A Summary *of*

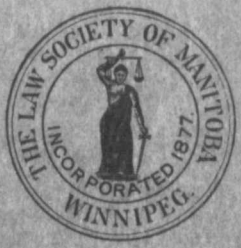
The Law of Divorce

by

THE HON. T. G. MATHERS

Chief Justice of

THE COURT OF KING'S BENCH
MANITOBA



Published by and under the authority of the Law Society of Manitoba.

B. E. CHAFFEY, Barrister-at-Law
Reporter

PREFACE

During the past winter a series of lectures upon legal topics was delivered by myself and others to the members of the Junior Bar and Law Students. One of these lectures by me was on the subject of Divorce. The lecture was prepared without any thought of its subsequent publication in any more enduring form than typewritten sheets. Those by whom the lectures were arranged, however, expressed a desire to have it printed and I have assented to that being done.

A summary of such of the Imperial Statutes, 1857 to 1870, relating to Divorce and Matrimonial Causes, as are in force in the four Western Provinces (omitting only such sections as are manifestly inapplicable) is printed as an appendix.

T. G. MATHERS.

Winnipeg,
23rd February, 1920.

DIVORCE

Lecture delivered by Chief Justice Mathers to the Junior Bar.—February 13th, 1920.

Our recently discovered jurisdiction in Divorce found us with a knowledge of the subject that was extremely nebulous. For that reason I have thought it advisable to devote at least a portion of this lecture to giving a brief historical review.

Prior to the Reformation in the time of Henry VIII, marriage in England as well as in other Catholic countries, was considered a sacrament which no human power could dissolve except perhaps the Pope as Christ's Vice-Regent on earth.

In *McQueen on Husband and Wife*, the law is thus stated at 164:

"To set aside a marriage in pre-Reformation times proof must have been that the contract itself was invalid. Conjugal infidelity furnished a ground for a separation, but nothing short of death could release the nuptial bond. The course, therefore, was to assert some obstructing antecedent impediment as a previous betrothment, undue consanguinity or affinity, physical incompetence or mental incapacity. Any one of these points established the marriage was thereupon declared *null ab initio*. But if originally valid it was under all circumstances positively and absolutely indissoluble."

To overcome the hardship which in many cases arose from the doctrine of indissolubility, the Church Courts extended the impediments of consanguinity and affinity so as to embrace not only the seventh cousin but also held that affinity might be established by mere sexual commerce. It thus had become no very difficult matter to have a marriage contract declared invalid because of the existence at the time of its celebration of one or other of the so-called impediments.

After Henry VIII had broken with Rome, an Act was passed, 32 Hen. 8, c. 38, which, in effect, limited the prohibited degrees to those specified in the 18th Chapter of Leviticus. This statute, with some modifications made in 2 & 3 Ed. 6, c. 23, and 5 & 6 Wm. 4, c. 54, is still the law.

If no such impediment could be discovered by the ingenuity of the canonist lawyers the Spiritual Courts had still the power to decree a divorce *a mensa et thoro* on the ground of adultery by one of the married pair. Such a decree did not in terms dissolve the

marriage tie because that tie could not be loosed by any human agency. All it did was to sentence the parties to a separation from bed and board.

After the Reformation opinion seems to have undergone a change as to the legal effect of such a decree. The doctrine of the indissolubility of marriage was now to a large extent abandoned and when a decree *a mensa et thoro* was obtained for adultery it soon came to be regarded as in legal effect, though not in form, a dissolution of the marriage so that the parties were at liberty to marry again. This may be taken to have been the view of the law by the church and was no doubt accepted and acted upon by the laity. That such was the opinion of the church is evidenced by the fact that in 1597 at a church convention a constitution was solemnly adopted, the 105th Canon of which charges the use of great circumspection in "Causes wherein matrimony is required to be dissolved or annulled," and the 107th of which requires that where a divorce *a mensa et thoro* is granted a bond shall be entered into not to marry again during the life of one of the parties.

This continued to be the view taken of the legal effect of a decree *a mensa et thoro* for adultery from the Reformation until towards the end of the reign of Elizabeth. Lord Brougham says in *Warrender* v. *Warrender*, 2 Cl. & F. at 553, that "Between the Reformation and the latter end of Queen Elizabeth's reign it was held that the consistorial jurisdiction extended to dissolve marriage *a vinculo* for adultery." And in 3 Salkeld, 138, it is stated that "A divorce for adultery was anciently *a vinculo matrimonii* and therefore in the beginning of the reign of Queen Elizabeth the opinion of the Church of England was that after a divorce for adultery the form of decree pronounced was not changed; it still continued to be in form one for separation from bed and board."

About the end of the Queen's reign, doubt was cast upon the legal effect of such a divorce by the case of *Rye* v. *Foljambe*, tried in the Star Chamber in 1602, in the 44th year of Elizabeth's reign. This case is reported in the collection of cases made by Sir F. Moore at 942 and 72 Eng. Rep. at 838. It is also referred to in 3 Salkeld 138.

Foljambe having been divorced for adultery married a second time Sarah Page, the daughter of the plaintiff, his first wife still living, and it was held that the second marriage was void because the first divorce was but *a mensa et thoro* and not *a vinculo matrimonii*. See *McQueen, Husband & Wife*, 170; *Bishop on Divorce*, Pars. 661, 775.

The decision in *Rye* v. *Foljambe* was followed in all subsequent proceedings for divorce in the Spiritual Courts—the only Courts having jurisdiction in matrimonial causes—with the result that from that time until the enactment of the Act respecting Divorce

and Matrimonial Causes in 1857 the only kind of a divorce which could be obtained by a judicial proceeding was a separation from bed and board. The sentence was in form exactly the same as that pronounced prior to *Rye* v. *Foljambe*, but its legal effect was held to be different. Before that case a sentence *a menso et thoro* for adultery was treated as a dissolution of the marriage, leaving the parties free to marry again. After that case such a sentence was regarded in legal effect as if it was in form merely a separation from bed and board leaving the matrimonial tie intact. The church was averse to the re-marriage of either of the parties who had been separated by a divorce *a mensa et thoro* during the lifetime of the other and for the purpose of restraining the practice, an Ecclesiastical Canon was adopted in 1597, five years before *Rye* v. *Foljambe*, requiring the party seeking such a divorce to enter into a bond not to marry again.

The practical effect of *Rye* v. *Foljambe* was to re-establish in so far as the Ecclesiastical Courts were concerned, the indissolubility of the marriage tie, although the decision does not seem to have been at once acquiesced in by the laity.

It, however, effectually closed the door of the Courts to those who desired to have their matrimonial bonds loosed, and forced them to seek relief in another direction. The direction in which relief was sought was by a bill in Parliament. The first recorded instance of such an Act is in 1666. In that year Lord de Roos, who had obtained an Ecclesiastical decree *a mensa et thoro* against his wife for adultery, and had entered into a bond not to marry again during her lifetime, procured the passage of an Act entitled "An Act for Lord Roos to marry again." The object of the Act was not to dissolve the marriage tie but merely to relieve Lord de Roos from the bond he had entered into not to marry again. Parliament seems to have regarded the marriage as already dissolved by the decree and the bond as the only obstacle in the way, showing that Parliamentary opinion was not in accord with the doctrine of *Rye* v. *Foljambe*.

The principles which should guide Parliament in dealing with divorce bills and the practice to be followed was not, however, settled until 1701. The practice then established appeared to require the applicant, if the husband, to prove that he had recovered a judgment in an action in the Common Law Courts for criminal conversation against the adulterer followed by a divorce *a mensa et thoro* against his wife for adultery in the Spiritual Courts. Upon proof of these facts parliament passed an Act dissolving the marriage.

An interesting account of these early parliamentary divorces will be found in *McQueen on Husband and Wife*, 172, et seq. and 1 *Bishop on Divorce*, par. 660 et seq.

The expense of obtaining a parliamentary divorce was such that that method of release was open only to the well-to-do, while to all others relief was denied. The situation as it existed for upwards of one hundred and fifty years before the Divorce Act of 1857 is stated with admirable irony by Mr. Justice Maule in sentencing a poor man who had been convicted of bigamy during this period. The prisoner's wife had robbed him and had run away with another, with whom she was living, and in these circumstances the prisoner had married again.

"You should" (said Mr. Justice Maule), "have brought an action and obtained damages which the other side would probably not have been able to pay and you would have had to pay your own costs, perhaps an hundred or an hundred and fifty pounds. You should then have gone to the Ecclesiastical Courts and obtained a divorce *a mensa et thoro* and then to the House of Lords where, having proved that these preliminaries had been complied with, you would have been entitled to marry again. The expense might amount to five or six hundred or a thousand pounds. You say you are a poor man. But I must tell you that there is not one law for the rich and another for the poor."

In 1857 a Divorce Act was passed creating a new Court called the Court of Divorce and Matrimonial Causes and to it was transferred all the jurisdiction in matrimonial matters theretofore exercised by the Ecclesiastical Courts. This Act was followed in 1858, 1859, 1860, 1862, 1864, 1866 and 1868 by other Acts relating to the same subject.

The general effect of these several Acts was to vest in the new Court the power to grant not only the relief which might theretofore have been obtained in the Ecclesiastical Courts or by Act of Parliament, but also in the Common Law Courts by an action of criminal conversation.

The Act of 1857 and those which followed it are confined in their operation to England and Wales alone. They have no extra-territorial operation, and are not in force in any Province of Canada except in those Provinces where they have been brought into force by colonial legislation.

Prior to Confederation, three Provinces now included in the Dominion of Canada had created Divorce Courts and enacted divorce legislation. In New Brunswick in 1791, an Act of the Legislature (31 Geo. III, c. 5) created the Governor-in-Council a Court with power to dissolve or annul marriages for impotence, adultery or consanguinity within the degrees prohibited by 32 Hen. VIII, c. 38. In 1860 this jurisdiction was transferred to a Court called "The Court of Divorce and Matrimonial Causes."

In Prince Edward Island an Act passed in 1885 also created the Governor-in-Council, a Court with such powers as those conferred on the Governor-in-Council and subsequently on the Divorce Court in New Brunswick.

Nova Scotia also before Confederation had its own Divorce Court with practically the same powers as those conferred upon the like Courts of her sister Provinces.

British Columbia did not enter Confederation until 1871. In 1867 by an Ordinance of the Legislative Council of the then colony the civil and criminal laws of England as the same existed on the 19th day of November, 1858, were made the laws of that colony. The Divorce and Matrimonial Causes Act had on the last mentioned date become part of the civil law of England. In 1877, in *M. falsely called S.* v. *S.*, 1 B.C. 25, by a majority decision of the Full Court of British Columbia, it was held that by virtue of the Ordinance referred to, the Supreme Court of the Province possessed the jurisdiction of the Court of Divorce and Matrimonial Causes in England. This view was finally confirmed by the decision of the Privy Council in *Watt* v. *Watt*, [1908] A.C. 573. British Columbia thus acquired jurisdiction in matrimonial causes, not by any express pre-Confederation enactments of its Legislative Assembly, but by a general Act bringing into force the civil and criminal laws of England as they stood on the 19th November, 1858.

Coming now to the Province of Manitoba. This Province entered Confederation in 1870, three years after the British North America Act of 1867, by which the Dominion of Canada was created. By section 91, s-s. 26, of that Act marriage and divorce are subjects over which the Parliament of Canada has exclusive legislative authority, while the Provinces have exclusive authority over property and civil rights in the Provinces. As the Province of Manitoba accepted that Act as its constitution when it joined Confederation in 1870, it is quite clear that the subjects of marriage and divorce never were within the competence of the Legislature of this Province. When the Court of King's Bench (then known as the Court of Queen's Bench) was established, it was given all the powers and authorities possessed on the 15th July, 1870, by any Court in England having cognizance of property and civil rights and of crimes and offences and the laws to be administered were those applicable to property and civil rights as they existed in England on that date or as they had been or might subsequently be altered by the Legislature of the Province, the Parliament of Canada, or the Imperial Parliament applicable to the Province. This general Act is quite as comprehensive in its terms as the British Columbia Act which, it has been held, conferred divorce jurisdiction upon the Supreme Court of that Province. But the British Columbia Act was passed before that Province became subject to the limitation upon its legislative authority contained in sec. 91, s-s. 26 of the British North America Act, whereas Manitoba came into existence subject to these limitations. This Province could not by any legislative Act of its own either enact or bring into force a law relating to divorce.

In 1888 the Dominion Parliament passed a general Act, 51 Vic. c. 33, which provided that

"the laws of England relating to matters within the jurisdiction of the Parliament of Canada as the same existed on the fifteenth day of July one thousand eight hundred and seventy were from the said day and are in force in the Province of Manitoba in so far as the same are applicable to the said Province and in so far as the same have not been or are not hereafter repealed, altered, varied, modified or affected by any Act of the Parliament of the United Kingdom applicable to the said Province or of the Parliament of Canada."

Although the Act was passed in 1888, it was not until twenty-nine years afterwards, viz., in 1917, that the claim was first made that it had the effect of bringing into force in this Province the divorce legislation of England as of the 15th July, 1870. Until that year it had been assumed that the only means by which a person domiciled in any of the Provinces of Canada, except the four in which divorce jurisdiction had been acquired before entering Confederation, could obtain relief from the marriage tie was by a bill in Parliament introduced in the Senate. The Courts of Quebec have assumed jurisdiction not to dissolve but to annul a marriage because of antecedent impediment and even to entertain petitions for separation from bed and board. I do not propose, however, to investigate the source of such jurisdiction. The prevailing opinion in Ontario is that the Courts of that Province have no jurisdiction to either dissolve or annul a marriage; *T.* v. *B.*, 15 O.L.R. 224; *May* v. *May*, 22 O.L.R. 559; and *A.* v. *B.*, 23 O.L.R. 261.

