Case and Comment

ADMINISTRATIVE LAW—PRIVATIVE CLAUSES AND THE COURTS—A REVIEW.— ". . .the orders, decisions and rulings of the Board shall be final and shall not be questioned or reviewed . . . nor shall the Board be restrained by injunction, prohibition, mandamus, quo warranto, certiorari or otherwise by any court . . ." .[1]

A layman might well think that this section, or one similar to it, would deprive the courts of any jurisdiction over the proceedings of the Ontario Labour Relations Board, or other similar bodies exercising a judicial function, but the courts have repeatedly held otherwise. A recent decision of Mr. Justice Gale[2] held that an order of certiorari to quash an order of the Ontario Labour Relations Board would lie, despite the quoted section, saying, in effect, that when the board acts in such a manner that the court is able to say that it is acting without jurisdiction, then it is not acting within the statute, which by necessary implication assumes it to be so acting, and thus it is not entitled to the protection of the statute.

This somewhat startling example of statutory interpretation may be thought sufficient excuse for attempting a summary of the various types of deprivatory clauses, and their reception by the courts. There are several types of clauses designed to exclude review by the courts; they may be classified as follows: (1) "decision shall be final", (2) "no certiorari", (3) "as if enacted", (4) "conclusive evidence", (5) combinations and extensions of the other four.

(1) *"Decision shall be final"*. This clause was the first attempt of the legislature to exclude review by the courts. The earliest case I have been able to find is *The King* v. *Plowright*[3] where the statute imposed a tax on chimneys, and empowered the justices of the peace, in case of any dispute, to "hear and finally determine the matter". The court on application for a writ of certiorari held

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[1] Labour Relations Act, Statutes of Ontario, 1948, c. 51, s. 5.

[2] *Re Ontario Labour Relations Board, Re Toronto Newspaper Guild, Local 87, and American Newspaper Guild (C.I.O.) and Globe Printing Co.*, [1951] 3 D.L.R. 162.

[3] (1686), 3 Mod. 94.

that since the statute did not mention certiorari, it did not mean to exclude that remedy, and so they granted the writ.

The courts consistently hold that this type of clause does not bar review by means of certiorari — relying on a rule of construction to the effect that "certiorari is a beneficial writ for the subject, and so cannot be taken away without express words. Indeed, it is much to be lamented in a variety of cases that it was taken away at all."[4] In one of the more recent cases a Quebec court held that this clause excluded appeals, but was not applicable to certiorari.[5]

The legislature then proceeded to pass the "no certiorari" clause when they desired to exclude judicial review, presumably with a regard for the statements in these cases that only express words are sufficient to remove this remedy.

(2) *"No certiorari"*. This is the type of clause most frequently found to-day, and it is the one with which most of the jurisprudence is concerned.

A typical provision of this kind is to be found in the Public Health Act of 1848,[6] of which section 137 provided that no proceeding touching the conviction of any offender against the Act should be removeable by certiorari. In *Regina* v. *Wood*,[7] *A* was convicted under a by-law passed under the provisions of the Act. *A*, as his defence, had attacked the validity of the by-law, but the magistrate refused to inquire into it. On application for certiorari, the court held that since the magistrate had refused to hear *A*'s defence, he must be considered as having declined jurisdiction, and so the writ was granted.

The leading case on this phase of the subject, *Colonial Bank of Australasia* v. *Willan*,[8] laid down the proposition that the effect of such a clause is not to oust entirely the powers of the superior court to issue certiorari, but to control and limit them. It may still quash on certiorari on two grounds: (1) manifest defeat of jurisdiction in the tribunal; or (2) manifest fraud in the party obtaining the order of the tribunal. The defect of jurisdiction may be either apparent on the face of the record, or be brought out by affidavit evidence, extrinsic to the adjudication impeached.

[4] Lord Kenyon C.J. in *The King* v. *Jukes* (1800), 8 T.R. 542.

[5] *Furness Withy & Co. Ltd.* v. *Recorder E. J. McManamy & Young*, [1943] S.C. 277. Other authorities to the same effect are: *Rex* v. *Moreley* (1760), 2 Burr. 1040; *Fraser* v. *City of Fraserville* (1917), 34 D.L.R. 211.

[6] C. 63 (Imp.).

[7] (1855), 5 El. & Bl. 49. See also: *Ex parte Bradlaugh* (1878), 3 Q.B.D. 509; *Regina* v. *Justices of St. Albans* (1853), 22 L.J.M.C. 142; *Regina* v. *Gillyard* (1848), 12 Q.B. 526; *Rex* v. *Justices of Somersetshire* (1826), 5 B. & C. 816; *Regina* v. *Gosse* (1860), 3 El. & El. 277,

[8] (1874), L.R. 5 P.C. 417, at pp. 442 ff.

The courts have put an extremely wide interpretation on "jurisdiction", and the numerous cases have extended it almost beyond recognition.[9] The courts have also held that they are not confined to inspection of the record, but may receive new evidence *ad hoc*, not to show that the decision was wrong, but that the error complained of went to jurisdiction.[10]

So far have the courts gone in their interpretation of this clause that one early Ontario case[11] said "the first question that arises is whether under the circumstances, the writ of certiorari lies. Neither of these statutes takes away that remedy. . . . It can only be used where there has been a plain excess of jurisdiction — and then this remedy would be available even if a statute had declared that the writ should not issue, because that prohibition would be held not to apply when the justices had entertained a matter not within their jurisdiction." After an exhaustive collection of the authorities, the conclusion is stated in the last edition of *Tremeear* that "It is very difficult to see any clear dividing line between circumstances which will justify interference (where there is a deprivatory clause) and those generally applicable to certiorari — where there is no such restriction on the right".[12]

(3) "*As if enacted*". The usual type of clause to be found here is that the order, scheme, rule, decision or the like, "shall be final, and shall have effect as if enacted in this Act".

