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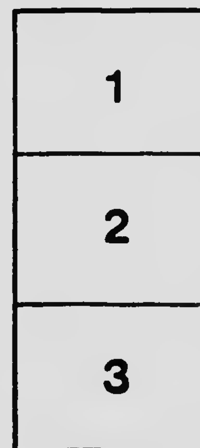

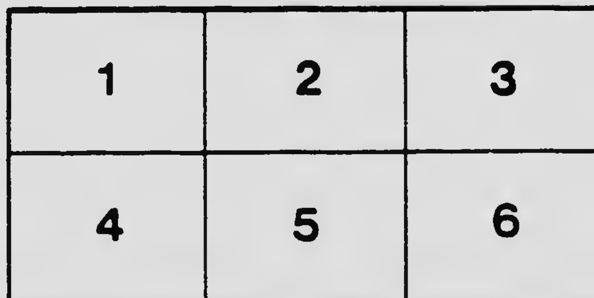

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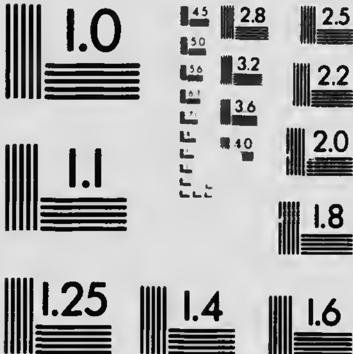

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The Custom of Paris in the New World.

Von

William Bennett Munro,

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Some few years ago the Judicial Committee of the English Privy Council, in a case which came before it on appeal from the Court of King's Bench in Canada [1]), encountered considerable difficulty in the interpretation of a certain clause in the Civil Code of the Province of Quebec [2]). The clause in question had, it appeared, been borrowed almost literally by the framers of the Quebec compilation from the Code Napoléon [3]). R[illegible]ort was had, therefore, to this latter Codification, upon which it further appeared that the provision had been condensed by the Napoleonic jurists from a passage in the works of a well-known commentator on the laws of France during the old régime [4]). As the code provision was not without ambiguity, further reference was accordingly made to this commentary, whereupon it was found that the writer had drawn his principle from a rule of the Roman Digest [5]), and the judges went on back to the Justinian compilation. Here they found the rule of law set forth in [illegible] unmistakable terms as to enable them to give decision with [illegible]idence.

That a contestation relating to p[illegible]ights in a small waterway in Northern Canada should be, in the twentieth century, determined in accordance with and by final reference to a rule of the Justinian Pandects affords an interesting example of what Mr. Bryce has emphasized as the »vitality« of Roman jurisprudence and of its application to-day over immense areas which never knew the Roman sway [6]). At the first glance this instance, and many others like unto it, seem ca-

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[1]) Kieffer, v., Les Ecclésiastiques du séminaire, in English Law Reports, Appeal Cases (1903), p. 85 ff.

[2]) Code civil de Québec, § 501. The clause relates to the liability of a landlord for the torts of a tenant connected with the impairment of a ripuarian right.

[3]) Code Napoléon, § 640.

[4]) R. P. Pothier, Traité de société (Paris 1774), 2 appx. 235—239.

[5]) Corpus Juris Civilis (ed. Krueger & Mommsen, 3 vols., Berlin 1882—1883), Vol. I (Digesta), Tit. 39, § 3 (de aqua, 6. 7).

[6]) James Bryce, Studies in History and Jurisprudence (London 1901), p. 72.

pable of very facile explanation. French law is based upon Roman; the French settled Canada; they introduced their own law; the English, when they came, retained it; hence Roman law very naturally forms the groundwork of jurisprudence in the French-Canada of to-day. This simple explanation is, however, both defective and misleading. It does not entirely square with the fact that the first body of law which the French introduced into Canada, — the Custom of Paris — was as free from the stamp of Roman influence as was the common law of England at the contemporary stage of its development. And it does not make clear, moreover, how it has come to pass that many provisions of the Code Napoléon, a compilation prepared many years after Canada had passed out of French hands, should have been embodied in the civil code of a British colony. The territory which now forms the province of Quebec began its legal history almost wholly free from Roman influence; this latter had little or no place in the original colonial code. It soon made its appearance, however, through the channels of legislation and it has continued to make itself felt and even to entrench itself during almost a century and a half of English rule. To sketch in a general way the evolution of the Custom of Paris into the contemporary civil law of French-Canada and to explain the exact channels through which Roman Law thus obtained its strong foothold in the province is the purpose of the present chapter.

The Custom of Paris, which must form the starting point in any study of French-Canadian legal history was, at the outset, only one of the numerous bodies of local custom which determined and regulated private relations in that part of France, mainly the North, which is commonly known as the pays de coutume or pays coutumiers. This is to distinguish this territory from the pays de droit écrit, mainly the South, where Roman political influence had been more strongly imprinted, and where, in consequence the written laws of Rome had obtained and maintained a firm foothold [1]). These various bodies of customary law applied each in its own jurisdiction, this latter being sometimes large, but more often very small, comprising sometimes a whole dukedom like that of Normandy, but more often only an single small fief. They had the advantage of being indigenous, for they were fundamentally the customs of the Teutonic Franks developed by these latter in their new homes [2]); but like all bodies of uncodified custom-

[1]) See the map of the two regions in J. Brissaud's Manuel d'histoire du droit français (Paris 1904), p. 152.