In 1917 a petition was presented to the Court of King's Bench in this Province in *Walker* v. *Walker*, 28 M.R. 495, praying that the marriage of the petitioner with the respondent be declared null and void because of the alleged impotency of the latter. Mr. Justice Galt dismissed the petition in order that the question of the Court's jurisdiction might be taken to the Court of Appeal. That Court, by a unanimous decision, held that the divorce laws of England were introduced into this Province by the Dominion Act of 1888 and that the Court of King's Bench had the same jurisdiction as the Courts have in England under the Matrimonial Causes Act, 1857, and the amending Acts. *Walker* v. *Walker* was affirmed in the Privy Council, [1919] A.C. 947. So that there is now no doubt that the divorce laws of England as they existed on the 15th day of July, 1870, are in force in this Province and the jurisdiction to administer the same is vested in the Court of King's Bench.

Saskatchewan and Alberta were created in 1905 out of part of the territory then designated the North West Territories. In 1886, the Parliament of Canada had by 49 Vic. c. 25, enacted that the laws of England as they stood on the 15th day of July, 1870, should be in force in these Territories. When the new Provinces

were created it was provided that the laws of the Territories should become the law of the new Provinces. In *Board* v. *Board*, [1918] 2 W.W.R. 633, affirmed in the Privy Council, [1919] A.C. 956, it was held that the effect of this legislation was to make the English law of divorce part of the law of Alberta.

The same was held with regard to Saskatchewan by the Court of Appeal of that Province, following *Board* v. *Board*, in *Fletcher* v. *Fletcher*, [1920] 1 W.W.R. 5.

We have now seen that with respect to the three Provinces, Manitoba, Saskatchewan and Alberta, with which I think may be included the North West Territories, the divorce legislation of England as it existed on the 15th day of July, 1870, and with respect to British Columbia such legislation as it existed on the 19th November, 1858, is in force. The three Maritime Provinces have divorce laws of their own. In Ontario and Quebec alone no Court has power to dissolve a marriage and married people whose domicil is either of these Provinces must if they desire relief, seek it through the Senate.

It having been conclusively established that the right to divorce had been introduced into the substantive law of this Province and no other Court being designated to exercise jurisdiction in divorce, the Court of King's Bench, as the only Superior Court of original jurisdiction, at once became clothed with the power and bound in duty to entertain and give effect to proceedings for making that right operative; *Board* v. *Board*, *supra*, at 962.

The Dominion Act of 1888 provided that "the laws of England" relating to matters within the jurisdiction of the Parliament of Canada should be in force in Manitoba. The Parliament of Canada has no jurisdiction over procedure in civil matters, so that the effect of that Act was to bring into force the substantive law of divorce only. Indeed it is doubtful if the term "laws of England" would be wide enough in any event to include rules of practice and procedure.

Then has the Legislature of this Province, which alone has jurisdiction over practice and procedure in civil matters, by any Act brought into force here the English divorce rules and procedure. It is not necessary to discuss the debatable question as to whether this procedure had become part of the law of Assiniboia prior to the entry of this Province into Confederation. By sec. 4 of the Act respecting the Court of Queen's Bench, R.S.M. 1880, it is provided that the Court is to be "governed by the rules of evidence and the modes of practice and procedure as they were, existed and stood in England" on the 15th July, 1870, except as they already had been or might thereafter be changed. At the time of the passing of this Act the law of divorce was not a part of the substantive law of Manitoba unless derived from the laws of Assiniboia, a point

which was discussed in *Walker* v. *Walker* in both the Court of Appeal and Privy Council but treated as immaterial and therefore not decided. If the right of divorce was not part of the law of Manitoba in 1880, as I assume to be the fact, it could not be presumed that the Legislature by the Act referred to intended to introduce a procedure for the enforcement of a non-existing law.

The same presumption does not exist with respect to the re-enactment of this section in substantially the same form in the revisions of 1892, 1902, and 1913, after the law of divorce had become part of the law of the Province by virtue of the Dominion Act of 1888. The conclusion, therefore, is that the substantive law of divorce was made part of the law of this Province in 1888, and by the re-enactment of sec. 4 of the Queen's Bench Act of 1880 in the Revision of 1892 and again in 1902 and 1913 the English Divorce Rules as they existed on the 15th day of July, 1870, were also introduced here. There has been no legislation of either the Legislature of Manitoba, the Parliament of Canada or of the United Kingdom applicable here altering this procedure. It follows that it is still in force except in so far as it has been changed or altered "by any rule or rules, order or orders of" the Court of King's Bench "lawfully made," sec. 11, K.B. Act.

Sec. 53 of the K.B. Act gives the Court power to make rules of Court for the purpose of carrying *this Act* into effect or for the purpose of providing for any matters not fully or sufficiently provided for in this Act. It seems that this power is sufficiently comprehensive to include the making of divorce rules. But the question is academic because under sec. 53 of the Divorce Act, 1857, the Court has ample power to do so.

Even if we had nothing but the ordinary machinery of the Court of King's Bench, it would be the duty of the Court to adapt that machinery to the working out of the rights conferred by the statute without regard to the special machinery established in England for that purpose; *Whitby* v. *Liscombe*, 23 Grant 1; *S.* v. *S.*, 1 B.C.R. 25.

It is desirable that codes of procedure should not be multiplied and that so far as possible all civil remedies should be prosecuted in accordance with the same rules of procedure. The rules of the Court of King's Bench, however, were not made with a view to carrying out the Divorce Acts or to provide procedure appropriate to a divorce action. These rules as a whole cannot be applied to such a proceeding without the most liberal constructions; so liberal indeed as to amount to legislation.

Such a proceeding could not be instituted by a Statement of Claim as in an ordinary action because the Act itself says that the relief may be obtained upon petition, (sec. 27); and where an Act which

"Creates a new jurisdiction, a new procedure, new forms or new remedies, the procedure, forms or remedies there prescribed and no others must be followed until altered by subsequent legislation." *Craie's Hardcastle*, 4th ed. 306; and see *Fletcher* v. *Fletcher*, [1920] 1 W.W.R. 6.

In England it had been found necessary to amend the rules subsequent to the 15th July, 1870, and in order that we might have in this Province a procedure which would include these amendments as well as any others which it might be thought desirable to make, I, in September last, drafted a set of Divorce Rules, using as a basis the English Rules as they then existed. This draft was submitted to a joint committee of the Law Society and of the Bar Association, and with some suggested alterations, the rules were passed by the Judges on the 8th September last to be effective on the 15th September.

I have now devoted considerable time to what may be called the historical aspect of the subject, but not more, I think, than is necessary for its intelligent comprehension.

I propose now to discuss the right itself.

THE DIVORCE AND MATRIMONIAL CAUSES ACT of 1857 was followed by other Acts in each of the years 1858, 1859, 1860, 1862, 1864, 1866 and 1868. Several amending acts of more recent date were also passed, but as they all came into effect after the 15th day of July, 1870, they do not concern us.

EVIDENCE OF PARTIES: There is also another Imperial Act which has an intimate bearing on this subject. I refer to *The Evidence Further Amendment Act* of 1869, c. 68. This Act finally removed all restrictions on the competence of parties to give their evidence on oath in matrimonial causes, but it at the same time imposed a very important restriction on the right to examine any witness, whether a party or not, with respect to his or her own adultery. Section 3 of the Act says:

"The parties to any proceeding instituted in consequence of adultery and the husbands and wives of such parties shall be competent to give evidence in such proceeding; provided that no witness in any proceeding whether a party to the suit or not shall be liable to be asked or bound to answer any question tending to show that he or she has been guilty of adultery unless such witness shall already have given evidence in the same proceeding in disproof of his or her alleged adultery."

The practice in the Ecclesiastical Courts was to hear all causes on written depositions. This practice was reversed by sec. 46 of the 1857 Act in so far as witnesses were concerned. By that section all witnesses whose attendance can be procured are subject to the rules to be examined orally in open Court. The parties were still permitted to verify their cases in whole or part by affidavit,

subject to the right of the opposite party to require the affiant to attend and submit to cross-examination and re-examination orally in open Court.

Section 43 empowered the Court to order the attendance of the petitioner and either examine or permit him or her to be examined on oath on the hearing of the petition; but the petitioner was not bound to answer any question tending to show that he or she had been guilty of adultery.

When the 1857 Act was passed the parties to a matrimonial suit were not competent to give evidence as to adultery, cruelty or desertion, or any other matrimonial offence. These two sections, 43 and 46, constituted the first relaxation of the rule. Section 6 of the 1859 Act made both the husband and wife competent and compellable witnesses as to cruelty or desertion upon a wife's petition charging the husband with adultery coupled with either. Then followed the Evidence Act, 1869, making the parties and their husbands and wives competent but not compellable in any proceeding instituted in consequence of adultery.

When a witness is called to prove adultery with one of the parties, it is the privilege of the witness to decline to give evidence; but unless the witness claims the protection of the statute, his or her evidence is admissible and neither party nor their counsel has any right to object. It is the duty of the Judge, however, to tell the witness that he or she is not liable to be asked or bound to answer any question tending to show his or her adultery unless willing to do so. *Hebblethwaite* v. *Hebblethwaite* L.R. 2 P. & D. 29 (1869) and see per Brett, M.R. *Harvey* v. *Lovekin*, L.R. 10 P.D. at 129.

DISCOVERY: Discovery may be obtained in a matrimonial suit either by affidavit of documents or interrogatories. The practice obtained in the Ecclesiastical Courts and has come down from them; *Harvey* v. *Lovekin, supra.* But independently of the Ecclesiastical practice the right to obtain discovery by either of the methods above named or by oral examination exists in this Province because sec. 75 of the Divorce Rules makes the K.B. rules relating to discovery applicable to matrimonial causes; provided that no document need be produced and no interrogatory or oral question need be answered if the production of such document or the answer to such interrogatories or question would tend to show that the party from whom discovery is sought had committed adultery. And if the proof of adultery be the sole object of the discovery it will not be granted, *Redfern* v. *Redfern* L.R. 1891, P.D. 139.

CAUSES OF ACTION: There are seven different kinds of actions which may now be brought under the Divorce Acts:

First: Dissolution of marriage.

Second: Judicial separation.

Third: Nullity of marriage.
Fourth: Restitution of conjugal rights.
Fifth: Jactitation of marriage.
Sixth: To establish legitimacy, the validity of marriage and the right to be deemed a natural born subject.
Seventh: Damages claimed by a husband against a person who has committed adultery with his wife.

Petitions for dissolution of marriage are of most frequent occurrence as well as the most important of the proceedings which may be instituted under the Act. It is the only proceeding to which the term divorce is now applicable.

GROUNDS OF DIVORCE: The grounds upon which such a divorce may be obtained are stated in sec. 27.

A husband may obtain a dissolution of marriage with his wife on the sole ground of adultery since their marriage. On the other hand, a wife cannot obtain a dissolution of her marriage on the sole ground of her husband's adultery. The grounds upon which a wife may obtain such a decree are that since their marriage he has been guilty of:

1. Incestuous adultery.
2. Bigamy, with adultery.
3. Rape.
4. Sodomy.
5. Bestiality.
6. Adultery coupled with such cruelty as without adultery would formerly have entitled her to a divorce *a mensa et thoro*.
7. Adultery, coupled with desertion without reasonable excuse for two years or upwards.

CO-RESPONDENT: When the husband files a petition he must make the alleged adulterer a co-respondent unless upon special grounds the Court excuse him from doing so. The practice in this respect is stated in *Browne & Watt on Divorce*, 285 to 287. If the wife is the petitioner she may not without leave add as a party the person with whom the husband is alleged to have committed adultery, but the Court may direct that such person be added as a respondent. By sec. 11 of the Act of 1858, the Court is empowered after the close of the evidence to dismiss from the suit the co-respondent or the respondent so added if there is not sufficient evidence against him or her.

DEFENCES: The defence which may be set up by either a respondent or a co-respondent to a suit for dissolution are:

1. A denial of the facts alleged in the petition.
2. Connivance.
3. Condonation.
4. Collusion.

Section 30 of the 1857 Act makes each of these defences if established, an absolute bar to the action. That section provides that if the Court is not satisfied that the alleged adultery has been committed or shall find that the petitioner has been accessory to or has connived at the adultery or has condoned it, or that there is collusion between the petitioner and either of the respondents, the petition shall be dismissed. And sec. 29 makes it the duty of the Court not only to satisfy itself as to the truth of the facts alleged but also whether or not the petitioner has been accessory to, or as to whether there has been connivance, condonation or collusion.

There are several other matters of defence which may be set up which, while they do not constitute an absolute bar to a decree, the Court has a discretion if such defence is made out, to refuse a decree. These are stated in the proviso to sec. 31 and are

1. That the petitioner has during the marriage been guilty of adultery.
2. That the petitioner has been guilty of unreasonable delay.
3. That the petitioner has been guilty of cruelty to the other party to the marriage.
4. That the petitioner had without reasonable excuse deserted or wilfully separated from the other party to the marriage before the adultery complained of; or had been guilty of such wilful neglect or misconduct as had conduced to the adultery.

Courts of Appeal have refused to restrict the discretion given by this section by laying down rules, but have left it as wide as the statute has left it; *Wickins* v. *Wickins*, [1918], P. 265; *Hollond* v. *Hollond*, Id. 273; and *Hines* v. *Hines*, Id. 364.

DAMAGES: In a petition by a husband either for dissolution or for judicial separation he may either as the sole relief or in addition to the other relief, claim from his wife's adulterer such damages as he would be entitled to in the common law action of criminal conversation. See sec. 33. The damages claimed must be assessed by a jury, and after verdict the Court may direct how the damages are to be applied and may direct that the whole or any part shall be settled for the benefit of the children, if any, or as a provision for the maintenance of the wife. I have already pointed out that a husband may present a petition for this relief alone, but petitions for damages as the sole relief are of very rare occurrence in England and I apprehend will be equally rare here.

Having given the husband the equivalent remedy by petition, either with or without a claim for other relief, sec. 59 of the Act abolished the common law right of action for criminal conversation.

As the common law action of criminal conversation had been abolished in England in 1857, it was not part of the law of England on the 15th July, 1870, and so was not introduced into this

Province. By the original of what are now secs. 10 and 11 of the K.B. Act, this defect was remedied by what is now sec. 18 of that Act, which gives the Court jurisdiction in actions of criminal conversation. It provides, however, that the law applicable to such actions shall be as the same was in England prior to the abolition of such action there, i.e. in 1857; but that the practice shall be the same as in other actions in the Court.

