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REVUE

DE

Législation et de Jurisprudence.

REDACTEURS:

A Montréal—M. Louis O. Le Tourneux.

Rédacteurs-Correspondants :

A Québec.—MM. S. Lelievre et F. Real Angers.

PREMIERE ANNÉE.

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1846.

REVUE

DU

LÉGISLATION ET DE JURISPRUDENCE

ET

COLLECTION DE DÉCISIONS

Des divers Tribunaux du Bas-Canada.

REDACTION

DE MM. LOUIS O. LE TOURNEUX,
S. LELIÈVRE ET F. RÉAL ANGERS,
AVOCATS.

LOUIS O. LE TOURNEUX,
Directeur-Gérant.—Propriétaire.

PREMIÈRE ANNÉE.—1845-6.

Montreal :

IMPRIMERIE DE LA REVUE CANADIENNE.

1846.

REVUE

DE

LÉGISLATION ET DE JURISPRUDENCE.

VOL. 1. MONTRÉAL, SEPTEMBRE 1846. No. 12.

Le mois d'octobre 1845, vit paraître la première livraison de cette œuvre, qui depuis a continué de répondre à l'attente du public. Le besoin d'une publication de ce genre, s'était fait sentir depuis longtemps, et cependant, ceux mêmes qui se plaignaient le plus hautement du besoin qu'on en éprouvait, ne prenaient aucunes mesures pour y apporter le remède nécessaire. Souvent, il avait été question de publier des Rapports; quelquefois, la tentative en avait été faite; d'autrefois, l'on avait accompli quelque chose. Mais ces efforts partiels n'amenaient jamais des résultats satisfaisans. La nécessité d'imprimer aux décisions des Tribunaux, cette publicité efficace si bien appréciée par les hommes d'expérience, devenant de plus en plus, apparente, l'on conçut le projet de donner suite à un plan dont l'auteur était assez généralement connu. Le rédacteur actuel n'hésita pas à seconder des vues aussi justes, qui s'annonçaient sous des auspices favorables. Des souscriptions, des engagemens de contributions etc., furent promptement tentés et assurés. Le premier nnméro, celui d'octobre 1845, donna l'avant goût de ce que seraient les suivans. Il ne fut pas un squelette de rapports secs et sans intérêt: plusieurs dissertations de mérite, sur des sujets dignes d'un barreau éclairé, de la plume d'hommes exercés, ne manquèrent pas de faire naître la réflexion, que la *Revue* se tiendrait à la hauteur de sa position.

Le second numéro ne trompa pas l'attente de ceux qui s'intéressaient au succès de cette publication. L'on vit, avec plaisir, une critique raisonnée de notre "*Statute of Limitations.*" Les observations de l'auteur de cette critique, sont judicieuses, et le ton de l'article convient à l'importance du sujet.

L'historique de l'organisation judiciaire, ne pouvait être plus à propos rangé, que dans une des premières livraisons: aussi, bien que parfois, l'écrit signé "J. U. B." ne soit pas entièrement dégagé de certains liens qui se ressentent naturellement de l'éducation légale chez la plupart des hommes, il n'en est pas pour cela, sans beaucoup de mérite; Etudians ou Avocats y trouveront de quoi apprendre, ou se rappeler ce qui a pu s'effacer de la mémoire.

Une des causes les plus fréquentes de désordres dans la plaidoirie au Barreau, surgit des prétensions des Avocats à commencer, aussi bien qu'à avoir le dernier mot. " R. Mc K." par des observations intéressantes sur un ouvrage de " William M. Best, écr., Avocat, Londres, 1837, réclame l'attention du Barreau, et nous ajouterons, que les Juges ne regretteront pas le temps qu'ils ont pu donner, ou feraient bien de consacrer à la lecture de l'écrit dont nous parlons.

En se rappelant la décision de la cour Inférieure de Québec, dans la cause de Harvey *vs* Aylmer (le gouverneur du Bas-Canada, alors) on a dû lire avec intérêt, le rapport que donne à la page 76 "F. G. J." d'une décision en Angleterre, par lord Brougham. lord Campbell, le Juge Erskine et sir S. Lushington.

Cette deuxième livraison est terminée par le rapport de plusieurs jugemens de nos Tribunaux.

La troisième livraison renferme la continuation de l'historique des divers systêmes de judicature établis en Canada, depuis la colonisation du pays, jusqu'à nos jours, y compris le systême actuel.

Il n'est guère besoin d'attirer l'attention sur l'article qui prouve " la nécessité que les Etudians, les Avocats et les Juges connaissent l'histoire du Droit ; " le sujet est important, les recherches qu'il nécessitait peuvent être utiles, et les considérations qui s'y rattachent sont bien dignes d'un éxamen sérieux.

Une question d'un intérêt grave, est soumise aux Juges, au public : les phases qu'elle a subies en Angleterre, à des époques reculées les unes des autres, peuvent servir à applanir certaines difficultés qu'entraine toujours un grand changement dans la jurisprudence ; et si on ajoute à cela, la réflexion que nombre d'innocens peuvent être sacrifiés, si on se laisse dominer, maîtriser, tyranniser par la puissance du *précédent*, de l'antécédent plutôt, l'on sera peut-être, mieux disposé à discuter la question formulée dans les termes du correspondant de la *Revue.* " *Is a witness bound to answer any question which has a tendency to expose him to the loss of character, public or private estimation, or to any kind of punishment, or to a criminal charge, or to infamy.*"

Des rapports de décisions, dans dix causes, remplissent le reste de la troisième livraison.

Dans la quatrième livraison, trois articles, l'un sur la Jurisdiction de la Cour du Banc de la Reine, au terme Supérieur, dans une cause où une demande excédant £20 courant, est réduite par la preuve, à une somme au dessous de £20 courant ; un second sur la " Rébellion à Justice ;" le troisième sur la loi des Hypothèques, précédent onze rapports de décisions rendues en Cour d'appel, par la Cour du Banc de la Reine, en Banqueroute, et dans la Cour des Commissaires. Vient enfin

un article sous le titre de "L'aveu Judiciaire est indivisible," où l'on semble vouloir répondre à un autre, intitulé de même, qui parut dans la première livraison de la Revue, où, cette question est discutée bien au long.

La 5me Livraison parait avantageusement." S. C. M." n'était pas homme à laisser incomplète, sa dissertation sur notre "Statute of Limitations :" aussi, l'article par lequel il la termine, est bien digne de faire suite au premier.

L'article 125 de la Coutume de Paris, qui proscrit l'action du medecin, du chirurgien et de l'apothicaire, si elle est intentée après l'an depuis la dernière meladie, avait été interpretée d'une manière si étrange, qu'il devenait nécessaire de discuter la question qui naît de cette interprétation—" M" la soumet en ces termes " Les medecins et chirurgiens en Canada, ont-ils, lorsqu'ils intentent leur action dans l'an, le privilège d'être crus à leur serment, sans autre preuve, quant à la quantité et qualité des visites remèdès et médicamens." Cette discussion vaut bien la peine d'être examinée, moins par la manière dont la question est traitée, qu'à raison du sujet.

Suit un article instructif intitulé "*Régistration*," extrait de la *Gazette de Québec* ; et enfin un autre sur la Jurisdiction de la Cour du Banc de la Reine, qui doit être lu, pesé et attentivement examiné, à la suite de celui dont nous avons déjà dit quelque chose, et qu'on trouve à la page 153 (4me livraison).

L'on a remarqué, avec plaisir, que les rapports des décisions des divers Tribunaux du pays, dans cette livraison, n'en cédaient, par l'intérêt qu'ils inspirent, et le soin avec lequel ils sont faits, à aucun de ceux qui les précèdent.

La (6me) livraison de Mars, s'annonce par un "Essai historique sur les Lois Romaines "as they came down to us *in corpus Juris civilis*." Cet essai est tout à fait intéressant, très-instructif et d'une clarté admirable.

Deux articles de " M," l'un sur "l'Inscription de Faux," le second sur les "Nullités non prononcées par la loi," occupent une grande partie du 6me No. Le dernier, surtout, de ces écrits, porte sur des questions dont la solution affecte, tous les jours, plus ou moins, les actes des Notaires. L'on sent de quelle importance il est pour toute la société, que les Cours ne prennent pas sur elles, d'annuler les titres sur lesquels reposent les droits des familles, à moins que les lois ne les autorisent à le faire. S'il était laissé à la volonté ou au caprice des Juges, quelqu'éclairés qu'on les suppose, de mettre au néant, des actes solemnels, il n'y aurait aucune stabilité, aucune garantie que ceux qui pensent avoir des droits acquis, les conservassent. Nous

conseillons donc la méditation de ces questions de haute portée, à ceux qui sont capables de réfléchir.

Le nombre des rapports est moins grand que d'ordinaire ; ils ne sont pas néanmoins dépouvus d'intérêt.

La 7me livraison renferme sept rapports. Le dernier de ces rapports (p. 335) est important. La décision en Banqueroute, qu'on y lit, est d'autant plus intéressante, que sur un appel interjeté à la Cour de Revue, elle a été confirmée par la Cour, à l'unanimité.

L'on trouvera à l'article "LaCompensation" un éxamen de plusieurs questions qui se présentent tous les jours, dans nos Tribunaux ; la classification de ces questions, en facilite l'intelligence, et en rend l'application plus tangible.

Nous voici rendus au 8me No. L'article en tête, "de la Codification des lois en Canada," mérite bien l'attention de ceux qui comprennent toute la pensée qui devrait dominer la Législature et le Gouvernement, à ce sujet. Cet écrit est en outre, propre à amener d'autres suggestions, car en une matière comme celle là, que de choses à dire, à conseiller et à faire !

Les lois de Banqueroutes dont on a doté le Canada, ont fonctionné jusqu'à présent, si peu dans l'intérêt du commerce et de la société en général ; elle ont tellement aidé à nombre de gens, à frauder leurs créanciers ; les Cours ont été si singulièrement restreintes dans l'éxercice de leur discrétion quant à l'octroi ou au refus du *certificat de décharge ;* en un mot, ces lois ont eu un effet si peu moralisateur,les honnêtes gens ayant tant eu à souffrir de sa mise en opération, sans que les débiteurs de mauvaise foi, aient pu, en général, être atteints, qu'un écrit sur ce sujet tout gros d'intérêt, ne pouvait qu'être bien acueilli. L'auteur a bien fait ce qu'il a fait, mais il eût pu facilement, en dire d'avantage ; et s'il nous était permis de lui donner un avis, ce serait de nous parler encore des lois de Banqueroute.

Au Barreau, il est un certain nombre d'hommes qui connaissent les règles de la procédure, qui savent distinguer entre une défense et une exception péremptoire qui affirme ; qui n'ignorent pas dans quel ordre, doivent être proposés les différens plaidoyers etc ; mais il en est d'autres qui confondent tout, et qui, grâce à la confusion produite par le mélange que l'on a fait de la plaidoirie anglaise avec la plaidoirie française, simple, claire, méthodique, philosophique qu'elle est, jètent pêle mêle, ce qu'ils ont à dire, comme ce que, souvent, ils devraient taire, et occasionnent à leurs adversaires et aux Juges, plus de désagrémens et de peine, qu'on ne saurait l'imaginer. La Défense en Droit non motivée, surtout, comme les Cours l'accueillaient autrefois, figura longtemps, comme une enseigne de trouble et d'irrégularités. Aujour-

d'hui, on semble plus disposé à revenir aux principes. Avouons le, certains Juges n'y ont pas peu contribué, par leur lumières et par leur énergie. L'article « la Défense en Droit," qui suit celui dont nous avons parlé plus haut, est venu assez à propos.

L' " *Analytical Index" to cases determined in the Court of King's Bench for the District of Quebec, from* 1808 *to* 1822," classifié comme il l'est, ne peut qu'être utile et instructif. Il serait à désirer que celui qui a le mérite de ce travail, n'en demeurât pas là, et le continuât. Une pareille revue quant aux décisions des Tribunaux dans le District de Montréal, serait goutée et appréciée.

Six rapports de decisions des cours d'appel, Banc de la Reine, Amirauté, Banqueroutes et Commissaires, complètent la 8me livraison.

Passons à la 9me Livraison. Le 1er article que nous y rencontrons, embrasse tant de considérations et de questions qui se rattachent au « Statute of Frauds," au « Statute of Limitations," aux Prescriptions de la Coutume de Paris, aux termes des articles 126 et 127, ainsi qu'à notre statut provincial 8 Vict. c. 31, sans oublier un aperçu des dispositions principales de ces lois, en autant qu'elles sont applicables au Canada, que nous ne pourrions dans une notice comme celle-ci, en parler d'avantage, sans en dire trop, ou trop peu. Nous y renvoyons le lecteur.

L'on a dû voir, avec plaisir, la continuation de « l'Analytical Index."

Cette livraison offre treize rapports de décisions, dont quelques uns sont très intéressants.

La 10me et la 11me Livraison ont été données au public, le même jour, et sous même couvert. Un bon écrit sur la publicité des Jugemens, et un autre sur les règles de témoignage en général, leur importance, les difficultés qu'elles offrent souvent dans la pratique—l'étude qu'on doit en faire—comment les classifier, avec un mot, en passant, aux Juges, au Barreau, et aux Etudians, méritent qu'on y réfléchisse, surtout par le temps qui court.

Les deux rapports de décisions en Apppel, sont très-longs, mais l'on ne-perd rien à les lire et relire avec attention.

La douzième livraison complètera l'année, il nous tarde de la voir.

Les Rédacteurs sont trop intelligens pour qu'il soit besoin de leur rappeler combien il importe que la table raisonnée des matières. soit soignée : cette tâche, ils la rempliront.

On se demande souvent, si la publication de la *Revue de Législation et de Jurisprudence,* se continuera au delà de l'année. Il nous est impossible de répondre à cette question, mais si les vœux que nous faisons pour le bien et le bonheur de la société, se réalisaient, nous

verrions les mêmes efforts, de plus grands encore, pour tenir le public au courant des décisions des Tribunaux, pour l'instruire sur des matières du plus haut intérêt, et pour appeler l'intervention de la Législature et l'engager à modifier nombre de lois.

Ce qui doit étonner, c'est que l'on ne songe pas à avoir de suite, des rapporteurs auxquels la législature pourrait, si facilement, assurer un traitement convenable. Est il possible qu'une économie malentendue soit cause d'une faute aussi grave que l'est celle de regarder à une prétendue épargne comme celle là ! Compte-t-on pour rien, l'administration de la justice ? Ne sait-on pas que de *tous* les départemens, celui qui s'y rattache est, sans contredit, le plus important, et que le seul moyen de rendre à la société, ce qui lui est dû, c'est de s'assurer ce qu'il y a de plus efficace, les Juges les plus capables et les plus honnêtes, et les officiers quelqu'ils soient, les plus propres à leurs fonctions? sans cela, rien ! Lorsque l'on voit des milliers de louis gaspillés, et souvent employés pour des objets secondaires, n'est-on pas justifiable de dire que la faute de ceux qui en sont responsables, est un crime envers la société ? Eh bien ! des rapports seraient un moyen assuré, en les livrant à la publicité, de soumettre à l'action d'une opinion éclairée, les décisions des Tribunaux ; et avant longtemps, nous ne verrions sur le Banc, que des hommes supérieurs, par la raison toute simple, que ces rapports feraient connaître, sans déguisement, quels sont ceux des Juges qui ont droit à une réputation, par leur savoir, leur habileté, leur intégrité et leur énergie ; et la manière dont ils rempliraient leur devoirs, feraient ouvrir les yeux à certains économistes qui, nous voulons bien le croire, sont activés par de bons motifs, s'ils ne sont pas des plus éclairés: ils verraient que l'économie pour toute la société, la mieux entendue, c'est de bien payer, afin de s'assurer de ce qu'il y a de plus distingué en science et en honnêteté, au lieu de faire payer bien cher au peuple, les bévues que commettent nombre de fonctionnaires dont l'infériorité est due à une économie déplacée, et que le peuple sera le premier à blâmer hautement, du moment qu'il comprendra son propre intérêt.

