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## CANADIAN PRIVATE INTERNATIONAL LAW RULES RELATING TO DOMESTIC RELATIONS

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### I—MARRIAGE[1]

Marriage is generally considered as a personal status, not strictly a *res* but savouring of a *res*, created and governed by the law of the domicile which is the *situs*. It also pertains to the nature of a contract due to the consensual aspect of the transaction. This contractual aspect involves any form of mutual consent from a formal ceremony to a mere oral exchange of promises.

There is agreement among the Canadian provinces that the formalities of marriage, *e.g.* whether a contract came into existence, are governed by the law of the place of celebration[2] while the capacity of the parties to enter into the contract of marriage[3] is governed by the law of their domicile[4]. In all provinces the courts will refuse to give effect to a foreign marriage which is contrary to the local public policy, although they may in certain cases give limited recognition to it.[5]

As already mentioned, the incidents of the marriage pertaining to form are governed by the law of the place of celebration.[6] If the marriage solemnized

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[1]In general see Falconbridge Essays on the Conflict of Laws, (2d. ed., 1954) pp. 663 *et seq.*; [1932] 4 D.L.R. 1; Johnson, The conflict of Laws with Special Reference to the Law of the Province of Quebec, vol. 1 (1933) pp. 274 *et seq.*; Baxter, The Law of Domestic Relations 1948-1958 (1958), 36 Can. Bar Rev. 299; Casgrain, La validité d'un mariage célébré hors de la province de Québec (1950), 10 R. du B. 14.

[2]*Berthiaume v. Dastous*, [1930] A.C. 79, [1930] 1 D.L.R. 849, noted (1930), 8 Can. Bar Rev. 696.

[3]e.g. age.

[4]*Johnston v. Hazen* (1914), 43 N.B.R. 154.

[5]For proof of foreign marriage see Power, The Law of Divorce in Canada (1948) pp. 268-9.

[6]*Berthiaume v. Dastous, supra* footnote 2 *Jodoin v. Mower*, [1953] S.C. 253 (Que.); C.C. 135; *Sedgewick v. Sedgewick* (1953), 9 W.W.R. (N.S.) 704 (Sask.). *Johnston v. Hazen, supra*, footnote 4; *Harris v. Cooper* (1871), 31 U.C.Q.B. 182.

in the foreign country is void as to form, there is no marriage anywhere, although the ceremony or proceedings if conducted in the place of the parties' domicile would be considered a good marriage. It is also immaterial that the foreign form would not be sufficient for a marriage celebrated in the place of the domicile. If the parties went abroad for the purpose of evading the formalities of their domiciliary law, the marriage would not be recognized in Quebec.[7]

In the case of minors, the consent of parents where required has been characterized as a matter of form,[8] while in Quebec it has been considered a matter of capacity.[9] If the *lex celebrationis* does not prescribe any solemnities at all but recognizes a marriage by declaration to third parties or a mere *de facto* marriage, it will be recognized in the Canadian provinces.[10] Canadian courts however do not recognize as marriage every type of union between man and woman and have adopted the view expressed in *Hyde v Hyde*[11] that marriage denotes only "a voluntary union for life of one man and one woman to the exclusion of all others." Any marriage concluded abroad which satisfied this test will be recognized in the various provinces. Although on the ground of public policy our courts will not in principle recognize the legal consequences of relations between men and women arising from some other kind of union, the tendency is to give a certain recognition to a marriage which has taken place in countries where polygamy is the usual form of union. Thus in *re Succession Duty Act; Yew v. Atty.-Gen. for B.C.*,[12] a domiciled Chinese died while temporarily present in British Columbia, leaving considerable property in that province. He was survived by two wives lawfully married in China. It was held that both were to be treated as "wife" for the purpose of fixing the rate of succession duty payable, on the ground that the question did not have any moral or religious aspect but simply involved the business of collecting taxes. In *re Immigration Act; in re Leong Ba Chai*,[13] the courts went even further, since they held that where the *lex loci contractus* and the law of the domicile both concur they will recognize as lawful wives women who have the legal status of

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[7]C.C. 135; *Cholette v. Jones* (1938), 45 R.L. (n.s.) 111, (Que.); *N. v. T.*, [1949] S.C. 327 (Que.); *F. v. G.*, [1951] S.C. 458, (Que.). *Pearson v. Barrett*, [1948] S.C. 65. (Que.).

[8]*Stewart v. Stewart* (1924), 56 O.L.R. 57. See also *Hunt v. Hunt* (1958), 14 D.L.R. (2d.) 243. (Ont.).

[9]*Agnew v. Gober* (1907), 32 S.C. 266, (1910), 38 S.C. 313 (Que. Rev.), *contra Redshaw v. Redshaw*, [1942] S.C. 109 (Que.)

[10]*Forbes v. Forbes* (1912), 3 O.W.N. 557, 3 D.L.R. 243; for proxy marriages see Carter, Proxy Marriages (1957), 35 Can. Bar Rev. 1195.

[11](1866), L.R. 1 P. & D. 130.

[12][1924] 1 D.L.R. 1166 rev. [1923] 2 D.L.R. 52 (B.C.), noted (1930), 8 Can. Bar. Rev. 187, also [1932] 4 D.L.R. 26.

[13]105 C.C.C. 136, [1953] 2 D.L.R. 766 (B.C.) aff'd., [1954] S.C.R. 10, 107 C.C.C. 337, [1954] 1 D.L.R. 401. See also in *re Dedar Singh Bains* (1954), 13 W.W.R. (N.S.) 90.

secondary wives in a country where polygamy is not illegal, and by consequence also recognize as legitimate the children by such women if they are recognized as legitimate under the law of the father's domicile at the time that status is acquired. On the other hand, in *Lim v. Lim*[14], the same British Columbia courts refused to entertain an action for alimony even though the parties, now domiciled in that province, were domiciled in China at the time of the ceremony and the marriage was solemnized there. Recently, in *Kaur v. Ginder, Ginder v. Kor*,[15] it was stated again that British Columbia courts have no jurisdiction to give or enforce any matrimonial remedies with respect to a polygamous marriage. Yet the court held that although the marriage was contracted by a British Columbia, domiciliary it would be recognized if valid by the *lex loci celebrationis* and, therefore, be a complete bar to the parties thereto validly contracting a subsequent monogamous marriage during his or her spouse's lifetime. Where the marriage has been contracted in unsettled parts of the country between a "native" and a "white" person according to local custom, it has been held that the marriage is valid if the parties intended the union to be monogamous.[16]

Questions pertaining to the intrinsic validity of the marriage, such as capacity to marry, prohibited degrees of consanguinity, as well as the attributes of the matrimonial status, are governed by the law of the domicile.[17] This is the ante-nuptial domicile of each party at the time of the marriage if they do not share a common domicile. If at the time of the marriage one or both parties are by their domiciliary law or laws incapable of marrying each other, their marriage wherever celebrated is invalid.

Where a divorce decree is coupled with a disability on the capacity to marry again within a prescribed period and a marriage takes place within that period, it has been held that if the parties at the time of the remarriage are domiciled within the province enacting the prohibition and the marriage is solemnized outside, it will be invalid. If, on the other hand, the parties are no longer domiciled within that province, their capacity to marry is governed only by the laws of the new domicile.[18]

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[14][1948] 1 W.W.R. 298, [1948] 2 D.L.R. 353 (B.C.).

[15](1958), 13 D.L.R. (2d) 465, 25 W.W.R. 532 (B.C.).

[16]*Re Sheram* (1899), 4 Terr. L.R. 83; *Robb v. Robb* (1890), 20 O.R. 591; *Fraser v. Pouliot & Jones* (1885), 13 R.L. 1; 13 R.L. 520, 12 Q.L.R. 327; *Connolly v. Woolrich & Johnson* (1867), 11 L.C.J. 197, (1869) 1 R.L. 253 (Que. C.A.). Note that the solemnization abroad of marriages in which at least one of the parties is a British subject is provided for in the Foreign Marriage Act 1892, 55 & 56 Vict. c. 23. supplemented by the British Subjects (Facilities Act) Act 1915, 5 & 6 Geo. V, c. 40, and The Marriage with Foreigners Act 1906, 6 Edw. VII, c. 40.

[17]*Dejardin v. Dejardin,* [1932] 2 W.W.R. 237 (Man.); *Miller v. Allison,* [1917] 2 W.W.R. 231, 24 B.C.R. 123, 33 D.L.R. 144; *Johnston v. Hazen, supra,* footnote 4.

[18]Note that a distinction must be made between prohibitions which exist until the decree of divorce is final and absolute and those which follow that decree: *Crosby v. Constable* (1957), 23 W.W.R. 32, 10 D.L.R. (2d.) 220 (B.C.). In general see *Hellens*

## II—MATRIMONIAL PROPERTY

Marriage affects the property rights of the spouses in many ways and conflict of laws questions usually arise concerning the property owned by the parties at the time of their marriage and that which they may acquire subsequently. A distinction must also be made between movables and immovables. The solution to these conflictual problems will in turn depend upon whether or not there exists an express or implied marriage contract or settlement.

### A Marriage Contract or Settlement Express or by Operation of Law

A man and a woman who are about to marry may wish to make an agreement concerning their financial affairs. If the parties are domiciled in different legal units and they do not indicate which law shall govern their agreement, the courts will have to determine that law. As a general rule, the law of the matrimonial domicile of the spouses is held to be applicable and this is interpreted as the place where the husband was domiciled at the time of the marriage.[19] This is only a presumption which can be rebutted by the surrounding circumstances of the case. Thus in Quebec, article 8 of the Civil Code states that deeds are construed according to the laws of the place where they were passed, unless the parties have agreed otherwise, or by the nature of the deed or from other circumstances it appears that the intention of the parties was to be governed by the law of another place. The proper law, once determined, will govern the interpretation and effect of the contract.[20] In Quebec also the capacity to conclude a marriage contract or settlement is governed by the law of each party's domicile at the time of contracting. It would seem that

*v. Densmore* (1957), 10 D.L.R. (2d.) 561 (Can.) reversing (1956), 19 W.W.R. 252, 5 D.L.R. (2d.) 200 affirming 17 W.W.R. 174, 1 D.L.R. (2d.) 132 (B.C.), noted Kennedy (1956), 34 Can. Bar Rev. 825 (remarriage after a decree dissolving a prior marriage has been pronounced but before time for appealing such decree has expired); *Colvin v. Colvin* 5 W.W.R. (N.S.) 648, [1952] 3 D.L.R. 510 (B.C.); *Bevand v. Bevand,* 35 M.P.R. 244, [1955] 1 D.L.R. 854 (N.S.); *Re Murdock Estate; Macfarlane v. Murdock,* 3 W.W.R. (N.S.) 19, [1951] 4 D.L.R. 251 (B.C.); *Toovey v. Toovey* [1950], 2 W.W.R. 142 (B.C.); *Gill v. Gill,* [1947] 2 W.W.R. 761 (B.C.); *Dahl v. Dahl,* [1951] 2 W.W.R. (N.S.) 392, (B.C.); *Re Eaton* [1922] W.W.R. 236, 30 B.C.R. 243; *Brown v. Brown* (1956), 20 W.W.R. 321 (B.C.). Where a decree of divorce imposes a permanent restriction on the remarriage it will be considered as final and the restriction will not be enforced.

[19]In *Re Jutras Estate,* [1932] 2 W.W.R. 533 (Sask. C.A.), at p. 556, it was stated that the parties to the contract may agree expressly or impliedly that the law of any country shall govern their proprietary rights. Note that the term matrimonial domicile could be extended so as to mean the intended domicile of the husband, that is, the country in which they intended to become and did become domiciled after the marriage, but this would leave property rights unsettled until the elements of domicile are present.

[20]For an interesting case interpreting a marriage contract as to dower see *Jamieson v. Fisher* (1863), 2 E. & A. 242 affirming 12 U.C.C.P. 601.

the same rule prevails in the common-law provinces although one could argue that all the incidents of the contract should be governed by its proper law.

The form of the contract is governed by the proper law or the *lex loci contractus*. The latter view prevails in Quebec by application of article 7.

In all provinces the interpretation or effect of the marriage contract or settlement cannot be varied by a subsequent change of domicile.[21]

The contract, if valid by the proper law, will be held valid everywhere and will govern the rights of the spouses in respect of all movable property which is possessed, or is afterwards acquired in a jurisdiction other than the matrimonial domicile, even if at that time the parties have acquired a new domicile there, unless it is contrary to the law of the place where it is sought to be enforced.

