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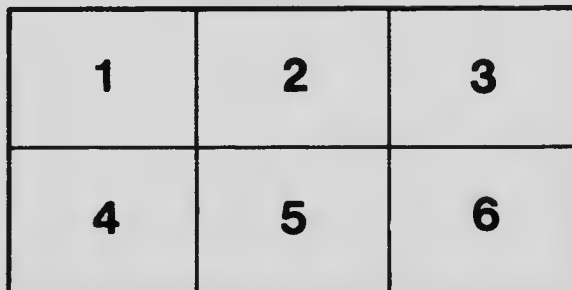
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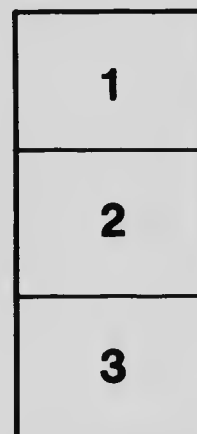
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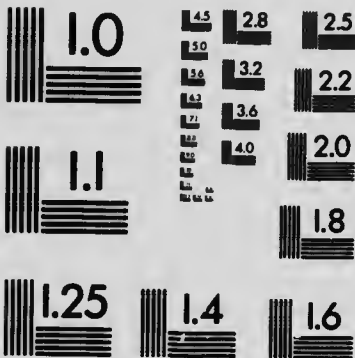
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JUNIOR BAR ASSOCIATION OF MONTREAL

The
Revision of the Civil Code
of the
Province of Quebec

An Address delivered before the Junior Bar Association of Montreal
December 4th, 1905

BY
ROBERT D. MCGIBBON, K.C.
Of the Montreal Bar

REPRINTED FROM THE CANADIAN LAW REVIEW

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The Revision of the Civil Code of the Province of Quebec.

I agree with those who assert that "The country that is governed least is governed best," and that the object and end of all government and law should be the contentment and welfare of the people.

When the citizen is not interfered with in the pursuit of his vocation--when his life and property are secure when his dealings with his fellow men proceed calmly along pleasant lines, without encountering obstacles in the shape of prohibitory laws or repugnant enactments which need to be specially derogated from by prior agreement--when he is free to dispose of his property during his lifetime, and is conscious that, after his death, the law will of itself, in the absence of special directions from him, distribute his estate among those nearest and dearest to him on humane principles, and will safeguard the interests of those unable to exercise their own rights--an ideal condition of affairs exists. It may perhaps be Utopian, but is it necessarily unattainable?

We can imagine the citizens of such a state enthusiastically recognizing and discharging their obvious duties as members of the public--practising the golden rule--realizing the privilege of the franchise and going voluntarily to the polls--there depositing their unpurchased ballots for the best man and the best measures--cheerfully paying their just share of taxation, and performing jury service--willing to accept public office in the general interest and scrupulously discharging their functions with a sole regard to the general good. Again, I ask is such a delectable condition absolutely unattainable?

There appears to exist a state of mind among many of our people, which regards the government, the state or the public as a thing apart and separate from themselves—an abstraction whose interests are opposed to those of the ordinary man and woman—a monster always oppressing and taxing and legislating about them for purposes of its own, with which the individual either has no concern or by which he is wronged.

In a section of the population which I trust is even more limited, the attitude assumed towards the government or public is one which seems to justify the ordinary citizen in taking advantage of it whenever he can, in being governed in his relations to it by moral standards infinitely lower than are recognized in dealings between himself and his fellow man. In a word, not only is there an absolute lack of identification on the part of the people of themselves with the community, but this unfortunate feeling of antagonism engenders a regrettable readiness to treat the public harshly if not dishonestly, to consider it not improper or discreditable to take advantage of it in business transactions, and to abstain from all participation in what has become known as politics.