M.

Montréal Septembre 1846.

ESSAY RESPECTING THE JURIDICAL HISTORY OF FRANCE.

AT THE MEETING of the QUEBEC LITERARY AND HISTORICAL SOCIETY, *holden at the Castle of Saint Lewis, in the city of Quebec, on Monday, the* 31*st day of May*, 1824—
The following inaugural Address and Essay respecting the early civil and ecclesiastical juridical History of France, written by the Honorable J. SEWELL, *Chief Justice of Lower Canada, was read before the Society, by the Author.*

MY LORD AND GENTLEMEN,

Appointed to address a Society, distinguished, in its origin, by the rank and character of its noble Founder, and, in the first stage of its progress, by the respectability and talents of its numerous Members; whose high and meritorious purpose is, to extend more amply the advantages of Science and Literature to a remote, but rising portion of the Great Empire to which we belong, and the beneficial effects of its disinterested labours to future times, I am anxious to devote the period, in which I hope to be honored with your attention, to a subject which, corresponding with the views of your Institution, & involving matter interesting to Science, may, in some degree, be worthy of your notice.

Confining myself, therefore, to the more immediate object of the Society—Historical Research—I shall offer to your consideration an Essay upon the Juridical History of France, antecedent to the erection of the Sovereign Council of Quebec, in the year 1663; the Law, as it was then administered in France, in the Tribunals of the Vicomté of Paris, being, in fact, the common Law of the division of Canada which we now inhabit (1).

The study of the Municipal Law of every country requires some previous knowledge of its rise and progress.—The obsolete principles of former ages are, most commonly, the foundations of what we possess; and, in many instances, the true object and intent of modern Institutions, can only be known by reference to the history of their origin and gradual improvement. And as I feel assured, that, to persons of liberal education, knowledge of the Law which constitutes the rule of their civil conduct, must at all times be desirable, I cannot but hope that what I am about to offer, upon the peculiar Municipal Law by which *we* are gouverned, (though, I am conscious, it will be found imperfect,) will nevertheless be favorably received, as an attempt to elucidate a subject which, in Lower Canada, cannot be thought to be uninteresting.

The conquest of Gaul by the Roman power—the entire subversion of the Roman Government by the Franks—the nearly total annihila-

(1) Edits et Ordonnances, vol. 1. p. 21.

tion of the power of the Crown at the close of the eleventh century, and the subsequent re-establishment of that power, are the events which more immediately affected the Laws of France, and occasioned their successive mutations. To these events, therefore, and to the greater effects which they have respectively produced in her legal polity, our inquiries will at present be confined.

Of the state of Gaul before the Roman conquest, (which was effected under the immediate command of Cæsar, about fifty years before the birth of our Saviour,) but little can be said with any degree of certainty. The inhabitants were then governed by a few unwritten customs and usages, peculiar to themselves, barbarous in the extreme and not meriting the appellation of Laws. Their manners were simple, and produced but few causes of contention, and such controversies as arose, were decided by their Druids, who, as among the ancient Britons, were both Priests and Judges. (1)

A consequence of the Roman conquest was, the introduction of the Roman Law, and for five entire centuries, during which Gaul remained a Province of the Empire, her people were wholly governed by that system. (2) The Roman Law, however, of that day was not the Justinian Code, for that was compiled near a hundred years after the expulsion of the Romans. (3) It consisted of the several Constitutions of the preceding Emperors, and of the writings of certain Civilians. The Constitutions had been collected in three Codes—the Gregorian, Hermogenian, and Theodosian, but the latter, published by the Emperor Theodosius, confirmed and adopted the two former, and as the writings of the Civilians consisted of such only as were sanctioned by the Code of Theodosius, there is reason to believe that it was the Theodosian Code only which was called the Roman Law. (4)

The power of the Roman Empire, in Gaul, was totally annihilated about the year 450 of the Christian æra. Rome, weakened by the extent of her dominion, and yet more by the degeneracy of her citizens, debased in sentiments, depressed in talents and enervated in courage, (5) fell a sacrifice to the more hardy and enterprising Nations of the North, and the Government of all that extent of Territory, which has since been denominated France, was transferred to Barbarians—to the Franks and their associate Tribes—the Goths and Burgundians, (6) and from the accession of the first Chieftain of the Franks (Merovée,) France dates the origin of her Monarchy, divided into three Dynasties or races of Kings—The Merovingian—the Carlovingian—and the Capetian. The first comprehends Merovée and his descendants, who possessed the Throne from the year 450, to the year 770, when they were succeeded by Charles, the son of Pepin, afterwards called Charlemagne, and his descendants, who constitute the Carlovingian

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[1] Cæsar de Bello Gal: Liber, 5 & 6.

[2] Histoire du Droit François, by l'Abbé Fleury, p. 9 & 10. Vide also, at the beginning of 1st vol. of Henry's, a learned Dissertation, by Bretonnier, which establishes this fact.

[3] Fleury, p. 10.

[4] Fleury, p. 12.

[5] Gibbon's Decline & Fall, vol. 1st p. 94. 1st. L. C. Denizart's Discours Préliminaire. p. 59.

[6] Esprit des Loix, Lib. 30, c. 6, vol. 2, p. 351.

race, in whose possession it remained until the year 987, when it passed to the Capetian race, who continued in possession, until the death of the late unfortunate Monarch, Louis the 16th, a descendant from Hugh Capet, the first of the Capetian dynasty. (1)

There was not among the Barbarians, by whom the Romans were expelled, any general Government; they were subject, in their own District, to the Chieftain who could do them the most good or the most injury, (2) and, when they conquered Gaul, they took possession of the country as a band of independant clans.(3) Their first object was to secure their new acquisitions, and with this view, the leaders distributed among the soldiery, the lands which they had conquered, with a condition of continued military service annexed to the Grant, an idea which appears to have been suggested by the peculiar situation in which they were placed, and to have been put in practice, as the best means of furnishing the immediate mutual assistance, which was indispensably necessary for the defence and preservation of their conquest. Large districts or parcels of land were accordingly allotted to the Chieftains and to the superior Officers, who were called Leuds (Lords or Seigneurs) (4) and their allotments, which were called feuds (fiefs or fees) where subdivided among the inferior officers and soldiers upon the general condition, that the possessor should do service faithfully, both at home and abroad to him, by whom they were given.(5) Every Feudatory was, therefore, bound, when called upon, to defend his immédiate superior, from whom he had received, and of whom he held, his estate: that superior to defend *his* superior, and so upwards to the Prince, while, on the other hand, the Prince and every Seigneur was equally bound to defend his vassals or independants, who held their estates of him, so that the duty of the whole was severally and reciprocally to defend the conquest they had made together, and every part of it.(6) This singular Institution, which is now called the feudal system, by degrees became general in France, and, by the new division of property which it occasioned: with the particular maxims and manners to which it gave rise, gradually introduced a species of laws before unknown.

The whole of France, however, was not so distributed, nor so holden—all was not seized by the conquerors; such of the ancient Inhabitants, as were allowed to remain in the country, kept their estates as they held them before; many, also, of the invaders, who were not yet attached to any particular chieftain, took possession of vacant Lands and enjoyed them in the same manner, (7) and there were some, even among the soldiery, who considering the portions which fell to their lot, as recompenses due to their valour, and as settlements acquired by their own swords, took and retained possession of them in

[1] See the History of France by Duhaillan, Mezeray, &c.
(2) Dalrymple's Essay on the Feudal System. p. 5.
(3) Ibid, p. 6.
[4] Dalrymple, p. 11. Loyseau des Seigneuries, §60 & 61, cap. 1.
[5] Loyseau des Seigneuries, cap. 1. §62 to 66.
[6] Wright on Tenures, p. 8.
[7] Dalrymple, p. 10 & 11.

full property as freemen.(1) From these causes, there were many estates which were allodial, which the possessors enjoyed in their own right and did not hold of any superior Lord, to whom they were bound to do hommage or perform service.(2) Every tenant of this description was called *liber homo* in contradistinction to " *vassalus*," or one who held of a superior, (3) yet they were not, by any means, exempt from the service of the state—they were subject to the command of the Dukes, or Governors of Towns, who were officers of the King's appointment; and the duty of personal service was considered so sacred, that they were prohibited from entering into holy orders, unless they had obtained the consent of the Sovereign. (4)

At their first incursions, the Barbarians, like the aborigines of Gaul, were governed by traditional customs. Their manners were uncivilized ; war and hunting, were the only subjects of pursuit in estimation, and, as they had no fixed habitations, no other property than cattle, their common disputes arose either from personal quarrels or acts of depredation. These were usually decided in public meetings of the people, held annually, at the close of winter, in general upon the information of witnesses, but in doubtful cases, by the ordeal of fire or water, or by combat. (5)

The polished minds of the Romans, found nothing worthy of imitation in such conquerors—but the conquerors, savages as they were, perceived much in theRomans, which they could not but admire. They particularly viewed a written Code of laws as a novelty possessed of many advantages, and, not only permitted the Roman Jurisprudence to survive the destruction of the Roman Government, but, in imitation of what they approved, reduced their own usages to writing, particularly the Salique law, which was the peculiar Law of Franks. (6) The Theodosian Code, and the Laws customs and usages of the Barbarians, became, therefore, equally the Laws of France, (7) and as all Laws were held to be purely personal, and were not, for this reason, confined in their operation to any certain District, the Barbarian was tried by the law of his tribe, the Roman by the Roman Code, the children followed the law of their father, the wife that of her husband, the widow came back to that to which she was originally subject, and the freedman was governed by the law of his patron. (8) Yet notwithstanding these general provisions, every Individual was permitted to make election of the law by which he chosed to be governed, it was only required that he should make it publicly, and such elections were frequent. (9) The Clergy, in particular, who were chiefly Romans, considered the privi lege of being governed by the Roman Law to be so valuable, that when

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[1] Roberston's Charles V. vol. 1st. p. 214. Lefevre de la Planche, Traité du Domaine, vol. 1st p. 117 & seq.
[2] Robertson's ibid. vol. 1st. p. 214.
[3] Robertson's ib. p. 216. Dalrymple, p. 10 & 11. Cust. of Paris, art. 182.
[4] Capitular's Liber. 1st. sec. 114.
[5] Fleury, p. 12 & 13.
[6] Fleury, p. 21.
[7] Esprit des Loix, Liber. 28, cap. 4, vol. 2. p. 240.
[8] Esprit des Loix, Liber. 28. cap. 2.
[9] Esprit des Loix, Liber. 28, cap. 2d. Fleury, page 18.

any person entered into holy orders, it was usual for him to renounce the Law to which he had been formerly subject, and to declare that he would, from henceforth, be governed by the Roman Code. (1) Many customs, also, peculiar to the victors, were continued after the conquest of Gaul. It had, particularly been their practice to meet in council, at the close of every winter, upon the state of their respective nations; and during the first and second Dynasties, several meetings of the Sovereign and of the Chiefs, in church and state, with the addition of the commons (from the reign of Charlemagne) were held, in the open air, annually in the month of March or May, and from thence denominated *champs de mars*, or *champs de mai*.(2)

In these Assemblies, Laws were passed for the government of the Kingdom at large, and Canons established for the regulation of the Church — Taxes were imposed — Regencies were appointed, and the Sovereign elected, until the Crown became hereditary, and then, the successor was preclaimed, if his right to the Throne was not controverted, and if it was, it was solemnly determined. (3) The question on each subject of discussion was generally propounded by the King, who when it had been fully debated, pronounced the definitive resolution. The result was then put into writing, the questions and resolutions which were passed upon them were reduced under distinct heads, called chapters, and to collections of several chapters was given the name of Capitulars. (4).

It is certain that a supreme jurisdiction over all persons, and all causes, was exercised by the Assemblies of the Champ de Mars, but the precise extent of that Jurisdiction, which was originally vested in the subordinate Courts of the Crown, or of the feudal Lords or Seigneurs, cannot now be determined. (5) It appears, however, from the learned researches of a modern writer, * to have been a fundamental principle of the French Monarchy, that every person who held a military command in chief, was, of right, entitled to a civil Jurisdiction over all whom he led to war. (6) Justice, therefore, was distributed by every feodal Seigneur to his vassals, within the limits of his Fief, whether he was a layman or an ecclesiastic, for he led them in person against the enemy, if he was a layman, and by his substitute (advocatus) if he happened to be an ecclesiastic,(7) and, upon the same principle, the *Liberi* or tenants of allodial estates who were led to war by the Dukes and Counts were subject to *their* jurisdiction. (8) The rule of decision, however, in every court was the general Law of the state, and the King, being the acknowledged head of the Government, in all matters, civil and military, all proceedings were in his name. (9)

The Dukes, the Counts and Seigneurs, in their respective jurisdic-

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[1] Robertson's Charles V. vol. 1st. p. 315.

[2] Fleury, p. 39.

(3) Encyclopedia Method. de Jurisp. verbo "Champ de Mars," vol. 1st. part 2d p. 453, Robertson's Charles V. vol. 1st. p. 167.

[4] Fleury, p. 40.

[5] Robertson's Charles V. 1st p. 304.

* Montesquieu.

[6] Montesquieu, lib. 30, cap. 18 — Répert. 8vo. vol. 25, p. 6 Loyseau des Seigneuries, cap. 1st sect. 72 and 73.

[7] Montesquieu, liber 30, cap. 17, vol. 2d. p. 377.

[8] Montesquieu, lib. 39 cap. Répert. vol. 6, p. 8 — 8vo. edit.

[9] Montesquieu, lib. 30 cap. 17.

tions, originally decided causes in person, (1) but they, afterwards, entrusted this part of their duty to others. The officer who was appointed for the purpose by a Seigneur, was sometimes, called a *Seneschal*, † but, most commonly, a Bailiff which, in the language of those days, imported a guardian or protector of Justice, (2) and those who were named by the Dukes and Counts, were called Viscounts, Prevosts Viguiers and Chastelans. (3) But in all their Jurisdiction, an usage which derived its origin from the forests of Germany, was continued. Neither the Dukes, the Counts nor the Seigneurs, nor any of their officers decided alone. They assembled in their courts a kind of assize composed of their vassals, to the number of twelve, (4) who were. principally, the officers ef their respective courts, and by those persons (who as vassals were the equals of the parties whose causes were there tried and thence called Peers) the judgement was pronounced according to the opinion of the majority, unless there was an equal division of voices, when, in criminal cases, it was given for the accused, and, in cases of Inheritance, in favour of the Defendant, subject always to an appeal to arms, and an ultimate decision by judicial combat. (5)

The feudal system is well calculated for defence, but not for the support of order.—In theory it is founded in subordination, but in practice it has been found universally to have diminished the power of the Sovereign, while it increased that of the greater vassals. This was particularly the case in France, where the Seigneurs, at a very early period of Monarchy, began to usurp the rights which had, till then been deemed the distinctions of Royalty, and with such advantage, in consequence of the weakness of the Kings of the second race, and the anarchy into which the Kingdom was thrown by the depredations of the Hungarians and Normans (6), during the ninth and tenth centuries, that the very dependants of the Crown, the Dukes, the Counts, and even the inferior officers of the State, were induced, by their example, to adopt the same conduct ; they combined together, and, about the period at which Hugh Capet, the first of the third race, took possession of the Throne, were completely successful. They made hereditary, in their families, the lands, titles and offices, which, before, they had enjoyed for life only. They usurped the sovereignty of the soil, with civil and military authority over the inhabitants. They granted lands to their immediate tenants, who granted them over to others by subinfeudation, and, although they professed to hold their Fiefs from the Crown, they were, in fact, independent. Strong in power, they

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[1] Dictionnaire de Jurisprudence, vol. 3. p. 18. col. 1.