In the common-law provinces the effect of the agreement in creating an interest in foreign land will be governed by the *lex situs*, including its conflict rules.[22]

In Ontario it has been held that where there is a valid marriage contract it will govern the mutual rights of the consorts with respect to all Ontario immovables within its terms which are then possessed or are afterwards acquired so long as the Ontario statute of frauds has been complied with and the contract is not repugnant to Ontario law.[23] It makes no difference whether the matrimonial domicile of the parties at the time of the contract was in Ontario or elsewhere. The proper law of the contract will apply to both movables wherever situated and immovables in Ontario whenever acquired. Foreign immovables would still seem to be governed by the *lex situs*.[24] The same rules will apply in the absence of a specific contract if the law of the matrimonial domicile creates for the spouses a sort of nuptial contract under which there is community of property between them.[25] In Quebec no distinction is made between movable and immovable property and the proper law of the contract will govern both.

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[21]Falconbridge op cit., p. 107, Que C.C. 1265; *Tetrault v. Baby* (1939), 78 S.C. 280; *Gauvin v. Rancourt*, [1953] R.L. 517 (Que. C.A.); *Re Parsons* (1926), 29 O.W.N. 430, [1926] 1 D.L.R. 1160 (the law was deemed to make a contract for the parties). *Re Tremblay*, [1931] O.R. 781, at p. 784, 41 O.W.N. 162.

[22]Dicey, Conflict of Laws (7th ed. 1958), rule 85.

[23]*Ibid.* exception 2. *Taillifer v. Taillifer* (1891), 21 O.R. 337 (ante-nuptial contract made in Quebec). See also in *Re Jutras Estate, supra* footnote 19, and in *re De Nicols; De Nicols v. Curlier*, [1900] 2 ch. 410.

[24]*Re Tremblay, supra*, footnote 21. It has been held in *Re Klaukie's will* (1873), 1 B.C.R. (pt. 1) 76 that a nuptial contract whereby the husband agrees not to alienate his property from his wife will apply even to his real estate in a country other than his domicile.

[25]*Re Parsons, supra*, footnote 21. *De Nicols v. Curlier* [1900] A.C. 21, rev. [1898] 2 Ch. 60 restoring [1898] 1 Ch. 403 and in *Re Nicols; De Nicols v. Curlier, supra*, footnote 23.

In the absence of an express or implied marriage contract or settlement the property rights of the spouses are governed by the law of the matrimonial domicile as regards present and future movable property in the common-law provinces and both movables and immovables in Quebec.[26] The difficulty is to determine whether these rights can be modified by a subsequent change of domicile.

The Editors of Dicey state that "the rights of husband and wife to each other's movables, both *inter vivos* and in respect of succession are governed by the law of the new domicile, except in so far as vested rights have been acquired under the law of the former domicile."[27] The chief application of the rule, which is not settled law in England, lies in the field of succession and here a problem of characterization arises. A distinction must be made here between matters of succession which are governed by the domicile of the husband at the time of his death and matrimonial property which is governed by the law of the matrimonial domicile.[28] If the spouses were domiciled in a state hy the law of which they are separate as to property in the absence of an express contract, the subsequent acquisition of a domicile in Quebec, for instance, does not have the effect of creating a community of property between them.[29] They cannot be deprived of their property or contractual rights existing before the change of domicile. On the other hand it can be argued that movable property acquired up to the change of domicile will continue to be owned on a separate basis while property acquired afterwards will be subject to the new law. This seems to be the view of the Nova Scotia courts which held that the mutual rights of the husband and wife as to movable property acquired by the law of the matrimonial domicile are not affected by a change of domicile, but rights acquired after such change are governed by the law of the new domicile.[30] It is submitted, however, that a better interpretation is that the law of the matrimonial domicile should continue to govern the property rights of the spouses even as to movable property acquired in the new domicile. To adopt another view would endanger the rights of the wife. It would also be inconsistent to say on the one hand that the matrimonial regime has not changed, and yet, in a case where spouses,

[26] *Astill v. Hallée* (1877), 4 Q.L.R. 120 (Rev.); *Belanger v. Carrier*, [1954] Q.B. 125, rev. [1954] R.L. 202; *McMullen v. Wadsworth* (1899), 14 A.C. 631.

[27] Rule 129, which is based on *Lasley v. Hog* (1804), 4 Paton 581.

[28] Falconbridge, *op. cit.*, p. 105 *et seq.* If the court characterizes the problem as one of succession to movables, the wife's right will be governed by the law of the domicile of the husband at the time of his death and immovables by the *lex rei sitae*. If it characterizes it as a matter of matrimonial property the law of the domicile of the husband at the time of the marriage will apply. *Cf. Beaudoin v. Trudel*, [1937] 1 D.L.R. 216, [1937] O.R.1 to *Re Parsons, supra*, footnote 21.

[29] *Gauvin v. Rancourt, supra*, footnote 21; *Astill v. Hallée, supra*, footnote 26. Falconbridge, *op. cit.*, p. 105; Dicey, *op. cit.*, rule 129, comment.

[30] *Pink v. Perlin & Co.*, (1898), 40 N.S.R. 260.

whose matrimonial domicile was New York, remove their domicile to Quebec, hold that one-half of the property acquired by the wife there belongs to the husband. In Quebec it is well settled that the property rights of spouses, married without a marriage contract, are governed as regards even immovables in Quebec by the law of their matrimonial domicile and are not affected by a change of domicile.[31]

In the common-law provinces, in the absence of a marriage contract express or implied by the law of the matrimonial domicile, the *lex rei sitae* applies whether the immovable property acquired is situated within the jurisdiction or abroad. From the point of view of simplicity it would seem better to adopt the Quebec view that the law of the matrimonial domicile will govern the property rights of the spouses both present and future and whether movable or immovable.

## III—MATRIMONIAL DOMICILE AND CAPACITY

Does the capacity of a married woman to contract, dispose of her property, or to appear in legal proceedings change with her domicile, or is it fixed once and for all by the matrimonial domicile? For instance, where consorts whose matrimonial domicile is in New York move their domicile to Quebec, will the wife find her capacity limited so that she cannot sue or contract without the authorization of her husband, as she could in New York? The problem arises quite often in this province where the wife must obtain the authorization of her husband to contract or appear in judicial proceedings.[32]

What if land is involved? Will her capacity to dispose of that land be governed by the *lex rei sitae* or by the *lex domicilii?* In the province of Quebec it would appear that the authorization of the husband is considered as a matter of capacity to be governed in all cases by the law of her new domicile,[33] while in the common-law provinces it would be considered as a matter of form[34] to be governed by the proper law of the contract. On the other hand, Dr. Johnson and Loranger[35] are of the opinion that the capacity of consorts as to their property rights is fixed once and for all by the law of the matrimonial domicile. It seems that this interpretation is not possible in the light of article 6 of the Quebec Civil Code.[36] In Ontario it has been held that the capacity of the wife to convey

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[31]Johnson, *op. cit.*, vol I, p. 379.

[32]C.C. 176, 177: See *Ryan v. Pardo,* [1957] R.L. 321 (Que.), capacity to sue is governed by the law of the plaintiff's domicile.

[33]C.C. 6; Lafleur, The Conflict of Laws in the Province of Quebec (1898), p. 70.

[34]*op. cit.*, p. 412.

[35]L'incapacité de la femme mariée (1898), 4 R.L. (n.s.) 145.

[36]But see *Laviolette v. Martin* (1861), 2 L.C.J. 61, 5 L.C.J. 211, 11 L.C.R. 254 (Que. C.A.). Note that in Quebec the right to make gifts between consorts is governed by the law of the domicile of the consorts at the time they are conferred: *Gauvin v. Rancourt, supra,* footnote 21.

land is governed by the *lex situs*[37] and not by the laws of the place of her domicile. As in the case of matrimonial property there still exists much confusion in both the civil law and common-law provinces. Clarification of the law could do much in removing the present uncertainties.

## IV—NULLITY

### (a) Jurisdiction of Courts with Regard to Annulment

The law of marriage, including annulment, applied in the common-law provinces is derived from English law,[38] and English conflict rules have had a great influence on the rules adopted by their courts.[39]

In *Shaw v Shaw*,[40] a British Columbia decision, it was held that where the marriage, by application of the proper law, is voidable, the court has no jurisdiction to annul it if the petitioning wife is resident in the province but the respondent husband is neither resident nor domiciled there at the time of the petition and the marriage was not celebrated in the province. The residence of the petitioning wife is not sufficient to give jurisdiction to grant the decree.[41] In *Fleming v. Fleming*,[42] the Ontario court held that in the case of a voidable marriage considerations governing jurisdiction in divorce cases are applicable by analogy and the jurisdiction is based on the domicile of the parties.[43] On the

[37]*Landreau (Landry) v. Lachapelle*, [1937] 2 D.L.R. 304, [1937] O.R. 444 affirming [1937] 1 D.L.R. 87, [1936] O.R. 569 and criticism by Falconbridge *op. cit.*, p. 629 *et seq.* (Here the consorts never changed their domicile). See also Dicey, *op. cit.*, p. 515.

[38]Since the enactment of the B.N.A. Act, the Federal Parliament has exclusive jurisdiction to legislate on the subject of marriage and divorce. The provinces retain exclusive power to legislate on the solemnization of marriage. Any legislation passed by provincial legislatures before the B.N.A. Act remains in force until amended or repealed by the Federal Parliament in case of marriage or divorce.

[39]In general Falconbridge, *op. cit.*, pp. 663 *et seq.* and Kennedy, Recognition of Foreign Divorce and Nullity Decrees (1957), 35 Can. Bar Rev. 628 at 647 *et. seq.*

[40][1945] 1 W.W.R. 156, 61 B.C.R. 40, [1945] 1 D.L.R. 413 aff'd., [1945] 3 W.W.R. 577, 62 B.C.R. 52, [1946] 1 D.L.R. 168. *Cf, Gower v. Starrett*, [1948] 2 D.L.R. 853, [1948] 1 W.W.R. 529 (B.C.).

[41]See the English case *De Reneville v. De Reneville*, [1948] P. 100, 64 T.L.R. 82 and *Inverclyde v. Inverclyde*, [1951] P. 29 overruled by *Ramsay-Fairfax (Otherwise Scott Gibson) v. Ramsay-Fairfax*, [1953] 3 W.L.R. 849, [1953] 3 All E.R. 695 (C.A.), which held that common residence of the parties was sufficient. In other words, there is no difference between void and voidable marriages in the matter of jurisdiction of courts. Also *Easterbrook v. Easterbrook*, [1944] P. 10; and *Hutter v. Hutter*, [1944] P. 95. See Grodecki, Recognition of foreign nullity decrees (1958), 74 L.Q. Rev. 225.

[42][1934] 4 D.L.R. 90, [1934] O.R. 588.

[43]For the application of the Divorce Jurisdiction Act 1930 to the annulment of a voidable marriage: *LeBlanc v. LeBlanc*, [1955] 1 D.L.R. 676 (N.S.). See also s. 13 of The Matrimonial Causes Act 1937 (Engl.) 1 Ed. VIII & 1 Geo. VI c. 57. In *Sheppard v. Sheppard*, [1947] 2 W.W.R. 826 (B.C.) it was said that the court does not acquire jurisdiction over the subject matter by mere appearance of the defendant

other hand, if both parties are domiciled in the province it would not matter whether the marriage is void *ab initio* or voidable and the local court will have jurisdiction. In other words, where the marriage is voidable it would appear that domicile of the respondent husband is the basis of jurisdiction.[44] The wife acquires the domicile of the husband and the court of the common domicile has jurisdiction.[45] Yet where the marriage is void *ab initio* each party retains his or her domicile and the domicile of the petitioner[46] or respondent[47] within the jurisdiction seems sufficient.

Residence of both parties or of the respondent is also sufficient to give jurisdiction in the case of a marriage void *ab initio,* while the residence of the petitioner alone is not.[48] In *Hutchings v Hutchings,*[49] it was held that the court has no jurisdiction to entertain an action for a declaration of nullity where the respondent is neither domiciled nor resident within the province and the marriage was not celebrated therein.[50] The rationale for these decisions is that since there has never been a legal marriage and a judgment for the plaintiff is only declaratory, there is no departure from the rule that a change of matrimonial status can be affected only by the courts of the matrimonial domicile. The fact that the marriage has been celebrated within the jurisdiction, irrespective of the domicile or residence of the parties, has also been adopted by some courts as a good basis for jurisdiction.[51]

In the province of Quebec no specific article of the Code of Civil Procedure gives the courts jurisdiction in matters of annulment of marriage but they have

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(voidable marriage). The act confers jurisdiction on a provincial court to entertain divorce proceedings brought by a deserted wife when her husband has become domiciled outside the province See *infra.*

[44]*Diachuk v. Diachuk,* [1941] 2 W.W.R. 599 (Man.); *Fleming v. Fleming, supra,* footnote 42; *Szrejher v. Szrejher,* [1936] O.R. 250, [1936] 2 D.L.R. 413; but see *G. v. G.,* 22 Sask. L.R. 376, [1928] 1 W.W.R. 651 and *Reid v. Francis,* [1929] 3 W.W.R. 102, 24 Sask. L.R. 1, [1929] 4 D.L.R. 311.

