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A TREATISE

ON THE

LAW RELATING TO MARRIAGES,

IN

LOWER CANADA.

BY JAMES ARMSTRONG,

Advocate.

MONTREAL:

PRINTED BY JOHN LOVELL, AT THE CANADA DIRECTORY OFFICE,

ST. NICHOLAS STREET.

1857.

TO THE

Honorable A. N. Morin,

ONE OF THE JUSTICES

OF

THE SUPERIOR COURT,

FOR

LOWER CANADA.

THIS TREATISE

IS

MOST RESPECTFULLY DEDICATED

AS A

MARK OF ESTEEM AND REGARD

BY

The Author.

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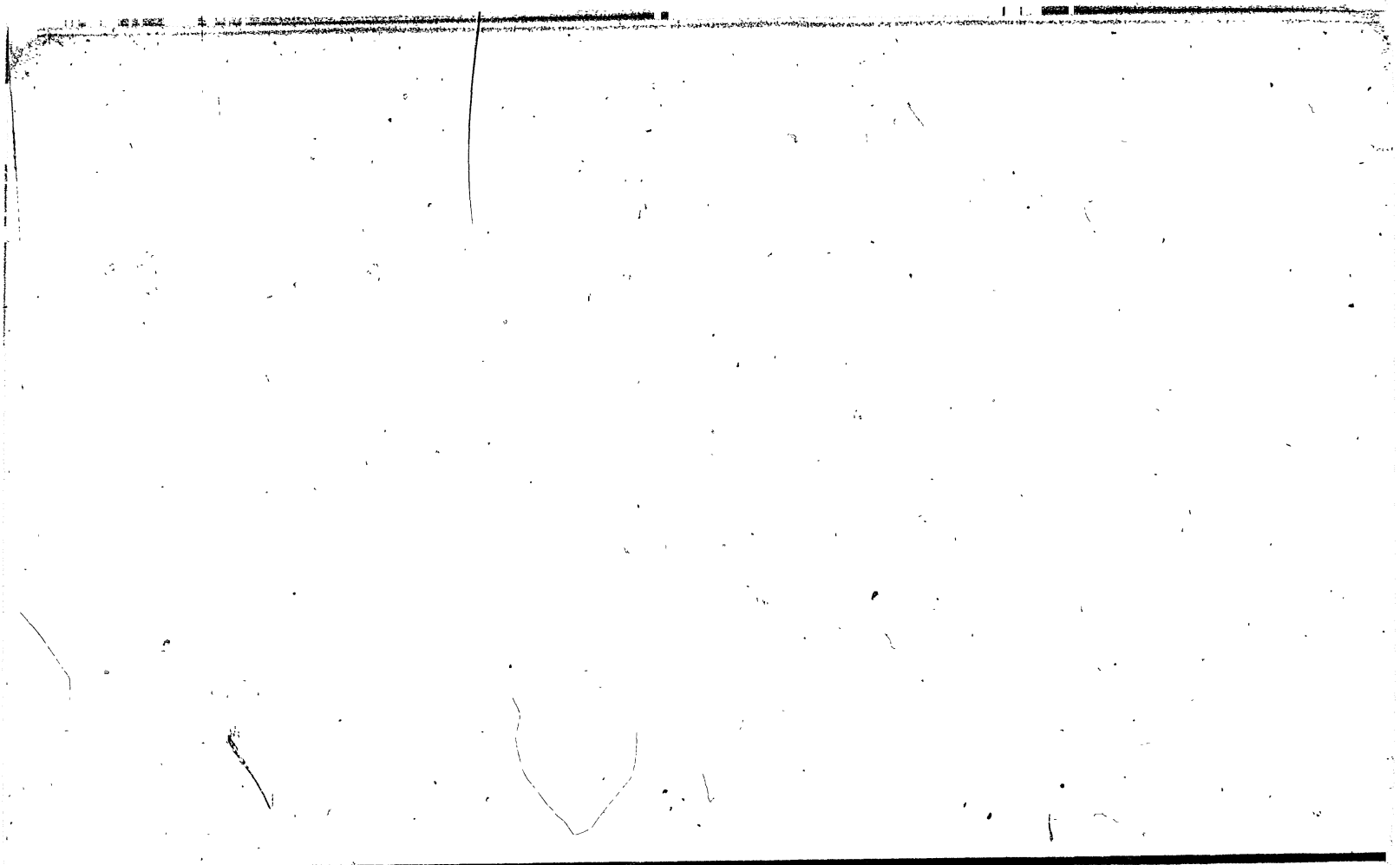

INTRODUCTION.

THE following pages are intended to convey to the reader a general knowledge of the laws which govern the condition of married persons. That there exists some necessity for a work like this, however elementary it may appear to professional men, and actually is, will be generally admitted. Few of British birth are aware of the importance of a knowledge of the laws affecting marriage in this section of the Province.

It is not pretended that our system of law is faultless; on the contrary, it is admitted by all who have devoted any time to its study, that many improvements may be made.

A knowledge of the laws of Lower Canada would, it is believed, pave the way for an assimilation of the laws of both Provinces. The difficulties in the way are by no means insurmountable.

MONTREAL, August, 1857.

A TREATISE

ON THE

LAW RELATING TO MARRIAGES

IN

LOWER CANADA.

PROPERTY.

Property is, by our Law, divided into two classes; Moveable and Immoveable. (1)

Things moveable by their nature are such as may be carried away from one place to another, whether they move by themselves as cattle, or cannot be removed without an extraneous power, as inanimate things. Obligations and actions, the object of which is to recover money due or moveables, although these obligations are accompanied with a mortgage, obligations which have for their object a specific performance, and those which from their nature resolve themselves into damages, shares or interest in banks or companies of commerce, or industry, or other speculations, although such companies be possessed of immoveables depending upon such enterprises, such shares or interests are considered as moveables with respect to every associate as long only as the Society is in existence; but as soon as the Society is dissolved, the right which each member has to the division of the immoveables belonging to it, produces an immoveable action. (2)

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(1) Custom of Paris, Art. 88.

(2) Civil Code of Louisiana, Act 465, 466. Pothier des Choses 2nd part, 2. Com. No. 69, 70, 76. De rente, No. 112.

All the furniture of a house which can be taken away without fraction or deterioration (1) is considered moveable, but that which is annexed by iron, or fixed in with plaster, with the intention of its being continued in such a state of annexation, is considered immoveable; for instance, a fire-grate fixed in a fire-place, and a stove inserted permanently in the wall between two rooms, in a house are considered immoveables, when they cannot be displaced without removing the bricks or other matter in which they were inserted, or by which they were secured in their position; otherwise they are considered moveables. This distinction is important, inasmuch as there are cases where one relation of the deceased would inherit the moveables, and another would inherit the immoveables, to which such fixtures had been permanently annexed, (2) and is also important as the law of the country where the person resides will, in the event of his dying intestate govern the succession as regards moveables. (3) Wood, hay and grain which have been cut down, even if they be on the field and not carried away, are moveables; but if growing, are considered immoveables and as forming part of the property.

Money given by parents to their children, in anticipation of marriage, to be employed in the purchase of real property, although it be not so employed, is considered immoveable, because of its destination, on the other hand an immoveable will be considered as moveable when by a contract of marriage it is

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(1) These words of the *coutume* are intended to distinguish actual moveables from those which were once moveables, but which having been permanently annexed to an immoveable are deemed to form part of an immoveable.

(2) Whatever is joined to a house or other building, such as anything that is fastened with iron, lead, plaster, or any other way, to the intent that it may always continue so, is reputed to be immoveable. (Domat.)

(3) Not only lands and houses, but servitudes and casements, and other charges, on lands, as rents and trust estates, are deemed to be in the sense of the Law, immoveables and governed by the *Lex rei sitæ*. In order to ascertain what is immoveable or real property or not, we must resort to the Lex loci rei, Story Conflict of Laws, No. 447.

stipulated that an immoveable is to be treated as a moveable for the benefit of the community, and thus becomes, to use the French law term *ameubli*, mobilised.

