The Legal News.

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THE FISHERY DISPUTE.

As the amount of the Fishery Award under the arbitration provided for by the Treaty of Washington, has been paid by the United States, it is unnecessary to comment at present on the extraordinary position assumed by Mr. Secretary Evarts, in the diplomatic correspondence, in reference to the claim of United States fishermen to privileges from which the Newfoundland fishermen are debarred by local statutes intended to preserve the fisheries from decay. We may, however, reproduce a circular addressed by Mr. Marcy, another United States Secretary, in 1856, to collectors of customs. In this circular, Mr. Marcy shows how he interpreted the language of the Reciprocity Treaty, —language the same as that which is used in the Treaty of Washington, on the point on question. The Reciprocity Treaty enacted that the inhabitants of each country should have "in common" with those of the other, the liberty to fish in the waters of both nations. Thereupon Mr. Marcy wrote as follows:

DEPARTMENT OF STATE,
WASHINGTON, March 28, 1856.

To Charles H. Peaslee, Esq., Collector of Customs, Boston:

SIR,—It is understood that there are certain Acts of the British North American Colonial Legislatures, and also, perhaps, Executive regulations, intended to prevent the wanton destruction of the fish which frequent the coasts of the colonies, and injuries to the fishing thereon. It is deemed reasonable and desirable that both United States and British fishermen should pay a like respect to such laws and regulations, which are designed to preserve and increase the productiveness of the fisheries on these coasts. Such being the object of these laws and regulations, the observance of them is enjoined upon the citizens of the United States in like manner as they are observed by British subjects. By granting the mutual use of the inshore fisheries neither party has yielded its right to civic jurisdiction over a marine league along its coasts. Its laws are as obligatory upon the citizens or subjects of the other as upon its own. The laws of the British provinces not in conflict with the provisions of the reciprocity treaty would be as binding upon the citizens of the United States within that jurisdiction as upon British subjects. Should they be so framed or executed as to make any discrimination in favor of British fishermen, or to impair the rights secured to American fishermen by that treaty, those injuriously affected by them will appeal to this Government for redress. In presenting complaints of this kind, should there be cause for doing so, they are requested to furnish the Department of State with a copy of the law or regulation which is alleged injuriously to affect their rights, or to make an unfair discrimination between the fishermen of the respective countries, or with a statement of any supposed grievance in the execution of such law or regulation, in order that the matter may be arranged by the two governments. You will make this direction known to the masters of such fishing vessels as belong to your port, in such manner as you may deem most desirable.

I am, etc.,

W. L. MARCY.

The above presents a singular contrast with the view set forth by Mr. Evarts when he wrote:—"You will therefore say to Lord Salisbury that this government conceives that the fishery rights of the United States, conceded by the Treaty of Washington, are to be carried on wholly free from the restraints and regulations of the statutes of Newfoundland now set up as an authority over our fishermen, and from any other regulation of fishing now in force, or that may hereafter be enacted by that Government."

PRESCRIPTION OF BILLS AND NOTES.

Writing somewhat hastily last week on the above subject as we were about going to press, we overlooked at the moment the very important case of *Walker & Sweet*, 21 L. C. J. 29. In that case the majority of the Court of Appeal expressly overruled the case of *Fenn & Bowker*, or perhaps it would be more accurate to say, that they held that under the Code the law is not what it was said to be in *Fenn & Bowker*.

The case of *Fiset* v. *Fournier* (*ante* p. 589) is not precisely the same as *Walker & Sweet*, because in *Fiset* v. *Fournier* the five years had elapsed and prescription had been acquired, before the alleged acknowledgment of indebtedness by the debtor. In *Walker & Sweet* the acknowledgment of indebtedness was before prescription had been acquired. But is this difference of any importance? If it is, Mr. Justice Bossé's judgment might still be correct, notwithstanding *Walker & Sweet*. Our own impression of that ruling is that it establishes that a prescription acquired may be renounced by the debtor as far as he is himself concerned, the same as prescription may be interrupted. In the case of *Fuchs* v. *Légaré*, (3 Q. L. R. 11), to which a correspondent has referred, Mr. Justice Casault expressly held that prescription acquired may be renounced, but the proof of renunciation in matters over $50 must be in writing. We take it, therefore, that if the report of *Fiset* v. *Fournier* presents the facts correctly, the decision in that case was given in forgetfulness of *Walker & Sweet*.

REPORTS AND NOTES OF CASES.

SUPERIOR COURT.

Montreal, Dec. 12, 1878.

TORRANCE, J.

ROY et al. v. THIBAULT.

Alderman—Property Qualification—Residence.

Held, 1. The Court will exercise a discretion in granting the conclusions of a petition in the nature of a *quo warranto* information.

2. A person occupying two adjacent rooms, one as an office and the other as a residence, in the City of Montreal, is a resident householder in the terms of 37 Vict. (Que) c. 51, s. 17.

The petitioners contested the right of the defendant to sit as Alderman for St. Mary Ward, in the City of Montreal. The grounds of objection were two. First, that Mr. Thibault was not a resident householder, and secondly, that he did not possess the necessary property qualification, *i. e.*, real estate of the value of $2,000, after deduction of his just debts.

