MATRIMONIAL JURISDICTION IN CANADA.*

Any discussion of matrimonial jurisdiction in Canada to-day must depend, in the last analysis, on the terms of The British North America Act, 1867,[1] its amendments, and statutes of the same genus. That Act is the basic source of the legislative competence of the various legislatures, and upon its terms are founded the reasoning of the different Courts in passing judgment upon the validity of any given statute—federal or provincial.

It must be remembered that the Dominion of Canada was formed by the union of a number of independent (i.e. of one another) states. Each of these states had by that time developed a definite scheme of government, with the necessary legislative, executive and judicial branches. A system of Courts had been established, and these had jurisdiction over matters arising under the statutes enacted by the respective legislatures.

These Courts and the laws they administered were recognized and continued in force by sec. 129 of the B.N.A. Act. That section sets forth that:

> Except as otherwise provided by this Act, all Laws in force . . . at the Union, and all Courts of Civil and Criminal Jurisdiction . . . shall continue . . . as if the Union had not been made; subject nevertheless (except with respect to such as are enacted by or exist under Acts of the Parliament of Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland), to be repealed, abolished, or altered by the Parliament of Canada, or by the Legislature of the respective Province, according to the Authority of the Parliament or of that Legislature under this Act.

It is submitted that the effect of this section is to continue in force the existing legislation of the uniting Provinces as at the time of Confederation. And the validity extends to such statutes as may now be found to fall within the exclusive legislative jurisdiction of the Dominion Parliament, unless and until repealed or altered by direct and conflicting legislation by that body. Repeal of such statutes as fall within the Dominion jurisdiction cannot be enacted by the individual provincial legislatures.[2] For it has been declared

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[1] 30 Vict. c. 3 (Imp.).

[2] *Ex parte O'Neill*, 28 S.C. 304; *Beaulieu* v. *La Cité de Montréal*, 32 S.C. 97

by the Judicial Committee of the Privy Council that:

> The powers conferred by this section (i.e. sec. 129) upon the provincial Legislatures of Ontario and Quebec to repeal and alter the statutes of the old Parliament of the province of Canada are made precisely co-extensive with the powers of direct legislation with which these bodies are invested by the other clauses of the Act of 1867.[3]

So that all statutes in force at the time of the Union continue in force to-day unless repealed or altered by the Dominion Parliament or individual provincial Legislatures within their respective powers as set forth in the B.N.A. Act, 1867.

The subject of marriage and marital relations is dealt with in the British North America Act in sec. 91, subsec. 26, and sec. 92, subsec. 12. Subsec. 26, which reads "Marriage and Divorce," is one of the classes of subjects enumerated as falling within the "exclusive Legislative Authority of the Parliament of Canada" contained in sec. 91. By sec. 92, subsec. 12, the subject of "The Solemnization of Marriage in the Province" is exclusively assigned to the provincial Legislatures. The question of how this exclusive jurisdiction to legislate is to be balanced has been passed upon by the Judicial Committee of the Privy Council in *In re Marriage Legislation in Canada.*[4] The Dominion Parliament had proposed to pass certain legislation with special reference to the Province of Quebec, to the effect that any marriage solemnized by any competent officer should everywhere in Canada be deemed to be valid, irrespective of the religion of the persons so married or of the officer performing the ceremony. The constitutionality of such a measure was attacked as an encroachment on provincial powers; and the Dominion authorities replied by taking the stand that any legislation on solemnization which affected the validity of the contract must emanate from the federal body. On a reference to the judicial authorities, the Privy Council held, confirming the Supreme Court of Canada,[5] that:

> The jurisdiction of the Dominion Parliament does not, on the true construction of ss. 91 and 92, cover the whole field of validity.

But that:

> The provision in s. 92 conferring on the provincial Legislature the exclusive power to make laws relating to the solemnization of marriage in the province operates by way of exception to the powers conferred as regards marriage by s. 91, and enables the provincial Legislature to enact conditions as to solemnization which may affect the validity of the contract. . . Prima facie, these words (i.e. of sec. 92) appear to their Lordships to import that

[3] *Dobie* v. *The Temporalities Board*, 7 A.C. 136 at p. 147.
[4] [1912] A.C. 880.
[5] 46 S.C.R. 132.

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.[6]

Just what is the extent of the provincial jurisdiction which is thus cut out of the general Dominion jurisdiction over marriage? What are the elements that constitute the "solemnization of marriage"? Charbonneau, J., in the Quebec case of *Hébert* v. *Clouatre*,[7] draws a distinction between two aspects of what the officiating authority does when he performs the ceremony. The learned Judge says:

Ce qui constitue essentiellement le mariage, c'est le consentement d'un homme et d'une femme à s'unir ensemble pour la vie commune et à la conservation de l'humanité. C'est là, non seulement la bâse du contrat, mais c'est le contrat même; le sacrement n'est qu'une forme qui lui donne son cachet de solemnité, et les fonctions ministérielles civiles ne sont qu'une autre forme qui lui donne publicité, authenticité et effet civil. Il faut donc distinguer entre les deux fonctions exercées par le prêtre ou le ministre en cette matière. Lorsqu'il bénit le mariage il remplit son ministère religieux; lorsqu'il reçoit le consentement des conjoints et lui donne la forme authentique en le consignant dans des régistres sous l'autorité que la loi lui confère, il exerce des fonctions purement ministérielles, qui doivent lui être attribuées par le pouvoir civil.

With the religious side we have, here, no concern. But when the officer acts for the civil authorities he does two things: (1) he sees to the proper ceremonial forms as required by the civil law of the province; and (2) he receives the consent of the parties to a contract recognized by that law.

It is this two-fold aspect of the marriage ceremony that gives a basis for the division of legislative competence. To the provinces, by way of exception under sec. 92, subsec. 12, falls the right to regulate the ceremonial side of the marriage. To the Dominion goes the regulation of the civil contract. The Dominion Parliament has the sole power to lay down rules as to the capacity of the individuals to contract; the provinces are given the right to regulate the form of contract, together with the precedent publicity. To the Dominion goes the right to control all the incidents of marriage posterior to a valid ceremony, including its dissolution; to the provinces is granted the power to formulate the procedure evidential of a valid ceremony.

Any rule of law laid down by the provinces which interferes with the inherent capacity of the individual to contract is, accordingly, *ultra vires*. The Dominion Parliament alone has the power to create

[6] [1912] A.C. 887, per Viscount Haldane.
[7] 41 S.C. 249 at p. 260.

a permanent disability to contractual capacity with regard to marriage.[8]

Such is the view which has been put forward by the law officers of the Crown in England. The question was put to them whether the New Brunswick Legislature or the Dominion Parliament had exclusive jurisdiction over the issue of marriage licenses. In a despatch from the Secretary of State for the Colonies to the Governor-General dated January 15, 1870, we find that: "It appears to them that the power of legislating upon this subject is conferred on the Provincial Legislatures by 30 and 31 Vict., Chap. 3, Sec. 92, under the words 'The solemnization of marriage in the Province . . . 'Marriage and Divorce,' which by the 91st Section of the same Act, are reserved to the Parliament of the Dominion, signify, in their opinion, all matters relating to the *status* of marriage between what persons and under what circumstances it shall be created and (if at all) destroyed." The procedure whereby that is created or evidenced being a matter within the control of the individual provinces.[9] And this view was apparently adopted by the Supreme Court of Canada in the *Marriage Reference Case*.[10]

Such, too, is the view of Meredith, C.J.C.P. (Ontario), who in *Peppiatt* v. *Peppiatt*[11] declares that:

> Solemnisation covers the ceremonial form by which marriage may be effected; it cannot affect the capacity of the man or woman to marry. . . Complete power to legislate upon these subjects [Marriage and Divorce] was intended to be conferred, all, with the exception of solemnisation of marriage, being given to Parliament; and so that legislative body must have power over the capacity of the contracting parties, as well as over the whole subject of divorce, in the widest meaning of that word.