If the average citizen could be made to realize that the state or government is merely the aggregation of the individuals who compose it, that each citizen is interested in its welfare and prosperity, that the taxes which it raises are paid by him and by his fellow citizens, that the money which the State expends is the money of the people of the State, that its indebtedness is their indebtedness, that the laws which it enacts are made not only by them but for them and must be obeyed by them, and if a sense of this responsibility were impressed upon the minds of the public, I venture to think a large step would be taken towards a higher and better standard of public administration and government.

It may be that, as a relic from the days when laws were made by kings and despots and imposed upon the common people without their previously having been consulted, this mental attitude to which I have referred may be due.

In this Province, it is not three-quarters of a century since the divine right of the people to govern themselves was recognized. That is a brief period to obliterate the traditions of centuries of oligarchical and despotic rule; but with modern enlightenment and education the time should, it seems to me, have arrived when

our people should feel that all power in the State is, in the result, derived from them, that the men who make the laws and administer public affairs are their delegates, and that if the administration is bad, the individual citizen has nobody but himself to blame therefor. If our laws are unjust or inadequate the individual member of the community should reproach himself for inattention to political and civic duties.

The laws of the Province being the expression not of any external command forced upon a subservient and unwilling population by a superior power, but being the rules voluntarily established by ourselves, subject to change as and when we decide (of course within constitutional limits) it should be a matter of duty and of interest that they are just and fair.

This being the case with respect to the general public, let me say that few subjects can have greater interest for a society of professional men devoted to the study of jurisprudence than the desirability of a revision of our Civil Code at the present time.

It will be admitted that the laws of a people should be adjusted and adapted to the manners and customs of the times, applicable to the actual circumstances and conditions, and there should be a responsive relation between its daily life and conduct and the laws under which it dwells, and by which it is ruled.

At this period of the world's history it is almost trite to say that conditions of life alter so rapidly, manners and customs are so quickly revolutionized, new inventions, novel methods of trade and transportation, new problems of finance and commerce spring into being with such suddenness, that it is not surprising that laws made a hundred years ago or even fifty years ago now seem antiquated and inadequate.

Since the Code Napoleon was promulgated in 1804, countless problems due to the invention of steam and electricity with their marvellous manifestations have originated, and it is not too much to say that in many other respects the habits and customs of the people of the twentieth century differ almost entirely from those prevailing when the Code was inaugurated. Then there has been inevitably developed on this Western Continent a civilization greatly different to that prevailing in Europe, and with our essentially modern and democratic ideas, the Province of

Quebec is vastly changed from the older European community to which we owe our civil law.

A priori, it would appear to be desirable that in any community periodical examinations of its legal system should take place, in order that it should be brought into harmony with the existing civilization. Let me for a moment invite you to consider whether there are any valid objections to such a proposal here. The chief objection to a codification has usually been that the law is thereby rendered inelastic and not only crystallized but even fossilized and petrified.

Let us remember that in the Province of Quebec, we are one of only two communities in North America where a codification of the Civil Law, based on the Code Napoleon, is in force. Not only, therefore, may the civil law itself but the principle of codification be said to be on trial, and in competition with the Common Law prevailing in the large number of communities by which we are surrounded. Therefore, as a matter of pride, it behooves all civil lawyers to see that our laws are as perfect as possible, and administered to the best advantage; in order that the great principles of which they are the embodiment and expression do not suffer reproach by reason of our improper or imperfect use of them.

Accordingly, it would appear that the time is opportune to survey the history and record of our Code with a view to removing incongruities and inconsistencies, of adding amendments that experience may show to be desirable with a due regard to what has been done on kindred subjects in other countries similarly situated.

Whatever good points the Parliamentary system has developed either in England or in France, it seems to be generally admitted, and I am inclined to think that it cannot be disputed, that in neither country is the present procedure satisfactory as a means of enacting general laws. Not only is the average deputy incompetent to consider questions of law reform, but the atmosphere of the Chamber, the political excitement that is prevalent, the pressure of other less important but more exciting questions, the necessity for haste, and the intrusion of partisan politics all render it virtually impossible for grave questions of law amendment to receive mature attention.

