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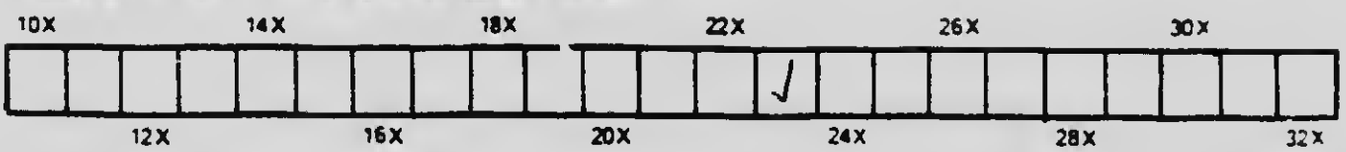

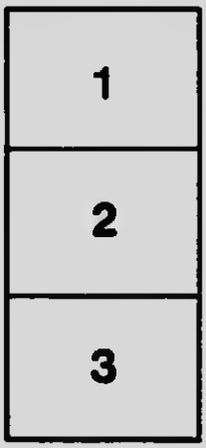

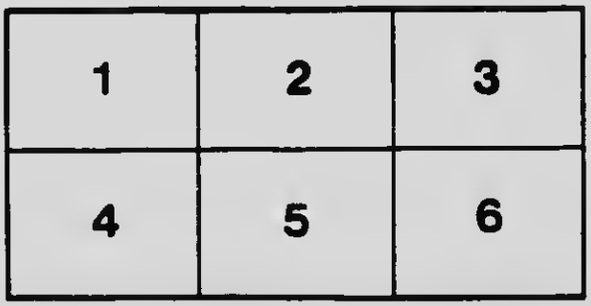

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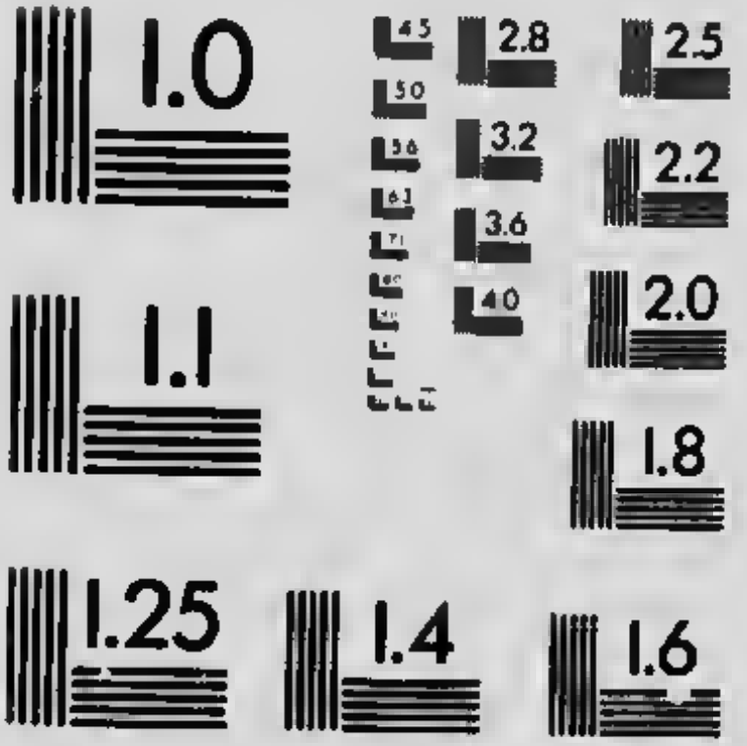

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FRENCH CIVIL LAW UNDER BRITISH RULE

ADDRESS DELIVERED BEFORE THE JUDICIARY AND BAR OF MONTREAL AT THE FIRST ANNUAL CONFERENCE OF THE BAR OF MONTREAL, ON THE 29TH OF APRIL, 1911, AT THE COURT HOUSE, MONTREAL.

BY

MR. PAUL EMILE LAMARCHE, LL.M.

Of the Montreal Bar

TORONTO:
THE CARSWELL COMPANY, LIMITED
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10.—

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FRENCH CIVIL LAW UNDER BRITISH RULE

. Bâtonnier, My L ds, Ladies and Gentlemen:—

When the committee entrusted with the organization of this first annual conference did me the honour of selecting me as one of the lecturers, my first preoccupation was the choice of a fit subject for such an occasion as this. I sought for it everywhere. At first, yielding to a very natural impulse towards the more gracious components of this distinguished audience, I thought it would be useful and interesting to take up the topic of woman.

But, upon reflection, I concluded that this topic should be set aside.

It would have been impossible for me, ladies, to prove to you that the legislator has always acted the part of a gallant gentleman with respect to yourselves. I might even have had considerable difficulty in convincing you that he did not actually ill-treat you. So that, placed in the awful alternative of hiding the truth or displeasing you, I took refuge in a more abstract region of law, leaving to some happier successor the privilege of dealing with you in some maturer deliverance.

