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FUNDAMENTAL PRINCIPLES

OF THE

Laws of Canada,

AS THEY EXISTED UNDER THE NATIVES, AS THEY WERE CHANGED UNDER THE FRENCH KINGS, AND AS THEY WERE MODIFIED AND ALTERED UNDER THE DOMINATION OF ENGLAND.

TOGETHER WITH

THE GENERAL PRINCIPLES OF THE CUSTOM OF PARIS, AS LAID DOWN BY THE MOST EMINENT AUTHORS, WITH THE TEXT, AND A LITERAL TRANSLATION OF THE TEXT.

THE IMPERIAL AND OTHER STATUTES, CHANGING THE JURISPRUDENCE IN EITHER OF THE PROVINCES OF CANADA, AT LARGE.

PREFACED

By an Historical Sketch of the Origin and Rise of Religious and Political Institutions amongst the principal nations of the world, from the remotest periods to the present time.

Of the Common, Canon, and Statute Laws of England, so far as they operate on the Jurisprudence of Canada.

Of the Origin, Rise, and Successive changes of the Laws of France.

Of the General Government, Religious, Military, Civil, and Criminal Laws of the Natives, particularly of the Huron and Iroquois Indians, at the time the interior of the country was discovered by Cartier: the whole supported by authorities.

COMPILED WITH A VIEW OF ASSISTING LAW STUDENTS IN THEIR STUDIES.

BY N. B. DOUCET, ESQ.

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Fundamental Principles,

OF THE

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I.—*Introduction.*

THE Heathen goddess of wisdom, Minerva, is fabled to have sprung from the head of Jupiter, perfect in form, mature in strength, and armed at every point.

It is otherwise with Science. The commencement of its authentic history is doubtful; its early progress, if at all perceptible, was necessarily slow. By and by, however, the darkness begins to clear away, and the minds of men sobered by time and experience, awakened from the entranced dreams of imagination and human intellect, begins to study the phemonena of nature, and to examine the physical and moral constitution of the world; and the soul, in amazement, contemplates the works of the Creator.

By the accidental discovery of a new truth, some ancient error is dislodged, and the way is prepared for future advances; each succeeding generation makes some addition to the stock of knowledge bequeathed by its predecessors; hypotheses are invented, which, though baseless and visionary, ultimately, from the influence of natural or accidental causes, reach a state of comparative maturity and perfection.

Thus at the inspection of a geographical chart of the ancient world, Christopher Columbus preconceived the existence of another continent, and guided by his genius, found it, and presented the Queen of Spain with a new world, a magnificent reward for her protection.

Following his steps, Cabot discovered the Island of Newfoundland, and Verazani explored more than five hundred leagues of the American coast.

The genius of Italy, which for ages seemed to have slumbered under ruins, awoke and astonished mankind. Three Italians had put Europe in possession of a multitude of unknown empires.

Less than three centuries after, a Scotchman inscribed on a rock, bordering the North Pacific Ocean, "Alexander M'Kenzie, from Canada, by land, 22d July, 1793."(1)

In June, 1831, a British sailor planted the banners of Britain on the north magnetic pole.(2) And an English merchant is now preparing to travel through the American continent, by land, and to cross to Russia, on foot.(3)

II.—*Of America.*

This division of the globe, larger than any of the others, is ten thousand miles in length, and two thousand in breadth.

It is distinguished by the loftiness of its mountains, the majesty of its rivers, the magnitude of its lakes, and the beauty of its plains.

III.—*Its Mountains.*

Two great oceans, the Atlantic and the Pacific, separate it from Europe and from Asia. The Andes, which present an elevation of 15,000 feet, and the

(1) See M'Kenzie's Journal of a Voyage through the Continent of America, in the years 1789 to 1793. London edition, 1801.
(2) Captain Ross.
(3) Sir George Simpson, Governor of the Hudson's Bay Territory.

Rocky Mountains, the largest and loftiest, form the grand American chain of mountains, which run along the whole length from Cape Horn to the shores of the Northern Ocean.

In the east are the Alleghany or Apalacian, which extend nine hundred miles in length, from the mouth of the Saint Lawrence to the confines of Georgia, and rise three thousand feet above the level of the sea.

IV.—*Its Rivers.*

On this great area are formed the rivers of America, in the northern hemisphere. The noblest is the Saint Lawrence, which opens from Lake Superior, and flowing successively through Lakes Huron, Erie, and Ontario into the Atlantic, after a course of two thousand miles, and is navigable for ships of the line, four hundred miles from the sea.

The Mississippi and Missouri, which take their source in the Rocky and Alleghany Mountains, join together after a course of three thousand miles, and falls into the Gulf of Mexico—the only outlet to the ocean for all the western provinces of the United States—after having watered a valley of twelve to fifteen hundred miles,—one of the richest upon the face of the earth. South America has its Amazon, more than equal to the Saint Lawrence in length, but not in majesty.

V.—*Its Lakes.*

Of its lakes, the Superior presents a surface of 61,341 square miles; the Huron, 39,240; the Erie, 14,553; and the Ontario, 10,089.(1)

VI.—*Its Plains.*

From the highest summit of the Rocky Mountains, two or three hundred miles from the western shores of the Northern Ocean, they descend towards the east into a plain of fifteen hundred miles in extent before it reaches the Atlantic.

Between the Alleghany Mountains on the west, and the Atlantic on the east, is a plain two hundred miles in breadth, comprising all the old and maritime States, on the Atlantic from New England to the Carolinas.

VII.—*Discovery by Modern Europeans.*

On the 11th of October, 1492, Christopher Columbus, employed by Spain, landed on the Island of Bahama,—the first footing which modern Europeans obtained in this portion of the globe,—to which Americus Vespucius gave his name, having discovered part of the continent south of the Equator 20th of May, 1497.

In June, same year, Jean Cabot, in the employ of England, took possession of the Island of Newfoundland, in the Gulf of Saint Lawrence.

In 1548, an Act of the English Parliament was passed to protect the English Fisheries on the Banks of Newfoundland, and in 1583 Sir Humphrey Gilbert, by

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(1) The Superior is 381 miles in length by 161 miles in breadth.
The Huron is 218 " by 180 "
The Erie is 231 " by 63 "
The Ontario is 171 " by 59 "

virtue of a commission of Queen Elizabeth, took formal possession of the island, and of two hundred leagues every way around it.

At the same time, Jean Verazani, engaged by Francis I. King of France, explored more than six hundred leagues of the American coast.

Jacques Cartier, his successor, ascended the Saint Lawrence as far as Ochelaga, now Montreal; solemnly took possession of the country in the name of Francis, by planting a cross on the shore of River Jacques Cartier, then River Sainte Croix, and inscribing on the arms of it, "*Ici regne François le Roi des François.*

VIII.—*Attempt at Colonization.*

In 1540, Mr. de Roberval obtained the Vice Royalty of Canada; he engaged his brother, whom Francis called the *Gendarme d'Annibal*, on account of his bravery with a number of French families to colonize it. They were all wrecked, and with them perished all the hopes of forming a permanent establishment in America; none presumed to flatter themselves with the belief of being more able, or to indulge the hope of being more fortunate than these two brave men.

The troubles which soon after followed, and for fifty years prevailed in France, prevented Government from turning its thoughts abroad; but the genius of Henry IV. having put an end to the civil dissentions which had disturbed that country half a century, the project of colonizing Canada was resumed with warmth.

Marquis de la Roche embarked in 1598 to try his chance: his expedition had a disastrous end.

Mr. Chauvin followed up his enterprise, and succeeded to his misfortunes.

At last Commandant de Catte, in 1603, was intrusted with the undertaking, and gave the direction of it to Samuel de Champlain, whose name brings to the recollection of the colonists the founder of Quebec and the father of the French Colonies in America, and to the mind of the natives, that of an evil spirit, whose genius of devastation is still raging amongst them, and who seems determined not to abandon their country until he shall have completed the destruction of their empires and extirpated their races from the face of the earth.(1)

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(1) The fate of the red inhabitants of America,—the real proprietors of its soil,—is, without any exception, the most sinful story recorded in the history of the human race; and when one reflects upon the anguish they have suffered from our hands, and the cruelties and injustice they have endured, the mind, accustomed to its own vices, is lost in utter astonishment at finding that in the red man's heart there exists no sentiment of animosity against us—no feeling of revenge; on the contrary, that our appearance at the humble portal of his wigwam is to this hour a subject of unusual joy. If the white man be lost in the forest, his cry of distress will call the most eager hunter from his game; and among the tribe, there is not only pleasure but pride in contending with each other who shall be the first to render assistance and food.

So long as we were obtaining possession of their country by open violence, the fatal result of the unequal contest was but too easily understood; but now that we have succeeded in exterminating their race from vast regions of land, where nothing in the present day remains of the poor Indian but the unnoticed bones of his ancestors, it seems inexplicable how it should happen, that even where the race barely lingers in existence, it should still continue to wither, droop, and vanish before us like grass in the progress of the forest in flames. "The red men," lately exclaimed a celebrated Miami Cacique, "are melting like snow before the sun!"

Whenever and wherever the two races come into contact with each other, it is sure to prove fatal to the red man. However bravely for a short time he may resist our bayonets and our fire-

IX.—*Beginning of Mr. de Champlain.—An Indian Engagement.*

The Hurons and their allies, the Algonquins, were at war with the Iroquois. Mr. de Champlain joined the former, and together formed the project to take the Iroquois by surprise in some of their villages.(1)

Whilst on their march, the allies were every day enquiring of the French Commandant if he had not in his dreams seen some of the Iroquois? The French officer repeatedly answered in the negative, which answer apparently made them uneasy. At last, whether the Commandant had dreamed or not, he told them that during his sleep he saw Iroquois drowning themselves in the lake, but that he placed no reliance on this dream.

The Indians thought differently, and from that moment they were confident that victory was in their favour.

Contrary to the expectation of the allies, the Iroquois were on the alert, and prepared to meet them. They met on Lake St. Sacrement, (now Lake George,) about ten o'clock in the evening.

The Indians fight on water only when they cannot help it; but in this rencontre they were near the shore, and immediately landed. Their respective entrenchments were soon made. Then the allies sent a *parlementaire* or *Cartel* to the Iroquois, leaving to them the option to fight immediately or to wait till the next day. The Iroquois answered that the night was too dark—that they would not see one another—that it was better to wait for daylight. This being settled, both armies went to rest and slept in their respective camps as if they had been in peace.

At daybreak next morning, Champlain placed some of his Frenchmen and a few Indians in the woods, with the view of outflanking the enemy. Then the Hurons and Algonquins left their entrenchments, and ran two hundred paces towards the Iroquois and halted, leaving a space in the centre of their line, where de Champlain, who came to lead them, placed himself with his men.

The appearance of these strangers, their heavy bearded faces, the form of their arms,—all was new to the Iroquois and surprised them; but when they heard the terrifying explosion of gunpowder,—when they heard for the first time the report

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arms, sooner or later he is called upon by death to submit to his decree; if we stretch forth the hand of friendship, the liquid fire it offers him to drink, proves still more destructive than our wrath; and lastly, if we attempt to christianize the Indians, and for that sacred purpose congregate them in villages of substantial log-houses, lovely and beautiful as such a theory appears, it is an undeniable fact, to which unhesitatingly I add my humble testimony, that as soon as their hunting season commences, the men, (from warm clothes and warm housing having lost there hardihood,) perish—or rather rot, in numbers, by consumption; while, as regards their women, it is impossible for any accurate observer to refrain from remarking, that civilization, in spite of the pure, honest, and unremitting zeal of our missionaries, by some accursed process, has blanched their babies' faces. In short, our philanthropy, like our friendship, has failed in its professions; producing deaths by consumption, it has more than decimated its followers; and under pretence of eradicating from the female heart the errors of a pagan's creed, has implanted in their stead the germs of Christians' guilt.

What is the reason of all this? Why the simple virtues of the red aborigines of America should, under all circumstances, fade before the vices and cruelty of the Old World, is a problem which no one among us is competent to solve; the dispensation is as mysterious as its object is inscrutible.—[Despatch of Sir F. B. Head to Lord Glenelg, 20th November, 1836—No. 32.]

(1) It is Mr. de Champlain himself who relates the fact.

of the French blunderbusses, and saw that at such a great distance two of their chiefs had fallen dead, a third mortally wounded,—at a second volley they took flight. It was for the first time that the dreaded Iroquois fled before the enemy.(1) The subjoined biographical notice of this nation will show the results of that fatal blow; although for many years after they had a great weight in the affairs of the country, and were respected for their diplomatic skill and warlike dispositions, both by the French and English Generals, who courted their friendship and their alliance, but they were doomed to fall.

X.—*By what Nations America was possessed at the time of the Discovery.*

At the time the Europeans discovered America, the continent was divided amongst the following nations:—

The Esquimaux possessed the country from the 52d degree of north latitude to the 60th, between Hudson's Bay and the Strait of Belisle.

The Souriquois, now called Micmacs, and the Abenakis,—Acadia.

The Killistinons, Tetes de Boule, Assenibouals, and Sioux,—all the north of Canada.

The country of the *Yendats*, now called Hurons, had for its boundaries, Lake Erie to the south, Lake Huron to the west, and Lake Ontario to the east, including the adjoining forests towards the southwest.

The Iroquois, the Outaouas, and Algonquins were the masters of the south of Canada, bordering on Lakes Michigan, Huron, Erie, and the Saint Lawrence. The Illinois and Natchez were in possession of both sides of the Mississippi.

The Virginians, Floridians, Wolves, and Mahingans, of the territories bordering on the country, which soon after formed the English possessions.

The Caraibes were the sovereigns of the Antilles.

The Tapuyes, Galibis, Brazilians, and the nations of Paraguay, occupied the shores of South America on the side of the North Sea.

A multitude of nations covered the interior. Seventy languages were spoken on the borders of the Amazon only.(2)

XI.—*By what Nations possessed at this period.*

The first invaders of these countries were not long in possession of what they called their conquests. It soon passed into other foreign hands. It is now distinguished by two divisions, North and South America. The North is divided as follows:—

The people of the United States of America have the largest share—of which

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(1) See Charlevoix, year 1609, vol. 1, liv. 3.
(2) See Lafitau, Moeurs des Sauvages comparés aux Moeurs des Anciens Peuples.

Vermont is in possession of	10,212	square miles
New Hampshire,	9,491	"
Massachusetts,	7,500	"
Maine,	32,628	"
Rhode Island,	1,508	"
Connecticut,	4,764	"
New York,	46,085	"
New Jersey,	8,320	"
Pennsylvania,	44,000	"
Ohio,	39,128	"
Indianna,	37,000	"
Delaware,	2,120	"
Maryland,	13,950	"
Virginia,	64,000	"
Kentucky,	42,000	"
North Carolina,	48,000	"
South Carolina,	28,000	"
Tennessee,	40,000	"
Georgia,	62,000	"
Mississippi,	45,000	"
Louisiana,	48,220	"
Illinois,	52,000	"
Besides The Alabama Territory,	46,000	"
Michigan,	30,000	"
Northwestern,	147,000	"
Missouri,	1,500,000	"
Columbia District,	100	"

Great Britain has two Provinces: Upper Canada and Lower Canada, to which are annexed New Britain, the Island of Cape Breton, New Brunswick, Nova Scotia, (formerly Acadia,) St. John's Island, and the Island of Newfoundland. The territory of the Killistinons, Tetes de Boule, Assinibouals, and Sioux, is still in their possession, but ruled by a chartered Company of British mercantile adventurers, under the sovereignty of Great Britain, styled the Honourable the Hudson's Bay Company, which is in possession of the exclusive right of commerce of that part of what is called British North America, of which the lakes and rivers empty their waters in James and Hudson's Bay. The viceroyalty of New Spain has fifteen provinces.

And South America has the independant State of Columbia, including the new kingdom of Grenada, and the Caracas, Quito, Peru, Buenos Ayres, and Chili.

The Dutch, French, and Portuguese partly occupy the territory of Guiana, and also Brazil, now an independent state.

XII. *By whom and in what manner was America peopled?*

Ancient historians have made mention of many nations who had occupied portions of the then known world which were no more to be found; this gave rise to

the general belief that they had become extinct. The discoveries made in the Eastern and Western Hemispheres, have reproduced the greater part of these nations. The difficulty at present is to trace their origin.

The most universally received and the most popular opinion derives all the American nations from the northern parts of Asia; a comparison of the manners and customs of the American savages with those of the people of Thrace and Scythia, proves that America was peopled from the most eastern parts of Tartary.

Pliny asserts that a great number of Scythians withdrew from Asia to this continent, flying from the tribes of Scythians Antropophagis.(1)

XIII.—*Scythian Customs, Mosaic Laws, Doctrines of Confucius and Zoroaster found in America.*

The Hurons and Iroquois are in possession of Scythian and other Asiatic customs; the scalping, torturing, and eating their prisoners, the construction of their canoes, their implements of war, their mode of warfare, marching in Indian fyles, their treatment of the infirm, &c., were all Scythian customs; and their being in possession of the Mosaic law of intermarriage and of a custom sanctioned by the laws of the Hebrews, and which no other code contains, which is—That if a man die without leaving any children, his brother is obliged to take the widow, so that the name and house of his brethren should not be extinguished. If he declines taking her he is subject to receive all the affronts she will be pleased to inflict upon him. The Indians give the same reasons for this act as are contained in the 23d chapter of Deuteronomy. And their observance of the doctrines of Confucius and of Zoroaster, particularly their worship of the sun and the fire, will make it appear that they are descendants of tribes already amalgamated, particularly of Israelites and Scythians, the latter being the most ancient name of the nations called Tartars,(2) with whom it is probable that some of the ten lost tribes of Israelites, mixed as they were carried away by Salmanazar to Assyria, they may have entered into the Euphrates by the narrow passes or heads of that river, which runs from the north into the Persian Gulf.

This is in accordance with the opinion of Grotius, who maintained that North America was peopled by Scythians and Tartars.(3)

Diodorus Siculus has written that the Phœnicians had navigated the Atlantic very far, and that by storms some of their fleets had been driven on a large island to the westward of Lybia.

Dehorn, upon the authority of Josephus, speaks of a transmigration of Phœnicians in what is now called America on a Tyrian Fleet in the employ of Solomon, and that the embarkation was made at Asion Gaber, a port of the Mediterranean.(4)

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(1) Plin. lib. 7, ch. 2.
(2) The appellation of Tartar was not known till the year 1227. The Tartars were at that time supposed to be a new race of Barbarians.—*Morse.*
(3) Grotius de origine Gentium Americ.
(4) See Charlevoix, Vol. 3.

XIV.—*Of the Esquimaux.*

The nation of the Esquimaux has particular customs, which are so different from those of the other American tribes, that we cannot be mistaken in supposing them to be of a different origin. They are tall, well made, and of a fairer complexion than the other Indians. They dress their beard and hair, which are generally black; but many have them of a light colour and some red and curled as the northern European people have them. Like other Indians, they have a religious respect for the fire.

It has been supposed that this nation had been formed from the wreck of some Basque vessels; but it seems that their origin dates from a more remote period.

"I believe them," says Lafitau, "to have come from the British Isles, or from the Orcades or Orkney Islands."

It is possible that they are descendants from Cambrians: the following narrative may not be so frivolous as it has been by some supposed to be:—

About the end of the twelfth century, Madoc, Prince of Wales, dissatisfied with the situation of affairs at home, on account of the disputes his brother had for the Crown of Owen Groynwalk, their father, left his country in quest of some new place to settle. Towards the west he discovered a fertile country, where he left a colony and returned home; there, he persuaded many of his countrymen to join him, and again put to sea with ten ships, and was never more heard of.(1)

The facility with which the Esquimaux converse with people of Gaellic descent, is a strong proof that they are of the rame origin.

XV.—*Signs of Christianity found in America—Madoc's expedition—Robertson's opinion.*

Robertson, in his history of America, mentions the expedition of Madoc and the assertion of Powls, but doubts the reality of that expedition; his principal reason for doubting is, that according to him, no signs of Christianity had been found in America at the time of its discovery.(2) But authors of respectability bear testimony that signs of Christianity did exist in America when discovered by modern Europeans.

When the Spaniards first landed in the Island of Jucatan, they found crosses upon the graves of the dead, and the natives informed them that a man of great beauty, wearing a long beard, had passed through their country and had left them that sign, so that they might remember him, adding that a man more brilliant than the sun had been put to death upon a similar cross.(3)

In the Island of Accuzamel, or Gozumel, there was a small temple, built with stones, in which a cross of ten hands high was adored by the natives.(4)

The Inca Garcillasso assures us that the kings of Peru had in one of their royal mansions a cross of jasper, for which they had a great respect.(5)

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(1) David Powl's History of Wales. Lafitau ibid. Vol. I. page 54.
(2) Robertson's Works, History of America, Edinburgh edition, 1819.
(3) Pierre Martyr, Ocean. Decad. lib. 4, ch. 1.
(4) Lopes de Gomara, histoire générale des Indes, lib. 3, ch. 2 and 23.
(5) Comment. Real. lib. 2, ch. 3.

A small Indian nation has been found towards Gaspé, in the Gulf of Saint Lawrence, on a river named Sainte Croix, which was called Crucientaux or Cross Bearers.(1)

XVI.—*Conjectures respecting the origin of the Hurons and Iroquois Indians—Their Language.*

Lafitau says that some characteristic customs of the Lycians compared with those of the Hurons and Iroquois, led him to conjecture that the latter sprung from the former, and that his opinion was confirmed by writers whose names are of great authority.(2)

The Lycians made use partly of the laws of the Cretans and partly of those of the Carians, but they possess this peculiarity: they take their names from their mothers, and it is in their mother's family they seek for the nobility of their house and the genealogy of their ancestors.

If a noble woman marry a commoner, the issue is considered to be noble; but if a nobleman marry a commoner, the issue is plebeian.

The Lycians lived by pillage; they had no written laws, but only customs established amongst them; the women were the masters since their origin. It is all the same with the Hurons and Iroquois, except that these live by the chase.

The first point of resemblance is in the name, which was given to the Lycians. They received that name from Lucus, son of Pandion, who settled amongst the Termiles, near Sarpedon, and made himself so commendable by his religious and moral regulations for their government, that they abandoned the name which they bore for the honour of receiving his, which in the Greek language signifies wolf.

The Hurons and Iroquois are divided into three families, one of which is that of the wolf. The distinction of these three families is sacred amongst them, and the wolf family prides itself in bearing the name of the first of mankind, the Lucus of the Lycians.

The second point of resemblance consists in the superiority possessed by the Lycian women over their husbands; so also it is among the Iroqois women. In the nation so called, the nobility of birth, the geneological descent, the order of generations, and the continuance of families exist. In them reside all real authority, the country, the fields, and their crops are theirs. They are the soul of the national councils. The arbiters of peace and war; the public treasury is under their care; it is to them that slaves are given; they form the marriages, the children are under their controul, and through them family descent is traced.(3)

XVII.—*No information to be had from the Indians.*

No characteristic information can be obtained from the Indians in general, touching their origin, unless it is faintly traced to the origin of mankind as contained in the Mosaic History.

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(1) Relation de la Gaspesie, ch. 9, v. 10. Lafitau. Ibid Vol. II. page 134, Charlevoix. Histoire de la Nouvelle France.

(2) Herodotus, lib. I, No. 173. Heraclit. Le Pont. Nicholas de Damas. Lafitau, Vol. I. pages 64, 65.

(3) Lafitau Comparaison des Moeurs des Sauvages Americains avec ceux des anciens peuples.

"In the beginning," say the Iroquois, "there were six men; at that time there was no land; the men were driven about upon the waters at the mercy of the winds. There were no women, and they dreaded lest their race should perish with them; when at last they learned that there was a woman in Heaven: a council was held, when it was resolved that one of them, called *Hougoaho* (the Wolf) should ascend. This undertaking appeared at first impossible, but the birds lent their aid, and raised him on their wings to Heaven."

Wolf was also informed that the woman was in the habit of going to draw water from a fountain near a certain tree, under which Wolf waited until the woman should come as usual; she came as was expected; Wolf went and conversed with her, and made her a present of bear's grease, which she ate. A talkative woman, who receives presents and is curious (says Lafitau) is not long victorious: ours was weak in Heaven itself.

When the master of Heaven discovered this, in his anger he kicked the woman down, but in her descent a turtle received her on its back, on which the otter and other fishes brought some clay from the bottom of the water and formed a small island, which gradually increased, and at last extended itself into the present globe.

Amongst others the woman had two children who quarrelled together and fought, and one was killed by the other.

Thus mankind, according to the Iroquois' notions, descends from Wolf and this woman, and this extraordinary event gave rise to the three families of the Iroquois and the Hurons, of the wolf, the bear, and the turtle, which in those names retain a living historical tradition of their origin.

The absurdity of this fable excites pity, although it is not more ridiculous than those invented by the Greeks, the most acute of men.

XVIII.—*Of the Character of the Indians.*

Not long since the notions the Europeans entertained of the Indians were that of men going naked, covered with hair, and possessing but an imperfect human form, living in the forests like brutes, without any society, and without any religion.

This opinion was first given by Hanno, a Carthagenian General, on his return from a voyage of discovery; he presented to his Government the skins of two female monkeys, of the ourang-outang kind, which he had obtained on the coast of Africa, and made the Carthagenians believe those to be the skins of Indian women.

The Indians are all well formed; they have a good constitution, are agile and active. In the qualities of the body they are certainly in no wise inferior to the Europeans, if even they have not some advantage over them.

Their genius and character are more difficult to describe. They are in general intelligent; their imagination is quick; their conception of things ready; their memory admirable; they all preserve the traces of an ancient and hereditary religion, and a form of civil polity. Their judgment is correct; they advance towards their ends by sure means, and act with a coolness and equanimity which would exhaust our patience.

From honourable and lofty feelings they command their passions, and like the Spartans, would think it a dishonour to appear to be agitated or angry. They are proud and fierce; they unite the most dauntless courage and intrepid valour with the most astonishing coolness and fortitude in the midst of the most cruel torments.

Among themselves they are civil and polite, according to their own judgment consecrated by immemorial customs, which they preserve with the utmost care.

For instance, in ordinary conversation an Indian never calls a man by his name; he always addresses him by his quality, either in government or in the family; but when there is an equality of rank between the parties and no relationship or affinity, they use the appellation of brother, uncle, nephew, or cousin, according to their respective ages or the degree of respect or friendship which they mean to show to the person to whom they speak.

They maintain a great respect and deference for their aged, which can scarcely be reconciled with their notions of independence, of which they are excessively jealous.

They are not caressing; they make no demonstration of love, nevertheless they are kind and courteous, and they extend to strangers and to the unfortunate a charitable hospitality which might put to shame nations calling themselves civilized.

Every where amongst these nations is found a patriotism and a love of the country engrafted in every heart, a natural passion for glory, a greatness of mind not only in encountering peril but above misfortune, an impenetrable secret of their deliberations, and in the execution, a contempt of death born with them and fortified by their education.

Their good qualities are undoubtedly mixed with many defects, for they are light and volatile beyond expression—ungrateful to excess, suspicious, deceitful, and vindictive, and the more dangerous that they conceal their resentment for years. They are cruel to their enemies, brutal in their pleasures, vicious both from ignorance and malice. Such is in general the character of all the savage nations of North America.(1)

XIX.—*Their Language.*

A multitude of languages exist in America, which may perhaps be reduced to twenty-five radical, and more than two thousand dialects.

They are often not unlike the Hebrew in roots, words, and grammar; but they have by far more analogies with the Sanscrit, the ancient Chinese, Celtic, Bask, Pelagian, Berber in Europe, and Lybian and Egyptian in Africa; or in fact all the primitive languages of mankind.

XX.—*Their Religion.*

Vestiges of all the ancient religions which have prevailed in the Old World were found in America, together with the religious cry of *Alleluia*, the *Allelujah* of the Hebrews, and which existed among the Indians, Arabs, Greeks, Saxons,

(1) Lafitau, ibid, Vol. I. pp. 1–49.

Celts, &c. In fact, the religion of all the Indians of America rests upon the same basis as that of the Barbarians who first inhabited Greece and extended themselves into Asia, and who followed Bacchus in his military expeditions, the same which served as a foundation to the Pagan mythology.(1)

The sun is the divinity of all the nations of America, yet the force and energy of their expressions can only apply to one god, whom they call the Great Spirit, sometimes the lord and master of life; besides their notions of this great being, whom they confound with the sun, they acknowledge an indeterminate number of subordinate *genii*, spirits, or demons, as the polytheists of antiquity, and they worship them in the same manner.

The fire, as the most active of all elements, and that which is the best adapted to represent the supreme intellect, disengaged from material objects, and of which the power is always active.

The peculiar doctrine of Confucius, born 551 years before Christ, had the worship of the sun as well as that of the fire.

The other religious notions of the East had long remained stationary, but received considerable strength from the writings of Zoroaster, a man of obscure birth; he was a native of Media, and became the legislator of the Persians. This man pretended to have made a visit to Heaven, where God spoke to him out of a fire. He made the people believe that he brought some of that fire with him on his return. It was considered holy, the dwelling of God.

To gain reputation he retired into a cave, and there lived a long time a recluse, and composed a book called the *Zind Avesta*, which contain the liturgy to be used in the fire temples, and the chief doctrines of his religion, which are still to be traced in the funeral piles of the Hindoos, the beacon fires of the Scotch and Irish, the periodical midnight fires of the Mexicans, and the council fires of the North American Indians.

His success in propagating his system was astonishingly great: almost all the Eastern world bowed before him. He is said to have been slain with eighty of his priests by a Scythian prince, whom he attempted to convert to his religion.

It is manifest that the whole system of God's dwelling in the fire was taken from Moses' burning bush, he was well acquainted with the Jewish Scriptures; he gave the same history of the creation and deluge that Moses had given, a faint tradition of which was found in America. He inserted a great part of the Psalms of David into his writings; he wrote of the Messiah in plain words. All this corroborates the belief of ancient authors, that he had been a disciple of the Prophet Daniel, or at least that he learned these doctrines of the Jews, whose books of theology, when Zoroaster flourished, had gone far among many nations.

The Mehistains, his followers, believe in the immortality of the soul, in future

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(1) Lafitau Comparaison des Mœurs des Sauvages Américains, avec ceux des anciens peuples, Vol. I. pp. 20, 21. Huet Demonstration Evangeliques, prop. 4, ch 10. Senec. lib. 4 de Benef. ch. 7. Grotius, in dissert. de Orig. Gen. Americ. Hornius de Origin Gent. Americ lib. 4, ch. 16.

rewards and punishments, and in the purification of the body by fire, after which they will be united to the good.(1)

XXI.—*Temples.*

There are no vestiges of temples in North America, at least amongst the Hurons and Iroquois. The fire of their hearths is the altar; their council lodges their temple, as among the ancient Persians, and the same as the Pyranees of the Greeks and the curix of the Romans.

In their allegorical expressions, the council fire conveys a sacred meaning; it is considered as always burning, and the symbol of all matters connected with religion and government.(2)

XXII.—*Iroquois, Vestals, and Hermits.*

Together with the sacred fire, the Iroquois certainly had their vestals; virgins consecrated to their gods; these never left their lodges, where they occupied themselves in doing light works, merely to prevent idleness.

The people treated them with great respect. Jacques Cartier says, that he saw at Ochelaga, now Montreal, lodges full of them.(3)

It must be of these vestals that Vincent LeBlanc spoke when he said that in Canada there were savages, eaters of human flesh, who made their boats with the bark of trees,—that when they took up the bark they used many religious ceremonies,—that they made long prayers, at which virgins consecrated to their gods assisted.(4)

The Iroquois and Hurons had also their hermits, like the *custi* among the Francians, the *bonzes* and penitents among the Asiatic Indians, &c. Lafitau saw one of them at Sault Saint Louis, near Montreal. He was a Huron; he had been made a slave by the Iroquois, who spared his life: he was afterwards induced by some one to kill a man,—for that purpose, as is customary amongst the Indians, he intoxicated himself, or pretended to be intoxicated, and performed the criminal task. After the act he took refuge at the village of Laprairie de la Magdelaine, three leagues above Montreal—got married to a woman of his nation, with whom he lived honestly, but always retained a love for a solitary life.(5)

XXIII.—*Of War.*

War is the favourite passion of all the Indians. It is declared by disinterring the tomahawk, and as long as the fatal hatchet remains unburied there is no peace.

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(1) See Terrasson's Histoire de la Jurisprudence Romaine, page 14. Baron Humbolt, quoted by Priest's American Antiquities, from page 200 to 212. Humbolt's Volume of Researches in Americe, &c. &c.

(2) Lafitau ibid. Vol. I. page 153.

(3) Jacques Cartier, Vol. II. Reported in a collection of Ramucius, Vol. III. Lafitau, Vol. I; page 159.

(4) Vincent Leblanc, 3ème partie. Vol. I. page 149.

(5) The Indians do not punish for acts committed in a state of intoxication: they say that the perpetrator is to be pitied, because he had lost his judgment. See Lafitau, Vol. I. pp. 161, 162.

The sun is the god they particularly invoke in their military expeditions; but they also implore the Great Spirit, the master of life, and their other divinities. To them all they pray for the success of their enterprises.

With the same god of war and the same spirit which animated the people of Thrace, the Iroquois and the Indians in general preserved the same character in their sacrifices, in their feasts, in their dances, in their music and musical instruments, and in their acclamations.

Their mode of sacrifice does not differ from that described by Appolonius of Rhodes.

XXIV.—*Government.*

The government of the Iroquois and Hurons is the same as that of the Lycians; *Gynecocrathie*, or the empire of the women. That part of the power possessed by the men, is only by virtue of a special authority delegated to them by the women.

The villages are independent of each other and of the whole. In each may be seen the same distribution of families, the same police regulations and order. But in matters which concern the entire nation, a general council, composed of deputations from each village, is assembled, which is conducted with great zeal for the public good, and the greatest harmony and unity. By this harmony the national strength is augmented.

XXV.—*Tribes and Families.*

Each tribe has its chief, who is among them what the chiefs of the nations who joined themselves at Rome, Romulus, Tatius, and Lucuman, were to their followers.

The names bestowed upon these chiefs establish the order of their pre-eminence over their tribe. In addition to their personal name they receive one of dignity.

XXVI.—*Noble Families.*

The first is that of *Roinder Goa*, or the noble by excellence.

The second is that which is taken from the name of the tribe itself, which they represent as if it was united in their person. Thus when they say the wolf, the bear, the turtle, has done or said that; it is the chiefs, the tribes, and the country that have done or said it.

XXVII.—*Chiefs.*

The dignity of the chief is perpetual and hereditary in his lodge, always descending to the children of his aunts, of his sisters, or his nieces in the maternal line.

As soon as the tree has fallen, (that is, as soon as a chief is dead,) the tree must be planted again. The matron, who possesses the chief authority, after a conference with those of her own tribe, whose approbation she obtains for the man whom she has chosen, she always respects the right of seniority, and in

general her selection falls upon him, whom she considers most fit by his good qualities, to support his elevated rank.

Then the election is complete; its announcement is made to the village, the chief elect is presented, and at once proclaimed and acknowledged, and afterwards is presented to the other villages.

The tree being thus raised, if the chief be still young and incapable of conducting the government alone, roots are added to the tree to support it and prevent it from falling, as was formerly done at Sparta; a tutor or regent is appointed, and as is still done in monarchical governments during the minority of the sovereign.

The authority of the chiefs extends properly over their tribe, whom they regard as their children; they commonly call them their nephews; it is rare that they make use of terms equivalent to that of subjects; although they possess real authority, and of which some of them make ample use, they nevertheless affect so great a leaning towards liberty, that it would seem that they are all equals. They have no mark of distinction,—no crown, no sceptre, no guards, no consular ax; they are notwithstanding obeyed, but that obedience appears to be voluntary; the manner in which it is yielded serves to restrain the chiefs from commanding what might create uneasiness or give rise to opposition; it likewise induces inferiors promptly to execute the orders given to them, and in this manner good order is maintained as in the best regulated States.(1)

XXVIII.—*Agoianders or Ephores.*

To prevent the chiefs from usurping too great a power, and from becoming absolute, associates under the name of *Agoianders*, divide the authority with them.

They are subordinate to the chiefs, who preside over them; each tribe and each family has one, who is also representative: the women choose them, and sometimes they are themselves appointed; they represent the Ephores of Lacedemon.

Their duty is to regulate the more immediate concern of the nation, and to guard and protect the public treasury; but with their intercourse with other nations they are not recognized as chiefs.

XXIX.—*Senate or Ancients.*

The senate is composed of old or aged men, in their language called *Ayoksentra*; each has a right to give his suffrage in council, as soon as he has attained the period of mature age, to which is generally attributed prudence and knowledge of national affairs.

XXX.—*The Warriors.*

The last national body is that of the warriors; it is composed of the young men capable of bearing arms.

The chiefs of the tribes generally, who having first given proofs of military skill and capacity for command, lead them.

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(1) Lafitau, Vol. II. pp. 170-174.

There are also war chiefs, who are a kind of generals without any real authority and subject to the chief of the tribe; they are employed on particular occasions or services, and owing to a sense of honour and patriotic zeal among their followers, their commands are seldom disputed. To attain this rank they must have exhibited satisfactory proofs of courage, capacity, and good conduct.

XXXI.—*Councils.*

The women are always the first to deliberate, at least according to their constitutional principles, it ought to be so.

They keep their councils separate from those of the chiefs, to whom they give notice of the matters submitted to their consideration, so that in their turn they deliberate upon them; whereupon the chiefs call the ancients or old men of their tribe, and if the subject be of general interest, a national council is summoned and assembled.

The warriors likewise have their separate councils for matters within their competence; but all particular councils are subordinate to that of the old men or ancients, which is the supreme council of the tribe.

XXXII.—*Council of Ancients.*

This council has its secret and public sittings; the former for deliberations upon all matters of interest in general, and the latter upon national and solemn occasions, such as the reception of ambassadors, diplomatic answers to be made, declaration of war, public mourning for the dead, preparation for a national festival, &c.

Although no regular periods are established for these assemblies, formal notices are previously given. They are most frequently held at the setting in of night; the council fire is solemnly kindled, and is constantly burning during the time of these important meetings.

It is possible that this senate does not possess the august majesty of the Roman republic in the time of Brutus; but it may not, however, be much inferior to that of Rome, when she called Cincinnatus and others from the plough, to make them consuls and dictators. It presents the assemblage of slovenly fellows, smoking, and squatting like monkeys, or reclining in various postures, perfectly at ease, on the ground, as the members of the House of Commons sit on their benches, yet deliberate upon state affairs with as much gravity as formerly did the Junta of Spain or the council of ancients at Venice.

None but the old men assist at these councils, and have a deliberative voice. The chiefs and *agoianders* would be ashamed to dare to open their mouths, if age be not united with their dignity; even the chiefs, the most celebrated for their talents, only advise, and always conclude by saying, "Consider of it, you old men, it is for you to command.

Their deliberations are conducted with great gravity: each speaker takes up the proposition in a few words, states his reasons for and against it, afterwards expresses his individual opinion, and closes by saying, "This is my opinion;" whereupon the assembly answer, "*Hoo*," or "*etho*," meaning good, whether he had

spoken well or ill. It is a term of courtesy among them, conveying the same meaning as *Mon savant confrere* amongst our lawyers or the learned gentleman in our municipal councils.

Their deliberation being over, if they publish their decision they make it so plausible that it is difficult not to coincide with them ; and so maturely have they considered the question in every point of view,—so accurately have they weighed every reason for and against, that they are always ready to support their decision by the strongest arguments.

In general they give a more patient investigation to all the bearings of an affair than we do ; they listen more calmly to the opinion of others ; they show more deference and courtesy towards those advancing opinions, different from theirs. They do not know what it is to interrupt another speaker, much less to dispute with intemperance and heat. It is their subtle zeal for the public good of their tribe and nation, which has given to the Iroquois and Hurons their ascendancy over the other nations ; that they have conquered the most warlike, after having fomented civil divisions amongst them. It is the means by which they maintained a peaceful neutrality between the French and English, who each in their turn courted and feared them.

XYXIII.—*Civil Matters.*

The Indians have no lawyers or attorneys ; consequently none have an interest in perpetuating their quarrels, which are not frequent and are soon settled. The interference of any one on whose opinion they rely, and who will make them sensible that their pretensions are unjust, puts an end to them ; otherwise, as with the Jews—arbitration terminates the contest.

XXXIV.—*Criminal Affairs.*

As with the ancient Germanic tribes, and afterwards with the Anglo Saxons, the crime to which they are particularly addicted is homicide : amongst men of violent passions, often intoxicated, always armed, quarrels and murders are inevitable ; and as with the Saxons, the system of retaliation and that of compensation exist.

