FUNDAMENTAL PRINCIPLES

OF THE

Laws of Canada,

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

TOGETHER WITH

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

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

PREFACED

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

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

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

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

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

BY N. B. DOUCET, ESQ.

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Fundamental Principles

OF THE

LAWS OF CANADA.

CIVIL CODE.

GENERAL INTRODUCTION.

RELIGIOUS, CIVIL, CRIMINAL, AND MILITARY LAWS OF THE NATIVES, STILL IN FORCE IN THE CANADIAN FORESTS IN THE WEST.

I. Introduction. II. Of America. III. Its Mountains. IV. Its Rivers. V. Its Lakes. VI. Its Plains. VII. Its Discovery by Modern Europeans. VIII. Attempt at Colonization. IX. Mr. de Champlain's beginning—An Indian Engagement. X. By what Nations America was possessed at the time of the Discovery. XI. By what Nations possessed at this time. XII. By whom and in what manner America was peopled. XIII. Scythian Customs, Mosaic Laws, and the Doctrines of Confuscius and Zoroaster found in America. XIV. Of the Esquimaux. XV. Signs of Christianity found in America—Madoc's Expedition—Robertson's Opinion. XVI. Conjectures respecting the origin of the Iroquois and Hurons. XVII. No information can be had from the Indians. XVIII. Character of the Indians. XIX. Their Language. XX. Their Religion. XXI. Temples. XXII. Iroquois, Vestals, and Hermits. XXIII. Of War. XXIV. Government. XXV. Tribes and Families. XXVI. Noble Families. XXVII. Chiefs. XXVIII. Agoanders or Ephores. XXIX. Senate or Ancients. XXX. Warriors. XXXI. Councils. XXXII. Councils of Ancients. XXXIII. Civil Matters. XXXIV. Criminal Affairs. XXXV. State Concerns. XXXVI. Porcelain Shell or Wampum. XXXVII. Public Treasury. XXXVIII. Solemn Assemblies. XXXIX. Atheron Dance. XL. Satiric Dance. XLI. The Calumet. XLII. Calumet Dance. XLIII. Its similarity with the Caduceus of the Egyptians. XLIV. War Pipe. XLV. Commerce. XLVI. Distinction of Families, Laws of Marriage. XLVII. Degrees of Relationship. XLVIII. Marriage Solemnities. XLIX. Celebration of Marriage. L. Divorce. LI. Death. LII. Mourning. LIII. Conclusion. LIV. Colonization. LV. Death of the Missionaries. LVI. Sir Alexander M'Kenzie's Observations. LVII. Sir Francis Bond Head's Reports to the Secretary of State for the Colonies. LVIII. Statistical Tables of the Indian Tribes.

I.—*Introduction.*

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

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

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

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

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

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

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

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

II.—*Of America.*

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

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

III.—*Its Mountains.*

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

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

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

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

IV.—*Its Rivers.*

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

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

V.—*Its Lakes.*

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

VI.—*Its Plains.*

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

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

VII.—*Discovery by Modern Europeans.*

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

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

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

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

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

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

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

VIII.—*Attempt at Colonization.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Caraibes were the sovereigns of the Antilles.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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(1) Plin. lib. 7, ch. 2.

(2) The appellation of Tartar was not known till the year 1227. The Tartars were at that time supposed to be a new race of Barbarians.—*Morse.*

(3) Grotius de origine Gentium Americ.

(4) See Charlevoix, Vol. 3.

XIV.—*Of the Esquimaux.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

XIX.—*Their Language.*

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

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

XX.—*Their Religion.*

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

(1) Lafitau, ibid, Vol. I. pp. 1–19.

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

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

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

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

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

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

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

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

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

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

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

XXI.—*Temples.*

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

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

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

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

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

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

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

XXIII.—*Of War.*

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

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

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

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

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

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

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

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

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

XXIV.—*Governmeut.*

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

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

XXV.—*Tribes and Families.*

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

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

XXVI.—*Noble Families.*

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

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

XXVII.—*Chiefs.*

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

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

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

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

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

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

XXVIII.—*Agoianders or Ephores.*

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

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

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

XXIX.—*Senate or Ancients.*

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

XXX.—*The Warriors.*

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

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

(1) Lafitau, Vol. II. pp. 170–174.

