans l’autorité du Roy.” 3 DE RICHEBOURG 735.

After publication it was usual for the final text to be reported back to the Parlement for official registration, but Louet refers to a decision of the Parlement of Paris on Sept. 7, 1571, holding that even this formality was not essential, since the customs took effect from the moment of their publication before the local estates. LOUET, RECUEIL D’AUCUNS NOTABLE ARRETS, ed. Brodeau, C, c. 20 (1650).

83 The only important publications not completed at his death were the publication of the custom of Normandy in 1583 and the “reformation” the same year of the custom of Orléans, which had been first published in 1509. The reformation of the custom of Orléans, which was completed in 1583 on the basis of plans made by de Thou before his death, was to rank with the reformation of the custom of Paris (in 1580) in the range of its influence. It will be recalled that the reformed custom of Orléans later provided the basis for Pothier’s great treatise on French private law.

During the seventeenth century a few scattered publications occurred, but the
More important, the machinery of publication had been employed for the revision and clarification of customs already published in the early years of the century. This last program of reform must be more fully described in a later section. Attention will be directed first to a problem of procedure which caused difficulty at the outset and might have threatened the success of the whole enterprise.

The Treatment of Disputed Articles

Even after the responsibility for declaring their own customs had been delegated to the inhabitants of each locality, there remained the danger of dispute within the local assemblies themselves. The solution first proposed for such cases was the reservation of disputed articles for later action by the king. The royal commissioners were also given discretion to fix the text by vote of "the larger and wiser part," but in the early publications this discretion was sparingly exercised and numerous articles were withheld from publication entirely.

The inconvenience of this expedient was clear enough. Even if the disputed article should remain in the official text, as frequently hap-

34 Letters of March 15, 1496-7 (4 De Richerbourg 639-640): "If any difference and disagreement arise, as to which the said estates cannot agree, the said difficulties, differences and disagreements shall be drawn up and put into writing together with the causes of their said differences, to be ordered and ended by us, the remainder of the said customs to be entirely published. . . . And nevertheless if on making the said publication certain difficulties arise concerning some articles of the said customs, we . . . have given and give you . . . power and authority to determine them with the consent in all cases of the said three estates in each baillage, seneschall and jurisdiction, or of the larger and wiser part thereof." Similar provisions appear in the letters of Sept. 2, 1497 (3 ibid., 428) and regularly in the royal letters of the sixteenth century.

The phrase "maior et sanior pars" was a canonist formula, important in the church's theory of collective action. 3 Gierke, Das deutsche Genossenschaftsrecht 324-327 (1881); Gierke, "Über die Geschichte des Majoritätsprinzips," Essays in Legal History, ed. Vinogradoff, 312 (1913).

35 Four articles in Bourbonnais in 1500—3 De Richerbourg 1207; general reservation of all articles on which there had been dispute at Ponthieu in 1506—1 ibid., 103; and Amiens—1 ibid., 137; three articles at Melun in 1506—3 ibid., 431-432; eight articles at Sens in 1506—3 ibid., 485-496; ten articles in Touraine in 1507—4 ibid., 634; three articles in Maine in 1508—4 ibid., 522-529; three articles at Meaux in 1509—3 ibid., 407-410; and three at Chaumont in 1509—3 ibid., 366, 367, 369. Dispute over the burden of proof as to the liability of land to rents and other burdens caused the reservation of articles on that subject in three places: Vitry, 3 ibid., 332; Troyes, 3 ibid., 261; and Chaumont, 3 ibid., 367.
pened, it could have no legal effect without further action by some outside agency. In the meantime, the older mode of proof through local inquest was the only means of ascertaining the custom for purposes of litigation. In effect, all the advantages of codification would be lost if large sections of the customary texts were to be expressly excepted from publication.

As early as September, 1497, the royal letters began to specify that disputed questions should be referred, not to the king or his Council, but to the Parlement whose officers conducted the publication. This solution of the difficulty proved to be ineffective. The press of judicial business prevented the Parlements from intervening on their own initiative to dispose of the questions reserved. The burden of litigating such disputes was placed on interested parties, and it was rarely that self-interest was sufficiently strong for private individuals to initiate judicial proceedings and prosecute them through to final decree.

There are records of two cases in which the Parlement of Paris was induced through private litigation to exercise the powers reserved to it by royal commissioners. Of these, the most celebrated was the dispute arising in the 1510 publication of the custom of Paris over the feudal dues claimed to be payable on the grant or repurchase of a rent charge. As a result of debates between the clergy and the representatives of Paris merchants, the commissioners had ordered provisionally that the articles requiring payment of such feudal dues should stand, with the privilege of appeal to the Parlement of Paris reserved to the Paris merchants. The essential functions of the rent charge in the credit system of the sixteenth century gave the dispute more than passing importance. For lawyers, engaged in an effort to reconstruct the theory and extend the usefulness of the rente constituée, the technical problems involved were vital. The appeal by the Prévôt des Marchands was not prosecuted before the Parlement until 1556. Decision was delayed by the évocation of the case by the king to his Privy Coun-

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86 The letters of March 15, 1497, had ordered a reference back "before us and the members of the Grand Conseil or such Commissioners as we shall appoint, to be by them decided and determined as they shall think fit." 4 DE RICHEBOURG 640. Reference back to the Parlement was substituted in the letters of Sept. 2, 1497—3 ibid., 428; March 4, 1505, 4 ibid., 640; and generally in the later publications. The exceptional resort to the Privy Council in the customs of Brittany and Normandy is referred to below, note 40.

87 The only instance reported where the Parlement acted on its own initiative in reviewing the disputes within the local assemblies was in the custom of Berry (1539), where a number of questions were settled by formal decree. 3 DE RICHEBOURG 990-994.
cil. Finally, after the Privy Council had remitted the dispute to the Parlement for its decision, the court decreed on May 10, 1557, that the articles provisionally inserted should be struck out and three new articles substituted in their place. 88

In spite of the results achieved in this and in one other instance, 89 it soon appeared that reference back to the Parlement had failed as a device for fixing the form of disputed rules. In most of the publications there was no other agency competent or, if competent, willing to intervene in matters of local private law. 40 The remaining alternative was to expand and perfect the functions of the local assemblies as legislative institutions. The expedients adopted for this purpose were chiefly two: (1) an increasing reliance on professional lawyers, and (2) a development of the principle of majority rule.

Lawyers had been prominent in the publications from the very first, not only in preparing preliminary texts 41 but in testifying as to

88 The decree is reproduced in 3 DE RICHEBOURG 5, note 2; JOUY, ARRESTS DE RÈGLEMENT 315 (1752); and PHILHOL, LE PREMIER PRÉSIDENT CHRISTOPHE DE THOU ET LA RÉFORMAION DES COUTUMES 271-272 (1937). A full account of the legal and economic background is given by PHILHOL, op. cit. 249-250.

89 Another well-known case of the Parlement's intervention was the dispute in the publication at Blois in 1523, concerning the unusually large fine demanded by the land-owning classes for all mutations of tenants. The commissioners had ordered that the article incorporating this alleged privilege "shall remain as custom provisionally, without prejudice to the opposition of the members of the said third estate." 3 DE RICHEBOURG 3108. After an appeal by the third estate, in which Dumoulin appeared as counsel, the article was ordered stricken from the text and it was provided that the landlords at Blois prove their rights by whatever private documents they might have. 3 ibid., 1055, note c. There is a full discussion of the case in the commentary of Dumoulin on the Custom of Paris, art. 76 of the new custom, gl. 1, nos. 12-31. 1 DUMOULIN, OPERA 719 (1681).

A similar dispute between nobles and clergy, on the one hand, and third estate, on the other, arising in the custom of Vitry in 1509, became involved in litigation in 1612. The court ordered the parties to the particular case to secure a final decision of the controversy within one year, the article provisionally fixed to take effect in the meantime. De Richebourg asserts that no further steps were taken, so that the article remained in force. 3 DE RICHEBOURG 332, note.