Those things which, if considered *per se* are moveable, will become immoveable on account of their destination; whilst, on the other hand, things which so long as they are attached to, and form part of immoveable property are immoveable, will, when separated from it, become moveable. Again, although they may be detached from the immoveable property, yet if they are preserved for the purpose of being again placed there, they will retain their quality of immoveable. Neither the bulk nor the value of the thing, but its connection with, and its being part of, or its permanent separation from, immoveable property, form the criterion of classing it under the one species or the other. (1)

The materials of a house which has fallen down, or been burnt, if they are preserved for the purpose of being used in rebuilding it, retain, according to the constitution of the *coutume*, the quality of the building, and are therefore immoveable property; but if such intention had been abandoned, they are personal. (2)

Constituted rents (*rents constituées*) (3) are considered immoveable, until they are re-purchased. If such rents due to minors are redeemed during their minority, the proceeds of the redemption and the interests on the same, are reputed immoveable as the rents were.

Immoveables are of two kinds, those which are actually so and those which being moveable in their nature, become immoveable by the force of Law. Immoveables *quod* the source of their acquisition, are divided into two sorts: *Propres* and *acquets*. Rents charged on and payable out of real estate (*rentes*

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(1) Burge 337. Pothier Com. No. 27.

(2) Pothier Com. No. 62 and seq.

(3) *A rente constituée* is the interest of a capital which the debtor can never be obliged to repay, but which he may at any time repay, and thus absolve himself from the payment of the *rente*. It is analogous to dividend in English Funds; Story puts on this point the very sensible distinction, that whether rentes are to be deemed personal, or real, depends upon whether they are charged on real property or not. 1 Burge 342.

froncieres) partake of its quality, and are therefore, immoveable and form no part of the community.

Propres are those which are acquired by inheritance, direct or collateral, or by donation in direct line. *Acquêts* are immoveables acquired in any other manner, and are of two kinds, viz: *acquêts* properly so called, and *conquets*. *Acquêts*, properly so called, are immoveables acquired by unmarried persons or by married persons not in a state of community of property, (*communauté de biens.*) *Conquets* on the contrary, are that species of *acquêts* which are acquired by married persons who are *communs én biens.*

A *propre* of the *communauté* is that property which belongs to one of the conjuncts, and is, either by its nature or by express stipulation, excluded from the community.

MARRIAGE.

A contract of marriage, like any other contract, may be vitiated by error, violence, fraud, the incapacity of the contracting parties, or by the inobservance of the formalities required by law.

As the error respecting the person married prevents consent, it is plain that it renders the marriage null; but the error which regards only the quality of the person cannot vitiate it.

As nothing is more contrary to a consent than acquiescence produced by violence, it also renders the marriage voidable; hence the Ordinance of 1639 declares, that the party ravished is incapable of contracting a marriage with her ravisher, until she shall have been released.

The incapacity of the contracting parties is either absolute or relative to one of the parties. Those who are absolutely incapable are: 1st. Madmen and idiots. 2d. Males under the age of 14, and girls under the age of 12. 3d. Impotents who from physical defects are incapable of copulation. 4th. Those who are already married; all these are absolutely incapable of contracting marriage.

Relative incapacity arises from too close relationship, and is indicated, in the closer degrees, by the law of nature, which makes us regard with horror, a marriage between lineal relations.

The Roman Catholic church prohibits the marriage not only of cousin-germans, but even of the children of cousin-germans; but a dispensation may be obtained from the Bishop.

Natural relationship produced by concubinage and the affinity

which the marriage creates between one of the married parties and the relations of the other, render the marriage null to the same degree as lawful relationship.

The Ordinance of Blois and the declaration of 1639 require, for a valid marriage, the publication of the banns upon three successive Sundays or holy-days, with a sufficient time intervening. This publication must be made in the church of the parish where the parties are actually domiciled, if they have been actually domiciled in the parish during the previous six months, otherwise the banns must be published in the parish of the previous domicile. If the parties about to be married are minors, the publication should be made not only in the parish where they have their actual domicile, but also in that of their father and mother, tutor or curator.

Notwithstanding the invalidity denounced by the Ordinance, a marriage publicly solemnized without a dispensation from a Roman Catholic bishop or a marriage license, would not be set aside. (1)

A marriage license (supposed to be given after due inquiry into the civil state of the parties,) is the substitute, in the Protestant churches, for the dispensation from banns which we have just now mentioned.

A requisite formality is the presence of four credible witnesses, besides the clergyman; all of whom must sign the certificate of the marriage. It is true that if the conjuncts, after a marriage made without witnesses, have publicly declared themselves man and wife, the want of witnesses cannot invalidate it; provided always that the marriage has been actually celebrated.

A fourth formality as regards minors, is the consent of father and mother, tutor or curator; but only the father and mother, tutor or curator can demand that the marriage be annulled upon the pretext of want of consent. (2)

There are marriages which the law regards as valid, and to which nevertheless it refuses all civil effects; so that the children, issue of such marriage, are treated as illegitimate with respect to the inheritance of their parents. Such are marriages which are kept

(1) Prevost de la Jannes, p. 9. (2) De la Jannès, p. 10.

secret up to the time of the death of one of the conjuncts: those which have been contracted in the last moments of one of the parties, between parties who had previously lived in a criminal connection; those which have been contracted by parties civilly dead, (outlawed or attainted;) that which a woman has contracted with her ravisher, since she has been released; for if the marriage had taken place while she was under the power of her ravisher, it would be clearly null on the ground of violence. (1)

CONTRACT OF MARRIAGE.

Contracts of marriage, may include all kinds of agreements provided they be not contrary to law and morality.

Covenants, which the law does not permit in other contracts are allowed in it; (2) this indulgence, independent of the favor extended to marriages, is founded upon this consideration, that marriage being indissoluble, it would be harsh to annul conditions without which it would not have been contracted. (3)

It may therefore be stipulated that the wife shall have no dower, or that there shall be no community; but even in those cases, the husband will have the enjoyment and administration of the *propres* of his wife, unless it be further stipulated that the wife shall enjoy them separately, and shall have the administration of them. (4) But the wife cannot stipulate that she may sell her *propres* without the authorization of the husband; (5) that clause, being opposed to the dependence in which the wife is placed by nature and law with respect to her husband, would be regarded as against public policy. General authorizations stipulated in a contract of marriage are null. (6)

The clause in a contract of marriage stipulating that the marriage rights of the parties should be governed by the laws and customs of Great Britain, is too vague and general to construct a contract of marriage. In Judge Story's Conflict of laws an authority always cited with respect, it is laid down that a man cannot by his marriage contract, submit his matrimonial rights to the laws of a

(1) Ord. of 1639, Art. 3.

(2) De la Jannes, p. 24. (3) Louet on Brodeau. (4) Loizeau, 1. 2, c. 4. (5) Lebrun, 1. 2, c. 1, s. 4, 2, 3. (6) De La Jannes, p. 25.

foreign state, and the word foreign is used by the author not in its customary sense to distinguish between an alien and a native, (1) but precisely as it would express the relation between the laws of England and those of Lower Canada, the latter country having a code of laws distinct from, and a legislature independent of the former, although both countries form one body politic; the author is speaking of the bearing which the laws of the state of Missisippi have on those of Lousiania. The above reasoning supposes the word England to have been used in the clause of the contract contended to be void; but the actual words of that clause were that the parties submitted their matrimonial rights "to the laws, usages and customs of Great Britain": Great Britain comprehends England, Scotland and Wales, and the municipal law of Scotland is totally different from that of England, it is in fact more like the law of Canada inasmuch as communauté exists in it &c. &c. (2)

Contracts of marriage should be passed before notaries; as they must have an authentic date; but would be valid if made *sous seing privé*

The contract, which the conjuncts have made, or which the law has made for them on their default, becomes, after the celebration of the marriage, a law between the two families, which imperiously governs during the marriage, whatever change of domicile they may make, and whatever agreement they may enter into during their marriage. If these changes were allowed, it would much disturb the peace of families.

Agreements made even before the marriage if they are *contre-letters* (or agreements made in terms opposed to the contract of marriage itself,) unless made in the presence of the relations of the parties who were present at the making of the contract of marriage itself, are null. (3)

The absence of a distant relation would not affect the validity of the *contre-letters.* (3) Donations made by one of the intending conjuncts to the other, since the execution of the marriage contract, and even a few days before, are looked upon as *contre-letters.* (5)

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(1) Wilson *vs.* Wilson 2 Revue de Leg., p. 431. (2) Ib.
(3) C. P. Art. 258. (4) Poth. Com. No. 16. (5) Ib. No, 14.