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

XXXI.—*Councils.*

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

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

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

XXXII.—*Council of Ancients.*

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

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

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

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

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

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

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

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

XYXIII.—*Civil Matters.*

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

XXXIV.—*Criminal Affairs.*

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

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

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

(1) II. Kings, ch. 14.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

XXXV.—*State Concerns.*

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

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

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

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

XXXVI.—*Porcelain Shell, or Wampum.*

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

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

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

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

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

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

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

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

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

XXXVII—*Public Treasury.*

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

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

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

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

XXXVIII.—*Solemn Assemblies.*

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

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

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

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

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

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

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

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

XXXIX.—*Athoron Dance.*

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

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

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

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

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

LX.—*Satiric Dance.*

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

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

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

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

LXI.—*The Calumet.*

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

XLII.—*Of the Calumet Dance.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

XLIV.—*War Pipe.*

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

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

(1) Lescarbot.

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

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

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

XLV.—*Commerce.*

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

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

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

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

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

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

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

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

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

XLVII.—*Degrees of Relationship.*

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

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

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

XLVIII.—*Marriage Solemnities.*

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

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

XLIX.—*Celebration of Marriage.*

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

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

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

L.—*Divorce.*

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

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

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

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

LI.—*Death.*

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

LII.—*Mourning.*

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

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

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

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

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

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

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

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

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

LIII.—*Conclusion.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

LV.—*Death of the Missionaries.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

My Children,

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

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

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

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

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

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

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

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

(Signed) F. B. HEAD.

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

Manatowaiming, 9th August, 1836.

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

NUMERICAL STATEMENT OF THE INDIANS IN NORTH AMERICA.

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

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

IN LOWER CANADA.

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

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

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

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

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

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

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

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

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

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

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

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

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

CIVIL CODE.

CHAPTER I.

OF PERSONS.

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

INTRODUCTION.

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

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

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

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

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

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

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

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

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

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

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

SECTION I.—PERSONS.

I.—*Definition.*

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

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

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

II.—*How considered by the Custom,*

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

III.—*Marriage.*

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

IV.—*Status of Marriage.*

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

V.—*Constitution of Marriage.*

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

VI.—*Rights and Effects of Marriage.*

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

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

VII.—*Divorce.*

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

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

VIII.—*Foreign Divorces.*

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

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

IX.—*Age of Majority.*

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

X.—*Emancipation.*

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

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(1) Guyot Dict. Jurisp. Verbo separation decorps.
(2) See Blackstone's Commentaries, Vol. I. pp. 440, 441.
(3) Ferguson on Marriage and Divorce.
(4) Code Civil des Francais.
(5) See Story Conflict of Laws. from page 168 to 192.
(6) Nouvelles, ch. 8, Cod. lib. 5. See Pothier Traité du Marriage.
(7) See Supra, Vol. I. page 43.
(8) 24 Geo. III. 16th February, 1780.
(9) Custom, Art. 239.

XI.—*Tutorship.*

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

XII.—*Curatorship.*

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

SECTION II.—ALIENS.

I.—*Aliens.*

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

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

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

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

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

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

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

Preamble of the Statutes.

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

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

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

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

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

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

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

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

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

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

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

V.—*Judicial Decisions.*

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

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

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

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

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

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

VII.—*Aliens by the Laws of England.*

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

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

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

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(1) Paquet against Gaspard, 20th April, 1820. Quebec. See Stuart's Reports, page 143.
(2) Sarony against Bell. King's Bench, Quebec, April, 1828. Stuart's Reports, p. 345.
(3) Donegani vs. Donegani. King's Bench, Montreal, 18th June, 1831. Stuart's Reports, p. 460.
(4) J. Donegani, Appellant, vs. J. A. Donegani and others, Respondents. Privy Council, 24 February, 1833. Stuart's Reports, p. 605.

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

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

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

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

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

SECTION III.—NATIONAL DOMICIL.

I.—*Definition.*

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

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

II.—*Domicil of Nativity.*

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

III.—*Of an Illegitimate Child.*

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

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

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

V.—*Of Married Women.*

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

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

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

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

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

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

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

SECTION IV.—CAPACITY OF PERSONS.

