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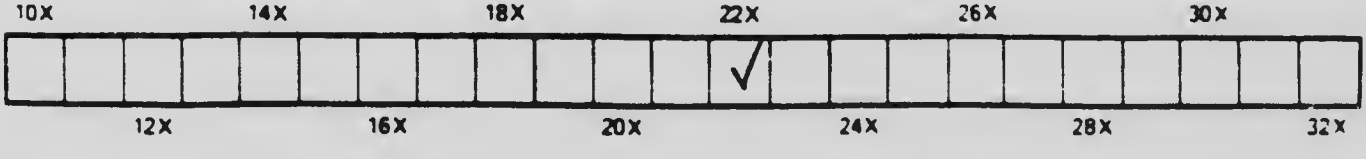

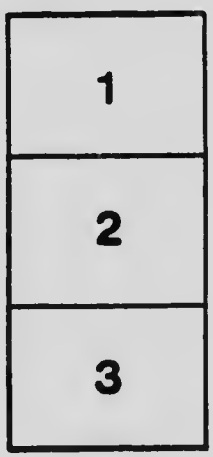

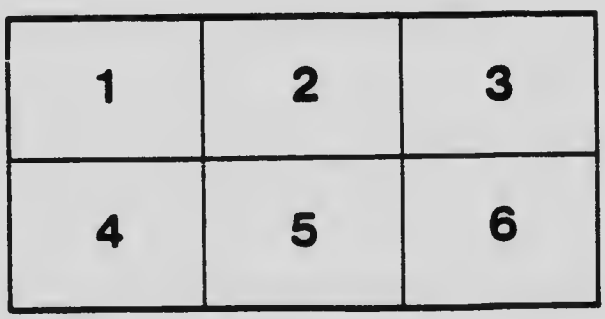

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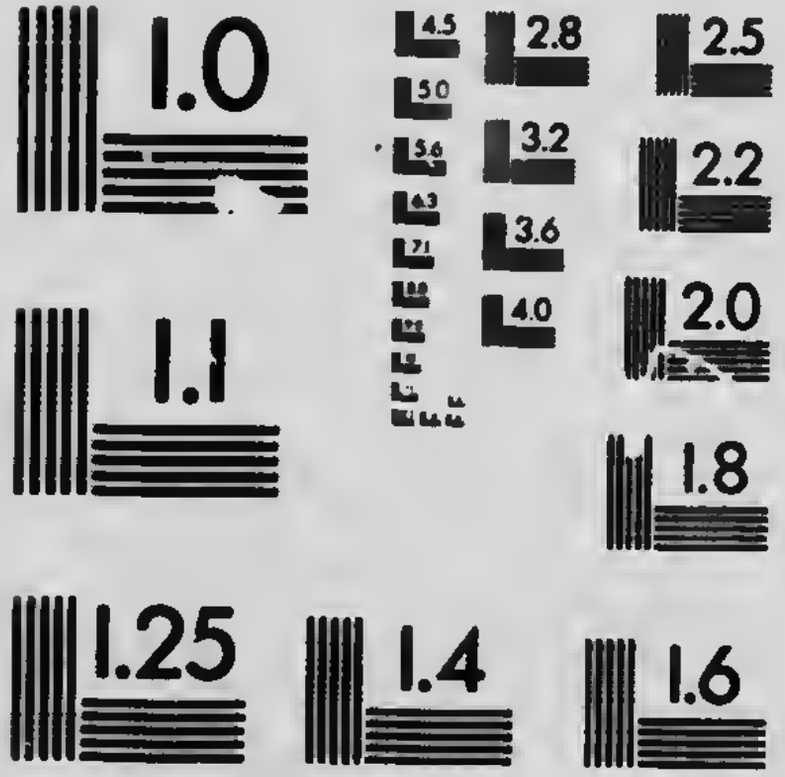

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Marriage and Divorce Laws of Canada

A Monograph Prepared for the Social Service Council of Canada

BY

E. F. RANEY, M.A., L.L.B.
Barrister-at-Law
Osgoode Hall, Toronto

(INTRODUCTION BY W. E. RANEY, K.C.)

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MARRIAGE AND DIVORCE LAWS OF CANADA.

INTRODUCTION.

By common consent of all the civilized countries of the world, the most important relationship known to society is that of marriage. And by the like common consent, monogamy is the only foundation upon which it is possible to build the institution of the home, and therefore, the only form of the marriage relation consistent with the true happiness of men and women, and the well-being of the race. It is, therefore, just and right that marriage, as we in Canada approve of it, should be surrounded by the highest legal sanctions. But it is also important that the laws with relation to this fundamental subject should be clear, consistent and generally understood.

The divided jurisdiction between the Parliament of Ottawa and the local Legislatures, does not lend itself to simplicity of treatment, and the matter is still further complicated by the relationship of the laws of the different provinces to the laws of England (depending in each case upon the date when the laws of England were introduced), and by the further fact that the civil laws of Quebec, founded as they are, upon the laws of France, are fundamentally different on this subject from the laws of the other provinces.

No effort has, so far as known to the writer, ever been made to simplify and harmonize the marriage laws of Canada. For the most part they just grew, and as there were ten or a dozen gardens far removed from each other, it will not be surprising if the growth presents some forms of contrast and some features that are not in harmony with the generally received social standards.

Take for example the law with reference to the prohibited degrees of affinity and consanguinity. These were declared by the Parliament of England at the Reformation, and were introduced into this country with the laws of England. Under the statute of Henry[1] a marriage forbidden by these prohibitions was voidable at the suit of one of the parties in the lifetime of the other. This law remained unchanged in England until 1835, when by Lord Lyndhurst's Act[2] such a marriage was made "absolutely null and void." The preamble to this Act recites that:

> "Whereas marriage between persons within prohibited degrees are voidable only by sentence of the ecclesiastical court pronounced during the lifetime of both the parties thereto, and it is unreasonable that the state and condition of the children of marriages between persons within the prohibited degrees of affinity should remain unsettled during so long a period, and it is fitting that all marriages which may hereafter be celebrated between persons within the prohibited degrees of consanguinity or affinity should be *ipso facto* void and not merely voidable." etc.

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[1] 28 Henry VIII., Chap. 7, Sec. 7.
[2] Imperial Statutes, 5 & 6 William IV., Chap. 54.

But the same objections which existed in 1835 to the then state of the law in England, exist in Canada to-day. For instance, if a man marries his brother's or his nephew's widow, the marriage is voidable, and in the provinces where there are Courts having jurisdiction in matrimonial causes, such a marriage will be set aside, and the children of the union thereby made illegitimate. The same will be true of the marriage of a woman with her deceased's husband's brother, or deceased husband's nephew. Furthermore, there appears to be nothing in the law of Canada to render void even a marriage within the prohibitive degrees of consanguinity, except that no Christian country would recognize an incestous marriage, that is to say, a marriage in the direct line of descent, or a marriage between brother and sister. In other words, such a marriage within the prohibited degrees, for example, the marriage of a man with his aunt or his niece, is, under the laws of Canada, not like a bigamous marriage, void, but only voidable, and the status of the children of such a union or of any other union forbidden by the rule with reference to prohibited degrees, will remain "unsettled" so long as both parents live or until the judgment of a competent legal tribunal.

One scarcely knows whether to approve less of Lord Lyndhurst's Act, which, with the late modification in favor of a deceased wife's sister, is still the law of England; or the Statute of Henry which, with the modifications imposed by the Parliament of Canada in favor of a deceased wife's sister and a deceased wife's niece, is still the law of Canada. Under the law as it is in England the marriage of a man with his brother's or his nephew's widow would be equally void with his marriage with his aunt or his niece, and in either case the children of the union would be illegitimate. Under the law as it is in Canada, a man's marriage with his brother's or nephew's widow would be on the same footing precisely as his marriage with his aunt or his niece, but here either would also be equally good or equally bad at the option of either party to the marriage contract during the life of both, and in either case the children of the union would be legitimate or illegitimate at the like option.