[2]) On this point see Adhémar Esmein's chapter on »La coutume et le droit romain« in his Cours élémentaire d'histoire du droit français (Paris 1892), p. 673 ff.

ary law they lacked that precision and definiteness which are essential to the proper determination of private relations when these latter increase in complexity. Hence it was that, in the course of time, the desirability of codifying them appeared. Unofficial codifications of the various coutumes began to be undertaken as early as the thirteenth century; but these seem to have been neither precise nor complete: it was not until nearly the close of this century that the first compilations under official auspices began to appear [1]). During the whole of the fourteenth century the movement proceeded very slowly; but during the first half of the ensuing century several important coutumes, notably those of Anjou, Maine, and Poitou, were codified by order of the local authorities [2]). The desirability of a general codification of all the coutumes soon became apparent, however, and in 1453 Charles VII issued his famous edict of Menie-les-Tours commanding that all the local customs within the limits of the kingdom should be reduced to writing by commissioners appointed for this purpose by the authorities of each province, and that no custom should thenceforth receive official recognition unless it had been so codified [3]).

The response to this ordinance was not at all general, however, and Louis XI, who came to the throne a few years later (1461), seems to have had in mind the elaboration of a single customary code, or system of common law for the whole kingdom rather than a continuance of his predecessor's policy of having the various customs compiled individually. At any rate he seems to have done little or nothing to secure the enforcement of the edict of 1453, and it was not until the reigns of Charles VIII and Louis XII that the work of codification was, in obedience to renewed royal orders, pushed rapidly forward.

Among the numerous official codifications completed during the reign of Louis XII in the opening years of the sixteenth century was that of the Custom of Paris. This body of local custom had been for centuries the guide of private relations within the limits of the Viscounty and Provostship of Paris; its codification in 1510 was accomplished by commissioners designated by the king; and their work

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[1]) Henri Klimrath, Études sur les coutumes (Paris 1837), Ch. I.

[2]) The full list may be conveniently found in Paul Viollet's Histoire du droit civil français (Paris 1893), p. 142.

[3]) This decree may be found in the Ordonnances des rois de France de la troisième race (Paris 1729—1849), Vol. XIV, p. 312—313. Part of the edict runs as follows: »Nous voulans abréger les procez et litiges d'entre nos subjectz, et les relever de mises et dépens, et mettrx certaineté es jugemens tant que faire se pourra . . . ordonnons et décernons, déclarons et statuons: que les coustumes, usages, et stiles de tous les pays de nostre royaume soyent redigez et mis en escrit.«

when completed was submitted to the Parliament of Paris, which gave its approval. Prior to this time there had been, it is true, unofficial codifications of this coutume, but these were incompiete and untrustworthy[1]). The compilation of 15[illegible]0 is commonly known as the »old custom«, and it was with this as a basis that Dumoulin wrote his famous Latin commentary in 1539. It remained the recognized code of the French metropolis for only [illegible]nty years, however; since in 1579 an entire revision was ordered by the crown, and this was undertaken by a distinguished commission of jurists under the presidency of Christofle [illegible] Thou. The revision, which was finished in 1580, gave us what is commonly known as the »new custom« upon which there are nearly a score of commentaries[2]).

In the revision of 1580 the general arrangement of the Custom of Paris was much improved and some important changes were made in the text. The code now appears with its text arranged in sixteen titles, which contain altogether 362 articles numbered consecutively. The form is satisfactory, and the various rules are set forth with remarkable clearness and brevity. A distinguishing characteristic is its thoroughly native spirit; for it contains very little distinct trace of Roman influence[3]). One may indeed safely assert that Roman Law had influenced the Custom of Paris in 1580 no more distinctly than it had influenced the common law of England at the same stage in its development. It ought to be emphasized, however, that the Custom of Paris did not purport to be a complete and comprehensive body of jurisprudence; for it did not embody the general law of obligations nor the law of the special contra[illegible]. All this, which forms the very heart of every legal syst[illegible]m, was left to be governed b[illegible] rules of Roman Law. The latter obtaine[illegible] its f[illegible]hold in the provostship of Paris not through the Coutume de [illegible]aris, but through its application to a sphere of private relations with which the Custom did not undertake to deal. It is important that [illegible] shou[illegible] remember this for it is at variance with the commonly[illegible]ted statement that Roman Law made its way into the New Wo[illegible]ough the transplantation of the Custom of Paris to New Franc[illegible] This Custom owed little

[1]) H. Buche, »Essai sur l'ancienne coutume d[illegible]aris aux XIIIe et XIVe siècles in Nouvelle Revue Historique, Vol. VIII, p. 4[illegible]6; Vol. IX, p. 558–579.