The Patents Act of 1883[13] by section 101 gave power to the Board of Trade to make such general rules as they might think expedient, subject to the provisions of the Act for regulating the practice of registration of Patent Agents under the Act. The section went on to provide that general rules made under it should

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[9] There is some doubt whether "jurisdiction" includes (i) error of law on the face of the record, or (ii) breach of natural justice, *e.g.* bias, failure to allow a hearing. If it does not, then these are also grounds for certiorari.

(i) *In re Watts & Emery* (1870), 5 P.R. 267, treats this as being a separate ground, but the majority of cases treat it as going to jurisdiction, and, it is submitted, this is the better ground. See: *The King* v. *Limerick, ex parte Dewar* (1916), 44 N.B.R. 233 — no record — held — goes to jurisdiction; *Re Nelson*, [1936] O.R. 31; *Huron & Erie Mtg. Corp.* v. *Propp*, [1943] 1 D.L.R. 29.

(ii) This question is open to more doubt. *The Queen* v. *Cheltenham Commissioners* (1841), 1 Q.B. 467; *Capital Cab Case*, [1950] 1 D.L.R. 184, both treat "breach of natural justice as a separate ground for the writ, but here again the better view seems to treat it as going to jurisdiction. See: *Regina Grey Nun's Case*, [1950] 4 D.L.R. 775; *Rex.* v. *Roach*, [1923] 1 W.W.R. 433; *Re Brown & Brock*, [1945] O.R. 554, *per* Roach J.A.; *Re Fairfield Modern Dairy*, [1942] O.W.N. 579.

[10] *The Globe Printing* case, *supra*, thus giving effect to *Rex* v. *Nat. Bell Liquors Ltd.* (1922), 91 L.J.P.C. 146.

[11] *Hespeller* v. *Shaw* (1859), 16 U.C.Q.B. 104, at pp. 105-106.

[12] Tremeear's Criminal Code (5th ed.) p. 1515.

[13] C. 57 (Imp.).

be laid before Parliament, and if not annulled within a certain period of time, they should be of the same effect as if contained in the Act. The Board of Trade made certain regulations for the registration of patent agents: the Institute of Patent Agents was to keep a register containing their names; and to charge a fee for initial registration, and a yearly fee thereafter; and only those who were registered were entitled to call themselves patent agents. The validity of these rules was questioned in *Institute of Patent Agents* v. *Lockwood.*[14] All their Lordships held that these rules were valid and that the statute made this conclusive; but all, except Lord Watson, indicated that where the rule was contrary to the statute the question might well be different, saying that probably the rule would be treated as subordinate to the statute.[15]

This situation did arise in *Regina (Conyngham)* v. *Pharmaceutical Society of Ireland,*[16] where the court held that the regulations passed by the Pharmaceutical Society were ultra vires and that the section granting immunity to their rules applied only to the case where the rules are within the powers given by the statute.[17]

The legislative provisions of the various Housing Acts in England present an interesting example of the response to judicial activity in this field. The Housing Act of 1925 [18] provided in Part II for the acquisition of certain slum areas by local authorities for improvement purposes. A scheme was to be drawn up and, after certain formalities, was to be presented to the Minister of Health, who after various steps were taken might approve it by order — an order which under section 40(5) had effect as if enacted in the Act.

A slum owner brought a writ of certiorari against one of these orders in *Minister of Health* v. *The King, ex parte Yaffe.*[19] Although the Court of Appeal and the House of Lords differed in the result, on the point whether the clause deprived the courts of jurisdiction to hear the matter they both agreed unanimously that it did not, and that the court was entitled to examine and invalidate the order because of imperfections in (1) the scheme (if not amended), and (2) the order itself. In the Court of Appeal:[20] "An order going beyond the statutory conditions under which alone it can be made, an order which for that reason the Minister could be prohibited

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[14] [1894] A.C. 347.
[15] Lord Herschell at p. 360.
[16] [1899] 2 I.R. 132.
[17] The Pharmacy (Ireland) Act (1875), c. 57, s. 17.
[18] C. 14 (Imp.), a consolidation of earlier housing acts.
[19] Court of Appeal, [1930] 2 K.B. 98; House of Lords, [1930] A.C. 494.
[20] Scrutton L.J. at p. 145 of the Court of Appeal judgment.

from making,[21] . . . is not an order which when made can by reason of s. 40(5) have statutory effect"; Viscount Dunedin, in the House of Lords, uses emphatic language:[22] "Inconceivable that the protection should extend without limit. . . . If the scheme as made conflicts with the Act, it will have to give way to the Act."

