CIHM
Microfiche
Series
(Monographs)

ICMH
Collection de
microfiches
(monographies)

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.

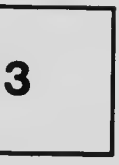
- [x] Coloured covers / Couverture de couleur
- [ ] Covers damaged / Couverture endommagée
- [ ] Covers restored and/or laminated / Couverture restaurée et/ou pelliculée
- [ ] Cover title missing / Le titre de couverture manque
- [ ] Coloured maps / Cartes géographiques en couleur
- [ ] Coloured ink (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
- [ ] Only edition available / Seule édition disponible
- [ ] Tight binding may cause shadows or distortion along interior margin / La reliure serrée peut causer de l'ombre ou de la distorsion le long de la marge intérieure.
- [ ] Blank leaves added during restorations 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.

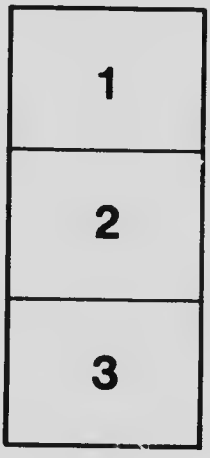
- [ ] Coloured pages / Pages de couleur
- [ ] Pages damaged / Pages endommagées
- [ ] Pages restored and/or laminated / Pages restaurées et/ou pelliculées
- [x] Pages discoloured, stained or foxed / Pages décolorées, tachetées ou piquées
- [ ] Pages detached / Pages détachées
- [x] Showthrough / Transparence
- [x] Quality of print varies / Qualité inégale de l'impression
- [ ] Includes supplementary material / Comprend du matériel supplémentaire
- [ ] 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.
- [ ] Opposing pages with varying colouration or discolourations are filmed twice to ensure the best possible image / Les pages s'opposant ayant des colorations variables ou des décolorations sont filmées deux fois afin d'obtenir la meilleure image possible.

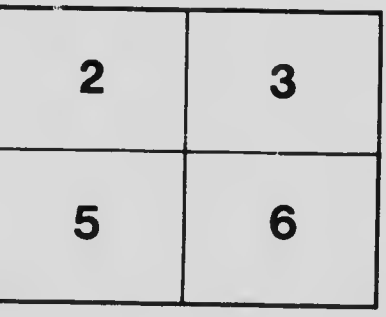
- [x] Additional comments / Commentaires supplémentaires: **Pagination is as follows: p. 579-590.**

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
								✓			

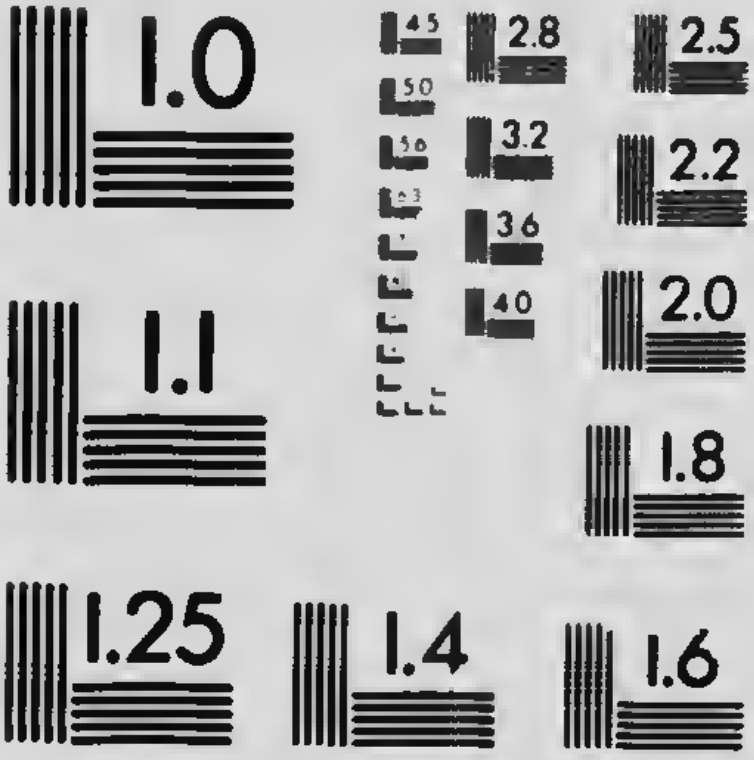






MICROCOPY RESOLUTION TEST CHART

(ANSI and ISO TEST CHART No 2)



APPLIED IMAGE Inc

1653 East Main Street
Rochester, New York 14609 USA
(716) 482 - 0300 - Phone
(716) 288 - 5989 - Fax

THE GENESIS OF ROMAN LAW IN AMERICA

BY
WILLIAM BENNETT MUNRO

Reprinted from the
HARVARD LAW REVIEW
June, 1909.

