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.

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In the calculation of the number of months necessary for a child to be considered as born capable of living, thirty days are counted for each month, and the day begun is counted for a whole day, because it is for the interest of the child,(1) with regard to the proofs necessary to establish the existence of the child, at the moment of its birth, it must not be determined by the simple palpitation of its members, that it was born alive, but by its respiration, or by other signs which demonstrate its existence.(2)

II.—*Persons unworthy of inheriting.*

ART. 159.—Persons unworthy of inheriting, and as such, deprived of the successions to which they are called, are the following:

1. Those who are convicted of having killed, or attempted to kill the deceased, and in this respect they will not be the less unworthy, though they may have been pardoned after their conviction.

2. Those who have brought against the deceased some accusation found calumnious, which tended to subject the deceased to an infamous or capital punishment.

3. Those who being apprised of the murder of the deceased, have not taken measures to bring the murderer to justice.(3)

The unworthiness is never incurred by the act itself, it must be pronounced by the laws, in a suit instituted against the heir accused of unworthiness, after he has been duly cited.(4)

If the heir be declared unworthy of inheriting, by a definitive judgment, he shall be condemned to deliver to the relations succeeding on his default, or those who have succeeded jointly with him, not only the effects of the succession, of which he has had the use since its opening, but all the fruits, revenues, and interest he has derived from such effects since the opening of the succession.(5)

The children of the person declared unworthy, are admitted to the succession *ab intestato* in their own name.(6)

III.—*Those who are incapable of inheriting.*

ART. 160.—Nuns, nor their monasteries for them.

No difference exist in the successions of bishops and priests from those of other citizens.—*Ibid.* 336.

Those who have been condemned to death or to perpetual banishment.

IV.—*General Maxims common to all Successions.*

ART. 161.—Every succession from the moment of its opening, devolves to the nearest relatives of the deceased, capable of succeeding to him.(7) None being

(1) Chaussier, Viabilité, p. 3; Merlin, art Viabilité.
(2) Capuron, page 199.—Leçons de Medecine Legale, par Mr. Orfila, Vol. 1, pages 388, 389. Seconde Edition.
(3) Poth, Succession, chap. 1. § 2. Art. 4.
(4) Toul IV. p. 117.
(5) Toul IV. p. 112.—No. 103, 116.
(6) Poth, Succession, chap. 2. § Art. 4, Contrat de Mariage, n. 335. Touiller II. p. 296, 297. IV. p. 117, 196.
(7) Custom, Art. 318. L'Anglois, Principes generaux de la Cout.

obliged to accept a succession: by his renunciation, he is deemed never to have been seized of his share, which accrues to the other heirs.(1)

V.—*Liberty of Renouncing.*

ART. 162.—To have the liberty of renouncing, no act of heirship must have been made. He who puts himself in possession of the inheritance, either in part or in the whole, makes an act of heirship, even supposing that the deceased was indebted to him, in that case he must make his claims in justice, before he seizes himself, otherwise he makes an act of heirship.(2)

VI.—*The quality of Heir and Legatee, incompatible.*

ART. 163.—None can be together Heir and Legatee to the deceased. (3) Neither his *Donee inter vivos*, and his heir in the direct line, descending or ascending; but the compatibility of these two qualities is admitted in the Collateral line. (4)

Nevertheless heirs taking real property of the succession, are bound towards the hypothecary creditors of the total of the mortgage saving their recourse against their co-heirs.

VII.—*Payment of Debts.*

ART. 164.—Those who succeed equally pays the debts, equally. (5)

And if in unequal proportions as when there are heirs to moveables, acquests and conquests and others to lineal property, or that there are donees, or universal legatees, in those cases, the debts are paid in proportion to the share each receives in the inheritance.

VIII.—*Exception in the Succession of Fiefs.*

ART. 165—This rule does not apply against the eldest sons, succeeding to fiefs in the direct line, although their share is larger than those of the other children, they pay the personal debts equally; but this is not the case, for the real debts, which they pay in proportion to the emolument,(6) as also, when in the collateral line, the male excludes the females of the fiefs.(7)

SECTION III.—OF COLLATIONS.

I.—*What Collation is, and by whom due.*

ART. 166.—Collation, *Collatio Bonorum*, is the supposed or real return to the mass of the succession, which an heir makes of property received in advance of

(1) Custom, Art. 314.
(2) Custom, Art. 317.
(3) Custom, Art. 300.
(4) Custom, Art. 301.
(5) Custom, 323.
(6) Custom, Art. 334.
(7) Custom, Art, 335.

his share or otherwise, in order that such property be divided together with the effects of the succession.(1)

II.—*Children accepting the Succession of their Ascendants, must collate.*

ART. 167.—Children, and grand children, accepting the succession of their father, mother, and other ascendants, must collate what they have received from them or take less, in other property of the estate of the same goodness and value.(2)

III.—*Those who accept by representation of their Ancestors.*

ART. 168.—Grand children accepting the succession of the ancestors, by representation of their father or mother, although they had renounced to the succession of their said father and mother, must collate what their father or mother had received. It is otherwise, if they succeed in their own right, as if their father and mother were dead, at the time of the opening of the succession. If the collation is made in nature, or same specie as the advantage was made, the collating heir must be responded by his co-heirs, of the useful or necessary expences he made on the property given to him, should they refuse to do so, he will be bound to collate only the estimated value of the heritage, at the time of division, deducting the said expences.

IV.—*Rule in favour of Donees.*

ART. 169.—The donee of sums of money is never bound to refund in specie, unless there should not be found in the succession, sufficient tangible property ; for the other heirs are not bound to take their share in obligations, or debts due to the succession.

V.—*Fruits and Interests must be collated.*

ART. 170.—With the real estate, the fruits must also be collated from the day of the opening of the succession, and if it be personal property, which is no more in the possession of the donee, he must pay interest at the rate of five per-cent, from the moment of the opening of the succession.(3)

VI.—*Legatees are not subject to Collation.*

ART. 171.—If children or other lawful descendants, holding property or legacies to the collated, should renounce the inheritance of the succession of the ascendants, from whom they have received such property ; they may retain the gift, or claim the legacy to them made, without being subject to any collation.

And things given or bequeathed to children, or other descendants, shall not be collated, if the donor has formally expressed his will, that what he thus gave, was an advantage or extra part ; unless in case of donation *inter vivos*. The value of

(1) Pothier, Succ. ch. 3l Sec. 3, Art 1, in the common law, signification in England, it is termed Hotchpot.
(2) Custom, Art 304, 304, 306. See Langlois.
(3) Custom, Art 309. See Langlois. Tit Rapport.

the object given, must not exceed the disposable portion, the legitim must be preserved, and the excess must be collated. In case of a legacy it is otherwise, for the owner of unincumbered property may dispose of it without any restriction to whom he pleases.

VII.—*To whom the Collation is due, and what things are subject to it.*

ART. 172.—The collation is only made to the succession of the donor (1)

Collation is due for what has been expended by the father and mother, to procure an establishment for their descendant coming to their succession, for the settlement of dowery, or for the payment of his debts.(2)

Neither the expense of board, support, education, and apprenticeship, are subject to collation, nor are marriage presents which do not exceed the disposable portion, neither are the expences in universities to obtain the degrees including the certificate or licence, but those paid for obtaining the degrees of doctor, are:(3)

SECTION IV.—BENEFIT OF INVENTORY.

I.—*Introduction.*

ART. 173.—Heirs either testamentary or *ab-intestato*, being doubtful whether the advantages they expect from a succession or inheritance will be sufficient to pay the debts, might by the Roman law enter and take the inheritance, *cum beneficio inventarii*, and limit his obligations to the assetts of the estate, by causing an inventory to be made, and declaring that he took the succession under the benefit of the inventory. Emperor Gordien, first introduced this benefit in favour of the soldiers, who had involved themselves by accepting burthened inheritances. Justinian by law *Scimus* in the code *de jure deliberandi* extended it to all heirs.

II.—*By the French Law.*

ART. 174.—By that law, the inventory was to be commenced thirty days after the opening of the succession, and completed sixty days after. It was introduced in France, with the Roman laws, under increased solemnities, the heir was obliged to obtain letters of *benefice d'inventaire* in Chancery, and have them registered by the judge when the succession was opened, cause an inventory to be made, and give security to the amount of the inventory.(4)

The Superior Council of Quebec, having been invested with the authority of the French Court of Chancery,(5) granted *letters of benefice d'inventaire.* The first were granted to Gedeon Petit, 5th July, 1683.(6) And the Court of King's

(1) Pothier, Successions, chap. 4, Art 2.
(2) Toullier, IV. p. 491 492, and XI. 453, 224.
(3) Pothier succession, chap. 4, Art 2. Toullier, IV. p. 488, 490.
(4) Guyot, Rep. Jurisprudence, Verbo, Benefice.
(5) Edits and Ordonnances, Vol. 1.
(6) Unprinted Judgments of the Council.

Bench having succeeded to the authority of the Conseil Superior, were authorised to grant them, even out of Court.(1)

This advantage is called *benefice d'inventaire*, as the inventory is the principal condition required.

III.—*Solemnities by the Civil Law.*

ART. 175.—By the Civil Law, the inventory was to be made under judicial authority, and after the judge had fixed the seal of the Court upon the papers, and on the places where the effects of the succession were.(2) It was to be made within three months after the opening of the succession and forty days to deliberate, and the judge extends the delay when the heir justifies that the inventory could not be made during that time.(3) The civil law has been modified by the custom of Paris, ruling in Canada.

IV.—*Unconditional and Beneficiary Heirs.*

ART. 176.—The unconditional heir excludes the beneficiary heir, although nearer in degree in the collateral line, but not in the direct line, nor in the collateral, when the heir is a minor,(4) the minor giving security, that he will not allow himself to be relieved of his unconditional acceptance, in which case he excludes the beneficiary heir.(5)

V.—*Formalities by the Laws of Canada.*

ART. 177.—The formalities necessary to be observed in Canada, to obtain the benefit of inventory, is by presenting a petition to the judge, and by giving security. The security is generally accepted as presented, the judge having no capacity to contest, but when creditors require it, he orders substantial security to be given.(6)

VI.—*Amount of Security.*

ART. 178—Security is required to the amount of the personal or moveable property ; but not for the real ; as the heir can not prevent the effect of mortgages upon the immoveable estate, the interest of the creditor cannot suffer,(7) and the omission of having had the moveable property valued, is not a sufficient cause for declaring the beneficiary heir to become an unconditional heir.(8)

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(1) Provincial Statute, 34, Geo. 3, chap. 7. Sec. 8.
(2) Domat Lois Civiles, Tit 2, sec. 3.
(3) Ordinance of 1667, registered at the Conseil Superieur, Edits et Ordinances, Vol. I. page 90.
(4) Custom Art.. 342, and 343.
(5) Le Brun des inventaires, lib 3, chap. 4, No. 45.
(6) Denizard actes de notoriété du Chatelet de Paris, page 253, 259.
(7) Guyot repertoire, V. Benefice d'inventaire.
(8) Arret du 18 Juin, 1605, Lacombe recueuil de Jurisprndence Verbo heritier.

SECTION V.—ENGLISH RULES OF SUCCESSION.

I.—*To Real Property.*

ART. 179.—From the common and statute law. Sir William Blackstone, and Sir Mathew Hale, have laid down rules of descent seven in number. They vary only in the phraseology; those of Sir William Blackstone have been universally adopted by subsequent writers.

II.—*First Rule, Inheritance descend.*

ART. 180.—Inheritance shall lineally descend to the issue of the person who last died actually seized in *infinitum*, but shall never lineally ascend.

III.—*Second Rule, Male issue is preferred.*

ART. 181.—The male issue shall be admitted before the female.

IV.—*Third Rule, the eldest Male alone Inherits.*

ART. 182.—When there are two or more males in equal degree, the eldest only, shall inherit, but the females all together.

V.—*Fourth Rule, he represents the Ancestor.*

ART. 183.—The lineal descendants in infinitum of any person deceased, shall represent their ancestor; that is, shall stand in the same place as the person himself would have done, had he been living.

VI.—*Fifth Rule, Failing Lineal; Collaterals are called.*

ART. 184.—On failure of lineal descendants, or issue of the person last seized, the inheritance shall descend to his collateral relations, being of the blood of the first purchaser; subject to the three preceding rules.

VII.—*Sixth Rule, the nearest of the whole blood is preferred.*

ART. 185.—The collateral heir of the person last seized, must be his next collateral kinsman of the whole blood.

VIII.—*Seventh Rule, Male Stocks preferred.*

ART. 186.—And last, that in collateral inheritances, the male stocks shall be preferred to the female, (that is the kindred derived from the blood of the male ancestors, however remote, shall be admitted before those from the blood of the female, however near) unless where the lands have in fact descended from a female.

IX.—*Consequences resulting from these rules.*

1. *Eldest Son and issue.*

The real property of a person who dies intestate, goes to his eldest son and his issue.

Failing them to the second, third, fourth, &c. sons and their issue successively through the sons.(1)

Failing sons and their issue, it goes to daughters equally, and their issue; the eldest son of any of the daughters deceased taking his mother's share, or if she leaves daughters only, then these daughters take their mother's share equally.

2. *Sisters.*

Failing daughters, and their issue, it goes to the eldest brother, and his issue, then the second eldest, and his issue, and so on.(2)

3. *Eldest Uncle.*

Failing children, brothers and sisters and their issue, it goes not to the father, but to the eldest uncle on the father's side, or the father's eldest brother and his issue, failing them to the second.(3)

4. *Father's Sisters.*

Children, brothers, sisters and uncles, on the father's side, being extinct, it goes to the father's sisters, or the aunts of the deceased on the father's side and their issue, as it would to daughters.(4)

5. *Brothers of the Grandfather.*

All these being extinct according to the same rules, it goes to the brother of the grandfather, on the father's side, and their issue, then the sisters, their issue, (5) and so ad infinitum in the ascending line.

There is no succession through the mother.

In Recapitulation.

The general rule is that heritage descends if it can; when it cannot descend, it will go sideways first to collaterals, and only ascend when these and their issue as well as descendants are exhausted. It never goes to the father or to any one in the direct line upwards, but to the collaterals of the father and their issue, then of the grandfather and their issue, and so on passing over the father, grandfather and themselves who never inherit.

English Rules of Succession to Personal Property.

1. *Widow and Children.*

ART. 187.—The moveable or personal property of a person dying intestate one third goes to his widow and the rest equally among his children; the children of those who have died taking their parents' share also equally.

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(1) Blackstone's Commentaries, Vol. 2, p. 208, 212, 213.
(2) Ibid, Vol. 2. p. 220 to 223.
(3) Ibid.
(4) Ibid.
(5) Ibid.

2. *Widow and next of Kin.*

If there be no children nor descendants of children, the widow takes a half, and the rest goes to the deceased; next of kin of their representatives.(1)

If there be children and no widow, then the whole is divided among the children, and the representatives of any who have died.(2)

If there be neither widow, nor children, nor representatives of children, then the father takes the whole.(3)

3. *Mother, Brothers and Sisters.*

ART. 188.—If the father be dead, then the mother, and the brothers, and sisters of the deceased take equally.(4)

If the mother be alive, and no brothers or sisters, then the mother will take the whole, and if the brothers and sisters be alive and not the mother, then the brother and sisters will take equally.(5)

4. *Grandfather and Grandmother.*

ART. 189.—After these the grandfather or grandmother, or uncles and aunts, will succeed as above, and so on.(6)

Payment of Debts.

ART. 190.—Before any right of succession can be claimed, creditors must be satisfied.(7)

Heirs, executors or administrators of wills, after burying the deceased and defraying necessary expences which are privileged or preferable, prove, that is exhibit and swear to the will with two witnesses before the judge ordinary, and obtain a probate or certificate of its being proved.(8)

After this they will deliver up an inventory of the estate on oath to the judge.(9)

They will then collect the estate according to the inventory,(10) and whatever is so recovered, that is of a saleable nature, and may be converted into ready money, is called assets from the French word *assez*, out of which the executors pay the debts.

1. *Funeral expences and probate of the Will.*

ART. 191.—First funeral charges and expences for proving the will.

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(1) Blackstone's Commentaries, Vol. 2. p. 220 to 223.
(2) Ibid.
(3) See 22 and 23, Lar. 2, chap. 10 and 29, chap. 30 Blackstone's Commentaries, Vol. 2, p. 208, 212, 213, 220, 223, 1st. James 2, chap. 17.
(4) 1st. James 2, chap. 17.
(5) Ibid.
(6) Ibid. Blackstone ut Supra.
(7) Bl. v. 2, 512
(8) Ibid. 508.
(9) Ibid. 510.
(10) Ibid.

2. *King's Debts.*

Secondly debts due to the king, for letters to the post office, debts of record as judgments, docketed according to statute 4 and 5 William and Mary, chap. 20.

3. *Debts due on Contracts, Servants' Wages.*

Debts due on special contracts, as for rent for which the lessor has often a better remedy in his own hands by distraining or upon bonds, covenants and the like, under seal. (1) Debts due on simple contracts upon notes unsealed and verbal promises. Among these simple contracts servants' wages are preferred to any other and stood the ancient law.(2)

4. *Legacies.*

Then they will pay legacies so far as they have not lapsed or fallen by predecease.(3)

5. *Executors.*

After the payment of debts and legacies, the residue belongs to the executors, if not otherwise ordered by the deceased.(4)

Heirs entering upon Inventory, English Rules.

ART. 192.—An heir who is doubtful whether his ancestors' estate will be sufficient to pay his debts, may enter upon inventory *cum beneficio inventarii*, and so limit the passive title to what is contained in the inventory.

By statute 21, Henry 8 c. 5, executors and administrators are required to make and deliver in upon oath to the ordinary inventories indented, of which one part remains with the ordinary and the other part with the executor or administrator.

The law requires that the inventory be exhibited within three months after the death of the person. If it be done afterwards, it may be good, for the ordinary may dispense with the time, and even in some cases, whether it shall be exhibited or not; as where creditors are paid and the will performed.

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(1) Blackstone's 2 § 511.
(2) Bracton and Flete, L. 2. chsp.26, Blackstone l. 2 § 513.
(3) Ibid 2. § 513.
(4) Ibid. 515.

CHAPTER V

MATRIMONIAL COMMUNITY.

SECTION I.—*I. What is meant by the words Communauté de Biens, between Married Persons. II. How and when Contracted. III. Of what consists. IV. General Rules. V. Charges of the Community. VI. Dissolution of the Community. VII. Acceptance of the Wife. VIII. Renunciation by the Wife. IX. Continuation of the Community. X. Continuation in case of a second and other Marriages.*

SECTION II.—*I. Legal Difference by the English Jurisprudence. II. Power of the Husband. III. Consequences of this Rule. IV. The Husband becomes liable for all the Debts of the Wife. V. He becomes the Master of her Personal Property. VI. He has the Freehold of her Real Estates during their Joint Lives. VII. There is no Community of Property between them. VIII. The Wife cannot dispose of her Property nor make an effectual Will. IX. The same in the American States governed by the Common Law.*

SECTION I.—MATRIMONIAL COMMUNITY.

