The Legal News.

VOL. I. DECEMBER 28, 1878. No. 52.

OUR FIRST YEAR.

With the present number we bring our first volume to a close. The time has not been a favorable one for the inauguration of new enterprises, and this has had its effect upon the success of the LEGAL NEWS. We have, however, attained a circulation as extensive as we ventured to expect would be reached within the first year of existence. The volume is a large one, and was issued at an extremely low price for a legal publication, the object being to bring it within the means of a large circle of readers. In this we have succeeded to a considerable extent, but we regret that we cannot say the same as to the advertising patronage which the publishers hoped would be extended to a journal of the character and circulation of the LEGAL NEWS. The absence of such support has made the journal unremunerative both to the publishers and the editors. We trust that this will be remedied during the coming year. We appeal with confidence to our readers to aid us in bringing the journal under the notice of those whom it does not reach at present. And we would further ask them to give us that class of advertisements which they control, and which would be especially appropriate to the LEGAL NEWS. This is the first attempt in Canada to give the profession a newspaper peculiarly their own, and while the publishers cheerfully undertake the burden for another year, it will ultimately depend on the profession whether the work is to be continued or not. It will be our aim during the coming year to add to its usefulness and value, and if our readers second our exertions, we feel confident of success.

TELEGRAPHIC MESSAGES.

We have observed a notice of a recent decision by an English Judge, holding that telegraphic messages are privileged communications. We shall refer to the case later, when the full report is before us. It has been the practice in the courts of the Province of Quebec to order the production of telegrams. We may refer to the case of *Leslie* v. *Hervey*, in 1870, before Mr. Justice Mackay, and to the authorities there cited: 15 L. C. Jurist, pp. 9, 10, 11. The Court held that telegrams which have passed between a principal and his agent are not privileged communications, in a suit in which that principal is a party. Mr. Justice Keogh, recently deceased, while trying the Dublin Election Petition in 1869, compelled the manager of the Magnetic Telegraph Company to produce the messages that were dispatched during the election by the various persons engaged in it.

The London *Law Times* remarked thereon: "In strict law this is permissible. Telegraph messages are not privileged communications, even in the hands of the Telegraph Company. But it is a very important question whether they ought not to be made such. What are they, after all, but letters without an envelope? The same communication sent through the post office would be practically privileged in the transit. If the postmaster were to break the seal and read it, he would not be permitted to give evidence of its contents. The telegraph clerk is only as a postmaster to whom a paper is confided, which the necessity of the case demands that he should read and preserve. It is necessary to the public security that messages should be held in as strict confidence by the officials as letters. No harm could possibly come of conferring upon them, when delivered to the company, and while in the possession of the company, the privilege of strict secresy; or, if an occasional inconvenience should arise, the benefits would vastly exceed the evil of such a provision."

FISET v. *FOURNIER.*

We have several communications with regard to the judgment in this case, and in particular an interesting letter from Mr. Charles Pacaud, of counsel for the plaintiff. In this letter Mr. Pacaud ably supports the view that the prescription acquired had been renounced to by the defendant. But strange to say, Mr. Pacaud does this by reference to the old law and authorities, and without citing *Walker & Sweet* or the other decisions since the Code. As the matter has been settled by positive authority,

we do not think it desirable to reopen the question in these columns. Mr. Justice Sanborn, who dissented in *Walker & Sweet*, said all that there was to be said on the one side, and the judgment of the Court of Appeal has finally settled the law in the opposite sense. We do not see that it would be possible for a Judge sitting in a lower court to disregard the authority of that case, if it were cited before him. We shall, therefore, content ourselves with an extract from Mr. Pacaud's letter, which is explanatory of the action brought.

He says: "The action in that case (*Fiset* v. *Fournier*) was not founded upon the promissory note, which the plaintiff acknowledged by his declaration was prescribed, but it was based upon the acknowledgment of the debt and the promise to pay the same, made by the debtor in presence of a witness in June or July last.

"It seems to me that this acknowledgment and promise were sufficient to constitute a new obligation on the part of the debtor, and that that was a perfect contract in itself according to the rules established by arts. 982, 983 & 984 C. C., which contract the plaintiff could get enforced in law.

"The promissory note was merely mentioned in the declaration, to show how the debt had originated. The action did not rest at all upon the note, which was absolutely prescribed and no action could be brought upon it, but it rested upon the acknowledgment of the debt and the promise to pay the same made by the debtor.

"Prescription is merely a presumption of payment. The debtor may renounce to the benefit of that prescription by acknowledging that he owes the debt, and art. 2227 C. C. expressly says: 'Prescription is interrupted civilly by renouncing the benefit of a period elapsed, and by any acknowledgment which the possessor or debtor makes of the right of the person against whom the prescription runs.'"

Then follows a reference to the works of French authors. The lenghty discussions to which this question has given rise, and the different opinions which have been advanced, show that the point is one of serious difficulty. A word or two in the Code would have placed the matter beyond all doubt; but we consider that the Code has now been interpreted in a manner which does not admit of further debate.

REPORTS AND NOTES OF CASES.

SUPERIOR COURT.

Montreal, Dec. 20, 1878.

JOHNSON, J.

LEONARD v. LEMIEUX.

Surety—Lease terminable on Notice.

A person who is surety for a tenant holding under a lease terminable on giving six months' notice, cannot exercise the right stipulated in favor of the tenant, if the latter fails to exercise it.