THE GENESIS OF ROMAN LAW IN AMERICA.

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 for Quebec,[1] encountered some 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 codification from the Code Napoléon of France.[3] Resort was had, therefore, to this latter compilation, whereupon 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 needed elucidation, further reference was accordingly made to this commentary, only to find that the commentator had drawn his rule from the Roman Digest.[5] The judges thereupon went back to the Justinian compilation, and here they found the rule of law set forth in such clear terms as to enable them to give decision with entire confidence.

This is an interesting illustration of the continuity of legal evolution: it affords testimony to what Mr. Bryce has emphasized as the vitality of the Roman jurisprudence, and of its contemporary application to immense areas which never knew the Roman sway.[6] At the first glance this instance, and many others like unto it, would seem capable of very easy explanation. French law is based on Roman; the French colonized Canada; they introduced their own law; the English, when they came, retained it; hence the Roman law very naturally forms the groundwork of Quebec civil jurisprudence in the twentieth century. This simple explanation

[1] Kieffer *v.* Le Séminaire de Quebec, [1903] A. C. 85.

[2] Code Civil de Quebec, § 501. The clause relates to the liabiiity of a landiord for the tort of a tenant in connection with the impairment of a riparian 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), voi. 1 (*Digesta*), Tit. 39, § 3 (de aqua, 6, 7).

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

is, however, entirely at variance with historical accuracy. It does not square with the facts that when the French came to Quebec their own law had not been romanized or that the first body of law which the French authorities introduced into Canada — the Custom of Paris — was about as free from the stamp of Roman influence as was the common law of England at the contemporary stage of its existence. It does not make clear to us, moreover, how it has come to pass that the Code Napoléon, a compilation prepared many years after Canada passed out of French hands, should have had many of its provisions embodied in the civil code of a British colony. The truth is that the territory which now forms the province of Quebec really began its legal history undominated by Roman influence. For a full century this influence, moreover, gained but little headway. When the colony passed into English hands, however, the romanizing of its legal system very soon began, and this has gone on more or less steadily under English auspices. For the dominance of Roman juridical ideas in the province at the present day the English authorities are mainly responsible. These ideas were not wholly a heritage from the French. —

The Custom of Paris, which must form the starting-point in any outline of French-Canadian legal history was, at the outset, only one of the numerous bodies of local custom which regulated private relations in that portion of France, mainly the North, which was known as the *pays coutumiers* to distinguish it from that other portion of the kingdom, mainly the South, which was known as the *pays de droit écrit* and in which the written laws of Rome applied.[1] These various *coutumes*, or local bodies of customary law, were fundamentally the codified customs of the Teutonic Franks; in origin and in development they were as thoroughly Teutonic and as free from Roman influence as were the laws of Ine or Alfred the Great.[2] Unofficial codifications of the Custom of Paris were made as early as the thirteenth century; but the first authoritative redaction was not accomplished until 1510.[3] The compilation prepared in this year is commonly known as the "old custom," and it was

[1] A map showing the two regions may be found in Jean Brissaud's Manuel d'histoire du droit français (Paris, 1904), 152.

[2] This almost entire freedom of the *coutumes* from Roman influence is discussed in Adhémar Esmein's chapter on "La coutume et le droit romain" in his Histoire du droit français (Paris, 1892), 673.