I.—*What is meant by the words Communauté de Biens.*

ART. 193.—Every marriage contracted in that part of the Province, of Lower Canada, which was subject to the French Laws before the conquest, superinduces of right, partnership or community of acquets or gains, if there be no stipulation to the contrary.

II.—*How and when Contracted.*

ART. 194.—It is contracted by the simple celebration of the marriage, and exists from the moment the nuptial benediction has been given.(1)

III.—*Of what Consists.*

ART. 195.—It consists 1st, of an equal share of all the moveable property belonging to each of the parties at the time of the marriage, and of that they or either may acquire during the time of their union.(2) 2. Of the conquests or immoveable property they may acquire together, and 3. Of the fruits and interests of their respective property not being in community.

(1) Custom, Art, 220.
(2) Ibid.

IV.—*General Rules.*

ART. 196.—The husband is the head and master of this partnership; he administers its effects, disposes of the revenue which they produce, and may alienate them by an unincumbered title, without the consent or permission of his wife; he may dispose of them at his pleasure, provided it be done without fraud, and made to persons legally authorised to receive.(1) But by last will he can dispose of his half only.(2)

ART. 197.—He is also the master of the personal and possessory actions of his wife, he may administer them and defend them in judgment, but he can not dispose of her own proper estates, can not partition them, nor sell them by licitation.(3)

ART. 198.—The wife cannot alienate her estates without the authorisation of her husband, nor defend her rights in Courts of Justice,(4) unless she be a public merchant, in which case she may bind both herself and her husband in regard to her mercantile dealings. But he may lease them, and after the dissolution of community, his wife and her heirs are bound to maintain the leases, provided they have been made without fraud and not exceeding the term of six years for property situated in towns, and nine years for that situated in the country.(5)

ART. 199.—This right of the husband, granted by these articles, 224, 225, and 234, over the property of the community, is reduced to an honest administration, his malversation, dissipation, or fraud are sufficient reasons to deprive him of it by a judgment of a Court of Justice duly executed, but in this case the wife only re-acquires the right of disposing of her moveable property; she can not alienate her real estates without the authority of her husband or of the Judge, unless she be a public merchant, that is to say, if she trade in other goods or commodities, than her husband and apart from him.(6)

ART. 200.—The husband is bound for the obligations his wife may give to release him from jail, for her maintenance and that of her children according to their situation in life, when he fails to procure it.(7)

V.—*Charges of the Community.*

They are:

ART. 201.—1. The debts contracted during the community.

2. The personal debts due by either party, on the day the marriage was celebrated, unless it was stipulated by the contract of marriage that each party should separately pay their debts created before the marriage, which stipulation however can have no effect against creditors, unless an inventory be duly made of the property of the wife, before marriage, the husband by producing such inven-

(1) Custom, Art 225.
(2) Custom, Art 296.
(3) Custom, Art 233.
(4) Custom, Art 224, 234.
(5) Custom, Art 227.
(6) Custom, Art 234, 235, 236.
(7) Langlois Tit Communauté.

tory is discharged such debts.(1) That inventory is not necessary says Langlois, if the total property of the wife is clearly and exactly detailed in the contract of marriage.(2)

It is usual to cause to be entered against the community, the passive personal debts, only to the extent of the moveable assets of the succession, but not what the parties have been by the law of nature obliged to furnish, such as support and maintenance to their father and mother in their distress, or to their children issue of other marriages when their income was not sufficient to support them.(3)

VI.—*Dissolution of the Community.*

ART. 202.—The community is dissolved.

1. By the natural or civil death of one of the spouses.

2. By a separation of property, ordered by court, and executed, and not re-established by the mutual consent of the parties which consent renders the judgment of separation null.

The community being so far dissolved, the wife may either accept or renounce it, provided she has done no act as being still in community, and has made a good and loyal inventory, the property being entire.(4)

The time to make the inventory has not been fixed by the custom, neither the time to renounce it. But the ordinance of Lewis XIV. 1667, has established that the widow being summoned as being in community, should be entitled to the same delays as the heir, to make the inventory deliberate and to accept or renounce to it, which delays are of three months from the opening of the succession or community,and forty days to deliberate. These forty days count from the day the inventory was finished, unless the heir has been prevented from making the inventory, in which case the Judge may extend the time.(5)

The inventory must be closed in justice, within three months after it has been completed.

The husband cannot renounce; he must attribute the disadvantageous state of the community to his mismanagement, or misfortunes.(6)

VII.—*Acceptance of the Wife.*

ART. 203.—When the wife accepts the community, it is divided by halves, of which the surviving party takes one half and the heirs of the other party the other half.

The private property of the parties being first taken or accounted for according to the rules previously established under the title of things.(7)

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(1) Custom, Art 222.
(2) Langlois Tit. Communauté.
(3) Ibid. page 196.
(4) Custom, Art. 237.
(5) Arrêt du Conseil d'état du Roi, 20 Avril 1667, as modified and registered at the Council Superior of Quebec, 7th Nov. 1678, Tit. VII. des délais pour délibérer. Edits and Ordonnances vol. 1. page 95 and 109.
(6) Langlois.
(7) Custom, Art. 229.

The surplus is declared to be the stock or mass of the community, upon which the survivor and the representatives of the other, will take:

1. The sums of money stipulated the personal property of each of the parties.

2. Such sums as have proceeded from the alienation of their private real property.

3. If the community be dissolved by death, the survivor takes the conventional *preciput*, if any has been stipulated.

4. Recompense of one half of the sums the community has expended to improve the private property and pay the debts of the other to which the community was not bound.

VIII.—*Renunciation by the Wife.*

ART. 204.—It is lawful for the wife to renounce the community.(1) When she renounces, the real and moveable property composing it, becomes the exclusive property of the husband, and the wife is discharged from its debts; if she has obliged herself personally to the payment of them or of part of them, the husband must indemnify her; and further he becomes her debtor:

1. For the amount of the matrimonial advantages, stipulated in her favour.

2. For the repairs of maintenance if any were required upon her private real property during the time the community had the usufruct of them, and were not made.

3. For the amount of her mourning according to her condition, which is due whether she accepts or renounces the community, but she loses it and must refund, if she marry again, within one year from the day of the death of her husband.(2)

IX.—*Continuation of the Community.*

ART. 205.—When at the time of the death of one of the conjuncts there are minor children of their marriage, the community is continued between the survivor and the said children, unless the survivor causes to be made a good and faithful inventory of the property composing the said community, at which the minor must be represented by a legitimate contradictor, that is, a person able to protect its rights.(3) That inventory must be acknowledged before the judge, and closed within three months after it has been made.(4)

Those of the children who have attained the age of majority, and in consequence are not entitled to demand the continuation,—may be benefited by the option of the minors, and have the continuation of community if the minors claim it.

X.—*Continuation of the Community in case of a Second and other Marriages.*

ART. 206.—In case of a continuation of community, the property of the first is divided between the survivor and the children representing their deceased parent, by halves.

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(1) Custom, Art 237.
(2) Langlois.
(3) Custom, Art 240.
(4) Custom, Art 241.

The second by thirds between the survivor, the children of the first marriage, and the new partner. And if the new partner have children by a former marriage, in which he was united by a matrimonial community, its continuation would be by fourths—and so on, each matrimonial union for one part, and the husband and wife each for one part; the survivor has always the right to put a stop to the community by making an inventory and causing it to be closed in justice three months after it shall have been commenced.(1)

The share of the children who die during the continuation of the community accrues to the other children.(2)

Although the survivor is the master of the continuation he can dispose of his share only of the conquests made during the lifetime of the two spouses, because the other half has become the exclusive property of the children. Thus in case no second marriage takes place the continuation is composed:

1. Of the moveable and immoveable effects of the community.
2. Of those which may become the property of the survivor by purchase or otherwise.
3. Of the income and revenue of the immoveable property belonging to the survivor.
4. Of the income and revenue of the immoveable property of the deceased.
5. Of the income of the revenue of the conquests made by the two conjuncts.

When the survivor marries again, another alteration or change in the continuation of community takes place, that is that his share of the immoveable conquests before made, from the moment of such second marriage make no more part of the coninuation,but become the private or lineal property of the survivor who marries again.

SECTION II.—DIFFERENCES.

I.—*Legal Difference by the English Jurisprudence.*

ART. 207.—This nuptial Jurisprudence, brief as it is, necessarily must present striking differences. By the laws of Canada, man and wife are partners and the husband is the administrator of the partnership so long as he is a faithful and intelligent agent, otherwise he may by judicial authority be dismissed.

II.—*Power of the Husband.*

ART. 208.—By the Laws of England, the wife is completely placed under the guardianship and coverture of the husband. The husband and wife are in contemplation of the law, one person. He possesses the sole authority and power over the person and acts of the wife, so that as Mr. Justice Blackstone has observed, the very being, or legal existence of the wife, is suspended during the marriage, or at least is incorporated and consolidated into that of the husband.(3)

(1) Custom, Art 242.
(2) 2 Art 243.
(3) Blackstone's Com. 441.

III.—*Consequence of this Rule.*

ART. 209.—For this reason a man cannot grant anything to his wife, nor enter into a covenant with her during his life, though he may devise to her by will.

She is incapable of entering into any contract of executing any deed or doing any other valid act, in her own name, all suits, even for personal injuries to her, must be brought in the name of the husband and herself with his concurrence.

IV.—*The Husband becomes liable for all her Debts.*

ART. 210.—Upon the marriage, the husband becomes liable for all her debts, but neither the wife, nor her property is liable for any of his debts.

V.—*The Husband becomes the Master of her Personal Property.*

ART. 211.—In respect to property, the husband, by the marriage, independent of any marriage settlement becomes *ipso facto*, entitled to all the personal property of every description in possession or in action belonging to the wife, he may dispose of it at his pleasure.

VI.—*He has the Freehold of her Real Estates during their Joint Lives.*

ART. 212.—He has also a freehold in her real estate, during their joint lives, and if he have issue by her, and survive her, during his own life also,—he has an exclusive right to the whole profits of it during the same period.

VII.—*There is no Community between them.*

ART. 213.—There is not any community between them in regard to property, as in Lower Canada. Upon his death the wife is simply entitled to a dower that is the enjoyment of one third of the real estate, which has been his during the coverture; during her life, and he may, at his pleasure, by a testamentary diposition deprive her of all right and interest in his personal estate, although it came to him from her by the marriage.

VIII.—*The Wife cannot dispose of her Property nor make an effectual Will without her Husband's consent.*

ART. 214.—During the coverture she is also incapable of changing, transferring, or in any manner disposing of her real estate, except with the concurrence of the husband, and she is incapable of making an effectual will.(1)

IX.—*The same in the American States, governed by the Common Law.*

ART. 215.—These differences which are by no means all which exist, exemplified in the French and English Laws, are for the most part the same as exist in America between the States deriving their origin from Spain or France, and those deriving their origin from England.(2)

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(1) Blackstone's Com., vol. 2, p. 433.
(2) Ib. y. 183, Sec. Story Conflict of Laws, p. 122, &c., and Title Marriages and incidents thereto.

CHAPTER VI.

DOWER.

SECTION I.—By the Ancient Laws of Canada.—*I. Dower. II. Of what composed the Customary Dower. III. When there are Children. IV. Rule in case of the death of Children. V. Prefix Dower. VI. When composed of Rents or Money. VII. In case of a Mutual Donation. VIII. It is the Wife's during her lifetime only. IX. From the day of the death of the Husband. X. Delivery. XI. Maintenance of the Property. XII. It is the Property of the Children. XIII. Cannot be Heirs of the Father and have the Dower also.*

SECTION II.—English Rules.—*I. Tenant in Dower, what it is. II. She must be the actual Wife. III. Of what the Dower is composed. IV. Seisin. V. Species of Dower. VI. A Widow may be barred of her Dower.*

SECTION I.—BY THE ANCIENT LAWS OF CANADA.

I.—*Dower.*

Art. 216.—Dower is the usufruct of a part of the property belonging to the husband, which is by law or by contract granted to the wife, surviving her husband, of which the absolute property passes to the children, unless agreement to the contrary be made by contract previous to the celebration of the marriage. There are two sorts of dower; 1st, the customary, which is by law regulated, and 2d, the prefix dower, which is established by contract.

II.—*Of what composed the Customary.*

Art. 217.—The customary dower is composed of one-half of the immoveable property the husband possesses on the day of the marriage, and of that which accrues to him in the direct line, after marriage; this is the rule for a first and subsequent marriage, when there are no children from preceding marriages.(1)

III.—*When there are Children.*

Art. 218.—When there are children by a former marriage, the dower of the second is composed, 1st, of one-fourth of the property, which was subject to the first dower; 2d, of one-half of the share of the husband in the conquests made during the first marriage, and one-half of the acquests by him made since the dissolution of the said first marriage, to the day of the consummation of the second marriage; 3d, of one-half of the immoveable property which he inherited during the second marriage in the direct line; the dower of subsequent marriage follows the same rule.(2)

(1) Custom Art. 248 and 253.
(2) Custom Art. 253.

IV.—*Rule in case of the death of Children.*

ART. 219.—The dower of the wife and of the children of a second marriage receives no augmentation by the death of the children of the first marriage, who died since the celebration of the second marriage. This rule applies to other marriages.(1)

V.—*Prefix Dower.*

ART. 220.—The prefix dower is established by the contract of marriage at the will of the parties; it may be composed of real estates described in the deed of rents, or of a fixed sum of money.

When the wife has been endowed with the prefix dower, neither she nor her children can claim the customary dower, unless it has been so agreed by the contract.(2)

VI.—*When composed of Rents or Money.*

ART. 221.—The prefix dower, composed of rents or money, is taken upon the whole of the property of the husband, after the division of the property of the community has been made.(3)

VII.—*In case of a Mutual Donation.*

ART. 222.—If a mutual donation has been made, the endowed wife has first the right to have the enjoyment of the share of the deceased husband in the personal property and conquests by virtue of the donation, and takes her dower upon the surplus of the property of the husband, without any diminution or confusion.(4)

VIII.—*It is the Wife's during her lifetime only.*

ART. 223.—The dower, either customary or prefix, is the wife's only during her life; at her death it reverts to the heirs of the husband, if there are no children, unless otherwise stipulated in the contract of marriage.(5)

IX.—*Fruits from the day of the death of the Husband.*

ART. 224.—The fruits and interest accrue to the wife from the day of the death of the husband. She is seised thereof of right, without demanding it in justice, unless the property subject to the dower have passed to third persons, who are bound to return the fruits and interests, but only from the day a demand of the same has been made.(6)

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(1) Custom, Art. 254.
(2) Custom, Art. 261.
(3) Custom, Art. 260.
(4) Custom, Art. 257.
(5) Custom, Art. 263.
(6) Custom, Art. 256.

X.—*Delivery.*

ART. 225.—Delivery must be made to the wife on her own personal security, provided she remain a widow. This security is to keep the property in good order, to enjoy it as a prudent administratrix, to return the capital of the dower; but if she contract another marriage, then she must give effectual and good security.(1)

XI.—*Maintenance of the Property.*

ART. 226.—The wife who takes the customary dower, is bound to keep the heritages in good order, as far as a life renter is bound to do; the four main walls of a building, whole roofs, the beams, arches, and covering of vaults, are not at her charge.(2)

XII.—*It is the Property of the Children.*

ART. 227.—Both the customary and the prefix dower are the heritage of the children; so sacred is that property, that the father and mother, from the moment of their marriage, can by no ways or means alienate it, and if the dower consists in rents or money, the children have a general mortgage upon their father's property from the time the dower was created; but as soon so the father is dead to prevent the operation of prescription the children must take the precautionary steps that other persons are obliged to take; for, so soon as dower is opened, the prefix dower, consisting in sums of money, becomes a personal debt.(3)

XIII.—*Cannot be Heirs of the Father and have the Dower also.*

ART. 228.—No one can take the father's inheritance and the dower together; and he who wishes to have the dower, must renounce to the succession.(4)

When there are many children, some may take the succession and others the dower; these last can have no more than the share they would have received, had all the children chosen the dower; the surplus accrues to the succession; it allows no right of primogeniture, and is free from debts.(5)

The child making election of the dower must return to the succession the advantages he has received from the succession, by marriage or otherwise, or take less.(6)

SECTION II.—ENGLISH RULES OF DOWER.

I.—*Tenant in Dower, what it is.*

ART. 229.—Tenant in dower is when the husband of a woman is seised of an estate of heritance, and dies; in this case, the wife shall have the third part of

(1) Custom, Art. 264.
(2) Custom, Art. 262. Sufra, chapt. Usufruct.
(3) Custom, Art 245, 250, 255, 269.
(4) Custom, Art. 251.
(5) Custom, Art. 250.
(6) Custom, Art 252. Vide Supra. title Collation.

all the lands and tenements whereof he was seised at any time during the coverture, to hold to herself for the term of her natural life.

II.—*She must be the actual Wife.*

ART. 230.—The wife must be the actual wife of the party at the time of his decease. If she be divorced, *à vinculâ matrimonii*, she shall not be endowed. But a divorce *à mensâ et thoro* only, doth not destroy the dower, not even adultery itself, by the common law. Yet now, by the statute West. 2, if a woman voluntarily leave (which the law calls eloping from) her husband, and lives with an adulterer, she shall lose her dower, unless her husband be voluntarily reconciled to her. The widows of traitors are barred of their dower, (except in the case of certain modern treasons relating to the coin); but not the widows of felons. An alien also cannot be endowed, unless she be queen consort; for no alien is capable of holding lands. The wife must be above nine years old at her husband's death, otherwise she shall not be endowed.

III.—*Of what the Dower is composed of.*

ART. 231.—And she is now by law entitled to be endowed of all lands and tenements of which her husband was seised in fee simple or fee tail at any time during the coverture, and to which any issue which she might have had might by possibility have been heir. Therefore, if a man seised in fee simple have a son by his first wife, and afterwards marry a second wife, she shall be endowed of his lands; for her issue might by possibility have been heir, on the death of the son by the former wife. But if there be a donee in special tail, who holds lands to him and the heirs of his body begotten on Jane his wife; though Jane may be endowed of these lands, yet if Jane die, and he marry a second wife, the second wife shall never be endowed of the lands entailed; for no issue that she could have could by any possibility inherit them.

