Correspondence

A Proposal to Reduce the Size of Juries

TO THE EDITOR:

At the present sittings of the Ontario Legislature two bills have been introduced for the purpose of reducing the number of jurors in civil cases from twelve to six and the number of grand jurors from thirteen to seven (Bills No. 36 and 37). These bills, I may say, were apparently decided upon without a public investigation by any committee appointed by the government and without any consultation with the Canadian Bar Association in the province of Ontario. As soon as it was learned that they were to be introduced, the Attorney General of the province was requested to refer them, before second reading, to the Legal Bills Committee of the legislature, so that representations might be made. This was done.

Some of the reasons for the jury system as it presently exists, especially as they affect the number of civil jurors, are set forth in a brief prepared for the Legal Bills Committee by the Ontario Subsection of the Civil Liberties Section of the Canadian Bar Association. The gist of the brief is as follows.

1. *The number of jurors on a jury is a most important question and no change should be made without careful study.* At the outset, in approaching this question, we cannot overemphasize its extreme seriousness. The establishment of the subject's right to trial by jury was one of the important factors in the making of the free and democratic society we enjoy, and the jury system must always be one of its vital safeguards. Members of the legislature should not be asked to vote upon a change of this far-reaching character until a careful investigation has been made of the experience of jurisdictions where juries of various sizes have been tried: the effect the change has had upon the operation of the courts, upon the confidence of the public in the jury system and upon the fairness of verdicts, in so far as these can be assessed. The figures showing the comparative costs of juries of various sizes, which will speak for themselves, should also be investigated to see if a reduction is likely to lead to any substantial saving. The last investigation of this sort in Ontario was made by the late Gordon

D. Conant, Q.C., in 1940, when he was Attorney General, and he sat with a select committee of which Leslie Frost, now Premier, and Paul Leduc were members. The report, which was made to the legislature in 1941, unanimously recommended against the six-man jury in civil cases. Some forty-eight witnesses were called, including men of such eminence and experience as the late Sir William Mulock, the late Chief Justice Rose of the High Court of Ontario, Chief Justice Robertson, Mr. Justice Middleton and D.L. McCarthy, Q.C. The investigation was a most thorough one.

2. *Twelve men can reconcile conflicting evidence better than six.* One of the main duties of a jury is to reconcile the conflicting evidence of witnesses and conflicting interpretations of it. The great virtue of a jury is that it brings to the decision of differences a vast reservoir of human knowledge, understanding and experience. Is it unreasonable to expect that twelve jurors will usually bring into the jury box twice as much experience as six? Discussion is more apt to be active in a group of twelve than of six and one prejudiced individual is less likely to be able to dominate eleven others than one to dominate five. Experience has shown, and common sense would verify, that a twelve-man jury is large enough to be impersonal and to provide a balance against the prejudices or other shortcomings of particular jurors; at the same time it is small enough to be workable. It is more likely to be unbiased, free from any sort of corruption and stable in its decisions.

3. *Trial by jury is community participation in the administration of justice, something which should be encouraged, not discouraged.* At stake is not only the right of the citizen to have his case tried by twelve jurors but also the citizen's right to act as juror. The opportunity for citizens to take an active part in the administration of justice, as in other branches of their country's government, is of great importance. Through the institution of the jury thousands of persons throughout Ontario are brought into personal contact each year with the administration of justice. In motor-vehicle cases, for example, the jurors, and through them their relatives and friends, are made aware of the grave results of careless driving and hence are educated in the principles of highway safety. To act as a juryman creates a realization of obligation that is of great public benefit.

But the active and direct participation of the citizen in any branch of government today is all too slight. As many citizens as possible should take part in the administration of justice and so get some understanding of the operation of the courts and the rule of law. To maintain individual freedom and democratic government we must preserve the links of the people with the institutions that protect them. By cutting in half the opportunity of citizens to

act as jurors we should be striking yet another and serious blow at our hope of preserving liberty for the individual in society.

4. *The twelve-man jury has the confidence of the public.* Not only must justice be done, but it must manifestly be seen to be done. Justice administered by citizens to citizens is one of the highest achievements of our society. It is essential that the tribunal representing the citizen body should be truly representative. Centuries of experience have created confidence that twelve persons are a fair cross-section of the community. That confidence will be shaken if the number of jurors is tampered with.

Trial by a jury of twelve has stood the test of time in our common-law system for at least 700 years and now has come to be considered one of our fundamental constitutional rights. During all that period there has been no general outcry from the public to abolish the jury or reduce the number of jurors. On the contrary, the twelve-man jury has played a vital rôle in creating for British justice and the common law the high esteem in which they are held throughout the world. As one of our constitutional rights, the English petty jury of twelve men should not be disturbed except upon a clear public demand for reform.

It would be interesting to poll those who have sat as jurors to discover what the jury system means to them. Often do they express satisfaction with their experience as jurors, even when at the beginning they had sought to be excused. They have been enriched by a new experience. It is the people who have never served on a jury, or been in court, who have little realization of the importance of the jury system.

5. *An anticipated saving in cost is not a sound reason for reducing the number of jurors.* Justice cannot be bought and it cannot be measured in dollars and cents. In any event the saving resulting from a reduction in the number of civil jurors will be inconsequential. The cost of maintaining and opening courts, payments to judges, sheriffs and constables, and so on, will be the same with a six- as with a twelve-man jury. Since the size of the jury panel is governed by the needs of the criminal list, the expense of striking and summoning the jury panel will be practically the same, except in the few counties where criminal trials are seldom held.

