THE SCOPE AND INTERPRETATION OF THE CIVIL CODE OF LOWER CANADA.

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OF THE

CIVIL CODE OF LOWER CANADA

BY

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PREFACE

I have found it difficult to choose a title which was not misleading.

This book is in no sense a commentary on the Code or on any part of it.

It has two aims in view. First to explain the scope of the Code, and second, to give the main rules applied in its interpretation.

In the earlier part of the book I have attempted to describe the various elements which compose our law, and to show in a simple manner, and with much illustration, what is meant by the "civil law of the Province of Quebec", and what branches of our law are not included under that designation.

For this purpose it seemed necessary to begin with a short account of the law before codification, and in this part of the work I have discussed with some fulness the two most disputed questions of our legal history, viz; the effect of King George's Proclamation, and General Murray's Ordinances, and the authority of the French ordinances in Canada.

In this Province it is of peculiar importance to make an analysis of the elements which compose the law.

Owing to our political situation there are certain initial difficulties for the lawyer or the student of law which do not present themselves in countries such as France or England.

We belong to the British Empire, and are governed as to some matters by principles of constitutional law of general application throughout the Empire, and as to other matters by imperial statutes.

We are in the habit of saying that our public law is English, and I have tried to explain what the term "public law" comprises when used in this connection.

We have a federal constitution, and legislative powers

are divided between the Parliament of Canada and the Legislature of the Province.

Nor is our provincial law itself derived wholly from the civil law of France.

Parts of it are of English origin, and one important part of it, viz; the commercial law, cannot be reckoned as purely English or as purely French.

In some classes of cases it is usual to cite English and French authorities side by side, while in others it is better to keep the stream of our civil law pure, and, if the English cases are cited at all, to realize that they belong to a foreign system, and can at best be useful merely as analogies.

I have endeavoured to indicate on what subjects it is usual and proper to refer to English and American authorities.

As regards the distribution of legislative powers between the Dominion and the Province several excellent works exist.

It seemed, however, convenient to give here a brief outline of that subject, and references to the most important cases.

In the latter part of the book I have essayed to formulate the chief rules of interpretation applicable to our Civil Code, and to answer the question what is, under our system, the authority allowed to cases decided by our courts, and to French or English precedents.

When the Code, is unambiguous, there is high authority for saying that it is, as a statute, to be construed according to the principles applicable to the interpretation of all statutes, but, very often, it is not free from ambiguity, and, when this is the case, I have tried to show that there are features peculiar to the Civil Code of which account has to be taken in order to arrive at a sound interpretation of its provisions.

F. P. WALTON.

McGill University,
Jan. 1st. 1907.

CONTENTS

TABLE OF CONTENTS

PART I.

CHAPTER I.

THE CIVIL CODE AND ITS HISTORY.

CHAPTER II.

THE LAW OUTSIDE THE CIVIL CODE.

PART II.

THE INTERPRETATION OF THE CIVIL CODE.

CHAPTER III.

Rules of Interpretation.

LIST OF ABBREVIATIONS

A. C.	Appeal Cases (English Law Reports).
A. R. (ONT.)	Appeal Reports, Ontario.
AUBRY ET RAU	Cours de Droit Civil.
B. N. A. ACT	British North America Act.
B. AND S.	Best and Smith's Reports.
C. B. N. S.	Common Bench, New Series (English).
C. C.	Civil Code of Lower Canada.
C. C. P.	Code of Civil Procedure of the Province of Quebec.
C. P. R.	Canadian Pacific Railway Company.
CAN. S. C. R.	Supreme Court Reports of Canada.
CAN. CRIM. CASES	Canadian Criminal Cases.
CART.	Cartwright's Cases on the B. N. A. Act (Toronto).
CASS.	Cour de Cassation.
CH. D.	Chancery Division (English Law Reports).
CLARK'S H. OF L. CASES.	Clark's House of Lords Reports.
COM. REP.	Reports of the Commissioners for the Codification of the Laws of Lower Canada relating to Civil Matters.
D. P.	Dalloz Périodique (French Reports).
D. or DALL. REP.	Dalloz, Répertoire.
DOR. Q. B.	Dorion's Queen's Bench Reports.
DOUG.	Douglas' Reports (English).
ENG. REP.	"The English Reports."
EX.	Exchequer Reports (Canada).
G. T. R.	Grand Trunk Railway Company.
HAGG. CON.	Haggard's Consistorial Reports (English).
L. C. J.	Lower Canada Jurist.
L. C. R.	Lower Canada Reports.
L. N.	Legal News.

L. R. E. AND I. APP...	Law Reports English and Irish Appeals.
L. R. P. C.....	" " Privy Council Appeals.
L. R. P. D.....	" " Probate Division (English).
L. T.....	Law Times (English).
MIGNAULT	Droit Civil Canadien.
M. L. R. Q. B.....	Montreal Law Reports, Queen's Bench.
M. L. R. S. C.....	" " " Superior Court.
O. L. R.....	Ontario Law Reports.
ONT. REP. OR O. R....	Ontario Reports.
PLANIOL, TRAITÉ ÉLÉM.	Traité Elémentaire de Droit Civil (French).
PROV. OF CAN.	Province of Canada.
PUGS.	Pugsley's Reports.
QUE.	Province of Quebec.
Q. L. R.....	Quebec Law Reports.
R. L.....	Revue Légale.
R. R.....	Revised Reports (English).
R. S. C.....	Revised Statutes of Canada.
R. S. Q.....	" " " Quebec.
R. DE J.....	Revue de Jurisprudence.
R. J. Q. K. B.....	Rapports Judiciaires de Québec, King's Bench.
R. J. Q. Q. B.....	Rapports Judiciaires de Québec, Queen's Bench.
R. J. Q. S. C.....	Rapports Judiciaires de Québec, Superior Court.
U. S. R.....	United States Reports.

CASES CITED

THE SCOPE AND INTERPRETATION

OF THE

CIVIL CODE OF LOWER CANADA

PART I

THE SCOPE OF THE CIVIL CODE

CHAPTER I

THE CIVIL CODE AND ITS HISTORY

French law before the Cession.

The civil code includes the main body of the law as to "property and civil rights," i.e. the law which falls within the competence of the Provincial Legislature.

It came into force on 1st August, 1866.[1]

Under the French *régime* the Custom of Paris had been in force in the Province.

Custom of Paris.

By the *Edit de Création du Conseil Supérieur de Québec* of 1663, the Council was directed to judge *selon les lois et ordonnances de notre royaume, et y procéder autant qu'il se pourra, en la forme et manière qui se pratique et se garde dans le ressort de notre cour de parlement de Paris.*[2]

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1 Proclamation of Governor-General, Lord Monck, of 26th May, 1866, see *Sharp's Civil Code*, p. xix.

2 See Edits et Ordonnances (reprinted by Government) Quebec, 1854, vol. 1 p. 37. See Consol. Stat. Low. Can. chap. 2, preamble; *Durocher* v. *Degré*, 1901, R. J. Q., 20 S. C. at p. 510 (C. R.); *Exchange Bank* v. *The Queen*, 11 A. C. at p. 164; *Lareau, E.*, Histoire du Droit Canadien, vol. 1 p. 138, (Montreal, 1888).

And in the commission appointing Jacques Duchesneau as intendant in 1675, he is directed to see that the *Conseil Supérieur* and all inferior courts decide cases "*conformément à nos édits et ordonnances, et à la coutume de notre bonne ville, prévôté et vicomté de Paris.*" [1]

French ordinances.

Besides the Custom of Paris, the *Lois et Ordonnances* which, prior to 1663, had modified or supplemented the Custom, were in force in Quebec.

But the *Ordonnances* prior to Louis XIV. had not, on the whole, made many important changes in the private law.

The earliest of what came to be called the *Grandes Ordonnances* was the *Ordonnance* of 1667 on Civil Procedure.

It was followed by a number of other important ordinances, dealing with particular branches of law, each of them, codifying, so to speak, the law of that branch.

I need not enumerate them, but I may mention the *Ordonnance sur le commerce* of 1673, that of 1681 *sur la marine*, that of 1731 *sur les donations*, that of 1735 *sur les testaments*, and that of 1747 *sur les substitutions*.[2]

Were the ordinances later than 1663 in force in Quebec? This is a question about which there has been much discussion. But I think it may be regarded as settled by the authorities cited immediately, that only such of these ordinances formed part of our law as had been registered by the Superior Council of Quebec.

In addition to the Ordinances published in France, and afterwards registered here, the law of the Province was altered by *arrêts et règlements* of the Superior Council of Quebec itself and by ordinances of the governors and of the intendants of Canada.[3]

1 Edits et Ordonnances, v. 3 p. 42.

2 See for a list of the chief ordinances and their subjects, *Esmein*, Histoire du Droit Français, 3rd. ed. pp. 774 seq.; *Brissaud*, Manuel d'Histoire du Droit Français, v. 1 p. 374.

3 Both the French ordinances registered in Canada, and our own are collected in Edits et Ordonnances, above referred to.

It is on the following principle that it has been held that those only of the French Ordinances which were registered at Quebec became law here.

In France it was a settled point that a royal ordinance did not become operative within the jurisdiction of anyone of the several *parlements* into which France was divided for administrative and judicial purposes, until it had been registered by that *parlement*.[1]

The government of Canada was modelled on that of a French province.

The Superior Council of Quebec, exercising as it did, powers both administrative and judicial, corresponded, so far as conditions permitted, to one of the French *parlements*. And in other French colonies where there was a *conseil souverain*, French ordinances required registration.[2]

By the *Ordonnance sur la procédure civile* of 1667, Louis XIV. directed that the several *parlements* should have eight days, or, in the case of the more distant *parlements* six weeks, in which to make such remonstrances or representations as they saw fit before being required to register an *ordonnance*.

We find the Council of Quebec remonstrating that in their case, looking to the great distance from Paris, this delay is insufficient, and asking that they should have a year's delay before being called upon to register an ordinance.[3]

Again, in 1746, Louis XV. expressly directs the Council of Quebec only to register ordinances specially addressed to it by the Secretary of State for the Marine.

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1 *Guy Coquille*, Institution, p. 7; *Esmein*, op. cit. p. 521; *Merlin*, Rép. s. v. Enregistrement des lois, p. 50; *Dalloz*, Rép. s. v. Lois, n. 27; *Glasson*, Histoire du Droit et des Institutions de la France, v. 8 p. 157.

2 *Merlin*, Rep. s. v. Colonie, s. 1 iv.; *Dall.*, Rép. s. v. Organisation des Colonies, n. 67.

3 See Edits et Ordonnances, v. 1 p. 108.

This was to prevent Canada adopting laws which had been passed for France only, and were unsuitable for the colony.[1]

The Commissioners who prepared the Civil Code of Lower Canada, speaking of the most important of all the great ordinances of Louis XIV., the ordinance commonly called *le Code de la Marine*, say "The Ordinance seems never to have been formally registered by the Superior Council, and hence it is generally held not to have the force of law in this province."[2]

And non-registration of an ordinance has in many cases decided by our courts been treated as a sufficient reason for holding that it is not in force in the Province.

In two cases this has been the ground of judgment adopted by the Privy Council, though, it is fair to say that the question does not seem to have been fully argued by counsel.[3]

Perhaps the strongest reason which has been urged against the soundness of this conclusion is that in early cases it is not uncommon to find ordinances which had not

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1 Lettre du Roi, 9 déc. 1746, Edits et Ordonnances, v. 1 p. 588, and ib. v. 2 p. 224.

2 Rep. v. 3, p. 226.

3 *Symes* v. *Cuvillier*, 1880, 5 A. C. 138, following *Hutchison* v. *Gillespie*, 1844, 4 *Moore*, P. C. 378. See *Les Sœurs Dames Hospitalières* v. *Middlemiss*, 1878, 3 A. C. at p. 1119.

See, also, *Jones* v. *Cuthbert*, 1885, M.L.R. 2 Q.B. at p. 52; (C.A.); *Lamarche* v. *Brunelle*, 1893, R. J. Q. 3 Q. B. *considérant* at p. 85, and per *Bossé, J.* at p. 79; *Stewart & Molson's Bank* v. *Simpson*, 1894, R. J. Q. 4 Q. B. at p. 30, per *Taschereau, J.* and authorities there cited. *Hurdman* v. *Thompson*, 1895, R. J. Q. 4 Q. B. at p. 443, per *Blanchet, J.*, *Provincial Fisheries, In re*, 1896, 26 Can. S. C. R. at p. 549, per *Girouard, J.*; *Delpit* v. *Côté*, 1901, R. J. Q. 20 S. C. at p. 354, per *Archibald, J.* See, however, for the contrary view, *Larcau*, Histoire du Droit Canadien, v. 1 p. 120; *Lemieux*, Les Origines du Droit Canadien, p. 279; and cf. *Mignault, P. B.* in *Revue Légale*, N. S. v. 6 p. 172.

been registered here, referred to without any statement that they are not in force in Canada.

But this is not unnatural when we remember that the great ordinances are to a large extent declaratory.

They codify the old law.

Consequently they often lay down law which is good, or was good, for Canada as well as for France, though its validity in Canada does not depend on the statutory force of the ordinance.

In modern cases such references to an ordinance are not uncommon, though the court is generally careful to deny it any formal validity.[1]

Among the ordinances which were not registered in Canada I may mention the ordinances of commerce, of donations, of testaments, the ordinance of substitutions, and the ordinance *de la Marine.*

The index to our collection of Edits et Ordonnances gives opposite each of those which were registered the date of its "insinuation" in the books of the Council of Quebec.

To sum up what has been said, our law prior to the Cession consisted 1. of the *Coutume de Paris,* and the ordinances in force within the jurisdiction of Paris prior to 1663, unless they were clearly not intended to have effect outside France; 2. of the *Arrêts du Conseil du Roi,* and the ordinances published between 1663 and 1763 which had been registered by the Council of Quebec ; 3. of the ordinances of the administrative authorities in Canada, especially those of the Intendants, and 4. of the judgments of the courts.

All this body of law, except the *Coutume,* is collected in the volumes of Edits et Ordonnances and in the five volumes of *Jugements et Délibérations du Conseil Souverain de la Nouvelle-France* also published under the auspices of the Provincial Legislature of Quebec, 1885-1889. These two

1 See e. g. *Les Sœurs Dames Hospitalières* v. *Middlemiss,* 1878, 3 A.C. at p. 1118.

compilations are a most valuable source of information as to the condition of Canada under the French régime.

It may be said that the Arrêts and Ordonnances touch the private law very little, except with regard to procedure. They consist largely of grants of various kinds to individuals or to companies, and of what we may call police regulations, many of them of a curiously minute kind, and such as would now be regarded as extremely vexatious.

E. g. in 1709 the inhabitants of Montreal are prohibited by the Intendant Raudot from keeping more than two horses or mares and one foal apiece, in order to encourage them to raise more cattle and sheep, and on the ground that the people do not know their own true interests.[1]

During the century of French rule the private law of the Province of Quebec was, practically, the Custom of Paris, interpreted with the aid of the old French Commentators on that *Coutume*, and on the *Droit Coutumier* in general

Effects of the Cession.

The conquest of Canada by the English in 1763, did not carry with it any change as to the main body of the civil law. It is an important principle of English law that when a country is brought under allegiance to the British crown this does not involve a change in the law of property and civil rights.

The law of the conquered country continues in force, so far as private rights are concerned, until it is altered by the new authority. The effect of the cession of Canada from France to England was to leave the private law of the Province unchanged but to substitute the public law of England for that of France.[2]

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1 Edits et Ordonnances, v. 2 p. 273.

2 See *Campbell* v. *Hall*, 1774, 1 Cowper 204, 20 State Trials, 304. *Ruding* v. *Smith*, 1821, 2 Hagg. Con. Rep. at p. 382; *Durocher* v. *Degré*, 1901, R. J. Q. 20 S. C. at p. 475, per *Lemieux, J.*; *Stuart* v *Bowman*, 1853, 3 L. C. R. 309, (C. A.); *Wilcox* v. *Wilcox*, 1857, 8 L. C. R. 34 (C. A.). See infra p. 26.

But if the French law was not abrogated by the Cession, was it abrogated afterwards by the new authority?

Was the French Law abrogated after the Cession?

This is one of the most disputed questions in the history of Canada, and though it is impossible to discuss it adequately in this place, it may not be uninteresting to state the main points in controversy.

I will give in full the clause upon the construction of which the question turns.

The King's Proclamation.

It occurs in the Proclamation of 1763 published after the Treaty of Paris, and is preceded by a narrative in which the King sets out that Great Britain has acquired under the Treaty extensive territories in America.

These new acquisitions are to be divided into four distinct governments to be called by the names of Quebec, East Florida, West Florida and Grenada, the boundaries of which are defined by the Proclamation.

Then follows the critical clause which is in these terms : "And whereas it will greatly contribute to the speedy settling our said new Governments, that our loving subjects should be informed of our paternal care for the security of the liberty and properties of those who are, and shall become inhabitants thereof; we have thought fit to publish and declare, by this our proclamation, that we have in the letters patent under our Great Seal of Great Britain, by which the said Governments are constituted, given express power and direction to our governors of our said colonies respectively, that so soon as the state and circumstances of the said colonies will admit thereof, they shall with the advice and consent of the members of our Council, summon and call general assemblies within the said governments respectively, in such manner and form as is used and directed in those colonies and provinces in America which are under our immediate government; and we have also given power to the said governors, with the consent of our said councils, and the

representatives of the people, so to be summoned as aforesaid, to make, constitute, and ordain laws, statutes, and ordinances for the public peace, welfare, and good government of our said colonies, and of the people and inhabitants thereof, as near as may be, agreeable to the laws of England, and under such regulations and restrictions as are used in other colonies; and in the meantime, and until such assemblies can be called as aforesaid, all persons inhabiting in or resorting to our said colonies may confide in our Royal protection for the enjoyment of the benefit of the laws of our realm of England; for which purpose we have given power under our great seal to the governors of our said colonies respectively, to erect and constitute, with the advice of our said councils respectively, courts of judicature and public justice within our said colonies for the hearing and determining of all causes, as well criminal as civil, according to law and equity, and, as near as may be, agreeable to the laws of England, with liberty to all persons, who may think themselves aggrieved by the sentence of such courts, in all civil cases, to appeal under the usual limitations and restrictions, to us, in our Privy Council."[1]

Murray's Commission.

The Commission appointing James Murray, Esquire, as the first Governor of Quebec is dated 21st November, 1763.[2]

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1 The Proclamation is given in the volume cited as "Public Acts, volume O, 1759-1790" (Quebec, 1800). This volume contains "A collection of the Acts passed in the Parliament of Great Britain, and of other Public Acts relative to Canada." In the same volume are generally bound "The Ordinances by the Governor and Legislative Council of the Province of Quebec" (Quebec, 1795). The clause above is at page 28.

The Proclamation is also reprinted with useful notes in *Houston, W.* Constitutional Documents of Canada (Toronto, 1891), p. 67.

2 It is printed in the "Collection of Commissions and other Public Instruments" by *Francis Masères* (London, 1772). Masères was appointed Attorney-General of Quebec in 1766. General Murray's commission is given (somewhat abridged) by Mr. Houston in his collection at p. 74.

The Commission empowers the governor to establish courts "for the hearing and determining of all causes, as well criminal as civil, according to law and equity."

Nothing is said as to what system of law the new courts were to administer, and I think the draft report prepared for General Carleton and his council is clearly right in saying that the King assumed that the English law had been already introduced by the Royal Proclamation of 1763.[1] On 17th February, 1764, Murray and his council upon the same assumption, issued an ordinance erecting various courts, and directing that they should decide cases agreeably to the laws of England, and the Ordinances of the Province.[2]

Murray's Ordinances.

Upon the interpretation and effect of these documents a very pretty discussion arose, which has hardly closed yet, although the subject is now only of historical interest. Francis Masères wrote at great length, and with much ingenuity, upon the question in the "Canadian Freeholder", and there were other disputants whose opinions deserve respectful consideration.

Perhaps the most weighty argument is contained in a document entitled "A View of the Civil Government and Administration of Justice in the Province of Canada while it was subject to the Crown of France."

This paper is clearly a report by one of the high officials of that date. It contains much valuable information on the legal side of the French régime, as well as the argument on the effect of the Proclamations.

It is neither signed nor dated, but is printed as an appendix to vol. 1 of the "Lower Canada Jurist."

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1 See *infra*, p. 17.

2 Masères's Collection of Commissions, pp. 19, 17. The ordinance is given in full at p. 3. It may be found also in *Stuart* v. *Bowman*, 3 L. C. R. at p. 383.

It was formerly attributed to Masères, but is now generally thought to have been prepared by Chief-Justice Hey.[1]

As "F. G." the writer of a note in the "Jurist" observes, it was not Masères's way to hide his light under a bushel and moreover, the opinions expressed do not altogether coincide with his. Lafontaine, C. J., distinctly assigns the report to Hey, in his opinion in *Wilcox & Wilcox,* 8 L. C. R. at page 43.

The arguments of Masères and Hey, if the latter was really the author of the anonymous report, are twofold.

They contend, in the first place, that the King had no power to alter the laws of Canada by proclamation, and, in the second place, that, if he had the power, it was not validly exercised.

On the first point their contention is that such an important measure as altering the legal system of a country which had become subject to Great Britain required an Act of the British Parliament.

On the second point they urged that the Proclamation itself does not affect to change the laws, but merely to express the King's intention that the governor to be appointed shall change them in the appropriate manner.

The manner prescribed for legislation by the governor was "with the consent of our said councils and the representatives of the people" in the assemblies.

But Murray's ordinance was published without the advice of any assembly, it having soon become clear to the authorities that it would be too dangerous in Canada to call together an assembly.

They maintain, further, that the law of England could not be introduced in this wholesale way.

Before any provision of law could come into effect in Canada it would need to be published *verbatim et literatim* in

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1 M. Garneau assigns it to Masères (Histoire du Canada, v. 3 p. 309).

that country in order that the new subjects might have fair notice of the laws which they were called upon to obey.

These arguments, or some of them, have been adopted by several judges in our courts, and in one case the Court of Review by a majority decided that the English law had never been introduced. On appeal, however, the court found it unnecessary to decide this question, and expressly reserved their opinion upon it.[1]

In a subsequent case the point was much discussed by the judges, but there also, its decision does not seem to have been required for the disposal of the case.[2]

The able judgment of Sir L. H. Lafontaine, C. J., in the case of Wilcox will repay careful study.

He adopts to a large extent the arguments of Hey, C. J., in the document above referred to.

His conclusions and those of Mr. Justice Charles Mondelet, in *Stuart v. Bowman*, are accepted by the learned writer of the most recent book in which the question is discussed.[3]

But, with great respect for these opinions, I think the weight of authority on the other side is over-whelming.

I think it may be conceded that if the English law was not introduced by the Royal Proclamation of 1663, it was not introduced by Murray's ordinance.

It appears to me that Murray in no way claimed to be altering the system of laws in force in the Province by this Ordinance, and that it is unnecessary to decide whether he had the power to do so without the consent of an assembly.

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1 *Stuart* v. *Bowman*, 1851, 2 L. C. R. 369, (C. R.); 3 L. C. R. 309, (C. A.).

2 *Wilcox* v. *Wilcox*, 1857, 8 L. C. R. 34, (C. A.). The judgment of the Court of Review was reversed, and, if we add the two courts together it will be found that the judges stood three to three. See also, *Stuart* v. *Eaton*, 1857, 8 L. C. R. 113, (Short, J.).

3 *Mr. Rodolphe Lemieux, K. C.*, the present Postmaster-General for the Dominion, Les Origines du Droit Franco-Canadien, pp. 363 seq. (Montreal, 1901).

What he believed himself to be doing, and what, in my opinion he did, was to establish courts, as he could do with the advice of his council only, to administer laws already introduced by the King.[1]

Reasons for affirming abrogation

If this be so the only questions for our consideration are 1. Had the King the power to alter the law of Canada, or could this be done only by the British Parliament? and 2. If the King had the power, did he sufficiently shew his intention to exercise it in the Proclamation in question?

Now the principle that by the constitutional law of England the King in Council has the power to legislate for a colony acquired by conquest or cession, until a legislative authority has been established in the colony is a principle about as well settled as any rule of our law can be which has not been expressly affirmed by the House of Lords. It was laid down more than a century ago by Lord Mansfield, a judge of the highest eminence, delivering the unanimous opinion of the Court of King's Bench.[2]

The doctrine laid down by Lord Mansfield upon this point has been expressly approved of in many cases, including at least three cases decided by the Privy Council.

It has been accepted by text-writers of eminence for the last century, and, so far as I know, it has never been questioned in any court in England.[3]

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1 See *Smith's History of Canada*, v. 2 p. 4.

2 *Campbell* v. *Hall*, 1774, Cowper's Reports, 204, 20 *Howell's* State Trials, 304.

3 *Cameron* v. *Kyte*, 1835, 3 Knapp 332, 12 Eng. Rep. 678, (P. C.); *Jephson* v. *Riera*, 1835, 3 Knapp 130, 12 Eng. Rep. 598, and note, (P. C.); *Beaumont* v. *Barrett*, 1836, 1 Moore, P. C. 59, 12 Eng. Rep. 733; *Att.-Gen.* v. *Stewart*, 1816, 2 Merivale, 143, 16 R. R. 162, (Grant, M. R.); Chitty on Prerogatives, p. 29, (1820), Forsyth's Cases and Opinions on Constitutional Law, p. 12; *Anson, Sir W.*, Law and Custom of the Constitution, Part 2, p. 273, (1896). See also *Lyons* (Mayor of) v. *East India Co.* 1836, 1 Moore 175, 12 Eng. Rep. at p. 818, per *L. Brougham*, delivering opinion of P. C.

If further support be required for the proposition that the King without Parliament had power to alter the law, I think it may be found in the British Settlement Act of 1887 (50 & 51 Vict. c. 54). That act enables the Crown to make laws and to establish courts for British settlements in places where no civilized government exists already. But in the definition of "British settlement" is excepted "any British possession acquired by cession or conquest." The reason for the exception was that no-one doubted that as regards colonies of the class excepted the Crown already possessed the power of legislation.[1]

Baron Masères strongly disapproved of the law laid down in *Campbell and Hall*.[2]

But I think *Campbell and Hall* has survived his criticism, and that now it must be regarded as secure from attack. Much stress was laid by Mondelet, J., and by Lafontaine, C. J., on certain opinions of the law officers of the Crown in England.

Attorney-General Yorke and Solicitor-General De Grey were asked by "the Lords of the Committee for Plantation Affairs" to report upon complaints that had been made with regard to the Administration of justice in Canada. Their report is dated 14th April 1766.[3]

They apologize for having been able to give only imperfect consideration to the subject "at this busy season of the year."

Even if they had given all the consideration possible, the opinion of these gentlemen would, of course, possess no binding authority, and any weight it ever had would have been destroyed by the judgment in *Campbell and Hall*.

But, in fact, the English law-officers in no way dispute the power of the King to alter the law of Canada.

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1 *Anson*, op. cit. pp. 267, 274.

2 Vol. 2 of the Canadian Freeholder is entirely occupied with a criticism of *Campbell and Hall*.

3 The report is given in full in *Smith, Wm.*, History of Canada, v. 2 p. 27 (Quebec, 1815).

They simply advance very sensible reasons against the policy of introducing the English law bodily, and they suggest that it would be wiser to proceed more cautiously. Reliance has also been placed on an opinion submitted to the King by Mr. Solicitor-General Wedderburne on 6th December 1772, and by Mr. Attorney-General Thurlow, on 22nd January, 1773.[1]

To these opinions the same criticism is applicable. In neither of them is the abstract right of the King challenged. And Mr. Thurlow, after stating with great fairness, the arguments urged by those who shared the opinion of Masères says "I freely confess myself at a loss to comprehend the distinction whereby they find the criminal law of England introduced, and the civil laws of Canada continued by instruments which seem to establish all the laws of England, both civil and criminal at the same time, in the same sentence, and by the same form of words, if they are understood to establish any, or to relate to Quebec."[2]

The power of the King to alter the law must, I think, be admitted.

The second question whether the proclamation sufficiently declared the Royal will to introduce the English law there and then is more arguable.

But in *Att.-Gen. v. Stewart* it does not seem to have been disputed that the English law was introduced by the same proclamation in Grenada.[3]

And in *Jephson v. Riera* it was held by the Privy Council in a judgment to which Baron Parke was a party, that the English law had been introduced in Gibraltar by a charter of justice granted by the King erecting a count of judicature and

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1 The essential portions of these opinions may be found in Christie's History of Lower Canada, v. 1 p. 27 (Quebec, 1848).

2 *Christie* at p. 57.

3 2 *Merivale*, 143, 16 R. R. 162, (Grant, M. R.)

declaring that in it the laws of England should be the measure of justice between the parties.[1]

In Canada the King did not erect a court but he commissioned the Governor to do so, and the Governor executed the commission. It seems to me that this difference is immaterial. The Privy Council express the clear opinion that for such an act no special form is prescribed by law. All that is necessary is an expression of the King's will. The power given to Murray to institute courts in which the English law should be applied presupposes that the French law had been abrogated already.

A word may be said on the argument pressed especially by Hey, C. J., that the English law could not be introduced without publication in Canada.

How would such a publication have been possible?

The common law had never been published in England.

In places like Grenada and Gibraltar it has been held to have been introduced without any such publication.

It has never been published in the United States or in the numerous other countries which are governed by the common law.

And, even to-day, in the Province of Quebec, as in the Dominion generally, what may be called the common criminal law of England is in force, although not included in our Criminal Code, unless, of course, it has been repealed expressly or by reasonable implication. Of this law no publication has ever been made.[2]

According to my reading of the history what happened was this.

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1 3 *Knapp* 130, esp. at p. 153, 12 Eng. Rep. 598. See also *Beaumont* v. *Barrett* 1836, 1 *Moore* P. C. 59, esp. at p. 75, 12 Eng. Rep. 733.

2 See *Union Colliery Co.* v. *The Queen*, 1900, 31 Can. S. C. R. at p. 87, and *infra*, p. 51.

In the famous proclamation George III. believed himself to be introducing the English law into all the newly acquired territories.

No special consideration was given to the peculiar situation of Canada.

It was thought that to guarantee that the law of the new possessions should be English was the best way to induce settlers to go out to them, and, probably, it never occurred to the King's advisers that the introduction of the English law anywhere could be regarded by the inhabitants as other than beneficial.

This attitude of mind on the part of the English in Canada itself is well brought out by a passage in Mr. Thurlow's opinion, where he is discussing the view that the criminal law had been introduced. "They seem to proceed much upon the supposed superiority which they justly impute to the criminal laws of England. It is very unfit that I should speak of them to your Majesty without the utmost reverence. But I can conceive that a Canadian, blinded, perhaps, by the prejudices of different habits, may think of them in a different manner, and even set but small value on that excellent institution the trial by jury."[1]

But George III. and his advisers did not intend to enforce the actual application of the whole of the English law in countries where it might be quite unsuitable.