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Then again, where opinions may so reasonably differ as they ever do upon legal matters, the tendency to prolong discussions is so great that unless introduced as a government measure and pressed with the authority and power which governments possess, the most beneficial law has a small chance of becoming a statute, and the consequence is that rarely do we find in either country any serious determined legislation in the direction of general law reform.

The unfitness of a Parliamentary body to deal with questions of law reform is strikingly pointed out by Professor Larnaude of the University of Paris, who asks the question : "*Concevrait-on qu'on confierait une réparation d'automobile Mors ou Mercedes à un forgeron de village ?*" The papers read at the centenary of the Civil Code in France seem to be unanimous upon this point with regard to the French Assembly. Our own experience is to the same effect, both in England and in Canada, and in the Province of Quebec. In fact, I have no doubt that the great jurists who were employed to draft the Code Napoleon would in all probability have continued their discussions interminably without arriving at any definite result had it not been for the dominating personality of Napoleon.

Since its enactment in 1866, almost every year, as the statutes will show, some more or less violent changes and additions have been made to the original Code. Most of these amendments have been directed to isolated cases of supposed necessity. They have been introduced as a rule by private members of the Legislature, and some of them have been undoubtedly meritorious. The Code Napoleon has had a similar record. Many articles have disappeared, new ones have been introduced, and others have been almost totally transformed.

How far the symmetry of the work of the codifiers of Lower Canada has been preserved, I shall not pause to enquire, but I confess it is somewhat difficult to believe that sporadic tinkering with a body of Civil Law can have any other than a pernicious and disturbing result. Personally, I am entirely averse to change for the mere sake of change. I believe, however, that so long as the spirit of the Civil Code is preserved in its integrity, reforms which advancing civilization shows to be necessary, should be made without undue prejudice or reluctance and above all without any exhibition of feeling or pride.

After an experience at the Bar of nearly 30 years, during which I have had occasion to keep more or less in touch with the legal systems and machinery of England, the United States and the other Provinces of Canada, I am more than ever convinced that in the Province of Quebec, we have on the whole a body of laws, civil, commercial and criminal that are unsurpassed by those of any other country. Even our Code of Civil Procedure could, with a few amendments and additions, be made a very effective and almost perfect system. I can conceive of no more satisfactory combination than the Civil Law with such modifications as were introduced in 1866 and since, including English rules of evidence in Commercial cases, English freedom of willing, and the English criminal and constitutional law.

The superiority of the civil law to the common law as a scientific, philosophic system, is obvious. The increased attention being given to the study of the civil law in communities where the common law prevails bears out what historians are coming to admit, that the best features of the common law and of the equitable system connected with it, were due to the influence of civilians.*

Now the fact that our laws require some amelioration does not imply that they were originally at all unfair or defective, but simply that like all human institutions, they cannot be perfect and immutable at the same time.

It should always be borne in mind that our purpose should be to produce a system of law and procedure which will be expeditious, inexpensive and satisfactory, intelligible to the people and having their respect and sympathy. No violent or drastic alteration or distortion of the system which we have lived

*In an extremely able address delivered to the Yale Law School, June 26th, 1905, to be found in 15 Yale Law Journal, the Hon. William H. Taft, Secretary of War of the United States, in discussing the system of Civil and Criminal Law desirable in new colonies of the United States, in Porto Rico and the Philippines, referring to the intense admiration of English and American lawyers for the Common Law, and their tendency to despise the Civil Law, says:

"When in actual practice the common law lawyer is brought to the study of the beautifully simple and exactly comprehensive language of the Civil Code governing the rights between individuals, he begins to feel the veneration that comes from consciously viewing the work of twenty centuries of jurists and law-givers who have been struggling during all that period to simplify and make lucid the rules of law and to reduce it to the science that under the Civil Code it certainly has become."