There seems to be some conflict in the reasoning of the judgments, although not in the result. One line of approach is that of Lord Dunedin who says that the section operates, but, as a matter of statutory interpretation, the order must yield in cases of conflict with the Act. The other line is to say that the Minister has been delegated the power to legislate, and so his jurisdiction to make the order is limited; only when he acts in strict compliance with the statute does the protection afforded by the section apply.[23]

As an aside, it is interesting to note that in the new Housing Act of 1936[24] the powers of the Minister to confirm are the same, but the immunity of his order has been changed. In Schedule II, section 2 provides for an application to the court to contest the validity of the order within a certain time after its publication; and the court may quash the order, if it, or the approval of the plan, is not within the powers conferred by the Act; or if the interests of the applicant have been substantially prejudiced by reason of non-compliance with the statutory requirements.[25] Section 3 provides that, except for this, no certiorari shall issue. It is submitted that this provision is of little protection, unless the applicant's conduct has been such as to debar him from the order of certiorari, although no English case exactly in point has arisen.[26]

This change in the legislation might well be termed a surrender by the legislature. Indeed, one may be excused at this point for wondering just what kind of a clause would be effective to exclude review.

(4) "*Conclusive Evidence*". This type of clause says that an order, decision, rule, or the like, is to be conclusive evidence of its validity in all respects. It is usually to be found in connection

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[21] On prohibition, see *Rex* v. *Minister of Health, ex p. Davis*, [1929] 1 K.B. 619.

[22] At pp. 501-503 of the report in the House of Lords.

[23] It is submitted that the second viewpoint is the better, it expresses the attitude of the Court of Appeal and of a majority in the House of Lords and it is consistent with the rationale of the "no certiorari" clause cases.

[24] C. 51 (Imp.).

[25] *I.e.* in the nature of certiorari. For an example see *In Re Ripon Housing Order*, [1939] 2 K.B. 838.

[26] This is analogous to the case where there is a limited time for appeal, and certiorari is taken away by the statute; the time for appeal goes by, and certiorari is brought. The courts will allow it: *The King* v. *Delagarde, ex p. Cowan* (1904), 36 N.B.R. 503; *Regina* v. *Becker* (1891), 20 O.R. 676; *Fanchaux* v. *Georgett* (1915), 9 W.W.R. 458; *Rex* v. *Gainor* (1919), 30 C.C.C. 357.

with other provisions — this aspect will be discussed in the next section. I was able to find only one decision dealing with this clause alone, *Corporation of Waterford* v. *Murphy*,[27] where the statute in question was the Waterford Bridge Act of 1906,[28] which gave to the Corporation of the Town of Waterford the power to make by-laws as to the passage of vessels through the bridge. The corporation made a by-law, which was confirmed, charging a fee of £1 for each passage. Section 10 of the Act provided that a printed copy of such by-law, purporting to be made and confirmed under the authority of the Act, and signed by an assistant secretary of the Board of Trade should be conclusive evidence of the validity of the by-law in any proceeding or prosecution under the Act. The corporation sued a bargee for £5 for passage through their bridge. The defendant attacked the validity of the by-law. The court held that the by-law was ultra vires, and that section 10 did not preclude the court from inquiring into its validity, because the words "A printed copy of *such* by-law" refer back to the by-law authorized by the Act, this was not such a by-law, and so the power to make it could be questioned.

(5) *Combinations and extensions of (1), (2), (3)* and *(4)*. The usual combination is of the "as if enacted" clause and the "conclusive evidence" clause.

In *Ex Parte Ringer*[29] an order was made by a county council for the acquisition of land under section 39 of the Small Holdings and Allotments Act of 1908,[30] which was confirmed by the Board of Agriculture and Fisheries. Section 39(3) provided: "An order under this section is of no force unless and until confirmed by the Board; and the Board may . . . confirm the order either without modification or subject to such modifications as they think fit, and an order when so confirmed shall become final, and shall have effect as if enacted in this Act, and confirmation by the Board shall be conclusive evidence that the requirements of this Act have been complied with, and that the order was duly made, and is within the powers of this Act". On application for certiorari, the court said (regretfully) that this clause excluded judicial review: "It gave to an order of a Public Department the absolute effect and finality of an Act of Parliament".

The cases which might seem contrary are to be explained on the ground that two alternate lines of conduct are both sought to be pursued: *In Re Kelly* (1895), 27 N.B.R. 553; *The King* v. *Haines, ex p. McCorquindale* (1908), 39 N.B.R. 49.

[27] [1920] 2 I.R. 165.

[28] C. 76 (Imp.).

[29] (1909), 25 T.L.R. 718.

[30] C. 36 (Imp.).

It is axiomatic that the whole is no greater than the sum of its parts — and so *Ex Parte Ringer* may be discredited on the authority of cases decided in higher courts: as to "shall be final" by, inter alia, *The King* v. *Plowright;* as to "conclusive evidence" by *Corporation of Waterford* v. *Murphy;* and as to "as if enacted" by *Minister of Health* v. *The King, ex parte Yaffe.*

The Housing Act of 1925 in Schedule III, section 2, provided that the Minister's order should "become final and have effect as if enacted in this Act and the confirmation by the Minister shall be conclusive evidence that the requirements of this Act have been complied with and that the order has been duly made and is within the powers of the Statute". In the *Yaffe* case, there are indications that this provision might be conclusive, and two of the speeches in the House of Lords (Lord Tomlin and Lord Thankerton) say specifically that it would be. It is submitted, however, that, in spite of contrary authority, it is at least arguable that even this type of clause would not bar judicial review by certiorari.