An injured husband has thus alternative remedies; he may proceed for damages by ordinary action or he may proceed by way of petition under the Divorce Acts. The only advantage in suing at common law is that the Court has in that case, no power to appropriate the damages so recovered.

While from time immemorial the law has given a husband a right to damages from his wife's seducer, it has never given the wife a right of action against her husband's seductress; *Eversley on Domestic Relations*, 175; 8 A. & E.E. 261. The reason assigned by Blackstone for this discrimination against the wife is the subservient relation she occupied at common law. The husband had a property in his wife's services, but the wife had none in the services of her husband. She could only sue jointly with her husband and the damages recovered belonged to him and he would thus profit by his own wrong. The law could not tolerate a result so indecent.

It is no defence for the adulterer to say that he was not aware that the wife was a married woman, but the fact (the onus of establishing which is on the petitioner) may be considered in estimating the damages; *Lord* v. *Lord*, L.R., [1900] P. 297. It is otherwise with respect to awarding costs against a co-respondent. By sections 34 and 51 of the Act, the Court is given a discretion upon proof of the adultery to award the whole or part of the costs against the co-respondent. The dominant fact by which the discretion of the Court is influenced is whether or not the co-respondent knew that the respondent was a married woman. If he was aware of that fact when the intimacy commenced he will generally be condemned in the costs; if he did not know the woman was married at the beginning he will not generally be so condemned even though he continued the intimacy after making the discovery; *Badcock* v. *Badcock*, 1 Sw. & Tr. 189, and *Bilby* v. *Bilby*, [1902] P. 8. The onus of showing such knowledge by the co-respondent is upon the petitioner; *Teagle v. Teagle*, 1 Sw. & Tr. 188. Cases collected *Hall on Divorce*, 298.

The principle upon which damages are awarded is not punishment of the co-respondent but the loss which the petitioner has sustained. On this principle it makes no difference whether the co-respondent be rich or poor. In practice it will be found that juries

will consider the co-respondent's ability to pay, and will sometimes ask for information on that point as they did in *Keyes* v. *Keyes*, 11 P.D. 100. The information, however, should not be supplied, but they should be told as Sir James Hannen told them in that case, that "the means of the co-respondent have nothing to do with the question. The only question is what damage the petitioner has sustained and the damage he has sustained is the same whether the co-respondent is a rich man or a poor man."

DOMICIL: The domicil of the parties at the time of the institution of the proceedings is a matter of very great importance because unless their domicil is in this Province the Court has no jurisdiction to dissolve the marriage. The same rule does not apply to other matrimonial suits. By sec. 22 of the Act as to these the Court is required to "proceed, act and give relief on principles and rules" which in the opinion of the Court are as nearly as may be comformable to the principles and rules on which the Ecclesiastical Courts acted. The Court is not tied to the principles and rules of the Ecclesiastical Courts in suits for dissolution because these Courts had no power to dissolve a marriage.

Not only will British Courts refuse to entertain suits for the dissolution of the marriage of parties whose domicil is not within the jurisdiction of the Court, but they will refuse to recognize the validity of the judgment of a foreign Court purporting to dissolve marriage contracted in British territory unless the domicil of the married pair was at the time within the jurisdiction of the foreign Court. According to international law the marriage tie can only be severed in accordance with the laws of the country wherein they are domiciled and by the tribunals which alone can administer these laws. The leading case on this subject is *Le Mesurier* v. *Le Mesurier*, [1895] A.C. 517, and followed in *Rex* v. *Woods*, 6 O.L.R. 41, and *Cutler* v. *Cutler*, 20 B.C.R. 34; *Anghinelli* v. *Anghinelli*, [1918] P. 247, and *Casdagli* v. *Casdagli*, [1919] A.C. p. 145. The rule of international jurisprudence prevails to this extent that a divorce granted by a tribunal of a foreign Christian state in which the parties have their domicil will, in the absence of evidence of fraud or collusion, be recognized as valid here although granted for a cause for which a divorce could not be granted here. Thus an English marriage was dissolved in Scotland at the suit of the wife on the ground of the husband's adultery alone, uncoupled with either desertion or cruelty. The parties were at the time domiciled in Scotland, and it was held in all the Courts that although the decree of dissolution was obtained for a cause for which it could not have been obtained according to the laws of England, it nevertheless had the effect of dissolving the marriage in England. The case referred to is *Farnie* v. *Farnie*, 5 P.D. 153. The decision was affirmed in the Court of Appeal, 6 P.D. 35, and in the House of

Lords, 8 A.C. 43, *Bater* v. *Bater*, [1906] P. 209. *Pemberton* v. *Hughes*, [1899] 1 Ch. 781. *Cromarty* v. *Cromarty*, 38 O.L.R. 481.

DOMICIL OF WIFE: It can be laid down as a rule of almost universal application that the domicil of the wife for the purposes of the divorce laws is that of the husband. In *Farnie* v. *Farnie*, *supra*, Lord Justice James says, 6 P.D. at 46:

"A wife's home is her husband's home; a wife's country is her husband's country; a wife's domicil is her husband's domicil; and any question arising with reference to the status of those persons is, according to my view, to be determined by the law of the domicil of those persons; assuming always that the domicil is a bona-fide one not a domicil either fictitious or resorted to for the sole purpose of altering the status."

Similar views were expressed by Lord Selbourne in the House of Lords, 8 A.C. 50.

The rule so dogmatically stated by Lord Justice James and to which he said there was no exception has been departed from in at least two cases because of the intolerable hardship which would result from a strict adherence to the rule. The first case was *Stathatos* v. *Stathatos*, [1913] P. 46. In that case the petitioner, an English woman, had married in England a Greek whose domicil was Greece. Upon marriage her domicil at once became that of her husband. After living for a time in London they went to Greece where the husband obtained from the Greek Court a decree declaring his marriage null and void because no Greek priest had been present at the ceremony. The marriage was perfectly valid according to the law of England, so that the petitioner was in the awkward position of being a wife according to the law of England but not according to the law of her husband's and therefore her own domicil. She returned to England and filed a petition for dissolution upon the ground of her husband's adultery and desertion. Bargrave Deane, J., adopting a suggestion made by the Court of Appeal in *Ogden* v. *Ogden*, [1908] P. 46, held that under the circumstances, the wife was entitled to petition the Court of her own domicil to which she had reverted and decreed a dissolution of the marriage. The other case is *de Montaigu* v. *de Montaigu*, [1913] P. 154. The circumstances were very similar, the only difference being that the husband was a domiciled Frenchman and the nullity decree was pronounced by a French Court. Sir Samuel Evans in deciding in favour of the wife's petition said:

"The situation is an intolerable one for the wife, and I think it is better where necessary, in a case like this, to make an exception from the ordinary rule that domicil governs these cases and to grant her a decree as a practical way of giving her the redress to which she is entitled and without which she will be suffering great hardship."

Then there are other circumstances in which the rule may work great hardship to an innocent wife; but as the law is laid down I cannot see any way out of the difficulty. I refer to the case where a married pair having their domicil and residence in this country, the husband deserts his wife and acquires a domicil in a foreign country, having either before or after the desertion committed acts which if still domiciled in Manitoba would entitle his wife to have the marriage dissolved here. Must the wife in order to procure redress institute proceedings in the Courts of his new domicil or may she have recourse to the Courts of this country? The point is not covered by the two decisions above referred to because the basis of the decision in both cases was that the wife could obtain no relief through the Courts of her husband's domicil. There is one case in which the decision itself if not the reasoning which led up to it is directly in point. I refer to *Deck* v. *Deck*, 2 Sw. & T. 90 (1860). In that case the parties were married in England where they both were domiciled. Some time after the marriage the husband deserted his wife and went to the United States and acquired a domicil there. He there contracted a bigamous marriage with another woman and lived in adultery with her. The wife who continued to reside in England filed her petition on the ground of bigamy and adultery. The Full Court composed of three Judges held that it had jurisdiction and dissolved the marriage.

At p. 93 of the same volume the case of *Bond* v. *Bond* is reported. There it was doubtful whether the domicil of the husband was Irish or English. The Court said if it had appeared that his domicil was Irish it would have had to consider whether the Court had jurisdiction, but it did not find the evidence of Irish domicil so conclusive as to compel the Court to deal with the case on that basis and the marriage was dissolved, referring to *Deck* v. *Deck*.

The question has not directly arisen in any other case that I am aware of. In *Le Sueur* v. *Le Sueur*, 1 P.D. 139 (1876) Sir R. J. Phillimore refers to *Deck* v. *Deck* and distinguishes it. He was dealing with a case where the parties had been married in Jersey, where they had their domicil. After some years they separated and the husband went to the United States. The wife went to England and established a permanent residence there. The husband never had a domicil in England. It was held that there was no jurisdiction to entertain the wife's petition for divorce. Phillimore, J., evidently had *Deck* v. *Deck* in his mind when he said:

"In the case before me the wife is suing her husband not in the tribunal of the place of his original domicil or of the marriage, or of his acquired domicil, but in a tribunal to which he has never been subjected by any act of his own."

In the case of *Niboyet* v. *Niboyet*, 4 P.D. 1 (1878) the Court of Appeal decided that an Englishwoman who married a French-

man at Gibraltar and afterwards lived with him in England might sustain a petition for divorce in England although the husband's domicil continued to be French. That case, however, is directly against the decision of the Privy Council in the later case of *Le Mesurier* v. *Le Mesurier*, [1895] A.C. 517, and as the latter is binding on this Court it would be followed here. In *Niboyet* v. *Niboyet*, Lord Justice Brett, who dissented, refers at p. 14 to the point I am now discussing. He there says:

"The case of an adulterous husband deserting his wife by leaving the country of his domicil and assuming to domicile himself in another might seem to raise an intolerable injustice; but we cannot help thinking that in such case if sued by his wife in the country in which he had left her he could not be heard to allege that that was not still the place of his married home, i.e. for the purposes of that suit his domicil."

Gorell Barnes, J., said something very similar in *Armytage* v. *Armytage*, [1898] P. at 185, and in 6 Hals. at 263, it is stated that such is probably the law although the point has never been decided.

In *Farnie* v. *Farnie*, 6 P.D. at 49, Lord Justice Cotton suggests that the rule as to the wife's domicil being that of the husband might not apply and that they would not be held to be domiciled in a country to which he took her because of the greater facilities of procuring a divorce there by making her subject to the tribunals of that country.

Notwithstanding these dicta and the decision in *Deck* v. *Deck* and *Niboyet* v. *Niboyet*, in effect overruled by the decision of the Privy Council in *Le Mesurier* v. *Le Mesurier*, the point must be regarded as still open. Until some exception such as suggested by Brett, L. J., in *Niboyet* v. *Niboyet* or by Gorell Barnes, J., in *Armytage* v. *Armytage* is established by a Court of Appeal, the wise course will be to assume that there is no exception and that when a husband has acquired a bona fide domicil in a foreign country such also must in the eyes of the law be the domicil of his wife even though he acquired such new domicil after deserting his wife in the country of his former domicil. The principle of international law is that the Courts of one country are bound to recognise the validity of decrees of divorce pronounced by the Courts of another country if and only if the parties were domiciled within the jurisdiction of the Court by which the decree was pronounced. A sentence of divorce pronounced by the Courts of this country in a suit by the wife against a husband whose domicil was in a foreign country would not be entitled to recognition by the tribunals of the state of the husband's domicil. It would only be effective within the jurisdiction where it was pronounced. The cases of *Stathatos* v. *Stathatos* and *de Montaigu* v. *de Montaigu* did not violate any principle of international law because in both cases the marriage had already been declared null by the Courts of the country of the hus-

band's domicil and it was only a question of loosing the bonds in England.

CO-RESPONDENT: Where the husband is the petitioner he must by sec. 2 of the Act make the alleged adulterer a co-respondent unless upon special grounds he is excused from doing so. As to the circumstances under which such an order may be obtained, see *Browne & Watts*, 286.

ADULTERESS RESPONDENT: When the wife is the petitioner she is not obliged to add as a party the person with whom her husband is charged with having committed adultery, but sec. 28 empowers the Court to direct that the husband's seductress be made a respondent. Note that she is not to be added as a co-respondent but as a respondent.

MARRIAGE: The first thing to be proved is of course the marriage. That can usually be done if performed in Manitoba by the evidence of the petitioner supported by a certificate from the proper official. If elsewhere in Canada or any other part of the British Dominions or in the United States, a properly certified copy of the register should be produced. It is not necessary in these cases to call expert evidence to prove the validity of the marriage as by sec. 32 of the Manitoba Evidence Act the Court takes judicial notice of the laws of these places. If the marriage took place in any foreign country other than the United States it is necessary to give some evidence of its legality according to the law of the place where it was performed. This evidence should be given by some one having some knowledge of the foreign law; *Bater* v. *Bater*, [1907] P. 333; *Barford* v. *Barford*, [1918] P. 140. See further *Browne & Watts* 261 et seq.

PROOF BY AFFIDAVIT: The same rules of evidence are to be observed in divorce as in other proceedings in the Court, with this difference, that by leave of the Court—usually granted by a Judge in Chambers—the parties may, by sec. 46 of the Act and rules 46 to 51, be permitted to prove the whole or any part of their petition by affidavit. The practice is to allow what may be described as the "mere fringe of the case" to be proved in this way: *Adams* v. *Adams*, 29 L.T. 699. The fringe will include the domicil, the marriage, the identity, the cohabitation and the issue, but not the substantive portion of the case. It is only in a very exceptional case that it will permit the fact of adultery to be so proved by affidavit even where there is no defence. The mere saving of the expense of a commission is not a sufficient reason: *Gayer* v. *Gayer*, [1917] P. 64; but the fact that the expense of a commission was beyond the means of the petitioner may be a sufficient reason for allowing adultery to be proved by affidavit; *Burslem* v. *Burslem*, 67, L.T. 719, and per Cozens-Hardy, M.R., *Gayer* v. *Gayer*, at 68.

