JURISDICTION IN MATRIMONIAL CAUSES IN CANADA

JURISDICTION IN MATRIMONIAL CAUSES

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It is the object of this thesis to present the law of matrimonial causes in its international aspect, as it is administered by the courts of the Dominion of Canada. Private international law as a branch of the whole body of law has been ably and exhaustively dealt with by jurists; the law of marriage and divorce and the domestic relations has been equally well expounded; but there has as yet been no published work on the international law of matrimonial causes as it is particularly applied to Canada. In a country composed of nine distinct states, the jurisdiction of whose courts is limited territorially by the boundaries of each Province, there are continually arising questions of interprovincial rights and liabilities, no less in the realm of the law of persons than in that of contract and tort. In a country, too, where common law and civil law exist side by side, the possibilities for conflict in remedies and causes are manifold.

To what tribunal in the Province of Quebec shall a man apply who is seeking a divorce? Before what court shall an Ontario woman cite a husband who has treated her with cruelty? What Province has jurisdiction to award the custody of children who are in Manitoba, if the parents are in British Columbia? Such questions as these are of frequent occurrence in the Provincial courts, and it is to furnish an answer to them, and to others of the kind, that this disquisition is designed.

Chapter I. History of Matrimonial Jurisdiction.

The Bible, one of the earliest Christian records, gives us references to divorce and "a bill of divorcement", expressing opinions as to its causes, effects, and validity, no less contradictory than those of many writers of the present day.(a)

In early Roman times, after the inscription of the XII Tables, there were three kinds of marriage:

by consent

by confarreatio

by coemptio. The two latter gave rise to what was called manus,-- the control of the husband over the wife, for which certain formalities were necessary. By the time of Julius Caesar, marriage without manus had become the rule, and, after Hadrian, the legal acts which gave rise to it were practically obsolete. The ceremony of marriage was simplified until it became a purely private act, requiring no intervention of any state official, no registration, or any other public act. It consequently had no prescribed form: consent alone, reciprocally expressed, was sufficient -- nuptiae solo consensu contrahuntur. It was a civil act: no ecclesiastical rite was required.

Since it was the theory of Roman law that the marriage relation rests on the free will of the parties, and a marriage could thus be effected by their consent alone, the marriage tie could be dissolved at the wish of either husband

(a) Deut. 24,1-4; Matt.5,31-32: 19,3-9: Mark 10,11-12.

or wife, just as easily as it could be formed. It was a tie less binding than an ordinary business agreement, and if either of the parties desired to be relieved of it, he could not be held to it against his will. This seems an extraordinary doctrine in the light of present-day marriage law, but it was a doctrine justly carried to its logical conclusion. As a natural result, with the general decline of moral principles in the Roman Empire, divorce became extremely common, and no stigma whatever attached to it.

However, the Christian Church was steadily increasing in power, and as its influence became appreciable, the attitude of the State toward such promiscuous divorcing gradually changed. At first the Emperors did not dare to forbid it outright, but, as the practice came imperceptibly into public disfavour, they were able to enforce pecuniary penalties, and later, prohibitive regulations. Divorce by the consent of both parties lasted the longest. Nevertheless, through this and succeeding legislation the two primary principles persisted:-- marriage was secular, and private. It was not until the 8th Century A.D. that marriage became by legislation a tie requiring the intervention of the State or the Church.

With the increasing power of the Church there developed within it what constituted a complete body of law. It applied in spiritual matters, and was of binding force only on those who submitted themselves to it by becoming members of the Church. In time, this law, known as the Canon Law of

the Roman Church, usurped the place of part of the general law of the land, and courts of Ecclesiastical jurisdiction had power co-ordinate with courts of temporal jurisdiction. They recognized the Pope as supreme judge and legislator of the Church, and claimed corrective jurisdiction pro salute animae, to enforce all promises made with oath or pledge of faith. In England in the 16th C. the Pope gave place to the King as head of the Church, and the Canon Law of the Western Church became the "King's Ecclesiastical Law of the Church of England".(b)

The Ecclesiastical Courts at first claimed jurisdiction in all cases of fidei laesio, but as this covered breach of contract, which was a matter more properly within the scope of the civil law, the extent of their authority was limited so as not to conflict with that of the temporal courts. From the 12th C. till the end of the 19th (1858), the Ecclesiastical Courts in England had undisputed jurisdiction over all matrimonial causes,-- the celebration of the marriage, the capacity of the parties, the legitimacy of the issue and the dissolution of the marriage. So much as affected the property rights of the parties to a marriage, and especially rights to land, was administered in the temporal courts. Unfortunately the line of demarcation could not be definitely drawn, and occasionally the holdings of the two courts were at variance.

(b) 27 Hen.VIII, c.20.

Prior to the Reformation, the Ecclesiastical Courts recognized no dissolution of a marriage, once it was validly solemnized. By the rules of the Roman Church, marriage was a sacrament, and therefore no human authority could rescind it except, perhaps, the Pope, who, as God's vicegerent on earth, could exercise the power delegated to him. This meant that there could be no true divorce a vinculo matrimonii. There were only the inferior remedies of divorce a mensa et thoro -- judicial separation -- and annulment, which was then inaccurately called divorce a vinculo. Though this doctrine of the sacramental character of marriage, with its necessary concomitant of indissolubility, was expressly denied by the Reformed Church (c), yet it had already given rise to a whole body of rules by means of which a marriage, though solemnized, could be declared void by reason of, not some event occurring after marriage, but some previously existing impediment, which might or might not have been known to the parties at the time. The result was a multiplication of incapacities, of disabilities and of prohibited relationships which made a marriage entered into by the parties either void or voidable.

The "sublimated subtleties" of the law as to impediments made a dissolution of marriage easier to obtain in the Ecclesiastical Courts than it is at the present day, but they furnished such admirable opportunities for fraud and chicane that a revision of the Ecclesiastical code became necess-

(c) 25th Article of the Religion of the Church of England, ratified by Queen Elizabeth a second time in 1571.

ary. With the Reformation the prohibited degrees of consanguinity and affinity were reduced to the Levitical degrees (d), and the sale of dispensations was stopped. An Act was passed (e) authorizing Henry the Eighth to appoint commissioners with power to revise and rectify the entire body of the Canon Law, in so far as it was operative within the realm.

These Commissioners duly appointed, prepared an elaborate report, their work extending over twenty years. Though it unfortunately never acquired royal sanction, yet it carried great weight as expressing the opinion of the Reformed Church upon a matter then regarded as purely ecclesiastical. Among other things, the "Reformatio Legum Ecclesiasticarum", as the report was called, advocated divorce a vinculo matrimonii in certain cases, and abrogated entirely the inferior remedy of divorce a mensa et thoro.

The doctrine of the indissolubility of marriage having been expressly denied, and marriage having thus become a civil contract requiring for its full completion some religious ceremony, the Ecclesiastical Courts had until about 1602 capacity to dissolve marriage. They still were loathe to do so, however, and tried to discourage divorced persons from marrying again. When, in 1602, a case came before the Court (f) for dissolution of a marriage on the ground of adultery only, the Judges held that a divorce a mensa et thoro

(d) 32 Hen.VIII, c.38. (1540)
(e) 1530.
(f) Foljambe's Case.

only could be granted, and no divorce a vinculo. A valid marriage, therefore, became again indissoluble, and the only recourse lay in a private act of the Legislature.

The first application to Parliament was in the form of a petition to bastardize the children of a wife living in adultery; the second, to permit the husband to marry again so as to continue the succession; then, several cases where relief had been sought and refused in the Ecclesiastical Courts. The precedent was now well-established, and in 1701 a divorce was granted for no particular reason,-- "An Act to "dissolve the marriage of Ralph Box with Elizabeth Eyre and "to enable him to re-marry again." The practice of resorting to Parliament being frequently exercised under the Whig regime of the Hanoverian kings, the Legislature became in fact a court for granting dissolutions a vinculo. In 1798 standing orders for the House of Lords were framed, and the formula followed was that of the Box Case.

The great disadvantage, and one that made the Divorce Act of 1857 absolutely necessary, was the lengthy process that had to be gone through before a husband or wife could even make application to Parliament for the divorce, and the enormous expense that it involved. Relief in this way could only be obtained by the wealthy. In Justice Maule's famous address to a prisoner indicted before him for bigamy, is to be found an outline of the preliminary steps that were necessary. The prisoner's wife had robbed him and run away with another man, and he had married again without obtaining

a divorce. The Judge sentenced him to one hour's imprisonment and said: "Prisoner at the bar, you have been convicted "of the offence of bigamy, that is to say, of marrying a woman "while you have a wife still alive, though it is true she has "deserted you, and is still living in adultery with another "man. You have, therefore, committed a crime against the laws "of your country, and you have also acted under a very serious "misapprehension of the course which you ought to have pursued. "You should have brought an action and obtained damages, which "the other side would probably not have been able to pay, and "you would have had to pay your own costs, perhaps a hundred, or a hundred and fifty pounds. You should then have gone to "the Ecclesiastical Courts, and obtained a divorce a mensa "et thoro, and then to the House of Lords, where having "proved that these preliminaries had been complied with, you "would have been enabled to marry again. The expense might "amount to five or six hundred or a thousand pounds. You say "you are a poor man. But I must tell you that there is not "one law for the rich and another for the poor."

The evils of this system became increasingly manifest, and in 1850 a Commission was appointed to investigate and report on the law of matrimonial causes. As a result, in 1857 the Divorce and Matrimonial Causes Act (g) was passed and the Court of Divorce and Matrimonial Causes was constituted. This Court has jurisdiction "in all causes, suits and matters matrimonial" and "in respect of divorces". There is nothing to prevent a consort from applying to Parliament for divorce under circumstances not provided for by the Act,

and in the case of desertion or incurable insanity this would be necessary.(h)

It is this law that was inherited by B.C., Saskatchewan, Alberta and Manitoba.

When the first two provinces of Canada were given constitutional privileges, in 1792, there being as yet no divorce in England except by Act of Parliament, there was no divorce law for the colony to inherit, and, naturally enough, no Divorce Court was expressly created. In the early days of the settlements they felt no need of such a law, and not until 1833 was the question even raised in the House.

In that year a bill was introduced into Parliament "to enable married people to obtain divorce in certain cases" but was dropped before the second reading. In 1839 the first Parliamentary divorce was granted in Canada,(i) and between 1845 and Confederation three bills were passed, though all of them were opposed by the Roman Catholics in the Legislature.

This brief outline traces the law of matrimonial causes to the Confederation of the Provinces of Canada: up to that time the course of English law is inseparable from our own; from then on, the two systems diverge into separate channels, influencing each other only by the analogy of similar laws and a common history.

(g) 20-21 V.c.85 (Imp.)
(h) This right has been exercised but once since 1857.
(i) John Stuart's Case.

Chapter II. Nullity.

1. Distinctions as to Void and Voidable, etc.

Before considering the question of the annulment of marriage it is essential that we see clearly the distinction between the action in annulment and the action in divorce. There exists between these two actions a not incomprehensible confusion, a confusion which is, moreover, not of recent origin. Coke on Littleton explains that there are two kinds of divorce; Blackstone also speaks of two kinds of divorce, one partial (a mensa et thoro), the other total (a vinculo matrimonii):--"For in the case of total divorce the marriage is " declared null as having been absolutely unlawful ab initio, " and the parties are therefore separated pro salute animarum." This is our annulment. The Ecclesiastical Courts, having no power to decree the dissolution of a valid marriage, naturally avoided this confusion, any decree of theirs being of necessity an annulment.

The authorities to-day recognize this distinction: An action for divorce is predicated on a valid marriage; an action for annulment presupposes that the marriage was void or voidable: the former can only be decreed for matters occurring after marriage; the latter, for reasons existing at the time of the marriage. For example, an annulment can only be decreed by reason of some fact or impediment existing at the time of the marriage, as, the physical incapacity of either husband or wife, or their kinship within the "prohibited degrees";(j) or fraud and duress: a divorce on the other hand

is the legal dissolution of a valid and existing marriage, for some such cause as adultery, or cruelty and desertion.

The embarrassing confusion existing in the U.S. today is due to the fact that legislators have treated true causes of nullity as causes of divorce, and certain States even specify as causes of divorce, bigamy, fraud and force, consanguinity and affinity, and so on.

There are two kinds of disabilities constituting impediments to lawful and valid marriage; namely, canonical, and civil; and the English law recognizes an important distinction between the two in the effect they have on marriage. The canonical disabilities -- impedimentum impeditivum -- such as certain corporal infirmities, fraud, force, and duress, only make the marriage voidable, and not ipso facto void, until a sentence of nullity be obtained; and such marriages are esteemed valid for all civil purposes unless the sentence of nullity be actually obtained during the life-time of the parties. Civil disabilities -- impedimentum dirimens -- such as prior marriage, want of age, idiocy and the like, and relationship within the prohibited degrees (by 5-6 Wm.IV,c.54, known as Lord Lyndhurst's Act), make the supposed marriage void ab initio, not merely voidable; they do not dissolve a contract already made, but they render the parties incapable of contracting at all, and cause any union formed between them to be "meretricious and not matrimonial".

(j) 32 Hen.VIII, c.38.

A void marriage is one which is good for no legal purpose whatsoever. Either party may disregard it and enter into a contract of marriage with another person without incurring the penalties of bigamy. Its invalidity may be maintained in any court, between any parties, whether in the lifetime of the parties or after their death, and whether the question arises directly or collaterally. As a void marriage has, even in the absence of judicial proceedings, no effect in law, it is not absolutely necessary to obtain a decree, particularly in cases of bigamy or consanguinity, where there can be no doubt; but this does not apply with equal force where want of consent, due, for example, to insanity, be the ground. In this case, a decree may be obtained as of right. Otherwise no decree is necessary.