Regarded historically it is not altogether easy to determine which statute has the more reputable parentage. Indeed, both may be said to be illegitimate in the strict etymological sense of the word. It is quite true that the prohibited degrees were recognized by the Church for centuries before the reign of Henry the eighth, but the historical venerableness of the ecclesiastical rule loses most of its value when it is remembered that it was for these centuries a prolific source of Church revenue, a permit in a case of affinity being always to be had for a consideration. Indeed Henry's own marriage to Catherine was under a papal dispensation. It is also true that the Parliament of Henry declared all such marriages to be "prohibited by God's laws." But a less subservient age has discerned that when Henry's obedient law-makers enacted this statute the monarch, violently smitten of the charms of Anne Boleyn, was eager to divorce Catherine who had been his brother's wife, and that it was under this statute that Catherine actually was divorced. So that in truth the prohibited degrees as we have them in Canada are based upon the matrimonial vagaries of an English monarch of the sixteenth century.

The motive underlying Lord Lyndhurst's Act was scarcely more respectable. The Duke of Bedford had married his deceased wife's sister, and the descent of his estates was in jeopardy. His friend Lord Lyndhurst came to his assistance with an Act which provided that all voidable marriages then existing were to be valid, and that no such union was in future to be assailed after two years from the date of the marriage. The Bill passed both Houses and was in its final stage in the Lords without material alterations when the Bishop of London insisted upon an amendment providing that for the future all such marriages should be absolutely and *ipso facto* void. A deadlock ensued with the Commons, until an understanding was reached that a supplementary measure would be introduced early in the next session, and, with that understanding, the Bill, with the amendment of the Bishop of London, became law. The supplementary measure never was brought down.

There are also certain other phases of the subject in which there will be common agreement that the time has come for the adoption of important changes in the law.

Two or three instances will serve:—

The law, as interpreted in Ontario, which tolerates polygamy in practice among nominal monogamists, but punishes polygamists who are also Mormons in name, is by common consent a scandal; and however doctors of law may differ as to the advisability of a divorce court for Canada they will all agree in reprobating divorce by special Act of the Parliament of Canada.

There will not be a unanimous request for full legal recognition of the science of eugenics, as applied to the marriage relation, but all will probably agree that the presence of certain communicable diseases in one of the parties, ought to be an impediment to marriage, and there will be a disposition to give a respectful hearing to the arguments of those who urge that persons who are mentally defective ought not to be permitted to marry.

Though the Dominion Parliament is authorized to legislate on the entire subject of marriage and divorce (excepting only the solemnization of marriage, which is assigned to the Provincial Legislatures), the federal field remains almost wholly uncultivated, the entire body of Dominion legislation on the subject, apart from the Criminal Code, being comprised in three lines in the Revised Statutes of Canada, the effect of which is to legalize the marriage of a man with his deceased wife's sister or his deceased wife's niece.

Ought it to be too much to hope that at no very distant date the Parliament of Canada will turn its attention seriously to this subject and enact a statute that will remove existing anomalies in the law and bring it abreast of public sentiment, and of our modern social conditions?

W. E. RANEY

Toronto, Dec., 1914.

MARRIAGE AND DIVORCE LAWS OF CANADA.

Chapter I.

JURISDICTION—DOMINION AND PROVINCIAL.

In the distribution of subjects of legislation between the Dominion and the Provinces under the British North America Act, the Dominion Parliament is empowered to legislate on the subjects of Marriage and Divorce[3], and the Provincial Legislatures on the subject of Solemnization of Marriage[4].

Additional jurisdiction with regard to marriage is conferred by the Act upon the central government under the heading Criminal Law Procedure[5], and upon the local assemblies under the heading Property and Civil Rights[6]. Two other sections of the Act are also of importance. One of them[7] empowers the Parliament of Canada to provide "for the establishment of any additional Courts for the better administration of the Laws of Canada": this has been interpreted to give power to create a Divorce Court[8]. The other[9] provides that existing laws and courts "shall continue in Ontario, Quebec, Nova Scotia and New Brunswick, as if the Union had not been made," subject to repeal or abolition by the Imperial Parliament, the Parliament of Canada, or by the Legislature of the Province in question. Provision was also made for the admission into the Dominion of Prince Edward Island and British Columbia[10], and when these Provinces were afterwards taken into the Dominion, their existing laws and courts were also continued. Consequently, the Provinces of Nova Scotia, New Brunswick, and Prince Edward Island, which had enacted legislation on the subject of Marriage and Divorce prior to Confederation, and Ontario and Quebec, which had legislation on the subject of marriage, including provisions as to capacity to contract marriage, are still under those Acts, except as they may have been repealed or amended.

The limits of the respective jurisdictions of the Dominion Parliament and the Provincial Legislatures have recently been more clearly defined by the Judicial Committee of the Privy Council, affirming a judgment of the Supreme Court of Canada[11], and it is now settled beyond controversy that the Parliament of Canada has no right to legislate in regard to the solemnization of marriage.

The specific point decided was that the power of the several Provinces to legislate as to the Solemnization of Marriage entitles them to say, if they choose, that only certain ministers shall be competent to perform the ceremony of marriage for certain persons, for example, for members of the

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[3]Sec. 91 (26).
[4]Sec. 92 (12).
[5]Sec. 91 (27).
[6]Sec. 92 (13).
[7]Sec. 101.
[8]Todd—Parliamentary Government in the British Colonies, 2nd Edition, at p. 595.
[9]Sec. 129.
[10]Sec. 146.
[11]In re Marriage Legislation in Canada (1912), Appeal Cases, p. 880.

church to which the minister belongs, and that non-compliance with this formality will render the marriage invalid. The Federal Government, moreover, cannot deprive the Provinces of this power by a law providing that any minister may marry anybody, whether belonging to his church or another, because this would be legislation dealing strictly with the subject of Solemnization of Marriage.

Dominion Legislation.

It is noteworthy that since Confederation the Dominion Parliament, apart from the provisions of the Criminal Code, has passed only two statutes dealing with marriage and divorce. In 1882 marriage between a man and his deceased wife's sister was legalized[12], and in 1890 marriage with a deceased wife's niece was legalized[13]. It was not until the Act of 1907[14] that marriage with a deceased wife's sister was legalized in England, and marriage has never been legalized in England with a deceased wife's niece.

The Criminal Code of Canada deals with offences in relation to conjugal rights. A bigamist is liable to imprisonment for seven years, and in case of a second offence to imprisonment for fourteen years[15]. The going through the form of a bigamous marriage, not the relationship afterwards, is the indictable offence. There is no crime if the accused on reasonable grounds believed his lawful wife or husband to be dead; or if the wife or husband has been continually absent for seven years and has not been heard of during that time; or if the accused has been lawfully divorced from the bond of the first marriage; or if the former marriage has been declared void by a court of competent jurisdiction. To constitute a crime punishable before a Canadian Court, the general rule is that the offence must have been committed in Canada. Bigamy is an exception to this rule to this extent, that if the accused person, being a British subject resident in Canada, contracted the bigamous marriage in another country, having left Canada "with intent to go through such form of marriage," the offence is one cognizable in a Canadian Court. This provision has particular application to the cases of Canadians who go to the trouble to procure so-called divorces from Dakota or other easy-going States, founded on a pretended domicile, and having procured these worthless papers, afterwards go through the form of a marriage ceremony in the United States. Neither the Dakota bill of divorcement, nor the fact that the marriage ceremony was performed outside of Canada, will avail as a defence in a Canadian Court if the accused left Canada "with intent to go through such form of marriage."[16]

The Criminal Code prohibits the practice "of any form of polygamy or of any kind of conjugal union with more than one person at the same time, or what among persons commonly called Mormons is known as spiritual or plural marriage," under penalty of imprisonment for five years and a fine of five hundred dollars.[17] The teeth of the polygamy section of the

[12]Statutes of Canada, 45 Victoria, Chap. 42, Sec. 1.
[13]Statutes of Canada, 53 Victoria, Chap. 36.
[14]Imperial Statutes, 7 Edward VII., Chap. 47.
[15]Criminal Code, Revised Statutes of Canada, Chap. 146, Sec. 307.
[16]Sec. 207, sub-sec. 4.
[17]Sec. 310.

Code were, however, drawn in 1893, when it was held by Chief Justice Armour, of the Ontario Bench, that this section was intended to apply only to Mormons.[18] Under the laws of Canada, as interpreted by this decision, it would appear to be no offence for a resident of Canada to occupy the relation of husband to two or more women at the same time, so long as he is not a Mormon and so long as he is careful not to contravene the bigamy sections. In other words, he may be a polygamist in practice, but must not be also a Mormon in name.

But the language of the polygamy section is wide, and it is worth noting that the view of Chief Justice Armour was not followed by a Quebec Judge in a more recent case.[19] An authoritative pronouncement on the subject by an appellate court is to be desired.