[2]) Among the more important of these comme[illegible]ries are those of Charondas le Caron (1582), Chopin (1586), Fortin (1595), Pithou [illegible]601), Troncon (1618), Tournet (1623), Guérin (1634), Brodeau (1658), Ricard (1661), [illegible]rière (1679), B[illegible]be (1683), Duplessis (1699), Laurière (1699), Le Maître (1700), A[illegible] (170[illegible]) and Bourjon (1747). Most of these have passed through several editi[illegible]

[3]) V. A. Poulenc, La coutume de Paris (Paris 1900[illegible]

[4]) See, for example, W. W. Howe's article on »Roman [illegible]erica«

or nothing to Roman Law, and it brought little or nothing with it across the seas.

The Custom of Paris, partly in virtue of its intrinsic superiority over the other coutumes of France, and partly because it formed the groundwork of the legal system in use at the national centre, came in time to possess a certain prestige over these others, becoming as it were a sort of primus inter pares among them. As early as 1560 Dumoulin was able to speak of it as caput omnium hujus regni et totius etiam Belgicae consuetudinum[1]); and by the lapse of another century it bade fair to become the »common law« of France. It was only to be expected, therefore, that the French authorities should have selected this particular coutume for transplantation when it became necessary to provide a system of jurisprudence for the new possessions beyond the Atlantic.

The first official step in this direction was taken in May, 1664, when a royal decree established the Company of the West Indies, and granted to this organization a vast extent of territory both in America and in Africa[2]). In one of the articles of this comprehensive charter it was provided that the judges appointed in all the said places should be held to render judgment in accordance with the laws and ordinances of the realm, and the officers of justice bound to follow and conform themselves to the custom of the viscounty and provostship of Paris, according to which the inhabitants shall enter into contracts, without its being lawful to introduce any other custom, in order to avoid diversity[3]). It was by the terms of this decree that the Custom of Paris first received its legal status in both Canada and Louisiana[4]).

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in the Harvard Law Review (Cambridge, Mass.), Vol. XVI, p. 343—358, especially p. 344 (March. 1903).

[1]) Paul Viollet, Histoire du droit civil français (1893) p. 206.

[2]) This charter may be found in Isambert's Recueil général des anciennes lois françaises depuis l'an 420 jusqu'à la révolution (30 vols., Paris 1822 bis 1833), Vol. XVIII, p. 38 ff.

[3]) »Seront les juges établis en tous les dits lieux tenus de juger suivant les loix et ordonnances du royaume, et les officiers de suivre et se conformer à la coutume de la prévôté et vicomté de Paris, suivant laquelle les habitans pourront contracter sans que l'on puisse introduire aucune coutume pour éviter la diversité.« Art. XXXIII.

[4]) The introduction of the Coutume de Paris into Canada has been commonly dated from the issue of the Édit de création du conseil souverain de la Nouvelle-France (April 1663); but an examination of this decree (Édits et ordonnances du roi concernant le Canada, Vol. I, p. 37—39) will disclose that while this new organ of colonial administration was instructed to follow the procedure prescribed for the Parliament of Paris, the document contains no men-

Of these two colonies the former had been founded nore than a half century prior to the date of this decree, but during this interval no specific provision for the establishment of a legal system had been made. The first governor of the colony, Samuel de Champlain, had been commissioned to appoint officers for the administration of justice, and to issue police ordinances until these should be otherwise provided for; and it was in accordance with this authority that a Court of the Prévôté, modelled upon the courts of the same name in France, was first established at Quebec. No definite instructions were issued concerning the procedure which this tribunal was to follow, but its records seem to show that, in the main at any rate, it governed itself by the rules of the Custom of Paris [1]. It appears, moreover, that the Company of One Hundred Associates, which controlled the administrative affairs of the colony intended that this Custom should be followed [2]. In the title-deed of a seigniory granted by this Company to one Jean Bourdon in 1647, the grantee is placed under obligation »to pay all duties and dues which may become payable for a fief of this nature, the whole agreeable to and in conformity with the custom of the viscounty and provostship of Paris, which the company intends should be followed and observed in the colony« [3]. In spite of this explicit declaration, however, the Company frequently departed from the Custom of Paris in making its grants of land, stipulating, for example, that seigniors, instead of paying the quint which was due upon mutations in ownership, should tender to the Company one year's revenue of the fief at each and every mutation of possession [4], according to the Custom of the French Vexin (Vexin le français) [5].

An explanation of the practice is attempted by the intendant, Jacques Raudot, in a despatch which he sent to the Minister of Marine in 1707. »I have the honor to observe,« he wrote, »that the Normans,

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tion of the Custom of Paris, and makes no stipulation that this code should be exclusively followed.

[1]) J. F. Perrault, Extraits ou précédents tirés des registres de la prévosté de Québec (Québec 1824).

[2]) Officially known as the Compagnie de la Nouvelle-France. Its organization was the work of Richelieu, and its charter may be found in Isambert's Recueil général des anciennes lois françaises, Vol. XVI, p. 216 ff. This company gave up its control of the colony in 1663.