The decision of criminal matters belongs immediately to those of the cabin or lodge of the culprit, who have the right of life and death over each other. The village appears to take no concern in the deed ; the person put to death is presumed to have given sufficient cause, and the one who committed the act to have been compelled to do it by powerful motives, which no stranger has the right to investigate ; he is even pitied for having been placed under the necessity of using such violence against his own blood. To his family alone belongs the right to judge of his conduct.

The Jews had a law in many respects similar.(1)

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(1) II. Kings, ch. 14.

Matters assume a different aspect if the murder has been committed in another cabin, in another tribe, or in another village, and much more if on an individual of another nation; in these cases the unfortunate death becomes of public consideration; all take up the cause of the deceased, and *revive the spirit*, (it is their expression), to the relatives grieving for the loss which they have sustained, all also interest themselves in saving the life of the criminal, and to protect his relatives from the revenge of those of the dead, which does not fail to show itself sooner or later, if the satisfaction prescribed by their customs, have not been observed and given.

Upon such occasions, as many as sixty presents are given, and presented by one of the chiefs, making an address with each present offered.

Of these, the nine first presents are put into the hands of the relatives of the deceased, to remove from their breasts all rancour and desire of revenge. The others are suspended from a pole over the head of the deceased; the first nine are the most considerable, the chief holding the first of the nine in his hands, raising his voice, and speaking in the name of the culprit, says, "With this I withdraw the axe from the wound, and let it fall from the hand of him who would avenge the injury."

To the second he says, "With this I wipe the blood from the wound."

These two presents serve to express the regret of the murder of the deceased; afterwards, as if the nation itself had received the mortal blow, he adds with the third, "Let peace be restored in the nation."

With the fourth, a stone will be made to cover the opening made in the earth by this murder.

With the fifth, this is to level the roads, to take away the brushes and thorns, so that every one may travel with safety and without falling into an ambush, &c.

So soon as the presents are accepted, the relations consider themselves fully satisfied. But if it happen that before the satisfaction be given, they avenge themselves upon the murderer, the entire penalty falls upon, and presents are expected from them.

In former times the laws were much more rigorous; the culprit was, besides the presents, subject to a personal punishment, almost as severe as death itself. The dead body was placed on poles—the murderer was stretched under it—his food was placed near him, which soon partook of the putrefaction of the dead body. He was to remain in that position as long as the vengeance of the relatives required it, or until it was appeased by further presents.(1)

There are occasions in which the crime is accompanied with such revolting or atrocious circumstances that the council, making use of its supreme authority, orders the punishment of the criminal, who is either stabbed by one of the chiefs, in his lodge, or drawn out of the village under false pretences, where the tomahawk avenges the offended laws of the nation.

As to those whose crimes consist in robbing or in troubling the peace of families,

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(1) Relation de la Nouvelle France, P. Brebeuf, reported by Charlevoix, year 1636, 2d part, ch. 2.

those busy bodies who meddle too much with the affairs of others,—those who are suspected of entertaining traitorous communications with the enemy of the state, &c.,—matters are underhandedly arranged by the chiefs, and the suspected individual is accused of witchcraft. The bad subjects of the village, being aware that the chiefs are well informed of their criminal conduct, afraid of being themselves accused of the same offence, voluntarily become evidence for the commonwealth, and swear to a multitude of magical feats of their mischievous comrade, who is doomed to be tortured to death; but to avoid the torments commonly inflicted in such cases, he pleads guilty, and a prompt death rids the community of a bad member.

Thus these people, without written laws, have a rigorous justice, which prevents public order and tranquillity from being disturbed, the real end of all good government.

XXXV.—*State Concerns.*

The affairs of the state engross the principal attention of the chiefs; each nation, constantly mistrusting their neighbours, are always on the watch, so as to take every possible advantage of favourable circumstances, either by sowing the seeds of discord among them or by drawing closer the ties of friendship already existing.

Their prudence on these points, and the multitude of secret springs they put in motion to attain their end, would baffle the skill and cunning of European politicians.

Their principal care when national difficulties are anticipated, is to consider passing events on all sides and in all their bearings; to observe and deliberate upon the minutest circumstance; to train up their young men to public affairs, and initiate them into the forms of their councils, and to make them conversant with the oral tradition and history of their nation.

Like the bards of the Germanic and Gothic nations, they sing the exploits of their ancestors, and raise the martial spirit of their warriors; by these means they maintain their tranquillity during peace, and their superiority in war.

XXXVI.—*Porcelain Shell, or Wampum.*

This porcelain or wampum is the richest and most precious article the Indians possess: it is their gold and their jewels; with it, the nations adorn their grandees, as the European nations decorate theirs, with ribbands, crosses, and stars.

These sea shells, to which the naturalists give various names, determined by the diversity of their species and forms, and by the variety of their colours, have something so agreeable to the eye that they may be looked upon as one of the wonders of nature, and one of the most charming productions of the sea. The white is considered the most common; that of a deep purple colour is more esteemed, and the darkest is the most precious.

Manufactured into small cylinders of about a quarter of an inch long, and half that in circumference, is made up by the Indian women into collars, sashes, belts, strings, &c. With these they make their contracts, they keep the public registers,

they record the annals and history of the nation; with these collars they form a kind of local memory by words and meanings; each of them is a representative sign of certain affairs and of certain circumstances. Their general name in the Iroquois language is *Gaionne*; but they are distinguished by particular appellations, as *Gariliona*, which signifies affair; *Gaouenda*, voice or word; *Gaianderensora*, grandeur, nobility. They are kept by the agoanders, and with the patricians or nobility, as the public forms of contracts were kept by the Romans patricians, and lawyers.

To avoid the confusion which the multiplicity of affairs would create, these collars are so variegated, the colours are so disposed, that they are as readily understood by the initiated as the hyerogliphics were understood by the Egyptian priests.

An Indian's word, when it is formally pledged, is one of the strongest moral securities on earth; like the rainbow, it beams unbroken when all beneath is threatened with annihilation. The most solemn form in which an Indian pledges his word, is by the delivery of a wampum belt of shells; and when the purport of this symbol is once declared, it is remembered and handed down from father to son with an accuracy and retention of memory which is quite extraordinary.

Whenever the belt is produced, every minute circumstance which attended its delivery seems instantly to be brought to life; and such is the singular effect produced on the Indian's mind by this talisman, that it is common for him, whom we term "the savage," to shed tears at the sight of a wampum, which has accompanied a message from his friend.(1)

Their wampum would soon be exhausted, if it was not that the customs and laws required that a word shall be answered by another word; that is, that for a belt received another belt of the same value should be given.

As these shells could be procured only through the United States, and government being aware of their importance to the Indian nations in the interior, the article of wampum, in the form of beads, moons, shells, and hair pipes, by a legislative provision, has been allowed to be imported from the United States, free from duty.(2)

XXXVII—*Public Treasury.*

The public treasury consists principally of these belts, collars, and strings of porcelain. It is kept in the lodges of the chiefs, and passes from one to the other in succession. No time is specified for the keeping of it in any one lodge; it remains in one place only, as long as jealousy or distrust suffers it to continue there. Years are computed by nights for the public treasury only; thus they say, it has been in such or such a lodge two or three nights, meaning two or three years.

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(1) See Sir F. B. Head's Despatch to Lord Glenelg, 20th November, 1836—No. 32. Ordered to be printed by the House of Commons, 16th May, 1839.

(2) Provincial Statute, 33 Geo. 3, ch. 2, A.D. 1793. The porcelena shell is the *concha veneria*, or the *cythera* of the ancients, or *porca porcella* of the Greeks, of which two last words that of porcelain or porcelena has been formed. Lopes de Gomara, Hist. General de Ind. lib. 3. Dezery, Hist. du Brazil, ch. 8, p. 106.

Besides, these belts of wampum, furs, corn, fresh and smoked meats, serve for the general expenses incurred in the public name, and are collected in the public treasury.

XXXVIII.—*Solemn Assemblies.*

All the meetings of the Indians are accompanied with dances, songs, and feasts. These have originated in religion, and the worship of the divinity in time became profane—being applied to the usage of civil life.

Lycurgus, whose republic retained for the longest period the practice of the ancients, had commanded his people to observe them; they were modelled on those of the Cretans.

The Lacedemonians, in their public feasts, took occasion to animate their young men, and to excite their warriors to imitate the virtues of those of their ancestors who had most distinguished themselves in the field of battle, and these were animating themselves in their warlike songs, by which they became accustomed to look on war as a gain, and to encounter death under the image of pleasure; so that their enemies should not have the least idea that they could fear it.

In these the lessons of Lycurgus is still adhered to by the Indians.

Their songs always turn upon the heroic acts of their nation; they are composed in an ancient style,—so much so, that they sometimes mention things which are neither known nor comprehended by the hearer, and possibly not by themselves.

While the assembly is forming, the master of the feast, or some one in his name, sings alone, as the one among the ancients song, *Hesiod's Theogomy*. This is intended to entertain the assembly with objects consonant with the subject of the meeting. Then the orator commences the sittings, by formally asking if all the guests are present; he afterwards names the master of the feast, and declares its purport, and mentions even the minutest contents of the kittle.

To the enumeration of each article, the assembly replies by an *ho! ho!* which are cries of approbation. This seems to be an ancient custom, which has descended from the republic of Lycurgus.(1)

The master of the feast does not touch it; he causes it to be served about, or serves it himself, naming the portion destined for, and which he presents to each guest. The best is given in preference to those whom he is desirous to distinguish. In the same manner as Agamemnon gave to Ajax the choice piece of the brawn of an ox, to honour him and to recompence the valour which he had displayed in his contest with Hector.(2)

XXXIX.—*Athoron Dance.*

After the repast, the master of the feast commences the *Athoron* or *Phyric* dance with the principal guests, who, for the most part, only rise in their places, and content themselves during the song to bend their heads, their shoulders, and their knees, to keep time.

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(1) Athenee, lib. 4, p. 141.
(2) Homer's Iliad, lib. 7, v. 321.

The young men have more lively songs, and movements more rapid and more becoming their age. He who wishes to dance rises from his seat, and to the assembly he is announced by a shout of approbation; as he passes before a fire, those who are seated on mats on each side of it, keep time by a motion of their heads, and by continual gutteral or pectoral cries of *he! he!* which they double at certain times, when the measure requires it, and that with so much correctness and truth, that Europeans, the most versed in their usages, have never succeeded in equalling them. On particular occasions they have the shell of a turtle and their arms in their hand.

Some of their dances exhibit only a simple, but a fierce and noble manner of marching to the enemy, and cheerfully to meet danger; others, in the same style, are pantomimic, representing an action and the manner in which it has been done. It frequently happens that a war chief, upon his return from an expedition, describes, without omitting the most trifling circumstance, every occurrence which has happened in battle, or in the expedition and in the combats he has had to sustain, and that, in such an expressive manner that all those present spontaneously rise, dance, and represent these actions with as much facility as if they had been present, and with such admirable vivacity and precision, that they appear to bring the scene to view, so natural and expressive are they in their actions.

These cretan dances were still honoured at Rome in the time of the Cæsars.

LX.—*Satiric Dance.*

The Indians are also very fond of scoffing and of raillery, and in their sarcastic expressions they succeed wonderfully. In this satiric dance, the dancer takes by the hand his butt, leads him into the middle of the assembly, to which no resistence is offered; the dancer continues to dance, and whether in dancing or breaking off at times, satirizes the sufferer, who receives the satire without a word. Then follows a succession of *bons mots*, a surprising abundance of spiritual irony, of lively conceit, of biting sarcasm, and of ingenious turns of expression, truly attic, and which astonish; each *bon mot* excites a roar of laughter among the assembly, and after having been turned into ridicule; to complete the comedy, the dancer covers the head of his patient with ashes, of which a good part is bestowed on the laughing women, who are the nearest to the mat.

Never does a young man get angry at these injurious epithets and railleries; he waits for his turn, and takes an ample revenge. It is probably from this custom, which in former times the satires and corybantes and curetes, Sybilian priests, that still exist among the Indians of America, that the name of satire has been given to biting and sarcastic pieces, both in prose and in verse.

Lycurgus made a law respecting this satiric dance among his people, to teach them to joke without malevolence and to support raillery without anger.(1)

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(1) Athenee, lib. 14, p. 630. Idem· lib. 14, p. 629. Plutarch, in Licurgus. Lafitau Moeurs des Sauvages Americains comparês aux Moeurs des premiers temps.

LXI.—*The Calumet.*

There is nothing among the Indians more mysterious and more venerated than this *calumet* or smoking pipe. The royal sceptre of European kings is by far less honoured. It is looked upon almost as the god of war and peace—the arbiter of life and death; to have it and to present it, is sufficient to march boldly in the midst of the enemy. It is composed of an angular polished red stone; a piece of hard wood, pierced in its centre from one end to the other, is fixed to it, and ornamented with the brilliant plumage of wild birds of Canada. The Indians look upon it as the sun's pipe. In all their ceremonies they present it to the sun, as if they were inviting him to smoke, when they require any favovrs from heaven. They scruple to bathe, to eat new fruit, to undertake any affair of importance, before they have daneed the calumet dance.

XLII.—*Of the Calumet Dance.*

This celebrated dance takes place only on the most important occasions, as in their preparatory assemblies, to undertake a great war, to secure peace, to honour a nation invited to join in the war, or as a mark of respect to some distinguished individual; on the occasion of public thanks offered to the master of life, in public rejoicings, &c.

I shall endeavour to describe this dance, having frequently been invited, and assisted in it, says one of the chief factors of the Hudson's Bay Company.(1)

The people begin by causing a new lodge to be erected, commonly upon an eminence, into which, after the brush is laid down to serve as flooring, a space of six feet by three is left in the centre, where clean sand is laid about four inches thick, which is confined by small logs.

No women are permitted to have any hand in these preparations, which are made by young men.

Upon this hearth or sand is laid a few live coals, suffieient to light a pipe and to burn sweet scented herbs, during the subsequent ceremony. One of the most respectable old men, takes the calumet, which is previously filled with tobacco mixed with odoriferous weed, and passes it three times over this smoke of the scented herbs, which is kept constantly burning upon the coals. Then, standing, he presents the pipe towards the four cardinal points, to heaven and to the earth, addressing to each a few words by way of prayer, previously calling upon the Great Spirit, the master of life, thanking him for having preserved his friends, their families, and himself, and all that was dear to him, during the past winter; at the same time, imploring his future kindness, by granting to all of them long life and an abundance of buffaloes, moors, deers, &c., on their lands.

This speech or prayer lasts half an hour, and is joined in by all with serious and respectful attention. When it is finished, the calumet is again passed over the burning grass; after which it is lit; the old man drawing a few whifs, sends it round, each following his example.

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(1) John Clarke, Esq. of Montreal. This description corroborates that of Lafitau, in its most minute circumstances.

On the most solemn occasions, a large bark mat, painted in various colours, is spread in the middle of a public square, on which is placed the favourite god of the master of the feast: for each one has his particular god, which is called *manitou.* It is either a serpent, a bird, or even a stone, of which they have dreamed, and in which they place a great confidence, for the success of war, of their hunt, of their fishing, &c. Near and at the right of the *manitou*, the calumet is placed, in honour of the master of the feast; each person, upon his arrival, salutes the *manitou* by breathing and taking a few whifs from his mouth, as if he presented incense.

The person commencing the dance respectfully takes up the *calumet* from two small wooden forks planted near the fire, to protect it from touching the ground, and dances in time to the air of the most admired songs or hymns, sung by beautiful voices of men and women, honourably placed under the branches of trees or shrubs.

At a certain moment the dancer presents the *calumet* to the sun, as if he were desirous that this great luminary should smoke from it, and afterwards the master of the feast presents it to the nation invited; in these songs the word *alleluiah* is frequently pronounced.(1)

XLIII.—*The Calumet—Its similarity with the Caduceus of the Egyptians.*

The *calumet* is the most appropriate representation of the *caduceus* of Mercury.

Mercury was a foreign divinity with the Greeks; they received it from the Egyptians. In the hyerogliphic religion of the ancients, the connection of Jupiter and Mercury with mankind was a mystery, representing the supreme being, who imposed upon them the obligation of respecting each other, and with strangers the duties of civil society; to hold the law of nations sacred; to respect in the persons of those who, in the spirit of peace, place themselves in their hands, not to injure them, and particularly to keep inviolable the faith they have promised.

The *caduceus,* placed in the hands of strangers, or of messengers, was their safeguard, as the *calumet* is among the American Indians.

The *calumet* is of the same length as the *caduceus*; like it, it is always ornamented with feathers. The *calumet* has whole wings attached to it, the *caduceus* has two extended wings of birds represented at its top; the only thing wanting, is the serpents linked around the *caduceus*; but the *calumet* has preserved the portative altar, containing the sacred fire, matter of the sacrifices offered to the ancient gods of an idolatrous world.

XLIV.—*War Pipe.*

As there are *calumets* of peace, there are also *calumets* for war; it is prudent to become able to distinguish them; the want of information in this respect might become fatal.

The Indians would not dare to violate directly the sacred faith due to the *calu-*

(1) Lescarbot.

met. but sometimes they try to deceive those against whom they meditate some acts of treason, so as to throw on them the responsibility of their fate.

An example will elucidate this. A French officer, although well acquainted with the customs of the Indians, nearly fell a victim to their deceit. The Sioux, amongst whom he was, were wishing to get rid of a few Indians, who had come to the French Commandant; had they succeeded, all the French under his orders, and he himself, would have been massacred with them.

They feigned to come towards him under the pretext of some affairs, and presented to the officer twelve *calumets*; the number of these *calumets* seemed to him suspicious: he postponed giving his answer, and on his return to his fort consulted a friendly Indian, who made him remark that there was one who had not, like the others, a tress of hair plaited around it. That upon its handle the figure of a serpent surounding it, was engraved. He informed the French officer that this was a *calumet* of war, and had he taken it, his destruction, that of the Indians he had received, and that of all his men was certain. And he would have been accused of having declared war by taking that *calumet*.

XLV.—*Commerce.*

The *calumet* is not only a symbol of war and peace, but it is also that of commerce, and a protection on the roads which were particularly placed under the protection of that god.

The Indian natives trade one with the other; theirs has that trait of resemblance with the commerce of the ancient Asiatic nations, that it is done by way of exchange or barter; the matter of the exchange is wampum, furs, tobacco, works ornamented with moose or porcupine hair, smoked meat, *calumets*, and whatever is of common use in their human but savage life. Feasts and dances render their commerce with the other nations rather an agreeable amusement than a laborious task, as war is looked upon as the most noble exercise; that of hunting and fishing as the most ordinary, though the most necessary, and which procure to the Indians the flesh on which they live, the garments with which they clothe themselves, and the furs, the principal objects of their trade.

XLIV.—*Distinction of Families—Laws of Marriage.*

The Romans had their patricians, their plebeians, and their slaves; the Saxons, their earls, their ceorls, and their slaves; the French, their nobles, their roturiers, and their serfs. So also have the Indians their three distinctive orders: the *ic-sendouans*, or noble families; the *ayongoueba*, or commonalty; and the *ennas-troua*, or slaves—these are war prisoners and their children, whose lives have been spared.

The noble families can only intermarry among themselves, especially the Algonquins.

The Meridional Indians and the Algonquins are very scrupulous on this; but the Iroquois point to more substantial advantages, either in the merit of the person, or in the wealth and strength of the lover.

The qualities looked for in the man is, bravery and intrepidity as a warrior, skill

as a hunter, and sobriety. In the girl, good reputation, industry, and an amiable character.

The marriage is sacred amongst them ; every agreement to the contrary, as well as the plurality of wives, are considered contrary to the good order of society.

XLVII.—*Degrees of Relationship.*

The Hurons and Iroquois are very scrupulous as to the degrees of relationship and consanguinity in respect to marriage; they follow the same rules as the Jews.(1)

As the population and the number of families constitute the principal force of the nation, the laws had an eye to promote both. As with the Jews, if a brother died without issue, his brother was obliged to take the widow as his wife, and to prevent the falling of the house and name of his brother.

Amongst the Indians, as it was amongst the Jews, the brother who rejected his brother's wife was exposed to all the outrages which the person rejected was pleased to heap upon him. The Jew was publicly slapped in the face with his sister's shoe, and the Indian had his head covered with ashes, as has been observed before.

XLVIII.—*Marriage Solemnities.*

Among the Romans, there were three kinds of marriages—coamption, conferreation, and cohabitation. Of these the two first were legitimate, and they exist among the Indians; the third is looked upon more as a species of concubinage than a legal marriage, for the validity of which a manifestation of consent must at least be exhibited, as in Scotland, where the Roman law has been preserved more than in the other countries of Europe.

The present made by the husband in the lodge of his intended wife, is a true coamption by which he purchases in some degree the alliance of the lodge.

XLIX.—*Celebration of Marriage.*

So soon as the marriage is settled, the relatives of the husband send a present to the lodge of the wife, consisting of belts of wampum and some common utensils, which are appropriated to the relatives of the wife, from whom no dowery is demanded, but only the acceptance of the husband offered to her; the lodge of the wife sends a present by mere courtesy, which being accepted, the contract is executed.

Then the intended husband goes and seats himself near his intended wife, who offers him a dish of *sagamite*.(2) Which ceremony amongst the Romans was considered as belonging to religion. The nuptial ceremony ends with festivities and dances.

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(1) Deuteronomy, ch. xxiii. & xxv. v. 5.
(2) This dish is made with Indian corn, flour and milk, or water.

L.—*Divorce.*

As with the other nations of the world, divorce happens, and is about the same both in its causes and effects.

The bad temper of one or both of the parties, their want of kindness towards each other, their obstinacy in following bad advices from others, by whom they allow themselves to be governed; jealousy, infidelity, which is often mutual, furnish occasion for a separation.

The Iroquois adopt divorce without difficulty, especially since their acquaintance with Europeans. If they have children, the husband claims them after the divorce, pretending a right particularly to the boys.

But the children generally appear to be alive to the affront received by their mother from their father, and do not leave her, but become her more attached and faithful protectors.

LI.—*Death.*

At the approach of death the piety of the Indians is strikingly exhibited, like that of mankind of all ages; but their foolish fear of not being able to close the eyes and mouth of the expiring sufferer renders their piety a cruelty.

LII.—*Mourning.*

Mourning has its laws consecrated by immemorial usage, bearing the character of the most venerable antiquity.

After the first days, during which the body is exposed in the lodge, which is a time of constant weeping, ten days full mourning follows; then a year or two of more moderate expansion of their grief.

The laws of full mourning are very strictly enforced, during the first ten days, after having had their hair cut off; they smear their faces with earth or coal; they remain fixed on their mat with their faces turned to the earth; they neither look at, nor speak to any person, unless from necessity, and then in an under tone of voice; they conceive themselves relieved from all duties of civility with respect to those who visit them. They eat only of cold meats; they do not come near the fire, even in winter, and do not go out at night.

The funeral observances not being the same for all persons, the laws of mourning also are not the same for all.

The more closely connected are the husband and wife. When these have lived happily together, the relatives of the deceased leave the rules of the mourning to those interested, who moderate it by festivities and by presents, until the expiration of the mourning, when a last present declares the perfect freedom of the survivor to take another partner.

This is performed with great ceremony, in full council; the widow is dressed in her best habiliments; her hair, which mourning required to be unbound, is bound up and arranged, and all becomes merriment.

But if the relatives have had reason to be dissatisfied with the survivor, they give him notice, by one solitary present that he is disengaged.

Such is a brief outline of the laws, religion, and customs of the North American Indians, particularly of the Iroquois, Hurons and Esquimaux. But with a fainter degree of civilization, they are the same amongst the Killistenons, Crees, and all the tribes covering the interior, from Lake Superior to the Pacific Ocean.(1)

Striking facts show that it is to the interior of Canada, that the principles of the laws of the Celtic and Germanic nations, of the Franks and of the Saxons, have taken their last refuge; that is, the law of retaliation and that of compensation for every crime, even for taking away life.

LIII.—*Conclusion.*

About the time Mr. De Champlain took the direction of the colony, the Jesuits attempted to carry the light of the Gospel among the nations, in the interior of their forests.

LIV.—*Colonization of Canada—Free Trade in the Interior.*

Then begun these famous missions which extended the French Empire from the ice of Hudson's Bay to the Mexican Gulf.

The discovery of the Ohio, the Mississippi, Lake Superior, Lac des Bois, River Bourbon, the interior of James Bay, the Rocky Mountains, was the result of their apostolical travels. River Columbia itself is indicated in their charts.(2)

When the first commercial settlements were made, the country was populous, the forests were abounding with buffaloes, stags, elks, bears, foxes, martins, wild cats, large grey, and other squirrels, hares, rabbits, &c. Among the birds may be reckoned eagles, vultures, owls, pelicans, swans, cormorants, cranes, pheasants, partridges, geese, ducks, and numerous species of singing birds; and the rivers, marshes, and lakes swarmed with fish, otters, beavers, &c. But those whose skins were precious in a commercial point of view, soon became scarce in the vicinity of the establishments.

The Indians, to procure the necessary supply, were encouraged to penetrate into the forests, where they were generally accompanied by some of the Canadians, who soon became so attached to the Indian mode of living that they forgot their former habits, their native homes, and even their families.

Thus habituated to savage manners, they became both hunters and traders, and hence derived their appellation of *Coureurs des bois.*

Their indifference about amassing property, and the pleasure of living free from all restraint, soon brought on a licentiousness of manners and conduct, which could not long escape the vigilant observation of the missionaries, who had much reason to complain of their being a disgrace to the Christian religion, and that

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(1) See M'Kenzie's Voyages from Montreal, on the River St. Lawrence, through the Continent of North America, in the years 1789 & 1793. London edition, 1801. This is more particularly elucidated by reports from the chief factors of the Hudson's Bay Company, to the Company, previous to Sir Alexander M'Kenzie's publication. We are indebted to John Clarke, Esq. now residing in Montreal, for the perusal of some of these reports.

(2) See Mr Chauteaubriand's Souvenir's d'Amerique.

they were bringing it into disrepute with those of the nations who had become converts to it. Thus they were defeating the great object to which those pious men had devoted their lives.

The Jesuits, therefore, exerted their influence to procure the suppression of these people, and according to their desire no one was allowed to go in the interior and trade with the Indians, without a license from Government.

At first these permissions were granted only to those whose character was such as could give no alarm to the zeal of the missionaries; but they were afterwards bestowed as rewards of services on officers and their widows, who were allowed to sell them to merchants, who employed the *Coureurs des bois* as their agents.

These men soon gave sufficient cause for the renewal of former complaints, and the remedy proved in fact worse than the disease.

At length military posts were established at the confluence of the different large lakes, which in a great measure checked the evil consequences of the improper conduct of these foresters, and at the same time protected the trade.

A number of able and respectable men retired from the army, prosecuted the trade in person, under the name of commandants, with great order and regularity; and these persons and the missionaries having combined their views, at the same time secured the respect of the natives and the obedience of the people necessarily employed in the laborious part of the trade.

Good regulations were introduced and enforced, amongst others that of not selling spirituous liquors to the natives, which was for some time observed with all the respect due to the religion by which it was sanctioned, and whose severest censures followed violation; illicit connection with Indian women was also submitted to the same ecclesiastical severities.

But the casuistry of the trade imagined a way to gratify the Indians with their favourite cordial, and fraudulently take possession of their furs, by giving, instead of selling, without incurring the penalties of the church, which, however, was inflexible.

LV.—*Death of the Missionaries.*

The missionaries had brought the light of the gospel at once to the distance of twenty-five hundred miles, from the civilized parts of the colonies, without any other resource than their zeal; they soon became dependant on the natives. The Indians, like civilized men, measure their respect to individuals by the weight of their gold; they lost the veneration they at first had for these priests, and the precepts and doctrines of their religion were soon obscured by the clouds of ignorance that darkened the human mind in those distant regions. The undertaking failed, and the Jesuits disappeared. Père Masse died of fatigue, and was buried at Syllery, near Quebec, in 1646.

Père Annoue was frozen to death between Three Rivers and Sorel, and was buried at Three Rivers the same year.

P. Jogues, who had previously been martyrized by the Iroquois, was by one of them murdered with an axe, on his return from France, at Sault Ste. Marie, the

17th October, 1646. Père Daniel was martyrised at the same place about the same time.

Pères Brebeuf and Lalement were burned on the borders of Lake Superior, the 16th of March, 1648. Their martyrdom began at the same time: P. Brebeuf was put over the flames the first, and continued to instruct the Indians in the principles of the Christian religion; after having had the knuckles of both his hands and feet torn off, the Iroquois placed a string of red hot axes around his neck, and with irony addressed him. "Father," said they, "you have told us that the more we suffer in this world, the less we suffer in the other; it is for the love we have for you that we do all this." In that situation they brought before him Père Lalement, whose body was enveloped in dried bark, and set fire to it; he died only on the 17th.

P. Garnier was shot the 5th or 6th of December, 1649.

P. Chabanel was murdered about the same time. All these were the acts of the Iroquois.

The Hurons were accused of having been the voluntary cause of the death of Père Daniel, a Recollet, by abandoning him alone in a bark canoe on the rapids of Rivière des Prairie, where he was drowned in 1625. It is on account of that death that the place has been named, and is still called Sault au Recollet.

LVI.—*Sir Alexander M'Kenzie's Observations.*

"If sufferings and hardships in the prosecution of the great work which they had undertaken," says Sir Alexander M'Kenzie, "deserved applause and admiration, they had an undoubted right to be admired and applauded; they spared no labour, and they avoided no danger in the execution of their important office; and it is seriously to be lamented that their pious endeavours did not meet with the success which they deserved; for there is hardly a trace to be found, beyond the cultivated parts, of their meritorious functions.

"The whole of their long route I have often travelled, and the recollection of such a people as the missionaries having been there, was confined to a few superannuated Canadians, who had not left that country since 1763, who particularly mentioned the death of some, and the distressing situation of them all."(1)

For some time after the conquest, the trade in the interior was suspended.

In 1766 a company of mercantile adventurers again appeared in the country. The trade by degrees began to spread over the different parts to which it had been carried by the French, though at a great risk, for the natives had been led to entertain hostile dispositions towards the English, from their having been in alliance with the Iroquois, their mortal enemies.

The commencement of the operations of this company was marked by the conflagration of the establishment; the French traders had thirty miles to the eastward of Grand Portage; upon its ruins the entrepot of the northwest trade was established.

This trade being carried on in a very distant country, was out of the reach of

(1) Sir Alexander M'Kenzie's Journal, ibid.

legal restraint; a free scope was given to all ways and means, however criminal, to obtain advantage.

Besides, the servants were taught to consider the commands of their employers, however wrong, as binding on them; in this they were supported by the laws of the Indians, making the responsibility rest on the principal who directed them. Soon the servants became insubordinate, and by drinking, quarrelling amongst themselves and with the Indians along the routes, they made the traders loose the good opinion of the natives, who formed the resolution to destroy the intruders, and nothing but the greatest calamity which befell the Indians, could have saved the traders and their men from destruction.

The small pox had never visited these regions; it suddenly appeared and spread its destructive and desolating power, as fire consumes the dry grass of the field; by its pestilential breath whole tribes fell victims to it: many, with the view of disappointing the plague of its prey, terminated their own existence.

The country being thus depopulated, the traders became confined to two parties, who formed a junction of interests, in 1784, under the name of the Northwest Company, divided in sixteen shares, to be under the management of Messieurs Benjamin and Joseph Frobisher and Simon M'Tavish.

Some of the ancient traders(1) not satisfied with the shares allotted to them, others having been left out of the new company,(2) being joined by Messieurs Gregory, M'Leod, and Alexander M'Kenzie,(3) formed a new company.

Then ensued the severest struggle ever known in that part of the world. Murder, arson, felonies of every cast and form, became the most active agents employed by both companies; but such unnatural conflicts could not last; both companies joined their interests in July, 1787, and formed one company under the name of the Northwest Company.

This was the signal of an open war with the Hudson's Bay Company, which terminated in 1821, by the junction of the two companies.

To that period the natives were decreasing in number, which in a great measure was attributed to the use of ardent spirits, more profusely distributed amongst them whilst the traders were at war; but since the union, beneficial changes have taken place, spirituous liquors are no more allowed to be introduced into the country; hence no murders, few quarrels, matrimonial unions more respected, and to these moral advantages an admirable regulation has been made and is enforced. Large tracts of the Indian forests are laid out, on which for seven years none are allowed to hunt, except for food and clothing; during that time the animals, whose furs are precious, encrease and multiply.

To these temporal benefits may be added spiritual blessings. To the influence of trade, the influence of religion is joined. Missions have been established almost all over the country; they were at first on the Hudson's Bay territory in

(1) Peter Pond.
(3) Mr. Pangman.
(3) Then a clerk, and afterwards deservedly knighted.

1818 by Bishop Plessis and Messieurs H. R. Provancher and Dumoulin wer sent to Red River; on the 12th May, 1822 Mr. Provancher has been consecrated Bishop, and is the Superintendant of these missions, where the Indians resort after the chase is over.

The Indians seem to be sensible to these advantages, and the Governor of the Hudson's Bay territory, Sir George Simpson, the chief factors and their clerks, have received public testimonies of the gratitude of the missionaries, for the assistance they have afforded them in their undertaking.(1)

In 1813 the celebrated chief Tecumseh fell, bravely defending British interests in Upper Canada. His allies, the Indian nations, issued forth from their forests, and were both dreaded and respected. Tecumseh's Influence equalled his great skill and bravery. When General Proctor intimated to him his intention of retreating before the American army, Tecumseh told him that he might prepare himself for the worst consequences, should he do so; that the great wampum belt of friendship and alliance binding the hands of the King of England and of the Indian nations, would be cut in the centre of the heart, and that the hands at each end of it would be eternally separated.(2)

The threat had a partial effect, but the fate of Tecumseh and of General Proctor were decided: the former fell gloriously fighting the enemy of the British Empire, and the latter had to defend his military character before a general court martial. Since that period the Indians, whose forests border on the great lakes, have abandoned large tracts of their lands to government for the whites. The following speech of Sir Francis Bond Head indicates that they are not yet done ceding their lands:—

LVII.—*Sir Francis Bond Head's Speech, as reported to the Secretary of State for the Colonies.*

My Children,

Seventy snow seasons have now passed away since we met in council at the crooked place (Niagara,) at which time and place your great father the king and the Indians of North America tied their hands together by the wampum of friendship.

Since that period various circumstances have occurred to separate from your great father many of his red children; and as an unavoidable increase of white population, as well as the progress of cultivation, have had the natural effect of impoverishing your hunting grounds, it has become necessary that new arrangements should be entered into for the purpose of protecting you from the encroachments of the whites.

In all parts of the world farmers seek for uncultivated land as eagerly as you, my red children, hunt in your great forest for game. If you would cultivate your

(1) See a notice of the Missions of the Diocese of Quebec, printed at Quebec, 1839, by Frechette & Co., No. 8, Mountain Street.

(2) In the centre of the belt was the figure of a heart worked in with wampum, and at each end that of a hand.

land, it would then be considered your own property in the same way as your dogs are considered among yourselves to belong to those who have reared them; but uncultivated land is like wild animals, and your great father, who has hitherto protected you, has now great difficulty in securing it for you from the whites, who are hunting to cultivate it.

Under these circumstances, I have been obliged to consider what is best to be done for the red children of the forest, and I now tell you my thoughts. It appears that these islands, in which we are now assembled in council, are, as well as all those on the north shore of Lake Huron, alike claimed by the English, the Ottawas, and the Chippewas. I consider that, from their facilities, and from their being surrounded by innumerable fishing islands, they might be made a most desirable place of residence for many Indians who wish to be civilized, as well as to be totally separated from the whites; and I now tell you that your great father will withdraw his claim to these islands, and allow them to be applied for that purpose.

Are you, therefore, the Ottawas and Chippewas, willing to relinquish your respective claims to these islands, and make the property (under your great father's controul,) of all Indians whom he shall allow to reside on them? If so, affix your marks to this my proposal.

(Signed) F. B. HEAD.

(Signed) J. B. ASSEKINACK, *Mosuweko.*
MOKOMMINOCK, *Kewuckance.*
WAWARPHACK, *Shawenausaway.*
KIMOWM, *Espaniole.*
KITCHEMOKOSNOU, *Snake.*
PEGA ATA WICH, *Pantauseway.*
PAIMANSIGAI, *Parmangumeshcum.*
NAIMAWMUTTEBE, *Wagaumauguin.*

Manatowaiming, 9th August, 1836.

LVIII.—*Statistical Tables of the Indian Tribes.*

NUMERICAL STATEMENT OF THE INDIANS IN NORTH AMERICA.

The remnants of the once numerous tribe of the Souriquois or Micmacs, the aboriginal inhabitants of the Lower Provinces, are scattered over New Brunswick, Nova Scotia, Prince Edward's Island, and the Island of Cape Breton; they do not exceed 200 individuals; they have preserved a roaming disposition, and, from their habits of intemperance, their numbers are rapidly decreasing.(1)

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(1) See Sir C. A. Fitzroy's Despatch to Lord Glenelg, 8th October, 1838.

IN LOWER CANADA.

At Sault St. Louis, the Iroquis number . .	932
At St. Regis, ...	381
Lake of the Two Mountains, . . .	300
Hurons at Lorette, ...	219
The Algonquins at Three Rivers, . . .	11
At St. Francis, ...	298
Abenakis at St. Francis, ...	330
Becancour, ...	119
Nepisingues at Lake of the Two Mountains, .	264
Têtes de Boules, River St. Maurice, . .	28
Malecites, Isle Verte, ...	105
Restigouche and Gaspé, Micmacs, . .	430
Wandering Malecites, Micmacs, and others, .	98

Making a total of (men 1058,) (women 1158,) (children 1359,) 3575 souls. (1)

INDIANS SETTLED WITHIN THE LIMITS OF THE PROVINCE OF UPPER CANADA, AS MENTIONED IN SIR FRANCIS BOND HEAD'S DESPATCH TO LORD GLENELG IBID.

The Mohawks of the Bay of Quinté.
Messessahgas of Gananoque, Kingston and Bay of Quinté.
Messessahgas, of the Rice Lakes.
Chippewas, of Matchedash Bay.
Chippewas, of Lake Simcoe.
Messessahgas, of River Credit.
The Six Nations, and other tribes, on the Grand River.
Chippewas, of Sahguenay.
Chippewas, of Thames.
The Delawares, (known by the name of Moravians,) of the Thames.
Chippewas, of Chenail Ecarté and north branch of Bear Creek.
Chippewas, of the St. Clair.
Wyandatts.
Chippewas, of Pointe Pele and River Rascum. They number about 5600 souls.
The Chippewas, Munsees, and Moravian Delawares number 945 souls, viz :—

Chippewas, ...	401
Munsees, ...	242
Moravians, ...	302

At Coldwater, and the Narrows of Lake Simcoe, there are two tribes of Chippewas, about 500.

The Chippewas, who resort annually to the borders of Lake Huron, between

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(1) See Sir F. B. Head's Despatch to Lord Glenelg, 13th July, 1837.

Penetangueshine and Sault St. Mary, within the province, may be computed at about 1200.

In addition to those, are vast numbers, scattered through the forests between Lake Huron and the Hudson's Bay Territory, on the north side of Lake Superior, and extending along the boundery line betwixt her Majesty's territory and that of the United States. These tribes are wild and uncultivated; their number has never been ascertained.

STATISTICAL TABLE OF THE INDIANS ON THE HUDSON'S BAY TERRITORY, FROM FOND DU LAC SUPERIOR.

Chippewa Ann, Athabaska, ...	17000
Killistinons, Athabaska River, ...	159
English River, ...	1691
Lac Ouinipique, ...	377
Nipigon, ...	820
Swampees, Rat River, ...	310
Assiniboines and Black Feet mixed, Fort des Prairies,	64360
Sauteux, Fort Dauphin, ...	67
Crees, Sauteux, and Assiniboines, mixed Sauteux :—	
Upper Red River, ...	4870
Lower Red River, ...	600
Lac Lapluie, ...	439
Fond du Lac Superior, . . .	3177
Mille Lacs, ...	232
Lac des Chiens, ...	147
Total, . .	94249 souls.

This statement is taken from the above mentioned reports of the chief factors of the Hudson's Bay Company, the communication of which we owe to John Clarke, Esquire, now of Montreal, one of them.

CIVIL CODE.

CHAPTER I.

OF PERSONS.