Hence it is that you must rest content to-night with a frugal and traditional dish from the legal table. I shall speak to you purely and simply on the subject of law itself.

Yet there is the very subject which one should shrink from, in addressing such a gathering as this one. And when I see before me the most eminent personalities of the Bench and the Bar, assembled to hear a mere novice speak to them of a science in which they are past masters, and when I reflect upon the difficulty of the task I have imposed upon myself, I cannot help realizing—though without a more pretentious parallel—the state of mind of the Athenian orator who, to correct the defects of his speech, went rehearsing his utterances to the majesty of the waves of the ocean, filling his cheeks with stones in order to overcome the falterings of his inexperienced tongue.

Nevertheless, ladies and gentlemen, I have this assurance at least, that it will be very hard for me to be obscure, when surrounded by so many lights.

You are all familiar with the legal maxim "*Nemo auditur suam turpitudinem allegans*," "No one is heard alleg-

ing his own fault." You would doubtless immediately and severely apply it to me, if I venture upon an explanation of the defects and weaknesses of this attempt. Your sagacity will not fail to discover the reason, and your fraternal indulgence to condone it.

When after fourteen years of labour and intellectual travail, the genius of Montesquieu bestowed upon France and upon the world that imperi-halde monument of social philosophy, "The Spirit of Laws," in the preface of the work the author declared to his contemporaries that his object had been to promote love for king, country and law.

In offering to you to-night the fruit of my modest research upon the origin of our civil law, could I, in like manner, compass a more noble or more useful object than to lead you to a greater reverence for the sovereign authority which has granted us the laws under which we live; to a greater love for the country on whose soil justice has sown, grown and nourished our freedom and privileges as citizens; and, finally, to a fairer appreciation of those laws which in your everyday relations inspire your civil acts and safeguard your most sacred rights.

The language of human justice is the conventional law of men. Is it necessary to state that, in so far as it is the product of the human mind, it is marred by many imperfections? On the other hand, as a necessary consequence of those imperfections, it is eminently perfectible, and it is to the thorough study of its principles and to the wisdom of its application that the social order largely owes its moral uplift and, to a certain extent, the impulse of its material progress.

The legal language manifests itself, according to epochs and peoples, in diverse idioms.

In the circle of their ordinary relations, the Frenchman, the Englishman, the German, the Italian, speak vastly different languages, which nevertheless must express ideas common to them all and formulate identical conclusions.

The same is true of their legal relations. Under different forms, applying different principles, often seemingly incompatible, the various human legislations have their vocabularies, their axioms, their maxims, their dialects and their idioms, which for the most part reflect the political institutions and the mental habits of the peoples who have made the laws.

Yet, in spite of this diversity, they have a common action, a common tendency, a convergence to a common focus:

the equitable regulation of the relations of man to man, and of man to society, according to the eternal principles of justice.

This necessary lack of uniformity in the human legislations, imperiously brought about by circumstances of time, place, and temperament, all beyond the control of man, invariably proposes problems bristling with difficulties of the gravest character whenever a territory inhabited by a civilized nation and ruled for a long period by settled laws is suddenly taken over by a foreign state.

That problem arose, in its most complex form, when Canada was conquered by Great Britain, and it was only fourteen years afterwards that England definitively solved it by establishing immutably the foundations upon which our private legislation was to be built.

It is with the solution of the problem, the causes thereof, and the effects it has brought about, that this address is concerned.

When a judgment is to be delivered on an important character in history, it is not his own actions alone that must be scrutinized. The times in which he lived must be taken into consideration, since they are the setting of his actions. One must go back to his birth, and account be taken, not only of the circumstances of his origin, but often of the circumstances which have preceded his coming. Otherwise the judgment delivered would be incomplete, and frequently unjust.

If this is true when men are to be judged, it is even more true when those institutions are on trial which are based upon the acts of men.

That is why, before studying the immediate genesis of our civil law, it is proper to cast a retrospective eye upon the historical events accompanying or preceding it. These circumstances are inseparable from the central fact, because of the intimate relation they bear to it.

Very often, in order to trace the source of the most placid lake, one must go back to the impetuous madness of a torrent far away back in the mountains. To discover the origin of our peaceful and harmonious legislation, we shall have, treading the paths of history, to go back to the dark and now forgotten days of war.

It was the autumn of the year 1760. France and England, unable to find in diplomacy the solution of their quarrels, had appealed to the uncertain but supreme arbitrament

of arms, and for four years, in Europe and in America, commerce, progress and civilization, had been marking time amid the terrible ravages of a war that was to be prolonged to 1763, and which is therefore known as the Seven Years' War.

On this side of the Atlantic, though, the curtain had fallen on the last act of the drama.