Thus we may say that the Dominion Parliament has competence to legislate as to the capacity to contract. That body has exclusive power to fix conditions as to minimum age, permanent impediments to marriage and matters *ejusdem generis*. To the individual provinces is given the right to say who shall officiate at the ceremony, what form the ceremony shall take, what publicity shall be accorded the intended contract, and what form the evidence of such a contract shall take. But, of course, this does not mean that a provincial Legislature can validly enact that inhabitants of the province of which it is the Legislature, shall not be validly married if they cross the

[8] Cf. Clements "Canadian Constitution," p. 561; Holmested "Marriage Laws of Canada," p. 30.

[9] Dom. Sess. Papers, 1877, No. 89 at p. 340. Cf., too, Lefroy "Constitutional Law of Canada," p. 246.

[10] Per Davies, J., 46 S.C.R., at p. 342.

[11] 30 D.L.R. 1 at p. 4.

border and are married according to the solemnities and under the conditions prescribed by the Legislature of another province for marriage within the borders of that province.[12]

A much disputed point is the question of *consent of parents,* or others, as a condition precedent to the marriage. In England, it has been held that consent of parents precedent to marriage is part of the solemnization, and not a matter affecting the personal capacity of the parties to contract marriage.[13] In Canada, it has been held that the condition requiring consent is only directory to the performing authorities, but is not an essentially precedent condition, two cases in point being *Breen* v. *Breen*[13a] and *Peppiatt* v. *Peppiatt* (*supra*). Following the latter case, however, The Marriage Act of Ontario[14] was amended to make consent an essential condition precedent to the solemnization of a valid marriage. And it has been held that this is *intra vires* legislation, and that "consent precedent to a valid marriage is part of the solemnization of the marriage and therefore a provincial Legislature may make a marriage without such consent absolutely null and void."[15]

But it is submitted that such a view is incorrect and that necessity for consent, being an interference with the contractual capacity to marry, is exclusively within the jurisdiction of the Dominion. A provincial law on the consent of the parents is valid only if so drawn as not to interfere with personal capacity of the individual to contract. Where the failure of the consent of A is a permanent disability to the marriage of B, that is a limitation to B's capacity, and any provincial legislation to that effect is *ultra vires*.[16] Under the Ontario law, as amended, the age at which consent is necessary is fixed at 18. But if this is valid, then a law wherein the age limit is set at 50 can be supported by the same reasoning. This change brings out the fact that such a restriction is an interference with personal capacity to contract, and therefore beyond the power of the provincial Legislature.[17]

[12] Lefroy "Canadian Constitutional Law," p. 134; Dicey's Conflict of Laws (4th ed.) p. 686; *Languedoc* v. *Laviolette*, (Que. 1857) 1 L.C.J. 240; Civil Code (Quebec) Art. 7.

[13] *Ogden* v. *Ogden*, 1908 P. 46.

[13a] 19 Alta. L.R. 545.

[14] R.S.O. 1914, c. 148.

[15] Headnote, *Stewart* v. *Stewart*, 5 C. B. Rev. 655; [1925] 1 D.L.R. 1.

[16] Cf. Dicey's Conflict of Laws, 4th ed., at p. 690, where the English judgments declaring that the consent of others is part of the ceremony are criticized, and it is maintained that the more logical view is that "a person who cannot marry without the consent of another, is, pro tanto, under an incapacity."

[17] Cf. annotation by J. R. Cartwright, [1925] 1 D.L.R. p. 5.

It has been stated[18] that the Dominion has power to establish what shall be the impediments to a marriage. But this must be qualified. There is an Imperial Act which provides what degrees of relationship are alone to constitute impediments to marriage.[19] It expressly declares that "no reservation or prohibition, God's law except, shall trouble or impeach any marriage without the levitical degrees."[20] And this statute is enforceable "within this the King's realm or any of his Grace's other lands and dominions." Now, under The Colonial Laws Validity Act of 1865,[21] the colonies (and Canada falls within the definition) cannot alter such Imperial legislation as extends to them. It results, accordingly, that not even the Dominion Parliament in the plenitude of its power, and, more obviously, no provincial Legislature, could deal with such a question adversely to the statute of Henry VIII. There is, however, the contrary view that the Imperial grant to the Dominion Parliament of exclusive jurisdiction over marriage acted as an implied abrogation of that Act as far as Canada was concerned. But that argument loses its force when the question of copyright legislation is considered.[22]

The question of jurisdiction of Courts is not to be confused with that of legislative competence to establish the substantive law to be applied. A distinction must be drawn between jurisdiction to hear and determine actions, e.g., in declaration of nullity, and the grounds upon which such jurisdiction, if any exists, should be exercised; or between the power of legislatures to confer jurisdiction to determine actions and to enact laws affecting the validity of marriage.

We must always remember that it is a basic principle of our system of government that the King is the fountain-head of all justice,—that the King, in theory, is present in all the Courts of Canada. All verdicts of all the Courts are rendered in the name of the Crown. And any right which is created by the Crown, in any aspect of its legislative function (in combination with the other necessary bodies), must receive its sanction in some Court of law.

Thus we have the Privy Council (talking of divorce jurisdiction in Alberta) enunciating the principle that: "if the right exists the presumption is that there is a Court which can enforce it, for if no other mode of enforcing it is prescribed, that alone is sufficient to

[18] (*Supra*).
[19] 32 Henry VIII., c. 38.
[20] Cf. 28 Henry VIII., c. 7.
[21] 28-29 Vict. c. 63 (Imp.).
[22] Cf. *Law Quarterly Review*, XLIII., p. 378. "The Legislative Competence of the Dominions," by Prof. H. A. Smith. Also *Nadan* v. *The King* [1926] A.C. 482.

give jurisdiction to the King's Courts of Justice. In order to oust jurisdiction, it is necessary, in the absence of a special law excluding it altogether, to plead that jurisdiction exists in some other Court."[23] And the Privy Council gives another rule of construction. The Act of 1907 (Alberta) under discussion: "sets up a Superior Court, and it is the rule as regards presumption of jurisdiction in such a Court that . . . . nothing shall be intended to be out of the jurisdiction of a Superior Court, but that which specially appears to be so."[24]

Now, although by subsec. 14 of sec. 92 of the B.N.A. Act the provincial Legislatures have the right exclusively to legislate with regard to "The Administration of Justice in the Province," this does not prevent the Dominion Parliament from assigning to purely provincial Courts the duty to hear and determine actions arising under Dominion statutory enactments.[25]

And, conversely, it is submitted that, under such exclusive power, provincial Legislatures may confer jurisdiction upon provincial Courts to hear matters within the exclusive legislative jurisdiction of the Dominion Parliament. True it is that anything ancillary to exclusive Dominion power overrides any exclusive provincial jurisdiction,[26] even to the extent of interfering with procedure in provincial Courts.[27] Yet in the absence of such directly conflicting legislation the provincial Legislatures may confer jurisdiction, which will subsist until contrary legislation is enacted by the federal body within its powers.[28] Logically, this is only an application of the maxim *ubi jus ibi remedium* which practical administration renders necessary.