A voidable marriage is one in the constitution of which there is an imperfection which can be inquired into only during the lifetime of both spouses, in a proceeding instituted for the very purpose of obtaining a statement declaring it null. Until set aside in this way it is valid for all civil purposes; when set aside, it is rendered void from the beginning. There must be a judicial sentence, and if such judicial sentence is not obtained before the death of either of the parties, the marriage remains valid, and, a most important point, the children of the marriage are held legitimate. Such a marriage cannot be avoided by the mutual consent of the parties. To quote Schouler (k): "The necess-
" ity of judicial sentence, before a marriage can be considered

" null for physical incapacity, is too obvious for argument."

2. Jurisdiction over the action.

In England, from the 12th Century to 1857, the Ecclesiastical Courts had undisputed jurisdiction over all matrimonial causes. They acted pro salute animae and proprio vigore, and gave relief to all persons in the diocese, whether they were properly domiciled there or not.(l) In 1857 this jurisdiction was vested in the "Divorce Court". Thus in England there is no doubt as to the Court that has jurisdiction in actions for annulment. But as in Canada there is no such federally appointed court, the question of jurisdiction in actions for annulment and in matrimonial matters generally has had to be settled by each Province in its individual capacity. (This refers to judicial, not legislative jurisdiction.) The resulting situation is consequently confusing and rather obscure.

It has been held in a series of Privy Council decisions that the Divorce and Matrimonial Causes Act of England is a part of the substantive law of each of the four Western Provinces.(m)

(k) "Marriage, Divorce, etc," 6th Edition, p.1378.
(l) Niboyet v. Niboyet (1878) 4P.D.1, per James,L.J.
(m) (B.C.) Watts v. Watts 1908 A.C. 573
approving S. v. S. (1877) 1 B.C.R. Pt.1,25
Scott v.Scott (1891) 4 B.C.R. 316
Sheppard v. S. (1908) 13 B.C.R. 486
(Man.) Walker v. Walker 1919 A.C. 947
(Alba.) Board v. Board 1919 A.C. 956
(Sask.) Fletcher v. Fletcher (1920) 50 D.L.R. 23

In Alberta, previous to Board v. Board, the Supreme Court was held to have jurisdiction to pronounce a declaratory judgment that an alleged marriage in Alberta was null and void; where it is found that before such marriage the defendant had been married to another person, that such person was alive at the time of the second marriage, and that the parties to the first marriage had not been divorced by a decree which our Courts recognize as effectual.(n)

In B.C., jurisdiction is vested in the Supreme Court of B.C., before a single judge; in Manitoba, in the Court of King's Bench, before a single judge; in Alberta, in the Supreme Court,"being a Superior Court of Record"; and in Saskatchewan, in the Court of King's Bench.

In P.E.I., all questions of marriage are heard by the Lieutenant-Governor-in-Council; Nova Scotia has a Court of Divorce and Matrimonial Causes; and New Brunswick has a similar court.(o)

In the two remaining Provinces -- Ontario and Quebec -- the point of jurisdiction is not so easily disposed of, as neither of these Provinces took advantage, as did the Maritime Provinces, of the power they possessed before Confederation to legislate on marriage and divorce and to establish courts to administer such law. Consequently, jurisdiction, if any, must be found in the existing civil courts.

(n) Cox v. Cox (1918) 13 A.L.R. 285
foll. Hardie v. Hardie 7 Terr.L.R. 13
which disting. Harris v. Harris 3 Terr.L.R. 259
(o) For references to statutes, v. Divorce, Chapter III,2.

Ontario.

In the case of Lawless v. Chamberlain (p) an action was brought in the High Court of Justice of Ontario to set aside as void a marriage solemnized between the plaintiff, an infant, and the defendant, on the ground that it was brought about by intimidation and threats. The action was dismissed on the merits, but Boyd, C, said:" To dissolve a marriage " once validly solemnized, is not of judicial but of legislat- " ive competence: whereas if the alleged marriage has been " procured by fraud or duress in such wise that it is void " ab initio, judgment of nullity may be given by the Court." And at p. 298: " When a marriage correct in form is ascertained " to be void de jure, by reason of the absence of some prelim- " inary essential, the action of the Court does not annul, but " declares that the marriage is and was from the first, null " and void. There is jurisdiction to grant this measure and " manner of relief now vested in the Supreme Courts of Ontario." This jurisdiction the judge based on S.28 of the Judicature Act, Ont.1897.

s.28. " The High Court shall have the like jurisdiction " and power as the Court of Chancery in England possessed " on the 10th June, 1857, as a Court of Equity, to admin- " ister justice in all cases in which there existed no " adequate remedy at law."

This seems to mean: that the High Court shall apply those powers which the English Chancery Courts exercised prior to

(p) (1889) 18 O.R. 296

1857, where common law courts gave no relief. The flaw in Boyd's reasoning would appear to be this: the Ecclesiastical Courts were common law courts, and could give relief where nullity was claimed; so that there was an " adequate remedy " at law" in England, and the section in question could therefore give no power to the High Court here.

The same judge, in the case of T. v. B.,(q) an action to have a marriage annulled on the ground of the physical incapacity of the defendant, held that the High Court of Justice had no jurisdiction to entertain an action to have a marriage declared null and void on such grounds. He distinguished this case from Lawless v. Chamberlain on the ground that in the former " the circumstances, if proved were such as to show " that the alleged marriage was void ab initio, and that the " ceremony was a mere unmeaning form.. . . Jurisdiction in " cases of nullity and other matrimonial difficulties is given " by the old statute law in Quebec: but no such legislation " enables the Courts of this Province to hold suit in cases " where the marriage status is involved, and the litigation " is really in rem, dissolving the existing marital union."

Morine, in his annotation to Peppiatt v. Peppiatt (r) suggests that the marriage in Lawless v. Chamberlain was a voidable marriage treated by Boyd,C., as void ab initio, on the ground that without free consent there could be no contract; or, as Boyd expressed it, " consensus, non concubitus, facit

(q) (1907)15 O.L.R. 224
(r) (1916) 30 D.L.R. 14

" matrimonium", while in T.v.B., the marriage was voidable only. This is reasonable.

Holmested, on Matrimonial Jurisdiction, holds that since a marriage obtained by duress is only voidable, the assumed distinction between duress and physical incapacity does not exist, and that the case of T. v. B. looks very like " a distinct retreat from the position taken up in L. v. C., " because, if there was really inherent jurisdiction to pron- " ounce a sentence of nullity for duress, it is very hard to " see why the same inherent jurisdiction did not exist in " the case of physical incapacity." However, Holmested somewhat spoils the value of his opinion by saying " that all de- " crees of nullity are based on the ground that the de facto " marriage was void ab initio."

As to whether L. v. C. was properly treated as void ab initio, Eversley (s) says: " It has been debated whether " a marriage brought about by duress is void de facto as well " as de jure, so that it does not need the sentence of any " Court to pronounce it invalid, or whether it is voidable " only. The better opinion would seem to be that it is void- " able only; for the ~~the~~ want of consent may be purged away " (by the principals themselves). A contract void ab initio " . . . . cannot be ratified."

In a later case of May v. May (t) an action to have a marriage between the plaintiff and her husband declared null

(s) "The Law of Domestic Relations," at p.68.
(t) 22 O.L.R. 559

and void because of their being related within the prohibited degrees, (Lord Lyndhurst's Act, 5-6 Will.IV. c.54, never having been in force in Ontario, such a marriage was only voidable) Latchford,J, considered himself bound by Lawless v. Chamberlain to hold that the Court had jurisdiction to entertain the action, though he dismissed it on the evidence.

Subsequent cases (u) have consistently held that the Courts of Ontario have no jurisdiction to annul a marriage, and in Hallman v. Hallman, per Lennox,J., " Neither can " I make declarations of right or status under s.16(b.) of " the Judicature Act. That section does not enlarge or aff- " ect the jurisdiction of the Ontario Courts so far as the " class of subjects which they can deal with is concerned." This section, which has been the cause of much discussion, (v) is as follows:

> s.16(b). " No action or proceeding shall be open to " objection that a merely declaratory judgment or order " is sought thereby, and the Court may make binding de- " clarations of right whether any consequential relief " is or could be claimed or not."

In the more recent case of Peppiatt v. Peppiatt,(w) in which the infant plaintiff sued for declaration of the nullity of a marriage celebrated without the consent of her parents, as required under the Ontario Marriage Act of 1914,

(u) A. v. B. (1909) 23 O.L.R. 261
Prowd v. Spence (1913) 10 D.L.R. 215
Hallman v. Hallman (1914) 15 D.L.R. 842
Leakim v. Leakim (1912) 6 D.L.R. 875
(v) See also the annotation to Peppiatt v. Peppiatt.
(w) (1916) 30 D.L.R.1

Meredith,C.J.C.P., stated quite decisively: " There is but " one Court for this Province, in which the parties to a " marriage can be relieved from any marriage tie that binds " them, and that is the High Court of Parliament in form -- " a committee of the Senate, perhaps, in reality."

It would seem hardly possible to contend, after this decision, unless it be disregarded by a higher Court, that the courts of Ontario have jurisdiction to annul a voidable marriage. Yet there is another section of the Ontario Marriage Act (x) worthy of mention:

> s.34(1). " Where a form of marriage is gone through " between persons either of whom is under 18 years with- " out the consent required by s.15 in the case of license, " or where without a similar consent in fact such form " of marriage has been or is gone through between such " persons after a proclamation of their intention to " inter marry, the High Court, notwithstanding that a " licence or certificate has been granted or that such " proclamation was made and that the ceremony was per- " formed by a person authorized by law to solemnize the " marriage, shall have jurisdiction and power in an ac- " tion brought by either perty who was at the time of " the ceremony under the age of 18 years, to declare and " adjudge that a valid marriage was not effected or en- " tered into."

The constitutionality of this section is seriously open to question. If a Provincial Legislature can effectually confer jurisdiction to annul a de facto marriage, even under

specified circumstances, it is hard to see why it cannot also confer jurisdiction to grant divorce. Yet in the face of B.N.A. Act s.91,s.s.26 one could hardly admit that the Province can grant jurisdiction to decree divorce. From the other standpoint, the above section scarcely seems to fall under s.92,s.s.12— " Solemnization of Marriage", since it refers entirely to the dissolution of a de facto marriage, and uses as a ground for the annulment no flaw in the ceremony.

Unfortunately no case has yet come before a Court to test the constitutionality of this Act; and all the arguments here adduced are mere theory; but yet it would appear that the Act which seems to confer jurisdiction in annulment on the Courts of Ontario, is itself not within the jurisdiction of the Legislature of Ontario.

Quebec.

In the Province of Quebec, prior to the Conquest, marriage was under the jurisdiction of the French Ecclesiastical Courts. They existed by the authority and consent of the French temporal ruler, were part of the recognized system for the administration of justice, and their judgments needed no supplemental decree of the Civil Courts to give them full effect. There was also vested in the Superior Council of Canada the jurisdiction recognized in French jurisprudence as the appellatio tanquam ab abusu, or " appel comme d'abus". In this

(x) 7 Edw.VII. c.23, am. by 9 Edw.VII. c.62, consol, as 1 Geo.V.c.32.

latter respect only did the French Ecclesiastical Courts differ in constitution from the English Ecclesiastical Courts. With the Conquest of Canada by the English and the overthrow of the French temporal power the Roman Church lost its position as the State Church, and the French Ecclesiastical Courts ceased to exist as part of the State machinery for the administration of justice. They became mere domestic tribunals, having a persuasive, not a coercive authority over those who voluntarily chose to submit to them. In the Guibord case (y) Sir Robert Phillimore stated their position: " It is no doubt true, " as has already been observed, that there are now in law no " recognized Ecclesiastical courts, such as existed and were " recognized by the State when the province formed part of " the dominions of France. It must, however, be remembered " that a bishop is always a judex ordinarius, according to " the general canon law; and according to the general canon " law, may hold a court and deliver judgment if he has not " appointed an official to act for him. And it must further " be remembered that, unless such sentences were recognized " there would exist no means of determining against the Roman " Catholics of Canada the many questions touching faith and " discipline which, upon the admitted canons of their Church, " may arise among them."

This dictum has been consistently misinterpreted (z) by the Civil Courts in Quebec, and been cited to support

(y) Brown v. Curé de Notre Dame de Montréal (1874) 20 L.C.J. 228,240.

(z) See,e.g.,Laramée v. Evans (1881) 25 L.C.J. 261,278 per Jette,J.

the theory that the Bishop has authority co-ordinate with that of the judges of the Civil Courts regularly appointed to administer justice, whereas, in fact, all that his Lordship meant to imply, was that it fell to the Bishop of the Diocese to settle those disputes which arise between persons of his parishes touching matters of the Church.

A Roman Catholic may subject himself to Ecclesiastical censure or discipline for breach of a law of his Church (such as the impediments to marriage which are recognized by the Roman Church though not included in 32 Hen. VIII. c.38), but until that law has also been adopted by the temporal power, its breach creates no civil liability, and a marriage could not be annulled merely for the breach of an Ecclesiastical law which has not received the sanction of or been adopted by the temporal power.

It was within the power of the English Parliament, subsequent to the Conquest, to confer on some spiritual or temporal court the power previously held by the French Ecclesiastical Court. But such power must have been conferred specifically and with explicit provisions as to the law that was to be applied: for instance, would it be the Pope's Ecclesiastical Law or the King's? Or the Pope's for Roman Catholics and the King's for other religions? That it would have to be expresslyconferred is clear, and in fact proved by the wording of the Quebec Act (a), which distinguishes between the various courts:

(a) 14 Geo.V. c.83.

s.17. ".....nothing herein contained shall extend or " be construed to extend, to prevent or hinder his Maj- " esty, his heirs and successors, by his or their letters " patent under the Great Seal of Great Britain, from " erecting, constituting and appointing, such courts of " criminal, civil and ecclesiastical jurisdiction within " and for the said province of Quebec, and appointing, " from time to time, the judges and officers thereof..."