It is obvious that only a fraction of the cost of jury trials in Ontario will be saved by the proposed changes. In the County of York last year, of the $115,429.35 paid to jurors, only $4,178.25 went to grand jurors. The remainder, $111,251.10, was paid to petty jurors, about equally divided between the Supreme Court and the County Court. The payments to jurors in the Supreme Court were again divided about equally between criminal and civil cases. In the Country Court the division between criminal and civil cases was probably similar. For instance, in the County of Essex, in the

fifteen-month period of 1953 and the first quarter of 1954, criminal trials with a jury took up thirty and one-half days in the Supreme Court and civil trials with a jury, twenty-four and one-half days; in the County Court seventeen and three-quarter days were taken up with criminal-jury work and six and three-quarter days with civil-jury work.

The total municipal taxes levied by municipalities in Ontario for the year 1953, as shown in the Annual Report of Municipal Statistics, amounted to $282,115,677. For the same year the total revenue of the province of Ontario, as such, was $388,361,654. An examination of the estimated expenditure upon highways for the coming year ($220,000,000) shows that the cost of building one or two miles of road is more than is likely to be saved by this interference with a cornerstone of our democracy.

6. *The cutting in half of the number of petty jurors is the thin edge of the wedge that will destroy the jury system completely.* In Ontario the twelve-man jury is the tribunal called upon to decide criminal cases where the life or liberty of the subject is in jeopardy. No one is likely to suggest that a six-man jury is better able to decide such cases. The province of Manitoba tried the six-man jury in criminal cases and returned to twelve. It seems thus to be conceded that twelve jurors form the tribunal of the highest quality. None of our people who seek the justice of the courts should be required to accept anything less. Is the common thief, then, to be entitled to a better tribunal than a widow seeking compensation for the death of her husband? The administration of justice is a public responsibility and its efficiency is the concern of all. Every citizen, be he rich or poor, involved in a civil or in a criminal trial, is entitled to a tribunal of the highest order known to a democratic people.

Over the last half century the size of juries has been reduced in some jurisdictions of the British Commonwealth; in others the number of types of cases triable by jury has been reduced; in still others, leave of the court has been made necessary to get a jury at all; and so on. In every case the practical effect has been the same, the gradual tearing down of the jury system and its virtual abolition. British Columbia has cut civil juries to eight, Alberta to six, New Brunswick to seven and Nova Scotia to nine. In the provinces where the size of juries has been reduced there is little or no jury work and I venture to say that in Ontario more civil cases are tried with a jury than in all the other provinces combined. Once the twelve-man jury is interfered with the result seems to be disintegration. In these days of strife and unrest it is a backward step to interfere with the foundations of democracy, which were built by our forefathers for the protection of the people as a whole. It is gratifying that many of the leading newspapers in the province,

through whom the people largely speak, are unalterably opposed to any interference with the twelve-man jury.

I trust that you will find space in the Canadian Bar Review for this letter, so that the thoughts expressed in it may be disseminated as widely as possible.

I. LEVINTER*

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Canadian Anti-Combines Law

TO THE EDITOR:

I have read with considerable interest Professor Friedmann's article on "Monopoly, Reasonableness and Public Interest in the Canadian Anti-Combines Law" in the February issue of the Review (pp. 133-163). Although it is impossible in a short letter to take issue with all the, to my mind at least, questionable points made by Professor Friedmann, I do feel that attention should be drawn to some of the more obvious ones.

In the first place I suggest that the learned author should have clearly differentiated between combinations or conspiracies in restraint of trade—generally referred to in Canada as "combines" —and monopoly or monopolization in the sense in which it is used in the Combines Investigation Act and the Sherman Act. Professor Friedmann has failed to do this and the result is to leave the reader frequently confused as to his views. In addition, unfortunately Professor Friedmann did not attempt to relate his views to actual combines reports or cases. It would have been most helpful if, rather than proceeding in general terms, he had proceeded by reference to past cases to demonstrate what restrictive measures would or might have been condoned upon a different approach than that taken by the courts.

To date the Canadian experience has been predominantly in the field of combinations or conspiracies in restraint of trade with price fixing as the base upon which the various restrictions were built as distinct from monopolies, whereas Professor Friedmann, although referring to these price-fixing cases, appears to imply that they were monopoly cases. In this respect the effect of the law in the United States is that price-fixing agreements are illegal *per se* under the Sherman Act "because of their actual or potential threat to the nervous system of the economy". This principle, which is generally accepted by the government, the bar and business alike, has been adhered to consistently and without deviation for over fifty years, antedating the introduction of the so-called rule of reason in the *Standard Oil* case (1911), 221 U.S. 1, and is still the law today. As the U.S. Supreme Court was careful to point out

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in both the *Trenton Potteries* case (1927), 273 U.S. 392, and the *Socony-Vacuum* case (1940), 310 U.S. 150, this principle was not affected by the *Standard Oil* case and, contrary to what Professor Friedmann states in his article, the Alcoa *monopoly* case did not introduce any new principle into American law in this regard.

In Canada, on the other hand, the effect of the law is that a combination or conspiracy whose tendency or effect is to eliminate competition by price fixing or other means over a *substantial portion* of the market is *per se* illegal. Was it Professor Friedmann's intention to suggest that this should not be the law in Canada but that the courts or some other tribunal should, in such cases, examine the "reasonableness" of the prices that have been fixed or the restrictions that have been imported? If so, it seems to me that the "uncertainty" to which Professor Friedmann refers would be compounded rather than reduced or eliminated.