JOHNSON, J. The defendant is *caution solidaire* for the rent of a house, together with the tenant, who took it under a lease for five years, with a right to terminate at the end of any one year by giving three months' notice. This right the tenant never exercised; but at the end of the first year continued to occupy, and on the 1st June there were six months' rent due, and the defendant being sued pleads that he gave notice last January, that he wanted to terminate his obligation; and it was maintained before me that he had this right. I can only say now, as I said at the hearing, that if he has, a tenant who apparently would not be trusted without furnishing security, will find himself able to occupy the place for the whole term of the lease without any security whatever. Plea dismissed. Action maintained for amount demanded.

Taillon for plaintiff.

J. E. Robidoux for defendant.

LANDA v. POULEUR.

Damages for Malicious Prosecution—Bad reputation of Plaintiff—Compensation.

1. Proof that the plaintiff had been formerly convicted of attempting to have carnal knowledge of a girl under eleven years of age will be admitted in mitigation of damages, in an action for malicious prosecution for bigamy.

2. A judgment obtained by defendant in right of his wife against plaintiff may be pleaded in compensation of damages claimed for such malicious prosecution for bigamy.

JOHNSON, J. This is a somewhat singular case. The parties are both of them Belgians, domiciled here; and the plaintiff's action is for damages, on account of the defendant having caused his arrest and prosecution for

bigamy. Confusion and prolixity are not uncommon; but here, I think, both have been abused. The plaintiff commenced his action by process of *capias*, and that process is contested at the same time as the merits of the action, by a consent of the parties. The plaintiff laid his damages at $10,000; but the Judge who gave the order fixed the bail at $400. There are the usual allegations of malice and want of probable cause; and, besides these, the plaintiff avers that the defendant knew very well that the charge of bigamy he was making was unfounded, and that he was actuated by express malice in making it. The plaintiff had to go to jail, and the case against him was sent to the Queen's Bench, where the Grand Jury threw out the bill. The defendant's pleas to the present action begin by denying the formal averment of the plaintiff that he is of good character and repute, and by setting up on the contrary, in a specific manner, that his reputation is *gravement entachée*.

The second thing pleaded by the defendant is that he had probable cause for doing as he did; and, in the third place, the defendant sets up a plea of compensation founded on three distinct grounds: 1st, on the damages caused to him by the arrest of his person in this very case, which began, as I have said, by a writ of *capias;* 2nd, on the damages he suffered by an unfounded prosecution instituted against him by the plaintiff for compounding a felony, and, 3rd, this plea of compensation sets up a judgment for $150 against the plaintiff in this case obtained by the defendant in right of his wife. The answers are general. I have, therefore, to see, first, whether the proof supports the essentials of the plaintiff's action; 2nd, whether the defendant's pleas are well founded, and to what extent; and 3rd, whether the process of *capias* is to be set aside under the evidence. This evidence was given before me, and lasted several days. I took careful notes, and have referred besides to the extended notes of the shorthand writer. I am of opinion that there was an arrest and a prosecution for bigamy against the plaintiff, and at the defendant's instance; that he is responsible for them, and that they were undertaken without probable cause, and with malice on the defendant's part. The facts are few: the plaintiff was married to Antoinette Vanden Daden at Brussels, on the 30th of January, 1870; and the marriage was dissolved at Laeken on the 31st of March, 1876; or rather the dissolution was then pronounced; the divorce itself having been granted at Brussels on the 6th of October, 1875. On the 21st of January, 1877, the plaintiff was married in Montreal, in the Roman Catholic Church, to Miss Octavie Viau, having previously been married to her in the United States. There had been difficulty here in getting the authorities of the Roman Catholic Church to marry him, and correspondence with Rome took place, and before the answer came, Landa and Miss Viau went to the United States, and there got married; and though the dispensation from Rome came at last, it was not required,—Landa, who had been a Jew, having in the interval professed the Roman Catholic faith. There is no doubt of course that if Landa came here and got married here, while his previous marriage in Belgium, (supposing it to have been a lawful marriage there) was subsisting, he would have committed the offence of bigamy; and so also, if he left this place to contract a second marriage in the United States, the previous marriage still subsisting, and came back here and was taken into custody here, he would have committed the like offence, and could have been prosecuted for it here. The defendant made his deposition before the Magistrate on the 12th of February, 1878. More than a year had elapsed since the second marriage here in Montreal. There had been deliberation before this last marriage. The plaintiff had consulted the Rev. Mr. Sentenne, who had consulted his Bishop, and both the ecclesiastical authorities and the man himself acted with caution and prudence, and the circumstances were discussed —at all events as between Landa and Mr. Sentenne, the priest, and if they were not known to the defendant he could easily have ascertained them by enquiry. I think there is no difficulty as to the proof of express malice on the part of Pouleur. He went to Mr. Sentenne to get from him the extract of marriage, and he was told by Mr. Sentenne that the second marriage was valid. This should have put him on his guard. He was protected to a certain extent in bringing a public prosecution for a felony—that is, as long as he can be supposed to have acted with upright