These suggestions by their Lordships were, it is submitted with the greatest respect, not only obiter, but also were spoken *per incuriam,* since the case of *Corporation of Waterford* v. *Murphy* was not cited to their Lordships. On this point, it is significant to note that in the new Housing Act of 1936 the provision in question has been entirely omitted.

There was in the *Yaffe* case a suggestion by Lord Dunedin that, since the confirmation was in conflict with the Act, the Act overrode the scheme, but if the confirmation of the scheme were *per se* to be embodied in a subsequent Act, the maxim *posteriora derogant prioribus* would apply, and the earlier Act would be overridden. The difficulty here is with his Lordship's treatment of the question as a problem of conflict, that is, he admits that the scheme is embodied in the Act by virtue of the section. If this view is correct, his suggestion would be effective, but if, as indicated in the majority of speeches in the House of Lords, the deprivatory section never applied, because the order of the Minister was such that it was not within the Act, then it would make no difference in what Act the order was to be embodied, for certiorari would issue anyway.

After this brief review of the judicial treatment of deprivatory clauses, it may well be asked if there is any type of clause that could be devised to exclude judicial review beyond any question. It is my contention that there is not. A court may always say that the "decision" of the "board" is not a "decision" since it was made without jurisdiction—and that the "board" is not a

"board" because it acted without jurisdiction: in other words, the deprivatory clause does not apply because, by its lack of jurisdiction, the tribunal has put itself and its decision beyond the protection of the statute. The result is that no type of deprivatory clause can exclude review, for the simple reason that it has no application.

H. SUTHERLAND*

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APPEAL TO COURT OF APPEAL — ONTARIO — DECISION OF JUDGE IN CHAMBERS — NEED OF LEGISLATIVE AMENDMENT.— In the recent case of *Lesieur* v. *Gibeau*[1] the Court of Appeal for Ontario held that there is no appeal to the Court of Appeal from the decision of a judge in chambers, even with leave, except in matters of practice or procedure.

This has come as a shock to many lawyers in Ontario since it has been assumed that such an appeal lies. In a more recent case, *Rotenberg* v. *Gelber*,[2] a motion for partition or sale involving valuable property was heard by a judge in chambers and the Court of Appeal refused to entertain an appeal. Many matters which are assigned under the Rules of Practice to the jurisdiction of a judge in chambers involve property of great value and exceed in importance many of the matters which under the rules must be dealt with by a judge in court. An appeal lies from a judge in court to the Court of Appeal and the anomaly arises that an appeal from a judge sitting in court lies, but there is no appeal except in matters of practice or procedure from the same judge sitting in chambers, although he may be dealing with a matter of great importance. Naturally, lawyers will be unwilling to proceed with motions before a judge in chambers in important matters where an adverse decision may be final in its nature. In most cases they have no choice.

As the judgment of the Court of Appeal in *Lesieur* v. *Gibeau* is rested not upon the Rules of Practice but upon statutory provisions, legislation is required in order to remedy the situation.

In 1939 a survey of the administration of justice in the province of Ontario was made by Mr. F. H. Barlow, K.C., now the Honourable Mr. Justice Barlow, and one of the matters discussed

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[1] *Lesieur* v. *Gibeau*, [1951] O.W.N. 818.

[2] *Rotenberg* v. *Gelber*, unreported.

before him was whether it would be advisable to abolish the distinction between motions in chambers and motions in court. Some of the grounds urged for abolishing the distinction were the following:

(1) it is often difficult to ascertain from the rules as drafted what matters come under the heading of court motions and what matters come under the heading of chamber motions;

(2) many matters which are heard in chambers are more important than many of the matters heard in court;

(3) where an important matter involving considerable preparation and argument is heard in chambers an adequate fee connot be obtained because it happens to be a chamber matter;

(4) chamber motions are not set down and listed for hearing, with the result that counsel are often kept waiting for a considerable time without knowing when their motion may be reached.

To these arguments can now be added a fifth: that there can be no appeal to the Court of Appeal from orders made on chamber motions except in matters of practice or procedure.

Mr. Barlow, as he then was, said he was not convinced that the change would result in any substantial advantage and that it might cause the business of the Weekly Court to be congested on certain days. He made certain suggestions as to placing in the list of matters which should be heard in court some of the more important motions that were heard in chambers, and placing in the list of matters to be heard in chambers some of the lesser matters that were heard in court. He suggested that it should be possible to clarify the Rules of Practice in order that a solicitor might easily determine what matters should be brought as court motions and what matters as chamber motions, and he recommended that the rules be re-drafted so that the members of the profession might more easily ascertain where a motion should be heard.

There is no doubt that even under the present rules it is often extremely difficult to determine what motions should be heard in court and what in chambers.

It is submitted that the whole question should be re-considered and that, in any event, legislation should be passed at the next session of the legislature to provide that an appeal shall lie to the Court of Appeal, with leave or without leave, in certain types of cases. Consideration would have to be given, of course, to the matter of deciding what types of cases should be appealable.

The late Mr. Justice Middleton, whose knowledge of practice has probably not been surpassed by any Ontario lawyer, said in *Re Waterman et al. and Building Enterprise Limited et al.*,[3] "It is

[3] [1936] O.R. at p. 50.

not intended by the Statutes that there should be any jurisdiction conferred upon a Judge of either a superior or inferior Court without a right of appeal", and it does seem absurd that if a judge is gowned and sitting in court there is an appeal from his decision to the Court of Appeal, but no appeal from the same judge if he is not gowned and is sitting in chambers.