Furthermore, if this is Professor Friedmann's view, then it has certain implications. Even if it were accepted without qualification that modern industrial conditions demand co-operation and even concentration of resources, would not a willingness to measure prices by some new standard of non-competitive behaviour involve two things that deserve a little more notice than the author gave them: (a) on the economic side, the fact that this would amount to a general invitation to relinquish competition as the driving force so that the resultant economy would no longer be a free enterprise economy, and (b) on the political side, the fact that, if a large measure of price fixing were to be allowed, it is almost certain that it would involve an insistence by the public that the government intervene by examining and regulating everything that goes into the makeup of prices?

If it were desirable to have government intervention, it must be conceded that precedents would not be entirely lacking. Under the United Kingdom system, in the case of the Match combine for example, the Monopolies Commission recommended that the government regulate the prices and practices of the industry and trade in a more intensive manner than has been done, even under wartime control, and proposed nine detailed rules to be applied by the government for controlling prices, profits and costs. Certainly it is not a question whether such an approach can be adopted and carried out. The question is whether it could be carried out compatibly with the economic and social climate desired by the general public in Canada.

Aside from the already noted tendency towards generalization, the author has, I respectfully suggest, erred on specific points. For example, his main argument appears to proceed upon the principle that the Canadian courts have read public detriment out of the legislation entirely and that every arrangement which restricts competition is condemned. This, of course, is not the case, as

Anglin J. pointed out in *Weidman* v. *Shragge* (1912), 46 S.C.R. 1, at p. 41, when he said that "every agreement to prevent or lessen competition is not declared to be an offence. The elimination or diminution of competition must be undue." Quite apart from this, however, the Supreme Court judgments in *Weidman* v. *Shragge* and the *Stinson-Reeb*, [1929] S.C.R. 276, and *Container Materials* [1942] S.C.R. 147, cases clearly emphasize the importance of the element of control in determining whether there has been an offence. In other words, it is not every arrangement in restraint of trade which the courts have condemned, as the author contends, but only those which so control a given market as to affect, as it were, the body politic and raise a present danger of changing a free competitive economy into a "cartelised" one. The words "to the detriment or against the interest of the public" or their *alter ego* "unduly", therefore, must always be met. To state in this connection, therefore, that "the Canadian courts have effectively interpreted the word 'unduly' out of the Act . . ." is, I suggest, at variance with the facts.

The author also states that some of the industries indicted have been accused for failing to change quickly enough from the wartime policy of co-operation to that of free competition. In this respect it is clear from the reported judgments and combines reports that in all cases in which the wartime period was included not only had the parties been operating under restrictive agreements before the institution of controls but they intended and did in fact continue to operate under such agreements when the controls expired. In addition and of equal importance in this connection, the parties continued throughout the control period to restrict competition by agreement on many matters which were not the subject of Wartime Prices and Trade Board orders.

If recent combines cases have demonstrated anything, they have shown that the law was sufficiently clear, Professor Friedmann notwithstanding, for the parties to be able to determine that what they were doing was illegal, as evidenced by the measures taken to conceal their activities.

Many of those opposing the manner in which the Canadian legislation has been interpreted seem to have lost sight of the fact that their suggestion of "standards of reasonableness" in the field of collusive practices would in all probability lead to legislatively established standards. In this regard, however, such a result would not only appear to be in conflict with our system of private free enterprise but it must also be admitted that it is doubtful whether Parliament, under the present division of legislative powers, would have the power to enact such standards or controls in peace-time (*In Re The Board of Commerce Act*, [1922] 1 A.C. 191).

B. J. MacKinnon*

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TO THE EDITOR:

In so far as Mr. MacKinnon defends the *policy* of the presently predominating interpretation of the Canadian anti-combines law, I have no quarrel with him. He has merely restated one side in an argument that has divided lawyers, economists and businessmen deeply for many years. I incline myself to the view—and I know several distinguished Canadian economists who share it—that a discriminating, empirical approach, as it is being developed under the British legislation, that is, an examination of a particular industry or practice by a mixed commission of economists, civil servants, accountants, businessmen and lawyers, is on the whole preferable to the more rigid and legalistic approach of Canadian and American law, which has produced many law suits and unending literature but in no way solved the basic controversy.

However, I was mainly concerned with legal analysis. For better or worse the Canadian legislation contains the word "unduly". My contention was—and is—that the Canadian courts have given this word a rigid, schematic and in a sense tautological construction. I suggested that it might be too late for the Canadian courts to alter the interpretation, unless they are willing to accept expert evidence on specific issues, and I further suggested that the Restrictive Trade Practices Commission could—and was intended to—bring that elasticity and individual appraisal into the law which the courts have taken out of it. I also indicated my belief, after a study of the reports issued to date, that the commission does in fact incline to rigid application of the judicial tests of "unduly". I also admit that in some cases public control may be a necessary condition of permitting certain restrictive trade practices or monopolies. I am far less confident than Mr. MacKinnon about "the economic and social climate desired by the general public in Canada" or "our system of private free enterprise". Is he really so certain that Canadian public opinion would in a depression prefer unlimited freedom of enterprise and competition to the possible elimination of an entire industry, with consequent unemployment, or to public control? I marvel at the assurance with which Mr. MacKinnon, like so many others, presumes to know public opinion. Perhaps we should beware of a "tendency towards generalization". Certainly the American experience, with its wall of protective tariffs, its subsidies for farmers, shipping, airlines, its special protection for export industries, and so on, shows that the enthusiasm for unlimited competition has its very definite limits, on this continent as elsewhere.

When Mr. MacKinnon asks for my view on alternative criteria, I may refer him to page 139 of my article where twelve suggested criteria are given, as well as to the brief observations on the criteria evolved by the British Monopolies Commission (at p. 160).