motives for the public good; but the circumstances in evidence show that there was the worst state of feeling between these two men, and it is impossible for me to believe that he acted without personal ill-will. That alone, however, would not support this action. The most deadly enmity in the prosecutor is not at variance with the clearest truth of the charge, and, therefore, there must be want of probable cause. That is a mere question of law for the Court, and I do not hesitate an instant in saying that there was a total want of probable cause for bringing the charge of bigamy. The law constituting this offence is quite plain :—32-33 Vic., c. 20, Sec. 58 : "Whosoever, being married, marries any other person during the life of the former husband or wife, whether the second marriage has taken place in Canada or elsewhere, is guilty of felony, and shall be liable, &c., &c., &c., and any such offence may be dealt with, enquired of, tried, determined and punished in any part of Canada where the offender is apprehended, or in custody, in the same manner in all respects as if the offence had been committed here: provided that nothing in this section contained shall extend to any second marriage contracted elsewhere than in Canada by any other than a subject of Her Majesty resident in Canada, and leaving the same with intent to commit the offence, or to any person whose husband or wife has been continually absent from such person for the space of seven years then last past, and was not known by such person to be living within that time, or shall extend to any person who at the time of such second marriage was divorced from the bond of the first marriage, &c., &c." The dissolution of the first marriage is proved here beyond doubt. We have the judgment with the seal of the Court, and the evidence of the Belgian consul as to the authenticity of it; and it cannot be seriously contested. The defendant says in one of his pleas that he did not know of the dissolution of the first marriage: but the existence of the first marriage was a constituent in the offence he was charging the plaintiff with, and it would be monstrous to say that any man who has married twice (which by-the-bye is the original and strict meaning of the word 'bigamy' may be prosecuted for a felony without any responsibility on the part of the prosecutor, and without any obligation on his part to make enquiry. If he chose to make the charge without knowing the facts, he must take the consequences. Therefore, up to this part of the case, I am with the plaintiff, and if it stopped here I would give him substantial damages; but the case does not stop here. The defendant has said in one of his pleas, as I have already stated, that the reputation which the plaintiff sets up as having been tarnished by the prosecution for felony was not such a very good reputation after all. It has always been allowed to urge this in mitigation of damages, because of course the amount of injury suffered is not so great in such a case. If there are spots already, one more will not make so much difference, and the defendant has proved this in my opinion. He has proved by several most respectable witnesses—his and the plaintiff's own countrymen here—that the plaintiff is held in very little estimation. This evidence of course must be justly appreciated. It seems to show that the plaintiff is not liked by his own countrymen, and perhaps so far it does not amount to very much: but it is there, and it goes for something, though, if there were nothing else, it would not go very far; but there *is* something else, and something very serious too. There is the plaintiff's own admission, when the defendant called him as his witness, that he had been publicly convicted in his own country of an attempt to have carnal knowledge of a child under eleven years old, (*attentat à la pudeur d'une fille de moins d'onze ans.*) Therefore, if this was known, and it probably was known to his fellow-countrymen here, it is not surprising that they should hold his reputation rather cheap. It must be borne in mind that we are dealing with a question of character as affected by a prosecution for felony here, and it appears that the person complaining was a misdemeanant in his own country, and, after one year's imprisonment, was pardoned. No doubt that pardon was equivalent to undergoing his sentence, and its effect is that he can't be spoken of again as guilty of the offence. That has always been the English law, and it was so held very lately in a case of *Leyman* v. *Latimer* in the Court of Appeal at Westminster, in an appeal from the decision of Barons Cleasby and Pollock in the Exchequer Division, who held that it is libellous to call a man a felon who has undergone his sentence, and is thereby placed in the position

of a man who has received the Queen's pardon under the great seal, and the decision of the Barons was affirmed. No doubt, therefore, that if this was an action for libel for calling this man a felon or a misdemeanant (whatever his offence may have been by the laws of Belgium,) the pardon would be an answer to the charge that such was his status; but it is not a question here whether he could be lawfully called a felon or a misdemeanant for what he did in Belgium; but merely whether his character has been lowered by what has happened there; whether, to use the words of the plea, it has been '*gravement entaché;*' and I must say that I think it must be taken as a very grave inconvenience for this man, who sues for damages on the ground that a spotless reputation has been tarnished, to be obliged to admit that it has already so large a spot upon it. Mind, I am not discussing the legal effect of the pardon, or of undergoing the sentence—that is what is decided in the case I have just mentioned—but I am considering the effect in common estimation of an admission that such a thing took place. There was a statement made by the plaintiff in his evidence that would have come near being serious for him if the prosecution had been for going to the States from this place, and being married there. He was asked whether the divorce had not been granted on the 30th of March, 1876—which would have been after his marriage in the United States, as he admits that took place on the 12th November, 1875—but his answer shows, as do the official documents, that the 30th March, 1876, was the date of registration of the divorce at Laeken, the sentence having been pronounced at Brussels on the 22nd of October, 1875, three weeks before the marriage in the United States; but the charge, as brought by the defendant, was for bigamy committed by his second marriage here—not by his leaving here to get married in the States. If it had been the latter, the question of the effect, according to Belgian law, of the judgment *en première instance* before its registration at Lacken would have arisen. As far as the plaintiff's action alone is concerned, therefore, I should find that he is entitled to damages; but my estimate of those damages would be very seriously lowered by what he has admitted with respect to his career at home, which evidently affects his character here among his fellow-countrymen.