[3]) Titres des seigneuries (Quebec 1852), p. 358—359.

[4]) Ibid. p. 386—387.

[5]) The Custom of the French Vexin was a code of rules not forming part of the Custom of Paris, but in a way supplementing the latter. See also below, p. 146, note 1.

being the first to come to this country, established in their seigniories the Custom of the French Vexin. As this Custom did not suit them, however, they asked to be placed under the Custom of Paris as regards their seigniorial obligations to His Majesty, preserving the Custom of the Vexin as against their vassals and dependents, because it is more favorable to themselves«[1]). No such request on the part of the seigniors is, however, on record, and indeed there seems to be no good reason why Norman seigniors, as such, should have preferred one rule to the other. It seems more likely that the Company preferred to make grants under the Vexin because the rules of this code provided for the payment of a relief at each mutation of ownership, whereas the Custom made provision for the payment of the quint only when mutations in ownership took place otherwise than by inheritance in direct succession[2]).

From the fact that the bulk of the colonial population was drawn from Normandy there flowed, however, one important consequence, namely, that despite the provision in the decree of 1664 which stipulated that the inhabitants should enter into contracts only in accordance with the terms of the Custom of Paris, many of the seigniors in the contracts which they made with their censitaires or dependents inserted provisions which were suggested by the terms of the Coutume de Normandy. One of the colonial intendants, Michel Bégon, complained of this practice in a despatch which he sent to the French Minister in 1716. »Some of the seigniors of this country« he wrote, »have established corvées of which no mention is made in the Custom of Paris, from which they deviate, they declare, in order to follow the terms of the Custom of Normandy«. The Council of State in France of course instructed the intendant that no official countenance was to be lent to this practice and that all deeds of land not made in strict conformity with the provisions of the Custom of Paris were to be declared null[3]); but the fact seems to be that both in their dealings with their seigniors and in their dealings with one another the inhabitants very frequently showed a disposition to follow the usages of their native province.

Since the Norman element in the population of New France was so strong it has sometimes been suggested that the French authorities might with propriety have given the colony the Custom of Nor-

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[1]) Raudot to Pontchartrain (November 10, 1707), in Canadian Archives, Series F, Vol. 26, p. 7 ff.

[2]) Coutume de Paris, Arts. VI, XXIII, XXV.

[3]) Minutes du conseil d'État du roi (5 mai 1717) in Archives du ministère des colonies, Paris, Série G[1], 462.

mandy rather than the Custom of Paris, particularly in view of the additional consideration that the former was adapted to the needs of an agricultural community whereas the latter had been developed to suit the needs of what was becoming a metropolitan area [1]). But it is to be remembered that the prestige of the Custom of Paris had, by the middle of the seventeenth century become very great, and especially so with the coterie of legal officials who stood nearest to the throne. It was regarded, and perhaps rightly regarded, as possessing an intrinsic superiority both as regards form and as regards matter over all the other coutumes of the kingdom. On the whole the Normans of New France accommodated themselves to its provisions readily and without apparent reluctance; and in the long run the action of the Paris authorities proved entirely justifiable.

It will be noted that, by the terms of the decree of 1664, the courts of the colony were to be guided not only by the provisions of the Custom of Paris but by the »laws and ordinances of the realm«. The ordinances of the French crown prior to this date had been numerous; but very few of them had made any important changes in the law of private relations. The age of Louis XIV, however, proved to be prolific in legislation of this sort, and a succession of ordinances commencing in 1667 and commonly known as the »grandes ordonnances« revised and codified several important branches of the law [2]). This legislation, in the main, supplemented the Custom of Paris, and covered fields of law into which the terms of the Custom had not ventured; but to some extent the ordinances varied and altered in effect the provisions of this latter code [3]). It therefore becomes important to know whether these »grandes ordonnances« applied to France alone, or whether their provisions extended to the colonies as well.

In France it was necessary, before an ordinance of this sort should become valid, that it should be registered by the Parliament of Paris.

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[1]) The Normans formed, in 1664, well over half the whole colonial population. Data concerning the strength of the Norman element and some of the interesting consequences of this fact, may be found in J. B. A. Ferland's Histoire du Canada (2 vols, Quebec 1861—1865), Vol. I, p. 511—516; E. Rameau de St. Père's La France aux colonies (Paris 1859), Chap. VI; and A. Salone's La colonisation de la Nouvelle-France (Paris 1906), p. 112 - 113.

[2]) Among these were the »Ordonnance civile touchant la reformation de la justice« (avril 1667), in Isambert's Recueil général, Vol. XVIII, p. 103 ff.; the »Ordonnance de la marine« (août 1681), in Ibid. Vol. XIX, p. 282 ff. and the »Ordonnance du commerce« (mars 1673), in Ibid., Vol. XIX, p. 92 ff.

[3]) For example, the »Ordonnance sur les donations« (fèvrier 1731), in Ibid. Vol. XXI, p. 343 ff.

