MARRIAGE AND DIVORCE

The rules of private international law, sometimes called Conflict of Laws, which deal with the validity of marriage, are confused and inconsistent. Therefore it is not surprising that the problems arising in the division of the legislative field, as partitioned by the British North America Act, should be particularly complex in the case of Marriage and Divorce. To the Dominion is assigned the subject of Marriage and Divorce, and to the Provinces, the Solemnization of Marriage. The provincial legislatures also deal with Civil Rights within the Province. Thus they impinge on the Dominion's sphere in a dual manner.

The leading case on this problem arose in Quebec and is reported in the 1912 volume of the Appeal Cases in the Law Reports series, under the heading In re Marriage Legislation, Canada.[1] The headnote gives the significant features of the case succinctly:—

> Under sections 91 and 92 of the British North America Act, 1867, the exclusive power conferred on the Provincial Legislature to make laws relating to the solemnization of marriage in the province operates by way of exception to the exclusive jurisdiction as to its validity conferred upon the Dominion, and enables the provincial legislature to enact conditions as to solemnization, and in particular as to the right to perform the ceremony, which may effect the validity of the contract.

This particular decision itself causes no difficulty altho some implications from it may appear to go quite far. For example the definition of "solemnization of marriage" leaves the matter still unsettled.

> *Prima facie* these words appear to their Lordships to import that the whole of what solemnization ordinarily meant in the systems of law of the provinces of Canada at the time of Confederation is intended to come within them, including conditions which affect validity.

This description of the law of the Provinces of Canada at the time of Confederation and their pre-federation conception of solemnization of marriage therefore is an excellent loop-hole for future Courts, but it is very unsatisfactory as a basis of decision under the present provincial marriage Acts.

[1] *In re Marriage Legislation*, Canada [1912]. A.C. 880, at p. 887.

The great problem arises in respect of the marriage of minors without the consent of parents, which consent is required by practically all the Canadian Provinces. This present inquiry will be confined to the Common Law Provinces, because of the many perils to be encountered by the common lawyer who tries to interpret civil law. The Acts in force in the Common Law Provinces can be divided into two classes; those declaring such a marriage voidable, and those merely prohibiting the issuing of the license for such a marriage, but making no provisions for nullity in the event of the forbidden happening coming about. Ontario and Nova Scotia belong to the first class and all the other provinces to the second.

The first cases[2] dealing with this problem in Ontario and Nova Scotia declared against nullity by giving the Acts a very strained interpretation. The Acts[3] were afterwards amended in no ambiguous terms, and the Ontario legislation has been sustained as *intra vires* by the Ontario courts. There is no unanimity of opinion on the question in Ontario however, as a survey of the cases will show.

The best case on behalf of this legislation is made by Mr. Justice Wright in *Stewart* v. *Stewart*,[4] in which he appears to agree in the result with suggestions previously made by Alfred Morine, K.C. in an annotation (supra) to *Peppiatt* v. *Peppiatt*[5] the first Ontario case dealing with this problem. In that case Mr. Justice Middleton was of the opinion that nullity legislation would be *ultra vires*. After referring to the earlier decisions against the validity of nullity legislation Mr. Justice Wright in *Stewart* v. *Stewart* (supra) proceeds to base his judgment on an *obiter dictum* which is to be found at the end of the much-disputed and almost discredited case of *Sottomayor* v. *De Barros*.[6] In this passage Mr. Justice Wright finds authority for the proposition that the consent of the parents must be considered a part of the marriage ceremony, as being in the nature of a mere formality, and so it is competent for the provinces to require it as a part of the solemnization of marriage. The passage also purports to distinguish the well known case of *Simonin* v. *Mallac*[7] thereby recognizing its authority.

[2] *Peppiatt* v. *Peppiatt* (Ont.) [1916], 30 D.L.R. 1; Annotation by Morine (Ont.) [1916], 30 D.L.R. 17; *Harris* v. *Meyers* (N.S.) [1916], 30 D.L.R. 26.

[3] Statutes Ont. 1919, c. 35, sec. 2; R.S.N.S. 1923, c. 134, sec. 35 as first enacted by 1916, c. 15.

[4] [1925] 1 D.L.R. 1; (1924-25) 56 O.L.R. 57.

[5] [1916] 30 D.L.R. 1. To the same effect. *Henderson* v. *Breen* (1922-23), 19 A.L.R. 545; 2 W.W.R. 480.

[6] (1877) L.R. 3 P.D. at p. 7.

[7] (1860-62) 2 Sw. & Tr. 67.