TORRANCE, J., said that the defendant lived separate from his wife and children, and occupied two rooms in a house on Notre-Dame Street, one as an office, and the other as a bedroom and eating-room. His Honor considered that under these circumstances he must be considered a resident and a householder. See Fisher's Digest, vo. Election Law, 3419. As to the property qualification, the property appeared by the books at the Registry Office to be charged with encumbrances which had been extinguished or paid off. The question was, what was the amount of the actual charges? The evidence on this point did not establish satisfactorily that the value of the property less the charges, fell below the $2,000, and moreover, the defendant's term of office had almost expired. The Court would exercise a discretion, and not disturb the defendant's possession under the circumstances. The petition, therefore, would be rejected; but seeing that the petitioners had been misled by the appearance of mortgages which had ceased to exist, each party would be ordered to pay his own costs.

E. Lareau, for petitioners.

A. Lacoste, Q. C., for defendant.

COURT OF QUEEN'S BENCH.

Montreal, Dec. 14, 1878.

Present:—Sir A. A. DORION, C. J., MONK, RAMSAY, CROSS and TESSIER, JJ.

KERR, (deft. below), Appellant; and BROWN et al., (plffs. below), Respondents.

Guarantee—Personal Liability of person signing "as President" of Company.

R. Kerr, the defendant, signed a letter of guarantee in the following form:

"Montreal, May 11, 1874.

"Messrs. Ritchie & Borlase,

"Gentlemen,—

"We, the undersigned, acting as director and secretary of the Montreal Omnibus Company, hereby agree to see the account that Brown and St. Charles have against the said Company duly settled, provided that the said account shall be made out, and agreed upon as either the court or arbitrator shall decide.

"R. KERR.

"As President of the M. O. Co."

He delivered this letter, which was not signed by the secretary, to the attorneys of Brown and St. Charles, the plaintiffs.

Held, that he was personally liable.

To avoid an attachment of the property of the Montreal Omnibus Company the appellant,

who was president of the company, gave the respondent's attorneys the letter of guarantee quoted above. Being sued personally on the undertaking, he pleaded specially that he only signed as president, that the letter was to be countersigned by the secretary, and that he did not intend to bind himself personally.

RAMSAY, J. Two questions arise: 1st.—Did Kerr act as director? 2nd—Is the undertaking binding without the signature of the secretary? The words of the letter seem to imply that the appellant was only "acting as president," but the whole tenor of the instrument shows that if appellant was acting at all it was personally. There can be no doubt that it was intended as a guarantee. Now, if the president was only signing for the company, it was no guarantee at all. The words of the instrument therefore qualify the words "acting as." See *Healey & Story*, 3 Ex. 3, 18 L. J. (Ex) 8. As to the second question, the appellant delivered the note without the secretary's signature. He thereby abandoned the secretary's signature, and made himself liable for the whole. On both points, therefore, the majority of the Court is against the appellant, and the judgment of the Court of Review, by which he was condemned, must be confirmed.

CROSS, J., dissented.

Judgment confirmed.

J. L. Morris, for Appellant.

Ritchie & Borlase, for Respondents.

HUDON et ux. (defts. below), Appellants, and MARCEAU (plff. below), Respondent.

Husband and Wife—Liability for Necessaries.

Held, that a wife separated as to property is not liable for the value of necessaries supplied to the family, where credit is given to the husband and the goods are charged to him in the books of the creditor.

The respondent sued the appellants for an account of $107 for goods sold to them. The appellants, husband and wife separated as to property, pleaded separately, that the price of the goods was to be taken in deduction of what the respondent owed Ephrem Hudon, fils & Co., and Ephrem Hudon, fils. The Court below condemned both the defendants to pay.

DORION, C. J., said the question was as to the responsibility of the wife. The rule in these cases was very simple. A woman *séparée* may buy goods and make herself liable. But if the trader sells to the husband and gives credit to him, the wife is not responsible. The question is, to whom was the credit given? To the husband, or to the wife, or to both? Here the credit was not given to the wife. The goods were charged to F. Hudon, the husband, and the account was sold by the assignee as a debt due by F. Hudon. The credit was certainly given to him alone. In the case of *Larose* v. *Michaud*, 21 L. C. Jurist, 167, the principle was established that where goods are charged to the husband in the grocer's books, and credit appears to have been given to him, the wife separated as to property is not liable, though the goods are necessaries consumed by the family. The test to be applied to these cases is, to whom was the credit given? The judgment must be reversed, and the action dismissed as to the wife.

Judgment reversed.

Duhamel, Pagnuelo & Rainville, for the Appellants.

Lareau & Lebeuf, for the Respondents.

MULLIN et al. (defts. below), Appellants; and MICHON et al. (plffs. below), Respondents.

Substitution — Investment of Proceeds of Real Estate—Family Council.

Real estate of a substitution was sold, and the purchase money was allowed to remain in the hands of M., the purchaser, until another investment should be found. Subsequently, a mode of investing the purchase money was duly authorized by a family council. *Held*, that M. could not refuse to pay over the money on the ground that the proposed investment was not in strict accordance with the terms of the deed creating the substitution.