Again, although provincial Legislatures have power to regulate the solemnization of marriage and confer jurisdiction on the Courts to determine the validity of marriages dependent on questions of solemnization, they have, of their own initiative and without any validity existing substantive law, no power to give jurisdiction to any Court to grant divorces or annul de facto marriages. Or, as it is put by Meredith, C.J.C.P., (Ontario), such power cannot:

> Afford any justification for the creation of a Court to consider any question of the validity of the marriage with a view to any judgment directly respecting it. . . Whenever the interposition of any court is needed

[23] Per Viscount Haldane in *Board* v. *Board* [1919] A.C. at p. 962.
[24] Idem, at p. 963.
[25] *Valin* v. *Langlois* 5 Q.L.R. 3.
[26] *Tennant* v. *Union Bank* (1894) A.C. 31; *G. T. R.* v. *A.-G. Canada* [1907] A.C. 65.
[27] *Cushing* v. *Dupuy*, 5 A.C. 409.
[28] *Russell* v. *The Queen*, 7 A.C. 829; *G. T. R.* v. *A.-G. Canada* [1907] A.C. 65.

to sever any kind of a marriage tie, that court must be a divorce court, by whatsoever name it may be called; and divorce in its entirety is within the exclusive legislative power of the Parliament of Canada.[29]

To sum up, the Dominion Parliament may legislate directly on any subject within its exclusive competence without creating or directing any special Court to hear actions arising therefrom, in which case the general rules of construction as to jurisdiction would apply; or/and the provinces could legislate on jurisdiction. And provincial Courts could take cognizance of such laws; for, as it has been put by Ritchie, C.J.:

> These courts are surely bound to execute all laws in force in the Dominion, whether they are enacted by the Parliament of the Dominion or by the Local Legislatures, respectively. They are not mere local courts for the administration of the local laws passed by the Local Legislatures of the Provinces in which they are organized. . . They are the Queen's Courts, bound to take cognizance of and execute all laws, whether enacted by the Dominion Parliament or the Local Legislatures, provided always, such laws are within the scope of their respective legislative powers.[30]

Or the Dominion Legislature may create a substantive law together with a court to pass upon resulting actions, e.g., The Exchequer Court.[31] Or it may invest established provincial Courts with jurisdiction under such legislation.[32] Again, the Federal Parliament may delegate its powers,[33] and allow the provincial Legislatures to determine not only the jurisdiction of the Courts but also the substantive laws to be applied in deciding actions before such Courts involving the subjects of marriage and divorce. And in the last place, there may be in existence legislation relating to marriage and divorce valid by reason of pre-Confederation enactment—though really of provincial origin—under which the provincial Courts were already granted jurisdiction, or exercise it to-day as a necessary corollary to such valid creation of certain rights.

The Dominion Parliament itself has directly exercised its exclusive right of legislation in order to declare a marriage with a sister or niece of a deceased wife valid by Acts of 1882 and 1890.[34] Again, in 1914, legislation was enacted to declare valid a marriage between a woman and the brother or nephew of her deceased husband.[35] Such

[29] *Peppiatt* v. *Peppiatt*, 30 D.L.R. at p. 4. Cf. Holmested "Marriage Laws of Canada," p. 30.

[30] *Valin* v. *Langlois*, 3 S.C.R. 1 at pp. 19-20.

[31] B. N. A. Act, 1867, sec. 101.

[32] E.g. Bankruptcy Act, 9-10 Geo. V., c. 36, s. 63; *Cushing* v. *Dupuy*, 5 A.C. 409, *Valin* v. *Langlois* (*supra*).

[33] *Hodge* v. *The Queen*, 9 A.C. 117.

[34] 45 Vict., c. 42, and 53 Vict., c. 36. Now c. 127 of R.S.C. 1927.

[35] 13-14 Geo. V., c. 19 (Can.).

legislation, it has been pointed out, is valid only in so far as it does not conflict with the impediments set forth in 32 Henry VIII, c. 38 (Imp.)—the levitical degrees. Doubt as to the validity of the first piece of legislation, i.e., that of 1882 validating marriage with a deceased wife's sister, has been removed by an Imperial Act which expressly covers the case of the sister, but not the niece.[36] And by the Act 11 & 12 Geo. V, c. 24 (Imp.) the validity of a marriage with a deceased brother's widow was established. The Dominion Parliament legislated on the grounds for divorce by 15-16 George V, c. 41, to the effect that "in any court having jurisdiction to grant divorce a vinculo matrimonii any wife may commence an action praying that her marriage may be dissolved on the ground that her husband has since the celebration thereof been guilty of adultery." This ground may be raised in any court of provincial creation, even if not found in the provincial statutes.

Outside of these statutes[37] there has been no Dominion interference with such legislation on the subject of marriage and divorce as is continued in force under sec. 129 of the B.N.A. Act. And consequently there are many provincial statutes in force to-day which the provinces would now be unable to enact as falling within the exclusive Dominion power on the subject.[38] Notably, prior to Confederation some of the provinces had already established Matrimonial and Divorce Courts, modelling them on the then existing English Courts, with largely similar fields of jurisdiction; and these Courts are to-day still functioning.

Prince Edward Island.

In Prince Edward Island, by 5 Wm. IV, c. 10 (1836), all matters touching marriage and divorce, including separation from bed and board and alimony, were directed to be heard by a Court made up of the Lieutenant-Governor and any five or more of his Council. Prince Edward Island was not one of the original provinces, but was admitted into the Dominion by Order of Her Majesty-in-Council of June 26, 1873, under sec. 146 of The B.N.A. Act. One of the conditions of admission has the effect of making sec. 129 apply to the new province "as if the Colony of Prince Edward Island had been one of the Provinces originally united by the said Act." It therefore results that 5 Wm. IV, c. 10 is still in force in that province,

[36] 7 Ed. VII., c. 47 (Imp.).
[37] All combined in "The Marriage and Divorce Act," R.S.C. 1927, c. 127. There is also Dominion legislation on bigamy—s. 307 of the Criminal Code.
[38] (*Supra*).

and it would seem that the body by that Act set up is still the Matrimonial and Divorce Court.

The causes for divorce are frigidity or impotence, adultery, and consanguinity within the degrees prohibited by 32 Henry VIII, c. 38. There is also the provincial statute, 6 Vict., c. 8, regulating the issue of marriage licenses, and forbidding their issue to any person under 21. But it does not appear that an infraction of this would entail the nullity of an otherwise valid marriage.