Procuring a feigned marriage is punishable by seven years imprisonment[20], while a penalty of two years imprisonment is imposed on anyone who solemnizes a marriage without lawful authority or procures such a marriage to be performed.[21] Solemnization of a marriage contrary to law renders the offender liable to a penalty of one year's imprisonment.[22]

A husband is criminally liable for the death of his wife if her death occurs through his failure to supply her with necessaries,[23] and by an amendment of 1913, a husband who neglects to provide such necessaries when his wife and children are destitute is liable to a fine of five hundred dollars or to imprisonment for one year.

Sources of the Provincial Laws.

Generally speaking, the sources of the law now enforced by the various Provincial Courts are as follows:—

British Columbia—

British Columbia is subject to the law of England as of the 19th of November, 1858, in so far as such law is not rendered inapplicable by local circumstances, and in so far as not repealed or varied by Federal or Provincial legislation. This is by virtue of a proclamation of that date subsequently confirmed by Provincial Statute.[24]

With regard to marriage, the Marriage Act of British Columbia[25] first enacted as the Marriage Ordinance of the 2nd of April, 1867, provides that in all matters relating to the mode of celebrating marriage, the validity thereof, the qualifications of parties about to marry, and the consent of guardians or parents—the law of England shall prevail—subject to the provisions of the Act.

After there had been conflicting decisions in the British Columbia Courts, the Judicial Committee of the Privy Council finally decided that

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[18]The Queen v. Liston. Article on Bigamy and Divorce, by W. E. Raney, 31 Canada Law Journal, p. 546.
[19]The King v. Harris (1906), 11 Canadian Criminal Cases, p. 254.
[20]Sec. 309.
[21]Sec. 311.
[22]Sec. 312.
[23]Sec. 242, sub-sec. 2.
[24]Sir James Douglas' Proclamation of November 19th, 1858, confirmed by the English Law Ordinance 1867, now Revised Statutes of British Columbia (1911), Chap. 75.
[25]Revised Statutes of British Columbia (1911), Chap. 151.

the English Divorce and Matrimonial Causes Act of 1857 was not rendered inapplicable to British Columbia by local circumstances, and that jurisdiction to pronounce decrees of divorce was vested in the Supreme Court of that Province.[26]

The North-West Territories, Alberta, Saskatchewan, and Manitoba—

The North-West Territories Act of 1886[27] enacts that the laws of England relative to civil and criminal matters as they existed on the 15th of July, 1870, shall be in force in the North-West Territories[28] in so far as the same can be made applicable and in so far as not repealed, and "subject to the provisions of the Act." The laws of the Provinces of Manitoba, Alberta and Saskatchewan and the Territory of the Yukon are founded upon the laws of the North-West Territories as so derived.[29] The North-West Territories Act would seem to be wide enough to bring into force the laws of England with regard to marriage and divorce, in the Territories and the Provinces formed out of them, when these subjects have not been dealt with by subsequent Provincial or Federal legislation. This point has not, however, been judicially determined.[30]

The Manitoba Marriage Act, 1906, as amended in 1910, is broader than the British Columbia Act and deals with consent, non-age, and impotency.

Ontario—

The law of Ontario is based on the English Common law and Statute law of the 15th of October, 1792, in so far as applicable.[31] The statute of 1792 provides that in matters of controversy relative to property and civil rights, and as to testimony and legal proof, the law of England as of that date shall be binding, except as repealed by any Act of the Imperial Parliament having force in Upper Canada, or by Act of the Province of Upper Canada.

As there was no law in England permitting the dissolution of marriages except by Act of Parliament until 1857[32], the Province of Ontario has not now, and never has had, any Court with jurisdiction to grant a divorce. For some time it was held, following a dictum of the Chancellor of Ontario,[33] that the Supreme Court of Ontario had jurisdiction to declare the nullity of a marriage which had been procured by fraud or duress. In a

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[26]Watt v. Watt (1908), Appeal Cases, p. 573, approving of the Judgment of Mr. Justice Martin in Shepherd v. Shepherd, 13 British Columbia Reports (1908), p. 487.

[27]Revised Statutes of Canada (1906), Chap. 62, Sec. 12, re-enacting Statutes of 1886, Chap. 25, Sec. 3, embodying Imperial Order-in-Council of the 23rd of June, 1870.

[28]The North-West Territories now comprise the Territories formerly known as Rupert's Land and the north-western territory except such portions thereof as form the Provinces of Manitoba, Saskatchewan, Alberta and the Yukon Territory, together with all British territories and possessions in North America and all islands adjacent thereto not included within any province except the Colony of Newfoundland and its dependencies (North-West Territories Act, Revised Statutes of Canada, 1906, Chap. 62, Sec. 2 (a)), that is, the Districts of Mackenzie, Keewatin, Ungava and Franklin. In 1870 the Provinces above excepted still formed part of the North-West Territories.

[29]The Yukon Territory Act, 61 Victoria, Chap. 6, Sec. 9; The Saskatchewan Act, 4-5 Edward VII., Chap. 42, Sec. 16; The Alberta Act, 4-5 Edward VII., Chap. 3, Sec. 16; Consolidated Statutes of Manitoba, 1880, Chap. 31, Secs. 3 and 4.

[30]See Eversley & Craies—Marriage Laws of the British Empire, London, 1910, p. 247, (Note).

[31]Statutes of Upper Canada, 32 George III., Chap. 1. See Consolidated Statutes of Canada (1859), Chap. 9.

[32]The Matrimonial Causes Act, Imperial Statutes, 20 & 21 Victoria, Chap. 185.

[33]Lawless v. Chamberlain (1890), 18 Ontario Reports, 296.

very recent case, however, this decision has not been followed, and it appears now to be well settled that the Ontario Courts have no such jurisdiction.[34]

Quebec—

In Quebec the law of marriage rests on the Civil Code which came into force on the 1st day of August, 1866, the year preceding Confederation.[35] The Civil Code codifies the old French law of Quebec as modified by the conquest and by subsequent Provincial statutes. The provisions of the Code dealing with marriage, tutorship, and property are wholly of French origin.[36]

The Civil Code deals not only with Solemnization of Marriage, but with the capacity to contract a marriage. Dissolution of marriage, according to the Code, can only be by death, although separation from bed and board may be granted. It is maintained by some writers that the Imperial Parliament could not have intended to grant to the Federal Parliament jurisdiction over divorce in the Province of Quebec—where divorce is not permissible according to the tenets of the Roman Catholic Church. This position, however, is not tenable.[37]

The Maritime Provinces—

Nova Scotia and New Brunswick, although acquired by conquest in 1713, have been treated by the Courts as planted colonies, and subject to the law of England as of that date. New Brunswick enacted legislation on marriage and divorce long before Confederation;[38] indeed its divorce legislation was prior to English legislation on the subject. Nova Scotia had also before Confederation established a Court with jurisdiction "over all matters relating to prohibited marriages and divorce," and with authority to nullify marriages for impotence, adultery, cruelty, pre-contract or kinship within the prohibited degrees.[39]

Prince Edward Island, like New Brunswick, was originally part of Nova Scotia, from which it separated in 1770, and has also been treated as a planted colony. Its Divorce Court was established in 1835.[40]

Chapter II.

CAPACITY FOR MARRIAGE.

"Marriage is a bond between husband and wife which is based on nature and sanctioned by law, and which has as its object that they shall live together for life in the closest community to the exclusion of all other men and women."[41]

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[34]Reid v. Auld (1914), 7 Ontario Weekly Notes, p. 85.
[35]Proclamation of Governor-General Lord Monck, of the 26th of May, 1865. See Sharp's Civil Code, p. XIX.
[36]Walton, "The Scope and Interpretation of the Civil Code of Canada," Montreal (1907), at pp. 23 and 133.
[37]Ib. pp. 63-64; and cf. Loranger, "Commentaire sur le Code Civil," Montreal (1879), Vol. 2, No. 81, et seq. Mignault, "Droit Civil Canadien," Vol. 1, p. 551.
[38]Statutes of New Brunswick, 31 George III., Chap. 5.
[39]Revised Statutes of Nova Scotia (2nd Series, 1851), Chap. 12.
[40]Statutes of Prince Edward Island, 5 William IV., Chap. 10.
[41]Renton & Phillmore, "Comparative Laws of Marriage and Divorce," London (1910), at p. 1.

This definition expresses in popular form the idea that marriage is more than a contract; it is, as Story says, an institution. It is both a contract and a status resulting from a contract.