† The title of Senechal imported "an officer of the household "— Viscounts were said to be "quasi comitum vicem gerentes" — Prevosts "quasi præpositi juredicendos — Viguieres "quasi vicarii comitum." — and Chastelans "quasi castorum custodes." — Loyseau de l'abus de Justice des Villages p. 6. quod vide.

[2] Ency. Method. verbo "bailiff," vol. 1. p. 710.. Dict. de Droit, verbo "bailiff," Loyseau de l'Abus des Justices do Village, p. 6, and Loyseau des Offices, p. 4 and p. 349.

[3] Loyseau de l'Abus des Justices de Village, p. 6.

[4] Montesquieu, book 30, cap. 18. vol. 2 p. 381 & 182.

[5] Montesquieu, Book 28, cap. 23, 24, 25, 26 & 27.

(6) Fleury, p. 47.

exercised, in their several territories, every Royal prerogative.—They coined money—fixed the standard of weights and measures—granted safeguards—entertained a military force—imposed taxes—and administered justice in their own names, and in Courts of their own creation, which decided ultimately in all cases, civil and criminal, not according to the written Laws of the Kingdom, but according to the unwritten customs and usages of the District over which they respectively claimed and exercised Jurisdiction. (1)

By these usurpations of the Seigneurs, the foundations of the ancient laws of France were gradually undermined. But the demolition of this venerable fabrick was greatly promoted by the profound ignorance which pervaded the Kingdom during this period. Few persons, except ecclesiastics, could read, and, hence, the Theodosian Code—the Laws of the Barbarians, which had been reduced to writing, and the Capitulars sunk imperceptibly, but equally, into oblivion. The clergy also furthered its destruction by adopting, in their jurisdictions, the Canon Law which they had begun to compile early in the ninth century, and the Crown completed it by the publication of the ever-memorable Edict of *Pistes*, so called from the City of Pictes, where it was promulgated in the year 864 by Charles the Bald, one of the weakest of the weak descendants of Charlemagne. By this Edict, in the mistaken policy of conciliation, the unwritten usages of each Seigneurie were ratified and declared to be Law ; a declaration which may be considered not only as the efficient cause of the final extinction of the ancient Law, but of the permanent establishment of that infinite variety of customs, which obtained in France until the late Revolution (2).

The authority of the Crown of France, at its ultimate point of depression, about the close of the tenth century, was merely nominal, the Royal Jurisdiction being confined to the Royal Domaine, which comprehended no more than four cities, in which the King was obeyed as feudal Lord, and not as Sovereign (3) ; on the other hand, the power of the Seigneurs at this epoch was enormous—their tyranny exorbitant,—The whole country was laid waste by the wars which they waged against each other, and their own vassals were reduced to an actual state of slavery, under the denomination of *serfs* and *hommes de peine*, or under the pretended rights of personal service and *corvée*, were treated as if, in fact, they had been reduced to that wretched condition (4). By this state of anarchy those who were yet in the possession of allodial property, were, in the first instance, induced to annex what they held to the Jurisdiction of some Fief, and to subject themselves to feudal services, for the immediate safety of their persons and the defence of their estates, and so generally was this the case that it gave rise to the maxim " *nulle terre sans Seigneur*," which at length, became the universal Law of France. (5) But as the Seigneurs could not, in

(1) Fleury, 5 & 52—Hargrave's Notes on Coke's Littleton, p. 266,
(2) Montesquieu, Lib. 28, cap. 4. vol. 2d. p. 243.
(3) Robertson's Charles V. vol. 1st. p. 366.
(4) Dictionnaire de Jurisprudence, vol 3d, p 16 and 17.
(5) Robertson's Charles V. vol 1st. p 223—Dict. de Jurisp. vol 3, p 16—Fleury, p 61—Robertson ibid, p 16.

every instance, protect their dependants against the incursions of their neighbours, and as the feudal burthens were, in themselves, insufferable, many vassals abandoned their Lords, by degrees, and sought protection in walled towns where they united and entered into armed associations for mutual defence. (1)

These associations, which began during the reign of "Louis le Gros," about the year 1109, and were called "communes," could not long remain without some government; regulations, therefore were made, and usages adopted by each commune for the control of its subjects, and being asylums for all who where inclined to be peaceable, and barriers against the common enemy (the Seigneurs) the crown afforded them every assistance in its power—conceded to them the right of enacting laws for their own internal government and enfranchised the Inhabitants. (2]

The Seigneurs plainly saw that the Institution of communes was adverse to their interest, yet they could not prevent the increase of such associations ; they even found themselves compelled to have recourse to the same expedient to prevent their dependants from taking refuge in the royal cities which were incorporated: many of the towns, also, within their territories, were willing to purchase charters of liberty, and as most of the seigneurs had expended large sums in the holy wars, and were needy, they sold them as a means of present relief. From hence, in less than two centuries, most of the towns in France, from a state of dependence, became free corporations, and personal servitude was generally abolished. (3)

The effects of these establishments were very soon felt ; they were found to afford a degree of security equal to that which was afforded by the seigneurs, who began to be of less importance when they ceased to be the protectors of the people. The *communes* themselves became attached to their sovereign, whom they considered as the author of their liberties, and they looked to the crown as the common centre of union, necessary for the defence of the whole against their oppressors. (4) On the other hand, the sovereign considered them as instruments which might, with great advantage, be employed to increase the Royal Prerogative. To this end, they endeavoured to raise them to importance, and with consummate policy, called them to assist, by their Deputies, in the states general of the nation. Availing themselves, also, of their co-operation, under the idea of restraining the power of the seigneurs, they laboured in the great design of restoring to France her ancient limits, and to the crown its original jurisdiction. From time to time, as opportunities occured, they reunited the dismembered Provinces to the Royal Domain, and reduced them to immediate dependence by conquest, by escheats and by treaties, (5) they abolished private warfare and judicial combats, and extended the

(1) Dict. de Jurisp. vol. 3d. p. 17.
[2] Dict. de Jurisp. vol. 3d. p 17. Reper. vol. 13. verbo "commune."
(3) Robertson's Charles V. vol. 1st. p. 33. 227 et 251.
(4) Robertson's Charles V. vol. 1st. p. 24.
(5) This design was ultimately completed in 1735, by the re-union of the Provinces of Bar and Lorraine—Vide Abrégé Chronologique des grands Fiefs de la Couronne de France, Paris 1759, and Hargrave's Note on Coke and Littleton, 266.

administration of Justice, under the royal authority, to all persons, and to all causes, (1) by steps of which the most effectual shall be more particularly noticed.

Before, and during the reign of Charlemagne, Justices in Eyre of the royal appointment, under the title of "*Missi Dominici*," visited, occasionally, the different Provinces, chiefly for the purpose of investigating the conduct of the Dukes, and Counts in the several Jurisdictions, civil and criminal, which they exercised under the authority of the Crown, which was sometimes greater, and sometimes less, as the sovereign was more or less feared and respected. (2) Louis the VI, about the year 1125, attempted to revise the office of the "Missi Dominici," under the title of *Juges des Exempts* (3), but the seigneurs were in his time too powerful, and he was obliged to abandon his intention. (4) His Successors had recourse to expedients less alarming. Among the first, certain cases in which the King was interested, or presumed to be interested, were declared to be "Pleas for the Crown," or "*Cas Royaux*" which, according to feudal principles, (he being the Lord paramount) could not be decided by the officer of his vassal, and were therefore cognizable in the Royal courts exclusively. To this distinction, the seigneurs of inferior note submitted, but it was scorned by the more powerful, who, relying upon their strength, continued to exercise Jurisdiction over all cases. The attempt, however, even with respect to the latter, was productive of benefit; it turned the attention of the vassals to courts distinct from those of their oppressors, and taught them to view the sovereign as a protector, and this facilitated the subsequent introduction of Appeals, by which the decisions of the seigneurial courts were brought under the review of the Royal Judges. (5) Of these the Appeal "*de défaut de droit*," on account of the delay or refusal of Justice, was the first. The feudal law had provided that if a Seigneur had not as many vassals as enabled him to try, by their peers, the parties who pleaded in his Court, or if he delayed, or refused to proceed to trial, the cause might be carried by appeal to the court of the superior Lord of whom the Seigneur held, and be there tried (6) The right of Jurisdiction had been usurped by many inconsiderable Seigneurs who were often unable to hold courts, for want of Officers and Vassals, and while trials by battle continued in use, there were times, and cases, even in the Courts of greater Seigneurs, in which it was difficult to assemble the Peers, by reason of the danger to which they were exposed, by their being liable to appeals, by either party, on account of false judgments, which necessarily led to the hazard of a personal combat, if they maintained their opinion. (7) In all such

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(1) Loyseau des Seigneuries, cap. 5. sec. 63. Delolme, p.117. Robertson's Charles V. vol. 1st. p. 36 & 56.
(2) Repert. 8vo vol. 40, p. 180 verbo "Missi Dominici." Du Cange verbo "Dux," "Comites," et "Missi."
(3) Reper. verbo "Missi Dominici," vol. II. p. 473.
(4) Hénault's Abrégé Chronologique, tome 2d p. 730.
(5) Robertson's Charles V. vol. 1st. p. 60, 61.
(6) Beaumanoir, cap, 62, p, 322, Esprit des Loix, Liber, 28, cap, 28,
(7) Montesquieu, Lib, 28, cap, 27, vol, 2d, p, 282 & secq, Robertson's Charles V, vol, 1st, p, 306,

cases Justice was delayed, and there were, therefore, frequent occasions for appeals of this description, from whence the practice became familiar, and served as an introduction to appeals on account of the "injustice" or "iniquity" of the sentence, which followed, and gradually increased, as the trial by combat declined; for the mode of trial being, in fact, an appeal to Deity, and the issue of the battle, held to be a decision by his immediate interference, was incompatible with a new judgment of any kind. (1)

To facilitate Appeals, and the recourse of the subject to the Royal authority, Judges, under the title of "*grand baillis,*" were appointed in all the cities of the Royal Domaine, with an Appellate Jurisdiction over all causes, civil and criminal, heard in the Seigneurial and in the Royal, (but inferior) Courts of Prevôté (2), which was final, except in certain cases of importance, which they were required to transmit to the King, to be decided by himself in his Council, where they were ultimately determined. (3) The number of these Jurisdictions, at their first creation, was inconsiderable, but in the reign of Philip Augustus, about the year 1190, they were numerous (4)

A regulation of greater importance succeeded the institution of the Grand Baillis. The King's Supreme Court of Justice, or Council, in which he presided, which, as in all other feudal Kingdoms, was originally ambulatory, following the person of the Monarch, and held only upon some of the great festivals, was rendered sedentary at Paris, and appointed to be kept open the greater part of the year, under the appellation of the "*Parlement de Paris.*" This was effected by an Ordinance of Philip le Bel, passed in the year 1302, and emphatically entitled "*Ordonnance pour le bien, l'utilité, et la réformation du Royaume.*" (5)

This Ordinance erected, also, a Soverign Court of Assize, at the City of Troyes, in Champagne, under the title of "Grand Jours," re-established the Parliament of Toulouse, a Court before held under the authority of the Counts of that Province, and confirmed a Court of Exchequer at Rouen, which had subsisted since the re-union of that City to the Crown of France, in the year 1200, and was originally created by the Court of the Peers of France, by which John, King of England, was by default, convicted, as a vassal of France, of the murder of his nephew Arthur. (6) Other Sovereign Courts of Parliament, making in all thirteen (*a*) were afterwards erected in the several Provinces of the Empire. (7)

To the several Royal Courts, when established, the people were invited to have recourse for redress, by every means which policy

(1) Robertson's Charles V. vol. 1st. p. 61,

(2) Dict. de Jurip. vol. 3. p. 18. Dict. de Droit, verbo "Baillis," v. 1, p. 166, col. 2d.

(3) Ency, Method, de Jurisp, verbo "Baillis," vol, 1st, p. 710.

(4) Dict. de Jurisp. vol. 3. p. 18. Fontanon, Lib. 1st. Tit, 1st. p, 179, Dict de Droit, vol, 1, p, 168.

(5) Conférence des Ordonnances, by Bouchel, p, 137,

(6) Dict. de Jurispr. vol. 3. p. 21 & 22. Ord. de Louvre, Tom. 1, p. 366.

(*a*) Paris, Toulouse, Grenoble, Bordeaux, Dijon, Rouen, Aix, Rennes, Pau, Merly, Besançon, Douai, Nancy.—See Répert. vol. 44, p. 296, verbo "Parlement," and Dict. de Droit, verbo Parlement.