I.—*Capacity of Persons.*

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

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

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

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

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

III.—*Age.*

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

IV.—*Married Women.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

SECTION V.—FOREIGN GUARDIANSHIP AND ADMINISTRATION.

I.—*Guardianship by the Roman Law.*

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

II.—*Property of the Ward.*

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

Vattel lays down a similar doctrine.(4)

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

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

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

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

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

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

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

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

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

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

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

Esquires.

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

Gentlemen.

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

Yeomen.

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

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

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

CHAPTER II.

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

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

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

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

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

SECTION I.—OF THINGS.

I.—*Estates and Things.*

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

II.—*Things in general.*

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

III.—*Things which are common.*

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

IV.—*How considered by the Custom.*

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

V.—*Division of Things.*

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

VI.—*Moveables.*

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

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

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

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

VII.—*Obligations and Actions.*

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

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

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

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

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

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

VIII.—*Perpetual Rents and Annuities.*

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

IX.—*Seigniorial Rents.*

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

X.—*Things which have no character.*

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

XI.—*Materials proceeding from Demolition.*

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

XII.—*Meaning of the word Furniture.*

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

XIII.—*Moveable Goods.*

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

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

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

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

SECTION II.—IMMOVEABLES.

I.—*Definition of the word.*

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

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

II.—*Moveables and Immoveables by destination.*

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

III.—*Buildings.*

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

IV.—*Trees and Fruits.*

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

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

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

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

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

Cattle intended for cultivation.

Implements of husbandry.

Seeds, plants, fodder, and manure.

Pigeons in a pigeon hole.

Fishes in a pond.

Beehives.

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

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

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

VI.—*Manure.*

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

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

VII.—*Beehives.*

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

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

VIII.—*Quarries.*

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

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(1) Labeo Generaliter Scribit, ea quœ perpetui usus causa in edificus sunt, edifficio esse, d. L. § 7. Custom Articles, from Art. 88 to 94. Guyot, Repertoire, verbo bieus.
(2) Guyot, Repertoire, Jurisp. verbo fumiers.
(3) Spelman, Gloss, 227. Blackstone's Commentaries, 2, p. 427.
(4) See Guyot, Repertoire, verbo Abeilles.
(5) Pothier, Droit de Propriété, No. 166, 168, No. 279. Toullier, p. 7, XI. 406, 414, No. 422 & 424.

IX.—*Moveables by Fiction.*

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

X.—*Immoveables by Fiction.*

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

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

SECTION III.—OWNERSHIP AND ITS MODIFICATIONS.

I.—*General Dispositions.*

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

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

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

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

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

II.—*General Principles.*

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

III.—*Division.*

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

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

IV.—*Rights of the Proprietor.*

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

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

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

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

VI.—*Of the Right of Accession.*

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

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

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(1) Grotius, lib, 2, ch. 6, § 1.
(2) Pothier, Droit de Propriété, No. 4 & 14. Introduction Générale aux Coutume, No. 100 & 101. Toullier, III. pp. 54, 57, 62, & 356.
(3) Pothier, Contrat de Vente, No. 112. Propriété, No. 274. Toullier, III. pp. 167—510.
(4) Pothier, Droit de Propriété, No. 151. Toullier, III. p. 71.
(5) Pothier Droit de Propriété, No. 306, 342, & & 396. Vente, No. 274.

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

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

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

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

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

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

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

X.—*Alluvions.*

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

XI.—*Derelictions.*

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

(1) Pothier, Droit de Propriété, No. 395, 342, § 396. Vente, 274. Toullier, I. p. 408.; III. p. 49; IV. p. 674; VIII. p. 224.
(2) Custom, Art 97.
(3) This is one of the laws of the twelve tables of Rome. Law 40. Pothier, Droit de Propriété, No. 170 & 171.
(4) Pothier, Droit de Propriété, No. 170. Toullier, III. p. 84, 85, 253, p. 152; XI. p. 70, 134.
(5) Pothier, Droit de Propriété, No. 157. Communauté, No. 192.