A party who contracts a second marriage, cannot dispose by marriage contract in favor of his second wife of any portion of the *conquêts* of the first community, or of a greater portion of the *acquêts* than that accruing to a child taking the smallest share. (1)

CIVIL EFFECTS OF MARRIAGE.

Some of the effects of marriage arise from natural law, others from the civil law.

One of the effects which the civil law gives to marriage, (differing from the law of England,) is the legitimation of children born before the marriage of their parents, and even although one of the parties may have contracted a marriage in the interval between the birth of the child and the marriage of the parents. The attempts of the Bishops of England to introduce the rules of the civil law with regard to legitimation, and the celebrated reply of the Lords, form the celebrated Statute of Merton; "Etrogaverunt omne episcopi magnates consentirent quid nati ante matrimonium essent legitimi sicut illi qui nati sunt post matrimonium, quantum at successionem hæreditariam, que ecclesia tales habet pro legitimis. Et omnes comites et barones una voce responderunt quod nolunt leges Angliæ mutari quæ hujusque usitatæ sunt et approbatæ." (2)

The offspring of an adulterous intercourse cannot be rendered legitimate. The marriage from which legitimation can be derived must be capable of producing all the civil effects of a marriage. There are certain marriages, which, although they are null, are yet, on account of their having been contracted in good faith, and in ignorance of the impediment which rendered them unlawful, are so far favored, that the issue are legitimate. A marriage of this description, or, as it is termed, a putative marriage, will not have the effect of legitimating children previously born. The legitimation is to be determined by the law of the democile of origin, notwithstanding there might have been another democile acquired by the parents, or by their offspring before the marriage. From the very nature of this status, there seems great

(1) Keith vs. Bigelow, 2 L. C. R., p. 175.
(2) Burge Col. Laws, p. 110.

propriety in considering it to have been conferred at the time of the birth, and therefore to have been derived from the law of the country in which the parents were domiciled. The consequences of this status are generally so exclusively confined to the person himself and his family, that the law of the domicile of origin may be adopted, without that prejudice to the interests of other persons which would result from its adoption in deciding on the status of majority. (1)

The husband has the absolute direction of the person of his wife, and from thence our laws have established that the wife can do nothing without the authorization of the husband, and that the husband has the enjoyment and administration of the property of the wife, upon the condition of his supporting the family expenses, (2) whether community exists between them or not. So that all the agreements and dispositions made by a married woman, to take effect during her life, are null, if they are not authorized by the husband given in express terms, or if they are not authorized by the Judge with a full knowledge of the facts upon the refusal of the husband; (3) and it is a question whether subsequent authorization of the husband can ratify them so as to have effect, from the day of the ratification, (4) or whether the deed is void from the beginning and therefore unsusceptible of ratification. (5) If a husband who is a minor authorize his wife who is of age, and be relieved from his authorization, the annulling of the authorization will occasion the nullity of the obligation entered into by the wife. (6)

The need of the authorization by the husband, is such, that contracts passed without it cannot be pleaded even by way of exception against the husband, (7) or against the wife after the death of her husband, or against her heirs, if the wife do not vivify it after the death of her husband, either by making a new obligation or tacitly by executing it.

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(1) Burge Col. Law, p. 97. (2) 1 Domat l. 1 c. 9. § 5. (3) 2 De La Jannes, p. 15, C.P. Art. 234. (4) 2 De La Jannes, p. 14. [5) Dict; de Droit, verbo Ratification. (6) Arret of 22nd June, 1674. (7 C. P. Art. 223.

There are nevertheless some cases in which the wife may validly contract without the authorization of the husband, viz: when a wife has the separate enjoyment of her property, (1) either by virtue of her marriage contract or by a judgment of a competent court, in this case she can contract without the authorization of her husband, as far as respects the administration of her property and the disposal of her revenues. 2nd. When the wife is *marchande publique*, that is, carries on a business not that of her husband, she is deemed to have his implied, and is not required to obtain the express authorization of her husband, in matters connected with that business. (2) 3rd. When the husband is civilly dead, and has thus lost his conjugal authority. 4th. When the wife has obliged herself to get her husband out of prison. (3) 5th. When she contracts with her husband in those cases allowed by law as the *don mutuel* (mutual gift); his being a counter-party to the contract is a sufficient authorization.

The husband, in the absence of any contrary covenant in the contract of marriage, has the enjoyment of all the property of his wife, as well of that which she had before the marriage, as that which she acquires under whatever title during the marriage, unless the grantor has given them upon the express condition that they shall not be under the control of the husband; he has therefore the right to all the fruits and revenues, ordinary as well as extraordinary.

Although the husband has the unlimited enjoyment of the property of his wife, he cannot nevertheless, sell this right, or his creditors could not have the same sold, because it belongs to him in his sole quality of husband, (4) and only as long as the marriage exists, and for the purpose of supporting the family. Such right on the part of the husband is confined to the administration of the property and the perception of its revenues, but he cannot alienate and hypothecate, or otherwise incumber it, without her consent. (5)

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(1) C. P. Art. 234. (2) C. P. Art. 234. (3) Pothier, "Puissance du Mari," p. 469. (4) Domat, 1 t. 9 Art. 3. (5) C. P. Art. 226.

If the property of the wife be sold by the husband without her consent. and she revendicate it, she can only do so for the one-half, unless she renounce to the community or at least give up all she has received from it; otherwise she will be held for one-half of the guarantee, which is a liability of the community, and this liability consists in the obligation to maintain the purchaser in possession of the property. It is evident that she cannot evict him whom she is bound to maintain in possession, but she may return the purchase money. If the wife were in possession of *conquêts* hypothecated in favor of the purchaser of the property revendicated, the action could not be maintained by the wife even if she renounced the community, unless she consented to abandon the said *conquêts* for the benefit of the purchaser, (1). For if proprietor of hypothecated property, she owes a guarantee to the purchaser of the property in question.

Necessary alienations may be regarded as administrative acts; they are, notwithstanding, not permitted to be made by the husband, although he be administrator, (2) because the wife's interest is to watch over the property and see if she cannot prevent these alienations; it is upon this that the custom of Paris (3) decides that the husband cannot alone demand nor prevent the licitation of the *propres* of his wife. Generally speaking, the husband cannot institute immoveable actions relative to her property, unless the wife be a party to the suit; and an action cannot be instituted against the husband only; but the husband and wife must be summoned. (4)

It is otherwise with regard to actions for moveables and possessory demands; (5) the latter concern the enjoyment which belongs to the husband, and the former have moveables for their object.

The husband alone cannot accept nor renounce the successions which the wife has inherited, unless such inheritances were by the contract of marriage covenanted to be in common.

The husband is bound to perform all the necessary acts of administration; he may lease the property of his wife; and as he

(1) 2 De la Jannes, 20. (2) Ferriere, Com. on C. P., Art. 226 & 233. (3) Art. 226. (4) 2 De la Jannes 21. (5) C. P. Art. 233.

does so in the quality not only of usufructuary, but of administrator, the wife is obliged to maintain such lease after the dissolution of the marriage, provided it be made in good faith, and for no more than nine years. (1)

The husband is bound to watch over the interests of his wife, interrupt the course of prescription against her, cause declarations *en hypothéque* to be made, have the donations made to the wife duly enregistered, have the necessary repairs made to her propres, in short, manage the property carefully and in good faith, and with the same zeal and attention as a good father, (*en bon pere de famille,*) would manage property which he intended to transmit in the best condition to his children. It results from these duties that the husband is liable for any losses or disadvantage that may have been occasioned through any neglect of them.

Separation as to property can be obtained by the wife, if it appear that her property is in course of dissipation by the misconduct, injudiciousness, or even misfortune of the husband.

Separation as to body and habitation is obtained on the ground of the cruel treatment of one of the conjuncts by the other; slight altercations between the parties are not sufficient to found a demand.

The wife demanding a separation either of property or person, must obtain the authority of the Judge to sue her husband. In the latter case the Judge will assign her a residence apart from her husband, (usually with some old and discreet person) during the pendency of the suit; and if she have not a sufficient income, a certain sum will be allowed her by the Judge proportioned to the means of her husband.

Neither the separation as to property, nor the separation as to habitation, wholly take the wife out of the power of the husband, nor give her the right to alienate or encumber her immoveables without his express authorization, unless it be for debts within the bounds of a simple administration, because the wife separated may, without the authority of her husband, perform all acts of administration concerning her property, enjoy her propres, and collect the revenues of them. (2)

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(1) C. P. Art. 227. (2) De La James, 68.