They introduced the English law *en principe*, and left it to the new colonies by their legislative bodies to make such modifications in the English law as might seem to them desirable.

Unfortunately the circumstances of Canada were such that it was out of the question to summon the contemplated assemblies.

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1 *Christie*, Hist. of Lower Canada, v. 1 p. 57.

This made the whole scheme unworkable.

There was no means of modifying the English law, and taking only such portions of it as were adapted to the conditions of the country.

It is true that Murray and his council soon found that it would be highly inadvisable to try to enforce some parts of the English law.

By an ordinance as early as 6th November, 1764, they enacted that the tenures of lands granted prior to the Cession, and rights of inheritance therein, should be subject to the laws and usages of Canada until 10th August, 1765, thus at one blow making a most important restriction in the application of the English law.[1]

Whether, in the circumstances, this was *intra vires*, or whether the calling of an assembly was an essential prerequisite to any legislation, though not to the establishment of courts of justice, is a question into which I do not enter.

The view that the proclamation merely expressed a pious wish that the English laws should be introduced when the assemblies met, appears to me to be excluded by the provision that "in the meantime, and until such assemblies could be called, all persons inhabiting in, or resorting to our said colonies may confide in our royal protection for the enjoyment of the benefit of the laws of our realm of England."

As is observed in the draft report prepared for Carleton's Council speaking of the proclamation of 1763:

"The British subjects in the colony understand English law to be thereby introduced and not the municipal laws of a conquered people continued. That they emigrated on this confidence.

The late Governor (i. e. Murray) so understood it, who by his ordinance of September, 1764, did not mean to overturn

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1 *Masères's* "Collection", p. 6.

all the Canada laws, but to erect courts for exercised English law supposed to be already introduced.

The Lords of Trade understood it so, for the seventh and last article of their report on 2nd September, 1765, upon Memorials complaining of the Ordinances of the Governor and Council, proposes: That in all cases where Rights or Claims are founded on events prior to the Conquest of Canada the several courts should be governed in their proceedings by the French usages and customs which have heretofore prevailed in respect to such property.

It is clear, then, that if upon events posterior to that Conquest, then the Courts are to be governed by English laws."[1]

The King had no thought of acting in an arbitrary or despotic manner.

Probably he and his advisers in no way realized that the change of law would excite much feeling. It seemed to them self-evident that to live under the law of England was an unmitigated benefit. And, at any rate, if there was anything in that law which the Canadians did not like, they would have full power to change it when the Assembly met.

The impossibility of convoking an assembly by which alone the popular sanction could have been given to the change, and such modifications made as were demanded by the feeling of the country, and the unexpected unwillingness of the French Canadians to give up the French law led to the failure of the whole scheme.

We do not need to say with Thurlow that the Canadians were "blinded by the prejudices of different habits."

They knew nothing about the English law and it would have been strange indeed if they had shared the enthusiasm

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1 I cite from the abstract of the report given by Mr. Smith, History of Lower Canada v. 2, p. 42; and see ib. p. 3. The full report is given by Masères. Collection pp. 1-49. The report was not adopted by the Council.

in regard to it which was quite natural in the law-officers of George III.

What they felt was that a foreign system of law was being thrust upon them, and that having no representatives in the Legislature to protect them, they would be obliged to endure the law of primogeniture which was probably the only rule of the English law of which they had heard much.

If this was a sample of the English law it seemed to them entirely unsuited to Canada.

Nothing is more natural therefore than their dissatisfaction at the abrogation of the old laws of Canada.

The law-officers, being consulted, were against the policy of "thorough", and were disposed to be ingenious in suggesting ways in which if the King were so advised, he might withdraw from a position which had been proved to be untenable. In the end, after much confusion and uncertainty, the proclamation, so far as affecting Quebec, and Murray's ordinances dealing with the administration of justice were revoked, and the French law was reintroduced by the "Quebec Act" of 1774.

I have dwelt at perhaps needless length on this matter, partly because it possesses for me considerable fascination and involves at least one constitutional principle of importance, and partly because I am unable to agree in the view of the subject presented by most of the recent writers.[1]

The Quebec Act, (14 George III. c. 83) provided by s. 8 "that in all matters of controversy relative to property and civil rights, resort shall be had to the laws of Canada as the rule for the decision of the same." The Quebec Act.

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1 See *Garneau*, Histoire du Canada, v. 3 p. 308; *Lareau*, Histoire du Droit Canadien, v. 2 p. 45; *Lemieux, R.*, Les Origines du Droit Franco-Canadien, pp. 363 seq. See also *Durocher* v. *Degré*, 1901, R. J. Q. 20 S. C. 510, where the Court of Review is careful not to admit the validity of the abrogation of the French law.

The body of the French civil law was, accordingly, restored. But, when, in 1791, Upper Canada was created, its first act as a separate province was to abrogate the French law within its jurisdiction and to substitute the laws of England.[1]

In the Maritime Provinces of New Brunswick, Nova Scotia and Prince Edward Island, the courts held that the French law had never been in force.

The Nova Scotia Act of 1759 declared "that this province of Nova Scotia or Acadie and the property thereof did always of right belong to the Crown of England both by priority of discovery, and ancient possession."[2]

And there, as in the other American colonies, the courts adopted the view of Blackstone and Mansfield that the colonists take all the common and statute law of England applicable to their situation and condition at the time of the settlement.[3]

In the new Canadian provinces the English law prevailed from the beginning.

So that the Province of Quebec is governed as to "property and civil rights" by a different body of law from that which prevails in the rest of Canada.

The Law of Quebec between 1763 and 1857.

During the century, roughly speaking, between 1763 and 1857, when the Act was passed which provided for the codification of the civil law of Quebec that law had undergone many changes,[4]

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1 32 Geo. iii. c. 1 (Upp. Can.).

2 33 Geo. ii.. c. 3.

3 *Uniacke* v. *Dickson*, 1848, *James'* Rep. 287 (Nova Scotia); *The Queen* v. *Porter*, 1888, 20 Nova Scotia Rep. 352. *Mansfield's* statement is in the case of *R.* v. *Vaughan*, 1769, 4 Burrow, at p. 2500. *Blackstone's* is in Comm. 1, 107.

See for illustrations, Tarring, Law Relating to the Colonies, 2nd. ed. p. 4. Cf. in U. S. A., Amer. and Eng. Encycl. of Law, v° Common Law, vol. 6 p. 286, and authorities there cited.

4 See 20 Vict. c. 20, Consol. Stat. L. C. c. 2. (preamble).

The old French law had been modified in many ways by provincial statutes.

And, as the preamble of that act narrates, it had been modified, especially in commercial cases by the practice of the courts.

Law of proof in commercial matters.

A statute passed in 1785, had provided that "in proof of all facts concerning commercial matters recourse shall be had in all the courts of civil jurisdiction in Lower Canada to the rules of evidence laid down by the laws of England." [1]

The Commercial Law.

The commerce of the country had always been mainly in the hands of the English-speaking part of the community. Their trade was almost exclusively with England, with the United States, or with the other provinces of Canada. And all of these were governed by the English mercantile law.

It was natural, therefore, that the decisions of English judges in commercial cases should come to be treated by our courts with a high degree of deference.

And this was all the more natural because examination shewed that the rules of the English law-merchant had, for the most part, nothing peculiarly English about them, but were based on the customs of merchants whether Dutch, French or English.

Our courts, therefore, found that in this branch of the law there was a great similarity between the English and the French systems.[2]

The result was that, in mercantile cases, before the Code, we had already come to have a somewhat eclectic system. The Commissioners who prepared the Code say "In a few instances the rules of the commercial law may be found in the statute book, or in the Ordinances of France, but much of it is to be sought in usage and jurisprudence."

"Our system, if system it may be called, has been borrow-

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1 25 Geo. iii. c. 2 s. 10, Consol. Stat., L. C., c. 82, s. 17.

2 See infra, p. 139.

ed without much discrimination partly from France and partly from England; it has grown up by a sort of tacit usage and recognition, without any orderly design or arrangement, and has not as yet received any well-defined or symmetrical form from the decisions of our courts."[1]

And they go on to say that it is not expedient to codify this part of the law in detail.

"Much of what has been established by usage may more safely be left to be interpreted in the like manner, and to be modified as new combinations and the experience of new wants may suggest."[2]

In this branch of law, since the Code as before it, our practice has been to refer both to French and English authorities.[3]

In this field our courts have, perhaps, more experience than those of any other country, in the application of comparative jurisprudence.

Perhaps the closest parallel is in Louisiana.[4]

In South Africa where we might have expected something similar, the old Roman-Dutch law has been found very meagre upon mercantile law, and, more particularly upon company law, with which the courts in South Africa have been much occupied.

The tendency there seems to be to follow, in this branch, English and American decisions, and to leave the Dutch law pretty much out of account.[5]

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1 Com. Rep. v. 3 p. 214.

2 ib.

3 See, e. g. *Glengoil Steamship Co.* v. *Pilkington*, 1897, 28 Can. S. C. R. 146; *Forget* v. *Ostigny*, 1893, R. J. Q. 4 Q. B. 118 (1895) A. C. 318.

4 See *Howe*, *W. W.*, Studies in the Civil Law, (Boston, 1896).

5 See *Morice*, *G. T.*, English and Roman-Dutch Law, p. 2 (London, 1903).

Codification.

Our Civil Code, then, codifies the old French law of Quebec, as modified by statutes, and also codifies, but only as to its broad principles, the commercial law of the province, which is derived from English as well as from French sources.

In the preparation of our code it was natural that the French code should be taken as the model, in spite of the numerous differences between our law and the modern French law.

Contents of Civil Code.

In arrangement and language our code follows the French code, closely, though by no means slavishly. Our Civil Code covers the law of persons, (subject, however, to what will be said later as to divorce.) the law of property, and of real rights less than property, the modes of acquisition of property, such as succession, gifts, obligations in general, and the special contracts in particular, the law of rights of security, of registration, and of prescription, and the outlines of the law of merchant shipping and of insurance. It also states the main rules of Private International Law.[1]

For the sake of distinction, it is convenient for us to call the French code by its old name the Code Napoléon, though since 1870, in France itself, that name has been superseded by the name "Code Civil".[2]

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1 Infra, p. 148.

2 This is, however, merely by custom. The title Code Napoléon has never been officially displaced by any law or decree. See *Planiol, M.*, Traité Elém., 3rd. ed. v. 1 n. 85.

CHAPTER TWO

THE LAW OUTSIDE THE CIVIL CODE.

Private Law of Province not covered by Civil Code.

It is only the law of property and civil rights which is covered by the Civil Code.

And, even of this law, certain parts are excluded from its scope.

The Municipal Law.

The Municipal Law, in the sense of the law of municipal corporations, is governed by the Municipal Code which came into effect on November 2nd, 1871,[1] by the later enactments by which that code has been modified, by the charters of those municipalities which have obtained separate charters, and by other statutes.

The Law of Civil Procedure

The law of procedure in civil matters is governed by the Code of Civil Procedure, of which a revision came into force on 1st September, 1897.

It may be remarked, incidentally, that this code does not resemble the French code of civil procedure in anything like the same degree in which our Civil Code resembles the Code Napoléon.

Our Code of Procedure has borrowed a good deal from the Code of Civil Procedure of Louisiana, and it includes remedies such as writs of injunction, mandamus and prohibition, which are of purely English origin.

The municipal law and the law of civil procedure are mat-

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1 34 Vict. c. 68 (Que.).

ters within the legislative competence of the Province, but they are not within the scope of the Civil Code.

Public Law.

But there are other branches of the law which lie outside the Civil Code, because they do not belong to the private law at all.

Private Law not within Provincial Jurisdiction.

And there are still other branches which belong to the private law, but as to which the Province has been divested of the power to legislate.

I will now attempt to enumerate these branches of law not covered by the Civil Code, and to give a few necessary explanations.

They are:

List of subjects upon which Province cannot legislate.

1. The Public Law.

2. The Criminal Law and the law regulating penitentiaries.

3. The Law of Merchant Shipping and Navigation.

4. The Law of Bills, Notes and Cheques.

5. The Law of Banks and Banking.

6. The Laws for the regulation of Trade and Commerce.

7. The Law of Patents and Copyrights.

8. The Law of Bankruptcy.

9. The Law of National Defence, of the Postal Service, and of the Census.

10. The Law of Customs, Excise and Indirect Taxes.

11. The Law of Currency, Interest, Legal Tender, and Weights and Measures.

12. The Law of Fisheries, Quarantine, Ferries not entirely within the Province, Lighthouses and Beacons.

13. The Law of Indians and Indian Reserves.

14. The Law of Naturalization.

15. The Law of Marriage and Divorce, but not the Solemnization of Marriage.

16. The Law of Insurance, in part.

17. The Law of Railways, in part.

18. The Law of Joint-Stock Companies, in part.

Of these, all except the public law, the law of insurance, the railway law, and the law of joint-stock companies are expressly assigned to the parliament of the Dominion by s. 91 of the British North America Act, 1867, which created the Confederation.

And certain powers of legislation as to insurance, railways and joint-stock companies are conveyed to the Federal Parliament by No. 2 of s. 91, under which it has the regulation of trade and commerce, and also fall under the general power of the Federal Parliament to deal with matters not assigned exclusively to the legislation of the several Provinces.

For a full explanation of the respective powers of the Parliament of Canada and of the Provincial Legislatures, I must refer to the treatises upon the Canadian Constitution.[1]

I am concerned here, merely to indicate in a broad sense the subjects which lie outside the scope of the Civil Code.

About many of these subjects nothing need be said in this place, but with regard to a few of them I propose to offer some explanation.

Public Law.

1. The Public Law.

The conquest of Canada in 1763 had the effect of substituting the public law of England for that of France.

Effects of Cession as to Private Law.

As we have seen the change of sovereignty did not necessarily involve a change in the private law.

Such matters as the rights of citizens *inter se*, in virtue of

1 See *Clement, W. H. P.*, The Law of the Canadian Constitution, (2nd. ed. Toronto, 1904); *Munro, J. E. C.*, Constitution of Canada (Cambridge, 1889); *Lefroy, A. H. F.*, Legislative Power in Canada (Toronto, 1897); *Bourinot, Sir J. G.*, Manual of the Constitutional History of Canada, (Toronto, 1901, where see the bibliography, pp. ix seq.).

the law of obligations, the personal status of individuals, the character of private property, and the limitations imposed by the law on owners of property, the power to dispose of it *inter vivos* or by will, and the disposition which the law makes of a man's estate if he dies without a will, are not necessarily governed by English law, in all parts of the British Empire.

In such matters the English law does not apply outside England and Wales unless it has been expressly introduced, or unless it was introduced without express legislation in countries occupied by settlers from England who were presumed to carry their law with them.

Within the Empire there are many systems of private law in operation. Scotland, the Channel Islands, South Africa, Ceylon, Mauritius, Trinidad, and, to a great extent many of the states in India may serve as examples of countries which still retain the private law which they had before they formed part of the British Empire.

The Province of Quebec is in the same category. In fact, the traditional policy of Britain has been to leave the private law untouched in the countries which she has acquired by cession or conquest.

I do not think any instance can be found in which the English law, as affecting private rights, has been forced upon an unwilling people.

Nor, if I am right in supposing that George III. introduced the English law into Canada, was that an exception. For the clear intention was to leave to the Legislatures which were then in contemplation a perfectly free hand to deal with the law as they pleased.

Effects of Cession as to Public Law.

The principle of "home rule" was to apply there also, though provisionally, the English law was to govern.

But, as regards the public law different considerations apply.

A change of sovereignty necessarily means a change in this part of the law.

Contents of Public Law.

For the public law is the law which regulates the rights and duties of citizens as such, and determines the powers and duties of all authorities from a parliament to a police constable.[1]

And, though this is not generally admitted, I would be disposed to include under public law the rules according to which courts decide that effect must be denied to agreements even of a private character, because they are contrary to public order and good morals.

When French sovereignty ceased in Canada, all offices dependent on that sovereignty became vacant.

Although the private law remained French, it had to be administered by courts which derived their authority from the new sovereign.

For the Crown is the supreme executive authority, and every official from the highest to the lowest exercises a power delegated by the sovereign.

A change of sovereignty, therefore, involves, as a consequence, the downfall of one official hierarchy and the setting up of another.[2]

Lord Stowell said, in a case arising out of the conquest of the Cape:

"I am perfectly aware that it is laid down generally in the authorities referred to that the laws of a conquered country remain, till altered by the new authority."[3]

Rights of Sovereign.

"But" he goes on, after noticing a point which does not concern us, "even with respect to the ancient inhabitants, no small portion of the ancient law is unavoidably superseded, by the revolution of government that has taken place.

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1 See the interesting analysis of public law in *Holland's* Jurisprudence, 9th. ed. pp. 345 seq.

2 See *Calvin's Case*, 1608, 7 *Coke's* Rep. 5 a, and 2 State Trials, 585; *Campbell* v. *Hall*, 1774, 20 State Trials, 304.

3 The "authorities referred to" are Calvin's Case and *Campbell* v. *Hall*.

"The allegiance of the subjects, and all the law that relates to it — the administration of the law in the sovereign, and appellate jurisdictions — and all the laws connected with the exercise of the sovereign authority — must undergo alterations adapted to the change."[1]

As to the rights of the sovereign a writer of high authority says: "Those fundamental rights and principles on which the King's authority rests, and which are necessary to maintain it, extend even to those of his Majesty's dominions in which the English laws do not as such prevail." [2]

And the Quebec Act in its 8th section grants to the King's Canadian subjects such rights as are there enumerated.

But they are to be such as "may consist with their allegiance to His Majesty, and subject to the Crown and Parliament of Great Britain."

The question if the French Canadians could be subjects, but subjects with a difference had indeed been suggested.

Article 41 of the Capitulation of Montreal prepared by the Marquis de Vaudreuil, had stipulated that the French and French Canadians left in Canada should never be required to take arms against France, but that the British Government should require of them only an exact neutrality.

But General Amherst would not agree to this.

His answer, curt but sufficient, was "They become subjects to the King."

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1 *Ruding* v. *Smith*, 1821, 2 Hagg, Con. Rep. at p. 382. See *Foelix*, Droit International Privé, 4th. ed. v. 1 s. 35; *Lawrence's Wheaton's* Elements of International Law, 2nd. ed. p. 896; *Halleck*, International Law, p. 831; *Baldwin* v. *Gibbon*, 1813, Stuart's Rep. 72; *Abbott* v. *Fraser*, 1874, L. R. 6 P. C. 96; esp. at p. 107; *Regina* v. *Waterous Engine Works Co.* 1893, R. J. Q. 3 K. B. at p. 233; *Delpit* v. *Côté*, 1901, R. J. Q. 20 S. C. 338, esp. at p. 389 (*Archibald, J.*); *Durocher* v. *Degré*, 1901, R. J. Q. 20 S. C. 474 (C. R.).

2 *Chitty* on Prerogatives of the Crown, p. 25. See also *Howell* on Naturalization p. 25 (Toronto and Edinburgh, 1884).

They became subjects with the same rights and the same duties as all other British subjects.

Major and minor prerogatives.

In regard to the position of the sovereign and the prerogatives of the crown we have to distinguish between rights which are properly speaking constitutional and rights of a pecuniary nature which belong to the crown.

The former group of rights belong to the public law of the Empire and since the Cession are governed by the laws of England.

The latter group belong to the private law and are regulated in this Province by the French civil law.

This distinction is expressed by old writers in dividing the prerogatives of the crown into major and minor.

The law has been thus stated "those fundamental rights and principles on which the King's authority rests, and which are necessary to maintain it, extend even to such of His Majesty's dominions as are governed by their own local and separate laws. The King would be nominally and not substantially a sovereign over such his dominions if this were not the case."[1]

Such are, according to the same writer, the right of the King to take part in legislation, his exclusive right to make war and peace and the like. And he proceeds "but in countries which though dependent on the British Crown, have different and local laws for their internal governance, as for instance the plantations or colonies, the minor prerogatives and interests of the Crown must be regulated and governed by the peculiar and established law of the place."[2]

The distinction is between constitutional rights and fiscal rights, between things which pertain to the King's dignity and regal power, and those which pertain to his revenue.

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1 *Chitty*, Prerogatives of the Crown, p. 25.

2 Ib. p. 26.

Blackstone says, quoting the distinction of the "feodal writers" that the minor prerogatives *fiscalia sunt, et ad jus fisci pertinent.*[1]

Thus in one case where the question was whether certain articles of an Edict by Louis XV. of 1743, dealing with mortmain, were still in force here, the Privy Council found that they had been abrogated by the Code.

Property rights of Crown.

But their Lordships said it was open to considerable doubt whether articles which had for their object to put fetters on the King's own power in regard to corporations could be of force after the Cession to control the will of the English Crown whose prerogative it would be to establish corporations.[2]

On the other hand in many cases the principle has been applied that the property rights of the Crown are minor prerogatives and depend on the law of the Province.

Thus the question whether the Crown has a privilege over other creditors depends on the law of Quebec.[3]

So a colonial legislature can deal with escheats which are part of the casual revenue of the Crown, and when lands are escheated in Canada they fall to the Province in which they are situated and not to the Dominion.[4]

And the Province exercises the royal right to the precious metals which belong to the King by prerogative and are not *partes soli.*[5]

And the property of the Crown in the beds of navigable and floatable rivers is vested in the Province.[6]

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1 1. 241.

2 *Abbott* v. *Fraser*, 1874, L. R. 6 P. C. 96.

3 *Exchange Bank of Canada* v. *The Queen*, 1885, 11 A. C. 157.

4 *Att. Gen. for Ont.* v. *Mercer*, 1883, 8 A. C. 767.

5 *Att. Gen. of B. C.* v. *Att. Gen. of Canada* 1888, 14 A. C. 295.

6 *In re Provincial Fisheries*, 1896, 26 Can. S. C. R. 444; (1898) A. C. 700.

Right to alienate Crown Lands.

It would appear that questions with regard to the right of the sovereign to alienate parts of the public domain, unless regulated by provincial statutes, must be answered by reference to the French and not to the English law.[1]

In regard to public lands the circumstances of the two countries are widely different.

The sale of crown lands is an important source of revenue in a country like the Province of Quebec which contains large tracts still unsettled. The sale of such lands is regulated by statute (See R. S. Q. 1262 seq.)

In France the public domain is divided into property which is not susceptible of private ownership or is destined to the use of the public, such as rivers, highroads, and fortifications, and property which although belonging to the state is alienable.

This last is called by modern writers the *domaine privé*.[2]

Our law undoubtedly recognises the same distinction.

As regards the public domain proper the French law has regarded it in principle as inalienable.

Before the sixteenth century there was some uncertainty, and portions of the royal domain were alienated by some of the kings for their own purposes. But in the sixteenth century the principle became established that the real owner of the public domain was not the King but the nation. The rights of the King were compared to those of a user or an administrator with wide powers.[3]

And in 1556 the *Ordonnance Du Moulins* gave clear expression to this principle: "*le domaine de nostre couronne ne*

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1 See per *Strong, C. J.* in re *Provincial Fisheries*, 1896, 26 Can. S. C. R. at p. 528, and per *Girouard, J.* ib. at pp. 549, 552, and see infra, p. 133.

2 *Planiol*, Traité Elém. 3rd. ed., v. 1, n. 3062.

3 *Du Moulins*, sur la Coutume de Paris, des Fiefs, art. 3, gloss 3, n. 17; *Esmein*, Hist. du Droit français, 3rd. ed. p. 336.

peut être aliéné que . . . . . pour apanage des puisnez masles de la maison de France." [1]

As to the beds of navigable or floatable rivers they have always been regarded in France as part of the public domain in the strict sense and therefore in principle inalienable.

But out of favour to commerce, the French crown, and since the fall of the monarchy, the administrative authorities have frequently made grants to mill-owners and others of such portions of rivers as were required for the erection of wharves, dams, etc. and were not necessary for navigation.

In France it is an established principle that such grants which are now called *concessions* are entirely revocable and can be taken away by the state without indemnity the moment they become injurious to the public use of the river.[2]

Beds of navigable rivers.

In our law also it is common for the Province to make grants of portions of the beds of rivers for the erection of bridges, wharves, dams, or other works, but such grants are, as in France, always subject to the reserve of the public rights of navigation.[3]

And in Canada seeing that "navigation" belongs to the Federal power, all such works must be built and maintained

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1 See *Esmein*, Histoire du Droit Français, 3rd. ed. pp. 327 seq.

2 *Block*, Dict. de L'Administration Française, 4th ed. (1898) vo. Cours d'Eau Nav. n. 15; *Simonet*, Traité Elém. de Droit Public, 3rd. ed., n. 1585; Pand. Franç. vo. Cours d'Eau n. 104 and n. 1121; *Batbie*, Traité de Droit Public v. 5, n. 363; Cass. 21 mai 1855, D. P. 55. 1. 310; *Planiol*, Traité Elém. 3rd. ed. v. 1, n. 3091.

3 See *Regina* v. *Baird*, 1854, 4 L. C. R. 331; Opin. of *La Fontaine, C. J.*, as Pres. of Seigniorial Court cited by *Girouard, J., in re Provincial Fisheries*, 26 Can. S. C. R. at p. 551. Cf. in Ont. *Queen* v. *Moss* 1896, 26 Can. S. C. R. 322. As to what rivers are "navigable and floatable" see *Lefaivre* v. *Att. Gen. of Que.*, 1905, R. J. Q. 14 K. B. 115 and cases cited. Upon this question American authority is especially valuable owing to the similarity in the geographical conditions. Ib. at p. 125 per *Hall, J.*

on plans approved of by the Governor-General in Council. (R. S. C. c. 92).

With regard to Crown property of the Dominion, e. g. the beds of public harbours, the Dominion government can dispose of it. And it has the power to dispose by statute of provincial Crown lands for the purposes of a Dominion undertaking, such as a Dominion railway, although this may interfere with public rights, e. g. a right of way over the foreshore.[1]

Constitutional Law.

Thus our constitutional and administrative law, so far as it depends upon custom is governed by the rules of law applied in like matters in England, and, so far as it has been reduced to statute, has been so reduced in statutes framed on English models.

Neither in national nor in local affairs have French governmental institutions been copied, and, in cases in which public law has to be applied, it is not usual to refer to French authorities.

The preamble to the British North America Act says: "Whereas the Provinces of Canada, Nova Scotia and New Brunswick have expressed their desire to be federally united into one Dominion under the Crown of Great Britain and Ireland, *with a constitution similar in principle to that of the United Kingdom.*"

And Würtele, J., in giving the opinion of the Court of King's Bench, said that the Lieutenant-Governor represented the sovereign, in the government of the province, as had been clearly laid down by the Privy Council,[2] and that "the executive council of a province occupies constitutionally, the

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1 *Att. Gen. for Brit. Columbia* v. *Canadian Pacific Railway Co.* [1906] A. C. 204 (P. C.).

2 *Liquidators of the Maritime Bank* v. *Receiver General of New Brunswick*, (1892) A. C. 437.

same position in the Province, as the Cabinet does in England."[1]

Control over municipal corporations.

And, in the municipal sphere, in a case where the question was whether the Superior Court had jurisdiction to declare a by-law void as unreasonable, it was held that this was a question of English law.

Ramsay, J., said "Municipal institutions, such as those we have, are derived from the English law, and our courts have the general prerogatives of English courts. These last are derived from the authority of the Sovereign and as the administration of justice is one of the greater rights of the Crown, it is governed by the public law of the empire."[2]

The greater part of our constitutional and administrative law is statutory.

Contents of Revised Statutes of Quebec.

A good idea of its range, so far as it falls under the legislative authority of the Province may be obtained from the contents of the Revised Statutes of Quebec.

We find there the Acts which define the areas into which the Province is divided for different public purposes, electoral, judicial, municipal, and for the registration of deeds; the Acts which define the Legislative Power, including the composition of the Legislature, the powers of the two houses, the rules as to the eligibility of members of the lower house, the privileges and immunities of members of both houses, and the election law, including provision for the trial of election petitions when an election is controverted; the Acts as to the Executive Power, including the rules as to the appointment and removal of public officers, the organization of the Civil Service, the different public departments and

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1 *Regina* v. *Waterous Engine Works Co.* 1893, R. J. Q. 3 Q. B. at p. 235. See *Todd, A.* Parliamentary Government in the British Colonies, 2nd. ed. p. 33; *Anson, Sir W.*, Law and Custom of the Constitution, 2nd. ed. Part. 2 p. 276.

2 *Corporation d'Arthabaska* v. *Patoine*, 1886, 4 Dor. Q. B. at p. 370 (C. A.). See infra, p. 42.

their functions, covering the law as to licenses, sale of intoxicating liquors, stamps, public lands, woods and forests, escheats, fishing and game laws, mines, agriculture, public works, arbitration and public instruction;

the Acts as to the Judicial Power, including the constitution and jurisdiction of the several courts, and the law as to Justices of the peace, jurors, coroners, court-houses and gaols;

the laws as to the police force, public health and safety, including reformatory schools, lotteries, declarations of names of printers and proprietors of newspapers, public exhibitions, public meetings, fires, boards of health and vaccination;

the law of charitable, philanthropic and provident associations, including mechanics' institutes, industrial schools, lunatic and inebriate asylums;

the laws as to religious matters, including the erection and division of parishes, the construction and repair of churches, the law of *fabriques*, protestant rectories, religious congregations, interments and disinterments, good order near churches, and sale of goods on Sunday;

the law as to the liberal professions, the bar, notaries, physicians and surgeons, chemists, dentists and land surveyors;

the law as to municipal corporations, societies and clubs, including municipal elections, markets, municipal taxes, and debts, joint-stock companies general clauses, incorporation of joint-stock companies, their powers to hold real estate and their winding-up, companies to facilitate the transmission of timber down rivers, companies for building roads or bridges, wharves or slides for timber, companies for stoning roads, railways, so far as provincial, mining companies, cooperative associations, cemetery companies, mutual fire-insurance companies of real estate proprietors in counties, municipal mutual insurance companies against fire, lightning and wind, build-

ing societies, loan and investment societies, butter and cheese societies, clubs for amusement, and fish and game clubs.

This is all exclusive of those parts of the general administrative law which were assigned to the Parliament of Canada, by s. 91 of the British North America Act. Common Law.

Notwithstanding this wealth of statutory law, constitutional questions occur which have to be solved by the application of the principles of English public law.

The general principles of constitutional government, as recognized in the United Kingdom, form an unwritten, but most important part of our public law.

Thus, e. g., the law as to what is necessary to make a valid contract with the provincial government, and the law as to votes of appropriation have, in recent years, been discussed in several cases. Contracts with Government.

In one of them the Provincial Secretary had written to a printer, and ordered for the government fifty thousand copies of a treatise on silos.

The treatise was printed, and delivered to the subordinate officials of the Department of Agriculture.

Before payment, the government was turned out of office, and the new Provincial Secretary refused to pay for the book.