IV.—*Seisin.*

ART. 232.—A seisin in law of the husband will be as effectual as a seisin in deed, in order to render the wife dowable; for it is not in the wife's power to bring the husband's title to actual seisin, as it is in the husband's power to do with regard to the wife's lands; which is one reason why he shall not be tenant by the courtesy, but of such lands whereof the wife, or he himself in her right, was actually seised in deed. The seisin of the husband for a transitory instant only, when the same act which gives her the estate conveys it also out of him again, and whereby a fine land is granted to a man, and he immediately renders it back by the same fine,) such a seisin will not entitle the wife to dower; for the land was merely *in transitu*, and never rested in the husband, the grant and render being one continued act, But if the land abide in him for the interval of but a single moment, it seems that the wife shall be endowed thereof. And in short, a widow may be endowed of all her husband's lands, tenements, and hereditaments, corporeal or incorporeal, under the restrictions before mentioned; unless there be some special reason to the contrary. Thus, a woman shall not be endowed of a

castle, built for defence of the realm, nor of a common without stint; for, as the heir would then have one portion of this common, and the widow another, and both without stint, the common would be doubly stocked. Copyhold estates are also not liable to dower, being only estates at the lord's will, unless by the special custom of the manor, in which case it is usually called the widow's freehold. But where dower is allowable, it matters not though the husband alienate the lands during the coverture; for he alienates them liable to dower.

V.—*Species of Dower.*

ART. 233.—There are now subsisting four species of dower. Dower by the common law, or that which is before described. Dower by particular custom; as that the wife should have half the husband's lands, or in some places the whole, and in some only a quarter. Dower *ad ostium ecclesiæ*,—which is where tenant in fee simple of full age, openly at the church-door, and troth plighted between them, doth endow his wife with the whole, or such quantity as he shall please, of his lands, at the same time specifying and ascertaining the same; on which the wife, after the husband's death, may enter without ceremony. Dower *ex assensu patris*, is that made when the husband's father is alive, and the son, by his consent expressly given, endows his wife with parcels of his father's lands.

By *magna charta*, a woman shall remain in her husband's capital mansion house for forty days after his death, during which time her dower shall be assigned. The particular lands to be held in dower must be assigned by the heir of the husband or his guardian. If the heir, or his guardian, do not assign her dower within the term of forty days, or do assign it unfairly, she has her remedy at law, and the sheriff is appointed to assign it. Or if the heir, (being under age,) or his guardian, assign more than she ought to have, it may be afterwards remedied by writ of admeasurement of dower. If the thing of which she is endowed be divisible, her dower must be set out by metes and bounds; but if it be indivisible, she must be endowed specially; as of the third presentation to a church, the third toll-dish of a mill, the third part of the profits of an office, the third sheaf of tithe, and the like.

VI.—*A Widow may be barred of her Dower.*

ART. 234.—A widow may be barred of her dower, not only by elopement, divorce, being an alien, the treason of her husband, and other disabilities before mentioned, but also by detaining the title deeds or evidences of the estate from the heir, until she restore them; and by the statute of Gloucester, if a dowager alienate the land assigned her for dower, she forfeits it *ipso facto*, and the heir may recover it by action. A woman may also be barred of her dower by levying a fine, or suffering a recovery of the lands, during the coverture. But the most usual method of barring dowers is by jointures, as regulated by the statute 27 Hen. VIII. c. 10.

CHAPTER VII.

LINEAL REDEMPTION, OR REDEMPTION BY ONE OF THE FAMILY.

I. General Outlines. II. Cases in which the Right of Redemption may be claimed. III. Time when the Action of Redemption must be commenced.

ART. 235.—This right, sanctioned by the Custom and granted to one of the relatives of a vendor of real property, consists in the power of redeeming the same by reimbursing the purchaser of the sums of money by him paid for it and his legal costs.(1)

I.—*General Outlines.*

ART. 236.—To redeem, it is necessary,

1. That the property be *propre* or lineal to the vendor.

2. It must have been alienated by sale or by an act equivalent to a sale.

3. The one who wishes to redeem, must be a relative of the side and line from which the property has descended. And

4. The demand of redemption must be made within the time and with the formalities required by the Custom.

II.—*Cases in which the Right of Redemption may be claimed.*

ART. 237.—It may be claimed upon all the property which has come to the vendor by his ancestors, as an inheritance ; perpetual ground rents are included in this.(2)

What was an acquest of the deceased, becomes a *propre* in the person of his heirs.(3)

An heritage received in exchange for a *propre*, and afterwards sold, is subject to the right of redemption.(4)

A *propre* which has been reacquired by a lineal relative, and afterwards sold to a stranger, gives the right of redemption to the first vender.(5)

The right of redemption may be claimed on a sheriff's sale.(6)

It is also claimable on heritages sold for redeemable rents.(7)

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(1) *Note.*—The formalities by law required to obtain this right, makes it a dead letter. The most trifling error—the want of a comma in a copy which is found in the original, a comma in the copy more than in the original, and the like, are errors fatal to the suit, which must irrevocably be dismissed.

(2) Custom, Art. 129.

(3) Custom, Art. 151, 152.

(4) Custom, Art. 143.

(5) Custom, Art. 133.

(6) Custom, Art. 150.

(7) Custom, Art. 136.

On heritages exchanged for personal property, or when there is money given to boot to the amount of more than one-half.(1)

In sales of irredeemable rents, if the vendor be reimbursed.

In sales by judicial auction, *licitation*, when the property is adjudged to a stranger.(2)

III.—*Time when the Action of Redemption must be commenced.*

ART. 238.—The action of redemption must be commenced within one year and one day from the time the purchaser has been put in possession of the property.

The year begins for seigniorial or feudal property from the day seisin has been granted, or possession taken.(3)

For seigniories from the day of investiture, or that fealty and homage have been made.(4)

In a sheriff's sale, from the day seisin of the deed has been granted.

For soccage land, from the day the acquisition has been published at the first king's court.(5)

The same rule applies when a seignior has purchased land holding from himself.(6)

When the redemption has been obtained, the fruits must be returned from the day a judicial demand was made.(7)

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(1) Custom, Art. 145.
(2) Custom, Art. 154.
(3) Custom, Art. 129.
(4) Custom, Art. 130.
(5) Custom, Art. 142.
(6) Custom, Art. 135.
(7) Custom, Art. 134. See the Text, Tit. Retrait Lignager.

CHAPTER VIII.

OF PRESCRIPTION.

SECTION I.—PRESCRIPTION.—*I. Definition of the word. II. Prescription of Ten and Twenty Years. III. Who are reputed present. IV. Prescription of Thirty and Forty Years. V. Action of Redemption. VI. Trouble in the Possession. VII. Action of Physicians. VIII. Action of Servants and Labourers. IX. Of Tavern Keepers. X. Action for the Payment of Rent. XI. Action of Rescision. XII. Particular Rule for the Payment of Rent. XIII. Prescription of Three Years. XIV. Of Promissory Notes. XV. Action of Warranty. XVI. Action of Warranty of Undertakers. XVII. By what Law to be decided. XVIII. Good Faith. XIX. Interruption of Prescription. XX. Law for the public good.*

SECTION II.—PRESCRIPTION BY THE LAWS OF ENGLAND.—*I. Definition. II. Good Faith. III. Prescription by the Common Law. IV. Title required. V. Things not liable to Prescription. VI. Civil or Legal Interruption. VII. Time required to Prescribe. VIII. Rule for computing Time. IX. Who is reputed present. X. Various Prescriptions.*

SECTION I.—PRESCRIPTION.

I.—*Definition of the word.*

ART. 239.—Prescription is a mode of acquiring property, or discharging debts, by the effect of time only, and under the condition regulated by law.(1) To acquire by prescription, it is necessary that three conditions be joined with the possession. The possession must be, 1st, without violence, *non vi;* 2d, public, *non clàm;* and the possessor must have enjoyed the possession, as the proprietor of the thing, not as a lessee nor usufructuary, *non precario.*(2) The possession must be peaceable, and during all the time required by law.(3)

II.—*Prescription of Ten and Twenty Years.*

ART. 240.—Immoveables are prescribed by *ten* years between persons present and by *twenty* years, if the proprietor has been absent when the possession has been

(1) Usucapio est adjectio Domini por Continuationem possessionis temporis lege definit.—l. 3, ff. de usurp. and usuc. Domat. Lois Civiles, ub. 3, tit. 17, sec. 4.
(2) Custom, Art. 115, 118.
(3) Custom, Art. 113.

in good faith and held by a just title during that time, and this title passes to successors.(1)

III.—*Who are reputed present.*

ART. 241.—Those are reputed present whose domicil is within the territory governed by the Custom of the place wherein the property is situated; those who reside without are declared to be absentees.(2)

IV.—*Prescription of Thirty and Forty Years.*

ART. 242.—Without a title, prescription is acquired by thirty years. The case of minors, interdicted persons, and those who are not able to manage their own affairs, excepted.(3)

To obtain prescription against the church, forty years are required.

V.—*Action of Redemption.*

ART. 243.—The action of redemption by one of the family is prescribed by one year, and when the year is expired, that action is extinguished even for minors, absentees, interdicted persons, or others, who might claim the benefit of restitution.(4)

VI.—*Trouble in the Possession.*

ART. 244.—It is the same for persons who have been troubled in their possession; they must make their complaint within one year and one day from the time the trouble began.(5)

VII.—*Action of Physicians, &c.*

ART. 245.—The action of physicians, surgeons, and apothecaries, is prescribed in one year, unless a settlement of account has taken place, and an acknowledgment in writing or obligation been granted, or a suit been instituted.(6)

VIII.—*Action of Servants and Labourers.*

ART. 246.—The action of servants and labourers for salary is prescribed after the expiration of one year, to be reckoned from the day of the last services, unless a settlement of account has been had, as in the preceding article.(7)

IX.—*Of Tavern Keepers.*

ART. 247.—Tavern-keepers have no right of action for liquors sold by the glass.(8)

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(1) Custom, Art. 113.
(2) Ibid. 116.
(3) Ibid. 113, 114, 118.
(4) Ibid. 129, 131.
(5) Ibid. 96.
(6) Ibid. 126, 127.
(7) Ibid. 127.
(8) Ibid. 128.

X.—*Action for the Payment of Rent.*

ART. 248.—The action for arrears of rent, established by contract for money lent, is extinguished by the expiration of five years; and the decisory oath of the debtor even cannot be demanded.(1)

XI.—*Action of Rescision.*

ART. 249.—The action of rescision to abrogate or cancel a deed, is extinguished by ten years.

The free and peaceable possessor by himself, and his ancestors in whose right he stands, of any estate or rent by a just title and in good faith during ten years, the proprietor being present, or twenty years if absent, and not privileged, has acquired prescription.(2) But without a title, thirty years possession is required.(3)

XII.—*Particular Rule for the Payment of Rent.*

ART. 250.—And prescription would take place even if the rent had been paid by him who has constituted it, or others in default of the possessor, if the creditor of the rent had a just cause to be ignorant of the alienation.

XIII.—*Prescription of Three Years.*

ART. 251.—The purchaser of a moveable acquires prescription of it by three years possession. This prescription requires good faith both in the one who has acquired the thing and in the one who has sold it.(5) The same rule applies in case of a thing found.(6)

XIV.—*Of Promissory Notes.*

ART. 252.—Promissory notes are prescribed in five years next after the day they become due, if no action be brought thereon within that period.(7)

XV.—*Action of Warranty of Undertakers.*

ART. 253.—The action of warranty due by undertakers, masons, carpenters, for the buildings they have constructed is prescribed after ten years from the day the work was completed for private buildings, and for public buildings the action of warranty is prescribed only by fifteen years.(8)

XVI.—*By what Law to be decided.*

ART. 254.—It is the law of the place where the property is situated which is to be followed in cases of prescription, and not the law of the domicil of those who assert the prescription.(9)

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(1) Ordinance of 1510.
(2) Custom, Art. 114.
(3) Custom, Art. 118.
(4) Custom, Art. 115.
(5) Cod. tit. de Usucapione transfer.
(6) Idem.
(7) Prov. Stat. L. Canada, 34 Geo. III. ch. 2.
(8) L. 8 Cod. de operibus publicis.
(9) Arrêt of the 19th August, 1609. Lacombe, recueuil de Jurisprudence. V. Prescription.

XVII.—*Dotal Property.*

ART. 255.—The enjoyment by the husband acquires to the wife prescription of the dotal property which has been given to her, although it did not belong to him who gave it.(1)

XVIII.—*Good Faith.*

ART. 256.—It is the ignorance of the possessor of a thing that another has any right upon what he possesses.

By the Roman law, that ignorance is necessary only at the beginning of the prescription, *si is.*(2)

XIX.—*Interruption of Prescription.*

ART. 257.—If prescription has been interrupted, the same good faith is required at the time it began again.(3) Such is the doctrine held by the Roman law. But the jurisprudence of Paris requires good faith during all the time necessary to obtain prescription.

XX.—*Law for the public good.*

ART. 258.—Individuals cannot renounce to a right introduced for public good.(4)

SECTION II.—PRESCRIPTION BY THE LAWS OF ENGLAND.

ART. 259.—By the civil law, or positive law of the Romans, things may be acquired, by *usucapion* or prescription. It is called *usucapion*, because a man may *usu rem capere.*

I.—*Definition.*

ART. 260.—*Usucapion* or prescription is defined to be an acquisition of property by a continuance in the possession of it for so long a time as is required by law. Prescription, therefore, is nothing else but a continued possession. This mode of acquiring property is derived from the laws of the twelve tables and from the Greeks.(5)

II.—*Good Faith.*

ART. 261.—1. *Bonâ fides*, a good conscience and honest design in the person pretending to a prescription; so that bare possession is not sufficient. This good conscience and honesty will appear, if possession was had from one who was

(1) Digest, Prodote, and several laws of the Cod.
(2) § Ult. loi 44, § ad. leg. Fab. Plag.
(3) Law qui fundum, § qui bona fide.
(4) L. 1 de prescriptione.
(5) Usucapio est adjectio Domini per continuationem possessionis Temporis lege Definiti. D. 41. 3, 3.

esteemed by him to be the true owner not only at the time of the delivery,(1) but also at the time of making the bargain. By the civil law the prescription is not interrupted, though the person afterwards knows that the thing delivered came not from the true owner,(2) for by this law it is sufficient that there were no ill practices at the beginning.

III.—*Prescription by the Common Law.*

ART. 262.—By the common law,(3) if at any time the person prescribing is conscious to himself that he derives his possession from a wrong doer, the prescription is interrupted, and wholly ceases; and this some interpreters say ought to be observed in the courts of the civil law, and that it is accordingly so practised in the Imperial chamber, and throughout the empire.(4)

IV.—*Title required.*

ART. 263.—2. A just, particular, and(5) real cause or title is required, as by sale, exchange, gift, &c. Such a cause as would entitle the receiver to the property from the true owner; for if there is no cause, or one that is insufficient to transfer the property, (as if the thing was only lent, or deposited for safe custody, or possessed by tenants, &c.,) no prescription can follow upon it.(6)

V.—*Things not liable to Prescription.*

ART. 264.—3. The thing must be susceptible of prescription; therefore, there is no prescription of things exempted from common(7) commerce, as of things sacred and consecrated to God, or of those things which were once lodged in the *Fiscus*, or Exchequer. The prince's domains, (called patrimonial,) are not liable to prescription, nor the goods of churches, cities, hospitals, nor things stolen, (for stolen goods may be concealed till the time of prescription comes); nor goods of infants, or minors.(8) Soldiers upon expeditions, or of those that are absent(9) in the affairs of the commonwealth; for that time of absence shall be deducted from the time prescribed; nor the goods given to magistrates in bribery, &c.; and lastly, those things are not liable to prescription which are prohibited to be alienated by last will and testament. Hence it is that moveable things are rarely prescribed; for some of these incapacities frequently attend them.(10)

4. Not only a just but a continual possession must support the title by prescription, which shall be presumed till the contrary appears. The possession of

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(1) D. 41, 4, 2.
(2) C. 7, 31, 1.
(3) C. 7, 31, 1.
(4) Mins. Observ. cam. cent. 5; Observ. 6, Gail 2; Observ. 18, num. 7; 2 D. Reg. Jur.
(5) D. 41, 3, 27.
(6) C. 7, 33, 4.
(7) J. 2, 6, 1.
(8) C. 7, 38, 2; C. 1, 2, 23; I. 2, 6, 2 & 8; C. 7, 35, 3; C. 7, 35, 8; C. 7, 35, 4.
(9) Absentia ejus qui Reipublic causâ abest neque ei neque alii damnosa esse debet. D. 50, 17, 140. Officium publicum nulli nec Damno nec compendio fit. D. 4, 60, 29.
(10) D. 48, 11, 8; C. 6, 43, 3; J. 2, 6, 3.

tenants, proxies, &c., continues the possession for the true proprietor, not for themselves; for it is not necessary that the possession should always remain in the same person. An honest buyer may begin the prescription in himself, laying aside the time acquired by a dishonest seller, because he fairly paid a price; but when the thing comes gratis, as by gift, or legacy, or succession, if there be fault or injustice in the first party, there does not seem as much reason to continue the prescription.(1)

It must be the faults in the person possessing; for if there be an incapacity in the thing itself to be prescribed, (as before, because either stolen or taken by violence, &c.,) the prescription cannot be supported, or continued over, by any means. All interruptions are before the time of prescription is fulfilled, and are either naturally and in fact, or civil interruptions and by law. A natural interruption is when a moveable thing is taken from the possessor, or an immoveable thing entered upon and seised by another, or deserted by himself; or when an alienation is made from us, by one who was intrusted with the possession in our names.(2)

VI.—*Civil or Legal Interruption.*

ART. 265.—A civil or legal interruption may be by citation or other judicial claim; sometimes by offering a libel before the judge, if the defendant abscond, or is a mad man; more especially when suit is contested, or issue joined upon the right, and sentence given by the judge. This interruption concludes only the parties in suit, the other (*in fact*) all parties whatever.(3)

A prescription may also cease for a time, without a total interruption, but concludes only the parties in suit, by standing still and not gaining ground, as in time of great sickness or war, when the party is hindered from making his claim; but if the courts of justice are open in the time of sickness or war, there is no reason it shall cease.(4)

VII.—*Time required to Prescribe.*

ART. 266.—5. Lawful time is necessary to give a right by prescription, which is three years for things moveable and corporeal, and ten years for things immoveable and incorporeal, if the persons pretending right inhabit the same province. But if they are so far absent from each other as to live in several provinces, then twenty years prescription is necessary to gain an estate. So much time is absolutely required to bar real actions and criminal accusations; for after that time there seems to be a new scene of affairs, and it may not be of any importance to the public to prosecute.(5)

VIII.—*Rule for computing Time.*

ART. 267.—In this computation of time we do not reckon from moment to

(1) D. 41. 3, 3; D. 41. 3, 33; D. 41. 4, 7, 6; D. 44. 3, 5.
(2) D. 41. 3, 5.
(3) C. 7. 40, 2; D. 44. 3, 10; C. 7. 33, 1.
(4) D. 41. 3, 5.
(5) I. 2, 6 pr.; C. 7. 33, 12; C. 3. 31, 7.

moment, or from hour to hour, but from day to day.(1) The first moment of the last day being computed as one whole day in favourable cases.