MONK, J. Dame Henriette de Chantal some years ago made a donation of real estate to her two children. A substitution was created in favor of the children of the donees. One of the conditions of the deed was that the institutes should have the right to sell the property, provided a proper investment was made of the proceeds on the security of real estate. The institute sold a portion of the property to the appellant, Mullin, and it was agreed that the purchase money should remain in his hands, at interest, until the death of the vendors, or until either of them should find a better investment of his or her share. Some time afterwards, the

curators to the substitution, being of opinion that a more advantageous investment might be made, a family council was convoked for the purpose of authorizing the proposed investment. The investment was sanctioned by the family council, but Mullin refused to pay over the money on the ground that according to the condition in the deed of donation, the proceeds should be invested on the security of real estate. The present action was then brought, and Mullin, in his defence, set up the condition. The answer to that was that the investment had been authorized by the family council. The Court below was of opinion that Mullin's defence was unfounded, and he was condemned to pay the amount. From that judgment the present appeal had been taken to this Court. The Court here was unanimously of opinion to confirm the judgment. The family council was perfectly regular, and this mode of investment had been formally sanctioned by it. It was difficult to see what Mullin's interest was in contesting the point. The family council's decision was a good discharge to him. Now, however, that he had got two judgments deciding that he ought to pay the money, he would no doubt feel relieved from all doubt.

Judgment confirmed.

Judah, Wurtele & Branchaud for the Appellants.

Doherty & Doherty for the Respondents.

CITIZENS INSURANCE CO., (defts. below), Appellants; and ROLLAND, (plff. below), Respondent.

Insurance—Verdict—Error.

Plaintiff sued under a policy covering goods in No. 319 St. Paul Street. The jury included in their verdict value of stock belonging to plaintiff, which was stored in No. 315 adjoining.

Held, error under the action as brought, and new trial ordered.

DORION, C. J., remarked that the case was one of considerable difficulty. The action was brought on a policy of insurance, covering the stock-in-trade of the respondent in a warehouse described in the policy as No. 319 St. Paul Street. The jury found for the respondent, and included in their verdict the loss of stock belonging to respondent, which was stored in No. 315 adjoining, stating in the findings that the appellants having continued the policy in force without objecting to the respondent keeping some of his stock in No. 315, the stock which was there was covered by the policy. This was going beyond the questions put to them. His Honor referred to the decision of the Supreme Court in the case of *Wyld & Darling* v. *The Liverpool and London and Globe Insurance Company* as sustaining, to some extent, the pretension of the respondent, that the knowledge of the agent as to the location of the goods, would bind the Company. But the question was not properly raised under the pleadings, and the case must be sent back for a new trial.

RAMSAY, J. I think the judgment should be reversed. The contract is the original policy. There was no new contract after the visit of Mr. Muir, the agent; at all events, there is none proved, seeing a doorway cannot be construed into extending the insurance of goods on one side of the doorway to an insurance of goods on both sides of the doorway. We have, therefore, to go back to the original policy, and see whether there is any accidental misdescription to which, equitably, the verdict could apply. No such pretension can be sustained for a moment. Rolland was not the occupant of No. 315, when the policy was made. I think the answer of the special verdict to interrogatory 3 is not an answer to the question, that it is beyond the issues raised in the action, and that it is contrary to the evidence. I concur in the judgment ordering a new trial, for there is no doubt there was something, at all events, for the jury to pass upon. There were goods still remaining in the portion of the building insured, but the jury had nothing to do with the goods in No. 315, and no verdict passing upon that could bind the company. The Appellants get their costs in this Court; the costs in the Court below are reserved until the final decision.

New trial ordered.

Abbott, Tait, Wotherspoon & Abbott, for the Appellants.

Archambault & David, for the Respondent.

COMMUNICATIONS.

STENOGRAPHY.

To the Editor of THE LEGAL NEWS:

SIR,—It must be admitted that Mr. Doutre's letter exhibits a real disposition to remedy the

present unsatisfactory manner of carrying out the system of taking evidence by stenography, and it would be well to take hold of his proposals as a basis for reform; more especially his suggestions that a uniform system of shorthand should be used, and that no stenographer should be employed unless his notes can be read by another shorthand-writer: for, even supposing, after due consideration, that it were not found feasible to appoint a set of salaried stenographers (two English and two French), as fixed officers of the Court, still Mr. Doutre's ideas might be practically applied, and with good effect.

Why not make it necessary that every stenographer, before being allowed to be sworn to take the evidence in a case, and before being allowed to receive his fees for same, shall obtain, (and produce, if required), a certificate signed by some competent authority, to be fixed upon by the Court or the Bar, to the effect that he has undergone and satisfactorily passed a test examination?

The test might be effected in some such way as this:—Let some suitable person dictate, to the candidate, for, say, half an hour, at a reasonable rate of speed, from some book or document to be selected, and then let some shorthand-writer of the same system, who has withdrawn from the room during the dictation, be called in to read over the notes taken by the candidate while the person who has dictated keeps his eyes on the passage selected, in order to test the candidate's correctness. This would be a proper test of proficiency, for no man can be said to write any system of shorthand properly unless another who knows the system can read his notes. It would not be absolutely necessary for the reader of the notes to be himself a rapid shorthand writer. It is well known that in England there are on the Press phonographic compositors who, though not rapid writers themselves, can and do very readily set up the type direct from the shorthand notes of *verbatim* reporters.

In connection with Mr. Doutre's idea of using a uniform system, there naturally arises the question, Which is best?