Then, the other pleas of the defendant must be looked at. As to the damages that he sets up against the damages claimed from him, his right to set them up at all is not questioned by the other party, and I do not do more than express my doubts whether it could be properly set up. It is not unusual to oppose damages to damages in cases of *injure verbale*; but it is the first time I have seen a demand of any kind, whether for debt or for damages, commenced by a writ of *capias*, and in which the damages done by executing the writ on the person of the defendant are set up in compensation. As the parties have said nothing about it, however, I have considered the proof, and I do not see that the defendant has proved any damage, either arising from his arrest in this case, or from the prosecution for compounding a felony, of which there is no legal proof whatever. There remains the judgment in favor of the defendant's wife, which he has a right to set off against any damages to be awarded to the plaintiff. Upon the whole, having considered every part of this case as scrupulously as I am able, I award $100. damages to plaintiff, because, notwithstanding the unfortunate *fletrissure* upon his character, the defendant had no right to accuse him of the felony; but of course the effect of allowing the compensation under the judgment will be to put both parties out of court, the costs being also *compensés*. The defendant, by having prosecuted the plaintiff for bigamy without probable cause, will thus lose part of the amount of the judgment he holds against him. If there had been no judgment I should have condemned him to pay so much money, and I do not see the difference in principle between the one and the other, although I find a case in the 13 L. C. Jurist, p. 229, (Jordesan v. McAdams) distinctly holding that this cannot be done, the damages against which the compensation is set up not being *claires et liquides* when the compensation was set up. That was an application of the text of the law in which I cannot concur. Where the debt demanded, and which it is sought to extinguish by compensation, is liquidated, I can understand why the creditor is not to be delayed, while his debtor sets about proving damages not yet ascertained, but to reverse the case, and say that if a plaintiff sues me for damages, and all the time owes me a debt which ought to be so much

cash in my pocket, I may not pay him his damages with his own overdue obligation for more, is what I must defer doing, until a higher Court has said that I am wrong; and probably afterwards. Of course, it is unnecessary to say anything as to the *capias*, when the plaintiff's damages are extinguished by compensation.

Prevost & Co. for plaintiff.

O. Augé for defendant.

LEDUC et vir v. DESMARCHAIS.

Prescription—Claim of Sick Nurse.

The claim of a sick nurse, for services rendered as such during a last illness, is prescribed under Art. 2262, C. C. by the lapse of one year, and the debt being absolutely extinguished after the lapse of the year, the Court is bound to take notice of such prescription though not pleaded.

JOHNSON, J. In this case, I differ from the law of both of the counsel in the case. It is an action to recover remuneration for services rendered as sick nurse in a last illness, which appears to have been of a peculiarly distressing and revolting description, and it is taken against the executor of the wills of Dame Scholastique Leduc, and of her husband, both deceased. The services were rendered from the 17th of April, 1874, to the 15th of January 1875, when the wife died, the husband surviving nearly two years, until December, 1877, and both leaving wills dated in December, 1874; the former making the plaintiff a legacy of $400, and the latter one of $50; but these legacies have been renounced by the plaintiff. The only plea on which any question arises is a plea of prescription. It alleges a lapse of more than three years between the services and the bringing of the action; and under this plea the defendant's counsel wanted to apply the two years' prescription under Article 2,261. The plaintiff's counsel, on the other hand, contended that it was only the five years' prescription under Article 2260 that could apply. For the defendant it was said that the case of the sick nurse, or *garde-malade*, came under No. 3 of Article 2,261:—"*Salaires des employés non reputés domestiques;*" but it was overlooked that there were the words added, "*et dont l'engagement est pour une année ou plus.*" Marcadé in commenting Article 2,272 of the French code, which enacts the one year prescription against doctors, assimilates the case of *sages femmes* to theirs, on the ground of scientific knowledge; but he is careful to add: "*il en est autrement des gardes-malades: ce sont des femmes de journée; des gens de travail, rentrant sous l'article précédent;*" that is subjected, under the French code, to the 6 months' prescription. Our code is entirely different from the French. Here we have the five years prescription as to physicians, and perhaps that may be extended, when the case arises, to midwives according to Marcadé's idea, and to our modern trained nurses for the same reason; but I give no opinion as to those cases now. The plaintiff's argument for the 5 years rule is untenable. It is not because the article 2,003 gives a privilege to the charges of physicians, apothecaries and nurses upon the assets of the estate, that the same limitation of action exists in all those cases. The privilege may be taken for granted if the debt exists; but it is the existence of the debt,—not the privilege—that is in question under the plea of prescription. I have said I take a different view of this case from that of either of the learned gentlemen engaged. Art. 2,262 enacts a prescription of one year in three specified cases; and sub-section 3 of that article is "for wages of domestic servants, &c, and other employees who are hired by the day, week or month, or less than a year." I have no doubt, therefore, that though the one party contended for the two years' prescription, and the other for the five, both are wrong, and the plaintiff's action (though it has not been pleaded, or contended for in argument, is really prescribed by one year. I am obliged, under the circumstances, to give the benefit of the law to the defendant. In all the cases mentioned in articles 2,260, 2,261 and 2,262 the debt is absolutely extinguished, and no action can be maintained, whether it be pleaded or not. I do this with great regret under the circumstances, and I dismiss the action without costs, because the precise point on which I dismiss it was not raised.

Loranger & Co. for plaintiff.

T. & C. C. De Lorimier for defendant.

LEBLANC v. LEBLANC et al.

Parent and Child — Action for Maintenance— Children not liable in solido—C.C. 169.

The obligation of children to support an indigent

parent is not joint and seveal, but each child is condemned to contribute in proportion to his means.