Of course, it is possible that most of the Canadian cases would have been decided the same way, even after an examination of the economic data. But the courts have usually debarred themselves from examining these issues, except perhaps marginally, because they have declared such an examination irrelevant. Tentatively I would suggest that there are certain practices which should be condemned as always against the public interest—and I may refer Mr. MacKinnon to the enormous American literature on the question of workable competition. Among these are: (1) any attempt to exclude a newcomer by closed guild practices (a prominent example is the "fighting brands" introduced by the match industry, both here and in Great Britain, and condemned in both countries); (2) sham-tenders as produced in the master-plumber and electricians cases quoted in my article (p. 159, fn. 67); (3) the exclusive division of markets with mutual prohibitions of entry. This whole, immensely complex problem is a concern of economists rather than lawyers, and I cannot attempt to elaborate it further. There is, however, ample material to be found in the studies of Professor Oppenheim and others referred to by me, as well as in the reports of the British Monopolies Commission.[1]

I now turn to Mr. MacKinnon's specific accusations of incorrectness in my analysis.

1. Mr. MacKinnon suggests that the Canadian courts have in fact interpreted the words "to the detriment or against the interest of the public", or their *alter ego* "unduly", in such a way as to demand more than mere restriction of competition. I had, in fact, given several cases (on pp. 147-148) where such an interpretation was attempted, but had shown, in conformity with virtually every commentator on the subject (see p. 147, fn. 35), that the overwhelming and authoritative interpretation is to the contrary.

But, as I have given many pages to the discussion of the cases and the reports of the Restrictive Trade Practices Commission on this very point, while Mr. MacKinnon quotes a single line from Anglin J. in *Weidman* v. *Shragge*, with the general assertion that "the cases clearly emphasize the importance of the element of control", I really do not see why I should go further into this matter.

2. Even more surprising is Mr. MacKinnon's assertion that I have not differentiated between "combinations or conspiracies in restraint of trade" and "monopoly or monopolization". I should have thought that a substantial part of the article is devoted

[1] To take the most recent example: the Monopolies Commission had condemned certain practices of the Electric Lamp Manufacturers' Association. Following it—and avoiding a possible ministerial order—the association dropped its sales quota system arrangements for exclusive dealing, payments to distributors, and the use of the stop-list to maintain resale prices.

to that very differentiation: first, in the comparative analysis of American and Canadian legislation on pages 142 and following; secondly, in the special section devoted to the question whether only monopolistic agreements or *any* restrictive agreement is condemned by the Canadian legislation (pp. 150 ff.); thirdly, in the discussion of the fact that, contrary to the American practice, hardly any monopoly cases have so far come before the Canadian courts (pp. 153 ff.); and, fourthly, in the summary of conclusions, one of which specifically differentiates between monopolistic practices and other restrictive trade practices. I therefore have some reason to hope that other readers have not been as confused as Mr. MacKinnon.

I should like to emphasize again, however (cf. p. 152), that the distinction between monopolies and other restrictive practices is a relative one, depending on the definition of monopoly. The British act of 1948 attempts a definition by regarding as monopolistic the restrictive conduct of one firm, or two or more firms which "handle one-third or more of the supply of the goods in the United Kingdom or in a substantial part of it". The interpretation of this definition has already given rise to considerable difficulties. But in the Canadian (and American) law there is no definition of this elusive concept at all. It can be understood in national, regional or local terms, in regard to buying or selling, to one-firm monopolies, dominant firms, or restrictive associations.

3. The theory that the *Alcoa* case had introduced a new principle into American law in regard to the *per se* illegality of price-fixing exists only in Mr. MacKinnon's imagination and not—as he asserts—in my article. My discussion of the *Alcoa* case (pp. 138 ff.) asserts the victory of the "market structure" test as against the "market behaviour" test, a view taken by almost all the American authorities. If Mr. MacKinnon had read the article a little more carefully, he would have found (on pp. 158 ff.) a statement on the present American and Canadian law on price-fixing, including a reference to the *Trenton Potteries* case. Whether price-fixing *should* be condemned *per se* as a matter of policy is another matter. The British Monopolies Commission, for example, has not unconditionally condemned all price-fixing arrangements, and Spence J., in the *Fine Paper* case, inclined to a similar view.

Finally, I have never suggested or implied that a more discriminating interpretation would produce certainty (see p. 162). A law of this character is bound to remain uncertain in its detailed application, whatever test is applied. I do, however, renew with emphasis my suggestion that the Canadian law, as reformed in 1952, presents a unique opportunity of combining the advantages of the British with those of the more legalistic Canadian and American approach: that is, if the Restrictive Trade Practices

Commission would implement what appears to be its clear legislative mandate and refuse simply to follow the judicial interpretations of "unduly".

W. FRIEDMANN*

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Foreign Divorces: Warrender v. Warrender

TO THE EDITOR:

In an exchange of correspondence before the publication of his valuable contribution on foreign divorces in the November 1954 issue, I raised with Mr. Ryan a question as to the true meaning of the word "there" in Lord Brougham's famous statement in *Warrender* v. *Warrender* (1835), 2 Cl. & F. 488, at pp. 534-535. Mr. Ryan has been kind enough to include, at page 1030, a suggestion that there may be two interpretations of this word. The famous utterance reads:

> [A consequence of the argument of counsel would be that] if there were a country in which marriage could be dissolved without any judicial proceeding at all, merely by the parties agreeing in *pais* to separate, every other country ought to sanction a separation had in *pais* there, and uphold a second marriage contracted after such a separation. It may safely be asserted, that so absurd a proposition never could for a moment be entertained.