In *Gayer* v. *Gayer*, the Court of Appeal disapproved of the practice which had grown up since 1908 of allowing almost as a matter of course the whole case to be proved by affidavit evidence in undefended cases and approved the earlier and stricter practice.

It is not necessary to give direct proof of adultery. Proof of familiarities coupled with the opportunity for adultery may be sufficient to raise a presumption. In petitions for dissolution, unlike other matrimonial causes, the Court is not, by sec. 22 of the Act, bound by the rules of the Ecclesiastical Courts, but may act upon any evidence legally admissible.

CONFESSIONS: It is the general practice in matrimonial causes not to act and grant relief upon uncorroborated confessions of adultery, but there is no absolute rule of either law or practice precluding the Court from acting upon such confession. The test is whether the Court is satisfied that the confession is true. Cases are not infrequent in which such uncorroborated admissions are acted upon; *Robinson* v. *Robinson*, 1 Sw. & Tr. 362, *Getty* v. *Getty*, [1907] P. 334.

It is stated in *Browne & Watts* at 255, that the Court will not act on the uncorroborated evidence of a party in a matrimonial suit. That no doubt is the general rule, but it is not absolute. There is no rule of law which prevents the Court from acting upon the uncorroborated evidence of the petitioner if such evidence carries conviction, to the mind of the Court; *Riches* v. *Riches*, 35 T.L.R. 141 (1918). By sec. 29 of the Act the Court is to "satisfy itself in so far as it reasonably can" and it should scrutinize uncorroborated evidence of the petitioner" cautiously, closely and even suspiciously." *Read* v. *Read*, [1905] Vic. L.R. 424.

IDENTIFICATION: The identity of the respondent and co-respondent with the charges alleged in the petition is very important. There are six principal means of identification.

First: Witnesses called to prove the adultery may know the parties and from such knowledge be able to swear that the adultress is the respondent named in the petition and the person with whom she committed adultery is the co-respondent. Evidence of this kind is the most direct and most satisfactory.

Secondly: The witnesses to prove the adultery may have seen the persons charged and identified them in the presence of some other witnesses who can prove that the persons so identified are the parties to the suit. The evidence uncorroborated of the petitioner alone for this purpose will not suffice: *Harris* v. *Harris*, L.R. 2 P. & D. 77.

Thirdly: Photographs of the party or parties may be looked at for the purpose of identification. This is but secondary evidence and can only be allowed where the petitioner is unable to produce better evidence. Even then it will not be acted upon unless in some way corroborated. In *Frith* v. *Frith*, [1896] P. 74, Gorell Barnes,

J., refused to grant a decree where the witness to the adultery only identified the respondent by a small photograph sworn by the petitioner to be that of his wife. The learned Judge said:

"I cannot act upon a photograph alone and this is a very small one. I am continually asked to do this, but it should be known that it is not the practice of the Court except under very special circumstances to act upon a photograph alone."

Fourthly: Identity may be proved by handwriting; this is but another kind of secondary evidence and should only be allowed when better evidence is not available, and when the evidence is clear and satisfactory.

Fifthly: Confrontation was a method of identification practised in the Ecclesiastical Courts. And an order requiring the respondent to attend in Court for the purpose of being confronted with the petitioner's witnesses might still be made in any but a suit for dissolution, to which the Ecclesiastical practice does not apply. Section 43 of the Act empowers the Court to order the attendance of the petitioner at the hearing of the petition in all suits, but it is silent as to ordering the attendance of the respondent. In *Hooke* v. *Hooke* (1858) 4 Sw. & Tr. 236, the Judge Ordinary in a petition for dissolution held that the Court had no power to order the attendance of the respondent for the purpose of identification.

Sixthly: The practice has been resorted to in several cases here of bringing the respondent into Court under subpœna not as a witness, but merely to get him or her into Court that they may be identified. Sec. 49 empowers the Court to command the attendance of witnesses by subpœna. This does not appear to be a legitimate use of a subpœna. The practice was severely condemned by Shearman, J., in *Farulli* v. *Farulli*, [1917] P. 28.

In a note it is stated that during the examination of a witness the respondent, who had been brought into Court on a subpœna, was asked to stand up, but the Judge forbade it. He said it was all right when the person in Court is willing to stand up and does so by consent, but that it was an abuse of the use of a subpœna to bring a person into Court for the sole purpose of being asked to stand up.

CRUELTY: When a wife petitions for dissolution on the ground of adultery coupled with cruelty, she must by sec. 27 allege and prove "such cruelty as without adultery would have entitled her to a divorce *a mensa et thoro*." The question of what constitutes cruelty within the meaning of this section was much discussed in the famous action brought by the Countess of Russell against her husband for restitution of conjugal rights and the counter petition by him for a judicial separation on the ground of cruelty. The cruelty alleged was making and persisting in making unfounded charges against him of gross and unnatural practices, even after these charges had been disproved in a Court of Law. The

See 1921 I.W.W.R. 22 708 - what is cruelty, reviews of decisions

petition and counter petition were tried before Baron Pollock and a jury. The jury found in favour of cruelty and the Court granted the husband's petition. On appeal the Court of Appeal held that the Earl was not entitled to a judicial separation because the conduct complained of did not amount to cruelty. They also refused to make a decree for restitution in her favour. Both parties appealed to the House of Lords where it was argued before Lord Halsbury, L.C., and Lords Hobhouse, Ashbourne, Morris, Herschell, Watson, Macnaghten, Shand and Davey. The first four were for reversing the Court of Appeal, but the last five thought it ought to be dismissed, and it was dismissed accordingly.

The judgment with which the majority of the Lords agreed was delivered by Lord Herschell and he has furnished a definition of cruelty which has been acted upon since. His judgment is too long to quote here but it can be found in [1897] A.C. at 444, and will well repay perusal. Briefly it is that to constitute cruelty there must be bodily hurt or injury to health or a reasonable apprehension of one or the other of these. Lord Herschell's definition was adopted by myself in *Willey* v. *Willey* (1908) 18 M.R. 298, and very recently by the Court of Appeal in Ontario in *Whimbey* v. *Whimbey* (1919), 45 O.L.R. 228.

Russell v. *Russell* was a case of judicial separation which by sec. 22 is to be dealt with according to the principles and rules of the Ecclesiastical Court. That section does not apply to petitions for dissolution which could not be maintained in the Ecclesiastical Courts. However, when a wife petitions for dissolution on the ground of adultery coupled with cruelty, sec 27 makes it incumbent on her to prove "such cruelty as without adultery would have entitled her to a divorce *a mensa et thoro*." That is to say she must establish the kind of cruelty the Ecclesiastical Courts acted upon. Such cruelty is shown by the Russell case to be bodily hurt or injury to health or a reasonable apprehension of one or the other. In *Brown* & *Watts*, the statement is made at p. 66 that in petitions for dissolution the Court has a free hand with respect to cruelty and is not hampered by the principles and rules of the Ecclesiastical Courts. It seems to me the learned authors must have overlooked the provisions of sec. 27 with respect to what cruelty must be established when a wife makes that one of the grounds for a decree of dissolution. In the case of a husband seeking such relief cruelty is not an ingredient. I know of no case since *Russell* v. *Russell* in which any less degree of cruelty than that stated by Lord Herschell has been held to be sufficient in a matrimonial suit. In *Jeapes* v. *Jeapes*, (1903) 89, L.T.R.N.S. 74, it was held that spreading a false charge concerning the wife, whereby her health was injured was cruelty. But such a charge without resulting injury to the wife's health would not be cruelty within the law; per Ferguson, J. A., *Whimbey* v. *Whimbey*, 45 O.L.R. at 233.

In *Jeapes* v. *Jeapes*, the opinion of the medical man was admitted to prove the effect upon the wife of the slanderous story spread abroad by her husband.

HEARING IN CAMERA: A point that is liable to arise frequently because of the desire of litigants to avoid publicity and which has already arisen several times before myself is whether or not matrimonial suits may be tried in camera. The law on this subject is to be found in *Scott* v. *Scott*, [1913] A.C. 417. It is there laid down that the Court has no authority on the ground of public decency to try actions with closed doors unless authorized by statute to do so; unless it is strictly necessary because justice cannot be attained if the case is tried in public. To this rule there are two exceptions: (1) Proceedings respecting the wardship of infants, and (2) Where lunatics are involved. The law as stated in the books of practice published prior to *Scott* v. *Scott* cannot be relied upon.

DECREE ABSOLUTE: By sec. 52 of the original Act of 1857 a decree of dissolution became absolute as soon as made. By sec. 7 of the Act of 1860 this was changed so that the decree in the first instance should be a *decree nisi* not to be made absolute for such time as the Court might by general or special order direct, but not less than three months. This latter Act was to continue in force only to the 31st of July, 1862, but in that year, by c. 81, it was made perpetual. A further change was made by the 1866 Act, c. 32, s. 3, by which a *decree nisi* is not to be made absolute for six months, with power to reduce the time to not less than three months; *Watton* v. *Watton* (1866) L.R. 1 P. & D. 227; and so the law stands today. This time will not be shortened unless under special circumstances; *Fitzgerald* v. *Fitzgerald*, L.R. 3 P. & D. 136; *Rippingall* v. *Rippingall*, 48 L.T.R. 126; *Shelton* v. *Shelton*, 20 L.T.R. 232.

Until the decree is made absolute the marriage tie is not dissolved; *Ellis* v. *Ellis* (1883) 8 P. D. 188, but when made absolute it reflects back to the date of the *decree nisi; Prole* v. *Soady*, L.R. 3 Ch. 220. Sec. 57 of the Act states when the parties are at liberty to marry again. That is—

1. When the time for appeal has expired without appeal;
2. In case of an appeal, when,
   (a) the appeal has been dismissed, or
   (b) results in the dissolution of the marriage.

Sec. 57 is to be construed in connection with the 1868 Act, ss. 3 & 4, with reference to the time for appealing.

INTERVENING: By section 7 of the 1860 Act, any person may intervene during the time which must elapse before the *decree nisi* can be made absolute and show cause why the decree should not be made absolute upon two grounds:

1. That the decree nisi had been obtained by collusion;

2. That material facts had not been brought before the Court.

The motion should be made to the Court at a Wednesday sitting. The procedure to be followed is detailed in Divorce Rules 67 to 72. "Any person" in above Act does not include the respondent: *Stoate* v. *Stoate*, 2 Sw. & Tr. 384; For Practice see *Brown* & *Watts*, 192 et seq. and *Hall on Divorce* 433, et seq.

After the expiration of the time limited by the decree nisi, the party in whose favor the decree has been made may make a motion to have the decree made absolute. Divorce Rule 73 tells how this motion should be made. It is a motion to the Court at a Wednesday sitting upon affidavits. It is a step in the cause and should be made within a reasonable time after the expiration of the time limited by the decree nisi, otherwise the respondent may be entitled to have the petition dismissed for want of prosecution; *Ousey* v. *Ousey* (1875) 1 P.D. 56; 33 L.T. 789; *Lewis* v. *Lewis*, [1892] P. 212. A motion to dismiss is the respondent's only remedy, because a decree absolute can only be applied for by the innocent party.

SHOWING CAUSE BY RESPONDENT: It is not clear what right the respondent has to be heard against the application for a decree absolute. *Stoate* v. *Stoate*, 2 Sw. & Tr. 384, is a decision against the right, while *Boulton* v. *Boulton*, 2 Sw. & Tr. 405, is in favour of it. It is probable that if information were presented to the Court which showed either that the decree nisi should not have been made, or adultery since it was pronounced, no matter by whom supplied, the Court would hold its hand until the matter was cleared up.

APPEAL: The question of the right of appeal and to what Court an appeal lies is by no means free from difficulty. A right of appeal must be conferred by express enactment. It does not exist in the nature of things; *Atty. Gen.* v. *Sillem*, 10 H.L.C. 704; *Sandback Charity* v. *North Staffordshire Ry.* 3 Q.B.D. 1-4 and per Osler, J.A., *Reg.* v. *Eli*, 13 A.R. at 529. It is a matter of substance, not a mere matter of procedure: *Colonial Sugar Co.* v. *Irving*, [1905] A.C. 369; *Doran* v. *Jewell*, 49 S.C.R. 88. It follows that if a right of appeal exists, it must be derived from the Imperial Divorce Legislation in force in this Province, or from Provincial legislation, because manifestly there is no Dominion legislation on the subject.

Sections 9 and 10 of the 1857 Act gave the Judge Ordinary full authority to try all actions except in cases of dissolution and nullity both of which were to be heard and determined by three or more Judges of the Court. Sec. 55 gave a right of appeal to the Full Court in all cases where the Judge Ordinary might act alone. This excluded petitions for dissolution and nullity because these petitions could not be dealt with by him alone, but must be heard before three or more Judges.

see Boland v. 25 Boland 31 M.R. 432

Sec. 56 of the 1857 Act gave a right of appeal to the Lords from any decision of the Full Court on a petition for dissolution of marriage and sec. 17 of the Act of 1858 made it clear that this sec. 56 also applied to nullity petitions.

The Act of 1860, c. 144, extended the powers of the Judge Ordinary. It gave him the power to hear all matters arising in the Court including petitions for dissolution and nullity, which theretofore could only be heard by the Full Court of three Judges.

The general effect of the Act of 1860 was to give a right of appeal from the Judge Ordinary to the Full Court in all cases except with respect to petitions for dissolution or nullity and as to these sec. 3 gave a right of appeal direct to the Lords.

Sections 56 of the original Act and 3 of the 1860 Act were repealed by the 1868 Act, c. 77, and new sections substituted which, however, made no material change in the substance of the law respecting appeals.

The result of these several enactments may be summarized as follows: Sec. 55 of the Act of 1857 gives a right of appeal from the Judge Ordinary to the Full Court within three months in all matters except dissolution and nullity, and its decision is final. Sec. 3 of the Act of 1868, c. 77, gives a right of appeal to the House of Lords direct from the Judge Ordinary in dissolution or nullity matters. In those cases there is no appeal to the Full Court provided for. In this Province there was no Court having appellate jurisdiction on the 15th July, 1870. Such jurisdiction was first conferred in 1872 upon the Court of Queen's Bench. We had not then and have not now any Court at all corresponding to the Full Court of Divorce and Matrimonial Causes created by the 1857 Act.