(7) Répertoire, 8vo. vol. 44. p. 296.

could devise. The Monarchs named Judges of abilities and legal acquirements—they added dignity to their character, and splendor to the administration of their office. To the Parliaments, which were the most respectable, and to the presidial Courts, which were established for their assistance, they granted the right of deciding, ultimately, in Appeal; and to the Baillis, whose judgments thus became liable to reversion, an original Jurisdiction which before,they did not possess. (1) They appointed a number of Counsellors or Members in each Parliament to assist the President, (2) and, in imitation of the Seigneurial Courts and those of the Dukes and Counts, in which the suitors had been accustomed to the trial by peers, they required the Baillis to summon to their assistance, a certain number of discreet persons (*prodes homines,*) and to decide according to their counsel and advice. (3) The people also were permitted, in the dialect of the times, "*de veignir à la Cort du Roi, par ressort, par appel, ou par défaute* "*de Droit, ou par faux Jugement, ou par recréance nie, ou par* "*Grief, ou par veer le droit de sa Cort,*" (4) and, under the sanction of this authority, the Royal Judges took advantage of every defect in the rights of the Seigneurs, and of every error in their proceedings; they brought before them, in their respective Jurisdictions, all causes which it was possible for them to remove, and held cognizance over all which it was possible for them to retain, at the same time, they laboured to render the pactice of their Courts regular, and their judgments consistent, by which means they ultimately obtained the confidence of the people, and were generally respected. Suitors then began to abandon the Seigneurial Courts, (in which the will of the feudal Lord was, but too frequently, the Law by which the case of his vassal was decided,) and took refuge in the more discerning and more equitable Tribunals of the Crown. (5) The King was again universally recognised to be the source of Justice, and the Seigneurs were deprived of every Jurisdiction to which they could not shew title, derived by grant from the Crown. (6)

The ecclesiastics, who, in the reign of Charlemagne, were altogether subject to the temporal power (7), had, in common with the Seigneurs, taken advantage of the disorders which prevailed, and of the superstition of the age, not only to enlarge their own peculiar Jurisdictions, but to shake off, entirely, their subjection to all authority, except that of the Church. They had, in fact, so multiplied their pretexts for extending the Jurisdiction of the Spiritual Courts, that it was, ultimately, in their power to withdraw almost every person, and every cause, from the cognizance of the Civil Magistrate. (8) They claimed and exercised, as their exclusive privilege, the right of deciding all civil

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(1) Dict. de Droit, verbo Baillis.
(2) Répertoire, verbo "Parlement," : 1. 44, p. 294.
(3) Montesquieu, Liber. 27, cap. 42, vol. 2. p. 320.
(4) Etablissemens de St. Louis, cap. 15, lib. 2. Ordonnances des Rois de France, de l'Imprimerie Royale, Tom. 1. p. 107. Dict. de Jurispr. vol. 3d. p. 21.
(5) Robertson's Charles V. vol. 1st. p 309.
(6) Bacquet's Droit de Justice, vol 1st, p 9 & 10.
(7) Loyseau des Seigneuries, chap. 15, sec. 29 to 39.
(8) Robertson's Charles V, vol. 1st, p. 112. Fleury's Institut. du Droit Canon, vol 2, p 8. Hericourt, part 1st, p 120.

causes, in which any of their body was a party, or was, in any manner, interested, and all criminal prosecutions, in which the defendant either was, or asserted himself to be, a Clerk ; in causes where none but laymen were concerned, they claimed and exercised a similar privilege for various extraordinary reasons—in matters of contract, because contracts were then usually enforced by the oath of the parties —in all testamentary cases, because the deceased having left his body to the Church for Sepulture, the execution of his Will, by the Church, was a necessary consequence, inasmuch as it concerned the repose of his soul (1)—in all matrimonial cases, because marriage was a Sacrament—and in all cases in which a widow or an orphan was a party, because it was the duty of the Church to protect such characters. In others cases the same privilege was claimed for reasons which were not less extraordinary. If an individual resisted their authority, he was excommunicated, and upon his submission, a pecuniary fine was imposed for reconciliation with the Church, which the temporal judge, in whose Jurisdiction he resided, was required to enforce by his authority, under pain of personal excommunication, and the interdiction of the whole District over which he presided, in case of disobedience. (2)

The first attempt, by the King's Courts, to reduce the exorbitant pretensions of the Clergy, was the appeal "*de Deni de Justice,*" (3) which was similar to the appeal "*de Défaut de Droit.*" This was daily extended, by construction, to a great variety of cases, and was followed by the "*Appel comme d'abus,*" which, in the nature of a prohibition, suspended all proceedings, and was allowed, at any stage of a cause, (4) to all who complained, that the Judge of the Spiritual Court had exceeded his authority by any proceedings, contrary to the Canons of the Church, *recognized in France*, or to the Law of the Land in any respect. (5) This remedy was in practice long before the year 1539, but in that year it was formally declared to be the Law of France, by an Ordinance of Francis the First "*pour la réformation et abréviation des Procès.*" (6) By this Ordinance the Ecclesiastical Judges were also forbid to cite before them any of the King's lay subjects in any matter whatever, except those which were strictly Spiritual, and the King's lay subjects were forbid to institute any suit, of a temporal nature, before any Court of Ecclesiastical Jurisdiction.(7)

Thus the Crown of France, by persevering in one great plan, with indefatigable exertion, and continued prudence, suspending its attempts when the conduct of the Clergy, or any formidable conspiracy of the greater Seigneurs, required it, and resuming them when they were feeble or remiss, became once more the Fountain of Justice. That part of its original Jurisdiction, over causes and persons, which the Clergy and the Seigneurs had usurped, was regained, and the entire

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(1) Loyseau des Seigneuries.

[2] Fleury's Institut. du Droit Canon, vol 2, § 10. p 9

(3) Dic de Jurisprudence, vol. 1st. p. 292.

[4] L. C. Dénizart's Preliminary Discours to vol 1st. p 73.

(5) Fleury's Institut, du Droit Canon, vol 2d, p 12.

(6) Dictionnaire de Jurisprudence, vol 1st. p 297. Traité de l'Abus, vol 1st. cap 2, p 11, ed. of 1778.

(7) Ordonnances de Neron, vol 1st. p 162. Loyseau des Seigneuries, cap. 15, sec 75, 76 & 77.

proceedings of the Seigneurial and Ecclesiastical Judges, in all causes, civil and criminal, spiritual and temporal, which were legally subject to their inquiry, were brought before the review and control of the Sovereign, through the medium of his Courts.

Upon the re-establishment of the Royal authority, the local customs of France were so numerous and so various, that there were not two Seigneuries, throughout the whole Kingdom, entirely governed by the same Law. (1) Some of the causes of this amazing diversity have been traced in the different usages of the Barbarians, which were introduced by the original conquest of Gaul---in that peculiar principle of their Jurisprudence, which permitted each individual to make choice of the Law by which he thought proper to be governed, and the consequent existence, not only of the customs of each particular tribe, but of the Theodosian Code, especially among the Clergy—in the introduction of the feudal system, and the distinctions which it created between feudal and allodial property—in judicial combats which were necessarily introductive of new usages created by their several and various issues —in the usurpations of the Seigneurs, the means which they, severally, adopted to support them, and the independent administration of Justice within the limits of their respective Jurisdictions—in the Ordinances enacted by the Sovereign for the government of the Royal Domaine—in the establishment of Communes and their bye-laws—and in the compilation of the Canon Law, and its general application to all questions decided by Ecclesiastics. But to these causes must be added the discovery of the Justinian Code, which was brought from Italy into France about the middle of the twelfth century, (2) and soon affected her Jurisprudence in various gradations:—In some of the Provinces it was entirely adopted and confirmed, and declared, by the Royal authority, to be exclusively their Common or Municipal Law. In others it was received as subsidiary to their own local customs, as a rule of decision in cases for which they had not provided ; but in the greater number it mingled imperceptibly with their usages, and had a powerful though less sensible influence.

To the revival of the Roman Law must, also be attributed the decline of the Trial by Peers and by the *prodes homines*. The duties of both were, originally, similar and required neither capacity nor study. They decided upon the usage and custom of the people and place to which they belonged, and a knowledge of these was all which it was necessary for them to possess. But when the Institutes and digest of Justinian were translated and publicly taught, the proceedings in the different Tribunals were materially changed. Learning among the laity was totally unknown—but the clergy having some information, and being in possession of all the offices in the different Courts, eagerly adopted the practice of the Roman Law. A new form of Trial was thus introduced, which was no longer an exhibition of state, grateful to the Seigneur and interesting to a warlike people, but a dry course of pleading which they neither understood nor cared to learn, and upon which the Judge was soon left to give judgment alone, for the Peers and the "*prodes homines*," being no longer capable of deciding, withdrew by

(1) Montesquieu. Lib. 28, cap. 45.
(2) Idem, Lib 28, cap. 42. Robertson's. Charles V. vol. 1st. p. 316.

degrees, and were succeeded by Lawyers, who were appointed to assist the Judges with their advice, under the title of *Assessors.* (1)

The Royal Judges, upon their re-establishment, were greatly embarrassed by the different local customs to which, in the administration of Justice, they were compelled to have recourse, and upon which, by the secession of the Peers and *prodes homines*, they found themselves obliged to decide in person. It was impossible for them to have a knowledge of the usages of each particular Seigneurie, and, therefore, in all cases in which any question arose respecting the existence of a custom, or of the practice which had obtained under a particular custom, there was an absolute necessity for a recourse to parole testimony, by which means all questions of Law became mere questions of fact, in which he who held the affirmative was required to prove what he asserted, by the production of ten witnesses at least. (2)

In such an equiry, which was called an "*Enquète par turbes*," so much depended upon the influence and industry of the suitors, and upon the experience and integrity of the witnesses, that it was, at all times, difficult to come to the truth, especially when evidence was adduced by both parties; in such case equal proof was sometimes made of two customs, in direct opposition to each other, in the same place, and upon the same fact. (3)

The reduction of the whole to writing was pointed out, by reference to the Roman Law, as an effectual remedy for these evils, and was adopted. At first the usages of certain Bailiwicks were collected by individuals.—Pierre Desfontaines (the earliest writer on the Law of France,) published his "*Conseil*," which contains an account of the customs of the country of Vermandois, and Beaumanoir, the "*Coutumes de Bovoisis*," during the reign of St. Louis, which began in the year 1126. (4) These works are followed by others of the same description, (5) and by one of a public nature, "*Les établissemens de St. Louis*," which contained a large collection of the Law and customs which prevailed within the Royal Domaines, and was published by the authority of that Monarch (6)

The compilations of individuals could have no weight in the King's Courts, except what they derived from the truth and notoriety of the subjects upon which they wrote; yet it cannot be doubted that they contributed greatly to those redaction of the customs which were afterwards made under the sanction of the Sovereign. In 1302, Philip the IV directed the most intelligent inabitants of each bailiwick to be assembled for the purpose of informing his Courts of the customs which had been observed in their respective Jurisdictions, and required his Judges to register and observe those which should be worthy of approbation, and to reject all which should be found unreasonable, and this command was carried into execution in several parts of the Kingdom. (7)

[1] Montesquieu, Book 28, cap. 42, vol. 2d. p. 319 & 320.

[2] Fleury's Hist. du Droit François, p. 85, Ferrière's gd. Com. vol 1st. p 5, sec 2, art 1.

(3) Fleury's Histoire du Droit Français, p, 86,

(4) Robertson's Charles V. vol, 1st p, 316.

(5) Montesquieu, Lib, 28, ch, 45, vol, 2, p, 324.

(6) Dict, de Jurisp, vol. 3,

(7) Dénizart, vol 1, p. 575, 9th edit.

Charles the VII conceived the idea of digesting the several customs into one general code for all France, and to this end, by the 125th article of the ordinance of 1453, (1) usually called the ordinance of *Montils le Tour*, he directed the several customs and usages of each Jurisdiction to be written, but nothing further was done, until the year 1495, when the custom of Ponthieu was reduced to writing under Charles the eighth. His successor, Louis XI, is represented, by the Historian, Philip de Commines, and by Dumoulin, to have been very desirous of having "*one custom, one weight, and one measure, throughout his Kingdom, and that every Law should be fairly enregistered in the French language*;" (2) yet it does not appear that any of the customs were compiled during his administration of the Government, but in the reigns of the succeeding monarchs, particularly Louis XII, Francis the I, and Henry the II, many were finished, and the whole, comprehending sixty collections of general customs, in force in the several Provinces, and about three hundred local customs, in force in the different Cities and Baliwicks of the Kingdom, were completed under Charles the IX, after the expiration of the century from the commencement of the design. (3)

In the execution of the edict of Charles VII, the States General of each Province, consisting of the deputies of the nobles, the ecclesiatics and the representatives of the commons, were convoked by the royal letters patent, issued for that purpose. By them, when assembled, an order was directed to all the Judges and other Royal Law Officers of the Province, requiring them to transmit to the States General, reports of all the customs and usages practised in their respective Jurisdictions, from time immemorial, These reports were referred to a special committee of the States General, by whom they were reduced to abstract maxims, arranged in order, and so returned to the States General by whom they were examined, confronted with the original reports, discussed and accepted or rejected.(4) Those which were accepted, being confirmed by the King, enregistered and published in the sovereign Court of the Jurisdiction to which they related, (5) became the Law of that Jurisdiction, binding upon its inhabitants, but in no way affecting the rights or prerogatives of the Crown, (6) and subject, at all times, to any alteration which the King might think proper to make by a royal ordinance. (7)

The redaction of the Custom of Paris was among the first. In 1510, Louis the XII published a general edict, in which, after reciting, that

(1) Ordonnances de Neron, vol. 1st. p. 43.

[2] Dictionnaire de Jurispr. vol. 3d. p. 47. Fleury, p. 68.

[3] Fleury's Hist. du Droit François, p. 69. Reper. verbo "Coutumes," vol. 16, p. 390.

(4) Fleury's Hist, du Droit François, p. 70.

[5] Loyseau des Seigneuries, ch. 3. sec 11. Ferrière, pet. Com. v. 1 p. 5.

[6] Bacquet Droit de justice, ch. 10, No, 8. Droit d'Aubaine, ch. 29, no. 2. Droits de Francs Fiefs, ch. 11. No. 5. Som. Seule.—Brodeau sur Paris—Tronçon sur Paris, art. 75.—Galland, Traité de Franc aleu, ch. 8—Ferrière gd. Com. v. 1, p. 9, sec. 10—D'Aguesseau, vol. 7. p. 302 & 363, & vol. 8, p. 152, & 153. Case of Rex and the Duke and Dutchess de Vanquinon, decided 5th August, 1762, and reported in Ferrière. D. D. verbo "Coutumes," vol 1, p 424, edit. of 1771 & in the Dict. des Domaines, vol. 2. p. 479.

[7] Brodeau sur Louet, letter D. ch. 25—Ferrière, D. D. vol. 1st, p. 542, verbo "Droits Coutumiers."

a fixed rule in the administration of Justice was absolutely necessary for the happiness of a state, & that no Government could exist without it; and declaring himself to be well acquainted with the great vexations, delays and expenses to which his subjects had been, and yet were obliged to submit, in consequence of the confusion, obscurity and uncertainty which pervaded the customs of the different Provinces and Bailiwicks of his Kingdom; he commanded the whole to be collected in the manner directed by his predecessor, Charles the VII (1) and by a royal commission of the same date, Thibault, Baillet, Président, François de Morvillier, Counsellor, and Roger Barme, Attorney-General in the Parliament of Paris, were authorized to call together the Counts, Barons, Chastelans, Seigneurs, Prelates, Abbots, Chapters, King's Officers, Advocates and Attornies of the city, prevoté and vicomté of Paris, with a certain number of respectable citizens, and to lay before them the Custom of Paris, as it had then been reduced to writing, in an assembly of the three estates, (which had been previously held for that purpose,) for such alterations as this new assembly of officers and citizens, upon discussion, should find requisite. (2) This was, accordingly, done, and some changes were made; and His Majesty having declared, in the edict above mentioned, that he sanctioned and approved whatever his commissioners and the three estates of any Province should, mutually, agree and certify to be the customs of that Province, (3) the whole, as it then stood, was enregistered and published in the Parliament and Chatelet of Paris, as the edict required and, thereupon, became the Law of the Prevoté and Vicomté of Paris. (4) In this state it remained until the year 1580, when, in an assembly of the three estates, in which the celebrated Chistopher De Thou, first President of the Parliament of Paris, by virtue of Letters Patent, issued for that purpose by Henry the III presided, it was reformed and amended, with all the formalities which were used at the original redaction; but it received no improvement or alteration of any kind after that period, and the several articles, as they were then corrected, continue, to this day, to be the text of the Custom of Paris.

Various attempts were made by succeeding Monarchs, particularly Francis the I, Henry the IV, and Louis the XIV to renew the great design of Charles the VII, for the Government of France by one general and uniform code of Laws, but never with success.—The customs were too deeply rooted in the pride and prejudices of the inhabitants of the districts in which they obtained, to be eradicated, and they prevailed, though the evils arising from such a discordant mass of Laws were most sensibly felt and frequently deplored;—"Our numerous customs," says an animated writer on the *Law* of France, "obscure "susceptible of any interpretation, form a vast and eternal Labyrinth,

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[1] Intr. to Ferrière, gd. Com. vol. 1, p. 51.
(2) Intr. to Ferrière, gd. Com. vol. 1, p. 33.
[3] Vide Edict of 1510, in Introduction to Ferrière, grand Comment. vol. 1, p. 52, and the conclusion of the Procès Verbal of the Redaction of the Custom of Paris, ibid. p. 50.
(4) Vide Edict of 1310, in Introduction to Ferrière, grand Comment, vol. 1 p. 52, and the conclusion of the Procès Verbal of the Redaction of the Custom of Paris ibid. p. 50.