An examination of the English cases both before and after *Sottomayor* v. *De Barros* (supra) as is made by Mr. W. L. Scott in the CANADIAN BAR REVIEW[8] leads one to the conclusion that all these cases seem to go on questions of capacity and absolute prohibition. The distinction attempted in the early cases between mere formalities and essentials is not maintained in the later ones and the reasoning in *Chetti* v. *Chetti*[9] the most exhaustive of them all in its treatment of the situation, seems to deny the existence of any solid distinction of this sort. The consent of parents to the marriage of minors may in some countries be merely a matter of form in others an essential. There is nothing which can be taken as a safe guide, it depending on the statute in each case. The Ontario statute[10] would seem to attempt to make it an essential since in many cases the absence of consent renders the marriage voidable. Rejecting the authority of *Sottomayor* v. *De Barros* (No. 1) (supra) what then is the Canadian situation? The provinces can only consider the ceremony of marriage and if there is no solid distinction between the form and the essentials, an incapacity of any sort will be properly a matter for Dominion Legislation as affecting status, i.e., the ability or capacity to marry and the resultant status of marriage, providing that the ceremony is performed in the manner prescribed by the province. This is the view of *Henderson* v. *Breen* (supra).

Accordingly in so far as the Ontario Act attempts to require the consent of parents as a condition of the validity of marriage of minors it is *ultra vires,* and the reasoning of the Court in *Peppiatt* v. *Peppiatt* (supra) and *Henderson* v. *Breen* (supra) rather than that used in *Stewart* v. *Stewart* (supra) seems to be correct. Mr. Justice Wright was followed however in his interpretation of *Sottomayor* v. *De Barros* (supra) in the case of *Doyle* v. *Deady*[11] decided by Mr. Justice Mowat. Moreover in neither of the two Canadian cases cited above contrary to this interpretation was it necessary to decide the particular point. Since they are the decisions of eminent judges and seem substantially correct in principle and in agreement with the English authorities considered in *Chetti* v. *Chetti* (supra) they are worthy of serious consideration.

There is a further problem arising out of the conflict of legislative competency, which should be considered, namely how far

[8] 2 C. B. Rev., p. 381.

[9] [1909] P.D. 67. Sir Gorell Barnes' opinion contains a valuable summary of the law.

[10] Stat. Ont. R.S.O. 1914, c. 148; 1914, c. 21, s. 35 am.; 1916, c. 32 am.; 1919, c. 35 am.; 1921, c. 51 am.; 1925, c. 45 am.

[11] [1925] 3 D.L.R. 317; (1925) 57 O.L.R. 44.

do the canonical degrees and the ecclesiastical law of marriage apply to the Canadian provinces. This question causes the greatest difficulty in those provinces which have no courts competent to deal with divorce and matrimonial causes. The problem therefore is particularly vexing in Ontario, and is magnified because of the conflicting opinions of Ontario judges when dealing with the matter.

Undoubtedly all matters dealing with the status arising from marriage or divorce are matters for Dominion legislation, together with the question of nullity arising from any of the causes known to the canon law and the English ecclesiastical courts. But as Mr. Morine points out, there is a difference between the right to legislate on the substantive law involved in such cases, and the right to create courts for the purpose of administering any such substantive law then or in future in force in the jurisdiction. The latter right, namely to create courts, belongs to the provinces under No. 14 of section 92. In Nova Scotia, New Brunswick, and Prince Edward Island, pre-federation courts are still functioning, while in the Prairie Provinces and British Columbia jurisdiction to entertain such suits has been given to the Supreme Court of the Province by requisite provincial legislation.[12] Only in the case of British Columbia is this legislation pre-federation.

Moreover the English Ecclesiastical Laws dealing with marriage, including the Divorce Act of 1857 have been brought into force in these provinces by the proper legislative authorities; in Alberta, Saskatchewan and Manitoba, by a Dominion Act; in British Columbia by a Provincial Act which was passed before Confederation.[13]

Thus if one assumes that the provinces can legislate on matters affecting the ceremony of marriage to regulate the form of its solemnization and even to the point of requiring a licence before the ceremony can be performed, or a fine in default of the licence, and also the further step authorized by the Quebec case decided in 1912, viz., declare the ceremony void unless it is carried out by the person designated by the legislature, nevertheless the problems of the prohibited degrees of affinity and consanguinity which render the marriage void ab initio or merely voidable as the case may be,

[12] Manitoba. *Walker* v. *Walker* [1919], A.C. 947. The law is in force by a combination of suitable Dominion Legislation introducing the English Law as of July 15, 1870, and suitable provincial legislation for the constitution of the superior court of the province. Saskatchewan. *Board* v. *Board* [1919], A.C. 956. Same as Man. and Alta. British Columbia. *Watts*. v. *Watts* [1908] A.C. 573. The English law as of 1878 was introduced, including the Divorce and Matrimonial Causes Act.

