MARRIAGE LAWS OF CANADA

BY

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The Marriage Law of Canada

Its Defects, and Suggestions for its Improvement

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Recent litigation in Quebec in which a court of law gave legal effect to the *Ne Temere* decree of the Council of Trent has aroused public attention to the marriage law of Canada, and anyone carefully examining the subject must come to the conclusion that it is not in a very satisfactory condition. Marriage being a matter of universal interest for all classes throughout the Dominion, the law concerning it ought to be so plain and accessible that "he who runs may read," but it is very far from being so.

For the intelligent consideration of the matter, our first inquiry must necessarily be, what laws affecting marriage are in force in the various provinces. In Quebec by virtue of the Quebec Act of 1774 (14 Geo. III. c. 33, s. 8), the laws of Canada were made the laws of the Province as to all matters of controversy respecting property and civil rights. The laws of Canada had their basis in the old French law which prevailed in Canada during the French regime; but with the grant of rights of self government, the former Province of Canada acquired the right to make laws for itself among other things, within certain limitations, on the subject of marriage, and the Provincial law of Quebec on the subject of marriage is now to be found in the Code Civil and Provincial Statutes passed since 1774 up to 1867.

Since 1867 the legislative jurisdiction on the subject of marriage has been curiously divided between the Dominion and Provincial Legislatures, and while the subject of "Marriage and Divorce" is committed to the legislative control of the Dominion Parliament: B.N.A. Act, s. 91 (26), the subject of the "Solemnization of Marriage" is committed to the control of the various Provincial Legislatures: B.N.A. Act, s. 92 (12). The effect of this division is to prevent either the Dominion or the Provinces from dealing comprehensively with the whole subject; the solemnization of marriage being, as we shall see, inseparably bound up with the subject of marriage itself, it would appear to have been a better arrangement to have committed the whole matter of both marriage and its solemnization to the Dominion Parliament.

By the treaty of Paris it is expressly provided that the King of Great Britain will "grant the liberty of the Catholic religion to the inhabitants of Canada: he will consequently give the most precise and most effectual orders, that his new Roman Catholic subjects may profess the *worship* of their religion, according to the rites of the Romish church, *as far as the laws of Great Britain permit*" a provision of the treaty which we may observe has always been most honorably and faithfully observed. By the laws of Great Britain and of Canada religious toleration prevails, and if this principle is properly carried out no one can be directly or indirectly coerced into the adoption of any religious opinion which he does not choose to accept, and no church or sect has any power or authority to make laws which in any way affect, bind, disable or disqualify any person who does not choose to

submit to them or agree to be bound by them. And in construing all laws relating to or affecting religion regard must be had to this universal principle. All parts of the Christian Church in Canada are in the position of mere voluntary associations, they stand on no higher footing before the law, no matter how great their antiquity or how illustrious their history, than a benefit society; they may make laws for the guidance of their own members and for their enforcement may provide spiritual censures, and may inflict deprivation of religious privileges, but even in administering such private law, they must as far as any temporal right is affected, do it in accordance with their own rules and the principles of natural justice. And they cannot, except as above mentioned, exercise any coercive powers even over their own members, and they have no power whatever to affect or to assume to affect the rights or status of any person who is not a member of their particular body.

In considering provincial laws affecting to deal with marriage, these limitations must be taken into account,—and any ecclesiastical regulation which directly or indirectly assumes to affect the status of persons under no obligation to conform to such regulation, would appear to be *prima facie* void as far as such persons are concerned.

Among other laws relating to marriage passed by the Legislature of the former Parliament of the Province of Canada, is the Code Civil which came into force on August 1, 1866—and this code besides making certain provisions regarding marriage and its solemnization also purports to make certain provisions respecting impedi-

ments to marriage. After specifying certain impediments—s. 127 provided:

"The other impediments recognized according to the differing religious persuasions as resulting from relationship or affinity, or *from other causes,* remain subject to the rules hitherto followed in the different churches and religious communities. The right likewise of granting dispensations from such impediments appertains as heretofore to those who have hitherto enjoyed it."

This provision seems to legalise whatever matrimonial prohibitions, any religious body may at the time of its passing have seen fit to impose, and to give the force of temporal law to such prohibitions, and to ecclesiastical dispensations therefrom.

It appears to be, however, a matter for very serious consideration whether this section can by any possibility have any such effect.

The grant of constitutional rights of self government to a colony or other Dominion of the Crown does not involve a right to repeal any statutes of the Imperial Parliament which *ex proprio vigore* have operation throughout the Dominions of the Crown. The framers of the Code seem to have overlooked the fact that the statute 32 Hen. 8, c. 38, provides what degrees of relationship are alone to constitute impediments to marriage—and expressly declares that "no reservation or prohibition, God's law except, shall trouble or impeach any marriage without the levitical degrees; and that no person of what estate, degree or condition soever he or she be shall after the first day of the said month of July [1540] aforesaid be admitted in any of the spiritual courts within this the

King's realm *or any of his Grace's other lands and dominions to any process plea or allegation contrary to the aforesaid Act.*" This Act laid down a rule which is applicable throughout the Empire, and which no Provincial Legislature ever had any power to repeal. The prohibited degrees referred to in this Act are those explicitly and implicitly set forth in the Book of Leviticus as more specifically mentioned in the prior statute 27 Hen. 8, c. 7, s. 7, (a) and it would not seem possible for any Colonial legislature to add to, or subtract from, the prohibitions or impediments therein referred to, or to delegate to any religious body whatever any power so to do. It is therefore submitted that all the provisions of the Code Civil of Quebec in reference to impediments to matrimony must be read and construed as having legal force or efficacy only so far as they are in harmony with, and do not controvert, this dominating statute of the Imperial Parliament. No Provincial legislature therefore can validly impose a prohibition that persons of different religions shall not intermarry, or that persons of different colour shall be incapable of matrimony with each other, and if it could not itself impose such prohibitions or impediments to matrimony, is it not equally manifest that it could not delegate to any church the power to do so? And it would seem that even the Dominion of Parliament in the plenitude of its power could not deal with such a question adversely to the statute of Henry VIII.,

(a) This Act, though repealed, is held to be still to be resorted to as being the Parliamentary explanation of the words "God's Law" in 32 Hen. 8, c. 38 ; see Reg. Chadwick 11 Q.B. 173; Brook, Brook 9 H.L.C. 193.

and the Dominion Statute permitting marriage with a deceased wife's sister or her niece seems to be open to grave doubt as to its validity; although any doubt as to the legal validity of such marriages in Canada is probably now removed by the Imperial Statute 7 Edw. VII. c. 47.

Prior to Confederation some of the Provinces had established Matrimonial and Divorce Courts. By the Provincial Statute of New Brunswick, 31 Geo. 3, c. 5, the Lieutenant-Governor and Council were constituted a Matrimonial and Divorce Court for that Province, with power to grant divorces or annul marriages for impotence, adultery, *consanguinity* within degrees mentioned in 32 Hen. 8, c. 38; and subsequently this jurisdiction was transferred to another court constituted by the Provincial Legislature: see R.S.N.B. c. 50. In Prince Edward Island by the Provincial Act, 5 W. 4, c. 10, the Lieutenant-Governor in Council was in like manner constituted a Matrimonial and Divorce Court to that Province with the like jurisdiction, and it would seem that that is still the Matrimonial and Divorce Court of that Province. The provisions of the Acts of both of these Provinces in regard to prohibited degrees recognize the binding force of the Imperial Statute, 32 Hen. 8, c. 38.