Nova Scotia

Under R.S.N.S. 3rd series, c. 126,[39] a Court of Marriage and Divorce was established in Nova Scotia prior to Confederation. It had jurisdiction to declare any marriage null and void for impotency, adultery, cruelty, precontract or kindred within the degrees prohibited by 32 Henry VIII, c. 38. In 1866,[40] the style of the Court was changed to the Court for Divorce and Matrimonial Causes. The grounds of relief remained unchanged, except that the ground of precontract was eliminated. And this would appear to be the Court enjoying jurisdiction in divorce questions in Nova Scotia to-day.

Nova Scotia's legislation "on the solemnization of marriage" is Chapter 134 of R.S.N.S., 1923. Provision is made for the publication of banns or the issue of licenses, and authority is granted to certain classes of persons to solemnize the ceremony. And sec. 6 provides that "no marriage in Nova Scotia shall be valid unless

(a) it is solemnized by a person authorized by this Chapter to solemnize the marriage; and

(b) publication has been made of the banns of such marriage or a license has been obtained for the solemnization of the marriage."

This is entirely within the power of the provincial Legislature. But sec. 12 goes on to declare that where either of the parties to the proposed marriage is under the age of 21, the consent of parents, or guardian, shall be required before a license is issued or banns are published. And sec. 35[41] purports to give the Supreme Court of the province jurisdiction to make a declaration of nullity in an action brought by either party who was at the time of the ceremony under 18; provided that person has not reached the age of 19 and the marriage has not been consummated. These provisions are almost a word for word reproduction of secs. 15 and 36 of the Ontario

[39] Cf. vol. 3, R.S.N.S. 1923, pp. 5 et seq.
[40] By 29 Vict., c. 13.
[41] Originally enacted by 6-7 Geo. V., c. 15.

Marriage Act, 1914, before amendment. The necessity for consent under that statute was declared to be directory only and not essential to the validity of the marriage[42] and that may be taken as authority for the meaning of secs. 12 and 35.[43]

In so far as this legislation interferes with the capacity to contract of persons under 18, it is submitted, it is *ultra vires* the Nova Scotia Legislature, being beyond the post-Confederation power of a provincial Legislature, which embraces only the solemnization of marriage. And if the substantive measure falls to the ground, the jurisdiction of the Supreme Court of needs must be considered as non-existent.

New Brunswick.

In New Brunswick, by 31 Geo. III, c. 5 (1791), jurisdiction to determine all controversies concerning marriage and divorce was vested in "the Governor and Commander in Chief of this Province and His Majesty's Council."[44] In 1860, by 23 Vict. c. 37, this jurisdiction was transferred to another Court constituted by the provincial Legislature, and styled "The Court of Divorce and Matrimonial Causes." "Divorce, as well from bonds of matrimony, as divorce, and separation, from bed and board, and alimony"[45] were entrusted to that Court. The grounds for divorce *à vinculo* are limited to impotence, adultery and consanguinity within the degrees prohibited by 32 Henry VIII., c. 38.

In Chapter 76 of the Consolidated Statutes of New Brunswick, 1903, are found the provincial regulations with regard to the necessity for banns before marriage, the officials competent to celebrate a marriage, and provisions for the issue of marriage licenses. Chapter 115 of the Consolidated Statutes includes the above provisions respecting the Court of Divorce and Matrimonial Causes. And in a very recent decision the New Brunswick Supreme Court, Appeal Division, declared that "these provisions of the Act of 1791 . . . . remain unrepealed and in force," and the jurisdiction transferred by the Act of 1860 is sufficient to allow the Court to grant alimony under the circumstances governing.[46]

Quebec.

Canada became a British possession by the Treaty of Paris of 1763. It had been a French colony and French civil law had been

[42] *Peppiatt* v. *Peppiatt* (*supra*).
[43] Cf. the consideration of the Ontario law, (*infra*) p. 585 et seq.
[44] Sec. 5.
[45] Sec. 5 of the Act of 1791 re-enacted in part.
[46] *Mac Intosh* v. *Mac Intosh* [1927] 3 D.L.R. 1190.

enforced here. The Treaty made no mention of what law was to prevail; but by a Royal Proclamation of October, 1763, the Province of Quebec was created out of the ceded territory, and the Governor was empowered to make laws "as near as may be agreeable to the laws of England." And an Ordinance of 1764 provided for the establishment of a Court of King's Bench at Quebec, and Courts of Common Pleas throughout the Province, in which English law and procedure were the major, though not only, considerations. As a result of this attempted introduction of the English common law, great confusion and dissatisfaction resulted. The validity of the Proclamation of 1763 was attacked as being an executive measure only without any legislative formality. All these considerations led to new legislation by the Imperial authorities.

By the Quebec Act of 1774[47] all prior ordinances and proclamations were revoked and it was provided for by sec. 8 that in all matters of controversy with regard to property and civil rights the French civil law was to prevail (with very minor amendments). In 1791 by the Constitutional Act,[48] the province was divided into Upper and Lower Canada, each to have a legislature of its own. And under the power given to each parliament to fix the laws of its own province, Lower Canada retained the French civil law. By the Union Act of 1840[49] (proclaimed in Canada on February 10, 1841), the two provinces were re-united, with only one legislative body. And this continued until the B. N. A. Act of 1867, when not only a Dominion Parliament was set up, but the Province of Canada was divided into Quebec and Ontario, each with its own legislative body with legislative power as set forth in that Act.

The law of Quebec on the subject of solemnization, marriage and divorce, and the jurisdiction of the courts is found in the Civil Code and the Code of Civil Procedure. The former is in force by virtue of a Proclamation of May 26, 1866, under the authority of 29 Vict. c. 4 (United Canada). The latter was enacted by 29 & 30 Vict. c. 25 and a Proclamation of June 22, 1867. So that both were in force at the time of the Union and remain valid law until abrogated or repealed by the competent legislature.

There is no divorce *à vinculo matrimonii* in Quebec, since Article 185 C. C. declares that "marriage can only be dissolved by the natural death of one of the parties; while both live it is indissoluble." But be it noted that such legislation is ineffectual in the

[47] 14 Geo. III., c. 83 (Imp.),
[48] 31 Geo. III., c. 31 (Imp.), sec. 33.
[49] 3 & 4 Vict., c. 35.

face of a divorce granted by the Federal Parliament under the exclusive power of sec. 91. But even in such a case, the provincial Courts may regulate the division of property, since there is here no necessary conflict with the provincial jurisdiction over "Property and Civil Rights in the Province."[50] But were the province itself desirous of setting up a divorce court now, it could not do so since such a measure falls outside the powers granted it by the B. N. A. Act.[51]

Marriage is dealt with in Title Fifth of Book First of the Civil Code. Chapter First treats of the "qualities and conditions necessary for contracting marriage," and covers such matters as minimum age, consent of parents, and impediments such as previous marriage and degrees of consanguinity. And such provisions subsist in virtue of sec. 129 of the B. N. A. Act as unrepealed pre-Confederation law. We must note, too, that the question of parental consent is included in this chapter on the qualities to contract, though commonly held to be a question of solemnization. The impediments based on consanguinity are to be found in Arts. 124, 125 and 126, and follow the lines laid down in 32 Henry VIII, c. 38. Art. 126 prohibits a marriage between "uncle and niece," but such a prohibition must fall before the Dominion Act[52] allowing marriage between a man and the daughter of his deceased wife's sister, and the prohibition of marriage between "aunt and nephew" to be found in the Code is contrary to 13-14 Geo. V, c. 19 (Can.), allowing marriage between a woman and the son of her deceased husband's brother.