The law of the domicile of the parties (in the absence of a contract of marriage) will govern the estate of the conjunct, (1) so that between parties married in England, and who were domiciled there at the time of the marriage, and who afterwards become residents in Lower Canada, no community of property exists. This doctrine is also held by the Scottish courts. (2)

It has been decided in the Superior Court at Quebec, that a wife, *séparée quand aux biens*, (separated as to property) by her contract of marriage, may sue for the preservation of her personal estate, without the assistance or authority of her husband; (3) but I have heard the soundness of this decision questioned.

COMMUNITY.

There exists between man and wife, a community of property as to the moveables belonging to each of them at the time of the marriage, and as to such as they may acquire during the marriage. That community also comprehends such immoveables as the conjuncts acquire during the marriage, otherwise than by inheritance, direct or collateral, or by donation from a relation in direct line with the donee. It comprehends, also, the fruits and revenues of such immoveable property belonging to the conjuncts as does not fall into the community. (3)

Community exists by law unless there be a marriage contract, executed before the marriage, which expressly stipulates that there shall be no community. The words of the custom are, "Man and wife, joined in matrimony, are common in all moveables and *conquêts* immoveables made during their said marriage. "And the community commences from the day of the solemniza-"tion of the marriage."

Community will be presumed to exist in the country where the parties have been married, unless the contrary is proved. This is important as the rule of law, is, that all matrimonial conventions must be governed by the law of the place where the

(1) McTavish *vs.* Pyke, S. C. Mont. (2) 1 Burge Col. Law, 623. This subject is fully discussed in the 6th chapter of Story, "Conflict of Laws." (3) Cary vs. Ryland & Gore, opposants. L. C. R., p. 132.

party was domiciled at the time of the marriage and cannot be effected by a subsequent change of domicile Hence, parties married in England and afterwards adopting a domicile in this country are not subject to the *communauté de biens*. In the case of Brodie against Cowan decided in the Superior Court for the district of Montreal in April, 1852, the court in delivering its Judgment is reported to have said: "The declaration set out that the first marriage was contracted in Scotland, and that by the laws of that country a community was created between the parties; that the Plaintiff's father had rendered no account of that community after the death of his wife; that he had removed to Canada, and contracted a second marriage with the defendant; that afterwards he died, leaving her in possession of his estate, and that she was by law bound to render an account. In this case the difficulty arose from the absence of any proof of the nature of the Scotch law. The defendant had declared it to be different from ours but had not proved it. In such a case, the universal law, was, that the foreign law must be taken to be the same as our own. The Plaintiff's right to recover must therefore be determined by the law of Lower Canada. This gave her the right to demand the account which she sought."

Moveables or immoveables granted unconditionally to one of the conjuncts during marriage, by collaterals or strangers, fall into the community without any restriction and must consequently be divided upon the dissolution of the community. To obviate this, it should be stipulated in the marriage contract, that all that shall devolve to one of the conjuncts during marriage, by inheritance, donation or otherwise, shall be and shall remain the property of the party to whom it shall have so devolved. From what we have above said, it appears that the moveables which the conjuncts have atthetime of the marriage fall into, that is, form part of the community; while, on the contrary, the immoveables, which they then have, do not. Again, the moveables they acquire during the marriage do fall into the community; while, of the immoveables which they acquire during that time, some do not fall into the community and some do: those they acquire by direct or collateral inheritance, or by donation in direct line, do not fall

into the community: those which are acquired in any other manner do. Such are the enactments by the *coutume de Paris*, in cases where contracts of marriage do not covenant otherwise; but, parties about to be married are not obliged to adhere to these enactments, but may make such dispositions, in that respect, as they may think fit; for marriage is highly favored by the laws, and a marriage contract is, even in a greater degree, than other contracts, susceptible of every covenant which is not contrary to law and morality. "Les contrats de mariage sont susceptibles de toutes les clauses et conventions qui ne sont contraires ni a la loi ni aux bonnes mœurs." Although by the *coutume* all moveables belonging to the conjuncts at the time of their marriage, fall into the community, they may nevertheless stipulate by their contract of marriage, that a part of the moveable effects which do belong to them shall be *propre* (*propres immeubles*) to them, that is, shall not fall into the community, so that at its dissolution the property shall not be divided between the deceased conjunct and the representative of the other, but shall belong to the conjunct whose property it was at the time of the marriage, or the heirs of such conjunct. It may be stipulated that no community shall exist or that either party may have a limited right in the community. And it may, on the other hand, be stipulated that the immoveables belonging to either of the conjuncts shall be considered as moveables and this is called *ameublissement* or mobilizing. The effect of such a clause is that any immoveable so mobilized forms part of the community; and that the husband can dispose of such immoveables in the same manner as the actual moveables of the community.

The donation by an *ascendant* of one of the conjuncts, to such conjunct, in a marriage contract, of an immoveable, destined to enter into the community, is an *ameublissement* within the meaning of the law, such *ameublissement* has no effect except as regards the community, and between the conjuncts themselves. The immoveable preserves its quality of *propre* up to the time of *partage*, (or division of property on the dissolution of the *communauté*.) One of the conjuncts being dead, and the child born of the marriage afterwards dying without issue and before *partage*, the *ameublis-*

sement has no longer any effect, and the collateral heirs of the *conjunct*, in whose favor it was stipulated, can claim no rights in such immoveables. (1)

Arrears of rents of immoveables are moveables and form part the community.

The products of quarries and mines opened before the marriage, are regarded as the revenues of the property and fall into the community; but they are excluded from the community if the mines and quarries have been opened during the marriage. (2)

Moveables substituted during the community for some property, exclusively belonging to either conjunct, do not form part of the community. Thus the price of an estate, the exclusive property of one of the conjuncts, sold during the community, although it remains a moveable of that conjunct, is, as regards the community, immoveable and excluded from it. (3) A sum of money, which, upon the division of a succession consisting only of immoveable property, may be due to one of the conjuncts *pour retour* to make his share equal to the share of his co-heirs, is an immoveable, because it is substituted for his right in that which was immoveable. (4)

The husband although he be master of the community, and, as such, may dispose of it as he thinks fit, provided he do it without the fraudulent intention of diminishing or expending the share of the community to which the wife, or her heirs, will become entitled to at its dissolution, cannot make a universal donation of moveables belonging to the community. He cannot, by his will, dispose of the half share of the community to which his wife, if she survive him, or her heirs if he survive her, will be entitled to at the time of his decease; nor can he give the property of the community to the children of his former marriage, nor to a concubine; nor to his illegitimate children. He is the master of the property of the community, but can only dispose of it with due regard to its interests.

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(1) Charlebois vs. Hedley. L. C. R., p. 213.

(2) Pothier, "Communauté," No. 97. (3) Ib. No. 99. (4) Ib. No. 100.

If community exist, the husband is personally bound for the payment of the personal debts incurred by his wife as well before as during their marriage; and can be sued for the same during their marriage; and the wife is likewise bound, after the death of her husband, to pay half of the personal debts created by him as well during his marriage as previous thereto, and this to the extent of the benefit she derives from the community; (1) unless there be a marriage contract containing certain precautionary covenants of which we are about to speak.

This precaution consists in the stipulation that the conjuncts shall pay their separate debts contracted before the marriage. It is necessary that an Inventory (2) of the property of the wife be made at the same time, otherwise this stipulation will not protect either conjunct against the creditor of the other. If such Inventory be made, and the husband be sued for debts contracted by the wife before marriage, in that case, if the debts of the wife exceed the value of the moveables which she brought into the community, the husband is discharged by producing the Inventory, and abandoning the property of the wife to her creditors, to be by them sold, and the proceeds distributed among them. If the moveables have been sold or have ceased to exist, the husband is bound to pay their value, and if they be not sufficient to pay the wife's debts, her creditors have their recourse against her immoveable property. If the value of the inventorized property have been estimated at the making of the inventory, the husband must pay the value therein mentioned. The creditors of the wife, who became such previous to the marriage, having no just claim upon the husband, can, in such a case, seize only the inventorized property of the wife, as she has but a contingent right in the community, and her claims cannot be established but at its dissolution.

The Inventory must be made in good faith; and the estimate of the value of the property of the wife must not be under its real worth. If the Inventory be fraudulent, it will be considered as invalid and inefficient.