In Nova Scotia prior to Confederation a Matrimonial and Divorce Court was established: see Rev. Stat. N.S. 3rd series, c. 126, with jurisdiction to annul marriages, or grant divorces for impotence, adultery, or kindred within the prohibited degrees, stated in 32 Hen. 8, c. 38.

In British Columbia the civil laws of England as they were on 19 November, 1858: see R.S.B.C., c. 115,

were made the law of that Province; and by the Proclamation having the force of law the Supreme Court of that Province was constituted and given complete cognizance of all pleas whatever, and jurisdiction in all cases civil as well as criminal, which has had the effect, according to a recent decision of the Judicial Committee of the Privy Council, of vesting in the Supreme Court of British Columbia the like jurisdiction as was possessed by the English Probate and Divorce Court on 19 November, 1858: see *Watts* v. *Watts* (1908), A.C. 573; C.R. [1908] A.C. 511, and has in effect made the law of England as it stood on 19th Nov., 1858, the marriage law of British Columbia.

In Ontario the laws of England as to property and civil rights as they existed in 1792, were made the law of that Province. This would have the effect *inter alia* of introducing the English marriage law as it stood in that year.

On the subsequent institution of the Courts of Common Law and Chancery in that Province, their jurisdiction was limited to that possessed by the English Courts of Queen's Bench and Chancery, and as neither of these courts then exercised any matrimonial or divorce jurisdiction it has been generally considered that the Provincial Courts of Common Law and Chancery, and their statutory heir the Supreme Court of Judicature for Ontario, had not, nor has any matrimonial or divorce jurisdiction; and for upwards of a hundred years the Provinces of Ontario and Quebec have been destitute of any matrimonial or divorce tribunals whatever; and the only forum to which citizens of those Provinces could look

for relief in matrimonial cases, has been the High Court of Parliament of Canada, where relief is granted not judicially, but legislatively.

In the case of *Lawless v. Chamberlain*, 18 Ont. 296, the High Court of Ontario declared a marriage which had been procured by duress to be null and void, and the jurisdiction so to do was ascribed to the inherent jurisdiction of the Court of Chancery in all cases of fraud, and in answer to the objection that that jurisdiction must be measured by that of the English Chancery in 1837, it was said that though that Court did not then exercise jurisdiction in matrimonial cases, it had formerly exercised it during the Protectorate, when the Courts Christian were abolished in England: 2 Showers R. 283 (Case 269), and the jurisdiction though not actually exercised in 1837, was said to be merely in abeyance.

But this view of the question does not appear to have commended itself to other judges who have had occasion to consider the matter: see *A.* v. *B.*, 23 O.L.R. 261; *T.* v. *B.* (1907), 15 O.L.R. 224; *May* v. *May*, 22 O.L.R. 559; and has not found favour in the United States where similar conditions prevail: see Bishop Mar. and Div. vol. 2, s. 657. And it seems to be deserving of very serious consideration whether some of the provisions of the Provincial Statutes, 1 Geo. V. c. 32, Ont., are not beyond the competence of the Provincial Legislature. Having regard to the history of the Marriage Law, and the provisions of the B.N.A. Act, it does not appear possible that any Provincial Legislature can validly give to any Provincial Court any matrimonial jurisdiction whatever.

If the High Court in Ontario has not any matrimonial

or divorce jurisdiction, then it is hard to understand how, by any declaratory or other judgment, it can effectively dissolve or annul a *de facto* marriage, for duress, or any other cause whatever; and the remedy of an aggrieved person is not in the courts, but in the Dominion Legislature: see *Re Stevenson*, 32 Vict., c. 75, in the Statutes of Canada for 1870. In that case it will be seen that one of the grounds on which the applicant claimed relief was that he had been inveigled into the marriage, which if established would apparently, according to the learned Chancellor's opinion, have given the Court of Chancery jurisdiction, a view which evidently did not occur to the promoters of that bill, which was one of the first divorce Acts passed by the Canadian Parliament, the first being *Re Whiteaves* (1868), 31 Vict. c. 95, and both were reserved for the consideration of the Crown, before being assented to by the Governor-General.

In Ontario the Provincial legislation regarding marriage is to be found in the recently revised statute, 1 Geo. V. c. 32. That Act it may be noted recognizes the fact that the 32 Hen. 8, c. 38, is the Act regulating in Ontario the degrees of relationship which constitute an impediment to matrimony.

In the Provinces of Manitoba, Saskatchewan and Alberta by Provincial legislation, the law of England as regards property and civil rights as it was on 15 July, 1870, was introduced; but inasmuch as the Provincial Legislatures had no legislative power to deal with the law of marriage, all those Provinces having come into existence since Confederation, it was impossible for them to introduce the English, or any other law of mar-

riage, and it is consequently difficult to say if those Provinces have any law of marriage at all except the Dominion Statute permitting marriage with a deceased wife's sister or niece (which for reasons already given appears to be of doubtful validity): see R.S.C. 105, the Imperial Statute 32 Hen. 8, c. 38, relating to prohibited degrees as modified by the Imperial Statute 7 Edw. 7, c. 47, and such Provincial Statutes as they have respectively passed regulating the solemnization of marriages within their borders.

What is Marriage?

We all know that marriage is as a matter of fact the union of man and woman in the relationship of husband and wife, but as Lord Stowell said in *Lind* v. *Belisario*, 1 Hagg Con. R. 230, "Opinions have divided the world as to the nature of the contract. It is held by some persons that marriage is a contract merely civil, by others that it is a sacred, religious and spiritual contract." It might also be said that there are others who consider that Christian marriage is both a civil and religious contract, on the one side it involves certain civil duties, rights and obligations, and on the other it involves certain spiritual rights, duties, and obligations, and a relationship of so sacred a character, that it is only when the spiritual side of the contract is fully appreciated, that the contract can be properly performed.

It may now be useful to inquire how is this relationship of man and wife constituted, for although the subject is of universal interest, it is probable that very few

people really understand what particular act creates or constitutes the marriage contract.

Because marriage is called a "Sacrament" by some Christians, it is supposed that like some other "Sacraments" the marriage contract consists in some religious rite which is performed, and that this religious ceremony is what really constitutes marriage. And so it has come to pass that in many, probably most, people's minds, the contract of marriage is confounded with the ecclesiastical or civil ceremony or act by which it is solemnized or witnessed. But if we examine into the history of marriage we find that for fifteen hundred years the Christian Church had no such doctrine, as that a religious ceremony was an essential part of marriage, and certainly no such ceremony attended the marriage of our first parents which, as a learned divine said at the Council of Trent, is the model of all others. On the contrary the Church uniformly and persistently held that the mutual consent of parties competent to contract, to take each other as husband and wife was what really constituted marriage, and was the only *essential* thing from the religious point of view. But to give greater solemnity to the contract, and to enable the Church authorities to prevent persons not competent by reason of their relationship, from assuming to marry each other, the solemnization of marriage in the face of the Church, as we shall hereafter see, was enjoined from time to time by the Church, and the disregard of the injunction was visited with ecclesiastical censures.