JOHNSON, J. In this case an old father, nearly blind, asks bread from his children, four in number—one of them described as a "commis," two others as "marchands," and the fourth a married daughter with her husband. The plaintiff alleges in his declaration that his wife is still living, and has no means of subsistence. The defendants plead, 1st, that the plaintiff's wife is not living with him, but that they are supporting her; and secondly, they plead that they are too poor to pay in money, but are willing to receive their father each in turn. Their obligation to support their parents is not diminished because their mother is obliged to leave her husband's house, owing probably to his inability to support her. The father is charged by law with the obligation of supporting his wife, and can maintain an action for the joint support of himself and his wife, and she can return to him at any time and force him to support her. One of the defendants has been examined on behalf of the others. They have a common defence, and I am not disposed to allow them to call one another to support it. The practice has never been perfectly settled in this Court as to the solidarity of the children's obligation. It appears to have been the rule acted on by most of the judges to apply the principle of solidarity in its entirety. I have known many such cases, and certainly they are not without authority to support them. Demolombe, 4 vol., No. 63, gives all the old and the modern authorities on the one side and on the other. But if we apply simply the rule of solidarity, how shall we apply Art. 169 of the civil code, which is not new law? "Maintenance is only granted in proportion to the wants of the party claiming it, and the fortune of the party by whom it is due." Demolombe comments, Art. 208, C.N. (the same as our Art. 169), and shows that the obligation is divisible. I know of no case in which the divisibility has been pleaded by a defendant, and has been held not to exist. I therefore apply the law as I find it; and make these several children pay according to their means. The plaintiff though old can still earn something, and though he is destitute, his children are also poor, and can only pay according to their means. One of them [Alphonse] is better off than the rest. He can pay $5 a month. The others will pay $2. In the case of Laplante *v.* Laplante, three years ago, I maintained the same principle of non-solidarity.

Bonin & Co., for plaintiff.

Sarassin for defendants.

THE CORPORATION OF VERDUN v. LES SŒURS DE LA CONGRÉGATION DE NOTRE DAME DE MONTRÉAL.

Art. 712, *Municipal Code—Religious and Charitable Institutions—Exemption from Taxation.*

The property known as Nuns' Island, occupied by the Nuns of the Congregation of Notre Dame, and the products of which are devoted to the maintenance of that religious community and other establishments of a religious and educational character, is exempt from taxation under 712, Municipal Code, which exempts properties belonging to Fabriques, or to religious, charitable or educational institutions, and not possessed solely by them to derive a revenue therefrom.

JOHNSON, J. I thought at the hearing that there might be a question of jurisdiction here; but I find that Art. 952 of the Municipal Code authorizes both school and municipal taxes to be sued for in this Court, when the municipality, at the request of the commissioners, asks for both together, as they do here. On the merits there is only one point, but it is a point of very grave importance both as regards the powers of municipalities to tax, and also as regards the rights of certain religious and educational institutions. The plaintiffs sue for $102.60, composed of two items, the first being $57.60, imposed by the Council on the basis of one twenty-fifth of a cent on the dollar on the assessed value of the defendants' taxable real estate there; and the second being $45 for school tax. The property in question is commonly known as the Isle St. Paul, or the Nun's Island; and the plea of the defendants is that they hold as a religious community of women for purposes of charity and education, the lands being used principally for pasturage, and the whole occupied for the ends for which they were established, and not possessed solely to derive a revenue from it; and therefore that the property in question is exempt from taxation. There is no doubt that in the first Parliament holden in Lower Canada, property possessed by such persons, and for such objects, was exempted from certain taxes. In 1796, the 36th of the King,

c. 9 was passed to provide for the making, repairing and altering the highways and bridges in the province; and the 61st section provided that, "no lots, houses, or buildings occupied by any of the religious communities of women" should be assessed under that Act. That section also exempted grounds used for pasture without the walls of Quebec and Montreal. Three years later that Act was amended, and by the 39 Geo. III, c. 5, sec. 20, it was enacted that the grounds outside of the cities that had been exempted under the first act should in future be assessed; but again, the properties of the religious communities of women were specially excepted from the operation of that amendment. The state of the law after that, until the passing of the municipal code, is irrelevant, because whatever it may have been, the municipal code repealed it either expressly or by implication, and made special provision for this subject by article 712. There are five classes of property exempted from taxation by that article of the Municipal Code. The third class of exemptions mentions expressly "properties belonging to Fabriques, or to religious, charitable or educational institutions, or corporations for the ends for which they wree established, and not possessed solely by them to derive a revenue therefrom."

The property in question now consists of about eight hundred arpents of land of which two-thirds are arable land and pasture, and the rest wood land. The buildings enclose about six arpents. The defendants were incorporated under letters patent issued by Louis the 14th, King of France in 1671, and they have possessed for more than a hundred years. The products of the island are devoted exclusively to the maintenance of the institution, comprising not only the establishment on Nun's island; but also the mother establishment, and twenty-one others on the island of Montreal, giving gratuitous instruction to over four thousand children, requiring instructresses who must be fed, clothed and lodged. The question for me is whether the defendants are, in the words of the law, a religious, charitable or educational institution, or corporation occupying for the ends for which they were established the property now sought to be taxed, and not possessing it solely to derive a revenue therefrom. From the evidence and the terms of the letters patent, it appears to me quite certain that they come completely within the meaning, and, indeed, within the express terms of the exemption in the municipal code; and, that, therefore, their plea ought to be maintained. I cannot see the slightest ground for saying that the final articles of the municipal code affect Art. 712 in any manner. The intermediate legislation between the dates of the two old statutes of Geo. III. and of the Municipal Code, contain exemptions of the same nature, though, perhaps, not of the same extent; and it was observed with truth, in the present case, that there is no school actually on the Nun's Island. Under the Municipal Road Act (Con. Stat. L. C., ch. 24, Sec. 58), that argument would have had more force; for the 58th section only exempts the *public buildings intended inter alia for the purposes of education, and charitable institutions and hospitals, and the lands on which such buildings are erected.* That, however, is repealed, and the case rests upon No. 712 of the Municipal Code, and it seems clear that the conditions of exemption required by that article, concur in the present case. The establishment on Nun's Island is subordinate to, or rather co-ordinate with, the general objects of their institution, which are also the objects for which it was established; and the property is not held exclusively to get revenue from it. The plaintiff's action, therefore, is dismissed with costs.