Of the problem, Mr. Ryan says:

> If by 'there' Lord Brougham referred to the country where separation in *pais* could dissolve a marriage, the proposition does not appear absurd at all. . . . The word 'there', however, may also refer to 'every other country'. Even so, the proposition does not seem so absurd now as it did in 1835, because in *Har-Shefi* v. *Har-Shefi*, [1953] 2 All E.R. 373 (Pearce J.), an extra-judicial divorce performed 'there', that is, in England, was recognized by an English court.

It is respectfully suggested (a) that it is the second alternative to which Lord Brougham was directing his attention, and that the word "there" refers not to the country by whose laws such a separation is permitted but to "every other country", so that if Olympia permits a dissolution, England or Canada need not permit it—it would be absurd to say that they should; but (b) that the *Har-Shefi* case is no authority for saying that the proposition, so interpreted, "does not seem so absurd now as it did in 1835".

First, let us deal with the word "there". It should be read in its context. The statement by Lord Brougham follows his analysis of the arguments put forward by counsel, and is his lordship's method of showing the inapplicability of the argument. That argument, as stated by Lord Brougham at page 532, is as follows:

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> But it is said that what is called the *essence* of the contract must also be judged of according to the *lex loci;* and as this is a somewhat vague, and for its vagueness, a somewhat suspicious proposition, it is rendered more certain by adding, that dissolubility or indissolubility is of the essence of the contract.

Before continuing with Lord Brougham's treatment of this argument it is well to recall the facts of the *Warrender* case. It involved a Scot, domiciled in Scotland, who married in 1810 an English girl domiciled, it would appear, in England. The marriage ceremony took place in London. She had never been to Scotland before the marriage and went there twice afterwards. The husband (Lord of the Admiralty and Commissioner of East India Affairs) resided in London for a good portion of the period 1812-1819 while he held office. In 1819 the parties separated. The husband thereafter resided mostly on his estates in Scotland, where he was resident and domiciled in 1834 when he brought action in the Scottish courts for dissolution of the marriage on the ground of adultery. The wife had been resident in various places, mostly on the continent, in this period. She objected to the court's jurisdiction upon three grounds, of which only two are relevant here. She asserted that the Scottish court had no jurisdiction because, following the separation, "the wife's domicile was no longer the husband's". She also asserted that even if the two domiciles had been "one and the same, and that domicile Scotland, the marriage having been contracted in England, and one of the parties being English, no sentence of a Scotch Court could dissolve the contract". The Scottish courts and the House of Lords rejected these arguments, holding that the wife retained her husband's domicile during the marriage, and that a court of the domicile (Scotland) could dissolve an "English marriage". It is the last point with which Lord Brougham is dealing when the remarks quoted and those to follow were made. It is also well to recall that English law did not in 1835 provide for dissolution of marriage, except by private act of parliament.

To the argument that the *lex loci* controls the essence of the marriage, that dissolubility or indissolubility is of the essence of such a contract, and in effect that a court in Scotland could not dissolve an English marriage, Lord Brougham made the following remarks (pp. 532-5), immediately following his statement of the argument just quoted:

> Now I take this to be really *petitio principii.* It is putting the very question under discussion into another form of words, and giving the answer in one way. There are many other things which may just as well be reckoned of the essence as this. If it is said that the parties marrying in England must be taken all the world over to have bound themselves to live until death or an Act of Parliament 'them do part;' why shall it not also be said that they have bound themselves to live together on such terms, and with such mutual personal rights and duties, as the English

law recognizes and enforces? Those rights and duties are just as much of the essence as dissolubility or indissolubility; and yet all admit, all must admit, that persons married in England and settled in Scotland will be entitled only to the personal rights which the Scotch law sanctions, and will only be liable to perform the duties which the Scotch law imposes. Indeed if we are to regard the nature of the contract in this respect as defined by the *lex loci*, it is difficult to see why we may not import from Turkey into England a marriage of such a nature as that it is capable of being followed by and subsisting with another, polygamy being there of the essence of the contract.

The fallacy of the argument, 'that indissolubility is of the essence,' appears plainly to be this: it confounds incidents with essence; it makes the rights under a contract, or flowing from and arising out of it, parcel of the contract; it makes the mode in which judicatures deal with those rights, and with the contract itself, part of the contract; instead of considering, as in all soundness of principle we ought, that the contract and all its incidents, and the rights of the parties to it, and the wrongs committed by them respecting it, must be dealt with by the Courts of the country where the parties reside, and where the contract is to be carried into execution.

But at all events this is clear, and it seems decisive of the point, that if, on some such ground as this, a marriage indissoluble by the *lex loci* is to be held indissoluble everywhere; so, conversely, a marriage dissoluble by the *lex loci* must be held everywhere dissoluble. The one proposition is in truth identical with the other. Now it would follow from hence, or rather it is the same proposition, that a marriage contracted in Scotland, where it is dissoluble by reason of adultery or of non-adherence, is dissoluble in England and that at the suit of either party. Therefore a wife married in Scotland might sue her husband in our Courts for adultery, or for absenting himself four years, and ought to obtain a divorce *a vinculo matrimonii*. Nay, if the marriage had been solemnized in Prussia, either party might obtain a divorce on the ground of incompatability of temper; and if it had been solemnized in France during the earlier period of the revolution, the mere consent of the parties ought to suffice for dissolving it here. Indeed, another consequence would follow from this doctrine of confounding with the nature of the contract that which is only a matter touching the jurisdiction of the Courts, and their power of dealing with the rights and duties of the parties to it: if there were a country in which marriage could be dissolved without any judicial proceeding at all, merely by the parties agreeing in *pais* to separate, every other country ought to sanction a separation had in *pais* there, and uphold a second marriage contracted after such a separation. It may safely be asserted, that so absurd a proposition never could for a moment be entertained; and yet it is not like, but identical with the proposition upon which the main body of the Appellant's argument rests, that the question of indissoluble or dissoluble must be decided in all cases by the *lex loci*.

