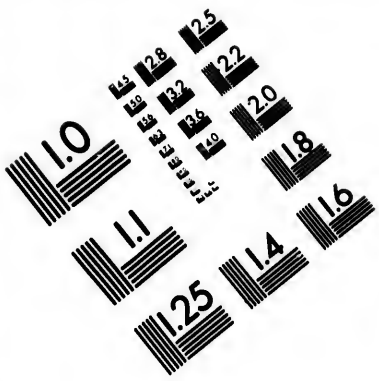


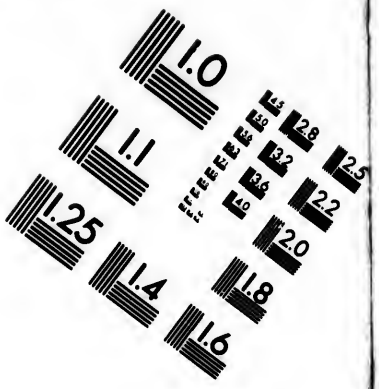
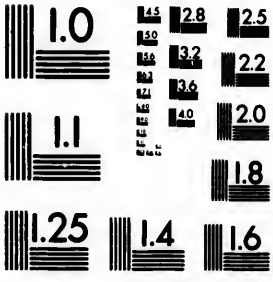
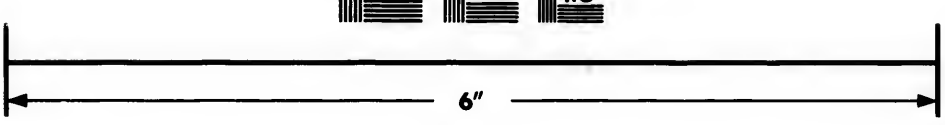


IMAGE EVALUATION TEST TARGET (MT-3)





Photographic Sciences Corporation

23 WEST MAIN STREET
WEBSTER, N.Y. 14580
(716) 872-4503

Technical and Bibliographic Notes/Notes techniques et bibliographiques

The Institute has attempted to obtain the best original copy available for filming. Features of this copy which may be bibliographically unique, which may alter any of the images in the reproduction, or which may significantly change the usual method of filming, are checked below.

L'Institut a microfilmé le meilleur exemplaire qu'il lui a été possible de se procurer. Les détails de cet exemplaire qui sont peut-être uniques du point de vue bibliographique, qui peuvent modifier une image reproduite, ou qui peuvent exiger une modification dans la méthode normale de filmage sont indiqués ci-dessous.

- ☐ Coloured covers/ Couverture de couleur
- ☐ Covers damaged/ Couverture endommagée
- ☐ Covers restored and/or laminated/ Couverture restaurée et/ou pelliculée
- ☐ Cover title missing/ Le titre de couverture manque
- ☐ Coloured maps/ Cartes géographiques en couleur
- ☐ Coloured ink (i.e. other than blue or black)/ Encre de couleur (i.e. autre que bleue ou noire)
- ☐ Coloured plates and/or illustrations/ Planches et/ou illustrations en couleur
- ☐ Bound with other material/ Relié avec d'autres documents
- ☐ Tight binding may cause shadows or distortion along interior margin/ La reliure serrée peut causer de l'ombre ou de la distortion le long de la marge intérieure
- ☐ Blank leaves added during restoration may appear within the text. Whenever possible, these have been omitted from filming/ Il se peut que certaines pages blanches ajoutées lors d'une restauration apparaissent dans le texte, mais, lorsque cela était possible, ces pages n'ont pas été filmées.
- ☐ Additional comments:/ Commentaires supplémentaires:

- ☐ Coloured pages/ Pages de couleur
- ☐ Pages damaged/ Pages endommagées
- ☐ Pages restored end/or laminated/ Pages restaurées et/ou pelliculées
- ☑ Pages discoloured, stained or foxed/ Pages décolorées, tachetées ou piquées
- ☐ Pages detached/ Pages détachées
- ☑ Showthrough/ Transparence
- ☐ Quality of print varies/ Qualité inégale de l'impression
- ☐ Includes supplementary material/ Comprend du matériel supplémentaire
- ☐ Only edition available/ Seule édition disponible
- ☐ Pages wholly or partially obscured by errata slips, tissues, etc., have been refilmed to ensure the best possible image/ Les pages totalement ou partiellement obscurcies par un feuillet d'errata, une pelure, etc., ont été filmées à nouveau de façon à obtenir la meilleure image possible.

This item is filmed at the reduction ratio checked below/
Ce document est filmé au taux de réduction indiqué ci-dessous.

10X	12X	14X	16X	18X	20X	22X	24X	26X	28X	30X	32X
					✓						

The copy filmed here has been reproduced thanks to the generosity of:

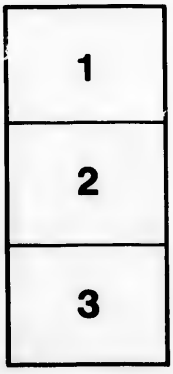
National Library of Canada

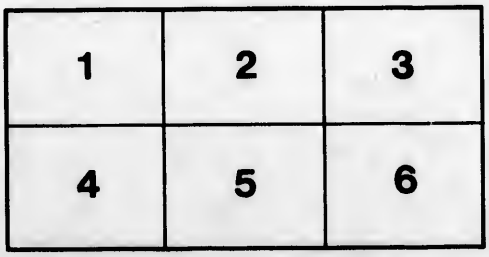
The images appearing here are the best quality possible considering the condition and legibility of the original copy and in keeping with the filming contract specifications.

Original copies in printed paper covers are filmed beginning with the front cover and ending on the last page with a printed or illustrated impression, or the back cover when appropriate. All other original copies are filmed beginning on the first page with a printed or illustrated impression, and ending on the last page with a printed or illustrated impression.