G. W. MASON*

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DIVORCE AND MATRIMONIAL CAUSES — RECOGNITION OF FOREIGN JUDGMENT — DISSOLUTION OR ANNULMENT?— The judgment of Chevrier J., at the trial in the Supreme Court of Ontario in *Forsythe* v *Forsythe*,[1] offers a tantalizing glimpse of a field of the conflict of laws beset with difficulties and pitfalls. A curtain is then drawn across the view by the decision of counsel not to elicit all the facts and raise all the issues that might have been relevant. The learned judge made a gallant effort to dispose of the problem on the facts before him. He dismissed the action because the evidence adduced did not enable him to make an affirmative finding in favour of the plaintiff on the question before the court, but one is led to ask whether, if the matter had been more thoroughly canvassed, the plaintiff might not have been successful.

The plaintiff and defendant in the present action had been, or at least may have been, husband and wife, and for convenience they are so described in this comment. They had gone through a form of marriage in New York in 1932, and afterwards had lived in Ontario. The wife had commenced action against the husband in the Ontario court for divorce in April 1943 and had obtained a judgment nisi in May 1943. The present action was commenced by the husband in January 1944 to have the judgment nisi set aside on the ground that it had been obtained by the fraud of the wife. The judgment nisi was nevertheless made absolute in June 1948 before the trial of the present action.

The fraud alleged against the wife arose out of a previous matrimonial experiment on her part. In 1925 she had gone through a form of marriage with one, Knechtel, in the state of Michigan.

*Recently the Editor suggested to the heads of a number of legal firms that their firms undertake responsibility for periodic contributions to the Canadian Bar Review. No restriction was placed on the kind of material they may submit but it is expected that they will usually be dealing with matters of direct concern to the lawyer in his day-to-day practice. This comment — the work of Mr. G. W. Mason, K.C., and others of the firm of Mason, Foulds, Arnup, Walter & Weir of Toronto—is the first result of an experiment new so far as we know among legal periodicals.

[1] [1951] O.W.N. 881.

Knechtel was at all material times domiciled in Ontario but at the time of the marriage ceremony, and for a few weeks afterwards, had resided in Michigan. Shortly after the marriage, Knechtel commenced proceedings in a Michigan court against the wife by what was called a bill of complaint, on a form described on the back as a bill for divorce. He alleged that the wife had been guilty of cruelty; that she procured the marriage through fraud; that he was "vamped into it by reason of his mental condition"; that she, "taking advantage of his physical and mental condition", forced him into marrying her; and that the marriage "ought of right to be annulled, set aside and declared void".[2] He concluded with a prayer "that the marriage be dissolved and that a divorce be decreed, and that the marriage be annulled and set aside as void and of no effect". In 1926, the Michigan court made a decree in which it was recited that the wife had been guilty of "the several acts of fraud sufficient to avoid the marriage", and it was ordered that the marriage be annulled and declared void and that a divorce be decreed. The formal decree was on a form entitled, "Decree for Divorce".

At the trial of the wife's divorce action against the husband, she had been asked whether she was a spinster at the time of the marriage ceremony in 1932 and she had answered, "Yes". The husband described that answer as a fraud on the court, alleging that if she had disclosed her relations with Knechtel the court would not have granted the decree nisi.

While the judgment for divorce remained in effect the husband would be estopped, at least in Ontario, from asserting the nullity of the marriage ceremony between the wife and himself,[3] but if he could prove that the ceremony was void he could have the divorce judgment set aside. The husband alleged that he did not know of the Knechtel incident until after the decree nisi, and for that reason did not raise the defence of nullity in the divorce action. One may ask why the attack on the divorce judgment was limited to the ground of fraud. The learned judge was unable, as the case was presented to him, to say that, if the Knechtel affair had been brought to the attention of the court, the court would have refused to grant judgment nisi.

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[2] My wife says that she can see no cause for annulment in all this. "How else do men get married?"

[3] *Thompson* v. *Crawford* (*falsely called Thompson*), [1932] O.R. 281; [1932] 2 D.L.R. 466; affirmed (1932), 41 O.W.N. 231; [1932] 4 D.L.R. 206. See also *Wilkins* v. *Wilkins*, [1896] P. 108, and *Woodland* v. *Woodland*, [1928] P. 169. This rule has been questioned in *Square* v. *Square*, *Cowan* v. *Cowan*, [1935] P. 120; 104 L.J.P. 46. See Power on Divorce (1951) Supp. 34, and Joseph Jackson, The Formation and Annulment of Marriage (1951) p. 83.

The learned judge speculated on the nature and effect of the Michigan decree, which was all he could do in view of its ambiguous form and language and the absence of evidence proving the law of Michigan. He could not very well act on the usual presumption that a foreign law is the same as the *lex fori* because he could not confidently equate the Michigan proceedings and decree with any Ontario counterparts. He considered that the Michigan decree might have been for dissolution of marriage by the law of that state. If so, the Ontario court could not recognize it as having any effect because Knechtel was not at any material time domiciled in Michigan. On the face of it, it looked more like a decree of annulment and, if it were, he conceded that the Michigan court might have had jurisdiction and the decree might have been entitled to recognition in Ontario. If so, the wife was not guilty of fraud.