"in which the peace, the happiness, the lives and fortunes of our "citizens, the very character and honor of Jurisprudence, are lost for "ever." (1)

The supreme legislative authority was, originally, vested in the assemblies of the Champ de Mars, (2), and, by them, it was exercised until the year 921, when the last of the capitulars was enacted, under Charles the simple. (3)

During the disorders which followed, the Sovereign and the great Vassals were influenced by motives, which, though extremely different produced the same effect in the conduct of both, and equally prevented all acts of general Legislation. The Weakness of the crown compelled the King carefully to abstain from every attempt to render a law general throughout the Kingdom ; such a step would have alarmod the Seigneurs—have been considered as an encroachment upon the independence of their Jurisdictions, and have led to consequences which might have proved fatal to the little remains of power which he yet retained. On the other hand, the Seigneurs as carefully avoided the enacting of general Laws, because the execution of them must have vested in the King, and must have enlarged that paramount power which was the object of all their fears. The general assemblies, or States General of the nation, thus lost or voluntarily relinquished their legislative authority, which, abandoned by them, was assumed by the Crown. (4)

The first of the royal ordinances, which can be taken for an act of Legislation, extending to the whole Kingdom, was published in the year 1190, by Philip Augustus, and is entitled "*Edit touchant la mouvance des Fiefs, entre divers Héritiers.*" (5) Previous to this period they contained regulations, whose authority did not extend beyond the limits of the royal domain, so that no addition whatever was made to the statute law of France, during the long period of 279 years, which elapsed between the date of the last capitular, in the year 921, and the publication of this edict.(6)

The first acts of general legislation were published by the Kings of France with great reserve and precaution. They assembled a Council, composed of the great officers of the Crown, and of certain of the Bishops and Seigneurs, which is generally supposed to have been no other than the King's Council of that day, the Court of the Palace, which was afterwards made sedentary and called the Parliament of Paris. (7) With them they deliberated—with their advice and consent they legislated, and by them the ordinances were signed, as well as by the Sovereign himself. (8) But, in a later period, and by suc-

(1) Prost. de Royer, Dictr. de Jurisp, vol. 3. p. 37. Vide also the Preamble to the Ordinance of 1721.
(2) Robertson's Charles V. vol. 1. p. 166.
(3) Robertson, ibid, vol. 1. p. 367,
(4) Robertson's Charles V, vol, 1, p, 167 and 168,
(5) Conférence de Guenois Chronologique, p. 2,
Robértson's Charles V. 1 vol, 1,p; 368 and 167,
(6) Maximes de droit Public François, v. p. 186.
(7) Miraumont des Jurisdictions de l'enclos du Palais p. 61.—Coquille, Institut du Droit Français, cap. 1.—Maximes du Droit Pub. Français, vol. 4. p. 184.
(8) Miraumont des Jurisdictions de l'enelos de Palais p, 61,—Coquille, Institut, du Droit Français, cap, 1,—Maximes du droit Pub, Françoises, vol 4 p, 184

ceeding monarchs, these were considered as unnecessary formalities, and rejected. They, then, enacted laws in their own names, and alone —the style of persuasion, which was used in the earlier edicts, was changed for the imperative declaration of an absolute Legislator, "*voulons, commandons et ordonnons, car tel est notre plaisir,*" and for the deliberative voice of the council, was substituted the practice of verifying and enregistering the royal ordinances in the Parliaments or Sovereign Courts of those Jurisdictions to which the King thought proper to extend them ; a practice which was continued, without deviation, until it became a fundamental maxim in French Jurisprudence, recognised, equally, by the Prince and by the People, that no Law could be published in any other manner, and that no ordinance could have any effect, or bind the inhabitants of any particular Jurisdiction, before it was verified and enregistered, by the King's order, in the Sovereign tribunal of that Jurisdiction. (1) Under the sanction of this maxim, the Parliaments of France, at various times, refused to verify and enregister particular ordinances, which they conceived to be oppressive to the subject, or subversive of the constitution, with a spirit and constancy which reflected the highest honor on their members, but bore no proportion to the power which they opposed.—In some instances of their opposition, the King voluntarily abandoned the obnoxious Law; in others, the Parliament, on their part, thought it most prudent to submit, and obeyed the royal commands, contenting themselves with an entry, purporting that the enregistry was made by compulsion, "*ex iterativo et expresso mandato Regis.*" (2) But, whenever instances have occurred in which the Parliaments have inflexibly refused to enregister an ordinance which the King had determined to carry into execution, the plenitude of the royal power has afforded a remedy for their refusal. Upon such occasions, the King repaired, in person, to the Parliament and held a "*lit de Justice.*" He took possession of that seat, which he was *supposed* at all times to occupy, and commanded the ordinance to be read, verified and registered in his presence—for, being the Sovereign, and personally present, the Parliament was held then to have no authority, according to the principle, *adveniente principe, cessat Magistratus*, a principle which the constitution of France seems to have recognized, and which most effectually defeated every effort of her Parliaments to limit and control the Crown, in the exercise of a supreme legislative authority. (3)

"*Ordonnance,*" is a generic term, comprehending, *in its most extensive* application, every rule of conduct prescribed by the Sovereign to his subjects *in person*, as the Royal Edicts, Declarations, and *Arrêts du Roi en son Conseil*, or *by his authority*, as the bye-laws of

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(1) Rocheflavin des Parlemens de France, liv. 13, cap. 17, No. 3, p. 702. Papon, troisième Note, tit. de la clause "car ainsi me plait," p 334 and 336— Pasquier, Recherches de la France, lib. cap. 4—Loyseau des Seigneuries, cap. 3 No 11. —Des Offices, lib 4, cap 5, No 67.—Coquille Inst. au Droit François, cap 1st.—Hericourt, Loix Ecclesiastique, p 108, cap 16, sec 10—Maximes du Droit Public François, vol 4, p 57.

(2) Maximes du Droit Public François, vol 4, p 240 & sec 1 q.

(3) Rocheflavin, p 928 & 929—Pasquier's Recherches, vol 2, p 576, 577, and 1st, p 61—Répert "Lit de Justice," vol 36, p 529.

corporations and the Arrêts of his superior or Sovereign Courts. (1)

In a narrower sense, it signifies all laws which emanate from the King directly, and those only ; (2) but, in its most limited import, it is confined to such general laws as are enacted by the Sovereign in person, and are rather codes of regulations respecting one or more branches of Jurisprudence, than provisions for particular objects, and this is its proper signification. (3)

In this sense the ordinance of John the I. of March 1356 ; (4) one of Charles the VII of July 1538, usually called the pragmatic sanction ; (5) another of Charles VII of October 1446 ; (6) another of the same monarch, of April 1453, usually called the ordinance of *Montil les Tours.* (7) The ordinance of Louis the XII of March 1498 ; (8) that of Francis the I of October 1535, commonly called the ordinance of *Yz sur Tille* ; (9) another of the same monarch of June 1536, usually called the edict of Cremieux ; (10) another of the same monarch, of the month of August 1539, commonly called the ordinance of *Villars Cotterets* ; (11) one of Charles the IX of January 1560, commonly called the ordinance of Orleans ; (12) another of the same Monarch of January 1563, commonly called the ordinance of Rousillon ; (13) another of the same Monarch, of February 1566, commonly called the ordinance of Moulins ; (14) one of Henry the III of May 1579, commonly called the ordinance of Blois. (15) The celebrated edict of April 1598, commonly called the edict of Nantes, (16) and that of Louis the XIII of January 1629, better known by the names of Code Michaud and code Marillac, (17) are the principal ordinance enacted before the erection of the Sovereign Council of Quebec. (18)

The ordinance of January 1629, which is one of the most extensive and best digested, was enregistered in a " *Lit de Justice*," held in the Parliament of Paris, on the 15th January, 1629. It was compiled by Michel de Marillac, then keeper of the seals, by order of the Cardinal De Richelieu, and was, at first, received with great approbation, which it well merits. But on the death of the Marechal de Marillac, who was brought to the scaffold by ihe Cardinal, the seals were taken from his brother, Michel, who was imprisoned, and died of a broken heart in the Castle of Chateaudrin in 1632.

(1) Bornier's Preface, p 2, Couchot, prat. Univ. vol 1st, p 4.
(2) Couchot, prat. Univ. vol 1, p 4.
(3) Bornier's Preface, p 3, Hericourt, Loix Ecclésiastiques, cap. 16, sec. 5, p 108.
(4) Neron, vol 1, p 2.
(5) Guenois' Chronologie, p 7.
(6) Neron, vol 1, p 17.
(7) Neron, vol 1, p 24.
(8) Neron, vol 1, p 56.
(9) Neron, vol 1, p 93.
(10) Neron, vol 1, p 152.
(11) Neron, vol 1, p 158.
(12) Neron, vol 1, p 368.
(13) Neron, vol 1, p 424.
(14) Neron, vol 1, p 444.
(15) Neron, vol 1, p 508.
(16) Neron, vol 2, p 921.
(17) Neron, vol 1, p 782.—Répertoire verbo " Code Michaud."
(18) Vide Dictr. de Jurispr. vol 3, p 39—Répert. verbo " Ordonnance" vol 43, p 470—Dénizart, verbo " Ordonnances."

The disgrace of Michel de Marillac affected the credit of the Ordinance of which he was known to be the author. It fell into general disrepute, and, certainly, for a period, was not cited in the Parliament of Paris. There were, however, even during that period, some Jurisdictions which continued to receive it, and in which it was quoted and admitted to be Law, particularly the Parliament of Dijon, and by some writers it is asserted, that it was finally received as such in all. (1) But by others this is denied, and the Ordinance is, by them, said to have become absolete. *Non mihi licet tantas componere Lites.*

Much of the Ecclesiastical Law of France, as it stood at the erection of the Sovereign Council of Quebec, is contained in the Ordinances which have been enumerated.— They relate, in general, to the Government of the Church as well as of the State, and to the Jurisprudence and practice of Courts, Ecclesiastical as well as Civil. There are, however, others which wholly concern the Church, some enacted upon the representations of the States General—some upon the representations of the Clergy—and some upon the mere motion of the Sovereign. (2) But the principal Ordinance, on this head, is that of Charles the Seventh, of July 1438, (3) called the Pragmatic Sanction.

During the schism of Avignon, when, from the year 1378 to the year 1417, (4) the Christian world saw with astonishment and disgust, two co-existent Popes, each claiming an equal right to the Papal Throne, and supporting their respective pretensions by the full exercise of the papal power, the Gallican Church rejected all foreign authority, and governed herself, principally, by those parts of the Canon Law which had been observed previous to the publication of the new Decretals. In the great Assembly of the Church, which was afterwards held at Constance, in the year 1414, (5) the superiority of the Œcumenick Councils over the Pope was acknowledged and formally declared, and, in consequence of this declaration, and of an agreement which took place between the Council held at Basle in the year 1437, and the Sovereign and States General of France convened at Bourges, in the same year, the Pragmatic Sanction was enacted. (6) But as this Edict materially affected the Papal Jurisdiction, it necessary created many differences between the Courts of France and Rome, which, becoming subjects of negotiation, were terminated in the year 1516, (7) by the Concordat, a treaty concluded between Francis the First and Pope Leo the Tenth, at Boulogne, and enregistered in the Parliament of Paris, but enregistered in opposition to the opinion of that respectable body, and in their own expression "*du très exprès commandement du Roi, réitéré plusieurs fois.*" (8)

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(1) Journ. d. Aud. vol. 4, p. 486—Dictr. de Jurisp. vol. 3, p. 44—Dénizart, verbo "Pareatis," No 25—L C Dénizart, vol 4, p 586, case of the Princess of Carignan, an. 1748—L C Dénizart, vol 9, p 761—Répertoire, 8vo. vol. 11, p 431 to 434—Encyclopedie Méthodique de Jurisprudence, vol 2, p 692—L C Dénizart, vol 1, p 184, sec 4, no 3..

(2) Hericourt, Loix Ecclesiastiques, introduction, p. 12 & 13

(3) Guenois' Chronologie, p 7.

(4) Millot's History of France, part 2d, p 153 & 217.

(5) Dict Canon verbo "Constance."

(6) Fleury's Inst, au Droit Canon cap. 1, vol. 1. p. 20.

(7) Fleury's Instit. au Droit Canon. vol. p. 22.

(8) Hericourt, Loix Ecclésiastique, introduction, p. 9, 10 & 11.

The encroachments of the See of Rome have, in fact, ever been opposed by France, (1) and the liberties of the Gallican Church, in opposition to the exorbitant pretensions of the Holy Pontiff, have, at all times, been asserted, and at all times, supported by the King, the Clergy and the People. (2) These liberties, which comprehend not only the privileges and immunities conceded by the Concordat, but all the ancient Canons adopted by the Gallican Church for its own government with all its ancient usages, are recognised in the celebrated declaration of the Church of France, made on the 19th of March, 1682, by the Archbishops, Bishops, and Deputies of the Clergy, assembled at Paris, by the King's order, and confirmed by the Royal Edict of the same month, and are founded upon two maxims of very great extent, viz: That the papal and all other ecclesiastical power, is purely spiritual, and does not extend, directly or indirectly, to any thing temporal; (3) and that in spiritual concerns, the authority of the Pope being inferior to that of the Councils, he is restrained by the Canons, and cannot, by any new constitution, infringe them, or set aside any usage or custom of the Church of any State, recognised, by the Municipal Law of that State, to be valid. (4) The Ecclesiastical Law of France, therefore, at the period above mentioned, although it recognised the Papal Canon Law, comprehended the parts, only, of that system, which had been received by the Gallican Church, under the sanction of the Sovereign, expressed in letters patent, or implied from immemorial usage. — No Papal constitution, decree, decretal, epistle, rescript or bull — no canon or decree of any Council of the Church Œcumenical, national or provincial, had, at that time, or afterwards, in France the effect of Law, until published by the Clergy in their respective Dioceses; and such publication (even of a constitution relating to an article of faith,) could not be made without the Royal authority and permission. (5) Even the decrees of the Councils of Trent (admitted to have been legally convened,) were not recognised to be Law, their publication not having been authorised by the Sovereign; and to give effect to many of its dispositions, which it was thought proper to adopt, they were enacted in the Royal Ordinances. (6)

The Royal Ordinances, with the Law of nature and of nations, and the Ecclesiastical Code, so far as it was sanctioned by the Sovereign, may be considered as the Common or universal Law of France; but the remaining part of the municipal Laws of her several Provinces or Districts were very dissimilar. In the Pays de Droit Ecrit, which

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(1) Fleury's Institut. au Droit Canon, vol. p. 220.

(2) Vide the Declaration of the Clergy of France of 1682, and the Royal Edict thereon in Neron, Vol, 2, p, 172,

(3) Poithier, 4to vol. 6. p. 306.