A devize by the husband of the share of the *communauté* belonging to his wife, under a condition to pay her a life-rent, is

(1) C. P. Art. 221 and 228. (2) C. P. Art. 222.

valid, if she accept of the condition annexed to such devize. (1)

The husband being the chief of the community, his creditors may seize all the property belonging to it, for the payment of his debts; although part of that property was brought to the community by the wife; but the wife by virtue of the article of the *coutume*, and having had an Inventory made, may make her demand in separation as to property from her husband and oppose the sale of the moveables which she has so brought, and which have been entered into the Inventory, and demand distraction thereof; and her moveables in that case will not be liable for the payment of her husband's debts. If the very same moveables are not to be found in the community, either from having perished or having been alienated, she cannot take, in their stead, other moveables of the community, but her husband is bound to indemnify her.

As there are certain immoveables which do not enter into the community, debts due for the purchase of such immoveables, *propres de la communauté* can be recovered from the conjunct only who owes them; and such conjunct becomes debtor to the community, if the amount of the debts be paid by it.

The *communaute* enjoys the benefit of the issues and profits of the *propres* on either side, and consequently is bound to pay and discharge the *rentes* with which they are burthened during its continuance. (Guard vs. Lemiéux, Quebec, 1810.)

No married woman can become security for her husband, or incur any liability whatever on his behalf, otherwise than as *commune en biens* with him, for any debt, contract or obligation which may have been contracted or entered into by her husband before their marriage, or during its continuance. (2)

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(1) Roy vs. Gagnon, 3 L. C. R., p. 45.

(2) Registry Ordnance, § 36.

DISSOLUTION OF THE COMMUNITY.

The community is dissolved by the death of one of the conjuncts or by the judgment of separation as to property duly executed or by a judgment of separation as to person, which latter carries with it separation as to property.

The widow after the death of her husband may renounce the community, and by so doing will avoid all liability with respect to the debts due by the community at the time of her husband's death, provided she make a good and faithful inventory of the property of the community. (1) The wife who has joined in any obligation with her husband as *commune en biens* may nevertheless be bound as regards such obligation, for the article of the *coutume* which exempts the wife renouncing the community from paying the debts of the community, refers only to debts contracted by the husband as head of the community but she has recourse against the representatives of the husband. The liberty to renounce extends to the heirs and other represent tatives of the wife, if the community be dissolved by her death The renunciation must be made bydeed before notaries, and duly enregistered. If the parties have been separated by a judgment of the court, it has been held (2) that that judgment cannot be set aside by a mere notarial act. The judgment which is in these words show the reasons upon which it is founded.*

"The said respondent having, in pursuance of the said judgment, (of separation de biens) and for the purpose of carrying it into execution, duly renounced to the said community which existed between her and her husband the appellant, the same could not be legally re-established but by an authentic act or agreement by and between the said parties, passed before notaries to that effect, homologated by the said court which had pronounced the said *separation de biens*, and made public by the due enregistration thereof in the *Greffe* of the tribunal, where such sentence had been pronounced, and considering that no such

(1) C. P. Art. 237. (2) Court of Appeals, Bender Appellant, and Jacobs Respondent, 1 Revue de Leg. 326.

* Sir James Stuart, the President of that Court, and acknowledged to be the first lawyer in Lower Canada, dissented from that judgment.

act or agreement re-establishing the said community was made and entered into by and between the said appellant and respondent, and that the right of the said respondent, to cause the said judgment of *separation de biens* to be duly executed, could only be barred by a lapse of thirty years, the said judgment could not be invalidated or annulled by the effect of the aforesaid deed of transaction."

A married woman can claim the value of an immoveable property, sold upon the representatives of her husband, such property having been given to her during the community, notwithstanding the clause of *ameublissement* in the contract of marriage provided there is a stipulation in the contract of marriage that the wife may renounce the community, and take back whatever she brought to it, and notwithstanding that the contract of marriage executed previously to the coming in force of the registry ordinance was never registered, the claim of the wife in such case, being rather in the nature of *a right of property* than in the nature of an hypothecary right. (1)

The wife who renounces cannot profit by the community, nor can she recover that which she put into it, or that has devolved upon her by succession of moveables, donation, or otherwise; unless the marriage contract contains the clause that in renouncing she will resume, without deduction, all that which she have brought or put into the community; and without this clause, unless she be a minor, she cannot resume the property; (2) for a minor may obtain relief from the omission of such a clause.

The favor in which contracts of marriage are held, permit this stipulation, although it be contrary to the rules of a partnership as the wife may take part in the community if it be profitable, and resume her own, if the partnership have been unprosperous; and this right of *reprise*, resumption, should be stipulated not only in favor of the wife but of her heirs and other representatives if she do not survive her husband; for this right of resumption is founded solely upon the agreement of the parties and being contrary to the common law of this country must be limited to persons in whose favor the stipulation is made, hence

(1) Labreque vs. Boucher, 1 L. C. R., 47. (2) Com. on Art. 237.

the wife and children are included in the stipulation but not the collateral heirs.

The wife who has abandoned her husband, or has been convicted of adultery has no share in the community.

The courts have a right to declare that a married woman has forfeited her matrimonial rights, in an action of *separation de corps et de biens*, by reason of the adultery of the wife. (1)

Upon the dissolution of the community, by the death of one of the conjuncts, the property belonging to it is equally divided between the survivor of the one part, and the representatives of the deceased of the other part. The debts due by the conjuncts during their marriage must be paid out of the funds of the community. The funeral expenses of the deceased are paid by his representatives. The wife is seized *ipso jure* of one-half the debts due to the community; and she may therefore demand one-half of each of them. She also becomes the debtor of one-half the amountdue by the community; but, as we have seen, she may avoid the obligation of paying these debts by renouncing, and even if she accept it, she is only held for one-half of the debts to the extent of her half-share of the community. It must, however, be observed, that she cannot exercise this privilege of renunciation, or of limited liability, unless she have made a good and faithful Inventory of the property of the community.

The creditor who has a mortgage upon any part of the *conquēts* which has devolved to the wife, has his recourse against her individually as the holder of the property hypothecated; but in such a case, the wife who has paid the debt, has her recourse against the representatives of the husband for the one-half.

The wife may at any time renounce the community, as long as she has not acted as *commune*, but until she renounces she may be sued by the creditors of the community for the debts due by it. The law gives her delay, namely, three months to make an inventory and forty days to deliberate, which forty days however begin to run from the completion of the inventory, if it be completed

(1) 3 L. C. R., p. 418.

sooner than in three months. If the wife sued by a creditor of the community before the expiration of these delays, chooses, she may, by a dilatory exception, obtain from the court a stay of proceedings until their expiration, upon which expiration, the Plaintiff creditor may force her to declare her option. Should she neglect to do either, she will be deemed to be *commune;* nevertheless, she may renounce at any time during the suit, because such renunciation can do no positive injury to the creditors.

When the wife accepts the community the division is made thus:—

If, by the contract of marriage, part only of the moveables of one of the conjuncts have entered into the community, the surplus is a *propre* to such conjunct.

After the deduction of all such sums and other moveables as would have formed part of the community, had they not been excluded by special covenant, (which are technically called *propres de communauté,*) the debts are paid, and if the dissolution of the community have been occasioned by the death of one of the conjuncts, the residue is divided equally between the survivor and the heirs or other representatives of the deceased; if the dissolution have been occasioned by a judgment of separation of person, or of separation of both person and property, the residue is divided equally between the conjuncts.

The wife, if the community be dissolved by the death of the husband, re-enters into the possession and administration of her immoveable property. If any immoveable of either of the conjuncts, have been sold during the marriage, or some of the *rentes* (*foncieres or constituées*) with which any immoveable of such conjunct was encumbered, have been paid off out of the funds of the community, that conjunct to whom such sold immoveable belonged, or his representative will be re-imbursed the amount of the sum produced by the sale, with interest from the day of the dissolution; and on the contrary, the conjunct whose *rentes* were so paid off, or his or her representatives will be bound to re-imburse to the community the sum borrowed from it for such purpose.

