SYNOPSIS OF THE CHANGES IN THE LAW EFFECTED BY THE CIVIL CODE OF LOWER CANADA

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THE CIVIL CODE OF LOWER CANADA.

BY

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I.

The completion of the Civil Code of Lower Canada is an event which forms an epoch in our history, and is suggestive of many considerations.

In the retrospect, it brings to mind the long and arduous labor, the study, research and learning bestowed upon the work, by the eminent legists entrusted with its elaboration; it announces the successful attainment of a result, aimed at by the enlightened patriotism, and achieved by the ability and persevering energy of a statesman whose name must ever remain connected with the Code; and it presents to us our civil laws rescued from antiquity and chaos, and embodied in a form which renders them accessible and intelligible to all classes of the people whose rights and property they control.

Prospectively, the Civil Code promises uniformity of jurisprudence, which contributes to diminish litigation and add to the stability and security of our civil rights. It offers great additional means of legal education, from which may be expected a higher standard of professional excellence. It will ensure among the individual members of society, a more intimate acquaintance with their reciprocal rights and obligations, tending to increase and facilitate business relations, and to promote the material welfare of the community. Moreover, as a conservatory barrier against the continual inroads of fragmentary legislation, it is an earnest of stability in the law itself.

In view of a union of the British American provinces, the codification of our laws is perhaps better calculated than any

other available means to secure to Lower Canada an advantage which the proposed plan of confederation appears to have already contemplated, that of being the standard of assimilation and unity, and of entering into new political relations without undergoing disturbing alterations in her laws or institutions.

Such are the main features presented by the Civil Code, regarded as an embodiment of existing laws, but it has yet other advantages as a work of legislation, inasmuch as it introduces numerous and important amendments, intended for the most part to improve our law as a system, and to adopt it more perfectly to our present state of society.

It is evidently of great importance, that when the Code comes into force, these changes in the law should be known beforehand, at least to the profession, if not to the community at large. They are distinguished in the Code by their insertion between brackets. But, as the former law corresponding with them, as exhibited in the Draft, has disappeared, a previous knowledge of it is necessary in order to understand clearly the difference between the old and the new rules; and, as the observations made by the Commissioners, in reporting upon these amendments, no longer accompany the text, a like difficulty exists in ascertaining the reasons which suggested each particular amendment.

To obviate these difficulties, and to furnish a prompt and an easy method of becoming acquainted with the new legislation of the Code, the following synopsis has been written. Great care has been taken to present as succinctly and clearly as possible all the changes introduced by the Code, classifying them according to their character and motives, and referring in every case to the number of the article containing the amendment.

Of these changes generally, it may be remarked at the outset that they are not of a subversive character, or likely to disturb existing relations or to clash with prevailing notions. They are on the contrary of a nature to harmonize with the ideas of the present day, and to adapt our ancient laws to the changes which since their date society itself has undergone.

It is one of the characteristics of the olden legislation that it appears to have had in view Things before Persons. The conservative spirit of the law seems to have clung to immoveables as the safest basis of social stability, and its policy tended to restrict

rather than to encourage the conveyance of real estate. Hence the numerous distinctions of property and the different rules of law to which Persons were subject in respect of each kind of Thing. Hence too, the old rule "*Traditionibus non nudis pactis dominia rerum transferuntur*," and similar maxims. Hence also the facilities afforded for getting back alienated property by means of *retraits*, *rémérés*, and *restitutions*.

On the other hand, in modern society the frequency and multiplicity of transactions have become so great that real property now changes hands as rapidly as moveables did formerly. Agreements and promises are practically dealt with as representing the objects to which they relate. The tendency of the age is to make Things subservient to Persons, and to bring immoveables as well as all other things under complete subjection to the will of man, without any other restriction than a due regard for the rights and interests of others.

In order to adapt the old law to the new state of society the Code has introduced a number of new provisions. Some of these are intended to facilitate the free exercise of man's dominion over property. Some, by rendering contracts and other expressions of man's will definitive and reliable, are calculated to furnish elements of stability, for which formerly the nature of immoveable property was relied upon. Others tend to protect the rights of third parties; while some again are merely intended to remedy deficiencies or defects in previous laws.