Macmaster & Co. for plaintiffs.

Lacoste & Co. for defendants.

Ex parte WAIT, Petitioner for certiorari, and BREHAUT, P. M.

Certiorari—Summary Conviction.

No certiorari lies for a defect of form from a conviction for an offence within the meaning of the Summary Convictions Act, (32-33 Vict. c. 31) where the merits of the case have been tried, and the defendant has not appealed under section 60.

JOHNSON, J. The conviction brought up under this writ is a conviction by Mr. Police Magistrate Brehaut for having sold a number of pails of lard with the counterfeited trade mark of the firm Fairbanks & Co., of Chicago. The act under which the conviction took place is the 35 Vic. c. 32, entitled "An act to amend the law relating to fraudulent marking of merchandize." The 15th section enacts that penalties incurred under the Act may be recovered by action of debt in any Court of record, or before two

justices of the peace by a summary proceeding. The sixteenth section provides that where the summary proceeding is adopted, the offence is to be deemed one within the meaning of the summary convictions Act (32-33 Vict. c. 31), and to be governed accordingly. In the present case the summary remedy *was* taken, and the conviction adjudged Wait, the present petitioner, to have forfeited to our Sovereign Lady the Queen the value of the thing sold and $20 penalty and the costs, according to the Act first cited. The information was laid by Ewan McLennan and it is said, and said truly, that it does not ask for the forfeiture in terms, and does not profess on the face of it to be made on behalf of our Sovereign Lady the Queen; but merely to be made by the complainant as agent for the firm defrauded, and to conclude by a "wherefore complainant asks for justice in the premises." The constructive want of jurisdiction of the police magistrate is urged in every conceivable form; but the substance of the whole is that the conviction adjudges to Her Majesty the value of the thing sold and the penalty and the costs, without their having been asked for on behalf of Her Majesty, and, on general principles, this would appear to a fair enough objection. But the police magistrate was here administering a comparatively recent statute, and whether he was right or whether he was wrong in not exacting that there should be a technical averment that the complaint was made on behalf of Her Majesty, and a technical conclusion asking that the sum and the penalty be forfeited to Her Majesty, there is no doubt that very extensive powers are given to magistrates under these modern acts, and a very extensive discretion is vested in them for the purposes of substantial and speedy justice, and the prevention of technical obstruction to its administration. Under the Summary Convictions Act, which is the one we are to resort to here, there is to be an information laid, and a summons issued; and then, by section 5, we find that no objection is to be allowed to any information, complaint or summons for any alleged defect therein, in substance or in form, or for any variance between the complaint and the evidence; but the magistrate can, if he thinks that the person summoned has been misled or deceived, adjourn the case on such terms as he may think fit. The magistrate, therefore, and the magistrate only is the person vested with this large discretion for the purposes of speedy and substantial justice as contradistinguished from technical forms and delays; and if I felt myself called upon to say whether he had exercised his discretion wisely upon the present objection, I certainly could not say that he had not. But in reality the present case is met decisively by the provisions of the 71st and the 73rd sections of the Summary Convictions Act. The 71st section says distinctly that there is no *certiorari* at all in this case. A previous section had given an appeal; but this section, the 71st, says distinctly that "no conviction or order, or adjudication in appeal therefrom, shall be quashed for want of form, or be removed by *certiorari* into any of Her Majesty's Superior Courts of record." The 73rd section says that where it appears by the conviction that the merits have been tried, (as they have here), and the defendant has not appealed (as in the present case), such conviction shall not afterwards be set aside in consequence of any defect of form whatever; but the construction shall be such a fair and liberal construction as will be agreeable to the justice of the case. The point raised here is eminently one of form and form merely. I am not prepared to say whether if I had been sitting in the Court below, I should have ordered an amendment or not; but I am perfectly prepared to say that no certiorari lies here unless there has been a clear usurpation of jurisdiction, and even in such a case, the appeal given by the 60th section would probably take away the certiorari, though on that I give no opinion; but even if the case were properly before me, I should decline to interfere in a mere matter of form like this, under the restrictions put upon me by section 73. Therefore the petition and writ are dismissed and quashed, and the conviction must remain.

J. R. Gibb, for petitioner.

J. S. Hall, Jr., for respondent.

HOOD v. BARSALOU.

Insolvent—Claim included in List of Liabilities.

The fact that an insolvent has included a claim in his list of liabilities does not prejudice his defence to such claim.