It will be noted that the remarks which form the basis of this letter —about agreements to separate without judicial proceedings, and so on—appear near the end of this quotation. I have set it out in

full, even though it is rather long, to give the full picture. (His lordship's treatment of this argument as to the marriage being governed by the *lex loci* is considerably longer than the one portion quoted. It extends from pages 529 to 557. The general question of the nature of the contract being so governed is dealt with at pages 529 to 532. Then the question whether dissolubility or indissolubility is to be governed by the same law, assuming the parties both belong, at the time of the marriage, to the place in which it is celebrated, is dealt with in the quoted passages from pages 532 to 535. Finally the question "of parties belonging to one country and marrying in another (which is the case before us)" is dealt with at pages 535ff.)

It is not easy, it is admitted, to determine what the word "there" means in the second last sentence of this long quotation. "If there were *a country* in which marriage could be dissolved without any judicial proceeding at all, merely by [separation in *pais*], *every other country* ought to sanction a separation . . . *there* . . ."—this is the proposition which is said by Lord Brougham to be absurd. It is possible to say that "there" means "a country", so that if France granted a divorce by separation without judicial proceedings (as was possible in the period mentioned by his lordship), it would be absurd in his view to say that "every other country" ought to *recognize* a divorce so had "there" (that is, in France). But it is submitted that such is not absurd, and I do not think that his lordship would have thought so either. Some may feel that the remarks were directed to the recognition of foreign separations by agreement without judicial proceedings, and that this is what Lord Brougham meant. I suggest not. Let us look at what he was dealing with—an argument that the *lex loci* controlled the dissolubility or otherwise of a marriage—that this marriage was governed by English law (as the *lex loci*) and was indissoluble in Scotland because domestic English law knew nothing of divorce in 1835, even though Scottish law allowed a divorce (for adultery or desertion) by way of judicial proceedings. And in an attempt to show the incorrectness of this submission, his lordship puts by way of illustration, immediately preceding the famous passage, the converse situation—must, on this argument, *English* courts grant a divorce to a couple married in Scotland, on the ground of adultery or on the ground of four years desertion. "Nay, if the marriage had been solemnized in Prussia, either party might obtain [in England], a divorce on the ground of incompatability of temper; and if it had been solemnized in France during the earlier period of the revolution, the mere consent of the parties ought to suffice for dissolving it *here* [that is, in England]." Then follows the famous passage: "if there were *a country* in which marriage could be dissolved without any judicial proceeding at all, merely by [separation in *pais*], *every other country* ought to sanction a separation *there*". Surely this context shows that

"there" means "every other country"—that if France (for example) permitted the dissolution mentioned, every other country (including England) ought to "sanction" (that is, "grant", remembering it is dissolution by agreement) such a separation "there", that is, in England, to persons married in France. These are the propositions said to be absurd.

It may be argued that Lord Brougham concludes his remarks about this "absurd" proposition by saying it is "identical with the proposition upon which the main body of the Appellant's argument rests, that the question of indissoluble or dissoluble must be decided in all cases by the *lex loci*"; that it is absurd to say that we must recognize a second marriage in France ("a country") following such a divorce "there" (that is, in France)—that we must recognize that second marriage as valid because it is so by the *lex loci.* But his lordship is not dealing with the second marriage in his illustrations and discussions. In fact, "there" modifies the divorce; no place is specified for the second marriage. And, in any event, the nature of his thinking is surely shown by the very next sentence, introducing a further aspect of the problem:

> Hitherto we have been considering the contract as to its nature and solemnities, and examining how far, being English, and entered into with reference only to England, it could be dissolved by a Scotch sentence of divorce. [p. 535]

And to conclude that discussion he had reversed the situation to ask how far, the contract being Scottish, Prussian or French, it could be dissolved in England, using the Scottish, Prussian or French law as a basis (there being no English law of divorce).

Surely, then, the true interpretation of Lord Brougham's famous remark is that he was directing his attention, not to recognition in England of a foreign divorce, but to whether or not a divorce might be had *in England,* by way of an agreement to separate, simply because some other law where the marriage took place allowed marriages to be so dissolved.

It is unfortunate that the other view has received judicial blessing in the famous *Hammersmith Marriage* case, [1917] 1 K.B. 634 (C.A.), and from that unfortunate incident has been cited and quoted in subsequent cases and in textbooks as if Lord Brougham were speaking of recognition, not jurisdiction. Lifted out of its full context, the passage certainly is open to the view for which it is cited—that he was castigating dissolutions by agreement and wtthout judicial proceedings. Yet he was really condemning any divorce, judicial or otherwise, sought to be obtained solely on the basis of the *lex loci* of the marriage. Because of this error in interpretation and because all foreign divorces are not bad, the courts and writers are forced to say that Lord Brougham was asserting the absurdity of our recognition of divorces by agreement

without judicial proceedings. Some of the writers properly object to this assertion and suggest that it may not be absurd. In fact they have been proved correct, on this point, in the *Har-Shefi* cases. But, if correctly viewed, no disagreement with Lord Brougham is necessary.