40 There was a reservation in favor of the Privy Council of the right to settle disputed articles in the 1539 publication of the custom of Brittany, 4 DE RICHEBOURG 333, and four articles were referred back accordingly, but apparently no further steps were taken. 4 ibid., 358. Quite exceptionally, the Privy Council intervened in the custom of Normandy (1583) to reject 15 articles as prejudicial to the rights of the king. 4 ibid., 127.

41 As at Reims in 1481, 1 VARIN, ARCHIVES LÉGISLATIVES DE LA VILLE DE REIMS 652 (1890), and at Amiens in 1507, 1 DE RICHEBOURG 114. Evidence of similar activity by local lawyers appears abundantly in the later publications. See below, note 94.
the state of local law and in influencing lay opinion. In the later publications the assemblies themselves were composed predominantly of lawyers, appearing as authorized representatives of persons entitled to attend. It was natural that the royal commissioners, in debates over rules that were often technical, should give great weight to the testimony of local lawyers, even against the protest of strong minority groups of laymen. It seems hardly too much to say that the extraordinary efficiency of the later publications was chiefly due to the silent conquest by a professional class of the local popular assemblies. As time went on the reports of the debates become more meager; the methods by which agreement was reached are increasingly obscure. But the appearance of unanimity which the later publications frequently present may be traced to a body of professional opinion which filtered into the local assemblies through their altered personnel.

The principle of majority rule had been admitted to a limited extent from the outset. Even in the early publications the royal commissioners had been willing to overrule small minorities when the opinion of the great majority was clear.

42 Bourbonnais, 1493—3 DE RICHEBOURG 1208; Paris, 1506—Martin, "De L'Ancienne Coutume de Paris," 42 NOUVELLE REVUE HISTORIQUE DE DROIT FRANÇAIS ET ÉTRANGER 192 at 212, 216, 218, 219 (1918). At Troyes in 1494 they are seen testifying unanimously against certain nobles and clergy who sought to defend their manorial jurisdictions against royal encroachment. 3 DE RICHEBOURG 269. In Anjou in 1508 the diversity of views among the lawyers as to the form of an existing rule led the commissioners to withhold it from publication. 4 ibid., 593.

43 For example, at Amiens in 1507 a large group of lawyers persuaded the majority that the old requirements of attendance by the vassal at the lord's court were "too rigorous." 1 DE RICHEBOURG 131.

44 The procès-verbaux of the commissioners regularly include a full list of the persons attending the local assemblies. The lists in the later publications indicate a high percentage of lawyers appearing as procureurs, particularly on behalf of the nobles and clergy. In many instances lawyers are listed as appearing in their own right.

45 For example, at Paris in 1510 "most of the clergy and nobility" claimed that tenants of land in the city owed the same fine for non-payment of rent as those outside the city. The "practiciens," however, swore that the exception in favor of the lands in the city (incorporated in article 62) was coutume notoire and it was accordingly allowed to remain. 3 DE RICHEBOURG 21-22. Two articles at Orléans in 1509 were settled over the opposition of the nobles when the "collèges des avocats, procureurs, et praticiens" came to the support of the clergy and third estate. 3 DE RICHEBOURG 769-770. Similarly at Vitry in 1509. 3 ibid., 334.

The reliance on the testimony of lawyers became very marked in the publications after 1520. For example in Bourbonnais (1521), articles 318, 319, 340, 342, 434, 479, and the chapter on Batards et Aubains; La Marche (1521), articles 62, 99, 123, 136, 175, 222, 230, 234, and 315; Blois (1523), articles 11, 20, 21, 33, 105, 109, 182, 183, and 258; and so on.

46 In Touraine in 1507 the objection of one noble to article 1 of the chapter
ercised with the greatest caution, but before long the commissioners resorted to an expedient which preserved the rights of disaffected minorities and yet went far toward definitive formulation of a binding text. They began to adopt provisionally the rule for which a majority could be found, and reserve to those who objected the right to appeal to the Parlement. The advantage of this device was obvious. It placed minorities in the position of appealing against a settled text, which in the meantime would be fully operative. A second consequence of this procedure must have been to emphasize the legislative powers of the local assemblies, in fixing provisionally, by vote of a majority, which one of several competing rules should govern them in the future.

**Legislative Reform by the Local Assemblies**

In the popular assemblies of the early fifteenth century, meeting perhaps for the first time to declare their customs, there appeared a strong feeling that certain rules of immemorial custom were unjust or inequitable. The slow evolution of French customary law had proceeded with little stimulus from direct legislation. The available agencies for conscious reform and adaptation could not keep pace with the social transformations of the fifteenth century. It was inevitable that a widening gap should appear between contemporary opinion and a body of customary rules which bore the deep imprint of their medieval origin. The difficulty came in finding a procedure by which such con-

"De Banc de Vin" and those of four or five nobles to article 2 of the chapter "Des Droits du Seigneur Chatellain" were overruled. At Sens in 1506, article 245 was allowed to remain against the opposition of an archbishop and a bishop. The power expressly conferred by the king to fix the text by vote of la plus grande et saine partie has already been referred to, above, note 34.

47 In Anjou (1508), articles 40 and 222; Troyes (1509), article 74; Meaux (1509), article 39; Orléans (1509), articles 29, 36, 37, and 38. Similar dispositions of disputed articles in the customs of Paris (1510) and Blois (1523) have already been referred to, above, notes 38 and 39.

48 Dumoulin, note to the procès-verbal of the custom of Paris (3 De Richebourg 26, note d): "Partant les articles accordez par la plus grand'-partie des Estats, et mis au Coustumier sont gardez pour coutume, nonobstant la litispendence de l'opposition et appel de la moindre partie. Et ainsi en usons."

49 In later publications it was even admitted at times that the vote of two of the three estates could prevail over the other, as at Auxerre in 1561, where the nobles and clergy established a disputed article over the objection of the third estate. Compare the note of Dumoulin to the custom of Montfort (1556), where he attacked the clergy for not supporting a reform proposed by the third estate, "car deux États eussent fait la plus grande part et conséquemment la loy."
victions, however widely held, could be translated into an effective program of legislative reform.

The first impulse of the local assemblies was to invoke the aid of the king. No response to this appeal was immediately forthcoming. It was not until the machinery of publication was organized in 1498 that a sanction was by implication provided. When publication before local assemblies was ordered, the estates soon took advantage of their opportunity. As early as 1506 the estates at Paris went so far in their preliminary meetings as to recommend specific changes in existing custom. In other districts the initiative was assumed in the same way by the local assemblies, and some of the changes so proposed were included in the published texts.

These first steps must have been made easier by the fact that it was difficult to draw a sharp distinction between legislation in the sense of making new law and mere codification or publication of existing custom. As the effort to compile the customs in an orderly form revealed uncertainties and gaps in local tradition, these gaps could be filled without formal legislative action. Furthermore, even in areas as to which tradition had crystallized, the necessity for verbal formulation must have impelled a new precision of thought and given sharper contours to the experience expressed, often in colloquial language, by the early texts.