Of course it is needless to say that upon this point, at any rate in America, opinions are somewhat divided. I think, however, that on the whole, the general leaning is towards Mr. Isaac Pitman's, who is certainly *the* inventor of phonography; and although several Americans profess to put forward other and better systems, these on examination, are found to be based on Isaac's, and are, for the most part, mixtures and modifications of that system as it has appeared in its various stages of improvement during the last 40 years in which its inventor has been bringing it to its present state of perfection. The best arguments in its favor are the facts that the most expert and successful reporters are to be found among the writers of it, and that Mr. Pitman himself, although now comparatively old, is able to write in a clear, legible style at the rate of 200 words a minute.

Yours respectfully,

PHONOGRAPHER.

To CORRESPONDENTS.—The communications of "C. P." and some others were received too late for insertion in the present issue.

DIVORCE.

A Roman marriage was dissolved by death of one of the spouses; and by divorce in the lifetime of the parties. Divorce existed in all ages at Rome, and was always a private act; it required the sanction of no court of law; and although the unjustifiable exercise of the right of dissolving a marriage was at different times visited with more or less punishment, yet the right was never denied.

Divortium was the dissolution of a marriage at the instance of either or both parties (D. 50, 16, 191).

Repudium was strictly the dissolution of agreement of betrothal (*sponsalio*). Sometimes *divortium* is taken as the name for dissolution of marriage, and *repudium* for the written bill of divorce (*repudio misso*) (C. 5, 17, 8).

A marriage could be dissolved by the *paterfamilias* of the wife. When the wife passed into the hands of her husband, she was thereby released from the authority of her father; but when she married without falling under the *manus*, she remained in the *potestas* of her father, and the father in the exercise of his authority could take his daughter from her husband against the wishes of both. This abuse was limited by a constitution of Antoninus Pius, who prohibited

a father from disturbing a harmonious union, unless, as Marcus Aurelius added, for very weighty reasons. The father could not of course take away his daughter from her husband if she were not emancipated.

Divorce by mutual consent (*divortium bona gratia*).—From the foundation of Rome to the time of Justinian, divorces might take place by mutual consent without any check from the law whatever. For a long time divorce was not abused by the Romans, but toward the latter part of the Republic and under the Empire divorces became very common. Seneca notices this laxity of manners; and Juvenal (6 Sat., 20th line) gives a remarkable instance of a Roman matron who is said to have gone the round of eight husbands in five years. Pompey divorced his wife Mucia for alleged adultery. Cicero speaks of Paula Valeria as being ready to serve her husband with notice of divorce on his return from his Province. Cicero himself divorced his wife Terentia after living with her thirty years. Justinian prohibited divorces by the mutual consent of the parties, except in three cases: First, when the husband was impotent; second, when either husband or wife desired to enter a monastery; third, when either of them was in captivity for a certain length of time. At a later period Justinian enacted that persons dissolving a marriage by mutual consent should forfeit all their property and be confined for life in a monastery, which was to receive a third of the forfeited property, the remaining two-thirds going to the children of their marriage. This severity, so much at variance with the Roman spirit, indicates the growing power of the clergy. Justinian's nephew and successor repealed his uncle's prohibition, and restored divorces *bona gratia*. Before the Lex Julia de Adulteriis no special form was observed,—either party could dissolve the marriage by telling the other that it was at an end. The husband generally took the keys from his wife, put her out of his house, gave her back her dowry, and so dissolved the marriage. This might be done in the wife's absence. Cicero divorced his wife Terentia by letter.

The Lex Julia de Adulteriis required a written bill of divorce (*libellus repudii*); the written record of the marriage was destroyed and the divorce publicly registered. There must be a deliberate intention to break up the marriage, and the repudiation was considered valid, although there was no excuse for it, and it was unnecessary even to acquaint the other party with the change in their condition. If the wife made a bill of divorce in the presence of the requisite witnesses, the marriage was dissolved without delivery of the bill to the husband, and even without his knowledge of it. It was proper, however, to deliver the bill of divorce to the other party. The laws of the XII Tables seem to have recognized freedom of divorce, although it is said that no one took advantage of the liberty for 500 years, until Sp. Carvilius put away his wife for barrenness by order of the Censor. The censors were the only check on divorce during the Republic. L. Antonius was expelled from the Senate on account of his unjustifiable repudiation of his wife. A wife *in manu* could not divorce her husband; but if he divorced her, she could require him to release her from the *manus*. The power of repudiation was reciprocal.

By the Julian law (*lex Julia et Papia Pappœa*) if the wife was guilty of adultery, her husband in divorcing her was allowed to retain a sixth part of her dowry (dos). If the fault was less serious, he could only retain one-eighth (Ulp.-Frag. C. 5, 12, 24).

If the husband were guilty of adultery, the wife could command immediate restitution of her dowry. If the fault was less serious, he must restore the dowry in six months. The penalties ceased if both sides were in fault.

Constantine's legislation was against capricious repudiation, and specified the causes for divorce without incurring penalties.

A woman could repudiate her husband without blame in case he was guilty of *murder*, or prepared poisons, or violated tombs.

If she divorced her husband on account of being a drunkard (*ebriosus*) or gambler (*aleator*). or associating with loose women (*mulier cularius*), she forfeited her dowry and was punishable with deportation.

A husband could divorce his wife without blame: 1. If she were an adulteress; 2. Preparer of poisons; 3. Or a procuress. If for any other cause than one of these three, he forfeited all interest in his wife's dowry; and his first wife, if he married again, could take the second wife's dowry as well.

Honorius and Theodosius ignoring the consti-

tution of Constantine imposed somewhat different restrictions.