The last recorded frame on each microfiche shall contain the symbol → (meaning "CONTINUED"), or the symbol ▽ (meaning "END"), whichever applies.

Maps, plates, charts, etc., may be filmed at different reduction ratios. Those too large to be entirely included in one exposure are filmed beginning in the upper left hand corner, left to right and top to bottom, as many frames as required. The following diagrams illustrate the method:





L'exemplaire filmé fut reproduit grâce à la générosité de:

Bibliothèque nationale du Canada

Les images suivantes ont été reproduites avec le plus grand soin, compte tenu de la condition et de la netteté de l'exemplaire filmé, et en conformité avec les conditions du contrat de filmage.

Les exemplaires originaux dont la couverture en papier est imprimée sont filmés en commençant par le premier plat et en terminant soit par la dernière page qui comporte une empreinte d'impression ou d'illustration, soit par le second plat, selon le cas. Tous les autres exemplaires originaux sont filmés en commençant par la première page qui comporte une empreinte d'impression ou d'illustration et en terminant par la dernière page qui comporte une telle empreinte.

Un des symboles suivants apparaîtra sur la dernière image de chaque microfiche, selon le cas: le symbole → signifie "A SUIVRE", le symbole ▽ signifie "FIN".

Les cartes, planches, tableaux, etc., peuvent être filmés à des taux de réduction différents. Lorsque le document est trop grand pour être reproduit en un seul cliché, il est filmé à partir de l'angle supérieur gauche, de gauche à droite, et de haut en bas, en prenant le nombre d'images nécessaire. Les diagrammes suivants illustrent la méthode.

V

CODIFICATION OF THE LAWS OF LOWER CANADA.

SOME REMARKS

ON THE

TITLE "OF OBLIGATIONS,"

AS REPORTED

BY THE COMMISSIONERS.

BY

T. W. RITCHIE.

Montreal:
PRINTED BY JOHN LOVELL, ST. NICHOLAS STREET.
1863.

IN June, 1857, the Legislature passed an Act, the importance of which it would be difficult to exaggerate, providing for the Codification of the Laws of Lower Canada, relative to civil matters and procedure. The preamble of the Act declares that such codification is "manifestly expedient." Nevertheless, the Government of the day allowed a period of more than eighteen months to elapse before the Act was put in force, by the nomination of Commissioners to execute the important work thus decreed by the Legislature. The Act provides that three Barristers should be named as Commissioners for Codifying the Laws (but any Judge or Judges of the Queen's Bench or Superior Court might be appointed), and two Secretaries, also Barristers. The Act instructs the Commissioners to reduce into one Code, to be called the *Civil Code of Lower Canada*, those provisions of law which relate to civil matters, and are of a general and permanent character; and into another Code, to be called *the Code of Civil Procedure of Lower Canada*, provisions of law, of the like character, relative to procedure in civil cases. In these Codes, the Commissioners are to embody only such provisions of law as they hold to be actually in force, giving the authorities in support of them. They may, however, suggest amendments, stated separately and distinctly, with their reasons for proposing them. The three French Codes, known as the *Code Civil*, the *Code de Commerce*, and the *Code de Procedure Civile*, are expressly given to the Commissioners as models, in so far as respects general plan and the amount of detail on each subject. The Commissioners are instructed from time to time to report to the Governor their proceedings and the progress of the work. When sufficiently advanced, sections are to be printed, and sent with a Report to the Governor, who may transmit copies to each of the Judges of the Queen's Bench and Superior Court. The duty is imposed upon the Judges to examine the portions so submitted, more especially that part of the work purporting to state the laws in force, and return the same stating their opinion, with their reasons and authorities, and drafts of any amendments proposed, either to the work of the Commissioners or to the law itself.

Early in the year 1859, the Commissioners and Secretaries were named, and commenced their labors. The first part of the work reported to the

Governor is the title under consideration, and was submitted in October, 1861. Although eighteen months have since elapsed, no review or even notice of this important part of the project of the Code has, to my knowledge, appeared in print in the English language. This is doubtless to be accounted for by the fact that copies have not been furnished to members of the profession generally; otherwise, surely the work would not have been received in silence by the English-speaking members of the Bar. Some criticisms would have appeared upon the manner in which this important title has been prepared. It has, however, been laid before the Judges, as the Act contemplated, and it would appear from a subsequent report of the Commissioners, that they had confidently expected great assistance from the enlightened observations of the experienced jurists whose duty it is from month to month to lay down the law in an authoritative manner. It is, however, left to be inferred that the Commissioners have been disappointed in the hopes thus entertained.

The arrangement of this part of the work leaves nothing to be desired. The Commissioners have substantially followed the order of Pothier, which is more natural and philosophical than that of the Code Napoléon, the errors of arrangement of which, pointed out by different commentators, have been carefully avoided in the Title in question. In the French Code, the subject of Obligations is divided into two distinct titles, "Des Contrats ou des Obligations conventionelles en général," and "Des Engagemens qui se forment sans convention." Such a division was entirely unnecessary, the greater part of the rules laid down with respect to conventional obligations applying equally to those arising from quasi-contracts, quasi-offences, or from operation of law. This is shown by the fact that the former title contains nearly three hundred articles, the latter only seventeen. That the order adopted by our Commissioners is preferable to that of the *Code Civil*, will appear by a mere glance at the general division of the project of this title. The chapters are entitled as follows: 1. Of Contracts; 2. Of Quasi-Contracts; 3. Of Offences and Quasi-Offences; 4. Of Obligations which result from the operation of the law solely; 5. Of the object of Obligations; 6. Of the effect of Obligations; 7. Of different kinds of Obligations; 8. Of the extinction of Obligations; 9. Of Proof.