SECTION I.—INTRODUCTION.—*I. Definition of the word. II. How considered by the Custom. III. Marriage. IV. Status of Marriage. V. Constitution of Marriage. VI. Rights and Effects of Marriage. VII. Divorce. VIII. Foreign Divorces. IX. Age of Majority. X. Emancipation. XI. Tutorship. XII. Curatorship.*

SECTION II.—ALIENS.—*I. Aliens. II. Aliens by the Laws of Lower and Upper Canada, under the French Kings. III. Aliens by the Laws of Canada by Provincial Statutes, in both Provinces. IV. Statutes and their Contents by Articles. V. Judicial Decisions. VI. What is an Alien. Status and Consequences. VII. Aliens by the Laws of England.*

SECTION III.—NATIONAL DOMICIL.—*I. Definition. II. Domicil of Nativity. III. Of an Illegitimate Child. IV. Of Minors and of persons under the authority of others. V. Of Married Women. VI. Of a Married Man having his Family in one place and doing business in another.*

SECTION IV.—*I. Capacity of Persons. II. Governed by the Laws of his Domicil. III. Age. IV. Married Women. V. Effect of the change of Domicil in case of Community. VI. Decision of the English Courts. Lord Eldon's Opinion. VII. Rules adopted by the Scotch Jurists. VIII. Decisions of the Supreme Court of Louisiana.*

SECTION V.—*I. Guardianship by the Roman Law. II. Property of the Ward. III. Guardianship by the Laws of England—Opinion of Lord Eldon. IV. Executors and Administrators by the Laws of Nations.*

INTRODUCTION.

IN almost every system of jurisprudence, the civil law holds the first and most predominant place; it is the great source from whence they have been derived, and they still recognize the influence of its principles and doctrines.(1)

Until the constitution of the French code civil, the Roman law prevailed in numerous provinces of France as the acknowledged law, which the judicial tribu-

(1) Burge's Commentaries on Colonial and Foreign Laws, Vol. I. page 16.

nals were bound to adopt, except so far as it was at variance with any of the ordinances of the kings of France. These provinces were called *Provinces du droit ecrit*, but there were other provinces which did not recognize it as having the force of law, but had been governed by customs—those customs were reduced to writing by the authority of the kings of France; that of Paris under Louis XII. in 1510.

The Jurists of France, in making the distinction between these different systems of jurisprudence, say, "The Roman law is the common law of France, and it is an unquestionable maxim that in all cases wherein the custom did not pronounce, they were to be decided by the Roman law, and that before the custom of Paris could be extended to the other customs, it was necessary to ascertain if the question was not decided by the Roman law."(1)

The customs of France were abolished by the seventh article of the law, 30 Nentose, the 12th of the Republic.

The code civil has been formed partly by the dispositions of the customs and partly on those of the civil law.

The eminent jurists who assisted in this great work, thus happily express the union of the two systems: "We have made, (if we are allowed to express ourselves in these terms,) we have made a compact between the written law and the customs as often as it has been possible to conciliate their dispositions, or to modify some of them by the others, without breaking the unity of system.(2)

In the compilation of the code, amongst the conflicting opinions on the text of the written law and the customs, the authority of Pothier was almost universally followed; he was their principal guide; in very few instances only they dissented from his opinion. On the celebrated question, whether money paid under an ignorance of the law could be recovered back, they adopted that of Daguesseau.

More than three fourths of the civil code has been literally extracted from Pothier's treatises, without mentioning his name, as he formed his from those of Domat, and as the digest has been composed from Papinien, Paul, and Ulpie.(3)

It appears that these modern lawgivers were either afraid or ashamed of their names or their authors. Strong men have weak parts.

SECTION I.—PERSONS.

I.—*Definition.*

ART. 1.—The difference of sexes, the various situations every human being is called to fill in the family of mankind, have caused essential distinctions to be established in the social, political, and civil rights of every one.(4) And the law

(1) Loiseau, lib. 2, ch. 6, No. 5. Ferriere, Histoire du Droit Romain, Tom. 1, p. 336.
(2) Discours Preliminaire, par Messieurs Portalis, Tronchet, Preamieu, et Maleville, du projet du Code Civil, page 33.
(3) See Burge's Foreign and Colonial Law, Vol. I. pp. 12, 13.
(4) L. 4, § 1 ff. de Stat. hom. Ibid L. 20. Domat. Loix Civiles des Personnes, Tit. 2, sec. 1, &c.

has modified its language accordingly. In jurisprudence, under the word man, every human being is comprehended, whether a member or a stranger to society, whatever be his situation, capacity, sex, or age. And a person is a man, considered with reference to the rank he holds in society, with all the rights his situation entitles him to, and subject to all the duties that situation imposes upon him: thus a man sentenced to a capital punishment inflicting civil death, still lives as a man, but the civil person is dead, being no more a member of society.

II.—*How considered by the Custom,*

ART. 2.—The custom considers persons in relation to property only; the difference which existed in France between noble families and burgesses has not been introduced in Canada.(1) The Roman law, and the international law of nations, take a wider view.

III.—*Marriage.*

ART. 3.—Marriage is the first link of that long chain of ties which binds the human family together. In Lower Canada, and in all Catholic countries, it is treated as a sacrament, and also as a civil contract; in England, where the holiness of the matrimonial state is left to the ecclesiastical law, the temporal courts have no jurisdiction to consider unlawful marriages as a sin, but merely as a civil inconvenience.(2)

IV.—*Status of Marriage.*

ART. 4.—The status of marriage is *Juris Gentium.* Like other contracts, it rests on the consent of parties able and willing to contract; but different from them, it is also a matter of municipal regulations; it confers the status of legitimacy on children; it gives rise to the relations of consanguinity and affinity, and it cannot be dissolved by mutual consent.

V.—*Constitution of Marriage.*

ART. 5.—As to the constitution of marriage, if celebrated according to the law of the place, *lex loci contractus,* it must be valid everywhere, even if made in a savage or barbarous country.(3)

VI.—*Rights and Effects of Marriage.*

ART. 6.—Not only the contract of marriage, properly celebrated in a place, is valid in all other places, but the rights and effects of the marriage contract, according to the laws of the place where celebrated, are also to be held equally in force everywhere.(4)

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(1) See an abstract of the Custom of Paris, made by Canadian gentlemen, by order of the Honourable Guy Carleton, Esquire, Governor in Chief, of Canada, published in London in 1772.
(2) Blackstone, Vol. I. p. 433. Story conflict of laws, pp. 101, 102.
(3) Ibid.
(4) Rex vs. Lally. Case of Dalrymple vs. Dalrymple. 2 Hagg. Consist. R. 54. Bouhier Coutume de Bourg: ch. 21 § 11, page 463. Huberus, lib. 1, tit. 3, § 9. Story conflict of laws, page 147.

VII.—*Divorce.*

ART. 7.—The laws of Lower Ganada do not admit of a divorce; the utmost to be obtained is a separation of property and habitation; this even is considered to be a violent remedy, introduced by the natural obligation to choose the least of two evils,—but it only relaxes the chain, it does not break it.(1)

By the laws of England, marriage is also indissoluble, except by a special Act of Parliament.(2)

VIII.—*Foreign Divorces.*

ART. 8.—In Scotland, divorce may be had through the instrumentality of a judicial process, a decree of adultery and much less.(3)

It is now deemed by all modern nations to be within the competency of legislation to provide for the dissolution of marriage by enactments. In France a divorce may be judicially obtained on mutual and persevering consent.(4) In the United States of America, although there is a diversity of practice, it exists. Divorce is grantable by judicial tribunals. It is also the law in Holland, in Pussia, in Protestant States of Germany, in Denmark and Russia.(5) By the Roman law unbounded license is allowed to divorces.(6) By the laws of the Jews divorce was admitted, but obtained with difficulty.(7)

IX.—*Age of Majority.*

ART. 9.—By the custom, the age of majority is, as by the Roman law, at twenty-five, but a provincial ordinance has fixed it for both sexes at twenty-one.(8)

X.—*Emancipation.*

ART. 10.—By marriage duly solemnized, minors are emancipated; that is, they are authorised to dispose of their personal property, as also of the interest, income, and utility their real property may produce. By the advice of a family, council of seven relatives, or friends for want of relatives, sanctioned by the judge, emancipation is also obtained.(9)

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(1) Guyot Dict. Jurisp. Verbo separation decorps.
(2) See Blackstone's Commentaries, Vol. I. pp. 440, 441.
(3) Ferguson on Marriage and Divorce.
(4) Code Civil des Francais.
(5) See Story Conflict of Laws. from page 168 to 192.
(6) Nouvelles, ch. 8, Cod. lib. 5. See Pothier Traité du Marriage.
(7) See Supra, Vol. I. page 43.
(8) 22d Geo. III. 16th February, 1780.
(9) Custom, Art. 239.

XI.—*Tutorship.*

ART. 11.—The Roman or natural tutorship is not admitted; the dative, or by election, is the only one in force.(1)

XII.—*Curatorship.*

ART. 12.—Curators to insane persons, or others labouring under other disabilities, or absence, may be appointed in the same way.(2)

SECTION II.—ALIENS.

I.—*Aliens.*

ART. 13.—The jurisprudence of every State makes a distinction between its natural born subjects and those who are aliens, by withholding from the latter certain rights and privileges enjoyed by the former. The jealous reserve with which Rome granted the *Jus Civitatis*, the right of citizenship, has been regarded in the same light and jealous spirit by almost every State which succeeded her.(3)

II.—*Aliens by the Laws of Canada, under the French Kings*

ART. 14.—Previous to the Conquest, the French laws regulated the capacity of the subject. By them strangers were capable of performing all acts allowed by the laws of nations; in general they could enter into all contracts authorised by that law; they might give and receive *inter vivos*, but they could neither receive nor dispose by will; they lived free, but died slaves, *serfs*. The advantage of making acts, permitted by the civil law, was interdicted to them; they could not transmit their succession; but the king, by letters of naturalization, could relieve an alien from these disabilities.(4) Under the present government an Act of the Imperial Parliament is, by Blackstone, said to be absolutely necessary for the naturalization of an alien.(5)

III.—*Aliens by the Laws of Canada by Provincial Statutes.*

ART. 14.—But the provincial legislatures of Lower and Upper Canada, by two Acts, assented to by the king in council, have declared to secure and confer the civil and political rights of natural born British subjects on certain inhabitants of both provinces.(6)

(1) Custom, Arts. 266, 271.
(2) Custom, Art. 270.
(3) See Burge's Commentaries on Foreign and Colonial Laws, Vol. I. page 667.
(4) Guyot's Repertoire de Jurisp. V. Aubain.
(5) Blackstone's Commentaries, Vol. I. § 366.
(6) An Act of the Legislature of Upper Canada, in 1828, assented to by his Majesty in council, May 7 same year, 9 Geo. IV. ch. 20; and an Act of the Legislature of Lower Canada, in 1831, assented to by the king in council 12th April, 1832, 1 Wm. IV. ch. 53.

The principal disposition of both of these Acts are as follows:—

Preamble of the Statutes.

ART. 15.—Whereas it is expedient to remove by law doubts that may have arisen as to the civil rights and titles to real estates of some of the persons hereinafter mentioned, and to provide by some general law for the naturalization of such persons, not being by law entitled to be regarded as natural born subjects; it is enacted that all persons who have at any time received grants of land from the crown, all who have held public offices under the great seal of the province, or the seal at arms and sign manual of the governor, all persons who have taken the oath of allegiance, all persons who had their settled place of abode in Upper Canada before 1820, and in Lower Canada before 1823, and still resident in the said provinces at the passing of the Acts respectively, are admitted and confirmed in all the privileges of British born subjects, as respects their capacity at any time heretofore, to take, hold, possess, convey, devise, and transmit any real estates in the said provinces, to all intents as if they had been born in his Majesty's kingdom of Great Britain and Ireland; and that the children, or more remote descendants of such persons who may be dead, shall be admitted to the said privileges, after having taken the oath abovementioned.(1)

Sec. 2. All persons actually domiciled in Upper Canada before 1828, and in Lower Canada before 1831, not being of the descriptions of persons beforementioned, who shall have resided therein, or in some of his Majesty's dominions, to complete seven years continual residence, shall be admitted to the benefits of these Acts, having taken the oath of allegiance within three years after having completed the stated residence, if of the age of eighteen years, at that time or within three years after having attained the age of eighteen.(2)

Sec. 3. The false swearer shall be deemed guilty of wilful and corrupt perjury, and will forfeit the advantages of the Act.

Secs. from 4 to 12 are relative to the clerks, their duties, and their fees, and the 9th section limits to the 1st of January, 1850, the time in which the oaths shall be administered, or proceedings be had, under these Acts.

Sec. 13. Persons not natural born subjects, who at the time of passing these Acts were domiciled in the said province, dying before the period of taking the oath, such persons may be deemed born subjects for all the purposes of this Act.

Sec. 14. No persons to be disturbed in the possession of any lands on the ground that they or their ancestors have been aliens, provided they resided in Upper Canada the 26th of May, 1826, and were actually under the age of sixteen, and in Lower Canada on the 1st of January, 1828.

Sec. 15. Any person claiming to hold as next entitled as nearer in the line of descent of an alien, and having taken actual possession of real estate in Upper Canada before the 1st of May, 1826, and in Lower Canada before the 1st of January, 1828, and made improvements thereon, or had contracted to sell or de-

(1) Females are exempted from taking the oath, and Quakers are allowed to affirm, in all provisions of these Acts relative to the oath.

(2) In Upper Canada the oath is to be taken at sixteen years of age.

part with the said real estate before the said periods of 26th of May, 1826, and 1st of January, 1828, no person being at that time in adverse possession of the same, such rights will remain valid as if these Acts had not been passed.

By the 14th section of the Upper Canada statute, the Acts respecting the eligibility to the assembly, and the provincial statutes 54 Geo. III. ch. 9, not to be affected.

V.—*Judicial Decisions.*

The Courts of King's Bench of Lower Canada, the Provincial Court of Appeals, the King's Privy Council, on appeals from these Courts, have established the following doctrines relative to aliens in Lower Canada :—

An alien domiciled in Canada, but not naturalised, is incapable of taking real property by divise.(1)

An alien can inherit the personal estate of British subjects.(2)

An alien cannot devise by last will and testament. The succession of an alien will devolve to his grand children, natural born subjects, to the exclusion of his own children, who are aliens.(3)

VI.—*What is an Alien.—Status and consequences.*

ART. 17.—Who is an alien? is a question to be decided by the law of England, but when alienage is established the consequences which result from it are to be determined by the law of Canada. If an alien dies without issue, his lands belong to the crown; but if he leaves children, some born in Canada and others not, the former exclude the crown, and then all the children inherit as if they were natural born subjects. When an alien has a son, who is also an alien, the children of the latter inherit from the grandfather, to the exclusion of their father. Although an Act of the Legislature passed after judgment, rendered in a court of original jurisdiction, may affect the rights of a party as they existed at the institution of a suit, this circumstance cannot be taken advantage of, in an appeal from the judgment(4)—as no proceedings will be had upon the two last recited statutes, after the 1st of January, 1850. The laws of England will take their effect relative to aliens in the province of Canada.

VII.—*Aliens by the Laws of England.*

ART. 18.—An alien, by the laws of England, is a person born out of the allegiance of the sovereign.

The qualities incident to a natural born subject, and which constitute that status, are :

1st. That his parents must be under the actual obedience of the king of England at the time of his birth.

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(1) Paquet against Gaspard, 20th April, 1820. Quebec. See Stuart's Reports, page 143.
(2) Sarony against Bell. King's Bench, Quebec, April, 1828. Stuart's Reports, p. 345.
(3) Donegani vs. Donegani. King's Bench, Montreal, 18th June, 1831. Stuart's Reports, p. 460.
(4) J. Donegani, Appellant, vs. J. A. Donegani and others, Respondents. Privy Council, 2d February, 1833. Stuart's Reports, p. 605.

2d. The ineligibility of an alien to public offices, forms a part of the laws of England. An alien is disabled from holding immoveable property for his own benefit, although he may purchase: for the crown acquires a right to it from the moment of the purchase, which no act of the alien can defeat.(1)

An alien cannot take by devise, by descent, dower, guardianship, or other acts of the law; he cannot purchase a lease of land for a long term, but he may, if he be a merchant, take a lease of a house for his habitation for a term of years only, and, if he depart the kingdom, or die, it goes to the king.(2)

A relaxation of the disability under which aliens laboured, has been admitted in the colonies for the purpose of encouraging loans of money; whether friends or enemies, they are enabled to lend money on mortgage of estates, and on non-payment to bring the property to sale.(3)

Every foreign seaman, who, in time of war, serves two years on board of an English ship, by virtue of the king's proclamation, is, *ipso facto*, naturalized under the restrictions mentioned in the two last statutes 12th and 13th Wm. III. ch. 2.

All foreign Protestants and Jews, upon their residing seven years in any of the American colonies, without being absent above two months at a time, and all foreign Protestants serving two years in a military capacity there, or being three years employed in a whale fishery, without afterwards absenting themselves from the king's dominions for more than one year, and none falling within the incapacities declared by statute 4, Geo. II. ch. 21, shall, upon taking the oaths of allegiance and supremacy, or in the ordinary cases, making an affirmation to the same effect, are naturalized to all intents and purposes, as if they had been born in England, except as to the sitting in Parliament, holding offices, or obtaining grants of land from the crown within the kingdom of Great Britain and Ireland.(4)

SECTION III.—NATIONAL DOMICIL.

I.—*Definition.*

ART. 19.—A domicil is the place where a person has his permanent home, his principal establishment, his family residence, to which, whenever he is absent, has the intention of returning,(5) where he enjoys his municipal privileges.(6)

(1) Beacon's Abridgment, p. 174. Blackstone's Commentaries.
(2) See Burge's Foreign and Colonial Law, Vol. I.
(3) 13 Geo. III. ch. 14. Jamaica Act, Geo. III. ch. 16.
(4) Statutes 13 Geo. II. ch. 7. 20 Geo. II. ch. 44. 22 Geo. II. ch. 45. 2 Geo. III. ch. 25. See Blacdstone's Commentaries, Vol. I. pp. 364, 371. Vol. II. pp. 249, 274, 293. Vol. IV. p. 111.
(5) Cod. lib. 10. tit. 39. Pothier. Pandect lib. 50, tit. 1, § 2, art. 2, No. 15, p. 308.
(6) Digest, lib. 50. Pothier Pendectes, lib. 50. Denizard, Art. Domicil.

II.—*Domicil of Nativity.*

ART. 20.—It is generally adopted that the place of the birth of a person is his domicil, if at the time it is that of his parents.(1)

III.—*Of an Illegitimate Child.*

ART. 21.—If illigitimate, he follows the domicil of his mother.(2) The domicil of nativity continues until a new one is obtained.

IV.—*Of Minors and of persons under the authority of others.*

ART. 22.—Minors and persons under the authority of others, cannot change their domicil. They follow the domicil of their parents or of those over them; and if the father die, his last domicil is that of his infant children.(3)

V.—*Of Married Women.*

ART. 23.—The domicil of a married woman is that of her husband; being a widow, she retains it.

VI.—*Of a Married Man having his Family in one place and doing business in another.*

ART. 24.—If a married man has his family settled in one place, and does business in another, the former is considered the place of his domicil; if unmarried, the place where he transacts his business or exercises his profession.(4)

ART. 25.—Residence in a place, to produce a change of domicil, must be voluntary; it is not changed by banishment, imprisonment, &c.

Intention to change a domicil without the fact, or the fact without the intention, avails nothing.

ART. 26.—If a man has acquired a new domicil from that of his birth, and removes from it with an intention to resume his native domicil, the latter is re-acquired, even when he is on his way to return.

ART. 27.—Children born upon sea are deemed to be of the country of the domicil of their parents.(5)

SECTION IV.—CAPACITY OF PERSONS.

I.—*Capacity of Persons.*

ART. 28.—All laws, which have for their principal object the regulation of the capacity, state, and condition of persons, have been treated by foreign jurists ge-

(1) Cod. lib. 50.
(2) Digest, lib. 50.
(3) Pothier, Coutume de Orleans, ch. 1, art. 12. Domat. Loi Publique.
(4) Denizard, Merlin, Guyot, Verbo Domicil. Digest.
(5) Denizard's Dictionary. Merlin and Guyot's Repertoires. Verbo Domicil. Digest, lib. 50, tit. 1. Cod. lib. 10, tit. 30. Henry on Foreign Law. Story's Conflict of Laws, from page 39 to 49.

nerally as personal laws. Boullenois has stated the doctrine among his general principles. Personal laws (says he) affect the person with a quality which is inherent in him, and his person is the same everywhere; that is to say, a man is everywhere deemed in the same state, by which he is affected by the law of his domicil.(1) Wherever inquiry is made as to the state and condition of a person, there is but one judge, that of his domicil, to whom it appertains to settle the matter.(2)

II.—*Governed by the Laws of his Domicil.*

ART. 29.—The state and quality of a person are governed by the laws of the place to which he is by his domicil subjected. Whenever a law is directed to the person, we must refer to the law of the place to which he is personally subject.(3)

III.—*Age.*

ART. 30.—The result of this doctrine is that a person who has attained the age of majority, by the law of his native domicil, is deemed everywhere to be of age; and on the other hand, a person who is in his minority, by the law of his native domicil, is to be deemed everywhere in the same condition.

IV.—*Married Women.*

ART. 31.—The same rule applies to a married woman, if, by the law of her domicil, she cannot dispose of her property except with the consent of her husband; she is equally prohibited from disposing of her property situate in another place, where no such consent is requisite.(4) Frolands, who maintains this doctrine, excepts wills by which the wife may dispose of the property, notwithstanding the contrary law of her domicil, if the law of her actual domicil allows it.(5) Although other jurists distinguish between moveable and immoveable property, applying the law of *situs* to the latter, and the law of the domicil to the former.(6)

V.—*Effect of the change of Domicil in case of Community.*

ART. 32.—Is the law of the matrimonial domicil to govern, or the law of the local situation of the property, or the law of the actual domicil of the parties?

Does the same rule apply to moveable as to immoveable property? When in different countries these questions are of daily occurrence, particularly in Lower Canada, where the law of community exists, on account of the emigration from the British isles and other foreign countries where it does not exist; yet they have not received the solemn opinion of our courts, to relieve practitioners from the perplexing diversity of opinions amongst foreign jurists on these subjects.

Merlin at one time bent the whole strength of his acknowledged abilities to es-

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(1) Boullenois, Principles Generaux, 10, 18, pp. 4, 6. Observations, 4, 10, 12, 14, 46.
(2) Rodenburg, De Div. Stat. ch. 3, § 4 to 10. Boullenois, 145, ib. Ob. 14, 196.
(3) A similar rule is laid down by Froland, Bouhier, Voet, Pothier, and others. See Story, Conflict of Laws, page 52. Merlin, Repertoire Statuts.
(4) Henry on Foreign Law, § 1, p. 31.
(5) Froland's Memoirs, ch. 7, § 15, p. 172. Story, Conflict of Laws, ch. 4, p. 57.
(6) Voet, Burgundus, Stockmans, and Pickins, cited in Merlin, Repertoire Majorité, § 5, p. 189. Edit. 1827. See Story, Conflict of Laws, p. 53, and following Capacity of Persons.

tablish the doctrine, that the law of the matrimonial domicil, and not of the new domicil, ought to prevail. But after having maintained this opinion more than forty years, he changed it, and adhered to the doctrine that the law of the new domicil ought to govern.(1) LeBrun and Renusson are of opinion, that without a special contract, it is the law of the domicil of the husband at the time of the marriage, that is to govern.(2)

Pothier, following the opinion of Dumoulin, says, that in case there is no express contract, if the law of the matrimonial domicil creates a community, that it applies to all property present and future, wherever situate, and even in provinces, which do not admit of a community.(3) Grotius is also stated to have held the same opinion in a case where he was consulted.(4) That question may arise in Upper Canada, in case of removal of a married couple from Lower Canada, without a special contract. Guyot admits that customs are real statutes, although he maintains the opinion that future acquisitions, in case of no contract, are to be governed by the laws of the matrimonial domicil of the parties.(5)

VI.—*Decision of the English Courts.—Lord Eldon's Opinion.*

ART. 33.—No question appears to have arisen in the English courts upon this point; but there is a case in which Lord Eldon is reported to have said that the suit of Faubert vs. Turst was founded in the nuptial contract, and that if there had been no contract the law of England, notwithstanding their domicil at the time of their marriage, was in France, would have regulated the right of husband and wife, who were domiciled in England at the dissolution of the marriage (by death,) so that, according to this doctrine, the law of the actual domicil will govern as to all property, without any distinction, whether it is property acquired antecedently or subsequently to the removal.(6)

VII.—*Rules adopted by the Scotch Jurists.*

ART. 34.—The Scotch jurists have adopted the rule that, in cases of community where there is no contract, the law of the domicil of the parties, at the death of either of them, regulates the disposal of the property.(7)

VIII.—*Decisions of the Supreme Court of Louisiana.*

ART. 35.—In the United States of America, there has been a general silence in those states governed by the common law; but in Louisiana, where the jurisprudence is mostly framed upon the general basis of the French law, and where the law of community exists the point has several times come under judicial decisions. In that state, its supreme courts are of opinion that the law of community should, upon just principles of interpretation, be deemed a real law, as it relates to things more than to persons, and has, in the language of Daguesseau, the destination of

(1) Merlin Repertoire, v. retroactif. Autorisation Maritale, Majorité.
(2) Lebrun de la Communauté, liv. 1, ch. 2, and Renusson de la Communauté, liv. 1, ch. 2 and 3.
(3) Pothier, Traité de la Communaoté, Art. Prebin n. 10, 11, 12, 13, 14.
(4) See Henry on Foreign Law, ch. 4, p. 36, 37 note.
(5) Guyot, Repertoire v. Communauté.
(6) Prec. ch. 207. See Story, Conflict of Laws, ch. 6, p. 150.
(7) Ferguson on Marriage and Divorce, 346, 347 id. 361. Story, ibid.

property to certain persons, and its preservation in view.(1) The court, therefore, held, that where a married couple had removed from Virginia, their matrimonial domicil, where no community exists, into Louisiana, where it exists, the acquests and gains, acquired after their removal, were to be governed by the law of community in Louisiana.(2)

SECTION V.—FOREIGN GUARDIANSHIP AND ADMINISTRATION.

I.—*Guardianship by the Roman Law.*

ART. 36.—By the Roman law, guardianship was of two sorts—*tutela* and *cura*. The first lasted in males until they arrived at fourteen years of age, and in females until they were at twelve, which was called the age of puberty of them respectively. From the time of puberty until they were twenty-five years of age, which was then full majority, they were deemed minors and subject to curatorship. During the first tutelage, the guardian was called tutor, and they were called pupils. During the second period, their guardian was called curator, and they were called minors.

II.—*Property of the Ward.*

ART. 37.—Boullenois maintains that the property of the ward is strictly personal, and extend to the ward in foreign countries as well as at home.(3)

Vattel lays down a similar doctrine.(4)

Voet denies that laws respecting either persons or property have any extra territorial authority.(5)

III.—*Guardianship by the Laws of England—Opinion of Lord Eldon.*

ART. 38.—The House of Lords in England deemed the authority of the English guardian sufficient to institute a suit for the personal property of his ward in Scotland; but the courts of Scotland have unequivocally decided the other way.(6)

IV.—*Executors and Administrators by the Laws of Nations.*

ART. 39.—In regard to the title of executor and administrator, derived from a grant of administration in the country of the domicil of the deceased, it cannot *de jure* extend beyond the territory which grant them, for it is strictly territorial, and when granted in a foreign country is not recognized in other countries, unless it is confirmed there by proper judicial proceedings; and it has become a general doctrine of the common law, recognized both in England and America, that no suit can be brought by or against any foreign executor or administrator in other courts, in virtue of his foreign letters, testamentary or of administration.(7)

(1) Oeuvres de Daguesseau. Tom. 4, p. 54, p. 660.
(2) Story's Conflict of Laws, ch. 6, p. 152.
(3) Boullenois, lib. 51, 68.
(4) Vattel, b. 2, ch. 9, § 85.
(5) Voet. De Stat. § 4, ch. 2, n. 6, p. 123.
(6) See Cases cited by Story, Conflict of Laws. Foreign Guardianship.
(7) Kaim's Equity, b. 3, ch. 8, § 4. Erskine's Institutes, b. 3, tit. 9, § 2, 26, 27, 29. See Story's Conflict of Laws, ch. 13.

Before concluding this chapter, it will be observed that, by the laws of England, the people, whether aliens, denizens, or natural born subjects, are divisible into two kinds, the clergy and laity; the clergy comprehending all persons in holy orders and in ecclesiastical offices.(1)

The lay part, or such of the people as are not comprehended under the denomination of clergy, may be divided into three distinct states—the civil, the military, and the maritime.

The civil state includes all orders of men, from the highest nobleman to the meanest peasant; since a nobleman, a knight, a gentleman, or a peasant, may become either a divine, a soldier, or a seaman.(2)

All degrees of nobility and honour are derived from the king, as their fountain, and he may institute what new titles he pleases. Those now in use are dukes, marquesses, earls, viscounts, and barons; these, Sir Edward Cook says, are all the names of dignity in the kingdom, esquires and gentlemen being only names of worship.(3)

The commonalty, like the nobility, are divided into several degrees, as esquires, gentlemen, yeomen, tradesmen, artificers, and labourers.

Esquires.

It is, (says Sir W. Blackstone,) a matter somewhat unsettled, what constitutes the distinction, or who is a real esquire; for it is not an estate, however large, that confers this rank upon its owner. Some are esquires by birth, as the sons of certain noblemen; others by virtue of their office, as justices of the peace, in practice, are understood to be those only who bear an office of trust under the Crown, and who are styled esquires by the king in their commissions and appointments.(4)

Gentlemen.

As for gentlemen, (says Sir Thomas Smith,) they be made good cheap in this kingdom; for whosoever studieth the laws of the realm, who studieth in the universities, who professeth the liberal sciences, and, to be short, who can live idly, and without manual labour, and will bear the port, charge, and countenance of a gentleman, he shall be called master, and shall be taken for a gentleman.

Yeomen.

A yeoman is he that hath free land of forty shillings by the year.

The rest of the commonalty are tradesmen, artificers, and labourers; who, as well as all others, must, in pursuance of the statute, 1st Henry V. c. 5, be styled by the name and addition of their estate, degree, or mystery, and the place to which they belong.(5)

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(1) See Blackstone's Commentaries, vol. 1, p. 376, § 377.
(2) Ibid, p. 396.
(3) Ibid, p. 404, § 405.
(4) See Blackstone's Commentaries, vol. 1, p. 406, § 405, and the note of the Editor of the London edition, 1809.
(5) Blackstone's Commentaries, vol. 1, p. 406, § 407.

CHAPTER II.

OF THINGS, AND THE DIFFERENT MODIFICATION OF PROPERTY AND ESTATES.

SECTION I.—*I. Estates and Things. II. Things in general. III. Things which are common. IV. How considered by the Custom. V. Division of Things. VI. Moveables. VII. Obligations—Actions. VIII. Perpetual Rents. IX. Seigniorial Rents. X. Things which have no Character. XI. Materials proceeding from Demolition. XII. Meaning of the word Furniture. XIII. Moveable Goods.*

SECTION II.—IMMOVEABLES.—*I. Definition of the word. II. Moveables and Immoveables by destination. III. Buildings. IV. Trees and Fruits. V. Things placed by the Owner for the service of the inheritance. VI. Manure. VII. Bee Hives. VIII. Quarries. IX. Moveables by Fiction. X. Immoveables by Fiction.*

SECTION III.—OWNERSHIP AND ITS MODIFICATIONS.—*I. General Dispositions. II. General Principles. III. Division. IV. Rights of the Proprietor. V. Property of the Soil and its consequences. VI. Of the Right of Accession. VII. What is Good Faith in a Possessor. VIII. Alluvions. IX. Derelictions. X. Land carried away and identified. XI. Islands and Sand Bars.*

SECTION IV.—DECISION OF THE COURTS OF KING'S BENCH AND PROVINCIAL COURT OF APPEALS.—*I. Rivers—They are vested in the Crown for public use. II. Seigniors have a Right in the Soil, and Servitude on the Water.*

SECTION I.—OF THINGS.

I.—*Estates and Things.*

ART. 40.—The word estate in general is applicable to any thing of which riches and fortune may consist. This word is also relative to the word thing, which is the second object of jurisprudence, the rules of which are applicable to persons, things, and actions.

II.—*Things in general.*

ART. 41.—Things are either common or public; they either belong to the state or to a corporation. Then the use of them are regulated by the prince or by the laws of the country, or they are the property of individuals.

III.—*Things which are common.*

ART. 42.—Things which are common are those of which the property belongs to nobody in particular, and which all men may freely enjoy, conformably to the use for which nature has intended them,—such as light, air, running water, the sea and its shores, rivers and their banks, and rivages, public roads.(1)

IV.—*How considered by the Custom.*

By customs, things which are common to all by the laws of nature, in monarchical and mixed governments, are said to be the property of the king, being the one visible magistrate in whom the majesty of the public resides; in republics, that of the state; but in all, the use of them are equally governed by the laws of nations and the local or municipal laws of the country.(2)

V.—*Division of Things.*

ART. 43.—Things are also divided into moveables and immoveables, and into corporeal and incorporeal.(3)

VI.—*Moveables.*

ART. 44.—Estates are moveable, either by their nature or by the disposition of the law.

Things moveable by their nature, are such as may be carried from one place to another, whether they move by themselves, as cattle, or cannot be removed without extraneous power, as inanimate things.(4)

In the sense of the civilians and European, continental jurists, goods and chattels are not only comprehended as in the common law, but also real estates.

The definition between moveable and immoveable property, is, nevertheless, recognized by them, and gives rise, in the civil as well as in the common law, to many important distinctions as to rights and remedies.

VII.—*Obligations and Actions.*

ART. 45.—Obligations and actions, the object of which is to recover money due, or moveables; although these obligations are accompanied with a mortgage. Those which have for their object a specific performance, and those which, from their nature, resolve themselves into damages, shares, or interests, in banks or companies of commerce or industry, or other speculations, although such companies be possessed of immoveable property, depending upon such enterprizes, all such actions are considered as moveables; but respecting associates, as long only

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(1) Quæ creavit Dominus tuus in ministerium cunctis gentibus quæ sub caelo sunt. Deuteronomy iv. 19. Naturali jure communiæ sunt omnium haec, aer, aqua profluens, et mare, et per hoc littora maris, § 1, Inst. de rer. div. 2, § 1 cod.

(2) Bacquet. Desp. No. 1, Lacombe Receuil de Jurisprudence. Verbo Fleuve. Blackstone's Com. Vol. II. p. 429, § 300.

(3) L. 1, ff. de oed, ed. 8, § 4, C. de von. Quælite, L. 30, C. 93, de verb. Sign.

(4) Merlin, Repertoire verbo meubles, § 5. Idem biens, § 2. Idem Loi, v. beerts.

as the society is in existence; for as soon as the society is dissolved, the right which each member has to the division of the immoveables belonging to it, produces an immoveable action.(1)

VIII.—*Perpetual Rents and Annuities.*

ART. 46.—In the class of things, moveables, by the determination of the law, are also considered the arrears of perpetual rents and annuities, whether they are founded on a price in money or on the price or the condition of the alienation of an immoveable, as the action consists in the right of enforcing payment of them, they become due day by day, it is the condition that extends the term of payment.(2)

IX.—*Seigniorial Rents.*

ART. 47.—Seigniorial rents do not follow the above rule; they become due only once a year, on the day appointed for payment.(3)

X.—*Things which have no character.*

ART. 48.—All things corporeal and incorporeal, which have not the character of immoveables, by their nature or by the disposition of the law, according to the rules laid down in this title, are considered as moveables.

XI.—*Materials proceeding from Demolition.*

ART. 49.—Materials arising from the demolition of a building, those which are collected for the purpose of raising a new building, are moveables until they have been made use of in the new building. But if the materials have been separated from the house or other edifice only for the purpose of having it repaired, or added to, and with the intention of replacing them, they preserve the nature of immoveables, and are considered as such.(4)

XII.—*Meaning of the word Furniture.*

ART. 50.—The word furniture, made use of in the provision of the law, or in the conventions or acts of persons, comprehends only such furniture as is intended for the use and ornament of apartments, but not libraries which happen to be therein, nor plate.(5)

XIII.—*Moveable Goods.*

ART. 51.—The expression of moveable goods, that of moveables, or moveable effects, employed as above stated, comprehends generally all that is declared to be moveable, according to the rules laid down in this chapter.(6)

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(1) Custom Articles, 89, 94, 95.
(2) Custom Articles, 88, 89, 90, 91, 92, 94.
(3) On the whole, see Domat Loix Civiles, des Choses, tit. 3, sec. 1. Pothier des Choses, 2me. partie, § 2. Communauté, No. 69. Const. de Rente, No. 112. Toullier II. page 369; III. page 15, 222.
(4) C. N. Toullier III. page 14.
(5) C. N. 534. Pothier Donat. Test. ch. 7, art. 4.
(6) Toullier II. page 410; III. page 18. V. page 504.

The sale or gift of a house, ready furnished, includes only such furniture as is in the house.(1)

The sale or gift of a house, with all that is in it, does not include money, nor the debts, or other rights, the titles of which may be in the house; all other moveable effects are included.(2)

SECTION II.—IMMOVEABLES.

I.—*Definition of the word.*

ART. 52.—Immoveable things are in general such as cannot either move themselves, or be removed from one place to another.

This definition, strictly speaking, is applicable only to such things as are immoveable by their own nature, and not to such as are so only by the disposition of the law.(3)

II.—*Moveables and Immoveables by destination.*

ART. 53.—There are things immoveable by their nature, others by their destinations, and others by the object to which they are applied.(4)

III.—*Buildings.*

ART. 54.—Lands and buildings, or other constructions, whether they have their foundations in the soil or not, are immoveable by their nature.(5) Standing crops and fruits of trees, while standing, are likewise immoveable, and are considered as part of the land to which they are attached.(6)

IV.—*Trees and Fruits.*

ART. 55.—As soon as the trees are cut down, and the fruits gathered, although not carried off, they are moveables.(7)

V.—*Things placed by the Owner for the service of the Inheritance.*

ART. 56.—The pipes made use of for the purpose of bringing water to a house or other inheritance, are immoveable, and are a part of the tenement to which they are attached.(8)

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(1) Toullier III. page 14.
(2) Pothier, Donation Testamentaire, ch. 7, art. 4 & 5. Toullier, ch. 2, page 413.
(3) Pothier des Choses, 2me partie. Communauté, No. 27 & 66. Merlin, Repertoire, Verbo Statut.
(4) C. N. P. 517. Toullier, III. p. 8; XII. p. 184.
(5) Toullier, III. p. 8.
(6) Fructus pendentes pars fundi videntur, L. 44, ff. de rei vend. Custom Art. 92, 74, 231.
(7) Custom Articles, 92, 74, 231. Langlois, Princ. Gen. Immeubles. Pothier, Com. No. 35.
(8) Pothier, Communauté, No. 45. Toullier, XIX. p. 387. Merlin, Repertoire, Verbo Loi. § n. 203.

Things which the owner of a tract of land has placed upon it for its service and improvements, are immoveable by destination ; such are the following:—

Cattle intended for cultivation.

Implements of husbandry.

Seeds, plants, fodder, and manure.

Pigeons in a pigeon hole.

Fishes in a pond.

Beehives.

Mills, kettles, alembics, cisterns, vats, and other machinery made use of in manufactures and other works.

Marbles, mirrors, wainscoats, &c., which, if taken away, would show a deformity in the apartments, or leave the place unplastered, are all immoveables, but an essential condition is, that it is the proprietor who must have fixed them, and that must be done in a permanent manner, as if they are sealed with plaster or secured with iron, &c.

Those placed by an usufructuary possessor, or a tenant, have not that quality, because they are not deemed to have had a perpetual destination.(1)

VI.—*Manure.*

ART. 57.—Manure, even that which has been brought on a farm by the lessee from elsewhere, makes part of the land, its apparent destination to be incorporated, and the necessity of manuring the soil, has established this rule, and the lessee must leave it without any remuneration.(2)

In England all these are called heir looms, from the Saxon termination loom, in which language it signifies a limb or member.(3)

VII.—*Beehives.*

ART. 58.—As to beehives, there is a diversity of opinion. Chopin, LeBrun, Deispesses, and others, pretend that they are part of the land on which they live. Pothier maintains that they are only a part of their hives, and, like them, are moveables. His opinion seems to be preferred.(4)

Bees, pigeons, or fish, which go from one hive, pigeon-house, or fish-pond, to another hive, house, or pond, belong to the owners of the last, provided such bees, pigeons, or fish have not been attracted thither by fraud or artifice.(5)

VIII.—*Quarries.*

ART. 59.—Quarries are by their nature immoveables, but the stones which have been taken up are moveable, although still on the spot.

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(1) Labeo Generaliter Scribit, ea quœ perpetui usus causa in edificus sunt, edificio esse, d. L. § 7. Custom Articles, from Art. 88 to 94. Guyot, Repertoire, verbo bieus.