IX.—*Who is reputed present.*

ART. 268.—If the persons have dwelling places in several provinces, they are reputed to be present in each; and if a man hath no dwelling place of his own, and neglect what belongs to him, that person may be esteemed to be present every where, because he hath no fixed station.

These are the common prescriptions of time, and take place in all things belonging to private persons which are susceptible of prescription, when they are possessed *bonâ fide*.

X.—*Various Prescriptions.*

ART. 269.—There are other prescriptions of longer time, viz. thirty or forty years, by which even stolen goods, and those obtained by force, may be prescribed by the civil law, having no regard to the justice or the injustice of the first obtaining them; and this is for the public quiet, which seems to justify the lawfulness of it in conscience.(2)

The common law does not approve of it, but directs the contrary.(3) By the common law of England, the time of prescription is that time whereof there is no memory of man or record to the contrary; so that the *bona fides*, or the cause or consideration of it cannot be enquired into. This is applicable to customs and usages, &c.(4) Yet in several instances less time is sufficient to prescribe, as a year and a day, six months upon the lapse of a patron in not presenting to a church, &c.(5)

There is a prescription, too, of a shorter time, by Acts of Parliament in England; as, of five years after four proclamations upon a fine, (*i. e.* a judicial transaction or agreement,) of lands and tenements duly acknowledged in a court of record, &c.(6) Two years, or one year, or shorter time, bars popular actions by informers.(7) Some writs or actions are barred after fifty, forty, or thirty years;(8) some, after twenty years; some, after six years, or four years, or two years.(9) By other Acts of Parliament, several periods of time are fixed, greater or less, which are not so common in practice as those already hinted at. Regularly no man can prescribe against the king of England, or against an Act of Parliament.(10)

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(1) D. 44. 3, 15, and D. 44. 7, 6. In Usucapionibus non a momento ad mementum, ad totum postremum diem computamus—D. 41. 3, 6. In omnibus Temporalibus Actionibus nisi novissimus Totus dies. Compleatur, non fruit Obligationem—D. 44. 7, 6. Vide Antea, p. 108.
(2) C. 7. 39, 3.
(3) C. fin. Ext. de Prescrip.
(4) V. p. 98.
(5) 1 Inst. 114, b. 115, a. 254, b. 344 b.; Dr. & Stud. lib. 2, c. 36.
(6) 4 H. 7, 14, 35; Eliz. c. 2.
(7) 31 Eliz. 5.
(8) 32 H. 8, c. 2.
(9) 21 Suc. c. 16.
(10) 1 Inst. 41 b.; 1 Inst. 113 a.

CHAPTER IX.

DONATIONS, INTER VIVOS.

SECTION I.—According to the Laws of Canada.—*I. Definition. II. Capacity to dispose and receive. III. Acceptation. IV. Incapacities. V. Formalities. VI. Donation between Married Persons. VII. Prohibitions between Married Persons. VIII. Prohibitory Rules. IX. Exceptions.*

SECTION II.—By the Laws of England.—*I. Definitions and Rules. II. Registration. III. Cannot be revoked except in some cases. IV. Capacity of the giver. V. Personal Things.*

SECTION I.—ACCORDING TO THE LAWS OF CANADA.

I.—*Definition.*

Art. 270.—A donation is an act by which he who gives, by law styled the donor, divests himself irrevocably and for ever of the thing given to him who accepts, by law styled the donee. The acceptation is of the essence of this contract.(1) It proceeds simply from the liberality of the donor.(2)

A transfer made with certain conditions imposed upon the donee, is not considered a donation, even though these conditions are not reducible to any fixed price in money. If the conditions are in any way an equivalent to the thing given, the transfer becomes a sale and not a donation.(3)

II.—*Capacity to dispose and receive.*

Art. 271.—All persons may dispose or receive by donation inter vivos, except such as the law expressly declares incapable, and except a certain share of the real estates, which is called a *legitime*, which parents must reserve for their children; that *legitime* is one half of the property such children would have had in the successions of their father, mother, or other ancestors, had no donation been made, funeral expenses being first paid.(4)

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(1) L. 8, § 3 ff. de Don. lib. 1. 10 de Don.
(2) L. 1 ff. de Don.; Custom, Art. 273, 274.
(3) Rente n. 13 et n. 615, Toul. 4; Des Donations entreviss, sec. 4 & 5, No. 1; Puffendorff, Droit des gens, lib. 5. ch. 3; Blackstone's Commentaries, 442; Bracton de acquirendo rerum dominio, lib. 2, 15, 16.
(4) Custom, Art. 298.

III.—*Acceptation.*

ART. 272.—The acceptation is of the essence of this contract.(1)

IV.—*Incapacities.*

ART. 273.—Incapacities are absolute or relative. Absolute incapacities prevent the giving or receiving indefinitely with regard to all persons; relative incapacities prevent the giving to certain persons or receiving from them.

It is sufficient that the capacity for giving exist at the moment the donation is made with regard to the capacity of receiving. If it exist at the moment of the acceptance of the donation inter vivos, or at the opening of the succession of the testator, provided also that the legacy do not become null by his predecessor's incapacity of receiving the legacy before the execution of the condition, or before the death of the testator.(2)

In order to be capable of receiving by last will it is sufficient to be conceived at the time of the decease, provided the child be born alive. When the donation depends on the fulfilment of a condition, it is sufficient if the donee be capable of receiving at the moment the condition is accomplished.(3)

V.—*Formalities.*

ART. 274.—To make a donation inter vivos, the donor must be of age; he must be of sound mind.(4) He must be of good bodily health, at least not affected of a sickness apparently mortal, and of which he afterwards dies.(5)

ART. 275.—The donor must deseize himself of the thing given, so that it will be no more in his power to dispose of it.(6) But he may reserve the usufruct for a time, even for his lifetime.(7) Donations of universalities of property acquired and to be acquired are null.

ART. 276.—When a donation of moveable property is not followed by immediate delivery, an inventory of the same, signed by the parties, must be made and remain annexed to the original of the donation, otherwise the donee cannot claim it, neither from the donor nor from his heirs.(8) The donation must be received by two notaries, or one notary and two witnesses, and the original kept of record.

VI.—*Donation between Married Persons.*

ART. 277.—From the moment of the marriage, married persons cannot make any donation inter vivos one to the other, except it is by mutual gift.(9)

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(1) ff. de Don.; Custom, Art. 272, 273 & 274.
(2) Pothier, Introduction à la Coutume d'Orleans.
(3) Pothier, Donation inter vess, Art. 2.
(4) There is no more intricate and puzzling question in the books than that of soundness or unsoundness of mind. Benevolence, fancy, caprice, and fanaticism have a wide range in the matter of disposing of property and to deeide what degree of mental alienation is sufficient to avow a donation, or what acts of conduct are to be considered as evidence of mental aberration is often a matter of the extremest nicety and difficulty.
(5) Custom, Art. 277. Pothier des Donations entre vess, Sec. 1, No. 1.
(6) Custom, Art. 273, 274.
(7) Custom, Art. 275.
(8) Ordinance of 1731, Art. 15.
(9) Custom, Art. 282.

A woman marrying a second time, or oftener, having children, is prohibited from giving to her second husband or to his children, either directly or indirectly, of her proper estates or acquests, more than the share which one of her children is entitled to in her succession; and if the children are unequally divided, more than the share of the one who will have the least. No part of the conquests made with her former husband. These conquests, as also those which will be made during subsequent marriages, will be equally divided amongst all the children of the first and subsequent marriages. She is not allowed to give to a second husband any share of the property proceeding from the liberality of her first husband.(1)

VII.—*Prohibitions between Married Persons.*

ART. 278.—These prohibitions cease by the dissolution of the last marriage, or by the death of all the children of the preceding marriages.(2)

VIII.—*Prohibitory Rules.*

ART. 279.—Minors and persons under the authority of others are not allowed to give by donation, either directly or indirectly, to their tutors, curators, masters, and others, being their administrators during the time of their administration, and before they have rendered their account of the same and paid the balance. Father and mother, and other ascendants, are excepted from this prohibition.(3)

ART. 280.—Under the term administrators, the arrets include masters as to their apprentices, convents as to the persons who have pronounced their vows in them, confessors and directors as to those who are under their direction, (except it be moderate sums, which may be given or bequeathed to them); attornies and solicitors as to their clients, physicians, surgeons, and apothecaries as to the sick under their attendance. Those who have lived together in open concubinage are respectively incapable of making to each other any donation exceeding a moderate sum or an usufruct, as an alimentary pension. Those who afterwards marry, are exempt from this rule.

ART. 281.—The father and mother of bastards and adulterous children can make no donation inter vivos to such children, unless it be as an alimentary pension, which by the laws of nature is due to them.

ART. 282.—And to determine the validity of such donations, regard must be had to the quantity and the quality of the property of the donors, and to the number and the quality of their heirs.

ART. 283.—Persons dead civilly are unable to receive donations, unless it be an usufruct for immediate wants and an elementary pension.

IX.—*Exceptions.*

ART. 284.—To the prohibitions made against the doctors of physic or surgeons, there are, however, the following exceptions: 1st, remunerative dispositions

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(1) Edit des secondes noces. That edict extends the prohibitions to husbands marrying a second time.

(2) Custom, Art. 279.

(3) Custom, Art. 276; Ordinance of 1539, and Declaration of February, 1549.

made on a particular account, regard being had to the means of the disposer and the services rendered; 2d, universal dispositions, in cases of consanguinity. The same rules are observed with regard to the ministers of religious worship.(1)

SECTION II.—BY THE LAWS OF ENGLAND.

I.—*Definitions and Rules.*

ART. 285.—A proper gift, (or donation inter vivos, especially so called,) is when one out of mere liberality bestows any thing upon another, there being no law to force him to do it.(2)

Recompence is not comprehended under the definition, nor honorary payment for services done.(3)

In the eleventh century, under Henry II., the words gift, grant, or feofment, were comprehended under the general name of donation; it was the exclusive mode of transferring property. At the present time, gifts are not favoured by law, they having been too often the means of corruption, or the effects of prodigality; presumption is not for them; strict proof is required to show the intention of the owner; but when that intention is evident, even dishonest gifts upon lewd women for their personal and absolute wants, as for alimony, are not void, there being no depravity in receiving gifts. Besides, both the man and the woman are blameable.(4)

To the perfection of a gift, the consent of the giver, and the consent of him to whom the gift is made, are required.

By the civil law, a gift may be perfect (*ex nudo facto*) by bare consent and agreement before delivery.(5) These nude agreements are valid by the cannon law.(6) But by the common law, no action lies upon such a bare consent, agreement, or promise.(7)

Before the gift is accepted, the giver may recall it.(8)

And if the person to whom the gift is made die before acceptance, his heir cannot accept where the gift is personal, for an union of consent is requisite.(9)

II.—*Registration.*

ART. 286.—If the gift exceeds the value of 500 crowns, it must be publicly registered at the time the gift is made, that men may not part with their estates rashly.(10)

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(1) Pothier, Donations entrevos, sec. 1; Art. 1; Des personnes, 1er. partie, tit. 2, sec. 2.
(2) Digest, 39, 5 pr.
(3) D. 39. 5, 19.
(4) Digest, 39. 5, 5.
(5) Cod. 8. 54, 35.
(6) Inst. tit. 20, § 19.
(7) Doctor and Student, Dial 2, c. 24.
(8) D. 39, No. 1, 5, 2, 6.
(9) Cod. 1, 2, 15; Digest 41, 2, 38.
(10) Cod. c. 8, 54, 27.

III.—*Cannot be revoked except in some cases.*

ART. 287.—Gifts once perfect are of their own nature irrevocable.(1) Yet they may be recalled.

For ingratitude against the giver, which may exert itself in five instances.

1. If the receiver has grievously defamed the giver.
2. Laid violent hands on him.
3. Damnified his estate.
4. Laid in wait to take away his life.
5. Refused to fulfil the agreements which were made at the time of the gift.

But the donor himself must make these complaints of ingratitude; for if he is silent, his heir is for ever barred, and if the receiver die, his heir cannot be prosecuted for it.(2)

The gift itself is only called back by ingratitude, not the profits. And if the gift is sold or exchanged, or given away, it cannot be recalled; for then an innocent person might suffer for the crime of the receiver.(3)

Gifts may be recalled or revoked, if the giver afterwards happens to have children, because no one can be presumed to prefer strangers to their own blood offspring. By the laws of England, alienations by bargain and sale of an inheritance or a freehold are required to be registered or enrolled.(4) So are gifts, even those made for pious uses.(5)

He that delivers a thing by mistake may recall it; but if he does it knowingly it is a gift.(6)

IV.—*Incapacity of the giver.*

ART. 288.—Doating persons, madmen, prodigals, minors, are prohibited; also, a deaf and dumb person by nature, not by chance of decease, husband to his wife, or a wife to her husband, except by will.(7)

By the laws of England, a joint consent is sufficient to alienate the dowery of the wife.(8) But she cannot alienate anything without his consent.(9)

Criminals condemned to death cannot grant away their estates after sentence.(10) English authors date the forfeiture from the commission of the crime.

V.—*Personal Things.*

ART. 289.—Personal things may be given by words only, unless made by a corporation or body politic, for then it must be in writing under seal. All gifts of estate of freehold or leases above three years, must be made in writing.(11)

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(1) Cod. 8, 56, 2 & 4.
(2) Cod. 8. 20, 1, 2, 3, 4 & 8, 56, 10.
(3) Cod. 8, 56, 7.
(4) 27 Henry VIII. c. 16.
(5) Doctor and Student, L. 2, ch. 21.
(6) Digest, 50, 17, 53.
(7) Cod. 8, 54, 16; Ibid. 6, 22, 10; Digest, 26, 2, 9, 2.
(8) 4 Henry VII. c. 24.
(9) 1 Inst. 112, a.
(10) Digest, 56, 5, 15.
(11) 29 Car. 2, chap. 3.

CHAPTER X.

WILLS AND TESTAMENTS.

SECTION I.—Wills according to the ancient Laws of the Province. —*I. Definition of the word. II. Word Legacy. III. Who can make a Will. IV. What age was required. V. Solemn Wills acknowledged by the Custom. VI. Olograph Will. VII. By Public Instrument. VIII. Formalities. IX. Execution of Wills. X. Inventory to be made. XI. Cases in which there is more property than necessary to pay the debts. XII. Payment of debts do not devolve on the Executors. XIII. Rule in case of Seizure. XIV. Account and delivery by the Executors. XV. In case there are many Executors. XVI. Practice for the renting of Real Estates by the Executors. XVII. Modification of the Laws of Wills by Statutes. XVIII. Difficulties raised by the Canadian Lawyers. XIX. Mr. Panet's Act. XX. Decision of the Privy Council.*

SECTION II.—English Rules.—*I. Definition. II. Divise. III. Nuncupative Wills. IV. Witnesses. V. Probate. VI. Military Wills. VII. Who are capable of making a Will. VIII. Prohibition. IX. Jurisdiction of the Ecclesiastical Court. X. Consent of the Husband. XI. Criminal Conduct. XII. Traitors. XIII. Felons. XIV Suicide. XV. Outlawed. XVI. What may be disposed by Will. XVII. Of two Wills without date. XVIII. Of the execution of a Will. XIX. Words to be used in a Divise. XX. Statute of Frauds. XXI. Attestation.*

SECTION I.—WILLS ACCORDING TO THE ANCIENT LAWS OF THE PROVINCE.

I.—*Definition of the word.*

Art. 290.—The testamentary donation is an act of liberality by which the donor disposes, under the form of a testament for a time he will exist no more, of the whole or part of his property, in favour of the donee; which donation he may revoke.

II.—*Word Legacy.*

Art. 291.—The word legacy derives its origin from the Latin word *lex*, which signifies law. In the infancy of Rome, before the laws of the twelve tables were promulgated, a will was made in the presence of the people in the *commicium*,

who confirmed it in the form a law, which was called *legare*, or *legen dare*, to make a law.

III.—*Who can make a Will.*

ART. 292.—All persons of sound mind, of age, and enjoying their rights, could dispose by testaments, to the advantage of persons capable of receiving, of all their goods, moveables, acquests, and conquests immoveable, and of one-fifth part of all their real estate *propres*, but no more, even had it been for charitable or pious uses.

IV.—*What age was required.*

ART. 293.—To bequeath moveables, acquests and conquests, immoveables, the age of twenty years was sufficient, but twenty-five years of age was required to dispose of *propres* real estates.(1)

If the testator had neither moveables, acquests, or conquests, he might divise one-fifth part of his *propres* at twenty.(2) Had he exceeded this, the legacy was not null, but was reducible.(3)

V.—*Solemn Wills acknowledged by the Custom.*

ART. 294.—The Custom acknowledges two sorts of wills, which are both called solemn wills.

VI.—*Olograph Will.*

ART. 295.—The olograph, which must be written by the testator himself, without any addition of another hand.

VII.—*By Public Instrument.*

ART. 296.—And that passed before two notaries, or before the curate of the parish of the testator, or his vicar general and one notary, or by the curate or vicar and three witnesses, or one notary and two witnesses, such witnesses being males, aged twenty years at least, and not legatees, afterwards read to the testator, in the presence of the notaries, curate or vicar, and witnesses.

VIII.—*Formalities.*

ART. 297.—Mention must be made in the will that it was dictated, named, and again read, *dicté nommé et relu*, (these words are essential,) and signed by the testator and witnesses, or that mention be made of the cause why they did not sign.(4)

IX.—*Execution of Wills.*

ART. 298.—As wills have their effect only after the death, it is customary for

(1) Custom, Art. 293.
(2) Custom, Art. 293.
(3) Custom, Art. 295.
(4) Custom, Art. 289.

testators to appoint executors. These executors are seized during one year and one day of the moveable property existing at the time of the demise of the testator for the execution of his will.(1)

X.—*Inventory to be made.*

ART. 299.—The duty of the executors is, to cause an inventory to be made with all due diligence, the presumptive heir being present or legally called to attend.(2)

The inventory being made, the executor must sell the moveable property; the sale must be public; it must be published at the church door of the parish of the testator; placarded on the door of the house where he died, as the sale of minors' property; the time given to the executor to execute the will is one year and one day from the day of the death of the testator; that time may be extended for just causes, as if the heirs had contested any of the legacies, or prevented the sale of the moveable property.