Nevertheless, the evidence of systematic innovation is not long in appearing. The *procès-verbaux* of the commissioners began to distinguish between "ancient custom" and custom that should be observed in the future. In one of the earliest publications, in 1506, proposed articles were rejected as "too rigorous and contrary to reason and equity." In Touraine in 1507 a large number of articles underwent minor change and several were entirely recast. Very soon these ex-
amples were imitated in other districts.\textsuperscript{55} Almost without conscious claim and certainly without resistance from the agents of the king, the estates were establishing their right to legislate in the promulgation of their own customs. It is true that in 1510 and on two occasions in 1521, royal commissioners refused to publish new customary rules without express authorization from the king.\textsuperscript{56} But in later publications the scruples of the commissioners were anticipated by an authorization in advance of any changes agreed upon at final publication.\textsuperscript{57}

As early as 1508 the increasingly legislative powers of the local estates were thrown into relief by the commissioners themselves, in their attempts to persuade the estates to modify objectionable rules. One customary institution of which the commissioners were especially critical was the system of guardians for infant nobles. The right to guardianship belonged first to the parent of the infant, and then to his nearest adult relative. Its most undesirable feature was the incidental right to all the personalty of the infant, and to the revenue of his realty. Whatever justification there may have been in feudal society for this privilege, it seemed anomalous and unfair at the beginning of the sixteenth century. Both the garde of ascendants and the bail of collateral relatives were vigorously attacked by the commissioners as “contrary to reason and equity.”\textsuperscript{58} They succeeded in most places in wiping out the bail of collateral relatives entirely.\textsuperscript{59} They attempted to persuade the estates that the garde of ascendants should be restricted to the infant’s

\textsuperscript{55} Examples are too numerous for exhaustive citation. See, for example, the customs of Anjou, 4 \textit{de Richerbourg} 591; Chaumont, 3 \textit{ibid.}, 366; Orléans, 3 \textit{ibid.}, 769; Troyes, 3 \textit{ibid.}, 260-262; Paris, 3 \textit{ibid.}, 20.

\textsuperscript{56} In Auvergne in 1510 the new articles voted by the estates were remitted by the commissioners “to the pleasure of the King our said lord and of the said Court,” and were subsequently confirmed by a decree of the Parlement of Paris on March 1, 1510-1511. 4 \textit{de Richerbourg} 1223, 1226. In LaMarche and Bourbonnais in 1521 the reservation was in favor of the king alone, and the result was the grant of royal letters expressly confirming all alterations and additions by the estates. 4 \textit{ibid.}, 1146; 3 \textit{ibid.}, 1503.

\textsuperscript{57} In Nivernais, 1534, 3 \textit{de Richerbourg} 1165; Brittany, 1539, 4 \textit{ibid.}, 3333; and generally in the later publications. But in the custom of Berry, which was an independent dukedom like Auvergne, LaMarche, and Bourbonnais, special letters were issued after the publications, ratifying the changes made. 3 \textit{ibid.}, 988.

\textsuperscript{58} Maine, 1508, 4 \textit{de Richerbourg} 523. Similar arguments of the commissioners are reproduced in the \textit{procès-verbaux} in Anjou (1508), art. 85; at Chaumont (1509), art. 11; Troyes (1509), arts. 15 and 16; Paris (1510), art. 99.

\textsuperscript{59} Maine, art. 98; Chartres, art. 108; Dreux, art. 98; Anjou, art. 85; Vitry, art. 64; Troyes, arts. 15 and 16; Chaumont, art. 11; Meaux, art. 147; Orléans, art. 38, depriving collateral relatives of the right to profits; Paris, art. 99.
father and mother, and usually obtained consent to a clause providing that the garde should cease on the guardian's remarriage.

For the alteration of another common rule such promptings from the commissioners were unnecessary. This was the rule of intestate succession which denied to children the right to the intestate shares of their deceased parents, a rule which had appeared in medieval England and which must be explained by the need in feudal society of an able bodied adult to perform the military services of the fief. By the sixteenth century this explanation had been forgotten. The desire to alter the rule was stimulated by the fact that the legislation of the late Roman empire had admitted representation in the direct line of succession, and in one case in the collateral line. In preliminary meetings the estates of at least one district had spontaneously declared their dislike of the rule. It was allowed to pass as accepted custom in the first publications, but by 1508 the estates began to vote for its abolition. The right of representation was regularly introduced in successions in the direct line, and usually in the collateral line as well within limited degrees.

The system of community property, established quite generally through northern France during the fourteenth century, commonly carried with it a right of survivorship. Though no desire appeared to attack the system of community property as a whole, an effort was consistently made to protect the children of the marriage in the event of remarriage by the surviving spouse. Likewise in cases of testate

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60 This limitation was introduced in Maine, art. 98, at Chaumont, art. 104, at Troyes, art. 15, and Meaux, art. 147, but in other districts the right of guardianship was preserved to grandparents.

61 For example, at Paris, 3 DE RICHEBOURG 22; CHARTRES, art. 104; Anjou, art. 85; Troyes, art. 16; Meaux, art. 152.


63 1 BRISAUD, HISTOIRE DU DROIT PRIVE 600-601 (1904).

64 Nov. 127, c. 1; Nov. 118, c. 3.

65 At Chaumont in 1494—3 DE RICHEBOURG 376-377. At Chartres in 1508 (art. 93) the change had been made in the preliminary meeting and the commissioners simply overruled the objections of three nobles. 3 ibid., 731.

66 Melun, art. 100; Sens, art. 72; Amiens, art. 37.

67 Chartres, art. 93; Troyes, art. 92; Vitry, art. 66; Chaumont, art. 79; Meaux, art. 41; Paris, art. 133. In all of these, representation was introduced in the direct line, and in all except the customs of Meaux and Paris, in the collateral line as well, to include the children of a deceased brother.

68 Anjou (1508), art. 283; Meaux (1509), art. 49; Chaumont (1509), art. 6; Vitry (1509), art. 74; Troyes (1509), art. 11; Paris (1510), arts. 116 and 131. In the four instances last referred to, the procès-verbaux of the commissioners recite
succession there was a strong tendency to extend the powers of the testamentary executor and free him from control by the heir. For formalities required for the execution of wills were made more strict and the wide variations in different districts were reduced to something like a uniform style. The system of retrait lignager and the right of primogeniture were somewhat modified, though here as elsewhere the object was not so much a basic revision of established institutions as the removal of injustice in some of their details.

When the work of publication was resumed in the third decade of the sixteenth century, no basic change was introduced in the machinery of publication, but the significant step was taken of making a formal at length the arguments by which they persuaded the estates to introduce the changes in question.

The effort to protect children of a first marriage against the effects of a parent's remarriage was also extended to the case of mutual gifts made inter vivos which included a similar right of survivorship in the event of the death of one spouse. Anjou, art. 321; Maine, art. 334; Chartres, art. 87; Dreux, art. 75; Vitry, art. 113; Troyes, art. 85; Meaux, art. 23; Paris, art. 155. Only at Troyes was there definite evidence that the changes were actively advocated by the commissioners.

The testator's heir was quite commonly deprived of the privilege of administering the will and the executor given seisin for a year and a day. Anjou, art. 274; Maine, art. 291; Vitry, art. 105; Meaux, arts. 34 and 35. In many places new articles were introduced, increasing the amount of property to which the executor was entitled, and allowing him new powers of charging other property for the purpose of carrying out the testamentary intent. Maine, art. 291; Anjou, art. 274; Vitry, arts. 106 and 107; Meaux, art. 38; Chaumont, arts. 89, 90, and 91; Troyes, arts. 98, 99, and 100; Paris, art. 95.

Vitry, art. 102; Troyes, art. 97; Paris, art. 96. In Maine (art. 292) the old requirements were somewhat stiffened, and at Chartres and Dreux new articles on the subject were added (arts. 90 and 80 respectively). At Troyes and Paris the procès-verbaux indicate that the commissioners took the initiative in urging such modifications.

The retrait lignager, by which relatives of a transferor of "family" land were allowed to repurchase the land at the price paid by the transferee, had been so favorably treated in the custom of Paris that purchasers had been seriously prejudiced. In the preliminary meeting some restriction of this privilege was demanded, a large number of persons declaring that in its existing form "the said custom is not good and is not to be tolerated." Martin, "De L'Ancienne Coutume de Paris," 42 NOUVELLE REVUE HISTORIQUE DE DROIT FRANÇAIS ET ÉTRANGER 192 at 220 (1918). At final publication the recommended change was adopted (art. 181). On the other hand, the commissioners themselves persuaded the estates in other districts to protect relatives against secret transfers, of which actual notice might not be received until after the year's period of limitation had expired. Troyes, art. 145; Vitry, art. 126; Chaumont, art. 112.