But it was not until the Council of Trent, in 1563, that it was ever pretended by Pope or Council, or any other

recognized ecclesiastical authority, that the omission of a religious ceremony rendered a marriage void, as far as its sacred or sacramental character was concerned. On the contrary Popes expressly ruled and decided that the marriage by mutual consent of the parties was just as valid and effectual, and as indissoluble by the parties, as if solemnized in the face of the Church; and on the fact of the existence of such a marriage being established, it was sufficient to nullify any marriage of either party during the lifetime of the other, with anyone else, even though such later marriage, or attempted marriage, should be solemnized in the face of the Church and be followed by cohabitation and the birth of children: see Howard's Matrimonial Institutions, vol. 1, pp. 339, 351.

The legal aspect of Christian marriage is intimately bound up with its religious aspect, from the fact that for hundreds of years after Christianity became the prevailing religion in Europe, marriage was regarded as a matter peculiarly within the province of the Christian Church.

From the reign of Constantine the Great in the beginning of the fourth century the Christian religion gradually became the recognized religion of the Roman Empire, and under the fostering care of the State it rapidly supplanted paganism and eventually became the dominant religion of Europe. Marriage derived its sacred character in the estimation of Christians from the teaching of Christ Himself who attributed it to a primal law of God on the creation of man; and St. Paul also did not hesitate to compare the union of husband and wife to the mystical union of Christ with the Church, (Eph. v.

23). Christian marriage in the contemplation of every Christian community, was and is regarded as the union of one man and one woman for life, to the exclusion of all others: see *Re Bethell, Bethell* v. *Hildyard,* 58 L.T. 674; *Hyde* v. *Hyde,* L.R. 1 P. & D. 130; wherein it differs from other kinds of marriage which admit of a plurality of wives, or husbands, or are not intended to be life long.

Prior to the Reformation, both the Christian Church in Europe, and the temporal authorities throughout Europe, were practically unanimous as to what constituted marriage; and the general law of Western Europe before the Council of Trent seems clear, and the mutual consent of competent persons to take one another only for man and wife during their joint lives, was alone considered necessary to constitute true and lawful matrimony, in the contemplation of both the Church and the State: (see per Willes, J., 9 H.L.C. at p. 306).

In Bacon's Abridgement tit. Marriage B. it is said "a contract *in praesenti,* or marriage *per verba de praesenti;* as 'I marry you'; or 'you and I are man and wife'; is by the *civil law* esteemed *ipsum matrimonium,* and amounts to an actual marriage which the parties themselves cannot dissolve by release or other mutual agreement, it being as much a marriage in the sight of God as if it had been *in facie Ecclesiæ;* with this difference that if they cohabit before marriage (solemnization?) *in facie Ecclesiæ,* they for that are punishable by ecclesiastical censures, and if after such contract, either of them lies with another, such offender shall be punished as an adulterer." Furthermore he says, "if A contracts him-

self to B, and after marries C, and B sues A on this contract in the Spiritual Court, and there sentence is given that A shall marry and cohabit with B which he does accordingly, they are baron and feme without any divorce between A and C, for the marriage of A and C was a mere nullity."

From this it is clear that according to the civil law a marriage was validly contracted by mutual consent of the parties *per verba de praesenti* to take each other as man and wife, and that any subsequent attempt of either party in the lifetime of the other to marry another person would, on the first marriage being established, be a mere nullity. This was not only the civil law which prevailed in France, but it was also the law of the Christian Church in the West for over 1,500 years.

It was the well established doctrine of the Church that, notwithstanding marriage was regarded as a Sacrament, nevertheless the presence of a priest was not essential to its validity: see De Burgh's Pupilla Oculi quoted at length by counsel in 10 Cl. & Fin, at pp. 581-2. De Burgh it appears was Vice-Chancellor of Cambridge, and a canonist of authority: see per Tindal, C.J., *Reg.* v. *Millis*, 10 Cl. & F., pp. 683-4.

In this work is a treatise on the administration of the 7 sacraments and under the head "De Sacramento matrimoniali" he says, "Of the minister of this sacrament it is to be observed, that no other minister is to be required distinct from the parties contracting; for they themselves for the most part minister the sacrament to themselves, either the one to the other, or each to themselves."

The great Latin Doctor Thomas Aquinas, lays down the same doctrine.

"Verba exprimenta consensum de praesenti sint forma hujus sacramenti, *non autem sacerdotis benedictio quæ non est de necessitate sacramenti, sed de solemnitatæ.*" *Thomas Aquinas* (in quatuor libros sententias: Lib. iv., Dist. xxvi. Qu, unic. Art. 1). So does Duns Scotus, Lib. IV., Dist. xxvi., Qu, unic: "Ut plurimum ipsimet contrahentes ministrant sibi ipsis hoc sacramentum vel mutuo vel uterque sibi."

It is said in Viner's Abridgement (tit. Marriage F.) that "the solemnization of marriage was not used in the Church before an ordinance of Innocent III; (1198-1216) before which the man came to the house where the woman inhabited, and carried her with him to his house; and this was all the ceremony." From which it would appear that up to the beginning of the 13th century, neither the Church nor any Pope had ever assumed to say that any religious rite was essential to a valid marriage, and even Innocent III did not pretend that it was essential, for it is to be noticed that though Pope Innocent III forbade clandestine marriages, *i.e.*, those not solemnized in the face of the Church, he nevertheless did not venture to declare that clandestine marriages were null and void, but merely that the persons who contracted them were to be disciplined: see Pothier, *Traité du contrat de Mariage*, Pt. II. s. 3.

But although the Church in western Europe never pretended before the Council of Trent that a religious ceremony was essential to a valid marriage, it appears that in England from the time of Edmund (A.D. 940) the temporal law required that marriage, in order that it might be recognized as valid by the State, should be

solemnized in presence of a mass priest:—see Ancient Laws p. 505 (Thorpe's Ed.). This law was as follows:

8. At the nuptials there shall be a mass priest by law, who shall with God's blessing bind their union to all posterity.

9. Well it is also to be looked to, that it be known that they through kinship be not too nearly allied, lest they be afterwards divided which before were wrongly joined."

This however was in order to give temporal effect to the marriage but not to make it valid as a sacramental act, or from the religious standpoint.

Lord Chief Justice Tindal in delivering the opinion of the common law judges in *Reg.* v. *Millis, supra,* said, "by the common law of England it was essential to the constitution of a full and complete marriage that there must be some religious solemnity that both modes of obligation should exist together, the civil and religious,"—and he goes on to observe that the religious ceremony has from time to time varied, but the temporal courts in England always accepted the ceremony which for the time being might be deemed by the Church of England to be sufficient.

It might perhaps be inferred from the above observations of Tindal, C.J., that the religious rite was necessary to give due effect to the religious obligation, whereas it was solely necessary, paradoxical as it may seem, in order to give effect to the civil obligation. Because as we have already seen the Church had always unanimously held that no religious ceremony was essential to the religious obligation. It had counselled and taught that mar-

riages should be solemnized in the face of the Church, but it had never taught that marriages would lack their religious, spiritual, or sacramental character if the religious rites were omitted. One reason the Church desired that all marriages should be submitted to its supervision, was, as we have said, that it might prevent persons entering into or assuming to enter into the marriage state who were incompetent to do so by reason of their relationship to each other, and this was also a reason which approved itself to the temporal rulers, and was apparently one of the reasons for the law of Edmund.