[45]*Solomon v. Walters* (1956), 18 W.W.R. 257, (1956), 3 D.L.R. (2d.) 78 (B.C.).

[46] *Bevand v. Bevand, supra,* footnote 18. *Spencer v. Ladd; Finlay v. Boettner,* [1948] 1 D.L.R. 39, [1947] 2 W.W.R. 817 (Alta.), but see *Gower v. Starrett, supra,* footnote 40 and *Shaw v. Shaw, supra,* footnote 40 per Sidney Smith J.A.

[47]*Bevand v. Bevand, ibid,* at p. 856 (D.L.R.); *Manella v. Manella,* [1942] 4 D.L.R. 712, [1942] O.R. 630, noted (1934), 21 Can. Bar Rev. 149; of course domicile of both parties within the jurisdiction is sufficient, *Gill v. Gill, supra,* footnote 18.

[48]*Whitaker v. McNeilly* (1957-58), 23 W.W.R. 210, (1958), 11 D.L.R. (2d.) 90 (B.C.), relying on the *Ramsay-Fairfax* decision, *supra* footnote 47, although this was not necessary in that case; *Adelman v. Adelman,* [1948] 1 W.W.R. 1071 (Alta.); *Purdy v. Purdy,* [1919] 2 W.W.R. 551 (B.C.) (the residence must be bona fide.).

[49][1930] 4 D.L.R. 673, 2 W.W.R. 565, 39 Man. R. 66.

[50]See also *Manella v. Manella, supra,* footnote 47.

[51]*G v. G.,* [1928] 1 W.W.R. 651, 22 Sask. L.R. 376 (Voidable); *Reid v. Francis, supra,* footnote 44; *Hinds v. McDonald,* [1932] 1 D.L.R. 96; *Bevand v. Bevand, supra,* footnote 18; *Gower v. Starrett, supra,* footnote 40; *Spencer v. Ladd,* [1948] 1 D.L.R. 39; *Shaw v. Shaw, supra,* footnote 40.

generally based it on domicile within the province. In *Main v. Wright*,[52] the Court of Appeal based its view, erroneously in my opinion, on the ground that article 6 of the Civil Code, which declares that status is governed by the law of the domicile, is also a jurisdictional rule giving exclusive competence in matters of annulment (*ratione materiae*) to the courts of the domicile of the parties. Here the spouses were both domiciled in Washington, D.C. at the time of the petition. Their marriage had been celebrated in Quebec after the wife had obtained a divorce from a prior marriage in Vermont while she and her first husband were domiciled in Quebec. The court unanimously rejected the application of English law. The fact that the marriage took place in the province of Quebec could not give jurisdiction to the courts to dissolve it.[53] Quebec courts are *forum non-conveniens* in such cases, as they could not give an effective decree which would be recognized in the state of the domicile.[54] One of the judges would have been prepared to hold that since the marriage was absolutely null, the respondent-wife had never acquired a domicile in the United States and was still domiciled in the province of Quebec. However, impressed by his colleagues' views that the merits of a case cannot be invoked in the determination of a question of jurisdiction, he did not enter a dissenting opinion. Another judge emphasized that whether the marriage was absolutely or relatively null,[55] a decision of the court was necessary to put an end to the relationship. Consequently, the distinction had no effect on the question of jurisdiction, and the wife was deemed to have acquired the domicile of her husband. It would seem that the court erred in characterizing article 6 of the Civil Code as a rule of jurisdiction, while it is exclusively a rule of conflict of laws. Article 6 specifies the laws to be used in Quebec courts and not the courts which have jurisdiction. One must separate questions of choice of law from rules of jurisdiction. Article 6 does not suggest that the only court which has jurisdiction in matters of status is that of the domicile. Actually it should not matter which court exercises jurisdiction, so long as the proper law is applied by the court. In *Somberg v. Zaracoff and Rothblatt*,[56] which involved an almost similar situation, the Superior Court reaffirmed the competence of the court of the domicile, but here it took jurisdiction on the ground that the respondent wife was domiciled in

[52][1945] K.B. 105 (Que. C.A.).

[53]But see *Trott v. Parkes*, [1945] S.C. 1 (Que.).

[54]This is not necessarily true since here the conflict rules of the District of Columbia may recognise jurisdiction based on the place of celebration of the marriage. On the other hand, it would probably have recognized the Vermont divorce as valid on the basis of the full faith and credit clause and therefore the Quebec decree would not have been recognized.

[55]For the purpose of the discussion one may assume that the civil law notions of absolute and relative nullities are the same as the common-law notions of void and voidable.

[56][1949] S.C. 301 (Que.).

Quebec while the petitioner husband was domiciled in Ontario, and the decree could be effectively enforced since the petitioner was domiciled in Canada. The court professed to have considered *Main v. Wright,* but its decision is certainly not in agreement with it. Not only did the court in order to take jurisdiction examine the merits of the case to decide that, since the marriage was void *ab initio,* the wife had retained her domicile in Quebec, but the argument of effectiveness based on domicile in Canada was completely unfounded, as again it depended exclusively upon the views entertained by the Ontario courts on this problem.[57] Although the doctrine of *stare decisis* does not apply in Quebec, it is likely that the views of the Court of Appeal will prevail. This is unfortunate from the point of view of the arguments advanced in their support. It also restricts jurisdiction considerably. Yet the views of the Court of Appeal conform with the practice followed in matters of divorce and separation.

The modern trend in the common-law provinces which has recently been adopted by the English Court of Appeal in the *Ramsay-Fairfax* case seems to be that expressed by the British Columbia courts in *Gower v Starrett*:[58] that the elements which give jurisdiction in a nullity action are the same regardless of whether the declaration is sought on the ground that the marriage was void *ab initio* or merely voidable. Jurisdiction which cannot be conferred on the court by the attornement of the respondent thereto is based on the domicile of the parties, or on the residence of the respondent within the jurisdiction, or on the ground that the marriage was solemnized there. This is no doubt the best approach.

As in other areas of the law of domestic relations, clarification is needed and recent developments in Canada and in England indicate that this is under way. The preliminary step is to separate rules of jurisdiction from choice of law rules. Once a court has taken jurisdiction on the basis of the forum's rules to that effect, it is in a position to apply the proper law. To apply that law to ascertain even indirectly its jurisdiction is most illogical, as it implies a provisional decision on the merits, while under ordinary rules of procedure the question of jurisdiction is to be raised in *limine litis* as a preliminary exception. Local jurisdiction cannot be made dependent upon some foreign law, even though applicable by virtue of the forum's conflict rules, especially if important social interests are at stake. It is to be hoped that the principles expounded in *Gower v. Starrett* and in the *Ramsay-Fairfax* case will soon be adopted in all Canadian common-law jurisdictions.[59] In Quebec, short of legislative action it is doubtful whether the rules as stated in *Main v. Wright* will be modified.

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[57] In fact the Ontario courts would probably have recognized the decree. See *supra.*

[58] *Supra,* footnote 40.

[59] Note that in England the Report of the Royal Commission on Marriage and Divorce (Cmd. 9678) rests on the distinction between void and voidable. The Commission recommended that the bases of jurisdiction in respect of voidable marriages should be materially similar to those suggested in the case of divorce (domicile of either party

Once the courts have acquired jurisdiction they will apply the proper law relating to annulment, that is, the *lex celebrationis* or the *lex domicilii* of the parties at the time of the marriage.[60] In Quebec, a decree of nullity retroactively annuls the marriage but the courts by application of articles 163 and 164 of the Civil Code may grant putative effect to the marriage annulled. It will produce civil effects with regard to the husband, wife and children if contracted in good faith. If, on the other hand, good faith exists on the part of one of the parties only, it produces civil effects in favour of such party alone and the children issued from the marriage. This has been applied to parties domiciled in Quebec at the time of their marriage,[61] but it would seem logical that if by the law of the foreign domicile of the parties a similar effect is granted, it should be recognized in Quebec or in any other Canadian province.

### (b) Foreign Decrees of Nullity

A foreign decree of nullity granted by the courts of the domicile of the parties will be recognised.[62] Whether Canadian courts would recognize foreign decrees based on jurisdictional grounds similar to those prevailing in Canada is not yet settled. There is certainly great merit in Dr. Falconbridge's view that "In an ideal system of conflict of laws the cases in which a court exercises jurisdiction should correspond exactly with the converse cases in which it recognizes the binding force of judgments rendered by foreign courts."[63]

## V—JUDICIAL SEPARATION

In New Brunswick and Nova Scotia the Court of Divorce and Matrimonial Causes has jurisdiction to grant judicial separation, while this is exercised by the Supreme Court in Newfoundland.[64] Judicial separation can also be

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at commencement of proceedings, common residence at commencement of proceedings, and, where the last matrimonial residence was in England, the presence of the petitioner). The Commission also recommended that jurisdiction to declare a marriage void should be based on domicile or presence of the petitioner in England at the commencement of proceedings. The commission did not explicitly deal with the determination of void and voidable marriages. For an analysis and criticisms of these rules see Mann, The Royal Commission on Marriage and Divorce: Jurisdiction of the English Courts and recognition of Foreign Decrees (1958), 21 Mod. L. Rev. 1, at p. 12 *et seq.*

[60] *Hunt v. Hunt, supra,* footnote 8.

[61] *Stephens v. Falchi,* [1938] 3 D.L.R. 590, [1938] S.C.R. 354 (Que.); *Berthiaume v. Dastous, supra* footnote 2; *Baraket v. Eddy,* [1932] 70 S.C. 125 (Que.). *Flam v. Flitman* (1958), 14 D.L.R. (2d.) 174 (Que.).

[62] *Wilcox v. Wilcox* (1914), 6 W.W.R. 213, 24 Man. R. 93, 27 W.L.R. 359, 16 D.L.R. 491; *Fleming v. Fleming, supra,* footnote 42.

[63] *Op. cit.* p. 690, to the same effect Kennedy, *op. cit. supra,* footnote 39.

[64] *Hounsell v. Hounsell* (1949), 23 M.P.R. 59 (Nfld.).

obtained in Quebec and in the Western provinces, while Ontario Courts have held that they have no jurisdiction to grant a decree of separation.[65] Jurisdiction is generally based on domicile.[66] Thus, in Quebec, according to article 96 of the Code of Civil Procedure, the defendant must be summoned before the court of the husband's domicile or, if he has left his domicile, before that of the last common domicile of the consorts.[67] In Alberta jurisdiction to hear actions for judicial separation exists when both parties are domiciled in Alberta at the time of the commencement of the action or had a matrimonial home in Alberta when their cohabitation ceased, or are resident in Alberta at the time of the commencement of the action.[68] In British Columbia in *Jamieson v. Jamieson*,[69] it was held that a decree of judicial separation may be granted to a wife in the province wherein she has taken up permanent residence although the husband is not domiciled or permanently residing there, if she has been obliged to leave him because of his cruelty and misconduct and he is temporarily resident in British Columbia. Residence is certainly a good ground for jurisdiction especially if the conduct of the spouses causes a public scandal and so long as the defendant has had good notice of the action and an opportunity to defend.[70]

It has been held that foreign separation decrees will be recognized in Canada if rendered by the courts of the domicile of the spouses.[71]

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[65]Power, The Law and Practice Relating to Divorce (1948), p. 162.

[66]*Paslowski v. Paslowski* (1955), 17 W.W.R. 524 (Sask.).

[67]See for instance *Mills v. Morrison*, [1947] P.R. 282 (Que.); *Duval v. Panghorn*, (1944), 47 P.R. 120 (Que.); *Martel v. Bertrand* (1942) 45 P.R. 237 (Que.); *Irwin v. Gagnon* (1917), 23 R.L. (n.s.) 264 (Que.); *Brown v. Waldman* (1929), 32 P.R. 199 (Que.). However, in Quebec separation from bed and board is equivalent to divorce, while in the common-law provinces it does not affect the matrimonial status of the parties: consequently residence of the defendant should be sufficient. See Power, *op. cit.*, p. 285 *et seq.* Johnson, *op. cit.*, vol. III, p. 684 *et seq.*

[68]The Domestic Relations Act, R.S.A., 1955, c. 89, s. 7. It is doubtful whether the Alberta statute is constitutional, Power, *op. cit.*, p. 161 *et seq.*

[69](1908), 9 W.L.R. 419, 14 B.C.R. 59; *Manley v. Manley and Weeks*, [1939] 2 W.W.R. 44, [1939] 2 D.L.R. 787 (Sask.).