The chief modification proposed by the commissioners in the rules as to primogeniture lay in the direction of enlarging the share of later-born children, where local customs showed undue preference for the first-born. Maine, arts. 238 and 239—4 DE RICHEBOURG 524; Anjou, arts. 226, 230—4 ibid., 592. In other places, however, the rights of the first-born were simply defined with greater precision, as at Troyes, art. 14.
It became increasingly clear that this machinery was being employed for the deliberate change of customary law, both in its content and formal expression.

Then in the second half of the sixteenth century there appeared a new movement more obviously devoted to a program of legal reform. Customs that had already been published in the early part of the century were now to be republished by the same procedure, through vote of the local assemblies. The period of the “reformations” begins with the custom of Sens, which had been first published in 1506. A group of local lawyers conceived the plan of republishing the custom with the avowed purpose of reforming rules which they considered unjust. After drawing up a new text they addressed themselves to the king and in the year 1555 secured the appointment as commissioners of Christopher de Thou, one of the presidents (later first president) of the Parlement of Paris, and two other judges. The following year the same commissioners were ordered to publish four other customs not as yet published, and to republish two others whose procès-verbaux had

At Bourbonnais in 1521 the royal commissioners explained to the local assembly how convenient it would be in future litigation to have a clear distinction between older custom and newly formulated rules. In publications of 1521, 1534, and 1556 the commissioners required an oath of the estates that they would inform the commissioners which articles were new and which ones old. The procès-verbaux in the second half of the century come to consist almost exclusively of a careful record of innovations.

A detailed account of this later stage has become unnecessary since the appearance of the admirable study by Filhol, Le Premier Président Christofle de Thou et la Réformation des Coutumes (1937) (hereafter cited as De Thou). The material for the present article was collected some time before its appearance, but the general conclusions here suggested are very similar to his. The only important omission in Filhol’s work is an account of the history and procedure of the publications before the advent of de Thou. An effort is made here to supply this omission and to state some conclusions of interest to American readers.

The loss of the procès-verbal of the 1506 publication is the reason given in royal letters authorizing republication. This pretext was at least plausible, since the procès-verbal often contained important information concerning the procedure and circumstances of publication.

It should be added that there had been one prior instance in 1521 of a republication, in the custom of Bourbonnais, which had been published hastily and uncritically in 1500. The royal letters ordering republication had given two reasons—the omission of numerous customs from the official text and the failure of the commissioners to add the usual prohibition of attempts to prove customs inconsistent with the text.

Their project is described by Jean Penon, one of the local lawyers who participated, in his subsequent edition of the custom of Sens, pp. 2b-3a (1556). I am indebted to M. Oliver Martin for this reference, which also appears in Filhol, De Thou, 41, note 4 (1937).

Letters of Aug. 17, 1555, 3 De Richebourg 530.
been lost.\footnote{77 Letters of Aug. 19, 1556. 2 DE RICHEBOURG 539.} A recent reorganization of the Parlement of Paris had given de Thou leisure for the prosecution of the enterprise.\footnote{78 2 PASQUIER, OEUVRES 186 (1723) (Letters, bk. 7, no. 10).} It was no doubt at his instigation that new letters patent were issued in 1558, authorizing the commissioners to reform not only the customs in which uncertainties remained after final publication, but also those containing "unjust and unreasonable" rules.\footnote{79 Letters of Feb. 12, 1558. 2 DE RICHEBOURG 642.}

The number of customs actually reformed by the commissioners was not great. The outbreak of the religious wars a few years later retarded their work. But the publications of all kinds in this period totalled fifteen,\footnote{80 Within the jurisdiction of the Parlement of Paris there were seven republications: Sens (1555), Touraine (1559), Poitou (1559), Melun (1561), Amiens (1567), Paris (1580), and Orléans (1583); and eight new publications: Montfort (1556), Vermandois (1556), Mantes (1556) Étampes (1556), Dourdan (1556), Grand Perche (1558), Auxerre (1561), and Peronne (1567). In addition there was a republication in 1580 of the custom of Brittany, by other commissioners. 81 J. PASQUIER, OEUVRES 186 (1723).} and the wide experience they gave was incorporated in the crowning achievement of all, the reformation of the custom of Paris in 1580. Furthermore, the fruits of this crusade cannot be measured merely through the number of customs published. In every one of them may be found the marks of de Thou's well-conceived program of reform, which is testified to by one of his lawyer contemporaries.\footnote{82 The refusal of representation was mentioned as the chief example of the "harsh, inequitable, and unreasonable" customs that were to be eliminated, in the royal letters of Feb. 12, 1558, with which the period of extensive reformation really opens. 2 DE RICHEBOURG 642. The extension of representation was described as a principal object of the reformations in Jean Penon's edition of the custom of Sens, p. 3a (1556), and in 2 PASQUIER, OEUVRES 186 (1723).} The result of his labors was to consolidate the triumph through most of northern France of the legal doctrine emanating from the Parlement of Paris.

Many reforms of this period followed the lines that had been marked out in the earliest publications. The extension of the right of children to represent their parents in intestate succession was one of the declared objects of de Thou's campaign.\footnote{83 This phase of the reformations is studied in detail by FILLHOL, DE THOU 223-248 (1937).} In the publications over which he presided this change was almost automatic.\footnote{84 Collateral relatives were deprived of the right of guardianship at Sens, 3 DE
persons were commonly inserted for the protection of children of the marriage. Uniform requirements for the formal execution of wills were introduced in most of the customs, and the institutions of the *retrait lignager* and primogeniture were regulated in detail.

Various other changes reflected the dominant professional opinion of the period. The widow’s option to take either legal or contractual dower was usually restricted. The widespread antagonism toward the

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Richebourg 556, and Reims, art. 328. At Peronne (art. 225), collateral relatives were denied the right to the profits of non-noble land. At Amiens in 1567, however, the articles allowing collateral relatives to take guardianship and keep profits were allowed to stand (arts. 126 and 130). Grandparents were denied the right to guardianship at Valois, art. 72; Clermont, art. 173; Senlis, art. 152; and Noyon, 2 ibid., 576.

Forfeiture of guardianship on remarriage was provided for at Montargis—3 ibid., 868; Valois, art. 67; Senlis, art. 152; Sens, art. 156; Mante, art. 180; Reims, art. 332; Grand Perche, art. 168; Melun, art. 286; Peronne, art. 230.

At Chalons in 1556 (art. 10), guardianship was eliminated entirely.

The right of the survivor to community movables was cut off entirely in the event there were children of the marriage or of any other, at Sens, art. 83, and Montfort, art. 133. In other places the less drastic step was taken of declaring the survivor’s rights forfeited on remarriage: Chalons, art. 35; Reims, art. 293; Touraine, art. 319; Melun, art. 218.

In the analogous case of mutual gifts between married persons, clauses were added in some places making them entirely void where there were children alive: Sens, art. 122; Mante, art. 147; Montfort, art. 149; Laon, arts. 47 and 48; Ribemont, art. 48; Grand Perche, art. 94; Touraine, art. 243; Melun, art. 226; Auxerre, art. 222; Amiens, art. 106.

Clermont, art. 140, and Valois, art. 170 (slight variations); Sens, art. 69; Mante, art. 153; Étampes, art. 107; Auxerre, art. 226; Montfort, art. 86; Dourdan, art. 104; Laon, art. 58; Chalons, art. 67; Reims, art. 289; Saint Quentin, art. 21; Grand Perche, art. 122; Touraine, art. 332; Melun, arts. 244 and 245; Amiens, art. 55; Peronne, art. 162; Paris, art. 289; Orléans, art. 289 (slight variation).

The problem of priority between two or more relatives seeking to exercise the *retrait* was provided for in the customs of Grand Perche, art. 181; Noyon, art. 35; and Reims, art. 190. Formalities required for the exercise of the *retrait* were modified in favor of the relatives at Reims, art. 200. Attempts to defeat the rights of relatives through simulated or secret transactions were provided against at Orléans, art. 384; Melun, art. 130; Noyon, art. 34; and Paris, art. 132. At the same time some effort was made to prevent the *retrait* from interfering unduly with liberty of commerce, by requirements of prompt payment by relatives to ejected purchasers. Étampes, arts. 173 and 175; Chalons, art. 232; Melun, art. 153 and 155; Auxerre, arts. 183 and 184.