The effect of this was that although a marriage might be valid according to the doctrine of the Church, it would not be declared valid by the Courts Christian in England until it had been duly solemnized *in facie ecclesiæ*. Until then, the marriage though valid in the eye of the Church would have no civil effects, the wife would not be entitled to dower, nor would the issue of the marriage be regarded in law as legitimate. But it must not be concluded that even in England a marriage by mutual consent, and without religious rites was a mere nullity. On the contrary it was, even there, so binding and indissoluble a contract, that upon its existence being established in the Court Christian it was sufficient ground for annulling a subsequent marriage *in facie ecclesiæ*, even though followed by cohabitation and the birth of issue. And the Courts Christian in England in such a case would give effect to the prior marriage by ordering it to be solemnized in the face of the Church. And here it is to be remarked that those Courts had no inherent jurisdiction, they owed their existence to temporal au-

thority just as much as the courts of common law; nor did they in England administer the general Canon law of Europe; but as their judicial power and authority was derived from the State so they also administered the law which the State approved.

Prior to the conquest in England the bishops sat as judges or assessors in the County Courts, but the Conqueror established ecclesiastical courts, and limited the jurisdiction of those courts to matters which were regarded as properly within their jurisdiction.

As Lord C. J. Tindal said in *Reg. Millis,* 10 Cl. & F. at p. 678, "The law by which the Spiritual Courts of this Kingdom (*i.e.,* England) have from the earliest time been governed and regulated is not the general Canon law of Europe, imported as a body of law into this Kingdom but instead thereof an ecclesiastical law, of which the general canon law is no doubt the basis, but which has been modified and altered from time to time by the ecclesiastical constitutions of our Archbishops and Bishops, and by the Legislature of the Realm, and which has been known from early times by the distinguishing title of the King's ecclesiastical laws, and the Chief Justice declared that this ecclesiastical law was part of the common law: see 10 Cl. & F. at p. 671.

The English law of marriage differed from that of the rest of Europe not only in requiring marriages to be solemnized by a priest, but also in another particular. By the civil law which prevailed in the rest of Europe, children born out of wedlock might be made legitimate by the subsequent marriage of their parents.* This law

* This also seems to be Jewish Law: see *Levy v. Soloman,* 37 L.T., 263.

which had been approved by the Roman Church, the Bishops of the Church of England desired in the reign of Henry 3 should be made the law of England, but the attempt failed, as appears by the statute of Merton, when the Barons of England with one consent declared they were unwilling to change the laws of England. This law of legitimation by a subsequent marriage was adopted in Scotland, it is to-day the law of Quebec, but has never been the law of England.

From what has been said it would appear, to use the language of Mr. Pemberton of Counsel for the Crown in *Reg.* v. *Millis,* that according to the English common law: A marriage consists of two parts; a contract which being made the marriage was perfect as between the parties themselves. That is the first part. But the second part is solemnization, and that is as necessary as the contract; and till solemnization the law never gave effect to the marriage for the *purpose of conferring civil rights,*" and again, "When the contract was made *per verba de praesenti or per verba de futuro cum subsequente copula,* no valid marriage could be subsequently contracted." The marriage was complete as between the parties themselves, but no further; but the parties obtained no civil rights till the Church had solemnized the contract."

From the time of Edmund (A.D. 940) therefore according to the law of England a marriage, in order to be perfect and sufficient for civil purposes, must have been solemnized in the presence of a priest, and this law continued after the Reformation with the difference, that thereafter a deacon might also solemnize a mar-

riage: see *Reg.* v. *Millis,* 10 Cl. & F. 534. In France also, from the time of Charlemagne (A.D. 800), the temporal law also enjoined that marriage should be solemnized *in facie ecclesiæ;* but there was this material difference between the temporal law of England and France, for whereas in England the omission of the solemnization in the face of the Church would render the marriage devoid of civil effect, in France the omission would not invalidate the marriage but merely expose the parties to spiritual censure and discipline: see *Pothier Traite du contrat de mariage,* Pt. IV. s. 3.

Pre-Contract.

A marriage contracted by the parties themselves without the intervention of a priest, having thus a potential validity, and being, as we have seen, sufficient if established to invalidate a subsequent marriage of either of the parties to anyone else,—was a fruitful source of trouble and litigation. It was as against any subsequent, or attempted marriage, termed a "pre-contract," and, as appears by the recital in the statute of 32 Hen. 8, c. 38, it was an occasion of much evil and injury to innocent persons.

At the time of the Reformation the legal effect of a pre-contract was in England very considerably modified by the statute 32 Hen. 8, c. 38, which expressly provided that every marriage between lawful persons and solemnized in the face of the Church should be deemed lawful and indissoluble "notwithstanding any pre-contract or pre-contracts of matrimony not consummate with bodily knowledge." But this left pre-contracts which had been

followed by consummation though not solemnized *in facie Ecclesiæ* of the same effect as formerly, and therefore a good ground for nullifying a subsequent marriage. By the statute 2-3 Edw. 6, c. 23, the 32 Hen. 8, c. 38, in so far as it abolished the legal effect of pre-contracts was repealed, and the law in regard to pre-contract as it stood before the passing of that statute, was restored, and the King's Ecclesiastical Judge was empowered to give due effect to such pre-contracts; but the Imperial Statute of 1753, 26 Geo. 2, c. 33, s. 13, commonly known as "Lord Hardwicke's Act" or "the Marriage Act," finally took away from the Ecclesiastical Courts in England all power to give effect to pre-contracts.

The legal effect formerly given to pre-contracts possibly accounts for the fact that actions for breach of promise of marriage were unknown to the law prior to the reign of Charles I., as it seems evident in earlier times the remedy would be in the Ecclesiastical Court to compel solemnization of the contract *in facie ecclesiæ*.

It may be useful to consider how far, if at all, the English Marriage Act of 1753, is in force in Ontario. It may be noted in the first place that it has no operation *ex proprio vigore*, its application out of England is expressly negatived by the Act itself; if therefore it has any operation in Ontario it must be due to the fact that it has by Provincial legislation been made part of the law of Ontario. The Constitutional Act of the first Parliament of Upper Canada (32 Geo. 3, c. 1) which provided that in all matters of controversy relative to property and civil rights resort shall be had to the laws of England as they stood on 15th October, 1792, seems

to have had the effect of incorporating *inter alia* so much of the English Marriage Act of 1753 as was suitable to the conditions of this Province: *O'Connor* v. *Kennedy*, 15 Ont. 20, though, it would seem that, all of its provisions are not: see *Reg.* v. *Becker*, 14 U.C.Q.B. 604, but the provision as to pre-contracts seems evidently one that was. But there is the fact that when the Imperial Statutes incorporated into the law of Ontario came to be revised and consolidated in 1902 this particular provision was not included in the third volume of the R.S.O. This may perhaps be justified on the ground that it deals with the law of marriage, and not merely with its solemnization, and therefore was not a subject with which the Revisers had any authority to deal. And it is also to be noted that the Provincial Statute, 2 Edw. 7, c. 13, s. 4 merely purports to repeal ss. 8, 11 of the Act of 1753. Section 13 therefore appears to be in no way affected by the revision and consolidation of the Imperial Acts above referred to, and is therefore a part of the marriage law of Ontario, though for the reasons above appearing, not discoverable without considerable research. In all the other English speaking Provinces (except perhaps Manitoba, Saskatchewan, Alberta, and the Territories) for reasons already stated, 26 Geo. 2, c. 33, s. 13, seems to be part of the laws of those Provinces. In any legislation on the subject by the Dominion this point ought not to be lost sight of.