(2) Guyot, Repertoire, Jurisp. verbo fumiers.

(3) Spelman, Gloss, 227. Blackstone's Commentaries, 2, p. 427.

(4) See Guyot, Repertoire, verbo Abeilles.

(5) Pothier, Droit de Propriété, No. 166, 168, No. 279. Toullier, p. 7, XI. 406, 414, No. 422 & 424.

IX.—*Moveables by Fiction.*

There are moveables and immoveables—also against their nature—but made such by a fiction of the law, by which real estates take the nature of moveable property, and as such to make part of a matrimonial community. This fiction originates in the contract of marriage, and its only effect is to cause immoveable property to enter in the community, otherwise they preserve their real nature.

X.—*Immoveables by Fiction.*

ART. 60.—On the reverse, and again by a contract of marriage, moveable property is made to take the nature of immoveables, but only in two cases. The first is when it is agreed that sums of money proceeding from dotations made to the wife, donations made to the husband, or other matrimonial stipulations, shall be invested into real estates. From the time of the stipulation, these sums take the quality of immoveable property; and although the investment has not been made, they do not enter into the community, and the action resulting from this stipulation, is a real action to each of the spouses, and to their respective lineal heirs.

The second effect is, that when a rent belonging to a minor is redeemed, the sums proceeding from such redemption still continue to have the nature of real estate; such is the case for all sums proceeding from the alienation of immoveable property belonging to minor children, because the nature of which cannot be changed during their minority, and not even at their majority, as far as regards tutors, curators, and other administrators of property belonging to minors, interdicted persons, and others who cannot defend their property. For them, the fiction ceases only when they have rendered the account of their administration and paid the balance.(1)

SECTION III.—OWNERSHIP AND ITS MODIFICATIONS.

I.—*General Dispositions.*

ART. 61.—The mode by which the property in things passes to a new proprietor, causes it again to be divided into *propres* or lineal property; acquests, or anti-nuptial gains; and conquests, or property acquired by a matrimonial community.

The custom has established five modes, by which the property in things is acquired:—

1. By successions.
2. Matrimonial community.
3. Dower.
4. Redemption by lineal heirs.

(1) Cout. ch. 94. Droit Commun. LeBrun des Successions. iiv. 4, ch. 2, n. 28. Lacomb Recueuil de Jurisprudence, verbo Meneur, p. 458.

5. By prescription, or by contracts; the custom acknowledges but two sorts—Donations inter vivos and wills.

II.—*General Principles.*

ART. 62.—Ownership is the right by which a thing belongs to some one in particular, to the exclusion of all other persons.(1) The ownership of a thing is vested in him who has the immediate dominion of it, and not in him who has a mere beneficiary right in it.

III.—*Division.*

ART. 63.—Ownership is divided into perfect and imperfect ownership; it is perfect when it is perpetual—when the thing which is the subject of it is unincumbered with any charges towards any person, then the ownership is perfect; it is imperfect when it is to terminate at a certain time, or on condition; or if the thing which is the subject of it, being an immoveable, is charged with any real rights towards a third person, as an usufruct, use, or service.

When an immoveable is subject to an usufruct, use, or service, then the owner of it, is said to possess the mere ownership.(2)

IV.—*Rights of the Proprietor.*

ART. 64.—No one can be divested of his property unless for some purpose of public utility, and on consideration of an equitable and previous indemnity, as prescribed by law.

By an equitable indemnity in this case, is understood not only a payment for the value of the thing of which the owner is deprived, but also a remuneration for the damages which may be caused thereby.(3)

V.—*Property of the Soil and its Consequences.*

ART. 65.—The ownership of a thing, whether it be moveable or immoveable, carries with it the right to all that the thing produces, and to all that becomes united to it, either naturally or artificially.

VI.—*Of the Right of Accession.*

ART. 66.—Fruits of the earth, whether spontaneously or cultivated, civil fruits, that is the revenues yielded by property from the operation of the law, or by agreement; young animals, &c., belong to the proprietor by right of accession.(4)

The produce of the thing does not belong to the simple possessor; it must be returned with the thing to the owner, who claims the same, unless the possessor held it *bona fide*.(5)

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(1) Grotius, lib, 2, ch. 6, § 1.
(2) Pothier, Droit de Propriété, No. 4 & 14. Introduction Générale aux Coutume, No. 100 & 101. Toullier, III. pp. 54. 57, 62, & 356.
(3) Pothier, Contrat de Vente, No. 112. Propriété, No. 274. Toullier, III. pp. 167—510.
(4) Pothier, Droit de Propriété, No. 151. Toullier, III. p. 71.
(5) Pothier Droit de Propriété, No. 205, 240, & & 206. Vente, No. 274.

VII.—*What is Good Faith in a Possessor.*

ART. 67.—He who possesses as owner, by virtue of an act, sufficient in terms to transfer property, the defects of which he was ignorant of. He ceases to be a bona fide possessor from the moment these defects are made known to him by a suit instituted for the recovery of the thing by the proprietor.(1)

VIII.—*Property of the Soil and its consequences.*

ART. 68.—The property of the soil carries with it the property of all that which is directly above and under it; the proprietor may construct upon or below the soil.(2)

IX.—*Works erected with other people's Materials.*

ART. 69.—If the owner of the soil have made constructions, plantations, and works thereon, with materials which did not belong to him, he has a right to keep the same, whether he has made use of them in good or bad faith, by reimbursing their value to the owner of them, and paying damages, if he has caused any.(3) And when plantations, constructions, and works have been made by a third person, and with such person's own materials, the owner of the soil has a right to keep them, or to compel this third person to take away or demolish the same.

If the owner keeps the works he owes to the owner of the materials, nothing but the reimbursement of their value and of the price of workmanship, without any regard to the greater or less value which the soil may have acquired thereby; nevertheless, if the works, &c., have been done by a bona fide possessor of the soil, and afterwards evicted, the owner shall not have a right to demand the demolition of the works, &c., but he shall have his choice either to reimburse the value of the materials and the price of workmanship, or to pay a sum equal to the enhanced value of the soil.(4)

X.—*Alluvions.*

ART. 70.—The accretions which are formed successively and imperceptibly to any soil situated on the shore of a river or creek are called alluvions. The alluvion belongs to the owner of the soil situated on the edge of the water, whether it be a river or a creek, and whether the same be navigable or not; who is bound to leave public that portion of the bank which is required by law for public use.(5)

XI.—*Derelictions.*

ART. 71.—The same rule applies to derelictions, formed by running water, retiring imperceptibly from one of its shores, and encroaching on the other; the

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(1) Pothier, Droit de Propriété, No. 395, 342, § 396. Vente, 274. Toullier, I. p. 408.; III. p. 49; IV. p. 674; VIII. p. 224.
(2) Custom, Art. 97.
(3) This is one of the laws of the twelve tables of Rome. Law 46. Pothier, Droit de Propriété, No. 170 & 171.
(4) Pothier, Droit de Propriété, No. 170. Toullier, III. p. 84, 85, 283, p. 152; XI. p. 70, 134.
(5) Pothier, Droit de Propriété, No. 157. Communauté, No. 192.

owner of the land adjoining the shore, which is left dry, has a right to the dereliction; nor can the owner of the opposite shore claim the land which he has lost.(1)

This right does not take place in case of dereliction of the sea.(2)

XII.—*Land carried away and identified.*

ART. 72.—If a river or creek, whether navigable or not, carries away by a sudden irruption a considerable tract of land from an adjoining field, which is susceptible of being identified on another field, the owner of the tract thus carried away may claim his property.(3)

XIII.—*Islands and Sand Bars.*

ART. 73.—Islands and sand bars, which are formed in the beds of navigable rivers or streams, and which are not attached to the bank, belong to the king, if there be no adverse title or prescription. Islands and sand bars, which are formed in streams not navigable, belong to the reparian proprietor, and are divided among them, by a line supposed to be drawn along the middle of the river. The reparian proprietors then severally take the portion of the island which is opposite to their land, in proportion to the front they respectively have on the stream opposite the island.(4)

SECTION IV.—DECISION OF THE PROVINCIAL COURTS OF KING'S BENCH AND APPEALS.

I. *Rivers—They are vested in the Crown for public use.*

ART. 74.—Rivers, whether navigable or not, are vested in the crown for the public benefit; and no person, seignior or other, can exercise any right over them without a grant from the crown.(5)

II.—*Seigniors have a Right in the Soil, and Servitude on the Water.*

ART. 75.—A seignior, by his grant from the crown, acquires a right of property in the soil over which a river not navigable flows; but in the running water

(1) Pothier, Droit de Propriété, No. 159. Toullier, III. p. 104, 105. A temporary dereliction takes place on the borders of the Saint Lawrence every year. By a provincial statute, 1st Wm. IV. ch. 38, the owners of the land adjoining on the south side of the river from and below Quebec, are entitled to cut and appropriate to their own use the hay that grows on these derelictions.

(2) Ibid.

(3) Pothier, ibid, No. 158. Institutes, 71. Toullier, III. p. 106.

(4) Haig. Tracts. Dejure Maris. The leading principles above laid down are supported by Sir W. Blackstone. See his Commentaries, Right of Things, Vol. II. p. 162, where he says, "The law of alluvions and derelictions, with regard to rivers, is nearly the same as in the imperial law." Inst. 2, 1, 20, 21, 22, 23, 24. See Blackstone's Commentaries, Vol. 1, p. 298.

(5) Provincial Court of Appeals, Boissonneau vs. Oliva. 16th November, 1833. An Appeal from Quebec. Stuart's Reports, p. 564.

he has only a right of servitude while it passes through or before the land he retains in his possession, which does not authorise him to divert the stream, or use the water to the prejudice of other proprietors, above or below him.(1)

III.—*Banks belong to the Reparian Proprietor.*

ART. 76.—The banks of navigable rivers belong to the reparian proprietor, subject to a servitude in favour of the public, for all purposes of public utility.(2)

IV.—*Rivers and Highways are of Public Domain.*

ART. 77.—Navigable rivers have always been regarded as public highways, and dependencies of the public domain; and floatable rivers are regarded in the same light: in both, the public have a legal servitude for floating down logs or rafts, and the proprietors of the adjoining banks cannot use the beds of such rivers to the detriment of such servitude.(3)

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(1) Provincial Court of Appeals, St. Louis vs. St. Louis and Benjamin Dumoulin, 30th April, 1834.

(2) Provincial Court of Appeals, Fournier vs. Oliva, 17th November, 1830. Stuart's Reports. p. 427.

(3) Court of King's Bench, Quebec. Oliva vs. Boissonneau. Stuart's Reports, p. 524.

CHAPTER III.

SERVITUDES.

SECTION I.—*I. Definition of the word. II. Division. III. Personal Servitudes. IV. Usufruct. V. Obligations of the Proprietor. VI Rights and Obligations of the Usufructuary. VI. Civil Fruits. VIII. Rents and Annuities, when due. IX. Trees, Sand, Stones, Mines, Quarries, how to be used by the Usufructuary. X. Alluvions, Islands, Treasure Trove, Rights of Servitudes to be enjoyed by the Usufructuary. XI. He may dispose of his right.*

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SECTION I.—OF SERVITUDES.

I.—*Definition of the word.*

ART. 78.—The right of servitude is the right one has to use property belonging to another.

II.—*Division.*

ART. 79.—Servitudes may be divided into two kinds—personal and real.

III.—*Personal Servitudes.*

ART. 80.—Personal servitudes are those attached to the person for whose benefit they are established, and terminate with his life. This kind of servitude are of three sorts—usufruct, use, and habitation.

IV.—*Usufruct.*

ART. 81.—Usufruct is the right of enjoying a thing, the property of which is vested in another, and to draw from the same all the profit, utility, and advantages which it may produce, provided it be without altering the substance of the thing.(1)

V.—*Obligations of the Proprietor.*

ART. 82.—The obligations of the proprietor are reduced to one,—that of allowing the usufructuary to enjoy peaceably the property of which he has the usufruct; should the proprietor deteriorate it, or cause damages to the usufructuary, he must indemnify him.(2)

VI.—*Rights of the Usufructuary.*

ART. 83.—All kinds of fruits, natural, cultivated, or civil, the encrease of cattle, &c. produced during the existence of the usufruct by the things subject to it, belong to the usufructuary.(3)

VI.—*Natural Fruits.*

ART. 84.—Natural fruits are such as are the spontaneous produce of the earth; the produce and increase of cattle.(4)

VII.—*Civil Fruits.*

ART. 85.—Civil fruits are rents of real property, the interest of monies and annuities; all other kinds of revenue or income, derived from property by the operation of the law, are civil fruits.(5)

VIII.—*Rents and Annuities, when due.*

ART. 86.—Rents and income of property, interest of money, annuities, and other civil fruits, are supposed to be obtained day by day, and they belong to the

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(1) Law 1, Inst. de Usuf. 90. Domat. Loix Civiles de Usufruct. Liv. 1, Art. 1. Inst. L 1, ff. de Usufructu, Inst. cod.
(2) L. 5. Digest. de Usufructu. L. 2, Usufructus Pretatur.
(3) Pothier, Douaire, No. 194, n. 199. L. 27, de Usufructu. L. 3, 1 ff. de sufr. 67, cod. § 2 Institute. Dom. at Loix Civiles, tit. 11, art. 2, p. 90.
(4) L. 28 de Usuf. L. 48 D. de Acquerendo Rerum Domino. § 37, Inst. de Rerum Divisione. L. 68, § 1, de Usufructu.
(5) Pothier, Donaire, No. 196, 199. Communauté, No. 205. Toul. III. p. 262, 263, &c.

usufructuary in proportion to the duration of his usufruct, and are due to him, though they may not be collected at the expiration of the usufruct.(1)

IX.—*Trees, Sand, Stones, Mines, Quarries—How to be used by the Usufructuary.*

ART. 87.—The usufructuary has a right to draw all the profits which are usually produced by the thing, subject to the usufruct; accordingly he may cut trees, take from it earth, sand, stones, and other materials, but for his use only, and for the cultivation of the land; and provided he acts as a prudent administrator, he has a right to the proceeds of quarries in lands subject to the usufruct, if they were actually worked before the commencement of the usufruct; but he has no right to mines and quarries not opened.(2)

X.—*Alluvions, Islands, Treasure Trove, Rights of Servitudes, to be enjoyed by the Usufructuary.*

ART. 88.—The usufructuary enjoys the alluvions, but not the islands formed in the streams; neither has he any right of enjoyment to the treasure found on the land during his usufruct.(3) He enjoys the rights of servitude due to the inheritance.(4)

XI.—*He may dispose of his Right.*

ART. 89.—The usufructuary may sell, lease, or give away his right.(5)

SECTION II. OBLIGATIONS OF THE USUFRUCTUARY.

I.—*He must obtain possession.*

ART. 90.—The usufructuary must be put in possession by the owner, and an inventory containing the estimated value of the estate must be made by a notary.

Should the owner refuse to be present, or being absent from the jurisdiction of the court, after due notification, the judge shall appoint a counsel for him to assist at the inventory.(6)

II.—*He must give security.*

ART. 91.—The usufructuary must give security that he will use as a prudent administrator, and faithfully fulfil the obligations imposed upon him.(7)

(1) Institutes, L. 26 de Usufruct. Domat. Loix Civiles, lib. 1. Pothier, Douaire, No. 160. Communauté, No. 206, 207.
(2) See Pothier, Douaire, No. 196.
(3) Inst. L. 9, ff. de Usuf. Domat. Loix Civiles, tit. 11, p. 90. Pothier, Douaire, No. 68.
(4) Pothier, No. 195. Toullier, III. p. 273.
(5) Pothier, Douaire, No. 195, 220. Vente, No. 550. Contract de Louage, No. 43. Guyot, Repert. V. Usuf. Fruits Communauté. Ordonance of 1667. Edits for Ordonances, Vol. I. p. 241.
(6) Pothier, Donaire, No. 240.
(7) Pothier, Obligations, No. 387. Toullier, II. pp. 295 & 300.

III.—*He must make the necessary Repairs.*

ART. 92.—The usufructuary is bound to make such repairs only as are indispensably necessary for keeping the property subject to the usufruct in good order. Repairs extraordinary are to be made by the owner himself.

IV.—*He cannot alter the Destination.*

ART. 93.—He cannot alter the destination of a building, as to convert a dwelling house into a tavern.(1)

V.—*When consisting of Herds—Expiration of the Usufruct.*

ART. 94.—If the usufruct consist of a herd of cattle, should the whole herd die, owing to some accident or disease, without any neglect on the part of the usufructuary, he is bound only to return the owner the hides. If the whole herd does not die, the usufructuary is bound to make good the number of dead out of the new born cattle of the same herd.(2) But if the remaining cattle produce none, the usufructuary is not bound to return any.(3) The right of the usufruct expires at the death of the usufructuary.(4)

SECTION III.—USE AND HABITATION.

I.—*Use*

ART. 95.—Use is the right given to any one to make a gratuitous use of a thing belonging to another, or to exact such portion of the fruits it produces, as is necessary for his personal wants, and those of his family; if it consist in the use of cattle, he can have only the milk for his daily use, and that of his family.(5)

Like the right of habitation, it is regarded by the title which has established it, and receive accordingly a more or less extensive sense. If the conditions exceed the limits of the laws on use and habitation, they create other rights.(6)

These rights are established and extinguished in the same manner as the usufruct.(7)

The person who has the use can neither transfer, let, nor give his right to another; it is strictly personal.

II.—*Habitation.*

ART. 96.—But nothing prevents him who enjoys the right of habitation from

(1) Dict. b. 13.
(2) C. 68, § 2, C. 69, D. Cod. tit. Toullier, III. p, 291.
(3) Guyot, Repertoire, v. Usufruct.
(4) Pothier, Douaire, No. 248 Toullier, I. p. 262, III. p. 249.
(5) Guyot, Repertoire.
(6) Law 10, D. de Use & Habitation.
(7) Inst. 1, 3, § Quib. Mod, Usuf.

receiving in his house, or the part which has been assigned to him, friends, guests, or even boarders, provided he inhabits it himself, and though he may not have been married at the time this right was granted to him, his wife and family may enjoy it.(1)

He may transfer or let part of his right for some remuneration, but not gratuitously and not the whole.(2)

SECTION IV.—REAL SERVITUDES.

ART. 97.—Real or landed servitudes are those which the owner of an estate enjoys on a neighbouring estate, for his own benefit. These servitudes are called predial and urban servitudes, because they are rather due to the estate than to the owner personally.(3)

I.—*Subdivision.*

ART. 98.—They may again be subdivided into contractual servitudes, which are created by the will of persons, and into natural servitudes, established by law.

When the owner of real estates aliens part of a house or real property, he must specially declare what servitudes he retains on that part of the property he puts out of his hands, for all general constitutions of servitudes not designated are of no avail.(4)

But the destination of the father of a family is equal to a title, provided it is declared in writing.(5)

A servitude is a right so inherent in the estate to which it is due, that the faculty of using it, considered alone and independent of the estate, cannot be given, let, or mortgaged, without the estate to which it appertains; because it does not pass to the person but by means of the estate.

Servitudes arise either from the natural situation of the place, from the obligations imposed by law, or from contracts between the respective owners.

II.—*Servitudes which originate from the natural situation of the place.*

ART. 99.—The servitudes arising from the natural situation of the place, are those due by the estate situated below to receive the waters which run naturally from the estate situated above, provided the industry of man has not been used to create that servitude.

The proprietor below is not at liberty to raise any dam, or to make any other work to prevent this running of the water.

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(1) Law above cited, de Usu. & Habitatione. Pothier, Droit & Habitation.
(2) Guyot, Rep. Juris. Verbo Habitation.
(3) L. 1, ff. de Servitudes. Domat. Loix Civiles, lib. 1, tit. 12. Toullier, III. p. 58, n. 90, 91.
(4) Custom Art. 215.
(5) Custom Art. 216.

The proprietor above can do nothing whereby the natural servitude due by the estate below may be rendered more burthensome.(1)

He whose estate borders on running water may use the water to his advantage, as for the purpose of watering his estate while it runs over his land: but he cannot stop, nor give it another direction, and he is bound to return it to its ordinary channel, where it leaves his estate.(2)

III.—*Servitudes imposed by Law.*

ART. 100.—The servitudes imposed by law are established either for public or common utility, or for the utility of individuals. The first relate to the space which is to be left for public use by the adjacent proprietors on the shores of navigable rivers, and for the making of roads and other public or common works.

All that relates to this kind of servitudes is determined by laws or particular regulations.(3)

IV.—*Particular Services.*

ART. 101.—The particular services imposed by law relate to the following objects:—To boundary walls, fences, and ditches; to cases requiring counter walls; to the right of lights over a neighbour's property; carrying off water from roofs; to the right of passage.

V.—*Common Walls.*

ART. 102.—Every proprietor in the cities and suburbs may compel his neighbour to contribute to the raising of partition walls. When they are to separate buildings as high as the upper part of the first story, and when to separate gardens, yards, and fields ten feet high, exclusive of the foundation; when these walls exist they are presumed to be in common, if there are no titles, proofs, or marks to the contrary.(4) The same rule applies to the walls separating houses.(5)

VI.—*Walls not in common.*

ART. 103.—The reason of this is, that none are allowed to build against a wall not in common, unless he has paid for the half of the wall and foundation thereof to the extent of his building; but the wall separating a house from a vacant lot, is not reputed to be common except to the height of ten feet.(6)

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(1) Pothier, Contrat de Societé, No. 336. Toullier, III. p. 210, 374. Aqua currit & debet currere.
(2) Domat. Droit Public, tit. 8, art. 2 & 11. Flumina Publica Sunt. L. 2, Inst. de Flum.
(3) Inst. de rei devis. V. Domat. Droit Public, tit. 8, sec. 2.
(4) Custom Ar. 209, 196, 205, and 211.
(5) Ibid, 194 & 206.
(6) Pothier, Contrat de Societé, No. 202.

VII.—*Privilege of the Proprietor to abandon a Partition Fence.*

ART. 104.—Nevertheless, the proprietor of a partition fence wall, by abandoning by deed to his neighbour his right to the wall and to the ground upon which it is built, is exonerated from repairing and building the same; and it will be lawful for him to reacquire the right of being common in the wall by paying to the person who has made the advance the half of what he has laid out for its construction, and paid for the land.(1)

VIII.—*Of a Common Wall to demolish and erect.*

ART. 105.—Every proprietor may build against a wall held in common, and for that purpose open and demolish the wall, (if there be no title to the contrary,) and to use the same for the new building; but he must previously notify his neighbour of his intention, and to rebuild the wall with reasonable despatch, and without discontinuing the work.(2) He may put beams in the wall to one half of its thickness, but he must place under them jams, piers, props, or chains and corbils, in cut stone, sufficient to support the beams.(3)

IX.—*To raise it.*

ART. 106.—Should one of the neighbours find that the common wall is not sufficiently high for his purposes, he may raise it as high as he pleases, provided the wall is strong enough to bear the elevation; if not, he is obliged to cause a sufficient strength to be added to it, and furnish the ground for the extra thickness,(4) and further pay to his neighbour the amount of one-sixth part of the elevation with which he loaded the wall. This is called *charges*. The neighbour, by reimbursing one-half of the advances for raising the wall, and one-half of the ground furnished to make it more thick and strong, the wall will again become common, as far as the neighbour who did not contribute will have use of the wall.(5)

X.—*How to render a Wall a Common Wall.*

ART. 107.—He who wishes to build against a wall which is not common, may do so; but he must, before demolishing any part of it, or build, pay to the proprietor one-half of the value of the wall, and one-half of the ground upon which it is built, unless he or his ancestors had furnished one-half of the ground.(6)

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(1) Custom, Nos. 201, 202. Traité des Obligation, No. 845.
(2) Ibid, 204.
(3) These piers or jams, (*jambes per peignes,*) are made with stones, of which each course are of the whole thickness of the wall in which they are placed, and the corbils, (*corbeaux,*) are pieces of stone which project out of the naked wall under the beams. Desgodets, Loix des Batimens, page 679, &c.
(4) Custom Art. 195.
(5) Ibid, 198.
(6) Ibid, 194.

XI.—*Responsibility of the Masons.*

ART. 108.—The law has rendered the masons responsible of all costs, damages, and interests, and to rebuild the walls they demolished or touched, before calling the parties who have an interest in the wall—a simple notification suffices, although the time is not fixed, to authorise masons to proceed with their work, it is to be presumed that a reasonable time must be allowed.(1)

XII.—*Boundary Enclosures in the open country.*

ART. 109.—Every fence which separates rural estates is considered as a boundary enclosure, and are made and kept up at the expense of the adjacent estates, as also the ditches, the share of the fence of each neighbour, for want of other vouchers is deemed to be for board fences, the side from which the boards are nailed. For picket fences the side from which the pickets are pinned; for rail fences it is the part which is on that side of the ditch where it is planted; and for the ditches, it is the part of the proprietor on whose land the earth taken from the ditch to make or clean them, is thrown.(2)

XIII.—*Distance of Intermediary Walls—Stables.*

ART. 110.—He who wishes to build stables against a wall held in common, is bound to make a double wall of eight inches thick, to the height of the racks or manger.(3)

XIV.—*Chimnies and Hearths.*

ART. 111.—He who wishes to build chimnies or hearths against a wall held in common, is bound to make a double wall of tiles or brick, or other proper materials, six inches thick.(4)

XV.—*Ovens, Forges, and Furnaces.*

ART. 112.—He who wishes to build an oven, a forge, or a furnace, against the wall held in common, is bound to leave half a foot interval or vacancy betwixt such wall and that of his oven; and this last wall must be one foot thick.(5)

XVI.—*Wells and Necessaries.*

ART. 113.—He who wishes to dig a necessary or a well against a wall, whether held in common or not, is bound to build another wall one foot thick; and when there is a well on one side, and a necessary on the other, there shall be four feet masonry betwixt the two; but between two wells, three feet is sufficient, including the thickness of the wall.(6)

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(1) Custom Art. 203. See Degodets, Loix des Batimens, upon this article, page 271, &c.
(2) See Guyot, Repertoire de Jurisprudence, verbo Clotures.
(3) Custom Art. 188.
(4) Ibid, 189.
(5) Ibid, 188.
(6) Ibid, 191.

XVII.—*Ploughing and Manuring against a Wall.*

ART. 114.—He who wishes to cause his ground adjoining a common wall to be manured and ploughed, must build another wall of six inches thick, and one foot thick if the ground has been artificially raised.(1)

XVIII.—*Sinks, Sewers, Ditches, &c.*

ART. 115.—To have sinks, sewers, ditches, &c. against a common wall, six feet interval must be left on all sides.(2) Common necessaries must be by the proprietors cleaned and repaired in common.(3)

XIX.— *Cases in Dispute—Appointments of Experts.*

ART. 116.—In case of dispute upon any of the matters contained under the title of servitudes, experts are appointed by the parties in court, for the purpose of visiting the localities *ex officio* by the judge, if the parties do not agree.(4) The experts must take the oath of office before the judge. They must cause their report to be put in writing, sign the original thereof upon the place of their operation, and before they have left the ground.(5)

XX.—*Report how to be made and delivered.*

ART. 117.—The report must be delivered to the court, for the judge to have such regard to it as he will think reasonable ; or delivered to their assisting clerk, who is bound to deliver it to the parties within twenty-four hours should they require it. Neither of the parties can demand a second visit, but the judge of his own authority may order one, should he think it proper.(6)

XXI.—*Of the Right of Lights on the Property of the Neighbour.*

ART. 118.—One neighbour cannot, without the consent of the other, open any window or aperture through the wall held in common, in any manner whatever, not even with the obligation, on his part, to confine himself to lights, the frames of which should be so fixed within the wall that they could not be opened.(7)

XXII.—*Windows and Lights.*

ART. 119.—But the sole proprietor of a wall, although joining immediately the property of others, may have windows or sights in his wall, provided they be

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(1) Custom, 192.
(2) Ibid, 217.
(3) Ibid, 213.
(4) Ibid, 184.
(5) Ibid, 185.
(6) Ibid, 185.
(7) Ibid, 199.

placed nine feet above ground for the first story, and seven feet above the floor of the other stories, and that they are so permanently fixed that they cannot be opened, and have a wire lattice or netting, *fer maille.*(1) None of the opening of this iron netting can have more than four inches on all sides, and the glass or sash must be sealed with plaster.

XXIII.—*Lights and Views.*

ART. 120.—No one can have lights or views upon the property belonging to others, unless there is a space of six feet for direct views, and two feet for side views.

XXIV.—*The manner of carrying off Rain from the Roofs.*

ART. 121.—Every proprietor is bound to fix his roof so that the rain water fall upon his own ground or upon the public road. He has no right to cause the same to fall on his neighbour's ground.(2) And when the water falls upon streets, the proprietor must conform himself to the regulations of the police.

XXV.—*Of the Right of Passage.*

ART. 122.—The proprietor, whose estate is enclosed, and who has no way to the public road, may claim the right of passage on the estate of his neighbours for the cultivation of his estate; but he is bound to indemnify them in proportion to the damage he may occasion.(3)

XVI.—*How Servitudes are established.*

ART. 123.—No one can claim a right of servitude unless he has a title from the owner of the ground who established it. Enjoyment by one individual, and by his ancestors, however long, even for one hundred years and more, does not ensure it.(4) Immemorial possession itself is not sufficient to acquire them. Immemorial possession is that of which no man living has seen the beginning, and the existence of which he has learned from his elders.(5)

A sheriff's sale, which carries with it the utmost power the law can give in the transferrance of individuals' property, should it transfer a right of servitude without a previous title establishing it, is of no avail; prescription does not cover the defect, however long, without a former title, the sheriff's declaration and sale in regard to it a nullity.(6)

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(1) Custom, 200.
(2) Pothier, Contrat de Société, No. 244.
(3) Inst. 88, Loi 1, Inst. de Serv. proed. rust. Domat Loix Civiles, tit. 12, sec. 3. Pothier, Vente, n. 215. Contrat de Loi, No, 216.
(4) Custom Art. 186.
(5) Pothier, Contrat de Société, No. 246. Toullier, III. p. 410.
(6) See Degodels, Loix des Batimens, page 4.

XXVII.—*To whom belongs the Right of imposing a Servitude.*

ART. 124.—The right of imposing a servitude permanently on an estate, belongs to the owner alone.(1)

Married women, and persons labouring under any disabilities, or under the authority of others, cannot establish it except by observing the forms prescribed for the alienation of their property.

The husband cannot establish a servitude on the dotal property of his wife, even with her consent, unless it be expressly stipulated in the marriage contract that he shall be permitted to do so, and with her consent.(2)

Without a special power, an attorney cannot do it.(3)

When a servitude is established, every thing which is necessary to use such servitude is supposed to be granted at the same time with the servitude. Thus the servitude of drawing water out of a spring, carries necessarily with it the right of passage, which, however, must be the most direct and the least inconvenient to the estate subject to the servitude.(4)

XXVIII.—*How Servitudes are extinguished.*

ART. 125.—Servitudes are extinguished by prescription, or the non usage during thirty years.(5)

When things are in such a situation that they can no longer be used, and when they remain perpetually in such a situation; but if they are re-established in such a manner that they may be used, the servitudes will only have been suspended, and they resume their effect, unless, from the time they ceased to be used, sufficient time has elapsed for prescription to operate against them.(6)

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(1) Merlin, Repertoire, sec. 1, Nos. 8 & 9.
(2) Pardessus, Servitudes, n. 342.
(3) Pothier, Traité du Contrat de Mandat, No. 121.
(4) Toullier. III. p. 411.
(5) Custom Art. 184.
(6) Pothier, Introduction au Titre, 13 de la Coutume d'Orleans, No. 13 Toullier, III. pp. 522, 527, 531, & 533.

CHAPTER IV.

SUCCESSIONS—BY THE LAWS OF CANADA AND BY THE LAWS OF ENGLAND.

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FRENCH RULES.

SECTION I.—GENERAL PRINCIPLES.

I.—Definition.

ART. 126.—In the language of the law, the word succession means the transmission of the rights and obligations of the deceased, to the nearest capable of succeeding,(1) who is seized from the moment of the death.(2)

Succession signifies also the estate, rights, and charges which a person leaves after his death, whether the property exceeds the charges, or the charges exceed the property, or whether the deceased has only left charges without any property.(3)

II.—*It includes augmentations and charges accrued since the death.*

ART. 127.—The succession does not only include the rights and obligations of the deceased, as they exist at the time of his death, but all that has accrued thereto since the opening of succession, as also the new charges to which it becomes subject.

III.—*Different sorts of Successions.*

ART. 128.—There are three sorts of Successions, to wit—testamentary successions, legal successions, and irregular successions.

IV.—*Testamentary Successions.*

ART. 129.—Testamentary succession is that which results from the institution of heir contained in a testament, executed in the form prescribed by law. This sort of succession is treated under the title of donations, intervivos, and testaments.(4)

V.—*Legal Successions.*

ART. 130.—Legal successions is that which the law has established in favour of the nearest relation of the deceased.

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(1) Grotius, b. 2, c. 7. Toullier, III. p. 40. Guyot and Merlin, Repertoires, verbo Succession.
(2) Custom Art. 318. See articles 169, 256, 258.
(3) Institutes, lib. 2, tit. 10.
(4) Custom Art. 272 to 288, and from 289 to 298.

There is also another sort of legal successions, called irregular successions, which is established by law in favour of certain persons, or of the state in default of heirs, either legal or instituted by testament.

VI.—*Different sorts of Heirs.*

ART. 131.—There are three kinds of heirs which correspond with the three species of successions described in the preceding articles, to wit—testamentary, or instituted heirs; legal heirs, or heirs of the blood; and irregular heirs.(1)

He who is the nearest relation to the deceased capable of inheriting, is presumed to be the heir, and is called the presumptive heir. This quality is given to him before the decease of the person from whom he is to inherit, as well as after the opening of the succession, until he has accepted or renounced it.

VII.—*Unconditional and Beneficiary Heirs.*

ART. 132.—Heirs are divided into two classes, according to the manner in which they accept successions left to them—unconditional heirs and beneficiary heirs. Unconditional heirs are those who inherit without any reservation or without making an inventory, whether their acceptance be express or tacit. And beneficiary heirs are those who have accepted the succession under the benefit of an inventory, and having observed the formalities required by law.

There are three classes of legal heirs. 1st, The children and other lawful descendants. 2d, The father and mother, and other lawful ascendants. 3d, And the collateral kindred.(2)

VIII.—*Degrees of Consanguinity.*

ART. 133.—The propinquity of consanguinity is established by the number of generations, and each generation is called a degree.(3)

The series of degrees between persons who descend from one another is called direct or lineal consanguinity, and the series of degrees between persons who do not descend from one another, but spring from a common ancestor, is called the collateral line, or collateral consanguinity.

IX.—*Direct Line.*

ART. 134.—The direct line is divided into a direct line descending and direct line ascending. The first is that which connects the ancestor with those who descend from him; the second is that which connects a person with those from whom he descends.(4)

In the direct line there are as many degrees as there are generations. Thus the son is with regard to the father in the first degree, the grandson in the second, and *vice versa* with regard to the father and grandfather towards the sons and grandsons.(5)

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(1) Montesquieu, Esprit des Loix, lib. 27.
(2) Toullier, IV. p. 63.
(3) Pothier, Successions, ch. 1, sec. 2.
(4) Ibid, ch. 1, sec. 2, art. 3.
(5) Ibid, ch. 1, sec. 2, art. 3.

X.—*Collateral Line.*

ART. 135.—In the collateral line the degrees are counted by the generations from one of the relatives up to the common ancestor exclusively, and from the common ancestor down to the other relative.

Thus brothers are related in the second degree, uncle and nephew in the third degree, cousins german in the fourth, and so on.(1)

XI.—*Equality of Division.*

ART. 136.—In matter of equal successions, no difference of sex, and no right of primogeniture are known; but they are regulated by the most perfect equality,(2) except on seigniorial lands.(3)

XII.—*Variance in the Cannon and Civil Law.*

ART. 137.—In the collateral line, the cannon law and civil law differs materially in the mode of computing the degrees of kindred. The civil law regards the number of persons from the common stock exclusively, and the cannon law only considers the distance in the number of degrees between the common ancestor and the person whose consanguinity is in question, or that one of them who is the most remote from such ancestor, for the canonists begin from the stock.

XIII.—*Representation.*

ART. 138.—Representation is a fiction of the law, the effect of which is to put the representative in the place, degree, and rights of the person represented.(4)

XIV.—*Ad Infinitum in the direct Descending Line.*

ART. 139.—Representation takes place at *infinitum* in the direct descending line.(5)

It is admitted in all cases, whether the children of the children of the deceased concur with the descendants of a predeceased child, or whether all the children have died before him.

XV.—*None in the Ascending Line.*

ART. 140.—Representation does not take place in favour of the ascendants; the nearest relation in degree always exclude those of a degree superior or more remote.(6)

XVI.—*Restricted in the Collateral.*

ART. 141.—In the collateral line, representation is admitted only in favour of the children and descendants of the brothers and sisters of the deceased, whether

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(1) Montesquieu; Esprit de Loix, liv. 27, ch. 1, c. 27 & 36. Deut. c. 21, v. 17. Institutes. liv. 3, tit. 4.
(2) Pothier, Successions, ch. 2, sec. 1.
(3) Custom Art. 302. See Articles 13, 15, 16, 17, 18, & 68.
(4) Pothier, Successions, ch. 2, sec. 1.
(5) [illegible]. 107.
(6) [illegible] p. 191 193, 203.

they come to the succession in concurrence with the uncles and aunts, or whether the brothers and sisters of the deceased having died, the succession devolved on their descendants in equal or unequal degrees. In all cases in which representation is admitted, the partition is made by roots.(1)

If one has produced several branches, the subdivision is also made by roots in each branch, and the members of the branch take between them by heads.

Persons deceased only can be represented; persons alive cannot.(2)

The uncle succeeds to his nephew before the cousin german, because he is nearer in degree.(3)

The uncle and the nephew succeed equally, because they are in the same degree, provided the deceased has left no brothers or sisters capable of succeeding to him; otherwise, should they even renounce the succession, the uncle would not inherit, the nephew would be the sole heir, because, at the moment of the succession, it would have devolved to the brothers and sisters, and to the nephew by representation, according to the rule established by the 318 article of the Custom, that the heir is seized at the moment of the death, and also because the share of the one who renounce augments that of the other heirs.

XVII.—*No regard to Full Blood.*

ART. 142.—The Custom pays no regard to full blood; it has no advantage upon half blood.(4)

When the brothers or sisters of the deceased rank with their nephews by representation, the succession is to be divided by roots.(5)

But if he has left only nephews in equal degrees, the partition shall be made by heads,(6) as also amongst all other collateral heirs, in whatever degree they may be.(7)

XVIII.—*Exception.*

ART. 143.—This rule is relative to persons only; as to property, the Custom makes two distinctions—the one is relative to feudal lands or lands held seigniorially, and the other between moveable property and acquests and lineal property.(8)

In this succession the eldest son has no right of primogeniture.(9)

But in seigniories the males exclude the females in equal degrees, even in the subdivision between brothers and sisters, in the share they have taken in the succession by representation of their father.(10) It is the contrary if the females are

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(1) Custom Art. 320-328.
(2) Pothier, Successions, ch. 2, sec. 1.
(3) Custom Art. 338.
(4) Custom, Art. 340 & 341.
(5) Ibid, 320-328.
(6) Ibid, 321. Langlois, Princ. Gen. from page 117 to 125.
(7) Ibid, 327.
(8) Ibid.
(9) Ibid, 331,
(10) Ibid, 25.

in a nearer degree,(1) except that the deceased should have left as heirs brothers and nephews, sons of a deceased sister. These nephews would be excluded from inheriting these seigniorial lands, as their mother would have been.(2)

But this distinction of origin between nephews descending from a male and those descending from a female, takes place in the only case that they succeed by representation, for when nephews and cousins succeed in their own right, males exclude females indistinctly without any regard to the origin of either.(3)

XIX.—*Moveables and Acquests.*

ART. 144.—The moveables and acquests are indistinctly divided amougst the nearest relatives of the deceased, save the right of representation in favour of nephews and of seigniorial property.(4)

Lineal property is to be preserved as much as possible in the line whence it proceeds; it ought to belong to the nearest relatives of that line, although they were not the nearest relative to the deceased.(5)

XX.—*How reputed of the Line.*

ART. 145.—To be reputed a relative of the side and line, it is not necessary to have descended of the one who has first put the property in the family; it suffices to be of the family; although his descendants are always preferred to the other lineal heirs, notwithstanding nearer in degree.(6)

When there are no heirs of the side and line wherefrom proceeded a lineal heritage, then that heritage loses its nature of lineal property, and is reputed to be an acquest, and divided as such.(7)

XXI.—*Ascending Line.*

ART. 146.—Succession falling to ascendants.