Quebec had surrendered. At Montreal, yielding to overwhelming odds, Lévis had broken his sword that he might not give it up to the enemy, and Monsieur de Vaudreuil, postponing the promptings of his chivalrous soul to the safety of his people, had capitulated.

The capitulation submitted the entire colony to British arms.

History, the repository where lie pell-mell all the great facts affecting humanity, registered on that day, in the desperate act of a handful of abandoned soldiers, the last struggle of French domination in a country which France had brought out of its nothingness, and raised from aboriginal barbarity of the worst kind.

Little by little, the soldiers, the officers, the professional men, the merchants, the middlemen, all those in short whose economic life is grafted upon the lives of others and fattens upon the accidents of existence, saw in this change of masters a social upheavel incompatible with their survival, and sailed for France.

Only those who had attached themselves to the soil by the deep roots of their august occupation, and who looked to the glebe itself for their daily bread, the glebe which irrespective of forms of government always feeds and supports the worker, only those remained faithful to this land.

Their primitive philosophy did not make them disdainful of "the few arpents of snow," but driving into the soil of America the stakes of the claims of future generations, they learned to wait, with that perseverance which is the best substructure of nations, the springtime of a people who were to turn the arpents of snow into arpents of ripening wheat.

1763 brought the end of the war. On the 10th of February, French royalty, weakened by British artillery and the kisses of courtesans, had to accept the disastrous Treaty of Paris, by the terms of which the queen of nations severed off her members in order to purchase the integrity of her head and body.

The cession of Canada by this treaty of peace transformed the actual possession of the land by the British into a definite and complete right of ownership.

The military standard of Great Britain had after seven years of unremitting efforts won its way to supremacy over the world. It now remained for its commercial standard to complete the work of absolute domination.

A foreigner setting foot for the first time on the soil of the province of Quebec, and coming into contact with our political institutions and laws, is often astounded when he finds that, under the folds of the British flag, we are still ruled in civil matters by the French law. And he naturally looks for an explanation.

The explanation is not always given in the same way. In fact, the origin of our civil law under British rule has been the subject of a very hot controversy among us.

Inasmuch as at this late date this question, though attractive enough, possesses historical interest only, we shall be able to debate it coolly, without other preoccupation than this, that the truth be made manifest.

At the time of the conquest Canada was ruled, in its public as well as in its private law, by French legislation, that is to say by the custom of Paris, by those French ordinances enacted after 1663, and registered in the Superior Council, by the ordinances of the Superior Council itself, and by the ordinances of the intendants, who personified civil authority under the French *régime*.

The preservation of the French civil law as the private law of the Canadians was one of the questions particularly taken up by the Marquis de Vaudreuil when he surrendered the colony to General Amherst, and there is in this country a widespread impression that the continuance of the French civil law was formally guaranteed the Canadians by the capitulation of Montreal.

On the other hand, there are many who have found in the terms of that capitulation a formal substitution of English law for French law.

I think a close scrutiny of this important document, together with the principles of the *jus gentium* will lead us to a different conclusion.

According to Bluntschli, capitulations are agreements whereby a body of troops, a ship or a fortress is surrendered to an enemy.

Other distinguished writers admit that a whole province may be the object of capitulation.

A capitulation may be conditional or unconditional.

In the first place it partakes of the nature of a bilateral contract, the stipulations of which bind the sovereigns, provided they do not exceed the authority of the commander—an authority occasionally express, but oftener implied and varying according to the rules of war.

If the capitulation be unconditional it is submitted to the rules of the *jus gentium*, as to all its consequences.

The capitulations of Quebec and Montreal are conditional capitulations, absolutely in proper form, divided into several articles of proposals of the besieged, with the answers of the besieger written over against them.

With respect to this article the capitulation of Quebec affords little interest. Its importance is purely local, and the question of the laws to prevail is not even raised in it.

On the contrary the capitulation of Montreal brought about the surrender of all the French troops in Canada, and it may be regarded, from a legal point of view, as the surrender of the colony itself.

Let us now consider the parts of that capitulation which refer to the civil law.

By the terms of article 42 of the capitulation of Montreal, M. de Vaudreuil required the preservation of the French civil law for the inhabitants of Canada.

Textually it reads as follows:

"The French and Canadians shall continue to be governed according to the custom of Paris and the laws and usages established for this country, and they shall not be subject to any other imposts than those which were established under the French Dominions."

That request, you see, had nothing ambiguous about it. It was clear and explicit.

General Amherst did not reply to this article by writing in the word "Granted," which would remove the question from the field of discussion, nor by writing in the word "Refused," which also would have rendered all debate impossible. He replied by referring to his answer to the article immediately foregoing, that is to say, by the words "They become subjects of the King."

Before interpreting this expression, let us remark, first, that in the answer of the English General there is a striking illustration of the difference between English doctrine and

the doctrine of most other nations on the consequence of military occupation.