XI.—*Cases in which there is more property than necessary to pay the debts.*

ART. 300.—Should there be more moveable property than necessary to pay the legacies, the heirs may prevent the sale of the surplus, and point out those to be sold, and even prevent the sale, by furnishing the executors with means to pay the legacies; which is the next thing the executors must do,—not, however, without calling the presumptive heirs.

XII.—*Payment of Debts do not devolve on the Executors.*

ART. 301.—The payment of the debts does not devolve upon the executors, unless it be particularly mentioned in the will.

XIII.—*Rule in case of Seizure.*

ART. 302.—In case there should be any seizure made in the hands of the executors, the judge is to decide upon them, the presumptive heir being called. When the will is executed, the legatees may demand the delivery of the moveable estate.

XIV.—*Account and delivery by the Executors.*

ART. 303.—Then the executors must render their account and pay the balance in their hands, although the year should not have elapsed.

XV.—*In case there are many Executors.*

ART. 304.—When there are many executors, they must render their account conjointly; without, however, being jointly held, for each of them is bound only for his portion of the administration. Legacies of money and things, which by their nature profit, interest is due but after demand only, although they became due before. Of a *haras* of breeding horses, the colts belong to the legatees.(3)

(1) Custom, Art. 297.
(2) Custom, Ibid.
(3) See L. 7, ff. de ann.; Legat. & fedeic.; L. 17, ff de Legat. 2; Domat. Loix Civiles, lib. 3, tit. 1; see X., pages 169 & 170; Merlin & Guyot, Repertoire verbo Executeurs.

XVI.—*Practice for the renting of Real Estates by the Executors.*

ART. 305.—Although the executors are by law seized only of the moveable property of the deceased in consequence not competent to receive the rents of the real estates, it was the usage at the chatelet of Paris to allow them to receive the rents of the houses, and other profits produced by the landed property during the year of their administration.

XVII.—*Modification of the Laws of Wills by Statutes.*

ART. 306.—An Act of the Parliament of Great Britain, 14th Geo. III. ch. 83, for making more effectual provision for the government of Quebec, in North America, it is enacted that "it shall and may be lawful to and for every person that is owner of lands, goods, or credits, in the said province, and that has a right to alienate the said lands, goods, and credits, in his or her lifetime, by deed of sale, gift, or otherwise, to devise or bequeath the same, at his or her death, by his or her last will and testament, any law, usage, or custom, &c. notwithstanding; such will being executed either according to the laws of Canada, or according to the forms prescribed by the laws of England."

XVIII.—*Difficulties raised by the Canadian Lawyers.*

ART. 307.—The lawyers entertained doubts as to the efficacy of this enactment, and pretended that it removed the incapacities of the testators to give, but not those of the legatees to receive, to remove these difficulties.

XIX.—*Mr. Panet's Act.*

ART. 308.—A provincial statute, 41 Geo. III. c. 4, (at the time called Mr. Panet's Act,) declared, that "it shall be lawful for all and every person of sound intellect and of age, having the legal exercise of their rights, to devise or bequeath by last will and testament, whether the same be made by a husband or wife, in favour of each other, or in favour of one or more of their children, as they would see meet, or in favour of any other person whatsoever, all and every his or her lands, goods, or credits, *propres*, acquests, or conquests, &c. The subtlety of the lawyers was not yet conquered, in the face of the English rule of jurisprudence establishing that remedial statutes were to be beneficially and liberally expounded, and although the custom declared that persons of twenty years were of age, were able to dispose by will of their personal property: they contended that they, such persons, were not of age to bequeath their moveable property to their tutor or other relative by whom they might be influenced.

XX.—*Decision of the Privy Council.*

ART. 309.—A decision of the Privy Council settled the question, by declaring, that a minor, having attained the age of twenty years, was of age to exercise his legal rights with respect to moveable property, and that in the case appealed the incapacity of the guardian being removed, the legacy made to his wife by a person of twenty years was valid.(1)

(1) Alexis Durocher and others, Appellants, and Benjamin Beaubien and Lewis Guy, Respondents, 13th May, 1828, on appeal from Montreal King's Bench to the Provincial Court of Appeals, and from thence to the Privy Council. Stuart's Reports, page 307.

SECTION II.—ENGLISH RULES.

I.—*Definition.*

ART. 310.—A will or testament is "the legal declaration of a man's intention of what he wills to be performed after his death.

The person who makes a will or testament is called a testator; he who dies without a will is termed in law intestate.

A will and testament, strictly speaking, are not words of the same import. A will is properly limited to land, and a testament only to personal estate; and the latter requires executors, who are named, to take care and see it performed; but the terms are continually applied indifferently to a disposition of lands or goods.

II.—*Devise.*

ART. 311.—A gift of lands and tenements by will is called a devise; and the person to whom they are given, the devisee.

A bequest of goods and chattels is termed a legacy, and the person to whom they are bequeathed, a legatee.

There are two sorts of wills or testaments: first, written, and secondly, verbal, or made by word of mouth; the latter is called a nuncupative will.

III.—*Nuncupative Will.*

ART. 312.—A nuncupative will is where a testator declares his will before a sufficient number of witnesses; and this can extend only to personal property; for no real estate can pass by will, unless it be written and properly attested.

No nuncupative will is good where the estate thereby bequeathed shall exceed the value of thirty pounds, that is not proved by the oath of three witnesses at least, who were present at the time of pronouncing the will, and bid by the testator to bear witness that such was his will, or words to that effect.(1)

IV.—*Witnesses.*

ART. 313.—None are deemed good witnesses to a nuncupative will but those allowed to be good upon a trial at law.(2)

To be good, the nuncupative will must be made in the time of the last sickness of the deceased, and in the house of his or her habitation for the last ten days or more next before the making of such will, except such person was surprised or taken sick, being from his own home, and died before he returned to the place of his or her dwelling.(3)

V.—*Probate.*

ART. 314.—That after the expiration of six months after speaking the testamentary words, no testimony shall be received to prove any will nuncupative,

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(1) Statute of Frauds, 20, Car. 2, c. 3, § 19.
(2) 4 Ann, c. 16, § 14.
(3) 29th Car. 2, c. 3, § 19.

except the said testimony, or the substance thereof, were committed to writing within six days after the making of the said will.(1)

Nor shall such be proved till fourteen days after the death of the testator, nor till process has first issued to call in the widow, or next of kin, to contest it, if they think proper.(2)

No written will shall be revoked or altered by any subsequent nuncupative will, unless the same be, in the lifetime of the testator, reduced to writing, and by him read over and approved, and unless the same be proved to have been done by three witnesses at the least.(3)

VI.—*Military Wills.*

ART. 315.—But any soldier in actual military service, or any mariner or seaman being at sea, may dispose of his moveables, wages, and perpetual estate, as before the making of this last recited act. No stamp is required till after the death of the testator.

VII.—*Who are capable of making a Will.*

ART. 316.—All persons of sound memory and understanding have full power to dispose of their property by will, unless under some special prohibition: as, 1st, want of sufficient discretion in the person making the will; 2d, want of sufficient liberty and free will; 3d, on account of criminal conduct.

VIII.—*Prohibition.*

ART. 317.—In the first class of prohibitions are infants. The law, however, allows that a male infant, at the age of fourteen years, and a female at twelve years and upwards, are capable of making a will respecting any goods, money, and other personal estate. In reckoning the age of an infant, the day of the birth must be excluded.(4)

Idiots, or natural fools fools from their birth, but a man is not an idiot who has any glimmerings of reason.

IX.—*Jurisdiction of the Ecclesiastical Court.*

ART. 318.—The ecclesiastical court is the judge of every testator's capacity, and decides on disputes respecting the validity of wills relating to personal estates. The discretion of the person making a will, and his capacity of devising, whatever may be his age, may be disputed there.

Under the second head of persons incapable of making a will, are those who have not sufficient liberty and free will: married women come under this description.

A married woman, or *feme covert*, is restrained and prevented from devising any land or real estate whatsoever, being particularly excepted out of the Act of

(1) 29th Car. 2, c. 3, § 19.
(2) Ibid.
(3) Ibid.
(4) Ibid.

34 and 35 Henry VIII., ch. 5, enabling other persons to dispose of their lands by will, even of goods or personal estate, without the license or consent of her husband, except her pin money, or savings out of her allowance by will.

X.—*Consent of the Husband.*

ART. 319.—The license and consent of the husband may be given previous to his marriage; and the husband, by his bond or covenant, is bound to allow the execution of it.

If the husband be banished beyond the sea for life, the wife may make a will, and act in every thing as if she was unmarried, or as if the husband were dead.

A will is void, when it is made by a person in consequence of threats, whereby he is induced, through fear of injury, to make such a will. But if the testator afterwards, when there is no excuse of fear, do ratify his will, the same is then good in law.

XI.—*Criminal Conduct.*

ART. 320.—Criminal conduct occasions a third kind of disability.

The lands and tenements of a traitor, from the commission of the offence, and his goods and chattels, from the time of conviction, are forfeited to the king.

XII.—*Traitors.*

ART. 321.—Traitors are not only deprived of the privilege of making a will at the time of conviction, but any will made before, by reason of such conviction, becomes void, in respect both of goods and lands.

XIII.—*Felons.*

ART. 322.—A felon, or one guilty of petit treason, lawfully convicted, cannot make a will of goods or land, because the law has disposed thereof already by forfeiture. A pardon, however, restores him to his former estate and capacity of making a will.

XIV.—*Suicide.*

ART. 323.—A person who wilfully kills himself, has also forfeited his goods and chattels to the king, but not his lands and other real estate, not being attainted as a felon.

XV.—*Outlawed.*

ART. 324.—Outlawed persons are out of the protection of the laws, and their goods and chattels are forfeited to the king, so long as the outlawry subsists; but they may dispose of their real estates by will; they are not forfeited by the outlawry.

XVI.—*What may be disposed of by Will.*

ART. 325.—All personal estates of every description, as goods and chattels, things in action, as debts and other monies, mortgages, &c., may be disposed of by will.(1)

(1) Blackstone's Commentaries, vol. 2.

As to the real estate, by Statute 34 and 35 Henry VIII. c. 5, and 11 Henry II. c. 25, all persons (except married women, infants, idiots, and persons of nonsane memory,) are empowered to dispose by will in writing of the whole of their landed property (except their copyhold tenements, they being excepted out of the Statute 29, Car. 2, c. 24,) to whom they think fit, unless it be to bodies corporate, and that even to the total disheriting of their heir at law, notwithstanding that erroneous opinion, which some entertain, of the necessity of leaving their heir a shilling, or some express legacy, in order to disinherit him effectually. As to freehold estates, held by one person during the life of another, styled estates *par autre vie*, or for the term of another's life, they are devisable by will.(1)

The dower crops of widows may be bequeathed.(2)

Corn growing on the lands of tenants for life, &c., at the time of the testator's decease, may be bequeathed by will.

So if a man have lands in right of his wife, or is tenant by the courtesy of lands, and sow them with corn, he may devise the corn growing on the lands at his death, and the devise is good, and the wife, though entitled to the land, shall not have the corn.

XVII.—*Of two Wills without date.*

Art. 326.—Where two wills are made, and neither of them dated, the man is declared to have died intestate, it being impossible to ascertain which was the last.

XVIII.—*Of the execution of a Will.*

Art. 327.—By the 29th Car. 2, c. 3, usually styled the statute of frauds and perjuries, it is enacted, that all devises and bequests of any lands or tenements, devisable either by common law or by force of the statute of wills, or by that statute, shall be in writing, and signed by the party so devising the same, or by some other person in his presence, and by his express direction, and shall be attested and subscribed in the presence of the devisor, by three or more credible witnesses, or else such devises or bequests shall be utterly void and of none effect.

XIX.—*Words to be used in a Devise.*

Art. 328.—The words commonly used in the devise of a fee are, "I give, devise, and bequeath unto A all those my freehold messuages, lands, tenements, hereditaments, and premises, with the appurtenances whereof I am seized in fee, situate, &c."

In general, however, the intention of the testator is so entirely regarded, that any kind of disposition, not expressly contrary to the rules of law, will constitute a valid devise.(3)

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(1) 29th Car. 2. c. 3, § 12.

(2) 20 Henry III. c. 2.

(3) "I agree that the word 'property,' standing alone, is sufficient to carry the fee simple in the land:" *Per* Rooke, J. 2, New. Rep. 221.—"That 'property' is a term sufficient to pass real estate, when used in a last will, cannot now be disputed:" *Per* Lord Ellenborough. C. J. 14 East, 372.

In the construction of wills, it is an invariable rule that a devise must be most favourably expounded, to pursue, if possible, the will of the testator.

XX.—*Statute of Frauds.*

ART. 329.—In the construction of the statute of frauds and perjuries, it has been adjudged that the name of the person making his will, written with his own hand, as: "I, John, do make this my last will and testament," is a sufficient signing, without any name at the bottom. But the safest way is to sign at the end of the will, and at the bottom of each page.

XXI.—*Attestation.*

ART. 330.—The attestation and subscription of the witnesses, in the presence of the testator, is required by the statute, principally with a view of putting a stop to the secret manner in which, previous to the act, wills were executed.

But the business of the persons attesting the execution of a will, is not barely to witness the manual act of signing, but also to bear testimony of the sanity of the testator. It is not necessary that the witnesses should be made acquainted with the contents of the will.

Though the witnesses must all attest the execution of the testator's will in his presence, it is not necessary that it be at the same time.(2)

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(2) See Ante, vol. 1. The Origin, Use, and Progress of Wills, by the Common and Statute Laws. Blackstone's Commentaries, vol. 2, pages 11, 12, 373, 489, 499; vol. 4, pages 424 and 430.

CHAPTER XI.

ACTIONS.

I. Definition of the word. II. Principal sorts of Actions. III. Petitory. IV. Possessory. V. Complaint. VI. Simple Saizin. VII. Actions tending to enforce the execution of Engagements. VIII. Personal. IX. Personal and Hypothecary. X. Purely Hypothecary. XI. Real and Personal. XII. Purely Real. XIII. How extinguished. XIV. Rule for those who acquired from the First Tenant. XV. Decrêt. XVI. Abandonment for Discharge. XVII. Abandonment after Contestation. XVIII. Mortgages. XIX. Difference between a Mortgage and Pledge. XX. Mortgage is indivisible. XXI. Three sorts of Mortgage. XXII. Legal or Tacit Mortgage. XXIII. Judicial Mortgage. XXIV. In case of an Appeal. XXV. Privilege upon Moveable Property. XXVI. Consequence from that Rule. XXVII. Exceptions. XXVIII. Doctors. XXIX. Servants. XXX. Tavern-keepers.

I.—*Definition of the word.*

ART. 331.—An action is the right and power of prosecuting in judicature for what is due to us and for the reparation of wrongs we have suffered, either by actions or by words.(1)

II.—*Principal sorts of Actions.*

ART. 332.—There are two principal sorts of actions—personal actions, and real actions; mixed actions partake of the nature of both.(2)

III.—*Petitory Actions.*

ART. 333.—Some are petitory, which claim the property from one who is in possession.(3)

IV.—*Possessory Actions.*

ART. 334.—Others possessory, which seek the possession only,(4) either to preserve it or to claim heritages or real rights, in the possession of which we are troubled, or of which we are dispossessed. This action is called complaint.(5)

(1) Institutes, lib. 4. tit. 6; L. Cornelia, ff. De Injuris.
(2) Ibid *Quædam.*
(3) Dig. lib. 6, 1, 24.
(4) Institutes, 4. 6, 30.
(5) Custom, Art. 96.

V.—*Complaint.*

ART. 335.—This action is granted to the possessor, without examining if his claim to the property be just or not; it is sufficient to have been in possession one year and one day publicly, without violence, and as master.

This action is also used to claim an universality of moveables, as a succession, but not to claim a particular moveable.(1) By the Custom, this action lasts thirty years.(2)

VI.—*Simple Saizin.*

ART. 336.—The Custom gives another sort of complaint for rents, which it calls *simple saizin*, but this article is full of absurdity; it is unintelligible, and is no more in use.(3)

VII.—*Actions tending to enforce the Execution of Engagements.*

ART. 337.—They are of five sorts, viz:

VIII.—*Personal.*

ART. 338.—1. The personal action, which is given against him who has contracted the engagement.

Against his heirs, each for such part as he is benefited in the succession.(4)

Against the husband, for the personal debts of his wife, contracted before marriage, in case there is a community, and no clause to the contrary, of which debts *in toto* the husband is personally holden, during the marriage, and even after dissolution, if the wife renounces to the community; but if she accepts, the action is reduced to one-half.(5)

Against the wife, after the demise of her husband, when she accepts the community for one-half of the debts contracted by her husband during the community, also of the personal debts contracted by him before the marriage, if there is no clause to the contrary; but this action can be maintained against the wife and against her heirs, only to the amount they have received of the community: provided always that a faithful inventory has been made, without fault or fraud on their part.(6)

IX.—*Personal and Hypothecary Actions.*

ART. 339.—2. The personal and hypothecary actions are given against donees or universal legatees, of him who has contracted the debt, when they are holders of real estates which have belonged to the deceased, and which had been by him mortgaged for the payment of the debt, in which case each of the heirs, donees, or legatees is hypothecarily held for the total of the debt, saving his recourse against the other heirs, donees, or universal legatees.

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(1) Custom, Art. 97.
(2) Art. 118, Imbert, lib. 1, chap. 35, n. 7. Langlois, Principes généraux de la Coutume, p. 283.
(3) Custom, Art. 98. Langlois, Princip. gen. p. 283.
(4) Custom, Art. 332, 334.
(5) Ibid. 221, 222.
(6) Ibid. 221, 222.

And against the husband and the wife, holders of immoveable property belonging to their community for its debts, to which they were not personally bound, to which debts they are hypothecarily held for the whole, saving their recourse against the other conjunct or against his heirs.(1)

X.—*Purely Hypothecary.*

ART. 340.—3. The action purely hypothecary, which is given against the possessor and proprietor of immoveable property, mortgaged for a debt for which the holder is not bound by the title of his purchase, and of which he has had no knowledge, yet the creditor may sue him for the debt without calling upon the person who created it, and of whom the possessor has acquired.(2)

XI.—*Real and Personal.*

ART. 341.—4. The real and personal action, which is given against the purchaser and the proprietor of estates owing seigniorial or other charges, real and annual, and against such of his heirs, legatees, or donees, to whom the property has descended, and against all other possessors of the said property who have bound themselves to pay the same, as also for the arrears of rent.(3)

XII.—*Purely Real.*

ART. 342.—5. The action purely real, which lies against the holder of the said heritage, burthened with a seigniorial and ground rent, or other real or annual burthens, when the holder has had no knowledge of the said charges and burthens, against whom, notwithstanding, this action may be maintained, without calling upon his vendor.