Let us briefly recapitulate the cases. The *Hammersmith Marriage* case has been very adequately summarized by Mr. Ryan in his comment at pages 1034-1038. Briefly the husband in England purported to give to the wife a document signed and executed in England (a "talak") by which he divorced her, an act of divorce permitted by his religious law. This law was probably (though the court thought the evidence insufficient on this point) by the law of his domicile (India) his matrimonial and divorce law. The wife had been English and the marriage in England. Both the Divisional Court and the Court of Appeal held that it was an English marriage. The now famous remarks of Lord Brougham therefore surely had no application. Yet in the Divisional Court, Bray J., at page 653, and all members of the Court of Appeal, Swinfen Eady L.J., Bankes L.J. and A. T. Lawrence J., at pages 659-60, 661 and 662, adopt this passage from Lord Brougham and use it as a basis for holding invalid in England the divorce by "talak". In fact, in the Court of Appeal judgments, the famous passage is the chief authority referred to. It might be argued that this is the very type of situation which I contend Lord Brougham contemplated—a situation where the "there" was in England. Artificially, yes; but Lord Brougham was dealing with, at this stage of his illustrations, a marriage *celebrated abroad* (Scotland, Prussia and France were illustrations he gave). It was the argument that the dissolubility of marriage is governed by the *lex loci*, and that as a consequence a marriage in a foreign land might be dissolved in England by the law of that foreign land (the *lex loci*) that he was so vigorously attacking. His mind was not directed to the question of the *recognition* in England of a form of divorce, wherever carried out, appropriate to the law of the husband's domicile at the time of the dissolution. The unfortunate reference to dissolutions without judicial proceedings turned the attention of the courts in 1916 away from the true problem—they ducked the domicile question by saying that it was not sufficiently proved, and seized on the old "out of context" passage as to divorces without judicial proceedings. Yet divorces granted or recognized by courts in the domicile were being recognized in England in 1916, even though granted on grounds differing from those then available in England (*Armitage* v. *A.-G.*, [1906] P. 135), a proposition recognized by Lord Reading L.C.J. in the Divisional Court (at p. 643). The Courts in 1916, however, failed to see the full picture—that by recognizing such divorces, and allowing the *law* of the parties' present domicile to determine the dissolution or otherwise of their marriage, they

might properly be recognizing divorces of the country of domicile granted either by a court or by other means. In the *Hammersmith* case they refused to recognize the other means, relying upon the obiter of Lord Brougham as to agreements to separate and declaring that, if they were bad, an *ex parte* divorce by talak was even worse. To repeat, they failed to recognize that Lord Brougham was not casting down divorces by agreement as such—he was casting down the argument that a foreign method and law of divorce could be used in England or anywhere else merely because they were the method and law appropriate in the place where the parties had married.

Dicey (3rd ed., 1922, pp. 840-41; 6th ed., 1949, p. 371, n. 20) seems to accept the view of Lord Brougham's remarks objected to here, though in the sixth edition the editors merely refer to the *Hammersmith* quotation of these remarks. Cheshire (4th ed., 1952, p. 371) also seems to misinterpret this passage. He submits that the proposition "so disparagingly rejected" by Lord Brougham "is perfectly sound in principle". With very great respect for a very careful conflicts scholar, I submit that, when read in its proper context, it was not only not sound, but, as Lord Brougham said, absurd.

The statement was repeated, again apparently out of context, by Barnard J. in *Maher* v. *Maher*, [1951] P. 342; 2 All E.R. 37. This case is discussed by Mr. Ryan at pages 1038-1040. There was even less justification for the use of the passage in this case. Some might have argued, as I noted, that the passage was available in the *Hammersmith* case because the "talak" was delivered in England. Not even that happened here. The proceeding took place in Egypt, the husband's domicile. Again the famous passage is not authority for this decision.

Both the *Hammersmith* and *Maher* cases also purported to refuse recognition to the foreign divorce (that is, to the divorce obtained pursuant to the law of the foreign domicile) on the ground that it was a form of divorce not appropriate to a "Christian" marriage into which the parties had entered in England. I do not propose to discuss here whether the marriage was or was not "Christian", or even whether other extracts from the *Warrender* case on this entirely different subject were also lifted out of context by the *Hammersmith* judges to "prove" that the marriage there was "Christian". But parenthetically I do suggest that there is nothing unusual about a Christian marriage being dissolved in an "un-Christian" way, just as there is nothing unusual in the comparable though not similar situation of a presumably "indissoluble" Roman Catholic marriage in the Republic of Ireland being dissolved in the State of Michigan following a bona fide change of domicile, and then having that Michigan dissolution recognized in Ireland. See *Gauvin* v. *Rancourt*, [1953] Q.B. 663n; R.L. 517 (Que. C.A.; for

Ireland in the illustration read Quebec); and comment by W.S. Johnson (1954), 14 Revue du Barreau 301. Lord Westbury in *Shaw* v. *Gould* (1868), L.R. 3 H.L. 55, at pp. 84-85, says the same thing, in effect. I might also add that Romer L.J. in *Nachimson* v. *Nachimson*, [1930] P. 217, at p. 239 (C.A.), did not seem to treat as non-Christian a marriage which could be dissolved by mere consent with or without any judicial proceeding. And somewhat further on in the same judgment, his lordship makes it clear, in obiter, that he does not regard a dissolution by agreement without the intervention of a court as improper. "But the difference between a Christian and a non-Christian marriage cannot turn upon the distinction between a judge and a registrar." (p. 245) His lordship had just recited the method of obtaining a divorce in Russia in 1924 by consent by appearing before the marriage registrar and having the couple's desire to end the marriage recorded; and, by 1927, this could be done ex parte and against the will of the other party in the same way. "But the dissolution in Russia is as much or as little a dissolution by the State as it is in England." (p. 245)