This body, as every one knows, had technically the right to refuse registration and thus to deny validity to royal decrees; but the king might, and as time went on, did actually override its opposition by the use of the prerogative known as the *lit de justice*. Now the Sovereign Council which the king established at Quebec in 1663 was modelled generally after the frame of a French provincial *parlement* and was ordered to conform its procedure to that of the *Parlement de Paris*[1]). One of its chief functions indeed was that of receiving ordinances and decrees sent from France and of registering these in its council records[2]). Might this colonial council, then, like its prototype in Paris, refuse to register a royal decree; and might any royal ordinances acquire validity in the colony save by such registration? The answer to the first question is simple enough. Whatever the legal rights of the Council in the matter, the fact was that all its members were appointed by the king; they held office only during the royal pleasure; and they might be removed by the crown at will. Unilke the members of the Parliament of Paris or the provincial *parlements* they had in no case obtained their posts by inheritance or by purchase; hence they had no security of tenure. To have ventured to refuse registration to any royal decree would therefore have brought about the immediate removal of the recalcitrant councillors from office; the councillors knew this very well; and there is consequently no record that they ever showed any sign of refusing compliance with the royal orders. Whatever its technical right in the matter, the Sovereign Council at Quebec was bound from the nature of its organization to register the royal mandates without discretion.

There was, however, a method much less drastic than that of direct refusal to register a decree, whereby the colonial council might virtually negative a royal order; for before a decree could be brought to public attention in the colony it had not only to be registered but to be duly promulgated. The usual practice was to have copies of the decree prepared, and then to have these copies sent out to the subordinate courts or to the minor administrative officers of the various parishes. These officers made due promulgation by posting the copies in conspicuous places, usually at the door of the parish church. Now while the councillors dared not refuse or even neglect the registration

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[1]) »Edit du création du conseil souverain de Québec« in *Édits et ordonnances du roi concernant le Canada* (3 vols., Quebec 1854), Vol. 1, p. 37—39.

[2]) The records of the Council are preserved at Quebec in 56 ponderous manuscript volumes. Of these the records from 1663 to 1716 have been printed in *Jugements et délibérations du conseil souverain de la Nouvelle-France* (6 vols., Quebec 1885—1891).

of a royal arrêt, they appear to have found little difficulty, when occasion arose, in arranging with the attorney-general that a decree, after its registration, should be allowed to stand unpromulgated. In such cases no one outside the little Circle of councillors and higher officials gained any knowledge that the decree had ever been received.

A very interesting example of this method of procedure is afforded in the case of a royal edict which Louis XIV, in 1686, signed and transmitted to the authorities at Quebec for registration and enforcement [1]). The decree was important in that it provided for the immediate erection of grist-mills by all the seigniors of the colony, and stipulated that seigniors who failed to comply with its terms within a year should be forever deprived of their rights of mill banality (droits de moulin banal). This order was very unwelcome to the members of the colonial Council, most of whom were themselves seigniors. They therefore passed the decree to its registration [2]) but appear to have arranged informally with the attorney-general that it should not be promulgated. Promulgation, accordingly did not take place, and the colonial population remained entirely in ignorance of the measures which the king had taken on their behalf. It was only a score of years later, when a new and inquisitive intendant arrived on the scene, that the ruse of the Council was discovered and reported to the king [3]). The Council, therefore, knew of at least one way to circumvent the royal will; but it is fair to the councillors to state that this ruse was resorted to very infrequently.

The other question, namely, whether an ordinance which had been registered and promulgated in France, but which had not been sent

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[1]) »Arrêt du conseil d'État au sujet des moulins banaux« in Édits et ordonnances du roi concernant le Canada, Vol. I, p. 255—256.

[2]) Jugements et délibèrations du conseil souverain de la Nouvelle-France, Vol. III, p. 87.

[3]) »Je croirais donc, Monseigneur, ... qu'il serait nécessaire que Sa Majesté donnât une déclaration ... qu'on conservât aux seigneurs le droit de banalité en faisant bâtir un moulin dans leurs seigneuries dans un an, sinon qu'on les declarât deschus de leurs droits, sans que les habitans fussent obligés, lorsqu'il y en aurait un de bâti, d'y aller faire moudre leurs grains.... Cela leur a este accordé, en l'année mil six cent quatre-vingt-six, par un arrest qui a esté enregistré au conseil de ce pays; mais l'arrest d'enregistrement n'ayant pas esté envoyé aux justices subalternes pour estre publié, ces peuples n'ont pû jouir de cette grâce jusqu' à present.... On n'en peut imputer la faute qu'au sieur D'Auteuil, lequel en qualité de procureur-général de ce conseil, est chargé d'envoyer les arrests de cette qualité dans les sièges subalternes; mais il estait de son intérêt comme seigneur, et aussi de l'intérêt de quelques conseillers, aussi seigneurs, de ne pas faire connoître le dit arrest.« Raudot to Pontchartrain (November 10, 1707), in Canadian Archives, Series F, Vol. 26, p. 7 ff.