Art. 127 C. C. has been provocative of much discussion and litigation. The article provides that "the other impediments recognized according to the different religious persuasions, as resulting from relationship or affinity or from other causes, remain subject to the rules hitherto followed in the different churches and religious communities." The difficulty is whether "other causes" refers to something of the same kind as relationship or affinity, or to something beyond them. If the latter is true, how far does the phrase go? What right is given to ecclesiastical authorities to settle the validity of any marriage?

The question came before the Privy Council in the case of

[50] Sec. 92, subsec. 13. But note that no decree is needed from a Provincial Court to effect separation of property where community existed. Only the means of effectively executing the divorce decree are referred to—*Dawson* v. *Hislop*, 57 S.C. 264, 60 S.C. 336.

[51] *Supra.*

[52] 53 Vict., c. 36 (now R.S.C. 1927, c. 127).

Despatie v. *Tremblay*.[53] Two Roman Catholics had been married in a Roman Catholic Church in 1904. In 1910, upon the application of the husband, the Roman Catholic Bishop of the diocese decreed that the marriage was null and void on the ground that the parties, being cousins of the fourth degree, their marriage, without a dispensation, was contrary to the rules of the Roman Catholic Church. The relationship is not an impediment specified by the Code. On action brought in the Superior Court, Bruneau, J., declared the marriage null and void, basing himself on the decree of the Bishop and Art. 127 of the Code. But this decision was reversed, on appeal, by the Privy Council. They held that the marriage was valid, since the intention and effect of Art. 127 was to leave the law as to the effect of the impediments to which it refers entirely unchanged. And immediately before the codification, no ecclesiastical authority had power to prohibit anyone from contracting the civil status of marriage.[54] Religious liberty was the right of every citizen, but there was no ecclesiastical jurisdiction in civil matters established. The Roman Catholic Church (as any other Church) could influence the conscience of its adherents, but no ecclesiastical authority had the right to exercise any coercive jurisdiction with regard to the validity of a marriage.[55] Nor are the religious beliefs of the parties to be married, nor the incompetence of the official, impediments included in the "other causes" of Art. 127. And as far as concerns the persons to be married, relationship other than such as fell within the levitical degrees created no inherent impossibility of civil marriage, for it was impossible to prohibit under Art. 127 what was legal under the law of England applicable here—i.e., 32 Henry VIII, c. 38. That article has no bearing upon any inherent incapacity of the parties to contract a valid marriage, but its effect is only to preserve "the rights of each religious communion to recognize the impediments which exist according to its faith, and justifies the refusal of a minister of that communion to solemnize any marriage which offends against its rules."[56] But once such a marriage is solemnized it remains valid. This was the clear intention of the law-makers, for, as is pointed out

[53] [1921] A.C. 702.

[54] Cf. a case of 1857—*Languedoc* v. *Laviolette* 1 L.C.J. 240. Per Day, J. —"As to the ground contended for by the plaintiffs, that these parties should have been married by the cure of their parish, and no marriage otherwise celebrated could produce any civil effect, it is undoubted that such was formerly the law of France, but it is equally undoubted that that law was based on a union of civil and ecclesiastical rule, which was peculiar to France, and which never has obtained in this country."

[55] Cf. on this point: *Delpit* v. *Cote*, 20 S.C. 338; *Hebert* v. *Clouatre*, 41 S.C. 249.

[56] Headnote *Despatie* v. *Tremblay* (*supra*).

by their Lordships, no method of annulling such a marriage is provided for in Chapter Fourth of the Title.

The formalities of solemnization are set forth in Articles 128 and 129. "Marriage must be solemnized openly, by a competent officer recognized by law."[57] And "all priests, rectors, ministers and other officers authorized by law to keep registers of acts of civil status, are competent to solemnize marriage."[58] C. C. 44 sets out who keeps the registers referred to. Art. 57 requires the officer to be satisfied that due publicity has been given the projected marriage by way of publication of banns. Arts. 59 and 134 provide for the replacement of the banns by the production of "a dispensation or license, from a competent authority." The Lieutenant-Governor is, by C. C. 59a, the competent authority for priests other than Roman Catholics.

Chapter Fourth treats "of actions for annulling marriage." Now marriages fall under three heads; they are (1) valid, (2) null or void, or (3) annulable or voidable. A valid marriage can, under C. C. 185, be dissolved only by the death of one of the parties. A null or void marriage stands until it is set aside by the Courts at the instance of any person having an interest, without any limit as to the time allowed to take such an action. Relationship within the prohibited degrees or absence of the formalities of solemnization are grounds of nullity under Arts. 152 and 156, respectively. These marriages never have had any legal existence, but this must be positively declared by the Courts. A voidable marriage is one which, under given circumstances, can be attacked by certain persons; it is a valid marriage unless and until the person entitled to take action does so, within the time allowed by law. The instances of relative nullity are minimum age, lack of consent of the parties or of others, and impotency. Actions are prescribed for all these grounds. We must note that Art. 127 has no corresponding action in this chapter, and that Art. 118, which declares that "a second marriage cannot be contracted before the dissolution of the first" also has no corresponding provision. But the latter action can be argued to fall within the jurisdiction of the Superior Court under that Court's "superintending and reforming power, order and control" over all persons within the Province.[59] The other actions fall within the jurisdiction of the Superior Court over "all suits or actions which are not exclusively

[57] C.C. 128.
[58] C.C. 129.
[59] C.P. 50.

within the jurisdiction of the Circuit Court or of the Exchequer Court of Canada."[60]

The Civil Code also makes provision for separation from bed and board.[61] Provisions for a judgment granting separation from bed and board are clearly an interference with the status of marriage, and have nothing to do with the solemnization of marriage. Such law subsists only by virtue of its pre-Confederation enactment, and would give way before Federal legislation on the subject. The grounds on which such an action may be brought are enumerated in Arts. 186 to 191, C.C. A husband may demand the separation on the ground of his wife's adultery. A wife may demand the separation on the ground of her husband's adultery, if he keeps his concubine in their common habitation. Husband and wife may respectively demand this separation on the ground of outrage, ill-usage or grievous insult committed by one towards the other. And the refusal of a husband to receive his wife and to furnish her with the necessaries of life, according to his rank, means and condition, is another cause for which she may demand the separation. "The suit is brought, tried and decided in the same manner as all other civil suits,"[62] before the Superior Court[63] "of the domicile of the husband, or, if he has left his domicile, before that of the last common domicile of the consorts."[64]

Ontario.

In Ontario, the laws of England as to property and civil rights as they then existed were made the law of that province in 1792.[65] This would have the effect, *inter alia*, of introducing the English marriage law as it stood in that year. Subsequently Courts of Common Law and Chancery were instituted in the province, and were later replaced by the Supreme Court of Judicature for Ontario. The jurisdiction of that Court in questions of marriage and the solemnization thereof may exist inherently, under the Ontario Marriage Act, or under the Judicature Act. It is generally recognized that the English law of divorce was never introduced into Ontario and that the Supreme Court has no jurisdiction in divorce. Has it any jurisdiction in nullity?