It is submitted that, even if the decree were one of annulment, it is by no means certain that it would be recognized in Ontario. In the first place, the Michigan court, or for that matter the Ontario court in a similar case, might have regarded a marriage attacked on the grounds alleged by Knechtel as voidable and not void *ipso jure*.[4] If so, it remains open for an Ontario court to adhere to the rule in *Inverclyde* v. *Inverclyde*[5] restricting jurisdiction to annul voidable marriages to the court of the domicile, although that rule has not been generally adopted.[6] In the second place, even if a marriage attacked on these grounds would be considered void *ipso jure* by the Michigan court, the note does not disclose where the wife was domiciled in 1926 or if Knechtel or the wife was resident in Michigan at the time of the commencement of the proceedings there. If the Michigan court based its jurisdiction on the celebration of the marriage in that state, there are substantial grounds for doubting that an Ontario court would recognize the Michigan decree, even if the marriage were void by the law of Michigan. It would be necessary in that event for the Ontario court to re-examine the Michigan ceremony, and it might conclude that the marriage was valid, because fraud *per se* is probably not a ground of nullity in Ontario, unless it induced a mistake as to the person or the nature of the ceremony, or complete want of

[4] See discussion of United States decisions by Jackson, *op. cit.*, pp. 192-3; Falconbridge, Conflict of Laws (1947) p. 625, note (d); and Kahn-Freund (1950), 13 Mod. L. Rev. 224. It is possible that English law and the law of Ontario may come to regard such a marriage as voidable.

[5] [1931] P. 29. Followed in Ontario in *Fleming* v. *Fleming*, [1934] O.R. 588, [1934] 4 D.L.R. 90.

[6] See (1950), 28 Can. Bar Rev. 973-6. Jackson, *op. cit.*, p. 245; Cheshire, Private International Law (3rd. ed., 1947), pp. 443-6.

consent, and the Michigan court apparently found no duress, while the decree does not recite that Knechtel was incompetent.[7]

English and Canadian courts have entertained annulment proceedings as the courts of the place of celebration. Cheshire[8] concluded that an English court was competent to annul a marriage solemnized in England. Dicey and his succeeding editors up to 1947 adhered to that theory. Westlake and his successors entertained doubts whether the rule remained in force, and these doubts appear to have been shared by Dr. Falconbridge.[9] Following these expressions of opinion, the English Court of Appeal in *De Reneville* v. *De Reneville*[10] spoke with distinct lack of enthusiasm about this ground of jurisdiction, although the point was not in issue. Nevertheless, Farris C.J.S.C., with the approval of all the British Columbia trial judges, reaffirmed in *Gower* v. *Starratt*[11] the rules laid down by the British Columbia Court of Appeal in *Shaw* v. *Shaw*,[12] and assumed jurisdiction on the ground of the celebration of the marriage in that province. Later still, the English Court of Appeal, in *Casey* v. *Casey*,[13] refused to entertain a petition to annul a voidable marriage as the court of the place of celebration, and the judges expressed views adverse to the jurisdiction based on the place of celebration, except possibly where the marriage was alleged to be void for defect of form. Nevertheless, Mr. Joseph Jackson[14] contends that English courts have jurisdiction on the basis of celebration whether the marriage is void or voidable. There does not seem to be an Ontario decision directly in point, but the tendency of the Ontario courts has been to limit rather than to extend the exercise of nullity jurisdiction.[15] It is quite possible that an Ontario rule adverse to jurisdiction based on celebration may be established, particularly if the English rule is adverse, even if such jurisdiction is exercised elsewhere in Canada. In any event, if the marriage is voidable, *Casey* v. *Casey* is a direct authority for refusal of jurisdiction.

Even if the Ontario courts should entertain petitions where jurisdiction is based on celebration, it is a far different thing to say that an Ontario court will recognize a nullity decree of a for-

[7] See discussion in Power on Divorce (1948), pp. 250-3; Jackson *op. cit.*, pp. 185-206.
[8] *Op. cit.*, p. 448.
[9] *Op. cit.*, p. 627.
[10] [1948] 1 All E.R. 56.
[11] [1948] 2 D.L.R. 853.
[12] [1946] 1 D.L.R. 168.
[13] [1949] 2 All E.R. 110.
[14] *Op. cit.*, p. 305.
[15] See *Manella* v. *Manella*, [1942] O.R. 630, [1942] 2 D.L.R. 712; *Fleming* v. *Fleming*, *supra*.

eign court which has acted as the court of the place of celebration. Cheshire says that there is no decisive authority establishing that nullity jurisdiction resides in the court of the foreign place of celebration: "The most that can be said is that the High Court, since it assumes jurisdiction on the ground of the English place of celebration, will find it embarrassing, when the question arises, to refuse the same indulgence to a foreign court".[16] Mr. Jackson, after a lengthy review of the cases and literature, says that there are no conclusive authorities indicating the view of the English courts on the question.[17] If the English rule should finally be that the English court has no such jurisdiction, even Cheshire's argument in favour of reciprocity will lose its force.

If Knechtel and the wife, or at least the wife, had been resident in Michigan at the time of the proceedings there, and both may have been in view of a remark by the learned judge, the Michigan decree would have a better chance, though no certainty, of being recognized in Ontario. Cheshire introduces his study of the problem as follows:

> If it were reasonable to assume that English courts will concede to foreign courts as wide a jurisdiction as they claim for themselves the present inquiry would be reasonably simple. . . . This conclusion, however, lacks the imprint of authority. For one thing, the dictates of reciprocity do not always impress the judges; for another, the decisions are few in number and not wanting in ambiguity.