The *idea* of a Code has been well apprehended by the Commissioners. A Code should be a comprehensive body of practical rules of law, expressed in language pure, concise and unambiguous. It ought to exclude mere definitions and legal axioms; for it can never supply the place of scientific treatises upon legal subjects. Nor ought it to be encumbered with more details and examples than are absolutely necessary to a practical understanding of the rules laid down. It is scarcely necessary to add that the subtleties in which many of the authors delight, would be entirely out of

place in a body of positive legislation such as a Civil Code. These views are not dissimilar to those which the Commissioners seem to have entertained in the execution of the Title of Obligations.

It is manifest that in the review of a Code, the articles of which ought to be not unlike the jewels composing a diamond necklace, pure, simple and transparent, verbal criticisms will almost necessarily suggest themselves, which would appear trivial, and even captious, if applied to any ordinary literary work. In the following observations it will be seen that no changes, even of a purely verbal nature, have been considered unworthy of notice, where they appeared to give any promise of greater perfection in the work. These remarks are unbiassed, and are submitted through a desire to contribute something towards a work which ought to interest every Lower Canadian, and especially every member of the profession. It is to be hoped that each title of this great work, as it makes its appearance in print, will receive from legal critics, more competent for the task than the present writer can pretend to be, the thorough and careful examination, criticism and discussion, demanded by the importance of the subjects of which the Code will contain an authoritative exposition.

In the brief remarks which follow, it will be seen that many articles and amendments are passed over in silence. After a careful examination of the corresponding provisions in the *Code Civil*, and reference to most of the authorities cited, no alterations suggested themselves with respect to the articles and amendments in question. Those portions of the project are, therefore, unreservedly approved. The number of such omissions is the best evidence of the opinion of the writer in reference to this important title, as a whole.

The title of Obligations, as reported by the Commissioners, consists of 275 Articles. The amendments proposed to some of these articles, by the substitution of others in their stead (as alterations in the law,) are twenty-one in number. Besides these, five articles entirely new are submitted by the Commissioners, also as amendments of the existing law.

TITLE "OF OBLIGATIONS."

GENERAL PROVISIONS.

THE general provisions are contained in the two following articles:

"1. It is essential to an Obligation that it should have a cause from which it "arises, persons between whom it exists, and an object."

"2. Obligations arise from contracts, quasi-contracts, offences, quasi-offences, and "from *the operation of* the law solely."

The words italicized in Art. 2 may be omitted. They are not found in Pothier, nor in the French version of this article.

CHAPTER I.

OF CONTRACTS.

SECTION I.—*Of the Requisites to the validity of Contracts.*

"3. There are four requisites to the validity of a Contract:
"Parties legally capable of contracting.
"Their consent legally given.
"Something which forms the object of the Contract.
"A lawful cause or consideration."

These requisites might be more concisely, and with equal clearness stated thus: "Parties capable of contracting; their consent; an object; a lawful consideration." The words omitted are clearly superfluous.

The word "legally" may also be omitted in the first paragraph of Art. 5. "Those *legally* incapable of contracting," &c.

SECTION II.—*Of the causes of nullity in contracts..*

The *rédaction* of this section, particularly of the paragraph "Of violence and fear" is not happy. Articles 11 and 12 are passed for the moment. The Commissioners, finding that "Fear" is by the Roman law declared to be a cause for annulling contracts, have added it to "violence," which is given by Pothier and the French Code. It is manifest that this addition is of no value, and only tends to create confusion of ideas. It is *violence creat-*

ing fear which annuls the contract. The existence of fear can only be established by proof of violence; and although it may be theoretically true that a consent obtained through fear is not a good consent, the statement of the principle in a practical code is useless. The first three articles of Section III. are as follows:

"13. Violence or fear is a cause of nullity, whether practised or produced by the "party for whose benefit the contract is made, or by any other person."

"14. The fear, whether produced by violence or otherwise, must be a reasonable "and present fear of serious injury. The age, sex, character, and condition of the "party are to be taken into consideration."

"15. The fear suffered by a contracting party is a cause of nullity, whether it be "a fear of injury to himself, or to his wife, children, or other near kindred, and "sometimes when it is a fear of injury to strangers, according to the discretion of "the Court."

These articles, leaving out of course the revival "fear," might be rendered in two, thus:

"13. Violence is a cause of nullity, whether practised by the party for whose "benefit the contract is made, or by any other person."

"14. The violence must be such as to produce, in the party influenced by it, a "reasonable and present fear of serious injury to himself, his wife, child, or other "near kindred; or sometimes (in the discretion of the Court), to any other person. "The age, sex, and condition of the party are to be taken into consideration."*

In the following article the words italicized may be omitted.

"16. The mere reverential fear of the father or mother, or other ascendant, with "out any violence *having been* exercised, *or threats made*, will not invalidate the Con- "tract."

"18. A contract for the purpose of delivering the party making it, or the husband, "wife, or near kinsman of such party, from violence or threats of injury, is not "invalidated by reason of such violence or threats: provided the person in whose "favour it is made be in good faith, and not in collusion with the offending party."

To this should be added: "But if the obligation be manifestly excessive, the Court may in its discretion reduce it." (Poth. Oblg. No. 24.)