According to almost all the authors, the inhabitants of a region militarily occupied after a capitulation remain subjects of the former sovereign, in theory at least, until a definite cession by treaty intervenes.

On the contrary the English doctrine holds that the inhabitants of territory subject to British arms become immediately, *ipso facto,* British subjects.

This will explain the form in which the answer of General Amherst to article 42 is cast.

The sense of the words "they become subjects of the King," and their judicial effect could not be submitted to a better criterion or to a better rule of interpretation than the principles of the public and political law of England which was gospel for the stipulating general.

These principles on which our parliamentary institutions have been modelled are too well-known to require extended commentary.

Let us bear in mind, though, that under the constitutional English monarchy, the subject of the King falls directly under the authority of the Crown, whose principal powers are exercised by the joint action of the sovereign, the Upper and Lower House, and, occasionally, by the sovereign alone, in virtue of royal prerogative.

One of the principal powers of the Crown is legislative power, the right to make laws for the subjects of His Majesty.

The reply of General Amherst was, therefore, complete, and absolutely to the point. By saying "they become subjects of the King," he declared that the inhabitants of Canada fell under the legislative authority of England, and would be ruled by such laws as His Majesty or his representatives might in the future be pleased to make, either provisionally or definitely.

In other words that question was left for the sovereign to decide.

Amherst did not deem it expedient, by granting M. de Vaudreuil's demand unreservedly, to block or limit for the future the legislative powers of his government.

It would be an interesting question to study, were we to inquire to what extent Amherst was authorized to bind his sovereign in legislative matters, but the inquiry would take us too far from the subject. For the time being, let us take

it for settled that the answer of the English general took away all possible effect from article 42.

The argument of those who see in the words "they become subjects of the King," a formal introduction of English law cannot be taken seriously, inasmuch as even for the subjects of the kingdom the legislative power is exercised by a series of positive and formal acts of the competent authority. This would be still more true of the new subjects in a conquered territory.

A Canadian author of very great worth, Mr. Edmond Lareau, traces the origin of our civil law under British rule back to the capitulation of Montreal, holding that the French civil laws were impliedly guaranteed by the granting of the stipulations of article 37.

That is the article which protects the property rights of the inhabitants of the country.

This is how M. de Vaudreuil formulated his demand, which was granted by General Amherst:

"The Lords of Manors, the military and civil officers the Canadians as well in the towns as in the country, the French settled or trading, in the whole extent of the colony of Canada, and all other persons whatsoever, shall preserve the entire peaceable property and possession of their goods, noble and ignoble, movable and immovable, merchandise, furs and other effects, and even their ships; they shall not be touched, nor the least damage done to them, on any pretence whatever. They shall have liberty, to keep, let or sell them, as well to the French as to the British; to take away the produce of them in bills of exchange, furs, specie, or other returns, whenever they shall judge proper to go to France, paying their freight as in the 26th article. They shall also have the furs which are in the forts above, and which belong to them, and may be on the way to Montreal; and for this purpose, they shall have leave to send, this year, or the next, canoes fitted out, to fetch such of the said furs as shall have remained in those posts."

"Preserve the property," says Mr. Lareau, "means to keep the laws which regulate properly." "It therefore follows that it must be regarded as certain," he concludes, "that by the capitulation, the country had the promise that it would not be deprived of its civil code."

I would be disguising my true opinion if I appeared to share Mr. Lareau's. And a lecturer must not abandon sincerity in order to appear more orthodox.

As we have explained in the beginning, the capitulation of Montreal is a bilateral contract entered into by the accredited agents of two belligerent nations.

We can, therefore, submit the document without hesitation to the ordinary rules of interpretation of contracts, in order to find the sense and purport of its text by seeking the intent of the parties to it.

As far as M. de Vaudreuil is concerned, nothing in article 37 reveals any other intent on his part than the desire to protect the inhabitants of the country from extortion and pillage.

It is in article 42 that he formulates, in the manner befitting a man who closes one chapter to open another, his clear and positive demand that the use of French law be maintained.

But it is the intent of General Amherst which is especially interesting to consider.

For the purposes of the debate, let us grant, temporarily, that he could discuss the continuance of the French civil law as a right accessory to that of peaceable possession, granted by article 37. Is it reasonable to suppose, then, that the English general, wishing to grant the use of that law would have failed to reply affirmatively to the direct demand of article 42, in such a manner that it would have to be gathered solely and simply from his acquiescence with the terms of article 37.

Moreover, even by this simple deduction, it is not logical to put aside the formal reply to article 42. "The formal reply," I say, because, for the reasons already given, the words "they become subjects of the King," could not mean anything but a desire on the part of Amherst not to decide the question himself.

Now, independent of this interpretation, can it be said that the use of the French civil law was in any way impliedly guaranteed by the terms of article 37 of the capitulation.