[60] C.P. 48.
[61] Title Sixth of Book First.
[62] C.P. 1100.
[63] C.P. 48.
[64] C.P. 1099 and 96.
[65] 32 Geo. III., c. 1 (Upper Canada).

The provincial legislation is Chapter 148 of R.S.O. 1914, entitled "an Act respecting the Solemnization of Marriage," based mainly on the Act 1 Geo. V, c. 32. Marriage is to be solemnized by certain authorized persons, only upon production of a license duly issued, or after proclamation of the intention to marry by way of banns. The issue of a license to a person under 14 is prohibited. By sec. 20, subsec. 3, the prohibited degrees are defined as those to be found in the English Act 28 Henry VIII, c. 7, sec. 7, as amended by the Dominion Parliament.

Sec. 15 laid down the rule that where either party is under 18, the consent of parents or guardian "shall be required before the license is issued." In default of such consent, it was declared in sec. 36[66] that the Supreme Court "shall have jurisdiction and power in an action brought by either party, who was at the time of the ceremony under the age of 18 years, to declare and adjudge that a valid marriage was not effected or entered into," provided the person bringing action has not yet reached the age of 19, and the marriage has not been consummated.

The effect and validity of this legislation came before the Courts of Ontario in the case of *Peppiatt* v. *Peppiatt* (*supra*). In the Court of first instance, Meredith, C.J.C.P., held such legislation to be *ultra vires* the provincial Legislature. He says: "My conclusions are that the provincial legislation in question is *ultra vires*, and this Court has no power under it, nor has it power otherwise,[67] to consider the matters in question in this action."[68] On a point of procedure, the case came before the Appellate Division of the Supreme Court. Here it was held that "The Ontario Marriage Act, R.S.O. 1914, c. 148, does not make the consent required by sec. 15 a condition precedent to the formation of a valid marriage —the provisions of sec. 15 are merely directory."[69] But in his notes, Meredith, C.J.O., declares that, apart from authority, the provision requiring consent is *ultra vires* as in effect a restriction upon the right to marry of a person under the age of 18 years, and that sec. 36, which purports to give the Supreme Court a jurisdiction in nullity, is *ultra vires* the Ontario Legislature.

To meet this situation, in 1919, by c. 35, sec. 2, the provincial Legislature amended sec. 15 to read that a consent in writing was

[66] The origin of this legislation is 7 Ed. VII., c. 23, s. 8—per Middleton, J., in *Reid* v. *Aull*, 32 O.L.R. 68.

[67] The learned Judge refers here to the declaratory power of the Court under sec. 16(b) of the Judicature Act, 1914.

[68] 34 O.L.R. 128; 30 D.L.R. 6.

[69] Headnote, 36 O.L.R. 427.

necessary and "such consent shall be deemed to be an absolutely essential condition precedent to the formation or solemnization of a valid marriage, and the marriage if solemnized without such consent shall, subject to the other conditions of the said sections 36 and 37, be absolutely null and void." This amendment came up for consideration before the Ontario Supreme Court in the case of *Stewart* v. *Stewart* (*supra*). The court held that parental consent is part of the solemnization of marriage, and therefore a provincial Legislature may declare a marriage without such consent null and void. But it is submitted that this decision is not strictly logical. If we replace the age of 18 by that of 30, we can perhaps see more clearly the interference with the freedom to marry that sec. 15 establishes. Such an enactment is *ultra vires* as being in effect a restriction upon the right of a person under 18 to marry, and, therefore, a restriction upon his personal capacity to contract, and, as such, falling within the exclusive competence of the Dominion Parliament.[70]

Even if we are to accept the decision in *Stewart* v. *Stewart*, (*supra*) and hold such a restriction *intra vires* the province as solemnization, we must consider what the effect is when sec. 15 is combined with sec. 36. Under the latter section, whether or not a marriage shall be avoided after solemnization is made to depend on the relation of the parties after the ceremony. The Court either confirms the validity because something happened after the ceremony—in reality an encroachment on Dominion jurisdiction over the marriage status—or it separates the parties. In the latter case, the marriage is dissolved by reason of something posterior to the solemnization—the absence of cohabitation and the disclosure of the age—the effect of which is really to make of the court a Divorce Court, which is an interference with sec. 91 of the B. N. A. Act, and *ultra vires* the Ontario Legislature.

But what is the jurisdiction of the Ontario Supreme Court with regard to marriages null *ab initio*—e.g., within the prohibited degrees? In *Lawless* v. *Chamberlain*,[71] the High Court of Ontario declared that it had jurisdiction in nullity inherently. But this view has been refused in *May* v. *May*[72] on the ground that the jurisdiction to decree nullity had not been introduced into Ontario by the Judicature Acts. And again in *A* v. *B*,[73] followed by *Reid* v. *Aull*.[74]

[70] Cf., note 16.
[71] 5 C. B. Rev. 659; 18 O.R. 296.
[72] 5 C. B. Rev. 658; 22 O.L.R. 559.
[73] 5 C. B. Rev. 658; 23 O.L.R. 261.
[74] 5 C. B. Rev. 658; 32 O.L.R. 68.

But this is to ignore the fundamental principle of law that "*ubi jus, ibi remedium,*" or to apply it here, that where the King's law, being valid, enacts a prohibition the King's Courts must enforce the sanction of nullity of any contrary contract.[75] Nor must we forget the general principles laid down in the Privy Council decision in *Board* v. *Board,*[76] which all point in the direction of inherent jurisdiction as a practical corrolary to valid legislation.[77]

Moreover, sec. 16(b) of the Judicature Act, 1914,[78] has been declared by good authority to give the Supreme Court jurisdiction in nullity over void marriages. The Divisional Court in *Peppiatt* v. *Peppiatt* (*supra*) declared that "if marriages without the required consent are, as is contended they are, invalid, it was unnecessary to confer jurisdiction to declare and adjudge them to be invalid, as the Supreme Court had that jurisdiction vested in it by the Judicature Act."[79] And in a very searching study of the question by A. B. Morine, K.C., he comes to the conclusion that "the Supreme Court of Ontario has jurisdiction inherently to declare the nullity of void ceremonies, and sec. 16(b) of the Judicature Act, 1914, authorizes such declaration of nullity where no consequential relief is or could be claimed."[80]

Aside from this jurisdiction in nullity, "under the name of alimony, this Court has power to adjudge that which is tantamount to a divorce from bed and board, by reason of pre-confederation law, with which the Parliament of Canada has so far not seen fit to interfere."[81] The law referred to may be found in the Consolidated Statutes of Upper Canada, 1859, c. 12, sec. 29, where the English law is adopted.[82]

Manitoba.