[3] H. Buche, "Essai sur l'ancienne coutume de Paris aux XIII et XIV siècles" in Nouvelle Revue Historique, vol. viii. pp. 45–86; vol. ix. pp. 558–579.

with this as a basis that Dumoulin wrote his famous Latin commentary. This is to distinguish it from the "new custom" which embodied the results of a revision made in 1580 by a commission of Parisian lawyers under the presidency of the distinguished jurisconsult Christofle de Thou.[1]

In this revision of 1580 the general arrangement of the Custom of Paris was improved, and some changes were made in the text. The code now appears with its text arranged in sixteen titles which contain altogether three hundred and sixty-two articles numbered consecutively. The form is satisfactory and the various rules are set forth with tolerable clearness and brevity. The most distinguishing characteristic of this code, however, is its thoroughly native spirit; for it contains very little distinct trace of either Roman or Canon law influence. One might indeed go so far as to say that the jurisprudence of Rome had up to this time influenced the Custom of Paris no more than it had influenced the common law of England at the contemporary stage of its development. It ought to be mentioned, however, that the Custom of Paris did not purport to be a complete and comprehensive body of jurisprudence; for it did not include the general law of obligations nor the law of special contracts. All this, which forms an important part of every legal system, was left to be governed, even in the territory to which the Custom of Paris applied, mainly by the rules of Roman law. This latter obtained its foothold in the Viscounty and Provostship of Paris, not through the Custom, but through its application to a sphere of private relations with which the Custom did not undertake to deal. It is highly important that one should remember this, for it does not coincide with the commonly accepted idea that Roman law first made its way to the New World through the transplantation of the Custom of Paris to New France and Louisiana.[2] The Custom itself owed little or nothing to Roman law; and it consequently brought little or nothing of it across the seas.

In 1664, when all the territories of France in the Western Hemisphere were given to the Company of the West Indies, it seemed advisable that a definite code of jurisprudence for these territories should be prescribed, and from the many customary codes available for this purpose the Custom of Paris was selected and decreed into

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

[2] See, for example, W. W. Howe's article on "Roman and Civil Law in America" in 16 HARV. L. REV. 343–358 (March, 1903).

force.[1] The French colonists in America up to this time had been drawn mainly from Normandy, and it has sometimes been suggested that the Custom of Normandy would have been a more appropriate choice as a colonial code. It is to be remembered, however, that the Custom of Paris had acquired a certain primacy among the various French *coutumes* at this time, and that even before this date Dumoulin had been able to speak of it as *caput omnium hujus regni et totius etiam Belgicae consuetudinum*.[2] At the time of its transplantation across the Atlantic it bade fair to become the "common law" of France, and its selection by the French authorities was therefore entirely logical, although it involved the application to sparsely settled and undeveloped colonies of what was intrinsically a metropolitan code.

By the decree of 1664 it was provided that the courts of the French colonies in America and the West Indies should govern themselves by the Custom of Paris and "by the laws and ordinances of the realm." The ordinances of the French crown prior to this date had been somewhat numerous, but few of them had made any important changes in the law of private relations. The age of Louis XIV (1662–1715) was prolific in royal legislation, however, and a succession of elaborate decrees, commonly known as the *grandes ordonnances*, revised and codified several important branches of law and civil procedure.[3] This legislation in the main supplemented the Custom of Paris, and covered fields of law with which the Custom did not undertake to deal; but to some extent the great ordinances varied and altered in effect the provisions of this code. It therefore becomes important to know whether these ordinances extended to the colonies, or whether their provisions applied to France alone.

In France it was necessary, before an ordinance of this sort should become valid, that it should be registered by the Parliament of Paris. This body, as every one knows, had technically the

---

[1] "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." Établissement de la Compagnie des Indes Occidentales (Art. xxxiii), in Isambert's Recueil général des anciennes lois françaises (30 vols., Paris, 1822–1833), vol. xviii. pp. 38 ff.

[2] Paul Viollet, Histoire du droit civil français (Paris, 1893), p. 208.

[3] Among these were the "Ordonnance civile touchant la réformation de la justice" (April, 1667), in Isambert's Recueil général, vol. xviii. pp. 103 ff.; the "Ordonnance de la marine" (August, 1681), in *Ibid.*, vol. xix. pp. 282 ff.; and the "Ordonnance du commerce" (March, 1673), in *Ibid.*, vol. xix. pp. 92 ff.