The very text of this article guarantees the respectful treatment of vested rights, and as an explanatory corollary proposition, it grants the rights of selling, renting, exchanging, etc. It is the right of ownership undiminished: "*usus*," "*fructus*," "*abusus*."

To assert that the preservation of the right of ownership necessarily implied the retention of the French civil law, would, according to my view, be equivalent to the proposi-

tion that English law, or indeed any legal system but that of France, was inadequate to safeguard the great principle, admitted by all civilised nations, and lying at the base of the social structure—the right of ownership.

Doubtless, with the rights of ownership guaranteed by article 37, all other vested rights were also protected: the servitudes, the charges, the mutations and conveyances already contemplated at the time of the capitulation, but not yet implemented. But these, properly speaking, were but the consequences of prior acts, subject to the old law, and having nothing in common with any future conveyance made by one not possessing them under those identical conditions.

Moreover, to conclude that the whole civil law was guaranteed as accessory to the right of ownership, is, I think, concluding from the particular to the general proposition.

For, if the right of ownership and the laws regulating it do form an important part of the body of the civil law, it is certainly not the whole civil law.

Civil law regulates ownership and the things submitted to it. True. But civil law regulates persons as well, and the acts of those persons in the domain of civil relations.

"*Omne autem jus quo utimur, vel ad personas pertinet, vel ad res, vel ad actiones,*" Gains cogently said, and that is the maxim which is the foundation of our theory of personal, real and mixed statutes.

Thus the laws relating to marriage, to take one of a hundred examples, deal with many things which are not even remotely connected with the right of ownership.

Another confirmation of our opinion, is that the Treaty of Paris, signed three years after the capitulation, and expressly ratifying the guarantees given the Canadians by General Amherst, is absolutely silent on the subject of the civil law. This leads to the conclusion that those who drew up the treaty of peace also wished to leave wholly untrammelled the legislative power of the English Government, exactly as Amherst had done when he said: "They become subjects of the King."

Do you seek further proof? Here is one, circumstantial, but of great corroborative value.

After the cession, the Canadians had serious grievances, and for ten years it may be said that they stoutly demanded the restoration of the French civil laws.

On several occasions the echo of their revendication reached the ear of the sovereign, and valuable documentary

records of their complaints have come down to us, asking redress in the matter.

If the use of the French civil law had been guaranteed, even impliedly, by the capitulation of Montreal, surely the contemporaries of its signatories would have been the first to be aware of the fact. If so they had in hand an irresistible argument in favour of their request, that to refuse it would involve violation of a solemn agreement. They would have invoked that argument to the probable exclusion of all others.

And yet, if we examine, for instance, the petition of the Canadians to the King, regarding the laws and the judicial system, dated the 7th January, 1765; if we study the petition of the inhabitants of Canada to the King for the restoration of the French laws and customs which was drawn up in 1770; if we peruse the petition of the French subjects to the King in February, 1774, praying for the re-establishment of their civil law, we will find in them arguments based upon public order, equity, the *jus gentium*, the interest of the colony and its subjects, the toleration extended to the French laws during the period of military occupation, but nowhere is the affirmation found that the agreement intervening between Amherst and Vaudreuil has been broken.

For all these reasons I humbly submit, inviting correction if I am wrong, that it is not in the capitulation of Montreal, as a written document, that the origin of our civil law under British rule is to be found.

Now, if you will allow me, let us put aside the capitulation of Montreal, regarded as a pact, to consider the capitulation itself as an event, examining its juridical effects according to the law of nations.

Heffter admirably sums up the thought of the principal writers, when he says:

"The total or partial conquest of a territory has not for effect the substitution of the conquering government for the conquest as long as the event of the struggle is still in doubt. It is only after inflicting on the conquered people a complete defeat (*debellatio, ultima victoria*), after removing all possibility of further resistance that the victor can establish his own domination, by taking over the sovereign power."

Now the submission of the colony was far from coinciding with the submission of the sovereign nation. France

was not yet *hors de combat*. On the contrary the war was waged for three years more. The capitulation of Montreal did not prevent France from ranking among the great nations of the earth, although it weakened her to some extent.

Therefore the capitulation and the military occupation, according to international law, had not abrogated completely and definitely France's sovereignty over Canada, although, as a matter of fact. England had already begun to apply the rules of her public law, which made the inhabitants of the country subjects in fact of the British Crown.

As an illustration, apply the rules of our civil law to this problem of international law. It might be said that one of the nations owned Canada under a suspensive condition, while the other owned it under a resolutory condition.

But, if military occupation cannot destroy the sovereignty *de jure*, and substitute another for it, it is nevertheless capable of vesting in the commander of the troops occupying the territory certain extensive powers which are like many dismemberments of sovereignty itself.