under so happily for so many years, and to which the Anglo-Saxon element in the community is quite as devoted as the French-Canadians, would be tolerated for a moment, and nothing of the kind is suggested in the present paper. The question seems to be not so much between those who favour a revision and those who are opposed to any revision, as it is about the form which it should take. Those who seem unwilling to contemplate the idea of a general review of the Code contend that annual individual amendments suffice. On the other hand, can it seriously be doubted that a well considered and concerted general effort to revise and perfect the Code, originating not necessarily in the Legislature or as the effort of one or two independent and theoretical law reformers, but as the result of preliminary discussions and deliberations by juris-consults, judges and lawyers, notaries and publicists, and finally submitted to a systematic and scientific commission appointed by Government is preferable?

A society such as the Junior Bar Association might in my humble opinion, profitably inaugurate the movement for a general revision of the Code, and in so doing it will be embarking upon a large and dignified undertaking. The form in which its efforts should be directed and the limits to which they should be confined may properly be the subject of consideration at your hands. In a general way, I think—if I may be allowed to express an opinion—your society might invite from the members of the Bar of our own district in the first instance, and from the judges and the notarial profession, expressions of opinion as to desirable amendments. These, when received, might be collated by a standing committee, and the result of their work presented in the form of a report to the society. Later on, various committees might be formed to consider separate groups of questions, the conclusions being communicated to the members of the Bar generally throughout the Province. The discussions thus awakened could not fail to be beneficial, and I think, in the result would lead to the appointment of a Government Commission, which of course, would in the end have the serious responsible work of preparing the Act of Revision for presentation to the Legislature. This commission, I need hardly say, would require to be composed of able, learned and practical men selected solely for their fitness for the office.

It may be not too much to hope that the selection would be made in the proper spirit.

I shall now, with your kind permission, refer briefly to a number of points upon which the work of your society might in the first instance proceed. This is not intended to be at all exhaustive but is merely a collection of suggestions which have occurred to me within the past weeks in thinking over this subject. They vary of course in their importance, but will, at all events, form a basis for the more serious and attentive consideration of others better qualified.

1. THE LANGUAGE OF THE CODE.

The English of the present Code is slovenly and the translation from the French has been badly done in many cases. This fact has been commented upon both at home and abroad, and in a recent book entitled "My Colonial Experiences," Sir William DesVœux, formerly the governor of St. Lucia in the West India Islands, calls attention to the difficulty experienced by him in adapting our Civil Code to the use of that Colony.

2. NUMBERING.

The code should be re-numbered, and in some cases re-arranged.

3. THE LAW OF SUCCESSIONS.

The bill introduced by the Hon. Mr. Perodeau would seem to point to the necessity for a general re-consideration of our law on the subject of successions. The Superior Court should have a summary jurisdiction in all matters connected with the estates of deceased persons. Testamentary executors should be subject to its control, and obliged to render periodical accounts. Judicial officers should have the right on demand, to inspect and audit estate accounts and the machinery for the speedy interpretation of wills should be increased. With respect to ab-intestate successions, the Court should have the right to appoint an Administrator on the petition of parties interested, especially in cases where the heirs at-law are absent or not accessible, and prompt action of a conservatory or other nature is necessary. The time-honored institution of the family council is an excellent one when composed of members of the interested family, but members of the Bar will smile when they recollect how seldom a family council is composed of deal members. How frequently have we seen family councils

assuming to advise the court on important matters of family concern, composed of entire strangers to the parties interested.

The Court should exercise greater vigilance in seeing that every available relative is summoned to these councils, and in scrutinizing jealously their advice when they are composed not of relatives but of friends or acquaintances. There might be an officer of the court appointed to safeguard the interests of unrepresented parties on all such applications. Administrators should be obliged, of course, to render accounts and estate books should be open to court inspection, and all parties interested in the summary jurisdiction of the Court.