In most districts the rules of primogeniture were simply defined with greater precision, but the commissioners undertook to ensure more adequate provision for later-born children in those districts along the eastern border where privileges of the first-born seemed excessive. For example, Ribemont—2 De Richebourg 580; Saint Quentin, 2 ibid., 577; Amiens, 1 ibid., 312.

Senlis, art. 185; Valois, art. 107; Laon, arts. 34 and 35; Saint Quentin—2 De Richebourg 579; Auxerre, art. 213; Melun, art. 238; Peronne, art. 142.
fiscal privileges of the nobility showed itself in numerous changes, though no attempt was made to undermine the main sources of power of the feudal aristocracy. The developing theories of the jurists were reflected in some important changes in the law of rents.

The radicalism of these and many other reforms should not be exaggerated. It is clear that their objects were at once to liberalize and to unify the divergent details of the various customs. Though the influence of Roman law can be traced at certain points, the result of the later publications was to preserve the essential principles of customary law through organization and perfection in detail. The fact that the primary responsibility was entrusted to local assemblies made it certain that reform when it came would be moderate in scope and sympathetic in spirit.

The Powers of the Royal Commissioners

The most remarkable fact in all the publications was the self-restraint of the royal commissioners. In the period ending in 1510 the burden of directing the publications fell largely on Thibault Bailléét, president of the Parlement of Paris. On most of the questions debated before him he and his assistants were known to have strong opinions. The procès-verbaux reveal that these opinions were advanced freely and sometimes vigorously, with all the authority that the commissioners’ position might lend. But they observed in good faith the king’s instruction to publish the custom according to the vote in the local assemblies. There is no trace in the earlier period of a single rule incorporated in a final text against the will of a clear majority in the estates.

89 The observations of Filhol, de Thou 152-158 (1937), on this subject are excellent.
90 An extended review of doctrinal developments, and their effects on the reformation of the customs, will be found in Filhol, de Thou 290 (1937).
91 Though Roman law was frequently referred to as authority for the extension of representation in intestate succession, the chief instance of direct borrowing from Roman law is the introduction of the légitime, which provided a restriction on gifts by parents for the protection of the intestate shares of their children. See, for example, Noyon—2 de Richebourg 576; Laon, art. 51; Peronne, art. 111; Auxerre, art. 219.
92 The debate in 1508 concerning article 454 of the custom of Maine is typical. This article provided a general exemption of minors from rules of prescription. The procès-verbal records the remonstrances of the commissioners, to which the estates replied “that such was the custom of the district . . . saying that the said article must be observed and followed.” It accordingly remained. 4 de Richebourg 526. The same result was reached in both Maine and Anjou on another customary rule to which the commissioners objected—4 ibid., 527 and 595; at Vitry—3 ibid. 331; Troyes—3 ibid., 257; and Bourbonnais—3 ibid., 1291, 1292.
In the later period the work of the commissioners is shrouded in greater obscurity, as the *procès-verbaux* grew more brief. At the same time, evidence from contemporary sources indicates that their personal influence was in fact increasing. While the preliminary texts were still prepared, as a rule, by local lawyers, the commissioners assumed a broader control over the drafting of the final texts, after debate had revealed the wishes of the local assemblies. To this control over

93 *Chopin, Commentary on the Custom of Anjou* (part 3, qu. 3, note 1) expressly declares that the recently reformed customs represented "the product of changes by the commissioners and laws pronounced by their decision, rather than ancient institutions of the districts."

Dumoulin, with his usual self-effacement, did not hesitate to charge Lizet, the chief commissioner at the publication in Berry (1539), with borrowing from Dumoulin's own writings: "Lizet took this from my writings and added it." *Dumoulin, Les Coutumes Générales et Particulières de France* 336 (1635) (Coutumes de Berry, tit. 12, "Prescriptions," art. 4). In another place, "This view of mine was imitated by Lizet at this point." Ibid., p. 333 (tit. 9, "Executions," art. 83). Again, "This is the inequitable addition of Pierre Lizet." Ibid., p. 319 (tit. 5, "Fiefs," art. 19).

Coquille in his commentary on the custom of Nivernois describes the commissioners in Berry (1539) and at Blois (1523) as the "authors" of those customs, and in general rates the customs as to their persuasive authority according to the reputations of the commissioners who presided over their publication. *Coquille, La Coutume de Nivernois* 305, 324, 3-4 (1646).

94 There is affirmative evidence to this effect in Brittany in 1539—4 *de Richelbourg* 336; at Sens in 1555—3 ibid., 547; at Laon, Noyon, Saint Quentin, Ribemont and Coucy in 1556—2 ibid., 553; Étampes in 1556—3 ibid., 108; Grand Perche in 1558—3 ibid., 662; Melun in 1561—3 ibid., 466; Paris in 1580—3 ibid., 75; and at Orléans in 1583—3 ibid., 817. See further the summaries by *Filhol, de Thou* 291-298 (1937).

On the other hand, in Berry in 1539 the preliminary proceedings were directed by the royal commissioners and were quite exhaustive. 3 ibid., 974, 979. At Mante in 1556 the commissioners drew up a new text themselves at the request of the estates. 3 ibid. 201. In Burgundy in 1570, the preparation of a text was entrusted to judges of the Parlement of Burgundy, who showed the greatest freedom in adding to, modifying, and interpreting the existing custom. *Bouhier, Les Coutumes du Duché de Bourgogne* 34-72 (1742) (Procès verbal des conférences). In Brittany the commissioners for the reformation of 1580 were also drawn from the provincial Parlement, and also deliberated separately before presenting a reformed text to the estates general. 4 *de Richelbourg* 422. The same was true in Normandy, in the publication of 1583. 4 ibid., 111-113.

95 In several districts the *procès-verbaux* expressly refer to a power conferred on the commissioners to alter the arrangement and improve the language of the articles agreed upon by the estates. Vermandois—2 *de Richelbourg* 553; Amiens—1 ibid., 210; Brittany—4 ibid., 338; Grand Perche—3 ibid., 662. An incident at Peronne in 1567 suggests that the commissioners may occasionally have used this power to eliminate articles of which they disapproved, but which had passed their first reading in the assembly without opposition or debate. The article involved in this instance contained a provision in the law of rents, which was consistently eliminated in other publications.
phraseology and arrangement may undoubtedly be attributed the marked improvements in draftsmanship that appear in the later publications. Furthermore, the prestige of their high office and their experience in directing debate must have given the commissioners increasing influence over the decisions of the assemblies on matters of substance. Representatives of the highest court in France and spokesmen for the most enlightened professional opinion of the period, they possessed a unique opportunity to impress their views on the legislative product. It seems unlikely that most of the changes made in the later publications could have been produced by spontaneous demand from within the local assemblies. The issues involved were frequently technical; the changes made were too numerous and too uniform to be explained in terms of deeply-rooted popular conviction. In effect, the local assemblies, under the skillful guidance of the commissioners, had become a passive but willing instrument in a program of moderate reform.

In the last analysis, however, there were limits to the influence that the commissioners could exert. Formal assent of the local assemblies was still required, even for changes that the commissioners themselves had suggested. When a clear majority remained unconvinced by tactful argument and persuasion the commissioners were compelled to give way. It is remarkable that direct conflict between the commissioners and the local assemblies was so rare. But where such conflict could not be avoided, there was no longer any doubt that the will of the estates would prevail.

and which quietly disappeared at Peronne between first and final reading. Filhol, de Thou 284-285 (1937). It may be inferred that the commissioners were responsible. How commonly such devices were resorted to it is impossible to say.