When the property of one of the conjuncts has been alienated, during the marriage, subject to a life annuity, the indemity is only

for the amount which the annuity has yielded, for the community has been benefitted by the alienation to that extent only. (1)

The husband owes the wife the re-imbursement not only of that which he has received for her alienated *propres;* but even for any loss she has sustained through his negligence. If, for example, he has allowed sums of money due to his wife upon the alienation of her *propres*, to be lost by prescription, or has neglected to enforce payment from a debtor who has subsequently become insolvent; he must also indemnify her for deteriorations to her property caused by his want of proper attention, a liability which arises from his office of administrator. The re-imbursement for the alienated *propres* of the husband are only due by the community; (2) but the wife has her recourse against the individual property of the husband, when the property of the community is not sufficient, this also follows from the husband's liability as administrator.

If one conjunct, out of the funds of the community, erect or repair any building upon, or otherwise improve any of his or her *propre*, or pay any debt to which the *propre* was subject, he must indemnify the community after its dissolution.

If the improvements made on the *propre* of the conjunct cost more that the increased value of the property, the compensation will be made for the improved value only, but if the property was increased in value much more than the actual cost of the improvement, the compensation will only be for the amount expended.

The indemnity is due even if the buildings should be subsequently burnt down or destroyed. Simple repairs required to keep the property in good order are paid by the community.

The husband and wife are incapable of deriving from each other by donation, *inter vivos*, any advantage, directly or indirectly, unless it be by such mutual or reciprocal donation as the law permits, and which will be presently stated. This prohibition extends not merely to simple donations, but also to those which are mutual, unless they are made in strict conformity with the conditions under which they are permitted. From the general terms of

(1) 1 De la Jannes, p. 86. (2) 2 De la Jannes, p. 87.

the 279th Art. of the coutume, it may be stated, that every disposition or act, whatever be its form or character, or however it may be disguised by the introduction of a nominal donor or donee, is, if either conjunct derive an advantage from it, null and void. An acknowledgment by the one that he or she has received from the other, more than the former did actually receive, or a release by the one of the other, is therefore void. The incapacity, induced by this prohibition, continues, notwithstanding the separation of the husband and wife, unless that separation be the effect of a sentence declaring the marriage null. No title can be acquired under such a donation. (1) One conjunct cannot give to a child of the other, by a former marriage, as such donation would be considered as a circuitous method of making a donation to such other conjunct. (2.)

Mutual donations are, however, permitted under certain restrictions. (3) Both the conjuncts must be in good health at the time the donation is made. The construction given by Duplessis to the expression *étanten santé*, in which Pothier concurs, is, that the donation is null, if it be made when the conjunct is laboring under a dangerous illness, although it does not ultimately end in death. The conjunct must have been married under a community of goods. This donation cannot be made if there be children of the marriage, or if either conjunct has a child by a preceding marriage. No other property than moveables and the immoveable *conquèts* of the conjuncts can be included in this donation. It enures to the survivor, and is enjoyed only for the life of such survivor, who must give sufficient security to restore it, and until the security has been given, the donee is not entitled to enjoy it. (4) There must be no such disparity in health or age, as to render the probability of survivorship considerably unequal. It must be irrevocable, and any reservation inconsistent with its irrevocability, renders the donation void. (5) The gift being made to the survivor of the two conjuncts, it takes effect on the death of the one who first dies. The donee is not seized of it, but must demand it from the heirs of the deceased. (6)

(1) 1 Burge, p. 389 and seq. (2) C. P. Art. 283. (3) C. P. Art. 280. (4) C. P. Art. 285. (5) 1 Burge 400. (6) C.P. Art. 284.

The deed of donation should be enregistered within four months. Any gift *inter vivos* of goods and chattels, made either before or since the passing of the Registry Ordinance, is sufficiently registered or *insinuée*, provided the same be registered in the Registry Office of the Registration Division in which the lands and tenements thereby given are situate; and if there be goods and chattels only, in the Registration Division in which the donor is a resident at the time of the execution of the deed. If the lands given be situated in two Registration Divisions, the deed must be enregistered in both, if it be enregistered but in one, it will affect the lands only, which are situate in that division. (1)

If the conjuncts have made a mutual donation, the property which is the subject of the gift is charged with the expenses of the funeral of the deceased, and with the share or moiety of the debts which were due by the community, or by the conjunct to the community. If the gift does not consist of the entire share of the conjunct in the community, the liability of the survivor for the debts is proportioned to the amount of the gift. (2)

SECOND MARRIAGES.

By second marriages, whether it be that of the husband or of the wife, is understood every marriage which is not the first; and whatever number of marriages there may have been, they are all comprehended under this name of second marriages, with respect to that one of the conjuncts who has been married before. (3)

A parent, on his second marriage, in some particulars is denied certain privileges which he would otherwise enjoy.

The protection of the children is somewhat secured by the restrictions to which the parent is subject, in the disposition of his property on a second marriage. Those restrictions, which are borrowed from the Civil Law, were imposed by the edict of Francis II., July 1560, and the 279th article of the Custom.

The husband or wife who has a child, or the issue of a deceased child, or children by a former marriage, cannot, on a second marriage, make a disposition of moveables or immoveable property in

(1) 14 and 15 Vic., c. 93, § 4. (2) C. P. Art. 286. 1 Burge, p. 401
(3) Domat l. 3 t. 4, § 1.

favor of the person whom he or she may marry, exceeding the least share of any of the children. If it exceed that share it is subject to reduction. In making this reduction, the number of children is computed at the time, not of the second marriage, but of the death of the deceased. The prohibition extends to every species of donation made by the person so re-marrying to the person whom he or she is about to marry. (1) The share to which the donation or advantage is reduced, is the least to which any one of the children is entitled. Thus, if a widow, having children of a former marriage, marries again, and by her contract of marriage makes a donation to her new husband, and, by her will, makes her children universal legatees, with the exception of one by the first marriage, to whom she leaves only his legitime, (2) the donation, if it exceed the legitime—which is the least share either of the children takes—is subject to be reduced to the amount of such *legitime.* Although the edict of 1560 was introduced for the protection of the children of the first marriage, yet the reduction of the donation operates equally for the benefit of those of the second. The excess which is the subject of reduction becomes distributable amongst the children of both marriages. (3)

Legitime is the one half of such part and portion as each child would have had in the succession of his father and mother, grandfather and grandmother, or other ascendants, dying intestate, if the said father and mother or other ascendants had not disposed of the same by donation, *inter vivos.* (4)

The provision of the Edict by which the party marrying a second time, is bound to reserve the property for the children, formerly subjected the wife to a species of fidei commissary substitution in their favor, which took effect on her death; but since the enactment of our Provincial Statuie, 41 George III, c. 4, (which removed all restrictions with respect to the persons to whom property might be bequeathed,) it would seem that the conjunct, so remarrying and having children of a former marriage, may, although still restricted from advantaging the new conjunct by a contract of marriage, effect the same object by will, provided, of

(1) 1 Duplessis p. 533. (2) Burge p. 403. (3) Poth. Mar. No. 567. 1 Burge 403. (4) C. P. Art. 298.

course, that the other conjunct survives the conjunct so re-marrying. So entirely does the law contemplate the interest of the children, that the deceased husband cannot release his widow from the restriction as to advantages by the contract of marrriage. The *coutume* has made an important addition to the latter provision of the edict. 1st. It prohibits any disposition, by the wife to the second husband, of the *conquèts* of her preceding marriage, to the prejudice of the children of that marriage; and, 2ndly, it prohibits her from making such a disposition to any other person. Her disposition to a second husband of a *conquèt* is null *in toto*, and not merely as to the share which the child would have taken therein. The children of the second, as well as of the first marriage, can set it aside; but the disposition made by the wife in favor of any other person is void only in respect of the shares of the children of the first marriage. Thus, if the wife had two children by the first, and three by a second marriage, the disposition in the latter case would be void only for two-fifths, and would be valid as to the other three-fifths. (1) Althongh the article of the *coutume* speaks only of the wife, it has been decided that the restriction on the disposition of the *conquets* in favor of a second husband applies to the husband who may take another wife. (2)

DIVORCE.

In the earliest age of the monarchy of France, it seems divorces *à vinculo* were permitted. But that kingdom adopted the prevailing opinion of the Roman Catholic Church, that the marriage was indissoluble, and admitted only a divorce a *mensa et thoro*, or as it is called *la separation d'habitation*. This species of divorce is granted at the instance of the wife, when the husband has falsely accused her of a capital crime, or has treated her cruelly, not only by offering her personal violence, or withholding from her the necessary means of subsistence, but by habitually treating her before the visitors of the house, the domestics, and children with contempt. (3)

(1) Poth. Mar. No. 641. 1 Burge 405. (2) Ib. p. 406. (3) 1 Burge, p. 644.