to Quebec for registration and promulgation by the Sovereign Council could be held to apply in the colony, is by no means so easy to answer; and upon this point there has been considerable difference of opinion. As a matter of fact, the »grandes ordonnances« were not sent to the Sovereign Council to be registered by it, and they are not incorporated in the Council's records of registration. Several very plausible arguments have been advanced to prove that registration of a royal ordinance in the colony was not essentiai to its valid application there [1]); and it is a fact that the »grandes ordonnances« of Louis XIV, although never registered at Quebec, were used by the colonial courts as though they were nevertheless in full force and effect [2]). But it is now well settled that the only royal decrees which had any force in Canada during the French régime were those which were sent out and registered by the Sovereign Council at Quebec. All others, though their provisions often formed rules of guidance for the colonial authorities, were not binding upon them. The Canadian courts have, on more than one important occasion upheld this view [3]).

In addition to the Custom of Paris, and such royal ordinances as had been from time to time registered by the Council at Quebec, there was a third element in the law of New France, namely, the ordinances and reglements of the colonial authorities, and the judgments of the colonial courts. The Sovereign Council at Quebec framed and promulgated a formidable number of reglements, some of them of very special nature, others like the police regulations of 1676 of the broadest character and most comprensive scope [4]). Likewise the intendants, as the writer has elsewhere pointed out, issued their ordinances in profusion, these decrees dealing with the widest variety of matters from the most important to the most trivial [5]). The heirarchy of courts,

[1]) For a summary of these arguments see G. Doutre et E. Lareau, Histoire générale du droit canadien (Montreal 1872), p. 115 ff.

[2]) On one occasion the intendant Dupuy urged that »wherever the king has his domain established, all rights attaching to the domain exist in their integrity« as his justification for enforcing in Canada certain royal rights which had been established in France by royal ordinances. These ordinances, however, had not been registered in the colony. See Dupuy to Minister (October 20, 1727) in Canadian Archives, Series F, Vol. 49.

[3]) On this point see F. P. Walton, The Scope and Interpretation of the Civil Code of Lower Canada (Montreal 1907), p. 2—5, especially the cases cited on p. 4, note 3.

[4]) »Reglemens généraux du conseil supérieur de Québec, pour la police« (May 11, 1676), printed in Arrêts et reglements du conseil supérieur de Québec (Quebec 1854), p. 65—73.

[5]) »The Office of Intendant in New France« in American Historical Review, October 1906, p. 15—38.

moreover, from the Council down to the inferior tribunals, contributed a large number of judgments interpreting the law [1]). Indeed, if there is any one feature which impresses the student of French administration in the New World it is the prodigious official activity there displayed. Still this bewildering mass of colonial legislation and judicial decisions served but slightly to modify the general principles of the colonial law as set forth in the Custom of Paris and in the ordinances of the French crown, for the obvious reason that the ordinance power of the colonial authorities was limited to the elucidation and administration of the law and did not extend to the radical alteration of it. The intendants, however, allowed themselves considerable latitude in this direction, and one of their number assured the king that if he did not follow this policy of departing from the letter of the law with gre. freedom the result would be very detrimental to the interests of justice in the colony [2]). The home authorities countenanced this praetorian policy on the part of the intendants; but on the whole their exercise of it did not serve to make any very great variations in the general system of colonial law.

When, in 1760, the French withdrew from North America, they left implanted there a legal system which, on the whole, was very far from being wholly Roman in basis or in character. On the contrary the influence of Roman law had been but mildly stamped upon it, much less strongly indeed than it had by this time become impressed upon the legal system of France herself. This was because many branches of French law had been thoroughly romanized by the issue of the »grandes ordonnances« which, as has been stated, were not an integral part of the colonial jurisprudence. Strange and paradoxical as it may appear, a large part of the influence which Roman Law has obviously exerted both upon the form and matter of French-Canadian civil law, made itself effective not during the period of French rule but under English domination.

It is a recognized principle of English public law that the conquest of alien territory does not *ipso facto* involve the extension thereto of the English law of property and civil rights [3]). On the contrary the civil law of the conquered territory remains in full force and effect until such time as the new suzerain power may alter or abrogate it

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[1]) The decisions of the inferior courts have never been made available in printed form.

[2]) Raudot to Pontchartrain (November 10, 1707), in Canadian Archives, Series F, Vol. 26, p. 7 ff.

[3]) The leading case on this point is Campbell v. Hall, in 1 Cowper's Reports, 204.

by explicit provision. The conquest of Canada therefore left the colony with its old law for the time being. But a step in the direction of abrogating this legal system was not long delayed. The cession of the territory to England was made final and definite by the Treaty of Paris, which was ratified on March 10, 1763, and on October 7 of the same a royal proclamation was issued providing for the establishment of courts of justice in the colony, and directing that these courts should »hear and determine all causes, both criminal and civil, according to law and equity, and as near as may be agreeable to the laws of England« [1]).