The greatest of these powers is the only one which now concerns us. It is this, that military occupation gives the right to application of martial law.

Martial law is but the exercise of military authority, in conformity with the rules and customs of civilised warfare.

It is then quite right to say that the British taking possession of Canada, the French civil laws were not abolished but only suspended in favour of martial law.

But this suspension was only theoretical, for within the jurisdiction of the civil law, the martial law did little more than continue the pre-existing laws. Important changes were made in the system of judicial administration, in the redistribution of territorial jurisdiction, and in procedure, but the basis of the law was not altered.

Several of those entrusted with application of the substantive law did not know the first word of it. The result was a chaos that can be easily imagined. In many cases, judgments were influenced by the English law, even when the Judge himself was unaware of it. Nevertheless it can be fairly said that, as a rule, the French civil law continued in application, more or less awkwardly, during this period of transition, and, be it said to the credit of Governor Murray, justice and equity were generally respected.

The military *régime* lasted three years. In 1763 Canada was ceded to England by the Treaty of Paris. Thenceforth British sovereignty was established *de jure*, as it had been *de facto*.

A great many people have held that at the cession, the whole body of English law was automatically brought into being in this country.

Here a most important distinction must be made. The proposition is true, as regards public and administrative law. As regards civil or private law, it is erroneous.

By the final cession, the sovereignty of France over Canada completely disappeared forever. With it went all the country's political institutions, and all the machinery for regulating the relations of the subject to his former sovereign, which the military occupation had only suspended provisionally.

In their stead, came British sovereignty and, accessorily, all that was necessary for its maintenance. First and foremost, a new public or administrative law was substituted for the old.

Therefore the public or political law of England was here implanted with the establishment of British sovereignty.

With respect to private law, there is an important difference. As there is no relation between them, a change of sovereignty need not infringe upon it.

Accordingly, it is a principle of international law, recognised by English public law, that the private law of the conquered country subsists as long as it has not been expressly altered or replaced by a formal act of the conquering nation.

Therefore the cession did not abolish the French civil law.

Before dealing with the introduction of the English laws, we must dispose of a very important question.

Could England, on the morrow of the cession, substitute the English civil law for the French?

If the inquiry is limited to a strict examination of England's title to Canada, the question must be answered in the affirmative.

For, having become immutably the owner of the conquered territory, its sovereignty was established in all its

fulness, with all its powers, among them that of abolishing the existing system of civil law and replacing it by new legislation.

Nevertheless the exceptional nature of the acquisition of this country by England precludes a decision of the question upon such narrow rules, and forces us to look at it in the light of higher and more general ideas.

War properly so-called is terminated by the signing of a treaty of peace. Its consequences keep on happening long afterwards, and war makes victims long after the cannon has been silenced, not in the way of bloodshed, but by the strangling of the most sacred rights.

It was but natural that *jus gentium*, the law of nations, should aim to prevent and diminish, where it could, after-effects such as these.

On the morrow of a war, the sudden, rigorous and intempestive application of a right such as the making of new civil laws, can in many cases become inimical to public order, and a denial of justice to the individual.

Public international law, guided by justice, lighting its footsteps by the lamp of civilization, has taken upon itself, by the voices of its most authorized expounders, to make a wise and equitable regulation of the right.

Savages fight to exterminate. Civilized men fight that peace may come. Peace being attained, the end of war is accomplished. It is then in order to repair the ravages of the fight. Order must be restored, and not disorder promoted.

Now the sudden substitution of the civil law of the victor for the civil law of the vanquished constitutes, in its way, as serious a breach of order as war itself.

Precious rights are trampled under foot on the borderland between two systems of law which follow each other abruptly and without transition. The new subject, often a stranger to the actual fighting, and in any event not liable to punishment, since peace is restored, is obliged at the expense of his fortune, if not of his freedom, to seek in a labyrinth of law, filled with unknown pitfalls, the rule of his civil acts, or the remedies available to cure his wrongs.

Civilization wished to remove this danger. While keeping firm in the hands of the victor the sceptre of supreme command and legislative power, it desired that the exercise of

the legislative power should not become oppressive, or incompatible with justice, with the respect of vested rights, with the order, security and tranquillity of the subject.

Now, the people of Canada had never known any civil laws but those of France, and they did not understand the conqueror's tongue.

Can a state of things be imagined more calculated to call for the application of the principles of equity and justice that I have just enumerated?

But the application was not made.

Nothing shews absolutely that England's intent was to order the subverting of the private law domain at the cession. Public documents of the time rather reveal another intention altogether.

But Governor Murray, deplorably interpreting the royal proclamation of the 7th of October, 1763, and in flagrant fashion exceeding the powers expressly conferred upon him in matters of legislation, enacted an ordinance on the 17th of September, 1764, which introduced *holus bolus*, and even without promulgation, the body of English civil and criminal law.