96 Compare the protracted litigation over an article in the custom of Amiens, reformed in 1567. A considerable part of the membership of the local estates at Amiens appealed to the Parlement of Paris, attacking the procedure of the commissioners in various respects but emphasizing particularly the absence of any real consent by the estates to many of the changes made. The objections were finally overruled by the Parlement of Paris, de Thou himself presiding. The whole incident is described in detail by Filhol, de Thou 94-121 (1937), with the conclusion that in substance the appellants were attempting to assert that “une disposition coutumière nouvelle ne devait pas seulement avoir été consentie, mais qu’elle devait en outre être désirée.” A distinction as subtle as this the Parlement felt itself free to reject.

97 In the publication of the custom of Chalons, in 1556, delegates from the estates met with the royal commissioners and agreed on a new text, with the exception of two articles which the commissioners proposed to modify. The delegates reported back to the estates, which then instructed the delegates to insist upon the articles in their existing form. The commissioners capitulated. The incident is reported in the Bulletin Historique du Comité des Travaux Historiques et Scientifiques 139-143 (1887), and is discussed by Filhol, de Thou 84-86 (1937).
From the whole process of publication there emerged a principle of public law which strangely contradicted the main conclusions of French political theory. During the sixteenth century, and still more in the seventeenth, the movement of French political thought was increasingly toward the recognition of royal absolutism. It was impelled in this direction by the irresistible growth of royal power, the steady development of a central bureaucracy, and the pressure of Roman law conceptions of political authority. Among the many currents of opinion that swept across this confused and turbulent age, one single stream pursued an independent and divergent course. The relations of royal power to the private law of the customs could be divorced in men's minds from the broader issues of policy which provided the main material for political debate. In the private law of the customs the expanding political authority of the king was restrained by a strict requirement of popular consent, expressed through representative institutions; the tendency toward centralization of political functions was reversed in favor of complete local autonomy.

Approval by local representative assemblies had been from the first an essential element in the process of codifying the customs. Royal sanction remained, it is true, an indispensable formality; the expert guidance and technical skill of the royal commissioners exerted increasing influence in fact; but the formal vote of local assemblies was the essential medium for translating the custom of the neighborhood into codified "law." The machinery of publication functioned throughout on this assumption. Royal letters at times made this assumption explicit.98 There is no evidence that the king attempted personally to interfere with or control the free decision of local assemblies, but where such interference was suspected the assemblies did not hesitate to resist.99

98 Letters of Sept. 18, 1555, addressed to local officers at Sens and directing the convocation of the estates for republication of the customs of Sens: "And since, as you know, this cannot and should not be done except in the presence of the three estates of the said baillage..."

99 The estates general in Brittany in 1539 showed themselves extremely suspicious of proposals for changing the customs, and demanded full time to examine the tentative draft submitted to them, since "by the said proposed text the ancient custom may have been somewhat changed, and this would be to alter their form and manner of living, which must not be done unless the members of the said three estates have seen the said text and have had adequate time to deliberate concerning it." After three days had been given them for the purpose, they demanded still a longer time, and it was only after assurances that "the King did not wish or intend to change their customs in any respect" that they were satisfied. 4 DE RICHEBOURG 337, 339.
The requirement of popular consent was enforced under unusual circumstances in the region of Calais. After the reconquest of Calais from the English in 1558, the mayor and chief burgesses of the city supplicated the king to authorize the adoption of the custom of Paris as the law of the district. The king, by letters of May 18, 1571, granted their request, but the Parlement of Paris refused to register his letters until the three estates of the whole district had been assembled, had heard the custom of Paris read aloud, and had agreed to adopt it. Ten years later this procedure was followed in detail, and the custom finally published in 1581.100

Theoretical implications were drawn in even broader terms by legal writers of the sixteenth century. Coquille, the author of an important commentary on the custom of Nivernais, expressed a view that was widely held when he derived the validity of customary law from the will of the people, expressed through their representatives in the local estates.101 A well-known writer on Roman law relied on the popular origin of the French customs in denying the ruler any power of interpretation and assigning a monopoly of this function to organized courts of justice.102 Even more extreme was the assertion sometimes made that royal legislation was wholly ineffective in areas regulated by customary law.103

100 The incident is described in the royal letters of March 22, 1583, published in 1 DE RICHEBOURG 18-19.
101 Coquille, Questions, Responses, et Méditations sur les Coutumes, no. 1: “Le premier mouvement et vie de ce droit civil est en la volonté des états de provinces. Le roi, en autorisant et confirmant ces coutumes, y attribue la vie extérieurement, qui est la manutention et exercice de ce droit. . . . Les commissaires ordonnés par le roi pour présider ces assemblées d'états, les ont autorisées, en y inspirant la puissance de loi. Mais, en effet, c'est le peuple qui fait la loi.” For similar expressions by sixteenth century lawyers, see Filhol, de Thou 68-71 (1937).

Such explanations of customary law were of course no novelty in continental thinking, which was deeply penetrated with the consensus utentium theories of Roman and canon law. The expressions by French writers of the sixteenth century seem, however, to be less influenced by these theories than by the immediate and familiar experience with the process of publication.

102 Connaus, Commentariorum Iuris Civilis, bk. 1, c. 11, p. 47 (1724), after discussing the power of interpretation conceded to the sovereign by Roman law texts: “These things are to be done before and by the prince, unless the law is of a kind that did not emanate from him or his predecessors and is not in his control, such as the laws of the regions of France that we call customs; these can and must be interpreted by the judges. . . . For it is not our practice to consult the king concerning all the private controversies that present difficulty, as the Romans formerly were accustomed to do. In these matters the authority of the Parlement and of all the judges is supreme, and from the judges the appeal is to the Parlement; from the Parlement no one can appeal, not even the king.”

103 This is most vigorously asserted by Dumoulin in his note to the custom of
These main conclusions seem all the more striking when one contrasts developments in France with those in the customary lands of Belgium. In Belgian publications local assemblies were employed, as in France, for proof and even for modification of customary law, but their role was far more restricted and passive, and the sovereign retained far wider powers of interpretation and correction.¹⁰⁴

On some of the matters for which the customs at first purported to provide, French political authority refused to accept the principle of popular control. The regulation of weights and measures, which the king was attempting to extend on a national scale, was thus eliminated from some of the texts.¹⁰⁵ Rules of judicial procedure were likewise considered inappropriate subjects for inclusion in the published texts,¹⁰⁶

Maine, art. 447, concerning the period of limitation on actions for rescission of contracts. After stating that an ordinance of Louis XII, issued in 1512, was not intended to override a custom to the contrary, Dumoulin says: “The custom indeed was not only sanctioned thus in perpetuity by the three estates of the district, but it was enrolled at the Parlement of Paris, and from their authority the good king Louis XII could not, and did not wish or intend to derogate.” ² DUMOULIN, LES COUTUMES GENERALES ET PARTICULIERES DE FRANCE 156 (1635). But notes of Brodeau, a seventeenth century writer, following this and a similar annotation by Dumoulin to the custom of Anjou, reveal that the royal ordinance in question was in fact in force in both districts. ⁴ DE RICHEBOURG 511-512, note b, 575, note d.

In his notes to other customs Dumoulin adopted wholly inconsistent positions, sometimes admitting and sometimes denying that royal ordinances were effective in abrogating customary rules. ³ ibid., 845, note e, 851, note b, 1239, note a; ¹ ibid., 147, note a. That Dumoulin had some support in judicial decision for his denial of effect to royal ordinances is indicated by a decree of the Parlement of Paris reported in ¹ BRILLON, Dictionnaire des Arrêts 565, no. 57 (1711): “On January 26, 1593, the Parlement meeting in the city of Tours, the First President de Harlay said that he had pronounced a decree on January 19, 1591, by which it was decided that when there is an ordinance contrary to the custom, the custom is to be followed; before that time the opinion of the bar had been to the contrary.”