It was clearly the intention of this proclamation to abrogate entirely the old jurisprudence and to replace it with the law and equity of England. But it is indeed an open question whether the king of England, by the mere exercise of royal prerogative and through the simple agency of a royal proclamation had power to make this sweeping change, or whether, on the other hand, the change could be effected only by an Act of Parliament. This is a question which has been discussed at considerable length by the legal savants of French Canada. Until very recently the weight of opinion has inclined to the view that the king did not have the power which by the issue of this proclamation he purported to possess; and this attitude was assumed by one of the higher courts of Quebec in an important judicial decision [2]). In one other very significant case the chief justice, Sir Louis H. Lafontaine, argued at considerable length in the same direction and in a most convincing way [3]). But the most recent writer upon this subject has concluded, after a discriminating review of the whole field, that the power to issue the proclamation of 1763 was within the prerogative of the crown and that by the issue of this document the entire jurisprudence of the old régime in Canada was legally abrogated [4]). I am convinced that this conclusion is entirely sound. The question is, however, one of academic rather than of practical interest, for the terms of the proclamation, in their original form, were not put into general operation.

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[1]) Canadian Archives, Series Q, Vol. 62 A, Pt. I, p. 114 ff. The proclamation is printed in A. Shortt and A. G. Doughty's Documents relating to the Constitutional History of Canada (Ottawa 1907), p. 119—123.

[2]) Stuart v. Bowman (1851), 2 Lower Canada Reports, p. 369. See also Rudolphe Lemieux's Les origines du droit franco-canadien (Montreal 1901), p. 366, Note.

[3]) Wilcox v. Wilcox (1857), 8 Lower Canada Reports, p. 34 ff.

[4]) F. P. Walton, The Scope and Interpretation of the Civil Code of Lower Canada (Montreal 1907), p. 12—19.

Apart altogether from the question of its legality there were important practical difficulties in the path of the general change which the proclamation of 1763 essayed to bring about. For one thing it was immediately found that the new English law of real property could not be applied by the courts to the settlement of disputes concerning proprietary rights, for the obvious reason that this law dealt mainly with the principles and incidents of socage tenure whereas the land tenures of Canada was at this time almost wholly feudal, and it seemed to be the intention of the British authorities that they should be permitted to remain so. As the new legal arrangements were so obviously unadapted to the existing system of land tenure the colonial authorities took it upon themselves to instruct the courts that, where disputes concerning real property could not be adjusted properly by the application of English law, resort was to be had to the ancient laws and usages of the province. This action was duly confirmed by the home authorities who, in 1766, gave instructions that in »all suits and actions relative to the titles of land, and the descent, alienation, settlement, and encumbrance of real property«, the colonial courts, despite the terms of the proclamation, should »govern themselves in their proceedings, judgments, and decisions by the local customs and usages which have hitherto prevailed and governed within the province«[1]).

This action somewhat alleviated the legal chaos; but it did not seem to go far enough. The new governor of Canada, General Guy Carleton, believed that the administration of justice would not be successful until the whole body of the old law relating to civil rights should have been restored; and he advised the British government to this effect[2]). But he soon found an important difficulty in the way. This difficulty resulted from the fact that the jurisprudence which it was proposed to restore had never been entirely codified or brought together in any systematic form. The Custom of Paris was, it is true, a compact body of rules, easy to follow; but many of his provisions had never been regarded as applicable to the colony, had never been enforced there, and were not thought of as being part of the »ancient laws of the province«. Furthermore, the royal decrees issued during a whole century of the colony's history were still in manuscript, in a handwriting difficult to decipher, unarranged, unindexed, and to some extent incomplete. The colonial ordinances were in precisely the same

[1]) »Instructions to the Honorable James Murray« (June 24, 1766), in Public Record Office, London, Board of Trade, Canada, Vol. XV.

[2]) Carleton to Shelburne (December 24, 1767), in Canadian Archives, Series Q, Vol. V, Pt. I, p. 216 ff.

situation. How could the new English judges manage to find out precisely what were the laws and usages of the old régime relating to any matter which might come before them?

It was to meet this difficulty that Governor Carleton at once appointed a »Select Committee of Canadian Gentlemen well-skilled in the Laws of France and of that Province« and requested this committee to make a digest of the whole body of provincial jurisprudence as it had existed in the colony prior to the coming of the English. The compilers of this code went about their work promptly, and in 1773 completed their task[1]). When, by the Quebec Act of the following year, the old civil law was entirely restored to operation in the province, the compilation made by this committee proved of high service to the courts. It is worth noting, however, that the committee allowed itself considerable leeway in its work; for while its task was specifically to make a digest of the laws which had actually existed in the colony prior to 1760 it sought guidance for its arrangement of the abstracts, and to some extent for the interpretation of difficult rules, in the works of the standard French commentaries of the period and these, as is well known, bore marked traces of Roman influence. Through this channel, therefore, a small modicum of Roman Law made its way into the legal system of the province.