About a century afterwards, sitting in trial upon the consequences of that ordinance, our civil Courts, in the famous cases of "*Stuart* v. *Bowman*" and "*Wilcox* v. *Wilcox*," decided peremptorily that the ordinance of Murray was absolutely null and void, as unconstitutional, that it had never had the effect of legally introducing English law, and that, in consequence, the French civil law had never been abolished.

The question is not debatable now, but it is interesting to read in volumes 1 and 2 of the "Lower Canada Jurist," the opinions delivered by Sir Louis Hypolite Lafontaine, Mr. Justice Vanfelson, and the two Judges Mondelet. More interesting still is the admirable work entitled "A plan for settling the laws and administration of justice in the Province of Quebec," attributed by some to Hey, by others to the Baron Masères, and in which the Judges I have just mentioned found their most convincing arguments.

In spite of its unconstitutionality, Murray's ordinance subverted the tranquillity of the country by introducing suddenly *de facto* the body of English law, and the subsequent period, up to the Quebec Act, of 1774, was one of the most wretched of our history.

The civil law, or common law, of England, which the inhabitants of the country could not even get information upon was applied with disastrous results.

On the other hand, the century-old roots of the French customs resisted the axe of the legislator, and it is stated that for ten years English and French laws were indiscriminately applied, in a disorderly fashion, which seemed to ensure the shipwreck of the spirit of law itself, in the eddy and conflict of incompatible legislation.

Such a state of affairs could not last, without prompting recrimination on the part of the inhabitants of the colony.

Petitions and complaints began to pour in upon the colonial office.

On the one hand, appeals to British justice to restore the French civil law: on the other hand, formal opposition registered by a few English merchants to the granting of any privilege whatsoever to the vanquished.

It would be a grave historical error, should we judge the English people of the period by the mentality of a band of adventurers who swarmed to the new colony, not to develop its resources and implant new generations, but to cut off their pound of flesh and run away to gorge upon it elsewhere.

Above this popular clamour and these conflicting interests, the voice of enlightened English jurists was heard and hearkened to.

The reports of Yorke, of de Grey, of Thurlow, and of Wedderburne are splendid pages of political law in which one knows not what to admire the more, their simplicity of form and clarity of expression, or their elevation of ideas, their lack of prejudice, their regard for justice and the proper interests of the British Empire.

Basing their opinions upon principles of public order and upon rules recognised by the *jus gentium* of the period, they urged the re-establishment of the French civil laws.

Governor Carleton, too, could see no other solution of the problem, no other remedy for the ills of the colony. His reports and his private letters shew that to have been his constant opinion.

Francis Masères, afterwards Baron Masères, who was at one time Attorney-General of the colony believed that a

blend of English and French law would serve the country's interests better. His works upon the question are voluminous, and prove his erudition and remarkable intelligence. He was not only a great jurist, but a great mathematician as well, and some of his reports almost turn out that facet of his character. Dr. Marriott was the one who shared Masères opinions most heartily.

England was now sufficiently well informed to be convinced of the urgency of the reform.

On the 2nd of May, 1774, in the House of Lords, the Earl of Dartmouth introduced a Bill, which afterwards became the Quebec Act.

Its object was the abolition of all prior legislation and the laying of a new foundation for future legislation in the colony.

The criminal law was to be the common law of England, and the private law the civil law of France as it was at the time of the cession.

Moreover the absolute freedom of willing was introduced into the country.

Fifteen days later the Bill was unanimously read a third time, and sent to the Commons.

Before the representatives of the people, the Bill formed the subject of a long debate, and of a special inquiry, in the course of which Governor Carleton, Francis Masères, Dr. Marriott, and M. de Lothinière were summoned as witnesses, and gave their opinions on the proposed measure.

After such amendments as do not relate in any way to this question, the Bill was reported by the Commons on a division of 56 to 20. In its amended form it was sent up to the Lords, where it met with opposition. The Earl of Chatham, then seriously ill, was carried to the House to fight it. He found only six of the quorum to support him, while twenty-six voted for the Bill.

Nothing was now wanting but the royal assent to make it law.

At this stage it met with opposition from an unexpected quarter.

On the 22nd of June, His Majesty, King George III. was getting ready to go down to the Commons to prorogue Parliament, when the Lord Mayor of London, several aldermen, the Recorder, and some 150 members of the Com-

mon Council presented themselves at the palace, bearing a petition which prayed the King to withhold his assent from the Quebec Act.

The King did not heed, and instead of proceeding to the Commons, he went straight to the Lords and sanctioned the now famous Bill.

For a just appreciation of this measure I can do no better than to quote the words of the sovereign himself, upon giving it legal existence. He declared that it was based upon principles of the purest justice and would have the best effect in allaying the discontent and promoting the happiness of his Canadian subjects.

The use of the French law, guaranteed to the inhabitants of this country by international law, was thus confirmed to them by a formal act of the British Parliament.

