

CORRESPONDENCE,

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Marriage with Deceased Wife's Sister.

To the Editor of THE CANADA LAW JOURNAL:—

SIR,—I am glad to observe, by the article in your issue for 1st May, on the present state of the Marriage Law, that you contemplate a further discussion of questions affecting the marital relation, which will probably engage the attention of the Dominion Parliament ere long.

In my communication on the subject of Marriage with a Deceased Wife's Sister, which appeared in your magazine on 1st April, I stated that such an alliance was "as unlawful in Canada as it is in England;" although I was free to admit that in Canada, at present, it was in the power of anyone so disposed, to disregard this prohibition with impunity. A writer in the *Canada Law Times*, for 1st May, impugns the accuracy of this statement. He contends, with much apparent plausibility, that my position is untenable, on the ground that, for the lack of competent judicial authority to set aside such marriages, they cannot be invalidated in this Dominion.

Notwithstanding this obvious defect in our system of jurisprudence, I must adhere to the assertion that an alliance of this description is "unlawful in Canada." Whatever opinions may be entertained as to the propriety of legalizing them, there can be no doubt that nothing short of positive legislation could accomplish this result, for as the law now stands, such alliances are directly forbidden.

The supreme authority of the Imperial Parliament extends over all parts of the realm: and until the Crown and Parliament of the Mother Country has sanctioned a deviation from the public law of the empire, by colonial legislation, on any matter of common concern, the law as defined by imperial legislation must everywhere prevail.

Marriage is a relation which claims to be of equal obligation in all parts of the realm. It must, therefore, be governed by the common law of the empire, at least until a special local law, sanctioned by the supreme authority, has been enacted.

The views of Her Majesty's Government on this subject were well expressed by the Duke

of Newcastle, when Secretary of State for the Colonies, in a despatch to the Governor of Victoria, dated 19th February, 1861, announcing the disallowance by the Crown of a local act concerning divorce. His Grace remarks that "the formal *mode* of contracting marriages is no doubt a fit subject for the discretion of Colonial Legislatures, because, as a general rule, no difference of mere form can render a marriage bad in any part of Her Majesty's Dominions which is valid in that part where it was contracted. The case, however, is very different in respect to the *essential conditions* of marriage. Whatever the effect of a colonial law may be within a colonial jurisdiction, I believe it to be at least most doubtful whether a marriage wanting in these conditions can be made valid in England by any colonial law; and if this be not the case, if the validity of such marriages and divorces is confined, at most, to the colony in which they take place, the greatest embarrassments might result from the prevalence of different laws in different parts of the empire. Marriages, legally contracted in one colony, would be inoperative for all legal purposes in another." * * * "Children, legitimate in one part of the empire, might in another find themselves incapable of inheriting their parents' property anywhere else. In fact, it is impossible to foretell the distress, insecurity, and litigation which might arise from such a state of things. These evils would not be confined to the colony whose legislation had given birth to them—they are essentially imperial. The probability of such evils renders it the duty of the Home Government, as far as its power extends, to maintain throughout the empire that essential uniformity in the law of marriage which alone can effectually prevent them."

These conclusions were uniformly adhered to by the Imperial Government up to the year 1861. They are confirmed by an Imperial Statute passed in 1865, to remove doubts as to the validity of certain colonial marriages, which expressly declares that the benefits of this act shall not extend to give effect—outside of the colony wherein it took place—to any marriage which had not been contracted "according to the law of England." And they agree with the provisions of the Upper Canada Statute, 11 Geo. IV., c. 36, which authorizes ministers of