In 1774 the influence of those who wished a restoration of the old legal system proved sufficiently powerful to secure the incorporation in the Quebec Act of a clause providing that »in all cases relative to property and civil rights« the courts of the province should follow the laws and usages of the old régime[2]). This was a very welcome concession to the French-Canadian people, and no doubt had some influence in keeping them from casting their lot with the revolting American colonists to the southward. The latter, on the other hand, regarded the concession as a species of treason to Anglo-Saxon in-

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[1]) The compilations were published in four parts at London during the years 1772—1773. Their exact titles are: 1. An Abstract of those Parts of the Custom of the Viscounty and Provostship of Paris, which were received and practiced in the Province of Quebec in the time of the French Government. 2. The Sequel of the Abstract ... containing the thirteen latter Titles of the said Abstract. 3. An Abstract of the Criminal Laws that were in force in the Province of Quebec in the time of the French Government. 4. An Abstract of the Several Royal Edicts, and Declarations, and Provincial Regulations and Ordinances, that were in force in the Province of Quebec in the time of the French Government, and of the Commissions of the several Governors-General and Intendants of the said Province.

[2]) 14 George III, c. 83.

stitutions, and one of the clauses in the Declaration of Independence censured the British authorities for »abolishing the free system of English law in a neighboring province«. At any rate the provisions of the Quebec Act restored in its entirety the civil jurisprudence of the old régime, and it has remained in full force, throughout the province of Quebec, down to the present day. The English criminal law however, has existed side by side with it from the outset.

During the half century following the restoration of the old law system many changes were made in it; for the legislative authorities of the province had been given power to change it by enactment whenever such might seem desirable. In 1785, for example, provision was made that in all commercial matters the evidence was to be heard in accordance with the English rules of evidence in such causes. These English rules of evidence in commercial causes were founded, in the main, upon the rules of the old Law Merchant, and as they were in their origin of international rather than of local character, they did not differ in essentials from those which had been laid down in the »Ordonnance de la marine« of 1681 [1]), one of the Grand Ordinances which had never been registered in the colony. Other statutes made changes in various branches of the law, and the abolition of the seigniorial system of land tenure in 1854 made a very important change not in the law itself but in one of the chief subjects with which the civil law had to deal [2]). During this period of nearly eighty years a considerable development of the law took place, moreover, through the agency of judicial decisions. The judges of the province constantly turned for enlightenment to the recognized commentators, to the decisions of the French courts, and above all, to the provisions of the Code Napoléon after that compilation had been prepared. In many respects the provincial jurisprudence, while professing on its face to be a perpetuation of the old legal system, had steadily departed from this latter. Through the agencies which have just been mentioned the influence of principles drawn from Roman Law exerted itself very strongly and with enduring effect.

In 1857 it was deemed desirable that the law system of Quebec should be revised, and the whole civil jurisprudence of the province formally codified. This work was undertaken and accomplished with high credit by a commission of Canadian jurists, and upon completion, became the Code Civil de Quebec. If there was any one feature

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[1]) Printed in Isambert's Recueil général des anciennes lois, Vol. XIX, p. 282 ff.

[2]) A full discussion of this change may be found in the writer's Seigniorial System in Canada (New York 1907), Chap. XII.

which characterized the labors of this commission it was the unremitting attention which they gave to the Code Napoléon and the large extent to which they drew from this compilation. In arrangement the Code Civil follows the Code Napoléon almost slavishly; in matter its dependence is also marked. Many articles are reproduced verbatim; many others show only verbal changes; indeed, with the exception of one book[1]), the Civil Code of Quebec may be looked upon more as a recension of the Code Napoléon than as a revision and codification of what had been the civil jurisprudence of the province prior to 1857.

Now those who are familiar with the history of the legal system in France do not need to be reminded of the mighty debt which the Code Napoléon owes to the Roman Law. This obligation, direct and indirect, is made entirely clear in the collection of sources which its compilers used in the consummation of their great task[2]). But it may not be amiss to emphasize the fact that the Code Civil de Québec, in so far as it is based upon the Napoleonic code, shares equally in indebtedness to the jurisprudence of Justinian. Indeed it is probably well within the bounds of truth to suggest that more Roman Law found its way into the contemporary legal system of French Canada by way of the Code Napoléon than through any other single channel, or, possibly, through all other channels combined.

The dominance of Roman juridical ideas in this province is, therefore, not a heritage of the old régime. It is not because the French established there the Custom of Paris; but because, under English rule there have been wide departures from this original code. It is not at all unnatural that, being French in origin, the legal system of the province should have continued French in development, despite the passing of the colony into the hands of a new suzerain, and notwithstanding the startling break in the continuity of French legal evolution which marked the Revolutionary and Napoleonic eras. But it was not essential that the civil jurisprudence of Quebec should have taken this course: its authorities might readily have warped it into quite another groove. From any attempt to do this, however, the British authorities eventually refrained, and by so doing gave new recognition to the principle that, in the evolution of a legal system, ethnic factors are apt to prove more potent than the pressure of political control.

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[1]) Book iv.

[2]) These sources have been brought together in Fenet's Recueil complet des travaux preparatoires du code civil (15 vols., Paris 1827—1829).