The only certainty appears to be that an annulment decreed by the court of the foreign common domicile of the parties is sufficiently analogous to a judgment *in rem* that it is conclusive throughout the world, but even such a decree may be impugned if English notions of "substantial justice" are offended.[19] With regard to residence as a basis for foreign jurisdiction, Cheshire[20] finds that *Mitford* v. *Mitford*[21] is the only authority in favour of its recognition.

Mr. Jackson[22] is unable to find any clearer modern authority for recognition of the foreign jurisdiction but argues in its favour on the principle of reciprocity. In the absence of authority to the contrary, we may perhaps say that the odds are in favour of recognition of a decree of the foreign court of the place of residence of

[16] *Op cit.*, pp. 462-3.
[17] *Op. cit.*, p. 307.
[18] *Op. cit.*, p. 460.
[19] *Salvesen* v. *Administrator of Austrian Property*, [1927] A.C., 641. The limitations of this rule are illustrated by *Chapelle* v. *Chapelle*, [1950] 1 All E.R. 236. See comment by Joseph Jackson (1950), 28 Can. Bar Rev. 679.
[20] *Op. cit.*, p. 465.
[21] [1923] P. 130.
[22] *Op. cit.*, pp. 248-251.

the respondent, but that is as far as one can go. An Ontario court might not go so far.

Up to this point the question has been one of jurisdiction. It is therefore surprising that the learned judge in *Forsythe* v. *Forsythe* said: "If exhibit 8a [the Michigan decree] is in the nature of a judgment of nullity, then it is a judgment *in rem* and the *lex loci celebrationis* applies, in which case the residence of the parties within the jurisdiction of the court may be sufficient. But if it is a judgment for divorce, then it is a judgment *in personam*, and the law of the domicile of the husband applies".[23] With respect, it is suggested that this passage confuses the question of jurisdiction with the question of choice of law, that the distinction between a judgment *in rem* and a judgment *in personam* is inappropriate, and that if the Michigan proceedings were in the nature of an annulment it does not follow that the *lex loci celebrationis* would be the proper law.

A decree of nullity or a decree of dissolution of marriage declares or affects the status of the parties. Status is analogous to or "savours of" a *res;* and such a decree may have the same international effect as a judgment *in rem*, if made by the court of the common domicile of the parties. There is no distinction, in this respect, between annulment and dissolution. If the court is not that of the common domicile, the Ontario court will give no effect to a decree of dissolution.[23A] Cheshire reluctantly concludes,[24] on the authority of *Mitford* v. *Mitford*,[25] that if the jurisdiction of the foreign court is recognized on whatever basis, its annulment decree must be accepted by an English court without examination, even if it could be proved to be wrong on the merits and even if the wrong law was applied, as long as "natural justice", *à la mode anglaise*, is done. In this respect the *ratio* in *Mitford* v. *Mitford* is clearly expressed and free from any ambiguity. He proceeds to argue strongly against the possible unquestioned acceptance of as many as three different decrees affecting the validity of one marriage: one made in country *A*, where the marriage was celebrated; one in country *B* where the parties are domiciled; and the third in country *C* where they reside. Before the decision in *Mitford* v. *Mitford*, English courts were inclined to give scant heed to foreign annulments.[26] If one should feel that Cheshire need not have con-

[23] *Supra*, at p. 885.

[23A] Except where the rule in *Armitage* v. *Attorney-General*, [1906] P. 35 is applicable.

[24] *Op. cit.*, pp. 467-8.

[25] *Supra*.

[26] *E. g.*, *Simonin* v. *Mallac* (1860), 2 Sw. & Tr. 67; *Ogden* v. *Ogden*, [1908] P. 46; *Stathatos* v. *Stathatos*, [1913] P. 46.

cluded that the *Mitford* decision established a new rule, nevertheless there is no later contrary authority.[27] The distinction between an annulment and a dissolution, in respect of international recognition, is therefore not one between proceedings *in rem* and proceedings *in personam*, but only a distinction based on the different grounds on which the jurisdiction of a foreign court may be recognized. If Cheshire is correct, the question of the proper law does not arise, unless it is first decided that the jurisdiction of the foreign court is not to be recognized.

If the Ontario court were called on to re-examine the marriage between Knechtel and the wife, there is no clear agreement on what is the proper law to determine the particular issues involved. Cheshire asserts[28] that the *lex loci celebrationis* is the governing law where the alleged defect vitiating consent is one that affects the formation of the contract, such as mistake, fraud, coercion and the like. He relies on *Hussein* v. *Hussein*,[29] but admits that it is questionable whether the rule he enunciates was applied in *Mehta* v. *Mehta*.[30] Barnard J. leaned toward Cheshire's view in *Robert* v. *Robert*,[31] and classified refusal to consummate as a defect in marriage, an error in the quality of the respondent, to be determined by the *lex loci celebrationis*. However, in *De Reneville* v. *De Reneville*[32] Lord Greene M.R. expressed the view that impotence and refusal to consummate were not matters of form, and preferred to select the law of France as the law of the "matrimonial domicile". In *Way* v. *Way*[33] Hodgson J. held that questions of consent "are to be dealt with by reference to the personal law of the parties rather than by reference to the place where the contract was made". The Court of Appeal managed to avoid the issue,[34] but the views expressed there are adverse to the selection of the law of the place of celebration to try these issues. Fraud and duress are factors vitiating consent, and yet not matters of form. The Ontario court would probably feel obliged to apply the law of Ontario as the law of the "husband's" domicile.