JOHNSON, J. It appears that Barsalou is in insolvency, and the plaintiff's claim is made there, so that it is really only the costs that depend on the judgment now to be given. I do not think that the defendant is liable. The action was on an alleged suretyship; and the defendant pleaded that it was given conditionally, that is, Barsalou only undertook to pay whatever balance might remain in hand after the completion of the work by the men for whom he went security. There is no legal proof of the suretyship alleged. It was urged that the defendant had included the plaintiff's claim in his list of liabilities; but it was done at the request of the assignee, and without any admission of liability.

Action dismissed with costs.

Hutchinson, for plaintiff.

Geoffrion & Co., for defendant.

DIVORCE.

(Continued from page 611.)

Ordinarily divorces are sought upon grounds, or for causes arising after marriage; but there are cases in which the cause may have existed before and at the time of the marriage, as in the case of incurable impotency. Impotency arising from idiocy is no cause for divorce in Vermont. *Norton* v. *Norton*, 2 Aiken, 188 *Vide Devanbagh* v. *Devanbagh*, 5 Paige, 550; 6 id. 175; *Newell* v. *Newell*, 4 id. 25.

Adultery is a good ground for an absolute divorce in all the States of the Union except South Carolina. The statutes of the various States differ in matters of detail, and, therefore, require your examination. There has been an exception to this general rule, where it has been held that adultery committed by an insane wife did not furnish grounds for divorce in Vermont, Massachusetts and Alabama. The contrary was held in Pennsylvania. *Matchin* v. *Matchin*, 6 Penn. St. (6 Barr.) 332. Divorces have been granted by some of our State legislatures, but it has not been generally practised. And in some cases the State courts have denied the power of the legislature to grant divorces. In many of the State constitutions there are prohibitory clauses against such rights and confer the power upon the courts alone.

The power of the courts to grant *limited* divorces is well settled in this country. Cruel and inhuman treatment and abandonment are frequent grounds of action; there must be either actual violence committed, attended with danger to life, limb or health, or reasonable apprehension of such violence. A single act of cruelty, unless it is a very aggravated one, is not of itself sufficient ground of separation; the acts must be persistent, or reasonable ground for believing that they will be continued. If the husband has offered such indignities to his wife's person as to render her condition intolerable and life burdensome, yet such indignities need not be such as to endanger her life, to cause a good ground for a divorce. In Tennessee it was considered a good ground of a divorce *a mensâ et thoro*, when the husband made gross and unfounded charges of adultery against his wife, and endeavored to criminate her in adultery with a servant. If a husband whip his wife, or threatens or attempts to commit adultery; or if he curses or abuses her, or uses insulting and opprobrious language; or when the husband is in the habit of using vile and abusive language towards his wife, causing her much mental suffering and fits of illness, threatening permanent injury to her health, or making groundless charges of adulterous intercourse against his wife, are grounds of cruel treatment.

Austerity of temper, sallies of passion, abusive language, and mere indignities to the moral character or reputation of his wife, vulgar, obscene or harsh language, with such epithets that deeply wound the feelings and excite the passions, without any menace indicating violence to the person, do not afford sufficient grounds of divorce; nor will a divorce be granted on the ground of extreme cruelty where it appears that the party complaining *provoked* the violence or misconduct complained of, unless such violence was *extremely* out of proportion to the provocation. If a wife render her husband's "condition intolerable and his life burdensome," or if her conduct is so violent and outrageous as to render the proper discharge of the duties of married life impossible, it is a good ground of separation from her. Such abuse or indignities offered by the wife to the husband would not justify him in turning her out of doors; he must show

such cruel or barbarous treatment or danger of his life, as would entitle him to a divorce. Desertion or abandonment by either husband or wife is one ground for divorce; but the desertion or abandonment must be intentional, or wilful and malicious, with an intent to renounce and disregard the marriage relation. The length of time required to justify a divorce on the above grounds is not uniform in the several States.

Abandonment must be the deliberate act of the party and done with the intent of breaking up the conjugal relationship; and where it is mutual and deliberate on both sides no divorce *à vinculo* will be granted to either party. Where a husband has intentionally and against the consent of his wife, abandoned all matrimonial intercourse and companionship with her and denied her the protection of his home, although at the same time he may have contributed to her support during the time, yet it is a good ground for a divorce.

A wife who, without just and reasonable cause, refuses to accompany her husband, is guilty of desertion; but if the husband persist in taking her to a place where her health may be endangered, or near his relatives where she believes she could not live happily, such desertion would not be considered wilful. To constitute desertion on the part of the wife, she must absent herself from her husband on her own accord, without his consent and against his will.

The refusal of a wife to remove with her husband to a foreign country is not a wilful desertion. A husband is not justified in deserting his wife because she refuses him marital intercourse. Refusal of such intercourse for five years consecutively, although not justified by considerations of health, is not in Massachusetts "desertion." Nor is it any ground for desertion or divorce by the wife that her husband's marital intercourse is very frequent, if she has no peculiar debility or physical infirmity, and there is no violence or compulsion on the part of the husband.

If a husband should go away and live apart from his wife, it is not considered a desertion within the meaning of the statutes of New Jersey. It seems to me it would be more equitable and humane that some limit of time should govern the separation, otherwise the marriage may become a failure and the many attributes arising out of the contract are rendered nugatory. The failure to supply the wife with such necessaries and comforts as are within the husband's circumstances and thus by cruelty compelling her to quit him, amounts to actual abandonment and desertion.