II.

Taking these different categories in the order in which they have just been mentioned, the changes to be first noticed are those which relate to the FREE DISPOSAL OF PROPERTY.

These may be enumerated as follows:

Under the *Edit des secondes noces*, in force here, a widower, having children and intending to remarry, could not settle by gift, upon the wife he was about to take, any more than a very limited portion of his property. He might however, subject to a comparatively slight restriction, give away his property to a

stranger, or will it away entirely, without any restriction whatever, even to his second wife. This anomaly is removed for the future by article **764**, which abolishes the provisions of the Edict, and has the further advantage of favoring marriage.

Hitherto gifts made in favor of an ascendant, who had been tutor or curator to the donor, were null if the ascendant had remarried, or they became so if he afterwards married before the death of the donor. This double restriction, upon the disposal of property and upon second marriages, is removed by article **767**.

Gifts could not legally be made in favor of persons with whom the donor had lived in concubinage, nor in favor of the donor's incestuous or adulterine children; and illegitimate children, not incestuous or adulterine, could only receive from their parents to a very limited extent. These restrictions are in a great measure removed by article **768**, which places illegitimate children, not incestuous or adulterine, upon the same footing, as regards gifts, as other persons, and allows concubinaries to make gifts in favor of each other when they are contracting marriage; a provision which certainly appears to be more consistent with morality than the former rule.

Gifts made in favor of the spiritual, medical, or legal advisers of the donor, were liable to be reduced or set aside, upon the presumption of their having been obtained by undue influence. This presumption has no longer any foundation, and as, even in the matter of wills, where there might sometimes be cause for it, it is no longer recognized, it is properly abolished by article **769**. Under this article, undue influence, in these as in all other cases, must be proved.

According to the ancient law, children were entitled, notwithstanding any previous disposals by will or by gift, to one half of the share they would have had in the succession of their parents, had no will or gift been made. All gifts and legacies were liable to contribute to this legitim, and were therefore in so far subject to be annulled. The statute of 1801 removed this reservation with regard to legacies, and some were of opinion that its provisions extended by implication to gifts likewise. All uncertainty upon this point is removed by article **775**, which abolishes legitim.

Gifts of moveables, not immediately delivered, were not valid

under the old law unless the deed contained or was accompanied by an enumeration of the property given. Article **786** dispenses with this formality, and article **788** adds further facility for the conveyance of property by gift, by providing that the acceptance of a gift needs no longer to be in express terms, but may be inferred from the deed or from circumstances.

The intention of a testator, or of a donor, to prevent the property bequeathed or given from being alienated by the legatee or the donee, had no effect under our former law unless the deed mentioned some sufficient motive for such intention, or imposed some penalty in case of non-fulfilment. Article **972** frees prohibitions to alienate from these obstructive formalities.

Article **1267** allows minors, provided they are duly assisted, to make in their contracts of marriage all such agreements or gifts, in favor of their future consorts or children, as contracts of this nature admit of. Our former law restricted their right in this respect to certain portions of their property. Although the article has chiefly in view the favoring of contracts of marriage, its effect is also to assist the free disposal of property, and it has for convenience been included in the present category.

But the most important change introduced by the Code in connection with the free disposal of property, is the adoption of the principle that consent alone suffices, without delivery, to convey ownership. This new rule of law, in direct opposition to the old familiar maxim "*traditionibus non nudis pactis, &c.*," and especially its application in positive terms even to third parties, created at first some alarm in the minds of persons who had not brought to bear upon the subject as much study, knowledge, and reflection as the Codification Commissioners had done. Among these may be safely counted the Quebec Board of Trade, which in a laconic petition to the Legislature, "objected" to the then proposed amendment "as tending injuriously to affect the interests of third parties, by offering inducements and facilities for secret and fraudulent transfers of property." That these fears were groundless is sufficiently shown by the experience of over fifty years in France, where the courts have persistently maintained the new doctrine in its full extent, notwithstanding the doubtful wording of the Code Napoleon as regards third parties. That the rule is not a dangerous one