Though there has been no such specific delegation of Ecclesiastical jurisdiction as the above section provides for, the courts for many years gave effect to the decrees by which the Roman Catholic Bishop annulled marriages celebrated between Roman Cathblics, recognizing those decrees as definitive and binding upon the Civil Courts, (b) though in one early case (c) the judge pronounced his declaration of nullity without first referring the parties to the Bishop.

Two recent decisions, however, have settled the whole perplexing problem.

Hébert v. Clouâtre (d) arose out of the "Ne Temere" decree of the Roman Church. Two Catholics were married by a Protestant minister under authority of a marriage licence

(b) Lussier v. Archambault (1846) 11 L.C.J. 53
Vaillancourt v. Lafontaine (1866) 11 L.C.H. 305
Burn v. Fontaine (1872) 17 L.C.J. 40
4 R.L. 163
Laramée v. Evans (1880) 24 L.C.J. 235
(1881) 25 L.C.J. 261
(c) Dorion v. Laurent (1843) 17 L.C.J. 344
(d) (1912) 6 D.L.R. 411

authorizing the omission of a previous publication of banns. The husband later sought, and obtained, a declaration of the nullity of the marriage from the Roman Catholic Archbishop of Montreal on the ground that it was a marriage in contravention of the requirements of the above-mentioned decree, which made any marriage solemnized between Roman Catholics by other than a priest of their Church, illegal in the eyes of the Church. Hebert then applied to the Superior Court to have this decree of nullity given legal effect. The Court rejected his application and declared his marriage valid, as neither of the two Ecclesiastical decrees has any effect in law in the Province of Quebec. Though the marriage might be invalid and immoral in the eyes of the Church, it was certainly valid in the eyes of the law, no such impediment as that stated in the " Ne Temere" decree being known to the Civil Code. Mr. Justice Charbonneau quoted Casault, J., in an unreported case of L'Heureux v. Budgess: " Ce mariage, ou si l'on veut, ce contrat, n'a d'existence " que celle que lui reconnait la loi humaine. C'est la " justice civile qui prononce sa validité. L'action des " tribunaux civiles est quant à lui parfaitement indépendante de toute autre autorite, meme d'autorité religieuse."

In Despatie v. Tremblay (e), Tremblay, the husband, sought to have his marriage annulled on the ground that he

(e) (1921) 1 A.C. 702.

and his wife were fourth cousins, a relationship recognized as within the prohibited degrees of the Roman Church, though not of the Civil Code. He obtained a decree of nullity from the Bishop, and a similar one from the Superior Court. The case was carried to the Privy Council on appeal, and there definitely settled. In the first place, their Lordships held that, despite the relationship of the parties, as it was one recognized only by the Church, once a marriage was validly solemnized between them by the cure, it was good for all time; the relationship could only be raised as a bar previous to the ceremony. As to the question of Ecclesiastical jurisdiction, Lord Moulton said: " The law did not interfere " in any way with the jurisdiction of any Ecclesiastical " Courts of the Roman Catholic religion over the members " of that communion so far as questions of conscience were " concerned. But it gave them no civil operation. Whether " persons affected chose to recognize those decrees or not " was a matter of individual choice, which might or might " not affect their continuance as members of that religious " communion. But that was a matter that concerned themselves " alone." Which settles the question, without a doubt.

There are some authorities, iconoclasts at heart, who, not content with denying jurisdiction to the Ecclesiastical Courts, go even further, and claim that the Civil Courts have no jurisdiction either. (They fail to say who has.)

Holmested thinks that the Civil Court has no such

jurisdiction because it has never been expressly conferred on it; and a Court of civil jurisdiction would not by implication be empowered to exercise what at the time of its constitution was held to be under exclusively Ecclesiastical jurisdiction.

McKee, in 62 D.L.R., argues thus: When the Ecclesiastical Courts were abolished by the Conquest, the law they administered was not conferred on any new court. Though the Civil Code gives grounds for annulment, it does not confer jurisdiction on any court -- an anomalous state of affairs in view of the opinion of the judges in Board v. Board (f) as to the impossibility of a statute existing without a court to enforce it; and that the Civil Court has assumed jurisdiction with apparently no legal sanction whatever.

Yet it would seem a still more anomalous state of affairs for the Civil Code to exist with no court to enforce its provisions; and more than extraordinary, that, of the forty-one titles in the Civil Code prescribing causes of action and remedies therefor, the Civil Courts should have jurisdiction to adjudicate on forty of them, but not on the forty-first.

(f) (1919) A.C. 956.

3. Jurisdiction over the parties to the suit.

To give a court jurisdiction to adjudicate in any suit it is necessary to prove that the court has not only the power to adjudicate upon the subject-matter in dispute, but also the power to make a judgment binding upon the parties to the suit. Thus, in the question of annulment of a supposed marriage, or the declaration of the validity of a de facto marriage, assuming that the court before which the claimant wishes to bring his action has jurisdiction to make a declaration of nullity or validity that is not itself a nullity, it is necessary for him to prove that the court has such jurisdiction over him as will give its declaration extra-territorial effect.

There is much conflict of opinion among the authorities as to precisely what constitutes such jurisdiction. It is variously held, and supported in each case by decisions, that the Court of a Province has jurisdiction to entertain a suit for the declaration of the nullity of an existing marriage

(1.) where the marriage was celebrated in the Province.

(2.) where the respondent is resident in the Province, not on a visit as a traveller, and not having taken up that residence for the purpose of the suit.

(3.) where the parties are domiciled in the Province. This is the most questionable.

In support of the first doctrine: that the Court of a Province can annul any marriage celebrated within its borders, Dicey (g) holds that the English Court has unquestionably jurisdiction to pronounce on the validity of a marriage celebrated in England (h). He cites as his authority Linke v. Van Aerde (i). This was a case of a Dutch couple married in England, the husband having been previously married to another woman still living. Though both had ceased to be domiciled in England, the wife sued there for declaration of nullity. Gorell Barnes,J., held that the jurisdiction of the Court to deal with the question of the validity of the marriage was clear, citing Simonin v. Mallac (j), Sottomayer v. De Barros (k), and the judgment of Brett,L.J., in Niboyet v. Niboyet (l), who said that the principles of dissolution of marriage did not apply to nullity suits, and that in these suits the validity of the ceremony was to be determined according to the laws of the place in which it was celebrated.

Dicey further contends that the Court of the country where the marriage was celebrated is specially qualified

(g) "Conflict of Laws", 3rd Edition, at p. 301.
(h) Foote, "Private International Law", 4th Edition, p.123,also takes this view.
(i) (1894) 10 T.L.R. 426
(j) 29 L.J.P.&M. 9
(k) (1877) 3 P.D. (C.A.) 1
(l) (1878) 4 P.D. 1 at p.19

to decide the validity of the marriage in point of form.

Schouler, who cites american cases (m), also thinks that a suit for annulment of the res of the marriage should be brought where the res was created; that is, in the State where the marriage was celebrated; and this he considers the correct view, even though the great weight of American authority seems to put jurisdiction for annulment on the basis of domicile, largely, he thinks, as a result of popular confusion between annulment and divorce, and partly on account of the failure of the courts to distinguish between them.

Another American authority, Goodrich, in his treatise on "Jurisdiction to Annul a Marriage" (n), holds; " Since " the question goes back to the inception of the marriage " status, it ought to be the law by which the status would " come into being that should say that despite the form they " went through they are not husband and wife.....The state " pronouncing a decree of nullity is not seeking to affect a " res over which it no longer has control; it is saying that " no res, that is, marriage relationship, ever came into being."

Westlake, however, taking the contrary view, thinks it questionable whether jurisdiction will any longer be entertained on this ground only (o), and in view of the decision in De Gasquet James v. Mecklenburg-Schwerin (p) considers that jurisdiction based on the forum contractus would now

(m) "Marriage, Divorce,etc." 6th Edition, at p.1414.
(n) 32 Harvard Law Review 806, at p.811.
(o) "Private International Law", 6th Edition, s.49.
(p) (1914) P. 53.

appear to be doubtful. The Court in that case held that the mere fact that the marriage was celebrated in England and that the petitioner was purporting to be residing there at the date of the institution of proceedings, cannot give the Court power to give a declaratory judgment as to the validity of the marriage; and, per Sir Samuel Evans, Pres., at p.69: " No authority was or could be given for the proposition that " the Ecclesiastical Courts ever pronounced such a declaratory " judgment; and no case has happened since the Act of 1857 " where this Court has done so."

The second ground of jurisdiction, that of residence of the respondent in the Province at the institution of the suit, is founded on the procedure of the Ecclesiastical Courts. The presence of the respondent withinthe limits of the jurisdiction, of his appearance in Court, was necessary in order to proceed (q). By statute (1531) 23 Hen.VIII. c.9, parties were not to cite a defendant to appear in a Court out of his diocese.

This view is upheld by a recent decision: Roberts v. Brennan (r): that matrimonial residence within the jurisdiction is sufficient to give the Court power to declare a bigamous marriage null and void, even though the domicile of the respondent be Irish, and the de facto marriage celebrated

(q) Williams v. Dormer (1851) Fust.
(1852) 2 Robs. 505
Chichester v. Donegal (1822) 1 Add.Ecc. 5,19
(r) (1902) P. 143

in the Isle of Man. Per Jeune,P., " In my view, residence -- " not domicile -- is the test of jurisdiction in a nullity " case. The jurisdiction of the Ecclesiastical Courts was " based on the residence of the parties, and in suits for " nullity, this Court follows the practice of the Ecclesias- " tical Courts as prescribed by s.22 of the Matrimonial Causes " Act, 1857."

This was followed in a B.C. case (s), in which it was further laid down that such residence must be bona fide to be competent. It need not be of long duration (t).

Goodrich, however, points out (u),that although English Courts have thus held residence in England to be sufficient to give them jurisdiction, they have not recognized foreign decrees of nullity based on residence in that foreign country: " In the case of Ogden v. Ogden (v) the French " Court had as much basis for jurisdiction as did the Court " in Bater v.Bater (w) or the Irish Court in Johnson v.Cooke (x) " In Simonin v. Mallac a previous French decree (y) was " likewise disregarded." Though the resulting situation is an unfortunate one, the doctrine that the decree of nullity of a foreign Court is not conclusive in England, is recognized to be the existing law.

It is to be noted that Simonin v. Mallac has always

(s) Purdy v. Purdy (1919) 2 W.W.R. 55
(t) Korel v. Korel, The Times, May 28,1921.
(u) At p.878, u.s.
(v) (1908) P. 46
(w) (1906) P. 209
(x) (1898) 2 Ir.R. 130
(y) (1860) 2 Sw. & Tr. 67 ; 21 L.J.P.& M. 97

been held to be "bad law", and that the case of Ogden v. Ogden, if followed literally in this country, would cause considerable inconvenience, and create a situation inconsistent with public order and good morals. In the latter case an Englishwoman married a domiciled French minor in England, without his father's consent. The father took action in France to have the marriage declared null because of non-compliance with the French law. This was granted. The wife sued for divorce in England, which was denied her on the fallacious ground that the Court had no jurisdiction. In a subsequent action taken by the man she then married, to have his marriage declared null on the ground of her having a husband then living, the Court refused to recognize the French decree and held her first marriage to be still valid and subsisting. Without in any way suggesting what the learned Judges should have decided in this case, it can be shown how impossible it would be to apply this decision to a case involving Ontario and Quebec. Quebec law requires consent of parents or guardians to the marriage of a minor. Suppose a marriage celebrated in Ontario was declared null in Quebec at the suit of the Quebec father whose consent had not been obtained; and, following Ogden v. Ogden, it was held valid in Ontario at the suit of the wife: the marriage would then be valid in Ontario and void in Quebec, the woman a wife in one Province and not in the other -- two Provinces which are under the jurisdiction of one Supreme Court. The absurdity is patent.

The third suggested basis of jurisdiction -- the domicile of the parties in the Province in which the suit is brought -- is a matter subject to much controversy; but the weight of authority seems to be against the view that the Court has jurisdiction when the parties are only domiciled in the Province (z).

Dicey is in favor of jurisdiction based on domicile. He contends that status is dependent on the decree of a nullity suit, and the Court of the domicile is the best qualified to pronounce a decree affecting status. In Ireland, the Court held sufficient the Irish domicile of the respondent husband (a). Sir Gorell Barnes is found to have said: " A " further distinction is to be noticed between the two classes " of suits, namely, that our Courts regard the Courts of the " domicile as having in general exclusive jurisdiction in the " case of divorce.....but it has frequently been held that " although the Courts of the domicile of the parties might " entertain the question of the validity of their marriage " (but he does not state where it was so held) yet that the " courts of the country in which the marriage was celebrated " will also entertain a suit to determine the same question. " It might possibly be that if a suit were brought for null- " ity on the ground of impotence, and the facts were estab- " lished in favor of the petitioner, either in the Court of " the domicile or in the Court of the country in which the " marriage was celebrated, it might be reasonable to hold

(z) Foote does not even mention domicile in treating jurisdiction in nullity, p.123.
(a) Johnson v. Cooke (1898) 2 Ir.R. 130
See also Bater v. Bater (1906) P. 209, at p.220

" that such a decree ought to be treated as universally bind-
" ing." (b) The other cases cited are less valuable since, though the parties were domiciled in England, the reports do not state whether the basis of the jurisdiction was domicile or residence. Further, Sir Gorell Barnes' opinion, above, is obiter dicta.