Marcadé characterizes this doctrine of Pothier as not to be thought of, at the present day; but his reasoning is more subtle than just, and he admits that if the obligation be "*vraiment excessive*," the Judge may hold that the party had been deprived of his reason by the effect of fear, and consequently that the obligation was null for want of consent, and

---

* Since these notes were written, I am indebted to a friend, a member of the New York bar, for a copy of the Draft of a Civil Code for the State of New York, a work of much interest. The division of Obligations, as there reported, contains only 135 sections or articles. The article most nearly parallel to the one under consideration is in the following terms:—"An apparent consent is not real or free when obtained through 1. Duress; 2. Menace; 3. Fraud; 4. Undue influence; 5. Mistake; or, 6. Accident." These are, of course, resolvable into three: error, fraud, and violence.

thereupon may fix the sum to be paid, irrespective of any express contract, according to the service rendered, and by the effect of the quasi-contract *gestion d'affaires*. This is only doing indirectly what our article permits to be done directly.

In Article 19 the word "fear" should be omitted, to make it correspond with the preceding article.

Returning to Articles 11 and 12:

"11. Error is a cause of nullity only when it occurs *in the nature of the contract* "*itself*, *or* in the substance of the thing which is the object of the contract, or in "something which is a principal consideration for making it."

The words italicized may be omitted. They are not found in Pothier, nor in the French Code.

"12. Fraud is a cause of nullity when the artifices practised by one party, or with "his knowledge, are such that the other party would not have contracted without "them."

There are here two important omissions. The article ought to read thus: "Fraud is a cause of nullity when the artifices practised *or participated in* by one party *to deceive the other* are such that the latter would not have contracted without them." (Pothier, No. 28.) There is a distinction to be drawn between harmless artifices, and those of a fraudulent and deceitful kind. It is only manœuvres *pour tromper un autre* that give rise to nullity. (Pothier, No. 28; 5 Marc. No. 417.) The fraudulent arts must be the act of the other contracting party, or at least he must have participated in them. (Poth. No. 32.) It is not sufficient that they should be merely *with the knowledge* of the party. The article, as reported, is therefore inaccurate in two material respects.

In Section 4, "Of lesion," there is little to remark.

"25. The minor is not relievable from stipulations contained in his marriage con-"tract, made with the consent and assistance of those whose consent is required for "the validity of his marriage, *provided the donation or other advantage stipulated be* "*not excessive*."

The Commissioners very properly suggest the omission of the words in italics, as an amendment to the existing law.

"28. Contracts by minors for the alienation or incumbrance of their immoveable "property, with or without the intervention of their tutors or curators, unattended "with the formalities required by law, may be avoided without proof of lesion."

This article is unnecessary; and, if not so, is misplaced.

"29. Minors are entitled to relief for cause of simple lesion in contracts executed "by their tutors, or by themselves, with the tutor's authority, and clothed with all "the formalities of law, and even in sales by judicial authority upon an *avis de* "*parens*.

The Commissioners suggest the following article in place of the foregoing: "When all the formalities required with respect to minors or interdicted persons, for the alienation of immoveable property, or the partition of a succession, have been observed, such contracts and acts shall have the same force and effect as if they had been executed by persons of the age of majority, and free from interdiction."

The proposed amendment is an important one, but there is little doubt it ought to be adopted. It expresses the rule contained in the Code Napoléon. (Art. 1314.)

In Article 31 are given the cases in which persons of the age of majority are entitled to be relieved from their contracts, on the ground of lesion. The Commissioners propose to abolish lesion as alone a ground of annulling contracts entered into by persons of major age. The new article suggested is in these words: "Persons of the age of majority are not entitled to relief from their contracts for cause of lesion only."

This is in accordance with modern ideas, and probably ought to be adopted.

SECTION III.—*Of the interpretation of Contracts.*

Calls for no comment. The rules laid down are derived from Pothier, and are, of course, unexceptionable.

SECTION IV.—*Of the effects of Obligations.*

"44. The contract alone does not transfer the right of property in a thing; it gives only the *jus ad rem*, not the *jus in re*; to transfer the property, tradition is necessary."

(This is true, except as to deeds of lands held in free and common soccage. Consol. Stat. L. C., Cap. 37, Sec. 56.) The Commissioners propose the following amendment to this article:—"The contract of alienation of a thing certain and determinate makes the purchaser owner of the thing by the consent alone of the parties, although no delivery be made."

This conforms to Article 1583 of the Code Civil; and suggests a useful amendment. The additional article (46) proposed, in amendment, makes the previous rules apply also to third parties in respect of real estate, and is doubtless worthy of approval.

SECTION VI.—*Of the avoidance of contracts and payments made in fraud of creditors.*

This section has evidently been prepared with great care, and the subject is of the utmost importance. The law in respect of it is now

somewhat unsettled. Merely remarking that the whole section, and the amendments proposed by the Commissioners, appear to the writer to call for nothing but unqualified praise, particular attention is drawn to the articles composing the section. They are as follows:

"51. Creditors may in their own name impeach the acts of their debtors in fraud " of their rights according to the rules provided in this section."

"52. A contract cannot be avoided unless it be made by the debtor with intent to " defraud, and will have the effect of injuring the creditor."

"53. A gratuitous contract is deemed to be made with intent to defraud, if the " debtor be insolvent at the time of making it."

"54. An onerous contract made by an insolvent debtor with a person who knows " him to be insolvent is deemed to be made with intent to defraud."

"55. Every payment by an insolvent debtor to a creditor knowing his insolvency, " is deemed to be made with intent to defraud, and the creditor may be compelled to " restore the amount or thing received, or the value thereof, for the general benefit of " the creditors.

" 56. If any contract or payment designated in the three next preceding articles be " made by a merchant or trader within ten days previous to his bankruptcy,* his insol- " vency and intent to defraud and the knowledge thereof by the creditor or the party " with whom he contracted is presumed."

" 57. An onerous contract made with intent to defraud on the part of the debtor " but in good faith on the part of the person with whom he contracts, is voidable."