[70]*Cf. Miller v. Miller*, [1929] 3 W.W.R. 167 (Man.); *Burnett v. Burnett*, [1954] 1 W.W.R. 585, 61 B.C.R. 342, [1954] 3 D.L.R. 319. Note that an invalid foreign divorce is no defence to an action in separation. *Rexford v. Fraser*, [1942] 45 P.R. 24 (Que.).

[71]*Detro v. Detro*, [1923] 3 W.W.R. 690, 70 D.L.R. 61, at p. 63 (Alta.). In Quebec in *Ryan v. Pardo*, (*supra*, footnote 32), it is said that "article 96 applies exclusively to jurisdiction based on residence which according to *Le Mesurier v. Le Mesurier* would be recognized in certain circumstances as giving jurisdiction to decree separation." Note that there is no reason why Quebec courts should not recognize foreign separation decrees based on jurisdictional grounds similar to those found in article 96 of the Code of Civil Procedure. For a valid foreign decree as to separation of property see *Goudron v. Lemonier* (1883), 1 M.L.R. (S.C.) 160, 8 L.N. 100 (Que.) As to separation agreements see *Charron v. Montreal Trust Co.* [1958] O.W.N. 357 affirming [1958] O.W.N. 70.

## VI—DIVORCE

### (a) JURISDICTION[72]

Divorce can be obtained in the courts of all provinces except in Quebec[73] and Newfoundland,[74] where an Act of Parliament is necessary. The courts will entertain the action if in their eyes the husband is domiciled within the jurisdiction at the time of the commencement of the proceedings.[75] The citizenship of the parties, the place of celebration of the marriage, as well as the fact that the offence was committed outside the province, are immaterial.

In *Cook v. Cook and Atty.-Gen. for Alberta*[76] it was held that a wife deserted by her husband cannot acquire a domicile separate from him so as to give the courts of that domicile jurisdiction to dissolve the marriage, even though she was judicially separated from him. This decision has no application in Quebec where article 207 of the Civil Code, states that separation "...gives the wife the right of choosing for herself a domicile other than that of her husband." In order to diminish the harshness of the *Cook* rule in the common-law provinces, the Federal Parliament in 1930 passed the Divorce Jurisdiction Act,[77] whereby a wife may bring an action in the province where her husband was domiciled immediately prior to his desertion.[78] She must show that she has

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[72]See Falconbridge, *op. cit.*, pp. 726 *et seq.*; Read, Recognition and Enforcement of Foreign Judgments in the Common Law Units of the British Commonwealth (1938) p. 200 *et seq.*

[73]C.C. 185.

[74] See Kennedy, Conflict of Laws, Recognition of Foreign Divorce in Newfoundland (1954), 32 Can. Bar Rev. 211.

[75]*Myanduk v. Myanduk*, [1931] 1 W.W.R. 755, [1931] 2 D.L.R. 693 (Alta.); *Welsh v. Bagnall*, [1944] O.R. 526, [1944] 4 D.L.R. 439; *Harris v. Harris*, [1930] 1 W.W.R. 173 (Sask.), [1930] 4 D.L.R. 736; *Adams v. Adams* (1909), 11 W.L.R. 358 (B.C.); *Waggoner v. Waggoner* (1956-7), 20 W.W.R. 74 (Alta.); *Meise v. Meise*, [1947] 1 W.W.R. 949 (Sask.); *Kalenczuk v. Kalenczuk*, [1920] 2 W.W.R. 415, 13 Sask. L.R. 262, 52 D.L.R. 406 (C.A.); *Cutler v. Cutler* (1914), 6 W.W.R. 1231 (B.C.); *Newell v. Newell* (1957), 21 W.W.R. 572 (B.C.C.A.); *Mundell v. Mundell* (1958), 65 Man. L.R. 314; Service out of jurisdiction may be obtained in a matrimonial cause, Ontario Rule of Court 25 (1) (m). See also *Pearson v. Pearson*, [1951] O.R. 344, [1951] 2 D.L.R. 851.

[76][1926] 1 W.W.R. 742, [1926] A.C. 444, [1926] 2 D.L.R. 762, noted (1929), 7 Can. Bar Rev. 126.

[77]R.S.C., 1952, c. 84; Martin, The Divorce Act (1930), 8 Can. Bar Rev. 561; Read, The Divorce Jurisdiction Act 1930 (1931), 9 Can. Bar Rev. 73.

[78]*Levko v. Levko*, [1947] O.W.N. 702; *K. v. K.*, 17 M.P.R. 19, [1943] 2 D.L.R. 102 (N.S.); *L. v. L.*, [1943] 2 W.W.R., 308, [1943] 3 D.L.R. 333 (Sask. C.A.); *Mundell v. Mundell, supra*, footnote 75. Of course she can also sue him at his new domicile at any time after he has acquired it. She does not have to be a resident in the old or new domicile.

been deserted and that she has lived separate and apart from her husband for a period of at least two years, and is still so living at the time of the petition.[79]

Contrary to the rule prevailing in case of annulment, once the court has obtained jurisdiction it will apply its own internal law. No question of proper law arises. This seems to be justified only in cases where the court adjudicating the matter is that of the state or province, the law of which governs the status of the parties as man and wife. Questions of choice of law relating to status and of jurisdiction are separate, and to whatever basis resort is made to establish the jurisdiction of the court which adjudicates the rights of the parties, it is submitted that whether or not the divorce is to be granted should depend upon the domiciliary law. The divorce suit involves the detrmination of the status of the parties and consequently must be governed by the law of their domicile. Divorce must not be considered as a matter of jurisdiction alone.

### (b) Recognition of Foreign Divorces

Foreign divorces whether granted outside Canada or in one of the provinces will be recognised in all provinces, including Quebec.[80]

The recognition of foreign divorces is considered as a question of jurisdiction and not of choice of the proper law governing the merits of the action. It does not matter that the divorce has been granted for a reason which would not have been a ground for divorce in the province where the foreign decree is sought to be enforced, so long as the divorce was rendered by a court of competent jurisdiction according to the views of the forum.[81]

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[79]*McLeod v. McLeod*, [1931] 1 W.W.R. 811 (Alta.); Power, *op. cit.* s. 70. p. 285; *Schiach v. Schiach*, [1941] 1 W.W.R. 551 (Sask.), [1941] 2 D.L.R. 590; *Porkolab v. Porkolab*, [1941] 1 W.W.R. 535 affd. 2 W.W.R. 489, [1941] 3 D.L.R. 578 (Sask.). Note that there is no such thing as a Canadian domicile for the purpose of divorce: *Wilton v. Wilton*, [1946] O.R. 117, [1946] 2 D.L.R. 397; *Marriaggi v. Marriaggi*, [1923] 3 W.W.R. 849, [1923] 4 D.L.R. 463 (Man.) Note also that in New Brunswick s. 20 of The Married Women's Property Act, R.S.N.B., 1952, c. 140, states that under certain conditions set out, even though her husband may have acquired a domicile elsewhere, the wife's domicile will continue to be in New Brunswick so long as she maintains a *bona fide* residence in that province. Thus, a wife may sue for divorce if her husband is domiciled there at the time the action is brought or if she comes within the provisions of the New Brunswick statute, or the Act of 1930.

[80]*Gauvin v. Rancourt, supra* footnote 23; Johnson, Recognition of Foreign Divorce of Consorts Domiciled in Quebec at Marriage (1954), 14 R. du B. 301 *op. cit.*, vol. II, p. 1 *et seq.* Falconbridge *op. cit.*, p. 736 *et seq;* Power, *op. cit.*, p. 125 *et seq.;* Kennedy, *op. cit., supra* footnote 28.

[81]*Henderson v. Muncey*, [1943] 2 W.W.R. 120, 59 B.C.R. 57, [1943] 3 D.L.R. 515 affd. [1943] 3 W.W.R. 242, 59 B.C.R. 312, [1943] 4 D.L.R. 758 (C.A.); *Burpee v. Burpee*, [1929] 2 W.W.R. 128, 41 B.C.R. 201, [1929] 3 D.L.R. 18; *Goldenberg v. Triffon*, [1955] S.C. 341 (Que.). *Walker v. Walker*, [1950] 2 W.W.R. 411, [1950] 4 D.L.R. 253. (B.C.) (Collateral attack except by person not party to the original proceedings).

The rules adopted by Canadian courts to test a foreign court's jurisdiction reflect the rules for domestic jurisdiction. Thus they have adhered to the rule laid down in *Le Mesurier v Le Mesurier*[82] that the domicile of the husband in the Canadian sense is the basis of international jurisdiction in matters of divorce. The state, province or country in which, in view of the unity of domicile,[83] the husband has his domicile has sole jurisdiction to terminate the marriage by divorce.[84]

In the case of provincial divorces, jurisdiction based on the Act of 1930 will also be recognized. If Canadian courts follow *Travers v. Holley*[85] which held that English courts "should recognize a jurisdiction which they themselves claim" it may be assumed that a foreign court's decree based on grounds similar to those contained in the Act of 1930 will be recognized in Canada, at least in the common-law provinces having divorce courts. As Dr. Kennedy pointed out,[86] this is not a problem of comparing the grounds of jurisdiction of each court. The law of both places does not have to correspond. One must look to the facts of the case to see if the local court would have given a decree in those circumstances. The court "will not compare laws but will merely ascertain whether in roughly comparable circumstances it would have acted . . . The comparison is between the facts of the individual case applied to the law of the two countries involved and not the laws generally."[87]

Except for the special case provided for in the 1930 Act, whether both parties must have been domiciled where the decree was rendered or whether

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[82][1895] A.C. 517.

[83]*Atty.-Gen. for Alberta v. Cook, supra* footnote 76.

[84]*R. v. Woods* (1903), 6 O.L.R. 41 (Mich. div.); *Potratz v. Potratz*, [1926] 1 D.L.R. 147 (Sask.) (South Dakota Div.); *Thomson v. Crawford*, [1932] O.R. 281, [1932] 2 D.L.R. 466, affd. [1932] 4 D.L.R. 206 (C.A.) (Nevada div.) *Cassavallo v. Cassavallo*, [1911] 1 W.W.R. 212 (Alta.) (Washington Div.); *Cox v. Cox*, [1918] 2 W.W.R. 422 (Alta.) (Minnesota Div.); *Drummond v. Higgins* [1944] K.B. 413 (Que.) (Spanish Div.); *Drake v. MacLaren*, [1929] 2 W.W.R. 87 (Alta.). (Nev. Div.); *MacDonald v. Nash*, [1929] 2 W.W.R. 84 (Man.) (Nev. Div.); *Magurn v. Magurn* (1885), 11 O.A.R. 178 (Missouri Div.); *Kon v. Woodward and the Atty.-Gen. of the Prov. of Que.*, [1956] S.C. 202 (Mass. Div.); *L. v. M.*, [1951] S.C. 275 (Que.) (Florida Div.); *Lofthouse v. Lofthouse* (1908), 12 O.W.R. 140 (South Dak Div.); *Cromarty v. Cromarty* (1917), 39 O.L.R. 481 affd. 39 O.L.R. 571 (Illinois Div.); *Nusselman v. Novik and Stromberg*, [1949] S.C. 431 (Que.) (Ohio Div.); *Yates v. Yates* (1924), 34 Man R. 638 (Washington Div.); *Gauvin v. Rancourt, supra*, footnote 21; *Douglass v. Hodgins* (1957), 7 D.L.R. 2d. 57 (Ont.) (Mich. Div.); *White v. White*, [1958] O.W.N. 15 (Ont.) (Man. Div.); *Omelganow v. Omelganow*, [1958] O.W.N. 13 (Ont.) (Sask. Div.).

[85][1953] P. 246, [1953] 2 All. E.R. 794 (C.A.).

[86]*Op. cit.*, at p. 638.

[87]*Ibid.*, at p. 643. In the province of Quebec one could argue that since separation from bed and board (mensa et thoro) is the matrimonial remedy which takes the place of divorce (a vinculo), by analogy to article 96 of the Code of Civil Procedure, foreign divorces rendered by the courts of the last common domicile, if the husband has left it, should be recognised.

the domicile of one is sufficient arises only in Quebec where the principle of unity of domicile does not exist in certain circumstances. In that province a wife is allowed to acquire a forensic domicile separate from that of her husband in two cases. The first one involves *Stevens v. Fisk*,[88] where the parties domiciled in the State of New York were married there in 1871. The defendant husband then moved to Montreal where he established his domicile. The plaintiff-wife lived with him in Montreal until 1876 when she returned to New York, where, in 1880, she obtained a divorce. She later brought an action in Quebec for an accounting of her husband's administration of her property and the question arose whether she was entitled to sue without first obtaining his authorization as required by the Quebec Civil Code. The Supreme Court of Canada upheld the validity of the divorce. The Chief Justice rested his decision mainly on the ground that the husband had submitted to the jurisdiction of the New York court by having been personally served and appearing, although he did not contest the suit. Some of the other judges held that besides the husband's submission to the jurisdiction, the New York court had jurisdiction because the marriage was celebrated in New York, and, according to the law of that state, for the purpose of divorce the wife may establish her own domicile. The decision has often been criticized in Quebec on the ground that, in the absence of a separation from bed and board, a wife cannot acquire a domicile separate from her husband,[89] and in the common-law provinces as a result of the decision of the Privy Council in *Attorney-Gen. for Alberta v. Cook*.