In favor of the view that jurisdiction can not be based on domicile, we find the dictum of Brett, L.J., in Niboyet v. Niboyet, at p.19: " The domicile of the husband " in England at the institution of the suit is the fact which " gives jurisdiction to the English Divorce Court to decree " divorce.....The same rule, I confess, seems to me to apply " for the same reason to its power to grant any relief which " alters in any way that relation between the parties which " arises by law from their marriage. It applies, therefore, " as it seems to me, to suits for judicial separation and to " suits for the restitution of conjugal rights. I do not " think it does apply to suits for a declaration of nullity " of marriage." There is also the dictum of James, L.J., at p.9, in the same case: " A decree of nullity of a pretended " marriage is quite as much a decree in rem (as one of divorce) " and has all the consequences. How would it be possible to " make domicile the test of jurisdiction in such a case ? " Suppose the alleged wife were the complainant; her domicile " would depend on the very matter in controversy. If she

(b) Ogden v. Ogden (1908) P. 46,80.

" were really married, the domicile would be the domicile of " husband; if not married, then it would be her own previous " domicile." Westlake agrees undisputedly with this, though Dicey thinks its weight is in some measure diminished by the fact that it forms part of the argument by which the Lord Justice maintained the now discredited theory that domicile was not the basis of jurisdiction in divorce. He further claims that it is merely an authority against the view that jurisdiction rests on domicile alone; that it does not assert or imply that jurisdiction in nullity can never rest on domicle. In addition, he considers it a theory difficult to maintain, in that it would mean that a marriage that can be annulled does not change the domicile of the wife; whereas, in view of the fact that marriage is assumed valid until declared null by a competent court, in which declaration the woman regains her former domicile, until so declared she must be considered to have the domicile of her husband.

Schouler states as the reason why the majority of American decisions base their jurisdiction on domicile the fact that there is in the United States much confusion between divorce and annulment, legislators in many States having treated true causes of nullity, such as bigamy, fraud, consanguinity and affinity, and so on, as causes of divorce. Goodrich supports this view, and argues most ably against domicile as a basis for jurisdiction: " A Court having a thing " before it may, by a decree in rem, change rights in the

" thing the validity of which will be recognized everywhere.
" But noone could contend that such a Court could effective-
" ly say that rights vesting under a prior decree in a differ-
" ent jurisdiction, where the res then was, had never existed.
" So here: the marriage relation is the res, and is so treated
" in divorce actions. The Court having the domicile of the
" parties has jurisdiction in rem. But it cannot set aside
" what a former sovereign controlling the res has done."

From the foregoing authorities it would thus appear that the great weight of opinion and cases holds that a declaration of annulment or validity may be obtained from the Court of a Province when the marriage was celebrated in the Province, or when the parties to the suit are bona fide resident in the Province at the institution of the proceedings; but not when the parties are merely domiciled in the Province.

Illustrations 1. A husband and wife, married in the Province of Quebec, move to Alberta , and become domiciled there. A year or so later, the husband petitions in the Province of Quebec for declaration of nullity on the ground of the wife's incapacity. The Court has jurisdiction. (c)

2. French citizens, domiciled in France, are married in Winnipeg in accordance with the formalities of Manitoba laws, but without the consents and respectful

(c) Linke v. Van Aerde (1894) 10 T.L.R. 426

requisitions and etceteras of French law. The marriage is declared null in France. The wife, residing in Manitoba, petitions to have the marriage declared null there; the husband, though still domiciled in France, is in the U.S., and does not appear. The Court has jurisdiction to entertain the suit. (d)

3. A husband and wife, French domiciled citizens, are married in Paris. They become permanently resident in Winnipeg, though retaining their French domicile. The wife petitions for declaration of nullity in Winnipeg. The Court (semble) has jurisdiction.

4. A husband and wife were married in Quebec, where they remain permanently resident. Later the wife petitions the Superior Court to have the marriage declared null. The Court has jurisdiction. (e)

5. A husband and wife were married in Ontario, where they remain permanently resident. Later the husband petitions to have the marriage declared null on the ground of his wife's incapacity. The Ontario Court has no jurisdiction to entertain the suit. (f)

6. The husband in 5. then moves to Manitoba, to obtain there a declaration of nullity. Petitions for a declaration of nullity. Evidence showing that his residence was established for the purpose of the suit only, and not

(d) Sproule v. Hopkins (1903) 2 Ir.R. 133
(e) Despatie v. Tremblay (1921) 1 A.C. 702, for jurisdiction over the suit
Roberts v. Brennan (1902) P.143, for jurisdiction over the parties
(f) T. v. B. (1907) 15 O.L.R. 224

bona fide, the Court has no jurisdiction. (g)

7. The husband in 6. returns to Ontario and applies to the Divorce Committee of the Senate for a declaration of nullity. Jurisdiction. (h)

8. A man marries A. in Calcutta. He returns to Toronto and there marries B, living A. B. learns of A's existence and petitions the High Court for declaration of nullity of the supposed marriage on the ground of his previous existing marriage. Court has jurisdiction.

As to decrees of nullity pronounced by the courts of a foreign country in respect to English marriages, the English Courts have not accorded them the same respect which they hold for foreign decrees of divorce. A declaration of nullity is not regarded as in the nature of a judgment <u>in rem</u>, and as such is not held to be conclusive and of binding force outside the jurisdiction of the court that pronounced it.

" The validity of marriage, however, must depend in a great " degree on the local regulations of the country where it is " celebrated. A sentance of nullity of marriage, therefore, " in the country where it was solemnized, would carry with it " great authority in this country; but I am not prepared to " say that a judgment of a third country on the validity of " a marriage not within its territories or had between subjects " of that country, would be universally binding. For instance, " the marriage alleged by the husband is a French marriage. " (that is, a marriage celebrated in France) A French judgment

(g) Purdy v. Purdy (1919) 2 W.W.R. 551
(h) Peppiatt v. Peppiatt (1916) 3 D.L.R. 1

" on that marriage would have been of considerable weight;
" but it does not follow that the judgment of a Court at
" Brussels on a marriage in France would have had the same
" authority, much less on a marriage celebrated here in England.
(i).

This rule would no doubt be followed in Canadian Courts, (there are no decisions in point) though in a Manitoba case (j) it was held that a foreign decree of nullity would only be recognized if on the ground of physical incapacity or bigamy, these being grounds recognized in Manitoba, but such a foreign decree would not be recognized if on grounds not held sufficient in Manitoba.

Illustration. A man, domiciled in Quebec, marries in New York, a woman domiciled in New York. He subsequently obtains from a New York Court a declaration of nullity on the ground of his wife's inconstancy before marriage--recognized in New York but not in Quebec. This annulment (semble) would not be recognized as valid in Quebec.

(i) Sinclair v. Sinclair (1798) 1 Hagg.Con. 297
(j) Wilcox v. Wilcox 24 Man.R. 93

Chapter III. Divorce.

1. Legislative Jurisdiction.

Legislative jurisdiction in matrimonial matters, as in all others, was determined by the British North America Act of 1867, (30-31 Vict. c.3 Imp.) which assigned to the Parliament of Canada all matters coming within "Marriage and Divorce",(s.91,s.s.26) and to the Legislatures of the Provinces all matters coming within "The Solemnization of Marriage in the Province" (s.92,s.s.12). The fact that "the solemnization of marriage" is thus distinguished from the general subject of marriage indicates that some colour of solemnization was considered essential by the framers of the Act for a valid Canadian marriage.

According to Soliciter-General Langevin, in a speech he delivered during the debates on Confederation in the Parliament of Canada, " The word "marriage" has been placed in the draft of the proposed Constitution to invest " the Federal Parliament with the right of declaring what " marriages shall be held valid throughout the whole extent " of the Confederacy, without, however, interfering in any " particular with the doctrines or rights of the religious " creeds to which the contracting parties may belong." The Law Officers of the Crown in England, in 1870,(k) pointed

(k) Dom.Sess.Pap. 1877, No.89, p.340

out that under the "solemnization of marriage in the Province" the Provincial Legislature had power to legislate upon such subjects as the publication and issue of marriage licenses; while "marriage and divorce" in s.91 gives the Dominion power to legislate on all matters relating to the status of marriage, between what persons and under what circumstances it can be created, and, if at all, destroyed.

The same interpretation was given by the Privy Council in 1912 in answer to several questions submitted by the Governor-General-in-Council and appealed by special leave from opinions given by the Supreme Court of Canada (1). "The " jurisdiction of the Dominion Parliament does not on the " true construction of ss.91 and 92 cover the whole field of " validity.....the provision in s.92 conferring on the prov- " incial legislature exclusive power to make laws relating " to the solemnization of marriage in the province operates " by way of exception to the powers conferred as regards " marriage by s.91, and enables the province legislature to " enact conditions as to solemnizationwwhich may affect the " validity of the contract." (m) Prima facie, the words of the Act appear to their Lordships to import that the whole of what solemnization ordinarily meant in the system of law in Provinces of Canada at the time of Confederation is intended to come within them, including conditions which affect validity. " The whole subject goes to Parliament with the one

(1) In re Marriage Legislation in Canada 1912 A.C. 880
(m) Viscount Haldane, at p.887

the Provinces prior to 1867 have remained in operation, together with the machinery for enforcing them, no repeal of their prior authority having been made by the Dominion Parliament (p); but any furtherlegislation can only be brought about according to the terms of the B.N.A.Act. Hence the Provinces that had Divorce laws or had Divorce Courts established before Confederation have Divorce Courts now -- and those that had not, can only acquire them through the instrumentality of the Dominion Parliament.

The three Maritime Provinces,-- N.B., N.S., and P.E.I. have their own divorce laws.

New Brunswick in 1791 (q) by statute enacted that all controversies in regard to marriage and divorce were to be determined by the Governor and Council, and the Governor and any five or more of the Council were to constitute a Court. In 1834 (r) the Council was divided into legislative and executive sections, and the Court made to consist of the Governor, Executive Council, and Justices of the Supreme Court or Master of the Rolls. In 1860 (s) they enacted that all divorce jurisdiction be vested in the Court of Divorce and Matrimonial Causes, one Justice of the Supreme Court being commissioned the Justice of the Court. (t)

Prince Edward Island in 1833 enacted (u) that all questions of marriage and divorce be heard by the Lieutenant-

(p) Under B.N.A.Act s.129
(q) 1791 (N.B.) c.5
(r) c.30
(s) 1860 (N.B.) c.37
(t) This jurisdiction is now contained in N.S.N.B.(1903)c.115 and 1917,c.45
(u) Am. by 5 Will.IV. c.10

Governor and his Council, and provided that the Lieutenant-Governor and five of his Council should constitute a Court to hear divorce applications, and that the Governor would depute the Chief Justice of the Supreme Court to act in his place. No appeal was provided for. The law remains as of this date.

Nova Scotia has had a Court of Marriage and Divorce since 1864, (v) consisting of the President, Vice-President, and members of the Executive Council of the Colony, the Vice-President and two Councillors being sufficient to constitute the Court. In 1866 (w), under the influence of the Divorce and Matrimonial Causes Act of England, its name was changed to the Court for Divorce and Matrimonial Causes; the Vice-President to compose the Court and be called Judge in Ordinary. An appeal on findings of law and of fact can be made within fourteen days to the Supreme Court of Nova Scotia, to be heard by three Judges of that Court and the Judge in Ordinary. (x)

As to British Columbia,-- the Matrimonial Causes Act of England came into operation on Jan.1, 1858. On Nov.19, 1858, B.C. became a British colony, and Governor Douglas, as first Governor of the Province, issued a Proclamation (y) providing, inter alia, as follows:

s.2. " The civil and criminal laws of England, as the

(v) R.S.N.S. 3rd Series (1864) c.126
(w) 1866 (N.S.) c.13
(x) This jurisdiction is now contained in R.S.N.S. (1900) vol. 2, p.862

" same existed at the date of the said Proclamation,
" and so far as they are not from local circumstances
" inapplicable to the Colony of B.C., are and will remain
" in full force within the said Colony till such time as
" they shall be altered by Her Majesty in Her Privy Coun-
" cil, or by me, the said Governor, or by such other
" legislative authority as may hereafter be legally con-
" stituted in the said Colony."

In 1877 the Supreme Court of B.C. held that "the civil and criminal laws of England", as referred to in the Proclamation of 1857 and in another of March, 1867, included the Matrimonial Causes Act of 1857, even though it did not necessarily include the machinery for carrying out that Act, but, coupled with the language constituting the Supreme Court in B.C., was a direct Legislative sanction and authority to carry out that law in the Province by local tribunals and local machinery, and clothed the Supreme Court of the Province with ample power to hear and determine divorce and matrimonial causes. (z) This decision was confirmed by the Privy Council in Watts v. Watts (a).

In 1886 the Parliament of Canada passed the N.W.T. Act, providing inter alia, as follows:

s.3. " Subject to the provisions of the next preceding
" section the laws of England relating to civil and
" criminal matters, as the same existed on the fifteenth

(y) R.S.B.C. c.115
(z) S. v. S. (1877) B.C. vol.i, pt.1, p.25
(a) 1908 A.C. 573, approving S. v.S.; Scott v. Scott 4 B.C.R. 316
Sheppard v. S. 13B.C.R. 486

" day of July, in the year of our Lord one thousand
" eight hundred and seventy, shall be in force in the
" Territories, in so for as the same are applicable to
" the Territories, and in so far as the same have not
" been, or may not hereafter be, repealed, altered,
" varied, modified or affected by any Act of the Parlia-
" ment of the United Kingdom applicable to the Territo-
" ries, or of the Parliament of Canada....." (b)

An Act passed two years later made similar provision for the Province of Manitoba. (c)

In 1919, in the cases of Walker v. Walker (d) as to Manitoba, and Board v. Board (e) as to Alberta, the Lords of the Privy Council, following the suggestion in Watts v. Watts, decided that this section of the N.W.T.Act and of the Manitoba Act, was wide enough to cover the divorce law of England as it existed on the said day of July, 1870. In Manitoba jurisdiction is vested in the Court of King's Bench; in Alberta, in the Supreme Court.