The nobility in the convocation of the Estates General at Blois in 1576 asserted the same principle as to the superiority of custom over royal legislation. ⁵ FILHOL, DE THOU 76 (1937). That this principle proved impossible to maintain in the seventeenth century is indicated by the strong language of LOUËT, RECUEIL D’AUCUNS NOTABLES ARRESTS, ed. Brodeau, D, c. 25 (1650). The whole subject is discussed by LEBRUN, LA COUTUME 105-109 (1922).

¹⁰⁴ Hirschauer, “La Rédaction des Coutumes d’Artois,” 42 NOUVELLE REVUE HISTORIQUE DE DROIT FRANÇAIS ET ÉTRANGER 43 at 63 (1918).
¹⁰⁵ Touraine in 1507—⁴ DE RICHEBOURG 701; Reims in 1556—² ibid., 572.
¹⁰⁶ Touraine in 1507—⁴ DE RICHEBOURG 637; Paris in 1510—³ ibid., 25; Amiens in 1508—¹ ibid., 219. The whole subject of judicial procedure was eventually regulated by the great ordinance of 1667, which applied throughout the kingdom.
and the same attitude occasionally appears as to the law of crimes.\footnote{107} In the early publications the texts were allowed to include rules for the limitation of actions in certain special cases, but such provisions disappeared when royal legislation had supplied the deficiency.\footnote{108} In the course of time these distinctions were drawn with increasing clearness, and the local assemblies left free to legislate only in matters that lay within the broad area of private substantive law.

With popular legislation thus restricted in scope, the central administration detected no threat to its supremacy. On the contrary, complete freedom of action for the local assemblies entailed some obvious advantages. For the primary and limited purpose of proving existing custom, local assemblies were by far the most efficient instrument. Even when the local estates undertook direct legislative reform, their many adjustments in detail brought private law into closer conformity with prevailing beliefs in the community. It seems unlikely that royal officials ever desired to secure more than this, or that they were greatly concerned over the methods by which the adjustments were accomplished. A comprehensive reform of private law involved enormous difficulties. So long as administrative functions or royal revenues were not affected, the central administration was strictly neutral on most of the issues involved in private law disputes. It should not be surprising that so wide an area was left for the activities of the local assemblies and that the principle of popular control was so readily conceded.

The popular origin of customary law was obscured in later history. The very process of codification, in which the theory of popular consent was most vigorously asserted, transformed the working materials of French law and gave a tremendous impetus to doctrinal elaboration. Through effective cooperation of courts and theoretical writers, French customary law was rapidly withdrawn from direct popular control and enmeshed in all the complications of an elaborate legal technique.

\footnote{107} In Touraine in 1507, six articles prescribing the penalties for certain crimes were rejected and it was ordered "that the penalties for delicts mentioned in the said article will be remitted to the discretion of the judges, to be decided by their consciences according to royal ordinances and written reason." \footnote{108} Such provisions appear in the customs of Paris in 1510 (art. 199), Meaux (art. 64), Troyes (arts. 200-201), and in Chaumont (art. 119), in several instances at the suggestion of the commissioners themselves. After the royal ordinance of 1510 on the subject, such articles disappear from the texts of the customs, except at Bourbonnais in 1521, where the commissioners refused to publish a provision covering the subject which had been inserted in the preliminary text.
This is not the place to describe the methods by which French law was further developed during the rest of the Ancien Regime. It is enough to say that these processes of growth and refinement did not require direct participation by political agencies or political authority. To one familiar with English law it seems remarkable that French private law should have depended so little, throughout its history, on political authority as a source of innovation and reform. Though constitutional restraints on royal power were one by one abandoned, French private law remained essentially free from direct influence or control by the political sovereign. But this is another and a longer story.

**EFFECTS OF THE CODIFICATIONS**

The profound effects of the codifications can be measured by reviewing briefly the condition of French private law at the year 1600. Before the end of the sixteenth century, substantially all the customs of the pays de coutumes had been codified. The customs of eight districts, including the custom of Paris, had been republished with important revisions and technical improvements. The local inquest as a method of proving custom had for practical purposes disappeared, and in its place was substituted a formal text, carefully prepared, fully authenticated, and invested with the force of law. The mass of local customs had been sifted, their geographical scope determined, their relations to provincial customs defined. Though diversity and variation still remained, the resulting confusion was greatly reduced. French lawyers were at last supplied with material that responded to close analysis and systematic treatment.

The result was an outburst of creative energy that makes the French sixteenth century one of the decisive periods of legal history, comparable to the age of Bracton in England and the period of the

109 The royal legislation through which the procedure of publication was organized clearly contemplated the total abolition of the enquête par turbe. Often the royal commissioners, in the final stages of publication, expressly prohibited proof of any customs deviating from the published texts and for a time these prohibitions were reinforced by formal decrees to the same effect by the Parlement of Paris. Before long, however, the older practice was re-established, and the enquête par turbe held admissible (1) where a new custom had developed since the publication of the text and (2) where the published text omitted an existing custom. On the whole, however, resort to the enquête par turbe was extremely rare after the customs were published and the official texts were assumed to be authoritative both in theoretical discussion and court decision. By royal ordinance of 1667 the enquête par turbe were finally abolished, the last vestigial remnant being the certificates of local practitioners that occasionally appeared in the eighteenth century. The whole subject is admirably discussed by Pissard, La Connaissance et la Preuve des Coutumes 165-186 (1910).
classical jurists under the earlier Roman empire. Among the personalities that played an active part, the leading place was unanimously conceded to Charles Dumoulin, whose commentary on the custom of Paris was published in 1539.\footnote{An adequate study of Dumoulin is much to be desired. Even in French the fullest account of his life and achievements is that of Brodeau, published in the 1681 edition of the collected works of Dumoulin. For Anglo-American readers, interest would chiefly lie in a comparison of Dumoulin with Coke, the only English lawyer with whom Dumoulin can be compared in the depth and pervasiveness of his influence.} His work was carried on and supplemented by Guy Coquille, commentator of the custom of Nivernais, René Chopin, Bertrand d'Argentré, and the group of humanist lawyers that were centered around the Parlement of Paris. Christopher de Thou, first president of the Parlement of Paris and the leader in the program of reformation of the customs, had intimate personal and professional relations with this group and impressed their views at many points on the texts of the reformed customs.\footnote{The relations between de Thou and Dumoulin are further discussed by FILHOL, \textit{De Thou} 38-39, 170-174, 178-180 (1937).} The decisions of the Parlement, which rapidly became a primary and authoritative source of new legal rules, likewise reflected to a remarkable extent the conclusions of Dumoulin and other contemporary writers.

The intense activity of the sixteenth century was followed by a period of assimilation and organization. Through the seventeenth and eighteenth centuries a doctrinal structure, increasingly elaborate, was built around the framework of the codified texts. As this process continued, the basic similarities of the customs became increasingly clear. Out of divergent details it became possible to construct a system of general ideas, a "common law" of the customs, which could not displace the codified texts but which could be used to supplement and interpret them. Though influenced at many points by concepts derived from Roman law, the "common law" of the customs was in the main composed of native elements. The model employed for this construction of legal theory was the custom of Paris, particularly after the reformation of 1580 to which the best legal intelligence of the capital had been devoted. A by-product of the codifications, the "common law" of the customs enabled a trained legal profession to continue the processes of reform and unification that the codifications began.\footnote{See the interesting study by Professor Meynial, "Sur le Rôle Joué, etc.,” \textit{Revue Générale du Droit, de la Législation et de la Jurisprudence} 326, 446 (1903). Concerned particularly with specific problems of the law of succession, this study contains some penetrating remarks of general application.}

The codification of the customs likewise had important effects in
fixing the content of French private law and restricting the influence on the customs of lay practices and laymen’s beliefs. The processes of growth and adaptation were in effect entrusted to the conscious control of a professional class, whose methods and attitudes acquired decisive importance. A narrow and technical approach to the codified customs would have rendered them wholly inadequate to meet the needs of a developing society. It was fortunate that the customs were interpreted in a progressive spirit, by lawyers who were faithful to French tradition but whose minds were alive to the needs of their own time.