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

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

XII.—*Land carried away and identified.*

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

XIII.—*Islands and Sand Bars.*

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

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

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

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

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

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

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

(2) Ibid.

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

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

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

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

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

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

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

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

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

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

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

CHAPTER III.

SERVITUDES.

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

SECTION II.—OBLIGATIONS OF THE USUFRUCTUARY.—*I. He must obtain possession. II. He must give security. III. He must make the necessary repairs. IV. Cannot alter the destination. V. When consisting of herds —Expiration of the Usufruct.*

SECTION III.—USE AND HABITATION.—*I. Use. II. Habitation.*

SECTION IV.—REAL SERVITUDES.—*I. Subdivision. II. Servitudes which originate from the natural situation of the place. III. Servitudes imposed by Law. IV. Particular Services. V. Common Walls. VI. Walls not in common. VII. Privilege of the Proprietor to abandon a Partition Fence. VIII. Of a Common Wall to demolish and erect. IX. To raise it. X. How to render a Wall a Common Wall. XI. Responsibility of the Masons. XII. Boundary Enclosures in the open country. XIII. Distance of Intermediacy Walls—Stables. XIV. Chimnies and Hearths. XV. Ovens, Forges, and Furnaces. XVI. Wells and Necessaries. XVII. Ploughing and Manuring against a Wall. XVIII. Sinks, Sewers, Ditches, &c. XIX. Cases in Dispute—Appointments of Experts. XX. Report how to be made and delivered. XXI. Of the Right of Lights on the Property of the Neighbour. XXII. Windows and Lights. XXIII. Lights and Views. XXIV. The manner of carrying off Rain from the Roofs. XXV. Of the Right of Passage. XXVI. To whom belongs the Right of imposing a Servitude. XXVII. How Servitudes are extinguished.*

SECTION I.—OF SERVITUDES.

I.—*Definition of the word.*

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

II.—*Division.*

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

III.—*Personal Servitudes.*

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

IV.—*Usufruct.*

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

V.—*Obligations of the Proprietor.*

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

VI.—*Rights of the Usufructuary.*

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

VI.—*Natural Fruits.*

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

VII.—*Civil Fruits.*

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

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

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

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(1) Law 1, Inst. de Usuf. 90. Domat. Loix Civiles de Usufruct. Liv. 1, Art. 1. Inst. L 1, ff. de Usufructu, Inst. cod.

(2) L. 5. Digest. de Usufructu. L. 2, Usufructus Pretatur.

(3) Pothier, Douaire, No. 194, n. 199. L. 27, de Usufructu. L. 3, 1 ff. de sufr. 67, cod. § 2 Institute. Dom. at Loix Civiles, tit. 11, art. 2, p. 90.

(4) L. 28 de Usuf. L. 48 D. de Acquerendo Rerum Domino. § 37, Inst. de Rerum Divisione. L. 68, § 1, de Usufructu.

(5) Pothier, Donaire, No. 196, 199. Communauté, No. 205. Toul. III. p. 262, 263, &c.

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

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

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

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

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

XI.—*He may dispose of his Right.*

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

SECTION II. OBLIGATIONS OF THE USUFRUCTUARY.

I.—*He must obtain possession.*

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

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

II.—*He must give security.*

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

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

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

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

IV.—*He cannot alter the Destination.*

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

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

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

SECTION III.—USE AND HABITATION.

I.—*Use*

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

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

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

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

II —*Habitation.*

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

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

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

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

SECTION IV.—REAL SERVITUDES.

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

I.—*Subdivision.*

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

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

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

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

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

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

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

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

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

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

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

III.—*Servitudes imposed by Law.*

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

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

IV.—*Particular Services.*

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

V.—*Common Walls.*

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

VI.—*Walls not in common.*

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

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

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

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

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

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

IX.—*To raise it.*

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

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

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

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

XI.—*Responsibility of the Masons.*

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

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

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

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

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

XIV.—*Chimnies and Hearths.*

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

XV.—*Ovens, Forges, and Furnaces.*

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

XVI.—*Wells and Necessaries.*

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

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

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

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

XVIII.—*Sinks, Sewers, Ditches, &c.*

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

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

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

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

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

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

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

XXII.—*Windows and Lights.*

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

(1) Custom, 192.
(2) Ibid, 217.
(3) Ibid, 213.
(4) Ibid, 181.
(5) Ibid, 185.
(6) Ibid, 185.
(7) Ibid, 199.