Following their ruling in Board v. Board, the Privy Council held that Saskatchewan, also, included in its substantive law the Divorce and Matrimonial Causes Act of England, and that all rights arising under that Act were to be dealt with by the Court of King's Bench. (f)

(b) 49 Vict. c.25 (Dom) (c) 51 Vict. c.33 (Dom)
(d) 1919 A.C. 947
(e) 1919 A.C. 956
(f) Fletcher v. Fletcher 50 D.L.R. 23

Ontario inherited the law of England as to property and civil rights as of October 15, 1791. On the subsequent institution of the Courts of Common Law and Chancery, their jurisdiction was limited to that possessed by the corresponding Courts in England, which did not include divorce in their system of remedies. The only Courts which in England at that time possessed such jurisdiction -- the Ecclesiastical Courts -- were never introduced into Upper Canada. " While inherent-
" ly the matter of granting a divorce involves the judicial
" process, historically and theoretically the power to grant
" a divorce a vinculo is purely legislative. Consequently
" there is no inherent jurisdiction in the common law courts
" to grant a divorce absolutely severing and cancelling the
" the marital bonds; but they have only such power with res-
" pect to granting absolute divorces as the legislative de-
" partment in the particular jurisdiction sees fit to ex-
" pressly confer on them, or such as are necessarily implied
" from those expressly given them." (g) Attempts made after the Constitutional Act to establish a Divorce Court were unsuccessful, and recourse was had to the English practice of divorce by private bill.

For local reasons arising out of the old French laws and the preponderance of those professing the Roman Catholic religion, no Court of the Province of Quebec has been

(g) Ruge v. Ruge(Wash) 165 P. 1063
L.R.A. 1917 F. 721

vested with the power of dissolving marriage a vinculo. Application for divorce, therefore, from Quebec as well as from Ontario, must be made to the Federal Legislature.

It should be noted here that the Roman Church does not recognize any dissolution of a marriage once validly solemnized; so that the divorce of a member of that Church may be valid in law though of no effect in the eyes of the Church.

Applications for Parliamentary divorce are made to the Divorce Committee of the Senate, under a set of rules adopted in 1906. Where our rules are lacking, English rules are followed. (permissive, not imperative) On the advice of the Committee a bill is passed through the Upper and Lower House. If the bill is rejected, there is no appeal, except to have the bill introduced at a subsequent session. The same principles as to proof of valid marriage, domicile of parties, and so forth, are followed as in the Provincial Divorce Courts, with the important exception that the Senate observes precedents only when it chooses, whereas the Courts are bound by prior decisions and established rules.

An important difference should be noted here between the Canadian practice and that followed in England before 1858. In England the Committee of the House of Lords that tried the case was composed entirely of members versed in the law; in Canada the Committee of the Senate is made up

without discrimination of judicial and lay members both. Further, the petitioner in England had first to obtain damages from the co-respondent in a common law action for criminal conversation, and also a decree of judicial separation in the Ecclesiastical Courts. Only then could he petition for a private bill, on presenting proof that these two preliminary actions had been successfully carried through. The facts of the case were thus found in the ordinary Courts of law, and stood unquestioned by the Committee. In Canada no such preliminary actions are necessary: the Committee hears all the evidence, sitting first as a tribunal of fact, and on the facts so found decides the merits of the case, as would a tribunal of law.

Thus the four Western Provinces have a divorce law administered through their regular Courts; the three Maritime Provinces have special Divorce Courts; and Ontario and Quebec must have recourse to Parliament.

3. Jurisdiction over the parties to the suit.

The first requisite to a valid divorce, apart from all questions of jurisdiction and competency, is that a valid marriage shall have been previously celebrated between the persons who wish to be divorced. A simple declaration and certificate of marriage will suffice to establish this unless the non-existence or non-validity of the alleged marriage be raised as a defence, in which case the petitioner must produce further proof, both as to their capacity to contract

marriage, and as to the formalities required to be observed in the place where the marriage was celebrated. (h) The marriage must be such as is recognized as a Christian marriage -- the voluntary union for life of one man and one woman to the exclusion of all others (i). Any other sort of marriage, such as that of Mormons, who recognize polygamy as lawful, is not such a marriage as can be validly dissolved by Canadian Courts.

The Court of a Province has jurisdiction to entertain a suit for the dissolution of a marriage only when the parties to it are domiciled in the Province at the commencement of the proceedings. This jurisdiction is not affected by (1) the residence of the parties,

(2) their allegiance,

(3) the domicile at the time of the marriage,

(4) the place of the marriage, or

(5) the place of the offence in respect of which the divorce is sought.

The principle that jurisdiction in divorce depends on the domicile of the married pair at the time of the suit, was not firmly established in English law until 1895. Among

(h) Brook v. Brook (1861) 9 H.ofL.Cas. 193
DeWilton v. Montefiore (1900) 2 Ch. 481
In re Bozzelli (1902) 1 Ch. 751
Simonin v. Mallac (1860) 29 L.J.(Mat) 97
Ogden v. Ogden (1908) P. 46

(i) Hyde v. Hyde L.R. 1 P.& D. 130
Brinkley v. Att.-Gen. (1890) 15 P.D. 76

the earlier cases in which was involved the question of jurisdiction, concurrent with those that held domicile essential, (j) were several holding to the theory that residence was a sufficient basis for jurisdiction. Niboyet v. Niboyet (k) was decided on that ground, on the argument that before the Matrimonial Causes Act the Bishop of the Ecclesiastical Court would have given relief to persons in the diocese, whether properly domiciled there or not, pro salute animae, and proprio vigore, and after the said Act the Divorce Courts took over the jurisdiction hitherto thus exercised by the Bishop. Brett,L.J., who dissented from this judgment, held that "the " only Court, which on principle ought to entertain the ques- " tion of altering the relation in any respect between part- " ies admitted to be married, or the status of either of such " parties arising from their being married, on account of " some act which by law is treated as a matrimonial offence, " is a Court of the country in which they are domiciled at " the time of the institution of the suit. If this be a corr- " ect proposition, it follows that the Court must be a Court " of the country in which the husband is at the time domic- " iled; because it is incontestable that the domicile of the " wife, so long as she is a wife, is the domicile which her " husband selects for himself, and at the commencement of the

(j) Dolphin v. Robins 7 H.L.C. 390
Wilson v. Wilson (1872) 2 P.& D. 435
Harvey v. Farnie (1882) 8 A.C. 43
Shaw v. Gould L.R. 3 H.L. 55
Goulder v. Goulder (1892) P. 240
(k) (1878) 4 P.D. 1,13

" suit, she is ex hypothesi -- still a wife."

In 1895, however, the decision of the Court of Appeals in Niboyet v. Niboyet was in effect over-ruled by the Privy Council in the classic case of LeMesurier v. Le-Mesurier (l) and was so treated by Barnes, J. in Armytage v. Armytage (m).

LeMesurier, a Government official resident in Ceylon, applied to the Court of Ceylon for a divorce a vinculo. He had been married in England and was still domiciled there. None of the co-respondents were even resident in Ceylon. The district judge ruled that jurisdiction to proceed in the suit was conferred on him by the local law; and a decree nisi was granted. This decision being reversed by the Supreme Court upon the facts, the question of jurisdiction was then raised. The case went to the Privy Council and judgment was delivered by Lord Watson.

The matrimonial law applicable to British or European residents in Ceylon was the Roman-Dutch law which had prevailed in the Colony before its annexation by Great Britain. The question was, whether the Roman-Dutch law gave the Courts of the island jurisdiction to dissolve a marriage contracted in England by British subjects, who though resident within the forum, still retained their English domicile. The competency of the local Court must be derived either from some recognized principle of the general law of nations,

(l) 1895 A.C. 517
(m) (1898) P. 178

or from some domestic rule of the Roman-Dutch. In the first case the decree ought to be respected by the tribunals of every civilized country. "The position that the tribunal of " a foreign country having jurisdiction to dissolve the marr- " iages of its own subjects, is competent to pronounce a " similar decree between English subjects who were married " in England, but who before and at the time of the suit, are " permanently domiciled within the jurisdiction of such for- " eign tribunal, such decree being made in a bona fide suit " without collusion or consent, is a position consistent with " all English decisions..."(n). On the other hand, when jurisdiction is derived solely from a rule of municipal law peculiar to its forum, the decree a vinculo can not, " when " it trenches upon the interests of any other country to whose " tribunals the spouses were amenable, claim extra-territor- " ial authority." As Lords Cranworth and Westbury held in Shaw v. Gould, though they did not go the length of saying that the Courts of no other country could divorce spouses who were domiciled in England, " the Courts of England were not " bound by any principles of international law to recognize as effectual the decree of a foreign Court divorcing spouses " who, at its date, had their domicile in England." And the principle generally recognized by authorities on international law is that in actions of divorce, the Court of the domicile is the only competent Court.

(n) Lord Westbury in Shaw v. Gould L.R. 3 H.L. 55,85

Their Lordships, on these considerations, came to the conclusion that the domicilefor the time being of the married pair, affords the only true test of jurisdiction to dissolve their marriage. They concurred without reservation in the views expressed by Lord Penzance in Wilson v. Wilson (p) " ....the only fair and satisfactory rule to adopt on " this matter of jurisdiction is to insist upon the parties " in all cases referring their matrimonial differences to the " Courts of the country in which they are domiciled. Differ- " ent communities have different views and laws respecting " matrimonial obligations and a different estimate of the " causes which should justify divorce. It is both just and " reasonable, therefore, that the differences of married peo- " ple should be adjusted in accordance with the laws of the " community to which they belong, and dealt with by the trib- " unals which alone can administer those laws. An honest ad- " herence to this principle, moreover, will preclude the scan- " dal which arises when a man and woman are held to be a man " and wife in one country, and strangers in another." LeMesurier, therefore, lost his suit, as, not being domiciled in Ceylon, the Ceylon Court could not grant him a divorce.

There has been a similar question in the United States over the case of Haddock v. Haddock (q) , in which the Connecticut Divorce Court granted a decree of divorce to a petitioner who had not his matrimonial domicile in

(p) L.R. 2 P.& D. 435,442
(q) 201 U.S. 562

Connecticut but who complied with the requirements as to service on the defendant, and so forth. The Connecticut Court had jurisdiction to pronounce the decree according to the divorce statutes and judicial decisions of Connecticut; but when the validity of the divorce was questioned in a New York Court, it was the inter-state jurisdiction of the Connecticut Court that was in issue. For there is a well-defined distinction between the jurisdiction of a Court derived from rules of that law peculiar to the country in which the Court sits, and jurisdiction derived from rules of that law common to all countries, or international law.

There is a further argument raised in favor of jurisdiction being based on domicile, in that the dissolution of a marriage affects the status of the parties to it; and it is now a recognized rule of international law that questions affecting status can be validly adjudicated upon only by the Courts of the domicile.

Illustration H, domiciled in Canada, is divorced from W, his wife, in the United States, at W's instance. H then marries C in the United States, As the American Court had no true jurisdiction over the parties, the second marriage is bigamous and adulterous, and H and W are under a legal incapacity to marry again. On petition in Canada, C applies for and obtains declaration of nullity of the marriage to H. (r)

(r) Conway v. Beazley 3 Hagg. 639

(2) H and W are married in England. They move to Manitoba, where W deserts her husband. H removes to B.C. to live, and there establishes a bona fide domicile. W never goes to B.C., nor does H invite her to join him there. H petitions in B.C. for divorce against W. The Court has jurisdiction and grants divorce. (s)

It is quite essential in discussing jurisdiction in divorce to define clearly the term "domicile". A definition which covers all cases except domicile by operation of law, suggested by those of several writers on Private Internationl Law, is this: -- Domicile is the place or country in which a person resides with the animus manendi or intention of remaining there, or which, having once so resided there, he has not since abandoned. In the absence of his acquiring any new domicile, a man's domicile is his domicile of origin.(t) The domicile of origin; that is, the domicile which a person acquires during minority by reason of its having been the domicile of his father or of his guardian, persists unless a fixed and settled intention of abandoning it and acquiring another as the sole domicile is clearly shown. (u)

Illustration: H petitioned for a divorce from his wife W, on account of her adultery. He alleged in his petition that he was domiciled in England. No defence. Decree nisi pronounced. Afterward it turned out that H was mis-

(s) Cutler v. Cutler 20 B.C.R.34
(t) Goulder v. Goulder (1892) P.240
(u) Coleman v. Coleman (1919) 3 W.W.R. 490

taken in believing himself domiciled in England. Petition was thereupon dismissed and the decree nisi rescinded with costs. (v)

Where the evidence shows a change of domicile just previous to the institution of the action in divorce, the Court generally requires very clear proof that it is a bona fide change of domicile, and not change of residence, with a mere pretence of permanence. In a case decided in B.C. (w) when that Province was still the only one west of New Brunswick exercising divorce jurisdiction, the question turning on the appellant's domicile, the judge stated decisively that the Court must find a fixed intention on the part of the appellant to make that Province his permanent home, for, " this Province may be a haven of refuge; it should not be " a mere port of call."

Illustration : H, a travelling salesman, and his wife, reside in Toronto. H goes to Halifax with the intention to reside there permanently, but W refuses to follow him. After boarding in Halifax a year, H petitions for divorce, declaring it to be his permanent intention to make it his home. The Court holds that his mere statement of an intention, which might be consistent with the establishment of a temporary home, uncoupled with the fact of permanent residence, is insufficient to establish domicile. Therefore

(v) Barlow v. Barlow (1911) The Times, July 7, 1911
(w) Adams v. Adams (1909) 14 N.C.R. 301,307

the Court has no jurisdiction.(x)

The domicile must be a genuine one, and the proceedings to obtain the decree of dissolution must be free from collusion or fraud.(y)

Illustration: H petitions in Canada for divorce against W his wife. Petition dismissed. By arrangement with C, co-respondent, a fraudulent domicile is established for all parties in the United States. A decree of divorce is there obtained. This divorce is invalid in Canada by reason of want of jurisdiction and collusion. The subsequent marriage of W to C is null and bigamous.(z)

The domicile of a married woman is during coverture, the same as, and changes with, the domicile of her husband. (a) The fact that a wife lives apart from her husband, or that they have separated by agreement, does not enable her to acquire a separate domicile, according to English (and to Canadian) law.