The ascending succession is opened only in the case that the legitimate children die without leaving any children.(8)

It is their father and mother who inherit, failing them, the other ascendants are called to it; in this succession representation do not take place.(9) It is composed of the personal property, acquests and conquests of the deceased.(10)

Lineal property makes no part of it, for it does not ascend.(11)

But the ascendants take the property they had given to their children.(12)

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(1) Custom Art. 323. Langlois, Princ. Gen. from page 127 to 133.
(2) Ibid, 322.
(3) Ibid, 25.
(4) Ibid, 325.
(5) Ibid, 326.
(6) Ibid, 329.
(7) Ibid, 330.
(8) Ibid, 311.
(9) Ibid.
(10) Ibid.
(11) Ibid, 312.
(12) Ibid, 313.

The ancestors, after the demise of their grandchildren, inherit the immoveable property which has come to them by the succession of their father or mother children of the said ancestors, who had acquired them, provided always that the demised grandchildren left no descendants, nor any brother or sister, children of the purchaser.(1)

Had they left any brothers or sisters, who afterwards had died without leaving any descendants of them, and that the last had inherited the succession either of his father or mother or that of his brothers and sisters, all such property which had been acquired by his father or mother, would revert to the ancestors at the death of the last of the said grandchildren.

XXII.—*Important Rules to be observed before deciding who inherits.*

ART. 147.—When there is lineal property in the succession of the deceased, who died without leaving any children, and who leaves, as his heirs, descendants, and collateral relatives, the first thing to be considered is, whether these collaterals have descended from the purchaser. If they have not descended from him, but are only of the line, the ascendants of the line will exclude them, in whatever degree they may be.

If they have descended from him, the second enquiry will be to know in what degree they are, and in what degree are the ascendants. If the ascendants are in a nearer degree, they exclude the collaterals. It is the reverse if the collaterals descending from the purchaser are in equal or nearer degree, for they will exclude the ascendants.

Thus the only effect of the 312th article of the Custom, which establishes that lineal property does not ascend, is to exclude the ascendants from succeeding to lineal property of a line to which they do not belong, so as to preserve them to the collaterals of that line, as long as there are any; but if none are to be found, this lineal property is considered simply as an acquest.

ART. 148.—There is an exception to this rule: when a man and his wife, being in matrimonial community, have acquired together immoveable property, which by the death of one of them has partly passed to their children, who die without leaving children, that property becomes lineal in their persons; if all these children die without issue, the surviving conjunct will be entitled to the enjoyment of the said property during his life, although it has become lineal.(2)

The same rule applies to the succession of the last of the grandchildren in favour of the survivor of the ancestors, who had acquired these immoveables, which were conquests in their community. But to be entitled to claim that usufruct,

1st, There must be no descendants from the purchaser.

2d, That the father or mother, or other ascendant, inherits from their children or grandchildren.

ART. 149.—Thus, if a matrimonial partner had children from two marriages, the survivor could claim that usufruct only after the demise of all the children, and

(1) Custom Art. 315.
(2) Ibid, 314 & 230.

he would have no claim to it should the last dying of the said children be of another marriage, for in this case he would not be heir to him.(1)

XXIII.—*Irregular Successions.*

ART. 150.—There are no irregular successions in Lower Canada. Ascendants and collaterals do not succeed to bastards.(2) But the legitimate children of bastards succeed to them; their lawful marriage gives them a rank in civil society.

XXIV.—*Law unde vir et uxor.*

ART. 151.—The pretorian edict, *unde vir et uxor*, is in force everywhere, unless there is a positive law to the contrary. By that law, when the deceased has left no lawful heirs, the surviving husband or wife succeeds to the other in preference to the crown.(3)

XXV.—*Opening of Successions.*

ART. 152.—The succession, either testamentary or legal, becomes open by death or by presumption of death, caused by long absence, in the cases astablished by law.

The place of the opening of successions is as follows:—

1st, In the parish or township where the deceased resided, if he had a fixed domicil or residence in the province.

2d, In the parish or township where the deceased owned real estate, if he had neither domicil nor residence in the province, or in the parish, or township in which it appears by the inventory his principal effects are, if he has effects in different parishes.

3d, In the parish or township in which the deceased has died, if he had no fixed residence, nor any moveable effects within the province, at the time of his death.(4)

XXVI.—*Rules when it is not known who died the first.*

ART. 153.—For want of circumstances of the fact, as when persons have perished together, the determination must be guided by the probabilities resulting from the strength, age, and difference of sex, according to the following rules.

If those who have perished together were under the age of fifteen years, the oldest shall be presumed to have survived.

If both were above the age of sixty years, the youngest shall be presumed to have survived.(5)

If those who have perished together were above the age of fifteen years, and under the age of sixty, the male will be presumed to have survived; also, when there was an equality of age, or a difference of less than one year.

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(1) Langlois, Princ. Gen. p. 350. Custom Art. 318.
(2) Bacq. ch. 8, n. 3.
(3) See Lacombe, Recueuil de Jurisprudenee, verbo Succession, sec. 4.
(4) See Merlin, Repertoire, tit. Loi, § 6, 3.
(5) Pothier, Succession, ch. 2, sec. 1, art. 2, § 1. Toullier, IV. p. 69 & 70.

If they were of the same sex, the presumption of survivorship, by which the succession becomes open in the order of nature, must be admitted; thus the younger must be presumed to have survived the elder.(1)

The heir is seized of the inheritance at the moment of the death of the person to whom he succeeds.(2) This rule applies as well to legal heirs, and to universal legatees, but not to particular legatees; these must be put in possession by the heir; the right is acquired by the operation of the law alone, before he has taken any step to put himself in possession, or has expressed any will to accept it; and the right of possession which the deceased had, continues in the person of the heir, as if there had been no interruption, and independant of the fact of possession.(3)

XXVII.—*Acceptance of Successions.*

ART. 154.—No one can be compelled to accept a succession or a legacy; he may, therefore, accept or renounce it.(4)

A person cannot accept a succession before it has fallen to him. Thus a relative in the second degree cannot accept or renounce until he who is related in the first degree has legally decided to accept or renounce; and in testamentary successions, the heir, *ab intestato*, can neither accept nor renounce until the instituted heir has decided to accept or renounce.(5)

XXVIII.—*Effect of the Acceptance.*

ART. 155.—The effect of the acceptance goes back to the day of the opening of the succession.(6)

The beneficiary acceptance has also its effect from the day of the opening of the succession. The acceptance of the community is from the day of its dissolution.

XXIX.—*Tacit or Express Acceptance.*

ART. 156.—The simple acceptance may be either express or tacit. It is express when the heir in an unqualified manner, in some authentic or private instrument, or in some judicial proceeding, accepts.

It is tacit, when some act is done by the heir which necessarily supposes his intention to accept, and which he would have no right to do, but in his capacity of heir.(7)

It is necessary that the intention should be united to the fact, or rather manifested

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(1) Pothier, Introduction au tit. xxii. de la Coutume d'Orleans, No. 38. Successions. sec. 1. Toullier, IV. p. 70 & 74.
(2) Custom Art. 318.
(3) Toullier, IV. p. 63. Bacquet, Droit Daubaine, c. 33. LeBrun, Suc. 61, c. 7.
(4) Pothier, Droit de Propriété, No. 248.
(5) Merlin, Questions de Droit Succession.
(6) Pothier, Droit de Propriété, No. 248. Successions, ch. 3, art. 1. Introduction du Tit xvii. de la Coutume d'Orleans, No. 39. L'Acceptation Beneficiaire remonte à la même epoque Successions, ch. 3, sec. 3, et l'Acceptation de la Communauté, remonte à sa Dissolution, Communauts 548. Toullier, IV. p. 350. X. p. 234.
(7) Pothier, Successions, ch. 3, sec. 3, art. 1. Toullier, IV. p. 340-344; VIII. p. 706.

by the fact, in order that the acceptance be inferred.(1) The making of the inventory, or the disposal of a thing which the heir does not know to belong to the succession, does not make him liable, because the first is a conservatory act, and the other does not imply the will to accept.(2) If it becomes necessary to sell some articles to prevent loss or waste, the heir must cause himself to be authorised by the judge to make this sale at public auction, in a petition, in which he shall allege the necessity there is for making it; otherwise he will become irrevocably the heir. An act of piety, or of humanity, towards one's relations, is not considered an acceptance; as to take care of the burial of the deceased, or to pay the funeral expenses, even without authorization. But the donation, sale, or assignment which one of the co-heirs makes of his rights of inheritance either to a stranger or to his co-heirs, is considered to be an acceptance of the inheritance.(3)

The heir being considered as having succeeded to the deceased from the instant of his death, the first effect of this right is that the heir transmits the succession to his own heirs, with the right of accepting or renouncing, although he himself have not accepted it, and even in case he was ignorant that the succession was opened in his favour.(4)

XXX.—*Acceptance of a Married Woman.*

ART. 157.— The acceptance of a married woman, without the authorisation o her husband, or of the judge, is not valid.(5)

If the wife should refuse to accept an inheritance, her husband, who has an interest to have it accepted, in order to increase the revenues of which he has the enjoyment during the matrimony, may, at his risk, accept it on the refusal of his wife.(6)

SECTION II.

I.—*Incapacity or unworthiness of being Heirs.*

ART. 157.—In order to be able to inherit, the heir must exist at the moment that the succession becomes open.(7) Nevertheless, if the child conceived is reputed born, it is only in the hope of its birth; it is necessary then that the child be born alive, for it cannot be said that those who are born dead have ever inherited.(8)

(1) Toullier, IV. p. 341.
(2) Ibid, p. 347, No. 331.
(3) Pothier, Successions, ch. 3, sec. 3, art. 1. Toullier, IV. 346; XIII. p. 241.
(4) Institute 2, 19, 2. Digest, 29. 2, 11.
(5) Pothier, Successions, ch. 3, art. 1. Puissance du Mari, No. 33. Toullier, II. p. 16.
(6) Pothier, Successions, sec. 3, art. 1.
(7) Ibid, ch. 1, sec. 2. Toullier, p. 131; IV. p. 100.
(8) Toullier, II. p. 131.

In the calculation of the number of months necessary for a child to be considered as born capable of living, thirty days are counted for each month, and the day begun is counted for a whole day, because it is for the interest of the child,(1) with regard to the proofs necessary to establish the existence of the child, at the moment of its birth, it must not be determined by the simple palpitation of its members, that it was born alive, but by its respiration, or by other signs which demonstrate its existence.(2)

II.—*Persons unworthy of inheriting.*

ART. 159.—Persons unworthy of inheriting, and as such, deprived of the successions to which they are called, are the following:

1. Those who are convicted of having killed, or attempted to kill the deceased, and in this respect they will not be the less unworthy, though they may have been pardoned after their conviction.

2. Those who have brought against the deceased some accusation found calumnious, which tended to subject the deceased to an infamous or capital punishment.

3. Those who being apprised of the murder of the deceased, have not taken measures to bring the murderer to justice.(3)

The unworthiness is never incurred by the act itself, it must be pronounced by the laws, in a suit instituted against the heir accused of unworthiness, after he has been duly cited.(4)

If the heir be declared unworthy of inheriting, by a definitive judgment, he shall be condemned to deliver to the relations succeeding on his default, or those who have succeeded jointly with him, not only the effects of the succession, of which he has had the use since its opening, but all the fruits, revenues, and interest he has derived from such effects since the opening of the succession.(5)

The children of the person declared unworthy, are admitted to the succession *ab intestato* in their own name.(6)

III.—*Those who are incapable of inheriting.*

ART. 160.—Nuns, nor their monasteries for them.

No difference exist in the successions of bishops and priests from those of other citizens.—*Ibid.* 336.

Those who have been condemned to death or to perpetual banishment.

IV.—*General Maxims common to all Successions.*

ART. 161.—Every succession from the moment of its opening, devolves to the nearest relatives of the deceased, capable of succeeding to him.(7) None being

(1) Chaussier, Viabilité, p. 3; Merlin, art Viabilité.
(2) Capuron, page 199.—Leçons de Medecine Legale, par Mr. Orfila, Vol. 1, pages 388, 389. Seconde Edition.
(3) Poth, Succession, chap. 1. § 2. Art. 4.
(4) Toul IV. p. 117.
(5) Toul IV. p. 112.—No. 103, 116.
(6) Poth, Succession, chap. 2. § Art. 4, Contrat de Mariage, n. 335. Touiller II. p. 296, 297. IV. p. 117, 196.
(7) Custom, Art. 318. L'Anglois, Principes generaux de la Cout.

obliged to accept a succession: by his renunciation, he is deemed never to have been seized of his share, which accrues to the other heirs.(1)

V.—*Liberty of Renouncing.*

ART. 162.—To have the liberty of renouncing, no act of heirship must have been made. He who puts himself in possession of the inheritance, either in part or in the whole, makes an act of heirship, even supposing that the deceased was indebted to him, in that case he must make his claims in justice, before he seizes himself, otherwise he makes an act of heirship.(2)

VI.—*The quality of Heir and Legatee, incompatible.*

ART. 163.—None can be together Heir and Legatee to the deceased. (3) Neither his *Donee inter vivos*, and his heir in the direct line, descending or ascending; but the compatibility of these two qualities is admitted in the Collateral line. (4)

Nevertheless heirs taking real property of the succession, are bound towards the hypothecary creditors of the total of the mortgage saving their recourse against their co-heirs.

VII.—*Payment of Debts.*

ART. 164.—Those who succeed equally pays the debts, equally. (5)

And if in unequal proportions as when there are heirs to moveables, acquests and conquests and others to lineal property, or that there are donees, or universal legatees, in those cases, the debts are paid in proportion to the share each receives in the inheritance.

VIII.—*Exception in the Succession of Fiefs.*

ART. 165—This rule does not apply against the eldest sons, succeeding to fiefs in the direct line, although their share is larger than those of the other children, they pay the personal debts equally; but this is not the case, for the real debts, which they pay in proportion to the emolument,(6) as also, when in the collateral line, the male excludes the females of the fiefs.(7)

SECTION III.—OF COLLATIONS.

I.—*What Collation is, and by whom due.*

ART. 166.—Collation, *Collatio Bonorum*, is the supposed or real return to the mass of the succession, which an heir makes of property received in advance of

(1) Custom, Art. 314.
(2) Custom, Art. 317.
(3) Custom, Art. 300.
(4) Custom, Art. 301.
(5) Custom, 323.
(6) Custom, Art. 334.
(7) Custom, Art, 335.

his share or otherwise, in order that such property be divided together with the effects of the succession.(1)

II.—*Children accepting the Succession of their Ascendants, must collate.*

ART. 167.—Children, and grand children, accepting the succession of their father, mother, and other ascendants, must collate what they have received from them or take less, in other property of the estate of the same goodness and value.(2)

III.—*Those who accept by representation of their Ancestors.*

ART. 168.—Grand children accepting the succession of the ancestors, by representation of their father or mother, although they had renounced to the succession of their said father and mother, must collate what their father or mother had received. It is otherwise, if they succeed in their own right, as if their father and mother were dead, at the time of the opening of the succession. If the collation is made in nature, or same specie as the advantage was made, the collating heir must be responded by his co-heirs, of the useful or necessary expences he made on the property given to him, should they refuse to do so, he will be bound to collate only the estimated value of the heritage, at the time of division, deducting the said expences.

IV.—*Rule in favour of Donees.*

ART. 169.—The donee of sums of money is never bound to refund in specie, unless there should not be found in the succession, sufficient tangible property; for the other heirs are not bound to take their share in obligations, or debts due to the succession.

V.—*Fruits and Interests must be collated.*

ART. 170.—With the real estate, the fruits must also be collated from the day of the opening of the succession, and if it be personal property, which is no more in the possession of the donee, he must pay interest at the rate of five per-cent, from the moment of the opening of the succession.(3)

VI.—*Legatees are not subject to Collation.*

ART. 171.—If children or other lawful descendants, holding property or legacies to the collated, should renounce the inheritance of the succession of the ascendants, from whom they have received such property; they may retain the gift, or claim the legacy to them made, without being subject to any collation.

And things given or bequeathed to children, or other descendants, shall not be collated, if the donor has formally expressed his will, that what he thus gave, was an advantage or extra part; unless in case of donation *inter vivos*. The value of

(1) Pothier, Succ. ch. 3l Sec. 3, Art 1, in the common law, signification in England, it is termed Hotchpot.
(2) Custom, Art 304, 304, 306. See Langlois.
(3) Custom, Art 309. See Langlois. Tit Rapport.

the object given, must not exceed the disposable portion, the legitim must be preserved, and the excess must be collated. In case of a legacy it is otherwise, for the owner of unincumbered property may dispose of it without any restriction to whom he pleases.

VII.—*To whom the Collation is due, and what things are subject to it.*

ART. 172.—The collation is only made to the succession of the donor (1)

Collation is due for what has been expended by the father and mother, to procure an establishment for their descendant coming to their succession, for the settlement of dowery, or for the payment of his debts.(2)

Neither the expense of board, support, education, and apprenticeship, are subject to collation, nor are marriage presents which do not exceed the disposable portion, neither are the expences in universities to obtain the degrees including the certificate or licence, but those paid for obtaining the degrees of doctor, are:(3)

SECTION IV.—BENEFIT OF INVENTORY.

I.—*Introduction.*

ART. 173.—Heirs either testamentary or *ab-intestato*, being doubtful whether the advantages they expect from a succession or inheritance will be sufficient to pay the debts, might by the Roman law enter and take the inheritance, *cum beneficio inventarii*, and limit his obligations to the assetts of the estate, by causing an inventory to be made, and declaring that he took the succession under the benefit of the inventory. Emperor Gordien, first introduced this benefit in favour of the soldiers, who had involved themselves by accepting burthened inheritances. Justinian by law *Scimus* in the code *de jure deliberandi* extended it to all heirs.

II.—*By the French Law.*

ART. 174.—By that law, the inventory was to be commenced thirty days after the opening of the succession, and completed sixty days after. It was introduced in France, with the Roman laws, under increased solemnities, the heir was obliged to obtain letters of *benefice d'inventaire* in Chancery, and have them registered by the judge when the succession was opened, cause an inventory to be made, and give security to the amount of the inventory.(4)

The Superior Council of Quebec, having been invested with the authority of the French Court of Chancery,(5) granted *letters of benefice d'inventaire.* The first were granted to Gedeon Petit, 5th July, 1683.(6) And the Court of King's

(1) Pothier, Successions, chap. 4, Art 2.
(2) Toullier, IV. p. 491 492, and XI. 453, 224.
(3) Pothier succession, chap. 4, Art 2. Toullier, IV. p. 488, 490.
(4) Guyot, Rep. Jurisprudence, Verbo, Benefice.
(5) Edits and Ordonnances, Vol. 1.
(6) Unprinted Judgments of the Council.

Bench having succeeded to the authority of the Conseil Superior, were authorised to grant them, even out of Court.(1)

This advantage is called *benefice d'inventaire*, as the inventory is the principal condition required.

III.—*Solemnities by the Civil Law.*

ART. 175.—By the Civil Law, the inventory was to be made under judicial authority, and after the judge had fixed the seal of the Court upon the papers, and on the places where the effects of the succession were.(2) It was to be made within three months after the opening of the succession and forty days to deliberate, and the judge extends the delay when the heir justifies that the inventory could not be made during that time.(3) The civil law has been modified by the custom of Paris, ruling in Canada.

IV.—*Unconditional and Beneficiary Heirs.*

ART. 176.—The unconditional heir excludes the beneficiary heir, although nearer in degree in the collateral line, but not in the direct line, nor in the collateral, when the heir is a minor,(4) the minor giving security, that he will not allow himself to be relieved of his unconditional acceptance, in which case he excludes the beneficiary heir.(5)

V.—*Formalities by the Laws of Canada.*

ART. 177.—The formalities necessary to be observed in Canada, to obtain the benefit of inventory, is by presenting a petition to the judge, and by giving security. The security is generally accepted as presented, the judge having no capacity to contest, but when creditors require it, he orders substantial security to be given.(6)

VI.—*Amount of Security.*

ART. 178—Security is required to the amount of the personal or moveable property; but not for the real; as the heir can not prevent the effect of mortgages upon the immoveable estate, the interest of the creditor cannot suffer,(7) and the omission of having had the moveable property valued, is not a sufficient cause for declaring the beneficiary heir to become an unconditional heir.(8)

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(1) Provincial Statute, 34, Geo. 3, chap. 7. Sec. 8.
(2) Domat Lois Civiles, Tit 2, sec. 3.
(3) Ordinance of 1667, registered at the Conseil Superieur, Edits et Ordinances, Vol. I. page 90.
(4) Custom Art.. 342, and 343.
(5) Le Brun des inventaires, lib 3, chap. 4, No. 45.
(6) Denizard actes de notoriété du Chatelet de Paris, page 253, 259.
(7) Guyot repertoire, V. Benefice d'inventaire.
(8) Arret du 18 Juin, 1605, Lacombe recueuil de Jurisprndence Verbo heritier.

SECTION V.—ENGLISH RULES OF SUCCESSION.

I.—*To Real Property.*

ART. 179.—From the common and statute law. Sir William Blackstone, and Sir Mathew Hale, have laid down rules of descent seven in number. They vary only in the phraseology; those of Sir William Blackstone have been universally adopted by subsequent writers.

II.—*First Rule, Inheritance descend.*

ART. 180.—Inheritance shall lineally descend to the issue of the person who last died actually seized in *infinitum*, but shall never lineally ascend.

III.—*Second Rule, Male issue is preferred.*

ART. 181.—The male issue shall be admitted before the female.

IV.—*Third Rule, the eldest Male alone Inherits.*

ART. 182.—When there are two or more males in equal degree, the eldest only, shall inherit, but the females all together.

V.—*Fourth Rule, he represents the Ancestor.*

ART. 183.—The lineal descendants in infinitum of any person deceased, shall represent their ancestor; that is, shall stand in the same place as the person himself would have done, had he been living.

VI.—*Fifth Rule, Failing Lineal; Collaterals are called.*

ART. 184.—On failure of lineal descendants, or issue of the person last seized, the inheritance shall descend to his collateral relations, being of the blood of the first purchaser; subject to the three preceding rules.

VII.—*Sixth Rule, the nearest of the whole blood is preferred.*

ART. 185.—The collateral heir of the person last seized, must be his next collateral kinsman of the whole blood.

VIII.—*Seventh Rule, Male Stocks preferred.*

ART. 186.—And last, that in collateral inheritances, the male stocks shall be preferred to the female, (that is the kindred derived from the blood of the male ancestors, however remote, shall be admitted before those from the blood of the female, however near) unless where the lands have in fact descended from a female.

IX.—*Consequences resulting from these rules.*

1. *Eldest Son and issue.*

The real property of a person who dies intestate, goes to his eldest son and his issue.

Failing them to the second, third, fourth, &c. sons and their issue successively through the sons.(1)

Failing sons and their issue, it goes to daughters equally, and their issue; the eldest son of any of the daughters deceased taking his mother's share, or if she leaves daughters only, then these daughters take their mother's share equally.

2. *Sisters.*

Failing daughters, and their issue, it goes to the eldest brother, and his issue, then the second eldest, and his issue, and so on.(2)

3. *Eldest Uncle.*

Failing children, brothers and sisters and their issue, it goes not to the father, but to the eldest uncle on the father's side, or the father's eldest brother and his issue, failing them to the second.(3)

4. *Father's Sisters.*

Children, brothers, sisters and uncles, on the father's side, being extinct, it goes to the father's sisters, or the aunts of the deceased on the father's side and their issue, as it would to daughters.(4)

5. *Brothers of the Grandfather.*

All these being extinct according to the same rules, it goes to the brother of the grandfather, on the father's side, and their issue, then the sisters, their issue, (5) and so ad infinitum in the ascending line.

There is no succession through the mother.

In Recapitulation.

The general rule is that heritage descends if it can; when it cannot descend, it will go sideways first to collaterals, and only ascend when these and their issue as well as descendants are exhausted. It never goes to the father or to any one in the direct line upwards, but to the collaterals of the father and their issue, then of the grandfather and their issue, and so on passing over the father, grandfather and themselves who never inherit.

English Rules of Succession to Personal Property.

1. *Widow and Children.*

ART. 187.—The moveable or personal property of a person dying intestate one third goes to his widow and the rest equally among his children; the children of those who have died taking their parents' share also equally.

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(1) Blackstone's Commentaries, Vol. 2, p. 208, 212, 213.
(2) Ibid, Vol. 2. p. 220 to 223.
(3) Ibid.
(4) Ibid.
(5) Ibid.

2. *Widow and next of Kin.*

If there be no children nor descendants of children, the widow takes a half, and the rest goes to the deceased; next of kin of their representatives.(1)

If there be children and no widow, then the whole is divided among the children, and the representatives of any who have died.(2)

If there be neither widow, nor children, nor representatives of children, then the father takes the whole.(3)

3. *Mother, Brothers and Sisters.*

ART. 188.—If the father be dead, then the mother, and the brothers, and sisters of the deceased take equally.(4)

If the mother be alive, and no brothers or sisters, then the mother will take the whole, and if the brothers and sisters be alive and not the mother, then the brother and sisters will take equally.(5)

4. *Grandfather and Grandmother.*

ART. 189.—After these the grandfather or grandmother, or uncles and aunts, will succeed as above, and so on.(6)

Payment of Debts.

ART. 190.—Before any right of succession can be claimed, creditors must be satisfied.(7)

Heirs, executors or administrators of wills, after burying the deceased and defraying necessary expences which are privileged or preferable, prove, that is exhibit and swear to the will with two witnesses before the judge ordinary, and obtain a probate or certificate of its being proved.(8)

After this they will deliver up an inventory of the estate on oath to the judge.(9)

They will then collect the estate according to the inventory,(10) and whatever is so recovered, that is of a saleable nature, and may be converted into ready money, is called assets from the French word *assez*, out of which the executors pay the debts.

1. *Funeral expences and probate of the Will.*

ART. 191.—First funeral charges and expences for proving the will.

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(1) Blackstone's Commentaries, Vol. 2. p. 220 to 223.
(2) Ibid.
(3) See 22 and 23, Lar. 2, chap. 10 and 29, chap. 30 Blackstone's Commentaries, Vol. 2, p. 208, 212, 213, 220, 223, 1st. James 2, chap. 17.
(4) 1st. James 2, chap. 17.
(5) Ibid.
(6) Ibid. Blackstone ut Supra.
(7) Bl. v. 2, 512
(8) Ibid. 508.
(9) Ibid. 510.
(10) Ibid.

2. *King's Debts.*

Secondly debts due to the king, for letters to the post office, debts of record as judgments, docketed according to statute 4 and 5 William and Mary, chap. 20.

3. *Debts due on Contracts, Servants' Wages.*

Debts due on special contracts, as for rent for which the lessor has often a better remedy in his own hands by distraining or upon bonds, covenants and the like, under seal. (1) Debts due on simple contracts upon notes unsealed and verbal promises. Among these simple contracts servants' wages are preferred to any other and stood the ancient law.(2)

4. *Legacies.*

Then they will pay legacies so far as they have not lapsed or fallen by predecease.(3)

5. *Executors.*

After the payment of debts and legacies, the residue belongs to the executors, if not otherwise ordered by the deceased.(4)

Heirs entering upon Inventory, English Rules.

ART. 192.—An heir who is doubtful whether his ancestors' estate will be sufficient to pay his debts, may enter upon inventory *cum beneficio inventarii*, and so limit the passive title to what is contained in the inventory.

By statute 21, Henry 8 c. 5, executors and administrators are required to make and deliver in upon oath to the ordinary inventories indented, of which one part remains with the ordinary and the other part with the executor or administrator.

The law requires that the inventory be exhibited within three months after the death of the person. If it be done afterwards, it may be good, for the ordinary may dispense with the time, and even in some cases, whether it shall be exhibited or not; as where creditors are paid and the will performed.

(1) Blackstone's 2 § 511.
(2) Bracton and Fleta, L. 2. chap.26, Blackstone l. 2 § 513.
(3) Ibid 2. § 513.
(4) Ibid. 515.

CHAPTER V

MATRIMONIAL COMMUNITY.

SECTION I.—*I. What is meant by the words Communauté de Biens, between Married Persons. II. How and when Contracted. III. Of what consists. IV. General Rules. V. Charges of the Community. VI. Dissolution of the Community. VII. Acceptance of the Wife. VIII. Renunciation by the Wife. IX. Continuation of the Community. X. Continuation in case of a second and other Marriages.*

SECTION II.—*I. Legal Difference by the English Jurisprudence. II. Power of the Husband. III. Consequences of this Rule. IV. The Husband becomes liable for all the Debts of the Wife. V. He becomes the Master of her Personal Property. VI. He has the Freehold of her Real Estates during their Joint Lives. VII. There is no Community of Property between them. VIII. The Wife cannot dispose of her Property nor make an effectual Will. IX. The same in the American States governed by the Common Law.*

SECTION I.—MATRIMONIAL COMMUNITY.

I.—*What is meant by the words Communauté de Biens.*

ART. 193.—Every marriage contracted in that part of the Province, of Lower Canada, which was subject to the French Laws before the conquest, superinduces of right, partnership or community of acquets or gains, if there be no stipulation to the contrary.

II.—*How and when Contracted.*

ART. 194.—It is contracted by the simple celebration of the marriage, and exists from the moment the nuptial benediction has been given.(1)

III.—*Of what Consists.*

ART. 195.—It consists 1st, of an equal share of all the moveable property belonging to each of the parties at the time of the marriage, and of that they or either may acquire during the time of their union.(2) 2. Of the conquests or immoveable property they may acquire together, and 3. Of the fruits and interests of their respective property not being in community.

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(1) Custom, Art, 220.
(2) Ibid.

IV.—*General Rules.*

ART. 196.—The husband is the head and master of this partnership; he administers its effects, disposes of the revenue which they produce, and may alienate them by an unincumbered title, without the consent or permission of his wife; he may dispose of them at his pleasure, provided it be done without fraud, and made to persons legally authorised to receive.(1) But by last will he can dispose of his half only.(2)

ART. 197.—He is also the master of the personal and possessory actions of his wife, he may administer them and defend them in judgment, but he can not dispose of her own proper estates, can not partition them, nor sell them by licitation.(3)

ART. 198.—The wife cannot alienate her estates without the authorisation of her husband, nor defend her rights in Courts of Justice,(4) unless she be a public merchant, in which case she may bind both herself and her husband in regard to her mercantile dealings. But he may lease them, and after the dissolution of community, his wife and her heirs are bound to maintain the leases, provided they have been made without fraud and not exceeding the term of six years for property situated in towns, and nine years for that situated in the country.(5)

ART. 199.—This right of the husband, granted by these articles, 224, 225, and 234, over the property of the community, is reduced to an honest administration, his malversation, dissipation, or fraud are sufficient reasons to deprive him of it by a judgment of a Court of Justice duly executed, but in this case the wife only re-acquires the right of disposing of her moveable property; she can not alienate her real estates without the authority of her husband or of the Judge, unless she be a public merchant, that is to say, if she trade in other goods or commodities, than her husband and apart from him.(6)

ART. 200.—The husband is bound for the obligations his wife may give to release him from jail, for her maintenance and that of her children according to their situation in life, when he fails to procure it.(7)

V.—*Charges of the Community.*

They are:

ART. 201.—1. The debts contracted during the community.

2. The personal debts due by either party, on the day the marriage was celebrated, unless it was stipulated by the contract of marriage that each party should separately pay their debts created before the marriage, which stipulation however can have no effect against creditors, unless an inventory be duly made of the property of the wife, before marriage, the husband by producing such inven-

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(1) Custom, Art 225.
(2) Custom, Art 296.
(3) Custom, Art 233.
(4) Custom, Art 224, 231.
(5) Custom, Art 227.
(6) Custom, Art 234, 235, 236.
(7) Langlois Tit Communauté.

tory is discharged such debts.(1) That inventory is not necessary says Langlois, if the total property of the wife is clearly and exactly detailed in the contract of marriage.(2)

It is usual to cause to be entered against the community, the passive personal debts, only to the extent of the moveable assets of the succession, but not what the parties have been by the law of nature obliged to furnish, such as support and maintenance to their father and mother in their distress, or to their children issue of other marriages when their income was not sufficient to support them.(3)

VI.—*Dissolution of the Community.*

ART. 202.—The community is dissolved.

1. By the natural or civil death of one of the spouses.

2. By a separation of property, ordered by court, and executed, and not re-established by the mutual consent of the parties which consent renders the judgment of separation null.

The community being so far dissolved, the wife may either accept or renounce it, provided she has done no act as being still in community, and has made a good and loyal inventory, the property being entire.(4)

The time to make the inventory has not been fixed by the custom, neither the time to renounce it. But the ordinance of Lewis XIV. 1667, has established that the widow being summoned as being in community, should be entitled to the same delays as the heir, to make the inventory deliberate and to accept or renounce to it, which delays are of three months from the opening of the succession or community, and forty days to deliberate. These forty days count from the day the inventory was finished, unless the heir has been prevented from making the inventory, in which case the Judge may extend the time.(5)

The inventory must be closed in justice, within three months after it has been completed.

The husband cannot renounce; he must attribute the disadvantageous state of the community to his mismanagement, or misfortunes.(6)

VII.—*Acceptance of the Wife.*

ART. 203.—When the wife accepts the community, it is divided by halves, of which the surviving party takes one half and the heirs of the other party the other half.

The private property of the parties being first taken or accounted for according to the rules previously established under the title of things.(7)

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(1) Custom, Art 222.
(2) Langlois Tit. Communauté.
(3) Ibid. page 196.
(4) Custom, Art. 237.
(5) Arrêt du Conseil d'état du Roi, 26 Avril 1667, as modified and registered at the Council Superior of Quebec, 7th Nov. 1678, Tit. VII. des délais pour délibérer. Edits and Ordonnances vol. 1. page 95 and 109.
(6) Langlois.
(7) Custom, Art. 229.

The surplus is declared to be the stock or mass of the community, upon which the survivor and the representatives of the other, will take:

1. The sums of money stipulated the personal property of each of the parties.

2. Such sums as have proceeded from the alienation of their private real property.

3. If the community be dissolved by death, the survivor takes the conventional *preciput*, if any has been stipulated.

4. Recompense of one half of the sums the community has expended to improve the private property and pay the debts of the other to which the community was not bound.

VIII.—*Renunciation by the Wife.*

ART. 204.—It is lawful for the wife to renounce the community.(1) When she renounces, the real and moveable property composing it, becomes the exclusive property of the husband, and the wife is discharged from its debts; if she has obliged herself personally to the payment of them or of part of them, the husband must indemnify her; and further he becomes her debtor:

1. For the amount of the matrimonial advantages, stipulated in her favour.

2. For the repairs of maintenance if any were required upon her private real property during the time the community had the usufruct of them, and were not made.

3. For the amount of her mourning according to her condition, which is due whether she accepts or renounces the community, but she loses it and must refund, if she marry again, within one year from the day of the death of her husband.(2)

IX.—*Continuation of the Community.*

ART. 205.—When at the time of the death of one of the conjuncts there are minor children of their marriage, the community is continued between the survivor and the said children, unless the survivor causes to be made a good and faithful inventory of the property composing the said community, at which the minor must be represented by a legitimate contradictor, that is, a person able to protect its rights.(3) That inventory must be acknowledged before the judge, and closed within three months after it has been made.(4)

Those of the children who have attained the age of majority, and in consequence are not entitled to demand the continuation,—may be benefited by the option of the minors, and have the continuation of community if the minors claim it.

X.—*Continuation of the Community in case of a Second and other Marriages.*

ART. 206.—In case of a continuation of community, the property of the first is divided between the survivor and the children representing their deceased parent, by halves.

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(1) Custom, Art 237.
(2) Langlois.
(3) Custom, Art 240.
(4) Custom, Art 241.

The second by thirds between the survivor, the children of the first marriage, and the new partner. And if the new partner have children by a former marriage, in which he was united by a matrimonial community, its continuation would be by fourths—and so on, each matrimonial union for one part, and the husband and wife each for one part; the survivor has always the right to put a stop to the community by making an inventory and causing it to be closed in justice three months after it shall have been commenced.(1)

The share of the children who die during the continuation of the community accrues to the other children.(2)

Although the survivor is the master of the continuation he can dispose of his share only of the conquests made during the lifetime of the two spouses, because the other half has become the exclusive property of the children. Thus in case no second marriage takes place the continuation is composed:

1. Of the moveable and immoveable effects of the community.
2. Of those which may become the property of the survivor by purchase or otherwise.
3. Of the income and revenue of the immoveable property belonging to the survivor.
4. Of the income and revenue of the immoveable property of the deceased.
5. Of the income of the revenue of the conquests made by the two conjuncts.

When the survivor marries again, another alteration or change in the continuation of community takes place, that is that his share of the immoveable conquests before made, from the moment of such second marriage make no more part of the coninuation,but become the private or lineal property of the survivor who marries again.

SECTION II.—DIFFERENCES.

I.—*Legal Difference by the English Jurisprudence.*

ART. 207.—This nuptial Jurisprudence, brief as it is, necessarily must present striking differences. By the laws of Canada, man and wife are partners and the husband is the administrator of the partnership so long as he is a faithful and intelligent agent, otherwise he may by judicial authority be dismissed.

II.—*Power of the Husband.*

ART. 208.—By the Laws of England, the wife is completely placed under the guardianship and coverture of the husband. The husband and wife are in contemplation of the law, one person. He possesses the sole authority and power over the person and acts of the wife, so that as Mr. Justice Blackstone has observed, the very being, or legal existence of the wife, is suspended during the marriage, or at least is incorporated and consolidated into that of the husband.(3)

(1) Custom, Art 242.
(2) 2 Art 243.
(3) Blackstone's Com. 441.

III.—*Consequence of this Rule.*

ART. 209.—For this reason a man cannot grant anything to his wife, nor enter into a covenant with her during his life, though he may devise to her by will.

She is incapable of entering into any contract of executing any deed or doing any other valid act, in her own name, all suits, even for personal injuries to her, must be brought in the name of the husband and herself with his concurrence.

IV.—*The Husband becomes liable for all her Debts.*

ART. 210.—Upon the marriage, the husband becomes liable for all her debts, but neither the wife, nor her property is liable for any of his debts.

V.—*The Husband becomes the Master of her Personal Property.*

ART. 211.—In respect to property, the husband, by the marriage, independent of any marriage settlement becomes *ipso facto*, entitled to all the personal property of every description in possession or in action belonging to the wife, he may dispose of it at his pleasure.

VI.—*He has the Freehold of her Real Estates during their Joint Lives.*

ART. 212.—He has also a freehold in her real estate, during their joint lives, and if he have issue by her, and survive her, during his own life also,—he has an exclusive right to the whole profits of it during the same period.

VII.—*There is no Community between them.*

ART. 213.—There is not any community between them in regard to property, as in Lower Canada. Upon his death the wife is simply entitled to a dower that is the enjoyment of one third of the real estate, which has been his during the coverture; during her life, and he may, at his pleasure, by a testamentary diposition deprive her of all right and interest in his personal estate, although it came to him from her by the marriage.

VIII.—*The Wife cannot dispose of her Property nor make an effectual Will without her Husband's consent.*

ART. 214.—During the coverture she is also incapable of changing, transferring, or in any manner disposing of her real estate, except with the concurrence of the husband, and she is incapable of making an effectual will.(1)

IX.—*The same in the American States, governed by the Common Law.*

ART. 215.—These differences which are by no means all which exist, exemplified in the French and English Laws, are for the most part the same as exist in America between the States deriving their origin from Spain or France, and those deriving their origin from England.(2)

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(1) Blackstone's Com., vol. 2, p. 433.
(2) Ib. y. 183, Sec. Story Conflict of Laws, p. 122, &c., and Title Marriages and incidents thereto.

CHAPTER VI.

DOWER.

SECTION I.—By the Ancient Laws of Canada.—*I. Dower. II. Of what composed the Customary Dower. III. When there are Children. IV. Rule in case of the death of Children. V. Prefix Dower. VI. When composed of Rents or Money. VII. In case of a Mutual Donation. VIII. It is the Wife's during her lifetime only. IX. From the day of the death of the Husband. X. Delivery. XI. Maintenance of the Property. XII. It is the Property of the Children. XIII. Cannot be Heirs of the Father and have the Dower also.*

SECTION II.—English Rules.—*I. Tenant in Dower, what it is. II. She must be the actual Wife. III. Of what the Dower is composed. IV. Seisin. V. Species of Dower. VI. A Widow may be barred of her Dower.*

SECTION I.—BY THE ANCIENT LAWS OF CANADA.