XIII.—*How Extinguished.*

ART. 343.—Means by which these actions may be extinguished or suspended:

1. By the payment or discharge of the debt.

2. By compensation of one debt for another, which takes place *de jure* or of right, provided both debts are clear, but not when one of the debts is liquidated and demandable and the other subject to dispute or litigation.

3. By prescription and by sheriff's sales made without opposition.

4. By quitting or giving over the heritage or real estates, except in the real and personal action, when the purchaser or tenant of real estates is burthened with seigniorial or ground rent, his heirs, donees, or universal legatees, have bound themselves to make improvements on the heritage and have not done them, or when they have bound themselves to guarantee and make good the charge or burthen with a general mortgage.(4)

XIV.—*Rule for those who have acquired from the first Tenant.*

ART. 344.—The same rule holds good against him who has acquired from the

(1) Custom, Art. 333.
(2) Ibid. 101.
(3) Ibid. 90 & 100.
(4) Ibid. 105, 106, 109. See Langlois, pages 288, 289, 290.

first tenant, when he has obliged himself to make improvements and has not made them or promised to pay the rent, but the words to warrant and make good, *fournir et faire valoir*, are essential; if they are omitted in the instrument transferring the property, he may abandon it by paying the dues accrued in his time.(1)

This kind of abandonment can be done only in a judicial process, the party being present or duly summoned, and in this case the property abandoned reverts, *de jure*, to the grantor or to his representatives.(2)

But to be discharged of actions purely hypothecary, or purely real, a simple act, duly signified, is sufficient; the possessor may, if he thinks fit, prefer to call upon his vendor, to save the warranty to which this latter is bound.(3)

XV.—*Decrêt.*

ART. 345.—In case of this sort of abandonment, the property abandoned does not go to the creditors, but a curator is appointed, upon whom the property is sued and sold by *Decrêt*, and adjudged to the highest bidder.(4)

XVI.—*Abandonment for Discharge.*

ART. 346.—If the abandonment has for its object to obtain a discharge, it must be made before contestation, that is before a rule is granted on the demand and defence of the parties' default, or the defence dismissed; he who abandons is not held for the arrears of the rent, although they became due during his possession, except of the seigniorial rent, which is always presumed to exist.(5)

XVII.—*Abandonment after Contestation.*

ART. 347.—And when the abandonment is made after contestation, the possessor must pay the arrears which have accrued during his possession, to the amount of the produce, interest, or advantage he has received.(6)

In these two last actions, the possessor is not bound to return the property in the state he received it, provided there is no fraud on his part, or that he derives no advantage from the deterioration.(7)

XVIII.—*Of Mortgages.*

ART. 348.—A mortgage is a right granted to the creditor over the immoveable property of his debtor, for the security of his debt, and gives him the power of having the property seized and sold in default of payment.

It is a species of pledge, the thing mortgaged being bound for the payment of the debt or fulfilment of the obligation.(8) It resembles the pledge.

1. In that both are granted to the creditor for the security of the debt.

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(1) Custom, Art. 109, 110.
(2) Ibid. 109.
(3) Ibid. 102.
(4) Ibid. 101.
(5) Ibid. 113.
(6) Ibid. 103.
(7) Langlois, Princ. gen., pages 293 and 294.
(8) 7 Inst. de Act. l. 5, § 1 ff. de pign. l. 138 § 2 ff. de verb. sigf. l. 9, § 2 ff. de pign. Act. l.1 Cod.; V. Domat. Des Gages & Hypotheques, lib. 3, tit. 1, sec. 1, pages 162, 163.

2. In that both bind the thing subjected to them, and that the same thing cannot be engaged to a second creditor to the prejudice of the first.

XIX.—*Difference between a Mortgage and Pledge.*

ART. 349.—A mortgage differs from a pledge in this:

1. That a mortgage exists only on real or immoveable estates, and that the pledge has for its object only moveables, corporeal or incorporeal.(1)

2. That in the pledge, the moveables and effects subjected to it are put into the possession of the creditor, or of third persons, agreed upon by the parties, while the mortgage only subjects to the rights of the creditors the property on which it is imposed, without it being necessary that he should have actual possession.

Generally the conventional mortgage extends upon all the real property of the debtor, yet it may be special upon part of the property, or general on the whole, and special on some which are designated.(2)

As the mortgage is only accessory to a principal obligation which it is designed to strengthen, and of which it is to secure the execution, a mortgage for a sum or for goods to be advanced, is void.(3)

XX.—*Mortgage is indivisible.*

ART. 350.—The mortgage is in its nature indivisible, and prevails over all the immoveables subjected to it, and over each and every portion.(4)

It is essentially necessary to the existence of a mortgage that there be a principal debt to serve as a foundation.

Hence in all cases where the principal debt is extinguished, the mortgage disappears with it; and when the principal obligation is void, the mortgage is likewise void. This, however, is to be understood with certain restrictions, which will be mentioned in this chapter.

XXI.—*Three sorts of Mortgages.*

ART. 351.—There are three sorts of mortgages.

1. Conventional mortgages, which depends on covenants contained in deeds passed before notaries, or under private signature, and afterwards acknowledged before notaries or judicial authority.

XXII.—*Legal or Tacit Mortgages.*

ART. 352.—Legal or tacit mortgages, which are created by the operation of law, as that of tutors in favour of their ward, on account of their administration, from the day of their appointment until the liquidation and settlement of their final account: and the tutors and curators of such persons have a like mortgage on their property, as a security for the advances which they may have made.(5)

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(1) Custom, Art. 170.

(2) By an Ordinance of the Special Council, L. C., 4th Victoria, c. 30, 1841, all mortgage must be special and registered.

(3) L. 4 ff. quæ res pign. vel. hyp. l. 11, qui potior. Ne contrahitur obligatio mulieris datione Inst. Quib. mod. re Contr. obl. Domat. Ibid.

(4) Qui pignori plures res accipit non cogitur unam liberare nisi accepto universo quantum debetur. l. 19, ff. de pign.; Domat. ibid. sec. 18; Pothier, Hypotheque, Art. Prelion. 1 Art. bid. ch. 1, sec. 2.

(5) Poth. Hyp. ch. 1, sec. 1, Art. 3; Communauté, No. 763, Toul. p. 119.

That of the wife for the restitution of her dowry, and for the reinvestment of the dotal property sold by her husband, and which she brought in marriage from the time of celebration.

For the restitution or reinvestment of dotal property, which came to her after the marriage, either by succession or donation, from the day the succession was opened or the donation perfected.(1)

XXIII.—*Judicial Mortgage.*

ART. 353.—Judicial mortgages, resulting from judgments, whether they be final or provisional, in favour of the person obtaining them.(2)

The judicial mortgage takes effect from the day on which the judgment is pronounced.

XXIV.—*In case of an Appeal.*

ART. 354.—If there be an appeal from the judgment, and it is confirmed, the mortgage relates back to the day when the judgment was rendered.

XXV.—*Privilege upon Moveable Property.*

ART. 355.—This right depends on the nature of the claim.

The general rule is, that moveables cannot be mortgaged when out of the possession of the debtor.(3)

XXVI.—*Consequence from that Rule.*

ART. 356.—Two consequences are drawn from the rule. The first is, that the purchaser of a moveable thing ought to enjoy the same peaceably, without being troubled by the creditors of the vendor, observing, however, that he is not seized of a personal debt, unless the transfer thereof be signified and copy of the transfer be delivered to the debtor.(4)

XXVII.—*Exceptions.*

ART. 357.—This consequence admits of two exceptions.

1st. In favour of the proprietors of houses situated in the towns and suburbs, and of farms. They may follow the moveable property of their tenants, when it has been clandestinely removed.(5)

2d. In favour of him who has sold moveable effects, with the view of being soon paid, without having fixed the term or day of payment, he may follow the thing wherever it may be, to be paid for the price thereof.(6)

The second consequence is, that the creditors do not take their pay according to the order of their claim, but by the anteriority of the seizure; and that no con-

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(1) Pothier, Hypoth. ch. 1, sec. 1, art. 3. Des Personnes, 1 partie, tit. six. sec. 4.
(2) Poth. Hypoth. ch. 1, sec. 1.
(3) Custom, Art. 170.
(4) Ibid. 108.
(5) Ibid. 171.
(6) Ibid. 174.

tribution takes place but after payment of privileged debts, which are, judicial charges and funeral expenses.

XXVIII.—*Doctors.*

ART. 358.—The debts due to physicians, doctors, surgeons, and apothecaries, for the last sickness of the deceased.

XXIX.—*Servants.*

ART. 359.—The servants, for the two last years of their wages, including the current year.

XXX.—*Tavern-keepers.*

ART. 360.—Tavern-keepers have a privilege on the clothes and upon the horses and goods of their hosts.(1)

A person who has not been paid the price of a moveable thing which he had sold on credit, to be paid at a certain day, has a privilege upon the thing as long as it is in the hands of his debtor.(2)

The creditor, who is seized of a moveable which has been pledged to him, has also a privilege on the pledge. The person in whose hands a moveable thing has been deposited has a claim on the thing deposited.

After the payment of these debts has been made, the unprivileged creditors are paid.

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(1) Custom, Art. 175.
(2) Ibid. 177.

CHAPTER XII.

COMMERCIAL MARITIME LAWS.

SECTION I.—INTRODUCTION.—*I. Rhodian Code. II. Laws of Oléron. III. French Ordinance of* 1681. *IV. English Maritime Laws.*

SECTION II.—NAVIGATION LAWS.—*I. New Act. II. Ships to be registered. III. By whom to be registered. IV. Forfeitures. V. Must be English built. VI. Foreign Repairs. VII. Port of Registry. VIII. Where a Ship shall be deemed to belong. IX. Qualifications. X. Declaration. XI. Addition in certain cases to the Declaration. XII. Survey. XIII. Rule to ascertain the Tonnage of a Ship. XIV. Mode of measuring a Vessel afloat. XV. Engine Room. XVI. The Tonnage once ascertained. XVII. Security to be given. XVIII. New Master must give a New Bond. XIX. Certificates of Registry. XX. Name of the Vessel not to be changed. XXI. Builder's Certificate. XXII. Loss of the Certificate. XXIII. Unlawful detention of the Certificate. XXIV. Ships altered. XXV. Vessel condemned. XXVI. Prize Vessels. XXVII. Transfer of Property. XXVIII. Must be divided in sixty-four Shares. XXIX. Exception. XXX. Bill of Sale must be produced. XXXI. Transfer of Property. XXXII. Times of the Entry. XXXIII. Loss of Certificate. XXXIV. Bill of Sale must be produced. XXXV. Bill of Sale not recorded. XXXVI. Change of Property. XXXVII. Copies received as Evidence. XXXVIII. Sales, &c. must be recorded* de novo. *XXXIX. Mortgage. XL. Bankruptcy.*

SECTION III.—GENERAL RULES.—*I. Master or Captain. II. Must be a British Subject. III. Named by the majority of the Owners. IV. Duties of the Master. V. Pilots. VI. Duties of the Pilots. VII. Rules for Pilots in Canada. VIII. Mate. IX. Seamen. X. Freighting, Bills of Lading, and Risks of Voyage. XI. Collision of Ships. XII. Risks in Landing. XIII. Selling Goods at Sea. XIV. Competition. XV. Payment of Freight. XVI. Passage Money. XVII. Wharfage. XVIII. Bottomry. XIX. Demurrage. XX. Delay. XXI. Goods unshipped. XXII. Average. XXIII. Common Loss. XXIV. In Distress. XXV. Ship Riding out the Storm. XXVI. Salvage. XXVII. What constitutes a Legal Wreck.*

SECTION I.—INTRODUCTION.

The use of the seas and rivers is, by the general law of nature and reason, common to all mankind.(1)

But to secure to every one the free possession of that liberty, it soon became necessary for nations to have a system of rules, deducible from the immutable principles of natural justice, and established by universal consent among the civilized inhabitants of the world, in order to decide all disputes, and to insure the observance of justice in the intercourse which the use of the seas made of so frequent occurrence between the individuals of each country.(2)

I.—*Rhodian Code.*

The earliest system of maritime jurisprudence was compiled by the Rhodians, several centuries before the Christian era.

The most celebrated authors of antiquity have spoken in high terms of the wisdom of the Rhodian code.(3)

The laws of Rhodes were adopted by Augustus into the legislation of Rome. Antonius being called upon to decide a contested point with respect to shipping, declared that it ought to be decided by the Rhodian laws, unless they happened to be directly at variance with some regulation of Roman laws. The rules of the Rhodian code with respect to average, contributions in the event of a sacrifice being made at sea, for the safety of the ship and cargo is expressly laid down in the Digest.(4)

II.—*Laws of Oléron.*

The collection of sea laws next in celebrity, is that denominated the *Roole des Jugements d'Oléron.* This is taken from the name of an island in the Atlantic, the origin of which is not certain. The prevailing opinion in England has been that they were compiled by the direction of Queen Eleanor, the wife of Henry II. in her quality of Dutchess of Guienne; and that they were afterwards enlarged by her son Richard I. at his return from the holy land. A code of maritime laws issued at Whisby, in the island of Gothland, in the Baltic, has long enjoyed a high reputation in the north.

III.—*French Ordinance of* 1681.

But by far the most complete and well digested system of maritime jurisprudence that has ever appeared, is that comprised in the famous *ordonnance de la marine*, issued by Lewis XIV., in 1681. This excellent code was compiled under the direction of Colbert, by individuals of great talent and learning, after a careful revision of all the ancient sea laws. It combines whatever experience

(1) Nationale Jure Communia sunt omnia hæc, aer, aqua profluens & mare; per hoc litera maris. § 2, Inst. de rer. divis., &c.
(2) Domat. droit. public. Liv. 1, tit 8.
(3) Cicero, pro lege manilia. Strabo, lib. 14.
(4) Lib. 14, tit. 2.

and the wisdom of ages has shown to be the best in the Roman laws, and in the institutions of the modern maritime states of Europe. In the preface to his treatise on the laws of shipping, Lord Tenderden says: "If the reader should be offended at the frequent references to this ordinance, I must request him to recollect that those references are made to the maritime code of a great commercial nation, which has attributed much of its national prosperity to that code; a code composed in the reign of a politic prince, under the auspices of a wise and enlightened minister,(1) by laborious and learned persons, who selected the most valuable principles of all the maritime laws then existing, and which, in matter, method and style, is one of the most finished acts of legislation that ever was promulgated.(2)

IV.—*English Maritime Laws.*

No code of maritime laws has ever been issued by authority in Great Britain. The principles laid down in the civil law, the *roole des jugements d'Oléron & Whisby*, and the works of distinguished jurisconsults, the judicial decisions of its own and of foreign countries establish its maritime jurisprudence.

The preceding remarks refer merely to the principles or leading doctrines of the English maritime laws. These, however, have often been very much modified by statutory enactments, and the excessive multiplication of acts of parliament; suspending, repealing, or altering parts of other acts, has often involved the commercial and maritime law in almost inextricable confusion.

Mr. Pitt has the merit of having introduced something like order in this chaos. Under his auspices, all the separate customs and duties existing in 1787 were repealed, and new ones substituted in their stead; consisting, in most instances, in the equivalents, so far at least as they could be ascertained, of the old duties. In carrying this measure into effect, the House of Commons passed no fewer than three thousand resolutions. The principles laid down in the famous navigation acts of 1650 and 1660 were sufficiently distinct; but when these acts were passed, there were above two hundred statutes in existence, many of them antiquated and contradictory, which they did not repeal, except in so far as the regulations in them might be inconsistent with those in the new acts. Since 1660 statutes were passed in almost every session, explaining, limiting, extending, or modifying in one way or other, some of the provisions of the navigation acts. There was not a single branch of the law that escaped the rage for legislation. Latterly, however, this uncertainty has been nearly removed. One of the bills introduced by Mr. Wallace for the improvement of the navigation laws, repealed above two hundred statutes, and the new acts substituted in the place of those that were repealed were drawn up with laudable brevity and clearness. But various alterations having been frequently made in these acts, new statutes embodying the changes were passed. The principal are 3 and 4 William IV. c. 54, for the

(1) Colbert.

(2) The ordinance of 1681 was published in 1760, with a detailed and most elaborate Commentary, by M. Valin, in 2 volumes 4to. It is impossible which to admire most in this Commentary, the learning or the sound good sense of the writer. Lord Mansfield was indebted for no inconsiderable portion of his superior knowledge of the principles of maritime jurisprudence to a careful study of M. Valin's work.

encouragement of British shipping and navigation, which may be called the present navigation law, (ibid. c. 55,) for the registry of British vessels, (ch. 52,) containing the regulations with respect to the importation and exportation, and ch. 59, for regulating the trade with the British possessions abroad.

Of the acts abovementioned, ten of the 6th year of George IV., commencing with chapter 115, were consolidated in 1825, under the care and correction of Mr. Herries, at the time one of the parliamentary secretaries of the treasury. A new consolidation was introduced into parliament in 1833, by Mr. Poulett Thompson, then vice president of the board of trade, and lately governor of this province, where he died in 1842.

It may be proper to observe that the preamble of the famous ordinance of 1681 contains the following disposition:—

"Nous avons cru que pour achever le bonheur de nos sujets, il ne restait plus "qu'à leur procurer l'abondance par la facilité et l'augmentation du commerce qui "est l'une des principales sources de la félicité des peuples, et comme celui qui "se fait par mer est le plus considérable, que nos ordonnances, et celles de nos "predecesseurs, ni le droit romain ne contiennent que très peu de dispositions "pour la décision des différents qui naissent entre les négociants et les gens de "mer, nous avons estimé qu'il étoit important de fixer la jurisprudence des "contrats maritimes jusqu'à présent incertaine, &c. d'établir une bonne police "dans les ports, costes et Rodes qui sont *dans l'étendue de notre domination*, "à ces causes nous avons déclaré et ordonné, déclarons et ordonnons ce qui suit."

Here follows the ordinance, &c., containing eight titles, with a notice explaining marine terms. It has been contended by some,(1) that this ordinance, not being found registered in the registers of the superior council established at Quebec in 1663, was not to be considered as making part of the jurisprudence of Canada. But the rule laid down by Blackstone for the construction of statutes seems to be contrary to that opinion. It is as follows:—

The general run of the laws enacted by the superior state, are supposed to be calculated for its own internal government, and not to extend to its distant dependant countries, which bearing no part in the legislature, are not therefore in its ordinary and daily contemplation. But when its sovereign legislative power sees it necessary to extend its care to any other subordinate dominions, or mentions them expressly by name, or indicates them under general words, there can be no doubt, but then they are bound by its law.(2)

SECTION II.—NAVIGATION LAWS.

I.—*New Act of* 1833.

ART. 1.—The preamble of the statute declares that an act for the registering of British vessels, 6th George IV., consolidating and amending the laws of registry, is repealed, and a new act is made to commence its operation on the 1st September, 1833.