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 veto by the use of the prerogative commonly known as the *lit de justice*. Now the Sovereign Councils, which the French government established in its American colonies, were modelled roughly after the frame of the Parliament of Paris, and in the edicts creating them were specifically instructed to follow the procedure of this body.[1] One of their chief functions, indeed, was that of receiving royal ordinances sent from France and of registering these in their council records. Might these colonial councils, then, like their prototype in France, refuse to register a royal decree; and might a royal ordinance become operative in the colonies save after such registration? The answer to the former of these questions is simple enough. Whatever the legal rights of the councils in Canada and Louisiana, the fact was that the councillors in both colonies were appointed directly by the king; they held office only during the royal pleasure; and they might be removed by the crown at will. Unlike the members of the Parliament of Paris, they did not secure their posts by purchase or by inheritance, and they had hence no security of tenure. At the first show of recalcitrancy Louis XIV would certainly have removed the colonial councillors from office. They themselves knew this very well, and there is consequently no evidence that they ever showed any disposition to refuse registration to any royal mandate sent to them.

The other question, namely, whether an ordinance which had been registered by the Parliament of Paris, but not sent out to be registered by the councils of the Franco-American colonies, could be held to apply in these colonies, is one which is by no means so easy to answer. As a matter of fact, the great ordinances of Louis XIV were not registered in any of the colonies. Still their provisions were commonly accepted by the colonial courts, and especially by the courts of Canada during the French régime, and some of them acquired the full force of law. There was a good deal of Roman law in these great ordinances, and it was in this way that some branches of Roman jurisprudence made their way to America and gained a footing there. The colonial courts followed the provisions of the great ordinances in many matters

[1] See the "Édit de création du conseil souverain de la Nouvelle-France" (April, 1663), in Édits et ordonnances du roi concernant le Canada (3 vols., Quebec, 1854), vol. i. pp. 37–39.

because they found it convenient to do so; it is now well settled that, since the ordinances were not registered in the colonies, they were in no way binding upon the colonial authorities.[1]

But the royal ordinances were not the only enactments by which the Custom of Paris or "common law" of the colonies was supplemented or changed. The Sovereign Councils of the colonies might themselves issue decrees, and the ordinances issued by the council at Quebec fill several ponderous volumes.[2] Likewise the Intendant in New France and the Sub-delegate in Louisiana issued their multitude of *réglements* covering all sorts of matters from the most important to the most trivial, as the writer has elsewhere shown.[3] 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 did not greatly modify the general principles of colonial law as set forth in the Custom of Paris and in those of the royal ordinances which had been registered, for the obvious reason that the ordinance power of the colonial authorities was limited to the elucidation and interpretation of the law, and did not extend to the radical alteration of it. It is true, however, that they did not limit themselves strictly in this respect, but allowed themselves considerable latitude, for, as one of the intendants expressed it in a despatch to the king, there would soon be more lawsuits in the colony than persons, if the authorities did not hold themselves free to order things in a fashion which often involved wide departures from the letter of the law.[4]

When the French withdrew from their extensive territories in 1760, therefore, they left implanted in these a legal system which was fundamentally Teutonic in character, and which, except so far as the law of special contracts was concerned, bore very little important trace of Roman influence. The jurisprudence of the French colonies in America had been much less romanized than the jurisprudence of the motherland at this time; for many branches of the home jurisprudence had been thoroughly impregnated

[1] F. P. Walton, The Scope and Interpretation of the Civil Code of Lower Canada (Montreal, 1907), especially the cases cited on p. 4, note 3.

[2] Jugements et déliberations du conseil souverain de la Nouvelle-France (6 vols., Quebec, 1885–1891).

[3] "The Office of Intendant in New France" in American Historical Review, October, 1906, pp. 15–38.

[4] Raudot to Pontchartrain (November 10, 1707), in Canadian Archives, Series F., vol. xxvi. pp. 7 ff.

with Roman influences through the issue of the great ordinances which, as has been stated, were not registered in the American colonies of France, and were consequently not part of the legal systems there. Somewhat strange and paradoxical as it may appear, a large part of the Roman influence which now appears in the civil jurisprudence of Quebec and Louisiana made its way to these jurisdictions, not during the period of French dominion, but since the expulsion of France from the New World. This may be best illustrated, perhaps, by confining attention to the former of these two jurisdictions alone.