In Scotland a divorce may be obtained by the husband or the wife on the ground of adultery or wilful desertion for four years without just cause, after adopting the forms of the act 1873, c. 55, so far as these are required. In Scotland the wife has precisely the same rights as the husband. Such actions are conducted before the Court of Sessions. As a preliminary, the pursuer is required to make oath that the suit is not collusive. The summons must be served upon the defendant personally when he is not a resident in Scotland: but upon evidence satisfactory to the court, that the defendant cannot be found, *edictæ* citation will be held sufficient; but in every case of *edictae* citation the summons must be served on the children of the marriage, if any, and one or more of the next of kin of the defendant, exclusive of their children, when the children and next of kin are known and resident within the United Kingdom; and such children and next of kin, whether cited or so resident or not, may appear and state defences to the action. In suit of adultery the husband may cite the alleged adulterer as a co-defendant, and the court may order him to pay the whole or any part of the costs, or may dismiss him from the action, as may seem just. Divorce is barred by condonation, as well as by collusion or connivance. Recrimination cannot be pleaded as a defence to exclude the suit; but it may be stated in a counter action, as the mutual guilt may affect the patrimonial interests of the parties. The legal effect of divorce on the ground of wilful desertion under the act of 1573, c. 55, is that the offending husband is bound to restore the tocher (dos) and to pay or implement to the wife all her provisoes, legal or conventional; and the offending wife forfeits all her terce and all that would have come to her had the marriage been dissolved by the predecease of the husband. After divorce both parties are at liberty to marry again; but the act of 1600, c. 20, annuls any marriage contracted between

the adulterer and the person with whom he or she is declared by the sentence of divorce to have committed the offence.—*From lectures by Isaac Van Winkle.*

CURRENT EVENTS.

IRELAND.

Lord Justice Christian's Successor.—Mr. Gerald Fitzgibbon, Q.C., Solicitor General for Ireland, has been appointed Lord Justice of Appeal, in room of Lord Justice Christian, resigned. Mr. Fitzgibbon, who is in his forty-ninth year, took his degree in 1859, was called to the bar in 1860, rose rapidly in his profession, and was made Queen's Counsel in 1872. He is a son of Master Fitzgibbon, who, before his appointment as a Master of Chancery, had enjoyed a very high position at the Irish bar as a lawyer and Nisi Prius advocate. The *London Law Journal* says, that the moderation of Lord Justice Fitzgibbon's political views before his removal to the bench and his great legal reputation will render his appointment a most satisfactory one to the public.

CANADA.

The Lincoln Election.—The protracted litigation in the Lincoln local election case appears to be drawing to a close. The judgment of the Court of Appeal, on reserved points, given on Monday, Dec. 23, says a daily journal, adds 22 votes to the respondent's previous majority, making it three more than declared by the returning officer three years ago. The votes had all been struck off by the registrar, against whose rulings the appeal was taken. This virtually decides the case in Mr. Rykert's favor, but as he resigned his claim two years ago to the seat, all it does now is to keep Mr. Neelon out. Mr. Hodgins has several appeals to be heard against the registrar's rulings, but at the most these can only amount to half a dozen, and cannot, therefore, reverse the main result. The question of costs will likely take some time to decide, so that it may be a twelvemonth yet before this most remarkable case is finally disposed of. The cost in witnesses' fees, &c., up to the present, is said to amount to $17,000.

The Late Mr. Justice Doucet.—P. A. Doucet, Esq., Judge of the Sessions of the Peace, Quebec, died on Saturday, Dec. 21. The deceased was a son of Pierre Doucet, Esq., merchant, of Quebec. He was born in that city on the 15th of February, 1815, and received his education there. In 1848 he married Mlle. Marie Thérèse Delphine, daughter of Hon. J. C. Bruneau, late a Judge of the Superior Court. Mr. Doucet studied law with J. G. Baird, Esq., and the late G. Drolet, Esq. He was called to the bar in 1838, and practised in the city of Quebec until appointed Clerk of the Court of Requests at Lotbinière on the 13th May, 1839. This Court having been abolished on the 28th January, 1842, Mr. Doucet was appointed Clerk of the District Court for the inferior District of Dorchester. He returned to the bar in 1844, and practised in partnership with the late Auguste Soulard, Esq. On the 20th Nov., 1846, he was appointed Joint Clerk of the Peace for the District of Quebec, conjointly with the late F. X. Perrault. After the death of Mr. Perrault, Mr. Doucet was appointed Clerk of the Peace and of the Crown, conjointly with the late James Green, and after Mr. Green's decease, he was, on the 19th May, 1858, appointed sole Clerk of the Peace and of the Crown. On the 19th September, 1868, he was appointed Judge of the Sessions of the Peace. He was *ex-officio* one of the members of the Police Board of the city of Quebec, under 26 Vict. cap. 57. He was created a Knight of the Royal Order of *Isabella Catolica*, 9th Dec., 1871. He was also elected a member of the Royal Academy of Jurisprudence and Legislation of Madrid, 1st June, 1876, and on the 30th June, 1876, a corresponding member of the Academy, with the rank of Professor.

The Paris correspondent of the *Times* gives a list of names circulated in 1848 from the central police-office of Berlin as those of men politically dangerous. Among them are James Fazy, subsequently for seventeen years Dictator of Geneva, and in policy a Cæsarist; Louis Blanc, now philanthropic member of the Chamber; Herr Bluntschli, Heidelberg professor and devotee of Prince Bismarck's ideas; and Herr Bucher, permanent head of the German foreign office, and Prince Bismarck's best servant.

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