The legal remedy to enforce a pre-contract having been taken away, whatever its effect may be from an ecclesiastical standpoint, it has at all events ceased, where English law prevails, to give any legal rights what-

ever, and a marriage solemnized according to the forms prescribed by law has ceased to be voidable on the ground of the existence of a pre-contract with some other person. It would appear that prior to the Council of Trent, the effect of pre-contract was in France the same as in England prior to the passing of the English Marriage Act of 1753: see Pothier *Traité du contrat de mariage,* Part IV., c. 1, s. 3.

What legal effect ought now to be given to pre-contract in the Province of Quebec, is one of those questions which it seems desirable should be removed by definite legislation from the realm of controversy or speculation. For although in France as we have seen the State had, from the time of Charlemagne, from time to time required marriages to be solemnized with religious rites, yet prior to the Reformation all such laws appear to have fallen into disuse: and in France the nuptial benediction and the celebration of marriages in the face of the Church had come to be regarded as a pious usage but not in any way necessary to the validity of marriages, either civilly or ecclesiastically, and a marriage was held to be validly contracted simply by the parties reciprocally promising by words *de praesenti* to take each other for husband and wife: see Pothier, *supra,* and that possibly is still the law of Quebec, but of course subject to Provincial law requiring solemnization.

Marriages which were not celebrated in the face of the Church were called "clandestine," and the Council of Trent in the 16th century endeavoured to find a remedy for what was felt to be a great and widespread evil; and one of the principal objects of its decrees concerning

matrimony was to do away with clandestine marriages altogether, by imposing stringent conditions as to the person before whom marriages are to be solemnized, and by declaring that all marriages which did not conform to the rules laid down should be null and void. But the initial difficulty in the way of any such legislation on the part of the Council from a religious standpoint was the fact that for 1,500 years the Catholic Church throughout Europe had unanimously taught that the only essential requisite to matrimony was the mutual consent of competent parties. And it is therefore not surprising to find that the proposed *volte face* met with some opposition.

Father Paul in his history of the Council, vol. 7, says that at the session on this subject on 9 February, 1563, and following days, Maillard, Dean of the Sorbonne, said that the Church had no power to do as proposed; that it could not make a sacrament which was valid to-day invalid to-morrow; and that the Church had no power to make it an essential requisite of marriage that it should be solemnized publicly. The first marriage, said he, between Adam and Eve which is the model of others was without witnesses. To which it is said the Jesuit Salmeron replied, that the Church had power over the matter of sacraments which it might alter so long as it did not interfere with their essence; that the qualities of publicity and secrecy are accidentals of marriage and that the Church had power to deal with these qualities as it deemed fit, and consequently to require for their validity that they should be public: see Pothier *Traité du Contrat de mariage*, Pt. II., s. 4. But this argument does not

appear to be very convincing, if the essence of marriage is mutual consent, it is surely altering the essence of marriage to say that it is invalid, if the consent is not given in some particular way, and it is in fact making the mode in which the consent is given a part of the essence of marriage; and, assuming marriage to be a "Sacrament," to say, "the sacrament was effectual to-day by the mere mutual consent of the parties without the presence of a priest, but to-morrow the Sacrament is null and void though the mutual consent has been given, because a priest was not present," is surely altering the essence of the Sacrament by making something essential to its validity which before was unessential.

Palavacino, another historian of the Council, declares the above statement as to what was said by Maillard is a fabrication. It appears, however, from the nature of the case, to be inherently probable, for it is hardly to be supposed possible that in such an assemblage of learned divines there would not be at least some to whom so obvious an objection would have occurred: and indeed the Council itself seems to have felt the force of the objection, whether it was or was not definitely made, because in the Canons which it passed it expressly anathematises those who shall say that a clandestine marriage is null and void, but it adds—'unless the Church shall so decree,' and it proceeds to declare that clandestine marriages are null and void. To some persons this may seem a somewhat inconsistent position; at all events we learn that at the 24th session of the Council held on the 24th November in the same year, when the decree making null and void clandestine marriages was passed,

it was so passed contrary to the votes of the respectable minority of 56 prelates; and it is stated by Father Paul that the Bishop of Warmie regarded the validity of such marriages as a dogma of faith, and therefore he would not assist in the decree. But in considering the marriage law of Canada it is necessary to remember that the decrees of the Council of Trent were never adopted by the temporal rulers either of England or of France, they were considered in France to encroach on the rights of the State and were therefore rejected there. Pothier says on this point, "The Council of Trent was not able to be received in France notwithstanding the efforts made by the Court of Rome and the clergy to have it received. All Catholics recognized and have always since acknowledged that the decisions of the Council upon the dogma are the faith of the Church; but the blow which it gives in its disciplinary decrees to the rights of the secular power, and to our maxims on a great number of points, was and always will be, an insurmountable obstacle to the reception of the Council in this Kingdom. . . . The decree of the Council was not able to remedy the abuse of clandestine marriages in France where this Council was never received and where consequently its decrees *have no authority.*" Pothier Pt. IV., s. 5.

The decrees of that Council were therefore not at the time of the conquest of Canada by Great Britain any part of the law of Canada under the French regime, and when by the Quebec Act in 1774 (14 Geo. 3, c. 33), it was provided s. 8 that "in all matters of controversy relative to property and civil rights resort shall be had

to the laws of Canada," the decrees of the Council of Trent were no part of such laws.

And in England owing to the breach which existed between the Church of England and the Roman Church the Council of Trent, at which the Church of England was in no way represented, was never regarded as having any authority, nor were the decrees accepted as having any binding force or validity in England, either civilly or ecclesiastically. But though the decrees of the Council of Trent had no authority either in France or England yet in both of those countries the secular rulers enacted laws on the subject of clandestine marriages.

By the Edict of Blois, it is said, "We have ordained that our subjects shall not be able validly to contract marriage without precedent proclamations. . . . . After which bans they shall be espoused publicly and for testimony to the form, there shall be four witnesses worthy of credence, which shall be recorded. And by Article 44, Notaries are forbidden under pain of corporal punishment to receive any promises of marriage by words *de présent.*" But in England no legislation took place on the subject till 1753 when Lord Hardwicke's Marriage Act, 26 Geo. II., c. 33, already referred to was passed.