The existence of appellate jurisdiction has been already challenged in one Province. The Full Court of British Columbia held in *Scott* v. *Scott*, (1891) 4 B.C.R. 316, that no appeal lay to it from a decree *a vinculo* made by a single Judge. The law in force in B.C. is the Acts of 1857 and 1858 alone without the amending and supplementary Acts passed prior to the 15th July, 1870. The essential circumstances, however, with respect to appeal in B.C. are the same as in Manitoba; that is to say, the Divorce Acts give the right of appeal to the Full Court in all matters other than dissolution and nullity and to the Lords in these matters. The B.C. Court held that the term "Full Court" as used in the Act did not mean the Full Court of B.C., so that even in a case which came under sec. 55 of the Act of 1857 there would be no appeal. After the jurisdiction of the Supreme Court of B.C. in divorce had been affirmed by the Privy Council in *Watt* v. *Watt*, [1908] A.C. 573, the question of the right to appeal to the Full Court from the decision of a Judge of first instance came up again in *Brown* v. *Brown*, (1909) 14 B.C.R. 142. The Judge of first instance had in that case

made an order for interim alimony from which the respondent appealed to the Full Court. The three Judges who constituted the Court held, following *Scott* v. *Scott*, *supra*, that no appellate jurisdiction in divorce had been conferred on any Court in B.C. by Imperial, Dominion or Provincial legislation.

In *Walker* v. *Walker*, 28 M.R. 495, an appeal was entertained by the Court of Appeal in a nullity petition. The sole ground of appeal was as to whether or not the Imperial divorce laws are in force in this Province. The question of the appellate jurisdiction of the Court of Appeal was not raised or discussed, so the question cannot be said to have been decided in that case. The case of *Board* v. *Board*, 13 Alta., 362, [1919] A.C. 956, which affirmed the jurisdiction of the Supreme Court of Alberta in matters of divorce, was decided in the appellate division not by way of appeal from the lower Court but upon a reference by Mr. Justice Walsh. In *Fletcher* v. *Fletcher*, [1920] 1 W.W.R. 5, an appeal as to the jurisdiction of the Court in divorce matters was entertained by the Court of Appeal of Saskatchewan from the decision of the trial Judge dismissing a petition for a dissolution of marriage for want of jurisdiction. As in each of the cases *Walker* v. *Walker* and *Board* v. *Board*, no question was raised as to the jurisdiction of the Court of Appeal.

Both divorce and criminal law are matters within the exclusive legislative authority of the Dominion. But there is this difference, that while procedure in criminal matters belongs exclusively to the Dominion, procedure in civil matters, which includes divorce, belongs exclusively to the Provinces. If the right of appeal were a matter of procedure only, the question would be easy of solution. Each of the Western Provinces has created a Court of Appeal and has given a right of appeal thereto from the judgment, order or decree of a single Judge or the verdict of a jury in terms ample in scope to include a decree pronounced upon a divorce petition. But is a right of appeal a matter of procedure or is it a matter of substantive law? If it is not a matter of procedure the Provinces cannot legislate concerning it (unless it can be said to belong to the administration of justice within the Provinces, as to which I shall refer presently) and the Provincial legislation referred to would be ineffectual to give a right of appeal in a divorce suit. This very point was dealt with in *Colonial Sugar Refining Co.* v. *Irving*, already alluded to, where it was held by the Privy Council that an Australian statute which limited the right of appeal to the High Court of the Commonwealth did not apply to litigation pending when the Act came into force, because appeal is a matter of substantive right and not a mere matter of procedure.

Then does the exclusive authority of the Provinces over the administration of justice include the right to legislate with respect to appeals in divorce actions? The two British Columbia cases,

Scott v. *Scott* and *Brown* v. *Brown*, referred to *supra*, are decisions to the contrary. The question has not as yet come before the Courts of any other Province, so far as I am aware, but a side-light is thrown upon it by several decisions as to appeals in criminal cases, in all of which it has been held that the Provincial Legislatures were powerless to give a right of appeal in criminal matters notwithstanding the right of the Provinces to legislate respecting the administration of justice. Reference may be made to such cases as *Reg.* v. *Eli*, 13 A.R. 526; *Reg.* v. *McAuley*, 14 O.R. 643; *Queen* v. *De Coste*, 21 N.S.R. 216; *Rex* v. *Carroll*, 14 B.C.R. 116; Re *Tiderington*, 17 B.C.R. 81; *Reg.* v. *Beale*, 11 M.R. 448; *Rex* v. *Harvie*, 18 B.C.R. 5.

It is impossible to say whether in any of the above cases it was thought that the Provincial jurisdiction in matters of criminal appeal was excluded because it concerned criminal procedure or because it related to substantive rights. It was not necessary to decide that question as both criminal law and criminal procedure are reserved to the Dominion. If criminal appeal was not thought to be a matter of procedure then the conclusion must have been that it was included under the reservation to the Dominion of criminal law and was not transferred to the Provinces as part of the administration of justice.

There is another view of the question which merits attention and which apparently was not considered by the British Columbia Court. By the Divorce Acts which have been made a part of the substantive law of the Western Provinces a right of appeal is conferred upon every dissatisfied suitor. The principle upon which *Watt* v. *Watt*, *Walker* v. *Walker*, and *Board* v. *Board* were decided is that where a right has been introduced into the substantive law of a Province it is the duty of the Superior Courts of such Province to entertain and give effect to proceedings to make that right operative whether they do or do not correspond in description or constitution with the Courts named in the Act by which the right is given.

The Court of King's Bench has no resemblance to the Court of Divorce and Matrimonial Causes established by the Act of 1857, but the right of divorce having become part of the substantive law of this Province the Court of King's Bench not only has the jurisdiction but is impressed with the duty to enforce the right. The same law which gives the right of divorce also gives the dissatisfied suitor the substantive right of appeal. We have no Court which corresponds to the Full Court of Divorce and Matrimonial Causes in England to which a final appeal is given in all matters except dissolution or nullity, nor, of course, any Court which corresponds to the House of Lords, to which an appeal is allowed in England in these cases. But the right of appeal exists and we have a Court

which possesses the necessary appellate jurisdiction to make the right operative.

It is not a question of giving a right of appeal. The right of appeal is as much a part of the law which was brought into force in these Provinces as the right to divorce itself is. It is a mere question of the Court by which the right will be made operative. The Provinces in the exercise of their control over the administration of justice and the organization and constitution of the Courts have established Courts with the requisite jurisdiction. Are not the Courts of Appeal so established not only vested with the jurisdiction but is it not their duty to entertain appeals and so make the right conferred by the statute effective just as the Superior Courts of first instance are bound to make operative the right of divorce conconferred by the same statute? If these Courts cannot entertain appeals in divorce suits, then the only remedy of a dissatisfied suitor is an appeal by leave to the Privy Council, which in the vast majority of cases would, by reason of the expense involved, be equivalent to a denial of the right altogether.

I have now given the reasons pro and con which have occurred to me. My own view is that those in favor of the exercise of jurisdiction in appeal by the Provincial Courts of Appeal are entitled to prevail. Be that as it may, it must be conceded that the path of the dissatisfied suitor in a divorce suit is at present beset with doubts and difficulties.

The interests involved are too important to be left clouded in so much uncertainty and the matter ought to be cleared up by legislation by the Dominion Parliament.

JURISDICTION OF REFEREE: I propose to touch on but one other point, and that is the jurisdiction of the Referee in Chambers in divorce proceedings. The original Act of 1857 is silent as to the power of the Judge Ordinary to sit and transact business in Chambers. The Act of 1858, c. 108, however, provided that it should be lawful for him to sit in Chambers for the despatch of such parts of the business of the Court as could in his opinion wtih advantage to the suitors be heard in Chambers; and while sitting in Chambers he was given the same powers and jurisdiction with respect to the business to be brought before him as if sitting in open Court.

Divorce Rule 75 makes the King's Bench rules applicable to divorce proceedings, in so far as they are applicable, in all cases not provided for in the divorce rules. By King's Bench Rule 27:

"The Referee in Chambers in regard to all actions and matters in Court shall be and hereby is empowered and required to do such things, transact all such business and exercise all such authority and jurisdiction in respect to the same as by virtue of any statute or custom or by the rules or practice of the Court or any of them respectively are or may be done, transacted or exercised by him or by any Judge of Court sitting in Chambers."

Then follows a number of exceptions, amongst which are

"all matters in respect of which the jurisdiction of a Judge in Chambers is not derived from legislation of the Legislature of Manitoba."

By section 43 of the King's Bench Act as amended:

"The Judges of the Court shall in rotation or otherwise as they may agree among themselves sit in Chambers or elsewhere, and shall transact all such business as may be transacted by a single Judge out of Court, subject to the right of appeal as provided in this Act and the rules from time to time in force."

Rule 455 specifies what business shall be disposed of in Chambers. Such business includes, s-s. (d) business "relating to the conduct of actions or matters." And Rule 462 provides that

"a Judge sitting in Chambers may exercise the same powers and jurisdiction, in respect of the business brought before him, as is exercised by the Court; all orders made by a Judge in Chambers are to have the same force and effect of orders of the Court; * * *"

The question of what powers a Judge may exercise in Court or in Chambers is a matter of procedure and therefore with respect to divorce proceedings is within the competence of the Provincial legislature.

It seems to me sec. 43 of the King's Bench Act and Rules 455 and 462 confer upon a Judge in Chambers all the powers which the Judge Ordinary derived from the Act of 1858, c. 108, and therefore that "the jurisdiction of a Judge in Chambers" in matters of divorce is "derived from legislation of the legislature of Manitoba." Although in the absence of such legislation recourse might be had to the Imperial Act. It follows that the Referee in Chambers has all the powers in divorce matters conferred by Rule 27.

I have now dealt with the principal matters which were likely to prove troublesome to the young practitioner. There remain a great many questions still untouched, but this lecture has already attained a length much beyond what I originally intended, and perhaps what you were prepared to endure, and I will in mercy forbear to deal with them.

APPENDIX

Divorce Act of 1857 with amendments and additions made prior to the 15th July, 1870, omitting such provisions as are inapplicable to Canada.

20 & 21 Vict. Chapter 85.

An Act to amend the law relating to Divorce and Matrimonial Causes in England, 28th August, 1857.

Whereas it is expedient to amend the law relating to Divorce and to constitute a Court with exclusive jurisdiction in matters matrimonial in England and with authority in certain cases to decree the dissolution of marriage: Be it therefore enacted by the Queen's Most Excellent Majesty by and with the advice and consent of the Lords Spiritual and Temporal and Commons in this present Parliament assembled and by the authority of the same as follows:

1. (Act to come into operation on day not sooner than 1st January, 1858, fixed by Order-in-Council made one month prior to day appointed.)

2. "As soon as this Act shall come into operation all jurisdiction now exercisable by any Ecclesiastical Court in England in respect of divorces *a mensa et thoro*, suits of nullity of marriage, suits of jactitation of marriage, suits for restitution of conjugal rights, and in all causes, suits and matters matrimonial shall cease to be exercisable except so far as relates to the granting of marriage licenses which may be granted as if this Act had not been passed."

3. (Decrees or orders of Ecclesiastical Courts enforceable by the Court of Divorce and Matrimonial Causes.)

4. (Suits pending in Ecclesiastical Courts transferred to said Court.)

5. (Provides for suits heard and standing for judgment when Act comes into operation.)

6. "As soon as this Act shall come into operation all jurisdiction now vested in or exercisable by any Ecclesiastical Court or person in England in respect of divorces *a mensa et thoro*, suits of nullity of marriage, suits for restitution of conjugal rights or jactitation of marriage and in all causes, suits and matters matrimonial except in respect of marriage licenses shall belong to and be

vested in Her Majesty and such jurisdiction together with the jurisdiction conferred by this Act shall be exercised in the name of Her Majesty in a Court of Record to be called 'The Court for Divorce and Matrimonial Causes.' "

7. "No decree shall hereafter be made for a decree *a mensa et thoro* but in all cases in which a decree for a divorce *a mensa et thoro* might now be pronounced the Court may pronounce a decree for a judicial separation which shall have the same force and the same consequences as a divorce *a mensa et thoro* now has."

8. (Judges of the Court, the Lord Chancellor, the Chief Justices of the Queen's Bench and Common Pleas, the Chief Baron of the Exchequer, the Senior Puisne Judge in each of these Courts and the Judge of the Court of Probate.) (By 22 & 23 Vict. (1859) c. 61, s. 1, all the Judges of the Queen's Bench, Common Pleas and Exchequer, were also made Judges of the Court.)

9. "The Judge of the Court of Probate shall be called the Judge Ordinary of the said Court and shall have full authority whether alone or with one or more of the other Judges of the said Court to hear and determine all matters arising therein except petitions for the dissolving of or annulling marriage and applications for new trials of questions or issues before a jury, bills of exception, special verdicts and special cases and except as aforesaid may exercise all the powers and authority of the said Court."

(21 & 22 Vict. (1858) c. 108, ss. 1, 2 & 3 provide for the Judge Ordinary sitting in Chambers and his powers are enlarged by 23 & 24 Vict. (1860) c. 144, see post.)

10. "All petitions either for the dissolution or for a sentence of nullity of marriage and applications for new trials of questions or issues before a jury shall be heard and determined by three or more Judges of the said Court, of whom the Judge of the Court of Probate shall be one."

(By 23 & 24 Vict. (1860) c. 144, ss. 1 & 2, the Judge Ordinary is given the power to alone hear and determine all matters arising in the Court with the right to assistance when deemed expedient of one other Judge, see post.)

11. (During temporary absence of Judge Ordinary Lord Chancellor may authorize Master of Rolls, Judge of Admiralty Court, Lord Justice or Vice Chancellor, or any Judge of a Supreme Court to act.)

12. (Place of sitting to be fixed by Order-in-Council.)

13. (Seal to be provided.)