It was held by the Court of Appeal that there was no binding contract. Such an order could not bind the government unless made with the consent of the Lieutenant-Governor expressed in an order-in-council. It is a principle of English public law, and therefore a principle of the public law of the Province, that executive acts of importance must be first sanctioned by the sovereign or his representative.

Ordinary acts of routine, or mere acts of departmental administration may be done on the sole authority of the head of the department. And there may be special acts which the head of a department is by statute authorized to perform on behalf of the government.

But acts of policy, and important contracts require the express consent of the Lieutenant-Governor.

Contracts, not of a departmental character must be reported by the council to the Lieutenant-Governor, and marked by him as "approved". It was held that the contract in question fell into this class, and that the government not having consented to it in the manner prescribed by the law, was not bound by it.

Nor could ratification be inferred from the unauthorized reception of the work by subordinate officials, nor from the setting down in the estimates of a sum of money, of which part was intended to be applied in satisfaction of this claim, especially when the item in the estimates did not disclose the particulars of the contract.[1]

Petition of Right.

Again, it is an important principle of the public law of the Province that the Crown can only be sued by its own express consent.

A person having a claim against the government must obtain the Crown's consent by presenting a petition of right. The Lieutenant-Governor may give the necessary consent (and, in practice, never refuses to do so) by granting his fiat "Let right be done."[2]

Consequently, if a person is sued by the government, as, e.g., for taxes, he connot plead compensation with a debt due to him by the government unless the payment of the debt has been authorized in the appropriate manner. For this would be, in effect, to obtain payment from the Crown without its consent. It would also involve another violation of our public law, because the payment would be a payment made without any legislative appropriation for that purpose.[3]

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1 *Regina* v. *Lavery*, 1896, R. J. Q. 5 Q. B. 310; *Regina* v. *Waterous Engine Works Co.* 1893, R. J. Q. 3 Q. B. 222; *Jacques-Cartier Bank* v. *The Queen*, 1895, 25 Can. S. C. R. 84.

2 See for the form Code Civ. Proc. arts. 1011 seq.

3 *Fortier* v. *Langelier*, 1895, R. J. Q. 5 Q. B. 107.

Again, the rule of the public law is that the remedy of petition of right is limited to certain cases. It is available "where the land, or goods or money of a subject have found their way into the possession of the Crown, and the purpose of the petition is to obtain restitution, or, if restitution cannot be given, compensation in money, or when a claim arises out of a contract, as for goods supplied to the Crown, or to the public service".[1]

But the remedy is not available where the ground of action is a wrong alleged to have been done by the King or his servants.

For the theory is that "the King can do no wrong."[2]

The general principle is part of our law.[3]

But it has been held in several cases that an exception has been introduced by the Act which re-constituted the Exchequer Court.[4]

Quasi-offences by Crown servants.

The Exchequer Court Act, (50 & 51 Vict. c. 16 s. 16 (c), Can.) gives the court jurisdiction as to "every claim against the Crown arising out of any death or injury to the person or to property on any public work resulting from the negli-

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1 Per *Cockburn C. J.* in *Feather* v. *The Queen*, 1865, 6 B. & S. 293, adopted by the Privy Council in *Windsor & Annapolis Railway Co.* v. *The Queen*, 1886, 11 A. C. at p. 615.

2 Ibid.; *Tobin* v. *The Queen*, 1864, 16 C. B. N. S. 310. Whether this rule was always applied is less certain. See the cases collected by *Mr. L. A. Audette*, Practice of Exchequer Court of Canada, p. 55.

3 *Lavoie* v. *The Queen* 1892, 3 Exch. Rep. 96, (*Burbidge, J.*) *Larose* v. *The King*, 1901, 31 Can. S. C. R. 206; *Algoma Central Railway Co.* v. *The King*, 1901, 7 Exch. R. 239 (*Burbidge, J.*) reversed on another point. 32 Can. S. C. R. 277; *Letourneux* v. *The King*, 1903, 33 Can. S. C. R. 335; *Paul* v. *The King*, 1904, 9 Ex. 245 (*Burbidge, J.*).

4 *Letourneux* v. *The King*, *ut supra*, approving of *The Queen* v. *Filion*, 1895, 24 Can. S. C. R. 482.

gence of any officer or servant of the Crown, while acting within the scope of his duties or employment".

"Public Works."

The Rocky Mountain Park is a "public work".[1]

So is the Intercolonial Railway.[2]

So is a government canal.[3]

But not the citadel of Quebec.[4]

Nor a rifle range.[5]

Nor the stream of a navigable river.[6]

The effect of the Act is not to make the Crown liable in a case where a subject would not be liable. So it has been held that in Manitoba, the Crown is not liable for damage caused to one of its servants by the negligence of a fellow servant, for the recent Act of that province altering the rule of the common law, did not apply to the Crown.[7]

Negligence on the part of a servant of the Crown must be proved. It is not presumed even when the Crown is acting as a carrier.[8]

Writ of Mandamus.

Again the English public law, and, therefore, our law, allows a mandamus to issue, ordering a public body or public officer to perform an act or duty which by law the public body or public officer is bound to perform.[9]

But a mandamus will not issue against the Crown or the executive government, for ministers are not subject to con-

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1 *Brady* v. *The Queen*, 1891, 2 Exch. 273, (*Burbidge, J.*).

2 *Gilchrist* v. *The Queen*, 1891, 2 Exch. 300. (*Burbidge, J.*). *Harris* v. *The King*, 1904, 9 Ex. 206, (Burbidge, J.).

3 *The Queen* v. *Filion*, 1895, 24 Can. S. C. R. 482; *Gagnon* v. *The King*, 1904, 9 Exch. 189, (*Burbidge, J.*).

4 *City of Quebec* v. *The Queen*, 1894, 24 Can. S. C. R. 420.

5 *Larose* v. *The King* 1901, 31 Can. S. C. R. 206.

6 *McDonald* v. *The King* (Supreme Ct.), Oct. 29th, 1906; *Paul* v. *The King*, *ut supra*.

7 *Ryder* v. *The King*, 1905, 9 Ex. 330, (*Burbidge, J.*), affd. 36 Can. S. C. R. 462.

8 *Nicholls Chem. Co.* v. *The King*, 1905, 9 Ex. 272. (*Burbidge, J.*).

9 Code Civ. Proc. 992.

trol by the courts as to what they should do or should not do, unless they actually break the law. The court has no right to interfere with them in the exercise of their discretion.

It is the business of the Legislature to control the acts of the Executive, and, if necessary to punish ministers by voting against them, and turning them out of office.

The same principle applies to a subordinate servant of the Crown, unless it can be shewn that, by statute or otherwise, there has been cast upon him a duty to the public distinct from his duty to the Crown.

So a writ of mandamus does not lie against a collector of provincial revenue to compel him to issue a license to a particular person, when the collector refuses to do so in consequence of instructions to that effect by his superior officer.[1]

Nor, when a discretion is vested in a public body or a public officer to do or not to do a certain thing, will a mandamus lie to enforce the exercise of the power in a particular way.[2]

Similarly, the rules applicable to the writ of *quo warranto* are taken from the English law. Writ of *Quo warranto.*

So, following English cases, it was held recently that the court is not bound to grant leave to file an information of the nature of a *quo warranto*, the object of which is to oust a municipal councillor from his seat. The petitioner is not entitled, as a matter of right to the issue of the writ. The judge may refuse it in the exercise of a judicial discretion.

A ground for refusing it may be that the petitioner was himself a party to the illegality of which he complains.[3]

And, apparently, the petitioner must be a British subject.[4]

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1 *McKenzie* v. *Bernier*, 1896, R. J. Q. 5 Q. B. 251.

2 *Collège des Médecins* v. *Pavlides*, 1892, R. J. Q. 1 Q. B. 405.

3 *Guay* v. *Fortin*, 1903, R. J. Q. 24 S. C. 210 (C. R.). See per *Cockburn, C. J.*, in *Bradley* v. *Sylvester*, 1871, 25 L. T. at p. 460.

4 *Montagnon* v. *Fiset*, 1894, R. J. Q. 6 S. C. 150 (*Andrews, J.*).

Control of Municipal Corporation.

By the public law municipal corporations are subject to the control of the courts. E. g., the court has at common law a right to declare a by-law unreasonable and void.[1]

Relation of subject to Justice.

Questions which concern the relation of the subject to the administration of justice belong to the public law, and are, therefore, governed by the law of England, and not by that of France.[2]

Applying the English rules, it has been held that injurious words used in pleading or in evidence are not actionable if they are relevant to the issue and uttered in good faith.

It is in the interests of justice that the parties and the witnesses should be able to speak freely without fearing actions for libel.[3]

And it is the English law which decides under what conditions damages are due for false arrest or malicious prosecution.

The plaintiff must show that the defendant acted maliciously, and without probable cause.[4]

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1 *Corpn. de la paroisse de l'Ile Bizard* v. *Poudrette*, 1893, R. J. Q. 4 S. C. 81, (*Davidson, J.*). See *Grenier* v. *Lacourse*, 1893, R. J. Q. 2 Q. B. 445; *Montagnon* v. *Fiset*, 1894, R. J. Q. 6 S. C. 150, (*Andrews, J.*); *Vallières* v. *Corp. de la paroisse de St-Henri de Lauzon*, 1905, R. J. Q. 14 K. B. 16. See *Beauvais* v. *City of Montreal*, (*Archibald, J.*), *Montreal Gazette*, Oct. 29th. 1906.

2 See *Corporation d'Arthabaska* v. *Patoine*, 1886, 4 Dor. Q. B. 364, esp. opin. of *Ramsay, J.*

3 *Wilkins* v. *Major*, 1902, R. J. Q. 22 S. C. 264, (*Archibald, J.*); *Morrison* v. *Western Assurance Co.*, 1903, R. J. Q. 24 S. C. 111, (*Rochon, J.*); *Renaud* v. *Guénette*, 1903, R. J. Q. 25 S. C. 310, (C. R.).

4 *Giguère* v. *Jacob*, 1901, R. J. Q. 10 K. B. 501, (head-note wrong); *Malony* v. *Chase*, 1894, R. J. Q. 7 S. C. 18, (*Andrews, J.*); *Isles* v. *Boas*, 1894, R. J. Q. 6 S. C. 312, (C. R.); *Gowan* v. *Holland*, 1896, R. J. Q. 11 S. C. 75, (C. R.); *Lemire* v. *Duclos*, 1898, R. J. Q. 13 S. C. 82, (*Lemieux, J.*); *Lavigne* v. *Lefebvre*, 1898, R. J. Q. 14 S. C. 275, (*Archibald, J.*). *Lachance* v. *Casault*, 1902, R. J. Q. 12 K. B. 179.

And, following English rules, it has been held that damages are due for false imprisonment, quite independent of motive.

It is a wrong in itself, and cannot be justified by showing probable cause. There must be some sufficient authority for it.[1]

Responsibility of Government Officials.

One of the most important of the many differences between our public law and that of France, is with regard to the responsibility of officials.

It is a fundamental principle of our public law that if an official wrongs a private person he is accountable to the ordinary courts, and it is no defence that he acted in good faith, or in obedience to the order of a superior official.

The highest minister of the Crown and the humblest official are equally answerable for the legality of their acts to the ordinary tribunals.[2]

Upon this principle a priest who solemnized the marriage of a minor without the consent of her parents was held liable to them in damages.[3] For, if they are officers competent to solemnize marriage, all priests and ministers of religion are officials.[4]

And, in several cases, registrars have been mulcted in damages for loss caused by their negligence in the discharge of their official duties.[5]

And justices of the peace who have illegally committed a

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1 *Cole* v. *Cooke*, 1903, R. J. Q. 12 K. B. 519. See *Russell*, on Crimes, 6th. ed. v. 3, p. 309; Archbold's Criminal Pleading, 22nd. ed. p. 848.

2 See *Entick* v. *Carrington*, 1765, 19 State Trials, 1030; Dicey Law of the Constitution, 5th. ed. p. 328.

3 *Larocque* v. *Michon*, 1858, 8 L. C. R. 222, (C. A.).

4 C. C. 128.

5 *Montizambert* v. *Talbot*, 1860, 10 L. C. R. 269, (C. A.); *Grenier* v. *Rouleau*, 1882, 8 Q. L. R. 323, (C. R.); *Trust and Loan Co. of Canada* v. *Dupuis*, 1880, 3 L. N. 332, (C. A.).

person to prison, when they ought to have known they had no jurisdiction, have been held liable in damages though no malice was proved.[1]

And where a man's property had been seized owing to a mistake, the bailiff having taken the owner of it to be another person of the same name, it was held that damages were due.

In this case the seizing creditor was held liable, as he was responsible for the bailiff's mistake.[2]

Liability of Municipal Corporations for fault of Policemen.

So in numerous cases police-constables have been mulcted in damages for illegalities in the discharge of their official duties, and, what is much more doubtful, municipal corporations have been held liable on the theory that the policemen were their servants.

Thus, where a police-constable had not taken the trouble to enquire the correct name and address of an accused person, but had merely obtained a description of him, and had arrested his brother in mistake, he was held liable in damages.[3]

It is generally easier to recover damages from a corporation than from a constable. And a municipal corporation has been held liable in several cases, for illegal arrests made by police-constables.[4]

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1 *Mooce* v. *Gauvin*, 1893, R. J. Q. 2 Q. B. 462; Cf. *Francœur* v. *Boulay*, 1895, R. J. Q. 7 S. C. 402, (C. R.).

2 *Lalonde* v. *Bessette*, 1888, M. L. R. 4 S. C. 39, (*Taschereau, J.*). See *Benatchez* v. *Hammond*, 1880, 7 Q. L. R. 25, (*Angers, J.*).

3 *Bigras* v. *Cité de Montréal*, 1892, R. J. Q. 2 S. C. 227, (*Jetté, J.*).

4 *Corporation de Montréal* v. *Doolan*, 1871, 3 R. L. 433, (C. A.); *Pratt* v. *Charbonneau*, 1890, M. L. R. 7 Q. B. 24, (C. A.); *Guérin* v. *Cartier*, 1904, Gazette, Feb. 26 (C. A.); *Mousseau* v. *City of Montreal*, 1896, R. J. Q. 12 S. C. 61, (*Doherty, J.*); *Bigras* v. *Cité de Montréal*, ut supra.; *Bourget* v. *City of Sherbrooke*, 1905, R. J. Q. 27 S. C. 78, (*Hutchinson, J.*).

Similarly, a corporation has been held responsible for the violence of a policeman in striking a man with his baton.[1]

And, in another case, where the limit of such responsibility would seem to have been reached, if not indeed exceeded, a constable had warned a shopkeeper to put ashes on his sidewalk.

The shopkeeper delayed to do so. In the meantime his son, a child of four, came out, slipped on the sidewalk and broke his leg.

The city was held to be responsible on the ground that the constable ought to have waited to see that the ashes were duly sprinkled.[2]

In the United States it appears to be settled that a police-officer is not the servant or agent of a municipal corporation which appoints him.[3]

And in England this ground of liability has not even been mooted.[4]

The Legislature devolves upon municipalities the duty of appointing police-officers.

But these are, notwithstanding, government officials.

The corporation cannot determine their duties.

Their powers and duties are fixed by law, and not by the corporation.[5]

In a recent case the Supreme Court of Canada reserved their opinion as to whether there was any difference upon this

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1 *Courcelles* v. *Cité de Montréal*, 1891, M. L. R. 7 S. C. 154, (*Pagnuelo, J.*).

2 *McDonald* v. *City of Montreal*, 1895, R. J. Q. 8 S. C. 160, (*Curran, J.*).

3 *Buttrick* v. *City of Lowell*, 1861, 1 Allen (Mass.) 172 (Supreme Ct. of Mass.); *McKay* v. *City of Buffalo*, 9 Hun. (N. Y.), 401, aff'd. 74 N. Y. 619. Dillon, on Municipal Corporations, v. 2, n. 975.

4 Beven, on Negligence, 2nd. ed. v. 1 p. 388.

5 *McCleave* v. *City of Moncton*, 1902, 32 Can. S. C. R. 106, and authorities there cited.

point between the law of the Province of Quebec, and that of the other provinces.[1]

And in one case in the Superior Court, Andrews, J. held that the principle followed in the English law of the other provinces, ought to be applied in the Province of Quebec, and that a municipal corporation was not responsible for the illegal acts of its police-constables unless these acts had been authorized or adopted by the corporation.[2]

In regard to arrests officials are to a certain extent protected by the rule, already noticed, that they are not liable unless both malice and want of probable cause are shewn.[3]

For, otherwise, the administration of justice would be hampered, and officers restrained in the exercise of their duty by the fear of incurring civil liability.

Privileges of Public officers.

And, in regard to other cases, there are certain statutory provisions applying to actions against officials.

By article 88 of the Code of Civil Procedure a public officer sued for damages by reason of an official act is entitled to a month's notice before the issue of the writ of summons.[4]

By R. S. Q. 2594 he may within a month of this notice offer to pay compensation to the plaintiff, and if the sum offered be not accepted, he may plead the offer in bar to the action.

If the court or the jury find the amount tendered to have been sufficient, they must find for the defendant.

By R. S. Q. 2597 the defendant if successful may recover costs as between advocate and client.

And, by R. S. Q. 2598 no such action can be brought, unless commenced within six months of the commission of the act complained of.

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1 Ibid.

2 *Tremblay* v. *City of Quebec*, 1902, R. J. Q. 23 S. C. 266.

3 Supra, p. 42.

4 See *Benatchez* v. *Hammond*, 1880, 7 Q. L. R. 25, (*Angers, J.*).

But, by R. S. Q. 2599 these privileges apply only to acts done by an official in the *bona fide* execution of his duty, although, in the act in question he may have exceeded his powers, and acted contrary to law.[1]

And the act. 60 Vict. c. 53 (Que.) provides that no action shall lie against a justice of the peace or other officer for any act done in virtue of a statute when the action is based upon the unconstitutionality of the statute.

It would be too hard to expect an official to be wiser than the Legislature, and to make him responsible for carrying out the provisions of an act which was afterwards held to be *ultra vires*.

But, with this natural limitation, it will be observed that the broad rule holds good in our law, as in England, that officials are liable for their acts, and that the legality or illegality of these acts can be determined by the ordinary tribunals.

Droit administratif.

The French law upon such matters is widely different. In France an official act must be judged of by a court of which the majority of the members are officials.

The so-called *droit administratif* is withdrawn from the ordinary courts. And a special court—the *Tribunal des Conflits*—exists to decide the preliminary question whether the act complained of was official or personal.

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1 Ibid. See *Commissioners of Ste-Marthe* v. *St-Pierre*, 1879, 2 L. N. 343, (*Torrance, J.*). A churchwarden (marguillier) is a public officer (*Bélanger* v. *Mercier*, 1903, R. J. Q. 1903, 12 K. B. 428). So is a harbourmaster of a public harbour (*Cochrane* v. *McShane*, 1903, R. J. Q. 24 S. C. 283), (*Fortin, J.*). So is an alderman (*Trudel* v. *Thibault*, 1904, R. J. Q. 26 S. C. 542), (*Rochon, J.*). So is a school commissioner (*Basin* v. *Sch. Comm'rs. of St-Anselme*, 1871, 3 R. L. 454), (C. R.); *Comm'rs. of Ste-Marthe, ut supra*. So is a city assessor (*Stewart* v. *Euard*, 1899, R. J. Q. 8 Q. B. 404). But not a bailiff, at any rate when acting without a legal warrant, (*Lachance* v. *Casault*, 1902, R. J. Q. 12 K. B. 179).

This is not the place for a full discussion of this important subject, but it is sufficient to indicate that in all questions relating to officials acting in the discharge of their public functions the French law differs in principle from ours.[1]

Contracts contrary to public policy.

Closely connected with the public law is the rule formulated by the Civil Code that "no one can by private agreement, validly contravene the laws of public order and good morals."[2]

In certain cases there may be a difference between the English and the French law as to whether an agreement is contrary to public order.

English or French Law?

In such cases is it the duty of our courts to be guided by the English or by the French rule?

Where the agreement contravenes the public law, in the strict sense, there can, I presume, be no doubt that the English law governs.

The same is true of a contravention of the criminal law.

E. g., in a question as to whether an agreement is invalid as being champertous, it is clear that we must be guided by English authorities.[3]

In a recent case in the Supreme Court the question was whether it was a valid condition in a substitution that children not brought up in the Roman Catholic church should be excluded.

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1 See *Dareste, R.*, La Justice Administrative en France, 2nd. ed. esp. pp. 515 seq. (Paris, 1898); Pandectes Françaises, s. v. Autorité Administrative, (Actes de l') n. 8, and n. 215; Ibid. s. v. Conflits, n. 57 and n. 684; *Dicey, A. V.*, Law of the Constitution, 5th ed. p. 308; *Lowell, A. L.*, Governments and Parties in Continental Europe, v. 1 p. 59 and p. 162; *Goodnow, F. J.*, Comparative and Administrative Law, v. 2 p. 174, (New York, 1897).

2 C. C. 13.

3 See *Power* v. *Phelan*, 1884, 4 Dor. Q. B. 57; *Meloche* v. *Deguire*, 1903, 34 Can. S. C. R. 24.

Such a condition would seem to be valid in England.[1]

In France its validity is doubtful.

Girouard, J., in delivering the opinion of the Court in favour of the validity of the condition, said that the English rule of public policy ought to govern in this case, because it was from England and not from France that we derived the freedom of testamentary disposition.[2]

The view of the court seems to have been that English public policy ought to supply the rule when the law under discussion was derived from England, and French public policy when the provision of our law was derived from France.

Such questions are not very common, because, fortunately, there is a pretty close agreement between the two laws as to what kinds of contracts are contrary to good morals.

But, with great respect, I would submit that the theory of the Supreme Court is inconvenient, and not supported by authority.

It is clearly desirable that on such questions, there should be uniformity in the different provinces of Canada.

The public conscience is likely to be confused if contracts which are reprobated as immoral at Toronto are approved of at Montreal.

Moreover when such questions arise with regard to commercial contracts it is very expedient that the same view of public policy should prevail here as in England and the United States, the two countries with which we have the closest commercial relations.[3]

1 *Hodgson* v. *Halford*, 1879, 11 Ch. D. 959, (*Hall, V. C.*). (Condition not to forsake the Jewish religion, or to marry any person not born a Jew). See Jarman on Wills, 5th. ed. v. 2 p. 886. And, apparently, in Scotland; see *Hays* v. *Brown*, 1883, Court of Session Cases, 4th. Series, (*Rettie*) v. 10, p. 460.

2 *Renaud* v. *Lamothe*, 1902, 32 Can. S. C. R. 357.

3 See *Glengoil Steamship Co.* v. *Pilkington*, 1897, 28 Can. S.C.R. 146.

Such arguments *ex inconvenientia* would have little weight in cases where the court was bound by some text of the positive law.

But in cases as to public policy and good morals the court has, of necessity, a considerable discretion, and it appears to me that it would require very strong reasons to induce them to lay down different rules on such matters for different parts of Canada.[1]

There is much to be said for the proposition that the rules of public policy are so closely connected with the public law, that the same rules ought to govern in all parts of the British Empire.

But even admitting that owing to differences in the civil law, or in particular statutes, or in the social customs of the people, certain things might be *contra bonos mores* in England which were not so in Canada, and conversely, I should still be disposed to think that there ought at least to be one rule for the whole of the Dominion.

Criminal Law.

2. The Criminal Law.

The English criminal law has been applied in the Province of Quebec since the conquest in 1763.

It is probable that a change of sovereignty involves a change of the criminal law, for this is a branch of the public law, and, as Marryott, Advocate-General in 1774, said, it is so "inherent in dominion" that on a conquest it must *ipso facto* and immediately operate.[2]

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1 Perhaps the discretion no longer extends to inventing new heads of public policy. See *Egerton* v. *Brownlow*, (*Earl*) 1853, 4 H. L. C. 1, 10 Eng. Rep. 359; *Printing and Numerical Registering Co.* v. *Sampson*, 1875, 19 Eq. 462 (*Jessel, M. R.*); *Jansen* v. *Driefontein Cons. Mines*, [1902] A. C. at p. 491, per Halsbury, L. C.

2 See the passage cited by Kingsford from the report by Marryott, Advocate-General which was published in 1774. Marryott maintains that the criminal law of England became the law of Canada at the instant of time after the conquest, and he says this

A criminal act is punished by the state because it is a breach of the rules of order which that state has laid down in the interest of the community.

And each state will, naturally, have its own views as to what acts are so injurious as to require repression in this way.

But a matter so important is not likely to be left in doubt by a conqueror, and, so far as I know, there is no authority on the abstract question.

It is for us merely academic, for the Quebec Act of 1774 declares by s. 11 that the criminal law of England shall continue to be administered. So far as any inference can be drawn from the language of the Act, it rather supports the view that the conquest in itself did not introduce the English criminal law.

For the Act says the people of Canada have enjoyed its "certainty and lenity" for more than nine years, which seems to refer to the ordinance of Murray in 1764.[1]

The criminal law was made a dominion matter by s. 91 of the British North America Act.

It has been codified, and the Criminal Code of Canada came into force on July 1st, 1893. Criminal Code.

The English criminal law has been introduced into Canada *en bloc*. Crimes at common law.

The fact that the Code does not specify an act as criminal

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view was generally accepted by French Canadian lawyers. *Kingsford*, History of Canada, v. 5, p. 235 note. Cf. Holland, Jurisprudence, 9th. ed. p. 357.

1 This would rather seem to have been the opinion of *Wedderburne* and *Thurlow*, though they are not distinct upon the point. See *Christie*, History of Lower Canada, v. 1, pp. 42 and 60. See, also, *Cavendish*, Debates on the Quebec Act, pp. 46, 55. But see the opinion of *Marryott*, Advocate-General, in Kingsford, History of Canada, v. 5, p. 235, and supra, p. 50.

does not prevent its being so, if it is criminal by the criminal common law of England.

Any part of that law which is not covered by our Code, is still in force here, unless it has been repealed expressly or by reasonable implication.[1]

Merchant Shipping.

3. The Law of Merchant Shipping.

This is governed partly by the Imperial Merchant Shipping Act, 1894, (57 & 58 Vict. c. 30)[2], but mainly by a series of Acts of the Parliament of Canada, passed in virtue of the exclusive power to legislate as to "navigation and shipping."[3]

These acts deal with the registration and classification of shipping, the licensing of small ships, the security for advances on ships in course of construction, and the inspection of ships; with the shipping of seamen; with the shipping of seamen on inland waters; with certificates to masters and mates; with wrecks, casualities and salvage; the safety of ships and the prevention of accidents; the inspection of steam-boats; the navigation of Canadian waters ; pilotage ; the liability of carriers by water; and the coasting trade of Canada.[4]

Other federal statutes deal with the regulations applicable to vessels carrying passengers, or emigrants.[5]

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1 *The King* v. *Cole*, 1902, 5 Can. Crim. Cases, 330; *Union Colliery Co.* v. *The Queen*, 1900, 31 Can. S. C. R. at p. 87; *Meloche* v. *Deguire*, 1903, 34 Can. S. C. R. 24; See *Crankshaw*, Criminal Code, 2nd. ed. p. 11, note on art. 7; *Burbidge*, Digest of Criminal Law of Canada, p. 138.

2 See esp. ss. 43, 102, 735, 744 and *Temperley*, Merchant Shipping Act. s. v. Canada.

3 B. N. A. Act., s. 91, n. 10.

4 C. C. 2355; R. S. C. cc. 72, 73, 74, 75, 77, 78, 79, 80, 81, 82, and 83.

5 R. S. C. cc. 65, 67 and 68.

But the contracts of affreightment, and of marine insurance, and the law of maritime lien, bottomry and respondentia belong to the commercial law of the Province, and are covered by the Civil Code.[1] So also are the rules as to the transfer and mortgage of registered ships.[2]

4. **The Law of Bills, Notes and Cheques.** Bills.

This is governed by the Act of which the short title is "The Bills of Exchange Act, 1890", (53 Vict. c. 33.), as amended.

This act is a Federal act under the power to legislate exclusively as to "bills of exchange and promissory notes."[3]

It is modelled on, and follows very closely, the English Bills of Exchange Act of 1882, (45 & 46 Vict. c. 6).

C. C. 2340 provides that in all matters relating to bills of exchange not provided for in the Code or by the Federal acts "recourse must be had to the laws of England in force on 30th May, 1849", i. e., to the common law of England on the subject, and this is also to govern the law of evidence in the investigation of facts as to bills, irrespective of whether they were granted by traders or by non-traders. But parties to such actions as to all others may now be examined as witnesses.[4]

Other negotiable instruments such as bank-notes and bearer-bonds belong to the general commercial law.

It is, perhaps, safe to say that in cases relating to such

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1 See, e. g., *Glengoil Steamship Co.* v. *Pilkington*, 1897, 28 Can. S. C. R. 146.

2 C. C. 2359-2382.

3 B. N. A. Act., s. 91, n. 18.

4 C. C. 2341, 2342; C. C. P. 316. See *MacLaren, J. J.*, Bills, Notes and Cheques, 3rd. ed. (Toronto, 1904). The amending acts are 54-55 Vict. c. 17; 56 Vict. c. 30; 57-58 Vict. c. 55; 60-61 Vict. c. 10; 1 Edw. VII., c. 12; 2 Edw. VII., c. 2.

documents, there is a strong inclination to follow English authority.[1]

Banking.

5. The Law of Banks and Banking.

This is regulated by the Bank Act, 1890, (53 Vict. c. 31) as amended. This is a Federal act under the power to legislate exclusively as to "banking, incorporation of banks, and the issue of paper money."[2]

This act is, of all our important codifying statutes, the one which borrows least from foreign sources.

It is based mainly upon Canadian practice.

Our banking system has a long history, and it differs considerably from either the English system or the American.[3]

The Bank Act covers such matters as the incorporation of banks, the transfer of shares, reserves, note-issue, banker's lien, periodical returns, liability of contributories, etc.

It hardly touches the law of banking, so far as that consists in the relations between the banker and the customer.

These belong to the general commercial law.[4]

But, seeing that the power to deal with the whole subject of "Banking" is assigned to the Dominion, the Federal Parliament might legislate in such a way as to affect "property and civil rights" within the Province.

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1 *Young* v. *Macneider*, 1895, 25 Can. S. C. R. 272; *Sweeny*, v. *Bank of Montreal*, 1885, R. J. Q. 3 Q. B. 540, 12 Can. S. C. R. 661, 12 A. C. 617. See infra, p. 144.

2 B. N. A. Act. s. 91, n. 15. The amendments to the Bank Act are 62-63 Vict. c. 14; 63-64 Vict. cc. 26 and 27, and 4 Edw. VII., c. 3, and 4 and 5 Edw. VII. c. 4. See as to Penny Banks, 3 Edw. VII. c. 47.

3 See *Maclaren, J. J.* Banks and Banking, 2nd ed.(Toronto, 1901).

4 See, e. g. *Imperial Bank of Canada* v. *Bank of Hamilton*, 1903, A. C. 49. 31 Can. S. C. R. 344; *Bank of Montreal* v. *Sweeny*, 1887, 12 A. C. 617; and see index to Maclaren on Banks, s. v. Civil Code.