By an Order-in-Council of June 23, 1870, Rupert's Land and the North-Western Territory were admitted into the Union, under the authority of sec. 146 of the B. N. A. Act, 1867, and the Rupert's Land Act, 1868.[83] In 1869, the Dominion Parliament had passed an Act[84] which provided *ad interim,* that all laws which would be

[75] Cf. *supra.*
[76] 5 C. B. Rev. 657; [1919] A.C. 962.
[77] Cf., too, Gemmill on Divorce, p. 40.
[78] R.S.O. 1914, c. 56.
[79] 30 D.L.R. 12, per Meredith, C.J.O.
[80] 30 D.L.R. at p. 25.
[81] Meredith, C.J.C.P., in *Peppiatt* v. *Peppiatt,* 34 O.L.R. 127; 30 D.L.R. 5.
[82] Cf. R.S.O. 1914, c. 56, sec. 73.
[83] 31 & 32 Vict., c. 105 (Imp.).
[84] 32 & 33 Vict., c. 3.

in force in that country at the time of admission should remain in force until altered. In 1870,[85] the Province of Manitoba was formed out of part of Rupert's Land and the North-Western Territory, and the provisions of the B. N. A. Act, 1867, were made to apply to the new province in the same way, and to the like extent, as if that province had been originally included at Confederation. And these two acts were confirmed as from their dates by the B. N. A. Act, 1871.[86]

In 1888, the Dominion Parliament provided[87] that the "laws of England relating to matters within the jurisdiction of the Parliament of Canada," so far as the same existed on July 15, 1870, were in force in Manitoba in so far as they were applicable to that province and unrepealed by Imperial or Dominion legislation. This Act, in so far as it extended to marriage and divorce, was clearly within the exclusive power of legislation conferred on the Dominion Parliament by sec. 91 of the B. N. A. Act, 1867, and the effect was to introduce into the province the English law of divorce as existing on July 15, 1870.

The question of matrimonial jurisdiction came before the Courts in the case of *Walker* v. *Walker*. This was a petition for a decree declaring a marriage null and void on the ground of the man's impotency. The case reached the Privy Council, and there it was held that "The Matrimonial Causes Act, 1857 (20 and 21 Vict. c. 85, Imp.) enacts a substantive law of divorce and matrimonial causes, which by virtue of 51 Vict. c. 33 (Dom.), s. 1, is in force in the province of Manitoba."[88] Their Lordships, per Viscount Haldane, explain that "the Matrimonial Causes Act, 1857 .. .. .. introduced new substantive law, and gave to the Court it constituted .. .. .. a new jurisdiction arising out of the principle, then for the first time introduced into the law of England of the right to divorce a vinculo matrimonii for certain matrimonial offences. This right had thus been made part of the law of England by July 15, 1870, and their Lordships are of opinion that it became part of the substantive law of Manitoba."[89]

It was further held that the Court of King's Bench of Manitoba has jurisdiction to administer such law. This results from sec. 10 of the King's Bench Act[90] whereby that Court is declared to have

[85] 33 Vict., c. 3 (Dom.).
[86] 34 & 35 Vict., c. 28 (Imp.).
[87] By 51 Vict., c. 33.
[88] 5 C.B. Rev. 657; Headnote [1919] A.C. 947.
[89] P. 954.
[90] R.S.M. 1913, c. 46.

the civil and criminal jurisdiction of the Courts of England as on July 15, 1870. Under sec. 17 of the Act, jurisdiction is also granted that Court in questions of alimony, with the substantive law that of England on the like question.

By R. S. M. 1913, c. 122, the provincial Legislature has enacted "An Act respecting the Solemnization of Marriages." Provisions for competent persons to officiate at ceremonies are provided. A marriage license is required, or the publication of banns (or dispensation thereof by the head of the Church). Sec. 15 provides that for a person under 18 the consent of parents or guardian shall be required. Sec. 16 forbids the issue of a license to a person under 16, except to prevent the illegitimacy of offspring. These two last mentioned sections are an interference with the capacity to contract, and therefore *ultra vires* the Manitoba Legislature.

Saskatchewan.

The "Rupert's Land Act, 1868"[91] affirmed the competency of the Dominion Parliament to admit "Rupert's Land and the North-Western Territory" to the Dominion of Canada in accordance with sec. 146 of the B. N. A. Act, 1867. That Act further declared that "Thereupon it shall be lawful for the Parliament of Canada .. .. .. to make, ordain and establish within the Land and Territory so admitted as aforesaid all such Laws, Institutions and Ordinances, and to constitute such Courts and Officers, as may be necessary for the Peace, Order and good Government of Her Majesty's Subjects and others therein." Rupert's Land and the North-Western Territory were admitted by Order-in-Council of June 23, 1870. And in 1886, The Dominion Parliament enacted that the laws of England as they existed on July 15, 1870, were to be enforced in the North-West Territories.[92]

By the B. N. A. Act, 1871,[93] not only had the right of the Dominion Parliament to legislate for any territory set up as a province been affirmed,[94] but the power to establish new provinces in such territory and "for the passing of laws for the peace, order and good government of such province" at the time of establishment had also been clearly enunciated.[95] Under the authority of this Act, the Province of Saskatchewan was created in 1905 by Act of the

[91] 31 & 32 Vict., c. 105 (Imp.).
[92] 49 Vict. c. 25, sec. 3.
[93] 34 & 35 Vict. c. 28 (Imp.).
[94] By sec. 4.
[95] By sec. 2.

Dominion Parliament.[96] By sec. 16 of this latter Act "all laws . . . . . and all courts of civil and criminal jurisdiction . . . existing immediately before the coming into force of this Act in the territory hereby established as the Province of Saskatchewan, shall continue in the said province." The laws are made subject to repeal or amendment by the Dominion or Provincial Parliament, each within its respective legislative jurisdiction as set forth in the B. N. A. Act of 1867.

These acts conferred upon the Province of Saskatchewan that part of the law of England relating to civil matters which is designated the law of divorce, as it existed on July 15, 1870, and as it had been transferred to the civil Courts in England in 1857.[97] And the Supreme Court of the Province (which succeeds the Supreme Court of the North-West Territories) is the Court with jurisdiction to administer that law. Following the Privy Council decision in the Alberta case of *Board* v. *Board* (*supra*), the Saskatchewan Court of Appeal maintained this view in *Fletcher* v. *Fletcher*.[97a] Jurisdiction to hear actions for judicial separation lies in that Court also.[98]

The Saskatchewan law on solemnization is to be found in The Marriage Act, 1924.[99] Certain persons are authorized to perform marriage ceremonies upon production of a license or the publication of banns. This legislation is valid, and jurisdiction in nullity thereunder vests in the Supreme Court. The levitical degrees, with Dominion amendments, are accepted as impediments. This too is valid as a re-enactment of pre-union law with Dominion legislation added. Consent to the marriage of a person under 21 is required, and may be remedied by an order of the Court where the person is over 18. The more logical view is to hold this an interference with personal capacity to contract, rather than merely directory or part of the ceremony, and as such *ultra vires* the province. By sec. 23 the minimum age is fixed at 15 years, an evident encroachment on Dominion power exclusively to regulate capacity to marry.

Alberta.