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

XXIII.--*Lights and Views.*

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

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

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

XXV.—*Of the Right of Passage.*

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

XVI.—*How Servitudes are established.*

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

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

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(1) Custom, 200.
(2) Pothier, Contrat de Société, No. 244.
(3) Inst. 88, Loi 1, Inst. de Serv. proed. rust. Domat Loix Civiles, tit. 12, sec. 3. Pothier, Vente, n. 515. Contrat de Loi, No, 246.
(4) Custom Art. 186.
(5) Pothier, Contrat de Société, No. 246. Toullier, III. p. 410.
(6) See Degodels, Loix des Batimens, page 4.

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

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

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

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

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

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

XXVIII.—*How Servitudes are extinguished.*

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

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

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

CHAPTER IV.

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

SECTION I.—General Principles.—*I. Definition. II. It includes augmentations and charges accrued since the death. III. Different sorts of Successions. IV. Testamentary. V. Legal. VI. Different sorts of Heirs. VII. Unconditional and Beneficiary. VIII. Degrees of Consanguinity. IX. Direct Line. X. Collateral Line. XI. Equality of Division. XII. Variancee in the Common and Civil Law. XIII. Representation. XIV. Ad Infinitum in the direct Descending Line. XV. None in the Ascending Line. XVI. Restricted in the Collateral. XVII. No regard to Full Blood. XVIII. Exception. XIX. Moveables and Acquests. XX. How reputed of the Line. XXI. Ascending Line. XXII. Important Rules to be observed before deciding who inherits. XXIII. Irregular Successions. XXIV. Law unde vir et uxor. XXV. Opening of Successions. XXVI. Rules when it is not known who died the first. XXVII. Acceptance of Successions. XXVIII. Effect of the Acceptance. XXIX. Tacit or Express Acceptance. XXX. Acceptance of a Married Woman.*

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FRENCH RULES.

SECTION I.—GENERAL PRINCIPLES.

I.—Definition.

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

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

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

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

III.—*Different sorts of Successions.*

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

IV.—*Testamentary Successions.*

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

V.—*Legal Successions.*

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

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

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

VI.—*Different sorts of Heirs.*

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

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

VII.—*Unconditional and Beneficiary Heirs.*

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

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

VIII.—*Degrees of Consanguinity.*

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

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

IX.—*Direct Line.*

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

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

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

X.—*Collateral Line.*

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

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

XI.—*Equality of Division.*

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

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

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

XIII.—*Representation.*

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

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

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

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

XV.—*None in the Ascending Line.*

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

XVI.—*Restricted in the Collateral.*

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

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(1) Montesquieu; Esprit de Loix, liv. 27, ch. 1, c. 27 & 36. Deut. c. 21, v. 17. Institutes. liv. 3, tit. 4.
(2) Pothier, Successions, ch. 2, sec. 1.
(3) Custom Art. 302. See Articles 13, 15, 16, 17, 18, & 68.
(4) Pothier, Successions, ch. 2, sec. 1.
(5) [illegible] c. 109.
(6) [illegible] p. 191 193, 203.

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

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

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

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

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

XVII.—*No regard to Full Blood.*

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

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

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

XVIII.—*Exception.*

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

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

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

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

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

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

XIX.—*Moveables and Acquests.*

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

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

XX.—*How reputed of the Line.*

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

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

XXI.—*Ascending Line.*

ART. 146.—Succession falling to ascendants.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

XXIII.—*Irregular Successions.*

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

XXIV.—*Law unde vir et uxor.*

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

XXV.—*Opening of Successions.*

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

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

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

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

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

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

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

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

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

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

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

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

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

XXVII.—*Acceptance of Successions.*

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

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

XXVIII.—*Effect of the Acceptance.*

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

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

XXIX.—*Tacit or Express Acceptance.*

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

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

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

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

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

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

XXX.—*Acceptance of a Married Woman.*

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

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

SECTION II.

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

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

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

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