The qualifications required by the law to enable a man and woman to enter into the contract of marriage may be classified as positive and negative.[42] The former are the essential requirements without which no marriage can exist; if these are not complied with the marriage is *ipso facto* void. The latter are restrictions, the breach of which does not render the marriage void—but (*a*) may render it voidable or (*b*) may subject the offending parties to penalties.

A void marriage is good for no legal purpose. Its validity may be attacked by any one at any time, and the invalidity subsists without the judgment of any court. Such, for instance, would be a marriage where either party had contracted a previous and still existing marriage; or where either party is under fourteen or an idiot. A voidable marriage on the other hand, is one in the constitution of which an imperfection exists which can only be inquired into during the lifetime of the parties in proceedings by one of them to have it declared void. If such a marriage is not attacked by one of the parties whilst the other is still alive, it is as good as any other, and it cannot be attacked collaterally either during the lifetime of the parties or afterwards. Circumstances which would give ground for such proceedings in the Provinces having Courts with jurisdiction to entertain them, are impotency, error, fraud, duress or the want of the consent of the parents.

(1) *Circumstances rendering the marriage void*—

If these are not complied with, the marriage is void:—

(*a*) *The legal age of marriage*—According to the civil law, a valid marriage could not be contracted by a man under the age of fourteen or by a woman under the age of twelve years unless to prevent illegitimacy. This provision was adopted by the English common law, and remains the law of all the Provinces of Canada except Ontario, where the age is fourteen for both men and women,[43] and Manitoba, where it is sixteen.[44].

(*b*) *Insanity* is a bar to marriage on the ground that without reason there can be no consent. Mere weakness of understanding is not enough. It is necessary that the insanity should have existed at the time of the alleged marriage. A valid marriage may be entered into in a lucid interval—provided the individual has not previously been found a lunatic by commission.

Drunkenness at the time of the marriage may or may not be a ground of nullity, depending upon the circumstances of each case.

(*c*) *Existing previous marriages*—If there is an existing valid marriage on the part of either of the sponses, the subsequent marriage is bigamous and void, and the offending party is liable to the penalty provided by the Criminal Code.

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[42]Ib., at p. 75.
[43]Revised Statutes of Ontario (1914), Chap. 148, Sec. 16.
[44]Statutes of Manitoba (1906), 5-6 Edward VII., Chap. 41, Sec. 16.

(2) *Circumstances rendering the marriage voidable*—

(*a*) *Impotence*—At common law capacity for consummating marriage is implied in the marriage contract, and its absence renders a marriage voidable. A suit for nullity on this ground, however, must be brought within a reasonable time and during the lifetime of the parties. Neither party may set up his or her impotency for the purpose of dissolving the marriage.[45]

In the Province of Quebec such an action must be brought within three years of the marriage.[46]

(*b*) *Consent of the parties*—According to the common law, the will or free consent of the parties is the very essence of the contract. If, therefore, a marriage is entered into when the parties or one of them is acting in error or is subject to fraud or duress, the marriage may be set aside by this party.

Error may be as to person, condition, fortune or quality, according to the common law. If a party is tricked into marrying the wrong person, this is a ground for having the marriage set aside. The other three kinds of error—as to condition, *i.e.*, whether slave or free; as to fortune, whether rich or poor, and as to quality, whether a virgin or not, or of noble birth or not—are now of no avail.

Fraud is a good ground for having a marriage set aside, especially if the person defrauded is an infant. In the case of adults, the fraud perpetrated must be in respect of the essentials, and not mere accidentals of the marriage. If the fraud is the fraud of third parties, relief will not be granted.

Duress or force may be either corporeal or mental. In either case a marriage brought about by these means may be set aside. The amount of coercion required to be proved varies with the strength of the person affected. Fear of harm happening to the party coerced or to some third person must be established.

The provisions of the Civil Code of Quebec are the same as the common law in this respect, but after six months cohabitation and after having acquired full liberty or become aware of the error, the person coerced or in error, as the case may be, cannot have the marriage annulled.[47]

(*c*) *Relationship within the prohibited degrees*—Consanguinity is the relationship of parties who are descended from the same ancestor, and is either in the direct or collateral line. In the direct line of ancestors and descendants, marriage is absolutely unlawful, however remote the relationship may be. In the collateral lines, all beyond the third degree, according to the civil law computation, may contract valid marriages. Thus, first cousins may intermarry. Affinity is the relationship which arises from marriage, and is an impediment to the same extent as consanguinity, with the exception that Dominion legislation has permitted marriage between a man and his deceased wife's sister or niece. The table of prohibited degrees as

[45]Norton v. Seton (1819), 3 Phillmore's Reports, p. 147.
[46]Civil Code of Quebec, Art. 117.
[47]Civil Code of Quebec, Arts. 148 and 149.

set out in the appendix to the Ontario Act[48] is in force in all the Provinces, and is as follows:—

A man may not marry his	A woman may not marry her
Grandmother.	Grandfather.
Grandfather's wife.	Grandmother's husband.
Wife's grandmother.	Husband's grandfather.
Aunt.	Uncle.
Uncle's wife.	Husband's uncle.
Wife's aunt.	Father.
Mother.	Step father.
Step mother.	Husband's father.
Wife's mother.	Son.
Daughter.	Husband's son.
Wife's daughter.	Daughter's husband.
Son's wife.	Brother.
Sister.	Grandson.
Granddaughter.	Granddaughter's husband.
Grandson's wife.	Husband's grandson.
Wife's granddaughter.	Nephew.
Niece.	Niece's husband.
Nephew's wife, or his	Husband's nephew, or her
Brother's wife.	Husband's brother.

In England since Lord Lyndhurst's Act (1835) all marriages between persons within the prohibited degrees of consanguinity and affinity are "absolutely null and void to all intents and purposes whatsoever."[49] But Lord Lyndhurst's Act has been held not to be applicable in Canada, and Canadian marriages within the prohibited degrees are therefore merely voidable as such marriages were in England before 1835, not "absolutely null and void."

It will be noted that whilst by virtue of the Dominion legislation above referred to, a man may lawfully marry his deceased wife's sister or his deceased wife's niece, he may not marry his brother's or his nephew's widow, and a woman may not marry her deceased husband's brother or his nephew or her deceased sister's husband. It is also to be noted that this prohibition extends to the half-blood; and includes illegitimate relationships.

(*d*) *Spiritual or official positions*—The Quebec Civil Code provides that the "impediments recognized according to the different religions persuasions as resulting from relationship, affinity or from other causes, remain subject to the rules hitherto followed in the different churches and religious communities."[50]

It has been held by the Quebec Courts that under this provision the Roman Catholic Church has power over its own members to annul the

[48]Revised Statutes of Ontario (1914), Chap. 148.
[49]Imperial Statutes, 5 & 6 William IV., Chap. 54.
[50]Civil Code of Quebec, Art. 127.

marriage of a person who has taken solemn vows as a monk or nun or is in holy orders.

> "According to the jurisprudence of the country, the sentence of the Roman Catholic Bishop, regularly pronounced and deciding as to the validity or nullity of the spiritual and religious tie of marriage between Roman Catholics, can and ought to be recognized by the Superior Court."[51]

In view, however, of the opinions of the majority of the judges of the Supreme Court of Canada in answer to the questions submitted to the Court as to the authority of the Parliament of Canada to enact the proposed Marriage Act of 1912,[52] it would appear that this pronouncement of the Quebec Court is not good law, and would not be approved by the Supreme Court of Canada.