The other situation arises where the unity of domicile is broken by a separation from bed and board. Thus in *Monette v. Larivière*,[90] the parties were married while domiciled in Quebec in 1908. In 1916 the wife was granted a decree of separation from bed and board. Her husband then removed his domicile to Massachusetts and sent her no support. Thereupon she sued her father-in-law in Quebec for maintenance, which was granted. In 1924 the husband secured a decree of divorce in Massachusetts and his father-in-law, believing he was freed from his obligation under the decree for maintenance, brought an action to set it aside. The action failed as the foreign divorce was not properly proved, but the Court of Appeal reasoned *obiter*. It adopted the view that since the wife was still domiciled in Quebec she had never ceased to be subject to the laws of that province as regards her status. Only the courts of her domicile had authority to modify it. On the other hand, the status of the husband could properly be changed by the courts of his domicile. The husband was validly divorced and one must assume could remarry in Quebec, while his first wife was still married to him. Presumably the same rule would apply if

[88](1882), 5 L.N. 79, (1883), 6 L.N. 329, 27 L.C.J. 228, (1885), 8 L.N. 42 (S. Ct Can.)

[89]See for instance *Carter v. Lemoine* (1926), 26 P.R. 56 (Que.).

[90](1926), 40 K.B. 350 (Que.). *Cf. Campbell v. Campbell*, [1921] 2 W.W.R., 849, 61 D.L.R. 409 (Alta.).

the wife leaves the province and the husband remains behind. The case is also interesting from the point of view of the jurisdictional rules which Quebec courts are prepared to recognize. One of the judges stated that for a foreign court to be internationally competent, the domicile of the defendant must be within the territorial jurisdiction of the court adjudicating, or the cause of action must have arisen and the defendant been personally served there, or the defendant must have property there. Should this view be followed by other Quebec decisions it would constitute a radical departure from the established practice. Recognition of foreign decrees would be allowed on a much broader basis than in any common-law jurisdiction.[91] The practice followed in Quebec is to a certain extent similar to that which prevails in the United States; there, where the husband and wife have separate domiciles, a divorce may be secured at the domicile of either spouse and will be recognized elsewhere.[92] Does this mean that the decree is binding on both spouses? The authorities are not clear. One possibility is to follow the *Monette v. Larivière* view and hold that it is binding on one spouse only, yet one cannot ignore the merit of Goodrich's argument when he states:[93]

> If Michigan can free the wife from the husband, the necessary consequence is also to free the husband from her. The logically difficult problem was answered when our courts said that the wife could have a separate domicile and sue for divorce there. This was done because of the hardship wrought by the rigid rule that the wife's domicile followed that of her husband. Having taken this step, it is illogical in principle and unjust to the parties not to recognize its necessary consequences. The conception of a husband without a wife or a wife without a husband may be a metaphysical possibility, but it is a reproach to the common law whose courts and lawyers have always prided themselves upon freedom from mere theoretical speculation and boasted of practical contact with hard fact. The only tenable doctrine, it is submitted is to recognize the effects of a divorce to liberate both parties when granted at the actual domicile of either. It is better to insist upon the unyielding doctrine that husband and wife must always have the same domicile than to adopt the rule allowing the wife to sue for divorce at a separate domicile and then refuse to recognize the necessary consequences of such a step.

Where the husband was not domiciled in any of the Canadian provinces at the time of the commencement of the action, a decree granted abroad in a state where the wife has acquired a separate domicile or residence or in the state of the husband's residence may be recognized in Canada on the basis of *Armitage v. Atty.-Gen.*,[94] if it is proved that the decree would be recognized

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[91]Note that the judge relied on *Stacey v. Beaudin* (1886), 9 L.N. 363 (Que.), a money judgment and articles 210-211-212 of the Code of Civil Procedure. No distinction was made by the judge between money judgments and divorce judgments. Note also that the grounds for jurisdiction are most of those found in article 94 of the Code of Civil Procedure which deals with matters purely personal. Quaere: Is divorce a purely personal matter? Can also article 94 bo applied by analogy to foreign divorce cases when divorce is unknown in Quebec? For a criticism of this decision see Johnson, *op. cit.*, vol. II, p. 167 *et. seq.*

[92]*Williams v. North Carolina* (1942), 317 U.S. 287.

[93]Handbook of the Conflict of Laws (3d. ed. 1949), p. 412.

[94][1906] P. 135.

as valid by the courts of the domicile of the husband. This decision enables Canadian courts not only to diminish the harshness of the rule of unity of domicile, but also allows a wider recognition of foreign decrees in Canada.[95]

A foreign decree rendered by the court of the husband's domicile will not be recognized if it was obtained by one party without notice to the other, or by fraud as to the jurisdiction.[96] A false pretence to a foreign court that the *bona fide* domicile is within the jurisdiction will invalidate the decree. On the other hand, the deliberate acquisition of a *bona fide* domicile for the purpose of obtaining a divorce which could not be obtained in the former domicile will be effective and give the foreign court jurisdiction to decree a divorce, as motive in acquiring domicile is immaterial. In Quebec, however, where the parties were formerly domiciled in the province, a foreign decree rendered in such circumstances may not be recognized on the ground that they have gone abroad with the intent of evading Quebec law, which prohibits divorce.[97] Fraud upon the law operates here in the same manner as public policy.

Where the foreign court had no jurisdiction, the fact that the plaintiff has invoked the jurisdiction and the defendant submitted to it, does not estop anyone, including the parties to the suit, from attacking the decree as it relates to their status. Consent or submission of one or both parties cannot cure a defect of jurisdiction.[98] On the other hand, in *Re Plummer*[99] and in *Carter v.*

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[95]*Walker v. Walker, supra,* footnote 81. *Wyllie v. Martin,* [1931] 3 W.W.R. 465; 44 B.C.R. 486, at p. 488. *Burnfiel v. Burnfiel,* [1926] 1 W.W.R. 657, 20 Sask. L.R. 407, [1926] 2 D.L.R. 129; *Holmes v. Holmes,* [1927] 2 W.W.R. 253, [1927] 2 D.L.R. 979 (Alta). For instance husband and wife are married, domiciled in New York. The wife establishes a domicile in Michigan and gets a divorce there which will be recognized by virtue of the full faith and credit clause in New York. The decree will be recognized in Canada; see also Morris, Recognition of Divorces Granted Outside the Domicile (1946), 24 Can. Bar Rev. 73.

[96]*Rothwell v. Rothwell,* [1942] 3 W.W.R. 442; 50 Man. R. 249, [1942] 4 D.L.R. 767; *Bavin v. Bavin,* [1939] O.R. 385, [1939] 3 D.L.R. 328; *Delaporte v. Delaporte* (1927), 61 O.L.R. 302, [1927] 4 D.L.R. 933, noted (1927), 5 Can. Bar Rev. 166. *Biggar v. Biggar,* [1930] 2 D.L.R. 940, at p. 945, 42 B.C.R. 329; *Tetrault v. Baby, supra* footnote 21, but see *Fields v. Fields,* 58 N.S.R. 65, [1925] 2 D.L.R. 256. The objection that a defendant did not receive due notice of the action can be taken only where at the commencement of the action he was not domiciled or resident in the country where it was brought.

[97]Johnson, *op. cit.* vol. II, p. 152.

[98]*McGuigan v. McGuigan,* [1954] O.R. 318, [1954] 3 D.L.R. 127; *Foggo v. Foggo,* [1952] 5 W.W.R. (N.S.) 40, [1952] 2 D.L.R. 701 (B.C.); *Smith v. Smith* (1957), 40 M.P.R. 51 (N.S.); *Cody v. Cody,* [1927] 1 W.W.R. 603, 21 Sask. L.R. 391, [1927] 3 D.L.R. 349; *Chatenay v. Chatenay,* [1938] 1 W.W.R. 885, 53 B.C.R. 13, [1938] 3 D.L.R. 379. *Cf Stevens v. Fisk, supra,* footnote 88, where as noted earlier the Supreme court of Canada held that appearance of the defendant in the suit absolutely and without protesting against the jurisdiction estopped him from invoking anew the want of jurisdiction.

[99][1942] 1 D.L.R. 34, [1941] 3 W.W.R. 788 (Alta.).

*Patrick*,[100] it was held that one spouse who obtains an invalid divorce is precluded from attacking the jurisdiction of the court in order to claim a share in the estate of the other spouse.[101] The foreign decree is not validated; it is recognized only to the extent of preventing the spouse who obtained the divorce from taking advantage of his own wrong.

A marriage which has been legally dissolved according to the law of the domicile will be recognized in Canada, whether this was done by legislative action or by ecclesiastical tribunals.[102]

Today in all Canadian provinces domicile still remains the basis for jurisdiction in divorce cases, but while the unity of domicile has been retained in the common-law provinces this has not been done in Quebec in all cases. As in nullity actions, the jurisdictional bases for divorce should be extended and it should be required that the court seized with the action apply the law of the domicile of the spouses or of one of them. It is an error to believe that the courts of the domicile should have exclusive jurisdiction in matters of divorce on the ground that domicile governs matters of status just as it is an error to maintain that in the case of immovables the courts of the *situs* have exclusive jurisdiction. There is no reason for not recognizing foreign divorces rendered by the court of the residence of the parties, or of one of them, so long as the law of their common domicile, if the unity rule is followed, has been applied and the parties had notice and an opportunity to defend. This would certainly remove divorce mills. The *Armitage* rule has been most beneficial in many instances and should be retained. As to *Travers v. Holley*, except in factual situations similar to those which call for the application of the Act of 1930, there is little opportunity for extending the jurisdictional grounds of recognition of foreign divorces unless our domestic rules are changed by Parliament.

## VII—CUSTODY DECREES

In Canada the custody of children is dealt with by the provincial legislation.[103]

### (a) Jurisdiction

The general principle is that jurisdiction to award the custody of children is based primarily on domicile, that is, the domicile of the father at the time of the application,[104] although there is great confusion in this area of the law. Where

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[100][1935] 2 D.L.R. 811, 49 B.C.R. 411, [1935] 1 W.W.R. 383.

[101]*In re Williams and A.O.U.W.* (1907), 14 O.L.R. 482; *Burpee v. Burpee, supra*, footnote 80; *Cf. Burnfiel v. Burnfiel*, [1926] 2 D.L.R. 129, per Lamont J. (Sask. C.A.); *C. v. C.* (1917), 39 O.L.R. 571, per Meredith C.J.C.P.; for a special situation see *Buehler v. Buehler* (1956), 18 W.W.R. (N.S.) 97, 4 D.L.R. 2d. 326 (Sask.); See also *Swaizic v. Swaizic* (1899), 31 O.R. 324 (alimony case).

[102]*Goldenberg v. Triffon*, [1955] S.C. 341 (Que.).

[103]Power, *op. cit.*, p. 457 *et seq.* In general see Johnson, *op. cit.* vol. II, p. 280 *et seq.*

[104]*Frew v. Frew* (1956), 18 W.W.R. (N.S.) 384 (B.C.) although the child is resident elsewhere. *Cody v. Cody, supra*, footnote 98. No order can be made where the

the wife sues for divorce at the last domicile of her husband under the Act of 1930 there is no reason for denying the right of the court to make an order for the custody of the children issued from the marriage especially if they reside with her. It has also been held that the presence of the child within the province is sufficient to give the court jurisdiction to make an order respecting his custody, although his domicile is in another jurisdiction.[105] Thus many Canadian courts will refrain from adjudicating upon the custody of a child if he is not present within the territory over which the court has jurisdiction, unless the person having the control and authority over the child is within that territory.[106] Of course no order will be made if the child is neither domiciled nor physically present within the province.

### (b) Foreign Decrees

In this area of private international law the welfare and happiness of the child has been the paramount consideration. Thus, Canadian courts will not consider themselves necessarily bound by foreign orders as to custody.[107] If a

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child is living with his father in a foreign country or in another province in which the father is domiciled. See for instance *In re Equal Guardianship of Infants Act; In re Heater (an infant)* (1951), 1 W.W.R. (N.S.) 229, [1951] 1 D.L.R. 795 (B.C.).