(1) Stuart's Reports, page 441. Appeal from Montreal—Maitland vs. Molson.
(2) Blackstone's Commentaries, vol. 1, pages 100, 101. Supra, vol. 1, page 18.

II.—*Ships to be registered.*

ART. 2.—No ship or vessel shall be entitled to any of the privileges of a British registered ship, unless registered by those claiming property therein, and shall have obtained a certificate of such registry.

III.—*By whom to be registered.*

ART. 3.—The persons authorised to make registry are in the United Kingdom and in the colonies of Asia, Africa, and America, the collector and comptroller of the customs, &c.

IV.—*Forfeitures.*

ART. 4.—Ships not duly registered shall be subject to be seized by the officer of the customs.

V.—*Must be English built.*

ART. 5.—None to be registered except such as are wholly of the build of the United Kingdom, Isle of Man, or the Colonies, or any prize of war, or legally forfeited, and which shall wholly belong to British subjects.

VI.—*Foreign Repairs.*

ART. 7.—No ship shall continue to enjoy the privilege of a British ship after the same shall have been repaired in a foreign country, if such repairs exceed 20s. per ton of the burthen of the ship, unless such repairs shall have been necessary by reason of extraordinary damage, to enable her to return to some British port.

VII.—*Port of Registry.*

ART. 9.—Ships shall be registered at the port to which they belong, under pain of nullity.

VIII.—*Where a Ship shall be deemed to belong.*

ART. 11.—Every ship shall be deemed to belong to some port, at or near to which some or one of the owners who shall subscribe the declaration required, shall reside. Change of subscribing owners require registry *de novo*. If the new registry cannot be made, may go one voyage, with permission endorsed on the certificate of registry. Built in foreign possessions for owners resident in the United Kingdom, may trade for two years on a certificate from the collector, &c. or until arrival in the United Kingdom.

IX.—*Qualifications.*

ART. 12.—Persons residing in foreign countries cannot be owners, unless they be members of some British factory. None who have taken an oath of allegiance to any foreign state, unless he shall afterwards become a denizen or naturalized British subject.

X.—*Declaration.*

ART. 13.—Declaration to be made by subscribing owners, previous to registry. (This article contains a long form of declaration.)

XI.—*Addition in certain cases to the Declaration.*

ART. 14.—An addition to the declaration may be made after, in case the required number of owners do not attend, provided the absentees are not resident within twenty miles from the port of registry.

XII.—*Survey.*

ART. 15.—Vessels must be surveyed previous to registry. Certificate of survey in which the owner or master shall concur.

XIII.—*Rule to ascertain the Tonnage of a Ship.*

ART. 16.—The rule to ascertain the tonnage of a ship shall be as follows:—The length taken on a straight line along the rabbet of the keel, from the back of the main stern post to a perpendicular line from the fore part of the main stern under the bowsprit, from which subtracting three-fifths of the breadth, the remainder shall be esteemed the just length of the keel to find the tonnage; and the breadth shall be taken from the outside of the outside plank, in the broadest part of the ship, whether that shall be above or below the main wales, exclusive of all manner of doubling planks that may be wrought upon the sides of the ship; then, multiplying the length of the keel by the breadth so taken, and the product of half the breadth, and dividing the whole by ninety-four, the quotient shall be deemed the true contents of the tonnage.

XIV.—*Mode of measuring a Vessel afloat.*

ART. 17.—In cases where it may be necessary to ascertain the tonnage of a ship afloat: Drop a plumb line over the stern of the ship, and measure the distance between such line and the after part of the stern post at the load watermark; then measure from the top of the plumb line, in a parallel direction with the water, to a perpendicular point immediately over the load watermark at the fore part of the main stern, subtracting from such measurement the above distance. The remainder will be the ship's extreme, from which is to be deducted three inches for every foot of the load draught of water for the rake abaft, also three-fifths of the ship's breadth for the rake forward. The remainder shall be esteemed the just length of the keel to find the tonnage, and the breadth shall be taken from outside to outside of the plank in the broadest part of the ship, whether that shall be above or below the main wales, exclusive of all manner of sheating or doubling that may be wrought on the side of the ship; then multiplying the length of the keel for tonnage by the breadth so taken, and that product by half the breadth, and dividing by ninety-four, the quotient shall be deemed the true contents of the tonnage.

XV.—*Engine Room.*

ART. 18.—The length of the engine room in steam vessels shall be deducted from the whole length of the vessel, and the remainder be deemed the whole length of the vessel.

XVI.—*The Tonnage once ascertained.*

ART. 19.—Tonnage, when so ascertained, to be ever after deemed the tonnage. (A new mode of measuring ships built since the 1st of October, 1835, was enacted by statute 5 & 6 William IV. ch. 62, which will be found at the end of this chapter.)

XVII.—*Security to be given.*

ART. 20.—To obtain a certificate of registry, a sufficient security by bond must be given to the sovereign, the condition of which will be that the certificate shall be solely made use of for the service of the vessel, or given up to be cancelled in certain cases, and that such certificate shall not be sold, lent, or otherwise disposed of to any person whatever.

XVIII.—*New Master must give a New Bond.*

ART. 21 and 22.—When the master is changed, the new master must give a similar bond, and his name be endorsed on the certificate of registry. By the article 22 it is enacted that these bonds are liable to the same duties of stamps as bonds for customs. (No stamp in Canada.)

XIX.—*Certificates of Registry.*

ART. 23.—Certificates of registry to be given up by all persons as directed by the bond, under the penalties therein provided.

XX.—*Name of the Vessel not to be changed.*

ART. 24.—The name of the vessel which has been registered never afterwards to be changed, and before such ship shall begin to take any cargo, the owner shall cause to be painted in white or yellow letters, of a length of not less than four inches, upon a black ground, on the stern, the name of the ship and the port to which it belongs, and preserve the same, under the forfeiture of £100.

XXI.—*Builder's Certificate.*

ART. 25.—The builders will give a certificate of the particulars of the ship, and the person applying for the same will give his declaration that the ship is the same as described by the builder.

XXII.—*Loss of the Certificate.*

ART. 26.—When the certificate is lost or mislaid, a new one may be obtained, by the owner finding security to deliver up the other when found, and that no illegal use has been or shall be made thereof with his privity or knowledge.

XXIII.—*Unlawful detention of the Certificate.*

ART. 27.—Persons unlawfully detaining a certificate of registry from the person

XXXVIII.—*Sales, &c. must be recorded* de novo.

ART. 41.—Sales of vessels or shares in the absence of owners, without formal powers, on proof of fair dealing before the commissioners of the customs, may be recorded or recorded *de novo*, as also where bills of sale cannot be produced, security being given to produce legal powers, or abide future claims.

XXXIX.—Mortgage.

ART. 42.—If a transfer is made only to secure the payment of a debt, either by bill of sale or mortgage, registry and endorsement shall be granted, and will state that the instrument was made as a security and mortgage; and the persons to whom the transfer is made shall not be deemed to be the owner, and the transferor do not cease to be the owner, except as far as to render the ship available for, and secure the payment of, the debt.

XL.—*Bankruptcy.*

ART. 43.—The bankruptcy of the transferrer and mortgager shall not affect the rights of the transferree or mortgagee.

SECTION III.—GENERAL RULES.

I.—*Master or Captain.*

Master, in commercial navigation, is the person intrusted with the care and navigation of a ship.

The situation of master of a ship is so very important, that in some countries no one can be appointed to it who has not been submitted to an examination by competent persons, to ascertain his fitness for properly discharging its duties.(1)

But in England the owners are left to their own discretion as to the skill and honesty of the master.

II.—*Must be a British Subject.*

No one is qualified to be the master of a British ship unless he be a natural born British subject,(2) naturalized by act of parliament, or a denizen by letters of denization, or have become an English subject by conquest, cession, &c., and have taken the oath of allegiance, or a foreign seaman who has served three years in time of war, on board of British ships.

The master is the confidential servant or agent of the owners, and, in conformity to the rules and maxims of the law of England, the owners are bound to the performance of every lawful contract made by him, relative to the usual employment of the ship.(3)

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(1) See the French Ordinance of Lewis XIV. 1681, tit. ii. art. 1.
(2) Richard II., Henry VII., and Henry VIII., 12 Car. 2, c. 1.
(3) Abbot, late Lord Tenderden, on the law of shipping, part 4, c. 2, stat. 6 Geo. IV. s. 109 12, 16.

III.—*Named by the majority of the Owners.*

He is named by the majority of the owners.(1) In a home port the master cannot enter into a charter party, but in a foreign port he may.(2)

IV.—*Duties of the Master.*

The master is bouud to employ his whole time and attention in the service of his employers.(3)

During war and sailing under convoy, he must obey the signals, instructions, and lawful commands of the commander; he cannot desert it without leave; for, besides his responsibility to his owners or freighters, he may be prosecuted by the Court of Admiralty and be fined £500, and imprisoned for one year.(4)

Unless prevented by stress of weather, necessary repairs, in avoiding enemies or pirates, in succouring ships in distress, or other imperious causes, as soon as the voyage has been commenced the master must proceed incessantly to the place of destination.(5)

By the common law, the master has authority over all the mariners on board the ship,—it being their duty to obey his commands in all lawful matters relating to the navigation of the ship and the preservation of good order. But the master should in all cases use his authority with moderation, so as to be the father, not the tyrant, of his crew. He is liable to damages, unless he show cause for chastising the mariner, and the chastisement must be reasonable; and should he strike him without cause or with a deadly weapon, and that death should ensue, it will lie with the jurors to pronounce him guilty of manslaughter or murder.(6)

The master is liable for damage done by him, or by the crew under his command, even while a pilot has charge of the ship.(7)

V.—*Pilots.*

The name of pilot or steersman is applied either to a particular officer serving on board of a ship during the course of a voyage, and having the charge of the helm and the ship's route, or to a person taken on board at any particular place for the purpose of conducting a ship through a river, road, or channel, or from or into a port.

It is to the latter description of persons that the term pilot is now usually applied.

VI.—*Duties of the Pilots.*

The principles of the law with regard to pilots, seems to be, that where the master is bound by law to place his ship in charge of a pilot, and does so accordingly, the ship is not to be considered as under the management of the owners or their servants; and they are to be liable for any damage occasioned by the mis-

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(1) Bell, 2, 506.
(2) Bell, 31, 506.
(3) Abbott, part ii. c. 4.
(4) 43 Geo. III. c. 160.
(5) Marshall on Insurance, book i. c. 6, § 3.
(6) Abbott on Shipping, part ii. c. 4.
(7) Taunston's Common Pleas, Report 108, 1, 568.

management of the ship, unless it be proved that it arose from the negligence or misconduct of the master or men; but when it is in the election or discretion of the master to take a pilot or not, and he thinks fit to take one, the pilot so taken is to be considered as the servant of the owners, who are to be responsible for his conduct.(1)

The statute of 6 Geo. IV. c. 125, has consolidated the laws with respect to the licensing, employment, &c. of pilots. It is of too great a length to be inserted in this sketch, but all its provisions are of importance.

VII.—*Rules for Pilots in Canada.*

In Canada pilots are to be appointed by the governor, after having undergone an examination before the master and wardens of the Trinity House at Quebec or Montreal, having served a regular apprenticeship for five years, and made two or more voyages to Europe or the West Indies; they must speak the English language sufficiently for the working of any ship.

They are authorised to demand the following rates of pilotage, viz.:—

From above the island of Bic up to the harbour of Quebec, 16s. currency per foot of water the vessel draws.

From the harbour of Quebec to the island of Bic, or where the pilot shall be discharged below Quebec, 14s.

From Quebec to Three Rivers, and from Three Rivers to Quebec, if the vessel shall not exceed 200 tons register, £7 10; if above 200 tons, £12 10.

From the harbour of Quebec to the harbour of Montreal, or any place beyond Three Rivers, and from thence down to the basin and harbour of Quebec, double these rates, including fourteen days for the pilot to remain on board after the arrival of the ship at her destination, if required; and more than fourteen days, a further allowance of 5s. per day, and found in provisions.

If a pilot is carried off to sea through stress of weather, the master shall provide him with a passage back to the port of Quebec, and will pay him £4 10 per month, by his performing whilst on board the duties whereof he may be capable.(1)

They are bound to bring the vessels coming from sea near the barracks at Grosse Isle, quarantine ground; to communicate to the masters of vessels copies of the sanitary statutes, which are to be furnished by the Trinity House of Quebec, and see that no violation is committed.(3)

VIII.—*Mate.*

Mate, in a merchant ship, is the deputy of the master, taking in his absence the command. There are sometimes only 1, and sometimes 2, 3, or 4 mates in a merchantman, according to her size; denominated 1st, 2d, 3d, &c. mates. The law, however, recognises only 2 descriptions of persons in a merchantman—the master and mariners; the mates being included in the latter, and the captain being responsible for their proceedings.

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(1) Abbott on the Law of Shipping, part ii. c. 5.
(2) 51 Geo. III. c. 12; 52 Geo. III. c. 12; 2 Geo. IV. c. 7.
(3) 2 Will. IV. c. 16. For further rates of pilotage on the St. Lawrence, see 51st Geo. III. ch. 12, sec. 10.

IX.—*Seamen.*

Seamen are the individuals engaged in navigating ships, barges, &c. upon the high seas. Those employed for this purpose upon rivers, lakes, or canals, are denominated watermen.

A British seaman must be a natural born subject of his Majesty: or be naturalised by act of parliament; or made a denizen by letters of denization; or have become a British subject by the conquest or cession of some newly acquired territory; or (being a foreigner) have served on board his Majesty's ships of war, in time of war, for the space of three years.(1) But his Majesty may, by proclamation during war, daclare that foreigners who have served *two* years in the royal navy, during such war, shall be deemed British seamen.(2)

Various regulations have been enacted with respect to the hiring of seamen, their conduct while on board, and the payment of their wages. These regulations differ in different countries; but, in all, they have been intended to obviate any disputes that might otherwise arise between the master and seamen as to the terms of the contract between them, to secure due obedience to the master's orders, and to interest the seamen in the completion of the voyage, by making their earnings depend on its successful termination.

1. *Hiring of Seamen.*—To prevent the mischiefs that frequently arose from the want of proper proof of the precise terms upon which seamen engaged to perform their service in merchant ships, it is enacted by statute (2 Geo. c. 36), "that it shall not be lawful for any master or commander of any ship or vessel bound to parts beyond the seas, to carry any seaman or mariner, except his apprentice or apprentices, to sea from any port or place where he or they were entered or shipped, to proceed on any voyage to parts beyond the seas, without first coming to an agreement or contract with such seamen or mariners for their wages; which agreement or agreements shall be made in writing, declaring what wages each seaman or mariner is to have respectively, during the whole voyage, or for as long time as he or they shall ship themselves for; and also to express in the said agreement or contract the voyage for which such seaman or mariner was shipped to perform the same;" under a penalty of £5 for each mariner carried to sea without such agreement, to be forfeited by the master to the use of Greenwich Hospital. This agreement is to be signed by each mariner within three days after he shall have entered himself on board the ship; and is, when signed, conclusive and binding upon all parties. By a subsequent statute, these provisions have been extended to vessels of the burden of 100 tons and upwards, employed in the coasting trade.(3)

The statutes do not render a verbal agreement for wages absolutely void; but impose a penalty on the master if a written agreement be not made. When a written agreement is made, it becomes the only evidence of the contract between the parties; and a seaman cannot recover any thing agreed to be given in reward for his services, which is not specified in the articles.

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(1) 3 & 4 Will. IV. c. 54, § 16.
(2) § 17.
(3) 31 Geo. III. c. 39.

A seaman who has engaged to serve on board a ship, is bound to exert himself to the utmost in the service of the ship; and, therefore, a promise made by the master of *a ship in distress*, to pay an extra sum to a seaman, as an inducement to extraordinary exertion on his part, is held to be essentially void.

2.—*Conduct of Seamen.*—It is essential to the business of navigation that the most prompt and ready obedience should be paid to the lawful commands of the master. To this effect it is covenanted in the articles of agreement, that "each and every lawful command which the said master shall think necessary to issue for the effectual government of the said vessel, suppressing immorality and vice of all kinds, be strictly complied with, under the penalty of the person or persons disobeying forfeiting his or their whole wages or hire, together with every thing belonging to him or them on board the said vessel."

In case of disobedience or disorderly conduct on the part of the seamen, the master may correct them in a reasonable manner. Such an authority is absolutely necessary to the safety of the ship and of those on board; but it behoves the master to act in such cases with great deliberation, and not to pervert the powers with which he is intrusted for the good of the whole to cruel or vindictive purposes. Masters abusing their authority must answer at law for the consequences. In the case of actual or open mutiny by the crew, or any part of them, the resistance of the master becomes an act of self-defence, and is to be considered in all its consequences in that point of view. The ordinances of Oléron and Wisby declare that a mariner who strikes the master shall either pay a fine or lose his right hand; a singular as well as cruel alternative, unknown in modern jurisprudence.

But although the master may by force restrain the commission of great crimes, he has no judicial authority over the criminal, but is bound to secure his person and bring him before a proper tribunal. And all justices of the peace are empowered to receive information touching any murder, piracy, felony, or robbery upon the sea, and to commit the offenders for trial.(1)

The *desertion* or absence without leave of seamen from a ship, while on a voyage to foreign parts, being attended with many bad consequences, has been provided against in all maritime laws. It was enacted in Great Britain, by the 11 and 12 Will. III. c. 7, "that all such seamen, officers, or sailors, who shall desert the ships or vessels wherein they are hired to serve for that voyage, shall for such offence forfeit all such wages as shall be then due to him or them." By subsequent statutes,(2) it is enacted, that if, after having entered into the agreement previously referred to, a mariner deserts or refuses to proceed on the voyage, he forfeits to the owners all the wages then due to him, and a justice of the peace may, on complaint of the master, owner, or person having charge of the ship, issue a warrant to apprehend him; and in case of his refusal to proceed on the voyage, or of his not assigning a sufficient reason for such refusal, may commit him to hard labour in the house of correction for not more than thirty nor less than fourteen days. A mariner absenting himself from the ship without leave of the master or other chief officer having charge of the ship, forfeits two days' pay for every such day's absence, to the use of Greenwich Hospital. And in the case of foreign

(1) 43 Geo. III. c. 160.
(2) 2 Geo. II. c. 36, and 31 Geo. III. c. 39.

voyages, if, upon the ship's arrival at her port of delivery in England, he leaves her without a *written discharge* from the master or other person having charge of the ship, or if in the coasting trade he quits the ship before the *voyage is completed and* THE CARGO DELIVERED, or before the expiration of the term for which he engaged, or before he has obtained a discharge in writing, he forfeits one month's pay to the said hospital. But these provisions do not debar seamen from entering on board any of his Majesty's ships.