(*e*) *Difference of religion*—While difference of religion of the contracting parties is not an impediment to a lawful marriage in any part of Canada, the Roman Catholic Church in Quebec has recently made a determined effort to establish its authority to declare invalid a marriage between two Roman Catholics or between a Roman Catholic and a Protestant, unless performed by a Roman Catholic priest. The Papal decree known as Ne Temere, which came into force on Easter Sunday, 1908, promulgated this doctrine. A majority of the judges of the Supreme Court of Canada are, however, of the opinion that this decree is only binding on the consciences of members of the Roman Catholic Church, and cannot be given effect to by the Civil Courts of Quebec.[53]

(*f*) *Marriage of minors of legal age to marry—Consent of parents*—In one respect Ontario has gone further than any of the other Provinces. In 1907 the Provincial Legislature passed an Act[54] providing that where a form of marriage has been gone through between persons, one of whom is under the age of eighteen, without the consent of the parent or guardian, the Supreme Court of the Province shall have jurisdiction in an action brought by the party who was under the stipulated age, to declare the marriage invalid, provided the parties have not lived together as man and wife, and provided that the action is brought before the plaintiff attains the age of nineteen. The constitutionality of this Act has been doubted by high authority.[55] The other Provinces have contented themselves with enacting legislation intended to discourage such marriages, without, however, affecting their status once the contract has been entered into. These acts contain provisions intended to insure publicity and that the parties are of competent age to marry without parental consent or that such consent has been given, and are all modelled after the English Act of 1834.[56] Quebec, Nova Scotia, British Columbia, the North-West Territories, Alberta and Saskatchewan require parental consent, if the parties are under twenty-one, with the exception that in the North-West Territories

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[51]Laramee v. Evans (1880), 24 Lower Canada Jurist, p. 235; Trewberg v. Terrill (1900), 6 R. de J., p. 143.
[52]See In re Marriage Laws, 46 Supreme Court Reports, p. 132.
[53]Ib.
[54]Now Revised Statutes of Ontario (1914), Chap. 148, Secs. 36 and 37.
[55]May v. May (1910), 22 Ontario Law Reports, p. 559.
[56]Imperial Statutes, 4 George IV., Chap. 76.

and Alberta and Saskatchewan, where a female over eighteen and under twenty-one is living apart from her parents and earning her own living, their consent is not necessary. Manitoba and New Brunswick fix the age of emancipation in this respect at eighteen for both sexes. In Quebec a marriage contracted without the required consent can only be attacked by those whose consent was required, and then only within six months after the marriage.[57]

It is to be noted that it is only in respect of clandestine marriages, that is to say the marriage of a person under the age of eighteen without consent of his or her parents, that the courts of Ontario have any jurisdiction. Theoretically a marriage may be avoided in any Province of Canada on the other grounds above indicated, but in Ontario these other grounds are practically a dead letter for want of a forum competent to make the declaration. Moreover, the jurisdiction of the Ontario Legislature to establish such a forum is doubtful.[58]

(*g*) *Communicable disease no impediment*—The fact that one of the contracting parties may have a communicable and incurable disease, the presence of which is not known to the other, is no legal ground for attacking the marriage, and will not subject the party to any penalty at law.

Chapter III.

THE MARRIAGE CEREMONY.

There are three main classes of marriage ceremoni. . —

1. The purely civil ceremony, characteristic of France and Germany, and permitted in Great Britain, the United States and Western Canada.

2. The purely religious, characteristic of Russia and other countries under the sway of the Greek Church.

3. The mixed civil and religious ceremony characteristic of Great Britain, Canada, and other parts of the British Empire.

By the canon law, the intervention of a priest was not essential to the validity of a marriage.[59] It has been held, however, though not without much dissent, that the English common law requires the presence of a priest.[60] Whether or not, on account of our different local conditions, this requirement of the common law is applicable to Canada was for some time a subject of debate. It was finally held that in the absence of legislative provision this rule is to be followed except where the country is so barbarous that a proper ceremony is impossible.[61]

In Ontario, marriages irregularly celebrated are valid at the end of three years from the date of the ceremony, or on the death of either party within that period, if they have cohabited as man and wife. This is subject to the proviso that there was no legal disqualification to marry and

[57]Civil Code of Quebec, Arts. 150 and 151.
[58]May v. May (1910), 22 Ontario Law Reports, p. 559.
[59]Renton v. Phillmore, supra at p. 177.
[60]The Queen v. Millis (1844), 10 C. & F., p. 534.
[61]Connolly v. Woolwich (1867), 11 Lower Canada Jurist, p. 197.

that neither party was lawfully married within the three years to anyone else.[62] Manitoba and other Provinces have similar provisions.

Prince Edward Island, British Columbia, the North-West Territories and the Provinces of Alberta and Saskatchewan[63] have made provision for the performance of the marriage by civil officials in no way connected with any religious body or organization.

With some minor exceptions the Provincial laws as to the solemnization of marriage are much alike. The latest Ontario Statute[64] may be taken as typical.

1. *Who may solemnize marriage*—

In Ontario the following persons, being men and resident in Canada, may solemnize marriage:

(*a*) Ministers and clergymen of every church duly ordained or appointed: (*b*) Elders chosen by the Disciples of Christ Church for that purpose: (*c*) Any duly appointed Commissioner or Staff Officer of the Salvation Army commissioned to solemnize marriage: (*d*) Elders or other officers of the Farringdon Independent Church chosen for that purpose whose appointment has been previously filed in the office of the Provincial Secretary. Marriages according to the usages of the Quakers are also valid.

In Nova Scotia there is a provision requiring a Provincial certificate as well as authorization by the congregation in the case of Salvation Army officers. Prince Edward Island requires such a certificate, if the applicant for the privilege of performing the ceremony is not a regularly ordained clergyman. New Brunswick requires that all clergymen performing the ceremony be registered. Alberta also requires every religious denomination to send a list of persons authorized to perform marriages, to the Vital Statistics Department every six months.[65] British Columbia requires a clergyman to have resided within the Province for one month before performing the ceremony.

British Columbia, the North-West Territories, Alberta and Saskatchewan, as already stated, allow civil marriages: British Columbia by Registrars appointed under the Provincial Marriage Act, and the North-West Territories, Alberta and Saskatchewan by Marriage Commissioners appointed by the Lieutenant-Governor in Council. In Prince Edward Island there is no direct authority given to Justices of the Peace to perform the marriage ceremony, but the statute appears to contemplate that marriage may be lawfully celebrated by license before a Justice of the Peace according to the form of the Common Prayer Book.[66]

In Quebec, priests, rectors, ministers and other officers authorized by law to keep registers of acts of civil status are qualified to perform the marriage ceremony.[67] As already stated, this is subject to the right of any

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[62]Revised Statutes of Ontario (1914), Chap. 148, Sec. 35.

[63]See Statutes of Prince Edward Island, 6 Victoria, Chap. 8 (Sched.): 2 William IV., Chap. 16, Secs. 4-6; Consolidated Ordinances of the North-West Territories (1898), Chap. 46; Revised Statutes of Saskatchewan (1909), Chap. 132. The Marriage Ordinance in force in the North-West Territories (Chap. 46 supra) is also in force in Alberta.

[64]Revised Statutes of Ontario (1914), Chap. 148.

[65]Statutes of Alberta (1908), Chap. 20, Sec. 23, Sub-sec. 4.

[66]See Statutes of Prince Edward Island, 6 Victoria, Chap. 8 (Sched.): 2 William IV., Chap. 16, Secs. 4-6.

[67]Civil Code of Quebec, Art. 129.

religious denomination to impose penalties (not enforcible by the civil law) upon members of its communion who are married otherwise than by a priest or minister of their own church.

2. *Notice of the marriage—by banns or license—*

The necessity of giving notice of the marriage, either by publication of banns or by obtaining a certificate or license after making the required affidavit, is common to the laws of all the Provinces. The differences are as to details only. The Ontario Act may again be taken as typical.

This Act provides that no minister or other authorized person shall solemnize any marriage, unless duly authorized so to do by license or certificate under the Act, unless the intention of the parties to intermarry has been published as required by the Act. Such publication must be by announcement once before or after the Sunday service from the pulpit in the pastoral charge where one of the parties has resided for at least fifteen days immediately preceding the publication. The marriage must take place not sooner than one week or later than three months from the publication. Licenses and certificates are issued by persons appointed by the Lieutenant-Governor. No irregularity in the issue of a license or certificate, where it has been obtained or acted on in good faith, will invalidate a marriage solemnized in pursuance thereof. An affidavit setting forth where the marriage is to be performed, that there is no legal bar to the marriage (such, for example, as consanguinity within the prohibited degrees), as to residence in the city, county or district for fifteen days, or proper publication of notice in lieu of residence, as to the age and condition of life of the parties, and as to the consent of parents where necessary, must be sworn before the license to marry will be issued.[68]

Nova Scotia and the North-West Territories require publication of the banns on two consecutive Sundays; British Columbia on three. Manitoba has a provision dispensing with publication of the banns at the request of the head of a Church, and this dispensation operates as a marriage license. In Quebec, banns must be published three times unless a dispensation has been obtained.[69] Notice is published by the Registrar or Marriage Commissioner in British Columbia, the North-West Territories, Alberta and Saskatchewan in lieu of banns where a civil marriage is to be performed.