Illustration (1) W, an Englishwoman, marries H, a domiciled Englishman. They separate; H resides in Scotland. W follows him and there obtains a divorce. She then marries F, a domiciled Frenchman and resides in France. H remains domiciled in England. The Scotch divorce, being invalid, W is still the wife of H, and is held to be still domiciled in England at her death. (b)

(x) Walcott v. Walcott (1915) 23 D.L.R. 641
(y) Bonaparte v. Bonaparte (1892) P. 402

(2) H, domiciled in Ontario, marries W. H leaves his wife, and residing temporarily in B.C., gives her grounds for divorce. W can only institute proceedings for divorce in Ontario.

If, however, H, leaving W, makes his permanent home in B.C., W may sue in B.C. for a divorce, and not in Ontario.

The American Courts do not adhere strictly, as do the English and Canadian Courts, to this rule as to domicile, but allow each a separate domicile; the wife, if separated from her husband being permitted to acquire a domicile of her own.

Jurisdiction is not affected by the residence of the parties at the time of the suit. In Goulder v. Goulder (c), in which the parties, though domiciled in England, had resided in France for many years, Lopes,L.J., said: " The " English Divorce Court has jurisdiction to dissolve the marr- " iage of any parties domiciled in England at the commence- " ment of such proceedings, and this, independent of the res- " idence of the parties, the allegiance of the parties, the " domicile of the parties at the time of the marriage, the

(z) Bonaparte v. Bonaparte
(a) Dolphin v. Robins (1859) 7 H.L.C. 390
Warrender v. Warrender (1835) 2 Cl.& F. 488
In re Daly's Settlement (1858) 25 Beav. 456
In re Mackenzie (1911) 1 Ch. 578
(b) Dolphin v. Robins
(c) (1892) P. 240

" place of the marriage, or the place where the matrimonial " offence or offences have been committed." (d)

Illustration H and W are domiciled in Alberta but reside in P.Q. W gives H grounds for divorce. H, though residing in Quebec, obtains a divorce through the Alberta Court. (e)

The allegiance of the parties, that tie by which a person is connected with a State as being a subject of the sovereign of such State, has no effect on the jurisdiction. (f) Those countries which hold to the rule that status depends upon nationality or allegiance, hold that the allegiance of parties to a divorce action is material to jurisdiction; but the English idea consistently holds that civil, as contrasted with political, status depends upon domicile, so that the jurisdiction of the English Court to grant a divorce is not affected by the allegiance of the parties. In Niboyet v. Niboyet, though the defendant husband was a French citizen, no objection was raised on the ground of his allegiance.

Illustration H and W are German citizens, domiciled and resident in Winnipeg. H petitions for a divorce against W. The Manitoba Court has jurisdiction. (g)

(d) See also Gillis v. Gillis (1874) 8 Ir.R.Eq. 597
Wilson v. Wilson (1872) L.R. 2 P.& D. 435
LeMesurier v. LeMesurier (1895) A.C. 517
Dolphin v.Robins, u.s.
(e) Goulder v. Goulder, u.s.
Gillis v. Gillis, u.s.
(f) Goulder v. Goulder ; Niboyet v. Niboyet (1878) 4 P.D. 1

The domicile of the parties at the time of the marriage, the place of the marriage,(h) and the place in which the matrimonial offence was committed (locus delicti) (i) are of no materiality in divorce. The decisions in Wilson v. Wilson (j) and Goulder v. Goulder (k) are alone sufficient to establish this. Nor do any of these facts have any bearing on grounds for divorce; no matter what the place of the marriage or the place of the offence, the offence must be one recognized by the law and practice of the Province as competent grounds for a divorce in that Province.(l)

Illustration (1) H and W, Scotch, are, when domiciled in Scotland, married at Edinburgh. They afterwards come to Canada and acquire a domicile in Saskatchewan. H deliberately deserts his wife for more than four years. Under the law of Scotland such desertion is a cause for divorce. Not so under the law of Saskatchewan. The Court of Saskatchewan, therefore, though having jurisdiction over the parties, will not grant a divorce to W.

(2) H and W are Americans, married in New York, and there live together. H discovers his wife's

(g) Niboyet v. Niboyet, u.s.
(h) Warrender v. Warrender, u.s.
Harvie v. Farnie 8 A.C. 43
Ratcliffe v. Ratcliffe (1859) 1 Sw.& Tr.467
See also Bolté v. Brière 49 Que.S.C. 229
(i) Deck v. Deck 29 L.J.Matr. 129, 2 Sw.& Tr. 90
(j) (1872) 2 P.& D. 435
(k) (1892) P. 240
(l) This is true in American decisions also. Bishop,ss. 709, 740, 741,745.

faithlessness, breaks up his home, and moves to Vancouver, where he makes his permanent home. He there petitions for a divorce. The Court has jurisdiction. (m)

(3) H and W in 2. above are domiciled in New York at the time of the marriage. The B.C. Court has jurisdiction. (m)

(4) The offence of the wife for which H sought a divorce was committed in South Carolina. The B.C. Court has jurisdiction. (m) (There is no divorce in South Carolina.)

(5) H and W are Canadians domiciled in Canada. W petitions for divorce against H for offences committed in the United States. Canadian Court has jurisdiction.(n)

It is to be remembered that if there is in fact no jurisdiction, the consent of the defendant to appear, and to acquiesce in the judgment, does not give an incompetent Court jurisdiction to decree a valid divorce.(o) If, however, as in Armitage v. Att.- Gen. (p), the Court of the domicile would recognize a decree obtained in a State in which the parties were not domiciled, the Courts of this country will recognize it.

G, an American citizen, domiciled in New York and resident in England, who had never abandoned his domicile of origin, married an Englishwoman in England. She

(m) Wilson v. Wilson (1872) 2 P.& D. 435
(n) Deck v. Deck 2 Sw.& Tr. 90; 29 L.J.Mar. 129
(o) Cass v. Cass (1910) 108 L.T. 397
(p) (1906) P. 135,140

later instituted proceedings for a divorce in the State of South Dakota, where she was resident; G put in an answer and cross-claim, the latter being dismissed, and a declaration of dissolution was pronounced, on the wife's petition, on a ground which would not constitute a ground either in the Courts of the husband's domicile or in England. On evidence which satisfied the English Court that such a decree would be recognized as valid by the Courts of the husband's domicile (that is, New York), the divorce was recognized as valid by the English Court.

The Court of a Province has no jurisdiction to entertain a suit for the dissolution of a marriage when the parties to it are not domiciled in the Province at the commencement of the proceedings.(q) Though at one time it was held that residence short of domicile might be sufficient this can no longer be maintained in the face of LeMesurier v. LeMesurier. Nothing less than a real and genuine domicile will suffice.(r)

Illustration H and W are domiciled in New York. W, resident in Halifax, petitions the Nova Scotia Court for divorce against H, who appears under protest. The Nova Scotia Court has no jurisdiction. (s)

The domicile being that of the husband in all cases, if this rule were carried strictly to its logical conclusion, an

(q) Casdagli v. Casdagli (1919) A.C. 145
(r) Barlow v. Barlow (1911) The Times, July 7,1911

injured wife could never obtain relief from her marital obligations except in the Court of her husband's domicile, whatever that might be. There has of late been a tendency, however, in the English Courts, to relax this rule, and to allow a woman under certain limited circumstances to acquire a separate domicile from that of her husband for the purpose of a divorce.

Where a husband or the parents of a husband domiciled abroad has or have obtained a decree of nullity in the Court of his foreign country of a marriage validly celebrated in England, and the wife, whose domicile was in England, is thus debarred from obtaining relief in the foreign Court, she may be treated as having a domicile of her own sufficient to give the English Court jurisdiction to entertain a suit by her for dissolution of the marriage.(t) If the husband has deprived her of her right of action in the forum to which she should properly have recourse, the Courts of her former domicile will, for the sake of preventing gross injustice, permit of this important exception to the rule as to domicile. It is an exception that sets aside two of the best-established principles with regard to the conflict of laws that are to be found in the law of England -- that the domicile of a married woman is the same as that of her husband; and that the Courts of no country have jurisdiction to divorce anyone not domiciled therein -- yet under similar

(s) LeMesurier v. LeMesurier
(t) Stathatos v. Stathatos (1913) P. 46
Followed and approved by de Montaigu v. de Montaigu (1913) P. 154

circumstances these two cases would undoubtedly be followed as precedents, in Canadian as well as in English Courts. It is but another instance of the co-relation of hard cases and bad law.

Illustration (1) H, a Greek subject there domiciled, marries W in Canada, and the marriage is valid by Canadian law. H and W go to Greece to live. H, tired of W, sends her back to Canada, and while she is in Canada, obtains from the Greek Court a declaration of the nullity of the Canadian marriage on the ground that there was no Greek priest present. H then re-marries in Greece. W petitions in Canada for divorce from H, who does not appear. The Court has jurisdiction and grants divorce. (u)

(2) H is a French citizen, domiciled in France, studying in Ontario. He marries W, domiciled in Ontario. The marriage is a valid Canadian marriage. They live in France for some time. H's father takes proceedings and has the marriage declared null on the ground of non- compliance with the C.N. in respect of publication at the Church, registration of the marriage on return to France, respectful requisitions to the parents, and clandestinity of celebration. W petitions in Canada for divorce. The Court has jurisdiction and grants divorce. (v)

As to a co-respondent, the English Courts have held

(u) Stathatos v. Stathatos
(v) de Montaigu v. de Montaigu

that they have no jurisdiction over a co-respondent domiciled abroad.(w) He will on his own application be dismissed from a suit, notwithstanding the fact that he has may have entered an appearance without protest.(x) The petitioner may, however, obtain leave to proceed without him. The Canadian Courts would undoubtedly follow the English decisions on this point.

The English and Canadian Courts have long since abandoned the idea that a marriage celebrated within their territorial limits can not be dissolved by the Courts of any other country, and now hold strongly to the view that where the parties to a marriage have acquired a genuine domicile in a foreign country, a divorce pronounced by the Courts of such country will be recognized as valid.(y) Thus a Canadian marriage can be dissolved by other than Canadian Courts, if the parties have a bona fide domicile within their jurisdiction,(z) and Canadian Courts will recognize such a divorce as valid even though it be granted for causes which would not be held sufficient under Canadian law.(a)

Illustration (1) H and W are married in B.C., become dom-

(w) Baker v. Baker & D. (1908) P. 257
(x) Vardopulo v. Vardopulo (1909) 25 T.L.R. 578
Levy v. Levy (1908) P. 256
(y) Lord Penzance in Shaw v. Gould (1868) L.R. 3H.L. 55,90,91
(z) Gregory v. Odell 39 Que.S.C. 291
(a) Harvey v. Farnie (1882) 8 A.C. 43
Bater v. Bater (1906) P. 209 (C.A.)

iciled in the State of Washington. There H obtains a divorce for incompatibility of temper which makes it impossible for them to live together. The decree (semble) would be recognized by Canadian Courts.

(2) H and W were married in England, and H later took divorce proceedings in England, which were unsuccessful. H went to New York and acquired a domicile there. W followed him and instituted divorce proceedings against him in New York, obtaining a decree on grounds which would have been insufficient in England, but which were sufficient in New York. W then married B. Ten years later, B, desiring a change, petitioned in England to have his marriage declared null on the ground of W's previous husband being still existing. The divorce was held to be valid in England, and the second marriage good.(b)

If, however, the cause of divorce be the mere pleasure of one of the parties, as in the case of some Mohammedan marriages, this rule would not hold; in such a case the marriage would never have been a true marriage in the sense in which it is understood in Private International Law, and so would not fall under the rules relative to the dissolution of valid marriages. Similarly, a Turkish divorce, procured by an Ottoman subject, who had married an English wife, was not permitted to operate upon property rights in England to

(b) Bater v. Bater

the full extent of the Turkish law.(c)

English and Canadian Courts ordinarily treat with extreme caution and open disfavor divorces obtained in the United States, because of the laxity of their rules as to domicile and because of the ease with which, in most States, divorces can be obtained under statutory provisions.

A foreign divorce, therefore, pronounced by the Divorce Court of a country in which the parties are bona fide domiciled for the time being, will dissolve a Canadian marriage and be held valid by the Canadian Courts.

Illustration (1) H and W, married and domiciled in Canada, obtain a divorce in the State of Washington. H marries, again, and is convicted of bigamy in Canada.(d)

(2) H and W are married and domiciled in Canada. They go to one of the States to found jurisdiction for divorce according to law of that State. Divorce there obtained is not valid.(e)

(3) H and W are domiciled in Canada. W leaves H, and after residing in Iowa for two-and-a-half years, obtains from a competent Court a divorce on grounds which would not be sufficient in Canada. She re-marries. This marriage is bigamous.(f)

(c) Colliss v. Hector (1875) L.R. 19 Eq. 334
(d) Lolley's Case (1812) 1 Russ.& Ry. 237
foll. by Conway v. Beazley (1831) 3 Hagg. 639
(e) Dolphin v. Robins 7 H.L.C. 390
Shaw v. Gould L.R. 3 H.L. 55
Tollemache v. Tollemache (1859) 1 Sw.& Tr. 557
(f) Shaw v. Att.-Gen. (1870) L.R. 2 P.D. 156

(4) H, domiciled in Canada, marries in Toronto W, who is domiciled in Pennsylvania. W leaves H and returns to her home. She institutes proceedings for divorce on alleged grounds of cruelty, jurisdiction being founded on statutory rule of Pennsylvania that the Divorce Court has jurisdiction over a woman, formerly citizen of the State, who is forced to leave her husband, citizen of another State, by reason of his cruelty. H does not appear. W's decree of divorce and subsequent re-marriage are void, and H can obtain divorce in Canada on the ground of W's adultery.(g)

(g) Green v. Green (1893) P. 89

Chapter IV. Other Matrimonial Causes.