It might, for example, confer on a bank as a lender, privileges which other lenders did not enjoy, or it might make a document negotiable which was not so by the law of the province.

The Privy Council has said that the Dominion Parliament has power to legislate "respecting every transaction within the legitimate business of a banker."[1]

6. The Regulation of Trade and Commerce. Trade and Commerce.

This power is less wide than might appear at first sight.

The words might be interpreted in such a way as to enable the Federal Parliament to alter all the commercial law of the Province of Quebec. But it is settled that this was not the intention of the Legislature.

The main principle of the British North America Act is to leave the provinces full and exclusive control over private rights, except where the general interest of the Dominion calls for uniformity.

Accordingly, it has been held that the Dominion has not the power to regulate the contracts in a particular kind of business, as, e. g., by enacting that any fire-insurance policy shall be void if dangerous substances are stored on the premises insured without the consent of the insurance company.

The Provincial Legislature might pass such a law, but it would be *ultra vires* of the Dominion Parliament to do so.

What is meant by "regulation of trade and commerce" is the power to make political arrangements in regard to trade, and regulations as to trade in matters of inter-provincial concern, and, perhaps, general regulations affecting the whole Dominion.[2]

1 *Tennant* v. *Union Bank*, (1894) A. C. 31. See *Merchants Bank* v. *Smith*, 1884, 8 Can. S. C. R. 512; *Maclaren*, *ut supra*, p. 4 and p. 151. Cf. *G. T. R.* v. *Att. Gen.*, Nov. 5th 1906 (P. C.).

2 *Citizens Insurance Co.* v. *Parsons*, 1881, 7 A. C. 96 (P. C.). See *Colonial Building and Investment Co.* v. *Att. Gen.* 1883, 9 A. C. 157; *Att. Gen. for Ontario* v. *Att. Gen. for Dominion*, (1896) A. C. 348; *Côté* v. *Watson*, 1877, 3 Q. L. R. 157.

As examples of "regulations of trade" in the sense intended might be given a statute providing that insurance companies doing business in Canada should make a deposit with the Finance Minister for Canada, as a security for Canadian policy-holders.[1]

And under this power would fall a law granting a monopoly.[2]

So, apparently, would fall a law prohibiting a particular kind of trading. The Province could only make such a law if the trade were contrary to good morals or public order.[3]

Patents and Copyrights.

7. The Law of Patents and Copyrights.

It has been maintained that the meaning of the power given in n. 23 of s. 91 is to give to the Dominion Parliament the exclusive control over copyright within the Dominion, and to leave no power either with the Imperial Parliament on the one hand, or the provinces on the other.

But this does not seem to be the true meaning of the words.

Before 1867 the Imperial Parliament had always exercised the right of granting copyright in books which gave the authors exclusive rights in every part of the British Dominions. The Imperial Act has been interpreted in this sense by the House of Lords.[4]

And it has been held by the Court of Appeal of Ontario that the B. N. A. Act does not express or imply any intention to surrender this right.

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1 *Re Briton Med. and Gen. Life Assurance Co.*, 1886, 12 Ont. Rep. 441.

2 *Ottawa Electric Co.* v. *Hull Electric Co.*, 1899, R. J. Q. 10 K. B. 34.

3 4 and 5 Edw. VII. c. 9. See *Wilder* v. *Cité de Montréal*, 1905, R. J. Q. 14 K. B. 139, (Use of "Trading Stamp"). See, also, *Beauvais* v. *City of Montreal*, (*Archibald, J.*), *Montreal Gazette*, Oct. 29th, 1906.

4 *Routledge* v. *Low*, 1868, L. R. 3 E. & I. App. 100.

All that was meant in giving to the Parliament of Canada exclusive legislative authority over copyrights was that the Federal Parliament should have the powers formerly exercised by the Provincial Legislatures.

That is to say it was to have the power of passing laws to protect in Canada literary or artistic works produced within the Dominion. But, in the view taken in this case, the Imperial Copyright Acts cannot be affected by Canadian legislation.[1]

By the Canadian Copyright Acts the author is given the right of obtaining copyright for a book in Canada by having it printed or reprinted or lithographed in that country within a certain delay. But, failing his doing so, any person in Canada may obtain a license to reprint the book for sale in Canada, without the author's consent, subject to the condition of paying him a royalty of ten per cent. on the copies sold.[2]

If the decision in *Smiles* v. *Belford* is sound, these provisions are *ultra vires* of the Canadian Parliament. The owner of the Imperial Copyright may without obtaining copyright in Canada restrain a reprint of the book there or prohibit the importation of foreign reprints.[3]

In a recent case the Supreme Court of Canada was careful to reserve its opinion as to whether *Smiles* v. *Belford* had been correctly decided.[4]

And it has recently been held by Fortin, J., that a work copyrighted in any country belonging to the international

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1 *Smiles* v. *Belford*, 1876, 1 App. Rep. (Ontario) 436. See *MacGillivray, E. J.*, The Law of Copyright, p. 189, (Lond. 1902).

2 R. S. C. c. 62; 52 Vict. c. 29; 58 & 59 Vict. c. 37; 63 & 64 Vict. c. 25.

3 *Smiles* v. *Belford, ut supra; Morang* v. *Publishers' Syndicate, Ltd.*, 1900, 32 Ont. Rep. 393 (*Robertson, J.*), where there is a very clear history of the legislation; *Imperial Book Co.* v. *Black*, 1905, 35 Can. S. C. R. 488, affirming C. A. in 8 O. L. R. 9.

4 *Imperial Book Co.* v. *Black*, 1905, *ut supra*.

copyright union is protected in Canada although the author has not complied with the Canadian Act by printing and producing here a certain number of copies.

The International Copyright Act, 1886 (Imp.) and the Imperial Order in Council of 28 Nov. 1887 gave copyright to such works throughout His Majesty's Dominions.[1]

The subject is one which has led to a sharp difference of opinion between the British and the Canadian governments.[2]

There is a series of Imperial Copyright Acts.

The most important are The Copyright Act, 1842, (5 & 6 Vict. c. 45) and the International Copyright Act, 1886 (49 & 50 Vict. c. 33).[3]

As regards pictures, drawings and photographs the Fine Arts Copyright Act, 1862, applies only to the United Kingdom.

Copyright for pictures, etc., in Canada must be obtained there.[4]

Patents, trade-marks and designs are governed by Federal laws.[5]

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1 *Mary* v. *Cie de Reproduction Littéraire*, March 23, 1906.

2 See for a full statement of the points at issue, and a history of British copyright legislation in its relation to Canada, the Report of the Representatives of the Colonial Office, Foreign Office, Board of Trade, and Parliamentary Counsel's Office in the Canadian Official Correspondence, etc. (*W. E. Hodgins*, Ottawa, 1896) pp. 1281 seq. and the Report in rejoinder by *Sir John Thompson*, the Canadian Minister of Justice. And see *Todd*, Parliamentary Government in the British Colonies, 2nd. ed. p. 180.

3 On Imperial Copyright generally, see *Scrutton, T. E.*, on Copyright 4th. ed. 1903; *Copinger, W. A.*, on Copyright, 3rd. ed. 1893; *Macgillivray, E. J.*, on Copyright, Lond. 1902.

4 *Graves and Co.* v. *Gorrie*, (1903) A. C. 496 (P. C.); 3 O. L. R. 697, 1 O. L. R. 309, 32 O. R. 266.

5 Patent Act, R. S. C. 61 and amending Acts. Trade mark and Design Act, c. 63, and amending Acts. See re *Bell Telephone Co.* 1884, 7 Ont. Rep. 605.

In cases of infringements of copyrights, patents and trademarks the English law affords the closest analogies.

Dorion, C. J., said, in one case, "*Notre statut sur les contrefaçons est basé sur les principes que l'on suit en Angleterre, et la jurisprudence anglaise doit ici nous servir de guide.*"[1]

But it is usual to refer also to French authorities.[2]

8. **The Law of Bankruptcy.** Bankruptcy.

There is now no Dominion Insolvency Act.

The former Act was repealed in 1880, by 43 Vict. c. 1 (Can.) and subsequent attempts to carry a new Act have not proved successful.

9. **Subjects requiring no explanation.**

I pass over as needing no explanation here, the subjects of defence, postal service, census, customs, and indirect taxes generally.

Nor is it necessary to consider the subject of currency, interest, weights and measures, fisheries, ferries, quarantine and Indians.

10. **Naturalization and Aliens.** Naturalization.

The Dominion Parliament has the right to decide upon what conditions aliens may be admitted into the country.[3] It also determines in what way an alien may become naturalized.

The Province has no power to place certain classes of aliens, or naturalized aliens under disabilities as regards property or civil rights.

So the Privy Council has decided that a law of British

1 *Bondier* v. *Dépatie*, 1883, 3 Dor. Q. B. at 237. See *Ottawa and Power Co.* v. *Murphy*, May 4, 1906, (C. A.).

2 See, e. g., *Beauchamp* v. *Cadieux*, 1900, R. J. Q. 10 K. B. at p. 260; *Pabst Brewing Co.* v. *Ekers*, 1902, R. J. Q. 21 S. C. 545, (C. R.). For the French law see *Pouillet, E.* Traité de la Propriété littéraire, 2nd. ed., Traité des Dessins de fabrique, 2nd. ed., Traité des Brevets d'invention, 3rd. ed., and Traité des Marques de fabrique, et de la concurrence déloyale, 3rd. ed.

3 See *Musgrove* v. *Chun Teong Toy*, (1891) A. C. 272.

Columbia was *ultra vires* which prohibited the employment of Chinamen of full age in coal mines.[1]

But the Province has the right to determine the conditions of the suffrage for the Provincial Legislature, and it may deprive certain classes of naturalized aliens from the right to vote.

So, it has been held by the Privy Council that an act of British Columbia was *intra vires* which excluded persons of Mongolian race from voting.[2]

It may be observed in passing that the opinions of the Privy Council in these two cases are difficult to reconcile.

In the first case the view was expressed that by giving to the Dominion the subject of naturalization the Legislature intended that the Dominion Government should have the power to declare what should be the consequences of naturalization, or, in other words, what should be the rights and privileges pertaining to residents in Canada after they had been naturalized.

In the second case, it was clearly stated that by placing the subject of naturalization and aliens under the jurisdiction of the Dominion, the Legislature meant only that the Dominion should determine what should constitute an alien or a naturalized alien. The question as to what consequences follow from the possession of either status was not intended to be touched.

Marriage and Divorce.

11. **The Law of Marriage and Divorce, but not the Solemnization of Marriage.**

"Solemnization of marriage" would seem to include only the conditions imposed by law as to the form of the celebration, the necessity for bans or licence (C. C. 57, 59,) the presence of a competent officer (C. C. 128.) and the like.

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1 *Union Colliery Co. of B. C.* v. *Bryden*, (1899) A. C. 580.

2 *Cunningham and Att. Gen. for B. C.* v. *Tomey Homma* (1903) A. C. 151.

It does not seem to cover such matters as capacity to marry, the necessary consents, or the want of legal impediment. (C. C. 115, 127.)[1]

The Federal Parliament has, however, refrained from legislating upon any of these matters, except as to one point.

The Act 45 Vict. c. 42 legalizes marriage between a man and his deceased wife's sister. (C. C. 125.). Marriage with deceased wife's sister.

Mr. Mignault contends that this act is *ultra vires*.[2]

It seems to me that, in view of the generality of the power to legislate as to marriage, this contention is extremely difficult.

C. C. 129 would entitle a priest to refuse to solemnize such a marriage.

And, if both the parties were Catholics, this might make it impossible for them to be married within the Province of Quebec.[3]

But, if they were married outside the Province in any place where the affinity was not recognised as an impediment, it appears to me that the marriage could not be treated as null on the ground that it was in fraud of our law.

For our law does not prohibit such a marriage. On the contrary it expressly declares it lawful, but it excuses certain officers of civil status from being compelled to celebrate it.

No Divorce Court has ever been constituted in the Province and divorces are granted only by special act of the Federal Parliament.

It is maintained by some writers that the Imperial Parliament could not have intended to grant to the Federal Parliament jurisdiction over divorce in the Province of Quebec.

Their main arguments are as follows:—

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1 See *Durocher* v. *Degré*, 1901, R. J. Q. 20 S. C. 456, (C. R.): *Delpit* v *Côté*, 1901, R. J. Q., 20 S. C. 338, (*Archibald, J.*).

2 Droit Civil Canadien, v. 1, p. 340.

3 *Durocher* v. *Degré, ut sup.; Mignault*, v. 1. p. 342.

The Capitulations of Quebec in 1759 and of Montreal in 1760, by art. 6 and art. 27, respectively, guaranteed to the French Canadians the free exercise of their own religion.[1]

This was confirmed by s. 5 of the Quebec Act of 1774.

The Imperial Parliament has never violated this treaty-right, and there is a strong presumption against putting a construction on the B. N. A. Act which would involve such a violation of faith.

Argument of Mr. Justice Loranger.

Accordingly, Mr. Justice Loranger thinks we must interpret the jurisdiction to legislate as to divorce conferred on the Federal Parliament by no. 26 of s. 91 of the B. N. A. Act as meaning that it is to have such jurisdiction only in those provinces in which divorce was not contrary to law at the date of Confederation.[2]

Mr. Mignault feels more difficulty.

He contends that the Imperial Parliament never intended to abrogate the right to religious freedom given by the Quebec Act.

Therefore, in his view, the Federal Parliament ought to refrain from pronouncing a divorce of the marriage of two Catholics.

It is not easy to make out from the learned author's argument whether he thinks that the power to do so exists.

But he maintains that in any event in the case of Catholics C. C. 129 makes it impossible for either of the consorts to contract a second marriage during the lifetime of the other consort.[3]

With all respect to these learned writers their arguments appear to me to be fallacious.

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1 See *Houston*, Constitutional Documents of Canada, pp. 29 and 45.

2 *Loranger*, T. J. J., Commentaire sur le Code Civil, v. 2, nos. 81 seq.; (Montreal, 1879).

3 Droit Civil Canadien, v. 1, pp. 551 seq.

The B. N. A. Act is an Imperial statute but it was passed at the request of Canada and in the very terms suggested by her. The bill was drafted by the Canadian representatives and it was passed by the British Parliament without amendment.[1]

It has been said that the British Parliament spoke, but the voice was the voice of Canada.

The resolutions prepared at the Quebec Conference of 1864 gave the subject of "marriage and divorce" to the Federal Parliament.

At the London Conference the generality of this expression was limited by assigning "the solemnization of marriage" to the Province (no. 12 of s. 92.).[2]

In these circumstances it is out of the question to tax the Imperial government with breach of faith for merely agreeing to the request made by Canada, a request to which the accredited representatives of what is now the Province of Quebec were parties.

The B. N. A. Act in giving to the Federal Parliament jurisdiction over marriage and divorce does not except the Province of Quebec and to interpolate such an exception would be contrary to every canon of construction.

But, further, how can the religious freedom of Roman Catholics be violated by giving them a civil right which no power can compel them to exercise?

The innocent consort whose religious principles do not allow him to seek for a divorce has only to refrain from so doing.

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1 *Bourinot*, Manual of Constitutional History of Canada, p. 56; 185 *Eng. Hansard*, Third Series, (Lords) 557, 804, 1011 (Commons) 1164, 1310, 1701; *Gray, J. H.* Confederation of Canada, p. 387, and see *Todd, A.*, Parliamentary Government in the British Colonies, 2nd. ed. p. 432.

2 Houston, op. cit. p. 310, note. Gray, op. cit. p. 386.

If his conscience is less scrupulous and he obtains a divorce, he shows thereby that he approves of this mode of dissolving marriage. The guilty consort has shewn by his misconduct his want of respect for the sacrament of marriage.

It is by his own fault that he runs the risk of being divorced.

But if his conscience does not allow him to regard the marriage as dissolved by the Act of Parliament, he is quite free to refrain from a second marriage during the lifetime of the other consort.

He can regard the divorce as equivalent merely to a judgment of separation from bed and board.

On the other hand if either of the consorts whose marriage has been dissolved by divorce desires to contract a second marriage the difficulty which may exist as to finding an officer of civil status competent and willing to perform the ceremony can be got over by having the marriage solemnized outside the Province.[1]

Insurance.

12. The Law of Insurance.

Under its general powers to legislate on subjects not assigned to the Province exclusively, and under its special powers of legislation for the regulation of trade and commerce, the Federal Parliament has passed acts dealing with the subject of Insurance.

The principal act is "The Insurance Act 1886," (R. S. C. c. 124) amended by 51 Vict. c. 28; 57 Vict. c. 20, and 59 Vict. c. 20.

These acts regulate the business of insurance, lay down conditions as to the incorporation of companies intended to operate in more provinces than one, and provide as to management, meetings, reserves, inspection and the like.[2]

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1 *Supra*, p. 61.

2 See e. g., *Re Briton Med. and Gen. Life Assur. Co.*, 1886, 12 Ont. Rep. 441.

But "Insurance" is not, like "Banks and Banking", one of the matters assigned exclusively to the sphere of the Federal Parliament.

The contract of insurance is included under "property and civil rights", and its incidents are governed by the Civil Code and by the principles of commercial law.[1]

There are a good many provisions in the "Insurance Act" which are of doubtful validity.[2]

13. **The Railway Law.** Railway Law.

A railway company operating entirely within the Province[3] may be incorporated by the Provincial Legislature, and the Revised Statutes arts. 5125-5223 contain full regulations as to the management and working of such railways.

It has been held in a New Brunswick case that a provincial railway running only to the boundaries of the Province is within the power of the Province even though there be corresponding legislation by the authority beyond the Province.[4]

But the great railways which traverse the Dominion or extend beyond the limits of the Province must obtain incorporation from the Federal Parliament, and railways though wholly within the Province may have been withdrawn from the control of the Provincial Legislature by having been declared by the Federal Parliament under no. 10c. s. 92 of the B. N. A.

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1 *Citizens Insur. Co.* v. *Parsons*, 1881, 7 A. C. 96. See e. g., *Colonial Building and Investment Assoc'n.* v. *Att. Gen. for Quebec*, 1883, 9 A. C. 164; *Accident Insur. Co. of N. America*, v. *Young*, 1891, 20 Can. S. C. R. 280; *Venner* v. *Sun Life Insur. Co.* 1889, 17 Can. S. C. R. 394; *Anchor Marine Insur. Co.* v. *Keith*, 1883, 9 Can. S. C. R. 483.

2 See *Holt, C. M.*, "Insurance Law of Canada", (Montreal, 1898) p. 66 seq. and see infra, p. 145.

3 See no. 10a of s. 92.

4 *European & N. A. Railway Co.* v. *Thomas*, 1871, 1 Pugs. 42 (New Brunswick). 2 Cart. 439. See *Windsor & Annapolis Ry.* 1883, 3 Cart. at p. 399.

Act "to be for the general advantage of Canada or for the advantage of two or more of the Provinces." [1]

When this is done the Federal Railway Act applies to such railway and overrides inconsistent provisions in the provincial charter.[2]

It is extremely inconvenient that a railway which passes from one province to another should be subject to different, and, possibly, inconsistent regulations in different parts of its system.[3]

The present Railway Act passed by the Federal Parliament is 3 Edw. VII. c. 58, which came into operation on February 1st. 1904, by Proclamation dated 18th. Jan. 1904.

The amending acts are 4 Edw. VII. c. 31, 4 Edw. VII. c. 32, and 4 and 5 Edw. VII. c. 35.

It provides for the appointment of a Board of Railway Commissioners with wide powers for the inspection and regulation of railways, and for judging complaints against them. It deals also with the construction, incorporation and management of railways, and provides as to rights of expropriation and procedure in expropriations, and as to crossings, fences, etc.

It forbids discrimination in favour of one trader as against another, prescribes the use of the best appliances, such as brakes, for insuring safety, orders inquiries to be held into accidents, and the preparation by railways of periodical returns.

These statutory provisions are modelled mainly upon English legislation.

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1 See *Macdougall* v. *Union Navigation Co.* 1877, 21 L. C. J. 63. 3 Edw. VII., c. 58 s. 6 (Can.).

2 See *McGibbon* v. *Armstrong*, 1906, (Feb. 28, 1883), (C. R.).

3 See *Bourgoin* v. *M. O. & O. Ry. Co.* 1880, 5 A. C. 381; *C. P. R. Co.* v. *Corp. of Notre-Dame de Bonsecours*, (1899) A. C. 367; *Madden* v. *Nelson & Fort Sheppard Ry.* 1899, A. C. 626.

French statute law as to railways is widely different from ours.[1]

The Act contains a new provision as to the liability of a railway company for fires caused by sparks from the locomotive.

It is now provided by s. 239 that in such cases negligence does not need to be proved.

But where it is shown that the company has used modern and efficient appliances, and has not otherwise been guilty of any negligence, the total amount of compensation recoverable under this section for all fires started by the same locomotive, and upon the same occasion, shall not exceed five thousand dollars, and it shall be apportioned amongst the parties who suffered the loss as the court may determine.[2]

But although the management of Federal railways is thus controlled by Dominion legislation, it must be borne in mind that the contract of carriage of passengers and goods, and the law of liability of carriers for negligence in the discharge of their common-law duties are not within the jurisdiction of the Federal authority.[3]

Notwithstanding this, provisions which appear to touch the contract may be *intra vires* as being general regulations of trade, or as provisions for maintaining the peace of the country.

E. g., the provision that a passenger who has not paid his fare, or cannot produce his ticket may be put off the train by the train servants of the company at any usual stopping place or near any dwelling house, as the conductor elects, the con-

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1 See *Abbott, H.*, Railway Law of Canada, (Montreal, 1896), preface, and infra, p. 142.

2 See for the previous law, *C. P. R.* v. *Roy*, (1902) A. C. 220 and *infra*, p. 137.

3 See *Abbott*, op. cit. chapters on Carriers and on Negligence.

ductor first stopping the train and using no unnecessary force.[1]

In a recent case a provision of the Federal law was sustained by the Supreme Court and by the Privy Council, though it seemed suspiciously like an invasion of provincial autonomy as to "property and civil rights."

The Act was 4 Edw. VII. c. 31 (Can.).

This Act provides that no agreement with an employee shall relieve a Federal railway from liability for personal injury to him.

The view taken by the Courts was that the Dominion Parliament had exclusive power to legislate as to the construction, management and operation of such railways, and that this act was legislation ancillary to their operation.[2]

Before the enactment in question, the Supreme Court had held, reversing the judgment of the Court of King's Bench, that such an agreement by a railway company with one of its employees was not void as contrary to public policy, at any rate when the fault was that of a fellow employee.[3]

On appeal to the Privy Council the judgment was reversed upon another ground, and this point was not decided.[4]

Unless the charter of a railway company contains stipulations to the contrary the company is subject to the general law with regard to the rights and duties of neighbouring proprietors such as the duty of receiving the water which flows naturally from a higher level.[5] The Provincial Parliament

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1 *G. T. R. Co.* v. *Beaver*, 1893, 22 Can. S. C. R. 498, (s. 217 of new Act).

2 *In re Railway Act*, 1905, 36 Can. S. C. R. 136. Affirmed by P. C. *sub nom. G. T. R.* v. *Att. Gen. for Can.*, Nov. 5 1906.

3 *G. T. R.* v. *Miller*, 1903, 34 Can. S. C. R. 45.

4 *Miller* v. *G. T. R. Co.* [1906] A. C. 187.

5 *G. T. R. Co.* v. *Langlois*, 1905, R. J. Q. 14 K. B. 173. See *C. P. R.* v. *Corp. de N.-D. de Bonsecours*, 1899, A. C. 367.

may impose direct taxation upon the portions of the railroad which are within the Province in order to the raising of a revenue for provincial purposes.[1]

And a railway company may be placed by the Court under the charge of a judicial sequestrator or receiver.[2]

14. The Law of Joint-Stock Companies.

Joint-Stock Companies.

Companies may be incorporated either by the Federal Parliament, or by the Provincial Legislature according as they are intended to carry on business throughout the Dominion or merely in the Province.

A company whose objects are purely provincial must be incorporated by the Province (no. 11 of s. 92 of B. N. A. Act).[3]

Provincial objects.

But when a company without fraud has obtained incorporation from the Dominion its status is not affected by the fact that it carries on operations solely within the Province.[4]

Dominion objects.

Conversely, when the objects of the company as set forth in the act or charter of incorporation transcend the limits of the Province, the company must be incorporated by the Federal Parliament.

This is the case, for example, with a telephone company which is intended to carry wires throughout Canada,[5] or with an electric power company which has the right to lay cables across the boundary into the United States.[6]

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1 *C. P. R.* v. *Corp. de N.-D. de Bonsecours, ut sup.* at p. 372.

2 C. C. 1823, C. C. P. 713. *Bégin* v. *Levis County Ry. Co.* 1905, R. J. Q. 27 S. C. 61 (*Pelletier, J.*).

3 As to "provincial objects" see *Clarke* v. *Union Fire Insur. Co.* 1883, 10 P. R. 313 (Ont.). *Clements*, Canadian Constitution, 2nd. ed. p. 283.

4 *Colonial Building and Investment Assoc'n.* v. *Att. Gen.* 1883, 9 A. C. 157.

5 *Corporation of City of Toronto* v. *Bell Telephone Co.* (1905) A. C. 52.

6 *Hewson* v. *Ontario Power Co.* 1905, 36 Can. S. C. R. 596. See *Clements*, Canadian Constitution, 2nd. ed. p. 266.

The Privy Council has lately said that the effect of the incorporation is to create a legal person with capacity to carry on a certain business within a definite area.

Effects of Dominion incorporation.

When the company is incorporated by the Federal Parliament it is a legal person in all parts of the Dominion.

But its capacity must be exercised in each Province consistently with the laws of that Province.[1]

The fact that the company is incorporated by the Federal Legislature does not give to that Legislature power to regulate the contracts into which the company may enter.

For this would be an interference with the provincial law of property and civil rights.[2]

But as to Banking and Insolvency the Dominion Parliament has exclusive power, and in dealing with these matters it may affect "property and civil rights."[3] And the same is true when the business is one falling under the exception made by s. 92, sub.-s. 10a of the B. N. A. Act, i. e., of transportation or communication beyond the provincial limits.[4]

So the Dominion Winding-Up Act (R. S. C. c. 129) being an insolvency law affects a provincial company.[5]

Companies Acts.

The Dominion Parliament has passed a series of acts on the subject of joint-stock companies of which the chief are the Canada Companies Act, 1887, (R. S. C. c. 119,) and the Dominion Companies Clauses Act, 1886, (R. S. C. c. 118.).

The former act deals with such matters as the incorpora-

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1 *Colonial Building and Investment Assoc'n.* v. *Att. Gen.* 1883, 9 A. C. 157.

2 *Citizens Insurance Co.* v. *Parsons*, 1881, 7 A. C. 96. As to railways see supra, p. 65.

3 *Tennant* v. *Union Bank* (1894) A. C. 31. See *Coté* v. *Watson*, 1877, 3 Q. L. R. 157 (*Plamondon, J.*).

4 *Toronto Corporation* v. *Bell Telephone Co.* (1905) A. C. 52; affirming C. A. in 6 O. L. R. 335. See *in re Railway Act*, 1905, 36 Can. S. C. R. 136, aff'd. Nov. 5 1906 (P. C.).

5 *In re Union Fire Insur. Co.* 1890, 17 Can. S. C. R. 265; *re Iron Clay Brick Mfg. Co.* 1889, 19 Ont. Rep. 113.

tion of companies and their powers, directors and their powers, calls, books to be kept, transfer of shares, liability of shareholders and of directors, domicile of companies, publication of statements, etc.

The Dominion Companies Clauses Act gives a number of clauses which are to apply to all Dominion companies except those for railways, banking or insurance unless the special act which incorporates the company otherwise provides.[1]

The Provincial Legislature has passed similar acts for the companies over which it has jurisdiction (R. S. Q. arts. 4651-4760), as well as acts dealing with particular classes of companies.

Power of Provincial Legislature.

For the present purpose it is not necessary to enumerate the subjects over which the Provincial Legislature has exclusive power to make laws.

They are to be found in s. 92 of the B. N. A. Act.

Most if not all of those among them in regard to which any conflict might arise between the Dominion and the Province have already been touched upon in speaking of the Federal powers.

But it may be worth while to say a few words upon three subjects of legislation which do not belong absolutely and exclusively either to the Province or to the Dominion.

These are Education, Agriculture and Immigration.

Education.

15. **Education.**

The intention of the Confederation Act is to make education in principle a Provincial matter, but at the same time to insert certain provisions for the protection of religious minorities.

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1 See on this subject generally *White, W. J.*, Canadian Company Law, (Montreal 1901). The amendments to the Companies Act are 50-51 Vict. c. 20; 61 Vict. c. 49; 62-63 Vict. c. 40; 2 Edw. VII. c. 15; 4 Edw. VII. c. 5. The Companies Clauses Act has been amended by 62-63 Vict. c. 40.

The question of separate schools had been keenly fought out, and strong party feeling had been evoked on both sides. The differences of opinion upon this matter formed one of the greatest obstacles to the Union.

In dividing the Province of Canada into Ontario and Quebec it was felt to be desirable to protect the minority in each Province from any act of the majority which would take away from them rights which they had struggled hard to win.

In Upper Canada a general system of undenominational education has been established, but with provision for separate schools to supply the wants of the Catholic inhabitants of that Province.

Similarly in Lower Canada there existed separate Protestant schools.

Neither the Roman Catholics nor the Protestants were willing to give the new provincial authorities power to take away the separate schools and to establish a uniform state system of schools with compulsory attendance for all children without regard to differences of religion.

At the same time the Provinces were unwilling to resign their powers over education to the Federal Legislature.

After much consideration the plan adopted was to take the existing Roman Catholic schools in Upper Canada as a sort of standard and to say that the denominational schools in the Province of Quebec should have the same privileges.

And it was provided that no Provincial law should prejudicially affect any right or privilege with respect to denominational schools which any class of persons had by law in the Province at the Union. (B. N. A. Act s. 93 sub-ss. 1 and 2.).

Further the Act provided that "where in any Province a system of separate or dissentient schools exists by law at the Union, or is thereafter established by the Legislature of

the Province an appeal shall lie to the Governor-General in Council from any Act or decision of any Provincial authority affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to education."

And "in case any such Provincial law as from time to time seems to the Governor-General in Council requisite for the due execution of the provisions of this section is not made, or in case any decision of the Governor-General in Council or any appeal under this section is not duly executed by the proper Provincial authority in that behalf, then and in every such case, and as far only as the circumstances of each case require, the Parliament of Canada may make remedial laws for the due execution of the provisions of this section and of any decision of the Governor-General in Council under this section." (sub-ss. 3 and 4.).

Manitoba school cases.

The Manitoba Act, 1870, by which the Province of Manitoba was created contains provisions which are almost identical with these. (s. 22). Two famous cases from that Province have been carried to the Privy Council.