I.—*Dower.*

Art. 216.—Dower is the usufruct of a part of the property belonging to the husband, which is by law or by contract granted to the wife, surviving her husband, of which the absolute property passes to the children, unless agreement to the contrary be made by contract previous to the celebration of the marriage. There are two sorts of dower; 1st, the customary, which is by law regulated, and 2d, the prefix dower, which is established by contract.

II.—*Of what composed the Customary.*

Art. 217.—The customary dower is composed of one-half of the immoveable property the husband possesses on the day of the marriage, and of that which accrues to him in the direct line, after marriage; this is the rule for a first and subsequent marriage, when there are no children from preceding marriages.(1)

III.—*When there are Children.*

Art. 218.—When there are children by a former marriage, the dower of the second is composed, 1st, of one-fourth of the property, which was subject to the first dower; 2d, of one-half of the share of the husband in the conquests made during the first marriage, and one-half of the acquests by him made since the dissolution of the said first marriage, to the day of the consummation of the second marriage; 3d, of one-half of the immoveable property which he inherited during the second marriage in the direct line; the dower of subsequent marriage follows the same rule.(2)

(1) Custom Art. 248 and 253.
(2) Custom Art. 253.

IV.—*Rule in case of the death of Children.*

ART. 219.—The dower of the wife and of the children of a second marriage receives no augmentation by the death of the children of the first marriage, who died since the celebration of the second marriage. This rule applies to other marriages.(1)

V.—*Prefix Dower.*

ART. 220.—The prefix dower is established by the contract of marriage at the will of the parties; it may be composed of real estates described in the deed of rents, or of a fixed sum of money.

When the wife has been endowed with the prefix dower, neither she nor her children can claim the customary dower, unless it has been so agreed by the contract.(2)

VI.—*When composed of Rents or Money.*

ART. 221.—The prefix dower, composed of rents or money, is taken upon the whole of the property of the husband, after the division of the property of the community has been made.(3)

VII.—*In case of a Mutual Donation.*

ART. 222.—If a mutual donation has been made, the endowed wife has first the right to have the enjoyment of the share of the deceased husband in the personal property and conquests by virtue of the donation, and takes her dower upon the surplus of the property of the husband, without any diminution or confusion.(4)

VIII.—*It is the Wife's during her lifetime only.*

ART. 223.—The dower, either customary or prefix, is the wife's only during her life; at her death it reverts to the heirs of the husband, if there are no children, unless otherwise stipulated in the contract of marriage.(5)

IX.—*Fruits from the day of the death of the Husband.*

ART. 224.—The fruits and interest accrue to the wife from the day of the death of the husband. She is seised thereof of right, without demanding it in justice, unless the property subject to the dower have passed to third persons, who are bound to return the fruits and interests, but only from the day a demand of the same has been made.(6)

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(1) Custom, Art. 254.
(2) Custom, Art. 261.
(3) Custom, Art. 260.
(4) Custom, Art. 257.
(5) Custom, Art. 263.
(6) Custom, Art. 256.

X.—*Delivery.*

ART. 225.—Delivery must be made to the wife on her own personal security, provided she remain a widow. This security is to keep the property in good order, to enjoy it as a prudent administratrix, to return the capital of the dower; but if she contract another marriage, then she must give effectual and good security.(1)

XI.—*Maintenance of the Property.*

ART. 226.—The wife who takes the customary dower, is bound to keep the heritages in good order, as far as a life renter is bound to do; the four main walls of a building, whole roofs, the beams, arches, and covering of vaults, are not at her charge.(2)

XII.—*It is the Property of the Children.*

ART. 227.—Both the customary and the prefix dower are the heritage of the children; so sacred is that property, that the father and mother, from the moment of their marriage, can by no ways or means alienate it, and if the dower consists in rents or money, the children have a general mortgage upon their father's property from the time the dower was created; but as soon so the father is dead to prevent the operation of prescription the children must take the precautionary steps that other persons are obliged to take; for, so soon as dower is opened, the prefix dower, consisting in sums of money, becomes a personal debt.(3)

XIII.—*Cannot be Heirs of the Father and have the Dower also.*

ART. 228.—No one can take the father's inheritance and the dower together; and he who wishes to have the dower, must renounce to the succession.(4)

When there are many children, some may take the succession and others the dower; these last can have no more than the share they would have received, had all the children chosen the dower; the surplus accrues to the succession; it allows no right of primogeniture, and is free from debts.(5)

The child making election of the dower must return to the succession the advantages he has received from the succession, by marriage or otherwise, or take less.(6)

SECTION II.—ENGLISH RULES OF DOWER.

I.—*Tenant in Dower, what it is.*

ART. 229.—Tenant in dower is when the husband of a woman is seised of an estate of heritance, and dies; in this case, the wife shall have the third part of

(1) Custom, Art. 264.
(2) Custom, Art. 262. Sufra, chapt. Usufruct.
(3) Custom, Art 245, 250, 255, 269.
(4) Custom, Art. 251.
(5) Custom, Art. 250.
(6) Custom, Art 252. Vide Supra. title Collation.

all the lands and tenements whereof he was seised at any time during the coverture, to hold to herself for the term of her natural life.

II.—*She must be the actual Wife.*

ART. 230.—The wife must be the actual wife of the party at the time of his decease. If she be divorced, *à vincula matrimonii*, she shall not be endowed. But a divorce *à mensâ et thoro* only, doth not destroy the dower, not even adultery itself, by the common law. Yet now, by the statute West. 2, if a woman voluntarily leave (which the law calls eloping from) her husband, and lives with an adulterer, she shall lose her dower, unless her husband be voluntarily reconciled to her. The widows of traitors are barred of their dower, (except in the case of certain modern treasons relating to the coin); but not the widows of felons. An alien also cannot be endowed, unless she be queen consort; for no alien is capable of holding lands. The wife must be above nine years old at her husband's death, otherwise she shall not be endowed.

III.—*Of what the Dower is composed of.*

ART. 231.—And she is now by law entitled to be endowed of all lands and tenements of which her husband was seised in fee simple or fee tail at any time during the coverture, and to which any issue which she might have had might by possibility have been heir. Therefore, if a man seised in fee simple have a son by his first wife, and afterwards marry a second wife, she shall be endowed of his lands; for her issue might by possibility have been heir, on the death of the son by the former wife. But if there be a donee in special tail, who holds lands to him and the heirs of his body begotten on Jane his wife; though Jane may be endowed of these lands, yet if Jane die, and he marry a second wife, the second wife shall never be endowed of the lands entailed; for no issue that she could have could by any possibility inherit them.

IV.—*Seisin.*

ART. 232.—A seisin in law of the husband will be as effectual as a seisin in deed, in order to render the wife dowable; for it is not in the wife's power to bring the husband's title to actual seisin, as it is in the husband's power to do with regard to the wife's lands; which is one reason why he shall not be tenant by the courtesy, but of such lands whereof the wife, or he himself in her right, was actually seised in deed. The seisin of the husband for a transitory instant only, when the same act which gives her the estate conveys it also out of him again, and whereby a fine land is granted to a man, and he immediately renders it back by the same fine,) such a seisin will not entitle the wife to dower; for the land was merely *in transitu*, and never rested in the husband, the grant and render being one continued act, But if the land abide in him for the interval of but a single moment, it seems that the wife shall be endowed thereof. And in short, a widow may be endowed of all her husband's lands, tenements, and hereditaments, corporeal or incorporeal, under the restrictions before mentioned; unless there be some special reason to the contrary. Thus, a woman shall not be endowed of a

castle, built for defence of the realm, nor of a common without stint; for, as the heir would then have one portion of this common, and the widow another, and both without stint, the common would be doubly stocked. Copyhold estates are also not liable to dower, being only estates at the lord's will, unless by the special custom of the manor, in which case it is usually called the widow's freehold. But where dower is allowable, it matters not though the husband alienate the lands during the coverture; for he alienates them liable to dower.

V.—*Species of Dower.*

ART. 233.—There are now subsisting four species of dower. Dower by the common law, or that which is before described. Dower by particular custom; as that the wife should have half the husband's lands, or in some places the whole, and in some only a quarter. Dower *ad ostium ecclesiæ*,—which is where tenant in fee simple of full age, openly at the church-door, and troth plighted between them, doth endow his wife with the whole, or such quantity as he shall please, of his lands, at the same time specifying and ascertaining the same; on which the wife, after the husband's death, may enter without ceremony. Dower *ex assensu patris*, is that made when the husband's father is alive, and the son, by his consent expressly given, endows his wife with parcels of his father's lands.

By *magna charta*, a woman shall remain in her husband's capital mansion house for forty days after his death, during which time her dower shall be assigned. The particular lands to be held in dower must be assigned by the heir of the husband or his guardian. If the heir, or his guardian, do not assign her dower within the term of forty days, or do assign it unfairly, she has her remedy at law, and the sheriff is appointed to assign it. Or if the heir, (being under age,) or his guardian, assign more than she ought to have, it may be afterwards remedied by writ of admeasurement of dower. If the thing of which she is endowed be divisible, her dower must be set out by metes and bounds; but if it be indivisible, she must be endowed specially; as of the third presentation to a church, the third toll-dish of a mill, the third part of the profits of an office, the third sheaf of tithe, and the like.

VI.—*A Widow may be barred of her Dower.*

ART. 234.—A widow may be barred of her dower, not only by elopement, divorce, being an alien, the treason of her husband, and other disabilities before mentioned, but also by detaining the title deeds or evidences of the estate from the heir, until she restore them; and by the statute of Gloucester, if a dowager alienate the land assigned her for dower, she forfeits it *ipso facto*, and the heir may recover it by action. A woman may also be barred of her dower by levying a fine, or suffering a recovery of the lands, during the coverture. But the most usual method of barring dowers is by jointures, as regulated by the statute 27 Hen. VIII. c. 10.

CHAPTER VII.

LINEAL REDEMPTION, OR REDEMPTION BY ONE OF THE FAMILY.

I. General Outlines. II. Cases in which the Right of Redemption may be claimed. III. Time when the Action of Redemption must be commenced.

ART. 235.—This right, sanctioned by the Custom and granted to one of the relatives of a vendor of real property, consists in the power of redeeming the same by reimbursing the purchaser of the sums of money by him paid for it and his legal costs.(1)

I.—*General Outlines.*

ART. 236.—To redeem, it is necessary,

1. That the property be *propre* or lineal to the vendor.
2. It must have been alienated by sale or by an act equivalent to a sale.
3. The one who wishes to redeem, must be a relative of the side and line from which the property has descended. And
4. The demand of redemption must be made within the time and with the formalities required by the Custom.

II.—*Cases in which the Right of Redemption may be claimed.*

ART. 237.—It may be claimed upon all the property which has come to the vendor by his ancestors, as an inheritance; perpetual ground rents are included in this.(2)

What was an acquest of the deceased, becomes a *propre* in the person of his heirs.(3)

An heritage received in exchange for a *propre*, and afterwards sold, is subject to the right of redemption.(4)

A *propre* which has been reacquired by a lineal relative, and afterwards sold to a stranger, gives the right of redemption to the first vender.(5)

The right of redemption may be claimed on a sheriff's sale.(6)

It is also claimable on heritages sold for redeemable rents.(7)

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(1) *Note.*—The formalities by law required to obtain this right, makes it a dead letter. The most trifling error—the want of a comma in a copy which is found in the original, a comma in the copy more than in the original, and the like, are errors fatal to the suit, which must irrevocably be dismissed.

(2) Custom, Art. 129.
(3) Custom, Art. 151, 152.
(4) Custom, Art. 143.
(5) Custom, Art. 133.
(6) Custom, Art. 150.
(7) Custom, Art. 136.

On heritages exchanged for personal property, or when there is money given to boot to the amount of more than one-half.(1)

In sales of irredeemable rents, if the vendor be reimbursed.

In sales by judicial auction, *licitation*, when the property is adjudged to a stranger.(2)

III.—*Time when the Action of Redemption must be commenced.*

ART. 238.—The action of redemption must be commenced within one year and one day from the time the purchaser has been put in possession of the property.

The year begins for seigniorial or feudal property from the day seisin has been granted, or possession taken.(3)

For seiguiories from the day of investiture, or that fealty and homage have been made.(4)

In a sheriff's sale, from the day seisin of the deed has been granted.

For soccage land, from the day the acquisition has been published at the first king's court.(5)

The same rule applies when a seignior has purchased land holding from himself.(6)

When the redemption has been obtained, the fruits must be returned from the day a judicial demand was made.(7)

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(1) Custom, Art. 145.
(2) Custom, Art. 154.
(3) Custom, Art. 129.
(4) Custom, Art. 130.
(5) Custom, Art. 142.
(6) Custom, Art. 135.
(7) Custom, Art. 134. See the Text, Tit. Retrait Lignager.

CHAPTER VIII.

OF PRESCRIPTION.

SECTION I.—PRESCRIPTION.—*I. Definition of the word. II. Prescription of Ten and Twenty Years. III. Who are reputed present. IV. Prescription of Thirty and Forty Years. V. Action of Redemption. VI. Trouble in the Possession. VII. Action of Physicians. VIII. Action of Servants and Labourers. IX. Of Tavern Keepers. X. Action for the Payment of Rent. XI. Action of Rescision. XII. Particular Rule for the Payment of Rent. XIII. Prescription of Three Years. XIV. Of Promissory Notes. XV. Action of Warranty. XVI. Action of Warranty of Undertakers. XVII. By what Law to be decided. XVIII. Good Faith. XIX. Interruption of Prescription. XX. Law for the public good.*

SECTION II.—PRESCRIPTION BY THE LAWS OF ENGLAND.—*I. Definition. II. Good Faith. III. Prescription by the Common Law. IV. Title required. V. Things not liable to Prescription. VI. Civil or Legal Interruption. VII. Time required to Prescribe. VIII. Rule for computing Time. IX. Who is reputed present. X. Various Prescriptions.*

SECTION I.—PRESCRIPTION.

I.—*Definition of the word.*

ART. 239.—Prescription is a mode of acquiring property, or discharging debts, by the effect of time only, and under the condition regulated by law.(1) To acquire by prescription, it is necessary that three conditions be joined with the possession. The possession must be, 1st, without violence, *non vi;* 2d, public, *non clàm;* and the possessor must have enjoyed the possession, as the proprietor of the thing, not as a lessee nor usufructuary, *non precario.*(2) The possession must be peaceable, and during all the time required by law.(3)

II.—*Prescription of Ten and Twenty Years.*

ART. 240.—Immoveables are prescribed by *ten* years between persons present and by *twenty* years, if the proprietor has been absent when the possession has been

(1) Usucapio est adjectio Domini por Continuationem possessionis temporis lege definit.—l. 3, ff. de usurp. and usuc. Domat. Lois Civiles, ub. 3, tit. 17, sec. 4.
(2) Custom, Art. 115, 118.
(3) Custom, Art. 113.

in good faith and held by a just title during that time, and this title passes to successors.(1)

III.—*Who are reputed present.*

ART. 241.—Those are reputed present whose domicil is within the territory governed by the Custom of the place wherein the property is situated; those who reside without are declared to be absentees.(2)

IV.—*Prescription of Thirty and Forty Years.*

ART. 242.—Without a title, prescription is acquired by thirty years. The case of minors, interdicted persons, and those who are not able to manage their own affairs, excepted.(3)

To obtain prescription against the church, forty years are required.

V.—*Action of Redemption.*

ART. 243.—The action of redemption by one of the family is prescribed by one year, and when the year is expired, that action is extinguished even for minors, absentees, interdicted persons, or others, who might claim the benefit of restitution.(4)

VI.—*Trouble in the Possession.*

ART. 244.—It is the same for persons who have been troubled in their possession; they must make their complaint within one year and one day from the time the trouble began.(5)

VII.—*Action of Physicians, &c.*

ART. 245.—The action of physicians, surgeons, and apothecaries, is prescribed in one year, unless a settlement of account has taken place, and an acknowledgment in writing or obligation been granted, or a suit been instituted.(6)

VIII.—*Action of Servants and Labourers.*

ART. 246.—The action of servants and labourers for salary is prescribed after the expiration of one year, to be reckoned from the day of the last services, unless a settlement of account has been had, as in the preceding article.(7)

IX.—*Of Tavern Keepers.*

ART. 247.—Tavern-keepers have no right of action for liquors sold by the glass.(3)

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(1) Custom, Art. 113.
(2) Ibid. 116.
(3) Ibid. 113, 114, 118.
(4) Ibid. 129, 131.
(5) Ibid. 96.
(6) Ibid. 126, 127.
(7) Ibid. 127.
(8) Ibid. 128.

X.—*Action for the Payment of Rent.*

ART. 248.—The action for arrears of rent, established by contract for money lent, is extinguished by the expiration of five years; and the decisory oath of the debtor even cannot be demanded.(1)

XI.—*Action of Rescision.*

ART. 249.—The action of rescision to abrogate or cancel a deed, is extinguished by ten years.

The free and peaceable possessor by himself, and his ancestors in whose right he stands, of any estate or rent by a just title and in good faith during ten years, the proprietor being present, or twenty years if absent, and not privileged, has acquired prescription.(2) But without a title, thirty years possession is required.(3)

XII.—*Particular Rule for the Payment of Rent.*

ART. 250.—And prescription would take place even if the rent had been paid by him who has constituted it, or others in default of the possessor, if the creditor of the rent had a just cause to be ignorant of the alienation.

XIII.—*Prescription of Three Years.*

ART. 251.—The purchaser of a moveable acquires prescription of it by three years possession. This prescription requires good faith both in the one who has acquired the thing and in the one who has sold it.(5) The same rule applies in case of a thing found.(6)

XIV.—*Of Promissory Notes.*

ART. 252.—Promissory notes are prescribed in five years next after the day they become due, if no action be brought thereon within that period.(7)

XV.—*Action of Warranty of Undertakers.*

ART. 253.—The action of warranty due by undertakers, masons, carpenters, for the buildings they have constructed is prescribed after ten years from the day the work was completed for private buildings, and for public buildings the action of warranty is prescribed only by fifteen years.(8)

XVI.—*By what Law to be decided.*

ART. 254.—It is the law of the place where the property is situated which is to be followed in cases of prescription, and not the law of the domicil of those who assert the prescription.(9)

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(1) Ordinance of 1510.
(2) Custom, Art. 114.
(3) Custom, Art. 118.
(4) Custom, Art. 115.
(5) Cod. tit. de Usucapione transfer.
(6) Idem.
(7) Prov. Stat. L. Canada, 34 Geo. III. ch. 2.
(8) L. 8 Cod. de operibus publicis.
(9) Arrêt of the 19th August, 1609. Lacombe, recueil de Jurisprudence. V. Prescription.

XVII.—*Dotal Property.*

ART. 255.—The enjoyment by the husband acquires to the wife prescription of the dotal property which has been given to her, although it did not belong to him who gave it.(1)

XVIII.—*Good Faith.*

ART. 256.—It is the ignorance of the possessor of a thing that another has any right upon what he possesses.

By the Roman law, that ignorance is necessary only at the beginning of the prescription, *si is.*(2)

XIX.—*Interruption of Prescription.*

ART. 257.—If prescription has been interrupted, the same good faith is required at the time it began again.(3) Such is the doctrine held by the Roman law. But the jurisprudence of Paris requires good faith during all the time necessary to obtain prescription.

XX.—*Law for the public good.*

ART. 258.—Individuals cannot renounce to a right introduced for public good.(4)

SECTION II.—PRESCRIPTION BY THE LAWS OF ENGLAND.

ART. 259.—By the civil law, or positive law of the Romans, things may be acquired, by *usucapion* or prescription. It is called *usucapion*, because a man may *usu rem capere.*

I.—*Definition.*

ART. 260.—*Usucapion* or prescription is defined to be an acquisition of property by a continuance in the possession of it for so long a time as is required by law. Prescription, therefore, is nothing else but a continued possession. This mode of acquiring property is derived from the laws of the twelve tables and from the Greeks.(5)

II.—*Good Faith.*

ART. 261.—1. *Bonâ fides*, a good conscience and honest design in the person pretending to a prescription; so that bare possession is not sufficient. This good conscience and honesty will appear, if possession was had from one who was

(1) Digest, Prodote, and several laws of the Cod.
(2) § Ult. loi 44, § ad. leg. Fab. Plag.
(3) Law qui fundum, § qui bona fide.
(4) L. 1 de prescriptione.
(5) Usucapio est adjectio Domini per continuationem possessionis Temporis lege Definiti. D. 41. 3. 3.

esteemed by him to be the true owner not only at the time of the delivery,(1) but also at the time of making the bargain. By the civil law the prescription is not interrupted, though the person afterwards knows that the thing delivered came not from the true owner,(2) for by this law it is sufficient that there were no ill practices at the beginning.

III.—*Prescription by the Common Law.*

ART. 262.—By the common law,(3) if at any time the person prescribing is conscious to himself that he derives his possession from a wrong doer, the prescription is interrupted, and wholly ceases; and this some interpreters say ought to be observed in the courts of the civil law, and that it is accordingly so practised in the Imperial chamber, and throughout the empire.(4)

IV.—*Title required.*

ART. 263.—2. A just, particular, and(5) real cause or title is required, as by sale, exchange, gift, &c. Such a cause as would entitle the receiver to the property from the true owner; for if there is no cause, or one that is insufficient to transfer the property, (as if the thing was only lent, or deposited for safe custody, or possessed by tenants, &c.,) no prescription can follow upon it.(6)

V.—*Things not liable to Prescription.*

ART. 264.—3. The thing must be susceptible of prescription; therefore, there is no prescription of things exempted from common(7) commerce, as of things sacred and consecrated to God, or of those things which were once lodged in the *Fiscus*, or Exchequer. The prince's domains, (called patrimonial,) are not liable to prescription, nor the goods of churches, cities, hospitals, nor things stolen, (for stolen goods may be concealed till the time of prescription comes); nor goods of infants, or minors.(8) Soldiers upon expeditions, or of those that are absent(9) in the affairs of the commonwealth; for that time of absence shall be deducted from the time prescribed; nor the goods given to magistrates in bribery, &c.; and lastly, those things are not liable to prescription which are prohibited to be alienated by last will and testament. Hence it is that moveable things are rarely prescribed; for some of these incapacities frequently attend them.(10)

4. Not only a just but a continual possession must support the title by prescription, which shall be presumed till the contrary appears. The possession of

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(1) D. 41, 4, 2.
(2) C. 7, 31, 1.
(3) C. 7, 31, 1.
(4) Mins. Observ. cam. cent. 5; Observ. 6, Gail 2; Observ. 18, num. 7; 2 D. Reg. Jur.
(5) D. 41, 3, 27.
(6) C. 7, 33, 4.
(7) J. 2, 6, 1.
(8) C. 7, 38, 2; C. 1, 2, 23; I. 2, 6, 2 & 8; C. 7, 35, 3; C. 7, 35, 8; C. 7, 35, 4.
(9) Absentia ejus qui Reipublic causâ abest neque ei neque alii damnosa esse debet. D. 50, 17, 140. Officium publicum nulli nec Damno nec compendio fit. D. 4, 60, 29.
(10) D. 48, 11, 8; C. 6, 43, 3; J. 2, 6, 3.

tenants, proxies, &c., continues the possession for the true proprietor, not for themselves; for it is not necessary that the possession should always remain in the same person. An honest buyer may begin the prescription in himself, laying aside the time acquired by a dishonest seller, because he fairly paid a price; but when the thing comes gratis, as by gift, or legacy, or succession, if there be fault or injustice in the first party, there does not seem as much reason to continue the prescription.(1)

It must be the faults in the person possessing; for if there be an incapacity in the thing itself to be prescribed, (as before, because either stolen or taken by violence, &c.,) the prescription cannot be supported, or continued over, by any means. All interruptions are before the time of prescription is fulfilled, and are either naturally and in fact, or civil interruptions and by law. A natural interruption is when a moveable thing is taken from the possessor, or an immoveable thing entered upon and seised by another, or deserted by himself; or when an alienation is made from us, by one who was intrusted with the possession in our names.(2)

VI.—*Civil or Legal Interruption.*

ART. 265.—A civil or legal interruption may be by citation or other judicial claim; sometimes by offering a libel before the judge, if the defendant abscond, or is a mad man; more especially when suit is contested, or issue joined upon the right, and sentence given by the judge. This interruption concludes only the parties in suit, the other (*in fact*) all parties whatever.(3)

A prescription may also cease for a time, without a total interruption, but concludes only the parties in suit, by standing still and not gaining ground, as in time of great sickness or war, when the party is hindered from making his claim; but if the courts of justice are open in the time of sickness or war, there is no reason it shall cease.(4)

VII.—*Time required to Prescribe.*

ART. 266.—5. Lawful time is necessary to give a right by prescription, which is three years for things moveable and corporeal, and ten years for things immoveable and incorporeal, if the persons pretending right inhabit the same province. But if they are so far absent from each other as to live in several provinces, then twenty years prescription is necessary to gain an estate. So much time is absolutely required to bar real actions and criminal accusations; for after that time there seems to be a new scene of affairs, and it may not be of any importance to the public to prosecute.(5)

VIII.—*Rule for computing Time.*

ART. 267.—In this computation of time we do not reckon from moment to

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(1) D. 41. 3, 3; D. 41. 3, 33; D. 41. 4, 7, 6; D. 44. 3, 5.
(2) D. 41. 3, 5.
(3) C. 7. 40, 2; D. 44. 3, 10; C. 7. 33, 1.
(4) D. 41. 3, 5.
(5) L. 2, 6 pr.; C. 7. 33, 12; C. 3. 31, 7.

moment, or from hour to hour, but from day to day.(1) The first moment of the last day being computed as one whole day in favourable cases.

IX.—*Who is reputed present.*

ART. 268.—If the persons have dwelling places in several provinces, they are reputed to be present in each; and if a man hath no dwelling place of his own, and neglect what belongs to him, that person may be esteemed to be present every where, because he hath no fixed station.

These are the common prescriptions of time, and take place in all things belonging to private persons which are susceptible of prescription, when they are possessed *bonâ fide*.

X.—*Various Prescriptions.*

ART. 269.—There are other prescriptions of longer time, viz. thirty or forty years, by which even stolen goods, and those obtained by force, may be prescribed by the civil law, having no regard to the justice or the injustice of the first obtaining them; and this is for the public quiet, which seems to justify the lawfulness of it in conscience.(2)

The common law does not approve of it, but directs the contrary.(3) By the common law of England, the time of prescription is that time whereof there is no memory of man or record to the contrary; so that the *bona fides*, or the cause or consideration of it cannot be enquired into. This is applicable to customs and usages, &c.(4) Yet in several instances less time is sufficient to prescribe, as a year and a day, six months upon the lapse of a patron in not presenting to a church, &c.(5)

There is a prescription, too, of a shorter time, by Acts of Parliament in England; as, of five years after four proclamations upon a fine, (*i. e.* a judicial transaction or agreement,) of lands and tenements duly acknowledged in a court of record, &c.(6) Two years, or one year, or shorter time, bars popular actions by informers.(7) Some writs or actions are barred after fifty, forty, or thirty years;(8) some, after twenty years; some, after six years, or four years, or two years.(9) By other Acts of Parliament, several periods of time are fixed, greater or less, which are not so common in practice as those already hinted at. Regularly no man can prescribe against the king of England, or against an Act of Parliament.(10)

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(1) D. 44. 3, 15, and D. 44. 7, 6. In Usucapionibus non a momento ad mementum, ad totum postremum diem computamus—D. 41. 3, 6. In omnibus Temporalibus Actionibus nisi novissimus Totus dies. Compleatur, non fruit Obligationem—D. 44. 7, 6. Vide Antea, p. 108.
(2) C. 7. 39, 3.
(3) C. fin. Ext. de Prescrip.
(4) V. p. 98.
(5) 1 Inst. 114, b. 115, a. 254, b. 344 b.; Dr. & Stud. lib. 2, c. 36.
(6) 4 H. 7, 14, 35; Eliz. c. 2.
(7) 31 Eliz. 5.
(8) 32 H. 8, c. 2.
(9) 21 Suc. c. 16.
(10) 1 Inst. 41 b.; 1 Inst. 113 a.

CHAPTER IX.

DONATIONS, INTER VIVOS.

SECTION I.—ACCORDING TO THE LAWS OF CANADA.—*I. Definition. II. Capacity to dispose and receive. III. Acceptation. IV. Incapacities. V. Formalities. VI. Donation between Married Persons. VII. Prohibitions between Married Persons. VIII. Prohibitory Rules. IX. Exceptions.*

SECTION II.—BY THE LAWS OF ENGLAND.—*I. Definitions and Rules. II. Registration. III. Cannot be revoked except in some cases. IV. Capacity of the giver. V. Personal Things.*

SECTION I.—ACCORDING TO THE LAWS OF CANADA.

I.—*Definition.*

ART. 270.—A donation is an act by which he who gives, by law styled the donor, divests himself irrevocably and for ever of the thing given to him who accepts, by law styled the donee. The acceptation is of the essence of this contract.(1) It proceeds simply from the liberality of the donor.(2)

A transfer made with certain conditions imposed upon the donee, is not considered a donation, even though these conditions are not reducible to any fixed price in money. If the conditions are in any way an equivalent to the thing given, the transfer becomes a sale and not a donation.(3)

II.—*Capacity to dispose and receive.*

ART. 271.—All persons may dispose or receive by donation inter vivos, except such as the law expressly declares incapable, and except a certain share of the real estates, which is called a *legitime*, which parents must reserve for their children; that *legitime* is one half of the property such children would have had in the successions of their father, mother, or other ancestors, had no donation been made, funeral expenses being first paid.(4)

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(1) L. 8, § 3 ff. de Don. lib. 1. 10 de Don.
(2) L. 1 ff. de Don.; Custom, Art. 273, 274.
(3) Rente n. 13 et n. 615, Toul. 4; Des Donations entreviss, sec. 4 & 5, No. 1; Puffendorff. Droit des gens, lib. 5, ch. 3; Blackstone's Commentaries, 442; Bracton de acquirendo rerum dominio, lib. 2, 15, 16.
(4) Custom, Art. 298.

III.—*Acceptation.*

ART. 272.—The acceptation is of the essence of this contract.(1)

IV.—*Incapacities.*

ART. 273.—Incapacities are absolute or relative. Absolute incapacities prevent the giving or receiving indefinitely with regard to all persons; relative incapacities prevent the giving to certain persons or receiving from them.

It is sufficient that the capacity for giving exist at the moment the donation is made with regard to the capacity of receiving. If it exist at the moment of the acceptance of the donation inter vivos, or at the opening of the succession of the testator, provided also that the legacy do not become null by his predecessor's incapacity of receiving the legacy before the execution of the condition, or before the death of the testator.(2)

In order to be capable of receiving by last will it is sufficient to be conceived at the time of the decease, provided the child be born alive. When the donation depends on the fulfilment of a condition, it is sufficient if the donee be capable of receiving at the moment the condition is accomplished.(3)

V.—*Formalities.*

ART. 274.—To make a donation inter vivos, the donor must be of age; he must be of sound mind.(4) He must be of good bodily health, at least not affected of a sickness apparently mortal, and of which he afterwards dies.(5)

ART. 275.—The donor must deseize himself of the thing given, so that it will be no more in his power to dispose of it.(6) But he may reserve the usufruct for a time, even for his lifetime.(7) Donations of universalities of property acquired and to be acquired are null.

ART. 276.—When a donation of moveable property is not followed by immediate delivery, an inventory of the same, signed by the parties, must be made and remain annexed to the original of the donation, otherwise the donee cannot claim it, neither from the donor nor from his heirs.(8) The donation must be received by two notaries, or one notary and two witnesses, and the original kept of record.

VI.—*Donation between Married Persons.*

ART. 277.—From the moment of the marriage, married persons cannot make any donation inter vivos one to the other, except it is by mutual gift.(9)

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(1) ff. de Don.; Custom, Art. 272, 273 & 274.
(2) Pothier, Introduction à la Coutume d'Orleans.
(3) Pothier, Donation inter vess, Art. 2.
(4) There is no more intricate and puzzling question in the books than that of soundness or unsoundness of mind. Benevolence, fancy, caprice, and fanaticism have a wide range in the matter of disposing of property and to decide what degree of mental alienation is sufficient to avow a donation, or what acts of conduct are to be considered as evidence of mental aberration is often a matter of the extremest nicety and difficulty.
(5) Custom, Art. 277. Pothier des Donations entre vess, Sec. 1, No. 1.
(6) Custom, Art. 273, 274.
(7) Custom, Art. 275.
(8) Ordinance of 1731, Art. 15.
(9) Custom, Art. 282.

A woman marrying a second time, or oftener, having children, is prohibited from giving to her second husband or to his children, either directly or indirectly, of her proper estates or acquests, more than the share which one of her children is entitled to in her succession; and if the children are unequally divided, more than the share of the one who will have the least. No part of the conquests made with her former husband. These conquests, as also those which will be made during subsequent marriages, will be equally divided amongst all the children of the first and subsequent marriages. She is not allowed to give to a second husband any share of the property proceeding from the liberality of her first husband.(1)

VII.—*Prohibitions between Married Persons.*

ART. 278.—These prohibitions cease by the dissolution of the last marriage, or by the death of all the children of the preceding marriages.(2)

VIII.—*Prohibitory Rules.*

ART. 279.—Minors and persons under the authority of others are not allowed to give by donation, either directly or indirectly, to their tutors, curators, masters, and others, being their administrators during the time of their administration, and before they have rendered their account of the same and paid the balance. Father and mother, and other ascendants, are excepted from this prohibition.(3)

ART. 280.—Under the term administrators, the arrets include masters as to their apprentices, convents as to the persons who have pronounced their vows in them, confessors and directors as to those who are under their direction, (except it be moderate sums, which may be given or bequeathed to them); attornies and solicitors as to their clients, physicians, surgeons, and apothecaries as to the sick under their attendance. Those who have lived together in open concubinage are respectively incapable of making to each other any donation exceeding a moderate sum or an usufruct, as an alimentary pension. Those who afterwards marry, are exempt from this rule.

ART. 281.—The father and mother of bastards and adulterous children can make no donation inter vivos to such children, unless it be as an alimentary pension, which by the laws of nature is due to them.

ART. 282.—And to determine the validity of such donations, regard must be had to the quantity and the quality of the property of the donors, and to the number and the quality of their heirs.

ART. 283.—Persons dead civilly are unable to receive donations, unless it be an usufruct for immediate wants and an elementary pension.

IX.—*Exceptions.*

ART. 284.—To the prohibitions made against the doctors of physic or surgeons, there are, however, the following exceptions: 1st, remunerative dispositions

(1) Edit des secondes noces. That edict extends the prohibitions to husbands marrying a second time.
(2) Custom, Art. 279.
(3) Custom, Art. 276; Ordinance of 1539, and Declaration of February, 1549.

made on a particular account, regard being had to the means of the disposer and the services rendered; 2d, universal dispositions, in cases of consanguinity. The same rules are observed with regard to the ministers of religious worship.(1)

SECTION II.—BY THE LAWS OF ENGLAND.

I.—*Definitions and Rules.*

ART. 285.—A proper gift, (or donation inter vivos, especially so called,) is when one out of mere liberality bestows any thing upon another, there being no law to force him to do it.(2)

Recompence is not comprehended under the definition, nor honorary payment for services done.(3)

In the eleventh century, under Henry II., the words gift, grant, or feoffment, were comprehended under the general name of donation; it was the exclusive mode of transferring property. At the present time, gifts are not favoured by law, they having been too often the means of corruption, or the effects of prodigality; presumption is not for them; strict proof is required to show the intention of the owner; but when that intention is evident, even dishonest gifts upon lewd women for their personal and absolute wants, as for alimony, are not void, there being no depravity in receiving gifts. Besides, both the man and the woman are blameable.(4)

To the perfection of a gift, the consent of the giver, and the consent of him to whom the gift is made, are required.

By the civil law, a gift may be perfect (*ex nudo facto*) by bare consent and agreement before delivery.(5) These nude agreements are valid by the cannon law.(6) But by the common law, no action lies upon such a bare consent, agreement, or promise.(7)

Before the gift is accepted, the giver may recall it.(8)

And if the person to whom the gift is made die before acceptance, his heir cannot accept where the gift is personal, for an union of consent is requisite.(9)

II.—*Registration.*

ART. 286.—If the gift exceeds the value of 500 crowns, it must be publicly registered at the time the gift is made, that men may not part with their estates rashly.(10)

(1) Pothier, Donations entrevos, sec. 1; Art. 1; Des personnes, 1er. partie, tit. 2, sec. 2.
(2) Digest, 39, 5 pr.
(3) D. 39. 5, 19.
(4) Digest, 39. 5, 5.
(5) Cod. 8. 54, 35.
(6) Inst. tit. 20, § 19.
(7) Doctor and Student, Dial 2, c. 24.
(8) D. 39, No. 1, 5, 2, 6.
(9) Cod. 1, 2, 15; Digest 41, 2, 38.
(10) Cod. c. 8, 54, 27.

III.—*Cannot be revoked except in some cases.*

ART. 287.—Gifts once perfect are of their own nature irrevocable.(1) Yet they may be recalled.

For ingratitude against the giver, which may exert itself in five instances.

1. If the receiver has grievously defamed the giver.
2. Laid violent hands on him.
3. Damnified his estate.
4. Laid in wait to take away his life.
5. Refused to fulfil the agreements which were made at the time of the gift.

But the donor himself must make these complaints of ingratitude; for if he is silent, his heir is for ever barred, and if the receiver die, his heir cannot be prosecuted for it.(2)

The gift itself is only called back by ingratitude, not the profits. And if the gift is sold or exchanged, or given away, it cannot be recalled; for then an innocent person might suffer for the crime of the receiver.(3)

Gifts may be recalled or revoked, if the giver afterwards happens to have children, because no one can be presumed to prefer strangers to their own blood offspring. By the laws of England, alienations by bargain and sale of an inheritance or a freehold are required to be registered or enrolled.(4) So are gifts, even those made for pious uses.(5)

He that delivers a thing by mistake may recall it; but if he does it knowingly it is a gift.(6)

IV.—*Incapacity of the giver.*

ART. 288.—Doating persons, madmen, prodigals, minors, are prohibited; also, a deaf and dumb person by nature, not by chance of decease, husband to his wife, or a wife to her husband, except by will.(7)

By the laws of England, a joint consent is sufficient to alienate the dowery of the wife.(8) But she cannot alienate anything without his consent.(9)

Criminals condemned to death cannot grant away their estates after sentence.(10) English authors date the forfeiture from the commission of the crime.

V.—*Personal Things.*

ART. 289.—Personal things may be given by words only, unless made by a corporation or body politic, for then it must be in writing under seal. All gifts of estate of freehold or leases above three years, must be made in writing.(11)

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(1) Cod. 8, 56, 2 & 4.
(2) Cod. 3. 20, 1, 2, 3, 4 & 8, 56, 10.
(3) Cod. 8, 56, 7.
(4) 27 Henry VIII. c. 16.
(5) Doctor and Student, L. 2, ch. 21.
(6) Digest, 50, 17, 53.
(7) Cod. 8, 54, 16; Ibid. 6, 22, 10; Digest, 26, 2, 9, 2.
(8) 4 Henry VII. c. 24.
(9) 1 Inst. 112, a.
(10) Digest, 56, 5, 15.
(11) 29 Car. 2, chap. 3.

CHAPTER X.

WILLS AND TESTAMENTS.

SECTION I.—Wills according to the ancient Laws of the Province. —*I. Definition of the word. II. Word Legacy. III. Who can make a Will. IV. What age was required. V. Solemn Wills acknowledged by the Custom. VI. Olograph Will. VII. By Public Instrument. VIII. Formalities. IX. Execution of Wills. X. Inventory to be made. XI. Cases in which there is more property than necessary to pay the debts. XII. Payment of debts do not devolve on the Executors. XIII. Rule in case of Seizure. XIV. Account and delivery by the Executors. XV. In case there are many Executors. XVI. Practice for the renting of Real Estates by the Executors. XVII. Modification of the Laws of Wills by Statutes. XVIII. Difficulties raised by the Canadian Lawyers. XIX. Mr. Panet's Act. XX. Decision of the Privy Council.*

SECTION II.—English Rules.—*I. Definition. II. Divise. III. Nuncupative Wills. IV. Witnesses. V. Probate. VI. Military Wills. VII. Who are capable of making a Will. VIII. Prohibition. IX. Jurisdiction of the Ecclesiastical Court. X. Consent of the Husband. XI. Criminal Conduct. XII. Traitors. XIII. Felons. XIV. Suicide. XV. Outlawed. XVI. What may be disposed by Will. XVII. Of two Wills without date. XVIII. Of the execution of a Will. XIX. Words to be used in a Divise. XX. Statute of Frauds. XXI. Attestation.*

SECTION I.—WILLS ACCORDING TO THE ANCIENT LAWS OF THE PROVINCE.