4. LAWS RELATING TO IMMOVEABLES.

These laws, in my opinion, might be greatly ameliorated to suit the conditions of our Canadian life. We have an excellent registration system which I believe to be the next best to that known as the Australian or Torrens system. The latter is, I think, admittedly superior, and it might be well if we took another step in advance. I believe the change could be made without much difficulty or inconvenience, and the results would be incalculable as simplifying land titles. Our laws on the subject of mortgages might also be greatly improved. One change I would suggest would be that in all cases of mortgages given by corporations to secure bonds and debentures, and in other cases by consent of parties, the mortgagor should be permitted to covenant that on default the court would have the right to appoint a sequestrator or receiver to take the rents or profits of the property pending the realization of the security or the enforcement of the obligations. In corporation mortgages especially the parties should be allowed to agree that the trustee for the parties should have the right to enter upon and take possession of the mortgaged property and operate the same for the interest of the parties concerned, subject to the court and guarding the interests of the debtor. In private mortgages, if institutions and parties willing to lend money could realize their security promptly, real estate of the Province of Quebec would be a more favourable investment and better rates would be obtainable by the borrowing community. The present delays in the collection of principal and interest are insufferable. A dishonest debtor can keep his creditor out of his money for months, and a poor widow, depending upon the interest of a small mortgage for her livelihood,

may not only be kept out of her interest for a year, but at the end of that time be compelled to purchase the mortgaged property at a sheriff's sale, burdened with heavy costs and then to her disgust find that her mortgagor had not only collected the rentals of the estate in the interval, but had actually got paid in advance. The inequalities and unfairness of our present system are so well known to every member of the Bar that the mention of them I think will be sufficient. The object to be gained by the remodelling of the system would be that transactions in real estate would be rendered more popular and its value as a marketable commodity increased as it would be if money could be borrowed at better rates than at present.

5. COMPANY LAW.

The law on the subject of corporations should, I think, be assimilated throughout the Dominion. We now have the Dominion Companies Acts and at least seven different provincial systems. There is no reason why one system—alike in its general outlines, should not prevail through all the different Provinces and in the Dominion as well. At the congress of lawyers held during the World's Fair at St. Louis, a delegate proposed a similar scheme extending to all civilized countries, namely that one general table of articles of associations should be universally adopted, and that all corporations should be constructed on the same general plan. We might do our part in this direction by making our own corporation laws homogeneous as far as possible.

6. LESSOR AND LESSEE.

This branch of our law wants careful remodelling. The erection of modern buildings, residential flats, office buildings, etc., necessitates new laws. The conditions of life differ from those contemplated when the Code was composed. The standards of comfort so greatly exceed anything imagined fifty or a hundred years ago, that rules which were applicable then are inadequate and out of date now.

7. CONDITIONAL SALES AND SALES ON INSTALMENTS.

Provision should be made for the registration of all agreements of this character, and traders or others possessing property not owned by them should be obliged to record the titles at some public office.

8. REGISTRATION OF TRUST DEEDS.

The popularity of corporation bonds and debentures, and the frequency with which they are now issued, necessitates a means of recording them and the mortgage deeds securing them, different to the ordinary registration of hypothecs, and a special book and method should be provided.

9. SATISFACTION OF JUDGMENTS.

Some provision should be provided in our law whereby on the satisfaction and payment of judgments, a record in the public book would appear.

10. CIVIL JURY TRIALS.

Instead of having civil jury trials taking place as isolated events throughout the year, I suggest one or two civil jury terms, similar to the terms of the Court of King's Bench in criminal cases.

Let a civil panel be summoned, a calendar prepared and let the term last until the list is exhausted. The jurors should be of the highest intelligence and qualification and there should be few if any exemptions.

11. SPEEDY JUDGMENTS.

Our Code of Procedure should be amended so that dishonest defences could be stricken out on motion. The Code is too favourable to the dishonest debtor. The English Procedure Act has excellent provisions on this point.