If the wife divorced the husband for grave reasons or crime committed by the husband, she could reclaim her dowry and the gifts made to her by her husband, on the betrothal, and could marry again after five years.

For acts of immorality or moderate faults, the wife forfeited her dowry and all interest in the money brought by the husband to the marriage, and was incapable of marrying again.

If no grounds existed for the divorce, the wife forfeited her dowry and betrothal presents, might be deported, and was incapable of marrying again or receiving pardon from the Emperor.

If the husband divorced his wife for a serious crime, he retained the wife's dowry and could at once marry again.

If for immorality, but not crime, the husband gained none of her property, but could at once marry again.

If for mere dislike, the husband forfeited the property he brought into the marriage (*donatio ante nuptias*) and was incapable of remarrying. The constitution of Constantine and Honorius and Theodosius were not retained in Justinian's Code. I cite from them to complete the history of legislative restraint on divorce. These constitutions seem to have fallen into utter neglect, perhaps from their stringency or severity, and milder forms have taken their place. Under Theodosius and Valentinian a wife could divorce her husband without blame if he were guilty of any of the following offences: 1, Treason; 2, Adultery; 3, Homicide; 4, Poisoning; 5, Forgery, etc.; 6, Violating sepulchres; 7, Stealing from a church; 8, Robbery and assisting or harboring robbers; 9, Cattle stealing; 10, Attempting his wife's life by poison; the sword, etc.; 11, Introducing immoral women to his house; beating or whipping his wife. If for any other than one of these offences a wife divorced her husband, she forfeited her dowry and could not marry again for five years.

A husband could divorce his wife for any one of the above reasons, except the eleventh, and also for the following offences, committed by the wife: 1. Dining with men not her relations, without the knowledge or against the wishes of, her husband; 2. Going from home at nights against his wishes and without reasonable cause; 3. Frequenting the circus, or theatres, forbidden by her husband. Justinian added; 4. Procuring abortion; 5. Frequenting baths with men (C. 5, 17, 11, 12). Justinian repealed the former Constitution, and resettled the grounds of divorce (Novell, 117). The valid grounds of a divorce of a husband by a wife (Nov. 117–9): 1. Treason against the Empire; 2. Attempting his wife's life, and not disclosing to her any plots against it; 3. Attempting to induce his wife to commit adultery; 4. Accusing his wife of adultery and failing to prove the charge, and in this case he was liable to especially severe fines; 5. Taking a woman to live in the same house with his wife or persisting in frequenting any other house in the same town with any woman, after being warned more than once by his wife or her parents or other persons of respectability. If the wife divorced her husband for any of these reasons she could recover her dowry, and and also the husband's portion for life, with the reversion of it to her children; If she had no children it became her absolute property. For all other reasons than those above mentioned, the provisions of the constitutions of Theodosius and Valentinian applied.

The husband's grounds of divorce against his wife were: 1. Of her knowledge of any plotting against the Empire and not disclosing the same to her husband; 2. Adultery by the wife (with additional penalties); 3. Attempting her husband's life, etc.; 4. Frequenting banquets or baths with men against the husband's consent; 5. Remaining from home against her husband's wishes, unless with her own parents; 6. Going to places of public amusement against the wishes of her husband. For any of these reasons if the husband should divorce his wife, he can retain her dowry if there are no children; and for his life if there are, the dowry going on his death to them. If he divorces his wife for any other reason he is liable under the constitutions of Theodosius and Valentinian.

The earliest legal provision for the settlement of children after the divorce of their parents seems to be a constitution of Diocletian and Maximian (C. 5, 24, 1). The judge could act according to his discretion. Justinian enacted that the divorce of parents should in no way

impair the legal rights of their children, or affect their right to inherit from their father, or to require aliment from him. If the father were guilty of an offence justifying his wife in divorcing him, and she remained unmarried, the children were to be given into her custody and maintained at the cost of the father; but if the mother were guilty, the father had the right of custody. If he were poor, and unable to support them and the mother was rich, she was obliged to take and maintain them. The parties were divested of their marital rights by the death of the husband or wife. Loss of liberty by either husband or wife. After five years since the captive was last known to be alive, his wife could marry again without divorcing her captive husband. Mere loss of citizenship did not dissolve the marriage unless either desired to give up the marriage (C. 5, 17, 1). Since marriage was considered a contract resting on mutual consent, it logically followed that the tie could be broken by the consent of the parties.

Before proceeding any further with our subject, it will become necessary for me to explain to you what is meant by the Modern Civil Law of Europe. I shall have occasion hereafter to speak very often of the Roman Law and the Modern Civil Law. In the 16th and 17th centuries there arose in Holland the classical school of Jurists, which at a later period was succeeded by the systematic and synthetic teachings of the Germans. The influence of the Dutch classical school upon the study of the Roman law was most important. They followed what the Germans termed the "Legal-Ordnung," that is the order observed by the compilers of the Pandects. The Pandects were founded on the writings of Geo. Fred Puchta, Karl Adolf Von Vangerow and Dr. Karl Ludwig Arndts. By the term "Pandekten" or Modern Civil Law is understood the systematic exhibition of the actually existing Roman Law in relation to private rights. These treatises on the Pandects do not embrace the theory of the pure Roman law, but are principles derived from that law applicable to the modern state of thought and civilization. Roman law is in force in nearly all the States of Europe, but in Germany it is confined to the minor States. Those States in which the civil law is adopted are designated "Common law countries." Its sources are those four component parts collectively called the "Corpus Juris Civilis." Its utility extends so far only as the glossators have declared it to be applicable in practice.