I.—*Definition of the word.*

Art. 290.—The testamentary donation is an act of liberality by which the donor disposes, under the form of a testament for a time he will exist no more, of the whole or part of his property, in favour of the donee; which donation he may revoke.

II.—*Word Legacy.*

Art. 291.—The word legacy derives its origin from the Latin word *lex*, which signifies law. In the infancy of Rome, before the laws of the twelve tables were promulgated, a will was made in the presence of the people in the *commicium*,

who confirmed it in the form a law, which was called *legare*, or *legen dare*, to make a law.

III.—*Who can make a Will.*

ART. 292.—All persons of sound mind, of age, and enjoying their rights, could dispose by testaments, to the advantage of persons capable of receiving, of all their goods, moveables, acquests, and conquests immoveable, and of one-fifth part of all their real estate *propres*, but no more, even had it been for charitable or pious uses.

IV.—*What age was required.*

ART. 293.—To bequeath moveables, acquests and conquests, immoveables, the age of twenty years was sufficient, but twenty-five years of age was required to dispose of *proprcs* real estates.(1)

If the testator had neither moveables, acquests, or conquests, he might divise one-fifth part of his *propres* at twenty.(2) Had he exceeded this, the legacy was not null, but was reducible.(3)

V.—*Solemn Wills acknowledged by the Custom.*

ART. 294.—The Custom acknowledges two sorts of wills, which are both called solemn wills.

VI.—*Olograph Will.*

ART. 295.—The olograph, which must be written by the testator himself, without any addition of another hand.

VII.—*By Public Instrument.*

ART. 296.—And that passed before two notaries, or before the curate of the parish of the testator, or his vicar general and one notary, or by the curate or vicar and three witnesses, or one notary and two witnesses, such witnesses being males, aged twenty years at least, and not legatees, afterwards read to the testator, in the presence of the notaries, curate or vicar, and witnesses.

VIII.—*Formalities.*

ART. 297.—Mention must be made in the will that it was dictated, named, and again read, *dicté nommé et relu*, (these words are essential,) and signed by the testator and witnesses, or that mention be made of the cause why they did not sign.(4)

IX.—*Execution of Wills.*

ART. 298.—As wills have their effect only after the death, it is customary for

(1) Custom, Art. 293.
(2) Custom, Art. 293.
(3) Custom, Art. 295.
(4) Custom, Art. 289.

testators to appoint executors. These executors are seized during one year and one day of the moveable property existing at the time of the demise of the testator for the execution of his will.(1)

X.—*Inventory to be made.*

ART. 299.—The duty of the executors is, to cause an inventory to be made with all due diligence, the presumptive heir being present or legally called to attend.(2)

The inventory being made, the executor must sell the moveable property; the sale must be public; it must be published at the church door of the parish of the testator; placarded on the door of the house where he died, as the sale of minors' property; the time given to the executor to execute the will is one year and one day from the day of the death of the testator; that time may be extended for just causes, as if the heirs had contested any of the legacies, or prevented the sale of the moveable property.

XI.—*Cases in which there is more property than necessary to pay the debts.*

ART. 300.—Should there be more moveable property than necessary to pay the legacies, the heirs may prevent the sale of the surplus, and point out those to be sold, and even prevent the sale, by furnishing the executors with means to pay the legacies, which is the next thing the executors must do,—not, however, without calling the presumptive heirs.

XII.—*Payment of Debts do not devolve on the Executors.*

ART. 301.—The payment of the debts does not devolve upon the executors, unless it be particularly mentioned in the will.

XIII.—*Rule in case of Seizure.*

ART. 302.—In case there should be any seizure made in the hands of the executors, the judge is to decide upon them, the presumptive heir being called. When the will is executed, the legatees may demand the delivery of the moveable estate.

XIV.—*Account and delivery by the Executors.*

ART. 303.—Then the executors must render their account and pay the balance in their hands, although the year should not have elapsed.

XV.—*In case there are many Executors.*

ART. 304.—When there are many executors, they must render their account conjointly; without, however, being jointly held, for each of them is bound only for his portion of the administration. Legacies of money and things, which by their nature profit, interest is due but after demand only, although they became due before. Of a *haras* of breeding horses, the colts belong to the legatees.(3)

(1) Custom, Art. 297.
(2) Custom, Ibid.
(3) See L. 7, ff. de ann.; Legat. & fedeic.; L. 17, ff de Legat. 2; Domat. Loix Civiles, lib. 3, tit. 1; see X., pages 169 & 170; Merlin & Guyot, Repertoire verbo Executeurs.

XVI.—*Practice for the renting of Real Estates by the Executors.*

ART. 305.—Although the executors are by law seized only of the moveable property of the deceased in consequence not competent to receive the rents of the real estates, it was the usage at the chatelet of Paris to allow them to receive the rents of the houses, and other profits produced by the landed property during the year of their administration.

XVII.—*Modification of the Laws of Wills by Statutes.*

ART. 306.—An Act of the Parliament of Great Britain, 14th Geo. III. ch. 83, for making more effectual provision for the government of Quebec, in North America, it is enacted that "it shall and may be lawful to and for every person that is owner of lands, goods, or credits, in the said province, and that has a right to alienate the said lands, goods, and credits, in his or her lifetime, by deed of sale, gift, or otherwise, to devise or bequeath the same, at his or her death, by his or her last will and testament, any law, usage, or custom, &c. notwithstanding; such will being executed either according to the laws of Canada, or according to the forms prescribed by the laws of England."

XVIII.—*Difficulties raised by the Canadian Lawyers.*

ART. 307.—The lawyers entertained doubts as to the efficacy of this enactment, and pretended that it removed the incapacities of the testators to give, but not those of the legatees to receive, to remove these difficulties.

XIX.—*Mr. Panet's Act.*

ART. 308.—A provincial statute, 41 Geo. III. c. 4, (at the time called Mr. Panet's Act,) declared, that "it shall be lawful for all and every person of sound intellect and of age, having the legal exercise of their rights, to devise or bequeath by last will and testament, whether the same be made by a husband or wife, in favour of each other, or in favour of one or more of their children, as they would see meet, or in favour of any other person whatsoever, all and every his or her lands, goods, or credits, *propres*, acquests, or conquests, &c. The subtlety of the lawyers was not yet conquered, in the face of the English rule of jurisprudence establishing that remedial statutes were to be beneficially and liberally expounded, and although the custom declared that persons of twenty years were of age, were able to dispose by will of their personal property: they contended that they, such persons, were not of age to bequeath their moveable property to their tutor or other relative by whom they might be influenced.

XX.—*Decision of the Privy Council.*

ART. 309.—A decision of the Privy Council settled the question, by declaring, that a minor, having attained the age of twenty years, was of age to exercise his legal rights with respect to moveable property, and that in the case appealed the incapacity of the guardian being removed, the legacy made to his wife by a person of twenty years was valid.(1)

(1) Alexis Durocher and others, Appellants, and Benjamin Beaubien and Lewis Guy, Respondents, 13th May, 1828, on appeal from Montreal King's Bench to the Provincial Court of Appeals, and from thence to the Privy Council. Stuart's Reports, page 397.

SECTION II.—ENGLISH RULES.

I.—*Definition.*

ART. 310.—A will or testament is "the legal declaration of a man's intention of what he wills to be performed after his death.

The person who makes a will or testament is called a testator; he who dies without a will is termed in law intestate.

A will and testament, strictly speaking, are not words of the same import. A will is properly limited to land, and a testament only to personal estate; and the latter requires executors, who are named, to take care and see it performed; but the terms are continually applied indifferently to a disposition of lands or goods.

II.—*Devise.*

ART. 311.—A gift of lands and tenements by will is called a devise; and the person to whom they are given, the devisee.

A bequest of goods and chattels is termed a legacy, and the person to whom they are bequeathed, a legatee.

There are two sorts of wills or testaments: first, written, and secondly, verbal, or made by word of mouth; the latter is called a nuncupative will.

III.—*Nuncupative Will.*

ART. 312.—A nuncupative will is where a testator declares his will before a sufficient number of witnesses; and this can extend only to personal property; for no real estate can pass by will, unless it be written and properly attested.

No nuncupative will is good where the estate thereby bequeathed shall exceed the value of thirty pounds, that is not proved by the oath of three witnesses at least, who were present at the time of pronouncing the will, and bid by the testator to bear witness that such was his will, or words to that effect.(1)

IV.—*Witnesses.*

ART. 313.—None are deemed good witnesses to a nuncupative will but those allowed to be good upon a trial at law.(2)

To be good, the nuncupative will must be made in the time of the last sickness of the deceased, and in the house of his or her habitation for the last ten days or more next before the making of such will, except such person was surprised or taken sick, being from his own home, and died before he returned to the place of his or her dwelling.(3)

V.—*Probate.*

ART. 314.—That after the expiration of six months after speaking the testamentary words, no testimony shall be received to prove any will nuncupative,

(1) Statute of Frauds, 20, Car. 2, c. 3, § 19.
(2) 4 Ann, c. 16, § 14.
(3) 29th Car. 2, c. 3, § 19.

except the said testimony, or the substance thereof, were committed to writing within six days after the making of the said will.(1)

Nor shall such be proved till fourteen days after the death of the testator, nor till process has first issued to call in the widow, or next of kin, to contest it, if they think proper.(2)

No written will shall be revoked or altered by any subsequent nuncupative will, unless the same be, in the lifetime of the testator, reduced to writing, and by him read over and approved, and unless the same be proved to have been done by three witnesses at the least.(3)

VI.—*Military Wills.*

ART. 315.—But any soldier in actual military service, or any mariner or seaman being at sea, may dispose of his moveables, wages, and perpetual estate, as before the making of this last recited act. No stamp is required till after the death of the testator.

VII.—*Who are capable of making a Will.*

ART. 316.—All persons of sound memory and understanding have full power to dispose of their property by will, unless under some special prohibition: as, 1st, want of sufficient discretion in the person making the will; 2d, want of sufficient liberty and free will; 3d, on account of criminal conduct.

VIII.—*Prohibition.*

ART. 317.—In the first class of prohibitions are infants. The law, however, allows that a male infant, at the age of fourteen years, and a female at twelve years and upwards, are capable of making a will respecting any goods, money, and other personal estate. In reckoning the age of an infant, the day of the birth must be excluded.(4)

Idiots, or natural fools fools from their birth, but a man is not an idiot who has any glimmerings of reason.

IX.—*Jurisdiction of the Ecclesiastical Court.*

ART. 318.—The ecclesiastical court is the judge of every testator's capacity, and decides on disputes respecting the validity of wills relating to personal estates. The discretion of the person making a will, and his capacity of devising, whatever may be his age, may be disputed there.

Under the second head of persons incapable of making a will, are those who have not sufficient liberty and free will: married women come under this description.

A married woman, or *feme covert*, is restrained and prevented from devising any land or real estate whatsoever, being particularly excepted out of the Act of

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(1) 29th Car. 2, c. 3, § 19.
(2) Ibid.
(3) Ibid.
(4) Ibid.

34 and 35 Henry VIII., ch. 5, enabling other persons to dispose of their lands by will, even of goods or personal estate, without the license or consent of her husband, except her pin money, or savings out of her allowance by will.

X.—*Consent of the Husband.*

ART. 319.—The license and consent of the husband may be given previous to his marriage; and the husband, by his bond or covenant, is bound to allow the execution of it.

If the husband be banished beyond the sea for life, the wife may make a will, and act in every thing as if she was unmarried, or as if the husband were dead.

A will is void, when it is made by a person in consequence of threats, whereby he is induced, through fear of injury, to make such a will. But if the testator afterwards, when there is no excuse of fear, do ratify his will, the same is then good in law.

XI.—*Criminal Conduct.*

ART. 320.—Criminal conduct occasions a third kind of disability.

The lands and tenements of a traitor, from the commission of the offence, and his goods and chattels, from the time of conviction, are forfeited to the king.

XII.—*Traitors.*

ART. 321.—Traitors are not only deprived of the privilege of making a will at the time of conviction, but any will made before, by reason of such conviction, becomes void, in respect both of goods and lands.

XIII.—*Felons.*

ART. 322.—A felon, or one guilty of petit treason, lawfully convicted, cannot make a will of goods or land, because the law has disposed thereof already by forfeiture. A pardon, however, restores him to his former estate and capacity of making a will.

XIV.—*Suicide.*

ART. 323.—A person who wilfully kills himself, has also forfeited his goods and chattels to the king, but not his lands and other real estate, not being attainted as a felon.

XV.—*Outlawed.*

ART. 324.—Outlawed persons are out of the protection of the laws, and their goods and chattels are forfeited to the king, so long as the outlawry subsists; but they may dispose of their real estates by will; they are not forfeited by the outlawry.

XVI.—*What may be disposed of by Will.*

ART. 325.—All personal estates of every description, as goods and chattels, things in action, as debts and other monies, mortgages, &c., may be disposed of by will.(1)

(1) Blackstone's Commentaries, vol. 2.

As to the real estate, by Statute 34 and 35 Henry VIII. c. 5, and 11 Henry II, c. 25, all persons (except married women, infants, idiots, and persons of nonsane memory,) are empowered to dispose by will in writing of the whole of their landed property (except their copyhold tenements, they being excepted out of the Statute 29, Car. 2, c. 24,) to whom they think fit, unless it be to bodies corporate, and that even to the total disheriting of their heir at law, notwithstanding that erroneous opinion, which some entertain, of the necessity of leaving their heir a shilling, or some express legacy, in order to disinherit him effectually. As to freehold estates, held by one person during the life of another, styled estates *par autre vie*, or for the term of another's life, they are devisable by will.(1)

The dower crops of widows may be bequeathed.(2)

Corn growing on the lands of tenants for life, &c., at the time of the testator's decease, may be bequeathed by will.

So if a man have lands in right of his wife, or is tenant by the courtesy of lands, and sow them with corn, he may devise the corn growing on the lands at his death, and the devise is good, and the wife, though entitled to the land, shall not have the corn.

XVII.—*Of two Wills without date.*

ART. 326.—Where two wills are made, and neither of them dated, the man is declared to have died intestate, it being impossible to ascertain which was the last.

XVIII.—*Of the execution of a Will.*

ART. 327.—By the 29th Car. 2, c. 3, usually styled the statute of frauds and perjuries, it is enacted, that all devises and bequests of any lands or tenements, devisable either by common law or by force of the statute of wills, or by that statute, shall be in writing, and signed by the party so devising the same, or by some other person in his presence, and by his express direction, and shall be attested and subscribed in the presence of the devisor, by three or more credible witnesses, or else such devises or bequests shall be utterly void and of none effect.

XIX.—*Words to be used in a Devise.*

ART. 328.—The words commonly used in the devise of a fee are, "I give, devise, and bequeath unto A all those my freehold messuages, lands, tenements, hereditaments, and premises, with the appurtenances whereof I am seized in fee, situate, &c."

In general, however, the intention of the testator is so entirely regarded, that any kind of disposition, not expressly contrary to the rules of law, will constitute a valid devise.(3)

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(1) 29th Car. 2. c. 3, § 12.

(2) 20 Henry III. c. 2.

(3) "I agree that the word 'property,' standing alone, is sufficient to carry the fee simple in the land:" *Per* Rooke, J. 2, New. Rep. 221.—"That 'property' is a term sufficient to pass real estate, when used in a last will, cannot now be disputed:" *Per* Lord Ellenborough. C. J. 14 East, 372.

In the construction of wills, it is an invariable rule that a devise must be most favourably expounded, to pursue, if possible, the will of the testator.

XX.—*Statute of Frauds.*

ART. 329.—In the construction of the statute of frauds and perjuries, it has been adjudged that the name of the person making his will, written with his own hand, as: "I, John, do make this my last will and testament," is a sufficient signing, without any name at the bottom. But the safest way is to sign at the end of the will, and at the bottom of each page.

XXI.—*Attestation.*

ART. 330.—The attestation and subscription of the witnesses, in the presence of the testator, is required by the statute, principally with a view of putting a stop to the secret manner in which, previous to the act, wills were executed.

But the business of the persons attesting the execution of a will, is not barely to witness the manual act of signing, but also to bear testimony of the sanity of the testator. It is not necessary that the witnesses should be made acquainted with the contents of the will.

Though the witnesses must all attest the execution of the testator's will in his presence, it is not necessary that it be at the same time.(2)

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(2) See Ante, vol. 1. The Origin, Use, and Progress of Wills, by the Common and Statute Laws. Blackstone's Commentaries, vol. 2, pages 11, 12, 373, 489, 499; vol. 4, pages 424 and 430.

CHAPTER XI.

ACTIONS.

I. Definition of the word. II. Principal sorts of Actions. III. Petitory. IV. Possessory. V. Complaint. VI. Simple Saizin. VII. Actions tending to enforce the execution of Engagements. VIII. Personal. IX. Personal and Hypothecary. X. Purely Hypothecary. XI. Real and Personal. XII. Purely Real. XIII. How extinguished. XIV. Rule for those who acquired from the First Tenant. XV. Decrêt. XVI. Abandonment for Discharge. XVII. Abandonment after Contestation. XVIII. Mortgages. XIX. Difference between a Mortgage and Pledge. XX. Mortgage is indivisible. XXI. Three sorts of Mortgage. XXII. Legal or Tacit Mortgage. XXIII. Judicial Mortgage. XXIV. In case of an Appeal. XXV. Privilege upon Moveable Property. XXVI. Consequence from that Rule. XXVII. Exceptions. XXVIII. Doctors. XXIX. Servants. XXX. Tavern-keepers.

I.—*Definition of the word.*

ART. 331.—An action is the right and power of prosecuting in judicature for what is due to us and for the reparation of wrongs we have suffered, either by actions or by words.(1)

II.—*Principal sorts of Actions.*

ART. 332.—There are two principal sorts of actions—personal actions, and real actions; mixed actions partake of the nature of both.(2)

III.—*Petitory Actions.*

ART. 333.—Some are petitory, which claim the property from one who is in possession.(3)

IV.—*Possessory Actions.*

ART. 334.—Others possessory, which seek the possession only,(4) either to preserve it or to claim heritages or real rights, in the possession of which we are troubled, or of which we are dispossessed. This action is called complaint.(5)

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(1) Institutes, lib. 4. tit. 6; L. Cornelia, ff. De Injuria.
(2) § Ibid *Quædam.*
(3) Digest 6, 1, 24.
(4) Institutes, 4. 6. 30.
(5) Custom, Art. 96.

V.—*Complaint.*

ART. 335.—This action is granted to the possessor, without examining if his claim to the property be just or not; it is sufficient to have been in possession one year and one day publicly, without violence, and as master.

This action is also used to claim an universality of moveables, as a succession, but not to claim a particular moveable.(1) By the Custom, this action lasts thirty years.(2)

VI.—*Simple Saizin.*

ART. 336.—The Custom gives another sort of complaint for rents, which it calls *simple saizin*, but this article is full of absurdity; it is unintelligible, and is no more in use.(3)

VII.—*Actions tending to enforce the Execution of Engagements.*

ART. 337.—They are of five sorts, viz.:

VIII.—*Personal.*

ART. 338.—1. The personal action, which is given against him who has contracted the engagement.

Against his heirs, each for such part as he is benefited in the succession.(4)

Against the husband, for the personal debts of his wife, contracted before marriage, in case there is a community, and no clause to the contrary, of which debts *in toto* the husband is personally holden, during the marriage, and even after dissolution, if the wife renounces to the community; but if she accepts, the action is reduced to one-half.(5)

Against the wife, after the demise of her husband, when she accepts the community for one-half of the debts contracted by her husband during the community, also of the personal debts contracted by him before the marriage, if there is no clause to the contrary; but this action can be maintained against the wife and against her heirs, only to the amount they have received of the community: provided always that a faithful inventory has been made, without fault or fraud on their part.(6)

IX.—*Personal and Hypothecary Actions.*

ART. 339.—2. The personal and hypothecary actions are given against donees or universal legatees, of him who has contracted the debt, when they are holders of real estates which have belonged to the deceased, and which had been by him mortgaged for the payment of the debt, in which case each of the heirs, donees, or legatees is hypothecarily held for the total of the debt, saving his recourse against the other heirs, donees, or universal legatees.

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(1) Custom, Art. 97.
(2) Art. 118, Imbert, lib. 1, chap. 35, n. 7. Langlois, Principes généraux de la Coutume, p. 283.
(3) Custom, Art. 98. Langlois, Princip. gen. p. 283.
(4) Custom, Art. 332, 334.
(5) Ibid. 221, 222.
(6) Ibid. 221, 222.

And against the husband and the wife, holders of immoveable property belonging to their community for its debts, to which they were not personally bound, to which debts they are hypothecarily held for the whole, saving their recourse against the other conjunct or against his heirs.(1)

X.—*Purely Hypothecary.*

ART. 340.—3. The action purely hypothecary, which is given against the possessor and proprietor of immoveable property, mortgaged for a debt for which the holder is not bound by the title of his purchase, and of which he has had no knowledge, yet the creditor may sue him for the debt without calling upon the person who created it, and of whom the possessor has acquired.(2)

XI.—*Real and Personal.*

ART. 341.—4. The real and personal action, which is given against the purchaser and the proprietor of estates owing seigniorial or other charges, real and annual, and against such of his heirs, legatees, or donees, to whom the property has descended, and against all other possessors of the said property who have bound themselves to pay the same, as also for the arrears of rent.(3)

XII.—*Purely Real.*

ART. 342.—5. The action purely real, which lies against the holder of the said heritage, burthened with a seigniorial and ground rent, or other real or annual burthens, when the holder has had no knowledge of the said charges and burthens, against whom, notwithstanding, this action may be maintained, without calling upon his vendor.

XIII.—*How Extinguished.*

ART. 343.—Means by which these actions may be extinguished or suspended:

1. By the payment or discharge of the debt.

2. By compensation of one debt for another, which takes place *de jure* or of right, provided both debts are clear, but not when one of the debts is liquidated and demandable and the other subject to dispute or litigation.

3. By prescription and by sheriff's sales made without opposition.

4. By quitting or giving over the heritage or real estates, except in the real and personal action, when the purchaser or tenant of real estates is burthened with seigniorial or ground rent, his heirs, donees, or universal legatees, have bound themselves to make improvements on the heritage and have not done them, or when they have bound themselves to guarantee and make good the charge or burthen with a general mortgage.(4)

XIV.—*Rule for those who have acquired from the first Tenant.*

ART. 344.—The same rule holds good against him who has acquired from the

(1) Custom, Art. 333.
(2) Ibid. 101.
(3) Ibid. 90 & 100.
(4) Ibid. 105, 106, 109. See Langlois, pages 288, 289, 290.

first tenant, when he has obliged himself to make improvements and has not made them or promised to pay the rent, but the words to warrant and make good, *fournir et faire valoir*, are essential; if they are omitted in the instrument transferring the property, he may abandon it by paying the dues accrued in his time.(1)

This kind of abandonment can be done only in a judicial process, the party being present or duly summoned, and in this case the property abandoned reverts, *de jure*, to the grantor or to his representatives.(2)

But to be discharged of actions purely hypothecary, or purely real, a simple act, duly signified, is sufficient; the possessor may, if he thinks fit, prefer to call upon his vendor, to save the warranty to which this latter is bound.(3)

XV.—*Decrêt.*

ART. 345.—In case of this sort of abandonment, the property abandoned does not go to the creditors, but a curator is appointed, upon whom the property is sued and sold by *Decrêt*, and adjudged to the highest bidder.(4)

XVI.—*Abandonment for Discharge.*

ART. 346.—If the abandonment has for its object to obtain a discharge, it must be made before contestation, that is before a rule is granted on the demand and defence of the parties' default, or the defence dismissed; he who abandons is not held for the arrears of the rent, although they became due during his possession, except of the seigniorial rent, which is always presumed to exist.(5)

XVII.—*Abandonment after Contestation.*

ART. 347.—And when the abandonment is made after contestation, the possessor must pay the arrears which have accrued during his possession, to the amount of the produce, interest, or advantage he has received.(6)

In these two last actions, the possessor is not bound to return the property in the state he received it, provided there is no fraud on his part, or that he derives no advantage from the deterioration.(7)

XVIII.—*Of Mortgages.*

ART. 348.—A mortgage is a right granted to the creditor over the immoveable property of his debtor, for the security of his debt, and gives him the power of having the property seized and sold in default of payment.

It is a species of pledge, the thing mortgaged being bound for the payment of the debt or fulfilment of the obligation.(8) It resembles the pledge.

1. In that both are granted to the creditor for the security of the debt.

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(1) Custom, Art. 109, 110.
(2) Ibid. 109.
(3) Ibid. 102.
(4) Ibid. 101.
(5) Ibid. 113.
(6) Ibid. 103.
(7) Langlois, Princ. gen., pages 293 and 294.
(8) 7 Inst. de Act. l. 5, § 1 ff. de pign. l. 138 § 2 ff. de verb. sigf. l. 9, § 2 ff. de pign. Act. l. 1 Cod.; V. Domat. Des Gages & Hypotheques, lib. 3, tit. 1, sec. 1, pages 162, 163.

2. In that both bind the thing subjected to them, and that the same thing cannot be engaged to a second creditor to the prejudice of the first.

XIX.—*Difference between a Mortgage and Pledge.*

ART. 349.—A mortgage differs from a pledge in this:

1. That a mortgage exists only on real or immoveable estates, and that the pledge has for its object only moveables, corporeal or incorporeal.(1)

2. That in the pledge, the moveables and effects subjected to it are put into the possession of the creditor, or of third persons, agreed upon by the parties, while the mortgage only subjects to the rights of the creditors the property on which it is imposed, without it being necessary that he should have actual possession.

Generally the conventional mortgage extends upon all the real property of the debtor, yet it may be special upon part of the property, or general on the whole, and special on some which are designated.(2)

As the mortgage is only accessory to a principal obligation which it is designed to strengthen, and of which it is to secure the execution, a mortgage for a sum or for goods to be advanced, is void.(3)

XX.—*Mortgage is indivisible.*

ART. 350.—The mortgage is in its nature indivisible, and prevails over all the immoveables subjected to it, and over each and every portion.(4)

It is essentially necessary to the existence of a mortgage that there be a principal debt to serve as a foundation.

Hence in all cases where the principal debt is extinguished, the mortgage disappears with it; and when the principal obligation is void, the mortgage is likewise void. This, however, is to be understood with certain restrictions, which will be mentioned in this chapter.

XXI.—*Three sorts of Mortgages.*

ART. 351.—There are three sorts of mortgages.

1. Conventional mortgages, which depends on covenants contained in deeds passed before notaries, or under private signature, and afterwards acknowledged before notaries or judicial authority.

XXII.—*Legal or Tacit Mortgages.*

ART. 352.—Legal or tacit mortgages, which are created by the operation of law, as that of tutors in favour of their ward, on account of their administration, from the day of their appointment until the liquidation and settlement of their final account: and the tutors and curators of such persons have a like mortgage on their property, as a security for the advances which they may have made.(5)

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(1) Custom, Art. 170.

(2) By an Ordinance of the Special Council, L. C., 4th Victoria, c. 30, 1841, all mortgage must be special and registered.

(3) L. 4 ff. quæ res pign. vel. hyp. l. 11, qui potior. Ne contrahitur obligatio mulieris datione Inst. Quib. mod. re Contr. obl. Domat. Ibid.

(4) Qui pignori plures res accipit non cogitur unam liberare nisi accepto universo quantum debetur. l. 19, ff. de pign.; Domat. ibid. sec. 18; Pothier, Hypotheque, Art. Prelim. 1 Art. bid. ch. 1, sec. 2.

(5) Poth. Hyp. ch. 1, sec. 1, Art. 3; Communauté, No. 763, Toul. p. 119.

That of the wife for the restitution of her dowry, and for the reinvestment of the dotal property sold by her husband, and which she brought in marriage from the time of celebration.

For the restitution or reinvestment of dotal property, which came to her after the marriage, either by succession or donation, from the day the succession was opened or the donation perfected.(1)

XXIII.—*Judicial Mortgage.*

ART. 353.—Judicial mortgages, resulting from judgments, whether they be final or provisional, in favour of the person obtaining them.(2)

The judicial mortgage takes effect from the day on which the judgment is pronounced.

XXIV.—*In case of an Appeal.*

ART. 354.—If there be an appeal from the judgment, and it is confirmed, the mortgage relates back to the day when the judgment was rendered.

XXV.—*Privilege upon Moveable Property.*

ART. 355.—This right depends on the nature of the claim.

The general rule is, that moveables cannot be mortgaged when out of the possession of the debtor.(3)

XXVI.—*Consequence from that Rule.*

ART. 356.—Two consequences are drawn from the rule. The first is, that the purchaser of a moveable thing ought to enjoy the same peaceably, without being troubled by the creditors of the vendor, observing, however, that he is not seized of a personal debt, unless the transfer thereof be signified and copy of the transfer be delivered to the debtor.(4)

XXVII.—*Exceptions.*

ART. 357.—This consequence admits of two exceptions.

1st. In favour of the proprietors of houses situated in the towns and suburbs, and of farms. They may follow the moveable property of their tenants, when it has been clandestinely removed.(5)

2d. In favour of him who has sold moveable effects, with the view of being soon paid, without having fixed the term or day of payment, he may follow the thing wherever it may be, to be paid for the price thereof.(6)

The second consequence is, that the creditors do not take their pay according to the order of their claim, but by the anteriority of the seizure; and that no con-

(1) Pothier, Hypoth. ch. 1, sec. 1, art. 3. Des Personnes, 1 partie, tit. six. sec. 4.
(2) Poth. Hypoth. ch. 1, sec. 1.
(3) Custom, Art. 170.
(4) Ibid. 108.
(5) Ibid. 171.
(6) Ibid. 174.

tribution takes place but after payment of privileged debts, which are, judicial charges and funeral expenses.

XXVIII.—*Doctors.*

ART. 358.—The debts due to physicians, doctors, surgeons, and apothecaries, for the last sickness of the deceased.

XXIX.—*Servants.*

ART. 359.—The servants, for the two last years of their wages, including the current year.

XXX.—*Tavern-keepers.*

ART. 360.—Tavern-keepers have a privilege on the clothes and upon the horses and goods of their hosts.(1)

A person who has not been paid the price of a moveable thing which he had sold on credit, to be paid at a certain day, has a privilege upon the thing as long as it is in the hands of his debtor.(2)

The creditor, who is seized of a moveable which has been pledged to him, has also a privilege on the pledge. The person in whose hands a moveable thing has been deposited has a claim on the thing deposited.

After the payment of these debts has been made, the unprivileged creditors are paid.

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(1) Custom, Art. 175.
(2) Ibid. 177.

CHAPTER XII.

COMMERCIAL MARITIME LAWS.

SECTION I.—INTRODUCTION.—*I. Rhodian Code. II. Laws of Oléron. III. French Ordinance of* 1681. *IV. English Maritime Laws.*

SECTION II.—NAVIGATION LAWS.—*I. New Act. II. Ships to be registered. III. By whom to be registered. IV. Forfeitures. V. Must be English built. VI. Foreign Repairs. VII. Port of Registry. VIII. Where a Ship shall be deemed to belong. IX. Qualifications. X. Declaration. XI. Addition in certain cases to the Declaration. XII. Survey. XIII. Rule to ascertain the Tonnage of a Ship. XIV. Mode of measuring a Vessel afloat. XV. Engine Room. XVI. The Tonnage once ascertained. XVII. Security to be given. XVIII. New Master must give a New Bond. XIX. Certificates of Registry. XX. Name of the Vessel not to be changed. XXI. Builder's Certificate. XXII. Loss of the Certificate. XXIII. Unlawful detention of the Certificate. XXIV. Ships altered. XXV. Vessel condemned. XXVI. Prize Vessels. XXVII. Transfer of Property. XXVIII. Must be divided in sixty-four Shares. XXIX. Exception. XXX. Bill of Sale must be produced. XXXI. Transfer of Property. XXXII. Times of the Entry. XXXIII. Loss of Certificate. XXXIV. Bill of Sale must be produced. XXXV. Bill of Sale not recorded. XXXVI. Change of Property. XXXVII. Copies received as Evidence. XXXVIII. Sales, &c. must be recorded* de novo. *XXXIX. Mortgage. XL. Bankruptcy.*

SECTION III.—GENERAL RULES.—*I. Master or Captain. II. Must be a British Subject. III. Named by the majority of the Owners. IV. Duties of the Master. V. Pilots. VI. Duties of the Pilots. VII. Rules for Pilots in Canada. VIII. Mate. IX. Seamen. X. Freighting, Bills of Lading, and Risks of Voyage. XI. Collision of Ships. XII. Risks in Landing. XIII. Selling Goods at Sea. XIV. Competition. XV. Payment of Freight. XVI. Passage Money. XVII. Wharfage. XVIII. Bottomry. XIX. Demurrage. XX. Delay. XXI. Goods unshipped. XXII. Average. XXIII. Common Loss. XXIV. In Distress. XXV. Ship Riding out the Storm. XXVI. Salvage. XXVII. What constitutes a Legal Wreck.*

SECTION I.—INTRODUCTION.

The use of the seas and rivers is, by the general law of nature and reason, common to all mankind.(1)

But to secure to every one the free possession of that liberty, it soon became necessary for nations to have a system of rules, deducible from the immutable principles of natural justice, and established by universal consent among the civilized inhabitants of the world, in order to decide all disputes, and to insure the observance of justice in the intercourse which the use of the seas made of so frequent occurrence between the individuals of each country.(2)

I.—*Rhodian Code.*

The earliest system of maritime jurisprudence was compiled by the Rhodians, several centuries before the Christian era.

The most celebrated authors of antiquity have spoken in high terms of the wisdom of the Rhodian code.(3)

The laws of Rhodes were adopted by Augustus into the legislation of Rome. Antonius being called upon to decide a contested point with respect to shipping, declared that it ought to be decided by the Rhodian laws, unless they happened to be directly at variance with some regulation of Roman laws. The rules of the Rhodian code with respect to average, contributions in the event of a sacrifice being made at sea, for the safety of the ship and cargo is expressly laid down in the Digest.(4)

II.—*Laws of Oléron.*

The collection of sea laws next in celebrity, is that denominated the *Roole des Jugements d'Oléron.* This is taken from the name of an island in the Atlantic, the origin of which is not certain. The prevailing opinion in England has been that they were compiled by the direction of Queen Eleanor, the wife of Henry II. in her quality of Dutchess of Guienne; and that they were afterwards enlarged by her son Richard I. at his return from the holy land. A code of maritime laws issued at Whisby, in the island of Gothland, in the Baltic, has long enjoyed a high reputation in the north.

III.—*French Ordinance of* 1681.

But by far the most complete and well digested system of maritime jurisprudence that has ever appeared, is that comprised in the famous *ordonnance de la marine*, issued by Lewis XIV., in 1681. This excellent code was compiled under the direction of Colbert, by individuals of great talent and learning, after a careful revision of all the ancient sea laws. It combines whatever experience

(1) Nationale Jure Communia sunt omnia hæc, aer, aqua profluens & mare; per hoc litera maris. § 2, Inst. de rer. divis., &c.
(2) Domat. droit. public. Liv. 1, tit 8.
(3) Cicero, pro lege manilia. Strabo, lib. 14.
(4) Lib. 14, tit. 2.

and the wisdom of ages has shown to be the best in the Roman laws, and in the institutions of the modern maritime states of Europe. In the preface to his treatise on the laws of shipping, Lord Tenderdon says: "If the reader should be offended at the frequent references to this ordinance, I must request him to recollect that those references are made to the maritime code of a great commercial nation, which has attributed much of its national prosperity to that code; a code composed in the reign of a politic prince, under the auspices of a wise and enlightened minister,(1) by laborious and learned persons, who selected the most valuable principles of all the maritime laws then existing, and which, in matter, method, and style, is one of the most finished acts of legislation that ever was promulgated.(2)

IV.—*English Maritime Laws.*

No code of maritime laws has ever been issued by authority in Great Britain. The principles laid down in the civil law, the *roole des jugements d'Oléron & Whisby*, and the works of distinguished jurisconsults, the judicial decisions of its own and of foreign countries establish its maritime jurisprudence.

The preceding remarks refer merely to the principles or leading doctrines of the English maritime laws. These, however, have often been very much modified by statutory enactments, and the excessive multiplication of acts of parliament; suspending, repealing, or altering parts of other acts, has often involved the commercial and maritime law in almost inextricable confusion.

Mr. Pitt has the merit of having introduced something like order in this chaos. Under his auspices, all the separate customs and duties existing in 1787 were repealed, and new ones substituted in their stead; consisting, in most instances, in the equivalents, so far at least as they could be ascertained, of the old duties. In carrying this measure into effect, the House of Commons passed no fewer than three thousand resolutions. The principles laid down in the famous navigation acts of 1650 and 1660 were sufficiently distinct; but when these acts were passed, there were above two hundred statutes in existence, many of them antiquated and contradictory, which they did not repeal, except in so far as the regulations in them might be inconsistent with those in the new acts. Since 1660 statutes were passed in almost every session, explaining, limiting, extending, or modifying in one way or other, some of the provisions of the navigation acts. There was not a single branch of the law that escaped the rage for legislation. Latterly, however, this uncertainty has been nearly removed. One of the bills introduced by Mr. Wallace for the improvement of the navigation laws, repealed above two hundred statutes, and the new acts substituted in the place of those that were repealed were drawn up with laudable brevity and clearness. But various alterations having been frequently made in these acts, new statutes embodying the changes were passed. The principal are 3 and 4 William IV. c. 54, for the

(1) Colbert.

(2) The ordinance of 1681 was published in 1760, with a detailed and most elaborate Commentary, by M. Valin, in 2 volumes 4to. It is impossible which to admire most in this Commentary, the learning or the sound good sense of the writer. Lord Mansfield was indebted for no inconsiderable portion of his superior knowledge of the principles of maritime jurisprudence to a careful study of M. Valin's work.

encouragement of British shipping and navigation, which may be called the present navigation law, (ibid. c. 55,) for the registry of British vessels, (ch. 52,) containing the regulations with respect to the importation and exportation, and ch. 59, for regulating the trade with the British possessions abroad.

Of the acts abovementioned, ten of the 6th year of George IV., commencing with chapter 115, were consolidated in 1825, under the care and correction of Mr. Herries, at the time one of the parliamentary secretaries of the treasury. A new consolidation was introduced into parliament in 1833, by Mr. Poulett Thompson, then vice president of the board of trade, and lately governor of this province, where he died in 1842.

It may be proper to observe that the preamble of the famous ordinance of 1681 contains the following disposition:—

"Nous avons cru que pour achever le bonheur de nos sujets, il ne restait plus "qu'à leur procurer l'abondance par la facilité et l'augmentation du commerce qui "est l'une des principales sources de la félicité des peuples, et comme celui qui "se fait par mer est le plus considérable, que nos ordonnances, et celles de nos "predecesseurs, ni le droit romain ne contiennent que très peu de dispositions "pour la décision des différents qui naissent entre les négociants et les gens de "mer, nous avons estimé qu'il étoit important de fixer la jurisprudence des "contrats maritimes jusqu'à présent incertaine, &c. d'établir une bonne police "dans les ports, costes et Rodes qui sont *dans l'étendue de notre domination;* "à ces causes nous avons déclaré et ordonné, déclarons et ordonnons ce qui suit."

Here follows the ordinance, &c., containing eight titles, with a notice explaining marine terms. It has been contended by some,(1) that this ordinance, not being found registered in the registers of the superior council established at Quebec in 1663, was not to be considered as making part of the jurisprudence of Canada. But the rule laid down by Blackstone for the construction of statutes seems to be contrary to that opinion. It is as follows:—

The general run of the laws enacted by the superior state, are supposed to be calculated for its own internal government, and not to extend to its distant dependant countries, which bearing no part in the legislature, are not therefore in its ordinary and daily contemplation. But when its sovereign legislative power sees it necessary to extend its care to any other subordinate dominions, or mentions them expressly by name, or indicates them under general words, there can be no doubt, but then they are bound by its law.(2)

SECTION II.—NAVIGATION LAWS.

I.—*New Act of* 1833.

ART. 1.—The preamble of the statute declares that an act for the registering of British vessels, 6th George IV., consolidating and amending the laws of registry, is repealed, and a new act is made to commence its operation on the 1st September, 1833.

(1) Stuart's Reports, page 441. Appeal from Montreal—Maitland vs. Molson.
(2) Blackstone's Commentaries, vol. 1, pages 100, 101. Supra, vol. 1, page 18.

II.—*Ships to be registered.*

ART. 2.—No ship or vessel shall be entitled to any of the privileges of a British registered ship, unless registered by those claiming property therein, and shall have obtained a certificate of such registry.