3. *The time and place of, and witnesses to, marriage—*

The provisions as to these requirements are all intended to conduce to publicity.

In Ontario a marriage must be performed between 6 o'clock in the morning and 10 o'clock at night unless the clergyman officiating is satisfied that exceptional circumstances exist. The marriage need not take place in a consecrated church or chapel. Two adult witnesses must be present and must affix their names as witnesses to the record in the register.

Similar rules are in force in the other Provinces. British Columbia requires that civil marriages take place between 10 o'clock in the forenoon

[68]Revised Statutes of Ontario (1914), Chap. 148, Sec. 19.
[69]Civil Code of Quebec, Arts. 57-59.

and 4 o'clock in the afternoon, and that all marriages must be "with open doors." Nova Scotia makes no provision at all as to time or place. In Quebec a marriage must be performed at the domicile of one or other of the parties, or the clergyman officiating is bound to verify and ascertain the identity of the parties.[70] Two witnesses are also necessary in Quebec.

4. *The registration of marriages*—

In Ontario a clergyman is required to enter in a register kept by him, immediately after the marriage, full particulars as to the name, age, occupation, religion, etc., of the persons married. Every issuer of marriage licenses is also required to endorse the same particulars upon a form supplied for that purpose, and to send the same to the Registrar-General.

The laws of the Provinces differ but slightly as to provisions for registration. Nova Scotia requires that the return of particulars be made within ten days to the issuer of the license; Prince Edward Island, within six months, to the Island Surrogate; New Brunswick, at once to the Registrar of the Division; Manitoba, to the Municipal Clerk, North-West Territories and Saskatchewan, within one month, to the Registrar of the Division, and Alberta, within one month, to the Registrar whose post office is nearest.

Chapter IV.

DIVORCE.

1. *Divorce tribunals and the grounds upon which divorce is granted*—

Divorce in its widest meaning includes both a total dissolution of the marriage bond and a partial suspension of the marriage relation. The former or divorce *a vinculo matrimonii* is the popular meaning of the word. The latter or divorce *a mensa et thoro* is usually called judicial separation. The word divorce will here be used in the first mentioned sense alone.

There is a fundamental difference between divorce and a proceeding for a declaration of the invalidity of the marriage contract. The first assumes what the second denies, namely, the existence of the marriage status. The distinction is especially important in the Province of Quebec, and from the point of view of the Roman Catholic Church which sets its face steadily against divorce, but tolerates and is sometimes said to encourage proceedings for a judicial declaration that in truth there never was a marriage in cases where, the parties or one of them being a Roman Catholic, the ceremony was not performed by a priest of the Roman Church.

As a general rule, throughout the Dominion, the court or tribunal which has authority to decide questions relating to divorce has also jurisdiction to declare a marriage to be null—and no other. Notwithstanding its undoubted power to declare a marriage to be void, the Dominion Parliament discourages applications of this nature, and has only exercised its authority in this respect on two or three occasions.

In England, prior to 1858, Parliamentary divorce was the only available method of obtaining the dissolution of the marriage bond. The Ec-

[70]Civil Code of Quebec, Art. 63.

clesiastical Courts could only give relief by separation. To bring divorce within the reach of ot ers than the wealthy classes, a Court of Divorce and Matrimonial Causes was established in 1858. Later, by the Judicature Act, the jurisdiction of this Court was vested in the High Court of Justice, Probate and Divorce Division. The jurisdiction of this Court includes (1) the dissolution of marriage, (2) the right to decide upon the nullity of marriage, (3) judicial separation, (4) the restitution of conjugal rights, (5) alimony, and (6) the custody of children.[31]

According to the Statute Law of England, a divorce can be granted for (1) the adultery of the wife, or (2), in the case of the husband, incestuous adultery, bigamy with adultery, rape, adultery with cruelty or adultery accompanied by desertion. A decree of nullity may be pronounced for (1) impotence, (2) the breach of a statute directing certain forms of marriage, (3) bigamy. Judicial separation will be granted for adultery, unnatural practices, cruelty, or desertion for two years and upwards. This is the law which is applicable in British Columbia, and possibly in the Prairie Provinces and the North-West Territories.

Divorce by Act of Parliament—

Parliamentary divorce or divorce by private act of the Dominion Parliament is the only form of divorce available for citizens of Ontario and Quebec, and in practice for Alberta, Saskatchewan, Manitoba and the North-West Territories. Bills of divorce were formerly granted by the Dominion Parliament upon the same evidence and for the same causes as are required by the Courts in England having jurisdiction in matrimonial causes. The practice of the Senate, however, has relaxed the requirements imposed by the English Statute upon wives applying for divorce. Adultery of the husband is held sufficient grounds for relief without the additional requirements laid down by the English Statute. On the other hand, the Senate will not grant divorce for any less cause than adultery, and has not encouraged applications for nullifying marriages or for judicial separation.

Divorce by Provincial Courts—

Nova Scotia—The Court for Divorce and Matrimonial Causes has power to declare any marriage null and void for impotence, adultery, cruelty or marriage with kindred within the prohibited degree. The Court, on dissolving the marriage, may order the husband to pay alimony. Its powers as to maintenance of children are the same as those of the English Court. It has, moreover, by Statute, all the power of the English Divorce Court.

New Brunswick—The Court of Divorce and Matrimonial Causes, as established by Provincial Statute of 1860, has power to dissolve a marriage on the ground of impotence, adultery or marriage with kindred within the prohibited degrees, provided that in case of adultery, the issue of such marriage shall not in any way be prejudiced, and provided that, unless

[31]Imperial Statutes 20 & 21 Victoria, Chap. 85, Sec. 6; 36 & 37 Victoria, Chap. 66, Sec. 31.

decreed to the contrary, the wife shall not be barred of dower, nor the husband of tenancy by the curtesy.[72]

Prince Edward Island—A Court for hearing all suits concerning marriage and divorce was established in 1835, with power to dissolve marriage on the ground of impotence, adultery or consanguinity within the prohibited degree. Such a decree of divorce does not render the issue illegitimate nor does it bar dower or curtesy unless expressly so adjudged.[73] It is noteworthy that no divorce has been granted in Prince Edward Island since Confederation, nor was there any for many years prior thereto.

British Columbia—Under the Ordinance of 1867,[74] the Supreme Court of British Columbia was given jurisdiction to give the relief and exercise the powers conferred by the Imperial Act of 1858.[75] By this Act, Judicial Separation may be granted to either party on the ground of adultery, cruelty, or desertion without cause for two years and upwards, but divorce may only be granted on the ground of adultery.

Ontario has no Divorce Court, and no Court having jurisdiction to annul a marriage except, possibly, for want of consent of parents under the Act of 1907, already referred to (*supra p.*14), the constitutionality of which is doubtful. Alimony is in the jurisdiction of the Supreme Court of the Province.

Quebec has no Divorce Court.

Manitoba, Alberta, Saskatchewan, and the North-West Territories have, as already stated, no legislation on the subject of divorce, and no Divorce Courts. It has not been judicially determined whether the Supreme Courts of these Provinces have jurisdiction over marriage and divorce.

2. *Procedure to obtain Divorce*—

Divorce procedure in the various Provincial Divorce Courts follows closely the procedure of the English Divorce Court.

The procedure with regard to parliamentary divorce is exceptional and deserves special mention. Generally speaking, the rules or orders of the Senate govern, but if there is no rule applicable, then recourse will be had to the rules governing the conduct of the English House of Lords sitting as a Court of Appeal. The Senate sits as a quasi-judicial and legislative body, and is not bound by any body of law or precedents. Divorce bills originate in the Senate by usage only; they could also originate in the House of Commons.

Proceedings to obtain a parliamentary divorce are commenced by petition to the Gover -General, Senate and House of Commons. This petition, which becomes the preamble of the bill for divorce, must state the facts relied upon to obtain relief. The petition is deposited with the Senate not less than eight days before the opening of Parliament, together with a fee of $200.00 and a sufficient additional sum to cover the cost of

[72]Revised Statutes of New Brunswick (1903), Chap. 115.
[73]Statutes of Prince Edward Island (1835), 5 William IV., Chap. 10.
[74]Embodied in Revised Statutes of British Columbia (1911), Chap. 75.
[75]See Watts v. Watts (1908), English Appeal Cases, p. 573.
[75]De Nichols v. Curlier (1900), Appeal Cases, p. 21.

printing the bill. Six months notice of the application for divorce is required, the publication to be in the Canada Gazette and in two newspapers published where the respondent resides. There must also be proof of service of a copy of the Gazette on the respondent.