The wife cannot obtain a divorce for adultery committed by the husband, although the adultery of the wife affords a ground on which the husband might obtain a divorce from her. This separation can only be effected by judicial sentence. The parties cannot by any act or agreement between themselves, or by any admission of the facts on which the separation can be awarded withdraw from the Judge the full and entire cognizance of, and adjudication on them. The law not only discountenances frivolous causes of separation, but endeavors, by the procedure to which it subjects the application for a separation, to prevent its being obtained by consent or collusion. Our Provincial Legislature exercising similar rights to those of its great prototypes in the mother country, has granted divorces, *a vinculo matrimonii*, in cases of adultery.

DOWER.

Dower is of two kinds, customary and conventional.

Customary Dower is that which the law, in the absence of a conventional dower, assigns; and consists of one-half of the immoveable property which the husband had at the time of the marriage, and of one-half of which devolves upon him by lineal inheritance during the marriage (1). And upon which immoveables the dower and the right of the dower may not have been released or barred during the continuance of the marriage, (2) A married woman may not only join in the alienation of property subject to her dower, but she may also release her dower on any land which her husband may mortgage (3).

If any stipulated sum, or any specified real property or *rente*, or, in short, any property differing in nature or quantity from that assigned by a customary dower, be covenanted by the parties about to be married, this is called *douaire prefix*, or conventional dower.

The parties to the marriage contract may stipulate there shall be no dower, either customary or conventional.

Doubts having arisen as to the effect of the words "legal and customary dower," used in the Registry Ordinance, (4) it was subsequently enacted (5) that the words "legal and customary dower"

(1) Poth. Mar. No. 517, and seq. (2) 4 Vic. c. 30, § 37. (3) 16 Vic. c. 206. (4) 4 Vic. c. 30. (5) 8 Vic. c. 27.

should be deemed to include not only legal and customary dower, but stipulated (*prefix*) or conventional dower.

Wherever the property of which the customary dower would consist, is covenanted by the contract of marriage as dower, such dower is called customary and conventional dower. Such covenant, however, would be superfluous, as the law grants the customary dower, unless it be expressly excluded in the contract of marriage. Upon the death of the husband, the wife, if she survive, or the children if she do not, become entitled tothe dower. In the former case, the wife enjoys the property during her life, time only, after which it devolves upon the representations of her husband

The conventional dower is paid out of the husband's assets only and not out of the property of the community. (1)

Dower does not attach on estates held by the husband, subject to a substitution which is to take effect after his death, because it is not in his power to charge such an estate; but if the party who created the substitution were the father or mother of the husband, and there be no other property, the dower would attach. (2) It attaches on property subrogated for that which was originally subject to dower, and accessions to it. (3) If the husband's property in the estate, terminates from a cause which preceded his marriage, the wife cannot claim her dower; she can derive no title when the husband himself had none.

An estate subject to dower, if it be sold by the husband, without the wife's consent, continues liable to her claim, into whatever hands it may have passed. (4)

If the conjuncts have entered into a *don mutuel*, the wife who has a conventional dower, will have, after the death of the husband, the usufruct of all the moveables and *conquêts* of the community, and takes her dower upon the other property of the husband. (5) This althongh enacted by the article of the *coutume*, is deducible from the principle above-mentioned, that the dower is independent of the community.

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(1) C. P. Art. 260. (2) Pothier, Dower No. 69. 1 Burge 383. (3) Ib. (4) Poth. Dower No. 84. 1 Burge 384. (5) C. P. Art. 263.

The stipulation of the *ameublissement* causes the real property by fiction of law, to be a moveable; the wife is thus excluded from a right of dower upon the property thus mobilised. (1)

The wife who has covenanted a conventional dower, by her contract of marriage, cannot afterwards claim the customary dower, unless permission be expressly granted by the contract of marriage itself. (2)

The predecease only of the husband will give the wife a right to the conventional dower, unless the stipulation to the contrary, and the renunciation to the dispositions of the *coutume* be most expressly made and formally stated in the contract of marriage. (3)

The *acquet*, the price of which has been paid by the community, does not cease to be subject to customary dower, and the wife is not bound to pay the costs of the ameliorations made on the immoveable by the community. (4)

The children are the *quasi* proprietors of the dower; but they cannot become the real proprietors of it unless they survive their father, that they renounce to his succession, and that they return to it all they have received from him. The children who thus acquire the dower, take it free from any debts or mortgage created by their father since his marriage with their deceased mother; the property is, however, bound for the payment of any debts created before the marriage by the father. (5) The dower is equally divided among the children. If one of the children renounce the succession, his share of it does not go to the other children.

The child who claims dower cannot be the heir of his father; he must renounce his succession. (6) This rule is founded on the principle, that one of several heirs shall not derive an advantage from which the others are excluded, and on the incompatibility, if there be only one heir, of his uniting in himself the character of a creditor, in respect of his dower, with that of a debtor as heir. This rule prevails, as between him and the co-heirs, even although

(1) Toussaint vs. Leblanc. 1 L. C. R. p. 25.

(2) C. P. Art. 261. (3) Mercier vs. Blanchet, and Bignell vs. Henderson, 1 R. de L. p. 122. (4) Martigny appellants, and Archambault opposants, 2 R. de L. p. 211. (5) C. P. Art. 250. (6) C. P. Art. 251.

they should have accepted the succession under the benefit of Inventory, that is, so as to be liable to the creditors to the extent only of the property of the estate, which estate is specified in an Inventory; but as against the creditors, he may claim his dower in preference to them. (1)

A child cannot claim his dower, and also retain a gift which has been made to him by the father, for such a gift is deemed in advance of the share which the child will inherit from his father's successor. (2) Any declaration on the part of the parent, exempting the child from returning it, will, as against the co-heirs and creditors, whose demands were prior to the donation, be nugatory and void. (3)

The customary dower of the children of a second marriage is one-fourth of the immoveables possessed by the father at the time of his first marriage and subject to dower, also one half of his share of the *conquets* of the first marriage, and one half of the property acquired by him between the dissolution of the first and the solemnization of the second marriage, and one half of the immoveables which came to him in the direct line during his second marriage, or in the interval between the dissolution of the first and the solemnization of the second. (4) If the community existing between the father and his children, by the first marriage, have not been closed, then, in that case, the children of the second marriage would, instead of one half, be entitled to but one fourth of the property acquired by their father, during the time he was a widower, for the half of the property acquired by him during that time belongs to the children of the first marriage, as has been explained in a previous chapter.

If the children of the first marriage should die before their father, and during his second marriage, the widow and the children of the second marriage have no greater dower than if the former survived their father. So that by the death of the children of the first marriage, the dower of the wife and children is not in any way increased; the same rule applies to subsequent marriages. (5)

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(1) Poth. Dower, No. 351 and seq. 1 Burge 389 (2) C. P. Art. 252. (3) Poth. Dower, No. 355. 1 Burge 389. (4) C. P. Art. 253. (5) C. P. Art. 254.

CONTINUATION OF THE COMMUNITY.

The continued community is nothing else than a penalty imposed upon the survivor of one of the conjuncts, by the Custom of Paris, for his neglect to make an inventory upon the death of the deceased conjunct.

There can be no continued community in the following cases: —1st. When by the contract of marriage an exclusion of community was stipulated. 2nd. When a judgment of separation has been obtained. 3rd. When by the contract of marriage a stated sum is granted to the wife in lieu of a share in the community. 4th. When the children, heirs of their mother deceased, have renounced to the community; for in all these cases the heirs of the deceased cannot complain of the survivor's neglect to make an inventory.

If one of the conjuncts die and leave one or more minor children issue of his or her marriage with the survivor, and the latter omit to make an Inventory of the community, the Custom of Paris (1) allows the children to demand a continuation of the community. If the deceased conjunct have left children by a former marriage, they have, through the children of the second marriage, a part in the continuation as they had in the community, in the quality of heirs of the deceased conjunct.

It is sufficient that there should be one minor child to enable those in majority to demand and participate in this continuation; who have thus, by means of the minor, that which they could not have in their own right. (2)

According to some authors if the minor were to renounce his right to the continued community, this would not affect those who were of age, because they could not be deprived of their vested right, (3) but it is now held that those who were of age, and the children of a subsequent marriage can participate in the continuation, only in the event of the continuation being demanded (4) by the minor.