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.[1] On the contrary, the law of the conquered territory remains in full force and effect until such time as the new suzerain may alter or abrogate it by explicit enactment. The conquest of Canada, therefore, left the colony with its old law for the time being. But this ancient jurisprudence was soon set aside, for within three years after the conquest, on October 7, 1763, a royal proclamation provided for the establishment of new courts in the colony and directed specifically that these tribunals should "hear all causes, both criminal and civil, as near as may be agreeable to the law and equity of England."[2]

The intent of this proclamation was without doubt to abrogate entirely the Custom of Paris and the other factors in the old law system of the province, replacing these by the common law and equity jurisprudence of England. But it is quite an open question whether the king of England, by the mere exercise of his royal prerogative and through the elementary agency of a royal proclamation, had power to make this sweeping change. There are those who believe that a change of this nature could be made only by Act of Parliament. The question is one which has been discussed at considerable length by the legal savants of French Canada, and until very recently the weight of opinion has inclined to the view that the king did not possess the right to abrogate the old law by proclamation.[3] One of the higher courts of Quebec,

[1] The leading case on this point is Campbell *v.* Hall, 1 Cowp. 204.

[2] Canadian Archives, Series Q., Vol. 62A, Pt. I, pp. 114 ff. An exact copy of the proclamation is printed in "Documents relating to the Constitutional History of Canada" (ed. A. Shortt and A. G. Doughty, Ottawa, 1907), pp. 119–123.

[3] Rudolphe Lemieux, Les origines du droit franco-canadien (Montreal, 1901), pp. 363 ff.

moreover, assumed this attitude in an important decision;[1] and in another significant case the chief justice argued convincingly in the same direction, although the determination of this point was not essential to the decision of the court.[2] But the most recent writer on the subject has concluded, after a discriminating review of the whole matter, that the king did have the power to abrogate the old law by proclamation, and that the proclamation of 1763 did legally abrogate the French jurisprudence in favor of the laws of England.[3] 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 never put into general operation.

Apart altogether from the question of legality there were important practical difficulties in the way of the change. 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 were at this time almost wholly feudal, and it was the intention of the English authorities, in compliance with pledges given at the time of the conquest, to leave the land tenure system untouched.[4] As the new law was so clearly unadapted to the subject matters with which it had to deal, the governor of the colony instructed the courts to apply the old law to disputes concerning land until the home government could be consulted on the point. In 1766 the English authorities 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 do govern themselves in their proceedings, judgments, and decisions by the local customs and usages which have hitherto governed and prevailed within the province."[5] The common law of England here received, so far as the new possessions in America were concerned, its first important set-back.

---

[1] Stuart *v.* Bowman, 2 L. C. Rep. 369 (1851).

[2] The judgment of Sir Louis H. Lafontaine in Wilcox *v.* Wilcox, 8 L. C. Rep. 34 (1857).

[3] F. P. Walton, The Scope and Interpretation of the Civil Code of Lower Canada (Montreal, 1907), pp. 12–19.

[4] This whole question of the relation of feudal tenures to the new legal system is discussed at length in the writer's "Seigniorial System in Canada" (New York, 1907), Chap. XI.

[5] Instructions to the Hon. James Murray (June 24, 1766) in Public Record Office, London, Board of Trade, Canada, vol. xv.

It was soon to receive, however, a much more severe assault, for the courts promptly found difficulty in administering the two systems of law side by side. Considerable chaos resulted from the fact that the royal decrees, the colonial ordinances, and the decisions of the courts during the French régime were yet unpublished: they were still in manuscript, in a handwriting difficult to follow, unarranged, unindexed, and to some extent scattered. It was only natural, therefore, that the English judges should have, in most cases, given up any serious attempt to ascertain the old law, and should have resorted, for the determination of matters which came before them, either to the rules of English law relating to tenure in copyhold or to the rules of Roman law relating to tenure *en fief*. Recognizing the difficulties which confronted the courts in complying with the letter of their instructions, Governor Carleton appointed a "Select Committee of Canadian Gentlemen well skilled in the Laws of France and of that Province," 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. This codification was accomplished in 1773.[1] 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 governed private relations in the colony before 1760 it sought guidance for its arrangement of the abstracts, and to some extent guidance in interpretation, in the works of the standard French commentators of the period. These, as is well known, had written under the influence of a more or less thorough training in the Roman law, and they transmitted some of this influence to the Canadian codifiers. Some Roman law therefore worked its way into Quebec through the decisions of the courts in the period 1764–1774 and through the work of those who codified the ancient laws during the latter years of this decade.