By the modern civil law, when husband or wife gives to the other a just cause of separation, the guilty party suffers a pecuniary penalty. The guilty wife loses her *dos*, so far as she might have reclaimed it after the dissolution of the marriage; where no *dos* has been constituted, she loses one-fourth of her property, the ownership of which goes to the children, the usufruct to the father. In cases of the wife's *adultery*, the penalty is increased to a third. The guilty husband loses the "*Donatio propter nuptias*," and when none has been constituted he forfeits one-fourth of his property in favour of his children, the mother having the enjoyment of the usufruct. When there are no children, the property goes in both cases to the innocent husband or the innocent wife, as the case may be.

The laws in the several Grecian States, regarding divorce, were different, and in some of them, men were allowed to put away their wives on slight occasions. The Cretans permitted it to any man who was afraid of having too great a number of children. Among the Athenians, either husband or wife might take the first step. The wife might leave the husband or the husband might dismiss the wife. Adultery on the part of the wife was in itself a divorce; but the adultery, we may presume, must have been legally proved. The Spartans seldom divorced their wives. The Ephori fined Lysander for repudiating his wife. Ariston (Herod. VI, 63) put away his second wife that he might have a son, for his wife was barren. Anaxandrides was strongly urged by the ephori to divorce his barren wife, and on his not consenting, the matter was compounded by his taking another wife, thus he had two at once, which Herodotus observes was contrary to Spartan usage. Whether the divorce was voluntary or not, the wife could recover from her late husband all the property she had brought to him as dowry upon their marriage. The party opposed to the separation could institute an action against the dissolution of the marriage; but of the forms of the trial and its results, we have no information.

Adultery was the only cause of divorce

among the ancient Germans, and this vice was by no means prevalent among them, and second marriage on the part of the woman was not in general practice, even upon the death of the husband. Divorce is not mentioned in the laws of the Ripuarians or Salians, but the practice very generally obtained after the Barbarians had settled among the Romans. Although second marriages were discountenanced by the Church they were constantly recommended by Justinian. By 10th Canon of the Council of Arles, which was held A. D. Circ 314, and which was attended by bishops from all parts of christendom, it was directed that Christians should be exhorted not to marry again during the life-time of their wives, after having divorced them for lawful cause. Flury's Hist. Eccles., tom. iii, liv. 10, c. 14. See St. Paul's Epist. to the Romans, c. vii; St. Paul's Epist. Corinthians, c. vii.

The Ostrogoths permitted divorce if the husband were convicted at law of murder or sorcery or of violating tombs; the wife might be divorced on the ground of adultery, sorcery or acting as a procuress. As to the power of marrying again they were no doubt governed by the Roman law then in effect.

Under the Visigoths, adultery was good ground of divorce, and the wife, if convicted, was delivered by the judge to the husband to dispose of her as he should think proper. The wife might obtain a divorce if the husband authorized or permitted a stranger to offer violence to her person, or if he were guilty of the most detestable of vices. This was subsequently allowed as good cause of divorce among the Franks. (*Vid* Beaumanor, p. 293.) When the wife obtained the divorce she could marry again, but not if divorce was adversely pronounced against her. The Codes of the Bavarians and Lombards permitted the husband to put away his wife for similar causes above specified. However, the precise causes of divorce are not stated in the codes. If a man were willing to forfeiture a certain sum of money, he might put away his wife at pleasure, and take another. Among the Burgundians if a woman, legally married, attempted to put away her husband, she was ignominiously put to death by being stifled with mud. The Franks, besides the above mentioned causes of divorce, allowed in practice various others. If a husband were reduced to slavery or compelled to fly the kingdom, the wife was permitted to marry again. Gregory of Tours mentions the circumstance of a man who put away two wives, marrying a woman who took him for her third husband. Merovingian Kings exercised the most unbounded license, taking wives and divorcing them at pleasure.

Charlemagne, by a capitulary inserted in the law of the Lombards (the general laws of the empire), directed that no woman divorced should marry again during the life of her former husband, nor should a man while his former wife was alive. Yet this emperor divorced his wife Bertha, daughter of Desiderius, King of the Lombards, and married Hildegarde, by whom he had issue Louis le Dobonnaire, his successor. The Anglo-Saxons permitted divorce for adultery; it might be obtained by mutual consent, but then the parties were not allowed to marry again. The Canons forbade second marriage in any case excepting after the death of the former husband or wife. (Lib. Canon Wilk, p. 154.) According to the law of Moses, when a wife finds no favor in the eyes of her husband on account of her uncleanness, he may divorce her and send her away from his house. She may marry again in ninety days; but after she had contracted a second marriage, though she should again be divorced, her former husband which sent her away may not take her again to be his wife, after that she is defiled. About the time of the Saviour there was a great dispute between the schools of the great doctors Hillel and Shammoi, as to the meaning of this law. The former contended that a husband might not divorce his wife except for some gross misconduct, or for some serious bodily defect which was not known to him before marriage, but the latter were of opinion that simple dislike, the smallest offence, or merely the husband's will, was a sufficient ground for divorce. This latter is the opinion which the Jews generally adopted, particularly the Pharisees. Christ considered that the law of Moses allowed too great a latitude to the husband in his exercise of the power of divorce. All that could be done was to introduce such modifications, with the view of diminishing the existing practice, as the people would tolerate. The form of a Jewish bill of divorcement is given by Selden Uxor

Ebraica, lib. iii, ch. 24. *Vide* Levi's Ceremonies of the Jews, p. 146.