[105]In other words both the court of the infant's domicile and that within whose jurisdiction he is present have jurisdiction. *Masterson v. Masterson,* [1948] 1 W.W.R. 642, [1948] 2 D.L.R. 696 (Sask. C.A.) overruling *Cody v. Cody, Ibid.* and explaining *in Re McGibbon (an infant),* [1918] 1 W.W.R. 579, 13 Alta. L.R. 196; 39 D.L.R. 177. See also *In re C.,* [1922] 1 W.W.R. 1196 (Man.) and *in re McKee* [1947] O.R. 819, affd. [1948] O.R. 658, [1948] 4 D.L.R. 579 rev. [1950] S.C.R. 700, [1950] 3 D.L.R. 577 rev. (1951) 2 W.W.R. (N.S.) 181 (P.C.) *sub nom McKee v. McKee,* noted (1948), 26 Can. Bar Rev. 1368, 1372, (1949), 27 Can. Bar Rev. 99, (1951), 29 Can. Bar Rev. 536. See also *Loasby v. Home Circle* (1893), Tru. 533 (N.B.).

[106]*Hannon v. Eisler* (No. 2) (1954), 13 W.W.R. (N.S.) 565, 62 Man 440, [1955] 1 D.L.R. 183; *in re McGibbon, Ibid.* The question whether there is jurisdiction to award custody where the child is living outside the province is not yet definitely settled; *Goforth v. Goforth,* [1928] 3 W.W.R. 483, [1929] 1 D.L.R. 58 (Alta.) where the court issued an order for custody only on proof that the courts of the State of Washington where the children resided would recognise it; *Munroe v. Munroe,* [1942] 3 W.W.R. 656 (B.C.); *Kilpatrick v. Kilpatrick,* [1929] 3 W.W.R. 463, 42 B.C.R. 88, [1930] 1 D.L.R. 288; *Gelasco v. Gelasco,* [1948] 2 W.W.R. 537 (Alta.); *Clifton v. Clifton,* [1949] 1 W.W.R. 125 (B.C.); *Re Sutherland,* [1950] O.W.N. 404; *Re Harding* (1929), 63 O.L.R. 518 overruling *Re Shand* (1928), 62 O.L.R. 145; but see *Dickson v. Dickson,* [1944] 1 W.W.R. 561, [1944] 2 D.L.R. 396 (Sask.); *Cleaver v. Cleaver,* [1949] O.W.N. 640, [1949] 4 D.L.R. 36; *Ginter v. Ginter,* [1953] O.R. 688 affd. [1953] O.W.N. 917; *Keel v. Keel and Jamieson* (1952-3), 7 W.W.R. (N.S.) 518 (Sask. C.B.), and *Re Tokarchuk Infants* (1952), 5 W.W.R. (N.S.) 19 (Alta.) (no jurisdiction although father domiciled in the province). Also *Kochan v. Kochan,* [1955] O.W.N. 949.

[107]*In re McKee, supra* footnote 105; *Ryser v. Ryser* (1915), 7 W.W.R. 1275 (Alta.); *Re C.,* [1922] 1 W.W.R. 1196 (Man.); 67 D.L.R. 630; *Re Davis* (1894), 25 O.R. 579; *Re E.* (1921), 19 O.W.N. 534, affd. (1921), 20 O.W.N. 92; *Re Gay,* [1926], 3 D.L.R. 349 (1926), 59 O.L.R. 40 (Michigan decree); *Re Shand, supra,* footnote 119;

foreign divorce decree is invalid for having been rendered without jurisdiction, its provisions dealing with the custody of the children will be of no effect in Canada.[108] However, where the foreign decree has been given by a competent court and the custody has been properly placed, it will be taken into consideration.[109]

As the Privy Council stated in *McKee v. McKee,*[110] the distinction between a foreign decree and an ordinary foreign judgment rests on the peculiar character of the jurisdiction and on the fact that an order providing for the custody of a child cannot in its nature be final. The court which has physical control over the child, even in the presence of a valid foreign decree, will examine the conduct and capacity to support of either parent claiming custody and all matters which might affect his or her suitability as a guardian.[111]

## VIII—ALIMONY AND MAINTENANCE

### (a) Jurisdiction

Canadian courts have the power to order the payment of interim or permanent alimony or maintenance to the wife as an incidental remedy in an action for divorce, nullity of marriage or of separation from bed and board.[112] In certain specified cases provincial legislation[113] also enables the wife and children

*Heslop v. Heslop* (1958), 12 D.L.R. (2d.) 591 [1958] O.W.N. 137; [1958] O.L.R. 183 (Ont. C.A.) (Michigan decree granting temporary custody). A decree of a foreign court is not binding in Ontario but does establish a *prima facie* right to custody. See also *Re Snyder,* [1927] 2 W.W.R. 240, 38 B.C.R. 336, [1927] 3 D.L.R. 151 (Ohio decree); *Re Mott,* [1912] 1 W.W.R. 833, 20 W.L.R. 396, 5 D.L.R. 406 (Alta.) (California decree); *In re Chisholm* (1913), 47 N.S.R. 250, 13 D.L.R. 811, 13 E.L.R. 182; *Re Bickley,* [1957] S.C.R.. 329 (Appeal from B.C.) (Nevada decree); *R. v. Hamilton* (1910), 22 O.L.R. 484 (Indiana decree), *Re Ayers,* [1921] 2 W.W.R. 171 affd. [1921] 2 W.W.R. 625, 16 Alta. L.R. 433, 65 D.L.R. 773 (Penna. decree). See also *In re Kinney* (1875), 6 P.R. 245 (Ont.) (Michigan decree).

[108]*Ibid.*

[109]*Lorenz v. Lorenz* (1905), 7 P.R. 186, 11 R.L. (n.s.) 527 (Que.); See also cases cited *supra* footnote 107; no weight will be given to a foreign decree where it was rendered in a jurisdiction where the child was neither domiciled nor physically present.

[110]See *supra,* footnote 105. In this case a valid order of a California court gave custody of the child to its mother and the father removed the child into Ontario. The mother obtained a writ of *habeas corpus.* The trial judge was held justified in forming the opinion that he ought not to follow the foreign order.

[111]Thus, if the circumstances of the case or the welfare of the child require it, his custody may be awarded to someone other than the person appointed by the competent foreign court.

[112]Power, *op. cit.,* p. 388 *et seq.* Note that in the case of interim alimony in a divorce action, the fact that the husband pleads that he is not domiciled within the jurisdiction does not prevent the court from making an order for such alimony, at p. 419.

[113]*Ibid.,* p. 192 *et seq.*

to obtain alimony as an independent remedy.[114] In both cases the court must have personal jurisdiction over the defendant husband.[115] Maintenance legislation does not generally confer jurisdiction to the local courts where the husband is not a resident of the province at the time of the action, or at the time the matrimonial offences were committed and the cohabitation ceased even though his wife has become resident therein, or he has assets there.[116] On the other hand residence of the child seems sufficient to confer jurisdiction.[117]

In *Hamilton v. Church*,[118] the Quebec Court of Appeal held that the right to alimony is not governed by the law of the domicile of the parties at the time of the marriage or at the time of the commission of an offence for which they have obtained a decree of separation from bed and board. The law of the matrimonial domicile determines the effect of the marriage as regards the property rights of the consorts *inter se*. The right to alimony is not a property right but a personal obligation in Quebec, and can be obtained if the defendant was domiciled in the province or the action was personally served upon him there, or the cause of actions arose there, or he had property in Quebec or the agreement as to alimony was made in that province.[119]

It has been held that a wife who has obtained a judicial separation abroad and whose husband has become domiciled in one of the Canadian provinces, may demand alimony apart from that granted by the foreign judgment.[120]

It is doubtful whether ownership of property alone is a sufficient ground for jurisdiction,[121] although in some provinces rules of court provide for service

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[114]See for instance The Deserted Wives and Childrens Maintenance Act, R.S.B.C., 1948, c. 93, am. 1949, c. 17, 1950, c. 16, 1951, c. 21, 1954, c. 6, 1955, c. 17, 1956, c. 51, 1957, c. 67, 1958, c. 65; *Ibid* Ontario, R.S.O., 1950, c. 102 and 1951, c. 20, 1953, c. 28, 1954, c. 22, 1955, c. 16, 1957, c. 27, 1958, c. 23. Similar statutes exist in other provinces. Note that an action for alimony may also be brought independently from divorce or judicial separation proceedings. *Lee v. Lee* (1920), 54 D.L.R. 608, 18 Alta. L.R. 83.

[115]*Lawrence v. Lawrence*, [1953] O.W.N. 124; *Nelson v. Nelson*, [1925] 2 W.W.R. 1, at p. 13, 3 D.L.R. 22 at p. 33 (Alta.); *Hill v. Hill*, [1951] O.W.N. 347, 99 C.C.C. 384 affd. [1951] O.W.N. 507, 100 C.C.C. 176. As to service out of the jurisdiction see: *Cheeseborough v. Cheeseborough*, [1958] O.W.N. 150.

[116]*Smith v .Smith* (1952), 7 W.W.R. (N.S.) 163 affd. 9 W.W.R. (N.S.) 144, 61 Man. R. 105, [1953] 3 D.L.R. 682, where it was held that the provisions of The Wives' & Children's Maintenance Act do not apply to residents in another province where both spouses were residing and cohabitating outside the province at the time that cohabitation ceased. See also *Meyers v. Meyers*, [1953] 2 D.L.R. 255 (Ont.) (Manitoba order). *Cf. Gagen v. Gagen*, [1934] 3 W.W.R. 84, 48 B.C.R. 481, 62 C.C.C. 286, [1924] 4 D.L.R. 409 (desertion within the province and wife resident therein. B.C. statutory definition of "magistrate" *supra*, footnote 114, s. 2). Leave to appeal to Supreme Court of Canada refused, 49 B.C.R. 102; see also *Holland v. Holland*, [1950] 1 W.W.R. 286, 96 C.C.C. 138 (B.C.) (Manitoba order).

[117]Ontario Act, *supra* footnote 114, s. 2.

[118](1915), 24 K.B. 26 (Que. C.A.).

[119]*Playe v. Vaesen* (1933-4), 36 P.R. 402 (Que.). *Cf. Pothier v. Lapierre* (1938), 42 P.R. 408 (Que.).

[120]*Detro v. Detro* (1922), 70 D.L.R. 61 (Alta.).

[121]*Nelson v. Nelson, supra*, footnote 115. *Smith v. Smith, supra*, footnote 116.

out of the jurisdiction in such a case.[122] Proof of a foreign divorce obtained by the defendant husband does not necessarily bar recovery,[123] especially where it has been rendered by fraud and without notice.[124] On the other hand in *Rosswron v. Rosswron,*[125] where the wife had voluntarily left her husband and had obtained a divorce from him abroad, and subsequently brought an action for alimony in Ontario, the court in dismissing the action stated: "Without being taken as passing on the validity of the divorce or holding the proceedings to be valid or binding even in the country in which it was obtained, otherwise than for the purpose I now state, I am of opinion that, having chosen the tribunal to which she made her appeal for relief, she is to be bound thereby, in so far as to disentitle her to make the present claim."[126]

### (b) Foreign Judgments for Alimony or Maintenance

Final judgments for alimony or maintenance to be paid at regular intervals rendered by a competent foreign court[127] are enforceable in all Canadian provinces.[128]

Where a foreign divorce decree is invalid for lack of jurisdiction, an award of permanent alimony which depends upon the divorce cannot be enforced.[129] On the other hand it has been held that an order for maintenance which is ancillary to a divorce decree is binding on a husband even though the court making the order did not have personal jurisdiction over him if the court has jurisdiction to grant the divorce on the ground that the judgment *in personam* is ancillary to a judgment *in rem.*[130]

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[122]*Lawrence v. Lawrence,* supra, footnote 115.

[123]*McCully v. McCully* (1908), 14 O.W.R. 788, 1 O.W.N. 95, affd. 14 O.W.R. 1012, 1 O.W.N. 187; *Switzer v. Switzer* (1907), 10 O.W.R. 406; but see *Guest v. Guest* (1882), 3 O.R. 344.

[124]*Maday v. Maday* (1911), 16 W.L.R. 701, 4 Sask. L.R. 18.

[125](1914), 7 O.W.N. 583.

[126]Note that in an almost similar case, the wife was allowed to recover for the period between the date of the desertion and the date of the invalid divorce. *Ackerman v. Ackerman,* [1918] 2 W.W.R. 759 (Alta.).

[127]*Curtis v. Curtis,* [1943] O.W.N. 382; *Meyers v. Meyers,* [1935] O.W.N. 547.