(4) Hericourt, Loix Ecclésiastiques, introduction, p. 13, vol. 1. p. 112 —Répert. verbo "Libertés de l'Eglise Galicane." — Dictr. de Droit verbo "Libertés de l'Eglise Gallicane" — La Combe, Recueil do Jurisp. Canon. verbo "Libertés de l'Eglise Gallicane." — Fleury's Inst. au Droit Canon. vol. 2, p. 220 & seq. — Preuves des Libertés de l'Eglise Gallicane, by Pithon.

(5) Hericourt, Loix Ecclésiast. vol. 1, p. 105. col. 2, and vol. 1, p. 98, and col. 1st. and 2d p. 100, col. 1st and p. 105, col. 1, & 2. Dict. Canon. verbo "Canon. verbo "Canon." et Droit Canon. La Combe, Recueil de Jurisp. Canon. introd. p. 1 & 2.

(6) Hericourt, Loix Ecclésiastique, vol. 1. p. 99, col. 1 & 2.

were those Provinces in which the Roman Code, by the especial favour of the Sovereign, had been permitted to remain, and was declared to be in force, that system obtained to the exclusion of the Customs; (1) while in the others, and particularly in the Vicomté of Paris, the Customs obtained, to the exclusion of the Roman Law, which, in the Provinces, or Pays de Droit Coûtumier, was of no force, and was considered only as a system of written reason. It was long, indeed, a disputed question in the Jurisdictions of the Vicomté of Paris, whether recourse was not to be had to the Roman, as to a positive Law, for decisions in unforeseen cases for which no remedy was provided by the Custom; but it was ultimately settled that such recourse ought not to be had, and that the Judges were not bound to decide by it.. (2)

I feel that I have already trespassed upon your time, yet before I conclude, as the suject upon which I have the honor to address you appears to allow it, I cannot but solicit your attention to the actual state of the Study of the Law in Canada.

Tho experience of many ages and of many countries seems to have shown, that the elements of science are best inculcated by public lectures — rightly conducted they awaken the attention of the student, abridge his labour, enable him to save time, guide his enquiries, relieve the tediousness of private research, and impress the principles of his pursuit more effectually upon his memory. (3)

The Student of Law in Canada has no assistance of this description; he toils alone in an extensive field of abstruse science which he finds greatly neglected, and therefore too hastily deems to be despised, and, discouraged from the commencement of his labours he is left to his own exertions, and is compelled to clear and prepare the path of his own instruction, almost without aid of any kind.

Would not an effort to relieve him in this arduous and solitary task, as one among the first fruits of this Society, be highly worthy of its views and character? And is it too much to say, that a public Institution, which would enable those who intend to pursue the profession of the Law to lay the foundation of their studies in a solid scientifical method, and afford them more ample knowledge of the peculiar system of Jurisprudence by which we are governed, would be productive of great and lasting benefit, not merely to the student, but to the public at large?

It is not, hewever my intention, upon the present occasion, to press this subject any further. The system to which I have just alluded is one of real merit, it is built upon the soundest foundations of natural and universal Justice, approved by experience, and is most admired by those who know it best. Its claims to notice are therefore so appa-

(1) Ferrière, D. D. verbo "Pays de Droit Ecrit."

(2) Ferrière, D. D. verbo "Pays de Droit Ecrit." Dumoulin, des Fiefs introduction, no. 106 & 109. D'aguesseau, vol. 1, p. 156 L. C. Dénizart, vol. 5, p. 674. Ferrière, gd. Com. vol. 1, p. 18 & 19, no. 1, 2, 3, 4 & seq. Ibid. p. 306, vol. 4, art. 10. Dict. de Jurisp. de Prost. de Royer, vol. 1, p. 6 Discours Préliminaire. Le Prestre Cent. 3, cap. 85, p. 675, which cites an Ordinance of Philippe le Bel,, declaring France not to be governed by the Civil Law.

(3) Vide Sir James Meckintosh's discourse on the Study of the Law of Nature and of Nations, p. 2.

rent, that I shall indulge myself in the hope, that the influence of this Society will soon be exerted for the establishment of some Institution of a public description, in which the Law may be taught AS A SCIENCE— A science which, though hitherto neglected, is of the first importance to mankind, and "with all its defects, redundancies and errors, is the "united reason of ages—the pride of the human intellect." (1)

RESPONSIBILITY OF ATTORNEY.

Ignorance.—Negligence.

Lord Mansfield remarked that "an attorney ought not to be liable in cases of reasonable doubt," 4 Burr. 2060. He is bound to show reasonable skill, and reasonable diligence. A Solicitor's profession implies an undertaking of reasonable diligence; but this does not mean that he shall be obliged to make good to his client every loss which the client may perhaps be able to show might have been averted by an excessive assiduity, or an extraordinary exercise of vigilance and activity. It is useless to put cases by way of illustration, since we have a recent decision in the House of Lords, in a number lately published of MM. *Clarke & Finelly's* Reports, vol. 12, p.91, showing the opinions of law lords on the subject. The question arose upon an appeal case from Scotland. We cannot do better than give a short summary of the speeches, in the order of their delivery. The action had been brought against a writer to the Signet at Edinburgh, for an alleged error or mistake committed by him as an attorney or solicitor for the plaintiff.

Lord Brougham said, it was of the very essence of such an action that there should be negligence of the description which we call *crassa,*

(1) Burke's Works, 4to. vol. 3, p. 134.

negligentia—that it should be *gross*. And as regarded want of skill—the same noble and learned person intimated that if an attorney were to display ignorance of the A. B. C. of his profession, and damage consequently ensued, he should be bound to repair it; but otherwise an action would not lie.

Lord Campbell entered more fully into the question, observing, "that in an action such as this, by the client against the professional adviser, to recover damages arising from the misconduct of the professional adviser, there was no distinction whatever, between the law of Scotland and the law of England. The law must be the same in all countries were law has been considered as a science. The professional adviser has never been supposed to guarantee the soundness of his advise. Against the barrister in England and the advocate in Scotland no action can on such grounds be maintained; but against the attorney, the professional adviser, an action may be maintained. But it is only where he is guilty of *gross* negligence; because it would be monstrous to say that he is responsible for even falling into what must be considered a mistake. You can only expect from him that he will be honest and diligent. It will be utterly impossible that you could have a class of men who would give a guarantee binding themselves, in advising upon suits at law, to be always in the right."

The Lord Chancellor, concurring in these views, rested his opinions shortly upon this ground,—that "when an action is brought against an attorney, he is liable merely in cases where he has shown a want of reasonable skill, or where he has been guilty of gross negligence."

SOLICITOR AND CLIENT — PURCHASE — FRAUD — CONCEALMENT — LAPSE OF TIME NO DEFENCE.

A VERY important and remarkable case, recently decided by the House of Lords, is to be found in the last number of Messrs. Clark & Finelly's Reports, vol. 2, p. 714, illustrative of the just severity with which professional frauds are visited by courts of equity.

This decision is perhaps one of the strongest upon record in support and enforcement of the great principle, that where there is fraud, length of time shall be no bar to the remedy; for there were many circumstances in the case which might appear well calculated at all events to put the late Sir John Trevelyan on his inquiry; circumstances which were pressed with great ability and confidence, though without success, by the appellant's counsel. The case in all respects is peculiarly deserving of a deliberate perusal and attention.

The leading circumstances appear to have been shortly these:—

In the year 1770, the late Sir John Trevelyan was owner of the manor of Seton, in Devonshire. The steward and receiver of this estate was the late Mr. Thomas Charter, a solicitor residing at Bis-

hop's Lydeard, who, as the agent of Sir John in that and other business, had for many years enjoyed much of his confidence. In 1785, Sir John became desirous of selling this property, and authorized Mr. Charter to look out for a purchaser. Accordingly, it appeared that in 1787 he entered, on behalf of Sir John, into consecutive treaties with two gentlemen for a sale of the estate at 13,650*l.*, but the treaties broke off in both cases; whereupon Sir John wrote to him, saying he should be glad to receive 13,000 guineas for the property at any time, "and the sooner the better, as he knew how to apply the money." Upon this general authority, Charter opened a treaty with the trustees of Sir Thomas Acland, and a bargain was concluded, without reference to Sir John Trevelyan, for the purchase of the demense lands of the manor by them at 12,024*l.* 15*s.*; after which Charter reported to Sir John that he had also sold the residue of the estate, being in fact, as it appeared, the manor or lordship itself, with certain lands appertaining to it, to a cousin of his own, (one James Charter,) at a sum, which, together with the sum payable by the trustees of Sir Thomas Acland, would make up exactly 13,000 guineas. In due time, Sir John Trevelyan executed conveyances to these respective purchasers. The deed of conveyance to James Charter was prepared by Thomas Charter, and bore date the 1st & 2d May, 1788. But by indentures of lease and release, dated 1st & 2d June in the same year, made between James Charter and Thomas Charter, after reciting the conveyance to the former by Sir John Trevelyan, it was further recited, that the purchase money in that transaction had been the proper money of Thomas Charter, and that the name of James Charter had been made use of in the said conveyance upon trust only for Thomas Charter, his heirs, and assigns; and that Thomas Charter had requested the said James Charter to convey to him the premises comprised in the indenture of the 2d May, 1788, which accordingly the said James Charter conveyed and assured to the said Thomas Charter with their appurtenances. Now all this part of the affair—this underhand juggle between the two cousins—was studiously concealed from Sir John Trevelyan; and herein was the fraud to which we have adverted. Thomas Charter ceased to act as the solicitor and steward of Sir John Trevelyan in 1806. He died in 1810; and upon his death, his son and heir-at-law, Thomas Malet Charter, took possession of all his real estates. On the 3th December, 1825, the solicitor of Thomas Malet Charter wrote to the solicitor of Sir John Trevelyan a letter, saying. "The manor of Seton, and certain lands in that parish, formerly belonged to Sir John Trevelyan, who sold them to Sir Thomas Acland, *of whom they were purchased by the late Mr. Charter.*" The statement which we have quoted in italics suggesting to Sir John's mind that there was something wrong in the case, he ordered an investigation, the result of which was, that he became satisfied that a deep fraud had been committed upon him by his late steward. In this situation, it was determined to file a bill against Thomas Malet Charter, praying that he might be decreed to deliver up all title deeds, &c., relating to the estates in question then in his custody, and that the sale might be declared fraudulent, and that Thomas Malet Charter might be ordered to reconvey and to account for the rents and profits. In April 1828, Sir John Trevelyan died; but the suit was soon revived by his son, the present ba-

renet ; and the cause came on for hearing in January 1835, before Sir C. C. *Pepys, M. R.*, (now Lord *Cottenham*) who made a decree conformable to the prayer of the bill, accompaning that decree with expressions too remarkable to be omitted in this place : " It does indeed become the duty of the court, when transactions of long standing are brought before it, most anxiously to weigh all the circumstances of the case, and to consider what evidence there may have been which, from the lapse of time, has been lost. But beyond this, in cases of fraud, I think time has no effect. Were it otherwise, the jurisdiction of the court would be defeated, and those who may be disposed fraudulently to appropriate to themselves the property of others, may be assured that no length of time will secure them in the enjoyment of their plunder, but that their children's children will be compelled by this court to restore it to those from whom it has been fraudulently abstracted."

From this decree the defeated party appealed to the House of Lords, contending that it was injustifiable to open up a transaction which had been settled so long ago as the year 1788, and even the existence of fraud did not warrant the doing so in a case where the party seeking to set aside the transaction had the means of ascertaining the circumstances, and had delayed for an unreasonable time to act upon it. These arguments, however, were unavailing, for the Lord Chancellor stated from the woolsack his impression of the evidence to be this: " That the property was purchased by Thomas Charter, in the name of James Charter, at the time when Thomas Charter was acting as agent to Sir John Trevelyan, and employed by him to dispose of it ; that Sir John Trevelyan was not informed at the time of the true nature of the transaction ; that the purchase money was greatly below the value ; that it was studiously concealed from Sir John Trevelyan that Thomas Charter had been the purchaser ; and that this appears to have been discovered only in consequence of the letter written in 1825. Under these circumstances, time could not be set up as a bar to the suit, which in other respects rested upon the clearest principles of equity." Lord Campbell said, " the only doubt he had was, as to the lapse of time and acquiescence ; for it was certainly important that there should be a limitation to inquiries of this sort ;" but he was obliged to come to the conclusion that the remedy in this case was not barred, and that the parties had never with a knowledge of the facts done anything which could be considered to amount to acquiescence. The decree therefore was affirmed with costs.

ANALYTICAL INDEX

To Cases determined in the Court of King's Bench for the District of Quebec,—from 1808 to 1822.

Sec. XIV. *actions d'Injure.—(Continued)*

ACTIONS.

11.—In an *action d'injure* for torts committed by several, each and every of the perpetrators may be sued jointly or severally. A *remise* by reconciliation may be proved by witnesses Peltier vs. Minville, 1818, No. 383.

12.—In an *action d'injure* for slander, whether the word spoken or written were spoken or written maliciously is a question of fact to be decided by the Jury, if there be one. Burns vs. Goudie. 1818, No. 802.

13.—In an *action d'injure* for slander every fact which rebuts the inference of malice may be proved by the defendant upon the *defense en fait.* They show that he is not guilty. Dupont vs. St. Pierre, 1819, No. 538.

14.—In an *action d'injure verbale,* it is sufficient if the *substance* of the word laid is proved. Hosser vs. Arnold 1819, No. 512.

15.—An *action d'injure* may be maintained for damages occasioned by imprudently setting fire to the woods in a dry season and during a high wind. Guay vs. Labelle, 1820, No. 67.

16.—In an *action d'injure* the time and place where the words were spoken must be stated, and if they are not stated, by an *exception à la forme* the action will be dismissed. Goudie vs. Legendre, 1820, No. 289.

17.—To call a woman a whore is actionable, and requires no proof of any special damage. Langlois vs. Tasché, 1820, No. 738.

18.—No damages can be recovered for an injury which has been sustained in consequence of an acccident produced by imprudence on the part of the person injured. Toussignant vs. Boisvert, 1820. No. 1074.

19.—The *action d'injure* lies for a malicious arrest of the person and false imprisonment and for a malicious arrest and seizure of property. Sims vs. Scholefield, 1820, No. 1140.

20.—In an *action d'injure* for a malicious arrest upon a capias ad respondendum because the defendant was about to leave the province, it is not necessary to alledge in the declaration that the action in which he was so arrested has been decided. Boyle vs. Arnold, 1821, No. 22.

21.—In an action for a malicious prosecution, if the verdict be for the defendant the court will not grant a new trial, even if the verdict be against the evidence and against the direction of the judge. McCallum vs. Wood. 1821, No. 1301.

22.—An *action d'injure* lies for exciting a dog to bite the plaintiff's

horse, whereby the horse was injured and his cart broken. Davidson vs. Cole, 1821, No. 1446.

23.—The contents of a confidential letter is not the subject of an *action d'injure*. Smith vs. Binet, 1821, No. 462.

Sec. XV.—*In Factum.*

1.—An indigent parent can maintain an action in factum against his or her child for an alimentary allowance. Parent vs. Dubuc, 1812, No. 414. Connor vs. Laforme, 1819, No. 176. Robin vs. Devarennes, 1821, No. 1255.

2.—If a husband turns his wife out of doors she can maintain an action in factum against him for an alimentary allowance. Chamland vs. Jobin, 1814, No. 453.

3.—An *action in factum* can be maintained for a *chemin de sortie*. Dionne vs. Émond, 1817, No. 560.