The decrees of the Council of Trent having no legal force or validity in Canada at the time of the conquest, and being therefore no part of the laws of Canada which the Quebec Act introduced as the rule of controversies respecting property and civil rights, it remains to be considered how they are to be regarded, for though they have no legal force or effect, yet they are the laws by

which the Roman part of the Christian Church in Canada conceives itself to be bound. They are simply like the laws of any other voluntary society, only binding on its own members, as private and domestic laws, not in any way enforceable by temporal penalties of any kind, and not in any way affecting or prejudicing anyone who is not a member of the Roman part of the Church, or in any way bound to conform to its regulations.

The grant of powers of self-government to the Province of Quebec, in common with other Provinces of the Dominion, has excluded from the Provincial sphere, the topic of marriage; but it has power to make laws regarding the solemnization of marriage, and it conceivably might make the decrees of the Council of Trent as to the solemnization of marriage the law of that Province, but having regard to that equity and justice which has usually characterized the Legislature of that Province, it is extremely unlikely that it would ever attempt to coerce the Protestant minority to accept or be governed by the decrees of a part of the Church whose authority they deny.

And though the Legislature has power to regulate the solemnization of marriage, it has no power to give jurisdiction to any Provincial Court to grant divorces or annul *de facto* marriages. Where any Quebec Courts got such jurisdiction it is hard to say. The Code Civil expressly declares marriage is indissoluble s. 185 says "Marriage can only be dissolved by the natural death of one of the parties; while both live it is indissoluble"; and yet we have Quebec Courts assuming to dissolve *de facto* marriages.

In both England and France at the time of the conquest of Canada the cognizance of matters relating to the validity of marriages, had been assigned by the temporal authority to the Ecclesiastical Courts, but those courts were bound to decide cases as we have seen not in accordance with the decrees of the Council of Trent, but in accordance with the law of those Kingdoms: see *Reg.* v. *Millis, supra*; Pothier *Traité du contrat de mariage*, Pt. IV. c. 1, s. 3, Art. 1, s. 5.

It cannot be successfully contended that when the Quebec Act provided that in matters of controversy relative to property and civil rights resort shall be had to the laws of Canada, that this indirectly gave a legal status to ecclesiastical tribunals which had formerly exercised jurisdiction in Canada prior to the conquest. Because it is a well recognized principle of English law that on Canada becoming a British country all courts theretofore existing in the country came to an end. It has never been seriously contended that the introduction of the laws of England into Ontario had the effect of giving any legal status to Courts Christian in Ontario, and there is no good reason for supposing that the introduction of the laws of Canada had any such effect as regards Ecclesiastical tribunals formerly recognized by that law. If the introduction of English law gave no jurisdiction in law to Bishops of the Church of England, so neither did the introduction of the laws of Canada give any jurisdiction in law to the Roman Catholic Bishops. Our constitutional laws must be construed with due regard to the principles of absolute religious equality, and religious toleration, which are fundamental principles of

our constitution. To give to the Ecclesiastical tribunals of any religious body whether it be Roman, Anglican, Presbyterian, Methodist, or Baptist any coercive jurisdiction, would be contrary to the principle of religious freedom on which our constitutional system is based. It would be just as contrary to that principle to give Roman bishops coercive authority, as it would be to give it to Anglican bishops, or Presbyterian moderators, or Methodist superintendents. One result of this, however, is that there are certain branches of law formerly administered in France and England by Ecclesiastical tribunals, which have not been definitely assigned to any existing courts in Ontario or Quebec, Saskatchewan, Alberta or the Territories. This difficulty as we have seen was recognized and discussed by the learned Chancellor of Ontario in the case of *Lawless, Chamberlain,* and by other judges: see *supra,* p. 10.

Impediments to Marriages.

A most important part of the law of marriage is that concerning impediments to marriage. In all the English speaking Provinces these impediments appear to be regulated by the Imperial Statute, 32 Hen. 8, c. 38, already referred to, and it would appear for the reasons already given that that statute is equally binding and operative in the Province of Quebec.

As we gather from the recital in this statute, prior to its passage marriages were frequently impeached on the ground of some ecclesiastical impediments not mentioned in Scripture, and it also appears that these impediments were created by the ecclesiastical authorities, apparently as a source of revenue; because they might be removed

by dispensations, for which fees were payable by all who had the means.

The Act then proceeds to abolish all impediments except those mentioned in "God's law," and declares that no other impediments shall render any marriage impeachable within "the King's realm *or any of His Grace's other lands and dominions,*" so that it is a statute not merely operative in England, but on the contrary, as we have already said, it is operative throughout the Empire *ex proprio vigore.* On the conquest of Canada it immediately became a part of the law of Canada and no grant of any legislative powers either to the former Province of Canada, or to the Dominion, or to the Provinces has included any power to repeal that Act. Therefore we conclude it is in force in Quebec, and all other impediments to marriage created by any part of the Christian Church are wholly nugatory and void in law: and this would of course include the pretended impediment arising from a difference in religious belief of the parties desiring to marry. That this position is beyond question seems to be clear from the Colonial Laws Validity Act (28-29 Vict. c. 63), which expressly provides s. 8, "Any colonial law which is or shall be repugnant to the provisions of any Act of Parliament extending to the colony to which such law may relate, or repugnant to any order or regulation made under authority of such Act of Parliament, or having in the colony the force or effect of such Act, shall be read subject to such Act, order or regulation, and shall to the extent of such repugnancy but not otherwise, be and remain *absolutely void and inoperative.*"

Canada, it is true, was not in 1564 a part of the British Dominions, but it is a rule of law that a statute is to be regarded as always speaking, and in that way the Act applies to all the King's dominions as they from time to time exist.

It being therefore clear that no Colonial legislature has any power to repeal or vary 32 Hen. 8, c. 38, in regard to prohibitions to matrimony, or to impose any other prohibitions than those referred to in that Act, it is manifest that no Colonial Legislature has, or ever had, any power to delegate to any church the power to make impediments to matrimony, and therefore all the provisions of the Code Civil of Quebec which in any way purport to give any such power to the Roman or any other part of the Christian Church are *ultra vires* and void.

The sections of the Code referred to are sections 124-127 and read as follows: "124. In the direct line marriage is prohibited between ascendants and descendants, and between persons connected by alliance whether they are legitimate or natural. 125. In the collateral line marriage is prohibited between brother and sister, legitimate or natural, and between those connected in the same degree by alliance whether they are legitimate or natural. 126. Marriage is also prohibited between uncle and niece, aunt and nephew. 127. The other impediments recognized according to the different religious persuasions, as resulting from relationship or affinity, or *from other causes, remain subject to the rules hitherto followed in the different churches and religious communities.* The right likewise of granting dispensations from such impediments appertains as heretofore to those who have hitherto enjoyed it."

For reasons which have been stated all of these sections are to be read subject to the provisions of the Imperial Statute, 32 Hen. 8, c. 38, which defines the prohibitions, and the only prohibitions, which can legally hinder or prevent lawful matrimony within the British Empire, and it is fortunate that it is so, for it is to be noted that the prohibitions purported to be made by section 124 are without any limit of degree, and all persons connected by alliance are forbidden to marry; and section 127 purports to give a legal sanction to impediments which any religious body had devised; which would be bringing into Canada the very troubles and difficulties which the Imperial Statute was passed to abolish, and which it has fortunately effectually abolished throughout the British Empire.

Dispensation With Law.