There was ample room for expansion. As codes of private law, the published texts were, to modern eyes, extremely incomplete. The 1510 custom of Paris, for example, comprised 199 articles; the reformed custom of 1580, only 362. Many of these were extremely brief, supplying the main outlines of a system of private law but refraining from specification in detail. In still another sense the customs were incomplete. The areas of law which they purported to regulate were essentially those which reflected the needs of a medieval society. They contained abundant provisions as to land tenure, including leaseholds and rents, a law of intestate succession, a family law that was primarily concerned with property rights of husband and wife, a law of gifts and testaments. As to other branches of private law, especially the field of contract, the customs were silent altogether. The “gaps” left to be filled by legal theory and court decision included large areas in which the needs of the future would be most strongly felt.

The codification of the customs did not by any means eliminate the influence of Roman law. The abbreviated language of the published texts was read against a broader background of general ideas, of which Roman law continued to supply important elements. The existence of this body of ideas was frequently suggested in the process of publication, when proposed articles were stricken from the texts and their contents left for regulation by general rules of law. Such areas

118 Compare note 109, supra, as to the limited operation of the enquête par turbe after publication of the official texts.

114 Even in the early publications there were numerous articles withdrawn from the formal texts and “remis à droit.” This occurred at Troyes in 1494 as to an article on the right of nobles to seize land to which the possessor could not prove his title—3 de Richébourg 276-277; in Touraine in 1507 (article defining the offenses which would lead to forfeiture of a fief and another article on the punishment to be administered to notaries for falsification of documents)—4 ibid., 637; in Anjou in 1508 (article on the right of the wife to claim lands descended to her during her marriage)—4 ibid., 595; at Orléans in 1509 (on the liability of the heir for debts)—3 ibid., 770; Troyes (on the right to take execution for rent due)—3 ibid., 261;
as the law of contract, which were entirely omitted from most of the texts, were constructed by courts and lawyers from Roman law materials. Nor was the infiltration of Roman law confined to the gaps left by imperfections and omissions in the published texts. The thinking of French lawyers was deeply penetrated by concepts, methods, and points of view derived from Roman law. The process of penetration had begun long before the sixteenth century; it continued through the period of the codifications; in the later period of technical elaboration the influence of Roman law was if anything increased. 115

The conflict between national law and alien doctrine provides a leading theme for modern legal historians, particularly the historians of English and German law. Read in terms of such conflict, the legal history of the sixteenth century takes on added elements of drama and taps reserves of accumulated emotion. 116 Even for English and German

and Vitry (on the liability of the feudal lord for rents after confiscation of the fief)—3 ibid., 332.

Sometimes this "droit" appeared clearly as "droit romain," as at Mantes (1556), where provisions concerning the rights of tutors (art. 184) were "remis à la disposition du droit écrit." But it sometimes took the name of "droit commun," as at Dunois (1523), where the right of clergy to alienate church property was involved—3 ibid., 1115; at Melun in 1561, involving rules of prescription—3 ibid., 472; and Auxerre (1506), art. 146—3 ibid., 577.

In some places the reference to Roman law appeared in the official texts themselves, as in the 1506 custom of Sens, art. 260: "L'usage touchant les usucapions & prescriptions en autres choses consonne à la disposition du droit écrit: & partant n'y eschet poser aucune coutume." Similarly, custom of Amiens (1567), art. 139.

115 The whole subject of the relation of customary law and Roman law is admirably discussed in the monograph of Martin, La Coutume de Paris, Traité d'Union entre le Droit Romain et les Législations Modernes (1925).

116 This deliberate heightening of dramatic effects may be seen best in the famous essay of Maitland, "English Law and the Renaissance," in Select Essays in Anglo-American Legal History 168 (1907). Maitland reveals his own bias when he says (p. 175): "We have all of us been nationalists of late. Cosmopolitanism can afford to await its turn." His argument may be attacked on several grounds. In spite of the caution with which his evidence is analyzed, Maitland may be charged with exaggerating greatly the "danger" of a reception in England in the sixteenth century. Furthermore, he apparently shares the conviction of German historians, so frequently expressed in German literature, that a large-scale reception of Roman law would necessarily be a "national tragedy." As to German law, it is easy to understand the modern German reaction against excessive Romanization. Perhaps an outsider may be permitted to suggest that the real "tragedy" of the German reception lay not so much in the triumph of more sophisticated legal ideas, but in the lack of selectivity, greatly aggravated by the sterile scholasticism to which the methods of the civilians degenerated. As to English law, it would seem that there might have been an enormous gain if the infection had spread across the Channel in the sixteenth century, as it did in the thirteenth century and again in the eighteenth.

Maitland's final explanation of the main course of English development gives a
law it would seem that this reading of history involves an intrusion of modern ideas, which at the time had scarcely begun to emerge. In French law it would certainly be a mistake to attribute the codification movement to a developed spirit of nationalism, reacting against the importation of foreign doctrine. It is true that the codifications gave new form and a new precision to French customary law at a critical stage of its history and thereby preserved its essential elements; it is probably true that the codifications were inspired by a conscious desire to organize and perfect the existing legal system and prevent disruption of existing social adjustments. But it would no doubt have surprised many persons if they had been told that this effort to restate and consolidate existing materials involved a conflict of systems or ideologies. It was everywhere assumed that French customary law had much to learn from the Roman law of the sixteenth century, with its large accretions of medieval and post-medieval experience. The resort to Roman law doctrines was throughout selective and discriminating. Where there were differences of opinion as to the permissible limits of direct borrowing, they related chiefly to matters of detail. French lawyers in the end were successful in adapting to their practical needs the immense learning and complex technique that had been built around the Roman texts. This process of adaptation occurred concurrently with an effort to preserve and perfect a highly localized system of popular law. Their success in harmonizing these diverse elements suggests that a middle course was still open in the sixteenth century between the sweep-

large place to the formal instruction in English law conducted through the Inns of Court. But it should be pointed out that the continuity of French law was preserved without the benefit, till the latter part of the seventeenth century, of any organized instruction in "national" law. While it cannot be denied that "Taught law is tough law," one may doubt whether the Inns of Court provide the main clue to English insularity.

117 For example, Coquille, in a celebrated passage, referred to a difference of opinion between Christopher de Thou and Pierre Lizet as to the extent to which Roman law should be used as a model in the publication of the customs. COQUILLE, LA COUSTUME DE NIVERNOIS 2 (1646). Lizet had preceded de Thou as first president of the Parlement of Paris and had presided over the publication of the custom of Berry in 1539. This difference of opinion is testified to in other sources, and it appears likely that it led to some differences in results both in judicial decision and in the provisions of the published texts. Indeed it has been urged that the program of publication conducted by de Thou was part of a general movement which was favorable to the development of a national system and which aimed at restricting the influence of Roman law. FILHOL, DE THOU 125-140 (1937). The evidence in support of this thesis, however, suggests at most a difference in emphasis and a dispute over matters of detail, rather than a radical and thoroughlygoing conflict of ideas.
ing reception of Roman law that occurred in Germany and the exclusiveness and insularity of English law.

The codification of the French customs represents merely one stage in a continuous development. Like the more comprehensive codification accomplished under Napoleon, it left open many avenues for growth and change, as new pressures and new ethical standards emerged in French society. Like the Napoleonic codification, however, it altered radically the formal sources of private law and gave a new direction to basic tendencies. Coming at a critical point in French legal history, the codification of the customs marks the point at which French law clearly diverged from the other great legal systems of Europe, to pursue its own independent course. Though the texts were restricted in scope and in language often crude, the completion of the task was in itself a considerable achievement. At a later stage another and more sweeping reformulation was still to be necessary, in order to unify French law and adjust it to the needs of a modern society. But the codification of the customs prepared the way for the great codification of the early nineteenth century, both by preserving the main elements of the customary systems and by supplying a more tractable material for the skilled legal technicians of the intervening centuries. In this sense it may be said that the codification of the customs provided an essential bridge across the wide gulf between medieval and modern law.