4.—Every proprietor is answerable in damages to his neighbour for an injury which he occasions to the property of the latter by the improper use of his own and for such an injury an action in factum will lie. D'Estimonville vs. Têtu, 1817, No. 550.

5.—An action *in factum* can be maintained against a neighbouring proprietor for impeding a water course or an aqueduct by acts done on his own property. Harrower vs. Babin, 1817, No. 532.

6.—An action *in factum* can also be maintained where a building erected on the property of another is a private nuisance to his neighbours, whether it be occasioned by the building or by the use to which it is applied. Côte vs. Measam, 1819, No. 2.

7.—Whenever goods are committed to any one for a qualified purpose any deviation from that purpose in the disposition of them for another is a conversion upon which an action in factum in the nature of trover may be maintained. Adam vs. Henderson, 1819, No. 1036.

8.—In an action in factum *quasi trover*, the material inquiries are, touching possession and conversion by the defendant, and as to his possession, whether he got it by finding or otherwise, matters not; Was he in possession being the *gist* of the inquiry. Fougère vs. Boucher, 1821, No. 235.

Sec. XVI.—*Partage and pro socio.*

1.—On partage d'*Hérédité*, all the co-heirs must be parties to the suit and if any are omitted and no steps are taken by either party to bring them into the suit, the court upon the final hearing will dismiss the action *quant à présent*. Laverdière vs. Laverdière, 1816, No. 227

2.—The action *pro socio* is an action of account and partage and each co-partner must be plaintiff or defendant in the suit and if he be the latter he must be summoned; service also in this action on one co-partner is no service on the others (aliter in suits for

debts due to other persons 1822, 457) and proceedings will be stayed till those who have not been summoned or their representatives are made parties to the suit. Alwin vs. Cuvillier, 1816, No. 182.

3.—If a right of way is granted without any designation of its precise situation, over a lot held by two joint proprietors in common, and if by a *partage de fait*, the passage is located and used by both for a term of time, each party must abide by it, and an action of partage will not be maintained to affect a new location. Duhamel vs. Bélanger 1817, No. 464.

4.—An action *en délivrance de douaire coutumier* is an action of *partage*, and all the co-heirs must therefore be parties to the suit. Turcot vs. Drouin, 1817, No. 674.

5.—In an action of partage the court can enforce the payment of a *soulte*. Bedigaré vs. Hamel, 1820, No. 466.

6.—The action of *partage entre co-héritiers* can be maintained, while any property of their ancestor remains to be devided. Tremblay vs. Girard, 1820, No. 69.

7.—Although an *usufruitier* be in possession, an action *en partage* will lie for the assignment of the portion which belongs to each heir in the property which is so possessed. Poulin vs. Falardeau, 1821, No. 983.

Sec. XVII.—*Réintégrande.*

Actions.

1,—Judgment of *réintégrande* and of damages may be asked and awarded in one and the same action. Côté vs. Riome, 1818, No. 314.

Sec. XVIII.—*Rédhibitoires, in Rescision & Résiliation.*

Actions,

1.—Waste is a sufficient cause for the resiliation of a lease, especially where the parties have covenanted that the tenant shall not commit waste. . Denis vs Burray 1810 No. 46.

2.—If an action be instituted upon a Notarial acte, fraud, and the consequent nullity of the acte cannot be pleaded by Exception; an incidental demand *en rescision* must be filed. Bradley vs Blake 1812 No. 553.

3.—A donation made by a weak and aged person in consideration of a small annuity for life much inferior to the amount of the annual issues and profits of the estate given may be set aside in an action of *rescision* if the inference of fraud is not rebutted by evidence. Bernier vs. Boisseau 1813 No. 200.

4.—Subleasing part of a farm leased is not a sufficient cause for the resiliation of the original lease. Cerat vs. Stephens 1816 No.278.

5.—If the rent reserved upon a *bail emphytéotique* is in arrear and unpaid during three years, it is a cause for the resiliation of the lease. Jamson vs. Woolsey, 1846, No. 667.
6.—If a *donataire* wilfully frustrates the objects intended to be effected by the donation, his misconduct is a cause of resiliation. Lagacé vs. Courberon, 1817, No. 46.
7.—An action en restitution and rescision may be maintained in the case of an exchange of real estates. Laperrière vs. Thibodeau, 1821, No. 996.

Sec. XIX.—*Retraït.*

ACTIONS.

1.—The *Retrait conventionel* is not *de droit.* It is matter of convention or must be stipulated in the original contract of concession or otherwise no action en retrait can be maintained. Després vs. Fortin, 1811, No. 259.
2.—Rent in arrear for three years on a *bail emphytéotique* is a cause of resiliation and *retrait.* Sanson vs. Woolsey, 1816, No. 667.

Sec. XX.—*Revendication.*

ACTIONS.

1.—Where the King claims possession in right of the crown in an action of revendication or information of intrusion, the defendant must prove title on himself specially and if he does not judgement will be entered against him. Rex vs. Lelièvre, 1812, No. 201.
2.—Revendication for property attached and tortiously abstracted can be maintained. Merkley vs. Cuvillier, 1812, No. 220.
3.—Goods sold for cash and not paid for when taken away may be followed and recovered from the purchaser in an action of revendication if it be instituted in 8 days and the goods are in identical state and condition in which they were taken away. Aylwin vs. McNalley, 1812, No. 340.
4—*Lettres de rescision* are not required to set aside a sale made by a Tutor on behalf of his ward without the authority of an *assemblée de parens.* Normandeau vs. Amblement, 1813, No. 590.
5.—In revendication if the defendant is in possession as a lessee of the property demanded he must plead his lease by *exception dilatore.* Clément vs. Hamel 1817, No. 77.
6.—An action of revendication can be maintained for the recovery of title deeds. Perrault vs. Hausseman, 1817, No. 513.

ACTIONS.

7.—In an action of revendication for an Ox, it is no justification to plead that he was seized "dommage faisant" on the defendant's soil and no more. Reilly vs. Chandler, 1817, No. 714.

8.—In revendication if the defendant pleads by *exception temporaire* that he holds the property demanded as a "Gardien" appointed by a justice of the peace and prays that the plaintiff's action may be dismissed, it is irregular. He can only stay proceedings until the person from whom he derives his authority to occupy the property claimed is made a party to the suit. His exception therefore should be an exception dilatoire. Pacaud vs. Bégin 1818, No. 414.

9.—Revendication will lie against a bailiff who under the authority of a justice of the peace holds in his custody the goods of the plaintiff, If the cause of the detention be a matter over which the justice has no jurisdiction. Pacaud et Bégin, 1819, No. 414.

10.—In revendication the title on which the plaintiff rests, his demand must be specifically set forth in the declaration. Pouliot, vs. Scott, 1820, No. 44.

11.—A legatee can maintain an action of revendication against a *Tiers détenteur* of his legacy before he has obtained *délivrance de legs*. Morrin vs. Peltier 1820, No 173.

12.—A person charged with felony cannot maintain an action for Bank notes supposed to be stolen or taken from him when he was arrested until the charge preferred against him has been disposed of. Carlisle vs. Sutherland 1821, No. 20.

Sec. XXI.—*Seduction.*

ACTIONS.

1.—In an action for seduction the plaintiff must prove a promise of marriage and breach thereof, or the birth of a child from which the law presumes a promise of marriage and a breach thereof. Poulin vs. Plante, 1820, No. 901.

2.—An action for damages by reason of seduction and for an alimentary provision for the child can be maintained by the mother alone if she be of age. Mathieu vs. Letourneau, 1821, No. 1006.

Sec. XXII.—*Séparation de corps et de biens*

ACTIONS.

1.—In general nothing less than future danger to life or limb will support an action *en séparation de corps*. Yet under peculiar circumstances, such as disparity of age, if the general conduct of the husband exhibits violent treatment, contempt, hatred, or neglect, though danger to life or limb cannot be inferred, it is, in an aggravated form, sufficient. Chalou vs. Trahan, 1820, No. 933.

ACTIONS.

2.—A general allegation of ill treatment will not support an action *en séparation de corps.* The facts on which the demand is founded must be set forth specially as to time, place and circumstance. Boulanger vs. Wheat, 1821, No. 251.

3.—A confirmed habit of intoxication is a menace of danger in its consequences and as such a legal cause of *séparation de corps.* Craven vs. Craven, 1821, No. 418.

4.—Long absence of the husband is not a cause for a *séparation de corps*, but it is a sufficient cause for a *séparation de biens.* Gravel vs. Girard, 1821 No. 805.

Sec. XXIII.—*On statutes penal qui tàm.*

ACTIONS.

1.—Costs may be awarded in a qui tàm action, and two witnesses to different acts in breach of the statute are sufficient. Puise (qui tàm) vs. Fay, 1812, No. 412.

2.—An action on the statute 33. Geo. III, cap. 2, sec. 5 upon a promissory note not expressed to be for value received cannot be maintained if there be but one count in the note and no other evidence than the note itself. Saul vs. Kemble, 1813, No. 23.

3.—In an action grounded on the *arrest* of 1711, the case stated in the declaration, (the arrest being a penal statute which may effect a forfeiture of real estate) must lie within the letter of the *arrêt.* Dubois vs, Caldwell, 1820, No. 92.

Actes Authentiques et sous seing privé.

A copy of a paper originally executed before one Notary only, cannot be received as evidence of an acte authentique. Miville vs. Roy, 1809, No. 45.

An acte en brevet does not create a *mortegage.* Belair vs. Godreau 1810, No. 10.

None but a public officer can render an acte authentique by his présence where it is executed. Exparte Geo. Spratt, 1816, No. 128.

The ordinance of 1731 is not a part of the law of Canada ; if therefore there be two witnesses to a notarial acte who do not write, this does not vitiate it, if it be executed in a country-parish, for the ordinance *de Blois* requires written signature by witnesses en "*gros bourgs et villes*" only ; they are not even there required à *peine de nullité.* Ruel vs. Dumas & al. 1816, No. 234.

A notarial acte of obligation for money can be novated by an acte sous seing privé and the mortgage thereby created can by the same means be destroyed. Nadeau vs. Robichaud, 1818, No. 301.

A Notary can pass an acte for his relations especially if the act he passes be contrary to their interest ; but cases of this description

depend altogether on their merits. Whether they induce a presumption of fraud or otherwise is the question. Fournier vs. Kirouac 1819, No. 135.

Relations may be witnesses to actes passed before a notary, by those to whom they are related, and the acts will be valid, unless there be ground to suspect fraud in which case they may be set aside. Ruel vs. Dumas 1816, No. 234.
Pagé vs. Carpentier, 1821, No.
Fournier vs. Kirouac.

Actes of Parliament.

Where an act of Parliament declares that the banks of a river on which the abutments of a bridge erected by an individual are to be public property, the right of the former owner is entirely extinguished whether he has or has not been indemnified. Hausserman vs. Casgrain, 1821, No. 622.

Admiralty.

A writ of prohibition to the court of Vice-Admiralty may be issued by the court of King's Bench. Hamilton vs. Fraser, 1811, No. 103.

The Code maritime of France, if it ever was in force in Canada was not a part of the common law but of the droit public and consequently was superseded by the effect of the conquest, and if it was law in the admiralty jurisdiction of that time, whether it was a part of the public law, or of the common law, it was abolished by the introduction of the marine law of England. Baldwin vs. Gibbon, 1815, No. 168.

Money in the hands of a Judge or Marshall of the Admiralty *virtute officiæ* cannot be attached by process issued out of the King's Bench. Perrault vs. McCarthy & Kerr & D'Estimauville, Tiers Saisis, 1816, No. 176.

Aliens.

Aliens cannot sue in *formâ pauperis.* Barry vs. Harris, 1810, No. 333.

Aliens cannot take lands by descent. Rex vs. Berthelot, 1811, No. 1.

An alien being guardian to children who are minors resident in a foreign country can support an action of account on their behalf. Allen vs. Coltman, 1811, No. 248.

That the Plaintiff is an alien *enemy* must be pleaded by Exception péremptoire. Bellinghurst vs. Lee, 1813, No. 73.

An alien domiciled in Canada, but not naturalized is incapable of tak-

ing real estate by devise. Paquet vs. Gaspart, 1820, No. 107.

Aliens cannot take lands by descent and inheritance. Rex vs. Berthelot, 1811, No. 1.

If a submission to arbitres be of all matters in difference, they must decide upon all the points in dispute between the parties, but the Court will not presume that any point has been left undecided and if such be the fact it must be shewn, Fairfield vs. Butchart, 1821 No. 492.

Arbitrators must not only hear the parties but must decide the matters in dispute before the expiration of the rule ol reference. Their proceedings are otherwise void. Gilley vs. Miller. 1811, No. 145.

Award by two of three arbitres is sufficient. Meiklejohn vs. Young, 1811 No. 292.

Appeals.

Exhibits offered in evidence to a jury at the trial (enquête) are not to be sent up to the court of appeals upon a writ of error. Flower & al vs. Dunn, 1810, No. 136.

An action on an Appeal Bond will not lie until the appeal has been determined. Kerr vs. Munroe, 1808.

An appeal disallowed for want of security does not stay proceedings in the Court. Perrault vs. Borgia, 1816, No. 503.

Bills of Exchange & Promissory Notes.

1.—A verbal acceptance of an inland Bill of Exchange is good and binds the acceptor. Lagueux vs. Everett, 1817. No. 581.

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QUEBEC
B. R.
No. 781

EX PARTE

JOHN KINGSMAN.

Application pour writ d'Habeas corpus ad subjiciendum.

En août 1839, Anne Kingsman, fille de John Kingsman et de Bridget Bookar, résidens à Québec, rue champlain, disparut de la demeure de ses parens. Elle était alors agée d'environ deux ans neuf mois, et l'on supposa dans le temps qu'elle était tombée d'un quai, et s'était noyée dans le fleuve. Toutefois, malgré toutes leurs recherches, ses parens ne purent découvrir aucune trace. Lors de la disparition de l'enfant quelques personnes rapportèrent avoir vu rôder dans le voisinages quelques femmes indiennes, mais on ne s'arrêta pas sérieusement à les soupçonner de l'avoir enlevé.

Dans le mois de juillet dernier, (1846) Anne Foster, une amie de la famille Kingsman et qui avait très bien connu l'enfant perdu, rencontra dans la boutique du nommé Walker, épicier, deux femmes de la tribu des Abénakis, accompagnées d'une jeune fille, dont le teint parfaitement blanc, trahissait l'origine Européenne. Elle adressa quelques mots à l'une des femmes, et fixa la jeune fille avec attention ; sur quoi l'indienne lui demanda si elle reconnaissait cet enfant. Ayant repondu qu'elle la reconnaissait pour la fille de Kingsman, que l'on avait enlevée sur un quai de la rue Champlain, la jeune fille tenta de s'enfuir, l'indienne affirma que l'enfant lui avait été remis à la Pointe Lévy, par la mère, à l'âge de trois mois, alors que la mère allait la noyer. Elle se hâta bientôt de corriger cette version incorrecte, et déclara que c'était la fille naturelle de John McCaye de Broughton et d'Elizabeth Grey, maintenant dans l'état de New-York, et que l'enfant lui avait été remis en 1833 par le père, à Broughton, à l'age de trois mois, et qu'elle l'avait élevé depuis. La femme Foster court informer la police et puis Kingsman de ses soupçons, et l'indienne, nommée Louise Kelly, est appréhendée, et écrouée sous soupçons d'avoir enlevé Anne Kingsman. A la demande de Kingsman père, un writ *d'habeas corpus* émane, enjoignant à Louise Kelly de produire devant la cour la personne de Anne Kingsman, et de rendre compte des causes de sa détention. Elle fait retour à ce writ qu'elle n'a pas en sa possession la personne d'Anne Kingsman, mais bien la personne d'Isabelle McCaye, fille naturelle de John McCaye de Broughton, et d'Elisabeth Grey, née le 12 Janvier 1833, et présentement agée de 13 ans : que John McCaye la lui donna à l'age de trois mois, et qu'elle l'a élevée depuis comme une fille adoptive.