[128]*Ellenberger v. Robins* (1940), 78 S.C. 1 (Que.); *Archambault v. Riopelle* (1934), 72 S.C. 176 (Que.). *Ashley v. Gladden,* [1954] 4 D.L.R. 848, [1954] O.W.N. 558; *Meyers v. Meyers, ibid; McDowell v. McDowell,* [1954] S.C. 319 (Que.); *Robertson v. Robertson* (1908), 16 O.L.R. 170; *Hadden v. Hadden* (1899), 6 B.C.R. 340 (C.A.); *Swaizie v. Swaizie* (1899), 31 O.R. 324; *Burpee v. Burpee,* [1929] 2 W.W.R. 128, 41 B.C.R. 201, 31 D.L.R. 765; *Curtis v. Curtis, ibid.;* In *Burchell v. Burchell* (1926), 58 O.L.R. 515 a foreign judgment awarding alimony to a husband was held to be enforceable in Ontario although the law of that province does not recognize a husband's right to alimony, because the judgment was pronounced by the court of the matrimonial domicile. Note that in *Ryan v. Pardo, supra,* footnote 32, it was held that a wife cannot recover arrears accumulated after the institution of her action in divorce.

[129]*Cassavallo v. Cassavallo, supra,* footnote 84;

[130]*Summers v. Summers* (1958), 13 D.L.R. (2d.) 454, [1958]O.W.N. 73.

The chief difficulty is in determining whether the order for alimony is final or provisional and subject to modification. The finality of the judgment is determined according to the law of the province or country in which it was rendered. It is generally held that an order for alimony with provision for periodic revision is not a final judgment.[131] However, if no power to modify the decree is reserved or if only future instalments may be modified, the decree is final to the extent that it will support an action for the amount accrued and unpaid.[132] Thus, a judgment awarding future alimony which may not be final when rendered becomes final for each instalment when it falls due in the absence of a contrary intent on the part of the court which rendered the judgment.[133] As the arrears accumulate they become a judgment debt which can be enforced by ordinary process, even though future payments may be modified.[134] In *Bedell v. Hartmann*,[135] it was held that part of a foreign judgment of divorce ordering payment of an alimentary pension which is subject to revision and modification by the court which rendered it, is not final and conclusive as to future instalments and cannot be declared executory in Quebec.[136] In other words, the judgment must finally and forever establish the existence of the debt so as to make it *res judicata* between the parties.[137]

The Uniform Reciprocal Enforcement of Maintenance Orders Act,[138] which has been adopted with slight modifications by most common-law provinces,[139] is designed to facilitate the enforcement of the obligations of parents and husbands where the dependent and the person under obligation to maintain

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[131] *McIntosh v. McIntosh*, [1942] O.R. 574, [1942] 4 D.L.R. 70; *Maguire v. Maguire* (1921), 50 O.L.R. 100, 64 D.L.R. 180; *Perry v. Perry* (1923), 53 O.L.R. 502, rev. 54 O.L.R. 613; *Ashley v. Gladden, supra*, footnote 128.

[132] See *Sistare v. Sistare* (1909), 218 U.S. 1, an American decision which has had a great influence in common-law jurisdictions.

[133] As in the case where the court retained a discretionary power to modify overdue instalments. *Smith v. Smith*, [1953] 1 D.L.R. 271, 13 W.W.R. 207, (B.C.); *Maguire v. Maguire, supra*, footnote 131; *McIntosh v. McIntosh, Swaizie v. Swaizie, Ellenberger v. Robins, Ashley v. Gladden, McDowell v. McDowell, supra*, footnote 128; *Ryan v. Pardo, supra*, footnote 32.

[134] *Ellenberger v. Robins, Hadden v. Hadden, Archambault v. Riopelle, Wood v. Wood. Swaizie v. Swaizie*, supra, footnote 128. As to security for costs in the case of a non-resident wife suing for arrears for alimony see *Gamble v. Gamble*, [1952] O.W.N. 173, [1952] 4 D.L.R. 525 reversing [1951] O.W.N. 866.

[135] [1956] Q.B. 157 (Que.).

[136] *In re Reciprocal Enforcement of Judgments Act, Mackowey v. Mackowey* (1955) 14 W.W.R. 190 it was held that alimony payable *in futuro* is not enforceable in British Columbia.

[137] *Wood v. Wood, Ashley v. Gladden, supra*, footnote 128.

[138] In 1946 a Reciprocal Enforcement of Maintenance Orders was approved by the Conference of Commissioners on Uniformity of Legislation in Canada. It was revised in 1953 and 1956, 1946 Proceedings, p. 69; 1953 Proceedings, p. 96, 1956 Proceedings, p. 89.

[139] Alta., B.C., Man., N.B., Nfld., N.S., Ont., P.E.I., Sask., N.W.T., Yukon; See for instance R.S.O., 1950, c. 334 which will be analysed here.

him are not resident in the same state. The Act provides the machinery for registering maintenance orders which are binding upon persons resident and subject to the jurisdiction of a reciprocating state without the necessity of initiating proceedings anew there. It also provides a means whereby proceedings may be initiated for the purpose of taking evidence which may be raised in support of an application for maintenance against a person who is subject to the jurisdiction of a reciprocating state and not within the jurisdiction of the court in which such proceedings are taken.[140] For instance, maintenance orders for the periodical payment of a sum of money towards the maintenance of a wife or other dependant made against any person by a court in a reciprocating state[141] will be enforced in Ontario. The certified copy of the order must be transmitted by the proper officer of the reciprocating state to the Attorney General or other officer of the province who will forward it to the appropriate officer of the competent court in Ontario for registration. Once registered proceedings may be taken under it as if it had been originally obtained in Ontario.[142]

The Act, while silent on the point, clearly contemplates that the order for maintenance so registered must have been made by a court having jurisdiction over the person against whom the award is made.[143] If the order makes payable sums of money expressed in a foreign currency it cannot be registered until the court has determined the equivalent of such sums in the currency of Canada on the basis of the rate of exchange prevailing at the date of the order by the court of the reciprocating state.[144]

Where an application is made to a court in one of the provinces which have such an Act in force, against any person who is resident in a reciprocating state, the court may, in the absence of that person and without service upon him, make any such order as it might have made if a summons had been served on him and he had failed to appear at the hearing. In such a case the order is provisional only and has no effect unless and until it is confirmed by a

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[140]*Re Scott*, [1956] S.C.R. 137, 114, C.C.C. 224, 1 D.L.R. (2d.) 433, rev. [1954] O.R. 246, 108 C.C.C. 393, [1954] 2 D.L.R. 465 rev. [1954] O.R. 676, 109 C.C.C. 235, 4 D.L.R. 546.

[141]S. 10 Ont. Act. Are reciprocating states: the ten Canadian provinces and two territories as well as: Capital Territory of Australia, England, Guernsey, Alderney & Sark, Isle of Man, New South Wales, New Zealand, Cook Islands, Northern Ireland, Northern Territory of Australia, Papua, New Guinea, Queensland, South Australia, Southern Rhodesia, Jersey, Tasmania, Union of South Africa, Victoria and Western Australia. Reg. Ont. Nov. 10/1956, O. 203/56 p. 369.

[142]S. 2 (1).

[143]*Re Kenny*, [1950] O.W.N. 339, [1950] 3 D.L.R. 858 rev. [1951] O.R. 153, 100 C.C.C. 70, [1951] 2 D.L.R. 98; See also *Summers v. Summers, supra*, footnote 130. S. 2 applies to orders made by a court having jurisdiction to make an effective award; *Meyers v. Meyers, supra*, footnote 116 *Cf. Burak v. Burak*, [1949] 1 W.W.R. 300 (Sask.).

[144]S. 2 (3) S.O., 1956, c. 77.

competent court in the reciprocating state.[145] The court must send to the Attorney-General or other officer a certified copy of the order for transmission to the proper officer of the reciprocating state. It must also prepare a statement showing the grounds on which the making of the order might have been opposed if the person against whom the order is made had been duly served with a summons and had appeared at the hearing and the depositions or a certified copy of the transcript of the evidence.[146] Section 4 of the Ontario Act contemplates proceedings when, owing to the husband being resident in a reciprocating state, and thus not within the territorial jurisdiction of the court to which the application is made, an order which might be registered under the term of section 2 cannot be made. The court in a reciprocating state where any such provisional order has come for confirmation may remit it to the original court for the purpose of taking further evidence.[147] If upon the hearing of such evidence it appears to the original court that the order ought not to have been made it must rescind it.[148]

The confirmation of an order by the reciprocating state does not affect any power of the original court to rescind or vary it, provided that a certified copy of the order, together with the depositions or a certified copy of the transcript of any new evidence adduced before the court, is sent to the proper officer of the reciprocating state in which the original order was confirmed.[149] No rights are conferred and no issues settled by a provisional order made under that section. Such order is merely a preliminary step taken in the province with a view to obtaining a maintenance order against the husband of a deserted wife or father of deserted children who reside in the province. On the other hand, where a maintenance order has been made by a court in a reciprocating state against a person resident within the province and the order is provisional only and subject to confirmation, the court of the residence shall call him to show cause why the order should not be confirmed.[150] That person may raise any defence that he might have raised in the original proceedings had he been a party thereto, but no other defence. The statement from the court that made the provisional order showing the grounds on which the making of the order might have been opposed if the person against whom the order was made had been a party to the proceedings is conclusive evidence that those are the grounds on which objection may be taken. The court to whom the application is made may confirm the order, with such modifications

[145]S. 4 of the Ontario Act. Note that the applicant has the same right of appeal, if any, against a refusal to make a provisional order as he would have had against a refusal to make the order had a summons been duly served on the person against whom the order is sought to be made. S. 4 (10).

[146]S. 4(5).

[147]S. 4(7).

[148]S. 4(8).

[149]S. 4(9).

[150]S. 5(1). *A-G for Ontario v. Scott, supra,* footnote 140.

as might be considered just, meaning that it may make such order as it thinks proper upon the evidence, or it may remit the case to the court that made the provisional order for the taking of any further evidence. The provisional order once confirmed may be varied or rescinded by the confirming court.[151] In other words, the purpose of section 4 of the Ontario Act is to enable a deserted wife or child in Ontario to take preliminary steps within the province to obtain maintenance from her husband or the father residing outside the province. The provisional order for maintenance made for the wife and children will be an indication of what the court in Ontario considers appropriate in their circumstances. Conversely, section 5 is aimed at providing means of enforcement against a husband residing in the province of an obligation to maintain a wife and children resident elsewhere. The foreign order will derive its legal force and effect entirely from the applicable Ontario statute.[152] A court in which an order has been registered under the Act or by which an order has been confirmed under it and the officer of that court must take all proper steps for enforcing the order in a like manner as if it had been a judgment of the court in which it is so registered or by which it is so confirmed.[153]

It is interesting to note that in Ontario if the Lieutenant-Governor in Council is satisfied that reciprocal provisions have been made by any foreign state for the enforcement therein of maintenance orders made in Ontario, he may declare it to be a reciprocating state for the purposes of the Act.[154] The Act is not restricted to orders made in other provinces of Canada or parts of the British Commonwealth of Nations.

In the province of Quebec special legislation of a substantially similar character[155] has also been passed to provide for the execution in that province of a judgment rendered in another ordering the payment of maintenance. The Attorney-General, when he receives from an authorized official source a certified true copy of such judgment, will transmit it to the prothonotary of the Superior Court of the district where the defendant has his domicile or residence for deposit

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[151]S. 5(2), *Shaw v. Shaw,* [1948] 1 W.W.R. 395 (Alta.); *Stevenson v. Stevenson,* [1947] 2 W.W.R. 962 (Sask.); *Storms v. Storms* (1953), 8 W.W.R. (N.S.) 458 (Alta.). S. 5(5). Note that according to s. 5(6), once confirmed, the person bound thereby shall have the same right of appeal, if any, against the confirmation of the order as he would have had against the making thereof had the order been one made by the court confirming it. In *Re Scott, supra* footnote 140, Locke J. stated the use of the word *confirmed* is unfortunate as one cannot speak of a confirming order which of itself has no binding effect.

[152]The order with the certified copy of the depositions of the witnesses heard by the court abroad affords evidence upon which it may make an order against the husband and nothing more. Any award must depend entirely for its validity upon the order made by the confirming court. *Re Scott, ibid.* per Locke J.

[153]S. 6.

[154]S. 9.

[155]An Act Respecting the Execution of Certain Judgments in Matters of Maintenance, Stats. of Quebec, 1951-52, c. 56.

in the archives of his office. The judgment will then produce the same effects as if it had been rendered by a Quebec court. This liberal approach is somewhat mitigated by the provision that the defendant may oppose the execution by way of summary procedure on the ground that the judgment is not in conformity with the laws and rules of public order of the province, especially those relating to marriage. According to section 6 of this Act where an extra-provincial judgment has been submitted for decision to the courts of the province, the creditor cannot execute it until he has obtained, upon petition, a confirmation of the judgment with or without modification. The Act also provides for the transmission of copies of judgments ordering the payment of maintenance rendered in Quebec against a person neither domiciled nor resident there. In such a case Quebec courts may also render a provisional judgment subject to the final judgment of the competent court of the place where the defendant resides or is domiciled.