" 58. No contract or payment can be avoided by reason of anything contained in " this section at the suit of a creditor posterior thereto, unless he be subrogated in " the rights of an anterior creditor, saving nevertheless the exception contained in the " following article."

" 59. Contracts and payments made by a merchant or trader within ten days pre- " vious to his bankruptcy may be avoided for the causes assigned in this section, at " the suit of any creditor, although posterior thereto."

"60. No contract or payment can be avoided by reason of anything contained in " this section at the suit of any individual creditor unless the same be brought within " one year from the time of his obtaining a knowledge thereof."

"If the suit be by assignees or other representatives of the creditors collectively, it " must be brought within a year from the time of their appointment."

CHAPTER II.

SECTION I.—*Of the Quasi-Contract* negotiorum gestio.

"63. He who, of his own accord assumes the management of any business of " another, *with or* without the knowledge of the latter, is obliged to continue the " management which he has begun until the business is completed, or the person for " whom he acts, is in a condition to provide for it himself; he must also take charge " of the accessories of the same business."

" He subjects himself to all the obligations which result from an express mandate."

---

* " Bankruptcy " is elsewhere defined to be " the condition of a trader who has discontinued his payments."

The words in italics are not in the article, but ought to be added, for although, strictly speaking, the article as reported, expresses the law in so far as it respects a quasi-contract, the addition would be of practical utility. A similar provision is found in the French code, Article 1372.

"64. He is obliged to continue his management, although the person for whom he "acts die before the business is terminated, until *such time as* the heir or other legal "representative is in a condition to take the management of it."

To this article there is only a verbal criticism, the omission of the words italicized.

"65. He is bound to exercise in the management of the business, all the care of "a prudent administrator.

"Nevertheless the court may moderate the damages arising from his negligence or "fault, according to the circumstances under which the management of the business "has been assumed."

A "prudent administrator" is not a happy rendering of the French "un bon père de famille." Why not translate the words literally?

"67. He who receives what is not due to him, through error of law, or of fact, "is bound to restore it, or if it cannot be restored in kind, give the value of it "with the profits received upon it."

The Commissioners suggest the following as an amendment instead of article 67:—

"He who receives what is not due to him through error of law or fact is bound to "restore it; or if it cannot be restored in kind, to give the value of it.

"If the person receiving be in good faith, he is not obliged to restore the profits of "the thing received by him."

Ought not the second paragraph to be altered so as to compel restitution of profits in all cases, where they have not been consumed by the person receiving?

"68. He who pays a debt, believing himself by error to be the debtor, has a right "of recovery against the creditor,

"Nevertheless that right ceases when the title (add, *evidencing the debt*) has in "good faith been cancelled, or has become ineffective, in consequence of the payment "saving the remedy of him who has paid against the true debtor."

"72. He to whom the thing is restored, is bound to repay to a possessor, in bad faith, "the expenses which have been incurred for its preservation."

The following is suggested as more in conformity to the law as it now exists: "He to whom the thing is restored is bound to repay, even to a possessor in bad faith, the *useful* expenses which have been incurred for its preservation."

74. The last clause should change places with the one immediately preceding it.

"82. The object of an obligation must be something possible, and not forbidden by "law or good morals."

Proposed amendment:—

"The object of an obligation must be something possible *in itself*, and "not contrary to law or good morals."

"84. The obligation to keep the thing safely, subjects the person charged there- "with to apply more or less care, and renders him liable for his gross default, or "very slight fault, according to the nature of the different contracts, the effects of "which in this respect, are declared, under their respective titles."

Instead of this Article, the Commissioners suggest the following: "The "obligation to keep the thing safely obliges the person charged therewith, "to keep it with all the care of a prudent administrator," which appears to be a sound amendment.

In Section II "Of defaults," the following additional article is suggested by the Commissioners: "In all contracts of a commercial nature, "in which the time of performance is fixed, the debtor is put in default by "the mere lapse of such time." This amendment is in favour of commerce and ought to be adopted.

SECTION III.—*Of the damages resulting from the inexecution of Obligations.*

"91. The debtor is liable to pay damages in all cases in which he fails to establish "that the inexecution of the obligation proceeds from a cause which cannot be im- "puted to him, although there be no bad faith on his part."

After "inexecution" the words "or delay in the execution," ought to be inserted. They occur in the French code, and are necessary to render the article more complete.

"96. When a certain sum is stipulated as the amount of damages to be paid on "failure to execute an obligation, the sum may be reduced by the court if it appear "excessive."

A majority of the Commissioners suggest the following amendment:

"When it is stipulated that a certain sum shall be paid for damages for the inexe- "cution of an obligation, such sum and no other, either greater or less, shall be "allowed to the creditor for such damages.

"But if the obligation have been performed in part, to the benefit of the creditor, "and the time for its complete performance be not material, the stipulated sum may "be reduced, unless there be a special agreement to the contrary."

From this opinion Judge Morin justly dissents. The proposed change was made in France, because the courts went great lengths in setting aside clauses containing a stipulated amount of damages, but it is not alleged that the same reason exists in this country. A majority of the Commissioners

declare the reasons of Pothier in support of the law, as it now stands to be inconclusive. It is difficult to concur in this decision. The rule of the law as it now exists, is most equitable, and the argument of Pothier unanswerable, that a creditor ought not to be permitted to recover excessive stipulated damages from a debtor, who has, from a false confidence, been tempted to submit himself to them, never for a moment dreaming that a possible failure to perform his obligation would render him liable to the actual payment of excessive damages. As interest ought always to be the measure of actions, a creditor in whose favour such a clause has been stipulated should be held to prove that the damage has been really suffered by him. No doubt, contracts ought, as the law of the parties, to be enforced in so far as they can be in justice and equity; but an improvident debtor ought not to be mulcted in excessive damages merely to secure the carrying into effect of an unconscionable contract obtained from him by a designing and heartless creditor. Possibly a middle course might be advisable, namely, that the stipulation of a specific amount as damages should create a presumption in favour of the plaintiff, absolving him from proof in the first instance, but liable to be rebutted and destroyed by evidence on the part of the defendant. The same remarks apply to Article 154 respecting penal clauses.