The opinions of their Lordships in the two cases are extremely difficult to reconcile.

Denominational schools existed in Manitoba till 1890.

In that year a complete change of educational policy was introduced.

The system of denominational schools was swept away. Free public schools supported by rates were established throughout the Province.

The Provincial Acts 53 Vict. c. 37 and c. 38, by which this change was made were challenged as *ultra vires* both by the Roman Catholics and by members of the Church of England.

The ground was that these persons were prejudicially affected by these Acts because they were taxed for the support

of the free schools, while they felt bound for religious reasons to maintain their own denominational schools for their children.

But the Privy Council reversing the judgment of the Supreme Court held that the Acts were not *ultra vires*.

Lord Macnaghten who delivered the opinion of the Judicial Committee said that no right or privilege had been prejudicially affected. Those persons who were in favour of separate schools were free to conduct them at their own expense without molestation. No child was compelled to attend a public school. The fact that the parents had to pay the same taxes as their neighbours for the public schools did not cause them any prejudice. It was their misfortune that owing to their religious convictions they were unable to partake of the advantages which the law offered to all alike.[1]

The aggrieved supporters of denominational schools were more successful in a subsequent case in which they invoked the other form of remedy viz.: an appeal for relief to the Governor-General in Council.

The Governor-General submitted the question to the Supreme Court for their opinion, under the power given by the Supreme and Exchequer Courts Act (R. S. C. c. 135 s. 137) as amended by 54 and 55 Vict. c. 25 s. 4 (Can.).

The Privy Council held in this case that even although the Acts were *intra vires* the Governor-General was entitled to interfere if any right or privilege of a Protestant or Roman Catholic minority in relation to education was affected.

Lord Herschell here gave the opinion, and indicated very clearly that in the opinion of the Board as then constituted the privileges formerly enjoyed by the dissentient minorities had been prejudicially affected by the Acts.[2]

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1 *City of Winnipeg* v. *Barrett*, (1892) A. C. 445. 5 Cart. 32.

2 *Brophy* v. *Att. Gen.* (1895) A. C. 202. 5 Cart. 156. See *infra*, p. 111.

16 and 17. **Agriculture and Immigration.**

Agriculture and Immigration.

Both the Dominion and the Province have power to legislate on these subjects, but if any conflict arises a provincial law will receive effect only so far as it is not repugnant to any Act of the Parliament of Canada (s. 95.).

18. **General residuary power of Federal Parliament.**

With regard to the powers of the Federal Parliament and of the Provincial Legislatures respectively one remark of a general character has to be made.

Peace, order and good government.

The Dominion Parliament has a general power of making laws for the peace, order and good government of Canada, in relation to all matters not assigned exclusively to the Province.

It has been called the residuary legatee of legislative power because it has all the powers not otherwise disposed of, provided they relate to matters of Canadian interest and importance.[1]

The foregoing summary will, I hope, be sufficient to indicate the broad lines which divide the Civil law of the Province from the Imperial and Federal laws which affect the whole of the Dominion of Canada.

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1 See *Att. Gen. for Ont.* v. *Att. Gen. for Dom.* Local Prohibition Case (1896) A. C. 348.

PART II

THE INTERPRETATION OF THE CIVIL CODE.

CHAPTER THREE.

Rules of Interpretation.

The Civil Code of Lower Canada came into force on 1st August 1866.

It became operative on that date in virtue of a proclamation of 26th May 1866 by Viscount Monck, Governor-General, issued under a power given by s. 6 of 29 Vict. c. 41 (Prov. of Can.).

History of codification.

The Act 20 Vict. c. 43 (Prov. of Can.) now c. 2 of the Consolidated Statutes of Lower Canada directed the appointment of a Commission to codify the laws of Lower Canada in civil matters, and to frame two Codes, one to be called the Civil Code of Lower Canada and the other the Code of Civil Procedure of Lower Canada.

That Act provided as follows (s. 6):— "In framing the said Codes the said Commissioners shall embody therein such provisions only as they hold to be then actually in force, and they shall give the authorities on which they believe them to be so; they may suggest such amendments as they think desirable, but shall state such amendments separately and distinctly, with the reasons on which they are founded."

The Commissioners complied with these instructions.

Their reports, of which there were eight referring to the Civil Code were laid before Parliament, and were referred to a Select Committee.[1]

Those portions of the text presented by the Commissioners which purported to be a codification of the existing law were hardly discussed at all by the Committee.

The number of changes made in this part of the work of the Commissioners was very small.

Speaking broadly, the Select Committee considered only the amendments proposed by the Commissioners and printed separately as directed by the Act.[2] Select Committee.

The Committee reported on the 13th March 1865.

By the Act of the Province of Canada, 29 Vict. c. 41, the part of the Code giving the old law was approved of, but it was declared that "the marginal notes and the references to existing laws or authorities at the foot of the several articles of the said Code, shall form no part thereof, and shall be held to have been inserted for convenience of reference only." (s. 1.).

A list of all the amendments suggested by the Commissioners or by the Select Committee was given in a Schedule as agreed to by the House, and the Commissioners were directed to incorporate these amendments with the text, "adapting their form and language (when necessary) to those

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1 See for dates and subjects of reports and for the members of the Select Committee *McCord's* edition of the Civil Code, preface to first edition, p. vii, which is reprinted in the 3rd ed. (Montreal, 1880). *Mr. Thomas McCord* was one of the two secretaries to the Codification Commission, and his remarks on the history of the Commission are of special value. He was afterwards a judge of the Superior Court.

The Reports themselves were published in three volumes (Quebec, 1865). They are cited in this work as "Com. Rep."

2 *McCord's* Code, ib.

of the said Code, but without changing their effect, inserting them in their proper places, and striking out of the said Code any part thereof inconsistent with the said amendments." (s. 2.).

After this work had been performed by the Commissioners the Code was printed by the Queen's printer in English and French.

The official copy is conclusive as to the text.[1]

Amendments in brackets.

In this official publication the Commissioners distinguished the amendments which they inserted from the old law. The amendments by which a change was made in the law were placed between square brackets [ ].[2]

Sometimes an amendment forms a whole article as, e. g., C. C. 1135, C. C. 1040. Sometimes it is only part of an article, e. g., C. C. 911, C. C. 889. C. C. 930 or C. C. 1047.

The instructions given to the Commissioners by the Act just cited were, as we have seen, rather indefinite, and it was feared that doubts might arise as to whether in inserting the amendments and adapting their language the Commissioners, in some cases, might not have inadvertently changed the effect of the amendment and thereby exceeded their powers.

To remove these doubts the Quebec Statute 31 Vict. c. 7 s. 10 (Supp. Rev. Stat. p. 11) provided that the Civil Code as printed by the Queen's printer was in force as law.[3]

Most subsequent editions of the Civil Code have retained the square brackets distinguishing the new law from the old as they appeared in the official publication of the Code. I shall show presently that these marks are of considerable importance as an aid to interpretation.

1 See *Dupuy* v. *Cushing*, 1878, 22 L. C. J. per *Dorion C. J.* at p. 206; 5 A. C. 409.

2 See note to p. 2 of the official copy.

3 See *McCord's* ed. of Civil Code note to 3rd. ed. at p. vii; *Naud* v. *Marcotte*, 1889, R. J. Q. 9 Q. B. at p. 124, per *Mathieu, J.*

Words interpreted in Code.

The Code contains certain rules for its own interpretation, and these are, of course, conclusive where they apply.

Article 17 which is in the Preliminary Title, gives an interpretation of certain words used in the Code, e. g., "person", "month", "holiday", "pound sterling", "bankruptcy", and "fortuitous event".

Section 9 of the same article says "The masculine gender includes both sexes unless it appears by the context that it is only applicable to one of them."

It may be added that *a fortiori* words which commonly include both sexes, e. g., "child" will not be restricted to one sex only unless the context shows clearly that this was intended.[1]

Section 10 provides "The singular number extends to more than one person, or more than one thing of the same sort, whenever the context admits of such extension."

These articles are based on similar provisions given in "The Interpretation Act" which is c. 5 of the Consolidated Statutes of Canada.

Some other equally obvious interpretations are there given of other terms which frequently occur in statutes.

They have not been embodied in the Code but are sometimes referred to as guides to the interpretation of expressions used in it.

I do not think it necessary here to enumerate them.

Articles 2613 and 2615 of the Code contain important rules of interpretation of a more general character. These will be dealt with when I come to speak of the points which they settle.[2]

I will now attempt to formulate the general rules for the interpretation of the Code.

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1 See *Grace* v. *Higgins*, 1892, R. J. Q. 1 S. C. 32 (*Mathieu, J.*).

2 Infra, pp. 80, 95.

Rule One.

The first and leading rule is that where the Code is clear and unambiguous upon the point at issue it cannot be controlled or explained away by reference to any other source.

The Code, in this case, abrogates all previous law upon the point and is absolutely binding upon the Courts.

C. C. 2613 provides "The laws in force at the time of the coming into force of this Code are abrogated in all cases:—

In which there is a provision herein having expressly or impliedly that effect;— In which such laws are contrary to or inconsistent with any provision herein contained;— In which express provision is herein made upon the particular matter to which such laws relate;— Except always that as regards transactions, matters and things anterior to the coming into force of this Code, and to which its provisions could not apply without having a retroactive effect, the provisions of law which without this Code would apply to such transactions, matters and things remain in force and this Code applies to them only so far as it coincides with such provisions."

Questions with regard to transactions anterior to the Code naturally become rarer as time goes on.

But they still occur.

In a recent case the question was as to the effect of a donation made in 1832.[1]

We must exclude then matters anterior to the Code which are still governed by the old law.[2]

As to all other matters the general rule is that where the Code is clear it supplies the governing rule, and must receive effect acording to its terms.

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1 *Meloche* v. *Simpson*, 1898, 29 Can. S. C. R. 375.

2 Ib. Cf. *Dubord* v. *Aubin*, 1889, 17 R. L. 414, (*Mathieu, J.*).; see per *Hall, J.*, in *Fry* v. *Quebec Harbour Commissioners*, 1896, R. J. Q. 5 Q. B. at p. 347.

Old law may be repealed by implication.

C. C. 1463 is a good illustration of an old law being repealed by implication. By the old French law a widow was deprived of her dower if she was guilty of unchastity during the first year of her mourning, or even later if her conduct was a public scandal.[1]

This rule was followed in Canada before the Code.[2]

C. C. 1463 is as follows:— "The wife may be deprived of her dower by reason of adultery or of desertion.

In either case an action must have been instituted by the husband, and a subsequent reconciliation must not have taken place; the heirs in such case can only continue the action commenced, if it have not been abandoned."

C. C. 1463 is silent as to the unchastity of the widow. It speaks only of the wife and leaves to the husband alone the right to choose whether he will sue to have the forfeiture declared.

The codifiers in their remarks do not indicate any intention to change the old law.[3]

But they would appear to have done so though, perhaps, inadvertently.

For provisions of a penal character must be strictly construed.

C. C. 1463 states only two grounds of forfeiture both applicable to a wife.

Its terms cannot be extended to include a widow.

Under the old law she was liable to the same forfeiture but the old law has been abrogated by implication.[4]

Rule Two.

Codifiers' statement of old law.

Where the Code professes to declare the old law, and the

1 *Pothier*, Douaire n. 258. *Renusson*, Douaire, ch. 12, n. 20.

2 *J.* v. *H.* 1857, 7 L. C. R. 391 (*Bowen, C. J., Meredith & Morin, JJ.*).

3 Com. Rep. v. 2, p. 249.

4 See *Mignault*, Droit Civil Canadien, v. 6, p. 454.

article is unambiguous there is a strong presumption that it is a correct statement of the old law.

Even as to matters before the Code, the Code is the primary authority when it merely professes to declare the old law.[1]

Where the words to be interpreted were not put by the codifiers between brackets they are to be taken as declaratory of the old law.

As matter of law it is permissible to attempt to show that the codifiers fell into error as to what the old law was.[2] For the Code has no statutory authority as to matters anterior to its passing. It possesses merely the weight of a statement made by eminent lawyers after consideration of the sources. The Court is bound to examine the sources themselves.

In a recent case the question arose whether a substitution of moveable property might be created under the law before the Code.

C. C. 931 runs "Moveable property as well as immoveables may be the subject of substitutions."

This is not placed between brackets and the codifiers, therefore, intended the article to be declaratory of the old law.

In spite of this H. T. Taschereau, J., held that the French ordinance of 1629 was in force in this Province This ordinance absolutely prohibited substitutions of moveables.

It was modified in France by the *Ordonnance sur les substitutions* of 1747. But the learned judge held that this subsequent ordinance had never come into force in Canada for want of registration by the Superior Council of Quebec.

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1 *Herse* v. *Dufaux*, 1872, L. R. 4 P. C. at p. 489; *Meloche* v. *Simpson*, 1899, 29 Can. S. C. R. 375.

2 See, however, per *Taschereau J.* in *Meloche* v. *Simpson*, 29 Can. S. C. R. at p. 386.

The Court of Appeals, however, rejected this *considérant* of the judgment of Taschereau, J., and held, that in this case, the Code must be accepted as a correct statement of the old law.

Hall, J., said "The provisions of our Code (C. C. 838 and 931) are, in my opinion, clear and unequivocal in their application to the matter under consideration, and that being so, any attempt to go back of their promulgation, and to establish an error or misconception, or even omission, on the part of the codifiers, as the basis of a judgment at variance with the accepted text of the Code, I consider unwarranted, unnecessary, and dangerous in the extreme."[1]

But, with great respect, this seems to be somewhat too strongly stated. Such a construction is to give the Code a retroactive effect, contrary to C. C. 2613. In that case the Code was not taken as conclusive. The sources of the old law were carefully considered as well.

Rule Three.

It is permissible to show that the words, although not in brackets are new law, and conversely, that words in brackets are old law. Brackets.

Cases occur in which the codifiers altered the old law without intending to do so.

In such cases if the language of the Code is clear effect must be given to it.

The Court cannot interpret the words in an unnatural sense, or modify them in order to make them yield a correct exposition of the old law.

In other words it is not permissible to argue that because certain words are not in brackets they must declare the old law, and that as they declare the old law they cannot be in-

1 *Stewart & Molsons Bank* v. *Simpson*, 1894, R. J. Q. 4 Q. B. at p. 50. See the appeal, in which the judgment of the C. A. was affirmed (1895) A. C. 270, though the point under discussion here was not argued.

terpreted in their natural sense, because that would give a result inconsistent with the old law.[1]

The converse case is much commoner.

Articles which are placed between brackets as being new law are new law only in part.

The corrections of language which the Commissioners were authorized to make by 29 Viet. c. 41 s. 2 (Prov. of Can.) are put in brackets.[2]

As illustrating the statement that it is permissible to show that words between brackets are not entirely new law the following case may be cited.

A man bought a piece of land without knowing that it was burdened with a servitude under which a neighbour could sink a well, and convey water by a pipe to his house. At the time of the sale the ground was covered with snow, and the pipe was invisible. The buyer saw the well but thought that it belonged to the seller. The servitude was therefore unapparent. On discovering its existence the buyer brought an action against the seller for diminution of the price and for damages. It was argued that C. C. 1519 which is all between brackets was entirely new law, and that it gave the buyer the right to claim indemnity only in a case where the unapparent servitude was "of such importance that it may be presumed the buyer would not have bought, if he had been informed of it." But Cimon, J., held that C. C. 1519 was all old law except the last clause which says that the buyer may bring his action as soon as he is informed of the existence of a servitude. By the old law he could not do so until he was troubled in his possession.[3]

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1 See *Trust and Loan Co. of Canada* v. *Gauthier*, (1904) A. C. at p. 101; (P. C.); Cf. *Dubord* v. *Aubin*, 1889, 17 R. L. 414, where *Mathieu, J.*, held that C. C. 1312 contained new law though not within brackets.

2 See *Naud* v. *Marcotte*, 1899, R. J. Q. 9 Q. B. at p. 130.

3 *Pothier*, Vente n. 239.

Cimon, J., held that except for this amendment C. C. 1519 stated the old law, and was never intended to abolish the right which a buyer had always enjoyed of bringing the *actio quanti minoris* when the defect in the thing bought was not so serious as to create a presumption that the buyer would not have bought if he had known of it.

And this judgment was affirmed by the Court of Review.[1]

Rule Four.

Text of Code not to be qualified.

Conditions and qualifications are not to be imported into the Code by reference to other sources.

It is not enough to argue that the article of the Code is not given as a new law, and that seeing that the Commissioners professed to be declaring the old law we must inquire from other sources what the old law was.[2]

In a leading case Lord Watson delivering the judgment of the Judicial Committee adopted the language used by Lord Herschell in *Bank of England* v. *Vagliano Brothers*.[3]

Lord Herschell was there speaking of the Bills of Exchange Act which is a kind of Code inasmuch as it summarizes and reduces to order the previous law on the subject, and Lord Watson said that Lord Herschell's statement was equally applicable to our Civil Code.

"The purpose of such a statute surely was that on any points specifically dealt with by it the law should be ascertained by interpreting the language used instead of, as before, by roaming over a vast number of authorities."

And Lord Watson went on to say "Their Lordships do not doubt that, as the noble and learned Lord in the same case

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1 *Lebel* v. *Bélanger*, 1892, R. J. Q. 2 S. C. 331. Cf. *Guillouard*. Vente 2nd. ed. v. 1 n. 413; *Dall.* Rep. vo. Vente, n. 1085; Rennes, 6 Janv. 1893, D. P. 94, 2, 148 note.

2 See per *Taschereau, J.*, in *Canadian Pacific Railway Co.* v. *Robinson*, 1891, 19 Can. S. C. R. at p. 323.

3 (1891), A. C. at p. 145.

indicates, resort must be had to the pre-existing law in all instances where the Code contains provisions of doubtful import, or uses language which had previously acquired a technical meaning. But an appeal to earlier law and decisions for the purpose of interpreting a statutory Code can only be justified upon some such special ground."[1]

Lord Herschell puts the rule in another passage in this way:— "I think the proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view."[2]

In the former of these cases the article under interpretation was C. C. 1056. That article, in cases where death has been caused by the fault of another, and the victim dies without having obtained indemnity or satisfaction, gives a right to his consort and his ascendant and descendant relations, but only within a year after his death, to recover all damages occasioned by such death.

The history of its introduction into the Code is curiously obscure. It does not occur in the draft Code or in the amendments passed by the Legislature.[3]

It is undoubtedly based upon c. 78 of the Consolidated Statutes of Canada 1859, which codified the provisions of the Act 10 and 11 Vict. c. 6 (Prov. of Can.). This statute was itself modelled on Lord Campbell's Act.

Lord Campbell's Act.

It would appear that the codifiers inserted the article at

1 *Robinson* v. *Canadian Pacific Railway*, (1892), A. C. at p. 487.

2 *Bank of England* v. *Vagliano Brothers*, (1891), A. C. at p. 144.

3 Com. Rep. v. 1, p. 61.

their final revision under the powers given to them by 29 Vict. c. 41, s. 4.

In doing so the Commissioners probably exceeded their powers but their action was ratified by the Legislature in the Act of Quebec, 31 Vict. c. 8, s. 10 which provides that the Code as printed shall have the force of law.

In the appendix B. to the Revised Statutes of Quebec 1888, c. 78 of the Consolidated Statutes of Canada is stated to have been superseded by the Civil Code. (p. xx.).[1]

The question to be decided in *Robinson's* case was whether a widow had a right to sue for damages for the death of her husband, although the husband's own right to sue had been extinguished by prescription. The Supreme Court had decided this question in the negative.

In reaching this conclusion they construed the article in the light of Lord Campbell's Act from which it was derived, though in a very indirect manner, and of the English cases interpreting that Act.

But this judgment was reversed by the Privy Council which held that the right of action of the relatives was quite distinct from that of the victim, and that the period of prescription of the widow's right began to run only from the date of the husband's death. They repudiated the view that the language of the Code was ambiguous, and held that its plain and intelligible language could not be interpreted in an unnatural sense because English judges interpreting a different statute had come to another conclusion.[2]

The same principle was applied in a more recent case.

A certain stock in trade was insured against fire. After the occurrence of a fire the owner of the stock assigned to a bank his claim against the insurance company.

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1 See *Mignault*, Droit Civil Canadien, v. 5, p. 339.

2 This case was followed in *Miller* v. *G. T. R. Co.*, [1906] A. C. 187.

The bank gave notice to the insurance company of the assignment together with a copy of the assignment itself as required by C. C. 1571.

"Signification" On being sued, the insurance company pleaded that there had been no sufficient signification to them of the assignment.

This was supported by references to the practice under the Custom of Paris and the actual French law (C. N. 1690).

The Court of Appeal by a majority upheld this contention holding that "signification" was a technical term and had always been interpreted in the French law to mean signification by a notary.

The Privy Council reversed this judgment.[1]

Lord Macnaghten said "It appears to their Lordships that the question must depend simply upon the provisions of the Civil Code, without introducing or importing any requirements which, though necessary under the Custom of Paris or under modern French law, are not found in the Code as it stands." "There is nothing in the Civil Code to show that the intervention of a notary is required. It is certainly not prescribed in terms, nor is there in their Lordships' opinion any room for implication in this matter." [2]

The following case is another illustration.

C. C. 1623 (C. N. 2102), dealing with the privilege of a lessor, says that he "may seize the things that are subject to it, upon the premises, or within eight days after they are taken away. If the things consist of merchandise they can be seized only while they continue to be the property of the lessee."

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1 *Bank of Toronto* v. *St. Lawrence Fire Insurance Co.* (1913), A. C. 59.

2 Ib. at p. 66.

In a recent case, a stock had been damaged by fire. The lessee sold it *en bloc*.

The lessor executed a seizure in reception of his stock in the possession of a purchaser in good faith.

It was held by the Court of Review that the seizure must be quashed.

The Court held that C. C. 1623 did not require that the "merchandise" should be sold in detail.

And a sale *en bloc* of a damaged stock was an ordinary and usual transaction.

It was sought to interpret the article by C. N. 2102 and the commentators on that article.

But the Court was of opinion that the language of C. C. 1623 was too plain.[1]

Tait, A. C. J., cited as applicable the following dictum "The works of learned French authors, whether written before or after the promulgation of the Code Napoléon, are useful only in so far as they explain what may be ambiguous or doubtful in the Canadian Code; they cannot control its plain letter or its express provisions."[2]

Perhaps the tendency of our Courts, and even more that of the Judicial Committee, has been to press rather far the doctrine that the Code must be construed literally and without reference to the past.

Reaction in France against over-literal construction.

In France, at any rate, there is a decided reaction against extreme literality of interpretation.

At one time the inclination of the French courts was to treat the Code as a statute sufficient in itself, and not needing to be interpreted in the light of the past.

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1 *Ligget* v. *Viau*, 1889, R. J. Q. 18, S. C. 201.

2 Per *Sir James Colville*, in giving the opinion of the Privy Council in *Herse* v. *Dufaux*, 1872, L. R. 4 P. C. at p. 489, Cf., in France, *Baudry Lacantinerie* et *Houques-Fourcade*, Personnes, 2nd. ed., v. 1 n. 258; *Aubry* et *Rau*, 5th. ed. v. 1 s. 41 p. 197.

In some cases, by reading certain articles together, conclusions were reached which would have greatly surprised the codifiers.

The revival of historical studies in France, and the number of admirable works which have appeared upon the history of the French law have helped to bring about a different tendency.[1]

The Courts are now disinclined to hold that the codifiers made any change in the old law, where the contemporary documents show no evidence of an intention to innovate.

They are more disposed than formerly to construe the text of the Code in the light of the old law which it summarizes.

Thus Bugnet the editor of Pothier, was able to say "*Je ne connais pas le droit civil; je n'enseigne que le Code Napoléon.*"

Planiol's rule. Whereas one of the very best of modern writers on the French law, M. Marcel Planiol, states somewhat as follows the rule of interpretation in cases where the Code has a provision on the point but its sense is doubtful.

We must first consult the *travaux préparatoires,* i. e., the reports of the codifiers, the discussions in the chambers, etc., in such compilations as Locré.

In our law the Reports of the Commissioners is the corresponding work.

But, M. Planiol says, very often no clear guidance can be found in the *travaux préparatoires.*

His second rule is the one which I wish to emphasize.

"In the second place we must look to see if the legislator had or had not the intention to change the existing law.

Did he wish to make a reform? If so we shall throw light on his intention by determining the circumstances which

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1 For a useful bibliography of historical works on the French law, see *Aubry* et *Rau,* 5th ed. v. 1 s. 42, p. 198.

called for this reform, and the object which the authors of the new law had in view."

"On the other hand if there was no reform, we must go back to the law anterior to the Code, for the presumption is that the old rules have been retained by implication.

If no indication to change old law presumption is that it was maintained.

This is what is called *l'autorité de la tradition.*

The old law is only in so far modified as we find in the law in force a new principle in contradiction with it."[1]

I have paraphrased rather than translated this passage in order to bring out its force more clearly.

I shall give one or two examples from the modern French law to illustrate the statement that a change of tendency is there perceptible.

Where the history of the codification is attested by full reports by the Commissioners, as is the case with our Civil Code, and where there is no evidence to be found of an intention to alter the old law, there certainly appears to be a reasonable presumption that the old law is maintained, unless the text of the Code is too clearly contrary.

Moreover, if this is a reasonable presumption in construing the Code Napoléon, it is still stronger when applied to the Civil Code of Lower Canada.

At the time when the Code Napoléon was prepared revolution was in the air, and the law like all the institutions of the country was subjected to a complete recasting. The various *coutumes* had to be harmonised, and a law framed which should apply to the whole of France, including the *pays de droit écrit.*

It is no wonder that some of the earlier writers were inclined to take the view that the French codifiers had made a *tabula rasa,* and that thereafter it was useless to inquire into the law of the *ancien régime.*

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1 *Planiol, M.*, Traité Elémentaire du Droit civil, 3rd. ed. v. 1 n. 218.

But, as we have seen this view has been abandoned, and the best writers now teach that the presumption is in favour of the old law.

In Canada the circumstances were very different. There were no conflicting systems of law to be reconciled, and the object of codification was rather to consolidate the existing law in a convenient form than to effect serious changes in its substance.

It is indeed a general rule of interpretation that an act does not by implication repeal the previous law unless the meaning of the statute is clear and precise.[1]

No doubt where the Code is absolutely unambiguous the Court is bound to give effect to it.

But when there is any room for doubt, and no indication can be found in the report of the Commissioners of an intention to change the old law, there would appear to be a fair presumption that the intention was to retain the old law.[2]

Difference between Civil Code and Bills of Exchange Act.

And, with the most profound respect for Lord Watson, I may be permitted to suggest that there are important differences between a statute such as the Bills of Exchange Act and a Code such as our Civil Code.

The Bills of Exchange Act is a codification of a small branch of the law. It is worked out in great detail, and is meant to settle a number of small points about which doubts existed owing to the difficulty of reconciling judicial decisions.

The Civil Code is a very brief summary of the whole of the civil law. It is derived from a great number of sources, and attempts to condense into a small volume the substance of many large books.

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1 See per *Casault, J. C.*, in *Thivierge* v. *Cinq-Mars*, 1897, R. J. Q. 13, S. C. at p. 402.

2 See infra, Rule 8 p. 103.

It is saturated with history, and in many parts is so extremely condensed, and expressed in such an abstract form, as to be hardly intelligible to anyone unfamiliar with the sources from which it is drawn.

And, in some cases, words, which at the first glance might seem to be clear, may be shewn to be equally susceptible of another meaning which is as consonant with the old law as the former meaning is contradictory of it.

Illustration of reaction in France.

A good illustration of the reaction in France from a narrowly literal construction of the Code may be found in the interpretation of the articles dealing with an heir's liability to pay legacies in full, even when he has to pay them out of his own pocket.

The question is whether a legacy is covered by the words *"dettes et charges de la succession"* (C. N. 870) which our Code renders "debts and liabilities" (C. C. 735.).[1]

Heir's liability to legatees.

If an heir accepts without benefit of inventory, and it turns out that the estate is insufficient to pay the legacies is the heir personally liable to the legatees?

In other words is a legacy among the *"charges"* or "liabilities" for which he has assumed responsibility?

The affirmative view was formerly adopted in France by an overwhelming body of authorities and many of the best writers are still of this opinion.[2]

But in a recent case the Court of Orleans has broken away from this view which was based entirely upon the literal in-

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1 C. N. 802 and 724.

2 *Demolombe*, Successions v. 2, n. 522; *Laurent*, v. 14 n. 108; *Aubry* et *Rau*, 4th ed. v. 6 s. 617, p. 442, 443 and s. 611, p. 381; *Baudry-Lacantinerie* et *Wahl*, Successions, 2nd. ed. v. 1, n. 158. Contra, *Bugnet* sur Pothier, v. 8, p. 210; *Demante*, v. 3, n. 24 bis; *Planiol*, Tr. Elem. 3rd. ed. v. 3 n. 2791, and other authorities cited by *M. Wahl*, l. c. and by *M. Flurer* in note to D. P. 91, 2, 313.

terpretation of the word "*charges*" and has reverted to the old law on the subject.[1]

The argument which prevailed was that to interpret "*charges*" literally led to a result entirely contrary to that which was supported by the historical sources of the law, and that there was no reason to believe that the codifiers intended to make any change.

In the Roman law the heir was liable for legacies only *intra vires successionis*.[2]

The old French law was the same.[3]

And the reports of the codifiers and the other documents classed among the *travaux préparatoires* contained in the compilation of Locré or Fenet afford no evidence of intention to alter the old law.

The distinction drawn between debts and legacies is most intelligible.

The heir who accepts without benefit of inventory is liable for the debts and that even *ultra vires successionis*.

For the *de cujus* was bound to pay his debts, and the heir continues his personality.

But the *de cujus* was not bound to leave a legacy to any one.

And if he did leave a legacy he could dispose only of what belonged to him. *Nemo liberalis esse debet ex alieno*.

The point came up later before the Court of Cassation.

But that Court found a way of disposing of the case without settling the general question of law.

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1 *Orléans*, 14 mai 1891, D. P. 91, 2, 313.

2 Inst. 2, 24, 1; Code 6, 21, 12; Dig. 30, I, 122, 2; see *Maynz*, Cours de Droit Rom. 5th ed. v. 3, s. 419, note 26 and s. 423, note 19.

3 *Pothier*, Successions, ch. 5 art. 3, s. 1; *De Ferrières*, Coutumes de Paris sur l'art. 344, and authorities in notes to D. P. 91, 2, 313 and D. P. 94, 1, 545.

The legatees in the case presented had commingled the funds of the succession with their own funds.

The Court held that, in these circumstances, they were estopped from pleading (*pas recevables à soutenir*), that they were liable only *intra vires successionis*.[1]

For the present purpose this illustration is equally applicable although in our law it is pretty clear that the opposite result must be reached.

The language of our articles which deal with this matter differs from that of the Code Napoléon.