A typical bill of divorce consists of a preamble and three enacting clauses, the first, dissolving the marriage, the second, allowing the petitioner to marry again, and the third, giving the issue of the second marriage the same rights as if the first marriage had never been solemnized. On the second reading, the rule requires that the petitioner attend before the Senate to give evidence. This rule is, however, in practice, suspended and the evidence is taken by a select committee of nine senators. The ordinary rules of evidence are followed in proceedings before this committee. If a witness fails to attend, he may be taken into custody by the Usher of the Black Rod. If the evidence is sufficient, the bill is read a third time, passed, and is sent to the House of Commons, where it goes through the ordinary procedure of a private bill and may, of course, be rejected. Until 1879 these bills were reserved for Her Majesty's pleasure, but since then that practice has been discontinued.

Collusion or connivance between the petitioner and the respondent will prevent the petitioner obtaining relief. If the wife has no means to defend the action, the husband will be required to advance a proper sum for this purpose.

Note—Table of divorces granted by the Dominion Parliament since Confederation:—

1868	1	1897	1
1869	1	1898	3
1873	1	1899	4
1875	1	1900	5
1877	3	1901	2
1878	3	1902	2
1879	1	1903	7
1884	1	1904	6
1885	5	1905	9
1886	1	1906	14
1887	5	1907	5
1888	3	1908	8
1889	4	1909	16
1890	2	1910	19
1891	4	1911	22
1892	5	1912	14
1893	7	1913	35
1894	6	1914	33
1895	3		
1896	1	Total	263

The ground for seeking divorce was adultery in every case, additional reasons being alleged in some of the cases.

The following table indicates how the divorces granted at Ottawa for eight years, ending with 1914, were distributed, by Provinces:—

	1907	1908	1909	1910	1911	1912	1913	1914	Total for 8 years.
Ontario	3	8	8	14	12	9	21	18	93
Quebec	1	0	3	2	5	3	4	7	25
Manitoba	1	0	2	2	3	1	5	2	16
Saskatchewan	0	0	1	2	0	1	1	2	7
Alberta	0	0	1	0	2	2	4	4	13
P. E. I.	0	0	0	0	0	0	1	0	1

Chapter V.

FOREIGN MARRIAGE AND DIVORCE.

The question of the validity of a foreign marriage or divorce may arise either directly in the Provincial Courts in Canada which have jurisdiction to annul marriages, or collaterally in the ordinary Courts of civil or criminal jurisdiction, as, for instance, on a question of inheritance or title to real property, or on a charge of bigamy. Whenever such a question arises, whether directly or collaterally, the domicile of the parties at the time of the marriage or divorce, as the case may be, is likely to be an important question. Upon the decision of this question of domicile will depend, in the case of a marriage, the body of law which is to determine the property rights of the parties, and in the case of an alleged divorce the validity of the decree.

Domicile being thus important, it is desirable to have a clear understanding of the meaning of the word.

In a leading case Lord Westbury describes domicile as "A conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place, with an intention of continuing to reside there for an unlimited time. There must be a residence freely chosen, and not prescribed or dictated by any external necessity, such as the duties of office, the demands of creditors, or the relief from illness; and it must be residence fixed, not for a limited period or particular purpose, but general and indefinite in its future contemplation.[76]

The domicile of a married women is the same as and changes with every change of the domicile of her husband, even though she resides apart from him, except for the purpose of procuring divorce.[77]

The validity of a foreign marriage is decided by Canadian Courts according to the law of England—which on this subject is also the law of Canada. A foreign marriage is valid when—

1. Each of the parties has, according to the law of his or her respective domicile, the capacity to marry the other, and

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[76] Udney v. Udney (1869), Law Reports House of Lords (Scotch), p. 441.

[77] Harvey v. Farnie (1882), 8 English Appeal Cases, p. 43, at pp. 50 and 51; Dolphen v. Robins (1859), 7 House of Lords Reports, p. 390; Seifert v. Seifert (1914), 7 Ontario Weekly Notes, p. 440.

2. Either of the following conditions as to the *form* of celebration is complied with—(*a*) The marriage is celebrated in accordance with the local form; or (*b*) The marriage is celebrated in accordance with the requirements of the English common law in a country where the use of the local form is impossible.[78]

Canadian Divorce Courts have no jurisdiction to entertain proceedings for the dissolution of the marriage of parties not domiciled within their respective Provinces at the commencement of the proceedings,[79] except where a husband domiciled in the Province deserts his wife and removes from the Province, and she continues to live in the Province. In such a case the Court may on petition grant her a divorce.[80] On the other hand a Canadian Divorce Court may entertain a suit for judicial separation or for the restitution of conjugal rights when both the parties thereto are at the commencement of the suit resident within its jurisdiction, although this residence may not amount to domicile.[81]

With regard to the dissolution of a Canadian marriage by the Courts of a foreign country the law is that the Courts of such a foreign country have jurisdiction to dissolve the marriage of persons domiciled there in good faith at the commencement of the proceedings for divorce. This rule applies alike to Canadian and to foreign marriages.[82] A foreign divorce, therefore, if pronounced by a competent Court of a country where the parties to a marriage performed in Canada were (in good faith) domiciled at the time of the divorce proceedings, will dissolve such marriage and be held valid in Canada.[83] This rule is equally applicable to foreign divorces granted for causes not recognized in Canada, if proper domicile is established.[84]

In the Ash case, 1887, it was stated that under no circumstances would the Canadian Parliament recognize a divorce granted by a United States Court in a case where the parties were married in Canada.[85] But the evidence in the Ash case did not establish a *bona fide* domicile within the jurisdiction of the Court which granted the divorce, and this broad statement was therefore unnecessary to the decision of the case. At all events, and whatever the Parliament of Canada might do, there is no doubt that Canadian courts of justice will recognize a foreign decree of divorce if regularly granted by a Court of competent jurisdiction.

Chapter VI.

RIGHTS AND OBLIGATIONS OF PARENTS AND CHILDREN.

By the common law of England the father has the right to the custody of his infant children as against third parties, and even as against the mother, and though the child be an infant at the breast. The ante-nuptial contract of a father to give over the control of the children of the intended

[78]The King v. Brampton (1808), 10 East's Reports, p. 282.
[79]Pro. A. V. Dicey, "The Conflict of Laws" (1908), 2nd Edition, at p. 256.
[80]Armytage v. Armytage (1898), Probate Reports, p. 178.
[81]Dicey supra, at p. 265.
[82]Dicey supra, at p. 381.
[83]Scott v. The Attorney-General (1886), 11 Probate Division Reports, p. 128.
[84]Harvey v. Farnie (1882), 8 Appeal Cases, p. 43.
[85]See Gemmill, "Practice of the Senate as to Divorce" (1889), at p. 27.

marriage to their mother is deemed to be against public policy, and will not be enforced by the Courts, although upon separation such an agreement is perfectly valid. During the lifetime of the father a mother has at common law no legal authority; but on the death of the father, without having appointed a guardian, she is entitled to the custody of her infant children. Where the father has by will appointed a guardian the mother has, by the common law, no right to interfere with him.

At common law the control of the parent (father or mother) lasts, under ordinary circumstances, until, and in all cases ends, when the child attains the age of twenty-one or marries under that age. Parents cannot at common law enter into legally binding agreements to deprive themselves of the custody and control of their children. If, however, as a matter of fact, parents do put their children into the control of others, they will not be permitted, at the hazard of injuring the children, to take them back into their own custody. The interest of the children is the sole guide to the Court in such a case."[86]

The obligation to maintain children is enforced by the Criminal Code.

> "Everyone who as parent or guardian or head of a family is under a legal duty to provide necessaries for any child under the age of sixteen years is criminally responsible for omitting, without lawful excuse, to do so while such child remains a member of his or her household, whether such child is helpless or not, if the death of such child is caused, or if his life is endangered, or his health is, or likely to be, permanently injured by such omission."[87]

An amendment passed in 1913[88] provides that if a parent so neglects his children when destitute or in necessitous circumstances, he shall be liable to a fine of $500 or to one year's imprisonment, or to both. It is also an indictable offence, punishable by three years imprisonment, to abandon any child under the age of two years, whereby its life is endangered or its health is permanently injured.[89]

At common law a parent is not liable for necessaries supplied to his children apart from agreement, express or implied. The same is true of the support of a parent by his child.