[13] See note 12 supra.

the various physical defects which affect validity, and the severing of the matrimonial tie by a divorce a vinculo matrimonii, are all matters for Dominion Legislation since they affect what is called the status of marriage. The power of the Dominion then, even as limited by the provisions of section 92 is very extensive.

In the provinces in which the Dominion has made no pronouncement on the applicability of Divorce, Ecclesiastical, or Common Law dealing with the marital relations, such laws, will be in force only, if they are introduced expressly or by implication by pre-federation legislation. In the three Maritime Provinces and British Columbia this has been done by express legislation. The same situation seems to prevail in Quebec.[14] In Ontario one finds that it is very difficult to determine whether any of the Ecclesiastical laws relating to marriage have ever been in force, or the Common Law only, and if the latter there is the special difficulty of an accurate statement of its rules.

The general principles of the common law of England and some recent Ontario cases may be taken as authority for the statement that no part of the Ecclesiastical or Canon Law was ever in force in the Province of Ontario except it be introduced by some special statute. As already noted such a statute must be of provincial creation and pre-federation, or Dominion and since Confederation. Nearly all the Ontario legislation on marriage, from the 18th century to the 20th implies that some portions of the English Ecclesiastical Laws are in force there. There is, however, no specific introduction.

The Courts in Ontario are agreed[15] that no existing legislation

[14] Gemmill On Divorce (1889), at p. 43. Civil Code for Lower Canada, Arts. 115-119.

[15] *T.* v. *B.* [1908], 15 O.L.R. 224. The High Court of Justice has no jurisdiction to entertain an action to have a marriage declared null and void by reason of the alleged incapacity and impotence of one of the parties. Followed in *Leakim* v. *Leakim* [1912], 2 D.L.R. 278. *May v. May* (1910), 22 O.L.R. 559. The High Court of Justice has no jurisdiction to declare a marriage void *ab initio*, upon the ground that the parties are related within the prohibited degrees—as in this case, that the husband is the brother of the wife's deceased husband. The dictum of Boyd, C., in *Lawless* v. *Chamberlain* is *obiter* and is not to be extended to such a case as this. *A.* v. *B.* (1911), 23 O.L.R. 261. Contains very excellent judgment by Mr. Justice Clute on this question of jurisdiction. See also *Reid* v. *Aull* (1914), 32 O.L.R. 68. The Supreme Court of Ontario has no jurisdiction to entertain an action brought for the purpose of having declared void a marriage which has been duly solemnized, unless the case can be brought under section 36 of the Marriage Act, R.S.O. 1914, ch. 148. Note that nearly all these cases deal with voidable marriages or what the judge appears to consider voidable marriages, i.e. Clute, J., in *A.* v. *B.* (1911), 23 O.L.R. 261, whereas *Lawless* v. *Chamberlain et al* (1890), 18 O.R. 296 considers the case of a marriage which is void *ab initio*.

gives to or creates any Court in Ontario with jurisdiction to hear causes which formerly could be heard by the English Ecclesiastical Courts, or the newer English Divorce Court. There is no reason why such a court or jurisdiction cannot be created, so the further problem should be considered, whether there is any substantive law now in force in Ontario which such new Court could apply.

The Common Law rules so far as they apply, which indeed is quite problematical, can be administered by the ordinary tribunals since the law of England dealing with property and civil rights only is introduced by the Constitutional Act of 1792.[16] Marriages involving questions of nullity *ab initio* and the resultant effect upon property and civil rights are also matters which can be considered by the regular courts as a part of their ordinary business. There is no instance of Dominion legislation introducing any part of the Ecclesiastical Law into Ontario, except a non-committal repeal of the rule against marriage with the deceased wife's sister.[17] Therefore it will be necessary to find the introduction of some part of the Ecclesiastical Law into Ontario before 1867.

There is a very exhaustive examination of this situation in a series of papers by Mr. E. Douglas Armour, K.C., which are to be found in the first volume of the Canada Law Times.[18] The evidence adduced in favor of the introduction of the Ecclesiastical Law into Ontario is to be found chiefly in three early cases[19] and in considerable statutory recognition of the introduction of the law at a very early time.