The next article which arrests attention is 110, which is as follows:—

"110. That which is due with a term of payment cannot be exacted before the "expiration of the term; but that which has been paid in advance voluntarily and "without error or fraud cannot be recovered."

It is doubtful whether the second part of this article expresses correctly the existing law. However, it is well to provide that payment before the expiration of the term should be invalidated by the same causes which suffice to avoid contracts. Although possibly included in the term "voluntarily," the word "violence" may be added after the word "error."

Art. 131, for "prosecuted" read "sued."

"138. In case the creditor have renounced his joint and several action against one "of the debtors, if one or more of the remaining co-debtors become insolvent, "the shares of those insolvents shall be made up by contribution by all the other "co-debtors, except the one so discharged, whose part in the contribution shall be "borne by the creditor."

The Commissioners recommend that this rule of law should be preserved. They admit, however, that of the French code to be different, although many commentators interpret it as throwing the loss upon the creditor. So that the law be clearly laid down, it matters little which rule is adopted; but as the law ought to favour the conventional liberation of the debtor, it would be better to change the article, so as to make the loss arising

from the insolvency of the co-debtor fall upon the debtor as to whom the creditor has agreed to waive his joint and several right. It might often happen that a creditor would be willing to release a debtor from his *solidarité*—a benefit to the debtor—when he would not be willing to assume any responsibility arising from the insolvency of any of the other debtors. If the debtor wished his release to have a more extended meaning, he should expressly stipulate for it.

CHAPTER III.

SECTION I.—*Of Payment.*

The next Article to be noticed is—

"160. Payment may be made by any person, although he be a stranger to the "obligation, and the creditor may be put in default by the offer of a stranger to per- "form the obligation on the part of the debtor, without the knowledge of the latter, "but it must be for the advantage of the debtor, and not merely to change the creditor, "that the performance of the obligation is so offered."

The wording of this article is open to criticism on the ground of vagueness. An improved rendering would be the following: "Any person, even a stranger to the obligation, and although without the knowledge or against the will of the debtor, may make payment and put the creditor in default to receive the same, provided such person act in discharge of the debtor, and without subrogation in the rights of the creditor."

"166. Payment made by a debtor to his creditor, to the prejudice of a seizure or "attachment, is not valid against the seizing or attaching creditors who may, accord- "ing to their rights, constrain the debtor to pay a second time, saving in such case, "only his remedy against the creditor so paid."

Here is a case of mis-punctuation somewhat altering the sense. The comma after the word "case" in the last line, should be after the word "only."

"168. A debtor cannot compel his creditor to receive payment of his debt in part, "even if the debt be divisible.

"The Circuit Courts and Commissioner's Courts, may nevertheless in their discre- "tion order the sum for which judgment has been given in either of them to be levied "by instalments, in the manner provided by the statutes, regulating the authority "of these courts."

The Commissioners recommend that this power of granting a *terme de grâce* be taken away from the courts. It is not alleged, however, that it is abused, and there are many cases in which the exercise of this discretion operates as a great favour to the debtor, without being at all prejudicial to the creditor. It ought not, therefore, to be abolished, but should no doubt

be restricted to cases in which confession of judgment is offered in the first instance, and is doubtless a power to be exercised with a sound discretion, due regard being had to the relative circumstances of plaintiff and defendant.

" 169. The debtor of a certain specific thing is discharged by the delivery of the " thing, in the condition in which it is at the time of delivery, provided that the " deterioration *in the thing* (read, *which has occurred to it,*)* hath not been caused by " any act or fault for which he is responsible; and that previously (*previous*) to the " deterioration, he was not in default."

In Article 174, respecting conventional subrogation, the Commissioners recommend an alteration, permitting the act of loan and acquittance to be executed before witnesses. Here, and in the Articles 195, 196 and 197, the word " hypothecation " is inaccurately used instead of " hypothec," which has been adopted in our recent legislation, and is to be preferred. " Hypothecation " means the *act* of hypothecating, a signification entirely different from that of " hypothec."

Instead of Article 175, the Commissioners suggest an amendment, extending subrogation by the sole operation of law. The 5th paragraph requires a slight alteration, by the supplying of the words in italics, so as to read thus :—" 5. When a rent *or debt* due by one married party alone " has been redeemed *or paid* with the moneys of the community, in this " case the other party is subrogated in the rights of the creditor accord- " ing to the share of such party in the community."

178. Add the word " but " after " interest " in the penultimate line. It is found in the French version.

" 181. When a creditor refuses to receive payment, the debtor may make an actual " tender of the money, or other thing due, and in any action afterwards brought for " its recovery, he may plead and renew the tender, and if the thing due be a sum " of money, *may* (read *must*) deposit the amount; and such tender, or such tender " and deposit, if the thing due be a sum of money, are equivalent, with respect to the " debtor, to a payment made on the date of the first tender: provided that, from the " date of the first tender, the debtor continue always (add *capable and*) willing to " deliver the thing, or to pay the sum of money."

" 182. Paragraph 4. That (add, *if of money,*) it be made in coin declared by law " to be current, and a legal tender."

" 184. If a certain specific thing be deliverable on the spot where it is, the debtor " must by his *tender* (read *notice of tender*) require the creditor to come and take it there."