14. (Registrars and Officers of Probate to attend sittings and to assist as directed by rules and orders under the Act; and see as to powers 21 & 22 Vict. (1858) c. 108, s. 4.)

15. (Advocates and Proctors of Ecclesiastical Courts and all barristers, attorneys, and solicitors entitled to practice in Court with same precedence as they have in Privy Council.)

16. "A sentence of judicial separation (which shall have the effect of a divorce *a mensa et thoro* under the existing law and such other legal effect as herein mentioned) may be obtained either by the husband or the wife on the ground of adultery, or cruelty, or desertion without cause for two years and upwards."

17. "Application for restitution of conjugal rights or for judicial separation on any one of the grounds aforesaid may be made by either husband or wife by petition to the court (repealed as to Judges of Assize 21 & 22 Vict. (1858) c. 108, s. 19) and the Court or Judge to which such petition is addressed, on being satisfied of the truth of the allegations therein contained, and that there is no legal ground why the same should not be granted, may decree such restitution of conjugal rights or judicial separation accordingly and where the application is by the wife may make any order for alimony which shall be deemed just * * * ."

18, 19, 20. (Provisions as to Assize Judges repealed 21 & 22 Vict. (1858) c. 108, s. 19.)

21. "A wife deserted by her husband may at any time after such desertion, if resident within the Metropolitan District, apply to a Police Magistrate, or if resident in the country, to the Justices of Petty Sessions, or in either case to the Court, for an order to protect any money or property she may acquire by her own lawful industry, and property which she may become possessed of, after such desertion, against her husband or his creditors, or any person claiming under him; and such Magistrate or Justices or Court, if satisfied of the fact of such desertion, and that the same was without reasonable cause, and that the wife is maintaining herself by her own industry or property, may make and give to the wife an order protecting her earnings and property acquired since the commencement of such desertion, from her husband and all creditors and persons claiming under him, and such earnings and property shall belong to the wife as if she were a feme sole: Provided always, that every such order, if made by a Police Magistrate or Justices at Petty Sessions, shall, within ten days after the making thereof, be entered with the Registrar of the County Court within whose jurisdiction the wife is resident; and that it shall be lawful for the husband, and any creditor or other person claiming under him, to apply to the Court, or to the Magistrate or Justices by whom such order was made, for the discharge thereof: Provided, also, that if the husband or any creditor of or person claiming under the husband shall seize or continue to hold any property of the wife after notice of any such order, he shall be liable, at the suit of the wife (which she is hereby empowered to bring), to

restore the specific property, and also for a sum equal to double the value of the property so seized or held after such notice as aforesaid: If any such order of protection be made, the wife shall during the continuance thereof be and be deemed to have been, during such desertion of her, in the like position in all respects, with regard to property and contracts, and suing and being sued, as she would be under this Act if she obtained a decree of judicial separation."

(This section 21 is amplified by 27 & 28 Vict. (1864) c. 44, s. 1, see post.)

22. "In all suits and proceedings, other than proceedings to dissolve any marriage, the said Court shall proceed and act and give relief on principles and rules which in the opinion of the said Court shall be as nearly as may be conformable to the principles and rules on which the Ecclesiastical Courts have heretofore acted and given relief, but subject to the provisions herein contained and to the rules and orders under this Act."

23. "Any husband or wife, upon the application of whose wife or husband, as the case may be, a decree of judicial separation has been pronounced, may, at any time thereafter, present a petition to the Court praying for a reversal of such decree on the ground that it was obtained in his or her absence, and that there was reasonable ground for the alleged desertion, where desertion was the ground of such decree; and the Court may, on being satisfied of the truth of the allegations of such petition, reverse the decree accordingly, but the reversal thereof shall not prejudice or affect the rights or remedies which any other person would have had in case such reversal had not been decreed, in respect of any debts, contracts, or acts of the wife incurred, entered into, or done between the times of the sentence of separation and of the reversal thereof."

24. "In all cases in which the Court shall make any decree or order for alimony, it may direct the same to be paid either to the wife herself or to any trustee on her behalf, to be approved by the Court, and may impose any terms or restrictions which to the Court may seem expedient, and may from time to time appoint a new trustee, if for any reason it shall appear to the Court expedient so to do."

25. "In every case of a judicial separation the wife shall, from the date of the sentence and whilst the separation shall continue, be considered as a feme sole with respect to property of every description which she may acquire or which may come to or devolve upon her; and such property may be disposed of by her in all respects as a feme sole, and on her decease the same shall, in case she shall die intestate, go as the same would have gone if her husband had been then dead; provided, that if any such wife should again cohabit with her husband, all such property as she may be

entitled to when such cohabitation shall take place shall be held to her separate use, subject, however, to any agreement in writing made between herself and her husband whilst separated."

(For provisions as to protection orders, see 21 & 22 Vict. (1858) c. 108, ss. 6, 7, 8, 9 and 10.)

26. "In every case of a judicial separation the wife shall, whilst so separated, be considered as a feme sole for the purposes of contract, and wrongs and injuries, and suing and being sued in any Civil proceeding; and her husband shall not be liable in respect of any engagement or contract she may have entered into, or for any wrongful act or omission by her, or for any costs she may incur as plaintiff or defendant; provided, that where upon any such judicial separation alimony has been decreed or ordered to be paid to the wife, and the same shall not be duly paid by the husband, he shall be liable for necessaries supplied for her use; provided, also, that nothing shall prevent the wife from joining, at any time during such separation, in the exercise of any joint power given to herself and her husband."

27. It shall be lawful for any husband to present a petition to the said Court, praying that his marriage may be dissolved, on the ground that his wife has since the celebration thereof, been guilty of adultery; and it shall be lawful for any wife to present a petition to the said Court, praying that her marriage may be dissolved, on the ground that since the celebration thereof her husband has been guilty of incestuous adultery, or of bigamy with adultery, or of rape, or of sodomy or bestiality, or of adultery coupled with such cruelty as without adultery would have entitled her to a divorce *a mensa et thoro*, or of adultery coupled with desertion, without reasonable excuse, for two years or upwards; and every such petition shall state as distinctly as the nature of the case permits the facts on which the claim to have such marriage dissolved is founded: Provided that for the purposes of this Act incestuous adultery shall be taken to mean adultery committed by a husband with a woman with whom if his wife were dead he could not lawfully contract marriage by reason of her being within the prohibited degrees of consanguinity or affinity; and bigamy shall be taken to mean marriage of any person, being married, to any other person during the life of the former husband or wife, whether the second marriage shall have taken place within the Dominions of Her Majesty or elsewhere."

28. "Upon any such petition presented by a husband the petitioner shall make the alleged adulterer a co-respondent to the said petition, unless on special grounds, to be allowed by the Court, he shall be excused from so doing; and upon every petition presented by a wife for dissolution of marriage the Court, if it see fit, may direct that the person with whom the husband is alleged to have

committed adultery be made a respondent; and the parties or either of them may insist on having the contested matters of fact tried by a jury as hereinafter mentioned."

(Such respondent or co-respondent may be dismissed from the suit for insufficient evidence. 21 & 22 Vict. (1858) c. 108, s. 11.)

29. "Upon any such petition for the dissolution of a marriage, it shall be the duty of the Court to satisfy itself, so far as it reasonably can, not only as to the facts alleged, but also whether or no the petitioner has been in any manner accessory to or conniving at the adultery, or has condoned the same, and shall also enquire into any countercharge which may be made against the petitioner."

30. "In case the Court, on the evidence in relation to any such petition, shall not be satisfied that the alleged adultery has been committed, or shall find that the petitioner has during the marriage been accessory to or conniving at the adultery of the other party to the marriage, or has condoned the adultery complained of, or that the petition is presented or prosecuted in collusion with either of the respondents, then and in any of the said cases the Court shall dismiss the said petition."

31. "In case the Court shall be satisfied on the evidence that the case of the petitioner has been proved, and shall not find that the petitioner has been in any manner accessory to or conniving at the adultery of the other party to the marriage, or has condoned the adultery complained of, or that the petition is presented or prosecuted in collusion with either of the respondents, then the Court shall pronounce a decree declaring such marriage to be dissolved; Provided always, that the Court shall not be bound to pronounce such decree if it shall find that the petitioner has during the marriage been guilty of adultery, or if the petitioner shall, in the opinion of the Court, have been guilty of unreasonable delay in presenting or prosecuting such petition, or of cruelty towards the other party to the marriage, or of having deserted or wilfully separated himself or herself from the other party before the adultery complained of, and without reasonable excuse or of such wilful neglect or misconduct as has conduced to the adultery."

(Now a decree nisi in the first instance not to be made absolute for six months with power to shorten time to not less than three months, 23 & 24 Vict. (1860) c. 144, s. 7; and 29 & 30 Vict. (1866) c. 32, s. 3.

Section 2 of the latter Act makes it lawful for the Court in a suit for dissolution to grant a respondent who opposes the relief sought, if a wife on the ground of her husband's adultery, cruelty or desertion, or if a husband on the ground of his wife's adultery or cruelty, the same relief as if he or she had been the petitioner. By 21 & 22 Vict. (1858) c. 108, s. 11, the co-respondent or female

respondent may be dismissed from suit for insufficient evidence, see post.)

32. "The Court may, if it shall think fit, on any such decree, order that the husband shall to the satisfaction of the Court secure to the wife such gross sum of money, or such annual sum of money for any term not exceeding her own life, as, having regard to her fortune (if any), to the ability of the husband, and to the conduct of the parties, it shall deem reasonable, and for that purpose may refer it to any one of the conveyancing counsel of the Court of Chancery to settle and approve of a proper Deed or Instrument to be executed by all necessary parties; and the said Court may in such case, if it shall see fit, suspend the pronouncing of its decree until such Deed shall have been duly executed; and upon any petition for dissolution of marriage the Court shall have the same power to make interim orders for payment of money, by way of alimony or otherwise, to the wife, as it would have in a suit instituted for judicial separation."

(29 & 30 Vict. (1866) c. 11, s. 1, empowers the Court upon a decree for dissolution against a husband who has no property to order him to pay a monthly or weekly sum. See post.)

33. "Any husband may, either in a petition for dissolution of marriage or for judicial separation, or in a petition limited to such object only, claim damages from any person on the ground of his having committed adultery with the wife of such petitioner, and such petition shall be served on the alleged adulterer and the wife, unless the Court shall dispense with such service, or direct some other service to be substituted; and the claim made by every such petition shall be heard and tried on the same principles, in the same manner, and subject to the same or the like rules and regulations as actions for criminal conversation are now tried and decided in Courts of Common Law; and all the enactments herein contained with reference to the hearing and decision of petitions to the Court shall, so far as may be necessary, be deemed applicable to the hearing and decision of petitions presented under this enactment; and the damages to be recovered on any such petition shall in all cases be ascertained by the verdict of a jury, although the respondents or either of them may not appear; and after the verdict has been given the Court shall have power to direct in what manner such damages shall be paid or applied and to direct that the whole or any part thereof shall be settled for the benefit of the children (if any) of the marriage, or as a provision for the maintenance of the wife."

34. "Whenever in any petition presented by a husband the alleged adulterer shall have been made a co-respondent, and the adultery shall have been established, it shall be lawful for the Court to order the adulterer to pay the whole or any part of the costs of the proceedings."

35. "In any suit or other proceeding for obtaining a judicial separation or a decree of nullity of marriage, and on any petition for dissolving a marriage, the Court may from time to time, before making its final decree, make such interim orders, and may make such provision in the final decree, as it may deem just and proper with respect to the custody, maintenance and education of the children the marriage of whose parents is the subject of such suit or other proceeding, and may, if it shall think fit, direct proper proceedings to be taken for placing such children under the protection of the Court of Chancery."

(22 & 23 Vict. (1859) c. 61, s. 4, empowers the Court or petition to make like orders after final decree. See post.)

36. "In questions of fact arising in proceedings under this Act it shall be lawful for, but except as hereinbefore provided, not obligatory upon, the Court to direct the truth thereof to be determined before itself, or before any one or more of the Judges of the said Court, by the verdict of a special or common jury."

37. "The Court, or any Judge thereof, may make all such rules and orders upon the Sheriff or any other person for procuring the attendance of a special or common jury for the trial of such question as may now be made by any of the Superior Courts of Common Law at Westminster, and may also make any other orders which to such Court or Judge may seem requisite; and every such jury shall consist of persons possessing the like qualifications, and shall be struck, summoned, balloted for, and called in like manner, as if such jury were a jury for the trial of any cause in any of the said Superior Courts; and every juryman so summoned shall be entitled to the same rights, and subject to the same duties and liabilities, as if he had been duly summoned for the trial of any such cause in any of the said Superior Courts; and every party to any such proceeding shall be entitled to the same rights as to challenge and otherwise as if he were a party to any such cause."

38. "When any such question shall be so ordered to be tried such question shall be reduced into writing in such form as the Court shall direct, and at the trial the jury shall be sworn to try the said question, and a true verdict to give thereon according to the evidence; and upon every such trial the Court or Judge shall have the same powers, jurisdiction, and authority as any Judge of any of the said Superior Courts sitting at nisi prius."

39. "Upon the trial of any such question or of any issue under this Act a Bill of Exceptions may be tendered, and a general or special verdict or verdicts, subject to a special case, may be returned, in like manner as in any cause tried in any of the said Superior Courts; And every such Bill of Exceptions, special verdict, and special case respectively shall be stated, settled, and sealed in like manner as in any cause tried in any of the said Superior

Courts, and where the trial shall not have been had in the Court for Divorce and Matrimonial Causes shall be returned into such Court without any Writ of Error or other writ; and the matter of law in every such Bill of Exceptions, special verdict, and special case shall be heard and determined by the Full Courts, subject to such right of appeal as is hereinafter given in other cases."

40. "It shall be lawful for the Court to direct one or more issue or issues to be tried in any Court of Common Law, and either before a Judge of Assize in any County or at the sittings for the trial of causes in London or Middlesex, and either by a special or common jury, or in like manner as is now done by the Court of Chancery."