The cases seek to introduce only such rules of the Ecclesiastical Law as deal with consanguinity and affinity,[20] and the requirement of the consent of parents to the marriage of minors. The statutes also imply that these portions of the Ecclesiastical Law are in force in Ontario.

On the other hand a series of English and Canadian cases implies that none of the Ecclesiastical Law of England was ever introduced into Ontario. Mr. Morine seems to assume the opposite result, but without any examination of the early authorities. Mr. Armour comes to the conclusion after his survey that no parts of the Ecclesiastical Law were ever introduced into Ontario and he only

[16] *Lawless* v. *Chamberlain et al* (1890), 18 O.R. 296.
[17] R.S.C. 1906, c. 105, s. 2.
[18] C.L.T. Vol. I., pp. 509, 569, 617, and 665.
[19] *Hodgins* v. *MacNeil*. 9 Gr. Ch. 305, see opinion Esten, V. C., at p. 308; *Regina* v. *Secker*, 14 U.C.R. 604.
[20] Eversley, Domestic Relations, 4th Ed., 1926, p. 20.

arrives at this result after a very exhaustive and critical examination of the authorities. It is interesting to note, however, that the latest legislative pronouncement[21] assumes the applicability of the Ecclesiastical rules of consanguinity and affinity in Ontario.

Examination of the language of the early marriage Acts, that is from 1793 on, will indicate an assumption by the legislature that originally the only binding marriages were those celebrated by Ministers of the Church of England between persons not within the Canonical degrees. The controversy in England on this question is finally settled by the notorious case of *The Queen* v. *Millis,*[22] which is now admitted as binding law though an erroneous statement of history. The later case *Beamish* v. *Beamish,*[23] however, indicates that the rule of *The Queen* v. *Millis,* the rule implied to be in force in Ontario, does not really apply outside of England. Legislation subsequent to the first Ontario Marriage Act (1793),[24] in which Act the right to perform marriages is given to magistrates for a time, extends[25] this right to ministers of various other religions in the Province provided the ceremony is according to the rites and usages of their respective churches.

Marriages already celebrated by these ministers are made valid despite any irregularity, provided that the parties are not within the prohibited canonical degrees. Mr. Armour lays great stress upon the use of the term "legal" as contrasted with "canonical" which is to be found in the selection of the Acts validating the earlier marriages, *i.e.,* may in future marry persons according to the rights and usages of their sect provided that these persons are not subject to any legal disability against marriage, as for instance a previous marriage.

[21] R.S.O. 1914, c. 148, sec. 20.

[22] (1844) 10 Cl. and F., p. 534.

[23] 9 H.L.C. 274. It being settled by the decision in *The Queen* v. *Millis* that to constitute a valid marriage by the common law of England, it must have been celebrated in the presence of a clergyman in holy orders, the fact that the bridegroom is himself a clergyman in holy orders, there being no other clergyman present, will not make a marriage valid. As to the manner in which a marriage is to be celebrated, the law does not admit of any difference between the marriage of a clergyman and of a layman. Per Lord Campbell (Lord Chancellor). A decision of this House occasioned by the Lord's being equally divided, is as binding upon this House itself and upon all inferior courts, as if it had been pronounced *nemine dissentiente. Semble* that the decision in *The Queen* v. *Millis* is not to be applied to a case where the presence of a minister in holy orders is impossible, i.e., the Colonies when first settled. Cf. 33 Geo. III., c. 5.

[24] 33 Geo. III., c. 5, sec. III.

[25] 38 Geo. III., c. 4; 2 Geo. IV., c. XI; 10 & 11 Vict. c. XVIII.

A suggested interpretation of the situation is that the legislature of Ontario originally introduced by implication by the Act of 1783 a part of the Ecclesiastical Law, *viz.*, the prohibition of marriages which are within the Canonical degrees, and of all marriage except it be performed by a clergyman of the Church of England. Then by subsequent legislation these rules are relaxed to include ceremonies performed by a member of any of the enumerated sects of professing Christians according to the rites and usages of each particular sect. In this way state recognition is given to the dogma of the various professing Christians in relation to marriage.

It is admitted that by the Common Law and the statutory declarations of the later period, no one sect had a pre-eminent position as an established church, but as is said in *Brook* v. *Brook* [26] there are some rules dealing with incest which are common to all sects of Christians, and where any legislative recognition of these rules is suggested as in this case, surely the conditions of civilized society dictate that they be considered in force, The fact that originally the rules were those of the Church of England and were gradually relaxed so as to include all sects may be explained by the political condition in the colony in which the Church of England did have the upper hand during the struggle for responsible government.[27] Against this interpretation one must set the established prejudice of the common law against any laws tending to make uncertain the marriage bond, and the very doubtful authority of *The Queen* v. *Millis* (*supra*), or rather the enunciation of the proper principle which is to be found in *Beamish* v. *Beamish* (*supra*).