12. DEPOSITS, ETC.

In one of the papers on the French Civil Code it was pointed out that in some respects the Code Napoleon had become superannuated. For instance the article giving the tenant the right to assign his lease was almost invariably derogated from in modern leases. The same statement might be made with respect to our own Code, and with regard to the titles of "deposit", "mandate," etc. There is no doubt that they are not in keeping with modern practice and that these contracts are rarely gratuitous. It is well to have the Code expressive of the popular law and practice.

13. SUBSTITUTION.

There is no doubt a great deal of confusion between "substitutions" and "usufructs," and even our highest courts appear to

be greatly perplexed at times to determine what is a usufruct and what a substitution. The law might be made much clearer and now that we have introduced the system of "trusts" under which provision may be made for a life tenant and a subsequent owner, the laws certainly might be made plainer without changing the general principles.

14. CAPITAL AND INCOME.

Many difficult and intricate problems are arising and will continue to arise as to respective rights of the usufructuary and proprietor, institute and substitute, or to use the language of the common law, the life tenant and remainderman, with respect to what is capital and what is income. The issues of new shares by joint stock companies, distribution of stock and cash bonuses, offerings of rights to subscribe for shares at less than market price, purchase for estates of bonds at either premium or discount which gradually diminish or appreciate in value until the period of maturity, when they are payable at par, all involve delicate questions of judgment between those entitled to the capital and income respectively. It is not surprising if the rules of our code, not designed to meet such complicated and novel situations, are inadequate for the purpose. In England and the United States and in France these questions have been found most difficult to settle satisfactorily. It would be well, I think, if the general principles of the law on the subject were extended so as to embrace the questions created by new financial considerations.

15. INNKEEPERS, CARRIERS, ETC.

Although our law has been somewhat amended, I think the whole subject of innkeepers and carriers could be very much improved. Much of it is artificial and illogical.

16. MANDATE, ETC.

The confusion which exists with respect to contracts of hire, etc., as to whether they should be governed by the law of lease of service or by that of mandate should be dispelled, and some rules laid down governing all contracts of agency. At the last term of the Court of Appeals it will be remembered the court was divided in opinion as to whether a particular agreement was or was not a contract of lease or one of mandate, important results depending

upon this distinction. There cannot be too much clarity about the law.

It would serve no useful purpose to prolong this list. Every gentleman present could doubtless add to it, and I shall therefore assume that the Code does require some amendment. The thing to be considered then, I repeat, is whether we shall suffer an al attacks to be made upon the cohesion and homogeneity of the Code by means of private bills promoted for special purposes, or whether we shall go to work in a deliberate and sagacious manner, with no undue haste or radical iconoclasm to make our Code a well-rounded, harmonious, logical body of law. I trust my purpose may not be misconstrued.

* * * * *

The mighty river which bisects this Province has its rise in the far North-West. On its way to the sea it receives accessions from countless tributaries and hidden springs which add to its volume and force but do not alter its identity, and it reaches the ocean, having fructified and gladdened the lands through which it passed—still the great St. Lawrence.

In like manner the beneficent stream of jurisprudence whose sources are to be sought in the almost legendary fountains of ancient Greece and Rome, has been augmented by the wisdom and culture of centuries, refreshed by generous additions from the jurisprudence of England and France and by the rivulets of our own domestic legislation and experience. Yet the main features of the civil law in all their strength and purity, predominate. Let us see to it that its channel be kept free and its principles pure and uncontaminated. Its course may be straightened or shortened here, a beacon light set up or a shoal removed there, but its main current should never be diverted either by sudden avulsion or insidious meandering. Then it may upon its benign and majestic progress through the ages, serve a contented, law abiding population, serenely conscious of the equity of its precepts and satisfied that it is the highest approach to human conceptions of divine justice.