X.—*Freighting, Bills of Lading, and Risks of Voyage.*

The freighting of a vessel is the hiring of her, in whole or in part for the carriage of goods or other purposes. It is commonly fixed by the bill of lading.

Bills of lading are documents which specify the goods received on board, the freight or charges for carriage, the destination of the goods, the conditions as to the risk, &c.

The written contract by which a merchant freights a ship, is called a charter party. When a vessel is hired altogether, by a regular contract of charter party, it is called a chartered ship; and when the ship undertakes to carry goods generally from one port to another, it is called a general ship, or a ship on general freight.

It is implied in the freighting of a ship that she shall be tight, staunch, and strong, properly manned, and provided with all necessary stores, and in all respects fit for the intended voyage.(1)

In the case of a general ship advertised to carry goods from one port to another, merchants or freighters first bargained for the carriage of their goods, will be preferred to such as make no such bargain, though the goods of the latter be first sent.(2) The freight is not due till every thing be landed at the last port agreed upon.(3) The risk of the goods is with the ship owners, from the time they begin to take delivery till they land them.(4)

From the risk incurred by the owners, however, are excepted the act of God, or the king's enemies, fire, and all and every danger and accident of seas, rivers, and navigation thereof, of whatever nature and kind soever, which it may be impossible to avert,(5) so that on proving the loss to have been occasioned by any such cause, they will be free.(6)

And they will incur no liability for loss, arising without their fault or privity, beyond the value of the ship and freight.(7)

Nor will there be liability for gold, silver, diamonds, watches, jewels, or precious stones, unless the owner or shipper thereof shall, at the time of shipping the same, insert their nature, quality, and value in the bill of lading, or otherwise declare the same in writing to the master owner, or owners.(8)

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(1) East 3, 402.
(2) Thompson's Reports, 15th June, 1809.
(3) Taylor's Reports, July, 1802.
(4) Abbott on Shipping, 224; Term Report of Cases of King's Bench, 260.
(5) Bell, 1, 543; Abbott, 1, 354.
(6) Jones' Reports, 12th February, 1830.
(7) Statute 53 Geo. III. 159, 1.
(8) Statute 26 Geo. III., 86, 3.

It will be enough to render the owners responsible for brittle commodities to mark their character on the exterior of the packages.(1)

XI.—*Collision of Ships.*

When a collision takes place between two ships, which is purely accidental, without the fault on either side, the rule is, that the loss falls where it lights; that is to say, the proprietors of the ship or cargo injured must bear their own loss.(2)

Where one ship is in fault, such as where, having the wind, she does not get out of the way of a vessel closehauled, her owners will be responsible for the consequences, if the two strike.(3)

When a collision takes place, for which both ships are to blame, the rule is, to apportion the loss between them; so that if one be lost, the other must make up half the loss to the owners.(4)

XII.—*Risks in Landing.*

The responsibility of ship owners continues in the general case till delivery, according to the bill of lading; but it will cease upon the goods being given over board to the consignee, who may so demand them before their actual arrival at the port of destination;(5) or if it be the practice at such port for the consignee to superintend the delivery, such practice will relieve the ship owners of the risk.(6)

XIII.—*Selling Goods at Sea.*

The consignee of goods may, by endorsing the bill of lading, transfer the property of them while at sea, and such transference, if for value, will cut off all stoppage in *transitu* by the consignor.(7)

XIV.—*Competition.*

If a competition takes place for the goods when they arrive, legal processes may be brought against claimants and competitors, and the goods may be put into a warehouse in the mean time.

XV.—*Payment of Freight.*

Each cargo of goods may be retained for the freight, and after part of the cargo has been delivered, the remainder may be retained for the freight of the whole.

The goods may be put into a wharf or warehouse till the freight is paid.(8)

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(1) Sprot's Reports, 15th February, 1803.

(2) Abbott on Shipping, 354. The regulations of the French Code de Commerce, Art. 407, harmonises in this respect with the law of England. According, however to the laws of Oléron and Whisby, and the French Ordinance of 1681, the damage occasioned by an accidental collision, is to be defrayed equally by both parties.

(3) Robertson's Admiralty Reports, 5, 345.

(4) Erskine's Institutes. Decision of the House of Lords, 1824.

(5) Term Reports, 4, 260.

(6) Abbott on Shipping, 218, part iii. ch. 7; Chitty's Commercial Law, vol. iii. ch. 9; Molloy de Jure Maritimo, book ii. ch. 4.

(7) Abbott on Shipping, 373; Boyle, 2d February, 1787; House of Lords Reports.

(8) Abbott on Shipping, 247.

Or if the goods be intended for bonding in the king's warehouses, they may be lodged there in the ship master's name till the freight be paid.(9)

XVI.—*Passage Money.*

The luggage of passengers may be detained in security of their passage money, but not their persons.(2)

XVII.—*Wharfage.*

Wharfage means the dues payable by ship owners for the benefit due by the ship from the wharf.(3)

These dues form no charge against the consignees or owners of goods on board, so that the goods cannot be detained for wharfage.(4)

XVIII.—*Bottomry.*

When money is wanted to purchase provisions and other necessaries for a vessel during her voyage, it may be obtained on a bond of bottomry, which is a bond charging the vessel with the payment thereof on finishing her voyage, but declaring that if she be lost on her way the obligation for payment shall cease and the lender lose his money.(5)

The repayment of the money, however, depending in this way on an uncertain event, the lender may, in addition to his principal, stipulate for a premium above the legal rate of interest, without infringing the usury laws.(6)

Bottomry creditors have a preference over the other creditors, and the last lender on bottomry is preferred first.

XIX.—*Demurrage.*

Demurrage is a claim due to a ship owner, whose ship is detained by the fault of shippers or consignees, either by the former not timeously furnishing the cargo, or by the latter not timeously discharging it.(7)

XX.—*Delay.*

Delays during the loading or unloading are chargeable against the freighters, though obstacles from weather or otherwise may have caused delay. After that the claim to demurrage ceases, though other obstacles may still detain the vessel.(8)

If a number of lay days, that is days of demurrage, have been agreed upon at so much a day, and more days have been taken, the same rate will be continued, unless the ship master can show that more damage has been sustained, or the freighters that less has been sustained, by the delay, than it will compensate.(9)

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(1) Abbott on Shipping, 247.
(2) Campbell's Nisi prius Reports, 3, 360.
(3) Bell's Commentaries, Law Scot. 101.
(4) Campbell's Nisi prius Reports, 3, 360. Law of Shipping, part ii. ch. 3. Tenderden.
(5) Erskine's Institutes, book 3, till. 3, sec. 17.
(6) Ibid. book 4, till 4, sec. 76.
(7) Laurie, 10th November, 1796. Report House of Lords.
(8) Chitty's Commercial Law, vol. iii. pp. 426, 431.
(9) Ibid. 2, 616.

XXI.—*Goods of a party packed over the goods of another party.*

When the goods of a party cannot be unshipped by reason of others packed above them, demurrage will still be due by him, but the owner of the latter goods will be bound to relieve him.

XXII.—*Average.*

Average is a term used in commerce and navigation to signify a contribution made by the individuals, when they happen to be more than one, to whom a ship, or the goods on board of it, belong, or by whom it or they are insured; in order that no particular individual or individuals amongst them, who may have been forced to make a sacrifice for the preservation of the ship or cargo, or both, should lose more than others. "Thus," says Mr. Serjeant Marshall, "where the goods of a particular merchant are thrown overboard in a storm to save the ship from sinking; or where the masts, cables, anchors, or other furniture of the ship, are cut away or destroyed for the preservation of the whole; or money or goods are given as a composition to pirates to save the rest; or an expense is incurred in reclaiming the ship, or defending a suit in a foreign court of admiralty, and obtaining her discharge from an unjust capture or detention; in these and the like cases, where any sacrifice is deliberately and voluntarily made, or any expense fairly and *bonâ fide* incurred, to prevent a total loss, such sacrifice or expense is the proper subject of a general contribution, and ought to be rateably borne by the owners of the ship, freight, and cargo, so that the loss may fall equally on all, according to the equitable maxim of the civil law—no one ought to be enriched by another's loss: *Nemo debet locupletari alienâ jacturâ.*"

Upon this fair principle is founded the doctrine of average contributions; regulations with respect to which having been embodied in the Rhodian law, were thence adopted into the Roman law; and form a prominent part of all modern systems of maritime jurisprudence. The rule of the Rhodian law is, that "if, for the sake of lightening a ship in danger at sea, goods be thrown overboard, the loss incurred for the sake of all, shall be made good by a general contribution."(1)

Average is either *general* or *particular;* that is, it either affects all who have any interest in the ship and cargo, or only some of them. The contributions levied in the cases mentioned above, come under the first class. But when losses occur from ordinary wear or tear, or from the perils naturally incident to a voyage, without being *voluntarily* encountered, such as the accidental springing of masts, the loss of anchors, &c., or when any peculiar sacrifice is made for the sake of the *ship only*, or of the *cargo only*, these losses, or this sacrifice, must be borne by the parties not immediately interested, and are consequently defrayed by a *particular* average.

There are also some small charges called *petty* or *accustomed* averages; it is usual to charge one-third of them to the ship, and two-thirds to the cargo.

No general average takes place, except it can be shown that the danger was imminent, and that the sacrifice made *was indispensable, or supposed to be indis-*

(1) Dig. lib. 14, tit. 2, § 1; Schomberg on the Maritime Laws of Rhodes, p. 60.

pensable, by the captain and officers, for the safety of the ship and cargo. The captain, on coming on shore, should immediately make his protests; and he, with some of the crew, should make oath that the goods were thrown overboard, masts or anchors cut away, money paid, or other loss sustained, for the preservation of the ship and goods, and of the lives of those on board, and for no other purpose. The average, if not settled before, should then be adjusted, and it should be paid before the cargo is landed; for the owners of the ship have a *lien* on the goods on board, not only for the freight, but also *to answer all averages or contributions that may be due.* But though the captain should neglect his duty in this respect, the sufferer would not be without a remedy, but might bring an action either against him or the owners.

But the mode of adjusting an average will be better understood by the following example, extracted from Chief Justice Tenterden's valuable work on the Law of Shipping, part iii. cap. 8.

The reader will suppose that it became necessary, in the Downes, to cut the cable of a ship destined for Hull; that the ship afterwards struck upon the Goodwin, which compelled the master to cut away his mast, and cast overboard part of the cargo, in which operation another part was injured; and that the ship, being cleared from the sands, was forced to take refuge in Ramsgate harbour, to avoid the further effects of the storm.

AMOUNT OF LOSSES.	£	VALUE OF ARTICLES TO CONTRIBUTE.	£
Goods of A cast overboard,.....	500	Goods of A cast overboard.....	500
Damage of the goods of B by the jettison,	200	Sound value of the goods of B, deducting freight and charges,.....	1,000
Freight of the goods cast overboard,....	100	Goods of C,.....	500
Price of a new cable, anchor, and mast,.....£300	200	—— of D,.....	2,000
Deduct one-third,..... 100		—— of E,.....	5,000
Expense of bringing the ship off the sands	50	Value of the ship,.....	2,000
Pilotage and port duties going into the harbour and out, and commission to the agent who made the disbursements,..	100	Clear freight, deducting wages, victuals, &c.	800
Expenses there,.....	25		
Adjusting this average,.....	4		
Postage,.....	1		
Total of losses,.....£	1,180	Total of contributory values, £	11 800

Then, £11,800 : £1,180 : . £100 · 10.

"That is, each person will lose ten per cent. upon the value of his interest in the cargo, ship, or freight. Therefore, A loses £50, B £100, C £50, D £200, E £500. the owners £280; in all £1.180. Upon this calculation, the owners are to lose £280; but they are to receive from the contribution £380, to make good their disbursements, and £100 more for the freight of the goods thrown overboard; or £480, minus £280.

They, therefore, are actually to receive..... £200
A is to contribute £50, but has lost £500; therefore A is to receive..... 450
B is to contribute £100, but has lost £200; therefore B is to receive..... 100

On the other hand, C, D, and E have lost nothing, and are to pay as before; viz: C £50, D 200, E 500

which is exactly equal to the total to be actually received, and must be paid by and to each person in rateable proportion."

When a vessel has been saved by throwing any part of her rigging or cargo overboard to lighten her, the loss thereby sustained is called general average.(1)

(1) Bell's Commentaries, 583.

XXIII.—*Common Loss.*

Such loss becomes a common loss to all concerned, so that the owners of the property sacrificed have claim for the loss, deducting their own share against the owners of the vessel and goods saved.(1)

The necessity or prudence of the sacrifice is to be determined by the majority.(2)

XXIV.—*In Distress.*

Whatever the master of a ship does in distress for the preservation of the whole, in cutting away masts or cables, or in throwing goods overboard, to lighten his vessel, which is what is meant by jettison or jetson, is permitted to be brought into a general average, in which all who are concerned in the ship, freight, and cargo, are to bear an equal or proportional part of the loss of what was so sacrificed for the common welfare; and it must be made good by the assurers in such proportions as they have underwritten.

In order to make the act of throwing the goods overboard legal, the ship must be in distress, and the sacrificing a part must be necessary to preserve the rest.

XXV.—*Ship Riding out the Storm.*

In calculating the proportions of the loss, the goods ejected are valued at prime costs, and the goods saved at the price they may bring at the next port.(3)

Diamonds, precious stones, &c., however light, are rated according to their value.

Neither the persons of those on board nor the ship's provisions, are computed. But wearing apparel is, when put up in boxes or chests.

There can be no contribution without the ejecting of some goods and the saving of others.(4)

XXVI.—*Salvage.*

Salvage is the reward due to those who save a vessel when in danger of capture, fire, or wreck.

The master and crew are not entitled to claim salvage, nor are passengers, unless they continue their exertions after an opportunity of escape has occurred, and save the ship after the master has given her up. Pilots are in general not entitled to salvage; it is paid by those benefited.

XXVII.—*What constitutes a Legal Wreck.*

In order to constitute a legal wreck, the goods must come to land; if they continue at sea, the law distinguishes them by the following uncouth and barbarous appellations, viz: *Flotsam*, *Jetsam*, and *Lagan*.

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(1) Bell's Commentaries, 590; Erskine's Institutes, book 3, c. 3, sec. 55.
(2) Bell's Institutes, 1, 586.
(3) Bell, 584.
(4) 53 Geo. 3, c. 87; 2 Geo. 4, c. 76.

Flotsam is when the goods continue swimming on the surface of the waves.

Jetsam is when they are sunk under the surface of the water.

Lagan is when they are sunk, but tied to a cork or buoy, to be found again.(1

Foreign liquors, brought or coming into Great Britain or Ireland, as derelict flotsam, &c., are to pay the same duties and receive the same drawbacks as simi lar liquors regularly imported.

New Rule by which Tonnage of Vessels is to be ascertained.(2)

And be it further enacted, that from and after the commencement of this Act the tonnage of every ship or vessel required by law to be registered shall, previou to her being registered, be measured and ascertained while her hold is clear, an according to the following rule; that is to say, divide the length of the upper deck between the afterpart of the stem and the forepart of the stern post into six equa parts. Depths: At the foremost, the middle, and the aftermost of those points o division, measure in feet and decimal parts of a foot the depths from the under sid of the upper deck to the ceiling at the limber strake. In the case of a break i the upper deck, the decks are to be measured from a line stretched in a continua tion of the deck. Breadths: Divide each of those three depths into five equa parts, and measure the inside breadths at the following points; *videlicet*, at on fifth and at four fifths from the upper deck of the foremost and aftermost depths and at two fifths and four fifths from the upper deck of the midship depth. Le gth At half the midship depth measure the length of the vessel from the afterpart o the stem to the forepart of the stern-post; then to twice the midship depth ad the foremost and the aftermost depths for the sum of the depths; add together th upper and lower breadths at the foremost division, three times the upper breadth and the lower breadth at the midship division, and the upper and twice the lowe breadth at the after division, for the sum of the breadths; then multiply the sum of the depths by the sum of the breadths, and this product by the length, an divide the final product by three thousand five hundred, which will give the num ber of tons for register. If the vessel have a poop or half deck, or a break in th upper deck, measure the inside mean length, breadth, and height of such par thereof as may be included within the bulk-head; multiply these three measure ments together, and dividing the product by 92·4, the quotient will be the numbe of tons to be added to the result as above found. In order to ascertain the ton nage of open vessels, the depths are to be measured from the upper edge of th upper strake.

Tonnage, when ascertained, to be entered on Register.

And be it further enacted, that the tonnage or burthen of every ship belongin to the United Kingdom, ascertained in the manner hereinbefore directed, shall, i respect of any such ship which shall be registered after the commencement of thi Act (except as hereinafter excepted), be inserted in the certificate of the registr

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(1) 28 Geo. 2, c. 19.

(2) By virtue of an Act to regulate the admeasurement of the Tonnage and Burthen o Merchant Shipping of the United Kingdom, repealing part of 3 and 4 Will IV. c. 55, 9th Sep tember, 1835.

thereof, and be taken and deemed to be the tonnage or burthen thereof for all the purposes of the said recited Act.

Mode of ascertaining Tonnage of Steam Vessels.

Provided, always, and be it further enacted, that in each of the several rules hereinbefore prescribed, when applied for the purpose of ascertaining the tonnage of any ship or vessel propelled by steam, the tonnage due to the cubical contents or the engine room shall be deducted from the total tonnage of the vessel as determined by either of the rules aforesaid, and the remainder shall be deemed the true register tonnage of the said ship or vessel. The tonnage due to the cubical contents of the engine room shall be determined in the following manner; that is to say, measure the inside length of the engine room in feet and decimal parts of a foot from the foremost to the aftermost bulk-head, then multiply the said length by the depth of the ship or vessel at the midship division as aforesaid, and the product by the inside breadth at the same division at two fifths of the depth from the deck taken as aforesaid, and divide the last product by 92-4, and the quotient shall be deemed the tonnage due to the cubical contents of the engine room.

Amount of Register Tonnage to be carved on Main Beam.

And be it further enacted, that the true amount of the register tonnage of every merchant ship or vessel belonging to the United Kingdom, to be ascertained according to the rule by this Act established in respect of such ships, shall be deeply carved or cut in figures of at least three inches in length on the main beam of every such ship or vessel, prior to her being registered.

Not to alter Tonnage of Vessels already registered.

Provided always, and be it further enacted, that nothing herein contained shall extend to alter the present measure of tonnage of any ship or vessel which shall have been registered prior to the commencement of this Act, unless in cases where the owners of any such ships shall require to have their tonnage established according to the rule hereinbefore provided, or unless there shall be occasion to have any such ship admeasured again on account of any alteration which shall have been made in the form or burthen of the same, in which cases only such ships shall be re-admeasured according to the said rule, and their tonnage registered accordingly.

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