If we compare C. C. 735 and C. C. 885 it is hardly doubtful that under our law the heir is liable even *ultra vires successionis*.[2]

Rule Five.

The English and the French versions of the Code are of equal authority, and the one may be used to interpret the other.

C. C. 2615 says "If in any article of this Code founded on the laws existing at the time of its promulgation, there be a difference between the English and French texts, that version shall prevail which is most consistent with the provisions of the existing laws on which the article is founded; and if there be any such difference in an article changing the existing laws that version shall prevail which is most consistent with the intention of the article, and the ordinary rules of legal interpretation shall apply in determining such intention."

The Code like any other Quebec Statute was published in both the official languages.

In comparing the two versions it is sometimes useful to know which was at first the original and which the translation.

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1 Cass. 29 mai 1894, D. P. 94, 1, 545, and note by *M. Planiol*.
2 See *Mignault*, v. 4, p. 380.

Which was language of Draft?

Mr. Justice McCord tells us that the Third Book was drafted in English, with the exception of the titles Of Successions, Of Gifts *inter vivos* and by Will, Of Marriage Covenants, Of Suretyship, Of Privileges and Hypothecs, Of Registration, and Of Prescription.[1]

That is, the title Of Obligations, and the titles on all the separate contracts except suretyship, were drafted in English. So was the whole of the Fourth Book which treats of Commercial Law.[2]

It is interesting to know something of the *modus operandi* of the Commission.

Modus operandi of codifiers.

Each of the three Commissioners drafted a portion of the Code.

Copies of the draft were furnished to the others, and, after examination by them individually, were brought before meetings of the Commissioners at which the two secretaries were present. Each article was separately discussed.

If the draft was in English it was then translated into French by the French-speaking secretary; if the draft was in French it was translated into English by the English-speaking secretary.

The translation was carefully examined by the Commissioner who had prepared the draft, and was afterwards read article by article at the meetings.

Mr. McCord tells us that the Commissioners sometimes found it difficult to discover English terms by which to render the legal expressions of the old French law, and that in many cases they made use of the terms of the Scotch law for this purpose.[3]

C. C. 2615 gives no special rule of interpretation where the two texts do not agree, and the article is one which changes

1 Preface to 1st. ed. of *McCord's* Civil Code, p. ix.

2 Ib.

3 Ib.

the law. For to say that the intention is to prevail is merely to state the ordinary rule of interpretation.

To be preferred which is nearest to old law.

It appears that the text is to be preferred which is nearest to the old law.[1]

Ramsay, J. pointed out that it would not be a safe rule to lay down that the French text was always to be favoured when it purported to express what came from the French law, or conversely the English text when it gave a rule taken from the English law.

Word technical in one language

But, undoubtedly, when a word is used which bears a technical meaning in one of the two languages it ought to be understood in the sense of that language.

Thus in C. C. 2374 the English text speaks of the "mortgage and hypothecation" of ships made according to the Merchant Shipping Act.

"Mortgage."

The French text uses the word *hypothèque* only as corresponding to the expression "mortgage and hypothecation."

Ramsay, J., said "If there be any difference can it be doubted that the English version would prevail?"[2]

In another case the question was as to the interpretation of C. C. 1994 no. 10.

Under this article a privilege is given in respect of "the claims of the Crown against persons accountable for its monies."

On the liquidation of the Exchange Bank, the minister of Finance of Canada, as representing the Crown, claimed a preference over other creditors for a sum of 237,000 dollars,

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1 *Harrington* v. *Corse*, 1882, 26 L. C. J. at p. 108, (see 9 Can. S. C. R. 412); per *Ramsay, J.*; *Naud* v. *Marcotte*, 1899, R. J. Q. 9 Q. B. 123.

2 *Harrington* v. *Corse*, ut sup. at p. 109. Cf. *Exchange Bank of Canada* v. *The Queen*, 1886, 11 A. C. at p. 167.

being money belonging to the Dominion which had been deposited with the bank.

The point was whether the claim was privileged under C. C. 194 and art. 611 of the old Code of Civil Procedure, an article which is now repealed.

The French version of no. 10 of C. C. 1994 is "*La Couronne pour créances contre ses comptables.*"

"Comptables." It was held by the Privy Council that "*comptables*" was a technical term of the French law. It meant a person liable to account.

The King's "*comptables*" were the officials who received and were accountable for the King's revenues.

If such a person became insolvent the King was a privileged creditor.

But a bank in which public money was deposited was not a "*comptable*" not being a servant of the Crown. It was merely an ordinary contract-debtor.

Accordingly they held that in this case the Crown had no preference, but must rank with the ordinary creditors.[1]

Inconsistency between two versions In one instance at least a clear inconsistency has been shewn to exist between the two versions.

Delay given to debtor. C. C. 1961 in the English version says "the surety who has become bound with the consent of the debtor is not discharged by the delay given to such debtor by the creditor."

The French version leaves out the qualification that the surety must be one bound with the consent of the debtor though it employs it in a second clause of the same article.

It has been held in two cases by the Court of Appeals that the English version is the correct one.

The report of the Commissioners on the article sufficiently shews the intention of the codifiers.[2]

1 *Exchange Bank of Canada* v. *The Queen*, 1886, 11 A. C. 157; M. L. R. 1 Q. B. 321; 29 L. C. J. 117.

2 *Friedman* v. *Caldwell*, 1894, R. J. Q. 3 Q. B. 200. Cf. *Naud* v. *Marcotte*, 1899, R. J. Q. 9 Q. B. 123.

The surety who is bound without the consent of the debtor, e. g., a guarantee company, does not need to suffer an extension of the time over which the guarantee extends.

Between such a surety and the debtor there is no *lien de droit*, and, therefore, the surety cannot protect himself.

But a surety bound with the consent of the debtor has a recourse against him, and C. C. 1961 says that if the creditor grants a delay to the debtor the surety may protect himself by suing the debtor in order to compel him to pay.

Privilege for hotel-charges.

Again C. C. 2262 no. 4 says, in the French version, that actions prescribe in one year "*pour dépenses d'hôtellerie et de pension.*"

It was held by Mathieu, J., that this applied to a claim for board and lodging whether made by a person whose business it was to keep an hotel or boarding-house or by a private person. But the Court of Appeals held that the English version "hotel or boarding-house charges" shewed that the article referred only to claims by those engaged in this business, and that this interpretation was also to be preferred *in dubio*, as being more in accordance with the old law.[1]

"Bodily injuries."

And again in interpreting C. C. 2262 no. 2, the natural meaning of "*injures corporelles*" has been extended by reading it in the light of the English version "bodily injuries."[2]

The same rule that the English version may be used as a guide to the interpretation of the French version or *vice versa* applies not only to the Code but to any Statute published, as are the Statutes of the Dominion and of the Province of Quebec, in both languages equally official.

And some light may be gained from cases in which the principle has been applied to other Statutes.

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1 *Naud* v. *Marcotte*, ut sup.

2 *Canadian Pacific Ry Co.* v. *Robinson*, 1891, 19 Can. C. R. at p. 324; see *Griffith* v. *Harwood*, 1899, R. J. Q. 9 Q. B. at p. 306, per *Lacoste, C. J.*

Penalties narrowly construed.

Thus when the provision is one which upon general rules of interpretation is subject to a narrow construction such as a clause creating a penalty, or imposing taxation, and the terms used in the one language are narrower than those used in the other, the narrower words will be taken to represent the intention of the Legislature.

"Transport"

E. g., the Act of Quebec of 1892, 55 and 56 Vict. c. 17 s. 1. R.S.Q. art 1191d. no. 5 reads in the French version "*Nul transport des biens d'une succession n'est valide et ne constitue un titre, si les droits payables, en vertu de cette loi, n'ont pas été payés.*"

The English version is "No transfer of the properties of any estate or succession shall be valid, *nor shall any title vest in any person*, if the taxes payable under this section have not been paid."

The question arose whether an heir who had not paid the duties could sue for his share of a debt due to the deceased.

It was maintained that under the above section no title vested in him till the succession duties had been paid, a contention that would have been very strong if the English version had stood alone.

But the French version says "*nul transport ne constitue un titre.*"

The word "*transport*" corresponds to "transfer" in English.

Both mean a cession of property by contract.

They do not apply to the devolution of property by death, to which the word "transmission" is appropriate in both languages. (See R.S.Q. 1191b.).

And if the matter were doubtful, the French version, as imposing the lighter burden would prevail.

Accordingly, it was held by the Court of Review that the old rule *le mort saisit le vif* still applied, and that the heir obtained legal seizin at the death of his ancestor, though, un-

til the duties were paid he was an owner without the ordinary power of an owner to alienate.[1]

An expression absolutely meaningless in one language has been given a satisfactory sense by reading it in the light of the other version.

"Superior judge."

Thus in a case on the interpretation of a Provincial Statute the expression "superior judge" in the English version was interpreted by the help of the French version as meaning "*juge de la Cour Supérieure.*"[2]

Rule Six.

When the Code is ambiguous or uncertain it must be interpreted.

Rule Seven.

For such interpretation the best guide will be the Code itself.

Illustrations.

By comparing other articles of the Code with the one of which the meaning is disputed the true sense of the doubtful article may be demonstrated.

Prescription of action against architect.

For example in a recent case the question was whether the right of action against an architect for the defective construction of a building had been lost by prescription.

C. C. 1688 (C. N. 1791) says "If a building perish in whole or in part within ten years, from a defect in construction, or even from the unfavourable nature of the ground the architect superintending the work, and the builder are jointly and severally liable for the loss."

C. C. 2259 (C. N. 2270) says "After ten years, architects and contractors are discharged from the warranty of the work they have done or directed."

Reading these two articles together, is the meaning that

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1 *Thivierge* v. *Cinq-Mars*, 1897, R. J. Q. 13 S. C. 398.

2 *Bellingham* v. *Abbott*, 1858, 2 L. C. J. 13, (Election Cases at end).

after ten years the architect is completely liberated? Or does C. C. 2259 refer only to warranty in other cases?

The Court of Appeals held that the generality of C. C. 2259 must be cut down by C. C. 1688.

That article lays down the principle that the architect shall be liable for damages due to a defect in construction which shews itself within ten years.

It fixes no period of prescription for the action laid upon this ground. Consequently the general rule applies that such an action prescribes only in thirty years from the discovery of the defect.[1]

The following case is another example.

Interruption of prescription by part payment.

C. C. 1235 no. 1 excludes proof by testimony in commercial matters where the value exceeds fifty dollars "upon any promise or acknowledgment whereby a debt is taken out of the operation of the law respecting the limitation of actions."

Defendant, sued upon a Bill of Exchange, pleaded prescription.

Plaintiff rejoined that the prescription had been interrupted by part payment.

He desired to prove this by parole.

Was this proof excluded by C. C. 1235?

Langelier, J., held that the evidence was admissible.

He held that C. C. 1235 did not apply to a Bill. The generality of this article was cut down by C. C. 2340 which provides "In all matters relating to Bills of Exchange not provided for in this Code or in the Federal laws recourse must be had to the laws of England in force on May 30th, 1840," and by the following article.

Under the English law a partial payment pleaded as an in-

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1 *Archambault* v. *Les Curé et Marguilliers de la paroisse de St-Charles de Lachenaie*, 1902, R. J. Q. 12 K. B. 349.

terruption of prescription may be proved by parole. It was held that our law was the same.[1]

Rule Eight.

If by collating the articles of the Code the interpretation of the article under discussion is still uncertain the most reliable guide will be the reports of the Commissioners.

Speeches in Parliament cannot be referred to.

It is not competent under our system to refer to the parliamentary history of a bill.

The reports of speeches made in Parliament are not evidence as to the intention of the language of the Act.

Apart from the suspicion of political bias which attaches to all parliamentary utterances, it can never be safe to assume that the meaning attributed by an individual member to a clause in a bill is that which was ultimately adopted by the Legislature.

It is with us an established rule that the reports of debates in Parliament cannot be referred to.

This was recently affirmed in the Supreme Court by Taschereau, C. J.[2]

That was a criminal case, but the rule was not said to be limited to criminal statutes.

In questions of interpretation of statutes the English authorities, and the text-books of Dwarris, Maxwell and others are mainly relied upon, though French works are also cited.[3]

And in England the rule is settled that parliamentary speeches cannot be referred to.[4]

1 *Boulet* v. *Métayer*, 1902, R. J. Q. 23 S. C. 289.

2 *Gosselin* v. *The King*, 1903, 33 Can. S. C. R. at p. 264.

3 See e. g., *ex parte Page*, 1881, 4 L. N. 146, (*Rainville, J.*), and infra, p. 131.

4 See *Maxwell*, Interpretation of Statutes, 3rd. ed. p. 38; *S. E. Railway Co.* v. *Railway Commissioners of Hastings*, 50 L. J. Q. B. 203, and other English authorities cited by *Taschereau, C. J.* ut supra. See, also, *Smiles* v. *Belford*, 1877, 1 A. R. (Ont.) at p. 445 and p. 450; *Toronto Ry. Co.* v. *The Queen*, 1894, 4 Ex. R. (Can.) at p. 270.

The same is held in America.[1]

In some American cases the rule has been so far relaxed as to receive in evidence the journals of the house for certain purposes as e. g., to show the mode in which embarrassing words not in the original act were introduced by an amendment.[2]

In France there is no such absolute rule excluding reference to the parliamentary discussions of a bill.

In France rule less absolute.

But all writers admit that the opinions of individual members as to the meaning of the law are of very little value.

But, owing to differences in the parliamentary procedure, the so-called *travaux préparatoires*, a term under which are included discussions in the Chambers, reports, explanations of the *motifs*, etc., are probably entitled in France to somewhat greater weight from their impartiality, than could possibly attach to speeches made in our Parliament.[3]

In the case of the Civil Code an especially high value attaches to the reports of the Commissioners. They are not political speeches but considered opinions of eminent lawyers, in which they explain their intention to leave the law unchanged or to introduce some modification of it.

If they do not indicate any intention to change the law the presumption is as already stated that the old law remains in force.[4]

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1 See *United States* v. *Freight Association*, 1896, 166 U. S. R. 290 and cases cited in Am. and Eng. Encycl. of Law, 2nd. ed. v° Statutes v. 26 p. 638.

2 Am. and Eng. Encycl. of Law l. c. See on reference to Codifiers per *Taschereau, C. J.*, in *Gosselin* v. *The King*, 1903, 33 Can. S. C. R. 269.

3 See *Delisle*, L'Interprétation des Lois, v. 2 s. 188; *Merlin*, Questions de Droit, vo. Protêt s. 8; *Baudry-Lacantinerie* et *Houques-Fourcade*, Personnes, 2nd. ed. v. 1, no. 262.

4 *Aubry* et *Rau*, 5th ed. v. 1 s. 41 p. 197; *Baudry-Lacantinerie*, Précis, 7th. ed. v. 1 no. 101 bis; *Planiol*, Traité Elém. 3rd. ed. v. 1, no. 219.

In France after the Code itself, all writers agree that the *travaux préparatoires* afford the best guide to its interpretation.

The *travaux préparatoires* of the *Code Napoléon* are found in the works cited as Fenet and Locré.[1]

It is on account of this presumption in favour of the old law that it is so important to commence the inquiry with a study of the reports of the Commissioners in order to see if they afford any evidence of an intention to innovate.

Messrs. Aubry and Rau give as their first rule of interpretation of the *Code Napoléon* the following: "All the dispositions taken whether from the old law or the intermediary law[2] must be explained by reference to the sources from which they were drawn.

When the intention of the legislator is doubtful, the presumption is that he meant to remain faithful to the anterior legislation.

Nevertheless we must be careful not to go back to old principles which are not reproduced in the Civil Code either expressly or by implication, and we must not lose sight of the influence which the changes introduced by this Code may have exerted upon dispositions which it has not expressly modified."[3]

Commissioners' Reports.

Similarly, in our law, it is competent and customary to found upon the reports of the Commissioners as a guide to the interpretation of the Code.

E. g., in many cases they declare that their intention is

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1 *Fenet*, Recueil complet des travaux préparatoires du Code civil, Paris, 1827-1828, 15 vol. in 8o.; *Locré*, Législation civile, commerciale et criminelle le la France. Recueil des discussions et travaux préparatoires de nos codes, 31 vol. 8. Paris 1829-1832,

2 I. e., the law of the Revolutionary period.

3 5th. ed. v. 1, s. 41 p. 197. See *Brocher*, L'Interprétation des Lois, p. 35, (Paris, 1870).

merely to reproduce the corresponding article of the *Code Napoléon*.

In other cases they explain that they desire to make some amendment which French experience has shown to be necessary.

Very frequently, when the *Code Napoléon* had altered the old French law, our Commissioners say that they prefer the old rule to the new one.

They are on the whole more conservative than the French codifiers and especially when the *Code Napoléon* has broken away from Pothier, our Commissioners often decline to follow its lead.

Or, again, the codifiers point to the expediency of making a change in some rule which has proved unsatisfactory in our own Province.

Illustrations of references to them by the courts.

Declarations of this kind are of the highest value when we desire to discover the intention of the Legislature, and when an article of the Code is ambiguous it will be interpreted in the sense which gives effect to the intention so expressed by the codifiers rather than in the sense which defeats it.

E. g., in a recent case upon the legality of the marriage of two Roman Catholics when the ceremony was performed by a Protestant minister, or by anyone but the "*propre curé des parties*" the judgment of the Court of Review is largely founded on the report of the Commissioners.

Lemieux, J., describes the codifiers as "the natural and veritable interpreters of the Code."[1]

In that case one of the *considérants* is "considering that it appears from the report of the codifiers of our Civil Code that they did not intend to change the existing law, and that it appears further by the Code itself that this law was not changed."[2]

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1 *Durocher* v. *Degré*, 1901, R. J. Q. 20 S. C. at p. 487.

2 Ib. at p. 512.

In the cases undernoted the reports of the Commissioners have been founded upon in the opinions of the judges, and in some of them the codifiers' remarks have been treated as almost conclusive.[1]

Rule Nine.

When the question is not concluded by reference to other articles of the Code, or to the explanations of the codifiers, the next best guide will be the decided cases upon the point.

Cases not binding in France.

In the French law it is a fundamental principle that the Courts are not bound by previous decisions.

French writers always refer to the maxim *non exemplis sed legibus judicandum est.*[2]

Thus M. Planiol says "Judicial interpretation is free in principle; each Court has the right of adopting the solution which seems to it the best and the most just: it is not bound either by decisions which it may have rendered previously in analogous cases, or by the decisions of another court though it be higher in rank."[3]

Laurent cites the sayings of two eminent authorities. President Bouhier says "*Il n'y a que les petits génies, les esprits plébéiens qui se laissent entraîner par les exemples au lieu d'écouter la raison.*" President de Thou says "*Les arrêts sont bons pour ceux qui les obtiennent, il faut se garder de les invoquer comme une autorité décisive.*"[4]

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1 *Meloche* v. *Simpson*, 1899, 29 Can. S. C. R. at p. 385; *Archambault* v. *Curé, etc., de la paroisse de St-Charles de Lachenaie*, 1902, R. J. Q. 12 K. B. at p. 360; *Friedman* v. *Caldwell*, 1894, R. J. Q. 3 Q. B. at p. 206; *Wardle* v. *Bethune*, 1872, L. R. 4 P. C. at p. 52; *Reid* v. *McFarlane*, 1893, R. J. Q. 2 Q. B. at p. 137; *Marcotte* v. *Perras*, 1896 R. J. Q. 6 K. B. at p. 423; *Griffith* v. *Harwood*, 1899, R. J. Q. 9 Q. B. at p. 307; *Stewart and Molson's Bank* v. *Simpson*, 1894, 4 Q. B. at p. 40. And see per *Taschereau, C. J.*, in *Gosselin* v. *The King*, 1903, 33 Can. S. C. R. 269.

2 Code 7, 45, 13.

3 Traité Elém. 3rd. ed. v. 1, n. 204.

4 v. 1, n. 280. C. N. 5.

A French judge has to give articulate grounds or *motifs* for his decision and he is not allowed to give a previous case as a *motif*.[1]

The strongest proof of the theory is to be found in the peculiar procedure of the *Cour de Cassation*. When a decision of a lower Court has been "cassed" or quashed this puts the parties again in the same position as before the first judgment, and the case is remitted to a court of the same rank as that which pronounced the original judgment.

This tribunal which is called the *tribunal de renvoi* is quite free to decide the point again contrary to the view of the *Cour de Cassation*. If it does so, there may be a second *pourvoi*. The *Cour de Cassation* examines this, all its chambers sitting together, (*toutes chambres réunies*) i e., before a bench of thirty-four judges, or *conseillers*, as they are called, including the President.

If the *Cour de Cassation* after this solemn audience comes to the same conclusion as before its decision is final. A second Court of remit must adopt the law laid down by the *Cour de Cassation*.

But, even then, if the same point arises in a subsequent case, the view of the Court of Cassation is not binding either on that Court itself or on the Courts below. A proposal to make it so was rejected after discussion as contrary to the doctrine of the *séparation des pouvoirs*.[2]

Authority of cases under our law.

It is only binding as between the parties.[3]

Under our system as matter of theory previous decisions

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1 See *Pandectes Françaises* v. *Arrêts de Règlement* and *Arrêts du Conseil*.

2 *Dalloz*, Répertoire s. v. Lois, n. 485.

3 *Planiol*, Traité Elém. 3rd. ed. v. 1, n. 205. See, for some illustrations, article by the present writer on the "Organisation of Justice in France", Law Quarterly Review, v. 19, p. 278 (1903).

are not absolutely binding.[1] But in practice they enjoy greater authority than they do in France though less than they do in England. And the tendency is towards giving them greater weight than was formerly the case.

This is inevitable seeing that the Privy Council and the Supreme Court of Canada, the two highest Courts of Appeal act upon the principle that previous decisions are binding.

Rule in Judicial Committee.

It is true that the Privy Council is not absolutely bound by its own previous decisions as is the House of Lords.[2]

In House of Lords.

The House of Lords has laid down the rule in more absolute terms than, probably, any other Court of supreme jurisdiction.

It has declared itself absolutely bound by a previous decision even when in the previous case there had been an equal division of opinion, and the judgment of the Court below had been affirmed according to the rule *semper præsumitur pro negante*.[3]

It must be admitted however that the members of this exalted tribunal show at times great astuteness in "distinguishing" a previous case by which they do not wish to be bound.[4]

Every Supreme Court will, for the sake of its own dignity, be very unwilling to reverse a previous decision of its own, but in most countries the Court does not hold itself powerless to do so.

This is the case, as we should expect, in France. The *Cour*

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1 See per *Lacoste, C. J.*, in *Migner* v. *St-Lawrence Fire Insurance Co.*, 1900, R. J. Q. 10 K. B. at p. 157, and *infra*, p. 112.

2 See *Holland*, Jurisprudence, 9th. ed. p. 65: *Anson*, Law and Custom of the Constitution, 2nd. ed. part 2 p. 472. *Sir Wm. Anson* refers to "cases mentioned by *Mr. Reeve* in his evidence before the Committee on Appellate Jurisdiction, p. 29." See *infra*, p. 110.

3 *Beamish* v. *Beamish*, 1861, 9 *Clark's H. of L. Cases* 273, (11 Eng. Rep. 735); *London St. Tramways Co.* v. *London County Council*, (1898), A. C. at p. 379, per *Halsbury, L. C.*

4 See e. g., *De Nicols* v. *Curlier*, (1900), A. C. 21.

de Cassation makes sometimes what Proud'hon has called *de glorieux retours sur elle-même*.[1]

In Supreme Court of U.S.A.

In America the Supreme Court of the United States has declared that it does not hold itself absolutely bound in all cases by its own previous decisions. In a question of property it would hardly reverse a previous judgment upon which reliance might have been placed in private dealings, but in cases of a more general or political complexion it has more freedom.

Thus in 1872 that Court decided that Congress could make government notes a legal tender for debts contracted before the law was passed.[2]

Illustrations of practice of Judicial Committee.

Two years before the same Court had held precisely the contrary, though it is true the decision was pronounced by a bare majority.[3]

In strict theory the Privy Council can hardly hold itself absolutely bound by previous decisions, for, in principle, it is not a Court but a Committee of the Council. Its opinion is not a judgment but a statement of the reasons which determine them in "humbly advising" His Majesty to give effect to their decision.[4]

And cases may be found in which the Privy Council has not followed a previous judgment of its own.

Thus in deciding that a provision of a Canadian Act that the judgment of the Court of Appeal should be "final" did not exclude the royal prerogative to allow appeals as an act of

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1 See e. g., Cass., 10 nov. 1880, D. P. 81. 1. 81.

2 *Legal Tender Cases*, 12 Wallace's Reports, 457, 529.

3 *Hepburn* v. *Griswold*, 1870, 8 Wall, 603; *Thayer*, Cases on Constitutional Law v. 2 pp. 2222 and 2237, and see for the general rule of the Supreme Court, ib. p. 2254.

4 *Anson*, ib. p. 470, and see arg. in *London St. Tramways* v. *London County Council*, (1898), A. C. at p. 378.

grace, the Privy Council practically overruled a previous judgment.[1]

Nor is it by any means easy to reconcile the two cases on the Manitoba school question.[2]

But in practice the Privy Council is very loth not to follow a previous judgment. In the rare cases in which it has not done so it has, generally, justified itself by saying that the previous case had been heard *ex parte*.[3]

In one of the cases against ritualistic clergymen the justification was that the previous decision of the Council had been based on insufficient historical research.

The head note to this case says "the rule of finality applicable to decisions of the Privy Council in relation to rights of property is not equally binding as regards decisions which relate to ritual and ecclesiastical practice and depend to some extent upon the accuracy of historical investigation."[4]

The learned authors of a recent work on the Practice of the Privy Council state the rule thus:— "A determination of the Judicial Committee which has been come to after argument on both sides is a sure guide in future cases."[5]

Subject to the qualifications above given, this rule may be accepted as warranted by the decided cases.

Rule in Supreme Court of Canada.

The Supreme Court of Canada has on many occasions declared that it considered itself bound by its own previous

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1 *Cushing* v. *Dupuy*, 1880, 5 A. C. 408, overruling *Cuvillier* v. *Aylwin*, 1832, 2 *Knapp*, 72, (12 Eng. Rep. 406).

2 *Brophy* v. *Att. Gen. of Manitoba*, (1895), A. C. 202; *Barrett* v. *City of Winnipeg*, (1892), A. C. 445. Supra, p. 73.

3 See *Ridsdale* v. *Clifton*, 1887, L. R. 2 P. D. at p. 307, opinion given by *L. Cairns; Tooth* v. *Power*, (1891), A. C. p. 292, opinion given by *L. Watson*.

4 *Read* v. *Bp. of London* (1892), A. C. 644.

5 *Safford* and *Wheeler*, Practice of the Privy Council, p. 900, (London, 1901).

decisions. Thus in a recent case Girouard, J., said "*Il n'entre pas dans les attributions de cette Cour de reviser ses propres décisions.*"[1]

And in another case Strong, C. J., said "There is no use in referring to authorities on this point as we are bound by our previous decisions regarding it."[2]

And again Taschereau, C. J., said he was bound by the authority of this last case.[3]

This being the position taken up by the Privy Council and the Supreme Court of Canada, it is clear that Courts of inferior jurisdiction will, for the sake of their own dignity, and to secure uniformity of jurisprudence, be inclined to submit to the views held in the Courts above.

Practice in courts of Province.

But the position here is still widely different from that in England.

It is not possible to formulate precise rules on the subject because there is no settled opinion, and the views of individual judges differ a good deal.

Mr. Mignault has thus stated the position "The judgments of the Court of Appeal are generally regarded as binding by Courts of an inferior rank, but if these judgments are contrary to the established jurisprudence, resistance or rather insistance is permitted until the Court of Appeal has declared that it persists in its interpretation of the law.

A Court may equally reverse its own decision if it thinks that this decision was rendered under an erroneous impression, as the Court of Appeal did in the case of *Reid* v. *McFarlane*, 1893, R. J. Q. 2 Q. B. 130, and as the Court of Cassation does often enough in France. Between the Court of Review of Quebec and the Court of Review of Montreal, or between the different judges of the Superior Court there is no subordina-

1 *Salvas* v. *Vassal*, 1897, 27 Can. S. C. R. at p. 89.

2 *The Queen* v. *Grenier*, 1899, 30 Can. S. C. R. at p. 51.

3 *Grand Trunk Ry.* v. *Miller*, 1903, 34 Can. S. C. R. at p. 58.

tion and consequently their judgments enjoy only *une autorité de raison* or as English writers call it an authority of convenience".[1]

In a recent case Lacoste, C. J., speaking of a decision of the Supreme Court, said "This decision in *Taplin* v. *Hunt* upsets (*bouleverse*) our jurisprudence. If however the Supreme Court persists it will be our duty to accept its jurisprudence."[2]

So, under our system, it happens, occasionally, that a judge of the Superior Court declines to follow the authority of a case decided by the Court of Appeal in order to give that Court an opportunity of reconsidering the matter.[3]

Majority judgments.

The weight of a previous decision is lessened if the Court was not unanimous.[4]

In a recent case the Court of Review declined to follow a judgment of the Court of Appeal in which that Court was divided three judges to two.[5]

They pointed out that the Court of King's Bench in the case of *Migner* v. *St. Lawrence Fire Insurance Co.* 1900, R. J. Q. 10 Q. B. 122 had refused to hold itself bound by two previous judgments of its own when the Court was differently composed, and had laid stress on the fact that the judgments were not unanimous.

And Doherty, J., said "If authority were needed for the

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1 See article on L'Autorité Judiciaire in *Revue Légale* (N. S.) v. 6 at p. 171, (1900).

2 *Vassal* v. *Salvas*, 1896, R. J. Q. 5 Q. B. at p. 358. The Supreme Court "persisted" (27 Can. S. C. R. 68).

3 See e. g., reasons given by *Archibald J.*, for not following a decision of the Court of Appeals in *Huot* v. *Bienvenu*, 1902, R. J. Q. 21 S. C. at p. 344, (in appeal, 12 K. B. 44), Cf. *Tremblay* v. *City of Quebec*, 1902, R. J. Q. 23 S. C., 263, (*Andrews, J.*)

4 See *Charest* v. *Murphy*, 1894, R. J. Q. 3 Q. B. at p. 387; *Church* v. *Bernier*, 1892, R. J. Q. 1 Q. B. at p. 268; *Jeannotte* v. *Couillard*, 1894, R. J. Q. 3 Q. B. at p. 497.

5 *Guertin* v. *Molleur*, 1902, R. J. Q. 21 S. C. 269.

proposition that under our system one judgment even of the Court of last resort neither makes law nor constitutes a jurisprudence which other Courts are absolutely bound to follow, and if it be a very consistent proceeding to cite precedent as justifying holding that we are not bound by precedent, we have such authority and precedent in these judgments."[1]

Conflicting decisions of C. A.