It will be noticed that s. 127 above referred to contains the provision.

"The right likewise of granting dispensations from such impediments appertains as heretofore to those who have hitherto enjoyed it."

This idea of granting dispensations to individuals from the observance of law has its foundation in a principle fundamentally opposed to English law, it sets up above the law some superior who is to have the privilege of saying whether or not a law shall be observed. It is derived from Imperial ideas of Government whose fundamental principle is "that what the Prince wills is law," and that besides making law, he may also dispense with it. But that principle is fundamentally opposed to

British constitutional law, and not even the King himself has under our constitution any inherent power to dispense with any law.* This dispensing power recognized by this statute cannot by any possibility refer to any impediments created by the law of the land, as that would be to sanction a breach of the Act of 32 Hen. 8, c. 38, which no Provincial Parliament can authorize: see *O'Connor* v. *Kennedy*, 15 Ont. at p. 23, *per* Armour, C.J.; it can therefore only refer to those impediments which as a matter of private and domestic regulation may be created and which, of course, have no legal or coercive force, nor any operation at all except on those who willingly choose to submit to them. The section, however, is likely to lead to the erroneous idea that it gives a power and authority which it was impossible for the legislature to impart, and should be removed from the statute book, as having really no legislative value.

Divorce and Nullity of Marriage.

Intimately connected with marriage is the question of divorce—and the annulment of *de facto* marriages.

In the popular mind these two things are often confounded, and in nearly all our histories the proceedings for the annulment of the marriage of Henry VIII., with Catharine of Arragon are referred to as a "divorce," although it was really a proceeding for nullity of marriage, on the ground that the parties were within the prohibited degrees of relationship. But the two things are really quite distinct, though their result may appear to be similar. An annulment of a marriage can only be decreed by reason of some fact or impediment existing

* See note 2, p. 46 *infra*.

at the time of the marriage or pretended marriage, *e.g.*, the physical incapacity of either party; the kinship of the parties within the "prohibited degrees," as it is called, or some other fact rendering the marriage void, or voidable *ab initio*. A divorce on the other hand is the legal dissolution of a valid marriage.

Nullity of Marriage.

The existence of the causes above mentioned do not *ipso facto* annul a *de facto* marriage. There must be a judicial sentence, and if such judicial sentence is not obtained during the lifetime of the parties, the marriage remains valid for all legal purposes and the issue thereof, if any, is held to be legitimate: see *Hodgins* v. *McNeil*, 9 Gr. 305.* In England under the Imperial Statute 5-6 W. 4, c. 54, s. 2, all marriages within the prohibited degrees of consanguinity or affinity are absolutely null and void; and that appears to have been also the Roman law: see Inst. Lib. i. Tit. x. 12; and it is worth consideration whether that should not also be made the law of Canada.

Divorce.

Prior to the Reformation marriages between competent parties were held to be indissoluble. The spiritual courts for certain specific causes were accustomed to grant a modified form of divorce, which, however, merely amounted to what is now termed a judicial separation form bed and board. It gave neither party a right to re-marry during the lifetime of the divorced spouse. This was called a divorce *â mensâ et thoro*. But an absolute divorce *â vinculo matrimonii* was not

* And see *Re Murray Carrol*, 6 Ont. 685; *Kidd* v. *Harris*, 3 O.L.R., 60.

grantable by any Court in England prior to the Reformation. After the Reformation an attempt was made to revise and consolidate the Ecclesiastical laws of England and a commission was appointed which prepared a revision and consolidation entitled *Reformatio Legum Ecclesiasticarum*, but this work never became law. By these proposed revised Ecclesiastical laws it was intended to enable the spiritual courts to grant absolute divorces, on various grounds, which would, even in the United States, be regarded as liberal; but the law remained unchanged until the passing of the Divorce Act in 1857 when the jurisdiction in matrimonial causes was taken away from the spiritual courts altogether, and vested in another tribunal created by Parliament, and endowed with power to grant absolute divorces. By this Act, 20-21 Vict. c. 85, Divorces *á mensa et thoro* were abolished, and power was given to grant an absolute divorce to either party for the adultery of the other of them, or cruelty or desertion without cause for two years and upwards. In all cases except dissolution of marriage, this divorce court is required to act on "principles and rules which in the opinion of the said court shall be as nearly conformable to the principles and rules on which the Ecclesiastical courts heretofore acted." This Act and the principles on which it is administered is material in Canada as it virtually forms the divorce law of British Columbia.

Between the reign of Henry VIII. and the passing of this Act, although Parliament refused to give effect to the proposed *Reformatio Legum Ecclesiasticarum*, it commenced the practice of passing special acts of Parlia-

ment granting divorces in individual cases. Relief of this kind could, of course, only be obtained by the wealthy which led to Mr. Justice Maules' memorable address to a prisoner indicted before him for bigamy. The prisoner's wife had robbed him and run away with another man, and he had married again without obtaining a divorce, and in sentencing him to one hour's imprisonment the learned Judge said, "You should 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 a hundred, or a 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 enabled 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."

This humourous statement correctly indicates the preliminary steps which were usually necessary in order to obtain a Parliamentary divorce in England.

In Canada as we have seen, in Nova Scotia, Prince Edward, New Brunswick, and British Columbia, there are Provincial Divorce Courts, but none in Quebec, Ontario, Manitoba, Saskatchewan and Alberta, or any of the Territories, and therefore residents of all of these Provinces can only obtain divorces by application to the Dominion Parliament. All the Provinces of the Dominion are in effect foreign countries as regards each other

in the matter of divorce, and their Provincial courts have no jurisdiction to dissolve marriages except as against parties *bonâ fide* domiciled within their borders. It is not therefore competent for a person to seek a divorce in one Province against a person domiciled in another Province. One result of this brief survey of the marriage law is to demonstrate that it is not uniform throughout Canada. This of itself is a defect which should be remedied without delay.

Then, not only is the law not uniform, but its administration is not uniform. In the Maritime Provinces and British Columbia there are Provincial Divorce Courts, and a different law as to divorce prevails in the Maritime Provinces to that in British Columbia. In all the other Provinces there are no Divorce Courts at all, and the remedy for offences against the matrimonial bond must be sought in the Dominion Parliament, and those who profess to know say that that is a far from satisfactory tribunal.

If Parliament desires to continue its legislative functions in matrimonial cases, which, by the way, is a glaring exception to our normal method of administration of justice, then proper provision should be made for hearing such cases by a small committee of Parliament composed principally of lawyers, and the proceedings should be conducted as nearly as possible in accordance with the established usages of Courts of Justice.

Proposed Remedial Legislation.

It may perhaps not be out of place here to offer some suggestions as to the way in which the marriage law of Canada may be put on a more satisfactory footing.

In the first place it seems desirable that all Provincial Matrimonial Courts should be superseded by one Court to be established for the whole Dominion, which Court might hold sessions in each Province once a year, and the decisions of this Court might be appealable to the Supreme Court of Canada. It might be worth considering whether this jurisdiction might not be assigned to the Exchequer Court.