Les prétentions de Kingsman reposaient sur la prétendue ressemblance de la jeune fille avec ses autres enfans, et la présence d'un signe naturel entre les deux épaules, et que portait aussi sa fille.— La lutte se trouvait engagée entre celle qui se croyait la mère naturelle et celle qui se représentait comme la mère adoptive ; toutes deux allé-

guaient des titres également respectables : mais il fallait constater la vérité des faits, afin de ne pas commettre une grave erreur. Il eut été dur de ne pas restituer à la famille Kingsman un enfant perdu depuis si longtemps et retrouvé ; il eut été plus cruel encore d'arracher à cette mère sauvage, aimante et dévouée, le légitime objet de tant de soins, d'affections et d'amour ; c'eut été un crime d'enlever à tort cette jeune fille à ses habitudes de vie sauvage et libre, à ses mœurs, à ses bois, à sa langue, pour la jeter à treize ans au milieu d'une société qu'elle ne comprenait pas et qui ne lui inspirait que de l'horreur. Tout en respectant les sentimens de la famille Kingsman, les sympathies de tous étaient acquises à l'Indienne, tout le monde désirait qu'elle constatat la vérité de son dire, et c'est ce qu'elle a fait d'une manière ncontestable. Les témoignages de John McCaye et de plusieurs membres de sa famille, de Mr. Nall, juge de paix, d'un grand nombre de personnes respectables de Broughton, et de plusieurs individus de la tribu des Abénakis ont établi d'une maniere indubitable la naissance d'un enfant naturel de John McCaye et d'Elisabeth Grey, le dépot de cet enfant, en 1833, entre les mains de la femme Kelly, et son identité jusqu'à ce jour.

Deux circonstances non équivoques ont donné aux prétentions de Kingsman un caractère d'invraisemblance qui a paru touchant.

Sa fille devait avoir neuf ans et dix mois : la fille adoptive de l'indienne en a treize ; et des médécins éminens ont certifié de ce fait. La fille de Kingsman avait été vaccinée au berceau, la fille de l'indienne ne porte aucune marque ancienne de vaccine ; au contraire, elle n'a été vaccinée que le printemps dernier, la cicatrice en est de date récente, et le fait est averé par le médécin qui a fait l'inoculation du vaccin.

Sur cette preuve, la loi a remis à l'indienne la fille adoptive, et s'est attachée à convaincre les époux Kingsman de l'erreur de prétentions qui leur font honneur, mais que force leur est de cesser d'entretenir. Ce petit drame judiciaire a été piquant d'intérêt, d'incidens et de péripéties, et a produit beaucoup de sensation dans le public. La première reconnaissance a donné lieu à une lutte et à des scènes déchirantes entre les parties ; comme il est facile de le comprendre, la jeune fille s'est cramponnée à l'indienne comme le lionceau aux flancs de la lionne, et l'affection paternelle des Kingsman s'est produite avec toute la chaude et pétulante véhémence d'une nature irlandaise. Dans le cours des débats, la tentative faite par Kingsman, au sortir du palais de justice, d'enlever l'infortunée jeune fille n'a pas permis à l'intérêt de se refroidir. Seule, l'indienne Kelly est restée de sang-froid, sans crainte sans anxiété sur le résultat de l'investigation, parfaitement rassurée par la rectitude et la sainteté de son titre de mère adoptive.

Lors du prononcé du jugement, la foule avait encombré les banquettes du palais de justice : l'indienne assise au banc des jurés, élevée au dessus de la foule, ayant, à ses côtés sa fille adoptive, belle, intéressante, vêtue simplement mais élègamment dans le costume européen, était parfaitement calme, et ne se trahissait ni par un regard ni par une émotion ; la tête haute et fière, elle paraissait croire qu'il était impossible que son droit ne prévalût pas ; à ses côtés sa fille, mélancolique et résignée, était également immobile. An fond de la salle,

les époux Kingsman, les traits bouleversés, la poitrine haletante, le regard fixé sur celle qu'ils avaient cru leur enfant, semblait sous le poids d'un poignant désappointement, sous le coup d'une espérance deçue. La femme Kingsman, au moment où l'on a emmené l'indienne et sa fille, n'a pu résister à un dernier mouvement de son cœur, et s'est précipitée avec frénésie vers celle qui lui avait apparu comme le fantôme de sa fille, et qui la fuyait pour toujours : sentiment fondé sur une erreur sans doute, mais bien digne de respect et de compassion.

Mr. Alleyn occupait pour les Kingsman ;

Mr. Austin, pour la mère adoptive.

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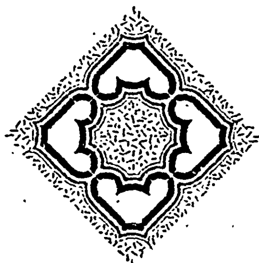

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Après la mort de sa femme, le mari fait à son fils, le Défendeur, une donation entre vifs de trois immeubles, dont deux avaient été conquêts et aussi de quelques effets mobiliers; puis par son testament, il confirme cette donation, et lègue au même tous les autres biens "qui se trouveront lui appartenir et qu'il délaissera au jour de son décès."

Cette donation et ce testament sont-ils censés comprendre, dans leurs dispositions, les biens de la mère prédécédée, bien qu'il n'y en soit fait aucune mention. Et, dans l'espèce, le legs par la femme au mari doit-il être regardé comme un legs de propriété, ou seulement comme un legs d'usufruit? (*Benoit-dit-Marquet et autres vs. Marcile*] ....140.

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Application du statut de la 3me guil. 4. c. 12. *de l'ord*: 2. *vic.* c. 47, *dit l'acte des locateurs et locataires. Comment et par qui sera signifiée l'action* in ejectment? *Le bref sera-t-il dans les deux langues? La procédure doit-elle être régie par la 7e vic. c.* 16. (*l'acte de la judicature*)? *suffira-t-il de trois jours de délai entre la signification et le retour? L'action peut-elle émaner en terme de même qu'en vacance? Par qui les brefs d'assignation devront être attestés? L'action peut-elle être portée devant un seul juge, quand le prix du bail est au dessous de £10 strg.? L'action doit-elle être continuée devant les deux mêmes Juges, Cette action est-elle cessible, passe-t-elle à l'acquéreur?*
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MANDAMUS.

CORPORATION DE PAROISSE, ÉLECTION DE MARGUILLIERS, ETC.

Les notables ont droit de participer à l'élection des marguilliers.

Les notables sont tous les paroissiens contribuables.

Le curé et marguilliers peuvent être contraints d'appeler les notables aux assemblées pour l'élection de Marguilliers, au moyen d'un writ de mandamus.

Le retour fait par le curé et les marguilliers qu'ils ont offert d'admettre aux assemblées certaines personnes *notables* par leur état et leur rang, à l'exclusion de la généralité des paroissiens, est déclaré, insuffisant est illégal.

Un seul writ de *mandamus* peut émaner pour faire priver de leur office deux marguilliers, et en faire élire deux autres.

Il n'est pas nécessaire que le premier writ de mandamus soit signifié sur le marguillier qu'il s'agit de faire priver de son office : la signification sur la corporation suffit.

La corporation, après avoir fait retour qu'elle ne pouvait obéir au premier writ, ne peut plus extrajudiciairement et sans la permission de la cour procéder à redresser le grief dont on s'est plaint.

Quand la corporation a fait un retour, le writ de mandamus péremptoire ne peut émaner qu'après que ce retour a été déclaré illégal et insuffisant et rejeté.

La cour n'accorde point de frais à celui qui a obtenu le writ de mandamus. L'annonce au prône peut se faire en termes généraux, sans qu'il soit nécessaire d'inviter spécifiquement les notables. (*Exparte Renouf*) 310

MARINER'S WAGES.

A promise to pay wages to a Mariner in advance, on condition that he proceeds to sea in the ship is an agreement to pay so much absolutely upon the performance of the condition, whether the ship and cargo be afterwards lost upon the voyage or not. [*Mullen vs. Jeffrey.*] ....362.

POSSESSION PAR DIVIS.

Plusieurs personnes possedant un terrain-par divis-ne peuvent être poursuivis conjointement par une même action; ils doivent l'être chacun par une action séparée. [*Panet vs. Laurin.*] 232,

PRESCRIPTION.

The prescription of five years as to loyers is an absolute prescription. [*Laurent dit Lortie vs. Stevenson.*] ....190. [*Scipiot vs. Gauvin.*]....237.

PRIVILEGE.

Lieutenant governor of a colony. Exemption from action. [*Privy Council, Hill vs. Bigge et al.*]....................76.

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PROMESSE DE MARIAGE.

Action pour inéxecution de promesse de mariage exige un commencement de preuve par écrit [*Asselin vs. Belleau.*]......46

PROMISSORY NOTES.

In order to vitiate the payment by the maker of a promissory note endorsed in blank, *bad faith* must be shewn; payment, *under circumstances* of suspicion, is not enough. The maker is only bound to assure himself of the genuineness of the signatures, and is not bound to make any enquiry. [*Adam Ferrie, appt. & House of Industry Respd.*]...27

No set form of words is requisite to constitute a promissory note; and an instrument callet a writ-

ing obligatory or a *Bon* payable to order for value received, may be considered as a *note in writ ing*, within the intent of the Provincial Statute 34, Geo III, ch. 2, though it does not follow the very words of that Act; and though it be merely described and designated in the Declaration as a writing obligatory, or *Bon.* [*Hall, appt. & Bradbury & al. Respd.*]................189

L'endossement écrit et sous croix, en présence de deux témoins, d'un billet promissoire, donne droit d'action au porteur contre le faiseur et l'endosseur. (*Noad vs. Chateauvert et al*......229

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RATIFICATION, (*Lettres de*)

Celui qui demande des lettres de Ratification est tenu de déposer le prix d'acquisition si ses créanciers opposans l'exigent. (*Ex parte, Cantin, et Dion et al, oppts*) 42

Le requérant pour lettres de ratification peut-il en tout état de cause se désister de sa procédure, en offrant de payer tous les frais? (*Ex parte, Chabot, et divers oppts.*) 224

D'après les dispositions de la 2e Vic. chap. 36, sections 5, 7, 14, 28—(*Ord. relative à la distribution des biens des Banqueroutiers, maintenant rappelée,*) la vente des immeubles du Banqueroutier par le Syndic ne les purge pas des hypothèques dont ils sont grevés, quoique les créanciers hypothécaires aient filé leurs reclamations devant le commissaire des Banqueroutes; il eût fallu obtenir d'eux une renonciation expresse à leur droit d'hypothèque, et le fait d'avoir filé leur reclamation ne saurait équivaloir à telle renonciation. Les créanciers hypothécaires ont encore droit de s'opposer à la demande de lettres de ratification faite par les acquéreurs de tels biens, et de se faire colloquer sur le prix de l'acquisition, nonobstant le paiement fait au Syndic. (*Ex parte, Laurent et Julien Chabot et Furois et al oppts*)................265

SAISIE-GAGERIE.

The Lessor to use the right of *Saisie Gagerie par droit de suite*, is bound to declare and prove that the lessee has not left sufficient furniture to secure the rent. [*Zeigler vs. McMahon.*]...76

SOCIETÉ

Si après la dissolution de la société aucune partie des effets d'icelle tombe entre les mains de l'un des associés, et qu'il soit sur le point de les convertir à son propre usage, l'autre associé néanmoins ne pourra par voie de saisie revendication, reclamer sa part indivise des dits effets. [*Maguire vs. Bradley.*]...367

SALE.

Upon the Sale of Goods by admensuration, which may happen to be destroyed before measurement, the loss is cast upon the seller; stipulations of admeasurement, and delivery at a particular place and time renders the sale conditional and incomplete until the occurrence of those events, and in the meantime the risk, *periculum rei venditæ* must be borne by the seller. [*Lemesurier et al. appts. et Logan et al. Respdts.*]......176.

SÉPARATION DE BIENS.

Is a woman, who has obtained a *sentence de séparation*, and who has suspended the execution of it, on certain conditions, and among others, on the payment by the husband to her, of a

yearly alimentary allowance,debarred from carrying out the execution of the *Jugement de séparation*, in consequence of her transaction with her husband, and the time elapsed since the Judgment ?

Could she suspend the execution of the said Judgment for a length of time, in consequence of such transaction ? [*Bender, appt & Jacobs, respdt*] 321

SALE OR TRANSFER

OF PROPERTY BY BANKRUPT.

Under the Bankrupt Law, 7 Vict, cap. 10, it was held that all sales or transfers of property by a Bankrupt within 30 days prior to the Bankruptcy are *primâ facie* void and that in an action by the assignees to recover such property, the burden of proof lies with the Defendant to shew his goon faith and that the transaction was in the usual course of dealing. [*Webster vs. Footner*] 40

TESTAMENTARY EXECUTOR.

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USUFRUIT.

SUBSTITUTION TESTAMENTAIRE.

« Un mari est condamné à fournir « à sa femme séparée de corps « et d'habitation, une rente et « pension annuelle et viagère de « £50 ; ce mari ne possède que certains biens *à charge de substitution*, en vertu du testament de son père qui a dit : « Je dé« fends expressément que ces « biens soient en aucune ma« nière engagés, aliénés, hypo« théqués, non plus que la « *jouissance, intérêt ou usu« fruit d'iceux*, qu'ils (les gre« vés) retireront pour leur pen« sion et subsistance et pour la « subsistance et l'éducation de « leur famille, sous peine de nul« lité de tous actes qu'ils feront « contraires à mon. intention, « pour que ces biens retournent « à leurs enfans, &c. &c. ;"

L'usufruit de ces biens est-il affecté au service de la rente et pension de la femme ? (*Montferrant, appt et Chevalier, intimé* ...81

WRIT, (*Return of*)

The Defendant must be called upon the return day, but the writ and declaration may be brought in, at any time afterwards, upon motion of either party. [*Dalton vs. Sanders*] 400

WIFE CONTRACTING WITH HER HUSBAND.

The wife who undertakes with her husband, such husband being a trader, becomes the *caution solidaire* of a trader, in so far as such undertaking concerns his trade, and without the necessity that the instrument by which she so binds herself should expres the *solidarité* or the fact that she is authorised by her husband, [*Power vs. Green,*]......186.

L'obligation contractée, solidairement avec son mari, par une femme séparée quant aux biens est nulle de plein droit quant à elle :—femme mariée ne peut s'obliger avec son mari que comme commune en biens. 4 Vic. c. 30, s. 36. [*Bertrand vs. Saindoux et al.*]........333.

A married woman, although separated as to property and having the « *administration de ses biens*" cannot without the express authority of her husband, validly do any act tending to affect and hypothecate her real and immoveable property. [*De-Rouville & al. appts. and Commercial Bank respdt.*]....406.

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