It was the first time that the parliamentary machinery had been set in motion for the benefit of the colony, and its first piece of work was one of eminent justice.

Later, in 1791, England was to divide the country into two distinct territories, Upper and Lower Canada, giving the former English common law, and preserving in the latter the legislation established by the Quebec Act.

That was the introduction of Constitutional Government which trained the Canadians for Responsible Government.

The constitution of 1791, which confirmed the guarantee of the French civil law to us was the subject of one of the most celebrated debates in the annals of the Commons of Great Britain, and indeed of all British parliamentary history.

On that memorable occasion, while the temple of our constitution was being erected, a sublime and poignant accident happened, when the lifelong friendship of Burke and Fox, which for twenty years had not been dizzied by the political heights, suddenly toppled from its footing of mutual admiration and esteem to smash itself on the hard pavement of their political opinions

There was an obliteration of personal interest in the apotheosis of public interest.

At the time of the Union of the two Canadas in 1840, and by the British North America Act, at the time of Confederation, all the guarantees of the Quebec Act were reaffirmed and ratified, and to-day, under the constitution,

there is only one power which can change or modify our French civil law, the power directly responsible to the free citizens of this province, the Legislature of Quebec.

Not only do we possess a clear title to the private legislation which rules our acts, but we are the trustees as well of the keys of the vault which wards from them the assaults of time.

In the course of the debate over the Quebec Bill in the British Commons, those most strenuously opposed to its enactment urged, among other things, that to allow a single vestige of the French domination to remain would be to give up all hope of permanently attaching the French-Canadians to the British Crown.

Providence provided our compatriots with a good opportunity of removing that impression and of expressing their gratitude for the recognition of their rights.

Not more than two years after the passing of the Act, the troops of the rebel Americans which had invaded Canada in the hope of forcing it into complicity in their efforts to shake off British rule were repulsed with heavy loss. And according to the testimony of a distinguished English historian, without the help of the French-Canadian volunteers, Carleton would have found it impossible to retain Canada for the British Crown.

But, what have we done with the French civil laws—the enjoyment of which as thus granted us?

We have kept them substantially intact, but we have modified their form.

Moreover, yielding to the exigencies of progress and to motives of public order, we have cleared our civil law from certain relics of feudalism which were no longer suited to this age. The abolition of seignorial tenure in 1854, rendered a signal service to society without violating any vested right.

Later on, at the time of Confederation, when Canadian statesmen were endeavouring to weld together the British possessions in North America, in such a way as to make them the compact foundation of a great nation, our own legislators were binding together the scattered elements of our civil laws, to perfect and co-ordinate them, and add the final touch of codification, which has made our civil law a

private legislation that will stand comparison with those of the most civilised nations.

One more consideration, and I am done. We have said and we have tried to prove that the continuance of the French civil law in this country had been commanded by the *jus gentium*, and that the Quebec Act was but the doing of an act of justice and the prestation of an inalienable right.

To be exact, we must nevertheless admit that the *jus gentium* did not require this continuance to be permanent. But this permanency also is now assured, and we owe it to the free but irrevocable act of Great Britain.

That was one of the good consequences of its admirable colonial system.

All the great fallen empires were built upon force and maintained by fear. If the British Empire, the marvel of the world, offers guarantees of stability and longevity hitherto unparalleled by any other, it is because it has been founded on the solid basis of the immortal principles of freedom.

The large measure of autonomy which England has granted to its numerous flourishing colonies, has made them grow and prosper without desire to shake off a domination which was never a burden, a sovereignty which was never a yoke.

That is the vital principle of the incomparable empire within whose boundaries we are content and proud to live in freedom.

As for us, citizens of the old province of Quebec, whose shield asserts that she remembers, faithful to our history, our traditions, our past, measuring the intensity of our affection by the respect extended to our rights, in the hour of thanksgiving, as in the hour of just revendications we shall always keep burning in the aisle of the imperial temple the pious and discreet lamp of a loyalty that has flamed undimmed, not only throughout the days of peace, but in the darkest nights of our national existence.

What matter the intrigues without and the plottings within? Individual liberty now, as in the past, will be the most formidable rampart of the imperial fortress.

And the strongest buttress of that liberty is the law, which orders it and prevents its degeneration into license.

Let us then love the law. In spite of fallibility of justice, in spite of the tactless zeal of the prosecutor and the weakness of the counsel for the defence, in spite of the myopia and the inconsequence of the jury, in spite of the innocent victims that are bound to be made in the working of any human system, still, remembering its many benefits, let us not speak evil of the law. Let us purge it of its defects. Let us fill in its blanks. Let us force observance of it. Above all let us respect it ourselves, remembering that the law of a people has something of the sublime, since it is the resultant of centuries of striving on the part of that people to follow the shortest pathway to eminent justice.