One advantage of this would be that the administration of the law of divorce would then be uniform throughout Canada, and a divorce, when granted, would be unimpeachable throughout the Dominion. This is an important point, because doubts often arise where there are separate jurisdictions in matters of divorce, whether a divorce granted in one jurisdiction is valid in another. It is illustrated in the neighbouring Republic, where each state has an independent divorce jurisdiction, and doubts frequently arise whether a divorce granted by the courts of one state are of any validity in the courts of another state.

It should also be made clear that the provisions of the Imperial Statute, 26 Geo. 2, c. 33, s. 13, as to pre-contracts is the law throughout Canada.

It should also be made clear by some declaratory enactment (1) that the statute 32 Hen. 8, c. 38, contains the only prohibitions against matrimony which are by law required to be observed in Canada. Also (2) that no ecclesiastical body or person has any power to create any other prohibitions, or any jurisdiction to dissolve or annual any *de facto* marriage in Canada. And a penalty should be imposed on all persons publishing or promul-

gating any sentence, decree or judgment purporting to annul or dissolve any *de facto* marriage of any person in Canada made, or purporting to be made, by any person whomsoever, without due authority of law. Because if such sentences have no legal effect the public should be protected from the annoyance of any such usurped and unlawful exercise of jurisdiction.

Furthermore, some restraint is necessary to be imposed on all persons authorized to solemnize matrimony from directly or indirectly making use of their office for ulterior purposes.

Suggestion for Dominion Legislation.

1. Whereas doubts have arisen as to the law governing impediments to matrimony in Canada it is hereby declared that those referred to in the statute passed in the 32nd year of His late Majesty King Henry VIII. are the only impediments or prohibitions in force in this Dominion of Canada.

2. It is further declared that the prohibitions or impediments to matrimony referred to in the said last mentioned statute are those which were specifically set forth in a certain statute passed in the 27th year of His said late Majesty, Chapter 7, as modified by the Statute of the Parliament of the United Kingdom passed in the seventh year of His late Majesty King Edward the Seventh, Chapter 47, and no others, that is to say (*specifying them*).

3. No marriage which has been duly solemnized according to law shall be impeachable by reason of the existence of any pre-contract of marriage which was not duly solemnized according to law.

4. It is further declared that no spiritual court, or Court Christian, has any jurisdiction, power or authority to annul any *de facto* marriage, or to grant a divorce, in the Dominion of Canada.

5. Any person hereafter publishing any sentence judgment or decree purporting to annul the marriage of any persons in Canada, or to grant any divorce to any person or persons resident in Canada, which shall have been made, or purported to be made, by any person, power, or authority whatsoever not having lawful jurisdiction to make such sentence, judgment or decree, shall on conviction be subject to a penalty of $..... which shall be recoverable by anyone who shall sue for the same.

6. All marriages which shall hereafter be celebrated between persons within the prohibited degrees of consanguinity or affinity shall be absolutely null and void to all intents and purposes, whatsoever: (see Imp. Stat. 5-6 W. 4, c. 54, s. 2).

If a Dominion Court for Matrimonial causes should be established it would of course be necessary clearly to define its jurisdiction and limit the causes for which, divorces may be granted, and to make explicit provisions as to the effect of a divorce upon the rights of the parties as to re-marrying in the lifetime of each other. At present it may be noted that it is customary in divorce acts to grant to "the innocent party" who in fact may be really as guilty as the "guilty party," a right to re-marry, and to say nothing as to whether or not "the guilty party" may also re-marry. As a matter of fact "guilty" parties do re-marry, or purport to re-marry, and

it is possible that thereby innocent people may be led into a false position.

If it is the intention of the Legislature that a divorce shall not give any right of re-marriage to a "guilty party," then that should be plainly declared to be the law.

Suggestion for Provincial Legislation.

One of the grievances which has been revealed by the recent discussion is the fact that certain ministers of religion authorized by statute to solemnize matrimony make use of the public authority thus conferred on them to propagate their own peculiar religious views on persons coming to them for the solemnization of their marriage. This is a clear abuse of a statutory power. The right to solemnize matrimony is given for public purposes, viz., to secure the due solemnization of marriages; that is its purpose, and no other. Parliament in conferring this power had no intention that it should be used by those to whom it is given as a means for promoting any particular form of religious belief—or as a means for depriving any person of, or compelling him to forfeit or agree to give up, any right which the law gives him.

By the law of Ontario, and presumably also by the law of Quebec, and all the other Provinces, a father has a right to control the religious education of his children, and to bring them up in his own faith: but some ministers of religion, having the right to solemnize matrimony, utilize their office for the purpose of exacting promises, having for their object the giving up of this right by persons coming to them to be married. It may be answered, no one need give any such promise unless he

pleases, but if the minister teaches, as some do, that the marriage will be null and void unless he solemnizes it, and he refuses to solemnize it unless the promise is given, it is clear that a proselytising engine is placed in the hands of persons authorized by statute to solemnize matrimony which the Legislature never intended to give them. That appears to be a real grievance which ought to be remedied, and would appear to be a matter within Provincial control—and the following enactment is suggested:—

1. No person authorized to solemnize matrimony shall exact or require directly or indirectly from either of the persons desiring to have their marriage solemnized before him, any promise or agreement whatever touching the religious education or faith of the children which may be the issue of such marriage, or the religious faith or belief of such persons or either of them, and all such promises exacted or required, or given or made contrary to the provisions of this Act, are hereby declared to be null and void, and of no force or effect whatever.

2. Any person contravening the provisions of this Act shall be liable to a penalty of $..... to be recoverable by any one who shall sue for the same.

3. Any person convicted of a breach of this Act shall, on conviction, cease to be qualified to solemnize matrimony in this Province.

NOTE 1.—I do not wish to be considered to be an advocate of divorce; personally I am opposed to absolute divorces and think that according to the true interpretation of Scripture marriage is indissoluble in the lifetime of the parties, and that the only divorce properly grantable is *à mensa et thoro*. I also think it is always unfortunate when the temporal law permits a violation of the Divine law, or what is generally believed to be the Divine law. At the same time there is undoubtedly a difference of opinion as

to what is really the Divine law on this point, even among Christians; and many, who are not Christians, entertain no scruples whatever as to the propriety of divorces *à vinculo*. If, in deference to this adverse opinion, divorces are granted in Canada, *à vinculo matrimonii*, then it appears to me to be better that they should be granted judicially, and for well defined causes, and should not be granted according to the fluctuating opinions of a Parliamentary committee.

The subject of the indissolubility of the marriage bond has been recently discussed in two works, one, *The History of Divorce and Marriage*, by Rev. H. J. Wilkins, D.D., and the other, *The Question of Divorce*, by Dr. Gore, the present Bishop of Oxford, the latter of which is perhaps all the more valuable as being the work of a man who says he formerly held laxer views on the subject; and to these two works I beg to refer those reading the foregoing pages who wish further light on that branch of the subject.—G. S. H.

NOTE 2.—It was the sale of Papal dispensations or "indulgences" for the purpose of raising money to build St. Peter's at Rome, which led to the Reformation in Europe. It was the dispensation granted by Pope Julius to Henry VIII., authorizing him to violate "God's Law" (Lev. xviii, 16), by marrying his brother's widow, which ultimately led to the Reformation of the Church of England; and it was an attempt by James II. to dispense with law which cost him his crown, and led to the English Revolution of 1688 —G. S. H.

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