The common law of England as above outlined is in force in Canada unless changed by the Statutes of the various Provinces. The changes which have been made are, however, important. Thus, in Ontario the Supreme Court or the Surrogate Court has general authority to make orders as to the custody of children and the right of access of either parent, having regard to the welfare of the children and to the conduct of the parents, and "to the wishes as well of the mother as of the father."[90]

All the English speaking Provinces, and the territories have very similar statutes. In the Yukon and the North-West Territories the Court may give the mother the custody of the child, but only if the child is under twelve years of age. In 1913 British Columbia enacted a provision similar

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[86]Eversley, "Domestic Relations," 2nd Edition, at p. 493 et seq.
[87]Revised Statutes of Canada (1906), Chap. 146, Sec. 242.
[88]Statutes of Canada, 3-4 George V., Chap. 13, Sec. 14.
[89]Revised Statutes of Canada (1906), Chap. 146, Sec. 245.
[90]Revised Statutes of Ontario (1914), Chap. 153, Sec. 2, Sub-sec. 1.

to that of Ontario. Prior to that year the Court could only give the mother the custody of her child if the child was under the age of seven.[91]

Adoption—

The only Province which has attempted comprehensive legislation dealing with adoption is Nova Scotia. The Nova Scotia statute provides that a child may be adopted by any person over twenty-one years of age upon petition to the Court and upon proving the consent of the child and its parents, or mother only if the child be illegitimate. The Court must be satisfied as to the petitioner's ability to maintain the child. Under this statute an adopted child has the same rights of succession in case of death of the guardian intestate that he would have if he were the legitimate child of the guardian. Alberta gives its Courts jurisdiction to sanction the adoption of infants, but goes no further.[92]

Children of Divorcees—

The jurisdiction of the English Divorce Court as to the custody of children is entirely statutory. The English Matrimonial Causes Act, 1857, gives the Court jurisdiction to provide for the custody, maintenance and education of the children of divorcees. Although the interests of the parents will be taken into consideration, the chief aim is to do what is best for the children. As a general rule the innocent party has a *prima facie* right to the custody of children after a final decree of divorce.

The British Columbia, New Brunswick, Nova Scotia and Prince Edward Island statutes dealing with Divorce and Matrimonial Causes do not vary substantially from those of the English Act.[93]

Children born out of Wedlock—

According to the common law of England, legitimacy is a status arising from the fact of birth within lawful wedlock or within a reasonable time after its dissolution.[94] Illegitimate children are, according to the strict interpretation of the common law, strangers so far as the rights of the child are concerned, to those who have brought them into being. Statute law has qualified this by imposing obligations for their support and maintenance upon their parents. Upon legitimacy depends the child's right of inheritance, of bearing the father's name, of kinship and of family ties and the right to be maintained, educated and protected. At common law the mother has the primary right to the custody of an illegitimate child. The liability of the putative father to maintain his illegitimate child is statutory.

Two outstanding methods of providing for the maintenance of illegitimate children have been adopted by Provincial statutes. Ontario permits

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[91]Statutes of British Columbia (1913), Chap. 31, Sec. 4, Sub-sec. 9; Statutes of Alberta (1913), Chap. 13, Sec. 2; Statutes of Manitoba (1913), Chap. 94, Sec. 32; Revised Statutes of New Brunswick (1903), Chap. 112, Sec. 196; Revised Statutes of Nova Scotia (1900), Chap. 121; Consolidated Ordinances of the Yukon (1902), Sec. 582; Consolidated Ordinances of the North-West Territories (1905), Sec. 574.

[92]Revised Statutes of Nova Scotia (1900), Chap. 122, as amended by Statute of Nova Scotia (1901), Chap. 47; Statutes of Alberta (1913), Chap. 13, Sec. 27.

[93]Revised Statutes of British Columbia (1913), Chap. 67, Sec. 20; Revised Statutes of Nova Scotia, 3rd Series, Chap. 126.

[94]Eversley, supra at p. 475.

any person furnishing clothing, lodging or other necessities to a child born out of wedlock and not living with its reputed father to recover against him for the same. Where the mother sues, corroborative testimony that the defendant is the father of the child, is necessary. In either case, in order to maintain an action an affidavit of affiliation must be made voluntarily by the mother and deposited with the Clerk of the Peace of the county or city in which she resides, either while she is pregnant or within six months after the birth of the child. British Columbia and the North-West Territories have similar statutes.[95]

The Nova Scotia law may be taken as typical of the second method of dealing with the subject. The Nova Scotia Act is divided into two parts. The first deals with proceedings which may be taken to indemnify the municipality against payment for the support of illegitimate children. At the instance of the mother, or of a ratepayer, an information is sworn out alleging that a certain man is the child's father. If the man admits the charge, he is required to give a bond for $150 for the mother's medical expenses and the child's future maintenance. If he does not admit the charge, he and the mother are brought before the County Judge. Evidence is taken and if the charge is established a lump sum in payment of expenses may be assessed, not to be less than $80 or more than $150.

A putative father is rendered liable, by the second part of the Act, for the medical attendance and care of the mother for three months after the child's birth, and for the child's maintenance and education until it is fifteen years of age. Action may be brought as for a debt, but no order for future maintenance will be granted awarding more than $1 per week. The weekly payment of maintenance may be enforced by execution.

New Brunswick, Manitoba and Saskatchewan have statutes similar to that of Nova Scotia.

In New Brunswick the consent of one of the overseers of the parish is necessary before a warrant for the arrest of the father can be issued. The limit of the allowance for maintenance in New Brunswick is 70 cents per week until the child is seven years old. In Saskatchewan the Judge may order a payment for maintenance, education and expenses of birth not to exceed $5 per week until the child reaches the age of thirteen. Saskatchewan also requires that an affidavit of affiliation be filed before action can be brought for necessaries supplied to an illegitimate child.[96]

Quebec—

The law of Quebec as to parent and child, being fundamentally different from the law of the English speaking Provinces, is treated separately.

A child remains subject to parental authority until his majority, that is to say, until he is twenty-one years of age, or until his emancipation, but the father alone exercises this authority during his lifetime.[97] A

[95]Revised Statutes of Ontario (1910), Chap. 151; Revised Statutes of British Columbia (1911), Chap. 107; Consolidated Ordinances of the North-West Territories (1905), including Statute of 1903, Chap. 29, Secs. 1-3.

[96]Revised Statutes of Nova Scotia (1900), Chap. 51; Revised Statutes of New Brunswick (1903), Chap. 182; Statutes of Saskatchewan (1912), Chap. 39; Revised Statutes of Manitoba (1906), Chap. 92.

[97]Civil Code of Quebec, Arts. 243 & 245.

father is by law entitled to the custody and guardianship of his children and cannot be deprived of his minor child, except for insanity, or gross misconduct; nor can he deprive himself of his paternal right; and any contract to the contrary cannot bind him, as it is immoral in the eye of the law.[98] As a general rule, where a minor is brought before the Court by *habeas corpus*, if he be of an age to exercise a choice, the Court leaves him to elect as to the custody in which he will be.[99] The mother has an absolute right to the charge of a child until it is twelve years old (the father being dead) unless it is established that she is disqualified by misconduct, or is unable to provide for the child.[100]

An unemancipated minor cannot leave his father's house without his permission.[101] Emancipation only modifies the condition of the minor: it does not put an end to the minority, nor does it confer all the rights resulting from majority. Every minor is of right emancipated by marriage.[102] A tutor (or guardian) for an infant may be appointed by a competent Court on the advice of a family council. The family council must consist of at least seven near relations, who must be males over twenty-one years of age.[103]

Quebec is the only Province in Canada where children born out of wedlock are legitimated by the subsequent marriage of their father and mother.[104] An illegitimate child has a right to establish judicially his claim of paternity or maternity, and upon the forced or voluntary acknowledgment by his father or mother of him as their illegitimate child, he has the right to demand maintenance from each of them, according to their circumstances.[105]

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[98]Barlow v. Kennedy (1871), 17 Lower Canada Jurist, p. 253.
[99]Regina v. Hull (1876), 3 Quebec Law Reports, p. 136.
[100]Ex parte Ham (1883), 27 Lower Canada Jurist, p. 127.
[101]Civil Code of Quebec, Art. 244.
[102]Ib. Arts. 247, 248 & 311.
[103]Ib. Arts. 249, 251 & 252.
[104]Ib. Art. 237.
[105]Ib. Arts. 240 & 241.