" If the thing be not so deliverable, and be from its nature difficult of transporta- " tion, the debtor must indicate by his *tender* (read *notice of tender*) the place where

---

*In several of the following articles, for the sake of brevity, suggested amendments are inserted in parenthesis as in the present article.

" it is, and the day and hour when he *is ready* (*will be ready*) to deliver it at the " place where payment ought to be made."

" If the creditor fail in the former case to take the thing away, or in the latter to " signify his willingness to accept, the debtor may, if he think fit, remove the thing " to any other place for safe keeping at the risk of the creditor."

Section III.—*Of Novation.*

" 189. Novation can be effected only between persons capable of contracting."

This article is entirely unnecessary.

197 and 198. The term " debtors *in solido*," as in the Code of Louisiana, would be better than " joint and several debtors." The same alteration ought to be made in other articles where similar expressions occur.

Section IV.—*Of Remission.*

" 202. The surrender to one of the joint and several debtors of the original title of " the obligation is available in favor of his co-debtors."

This article might be rendered somewhat more definitely, thus: " The " surrender to one of several debtors *in solido* of the original title of the " obligation has the same effect as if made to all."

" 205. That which the creditor receives from a surety as a consideration for releas- " ing him from his suretyship, must be imputed upon the debt, and goes in discharge " of the principal debtor and the other sureties, unless the surety discharged have " reason to fear that the debtor is insolvent, or about to become so."

The Commissioners suggest the following as an amendment to the law now in force :—" That which the creditor receives from the surety as a " consideration for releasing him from his suretyship is not to be imputed " in discharge of the principal debtor, or of the other sureties, unless the " condition of the latter have been made more onerous by the release of " such surety." The amendment is a good one. There is no reason why the principal debtor should profit by the consideration of a contract of release to which he is a stranger.

Section V.—*Of Compensation.*

" 208. Compensation is not prevented by a term granted by indulgence for the pay- ' ment of one of the debts."

This article will, of course, follow the fate of Article 168, which, as well as the present, the Commissioners wish to abolish. Their recommendation, as will have been seen before, is not concurred in by the writer.

" 213. When compensation by the sole operation of the law is prevented *by any of* " *the causes declared in this Section, or by others of a like nature,* the party in whose " favor alone the cause of objection exists may demand the compensation by excep-

" tion, and in such case the compensation takes place from the time of pleading the " exception only."

When compensation cannot take place *de plein droit*, by reason of the absence of one of the four conditions included in Articles 206 and 207, it may still be demanded when the condition wanting can be supplied. This compensation is called by Marcadé *facultative*. The four conditions required for compensation by operation of law are: 1. Mutual debtors; 2. Debts *fongibles;* 3. Debts *liquides;* 4. Debts *exigibles*. The article, as reported, is vague, referring as it does to causes which are not specified, and *others of a like nature*. An improved rendering would be the following: " When compensation by sole operation of law cannot take place by " reason of the absence of any of the conditions required in Articles 206 " and 207, the debtor who causes the accomplishment of all the conditions " which may be wanting may demand compensation by exception. In " such case the compensation takes place only from the time it is so " demanded."

" 218. The confusion which takes place by the concurrence of the qualities of " creditor and principal debtor *in the same person* avails the sureties."

The words in italics are superfluous, being included in the definition in the preceding article.

" 219. When the certain specific thing which is the object of an obligation perishes " (add, *is taken out of commerce*, C. C., 1302), or the delivery of it becomes from any " other cause impossible, without any act or fault of the debtor, and before he is in " default, the obligation is extinguished."

CHAPTER IX.

Of Proof.

The title of this Chapter is objectionable, as well as the use of word " proof " instead of " evidence " in several of its articles. " Th " word evidence, in legal acceptance, includes all the means by which " any alleged matter of fact, the truth of which is submitted to investi- " gation, is established or disproved. This term and the word *proof* are " often used indifferently as synonymous with each other, but the latter " is applied by the most accurate logicians to the *effect* of evidence, and " not to the *medium* by which truth is established." (Greenleaf, § 1.) This distinction ought to be observed throughout the chapter. In Articles 223 and 224, the word *evidence* should take the place of the word *proof*.

" 227. It is necessary to the authenticity of an instrument, executed before a " notary public, that it be received by him in the actual presence of another subscrib- " ing notary, or of two lawful subscribing witnesses.

" The witnesses must be males, not less than twenty years of age, of sound mind, " not related to either of the parties within the degree of *cousin germain*, without " interest in the instrument, not civilly dead, not deemed infamous by law."

The Commissioners suggest that the witnesses be *twenty-one* years of age. The article has been so drawn as to make the actual presence of two notaries, or a notary and two witnesses, absolutely necessary. It is well known that the most solemn acts are now passed before one notary, and afterwards countersigned by another notary who has no knowledge whatever of the instrument or the parties to it. A stop ought to be put to this abuse, but perhaps it would be well to require the actual presence of two notaries, or a notary and *one witness* instead of two witnesses.

" 230. An authentic writing may be contradicted, and set aside as false, in whole " or in part, by inscribing *en faux* in the manner provided in the Code of Procedure, " and in no other manner."

Instead of the words " by inscribing *en faux*," read " upon an *inscription de faux*."

" 231. Counter letters have effect between the parties to them only: they do not " make proof against third parties."

Instead of " do not make proof," read " have no effect." (C. N., 1321.)

" 234. Copies of notarial instruments, certified to be true copies of the original by " the notary or other public officer who has the legal custody of such original, are " authentic, and make proof of what is contained in the original," *of which the production may always be demanded.*

The words italicized ought to be [redacted] added to the article.