And in a recent case Langelier, J., declined to follow a judgment of the Court of Appeal which had held that the interruption of prescription by part payment could not be proved by parole testimony.[2]

So, under our system, there are some points, fortunately not many, upon which it is possible to find judgments, even of the Court of Appeal, in favour of two opposite views.

As an illustration there is the important question of the right of the third party, in good faith and for value, to recover on a bill when the maker was induced by fraud to grant it, and was unaware of the true nature of the instrument.

A fraudulent person made a practice of travelling among farmers, and of inducing them to sign bills which, they were told, were merely orders for agricultural implements.

Two of such bills were discounted by a bank.

In the first case in which the bank sued the maker the Court of Appeal held that he was not liable on the ground that there never was a bill. The maker who was an illiterate man had put his mark upon a paper not knowing it to be a bill. He had not intended to create a negotiable instrument and none had been created.[3]

The same question arose four years later before the same Court composed however of entirely different judges.

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1 Ib.

2 *Boulet* v. *Métayer*, 1902, R. J. Q. 23 S. C. 289. Cf. *Guay* v. *Guay*, 1902, R. J. Q. 11 K. B. 425.

3 *Banque Jacques-Cartier* v. *Lescard*, 1886, 13 Q. L. R. 39. Cf. *Banque Jacques-Cartier* v. *Lalande*, 1901, R. J. Q. 20 S. C. 43 (*Langelier, J.*).

It was answered in the opposite sense.

The new Court held that a person who is so careless as to sign a paper which is in fact a bill, can blame only his own imprudence should he be called upon to pay it by a holder in good faith and for value.[1]

However, it is not clear from the report whether the Court held that the maker knew he was signing a bill.

"Settled jurisprudence."

But when the same point has been decided several times in the same sense there is said to be a "settled jurisprudence" upon the matter, and it will be impossible to induce judges to adopt a different view.

Illustrations.

A great number of points are thus settled. The following may serve as illustrations. In actions of damages against employers it is a settled point that where *faute commune* is proved i. e., where the plaintiff's own negligence contributed to the accident the damages are divided, and the plaintiff is awarded only a proportion, varying according to the circumstances, of the sum to which he would otherwise be entitled.[2]

Finding of jury as to damages not easily disturbed.

Again it is settled by the "jurisprudence" that when damages have been awarded, the jury, or the judge of first instance sitting without a jury, is the proper authority to estimate the amount. A Court of Appeal is not entitled to disturb this finding, if there was evidence to support it, unless it is so unreasonable as to shock the sense of justice.[3]

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1 *Banque Jacques-Cartier* v. *Leblanc*, 1892, R. J. Q. 1 Q. B. 128 See authorities noted in *Maclaren*, Bills, Notes and Cheques, 3rd ed. p. 224. (Toronto, 1904).

2 *Price* v. *Roy*, 1899, 29 Can. S. C. R. 494; *Price* v. *Talon*, 1902, 32 Can. S. C. R. 123; *Fortier* v. *Lauzier*, 1898, R. J. Q. 14 S. C. 359 (*Larue, J.*); *McDonald* v. *City of Montreal*, 1895, R. J. Q. 8 S.C. 169. (*Curran, J.*).

3 *Angers* v. *Pacaud*, 1896, R. J. Q. 5 Q. B. 17; *Elliot* v. *Simmons*, 1890, M. L. R. 6 Q. B. 368; *Montreal Gas Co.* v. *St. Laurent*, 1896, 26 Can. S. C. R. 176; *Cossette* v. *Dun*, 1890, 18 Can. S. C. R. 222.

Lessee's liability for fire.

Or, again, it is settled that when damage has been caused by fire to leased premises the lessee is liable to the lessor unless he shews by positive evidence that the fire was not caused by his fault. He is not bound to show the actual cause of the fire though if he can do so this will generally be the best evidence of his freedom from blame. But he must, at all events, exclude the presumption that he was in fault.[1]

Trespasser's claim for improvements.

Again with regard to possessors in bad faith Hall, J., said "A well settled jurisprudence in this Province recognises the right even of a trespasser to the value of his improvements in compensation with the rents, issues and profits of the land which he has occupied."[2]

C. C. 417 refers only to "constructed removable improvements" and not to such improvements as clearing wild land, fencing and such other improvements as cannot be removed. Such improvements are *impenses utiles* and the owner when he recovers possession must pay for them at least to the amount by which they have increased the value of the property.[3]

Again our law of libel is principally case-law and differs from both the English and French law.[4]

Such illustrations might be multiplied indefinitely.

It is sufficient to say that there are many points which are settled in practice with regard to which no clear statement can be found in the Code. The rule has come to be established because the Courts have expressed their determination to abide by previous decisions on the matter.

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1 *Lindsay* v. *Klock*, R. J. Q. 7 Q. B. 9. See *Ford* v. *Phillips*, 1902, R. J. Q. 22 S. C. 296 (C. R.).

2 *Handley* v. *Foran*, 1894, R. J. Q. 5 Q. B. at p. 52.

3 *Ellice* v. *Courtemanche*, 1867, 11 L. C. J. at p. 332, per *Badgley, J.*

4 *Graham* v. *Pellan*, 1896, R. J. Q. 5 Q B. at p. 202, per *Bossé, J.*

Comparative Value of Judgments.

Among judgments the greatest weight must be given naturally to those pronounced by the Courts which rank highest in the judicial hierarchy. Rank of decisions.

The judgments of the Judicial Committee of the Privy Council come first, then those of the Supreme Court of Canada, then those of the Provincial Courts in their order viz.: first, those of the Court of Appeal, next, those of the Court of Review, and lastly, those of the Superior Court.

The judgments of the Court of Review have somewhat less weight than would be accorded naturally to the judgments of a Court composed of three judges from the fact that the composition of the Court is so various. Peculiarity of Court of Review.

The Court of Appeal has a fixed composition and is not likely to change its mind though as we have seen it does so sometimes.

But the Court of Review consists of any three judges of the Superior Court selected for the particular occasion. (C.C.P. 1189).

If a point is decided by the Court of Review and the same point comes up again for decision and review, the Court before which the question arises for the second time will hardly ever be composed of the same judges as those who rendered the first judgment.

As under our system the first judgment is not absolutely binding, and as some or all of the judges in the second case are in all probability considering the matter for the first time, it is natural that there should be less uniformity in the judgments of the Court of Review than in those of the Court of Appeal.

The judgments of the English Courts, applying as they do, a different system of law are not binding with us, though in certain classes of cases which will be indicated later they possess great value for us as guides to the correct interpretation of the Code. Authority of English cases in our law.

Judgments of House of Lords

The judgments of the House of Lords are entitled to especial respect from the great eminence of the members of that Court and from the fact that the learned Lords are also members of the Judicial Committee of the Privy Council.

In practice the Lord Chancellor and the Lords of Appeal in Ordinary frequently take part in the judgments of the Judicial Committee as well as in those of the House of Lords.

Upon a question of general jurisprudence not depending upon any peculiarity of English law a judgment of the House of Lords is pretty sure to be followed by the Privy Council if the same point should arise before them. The Lord Chancellor and the Lords of Appeal are very unlikely to adopt one conclusion as English judges, and another as judges on appeal from Canada unless there is a clear difference upon the point between the English and the French law.

E. g., in a recent case the question was whether a railway company was liable for damage caused by sparks from a locomotive when no negligence on the part of the company had been proved.

The Privy Council followed two judgments of the House of Lords in holding that in those circumstances no liability existed[1]

In France the weight of authority is the other way.[2]

There is one class of cases, not very frequent, in which a peculiar degree of authority attaches to English judgments.

When article reproduces English statute

This is when an article of our Code or of a statute, e. g., the Bills of Exchange Act is in identical or practically identical terms with an English statute.

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1 *C. P. R. Co.* v. *Roy*, (1902), A. C. 220. Cf. *Jackson* v. *G. T. R. Co.*, 1902, 32 Can. S. C. R. 245. See also *Angers* v. *Mutual Reserve Fund Life Ass.*, 1904, 35 Can. S. C. R. 330.

2 Cass. 3 Janv. 1857, D. P. 88, 1, 39; Toulouse, 6 mai 1902, S. & P. 1905, 2, 105 See art. by *M. G. Appert* in *Revue Trimestrielle de Droit Civil*, 1906, p. 81. As to present law, see supra, p. 67 and *infra*, p. 137.

When this is the case and the words in question have been judicially interpreted by the English Court of Appeal, or, *a fortiori,* by the House of Lords this interpretation is entitled to the highest respect.

Indeed the Privy Council in one case expressed the opinion that a judgment of the English Court of Appeal in such circumstances ought to be followed by the courts of a colony even though they felt unable to agree with it.[1]

Our Trade Unions Act (R. S. C. c. 131) is modelled on the English Act, (34 and 35 Vict. c. 31) and in a recent case in the Supreme Court, Girouard, J., said that English decisions interpreting the English Act would be binding here.[2]

But in the application of this rule great care must be exercised to see that the terms of our Code or statute are truly identical in meaning with those of the British statute.

If they differ effect must of course be given to the difference.[3]

FRENCH AUTHORITIES.

French authorities.

The same principle applies to a case very much more common than that of an article of our Code reproducing a British statute.

This is when an article of our Code reproduces in identical terms, or in terms not differing in effect, a provision of the *Code Napoléon.*

This is the case with, perhaps, the greater number of all the articles of our Civil Code.

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1 *Trimble* v. *Hill,* 1879, 5 A. C. 342. Cf. per *Taschereau, J.* in *C. P. R. Co.* v. *Robinson,* 1891, 19 Can. S. C. R. at p. 316.

2 *Perrault* v. *Gauthier,* 1898, 28 Can. S. C. R. at p. 253. Cf. as to Railway Law, p. 142 infra.

3 *Robinson* v. *C. P. R. Co.* (1892), A. C. 481. See *Miller* v. *G. T. R.,* (1906), A. C. 187. See *supra,* p. 87.

If we turn over the reports of the Commissioners we find them continually saying of a whole group of articles that they do not differ, or differ only in expression, from the corresponding articles of the French Code.

Articles of C. C. which reproduce C. N.

Broadly speaking our Code, excepting Book Four, is a recension of the *Code Napoléon,* while preserving no doubt some peculiarities of our old law, and correcting many obscurities and inaccuracies which the discussions of more than half a century had discovered in the French Code.

But after all, the bulk of the articles in our Code are intended to express the same law as the *Code Civil Français.*

When the article of our Code is of this class great weight will naturally be given to the construction which has been placed in France upon the corresponding article which served as the model.

And in discovering this construction the inquiry must take a wider range than if we were discovering what was the construction accepted in England of an Imperial statute.

French Commentators.

In that case we should have to examine only the decisions of the courts. On a question of statutory construction the opinions of writers of text-books would possess no authority for the courts.

But under the French system on a question respecting the intrepretation of the Code the opinions of the commentators of recognised merit are listened to with greater respect than the decisions of the Courts, unless it is a point upon which there is a settled jurisprudence.

French decisions.

This is partly because French decisions are by no means certain to be followed in later cases. An interpretation of a statute which has been adopted by the English Court of Appeal is certain to be followed by all the Courts in England unless the House of Lords should decide in favour of another construction.[1]

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1 See *Trimble* v. *Hill*, 1879, 5 A. C. 342.

But isolated French judgments can be found in support of almost any interpretation of the Code which is conceivable.

There is a French saying *Toutes les erreurs peuvent trouver des arrêts, et tous les paradoxes des autorités.*

And of some judgments it is said *on cite de pareils arrêts comme on signale des écueils.*[1]

It is also due partly to the fact that in France the professional reputation for ability and learning of many of the commentators is higher than that of most of the judges. Judges are not in France as they are in England a few carefully picked men taken from the very highest class of lawyers whose ability has been tried by long experience of successful practice.[2]

The judicial career in France is much more like the ordinary civil service. A young man becomes a judge of an inferior Court as soon as he has completed his professional studies, and his subsequent promotion is not always due entirely to his merits as a lawyer.

I do not mean that our Courts will not listen with respect to decisions pronounced by the French Courts, and especially to those of the *Cour de Cassation,* a court which always includes judges of great eminence.

Doctrine and Jurisprudence.

But in determining the French law upon any point our courts will feel bound to examine both the commentators and the judgments, or, to use the French terminology, both *la doctrine* and *la jurisprudence,* and they are quite at liberty to accept the view of the commentators in preference to that of the Courts.[3]

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1 Cited by *Taschereau, J.*, in *McFarran* v. *The Montreal Park and Island Co.*, 1900, 30 Can. S. C. R. at p. 414.

2 See for some details as to the appointment and promotion of judges articles on "Judicial Organisation in France", in Law Quarterly Review, 1903, v. 19, p. 263 and p. 402.

3 See *Magann* v. *Auger*, 1901, 31 Can. S. C. R. 186; *Consumers*

It is important to notice that there is a marked tendency in France to harmonise *la doctrine* and *la jurisprudence*, so that upon most points there is now no conflict. During the first fifty years after the passing of the *Code Napoléon* the commentators paid very little regard to the judgments of the Courts. They interpreted the Code by the light of reason, by consideration of the old law, and by discovering from the reports of the codifiers and the other official documents contained in Locré whether the intention had been to retain the old law or to change it. In the university teaching of law this was markedly the case.

As M. Esmein expresses it "*La doctrine faisait un peu la fière et ne se compromettait pas volontiers dans le commerce de la jurisprudence.*" On the other hand the courts, while regarding the professors with much respect, thought their theories often academic and unpractical, and frequently decided contrary to principles laid down by the commentators.

Tendency to harmony between them

The older writers are continually obliged to say in effect "This is the view taught in the schools and supported by the best writers, but unfortunately the Courts will not accept it."

There are still important questions upon which this conflict between the doctrine and the jurisprudence continues to exist. But in the majority of cases there has been a reconciliation.

In many cases the writers have ceased to argue against a jurisprudence which every decision made more fixed. In other cases the Courts have gradually become convinced of the soundness of some view for which the writers long struggled in vain. Moreover as time went on a great number of points arose for decision in the courts which the writers had never thought of.

Cordage Co. v. *Connolly*, 1901, 31 Can. S. C. R. at p. 304, per *Girouard, J.*; *Barsalou* v *Royal Institution*, 1896, R. J. Q. 5 Q. B. at p. 397, per *Lacoste, C. J.*

Further the profound changes in the condition of society since the Code, changes which may be summed up in the phrase "the rise of industrialism" have added new chapters to the law, and these chapters have been added mainly by the jurisprudence.

The law of commercial companies, the law of employer and workman in *la grande industrie*, the law of railways and steamships, and much of the law of insurance has grown up since the *Code Napoléon*, and is mainly the work of the judges.

A good deal of it is now statutory, but the statutes often do little more than declare principles arrived at by the courts.

The modern writers on the Code have applied themselves to fitting all this new law into the old systems.

If we compare such writers as Duranton or Toullier with Guillouard, or the large treatise under the general editorship of M. Baudry-Lacantinerie the change stares us in the face.

In the older books few cases are cited, and little weight is laid upon these. In the new books every paragraph bristles with notes giving the cases which support the text.

The new French law books have much more the appearance of the English text-books, and like them tend to become in a large measure an orderly arrangement and condensation of the results arrived at by the courts.

The speculative views of the older writers are very attractive, but in a practical age the lawyer who consults a text-book desires to discover how the court is likely to decide his case, rather than how it ought to be decided according to abstract principles.

Annotation of French Reports.

This reconciliation of the doctrine and the jurisprudence in France has been indirectly much facilitated by the practice of the writers annotating the decisions. If we turn over the annual reports in *Dalloz* we see that every important case has a footnote by some well-known writer who is often a specialist in that branch of law.

The note analyses and criticizes the judgment, and shews how it fits in with the previous cases and with the views of the best writers. It is often an admirable essay on the law of the case, and not infrequently expresses a strong dissent from the judgment.

This practice of annotating the reports was begun by M. Labbé and has been continued by numerous successors. The convenience of the practice is greater under the French system than it would be under ours. With us the judges themselves do to a great extent what is done in France by the annotator.

An elaborate judgment of one of our courts always gives a careful review of the previous cases which bear upon the question, and judges who do not agree in the view of the majority give at length the reasons for their dissent.

French judgments are quite different in form. The judgment is generally quite short and states only the articulate legal grounds called the *considérants* upon which the decision is rested.

It is not permissible to give as one of these grounds a previous decision.[1]

Moreover the judgment is always unanimous in form, i. e., it is not stated if any judges disagreed with it, and *a fortiori*, no dissenting opinions are given.

Consequently, it has been left to the writers to systematize the cases, and in this way to assist the court themselves in arriving at a settled jurisprudence.

It can hardly be doubted that these are some of the reasons which have brought about a reconciliation on very many points between the doctrine and the jurisprudence.[2]

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1 See Code Civil art. 5; Pandectes Françaises, s. v. Arrêts de Règlement; *Baudry-Lacantinerie* at *Houques-Fourcade*, Personnes, 2nd. ed. v. 1 n. 249, 2°.

2 See article by *M. A. Esmein* on *La Jurisprudence et la Doctrine* in *Revue Trimestrielle de Droit Civil*, v. 1, p. 5 (1902).

Rule Ten.

When our article reproduces an article of the Code Napoléon, either verbatim, or with alterations of a character merely verbal, the view taken of the French article by the highest authorities in France is entitled to every respect by our courts.

Illustrations of respect paid to French authorities.

So, e. g., we find Girouard, J., citing a number of recent French authorities in favour of what may be called the new rule that money paid under an unlawful contract can be recovered. His Lordship concludes his review thus: "I feel that I cannot disregard the opinions of these great jurists who are generally considered in Quebec cases as the best exponents of our Code; nor can I ignore the numerous decisions of the Court of Cassation and other French tribunals.

Even if I were entertaining a different view I would hesitate to regard it as the true interpretation of the articles of the Code.[1]

And Larue, J., speaking of C.C. 1065 as to the responsibility of the owner of a building for the damages caused by its ruin said:— "This disposition resulting from the principle that everyone is responsible for the defects inherent in his property has been taken *verbatim* from the *Code Napoléon* art. 1385, and in consequence the French commentaries are applicable to it."[2]

But it must not be forgotten that French decisions though entitled to the greatest respect are not binding authorities.

E. g., in a recent case as to proof of fault where a man had been killed by an explosion and it was impossible to shew the precise cause, the Judicial Committee declined to adopt a view for which there was much French authority.[3]

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1 *Consumers Cordage Co.* v. *Connolly*, 1901, 31 Can. S. C. R. at p. 310, and see *Renaud* v. *Lamothe*, 1902, 32 Can. S. C. R. at p. 366.

2 *Allan* v. *Fortier*, 1901, R. J. Q. 20 S. C. at p. 51.

3 *McArthur* v. *Dominion Cartridge Co.* (1905), A. C. 72.

And when our article follows the *Code Napoléon* we must take great care to make sure that changes which at first sight might seem to be merely verbal do not really involve a difference of substance.

E. g., in a case already referred to great weight was laid upon a slight difference between our article C. C. 1688 and C. N. 1792, though the codifiers themselves indicate that on the point in question they intended the two articles to be identical.[1]

In cases of this kind where the provision of our Code is based on the *Code Napoléon* English authorities are of little weight.[2]

Rule Eleven.

When the question is not concluded by reference to the decisions here, or, in appropriate cases, by reference to the French commentators, the article must be interpreted in the light of its history.

Value of references by the Codifiers.

For this inquiry the references of the Commissioners are of the utmost value.

They indicate the source from which the particular article was drawn and a glance at them generally shews whether the article is based upon the old French law or is of English origin, or reproduces a provincial statute, while the brackets will indicate if it is an amendment.

At the same time the references require to be used with judgment.

"They are merely notes of the passages consulted in preparing each article.

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1 *Archambault* v. *Les Curé, etc., de la paroisse de St-Charles de Lachenaie*, 1902, R. J. Q. 12 K. B. 349; Com. Rep. v. 2. p. 35. See supra p. 102. Cf. *Labbé* v. *Murphy*, 1896, R. J. Q. 5 Q. B. at p. 94, *Bossé, J.*

2 *Consumers Cordage Co.* v. *Connolly*, 1901, 31 Can. S. C. R. at p. 299; *Renaud* v. *Lamothe*, 1902, 32 Can. S. C. R. at p. 366.

They were furnished, in compliance with the law, to enable the judges and the law officers of the government to see upon what authority the articles were based, and were never intended for permanent publication as part of the Code."[1]

The compilation of Mr. de Lorimier entitled *La Bibliothèque du Code Civil* (21 vols. Montreal, 1871-1890) gives at full length the passages referred to by the Commissioners.

But we must remember that the authorities cited may not all support the article.

In many cases they are opposed to each other and are cited for that purpose by the Commissioners as indicating a *quaestio vexata* which the article is intended to settle.[2]

As a rule we shall find the authorities first cited support the text while those against it are put at the end of the list.[3]

Sometimes when both French and English authorities are cited it will be found that while they agree upon one point they differ upon another.[4]

Great authority of Pothier.

In most cases where opposing authorities are cited the report of the Commissioners will explain which view they intended to adopt.

When we know that the Code was meant to give effect to a rule stated by a writer referred to, say Pothier, it is clear that the passage cited will be the natural commentary. And for many reasons, Pothier enjoys a peculiar degree of authority in our courts. He was the last of the great French commentators before the *Code Napoléon*. And before our own Code was made his works were much more relied upon than those of any other

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1 *McCord*, Civil Code Preface to first ed. (reprinted in third ed.) p. iii.

2 See *McCord*, 1, c. p. iv.

3 See *Marcotte* v. *Perras*, 1896, R. J. Q. 6 Q. B. at p. 423; *Delpit* v. *Côté*, 1901, R. J. Q. 20 S. C. at p. 381.

4 *Gill* v. *Bouchard*, 1896, R. J. Q. 5 Q. B. at p. 158, (secret of confessional).

French writer. In fact, before codification, Pothier enjoyed in Quebec a degree of authority very analogous to that which John Voet has at the present time in S. Africa, and for similar reasons.

In the law of obligations, especially, he was looked upon as a guide all but infallible.

When the Code puts in three lines what Pothier takes a page to explain, there are almost sure to be ambiguities in the abstract which can be cleared up by reference to the passage from which it was abstracted.

The title of *Obligations* is to a great extent an abstract of Pothier's famous *Traité des Obligations.*

The compilers of the *Code Napoléon* transcribed Pothier or condensed him and our Commissioners copied the *Code Napoléon.*[1]

Accordingly, in many cases in which our article is ambiguous, if Pothier is referred to and he is clear upon the point, his authority will be almost conclusive.

In a recent case of great interest the question was whether a landlord could be sued to restore the level of his land which had been altered by a tenant to the detriment of a neighbour. The action was an *action négatoire* based on C. C. 501 (C. N. 640).

"The proprietor of the higher land can do nothing to aggravate the servitude of the lower land," (as to sending down water).

The Commissioners in their note to the article had cited a passage from Pothier (*Traité de Société* n. 239) in which that writer stated, following the Roman law, that the owner of the upper land cannot be compelled to destroy the work

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1 See *Viollet*, Histoire du Droit Civil Français, 2nd ed. v. 2, pp. 233, 604; *Locré* v. 12, p. 551, *Discours par M. Mouricault, Orateur du Tribunal.*

which had caused the damage nor to pay damages unless the works were made by his orders.

The extent of his liability is to allow the plaintiff to remedy the evil at his own expense, or at the expense of the tenant against whom he has a claim for damages.

In other words a tenant is not the agent of his landlord to cause damage to neighbours.

In the Superior Court, Doherty, J., adopted the view of Pothier.

His judgment was reversed by the Court of Review.[1]

The Court of Appeal likewise held that the action was rightly brought against the proprietor, and that he might be ordered to restore the level, but they held that the landlord having committed no fault could not be made liable in damages.[2]

But, on appeal to the Privy Council, the judgment of Doherty, J., was restored and the passage from Pothier treated as the best commentary on our article.[3]

Sometimes the Commissioners cite a case in their note.

Cases cited by Codifiers.

When it appears that they cite it in support of the article this will give to the case a high degree of authority. Such a case has been said to be "incorporated into the Civil Code."[4]

The interpretation of an article of the Code may sometimes require a lengthy historical investigation.

E. g., in the two recent and conflicting cases with regard to the validity of the marriage of two Roman Catholics cele-

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1 *Kieffer* v. *Les Ecclésiastiques du Séminaire*, 1898, R. J. Q. 14 S. C. 325.

2 R. J. Q. 11 K. B. 173

3 (1903) A. C. 85, see esp. at p. 96, Cf. *Durocher* v. *Degré*, 1901, R. J. Q. 20 S. C. at p. 461, per *Curran, J.*

4 *Wardle* v. *Bethune*, 1872, L. R. 4 P. C. at p. 52, per *Sir J. Napier*. See *Marcotte* v. *Perras*, 1896, R. J. Q. 6 Q. B. at p. 422 top; C. C. 1448, case of *Forbes* v. *Legault;* see Com. Rep. v. 2 p. 243.

brated by a Protestant minister, the history of the marriage law in this Province was very fully investigated.[1]

Or again in a question as to article 534 of the Criminal Code it being held that this article was *ultra vires*, the court was put to the necessity of discovering what the English law on the subject was in the year 1774, the date of the Quebec Act.[2]

And again in deciding that by our law the accused has no right to challenge a grand juror, it was discovered that the only statute which had any application was one of the end of the fourteenth century—Henry IV. c. 9.[3]

Rule Twelve.

When a provision is derived from the French law it is to be interpreted by reference to French authorities, and when it is derived from the English law by reference to English authorities.[4]

Nothing is more natural than the rule that we must interpret every provision by its history. The article in the Code is a statement of law in a condensed form. By comparing it with fuller and longer statements which are to be found in the writers from whose works our Code was drawn, or at any-rate from whose works the *Code Napoléon* was drawn, we are frequently able to clear up any ambiguity which may lurk in the passage.

It is like replacing the passage in the context out of which it was taken.

And when the provision is of English and not of French origin the same principle holds good.

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1 *Durocher* v. *Degré*, 1901, R. J. Q. 20 S. C. 456 (C. R.); *Delpit* v. *Côté*, 1901, R. J. Q. 20 S. C. 338, (*Archibald, J.*).

2 *Paquet* v. *Lavoie*, 1898, R. J. Q. 7 Q. B. 277.

3 *Reg.* v. *Mercier*, 1892, R. J. Q. 1 Q. B. 541.

4 See per *Girouard, J.*, in *Renaud* v. *Lamothe*, 1902, 32 Can. S. C. R. at p. 366.

Cases cited as analogies.

It is true that even when we are dealing with a point of pure French law it may be possible to find some English authority which supplies a good analogy.

E. g., in a case upon the meaning of the word "heir" in a particular will, French, English, Scotch and American authorities were all considered.[1]

Or in a question as to who bears the risk in the sale of things which have to be weighed, measured or counted it may be pointed out that there is no difference between the French and the English laws.[2]

Or again in a question of evidence it may be shewn that both the French and the English law admit the rule that to discover a contract it may be necessary to treat several documents as if they were one.[3]

Or again in such cases as those upon the construction of a statute we find both English and French books cited.[4]

And there are certain parts of our law, as I shall explain presently in which the Commissioners themselves founded upon both English and French authorities.

But, omitting these for the moment, it may be said that when the provision under examination is one taken from the French law references to English authorities are not likely to be very helpful.

At the best they can merely afford analogies, and there is

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1 *Allan* v. *Evans*, 1900, 30 Can. S. C. R. 416, R. J. Q. 9 Q. B. 257. See *Herse* v. *Dufaux*, 1872, 9 *Moore*, P. C. N. S. 281, 17 L. C. R. 246; *Aubry* and *Rau*, 4th. ed. v. 7 s. 726 p. 529; *Baudry-Lacantinerie* et *Colin*, Donations et Testaments, v. 2, s. 2828; Paris, 14 mai, 1864, D. P. 64, 2, 184.

2 *Ross* v. *Hannan*, 1890, 19 Can. S. C. R. 227.

3 *Hunt* v. *Taplin*, 1895, 24 Can. S. C. R. at p. 47.

4 *Corpn. de Farnham* v. *Roy*, 1902, R. J. Q. 12 K. B. 237; *L'Association Pharmaceutique de Québec* v. *Livernois*, 1900, R. J. Q. 9 Q. B. 243.

little doubt that the courts have sometimes been led astray by references to English cases upon points on which there is a difference of principle between the two laws.

As a general rule it is best to keep the French law pure, and the English law pure, and not to attempt to blend them.

Origin of various parts of our law.

This being so, it is of great importance to distinguish clearly those parts of our law which are wholly of French origin from those parts which are wholly of English origin and both of these from parts of our law which are derived from both sources, or at any rate in regard to which the codifiers have invited a comparison of the two laws.

For this purpose the references and reports of the commissioners are invaluable.

I may begin by eliminating certain parts of the Code which reproduce Provincial statutes entirely of native origin.

Articles based on statutes.

The law as to Acts of Civil Status, as to Advocates and Notaries, as to Imprisonment in Civil Cases, as to Registration, and as to the Transfer and Mortgage of Merchant Ships is entirely of statutory origin, while the law of Tutorship, of Lease, of Privileges and Hypothecs, of Wills, of Proof, and of Pledge, may be given as examples of branches of the law which are partly based on statute.

But, as has already been explained, an article which reproduces a statute which was itself based on English law will be interpreted naturally by reference to that law, and an article reproducing a statute which modified a rule of the old French law may be explained by reference to that law.

But in interpreting articles of statutory origin it will not often be helpful to cite authorities other than decided cases on the identical words of which the meaning is in dispute.

Where the Code does not closely reproduce the English Act the English cases may be more misleading than helpful.

In a well-known case the Privy Council held that the Supreme Court had erred by relying upon English cases on Lord

Campbell's Act, the terms of which differ from the articles of our Code which may have been suggested by it.[1]

Excluding the parts of our law which rest upon Provincial statutes reproduced by the Code we may divide the rest into three parts.

1. That which is wholly of French origin, upon which English authorities are seldom useful;

2. That which is derived from a comparative study of both laws, upon which both French and English authorities are commonly cited;

3. That which is wholly of English origin, upon which French authorities are seldom relevant.

Parts of Code wholly of French origin.

I will now state the parts of our laws which are wholly of French origin as evidenced by the references of the codifiers.

Upon Absentees, Marriage, Tutorship, and Property there are no references to English sources except upon a few points which touch criminal law or public law.

On C. C. 129, 130, referring to the duties of officers of civil status in regard to bans and the solemnization of marriage, English authorities on the criminal law are referred to as well as French authors.

C. C. 400 which explains what things belong to the public domain refers to Chitty on Prerogatives as well as to French writers.

And C. C. 421 and C. C. 589 dealing with Crown property also refer to authorities both English and French.

Property rights of Crown.

But even here the English authorities must not lead us to suppose that the property rights of the Crown in this Province are governed by English law.