III.—*By whom to be registered.*

ART. 3.—The persons authorised to make registry are in the United Kingdom and in the colonies of Asia, Africa, and America, the collector and comptroller of the customs, &c.

IV.—*Forfeitures.*

ART. 4.—Ships not duly registered shall be subject to be seized by the officer of the customs.

V.—*Must be English built.*

ART. 5.—None to be registered except such as are wholly of the build of the United Kingdom, Isle of Man, or the Colonies, or any prize of war, or legally forfeited, and which shall wholly belong to British subjects.

VI.—*Foreign Repairs.*

ART. 7.—No ship shall continue to enjoy the privilege of a British ship after the same shall have been repaired in a foreign country, if such repairs exceed 20*s.* per ton of the burthen of the ship, unless such repairs shall have been necessary by reason of extraordinary damage, to enable her to return to some British port.

VII.—*Port of Registry.*

ART. 9.—Ships shall be registered at the port to which they belong, under pain of nullity.

VIII.—*Where a Ship shall be deemed to belong.*

ART. 11.—Every ship shall be deemed to belong to some port, at or near to which some or one of the owners who shall subscribe the declaration required, shall reside. Change of subscribing owners require registry *de novo*. If the new registry cannot be made, may go one voyage, with permission endorsed on the certificate of registry. Built in foreign possessions for owners resident in the United Kingdom, may trade for two years on a certificate from the collector, &c. or until arrival in the United Kingdom.

IX.—*Qualifications.*

ART. 12.—Persons residing in foreign countries cannot be owners, unless they be members of some British factory. None who have taken an oath of allegiance to any foreign state, unless he shall afterwards become a denizen or naturalized British subject.

X.—*Declaration.*

ART. 13.—Declaration to be made by subscribing owners, previous to registry. (This article contains a long form of declaration.)

XI.—*Addition in certain cases to the Declaration.*

ART. 14.—An addition to the declaration may be made after, in case the required number of owners do not attend, provided the absentees are not resident within twenty miles from the port of registry.

XII.—*Survey.*

ART. 15.—Vessels must be surveyed previous to registry. Certificate of survey in which the owner or master shall concur.

XIII.—*Rule to ascertain the Tonnage of a Ship.*

ART. 16.—The rule to ascertain the tonnage of a ship shall be as follows:—The length taken on a straight line along the rabbet of the keel, from the back of the main stern post to a perpendicular line from the fore part of the main stern under the bowsprit, from which subtracting three-fifths of the breadth, the remainder shall be esteemed the just length of the keel to find the tonnage; and the breadth shall be taken from the outside of the outside plank, in the broadest part of the ship, whether that shall be above or below the main wales, exclusive of all manner of doubling planks that may be wrought upon the sides of the ship; then, multiplying the length of the keel by the breadth so taken, and the product of half the breadth, and dividing the whole by ninety-four, the quotient shall be deemed the true contents of the tonnage.

XIV.—*Mode of measuring a Vessel afloat.*

ART. 17.—In cases where it may be necessary to ascertain the tonnage of a ship afloat: Drop a plumb line over the stern of the ship, and measure the distance between such line and the after part of the stern post at the load watermark; then measure from the top of the plumb line, in a parallel direction with the water, to a perpendicular point immediately over the load watermark at the fore part of the main stern, subtracting from such measurement the above distance. The remainder will be the ship's extreme, from which is to be deducted three inches for every foot of the load draught of water for the rake abaft, also three-fifths of the ship's breadth for the rake forward. The remainder shall be esteemed the just length of the keel to find the tonnage, and the breadth shall be taken from outside to outside of the plank in the broadest part of the ship, whether that shall be above or below the main wales, exclusive of all manner of sheating or doubling that may be wrought on the side of the ship; then multiplying the length of the keel for tonnage by the breadth so taken, and that product by half the breadth, and dividing by ninety-four, the quotient shall be deemed the true contents of the tonnage.

XV.—*Engine Room.*

ART. 18.—The length of the engine room in steam vessels shall be deducted from the whole length of the vessel, and the remainder be deemed the whole length of the vessel.

XVI.—*The Tonnage once ascertained.*

ART. 19.—Tonnage, when so ascertained, to be ever after deemed the tonnage. (A new mode of measuring ships built since the 1st of October, 1835, was enacted by statute 5 & 6 William IV. ch. 62, which will be found at the end of this chapter.)

XVII.—*Security to be given.*

ART. 20.—To obtain a certificate of registry, a sufficient security by bond must be given to the sovereign, the condition of which will be that the certificate shall be solely made use of for the service of the vessel, or given up to be cancelled in certain cases, and that such certificate shall not be sold, lent, or otherwise disposed of to any person whatever.

XVIII.—*New Master must give a New Bond.*

ART. 21 and 22.—When the master is changed, the new master must give a similar bond, and his name be endorsed on the certificate of registry. By the article 22 it is enacted that these bonds are liable to the same duties of stamps as bonds for customs. (No stamp in Canada.)

XIX.—*Certificates of Registry.*

ART. 23.—Certificates of registry to be given up by all persons as directed by the bond, under the penalties therein provided.

XX.—*Name of the Vessel not to be changed.*

ART. 24.—The name of the vessel which has been registered never afterwards to be changed, and before such ship shall begin to take any cargo, the owner shall cause to be painted in white or yellow letters, of a length of not less than four inches, upon a black ground, on the stern, the name of the ship and the port to which it belongs, and preserve the same, under the forfeiture of £100.

XXI.—*Builder's Certificate.*

ART. 25.—The builders will give a certificate of the particulars of the ship, and the person applying for the same will give his declaration that the ship is the same as described by the builder.

XXII.—*Loss of the Certificate.*

ART. 26.—When the certificate is lost or mislaid, a new one may be obtained, by the owner finding security to deliver up the other when found, and that no illegal use has been or shall be made thereof with his privity or knowledge.

XXIII.—*Unlawful detention of the Certificate.*

ART. 27.—Persons unlawfully detaining a certificate of registry from the person

in legal possession of the vessel, or from the officers of the customs, shall forfeit £100, and, on failure of payment, shall be committed to gaol not less than three months nor more than twelve.

XXIV.—*Ships altered.*

ART. 28.—Where a ship is altered, so as not to correspond with the description given of her in the certificate, she must be again registered.

XXV.—*Vessel condemned.*

ART. 29.—Vessels condemned as prize or for breach of laws, against the slave trade, a certificate of condemnation must be produced.

XXVI.—*Prize Vessels.*

ART. 30.—Prize vessels shall be registered either at Southampton, Weymouth, Exeter, Plymouth, Falmouth, Liverpool, or Whitehaven.

XXVII.—*Transfer of Property.*

ART. 31.—Property in a ship can only be transferred by a bill of sale, or other instrument in writing, containing a recital of the certificate of registry or principal contents thereof. (The transfer will not be void by unimportant errors of recital.)

XXVIII.—*Must be divided into sixty-four Shares.*

ART. 32.—The property in a ship, if not belonging to one individual, must be divided into sixty-four shares or parts; each owner's share must, therefore, be so many sixty-fourth parts of the whole; but partners may hold ships without distinguishing the proportionate interest of each owner.

XXIX.—*Exception.*

ART. 33.—Excepting in the case of heirs, legatees, or creditors, shipping companies, and partnerships, no more than thirty-two persons at a time can be owners of the same vessel. The companies shall prove their association as joint stock companies, for the purpose of owning vessels, and appoint not less than three of the company as trustees, who will subscribe the declaration and state the name of the company, instead of that of the members to obtain registry.

XXX.—*Bill of Sale must be produced.*

ART. 34.—No instrument will be effectual to pass property in a ship until the same shall have been produced to the officers of the customs, and entered, (if not to be registered *de novo*,) who, if required, will endorse the particulars on the instrument.

XXXI.—*Transfer of Property.*

ART. 35.—As soon as the particulars of a bill of sale or mortgage have been registered, the property is transferred and the transfer valid against all persons,

except such subsequent purchasers and mortgagees who shall first procure the endorsement to be made upon the certificate of registry.

XXXII.—*Times of the Entry.*

ART. 36.—No other entry will be made by the same vender or mortgager of the same property, unless thirty days shall elapse from the day of the last entry. If at the time the last entry was made the ship was absent from the port she belonged to, thirty days more from the time of her return, and in case two instruments shall have been entered, the time will be computed from the day the last instrument was entered, or from the date of return, in case of absence; and, in case no person produce any certificate of registry during the said periods of thirty days, endorsements shall be granted to the first who shall produce the certificate of registry. The priority of claim will be according to the time of endorsement, and not of the instrument of transfer.

XXXIII.—*Loss of Certificate.*

In case of loss of the certificate, the commissioner may grant sufficient time for the recovery of the same, and no entry to be made in the interim.

XXXIV.—*Bill of Sale must be produced.*

ART. 37.—Bill of sale may be produced after entry at other ports than those to which vessels belong, and transfers endorsed on the certificate of registry.

XXXV.—*Bill of Sale not recorded.*

ART. 38.—If upon registry *de novo* any bill of sale shall not have been recorded, the same shall then be produced, and a bill of sale previous to registry may be recorded after registry.

XXXVI.—*Change of Property.*

ART. 39.—Upon change of property in any ship or vessel, if the owner or owners shall desire to have the same registered *de novo*, although not required by this act, and the owner or proper number of owners shall attend at the custom house at the port to which such ship or vessel belongs for that purpose. It shall be lawful for the collector and comptroller of Her Majesty's customs at such port to make registry *de novo* of such ship or vessel at the same port, and to grant a certificate thereof. The several requisites hereinbefore in this act mentioned and directed being first duly observed and complied with.

XXXVII.—*Copies received as Evidence.*

ART. 40.—Copies of oaths, declarations, and books of registry, shall, upon being proved to be true copies, be received as evidence upon every trial at law, without the production of the originals, and without the testimony or attendance of any collector or comptroller.

XXXVIII.—*Sales, &c. must be recorded* de novo.

ART. 41.—Sales of vessels or shares in the absence of owners, without formal powers, on proof of fair dealing before the commissioners of the customs, may be recorded or recorded *de novo*, as also where bills of sale cannot be produced, security being given to produce legal powers, or abide future claims.

XXXIX.—Mortgage.

ART. 42.—If a transfer is made only to secure the payment of a debt, either by bill of sale or mortgage, registry and endorsement shall be granted, and will state that the instrument was made as a security and mortgage; and the persons to whom the transfer is made shall not be deemed to be the owner, and the transferor do not cease to be the owner, except as far as to render the ship available for, and secure the payment of, the debt.

XL.—*Bankruptcy.*

ART. 43.—The bankruptcy of the transferrer and mortgager shall not affect the rights of the transferree or mortgagee.

SECTION III.—GENERAL RULES.

I.—*Master or Captain.*

Master, in commercial navigation, is the person intrusted with the care and navigation of a ship.

The situation of master of a ship is so very important, that in some countries no one can be appointed to it who has not been submitted to an examination by competent persons, to ascertain his fitness for properly discharging its duties.(1)

But in England the owners are left to their own discretion as to the skill and honesty of the master.

II.—*Must be a British Subject.*

No one is qualified to be the master of a British ship unless he be a natural born British subject,(2) naturalized by act of parliament, or a denizen by letters of denization, or have become an English subject by conquest, cession, &c., and have taken the oath of allegiance, or a foreign seaman who has served three years in time of war, on board of British ships.

The master is the confidential servant or agent of the owners, and, in conformity to the rules and maxims of the law of England, the owners are bound to the performance of every lawful contract made by him, relative to the usual employment of the ship.(3)

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(1) See the French Ordinance of Lewis XIV. 1681, tit. ii. art. 1.
(2) Richard II., Henry VII., and Henry VIII., 12 Car. 2, s. 1.
(3) Abbot, late Lord Tenderden, on the law of shipping, part 4, c. 2, stat. 6 Geo. IV. s. 109 12, 16.

III.—*Named by the majority of the Owners.*

He is named by the majority of the owners.(1) In a home port the master cannot enter into a charter party, but in a foreign port he may.(2)

IV.—*Duties of the Master.*

The master is bouud to employ his whole time and attention in the service of his employers.(3)

During war and sailing under convoy, he must obey the signals, instructions, and lawful commands of the commander; he cannot desert it without leave; for, besides his responsibility to his owners or freighters, he may be prosecuted by the Court of Admiralty and be fined £500, and imprisoned for one year.(4)

Unless prevented by stress of weather, necessary repairs, in avoiding enemies or pirates, in succouring ships in distress, or other imperious causes, as soon as the voyage has been commenced the master must proceed incessantly to the place of destination.(5)

By the common law, the master has authority over all the mariners on board the ship,—it being their duty to obey his commands in all lawful matters relating to the navigation of the ship and the preservation of good order. But the master should in all cases use his authority with moderation, so as to be the father, not the tyrant, of his crew. He is liable to damages, unless he show cause for chastising the mariner, and the chastisement must be reasonable; and should he strike him without cause or with a deadly weapon, and that death should ensue, it will lie with the jurors to pronounce him guilty of manslaughter or murder.(6)

The master is liable for damage done by him, or by the crew under his command, even while a pilot has charge of the ship.(7)

V.—*Pilots.*

The name of pilot or steersman is applied either to a particular officer serving on board of a ship during the course of a voyage, and having the charge of the helm and the ship's route, or to a person taken on board at any particular place for the purpose of conducting a ship through a river, road, or channel, or from or into a port.

It is to the latter description of persons that the term pilot is now usually applied.

VI.—*Duties of the Pilots.*

The principles of the law with regard to pilots, seems to be, that where the master is bound by law to place his ship in charge of a pilot, and does so accordingly, the ship is not to be considered as under the management of the owners or their servants; and they are to be liable for any damage occasioned by the mis-

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(1) Bell, 2, 506.
(2) Bell, 31, 506.
(3) Abbott, part ii. c. 4.
(4) 43 Geo. III. c. 160.
(5) Marshall on Insurance, book i. c. 6, § 3.
(6) Abbott on Shipping, part ii. c. 4.
(7) Taunston's Common Pleas, Report 108, 1, 568.

management of the ship, unless it be proved that it arose from the negligence or misconduct of the master or men; but when it is in the election or discretion of the master to take a pilot or not, and he thinks fit to take one, the pilot so taken is to be considered as the servant of the owners, who are to be responsible for his conduct.(1)

The statute of 6 Geo. IV. c. 125, has consolidated the laws with respect to the licensing, employment, &c. of pilots. It is of too great a length to be inserted in this sketch, but all its provisions are of importance.

VII.—*Rules for Pilots in Canada.*

In Canada pilots are to be appointed by the governor, after having undergone an examination before the master and wardens of the Trinity House at Quebec or Montreal, having served a regular apprenticeship for five years, and made two or more voyages to Europe or the West Indies; they must speak the English language sufficiently for the working of any ship.

They are authorised to demand the following rates of pilotage, viz.:—

From above the island of Bic up to the harbour of Quebec, 16s. currency per foot of water the vessel draws.

From the harbour of Quebec to the island of Bic, or where the pilot shall be discharged below Quebec, 14s.

From Quebec to Three Rivers, and from Three Rivers to Quebec, if the vessel shall not exceed 200 tons register, £7 10; if above 200 tons, £12 10.

From the harbour of Quebec to the harbour of Montreal, or any place beyond Three Rivers, and from thence down to the basin and harbour of Quebec, double these rates, including fourteen days for the pilot to remain on board after the arrival of the ship at her destination, if required; and more than fourteen days, a further allowance of 5s. per day, and found in provisions.

If a pilot is carried off to sea through stress of weather, the master shall provide him with a passage back to the port of Quebec, and will pay him £4 10 per month, by his performing whilst on board the duties whereof he may be capable.(1)

They are bound to bring the vessels coming from sea near the barracks at Grosse Isle, quarantine ground; to communicate to the masters of vessels copies of the sanitary statutes, which are to be furnished by the Trinity House of Quebec, and see that no violation is committed.(3)

VIII.—*Mate.*

Mate, in a merchant ship, is the deputy of the master, taking in his absence the command. There are sometimes only 1, and sometimes 2, 3, or 4 mates in a merchantman, according to her size; denominated 1st, 2d, 3d, &c. mates. The law, however, recognises only 2 descriptions of persons in a merchantman—the master and mariners; the mates being included in the latter, and the captain being responsible for their proceedings.

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(1) Abbott on the Law of Shipping, part ii. c. 5.
(2) 51 Geo. III. c. 12; 52 Geo. III. c. 12; 2 Geo. IV. c. 7.
(3) 2 Will. IV. c. 16. For further rates of pilotage on the St. Lawrence, see 51st Geo. III. ch. 12, sec. 10.

IX.—*Seamen.*

Seamen are the individuals engaged in navigating ships, barges, &c. upon the high seas. Those employed for this purpose upon rivers, lakes, or canals, are denominated watermen.

A British seaman must be a natural born subject of his Majesty: or be naturalised by act of parliament; or made a denizen by letters of denization; or have become a British subject by the conquest or cession of some newly acquired territory; or (being a foreigner) have served on board his Majesty's ships of war, in time of war, for the space of three years.(1) But his Majesty may, by proclamation during war, daclare that foreigners who have served *two* years in the royal navy, during such war, shall be deemed British seamen.(2)

Various regulations have been enacted with respect to the hiring of seamen, their conduct while on board, and the payment of their wages. These regulations differ in different countries; but, in all, they have been intended to obviate any disputes that might otherwise arise between the master and seamen as to the terms of the contract between them, to secure due obedience to the master's orders, and to interest the seamen in the completion of the voyage, by making their earnings depend on its successful termination.

1. *Hiring of Seamen.*—To prevent the mischiefs that frequently arose from the want of proper proof of the precise terms upon which seamen engaged to perform their service in merchant ships, it is enacted by statute (2 Geo. c. 36), "that it shall not be lawful for any master or commander of any ship or vessel bound to parts beyond the seas, to carry any seaman or mariner, except his apprentice or apprentices, to sea from any port or place where he or they were entered or shipped, to proceed on any voyage to parts beyond the seas, without first coming to an agreement or contract with such seamen or mariners for their wages; which agreement or agreements shall be made in writing, declaring what wages each seaman or mariner is to have respectively, during the whole voyage, or for as long time as he or they shall ship themselves for; and also to express in the said agreement or contract the voyage for which such seaman or mariner was shipped to perform the same;" under a penalty of £5 for each mariner carried to sea without such agreement, to be forfeited by the master to the use of Greenwich Hospital. This agreement is to be signed by each mariner within three days after he shall have entered himself on board the ship; and is, when signed, conclusive and binding upon all parties. By a subsequent statute, these provisions have been extended to vessels of the burden of 100 tons and upwards, employed in the coasting trade.(3)

The statutes do not render a verbal agreement for wages absolutely void; but impose a penalty on the master if a written agreement be not made. When a written agreement is made, it becomes the only evidence of the contract between the parties; and a seaman cannot recover any thing agreed to be given in reward for his services, which is not specified in the articles.

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(1) 3 & 4 Will. IV. c. 54, § 16.
(2) § 17.
(3) 31 Geo. III. c. 39.

A seaman who has engaged to serve on board a ship, is bound to exert himself to the utmost in the service of the ship; and, therefore, a promise made by the master of *a ship in distress*, to pay an extra sum to a seaman, as an inducement to extraordinary exertion on his part, is held to be essentially void.

2.—*Conduct of Seamen.*—It is essential to the business of navigation that the most prompt and ready obedience should be paid to the lawful commands of the master. To this effect it is covenanted in the articles of agreement, that "each and every lawful command which the said master shall think necessary to issue for the effectual government of the said vessel, suppressing immorality and vice of all kinds, be strictly complied with, under the penalty of the person or persons disobeying forfeiting his or their whole wages or hire, together with every thing belonging to him or them on board the said vessel."

In case of disobedience or disorderly conduct on the part of the seamen, the master may correct them in a reasonable manner. Such an authority is absolutely necessary to the safety of the ship and of those on board; but it behoves the master to act in such cases with great deliberation, and not to pervert the powers with which he is intrusted for the good of the whole to cruel or vindictive purposes. Masters abusing their authority must answer at law for the consequences. In the case of actual or open mutiny by the crew, or any part of them, the resistance of the master becomes an act of self-defence, and is to be considered in all its consequences in that point of view. The ordinances of Oléron and Wisby declare that a mariner who strikes the master shall either pay a fine or lose his right hand; a singular as well as cruel alternative, unknown in modern jurisprudence.

But although the master may by force restrain the commission of great crimes, he has no judicial authority over the criminal, but is bound to secure his person and bring him before a proper tribunal. And all justices of the peace are empowered to receive information touching any murder, piracy, felony, or robbery upon the sea, and to commit the offenders for trial.(1)

The *desertion* or absence without leave of seamen from a ship, while on a voyage to foreign parts, being attended with many bad consequences, has been provided against in all maritime laws. It was enacted in Great Britain, by the 11 and 12 Will. III. c. 7, "that all such seamen, officers, or sailors, who shall desert the ships or vessels wherein they are hired to serve for that voyage, shall for such offence forfeit all such wages as shall be then due to him or them." By subsequent statutes,(2) it is enacted, that if, after having entered into the agreement previously referred to, a mariner deserts or refuses to proceed on the voyage, he forfeits to the owners all the wages then due to him, and a justice of the peace may, on complaint of the master, owner, or person having charge of the ship, issue a warrant to apprehend him; and in case of his refusal to proceed on the voyage, or of his not assigning a sufficient reason for such refusal, may commit him to hard labour in the house of correction for not more than thirty nor less than fourteen days. A mariner absenting himself from the ship without leave of the master or other chief officer having charge of the ship, forfeits two days' pay for every such day's absence, to the use of Greenwich Hospital. And in the case of foreign

(1) 43 Geo. III. c. 160.
(2) 2 Geo. II. c. 36, and 31 Geo. III. c. 39.

voyages, if, upon the ship's arrival at her port of delivery in England, he leaves her without a *written discharge* from the master or other person having charge of the ship, or if in the coasting trade he quits the ship before the *voyage is completed and* THE CARGO DELIVERED, or before the expiration of the term for which he engaged, or before he has obtained a discharge in writing, he forfeits one month's pay to the said hospital. But these provisions do not debar seamen from entering on board any of his Majesty's ships.

X.—*Freighting, Bills of Lading, and Risks of Voyage.*

The freighting of a vessel is the hiring of her, in whole or in part for the carriage of goods or other purposes. It is commonly fixed by the bill of lading.

Bills of lading are documents which specify the goods received on board, the freight or charges for carriage, the destination of the goods, the conditions as to the risk, &c.

The written contract by which a merchant freights a ship, is called a charter party. When a vessel is hired altogether, by a regular contract of charter party, it is called a chartered ship; and when the ship undertakes to carry goods generally from one port to another, it is called a general ship, or a ship on general freight.

It is implied in the freighting of a ship that she shall be tight, staunch, and strong, properly manned, and provided with all necessary stores, and in all respects fit for the intended voyage.(1)

In the case of a general ship advertised to carry goods from one port to another, merchants or freighters first bargained for the carriage of their goods, will be preferred to such as make no such bargain, though the goods of the latter be first sent.(2) The freight is not due till every thing be landed at the last port agreed upon.(3) The risk of the goods is with the ship owners, from the time they begin to take delivery till they land them.(4)

From the risk incurred by the owners, however, are excepted the act of God, or the king's enemies, fire, and all and every danger and accident of seas, rivers, and navigation thereof, of whatever nature and kind soever, which it may be impossible to avert,(5) so that on proving the loss to have been occasioned by any such cause, they will be free.(6)

And they will incur no liability for loss, arising without their fault or privity, beyond the value of the ship and freight.(7)

Nor will there be liability for gold, silver, diamonds, watches, jewels, or precious stones, unless the owner or shipper thereof shall, at the time of shipping the same, insert their nature, quality, and value in the bill of lading, or otherwise declare the same in writing to the master owner, or owners.(8)

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(1) East 3, 402.
(2) Thompson's Reports, 15th June, 1809.
(3) Taylor's Reports, July, 1802.
(4) Abbott on Shipping, 224; Term Report of Cases of King's Bench, 260.
(5) Bell, 1, 543; Abbott, 1, 354.
(6) Jones' Reports, 12th February, 1820.
(7) Statute 53 Geo. III. 159, 1.
(8) Statute 26 Geo. III., 86, 3.

It will be enough to render the owners responsible for brittle commodities to, mark their character on the exterior of the packages.(1)

XI.—*Collision of Ships.*

When a collision takes place between two ships, which is purely accidental, without the fault on either side, the rule is, that the loss falls where it lights; that is to say, the proprietors of the ship or cargo injured must bear their own loss.(2)

Where one ship is in fault, such as where, having the wind, she does not get out of the way of a vessel closehauled, her owners will be responsible for the consequences, if the two strike.(3)

When a collision takes place, for which both ships are to blame, the rule is, to apportion the loss between them; so that if one be lost, the other must make up half the loss to the owners.(4)

XII.—*Risks in Landing.*

The responsibility of ship owners continues in the general case till delivery, according to the bill of lading; but it will cease upon the goods being given over board to the consignee, who may so demand them before their actual arrival at the port of destination;(5) or if it be the practice at such port for the consignee to superintend the delivery, such practice will relieve the ship owners of the risk.(6)

XIII.—*Selling Goods at Sea.*

The consignee of goods may, by endorsing the bill of lading, transfer the property of them while at sea, and such transference, if for value, will cut off all stoppage in *transitu* by the consignor.(7)

XIV.—*Competition.*

If a competition takes place for the goods when they arrive, legal processes may be brought against claimants and competitors, and the goods may be put into a warehouse in the mean time.

XV.—*Payment of Freight.*

Each cargo of goods may be retained for the freight, and after part of the cargo has been delivered, the remainder may be retained for the freight of the whole.

The goods may be put into a wharf or warehouse till the freight is paid.(8)

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(1) Sprot's Reports, 15th February, 1803.

(2) Abbott on Shipping, 354. The regulations of the French Code de Commerce, Art. 407, harmonises in this respect with the law of England. According, however to the laws of Oléron and Whisby, and the French Ordinance of 1681, the damage occasioned by an accidental collision, is to be defrayed equally by both parties.

(3) Robertson's Admiralty Reports, 5, 345.

(4) Erskine's Institutes. Decision of the House of Lords, 1824.

(5) Term Reports, 4, 260.

(6) Abbott on Shipping, 248, part iii. ch. 7; Chitty's Commercial Law, vol. iii. ch. 9; Molloy, de Jure Maritimo, book ii. ch. 4.

(7) Abbott on Shipping, 373; Boyle, 24 February, 1787; House of Lords Reports.

(8) Abbott on Shipping, 247.

Or if the goods be intended for bonding in the king's warehouses, they may be lodged there in the ship master's name till the freight be paid.(9)

XVI.—*Passage Money.*

The luggage of passengers may be detained in security of their passage money, but not their persons.(2)

XVII.—*Wharfage.*

Wharfage means the dues payable by ship owners for the benefit due by the ship from the wharf.(3)

These dues form no charge against the consignees or owners of goods on board, so that the goods cannot be detained for wharfage.(4)

XVIII.—*Bottomry.*

When money is wanted to purchase provisions and other necessaries for a vessel during her voyage, it may be obtained on a bond of bottomry, which is a bond charging the vessel with the payment thereof on finishing her voyage, but declaring that if she be lost on her way the obligation for payment shall cease and the lender lose his money.(5)

The repayment of the money, however, depending in this way on an uncertain event, the lender may, in addition to his principal, stipulate for a premium above the legal rate of interest, without infringing the usury laws.(6)

Bottomry creditors have a preference over the other creditors, and the last lender on bottomry is preferred first.

XIX.—*Demurrage.*

Demurrage is a claim due to a ship owner, whose ship is detained by the fault of shippers or consignees, either by the former not timeously furnishing the cargo, or by the latter not timeously discharging it.(7)

XX.—*Delay.*

Delays during the loading or unloading are chargeable against the freighters, though obstacles from weather or otherwise may have caused delay. After that the claim to demurrage ceases, though other obstacles may still detain the vessel.(8)

If a number of lay days, that is days of demurrage, have been agreed upon at so much a day, and more days have been taken, the same rate will be continued, unless the ship master can show that more damage has been sustained, or the freighters that less has been sustained, by the delay, than it will compensate.(9)

(1) Abbott on Shipping, 247.
(2) Campbell's Nisi prius Reports, 3, 360.
(3) Bell's Commentaries, Law Scot. 101.
(4) Campbell's Nisi prius Reports, 3. 360. Law of Shipping, part ii. ch. 3. Tenderden.
(5) Erskine's Institutes, book 3, till. 3, sec. 17.
(6) Ibid. book 4, till 4, sec. 76.
(7) Laurie, 10th November, 1796. Report House of Lords.
(8) Chitty's Commercial Law, vol. iii. pp. 426, 431.
(9) Ibid. 2, 616.

XXI.—*Goods of a party packed over the goods of another party.*

When the goods of a party cannot be unshipped by reason of others packed above them, demurrage will still be due by him, but the owner of the latter goods will be bound to relieve him.

XXII.—*Average.*

Average is a term used in commerce and navigation to signify a contribution made by the individuals, when they happen to be more than one, to whom a ship, or the goods on board of it, belong, or by whom it or they are insured; in order that no particular individual or individuals amongst them, who may have been forced to make a sacrifice for the preservation of the ship or cargo, or both, should lose more than others. "Thus," says Mr. Serjeant Marshall, "where the goods of a particular merchant are thrown overboard in a storm to save the ship from sinking; or where the masts, cables, anchors, or other furniture of the ship, are cut away or destroyed for the preservation of the whole; or money or goods are given as a composition to pirates to save the rest; or an expense is incurred in reclaiming the ship, or defending a suit in a foreign court of admiralty, and obtaining her discharge from an unjust capture or detention; in these and the like cases, where any sacrifice is deliberately and voluntarily made, or any expense fairly and *bonâ fide* incurred, to prevent a total loss, such sacrifice or expense is the proper subject of a general contribution, and ought to be rateably borne by the owners of the ship, freight, and cargo, so that the loss may fall equally on all, according to the equitable maxim of the civil law—no one ought to be enriched by another's loss: *Nemo debet locupletari alienâ jacturâ.*"

Upon this fair principle is founded the doctrine of average contributions; regulations with respect to which having been embodied in the Rhodian law, were thence adopted into the Roman law; and form a prominent part of all modern systems of maritime jurisprudence. The rule of the Rhodian law is, that "if, for the sake of lightening a ship in danger at sea, goods be thrown overboard, the loss incurred for the sake of all, shall be made good by a general contribution."(1)

Average is either *general* or *particular;* that is, it either affects all who have any interest in the ship and cargo, or only some of them. The contributions levied in the cases mentioned above, come under the first class. But when losses occur from ordinary wear or tear, or from the perils naturally incident to a voyage, without being *voluntarily* encountered, such as the accidental springing of masts, the loss of anchors, &c., or when any peculiar sacrifice is made for the sake of the *ship only*, or of the *cargo only*, these losses, or this sacrifice, must be borne by the parties not immediately interested, and are consequently defrayed by a *particular* average.

There are also some small charges called *petty* or *accustomed* averages; it is usual to charge one-third of them to the ship, and two-thirds to the cargo.

No general average takes place, except it can be shown that the danger was imminent, and that the sacrifice made *was indispensable, or supposed to be indis-*

(1) Dig. lib. 14, tit. 2, § 1; Schomberg on the Maritime Laws of Rhodes, p. 60.

pensable, by the captain and officers, for the safety of the ship and cargo. The captain, on coming on shore, should immediately make his protests; and he, with some of the crew, should make oath that the goods were thrown overboard, masts or anchors cut away, money paid, or other loss sustained, for the preservation of the ship and goods, and of the lives of those on board, and for no other purpose. The average, if not settled before, should then be adjusted, and it should be paid before the cargo is landed; for the owners of the ship have a *lien* on the goods on board, not only for the freight, but also *to answer all averages or contributions that may be due.* But though the captain should neglect his duty in this respect, the sufferer would not be without a remedy, but might bring an action either against him or the owners.

But the mode of adjusting an average will be better understood by the following example, extracted from Chief Justice Tenterden's valuable work on the Law of Shipping, part iii. cap. 8.

The reader will suppose that it became necessary, in the Downes, to cut the cable of a ship destined for Hull; that the ship afterwards struck upon the Goodwin, which compelled the master to cut away his mast, and cast overboard part of the cargo, in which operation another part was injured; and that the ship, being cleared from the sands, was forced to take refuge in Ramsgate harbour, to avoid the further effects of the storm.

AMOUNT OF LOSSES.	£	VALUE OF ARTICLES TO CONTRIBUTE.	£
Goods of A cast overboard,.....	500	Goods of A cast overboard.....	500
Damage of the goods of B by the jettison,	200	Sound value of the goods of B, deducting freight and charges,.....	1,000
Freight of the goods cast overboard,....	100	Goods of C,.....	500
Price of a new cable, anchor, and mast,.....£300	200	—— of D,.....	2,000
Deduct one-third,..... 100		—— of E,.....	5,000
Expense of bringing the ship off the sands	50	Value of the ship,.....	2,000
Pilotage and port duties going into the harbour and out, and commission to the agent who made the disbursements,..	100	Clear freight, deducting wages, victuals, &c.	800
Expenses there,.....	25		
Adjusting this average,.....	4		
Postage,.....	1		
Total of losses,.....£	1,180	Total of contributory values, £	11.800

Then, £11,800 : £1,180 : : £100 : 10.

"That is, each person will lose ten per cent. upon the value of his interest in the cargo, ship, or freight. Therefore, A loses £50, B £100, C £50, D £200, E £500. the owners £280; in all £1180. Upon this calculation, the owners are to lose £280; but they are to receive from the contribution £380, to make good their disbursements, and £100 more for the freight of the goods thrown overboard; or £480, minus £280.

They, therefore, are actually to receive..... £200
A is to contribute £50, but has lost £500; therefore A is to receive..... 450
B is to contribute £100, but has lost £200; therefore B is to receive..... 100

On the other hand, C, D, and E have lost nothing, and are to pay as before; viz: C £50, D 200, E 500

which is exactly equal to the total to be actually received, and must be paid by and to each person in rateable proportion."

When a vessel has been saved by throwing any part of her rigging or cargo overboard to lighten her, the loss thereby sustained is called general average.(1)

(1) Bell's Commentaries, 583.

XXIII.—*Common Loss.*

Such loss becomes a common loss to all concerned, so that the owners of the property sacrificed have claim for the loss, deducting their own share against the owners of the vessel and goods saved.(1)

The necessity or prudence of the sacrifice is to be determined by the majority.(2)

XXIV.—*In Distress.*

Whatever the master of a ship does in distress for the preservation of the whole, in cutting away masts or cables, or in throwing goods overboard, to lighten his vessel, which is what is meant by jettison or jetson, is permitted to be brought into a general average, in which all who are concerned in the ship, freight, and cargo, are to bear an equal or proportional part of the loss of what was so sacrificed for the common welfare; and it must be made good by the assurers in such proportions as they have underwritten.

In order to make the act of throwing the goods overboard legal, the ship must be in distress, and the sacrificing a part must be necessary to preserve the rest.

XXV.—*Ship Riding out the Storm.*

In calculating the proportions of the loss, the goods ejected are valued at prime costs, and the goods saved at the price they may bring at the next port.(3)

Diamonds, precious stones, &c., however light, are rated according to their value.

Neither the persons of those on board nor the ship's provisions, are computed. But wearing apparel is, when put up in boxes or chests.

There can be no contribution without the ejecting of some goods and the saving of others.(4)

XXVI.—*Salvage.*

Salvage is the reward due to those who save a vessel when in danger of capture, fire, or wreck.

The master and crew are not entitled to claim salvage, nor are passengers, unless they continue their exertions after an opportunity of escape has occurred, and save the ship after the master has given her up. Pilots are in general not entitled to salvage; it is paid by those benefited.

XXVII.—*What constitutes a Legal Wreck.*

In order to constitute a legal wreck, the goods must come to land; if they continue at sea, the law distinguishes them by the following uncouth and barbarous appellations, viz: *Flotsam*, *Jetsam*, and *Lagun*.

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(1) Bell's Commentaries, 590; Erskine's Institutes, book 3, c. 3, sec. 55.
(2) Bell's Institutes, 1, 586.
(3) Bell, 584.
(4) 53 Geo. 3, c. 87; 2 Geo. 4, c. 76.

Flotsam is when the goods continue swimming on the surface of the waves.

Jetsam is when they are sunk under the surface of the water.

Lagan is when they are sunk, but tied to a cork or buoy, to be found again.(1)

Foreign liquors, brought or coming into Great Britain or Ireland, as derelict, flotsam, &c., are to pay the same duties and receive the same drawbacks as similar liquors regularly imported.

New Rule by which Tonnage of Vessels is to be ascertained.(2)

And be it further enacted, that from and after the commencement of this Act, the tonnage of every ship or vessel required by law to be registered shall, previous to her being registered, be measured and ascertained while her hold is clear, and according to the following rule; that is to say, divide the length of the upper deck between the afterpart of the stem and the forepart of the stern post into six equal parts. Depths: At the foremost, the middle, and the aftermost of those points of division, measure in feet and decimal parts of a foot the depths from the under side of the upper deck to the ceiling at the limber strake. In the case of a break in the upper deck, the decks are to be measured from a line stretched in a continuation of the deck. Breadths: Divide each of those three depths into five equal parts, and measure the inside breadths at the following points; *videlicet*, at one fifth and at four fifths from the upper deck of the foremost and aftermost depths, and at two fifths and four fifths from the upper deck of the midship depth. Length: At half the midship depth measure the length of the vessel from the afterpart of the stem to the forepart of the stern-post; then to twice the midship depth add the foremost and the afternost depths for the sum of the depths; add together the upper and lower breadths at the foremost division, three times the upper breadth, and the lower breadth at the midship division, and the upper and twice the lower breadth at the after division, for the sum of the breadths; then multiply the sum of the depths by the sum of the breadths, and this product by the length, and divide the final product by three thousand five hundred, which will give the number of tons for register. If the vessel have a poop or half deck, or a break in the upper deck, measure the inside mean length, breadth, and height of such part thereof as may be included within the bulk-head; multiply these three measurements together, and dividing the product by 92-4, the quotient will be the number of tons to be added to the result as above found. In order to ascertain the tonnage of open vessels, the depths are to be measured from the upper edge of the upper strake.

Tonnage, when ascertained, to be entered on Register.

And be it further enacted, that the tonnage or burthen of every ship belonging to the United Kingdom, ascertained in the manner hereinbefore directed, shall, in respect of any such ship which shall be registered after the commencement of this Act (except as hereinafter excepted), be inserted in the certificate of the registry

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(1) 28 Geo. 2, c. 19.

(2) By virtue of an Act to regulate the admeasurement of the Tonnage and Burthen of Merchant Shipping of the United Kingdom, repealing part of 3 and 4 Will. IV. c. 55, 9th September, 1835.

thereof, and be taken and deemed to be the tonnage or burthen thereof for all the purposes of the said recited Act.

Mode of ascertaining Tonnage of Steam Vessels.

Provided, always, and be it further enacted, that in each of the several rules hereinbefore prescribed, when applied for the purpose of ascertaining the tonnage of any ship or vessel propelled by steam, the tonnage due to the cubical contents or the engine room shall be deducted from the total tonnage of the vessel as determined by either of the rules aforesaid, and the remainder shall be deemed the true register tonnage of the said ship or vessel. The tonnage due to the cubical contents of the engine room shall be determined in the following manner; that is to say, measure the inside length of the engine room, in feet and decimal parts of a foot from the foremost to the aftermost bulk-head, then multiply the said length by the depth of the ship or vessel at the midship division as aforesaid, and the product by the inside breadth at the same division at two fifths of the depth from the deck taken as aforesaid, and divide the last product by 92-4, and the quotient shall be deemed the tonnage due to the cubical contents of the engine room.

Amount of Register Tonnage to be carved on Main Beam.

And be it further enacted, that the true amount of the register tonnage of every merchant ship or vessel belonging to the United Kingdom, to be ascertained according to the rule by this Act established in respect of such ships, shall be deeply carved or cut in figures of at least three inches in length on the main beam of every such ship or vessel, prior to her being registered.

Not to alter Tonnage of Vessels already registered.

Provided always, and be it further enacted, that nothing herein contained shall extend to alter the present measure of tonnage of any ship or vessel which shall have been registered prior to the commencement of this Act, unless in cases where the owners of any such ships shall require to have their tonnage established according to the rule hereinbefore provided, or unless there shall be occasion to have any such ship admeasured again on account of any alteration which shall have been made in the form or burthen of the same, in which cases only such ships shall be re-admeasured according to the said rule, and their tonnage registered accordingly.