It is probable that the usages in the matter of divorce now existing among the Arabs are the same, or nearly so, as they were when Mohammed began his legislation. An Arab may divorce his wife on the slightest occasion. So easy and so common is the practice that Bruckhardt assures us that he has seen Arabs not more than forty-five years of age who were known to have had fifty wives, yet they rarely have more than one at a time.

By the Mohammedan law a man may divorce his wife orally and without any ceremony; he pays her a portion, generally one-third of her dowry. He may divorce her twice and take her again without her consent, but if he put her away on a triple divorce conveyed in the same sentence, he cannot receive her again until she has been married and divorced by another husband, who must have consummated his marriage with her. By the Jewish law it appears that a wife could not divorce her husband; but under the Mohammedan Code, for cruelty and some other causes, she may divorce him; and this is an instance where Mohammed appears to have been more considerate toward women than Moses. Among the Hindoos, and also among the Chinese, a husband may divorce his wife upon the slightest ground, or even without assigning any reason. She is under the absolute control of her husband — a perfect machinery of obedience. The law of France, before the revolution following the judgment of the Catholic church, held marriage to be indissoluble, but during the early revolutionary period divorce was permitted at the pleasure of the parties when incompatibility of temper was alleged. The Code Napoleon restricted this liberty, but still allowed either party to demand a divorce on the ground of adultery committed by the other, for outrageous conduct or ill usage, on account of condemnation to an infamous punishment, or to effect it by mutual consent expressed under certain conditions. By the same Code a woman could not contract a new marriage until the expiration of two months from the dissolution of the preceding. On the restoration of the Bourbons a law was promulgated, 8th May, 1816, declaring divorce to be abolished; that all suits then pending for divorce, for definite cause, should be for separation only, and that all steps then taken for divorce by mutual consent should be void; and such is now the law of France.

Divorce in Holland may be obtained for adultery and for malicious desertion. If other causes can, by an extended interpretation, be brought within the reason of the first two causes, they are held sufficient. Thus the commission of an unnatural crime, or perpetual imprisonment, are good grounds of divorce. Besides the divorce, which entirely dissolves the marriage, there is also a provisional separation introduced from the canon law, termed a separation of bed and board, cohabitation and goods. There must be lawful reason set forth in the application tending to show that the continuing to live together is dangerous, or at least insupportable. In this proceeding the intervention of the authority of the judge is requisite, who, after a summary inquiry, may confirm the agreement in this respect. President Von Bynkershoek observes: "It were to be wished that, from the too easy compliance of the magistrates, separations were not so frequent as they at present are." If such a separation includes a division of the goods, the community of goods induced by law on the marriage is suspended, and the marital power of the husband thereby ceases. Should the parties come together again, the former rights and consequences of marriage revive. When the marriage has been dissolved on account of adultery or malicious desertion, the innocent party may marry. And it is also permitted to the guilty party to marry again, while the other remains unmarried, except to the person with whom the adultery is committed.

This seemed to have a very salutary influence since divorces there were very rare, but the tide of contiguity seems to have brought with it many elements of demoralization and more dissatisfaction in relation to the marriage ties.

In Spain the same causes affect the validity of a marriage as in England, and the contract is indissoluble by the civil courts, matrimonial causes being exclusively of ecclesiastical cognizance. (Instit. Laws of Spain.) At the reformation the Protestants rejected the Papal tenet, that marriage was a sacrament and indissoluble. In some Protestant countries, however, the ecclesiastical courts clung to the

old Canon law of Europe, and down to a recent period the laws of England did not allow a marriage once validly contracted to be rescinded by divorce. Where there was no canonical disability nothing short of an act of Parliament could authorize divorce *a vinculo matrimonii;* but private acts were occasionally obtained by persons of rank and condition who could afford the expense, to dissolve marriages for adultery on the part of the wife, and for adultery accompanied by aggravated circumstances on the part of the husband. So deeply rooted was this principle in the law of England, that in Lolly's case where the parties were married in England and divorced in Scotland, and the husband subsequently married in England, he was tried and convicted there for bigamy, the conviction being affirmed by the unanimous opinion of the common-law judges.