On the contrary it is settled that they are to be determined

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1 *C. P. R. Co.* v. *Robinson*, (1892), A. C. 481. See 14 Can. S. C. R. at p. 121.

by French law, the minor prerogatives of the Crown forming part of the private and not of the public law.[1]

So, e. g., the questions whether a river is navigable or not, and whether a riparian owner can object to an obstruction without proof of actual damage are to be answered by French and not by English law.[2]

Successions, Gifts, Partitions, Substitutions.

The law of Successions, Gifts, Partitions, and Substitutions is entirely French, except one or two small points, and the references are all to the Roman or to the French law.

English authorities are not relevant on the law of Successions.[3]

Wills.

In regard to the law of Wills a distinction must be drawn.

The fundamental principle of freedom of willing we have taken from the English law, and in considering the consequences of this principle it is natural that English authorities should be referred to.

In a recent case, where the question was whether a condition of a legacy that the legatee should be brought up in a particular religion was *contra bonos mores*, the Supreme Court expressed the opinion that on such a point English authorities were of greater weight than French.[4]

Another consequence of this principle is that with us a testator can provide that his executors shall continue in office

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1 *Att. Gen.* v. *Black*, 1828, *Stuart's* Rep. 324, (K. B.); *Monk* v. *Ouimet*, 1874, 19 L. C. J. 71; *Att. Gen. of. Queb.* v. *Att. Gen of Can.* 1876, 2 Q. L. R. 236, *Exchange Bank of Canada* v. *The Queen*, 1885, 11 A. C. 157; *in re Provincial Fisheries*, 1896, 26 Can. S. C. R. 444; *Att. Gen. for Can.* v. *Atts. Gen. for Queb. and N. S.* (1898) A. C. 700; *Montreal, Mayor of*, v. *Drummond*, 1876, 1 A. C. 384; *Brown* v. *Gugy*, 1864, 2 *Moore*, P. C. N. S. 341, 11 L. C. R. 401; *Mercer* v. *Att. Gen. of Ont.* 1883, 8 A. C. 767 and see supra, p. 30.

2 *Bell* v. *Corp. of Quebec*, 1879, 5 A. C., at p. 98.

3 See *Allan* v. *Evans*, 1900, 30 Can. S. C. R. at p. 426, per *Taschereau, J.*

4 *Renaud* v. *Lamothe*, 1902, 32 Can. S. C. R. 357, and see supra, p. 49.

for an indefinite period, in fact, until his duties are completed, whereas, in France the executor's office necessarily comes to an end a year and a day after the death of the testator.[1]

Further, as a consequence of the freedom of willing, a testator under our law can direct that an executor can be appointed or replaced by the court, whereas in France this is not possible.[2]

So also C. C. 851 as to wills in English form, C. C. 857 as to probate of such wills, and C. C. 849 as to wills by soldiers and sailors, are of English origin.

Upon the interpretation of these provisions, taken from the law of England, the English books are our best guides.

But where the principle of freedom of willing is not involved, and the case does not fall under one of the few exceptions referred to, our law of wills, including the law of testamentary executors is entirely French, and it is safer to rely for its elucidation wholly upon the French authorities.[3]

Marriage Covenants, Community, Dower.

The law of Marriage Covenants, Community, and Dower is all French.

Proof in civil matters.

So is the law of Proof in civil matters as to the main rules. But in regard to proof so much of our law depends on our own jurisprudence or on statute that French authorities are by no means always in point.[4]

Sale, Exchange.

The law of Sale and Exchange is of French origin, except C. C. 1567 as to sale of moveables by auction, for which English authorities only are cited by the codifiers. The rules

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1 C. C. 921. Contrast, C. N. 1026; Pau, 7 déc. 1861, D. P. 63, 5, 164; *Planiol*, Traité Elém. 3rd. ed. v. 3, n. 2821.

2 C. . 924, contrast *Demolombe*, v. 22, n. 21. See Com. Rep. v. 2, p. 187.

3 See *Mignault*, Droit Civil Canadien, v. 4 p. 439, note b.

4 Com. Rep. v. 1 p. 28.

are founded on the previous practice of such sales in this country.[1]

The law of sale of immoveables by auction is taken from the French law.[2]

Lease.

So is the law of Lease except one or two points which are of statutory origin.[3]

Obligations.

English cases as to lease are not generally helpful.[4]

The whole of the law of Obligations is of French origin and differs only in a few details from the *Code Napoléon*.

As already stated, upon this branch of the law that Code follows Pothier very closely.

I think the codifiers make only two references to English or American authorities.

On C. C. 1136 there is a reference to Sedgwick, On Measure of Damages, and on C. C. 1165 Kent, Story, and Greenleaf, are cited.

The law of Contracts and Damages in the French law is on the whole not very dissimilar from the English law, and in cases of this class in our Courts it is very common to cite English authorities by way of illustration.

When the French authorities are divided, and the point is one upon which it is expedient to have a uniform rule for the Dominion, there will be a tendency to adopt a rule of the English law which appears to be reasonable in itself, if it is not contrary to our own settled jurisprudence.[5]

Tendency to assimilate French law to English.

Even in matters not distinctly commercial a tendency to assimilate the two laws is perceptible and has led to the adoption by our courts in a good many cases of a conclusion opposed to the modern French law.

E. g., it is now settled in our law that a carrier of freight

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1 Com. Rep. v. 2 p. 18.

2 *Jetté* v. *McNaughton*, 1876, 20 L. C. J. 255.

3 See C. C. 1669, 1670, 1671.

4 *Bean* v. *Marler*, 1892, R. J. Q. 1 Q. B. at p. 357 per *Hall, J.*

5 Cf. *Préfontaine* v. *Grenier*, *infra*, p. 145.

nay contract himself out of liability for the negligence of his servants.[1]

That no damages are to be given as *solatium* for wounded feelings[2], and that a contract is complete when the acceptance has been posted.[3]

And to the same tendency we may ascribe the recent decision of the Privy Council that a railway company is not liable for damage caused by sparks unless negligence is proved, a decision however which was so contrary to public sentiment in this country as to lead to a statutory provision.[4]

In these, and in many other cases where the question was one which was disputed in France, or at anyrate had not been settled in the old law, our courts have allowed the weight of English authorities to turn the scale.

But not where there is a difference of principle.

On the other hand there are many cases where the rule of our law differs in principle from that of the English law.[5]

When this is the case it is the duty of the Courts to follow our own law although if the question had been open there might have been a good deal to be said in favour of the English rule.

As illustrations of such differences on points which arise in daily practice I may mention the rule that common employment is no defence, or in other words that an employer is

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1 *Glengoil Steamship Co.* v. *Pilkington*, 1897, 28 Can. S. C. R. 146.

2 *Jeannotte* v. *Couillard*, 1894, R. J. Q. 3 Q. B. per *Hall, J.* at p. 498; *Quebec Railway, Light and Power Co.* v. *Poitras*, 1904, R. J. Q. 14 K. B. 429.

3 *Magann* v. *Auger*, 1901, 31 Can. S. C. R. 186. Cf. Toulouse, 13 juin 1901, D. P. 1902, 2, 16.

4 *C. P. R. Co.* v. *Roy*, (1902) A. C. 220; Railway Act 1903, 3 Edw. vii. c. 58 s. 239.

5 See, e. g., *McCleave* v. *City of Moncton*, 1902, 32 Can. S. C. R. at p. 110, per *Strong, C. J.*

liable for injuries caused to a workman by one of his fellow-workmen.[1]

Or again the rule that contributory negligence does not altogether exclude the right to damages but may cause the court to divide the damages.[2]

Or the rule which is perhaps still not absolutely settled that money paid for an unlawful purpose may be recovered even after the purpose had been carried out.[3]

When our rule is settled it is useless to cite English authorities to the contrary.

For it is admitted that there is a difference of principle between the two laws on the point.

But, where no such difference of principle is shewn, English cases in the law of contracts or damages are constantly cited, not indeed as authorities binding upon the court, but as persuasive illustrations of the application of principles common to both laws.[4]

Minor contracts.

The law of Loan, of Constitution of Rent, of Deposit, of Sequestration, of Liferent, of Transaction, and of Suretyship is all French. The references to Jones on Bailments and Story on Bailments which occur on C. C. 1762 and C. C. 1813 are merely corroboratory.

Privileges. Hypothecs. Prescription.

The law of Privileges and Hypothecs and of Prescription is all French or statutory, except the provisions as to prescription of bills and notes in C. C. 2188 and 2190. The references to English authorities as to prescription applicable to the Crown

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1 *Queen* (The) v. *Filion*, 1895 24 Can. S. C. R. 482; *Asbestos & Asbestic Co.* v. *Durand*, 1900, 30 Can. S. C. R. 285.

2 *Price* v. *Talon*, 1902, 32 Can. S. C. R. 123.

3 *Consumers Cordage Co.* v. *Connolly*, 1901, 31 Can. S. C. R. 244. Contrast *Anson*, On Contracts 8th. ed. p. 269. See *Brault* v. *L'Assoc. St-Jean-Baptiste*, 1901, R. J. Q. 12 K. B. 124.

4 See *e. g.*, *City of Quebec* v. *The Queen*, 1894, 24 Can. S. C. R. at p. 445, per *Strong, C. J.*; *Jeannotte* v. *Couillard*, 1894, R. J. Q. 3 Q. B. 461.

on C. C. 2215 and C. C. 2216 are subject to the remark made above as to similar references on C. C. 400.[1]

The Commercial Law.

I come now to the second of the three parts into which I have divided the law, viz.: that part in which the codifiers availed themselves freely of English and Scotch as well as of French authorities.

This includes the law of corporations and the mercantile law or law-merchant.

In the preparation of this part of our Code the Commissioners relied almost equally upon English and French authorities.

In fact the law-merchant is not either English or French.

It consists of rules formulated for the most part in the 17th and 18th centuries by French and Dutch civilians and applied in detail by the judges in all the commercial countries of Europe.

Its cosmopolitan nature.

In France the Maritime Law was embodied in the *Code de la Marine* of 1681 which our Commissioners call the greatest of the ordinances of the reign of Louis XIV.[2]

In England Lord Mansfield (1705-1793) has often been called the father of the modern commercial law.

The authorities on which Mansfield and other English judges relied were chiefly continental and among these authorities the *Code de la Marine* held a foremost place.

The ordinance itself was not registered by the Superior Council at Quebec but as our Commissioners say "as to the rules which belong strictly to private Municipal law the character of the ordinance is such that these rules may, for the most part, be retained as written reason of universal sanction and authority."[3]

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1 Supra, p. 133.

2 Com. Rep. v. 3 p. 224.

3 Ib. p. 226.

Mr. George Joseph Bell, a high authority in Scotland on this branch of the law, is frequently cited by our codifiers.

He says in the preface to his first edition "the Roman law, indeed, has furnished the great principles on which mercantile jurisprudence has in modern Europe been grounded." (vii).

And again he says in an admirable passage "The law-merchant is universal. It is a part of the law of nations, grounded upon the principles of natural equity, and regulating the transactions of men who reside in different countries, and carry on the intercourse of nations, independently of the local customs and municipal laws of particular states. For the illustration of this law, the decisions of courts, and the writings of lawyers in different countries, are as the recorded evidence of the application of the general principle; not making the law, but handing it down; not to be quoted as precedents, or as authorities to be implicitly followed, but to be taken as guides towards the establishment of the pure principles of general jurisprudence." [1]

Our codifiers fully recognise the cosmopolitan character of the law-merchant and expressly refer to the French *Code de la Marine* as the chief basis upon which the English judges erected the structure of the Maritime law.

Their "General Observations on the Contracts of Maritime law" deserve careful study. But the commercial law in general, and not merely the Maritime law falls under the same head, and the language of Mr. Bell applies to it.[2]

The Commercial law includes the law of corporations, carriers, mandate, brokers and factors, partnership, gaming-contracts, pledge, maritime lien, affreightment and insurance.

I will say a word or two about each.

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1 *Bell's* Commentaries in the Law of Scotland 1st ed. 1810, 7th ed. 1870, p. xi.

2 See Com. Rep. v. 3 p. 214.

As to corporations we find the Commissioners refer constantly to Blackstone, Grant and Arnould, as well as to Pothier, Domat and Denizart.

Municipal corporations.

Our municipal corporations are organised more upon the English plan, though with some adaptations from the United States, than on French models.[1]

In questions as to their powers, duties and liabilities, American, English and French authorities are all referred to though for the reason given French authorities are less useful than the others.

No work upon this subject is perhaps more frequently cited than that of Mr. J. F. Dillon.[2]

As we have seen our courts exercise a control over municipal corporations under the rules of the public law of England.[3]

There is however one class of corporations in regard to which English or American authorities are of little service.

"Fabriques."

These are the ecclesiastical corporations known as *fabriques*. They are governed entirely by the customary law of the Province.[4]

Joint-Stock Companies.

In cases as to joint-stock companies English and American

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1 See *Tremblay* v. *City of Quebec*, 1902, R. J. Q. 23, S. C. 266. *(Andrews, J.) Corp. d'Arthabaska* v. *Patoine*, 1886, 4 Dor. Q. B. at p. 364. per *Ramsay, J.*

2 Commentaries on the Law of Municipal Corporations, (Boston). See e. g. *Cité de Montréal* v. *Robillard*, 1896, R. J. Q. 5 Q. B. 292; *Légaré* v. *Ville de Chicoutimi*, 1896, R. J. Q. 5 Q. B. 542; *Corp. Ste-Louise* v. *Chouinard*, 1896, R. J. Q. 5 Q. B. 362; *Corp. of Dunham* v. *Garrick*, 1895, R. J. Q. 4 Q. B. 82; *Ville d'Iberville* v. *Banque du Peuple*, 1895, R. J. Q. 4 Q. B. 268; *Atlantic and N. W. Ry. Co.* v. *Corp. of St. Johns*, 1894. R. J. Q. 3 Q. B. 397; *McCleave* v. *City of Moncton*, 1902, 32 Can. S. C. R. 106.

3 Supra, p. 42.

4 *Auger* v. *Labonté*, 1892, R. J. Q. 2 Q. B. 38, see esp. at p. 65.

authorities are in practice more relied upon than French authorities.[1]

Carriers.

Upon the law of Carriers the Commissioners cite Domat, Merlin, Smith's Mercantile Law, Story on Bailments, Bell, Pardessus, and other writers both French and English.

In the cases, authorities in both laws are constantly referred to.[2]

When the case is covered by the Railway Act of 1903, a Federal statute, modelled on English acts, English cases alone are applicable.[3]

Agency or Mandate

On the law of Mandate we find references to Pothier, Troplong, Story, Erskine, Paley on Principal and Agent, and Bell.

In the cases English and French authors are cited.[4]

Brokers.

On Brokers, Factors, and Commercial Agents, the Commissioners refer to Domat, Pardessus, Chitty, Bell, and Erskine.

C. C. 1739-1754 reproduce a statute, C. S. C. c. 59.

In the cases both English and French works are referred to.[5]

Partnership.

On Partnership we are referred to Domat, Pothier, Bell, Story, Kent, Collyer, and other writers, and both English and French authorities are founded upon in the cases.[6]

But in Partnership there are some rules which are peculiar

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1 See *infra*, p. 145, and see *White's* Canadian Company Law, *passim* (Montreal, 1901).

2 *Glengoil Steamship Co.* v. *Pilkington*, 1897, 28 Can. S. C. R. 146.

3 *Wood* v. *Atlantic and N. W. Ry. Co.* 1893, R. J. Q. 2 Q. B. 335, esp. at p. 344 and p. 352. See *Abbott, H.*, Railway Law of Canada; (Montreal, 1896); *Macmurchy & Denison*, Canadian Railway Law, Introd. p. 4 (Toronto, 1905).

4 *Sweeny* v. *Bank of Montreal*, 1885, 12 Can. S. C. R. 661; *Martel* v. *Pageau*, 1896, R. J. Q. 9 S. C. 175, (*Archibald, J.*)

5 *Forget* v. *Baxter*, 1898, R. J. Q. 7 Q. B. 530; *Crane* v. *Nolan* 1875, 19 L. C. J. 309 (C. A.)

6 *Dingwall* v. *McBean*, 1900, 30 Can. S. C. R. 441; *MacLean* v. *Stewart*, 1895, 25 Can. S. C. R. 225.

to the French law and differ from the English law on the subject.[1]

Gaming contracts.

On Gaming Contracts and Bets, Pothier, Smith on Contracts, and Oliphant on Racing and Gaming Contracts are cited.

Both English and French authorities are used in the cases.[2]

Pawnbroking, Pledge, Maritime Lien.

The law of Pawnbroking is statutory.

On Pledge, Pothier and Story are mentioned.

Authorities from both laws are quoted.[3]

In a recent case as to the rights of a pledgee of the bonds of a railway company, English and American cases were followed.[4]

On Maritime Lien and Affreightment the codifiers refer to Smith's Mercantile Law, Abbott on Shipping, Bell, Erskine, Kent, Vinnius, Valin, Pardessus, etc.

Authorities from both laws are cited in the cases and perhaps it is safe to say that in this branch of the law more than ordinary deference is shewn to the English decisions.[5]

Dernier équipeur.

The privilege of the *dernier équipeur* given by C. C. 2383 is of French origin, and French authority upon it is especially valuable.[6]

But Bell is particularly relied upon by the Commissioners

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1 See White's Canadian Company Law p. 352.

2 *Forget* v. *Ostigny*, (1895), A. C. 318, R. J. Q. 4 Q. B. 118.

3 *Dingwall* v. *McBean*, 1900, 30 Can. S. C. R. 441; *King* v. *Dupuis*, 1898, 28 Can. S. C. R. 388; *Sweeny* v. *Bank of Montreal*, 1885, 12 Can. S. C. R. 661.

4 *Atlantic and Lake Superior Ry. Co.* v. *De Galindez*, 1905, R. J. Q. 14 K. B. 161.

5 *Mackill* v. *Morgan*, 1894, R. J. Q. 3 Q. B. 365; *Glengoil Steamship Co.* v. *Pilkington*, 1897, 28 Can. S. C. R. 146.

6 *McLea* v. *Holman*, 1892, R. J. Q. 2 S. C. at p. 115, per *Pagnuelo, J.*

on this subject and special stress was laid upon a passage from this writer in the most recent case.[1]

Cases within the jurisdiction of the Court of Vice-Admiralty "are determined according to the Civil and Maritime laws of England." (C. C. 2388).[2]

Vice-Admiralty cases.

Cases may be brought in this court *inter alia* about seamen's wages,[3] salvage and loss caused by collision.[4]

The jurisdiction of the Court of Vice-Admiralty is now exercised by the Exchequer Court.[5]

Banking.

Banking is not dealt with at all in the Code.

As we have seen it is regulated by Federal Statutes.[6]

But when the Bank Act is silent and recourse must be had to the general principles of law it is mainly to English decisions that reference is made.

In a recent case where a bank had gone into liquidation a shareholder had been called upon to contribute to the loss and had done so.

He sued in recourse the chairman of the board on the ground that he had been induced to become a shareholder by misrepresentations in the published statements of the bank.

The Court of Appeal held that there had been no negligence on the part of the defendant. He was not an expert actuary and he had accepted in good faith the statements of the manager as audited.

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1 Com. Rep. v. 3 p. 230; *Inverness Railway and Coal Co.* v. *Canadian Lines*, Feb. 14, 1906, (*Dunlop, J.*).

2 See *The Ship Cuba* v. *McMillan*, 1896, 26 Can. S. C. R. 651.

3 See The *Washington Irving*, 1863, 13 L. C. R. 123, (*Black, J.*).

4 See *Howell, A.*, Admiralty Law, Canada, (Toronto, 1893); *Audette, L. A.*, Practice of Exchequer Court of Canada (Ottawa, 1898).

5 54 and 55 Vict. c. 29 (Can.) and 53 and 54 Vict. c. 27 (Imp.).

6 Supra, p. 54.

He was not personally responsible for the fault of the manager which had caused the loss.

Hall, J., giving the opinion of the court, said "This is the effect of English decisions which are the principal authorities we have on the subject."[1] And, on appeal, the Privy Council said many attempts had been made to make directors liable on the ground that they had trusted the regular officers of the company, and had failed to detect concealments by them when there was no reason to doubt their fidelity. Such attempts had not been successful. (See *Dovey* v. *Cory*, 1901, A. C. 477) (H. L.). And the opinion proceeds: "Their Lordships thought that, in the absence of any legislation in force in Quebec inconsistent with the law as acted upon in England, and in the absence of any evidence of custom and course of business to the contrary, the Court of King's Bench was right in accepting the English rulings, because they were based, not upon any special rule of English law, nor upon any circumstances of a local character, but upon the broadest considerations of the nature of the position and exigencies of business."[2] It is obvious that this is a very broad ground of judgment, and one which would apply in commercial cases generally.

On Insurance the codifiers refer to Bell, Arnould, Phillips, and other English writers as well as to Pothier, Pardessus, and Emerigon. Insurance.

In the cases English authorities are greatly relied upon.[3]

An illustration of the weight attached to English authority in this branch of the law was given recently. After a case

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1 *Préfontaine* v. *Grenier*, March 1, 1906, reversing R. J. Q. 27 S. C. 307 (C. R.).

2 Nov. 3, 1906 (not yet reported).

3 See e. g. *Manchester Fire Ass. Co.* v. *Guérin*, 1896, R. J. Q. 5 Q. B. 434; *Holt, C. M.*, Insurance Law of Canada, (Montreal, 1898).

had been argued in the Supreme Court a very similar question was decided by the House of Lords. The Supreme Court before giving judgment ordered a rehearing in order to determine how far the judgment of the House of Lords covered the case before them.[1]

In insurance cases American authorities are also frequently cited.[2]

Commercial law not purely English.

We must not however fall into the error, which is by no means uncommon, of supposing that in the Province of Quebec the general body of commercial law is English, so that English authorities are directly applicable.

Taschereau, J., (afterwards Chief Justice of the Supreme Court) remarked in one case "As said by Sir Montague Smith in the Privy Council in the case of *Bell* v. *Corporation of Quebec*,[3] English and American decisions are not governing authorities in the Province. Except as to the rules of evidence (C. C. 1206) and to a certain extent as to promissory notes, by a special article of the Code (C. C. 2340) in force as to this case, the commercial law of the Province of Quebec, as a general rule, is the French law."

"Upon the contention that a commercial contract is governed by the English law in the Province of Quebec, Aylwin, J., said in the *Montreal Insurance Co.* v. *McGillivray*[4] 'A more dangerous error than this could not be committed; commercial contracts like all others are governed by the law of Lower Canada.

It is in proof only of commercial matters that the rules of evidence of the law of England are to be resorted to.'"[5]

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1 *Angers* v. *Mutual Reserve Fund Life Ass.*, 1904, 35 Can. S. C. R. 330.

2 See *Royal Electric Co.* v. *Hévé*, 1902, 32 Can. S. C. R. 462; *Home Insurance Co. of New York* v. *Victoria Montreal Fire Insurance Co.*, Nov. 15, 1906, (P. C.); *Holt, passim*. See supra, p. 64.

3 1879, 5 A. C., at p. 98.

4 1857, 8 L. C. R., at p. 423.

5 *Young* v. *Macnider*, 1895, 25 Can. S. C. R., at p. 283.

With great respect it would appear to be more correct to say with our Commissioners that our system of commercial law is neither French nor English but that from the first our judges have impartially considered authorities from all the commercial countries and have felt free to adopt the rule which appeared to be best suited to the practice of merchants in this Province.[1] And it is proper to observe that both the judgments of Taschereau, J., and that of Aylwin, J., are dissenting judgments.

In both the cases in which these opinions were given the English authorities were treated with great deference.

In *Young* v. *Macnider*, which was a question of the right to bearer-bonds in the hands of a pledgee without notice of defects in the pledgor's title English cases were mainly relied upon.[2]

Parts of Law wholly of English origin.

The remaining part of our law is that which is wholly of English origin.

Public Law.

Of this the greater part falls outside the Civil Code.

It consists of the public law or of matters governed by Imperial legislation or by Federal legislation based on Imperial models.

These have been referred to above.[3]

Proof in commercial matters.

Within the Code the main provisions as to English law are those relating to proof in commercial matters, to bills and cheques, and to the Court of Vice-Admiralty.

C. C. 1206 provides "When no provision is found in this Code for the proof of facts concerning commercial matters, recourse must be had to the rules of evidence laid down by the laws of England."

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1 See Com. Rep. v. 3, p. 214.

2 See per *Strong*, C. J., 25 Can. S. C. R. at pp. 277 and 278, and in the court below R. J. Q. 3 Q. B. 539.

3 Supra, p. 25.

C. C. 1235 requiring a writing signed by the party, or judicial admission, in certain commercial matters where the value exceeds $50.00 is from the English Statute of Frauds.[1]

Bills, cheques, etc.

C. C. 2340 provides "In all matters relating to bills of exchange not provided for in this Code or the Federal laws recourse must be had to the laws of England in force on the thirtieth day of May 1849."[2]

C. C. 2341 reads "In the investigation of the facts in actions or suits founded on Bills of Exchange drawn or endorsed either by traders or other persons, recourse must be had to the laws of England in force at the time specified in the last preceding article and no additional or different evidence is required or can be adduced by reason of any party to the bill not being a trader."

C. C. 2354 runs "In the absence of special provisions in this section, cheques are subject to the rules concerning Inland Bills of Exchange in so far as their application is consistent with the usage of trade."

Admiralty Law.

C. C. 2388 provides that in the Court of Vice-Admiralty the Maritime laws of England are to govern.[3]

The other matters of detail which are of English origin have been referred to already or may be identified by the references of the Commissioners.

PRIVATE INTERNATIONAL LAW.

The only branch of the law about which nothing has been said is that to which the name private international law is now commonly, but by no means happily, applied.

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1 See C. S. L. C. c. 67 s. 8; *Langelier*, Preuve, p. 260; *Molleur* v. *Mitchell*, 1904, R. J. Q. 14 K. B. at p. 78 per *Lacoste*, C. J.

2 See *Boulet* v. *Métayer*, 1902, R. J. Q. 23 S. C. 289.

3 Supra, p. 144.

This subject is treated of in a very fragmentary manner in the Code.[1]

The new German Code deals in a much more satisfactory way, though still very briefly, with this subject.[2]

Not part of Public Law.

But although our Civil Code contains only a statement of certain broad principles on this branch of law it must not be inferred that this subject is not a part of our civil law.

It is an entire mistake to regard it as a part of the public law, and, therefore, governed by the laws of England.

There are three cases in our reports in which this truth has not been perceived.

These are all cases connected with the plea of *lis pendens*.

In a case where this plea was based on the alleged existence of a suit in a foreign country between the same parties and for the same causes, Andrews, J., held that the plea was bad on the ground that it would have been bad in England, and that this being a question of public law was governed by the laws of England.[3]

And in holding that a plea was good by which it was alleged that a suit had been brought and decided in a foreign country between the same parties and for the same causes, and that the judgment had been satisfied by the defendant, the old Superior Court said that the public law of England was applicable to this case.[4]

But this ground of judgment cannot be regarded as sound. There was here no question of constitutional law and the prop-

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1 See CC. 6, 7, 18, 20, 25, 79, 600, 776, 835, 842, 1264, 2189, 2423, 2460; C. C. P. 79, 96.

2 Einführungsgesetz arts. 7, 30.

3 *Howard Guernsey Manufacturing Co.* v. *King*, 1894, R. J. Q. 5 S. C. 182; following *Russell* v. *Field*, 1833, *Stuart's* Rep. 558, (C. A.).

4 *Vaughan* v. *Campbell*, 1855, 5 L. C. R. 431, (*Day*, *Vanfelson* and *Mondelet*, *JJ.*).

er law applicable was the civil law of the Province, it not being in the least implied that this would not have yielded the same result.

For it is now generally admitted that what is called private international law is not any body of rules admitted by the Courts of all civilized nations, but is simply a part of the civil law of each country.

It is, in fact, to put it in the simplest way, the sum of the rules under which our judges will in certain cases apply a foreign law.

The following passage from a judgment by Selborne, L. C., is as authoritative a definition as can be found.

"The phrase" 'private international law' is liable to be misunderstood. It is a convenient expression for such rules as, in the jurisprudence of most civilized nations, are applied *ex comitate,* to the solution of questions depending upon foreign status, foreign laws, or foreign contracts. But no law binding *proprio vigore* upon any independent state, can be established by generalisation from the jurisprudence of other nations.

All such rules must yield to the *lex loci* whenever it differs from them; and in point of fact, few (if any) of such rules are universally accepted, without some modifications or variations, making it necessary to distinguish between the general principle and the forms and conditions of its local application."[1]

And Mr. Westlake says "Now since private international law is administered by national courts, it follows that each court must apply any solution of these questions which its own national law may be found to prescribe."[2]

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1 *Orr Ewing's Trustees* v. *Orr Ewing,* 1885, L. R. 10 A. C. at p. 513.

2 Private International Law 4th ed. p. 7 (Lond. 1905) Cf. Dicey, Conflict of Laws p. 5, (Lond., 1896) *Laurent, Droit Civ.* Int. v. 1 n. 3.

And, from this point of view, it is beyond question that when there are several legal systems administered in one state they are, as regards the rules of private international law, entirely independent of one another.

Our courts are national courts in this sense and the law of England a foreign law.

If any doubt could exist upon this point it would be solved by consideration of the question in cases arising between England and Scotland. Cases on the conflict of laws in the Scotch books consist for the most part of cases in which the conflict arose between the law of Scotland and the law of England.[1]

And in a recent case Lindley, L. J., said "This part of the international law as recognized by the Scotch law, becomes part of the Scotch law." [2]

Upon the same principle the rule of a foreign law which in any particular case is adopted by our Courts must be regarded as a part of the system of private law in force in this Province.

This being the case, there is no ground for the suggestion that when a question of private international law arises it must be solved by the application of the rule which would be applied in England to that case.

On the contrary, if the question cannot be answered by reference to the Codes or to any statutory provision on the subject, or is not settled by our jurisprudence, the old French authorities would upon general principle be the best guides.

The elementary principles of our law upon the subject are taken from French sources, and it is to French authorities that we should most naturally turn for their elucidation.

This is however a matter rather of theory than of practice.

By the adoption of the principle that personal rights depend

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1 See, e. g., *Orr Ewing's Trs.* ut sup.; *Fraser*, Husband and Wife, v. 2 p. 1251, (Chapter on International Law).

2 *Queensland Mercantile Co. in re* (1892) 1 Ch. p. 226.

upon nationality and not upon domicile, the *Code Napoléon* differs widely from our law. On this account the French cases and the admirable treatises of French writers are less useful to us than they would be if the fundamental principles of the two laws were the same.

Such cases are eminently of the class to be solved by the application of general principles of jurisprudence, and English and American cases and writers are freely referred to in our courts as "persuasive" authorities.

We have now a considerable body of jurisprudence in this branch of the law, and many points will be found to be settled without the necessity of consulting foreign authorities whether French or English.[1]

1 See *Lafleur*, Conflict of Laws (Montreal, 1898).

INDEX

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F