41. "Every person seeking a decree of nullity of marriage, or a decree of judicial separation, or a dissolution of marriage, or decree in a suit of jactitation of marriage, shall, together with the petition or other application for the same, file an affidavit verifying the same so far as he or she is able to do so, and stating that there is not any collusion or connivance between the deponent and the other party to the marriage."

42. "Every such petition shall be served on the party to be affected thereby, either within or without Her Majesty's Dominions, in such manner as the Court shall by any general or special order from time to time direct, and for that purpose the Court shall have all the powers conferred by any statute on the Court of Chancery: Provided always, that the said Court may dispense with such service altogether in case it shall seem necessary or expedient so to do."

43. "The Court may, if it shall think fit, order the attendance of the petitioner, and may examine him or her, or permit him or her to be examined or cross-examined on oath on the hearing of any petition, but no such petitioner shall be bound to answer any question tending to show that he or she has been guilty of adultery."

(By 22 & 23 Vict. (1859) c. 61, s. 6, both husband and wife made competent and compellable witnesses as to cruelty or desertion on wife's petition for dissolution on ground of adultery coupled with either. Now by Evidence Further Amendment Act (1869) 32 & 33 Vict. c. 68, parties are competent witnesses for all purposes.)

44. "The Court may from time to time adjourn the hearing of any such petition, and may require further evidence thereon, if it shall see fit so to do."

45. "In any case in which the Court shall pronounce a sentence of Divorce or Judicial separation for adultery of the wife, if it shall be made appear to the Court that the wife is entitled to any

property either in possession or reversion, it shall be lawful for the Court, if it shall think proper, to order such settlement as it shall think reasonable to be made of such property or any part thereof, for the benefit of the innocent party, and of the children of the marriage, or either or any of them."

(By 22 & 23 Vict. (1859) c. 61, s. 5, Court is empowered after a final decree of nullity or dissolution to inquire as to marriage settlements and to make orders as to the settled property and by 23 & 24 Vict. (1860) c. 144, s. 6, instruments executed pursuant to sec. 45 are validated notwithstanding coverture or disability. See post.)

46. "Subject to such rules and regulations as may be established as herein provided, the witness in all proceedings before the Court where their attendance can be had shall be sworn and examined orally in open Court: Provided that parties, except as hereinbefore provided, shall be at liberty to verify their respective cases in whole or in part by affidavit, but so that the deponent in every such affidavit shall, on the application of the opposite party or by direction of the Court, be subject to be cross-examined by or on behalf of the opposite party orally in open Court, and after such cross-examination may be re-examined orally in open Court as aforesaid by or on behalf of the party by whom such affidavit was filed."

47. "Provided, that where a witness is out of the jurisdiction of the Court, or where, by reason of his illness or from other circumstances, the Court shall not think fit to enforce the attendance of the witness in open Court, it shall be lawful for the Court to order a commission to issue for the examination of such witness on oath, upon interrogatories or otherwise, or if the witness be within the jurisdiction of the Court to order the examination of such witness on oath, upon interrogatories or otherwise, before any officer of the said Court, or other person to be named in such order for the purpose; and all the powers given to the Courts of Law at Westminster by the Acts of the thirteenth year of King George the Third, chapter sixty-three, and of the first year of King William the Fourth, chapter twenty-two, for enabling the Courts of Law at Westminster to issue commissions and give orders for the examination of witnesses in actions depending in such Courts, and to enforce such examination, and all the provisions of the said Acts, and of any other Acts for enforcing or otherwise applicable to such examination and the witnesses examined, shall extend and be applicable to the Court and to the examination of witnesses under the commissions and orders of the said Court, and to the witnesses examined, as if such Court were one of the Courts of Law at Westminster, and the matter before it were an action pending in such Court."

48. "The rules of evidence observed in the Superior Courts of Common Law at Westminster shall be applicable to and observed in the trial of all questions of fact in the Court."

49. "The Court may, under its seal, issue Writs of Subpœna or Subpœna duces tecum, commanding the attendance of witnesses at such time and place as shall be therein expressed; and such writs may be served in any part of Great Britain or Ireland; and every person served with such writ shall be bound to attend, and to be sworn and give evidence in obedience thereto, in the same manner as if it had been a Writ of Subpœna or Subpœna duces tecum issued from any of the said Superior Courts of Common Law in a cause pending therein, and served in Great Britain or Ireland, as the case may be: Provided that any petitioner required to be examined, or any person called as a witness or required or desiring to make an affidavit or deposition under or for the purposes of this Act, shall be permitted to make his solemn affirmation or declaration instead of being sworn in the circumstances and manner in which a person called as a witness or desiring to make an affidavit or deposition would be permitted so to do under the 'Common Law Procedure Act, 1854,' in cases within the provisions of that Act."

50. "All persons wilfully deposing or affirming falsely in any proceedings before the Court shall be deemed to be guilty of perjury, and shall be liable to all the pains and penalties attached thereto."

(As to perjury in affidavit, declaration or deposition, see 21 & 22 Vict. (1858) c. 108, s. 23, post.)

51. "The Court, on the hearing of any suit, proceeding or petition under this Act, and the House of Lords on the hearing of any appeal under this Act, may make such order as to costs as to such Court or House respectively may seem just: Provided always, that there shall be no appeal on the subject of costs only."

52. "All decrees and orders to be made by the Court in any suit, proceeding or petition to be instituted under authority of this Act shall be enforced and put in execution in the same or the like manner as the judgments, orders, and decrees of the High Court of Chancery may be now enforced and put in execution."

53. "The Court shall make such rules and regulations concerning the practice and procedure under this Act as it may from time to time consider expedient, and shall have full power from time to time to revoke or alter the same."

54. "The Court shall have full power to fix and regulate from time to time the fees payable upon all proceedings before it, all which fees shall be received, paid, and applied as herein directed: Provided always, that the said Court may make such rules and regulations as it may deem necessary and expedient for enabling persons to sue in the said Court *in forma pauperis*."

55. "Either party dissatisfied with any decision of the Court in any matter which, according to the provisions aforesaid, may be made by the Judge Ordinary alone, may, within three calendar months after the pronouncing thereof, appeal therefrom to the Full Court, whose decision shall be final."

56. "(Which provided for an appeal in a case of dissolution from the Full Court to the House of Lords was interpreted by 21 & 22 Vict. (1858) c. 108, s. 17, as referring also to sentences of nullity. By 23 & 24 Vict. (1860) c. 144, s. 3, the right of appeal was extended to decisions in such cases of the Judge Ordinary alone. Finally sec. 56 and the other two secs. 17 and 3 referred to were repealed by sec. 2, 31 & 32 Vict. (1868) c. 77, and by sec. 3 of the same Act a right of appeal to the House of Lords in cases of dissolution or nullity was reconferred subject to a proviso. See post.)

57. "When the time hereby limited for appealing against any decree dissolving a marriage shall have expired, and no appeal shall have been presented against such decree, or when any such appeal shall have been dismissed, or when in the result of any appeal any marriage shall be declared to be dissolved, but not sooner, it shall be lawful for the respective parties thereto to marry again, as if the prior marriage had been dissolved by death: Provided always, that no Clergyman in Holy Orders of the United Church of England and Ireland shall be compelled to solemnize the marriage of any person whose former marriage may have been dissolved on the ground of his or her adultery, or shall be liable to any suit, penalty, or censure for solemnizing or refusing to solemnize the marriage of any such person."

(This section is to be read and construed with respect to the time for appealing as varied by the 1868 Act. See 31 & 32 Vict. (1868) c. 77, s. 4.)

58. "Provided always, that when any Minister of any Church or Chapel of the United Church of England and Ireland shall refuse to perform such marriage service between any persons who but for such refusal would be entitled to have the same service performed in such Church or Chapel, such Minister shall permit any other Minister in Holy Orders of the said United Church, entitled to officiate within the Diocese in which such Church or Chapel is situate, to perform such marriage service in such Church or Chapel."

59. "After this Act shall have come into operation no action shall be maintainable in England for Criminal Conversation."

60. (Fees payable in stamps.)

61. (20 & 21 Vict. c. 77, concerning probate fees made applicable.)

62. (Expenses to be paid out of moneys appropriated by Parliament.)

63. (Admission of and annual certificate of Proctors.)

64. (Compensation to Proctors.)

65. (Remuneration of Judge Ordinary, £5,000.)

66. (Transfer of Ecclesiastical Court records.)

67. "All rules and regulations concerning practice or procedure, or fixing or regulating fees, which may be made by the Court under this Act, shall be laid before both Houses of Parliament within one month after the making thereof, if Parliament be then sitting, or if Parliament be not then sitting, within one month after the commencement of the then next session of Parliament."

68. (Yearly account of fees laid before Parliament.)

---

21 & 22 Victoria, Chapter 108.

An Act to amend the Act of the Twentieth and Twenty-first Victoria, chapter Eighty-five, 2nd August, 1858.

1. "It shall be lawful for the Judge Ordinary of the Court for Divorce and Matrimonial Causes for the time being to sit in Chambers for the despatch of such part of the business of the said Court as can in the opinion of the said Judge Ordinary, with advantage to the suitors, be heard in Chambers; and such sittings shall from time to time be appointed by the said Judge Ordinary."

2. (Commissioners of Treasury to provide Chambers.)

3. "The said Judge Ordinary when so sitting in Chambers shall have and exercise the same power and jurisdiction in respect of the business to be brought before him as if sitting in open Court."

4. "The Registrars of the Principal Registry of the Court of Probate shall be invested with and shall and may exercise with reference to proceedings in the Court for Divorce and Matrimonial Causes the same power and authority which Surrogates of the official principal of the Court of Arches could or might before the passing of the Twentieth and Twenty-first Victoria, chapter seventy-seven, have exercised in Chambers with reference to proceedings in that Court."

5. (Evidence taken in Ecclesiastical Court admissible in case of death, etc., of witness.)

6. "Every wife deserted by her husband wheresoever resident in England, may, at any time after such desertion, apply to the said Judge Ordinary for an order to protect any money or property in England she may have acquired or may acquire by her own

lawful industry, and any property she may have become possessed of or may become possessed of after such desertion, against her husband and his creditors, and any person claiming under him; and the Judge Ordinary shall exercise in respect of every such application all the powers conferred upon the Court of Divorce and Matrimonial Causes under the Twentieth and Twenty-first Victoria, chapter eighty-five, section twenty-one."

7. "The provisions contained in this Act and in the said Act of the Twentieth and Twenty-first Victoria, chapter eighty-five, respecting the property of a wife who has obtained a decree for judicial separation or an order for protection, shall be deemed to extend to property to which such wife has become or shall become entitled as executrix, administratrix, or trustee since the sentence of separation or the commencement of the desertion (as the case may be); and the death of the Testator or Intestate shall be deemed to be the time when such wife became entitled as executrix or administratrix."

8. "In every case in which a wife shall under this Act or under the said Act of the Twentieth and Twenty-first Victoria, chapter eighty-five, have obtained an order to protect her earnings or property, or a decree for judicial separation, such order or decree shall, until reversed or discharged, so far as necessary for the protection of any person or corporation who shall deal with the wife, be deemed valid and effectual; and no discharge, variation, or reversal of such order or decree shall prejudice or affect any rights or remedies which any person would have had in case the same had not been so reversed, varied, or discharged in respect of any debts, contracts, or acts of the wife incurred, entered into, or done between the times of making such order or decree and of the discharge, variation, or reversal thereof; and property of or to which the wife is possessed or entitled for an estate in remainder or reversion at the date of the desertion or decree (as the case may be), shall be deemed to be included in the protection given by the order or decree."

9. "Every order which shall be obtained by a wife under the said Act of the Twentieth and Twenty-first Victoria, chapter eighty-five, or under this Act, for the protection of her earnings or property, shall state the time at which the desertion in consequence whereof the order is made commenced; and the order shall, as regards all persons dealing with such wife in reliance thereon, be conclusive as to the time when such desertion commenced."

10. "All persons and corporations who shall, in reliance on any such order or decree as aforesaid, make any payment to, or permit any transfer or act to be made or done by, the wife who has obtained the same, shall, notwithstanding such order or decree may then have been discharged, reversed, or varied, or the separation

of the wife from her husband may have ceased, or at some time since the making of the order or decree been discontinued, be protected and indemnified in the same way in all respects as if, at the time of such payment, transfer, or other act, such order or decree were valid and still subsisting without variation in full force and effect, and the separation of the wife from her husband had not ceased or been discontinued, unless at the time of such payment, transfer or other act such persons or corporations had notice of the discharge, reversal, or variation of such order or decree, or of the cessation or discontinuance of such separation."

11. "In all cases now pending or hereafter to be commenced in which, on the petition of a husband for a divorce, the alleged adulterer is made a co-respondent, or in which, on the petition of a wife, the person with whom the husband is alleged to have committed adultery is made a respondent, it shall be lawful for the Court, after the close of the evidence on the part of the petitioner, to direct such co-respondent or respondent to be dismissed from the suit, if it shall think there is not sufficient evidence against him or her."

12. (By whom oaths administered.)

13. (Taxation of Proctors' and Solicitors' bills.)

14. (Enforcing payment of costs incurred in Ecclesiastical Courts.)

15. (Judge Ordinary's authority and control over Proctors.)

16. (Commissioners for Isle of Man, etc.)

17. (Repealed, 31 & 32 Vict. (1868) c. 77, s. 2.)

18. "Where any trial shall have been had by a jury before the Full Court or before the Judge Ordinary, or upon any issue directed by the Full Court or by the Judge Ordinary, it shall be lawful for the Judge Ordinary, subject to any rules to be hereafter made, to grant a rule nisi for a new trial, but no such rule shall be made absolute except by the Full Court."

19. (Repeals right of application to Judge of Assize.)

20. (Before whom affidavits to be sworn in foreign parts.)

21. (Before whom affidavits to be sworn in British Dominions out of England.)

22. (Felony to forge seal.)

23. (Perjury to take false oath.)

21 & 22 Victoria, Chapter 93.

An Act to enable persons to establish legitimacy and the validity of marriage and the right to be deemed natural-born subjects, 2nd August, 1858.