In *Forsythe* v. *Forsythe* the learned judge referred to the judg-

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[27] Jackson points out, *op. cit.*, p. 250, that the old case of *Scrimshire* v. *Scrimshire* (1752), 2 Hag. Con. 395, 161 E.R. 782, is in accord with *Mitford* v. *Mitford*. *Salvesen* v. *Administrator of Austrian Property*, *supra*, is an application of the same rule to a specific instance.

[28] *Op. cit.*, p. 460.

[29] [1938] P. 159.

[30] [1945] 2 All E.R. 691.

[31] [1947] P. 164, [1947] 2 All E.R. 22.

[32] *Supra*.

[33] [1949] 2 All E.R. 959.

[34] *Sub nom.*, *Kenward* v. *Kenward*, [1950] 2 All E.R. 297.

ment of the Ontario Court of Appeal in *Leigh* v. *Leigh*.[35] This case is remarkable in that, although the result is probably correct, there is hardly a proposition in the reasons for judgment that is not subject to question. The action was by the "wife" for a declaration of nullity by reason of bigamy. Her marriage to the defendant was celebrated at Toledo, Ohio. The defendant had been previously married to another woman and had, before the second marriage, obtained a decree of a Michigan court dissolving the prior marriage. His domicile of origin was Ontario, but he had gone to Michigan to seek employment with the intention of taking up permanent residence there, and he was still resident in Michigan when he commenced the divorce proceedings.

Middleton J.A., on the question of domicile, said, "whether this intention [to take up permanent residence in Michigan] is sufficient to change his domicile is uncertain", and later, "The Courts of Michigan, I have no doubt, are firm in adhering to the principle that a divorce cannot be granted unless the court is satisfied that it has jurisdiction by reason of the domicile of the parties in that state". Although that might be a true statement with regard to the practice of the Michigan courts, the Ontario court was obliged to satisfy itself that by the law of Ontario the husband was domiciled in Michigan when he commenced proceedings there, and if it was not satisfied the Michigan decree should have been treated as null and void.[36] The onus was on the party asserting a change of domicile to prove that the change was made, and the court could not rely on the assumption expressed by the learned judge.

Later he said: "It seems plain that before this court can act it should be informed of the facts set out in the divorce proceedings and of the evidence in support thereof, and of the findings of the court thereon. Some evidence should also be given of the law of the State of Michigan." It is submitted that if the Ontario court was satisfied that a Michigan court had jurisdiction by reason of the domicile of the husband in Michigan, it might demand proof of the existence of the court that tried the cause and its jurisdiction in matrimonial causes, and proof that the respondent in that court was reasonably notified of the proceedings and had an opportunity to appear, but it would have no interest in the grounds for divorce alleged, whether known to the law of Ontario or not, or the evidence adduced or the specific findings of the court, so long as the decree dissolved the marriage.

He continued: "It is said that the Detroit divorce was granted

[35] [1937] O.R. 239, [1937] 1 D.L.R. 773.
[36] See discussion in Power on Divorce (1948), pp. 126-129 and 150.

for a cause not recognized by our law as sufficient for divorce. It may well be that by the law of Ohio this would not render the divorce invalid. Evidence as to the law of Ohio appears to me material." The law of Ohio would be material only on the formalities of the ceremony performed there, and it would not be of the slightest relevance in an Ontario court, whether the grounds for the Michigan divorce were recognized in Ohio or an Ohio court would recognize the Michigan divorce.

At another point Middleton J.A. said: "The declaratory decree sought in this action is discretionary and not as of right . . .". This proposition is the reverse of the true rule where the marriage is attacked as bigamous and has been repudiated in the Ontario courts.[37]

Yet another statement was that "The first wife was a party to the Detroit decree of divorce and her rights should not be interfered with in her absence". Such an argument is *nihil ad rem.* If there were any foundation for it, the Rules of Practice would have to be rewritten.

Another ground for dismissing the action was that a declaration of nullity would bastardize the child of the parties. Although such an incidental effect of the decree is a ground for the exercise of extreme care by the court in assessing the evidence, it is not, and never has been, in law a ground for refusing a decree if the court is satisfied that the marriage is void.[38]

To crown all, the learned judge said: "If the marriage already celebrated is void, the plaintiff does not need the aid of this court. If, on the other hand, the Detroit decree, which it is sought to ignore without directly attacking it, is valid, the Ohio marriage of the plaintiff is valid, and the judgment of this Court would afford the plaintiff no defence if prosecuted for bigamy." That is a supreme example of begging the question.

There is more, but to the same effect. One may express the hope that *Leigh* v. *Leigh* will not again be cited as an authority.

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[37] Power on Divorce (1948), pp. 142-154; *Bateman* v. *Bateman* (1898), 78 L.T. 472; *Welsh* v. *Bagnall*, [1944] O.R. 526, [1944] 4 D.L.R. 439; *Saari* v. *Nykanen*, [1944] O.R. 582, [1944] 4 D.L.R. 619, *Grassick* v. *Grassick*, [1935] O.R. 50, [1935] 1 D.L.R. 351.

[38] See *Dredge* v. *Dredge*, [1947] 1 All E.R. 29; *L.* (*otherwise R*) v. *L*, [1949] 1 All E.R. 141.

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