Moreover Mr. Armour's common law precedents and selections from the Ontario statutes which may seem to be conclusive and in opposition to the interpretation suggested above can be explained so as to be quite consistent with it. Firstly all the Common Law [28] precedents are against the establishment of a church hierarchy with legal powers and a system of courts, such as existed in England previous to 1857, rather than against the introduction of a very necessary part of the Ecclesiastical Law such as the Canonical degrees. Secondly the statutory references given [29] by Mr. Armour are to

[26] 9 H.L.C. Particularly the opinion of Lord Campbell at p. 208

[27] Kennedy. The Canadian Constitution, pp. 138-141. Riddell. The Law of Marriage in Upper Canada, 2 Can. Hist. Rev., 226.

[28] *Long* v. *The Bishop of Cape Town,* 1 Mo. P.C.C. (N S.), p. 411; *Lyster* v. *Kirkpatrick,* 26 U.C.R. 217; In *re Natal* (Lord Bishop), 3 Mo. P.C.C. (N.S.) 115.

[29] Armour. On the Legal Degrees of Marriage in Canada, 1 C.L.T., at p. 626.

the same sort of thing and what is more significant come from the middle of the 19th century. These later references are therefore of small significance when set up against the implications of the earliest statutes; for the references dealing with the reception of the Common Law in Canada give most authority to the earlier statutory recognition.

The solution suggested in this article is not inconsistent with any of the decisions of the Canadian Courts, and is consistent with all the significant statutory references to the matter both early and contemporary. The alternative suggested by Mr. Armour is that under the early legislation Ministers of the Church of England might, if they saw fit, celebrate incestuous marriages, and there was no law in Ontario which could enable any court to declare these marriages null. One should compare with this dictum the statement of the law by Lord Campbell which is to be found in *Brook* v. *Brook* (*supra*) concerning the necessity of some rules relating to incest, which statement moreover since it is *a principle of the Common Law* is not affected by its later date.

The Marriage Act of 1793 passed by the Legislature of Upper Canada appears to have introduced into Ontario such parts of the Ecclesiastical Law as deal with consanguinity and affinity, together with the rule ultimately determined by *The Queen* v *Millis* (*supra*). Subsequent legislation confirmed the former parts and relaxed the latter. Since the canonical prohibitions merely render a marriage voidable no court in Ontario can give a decree of nullity unless it be specially constituted for that purpose. There is no current legislation of this sort, but there is no visible hindrance to any action of the legislature in this sphere.

In conclusion Matrimonial and Divorce causes are to be heard in those Provincial Courts which have been erected by the proper legislation, which may be pre or post federation as the case may be. Those courts which have been created since Confederation can function only if the substantive law of marriage and divorce has been introduced by the proper legislative authority, *i.e.*, Provincial before 1867, Dominion since. Neither Ontario nor Quebec seems to fulfil these requirements with regard to both marriage and divorce.

Acts requiring the consent of parents, which Acts have been passed by the Provinces, seem, upon a proper understanding of *Simonin* v. *Malloc* (*supra*); *Sottomayor* v. *De Barros* (*supra*), and the related cases, to be *ultra vires* as attempts of the Province to deal primarily with the status of marriage rather than with its solemnization.

Questions of nullity *ab initio* of the marriage contract and resultant problems of property, civil rights and inheritance can be dealt with in the ordinary courts as part of the regular business [30] and so there is no particular problem with regard to these cases.

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[30] See the opinion of Boyd, C., in *Lawless* v. *Chamberlain* (*supra*).

THE JUVENILE COURT.—It has frequently been pointed out that the Juvenile Court, as we now have it, cannot be said to have originated at any one place or time, still less to owe its existence to any one man. It has been the result of a slow growth or development extending back over many years, and has borrowed features from many and various sources. In the history of the movement in any specific locality, however, there are usually well defined epochs, marked by definite advances. One of these in Canada was the passing in 1893, by the Ontario Legislature, of "The Children's Protection Act," an Act borrowed in the main, from Australian legislation. Briefly, this provided for the establishment of children's aid societies and for the commitment to them by the court and the placing by them in foster homes, of neglected and delinquent children, who had been taken from bad homes, which the societies had found it impracticable to rehabilitate. This placing out and subsequent visiting were put under strict government supervision.—*W. L. Scott.*