1. Authority of Husband over Wife and Children.

The authority of a husband over his wife is governed by the law of the Province in which they are for the time being resident. No greater authority than this will be recognized by the Courts of this country, even though by the law of his own country, if he be a foreigner, a man may have had greater powers than are accorded him in Canada. Thus a Frenchman, living in Quebec, is no more allowed to coerce his wife by violent physical means than is a domiciled citizen of the Province, though in France he may, according to some authorities, force her to return to the conjugal home manu militari. Neither his domicile nor his nationality are material.

The authority of parents over their children is similarly governed by the laws of the Province in which the parents are resident. In a judgment of the House of Lords: " The law of this country regulates the authority of the " parent of a foreign child living in England by the laws of " England, and not by the laws of the country to which the " child belongs." (h)

2. Jactitation of Marriage.

The action for jactitation of marriage is so very rarely taken as to be of little importance. Its object is to

(h) Johnstone v. Beattie (1843) 10 Cl.& F. 42,114

silence the boasting of a person who falsely alleges that a marriage has taken place between himself and the petitioner. Should such an action ever be brought in Canada, the Courts would no doubt adhere to the principle laid down in English cases, that the residence of the respondent within the jurisdiction of the Court is the test of jurisdiction.

3. Restitution of Conjugal Rights.

A suit for restitution of conjugal rights is an action by one spouse to compel the return to the matrimonial home of the other, who has left for no reasonable cause. Blackstone's definition is clear: " The suit for restitution " of conjugal rights is brought whenever either husband or " wife is guilty of the injury of subtraction or lives sep- " arate from the other without any sufficient reason, in " which case they will be compelled to come together again, " if either party be weak enough to desire it, contrary to the " inclination of the other." There is no doubt that such an action has never been taken with the expectation that the decree will be obeyed: its real usefulness lies in the legal consequences of non-compliance. A defendant upon whom a decree for restitution of conjugal rights has been served, who fails to obey the decree, is thereupon guilty of statutory desertion, (i) Such statutory desertion can then be offered by the petitioner as one of the grounds for judicial separation or divorce in a subsequent suit. A suit for restitution, therefore,

(i) English statute : 47-48 Vict. c.68, s.5
Russell v. Russell (1895) P. 315

is merely a means to an end, but yet in many cases, an indispensable means.

The action exists in Canada. The Alberta Court recognized that fact in Torsell v. Torsell (j), where it was held that if cruelty is set up as a defence to an action for restitution of conjugal rights, it is not necessary to establish cruelty of the special kind required to be shown by the plaintiff in a suit for judicial separation.

The Civil Code of Quebec declares that "a wife is " obliged to live with her husband, and to follow him wherever " he thinks fit to reside," (C.C.175) The Superior Court held that the husband has an action in law to compel his wife to live with him. (k) This action is evidently similar to the common-law action, though not known under the same name.

A suit for restitution of conjugal rights is maintainable if the parties to the suit were domiciled within the jurisdiction of the Court at the institution of the proceedings; of had their matrimonial home within the jurisdiction when cohabitation ceased; or were both resident within the jurisdiction at the institution of the action.(l)

The earliest authority in favor of residence as a basis of jurisdiction is Yelverton v. Yelverton (m). In this the defendent was originally an Irishman who had never acquired an English domicile nor resided in England, and was not even temporarily in England at the institution of the suit. The Court had no jurisdiction over him. In Firebrace v. Fire-

(j) 16 A.L.R. 200
(k) Fisher v. Webster (1894) 6 Que S.C. 25

brace (n) though the husband had previously been temporarily resident in England, as he had left before the petition was presented, the Court held it had no jurisdiction over him: he was out of England and beyond the control of the Court. The primary object in such a suit is to control the wandering spouse,-- to put the laws of England in force against a husband to compel him to take his wife back into a common home. "As the obligation of a foreigner to obey the laws of " this country lasts no longer then the time during which he " is resident within its jurisdiction, the tribunals of this " country cannnot call upon him to obey those laws after the " obligation has ceased." (o)

Thornton v. Thornton (p) recognized jurisdiction over the parties where the petitioner, the wife, was resident in England, and the defendent husband resident only on short leave from India.

Gorell Barnes,J., in Armytage v. Armytage (q) after examining all the authorities, asid " I conclude from the " writers to whom I have referred that most of them are dis- " posed to consider that the Courts of the country in which " the parties are living, though not domiciled, ought to " have the right in a matrimonial suit to afford protection " to an injured party from the cruelty of the other party."

In favor of domicile as a basis for jurisdiction,

(l) Perrin v. Perrin (1914) P. 135 in which Sir Samuel Evans collected previous decisions and stated this principle as a rule of the Court.
(m) (1859) 1 Sw.& Tr. 574
(n) (1878) 4 P.D. 63
(o) Hannen,J.
(p) (1886) 11 P.D. 176
(q) (1898) P. 178

we find the judgment of Brett,L.J., in Niboyet v. Niboyet.(r) The exclusive rule of domicile applies as to the Courts'"power " to grant any relief which alters in any way that relation " between the parties which arises by law from their marriage. " It applies, therefore, as it seems to me, to suits for " judicial separation and to suits for restitution of conju- " gal rights."

Where neither party to a marriage is domiciled or resident within the jurisdiction, and their only connection with this country at the date of the marriage is that the marriage was celebrated here, and their only matrimonial residences are abroad, the Court will not decree restitution of conjugal rights.(s)

Service of the petition for restitution of conjugal rights may be made on the respondent even if he be temporarily out of the jurisdiction. Chichester v. Chichester held contra,(t) but Bateman v. Bateman (u) held such service good. Per Gorell Barnes,J.; " It seems to me,that in all these cases, " if you serve a respondent at a place which, although outside " the jurisdiction, is one from which he can reasonably get " back to his wife within the time limited in the decree, " it is reasonable to hold that it is good service."

Likewise the decree for restitution of conjugal

(r) (1878) 4 P.D. 1,19
(s) De Gasquet James v. Mecklenburg-Schwerin (1914) P. 53
(t) (1885) 10 P.D. 186
(u) (1901) P. 136

rights may be served on a respondent temporarily resident out of the jurisdiction, if he is, for all practical purposes, as well able to comply with the decree within the time limited therein, as if he had been served within the jurisdiction. (v) Under the old Ecclesiastical practice it was not possible to effect service abroad, but the Matrimonial Causes Act of 1884 changed this, at least with respect to England.

Illustration (1) A husband and wife are domiciled in New York and resident in North Dakota. They were married in Winnipeg, coming there for one day for that purpose. The wife returns and petitions for a decree of restitution of conjugal rights. The Court has no jurisdiction. (w)

(2) A domiciled Irishman marries in New York a woman from Alberta. They reside at various places in the United States and Canada, until the husband deserts his wife in California, returning to New York. She comes back to Alberta and petitions for restitution. The Court has no jurisdiction.(x)

(3) Facts as in (2), except that they are resident in Calgary when the husband deserts, the wife remaining there. The Court has jurisdiction (y),.

(4) A husband, domiciled in Manitoba, leaves his wife and goes to Cuba, their matrimonial residence at the time being Wisconsin. The wife petitions in Manitoba for a decree of restitution. The Court has jurisdiction, and service on the respondent in Cuba is good. (y)

(v) Dicks v. Dicks (1899) P. 275.
(w) De Gasquet James v. Mecklenburg-Schwerin
(x) Yelverton v. Yelverton
(y) Perrin v. Perrin

4. Judicial Separation.

Since the Divorce and Matrimonial Causes Act of 1857, the divorce a mensa et thoro of the old Ecclesiastical Courts has become judicial separation under the common law. The Western Provinces, therefore, have the remedy of judicial separation. The Courts of Ontario, though they can no dissolve a marriage, have the power, under the name of alimony, to adjudge what is tantamount to a divorce a mensa et thoro.(z) In Quebec, the Civil Code provides for divorce a mensa et thoro for specific causes. (a)

The action for judicial separation is one instituted for the protection of a wife or a husband from the cruelty or inconstancy of the other, -- for "the health of the soul" -- and not for the dissolution of a marriage. The decree does not dissolve the marriage under a prohibition not to re-marry: it does not affect the marriage bonds at all. Consequently it does not affect the status of the parties, so as to make domicile the necessary test of jurisdiction. Residence is sufficient, the matrimonial residence within the jurisdiction of the Court at the commencement of the suit.

Lord Watson enunciated this principle in LeMesurier v. LeMesurier (b): " There are unquestionably other remedies " for matrimonial misconduct, short of dissolution, which " according to the rules of the jus gentium may be administered

(z) Peppiatt v. Peppiatt 30 D.L.R. 1, Meredith, C.J.C.P.
(a) C.C. 186-217
(b) 1895 A.C.

" by the courts of the country in which spouses, domiciled
" elsewhere, are for the time resident. If for instance,
" a husband deserts his wife, although their residence be of
" a temporary character, these courts may compel him to ali-
" ment her; and in cases where the residence is of a more
" permanent character, and the husband treats his wife such
" a degree of cruelty as to render her continuance in his
" society intolerable, the weight of opinion among internation-
" al jurists and the general practice is to the effect that
" the courts of the residence are warranted in giving the
" remedy of judicial separation without reference to the
" domicile of the parties."

This was acted on in Armytage v. Armytage (c) and in Anghinelli v. Anghinelli (d). In the former case Gorell Barnes,J. pointed out the inadequacy of the remedy were it necessary to resort to the domicile of the parties. In the case where cruelty is the ground for separation, it can be clearly seen that the Court of the place where the parties are resident should be competent to protect the injured one. Police protection is an inadequate remedy, and the Court of the domicile too remote. As to the objection that a decree of judicial separation affects the status of the parties,
" ....the relief is to be given on principles.....conformable
" to the principles....on which the Ecclesiastical Courts
" gave relief.....the effect of the sentence was to leave the
" legal status of the parties unchanged." There is no

(c) (1898) P. 178
(d) (1918) P. 246 See also Christian v. Christian 78 L.T. 86 and E. v. E. (1907) 23 T.L.R. 364

doubt that under the old practice an injured wife or husband could appeal to the Bishop of the diocese for protection and succour.

The residence which founds jurisdiction must be bona fide, not mere temporary residence, and not casual, or as a traveller.(e)

The place of the misconduct is immaterial,(f) as is domicile and nationality, provided there is proper residence.(g)

The Court of the domicile is not entirely without its supporters: there is always at least one authoriy opposed to every accepted rule. In this instance it is a Quebec judgment: " Dans la demande en séparation, soit de corps et " de biens, soit di biens seulement, l'assignation doit être " donnée devant le tribunal du domicile de l'époux. Si " l'époux a abandonné son domicile, cette assignation doit " être faite devant le tribunal du dernier domicile commun " des époux."(h)

The effect of a sentence of judicial separation is to leave the status of the parties unchanged. It is consequently a judgment having no extra-territorial effect. It can be enforced against the parties only so long as they choose to remain within the jurisdiction of the Court which pronounced it.

(e) Manning v. Manning (1871) L.R. 2 P.& D. 223
(f) Armytage v. Armytage ; Anghinelli v. Anghinelli: Jamieson v. Jamieson (1908) 14 B.C.R. 59
(g) Anghinelli v. Anghinelli
(h) Bonin v. Bergeron (1912) 18 R.de J. 355

Illustration (1) A husband and wife are domiciled in Flo-
ida, and while travelling through Missouri, he treats her with such cruelty that she returns to Manitoba where she was formerly domiciled, and makes her home there. On the husband following her to force her to return to him, she sues for judicial separation. The Court has jurisdiction.(i)

(2) A husband and wife had been living in Montreal. Owing to his acts of cruelty and misconduct generally the wife leaves her husband and goes to B.C. to live with a sister. He follows and attempts further acts of cruelty. The wife petitions for judicial separation. The Court has jueisdiction.(j)

5. Alimony.

Alimony is a matter of civil rights arising out of the relationship of husband and wife, and is therefore a matter within the legislative jurisdiction of the Province. It is not a matter of "Marriage and Divorce", assigned by the B.N.A.Act to the Dominion Parliament. The Provincial statutes conferring jurisdiction to grant alimony in certain cases on the Courts of the four Western Provinces are almost identical. They provide that the " Court shall have juris-
" diction to grant alimony to any wife who would be entitled
" to alimony be the law of England, or to any wife who would
" be entitled by the law of England to a divorce and to

(i) Armytage v. Armytage
(j) Jamieson v. Jamieson

" alimony as incident thereto, or to any wife whose husband " lives separate from her without any sufficient cause and " under circumstances which would entitle her by the law of " England to a decree for restitution of conjugal rights...." (k). " The law of England" here referred to has been generally held to be the law as of July 15,1870 (1), but in an Alberta decision (m) it was held to mean the law of England without reference to any date. Consequently all amendments to the English law ipso facto become law in Alberta.

Alimony in the form of separate relief is very rarely granted. As it is usually sought collaterally in the course of a matrimonial suit, such as for divorce or judicial separation, the question of the jurisdiction of the Court over the parties is determined not in connection the claim for alimony, but with regard to the primary object of the proceedings. In a suit for divorce, with a counter-claim for alimony on the part of the respondent wife, if the Court has jurisdiction to grant a divorce, it has jurisdiction to allow the wife alimony, in its discretion.