"Whereas it is expedient to enable persons to establish their legitimacy, and the marriage of their parents and others from whom they may be descended, and also to enable persons to establish their right to be deemed natural-born subjects: Be it therefore enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:"

1. "Any natural-born subject of the Queen or any person whose right to be deemed a natural-born subject depends wholly or in part on his legitimacy or on the validity of a marriage, being domiciled in England or Ireland, or claiming any real or personal estate situate in England, may apply by petition to the Court for Divorce and Matrimonial Causes, praying the Court for a decree declaring that the petitioner is the legitimate child of his parents, and that the marriage of his Father and Mother, or of his Grandfather and Grandmother, was a valid marriage, or for a decree declaring either of the matters aforesaid; and any such subject or person, being so domiciled or claiming as aforesaid, may in like manner apply to such Court for a decree declaring that his marriage was or is a valid marriage, and such Court shall have jurisdiction to hear and determine such application and to make such decree declaratory of the legitimacy or illegitimacy of such person, or of the validity or invalidity of such marriage, as to the Court may seem just; and such decree, except as hereinafter mentioned, shall be binding to all intents and purposes on Her Majesty and on all persons whomsoever."

2. "Any person, being so domiciled or claiming as aforesaid, may apply by petition to the said Court for a decree declaratory of his right to be deemed a natural-born subject of Her Majesty, and the said Court shall have jurisdiction to hear and determine such application, and to make such decree thereon as to the Court may seem just, and where such application as last aforesaid is made by the person making such application as herein mentioned for a decree declaring his legitimacy or the validity of a marriage, both applications may be included in the same petition; and every decree made by the said Court shall, except as hereinafter mentioned, be valid and binding to all intents and purposes upon Her Majesty and all persons whomsoever.

3. "Every petition under this Act shall be accompanied by such affidavit verifying the same, and of the absence of collusion, as the Court may by any general rule direct."

4. "All the provisions of the Act of the last Session, chapter eighty-five, so far as the same may be applicable and the powers and provisions therein contained in relation to the making and laying before Parliament of rules and regulations concerning the practice and procedure under that Act, and fixing the fees payable upon proceedings before the Court, shall extend to applications and proceedings in the said Court under this Act, as if the same had been authorized by the said Act of the last Session."

5. "In all proceedings under this Act the Court shall have full power to award and enforce payment of costs to any persons cited whether such persons shall or shall not oppose the declaration applied for, in case the said Court shall deem it reasonable that such costs should be paid."

6. "A copy of every petition under this Act, and of the affidavit accompanying the same, shall, one month at least previously to the presentation or filing of such petition, be delivered to Her Majesty's Attorney General, who shall be a respondent upon the hearing of such petition and upon every subsequent proceeding relating thereto."

7. "Where any application is made under this Act to the said Court such person or persons (if any) besides the said Attorney General as the Court shall think fit shall, subject to the rules made under this Act, be cited to see proceedings or otherwise summoned in such manner as the Court shall direct, and may be permitted to become parties to the proceedings, and oppose the application."

8. "The decree of the said Court shall not in any case prejudice any person, unless such person has been cited or made a party to the proceedings or is the heir-at-law or next of kin, or other real or personal representative of or derives title under or through a person so cited or made a party; nor shall such sentence or decree of the Court prejudice any person if subsequently proved to have been obtained by fraud or collusion."

9. (Persons domiciled in Scotland.)

10. "No proceeding to be had under this Act shall affect any final judgment or decree already pronounced or made by any Court of competent jurisdiction."

11. "The said Act of the last Session and this Act shall be construed together as one Act; and this Act may be cited for all purposes as 'The Legitimacy Declaration Act, 1858.'"

22 & 23 Victoria, Chapter 61.

An Act to make further provision concerning the Court of Divorce and Matrimonial Causes, 13th August, 1859.

1. (Judges of the Queen's Bench, Common Pleas and Exchequer, made Judges of the Court.)

2. (Repealed by 23 & 24 Vict. (1860) c. 144, s. 4. New provision substituted, see post.)

3. (Precedence of Judge Ordinary.)

4. "The Court after a final decree of judicial separation, nullity of marriage, or dissolution of marriage, may upon application (by petition) for this purpose make, from time to time, all such orders and provisions with respect to the custody, maintenance, and education of the children the marriage of whose parents was the subject of the decree, or for placing such children under the protection of the Court of Chancery, as might have been made by such final decree or by Interim orders in case the proceedings for obtaining such decree were still pending; and all orders under this enactment may be made by the Judge Ordinary alone or with one or more of the other Judges of the Court."

(See sec. 35, principal Act.)

5. "The Court after a final decree of nullity of marriage, or dissolution of marriage may enquire into the existence of antenuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole or a portion of the property settled either for the benefit of the children of the marriage or of their respective parents as to the Court shall seem fit."

6. "On any petition presented by a wife, praying that her marriage may be dissolved by reason of her husband having been guilty of adultery coupled with cruelty, or of adultery coupled with desertion, the husband and wife respectively shall be competent and compellable to give evidence of or relating to such cruelty or desertion."

(See Evidence Act, 1869, 32 & 33 Vict. c. 68.)

7. Appeal to Lords under Legitimacy Declaration Act 1858, c. 93.)

---

23 & 24 Victoria, Chapter 144.

An Act to amend the procedure and powers of the Court of Divorce and Matrimonial Causes, 28th August, 1860.

1. "It shall be lawful for the Judge Ordinary of the Court for Divorce and Matrimonial Causes alone to hear and determine all

matters arising in the said Court, and to exercise all powers and authority whatever which may now be heard and determined and exercised respectively by the Full Court or by three or more Judges of the said Court, the Judge Ordinary being one, or where the Judge Ordinary shall deem it expedient, in relation to any matter which he might hear and determine alone by virtue of this Act, to have the assistance of one other Judge of the said Court, it shall be lawful for the Judge Ordinary to sit and act with such one other Judge accordingly, and in conjunction with such other Judge, to exercise all the jurisdiction, powers, and authority of the said Court."

2. "Provided always, that the Judge Ordinary may, where he shall deem it expedient, direct that any such matter as aforesaid shall be heard and determined by the Full Court; and in addition to the cases in which an appeal to the Full Court now lies from the decision of the Judge Ordinary, either party dissatisfied with the decision of such Judge sitting alone in granting or refusing any application for a new trial which by virtue of this Act he is empowered to hear and determine may, within fourteen days after the pronouncing thereof, appeal to the Full Court, whose decision shall be final."

3. (Repealed 31 & 32 Vict. (1868) c. 77. s. 2.)

4. (Regulates sittings of Full Court.)

5. (Court may in case of petition for dissolution direct papers to be sent to Queen's Proctor.)

6. "And whereas by section forty-five of the Act of the Session "holden in the Twentieth and Twenty-first years of Her Majesty, "chapter eighty-five, it was enacted, that 'In any case in which the " 'Court shall pronounce a sentence of divorce or judicial separation " 'for adultery of the wife, if it should be made appear to the Court " 'that the wife was entitled to any property, either in possession " 'or reversion, it should be lawful for the Court, if it should think " 'proper, to order such settlement as it should think reasonable to " 'be made of such property, or any part thereof, for the benefit of " 'the innocent party and of the children of the marriage, or either " 'of them:' Be it further enacted, that any instrument executed "pursuant to any order of the Court made under the said enactment "before or after the passing of this Act, at the time of or after the "pronouncing of a final decree of divorce or judicial separation, "shall be deemed valid and effectual in the law, notwithstanding the "existence of the disability of coverture at the time of the execution "thereof."

7. "Every decree for a divorce shall in the first instance be a decree nisi, not to be made absolute till after the expiration of such time, not less than three months from the pronouncing thereof, as the Court shall by general or special order from time to time direct;

and during that period any person shall be at liberty, in such manner as the Court shall by general or special order in that behalf from time to time direct, to show cause why the said decree should not be made absolute or by reason of the same having been obtained by collusion or by reason of material facts not brought before the Court; and, on cause being so shown, the Court shall deal with the case by making the decree absolute, or by reversing the decree nisi, or by requiring further inquiry, or otherwise as justice may require; and at any time during the progress of the cause or before the decree is made absolute any person may give information to Her Majesty's Proctor of any matter material to the due decision of the case, who may thereupon take such steps as the Attorney General may deem necessary or expedient; and if from any such information or otherwise the said Proctor shall suspect that any parties to the suit are or have been acting in collusion for the purpose of obtaining a divorce contrary to the justice of the case, he may, under the direction of the Attorney General, and by leave of the Court, intervene in the suit alleging such case of collusion, and retain counsel and subpœna witnesses to prove it; and it shall be lawful for the Court to order the costs of such counsel and witnesses, and otherwise, arising from such intervention, to be paid by the parties or such of them as it shall see fit, including a wife if she have separate property, and in case the said Proctor shall not thereby be fully satisfied his reasonable costs, he shall be entitled to charge and be reimbursed the difference as part of the expense of his office."

8. "This Act shall continue in force until the Thirty-first day of July One thousand eight hundred and sixty-two, and no longer."

(Repealed and Act made perpetual by 25 & 26 Vict. (1862) c. 81, s.1.)

---

27 & 28 Victoria, Chapter 44.

An Act to amend the Act relating to Divorce and Matrimonial Causes in England, Twentieth and Twenty-first Victoria, chapter eighty-five, 14th July, 1864.

1. "Where under the provisions of sec. 21 of the said Act a wife deserted by her husband shall have obtained or shall hereafter obtain an order protecting her earnings and property, from a Police Magistrate or Justices in Petty Sessions, or the Court of Divorce and Matrimonial Causes, as the case may be, the husband and any creditor or other person claiming under him may apply to the Court or to the Magistrate or Justices by whom such order was made for the discharge thereof as by the said Act authorized; and in case the said order shall have been made by a Police Magistrate and the said Magistrate shall have died or been removed or have

become incapable of acting, then in every such case the husband, or creditor, or such other persons as aforesaid, may apply to the Magistrate for the time being acting as the successor or in the place of the Magistrate who made the order of protection for the discharge of it, who shall have authority to make an order discharging the same; and an order for discharge of an order for protection may be applied for to and be granted by the Court although the order for protection was not made by the Court and an order for protection made at one Petty Sessions may be discharged by the Justices of any later Petty Sessions or by the Court."

---

29 & 30 Victoria, Chapter 32.

An Act to further amend the procedure and powers of the Court for Divorce and Matrimonial Causes, 11th June, 1866.

Whereas by the Act passed in the session of Parliament holden the Twentieth and Twenty-first years of the Reign of Her Present Majesty entitled "An Act to amend the laws relating to Divorce and Matrimonial Causes in England," it is by the Thirty-second section enacted, "that the Court may on pronouncing any decree for the dissolution of marriage order that the husband shall to the satisfaction of the Court secure to the wife such gross or annual sum of money as to the Court may seem reasonable and for that purpose may refer it to one of the conveyancing counsel of the Court of Chancery to settle and approve of a proper deed to be executed by all necessary parties."

"And whereas it sometimes happens that a decree of dissolution of marriage is obtained against a husband who has no property on which the payment of any such gross or annual sum can be secured but nevertheless he would be able to make a monthly or weekly payment to the wife during their joint lives."

1. "In every such case it shall be lawful for the Court to make an order on the husband for payment to the wife during their joint lives of such monthly or weekly sums for her maintenance and support as the Court may think reasonable: Provided always, that if the husband shall afterwards from any cause become unable to make such payments it shall be lawful for the Court to discharge or modify the order or temporarily to suspend the same as to the whole or any part of the money so ordered to be paid and again to revive the same order wholly or in part as to the Court may seem fit."

2. "In any suit instituted for dissolution of marriage if the respondent shall oppose the relief sought on the ground in case of such a suit instituted by a husband of his adultery, cruelty, or

desertion, or in case of such a suit instituted by a wife on the ground of her adultery or cruelty, the Court may in such suit give to the respondent on his or her application the same relief to which he or she would have been entitled in case he or she had filed a petition seeking such relief."

3. "No decree nisi for a divorce shall be made absolute until after the expiration of six calendar months from the pronouncing thereof unless the Court shall under the power now vested in it fix a shorter time."

---

31 & 32 Victoria, Chapter 77.

An Act to amend the law relating to appeals from the Court of Divorce and Matrimonial Causes in England, 31st July, 1868.

"Whereas it is expedient to amend the law relating to appeals from the Court of Divorce and Matrimonial Causes with a view to prevent unnecessary delay in the final determination of suits for dissolution or nullity of marriage."

"Be it therefore enacted, &c."

1. "Throughout this Act the expression 'the Court' shall mean the Court of Divorce and Matrimonial Causes."

2. "Section fifty-six of the Act of Twentieth and Twenty-first Victoria, chapter eighty-five, section seventeen of the Act of Twenty-first and Twenty-second Victoria, chapter one hundred and eight, and section three of the Act of Twenty-third and Twenty-fourth Victoria, chapter one hundred and forty-four are hereby repealed."

3. "Either party dissatisfied with the final decision of the Court on any petition for dissolution or nullity of marriage may within one calendar month after the pronouncing thereof appeal therefrom to the House of Lords and on the hearing of any such appeal the House of Lords may either dismiss the appeal or reverse the decree or remit the case to be dealt with in all respects as the House of Lords shall direct: Provided always, that in suits for dissolution of marriage no respondent or co-respondent not appearing and defending the suit on the occasion of the decree nisi being made shall have any right of appeal to the House of Lords against the decree when made absolute unless the Court upon application made at the time of the pronouncing of the decree absolute shall see fit to permit an appeal."

4. "Section 57 of the Act of 21 Victoria, c. 85, shall be read and construed with reference to the time for appealing as varied by this Act; and in cases where under this Act there shall be no right of appeal the parties respectively shall be at liberty to marry again at any time after the pronouncing of the decree absolute."

5. "This Act may be cited as The Divorce Amendment Act, 1868."

6. "This Act shall extend to all suits pending at the time when the same shall come into operation notwithstanding that a decree may have been pronounced therein; provided nevertheless that this Act shall not affect any pending appeal nor shall the same prejudice any subsisting right of appeal against a decree already pronounced provided such appeal be lodged within one calendar month after this Act shall come into operation."