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(1) C. P. Art. 240. (2) C. P. Art. 241.

(3) Renusson p. 3 c. 2 No. 2. (4) Duplessis Com. l. 3 c. 5. (5) C. P. Art. 243.

To prevent this continuation of the community, the survivor must make a true and faithful Inventory, after having given notice to those of the children who are of age, (1) and to the tutor or curator of those who are minors, to be present at the making thereof; and this Inventory must be completed within three months, (2) and closed in three months after its completion. The closing is made by an affidavit before a Judge by the survivor, that he has not omitted entering in the Inventory any of the effects of the community. If the Inventory be not closed within the latter three months, the continuation of the community ceases upon the day in which the Inventory is subsequently closed, not upon the day it is completed; but when the Inventory is made within the three months from the death of the conjunct, and closed within the proper time, there is no continuation of community.

The continued community can be dissolved in the same manner as the continuation may be prevented. It cannot be dissolved by a mere expression of will, there must be an Inventory duly made and closed, if there be any minor children; but if they were all of age, a division of the property properly made and authenticated, (3) or a written consent that the community be dissolved (4) would suffice. If the Inventory be not closed according to the formalities required by law, the survivor cannot take advantage of the defect, but the minors may.

The dissolution may be demanded by the children of the deceased conjunct, or by the minor only.

The continued community is also dissolved by the natural or civil death of the survivor, or by the death of all the children without heirs.; but the death of one of them does not dissolve it as in some other partnerships; because the children form only one head in this partnership; the portion belonging to those who die accrues to the others, because the law gives the liberty of asking the continuation jointly; the survivor therefore does not succeed to his children dying during the continuation as regards the property depending upon it.

(1) C. P. Art. 240. (2) Poth. Com. No. 813.
(3) De la Jannes, p. 93. (4) Lebrun. Com. l. 3 c. 352, Poth. Com. 815.

The dissolution of the continued community, by the execution of an Inventory, does not prevent a community to exist between the conjuncts themselves, unless an exclusion of community be stipulated by the contract of marriage.

The community continued between the surviving conjunct and the children is composed of all the moveables belonging to the first community, and those which the survivor acquires during the continuation, and of those immovables acquired by the survivor, (otherwise than indirect line or by inheritance in the collateral line,) as well as of the revenues of the immovables belonging to the deceased, as well as of the *conquêts* of the community. These *conquêts* cannot be alienated by the survivor, but are the property of the children of the marriage.

It is otherwise with the children, the fruits and revenues of the property they have acquired from the deceased, and their moveables only, enter into the community; but that which they have otherwise received and all which they acquire, under whatever title during the continuation, do not enter into the community, neither do the revenues arising therefrom, (1.) even if they had acquired the same with monies received from the continuation, unless they had acquired the same in the name and on the account of the continued partnership.

The charges upon the continuation are:—

1st. The moveable debts of the first community, in which are included the indemnity due to the representatives of the deceased conjoint and the *préciput* of the survivor.

2d. The arrears of constituted *rentes* whether they be due by the first commnnity, or if they were due seperately by either of the conjoints, which become payable during the continuation.

3rd. All the debts which the survivor contracts during the continuation, provided, nevertheless, that they can be presumed to have been contracted for the affairs of the continued community; because the survivor is not the master, as the husband is of the community, but is only the administrator. Hence it follows that the combined commuuity, is not chargeable with the debts or penalties arising from any criminal act committed by the survivor,

(1) Poth. Com. 829.

with those which he has contracted from motives of pure liberality, or which he has incurred from the mal-administration of affairs in which he has been employed as agent, or with the guarantie which he owes to any one to whom he has sold any of the *propres* of his children.

The continued community is not responsible for the debts contracted by any of the children, as they cannot bind it, and have not the administration of it. If the survivor have paid the funeral expenses of the deceased, and the legacies by him made, the children must indemnify him, because these are the private debts of the deceased.

Exclusive of the debts, the continued community is also charged with the expense of the maintenance of the survivor and the children; but those who have not lived at the expense of the partnership, cannot demand any indemnity,

The survivor is the chief of the continued community, and may dispose of all the property belonging to it, provided it be not gratuitously. If the survivor re-marry, (1.) the community continues between the three parties; that is, the children collectively have one share, and the husband and wife each one share, and this is (2) called the *tri-partite* community; and in that case the husband becomes the head of the community, and he may dispose of the effects of the continued community as he thinks fit, as far as the wife is concerned; but the children on the contrary must be indemnified for any property given away by him. (3)

If both parties had minor children of a preceding marriage, and each is in a state of continued community with them, the aggregate of these two continued communities will be carried on for the interest of four parties, viz: the two conjuncts, and the two batches of children, each of these parties having an interest of one fourth.

The moveables which by the first marriage contract have been stipulated *propres*, in favor of the survivor, do not form part of the *tri-partite* community; but are held in common by the husband and wife; neither do the moveables stipulated *propres* on behalf of the deceased conjunct enter into the continued community, as

(1) Poth. Com. No. 853. (2) Poth. Com. 907. (3) Ib. No. 929.

they only mingled with the funds of the original community, subject to their resumption by the children of the deceased with the survivor. The *conquêts* also of the continuation, acquired by the survivor in the interval between the death of the deceased and the subsequent marriage, do not enter it as they are in common between the survivor and the children of the former marriage; (1) but the revenues of all the *conquêts* do unless they were mobilised by the first contract of marriage. No property which does not form part of the first or the continued community, can enter into the *tri-partite*. The *conquêts* immovables which the second wife mobilises by the second contract of marriage, form part of it, because they enter into the two communities as the survivor acquires them for the community existing between himself and the children. (2) The revenues of all the property which the wife has or may have; and all the property which the survivor acquires since the socond marriage, and which enter into the two communities, form part of the *tri-partite* community, as well as all the moveables which the survivor is or becomes possessed of.

If a child having a share in the continued community, dies leaving children, they would represent the parent and have the same interest in the continued community.

The marriage of the children during the continuation does not dissolve the community; and if a donation be made to them, they will be obliged to account for it when the division is made; if the property given was more than the share coming to the children, the surplus will be charged to the survivor, because he had no right to give what did not belong to him.

The children, whether they be minors or of age, who have part in the continuation, may either accept it or refuse it, and abide by the community in the state in which it was upon the death of the deceased parent; they have, in that case, the right to verify the quantity, amount and quality of the property, as well by titles as by witnesses, and by common report; they even have, if the mother be the parent deceased, the right to renounce the first community.

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(1) Poth. Com. No. 910. (2) Ib.

The children must either accept or renounce the continued community as a whole; they cannot even accept it as it stood on the day of the subsequent marriage, and renounce it as it was afterwards, because it is regarded as but one partnership.

The effect of the renunciation, by the children, of the continuation, is to give them an action against the survivor to render them an account of the first community; but they cannot lay claim to any part in the property acquired by the survivor after the death of the deceased; they are not, on the other hand, responsible for debts contracted by the survivor since that time.

When the children accept the continued community, they must, when it is divided, return to the mass of the partnership, all the property which they have received from it. The monies paid them are compensated by the amount due to them as far as their share goes.

The survivor must account to the children for any *propres* belonging to the deceased or to the children which may have been sold during the continuation, as well as any moveables belonging to the children which the survivor may have alienated.

The division is made with the same formalities as on the dissolution of the community.

When some of the children accept, and others renounce, the continuation of the community, the share of those who renounce does not accrue to the others. So that, when there are three children, of whom one renounces and two accept, as the survivor had three-sixths in the community, against each of them one-sixth, the part of the survivor in the partnership which exists between him and the two children accepting, must be as three is to two; he must then have three-fifths, and the two who accept, each one-fifth.

The amount due to the child who so renounces, for his portion of the property of the deceased conjunct, is a debt of the continued community, to the payment of which, the survivor and those who accept, contribute each according to the amount of their interest.

The debts due by the *tri-partite* community are payable by the three parties composing it; but the second wife cannot be held

to pay more than she has benefitted by the community, the surplus must be paid by the husband and the children of the first marriage. If the wife be the surviving party, and be in continued community with her children and her husband, the wife and children are not bound to pay more than they benefit by the community, the husband, as head of the community, is bound for the surplus.

As regards the creditors, however, the parties composing the *tri-partite* community are responsible each for a third of the debts; except the holder of a property hypothecated by the head of community, for the holder is hypothecarily bound for the whole.