Illustration A woman sued in Alberta on a judgment recovered in the State of Washington for permanent alimony in connection with a divorce granted by the Washington

(k) (Alta) The Supreme Court Act 1907, c.3.,s.16
now contained in Judicature Act 1919 c.3.,s.26
(B.C.) Rule No.1040a. which has the force of a statute
(Man) King's Bench Act R.S.M. 1913 c.46,s.217
(Sask) King's Bench Act R.S.S. 1920 c.39,s.22(1)

(l) Harris v. Harris (1895) 3 Terr.L.R. 289
A. v. A. (1906) 15 Man.L.R. 483
Brown v. Brown (1909) 10 W.L.R. 120

(m) Torsell v. Torsell (1921) 16 Alta.L.R. 200

Court. At the time of the Washington suit, the defendant husband was domiciled in Canada. Held that as the Washington Court had no jurisdiction to entertain the action for divorce, it had no jurisdiction to grant alimony, and the judgment could not be enforced in an Alberta Court. (n)

The Court has jurisdiction to allot alimony pendente lite, even though a substantial question as to the jurisdiction of the Court has been raised by the respondent, and is awaiting determination. (nn)

The Alberta Courts have been held to have jurisdiction to grant interim alimony (o) and Saskatchewan Courts have taken the contrary view (p), following a Nova Scotia decision, (q) based on the fact of their identical statutory provisions.

As to the extra-territorial effect of a foreign judgment for alimony, an action has been held to lie in B.C. for arrears of alimony and maintenance under a consent judgment in Ontario, confirming an agreement between the parties, whether or not an Ontario judgment for alimony under the usual decree can, having regard to the power of the Ontario Court to abrogate or enforce the allowance, be enforced. (r)

(nn) Ronalds v. Ronalds (1875) 3 P.& D. 259
(n) Casavallo v. Casavallo (1911) 4 A.L.R. 6
foll. Magurn v. Magurn (1885) 11 P.A.R. 178
(o) Secrest v. Secrest (1912) 5 A.L.R. 389
Riddell v. Riddell (1913) 7 A.L.R. 3
followed by East v. East (1915) 7 W.W.R. 1239
(p) Sunderland v. Sunderland (1914) 6 W.W.R. 40
(q) Dorey v. Dorey 46 N.S.R. 469
(r) Hadden v. Hadden (1899) 6 B.C.R. 340

6. Custody of Children.

In awarding the custody of children, either incidentally to a matrimonial suit or on a petition or writ of habeas corpus, the welfare of the child is the first consideration.(s)

Where a decree of judicial separation or of divorce, whether nisi or absolute, or a declaration of nullity is pronounced, the Court has jurisdiction, in its discretion, to award the custody of the minor children of the marriage to either parent, or if neither of them are fit guardians, to a third party.

If the Court has jurisdiction over the parents, it has jurisdiction over the custody of their children, and this even though the children may be resident elsewhere.(t)

Illustration Parents are domiciled in Alberta. Their infant child is in the custody of the husband's sister in Ontario. The mother applies to the Alberta Court for the custody of the child. The Court has jurisdiction.(t)

The English Courts have held that if the parents are British subjects, they have jurisdiction to award the custody of the children, irrespective of the actual residence of the children at the time.(u)

Illustration A husband and wife are Canadian subjects domiciled in Manitoba. The wife is resident in New York, and pending divorce proceedings against her husband in the

(s) Boynton v. Boynton (1861) 2 S.& T. 275
Ryder v. Ryder (1861) 30 L.J.P.& M. 44
Bent v. Bent (1861) 2 S.& T. 392
D'Alton v D'Alton (1878) 4 P.D. 87 Cont'd on next

Manitoba Court, has been given the custody of her children by the New York Court. The father applies to the Manitoba Court for their custody, that he may have them educated in Canada. The Court has jurisdiction and grants his application.(u)

It may be that if the children are out of the jurisdiction the power of the Court can not be exercised because the order can not be enforced; in that case, there is not want of jurisdiction, but want of power to enforce it.

The Court has unquestionably jurisdiction over all children resident within its territorial limits. It follows as a matter of course from a consideration of the object of an order awarding custody -- the protection and care of the child. This rule may seem to conflict with the fore-going one: jurisdiction in one case based in the locus of the child. in the other, on the locus of the parents. Suppose, however, an action were taken in each of two Provinces for the custody of a child: the order made first would without a doubt be respected by the Court of the other Province. If it were not, and the child were given two different guardians, each would have authority within the jurisdiction of the Court which

(s) cont'd, Wood v. Wood (1919) 2 W.W.R. 246 for a review of the authorities
(t) In re M. 13 Alba.L.R. 196
(u) Logan v. Fairlee Jacob 193
Stephens v. James 1 M.& K. 627
Hope v. Hope (1854) 4 De G.M.& G. 328

appointed him. So long as the child remained in one Province, it would be under the care of the guardian there appointed; if taken to the other Province, the other guardian would have authority.

Illustration (1)Parents domiciled in B.C., have separated; the children are with an aunt in Alberta. The father applies to the B.C. Court for their custody. The B.C. Court has jurisdiction to entertain the application.

(2)Facts as above. The mother applies to the Alberta Court for their custody. The Alberta Court has jurisdiction to entertain the application.

An order by a foreign Court awarding the custody of a child, if called into question in a Canadian Province, will be respected and enforced as would an order of its own Courts. (v) But if it is not in the interest of the child that the foreign order be enforced, our Courts will not recognize it. (w)

Illustration H and W are married and domiciled in Illinois, W a British subject. Two children are born in Illinois; one in Alberta. On the wife leaving her husband, taking the youngest child with her, H moves to California and there obtains a decree of divorce, with an order giving him the custody of all three children. He petitions in Alberta for a writ of habeas corpus against the mother to produce the infant child. The Alberta Court has jurisdiction to enter-

(v) In re Ayers (1921) 2 W.W.R. 171
(w) Re Mott (1912) 5 D.L.R. 406

tain the suit, the child being in Alberta, but will not recognize the foreign decree to the extent of granting the father's petition and taking the infant child from its mother.(w)

7. Criminal Conversation.

The action for criminal conversation was abolished in England by the Matrimonial Causes Act of 1857, a subsidiary claim only for damages being allowed to the husband. The Western Provinces were thus obliged to make express statutory provision for it, and in Alberta, Manitoba, and Saskatchewan there is now jurisdiction in either the Supreme Court or the Court of King's Bench.(x) The Legislature of British Columbia specifically abolished the action. The statutes provide that the law applicable to such actions is the same as that in England prior to the abolition of such actions in England, and the practice is the same as in other actions in the Court, so far as applicable.(y)

An action for enticing away and harbouring the plaintiff's wife may be maintained although the Court has no jurisdiction over an action for criminal conversation.(z)

(x) (Alta) Supreme Court Act 1907 c.3, s.18
Judicature Act 1919 c.3, s.23
(Man) King's Bench Act R.S.M. 1913 c.46, s.18
(Sask) King's Bench Act R.S.S. 1915 c.10, s.22
(y) Hunt v. Smith (Sask) (1919) 3 W.W.R. 586
Winfrey v. Clute (Alta) (1921) 2 W.W.R. 428
(z) Marson v. Coulter (1910) 3 Sask.L.R. 485

Chapter V. Validity

Jurisdiction to Determine whether a Marriage Exists.

In the preceding chapters have been considered questions as to jurisdiction in actions for nullity and divorce and the minor causes: jurisdiction in proceedings instituted with the direct object of obtaining for the petitioner a declaration of the nullity of a marriage or a decree of dissolution. Such actions are clearly matrimonial in character. There are, in addition to this form of action, however, many instances in which the existence or non-existence of a marriage becomes a point at issue in a case which was not instituted to determine that question, and which may be not even remotely connected with the subject of matrimony. As has been shown, there must be special jurisdiction vested in a Court to warrant it in dissolving a valid marriage or annulling a voidable one; but any Court can determine whether or not a marriage exists, if such determination is essential to a proper decision in the case, and if the case itself in which the question is raised is one over which the Court has jurisdiction. Such a determination on the part of the Court does not have effect beyond the action in which it occurs; it has not the force of *res judicata quoad* the parties to the marriage so as to debar them from bringing a separate action in a proper Court for a declaration of nullity, say, or a declaration of validity. It is for the information and enlightenment of the Court, for the purpose of that suit only.

The validity of a marriage is very frequently

questioned in criminal cases. By the law of evidence, a husband and wife are under a legal incapacity to testify for each other, and are mutually privileged not to testify against each other. It thus often becomes of great importance to know if a certain woman is the wife of the prisoner at the bar, to determine whether or not her evidence should be admissible. Should there be two women, both of them claiming to be wives of the accused, as in the case of R. v. Nan-e-quis-a-ka (a) it must be ascertained which of his several marriages is the legally valid one, and consequently which woman is his wife.

In the case referred to, an Indian was prosecuted for assault. Two women, Maggie and Keewasens, presented themselves as his wives, to give evidence in his behalf. The Court asked for evidence as to the marriage ceremonies he had gone through, and found that the marriage to Maggie was so far legally binding as to exclude her from giving evidence, as being neither a competent nor compellable witness against the prisoner on a criminal charge. Keewasens, being not his legal wife, was admitted as a witness. Wetmore,J., in rendering judgment, pointed out that the marriage was valid at least to the point of making the rule of law as to evidence applicable. The marriage in this instance might not have been held legal and binding in an action involving Maggie's right to inherit Nan-e- quis-a-ka's property, or the legitimacy of their children; but for the purpose of the question before the Court -- Maggie's

(a) 1 Terr.L.R. 211

admissibility as a witness -- the marriage was valid and existent.

In the case of a prosecution for bigamy, the Court may have to determine whether or not the first ceremony constituted a valid marriage, for if not, ceteris paribus, the second one is not bigamous, but itself valid. Similarly the first marriage may have been previously dissolved or declared null by a competent Court. These are questions of validity that can be determined by the Court before which they arise.

In civil actions as well as in criminal, the same problem may come up. Particularly in the field of intestate succession, claims under wills, rights to dower, and so forth, has the question of the validity of a marriage often to be answered.

Illustration A widow files a claim for her deceased husband's estate, and is met with a counter-claim by a woman alleging to be a former wife, whose marriage to the deceased was still undissolved at the time of the second ceremony. It is for the Court to determine whether the first or the second marriage is the valid one, to ascertain which of the claimants is entitled to inherit.

In Browning v. Reane,(b) Reane applied for the administration of the effects of his wife, who had died intestate. Her nephew opposed the demand on the ground that Reane was not her husband, the woman having been incapable from mental deficiency

(b) (1812) 2 Phil. 69

to contract a marriage. Her idiocy being proved, and the marriage consequently a nullity, Reané's application was refused.

The distinction must be noted here between marriages that are void, and those that are merely voidable. As a voidable marriage cannnot be attacked after the death of either of the parties, or in a suit not instigated by one of them for that particular purpose, the nullity of such a marriage can not be effectually pleaded in all cases, as can the nullity of one that is absolutely void. In an English case decided before Lord Lyndhurst's Act (c), over a deceased wife's intestacy, the Court held that the nullity of her marriage by reason of her relationship to her husband within the prohibited degrees, could not be questioned after her death. There having been no declaration of nullity during her lifetime, the marriage must stand valid for all time, and for all purposes. (d)

There is a similar decision in an Ontario case. (e) Lawson married his deceased wife's sister, G. After her death he remained in possession of certain lands of which she had died seized. He was held to be rightfully in possession as tenant by the curtesy, his marriage with G having been not ipso facto void, but valid for civil purposes if not annulled during the lifetime of the parties. (f)

The proof of the validity of a marriage, when the question is raised only incidentally, is not always as strict as in a suit for declaration of nullity. A widow claiming compensation for the death of her husband in the course of his

(c) 5-6 Will.IV. c.54 (1835)
(d) Elliott v. Gurr (1812) 2 Phil. 16
(e) Lawson v. Powers (1883) 6 O.R. 685

employment, is not required to prove the validity of her marriage as she would be in defending a suit for a declaration of nullity against her. It was thus held in a Western case (g), that the plaintiff's marriage, and hence her right to claim damages, was sufficiently established by her evidence that she had been married in Belgium, was living with the deceased at the time of his death, and was popularly reputed to be his wife. The fact of the marriage having been celebrated abroad did not alter the case; the lex fori governs questions of proof.

In the common law actions for damages for criminal conversation, for alienation of affections, and for harbouring, the Court must be satisfied that the plaintiff is the husband of the woman on whose account the suit is instituted. If the marriage was celebrated in a foreign country, as was the case in Zdrahal v. Shatney (h) proof of the law of such country and of compliance with that law is required. The Court trying the action determines the validity of the marriage. In the case just cited, however, such proof was found to be unnecessary, as the Manitoba Marriage Act provides that within Manitoba any marriage shall be held valid as to its civil effects after two years cohabitation, notwithstanding any defects in its solemnization.

Any Court can declare a marriage null which is null and void ab initio.(i) The declaration is, legally, superfluous,

(f) Lord Lyndhurst's Act has, of course, never been in force in Ontario.
(g) Daye v. McNeill 6 Terr.L.R. 23
(h) 7 D.L.R. 554
(i) Cox v. Cox (1918) 13 A.L.R. 285

but it serves to define the status quo of a situation otherwise anomalous. Thus, when a marriage is void because of the insanity of one of the parties at the time of the marriage,(j) from the very nature of the disability, it needs the statement of a Court of law which has made an inquisition into the facts to render effective its invalidity.(k) No special jurisdiction need be specifically vested in the Court to give it competence to make such a declaration: it is a declaration as of right.

To summarize briefly: if the question of the existence of a marriage is raised in any proceeding before a Court, and it is material to the issue, the Court has jurisdiction to give a decision as to its existence, for the purposes of that proceeding.

(j) See Blackstone, Bk.1, ch.15, on "the fourth incapacity"
(k) Turner v. Meyers (1808) 1 Hagg.Con. 414
The dictum in Elliott v. Gurr, and Browning v. Reane.

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March, 1923.

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