In 1774 the provisions of the Quebec Act restored the old French

[1] It was published in four parts at London during the years 1772–1773. The exact titles of the four parts 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 to 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 Regluations 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 (London, 1772–1773).

law in "all cases relating to property and civil rights," thus ousting from the province all that was left of English law in its application to other than criminal causes.[1] This was a very welcome concession to the French-Canadians, and doubtless had some influence in keeping them from casting in their lot with the revolting American colonists to the southward. By these latter, as is well known, the change was regarded as a species of treason to Anglo-Saxon institutions, and in the Declaration of Independence George III was rebuked, *inter alia*, "for abolishing the free system of English law in a neighboring province." At any rate, 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 has, however, 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 changes might seem desirable. In 1785, for example, the provincial authorities made provision that in all commercial causes the English rules of evidence applicable to such proceedings were to be followed. These English rules of evidence in commercial causes were founded, however, on the rules of the old law merchant, and as they were in their origin rather international than national they did not differ in essentials from those which were prescribed in the Ordonnance de la Marine of 1681,[2] one of the Grand Ordinances which had never been registered in the colony. Other statutes made important changes in various branches of the law, and the abolition of the seigniorial system of land tenure in 1854 made a very radical change, not in the law itself but in one of the chief subjects with which the civil law had to deal. During this period, moreover, a considerable development took place through the agency of judicial decisions. The judges of the province turned constantly for enlightenment to the commentators of Old France, to the decisions of French courts, and, above all, to the provisions of the Code Napoléon after that compilation had been prepared. In many respects the provincial jurisprudence, therefore, while professing to be a perpetuation of the old legal system, was steadily departing from this latter. Through the channels

---

[1] 14 Geo. III. c. 83.

[2] This ordinance may be found in Isambert's Recueil général, vol. xix. pp. 282 ff.

which have just been mentioned the influence of Roman Law exerted itself strongly and with enduring effect.

In 1857 it was deemed advisable that the civil law system of the province should be revised and recodified, for there had been no important revision since 1773. The work was committed to a commission of French-Canadian jurists by whom it was accomplished with high credit. When the task was completed, the compilation was enacted as the Code Civil de Québec. If there was any one feature which marked 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 source. In its arrangement the Code Civil de Québec follows the Code Napoléon almost slavishly. In matter the dependence is extensive and obvious. Many articles are reproduced verbatim; many others show only mere verbal transposition. With the exception of a single book,[1] indeed, the Code Civil de Québec may be much more properly looked upon as a recension of the Code Napoléon than as a revision and recodification of the French civil law as it had existed in the colony before the English conquest.

Now those who are familiar with the history of the legal system of modern 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 perfectly clear in the collection of sources which the Bonapartist compilers used in the consummation of their monumental task.[2] The legal system of France had been steadily romanized during the century preceding the Revolution, and the compilers of the Code Napoléon completed the process. It may not be amiss therefore to point out that the Code Civil de Québec, in so far as it is based upon the Napoleonic compilation, shares equally in indebtedness to the jurisprudence of Justinian. 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 channel, or, possibly, through all other channels combined.

The dominance of Roman juridical ideas in this province is not, therefore, a heritage from the days of French possession. It is not because the French established there the Custom of Paris; but

[1] Book IV.

[2] These sources are brought together in Fenet's Recueil complet des travaux préparatoires du Code Civil (15 vols., Paris, 1827–1829).

because under English rule there have been wide departures from this original code. When the French left Canada in 1763, they left behind them a system of jurisprudence which probably owed more to Teutonic than to Roman sources. It is of course not unnatural that, being French in origin, the law 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 periods. But it was not essential that the civil jurisprudence of Quebec should have taken this course. In fact it was the intention of the English authorities at the outset to turn it into quite another channel. From this policy they eventually refrained, however, and by so doing gave 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.

William Bennett Munro.