The Province of Alberta was created at the same time and under the same circumstances as Saskatchewan.[100] It, too, was cut out of the North-West Territories, and by the effect of sec. 16 of the

[96] 4-5 Edw. VII. c. 42
[97] By 20 & 21 Vict., c. 85 (Imp.).
[97a] 13 S.L.R. 51.
[98] *Walsh* v. *Walsh & Kirkland*, 19 S.L.R. 509.
[99] 14 Geo. V. c. 36.
[100] By 4-5 Edw. VII, c. 3 (Dom.).

Alberta Act the English law of divorce was introduced into that province. In *Board* v. *Board* (*supra*), the Privy Council held that the Dominion Act of 1886[101] had the effect of making the English law of divorce as established by the Matrimonial Causes Act of 1857[102] apply to the Territories; and this substantive law was continued in force in Alberta by the Alberta Act. And by 7 Edw. VII, c. 3 (Alb.),[103] the Supreme Court of Alberta, to which had been transferred the jurisdiction of the Supreme Court of the North-Western Territories, has jurisdiction to administer that law. For the Privy Council ruled that "had it been intended to exclude jurisdiction in divorce it would have been necessary to say so; for the language of section 9 of the Act of 1907 in particular is so comprehensive that it confers on the Supreme Court of Alberta all the capacity given by the Divorce Acts to the judges of the other Courts in England to act as the Court established by those Acts."[104]

Alberta has also a "Solemnization of Marriage Act," being Chapter 39 of the Statutes of 1925. Stated classes of persons are authorized to solemnize marriages; a license, or the publication of banns, is a prerequisite. The marriage of a person under 16 years of age —except that of a female proved to be pregnant—is prohibited. This section is *ultra vires* as dealing with the capacity to contract; or, in another sense, as in reality divorce legislation, since validity is dependent on something posterior to the ceremony. The consent of parents or guardian is required if a person is under 21 years of age, with a Judge having the power to dispense with such consent upon the application of a person over 16. In *Breen* v. *Breen*,[105] Beck, J.A., declared that "the customary statutory provisions relating to the consent of parents are merely directory, and that the absence of consent does not nullify the marriage." The learned Judge goes on to express the opinion that a law wherein the breach of provisions with regard to consent of parents invalidates the marriage is *ultra vires* a provincial Legislature.

British Columbia.

By an Order-in-Council of May 16, 1871, British Columbia was admitted as one of the provinces of the Dominion of Canada from and after July 20, 1871. One of the terms of admission (being

[101] 49 Vict., c. 25.
[102] 20 & 21 Vict., c. 85 (Imp.).
[103] Now the Judicature Act, R.S.A. 1922, c. 72
[104] Per Viscount Haldane, [1919] A.C. at p. 962.
[105] 19 Alta. L.R. 545.

sec. 10 of the Address by the Legislative Council of British Columbia) was to the effect that the provisions of the B. N. A. Act, 1867, were to apply "as if the Colony of British Columbia had been one of the provinces originally united by the said Act." That is, sec. 129 of the B. N. A. Act continued the laws in force in British Columbia at the time of the Union.

Now a proclamation of Sir James Young, Governor of the Colony, on November 19, 1858, introduced into British Columbia the English law as of that date, and by the English Law Ordinance of March 6, 1867, it was enacted that the civil and criminal laws of England as existing on November 19, 1858, were and should be in force in all parts of British Columbia. As a consequence, jurisdiction in matters of divorce was assumed by the Supreme Court of British Columbia under the English Matrimonial Causes Act, 1857. In the case of *Watts* v. *Watts*[106] this was confirmed when it was decided by the Privy Council that legislation in British Columbia adopting the law of England was sufficient to make the Martimonial Causes Act of 1857 apply to that province. And that "The Supreme Court of British Columbia has jurisdiction to entertain a petition for divorce between persons domiciled in that Colony and in respect of matrimonial offences alleged to have been committed therein."[107]

R. S. B. C. 1924, c. 70, re-enacts the Imperial Act 20 and 21 Vict. c. 85 (Matrimonial Causes Act), with its provisions with regard to divorce, judicial separation and alimony. The Marriage Act[108] provides for the solemnization of marriage by authorized persons pursuant to the production of a license or the publication of banns. By sec. 22 consent is required by persons under 21 years of age, which consent may be given by a Judge. And by sec. 23 the marriage of a person under the age of 16, except with the authorization of a Judge, is forbidden. Both these sections are *ultra vires* the province as falling within the exclusive power of the Dominion Legislature to control the capacity to marry.

We have seen that in all the provinces of the Dominion, except Quebec and Ontario, there exist courts with jurisdiction over divorce and matrimonial causes. In Prince Edward Island, Nova Scotia, New Brunswick and British Columbia it is by reason of pre-Confederation law continued in force by sec. 129 of the B. N. A. Act, 1867. In Manitoba, Saskatchewan and Alberta it is the result of

[106] [1908] A.C. 573.
[107] Headnote, *Watts* v. *Watts* (*supra*).
[108] R.S.B.C. 1924, c. 152.

Dominion legislation, which may be termed a delegation of Dominion jurisdiction to provincial control.

Divorce jurisdiction depends on the domicile of the married pair at the time of the institution of proceedings—in reality the domicile of the husband. And on the authority of *Attorney-General of Alberta* v. *Cook*,[109] (wherein the jurisdiction of an Alberta court in divorce proceedings over a man domiciled in Ontario was not upheld), we must take it as settled that, in matters which depend on domicile, the territorial unit for the purpose of domicile is the province, not the Dominion. So that, for purposes of divorce, the domicile of a person settled in one of the provinces of Canada is that particular province, and only the courts of that province have jurisdiction. But the Dominion Parliament has legislative power to dissolve the marriage no matter in what provinces the parties are domiciled.

In the Dominion jurisdiction, the subject of divorce falls under the head of Private Bill legislation, and takes the form of an Act of Parliament originating in the Senate. The Dominion competence so to proceed has been questioned, but must be considered to be entirely *intra vires*.[110] The B. N. A. Act was a delegation of legislative power in all its fulness, and Canada possesses "a Constitution similar in Principle to that of the United Kingdom."[111] And it has been pointed out by the Privy Council that "the Parliament of Canada is supreme, and within the limits of subjects assigned to it by the Act its power is as plenary and ample as that of the Imperial Parliament."[112] Now "Marriage and Divorce" is one of the specific powers enumerated as exclusively assigned to the Dominion under sec. 91. It follows that the power of the Dominion Parliament to grant a divorce, in the shape of a Private Bill cannot be contradicted.[113] And Parliament, by virtue of its sovereignty in that field, can grant a divorce for any cause,[114] and even without cause.

J. H. BLUMENSTEIN.

Montreal.

[109] [1926] A.C. 444.

[110] Clement's "Canadian Constitution," pp. 414 and 558. So, too, Gemmill on Divorce. *Attorney-General Alberta* v. *Cook*, 1926 A.C. 444.

[111] Preamble, B.N.A. Act, 1867.

[112] *Hodge* v. *The Queen*, 9 A.C., at p. 132.

[113] The Dominion Parliament, on the same grounds, has jurisdiction to grant a separation as to bed and board by way of a Private Bill. Cf. Gemmill on Divorce, p. 165.

[114] For causes, as accepted by Parliament, see F. D. Hogg "Parliamentary Divorce Practice in Canada," chapter IV., pp. 15-22.