Articles 237 and 238, should be amended so as to include original instruments *destroyed.*

" 239. Paragraph 2. Exemplifications of any will executed out of Lower Canada, " under the seal of the Court wherein the original will is of record, or under the sig- " nature of the Judge or other officer having the legal custody of such will, and the " probate of such will under the seal of the Court."

Add the following clause: " Such probate is also received as *primâ facie* evidence of the death of the testator."

"3. Copies of the exemplification of such will, and of the probate thereof certified " by the Prothonotary *of any Court in Lower Canada*, in whose office the exemplifi- " cation and probate have been recorded, at the instance of an interested party, and " by the order of a judge *of such Court.*"

Omit the words italicized.

"4th. Certificates of marriage, baptism, or birth and burial of persons (*married, " baptized, or interred*) out of Lower Canada, under the hand of the clergyman or " public officer who officiated, and extracts from any register of such marriage, bap- " tism, or birth and burial, certified by the clergyman or public officer having the " legal custody thereof."

Add the words in italics.

"5th. Notarial copies of any power of attorney (*purporting to be*) executed out of "Lower Canada, in the presence of one or more witnesses, and authenticated before "any mayor, or other public officer of the country where it bears date, the original "whereof is deposited with the notary public in Lower Canada."

Supply the words italicized, and the same in the paragraph 6.

"241. Private writings, acknowledged by the party against whom they are set up, "or legally held to be acknowledged or proved, have the same effect in making proof "between the parties thereto, and between their heirs and legal representatives, as "authentic writings."

This article is quite too general. The private writings which are held in certain cases to be proved should be specified. The following is suggested in the place of this article: "The following writings are presumed to be genuine without evidence; any bill of exchange, promissory note, *cédule*, check, note, or promise, or other act or private agreement in writing when produced and fyled in any action in which the defendant makes default, or for any other reason the plaintiff becomes entitled to proceed *ex parte*. Such instruments may, however, be denied and proof thereof required in the manner provided by the code of procedure." Another article might here be conveniently added relating to protests, &c., produced under chapter 83 of the Consol. Stat. of Lower Canada. It might read thus: "The protest, notice and service of any writing included under the next preceding article, if any be alleged by the plaintiff in any such action, are presumed to have been regularly made, unless affidavit to the contrary be made in the manner provided in the code of procedure." (Consol. Stat. L. C., cap 83, sec. 86.) Article 243 would then be unnecessary.

"246. Family registers and papers do not make proof in favor of him by whom "they are written."

This is not a good translation of the French, "*les registres et papiers domestiques.*" "Private Registers, &c." would be better.

Sec. III. "Of testimony." The title "Of Oral Evidence" would be preferable.

"249. The testimony of one witness is sufficient in all cases in which proof by "testimony is admitted."

Instead of "proof by testimony," read "oral evidence."

"250. All persons are legally competent to give testimony except:

"1. Persons deficient in understanding, whether from immaturity of age, insanity, "or other cause;

"2. Those insensible to the religious obligation of an oath;

"3. Those civilly dead;

"4. Those declared infamous by law;

"5. Husband and wife for and against each other."

Of course persons who are insensible to religious obligation ought not to be admitted to testify under oath, but the law should be altered so as to allow such persons to affirm, under the penalties of perjury in case

of wilful falsity, their credibility only being affected by their want of religious conviction. The condition of the persons described in paragraphs 3 and 4 might also be permitted to go against their credibility, and not to exclude them altogether from giving evidence.

" 251. Testimony given by a party in the suit cannot avail in his favor." Add " *but such testimony cannot be divided to his prejudice.*"

Art. 252, last clause but one, " In all other matters, proof must be made by writ- " ing, or by the oath of the party," read "*adverse* party."

" 258. Legal presumptions are those which are specially attached by law to certain " facts. They exempt from making other proof those in whose favor they exist; " certain of them may be contradicted by other proof; others are presumptions *juris* " *et de jure*, and cannot be contradicted."

Instead of " making other proof," read " adducing evidence." In the next line, for " proof " read " evidence." This last remark applies also to Art. 259.

" 260. The authority of a final judgment (*res judicata*) is a presumption *juris et* " *de jure*, it applies only to that which has been the object of the judgment, and " when the demand is founded on the same cause, is between the same parties acting " in the same qualities, and for the same thing as in the action adjudged upon."

Add " The successors or representatives of the parties in the action adjudged upon are reputed to be the same as those parties."

" 265. A party may be examined under oath *in like manner* as a witness, or upon " interrogatories on faits et articles, or by decisory oath. And the Court may in its " discretion examine either of the parties, in order to complete imperfect proof."

Omit the words in italics, and for " proof " read " evidence."

" 266. The decisory oath may be offered by either of the parties to the other *upon* " *any issue raised in an action* in which the parties may legally bind themselves by " admission or compromise, in any state of the cause, and without any commence- " ment of proof."

Instead of the words italicized, read " in any action."

" 268. He to whom the decisory oath is offered, and who refuses to take it, and " does not consent to refer it to his adversary, or the adversary who refuses to take " it when it is referred to him, fails in his demand or exception."

Omit the words " consent to " as worse than useless.

In Article 272, instead of " joint and several creditors or debtors," read " creditors *in solido*," &c.

§ 2. " Of the oath *put* officially." The word *put* is objectionable. This title ought to be " Of the oath called *juramentum judiciale*," as in Pothier and the Code of Louisiana. In Art. 273, instead of " some proof has been made," read " some evidence adduced." If *proof* had been made, the suppletory oath would not be needed.

" 274. The oath put by the Court officially to one of the parties cannot be referred " by him to the other party."

Instead of *put by the Court officially*, read tendered by the Court." The same remark applies to Article 275.