From such a state of the law, it practically resulted that divorce, on what were deemed sufficient grounds, though always obtainable by the rich, were denied for the most part to the poor. This great injustice has been remedied by the establishment of the court for divorce and matrimonial causes, which went into operation in 1858. *Vide* Act 20 & 21 Vict., c. 85, § 27; *Vide Shaw* v. *Gould*, L. R., 3 H. L. 55. As to the effect of a decree of divorce by a foreign tribunal in the case of an English marriage between English subjects, there are now two ways of relief, viz.: by divorce or dissolution of marriage, which corresponds to the old divorce *a vinculo matrimonii*, and by a judicial separation or divorce *a mensâ et thoro*. The former is a complete severance of the marriage tie and can be obtained on the ground of the wife's adultery. It can be obtained by the wife on the grounds that since the marriage her husband has been guilty of incestuous adultery (that is if committed by the husband with a woman whom if the wife were dead he could not marry, by reason of her being within the prohibited degrees of consanguinity or affinity, 20 & 21 Vict., c. 85, § 27), or of bigamy with adultery, or of rape, or an unnatural crime, or adultery accompanied with such cruelty as would have formerly entitled her to a divorce *a mensâ et thoro*, or of adultery coupled with desertion, without reasonable excuse, for two years or upwards. A judicial separation which has all the effects attendant on a divorce *a mensâ et thoro* under the former law may be obtained by either party on the ground of adultery or cruelty or desertion without cause, for two years or upwards. If the petitioner has been accessory to or connived at the adultery, or has condoned the offence, or if there has been collusion between the parties, no decree of divorce can be granted. It is entirely in the discretion of the court whether it will pronounce a decree or not if the petitioner during the marriage has been guilty of adultery or unreasonable delay in presenting the petition, or cruelty to the other party to the marriage, or having deserted or wilfully separated himself or herself from the other party before the adultery complained of, and without reasonable excuse, or of such wilful neglect or misconduct as has conduced to the adultery.

After the decree of divorce has become final, the parties are at liberty to marry again, as if the previous marriage had been dissolved by death. After a decree of judicial separation the wife is considered as a *femme sole* in regard to property she may subsequently acquire, or which may come to or devolve upon her, and she may sue or be sued as if she were unmarried; and on the other hand her husband is not liable for her debts, except for necessaries supplied to her when she fails to pay the alimony decreed to her by the court.

[To be concluded in next issue.]

CURRENT EVENTS.

ENGLAND.

Dullness of Business.—The stream of reports would not indicate a great falling off in the amount of business before the English Courts; but it is nevertheless true that the profession in England are complaining of the dullness in business at the present time. According to the London *Law Journal*, firms of solicitors of the highest position have no work in their common-law department; and this falling off is specially noticeable as regards commercial matters. The utter stagnation of trade explains the absence of litigation on charter-parties, bills of lading, marine insurance, and other mercantile contracts; while re-

covery of debts by action is continually frustrated by liquidations. For many years there has been no such dullness in the offices of solicitors and the chambers of counsel. In conveyancing of the ordinary type there is almost equal depression. At present the general prospect is dismal, and there are no visible signs of a change for the better.

ANNUAL CONFERENCE.—The next annual conference of the Association for the Reform and Codification of the Law of Nations is announced to be held in the city of London. The Lord Chief Baron will preside. The Lord Mayor has undertaken to extend the hospitalities of the Mansion house to distinguished foreign jurists and other visitors, and the corporation will be asked to allow the meetings to be held in the Guildhall.

SALE AND MORTGAGE OF REAL ESTATE IN ENGLAND.—A correspondent of the N. Y. *Evening Post*, writing from England under date of the 23d ult., gives the results of investigations made by him into English methods of transferring and witnessing titles to real estate. In America, when a sale of real property has been negotiated, the ceremonies attending the transfer are considered of little moment, but in England the agreement for sale is only the first stage of a tedious proceeding. The contract of sale of lands there requires a showing of title, and if the estate is large and valuable, the buyer will demand the production of the title deeds for sixty years back, though in sales of small lots, proof of title for twenty years will usually be accepted. But if the vendor has carelessly agreed to sell a tract of land without having a detailed specification in the contract of sale of the exact deeds he can produce, the purchaser may require a showing of the whole title for sixty years. In a country where there is no record of deeds, the expense of obtaining such a showing will often amount to more than the price of the land. In such a case, the vendor has but one mode of escape, namely, the payment of a large fee to the purchaser's solicitor, ostensibly for looking up the title, but really as a bribe to induce him to pass the title as satisfactory. During the examination of the title deeds, the solicitors for both parties are present, and the papers are not permitted to pass out of sight for a moment. The lack of a system of records in a large part of the country renders the forging of deeds easy and holds out a temptation to such acts. In the negotation of mortgages, the same procedure is necessary as in the case of sale, the title deeds passing into the hands of the mortgagee, where they remain until the mortgage is paid.

UNITED STATES.

WHAT LAWYERS HAVE DONE.—We extract the following from a speech made by the Hon. Henry Edgerton, in the Constitutional Convention of California, on the 22nd of November. He said, addressing the President;

"SIR: It was the skill and wisdom of lawyers that laid the foundation and reared the superstructure of that benign Government under which we sit in this hall. It was an immortal company of lawyers whose statesmanship, supported by the deathless valor of its heroic armies, kept that government firm on its foundations in the most tremendous shock of war the universe has ever felt. It was a lawyer, who, at the call of his country in the hour of its direst peril, left the walks of his profession and became the greatest organizer of war the world has ever seen. But, sir, I need not stand here and call the roll of its heroes. In the Senate, upon the Bench, at the Bar, in the camp, in the stricken line of battle, always and everywhere when civilization and the rights of mankind have been assailed, that profession has been in the vanguard of their defenders. The bones of its martyrs are at the base of every great monument which marks the progress of the race, and there is not a legal security, nor a constitutional guaranty of liberty or labor that is not illustrated by their genius, or consecrated and cemented by their blood."

CANADA.

Lawyers in Toronto complain that the business they receive from the country is not always paid for. One gentleman states that he received a brief with a cheque, but the latter was returned, endorsed "no funds."