Turning back to my main point—the meaning of Lord Brougham's passage—I should refer at greater length to the *Nachimson* case. The facts raised the question of the validity of an ex parte divorce obtained by the husband at the Paris consulate of Russia in January 1929, but unfortunately the reported decision went off on a preliminary point as to the validity of the marriage. Hill J. held it bad on the ground that it was too easily dissolvable. The Court of Appeal unanimously reversed, but said nothing about the divorce. It may be that in subsequent proceedings it was discovered that domicile in Russia was lacking at the time the divorce was granted, or that an analysis of Russian law showed that it did not permit dissolutions "outside" Russia. The experts at the trial differed on the effect of the Paris dissolution—[1930] P. 85, at p. 86—even though it had been noted on the marriage certificate introduced into evidence (*ibid.*, p. 92). In the Court of Appeal, however, Romer L.J. did refer to Lord Brougham's passage in its proper context (p. 239). And there is no suggestion in the judgments that such a dissolution in Russia would not be held valid in England. In fact it is possible to gather the opposite impression. Perhaps Romer L.J. was discreetly trying to correct the trial judge's use, in obiter, of the passage in its mistaken form (p. 91). There seems to be no note as to what happened the case in subsequent proceedings. I should appreciate hearing. There is a statement at page 103 of *Hibbert's Leading Cases in Conflict of Laws* (1931) that the divorce in Paris "was refused recognition here as the Consulate was not a Court of law". The reference is to The Times of December 12th, 1929, and this would appear to be a mistaken interpretation of the trial judgment, which in the Law Reports is dated December 17th, 1929. Yet the trial judgment must have been available to Dr. Hibbert because he

copies parts of the Court of Appeal judgment, with a reference to the Law Reports, in a later part of his casebook (pp. 281-3).

Despite these lapses by courts and writers, it is, I submit, quite clear that Lord Brougham's statement referred to jurisdiction, not recognition, and that he was accurate in stating that it was absurd to suggest that marriages celebrated abroad and dissoluble in certain ways and for certain reasons by the law of the place of celebration were thereby dissoluble in the same ways and for the same reasons in England or any other country. To those who assert that, far from being absurd, the statement is "perfectly sound in principle" (Cheshire) or "does not seem so absurd now as it did in 1835, because in *Har-Shefi* v. *Har-Shefi* an extra-judicial divorce performed 'there', that is, in England, was recognized by an English court" (Ryan), I suggest that they have either interpreted what was said of jurisdiction as if it were said of recognition (Cheshire et al.) or, in correctly construing 'there' as meaning every other country, have yet construed the statement as condemning "extra-judicial" divorces *obtained according to the law of the domicile at the time of dissolution* (Ryan). This, I have tried to suggest, formed no part of his lordship's statements and was not even considered by him. He was doing one thing only—condemning dissolution, under English auspices, of marriages celebrated abroad, by use of the law of the place of celebration. He was not condemning extra-judicial divorces as such. There is, indeed, every suggestion that the Prussian and French marriages referred to in the long quotation are Christian marriages. There is no suggestion that we would not recognize dissolutions under the recited laws of Prussia or France to parties governed at the time of the dissolution by such laws.

In result, the *Har-Shefi* cases (summarized by Ryan at pages 1040-1044) are not inconsistent with Lord Brougham's true proposition. The *Hammersmith* and *Maher* cases are, because they misconstrue what his lordship said. In any event they are artificially distinguishable from *Har-Shefi*: in them, the marriage was in England and the mode of dissolution was said to be appropriate not to an English but to a polygamous marriage. In *Har-Shefi*, the marriage was not English though monogamous and the mode of dissolution was appropriate to a monogamous marriage. In this respect I fully agree with Mr. Ryan (and Lord Brougham) that the method of dissolution should not be confounded with the type of marriage. We should have recognized the divorces in all three cases, not merely in the third. Any attempt to distinguish between them is nonsensical and, as well as being illogical, not even warranted on grounds of policy. It is to be hoped that the two earlier cases will be treated as unable to stand in the face of the *Har-Shefi* decisions.

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TO THE EDITOR:

Professor Kennedy has kindly sent me a copy of his able analysis of Lord Brougham's reasons for judgment in *Warrender* v. *Warrender*.

By showing that the *ratio decidendi* of that judgment was an authority, not for, but against the opinions expressed in the *Hammersmith* case on the inapplicability of a Muslim divorce to a "Christian" marriage, he has provided a better foundation than mine for the views I expressed in my comment. I am not sure, however, that he has established his entire thesis.

From the context of Lord Brougham's *reductio ad absurdum* we might infer that, since he was at pains to support the jurisdiction of the court of the domicile to dissolve a marriage celebrated elsewhere, he denied *e converso* the validity of an attempted divorce in *pais* carried out in accordance with the laws of a country in which the parties were not then domiciled. If so, the proposition he condemned was undoubtedly absurd, and, I think, still is. In that case, it could make no difference to what country the word "there" referred, because the contemplated divorce would be invalid whether carried out in the country where the marriage was celebrated or anywhere else.

We might agree with Professor Kennedy that the passage must be interpreted as merely part of the chain of reasoning designed to demonstrate that the quality of a marriage, as related to dissolubility, is not fixed once for all, at the time of marriage, by the law of the place of celebration. The passage would be taken to be simply a refusal to recognize the validity of a divorce in *pais* which is supported only as being authorized by the law of the place of celebration. On that reading, the proposition refuted by Lord Brougham remains equally absurd to-day, but, again, the place of performance of the act of dissolution is immaterial. In any event, the second interpretation is included in the first.

If, as Professor Kennedy argues (and, I believe, rightly), the word "there" refers to "every other country", it follows that Lord Brougham attributed importance to the place of performance of the act of dissolution. In my view, there is no significance in the place of performance, unless the law of the domicile requires performance in a particular place.

In Lord Brougham's example, the hypothetical law is silent on the point. For this reason, I adhere to the view that the proposition, as he stated it, does not now seem as absurd as it did to him.

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