## IX—LEGITIMACY

### (a) Legitimacy at Birth

In Canada legitimacy is considered as a personal status which is determined by the law of the domicile of the parent whose relationship to the child is in question.[156] In the usual situation, a child legitimate according to the law of his father's domicile at the time of birth is legitimate everywhere.[157] Children of foreign polygamous or putative marriages have been recognized as legitimate if such status is given to them by the *lex domicilii* at the time of their birth.[158] The child's status as legitimate or illegitimate at the time of birth is not affected by a subsequent change of domicile.[159] However, the incidents which flow from this status may vary as they depend upon the law of the country where they are sought to be enjoyed. Thus a child who is legitimate by the law of the domicile of his father at birth may have this status recognized in one of the provinces although he may not be entitled to claim under the succession law of that province. In general, however, a foreign status of legitimacy will be given the same effect in the province of the forum as is given by that province to the status when created by its own local law.

### (b) Legitimacy after Birth

Statutes in most Canadian common-law provinces provide that if the parents of any child heretofore or hereafter born out of lawful wedlock inter-

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[156]Note that mention of the child's domicile in legitimacy at birth cases involves the danger of circuiar reasoning since his domicile will be with the father if he is legitimate, but with the mother if he is illegitimate.

[157]*Lefebvre v. Digman* (1894), 3 R. de J. 194 (Que.); *Hunt v. Trusts & Guarantee Co.* (1905), 10 O.L.R. 147.

[158]*Re Leong Ba Chai, supra* footnote 13; *In re Immigration Act in re Dedar Singh Bains, ibid;* Falconbridge, *op. cit.*, p. 774 *et seq.*

[159]*Re Leong Ba Chai, ibid.*

married or hereafter intermarry, such child shall for all purposes[160] be deemed to be and to have been legitimated from the time of birth without regard to the law of the domicile of any of the parties involved at the time of birth or at the time of marriage or the place of the legitimating act.[161] This solution constitutes a departure from the common law that a foreign legitimation of an illegitimate child by the subsequent marriage of his parents will be recognized if this is the effect given by the law of the domicile of the child's father at the time of birth and at the time of the marriage.[162]

In Quebec, legitimation by subsequent marriage is recognized by the Civil Code.[163] It depends upon the law of the domicile of the father at the time of the marriage without regard to the law of his domicile at the time of the child's birth.[164] Once legitimated a child has the same rights as if he were born of such marriage,[165] but from the date of the marriage only.

## X—ADOPTION

### (a) Statutory Enactments and Jurisdiction of Canadian Courts

Adoption is unknown to the common law and the civil law of Canada and exists exclusively by virtue of statutory enactment. It is usually effected by judicial proceedings and it is thus first necessary to determine on what basis the courts of a particular province have jurisdiction to grant an order for adoption. The statutes in most Canadian provinces differ widely in their details as to the circumstances in which a provincial court has jurisdiction. In Ontario

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[160]For instance the child may inherit real and personal property as though born in lawful wedlock.

[161]Proceedings of the Conference of Commissioners on Uniformity of Legislation in Canada (1919), p. 50-53, (1920) p. 18. In general, see Falconbridge, *op. cit.*, p. 789 *et seq.;* and Taintor, Legitimation, Legitimacy and Recognition in the Conflict of Laws (1940), 18 Can. Bar Rev. 589, 691; *In re W.*, [1925] 2 D.L.R. 1177, 56 O.L.R. 611, the child was deemed legitimated in Ontario by application of the statute although he was born out of wedlock in England and his parents were domiciled there at the time of his birth and at the time of subsequent marriage and English law at all material times did not legitimate the child. See Ontario Legitimation Act., R.S.O., 1950, c. 203, s. 1. One could argue that under the statutes in existence in the common-law provinces, a foreigu legitimation which is a matter of status, should be governed by the law of the child's domicile and that the statutes apply only to persons domiciled in these provinces when the act took place. The effect of the marriage must be to legitimate the child by virtue of the law of the domicile of the father at the time it took place.

[162]Note that the Canadian statutes also provide that "Nothing in this Act shall affect any right, title or interest in or to the property if such right, title or interest has vested in any person a) prior to the passing of this Act in the case of any such intermarriage which has heretofore taken place, or b) prior to such intermarriage in the case of any such intermarriage which hereafter takes place."

[163]C.C. 237-239.

[164]*Jack v. Jack* (1927), 65 S.C. 10 (Que.).

[165]C.C. 239.

the jurisdiction of the court is based on the domicile of the applicant anywhere in Canada and residence of both the child and new parent within the province.[166] In Saskatchewan and in the Yukon and North West Territories, it is based on residence of the applicant parent within the province of application for a period of one year immediately preceding the date of application.[167] British Columbia,[168] Manitoba,[169] Newfoundland[170] and Prince Edward Island[171] do not require residence or domicile of any person. In New Brunswick[172] and Nova Scotia[173] jurisdiction is based on the residence of either applicant or child, while in Alberta[174] in addition to these two parties, it may be based on the residence of the guardian. In Quebec on the other hand the applicant parent or the child must be domiciled within the province.[175]

In practice, most orders are made in Canada by courts which are not that of the child's domicile. As Dr. Kennedy wisely remarks the requirement, apart from statute, that the domiciliary law of both the child and new parent must be satisfied would be an unworkable rule, especially in federal states. He says:[176]

> So long as people may move about as freely as they do in this modern world, some new criterion for jurisdiction is required. May we not say that the court, assuming it is satisfied about the child's welfare, has adoption jurisdiction when there is some appropriate connection with the territory by at least one of the parties?... Preferably the order should be made by a court where the new parents reside — parents with whom the child will in most cases be residing. That court can more easily judge the child's welfare. But that court should not be the exclusive court. There may be causes where for one reason or another, the court of the natural parents' residence, child's domicile or child's present whereabouts might be a proper court. No one court will have, or should necessarily have, exclusive jurisdiction.

In other words, any court which has some connection with the child through the presence, residence or domicile of the natural parents, child or new parents should have jurisdiction to make a decree, provided the paramount consideration is the welfare of the child.[177]

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[166]Child Welfare Act, S.O., 1954, c. 8, s. 67.

[167]R.S.S., 1953, c. 239, s. 63, re-enacted S.S. 1955, c. 55, s. 68(1) am. 1956 c. 50, 1958 c. 37; Ordinances of the Yukon Territory, 1954, 3d. session, c. 13, s. 5(1) (f); Revised Ordinances of North West Territories, 1956, c. 1, s. 4 (1) (f).

[168]Adoption Act, S.B.C., 1957, c. 1, am. 1958 c. 3.

[169]Child Welfare Act, R.S.M., 1954, c. 35, am. 1955, c. 6, 69, 1956 c. 7.

[170]The Welfare of Children Act, R.S. Nfld., 1952, c. 60. *Cf.* s. 148 (1).

[171]Adoption Act, R.S.P.E., 1951, c. 3 as amended. *Re Davis* (1944), 17 M.P.R. 305 (P.E.I.); *Re M.*, [1944] 4 D.L.R. 258 (P.E.I.).

[172]Adoption Act, R.S. N.B., 1952, c. 3, s. 7.

[173]Adoption Act, R.S. N.S., 1954, c. 4, am. 1957, c. 12, s. 3.

[174]Child Welfare Act, R.S.A., 1955, c. 39, s. 72 (b).

[175]R.S.Q., 1941, c. 325, s. 5; Johnson, The Quebec Adoption Act and Domicile (1956), 16 R. de B. 5; Roch, L'Adoption dans la Province de Québec (1951) p. 98-100.

[176]Kennedy, Adoption in the Conflict of Laws (1956), 34 Can. Bar Rev. 507 at p. 514.

[177]One could object especially in Quebec that ouly the court of the domicile should have jurisdiction over matters of status. To this it could be replied that where the court has taken jurisdiction let us say on the basis of residence, it could always apply

### (b) Foreign Decrees

The next question is to determine the effect which will be given to an adoption order rendered abroad. Foreign adoptions may be recognized under common-law rules or by virtue of statutes. Of course the foreign order must be rendered by a court which was internationally competent in the eyes of the forum. Should the validity of the order depend on the law of the domicile of each party to the adoption, or only on that of the country, state, or province in which both parent and child are domiciled at the time of the order?[178] Although the first approach is more realistic, there is no reason why Canadian courts should not recognize foreign orders made in the absence of domicile if made upon a basis comparable to that used in Canada. International jurisdiction will depend upon domestic jurisdiction. "If we exercise jurisdiction upon the basis of some reasonable connection of the parties with the territory where the order is made, we should recognize orders similarly made abroad,"[179] unless the order is contrary to the public policy of the forum.

The most difficult problem is to determine the effects of a foreign adoption.[180] In the absence of any specific statutory provision to the contrary it is generally held "that persons whose relationship to another is the result of a recognized foreign adoption receive locally the incidents applicable either to local legitimate status or to a local adoption."[181]

In general in all Canadian provinces special statutory provisions exist,[182] some dealing only with one or more of the incidents arising from an adoption, while others deal with the effects to be given to a foreign order generally. In

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the law of the domicile of both the child and new parent, subject to the paramount consideration of the welfare of the child. It seems difficult to apply any other law than that of the forum.

[178]See for instance *Burnfiel v. Burnfiel supra,* footnote 95, per Haultains C.J.S.; *Culver v. Culver,* [1933] 1 W.W.R. 435, 2 D.L.R. 535 (Sask.); In general, see O'Connell, Recognition and Effects of Foreign Adoption Orders (1955), 33 Can. Bar Rev. 635.

[179]Kennedy, *op. cit., supra,* footnote 176, p. 526.

[180]For decisions dealing with the effect of foreign adoptions see: In *re Donald Estates,* [1929] S.C.R. 306, [1929] 2 D.L.R. 244 and annotation (Sask.); *Re Milestone Estate* (1958), 25 W.W.R. 514 (Sask. C.A.); *Burnfiel v. Burnfiel, supra,* footnote 101; *Re McGillivray,* [1925] 3 D.L.R. 854 (B.C.); *Re Throssel* (1910), 12 W.L.R. 683 (Alta.); *Robertson v. Ives* (1913), 15 D.L.R. 122 affd. *sub nom Forbes v. Bailey* (1914), 14 E.L.R. 514; *Re Ramsay,* [1935] 2 W.W.R. 506, 50 B.C.R. 83; *Re McAdam,* [1925] 4 D.L.R. 138 (B.C.); *Re Niven* [1942] 4 D.L.R. 285 (B.C.); *Re Skinner,* [1929] 4 D.L.R. 427 further proceedings (1930), 38 O.W.N. 201, *Re McFadden,* [1937] 46 O.W.N. 404; *Swartz v. Swartz* (1935), 38 P.R. 341 (Que.). Care should be exercised in relying upon any of these decisions as legislation in the various provinces has been passed or modified on many occasions.

[181]Kennedy, *op. cit., supra,* footnote 176 p. 537.

[182]Except Newfoundland, where the common-law rules apply.

Manitoba for example foreign orders which are comparable to local adoptions will be recognised and given the same effect in Manitoba as is given by that province to a decree of adoption handed down by its own courts.[183] There is no attempt to restrict the effects of the foreign adoption. Outside of reciprocity, this is certainly the best solution. In Nova Scotia an adoption made according to the law of the then place of domicile or residence of either adopted child or new parent will be recognized and the child will have for all purposes in Nova Scotia the same status, rights and duties as if the adoption had been in accordance with the local law.[184] The other Canadian statutory provisions are limited to questions of succession. Thus, the Saskatchewan Act is concerned only with the inheritance rights of the adopted child. Section 82 provides that:[185]

> A person who has been adopted in accordance with the laws of the jurisdiction, in or outside Canada wherein the adoption took place and his issue, shall, upon proof of the adoption be entitled to the same rights of succession to property as they would have had if the person adopted had been adopted in accordance with the laws of this province.

In Quebec, on the other hand, the child has the same rights of succession that he would have had in the foreign country in which he was adopted.[186]

In Ontario, no adoption in another province is recognized unless the person was domiciled in the province where the order was made both at that time and when the succession rights arose. As in Quebec, the adopted child has the same rights of succession as he would have had in the province where he was adopted, except that these rights cannot exceed those he would have had if adopted in Ontario.[187]

From this survey, it would seem that in many provinces it might be advisable either to repeal or to amend the statutory provisions in existence on a uniform basis. In that respect, Dr. Kennedy's suggestion that: "An adoption effected according to the law of any other jurisdiction shall have the same effect as an adoption under this act,"[188] should receive careful consideration as it is socially desirable that children adopted abroad be considered on the same general basis as children adopted locally.

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[183]*Supra,* footnote 169, s. 98. See also Alberta, *supra,* footnote 174, am. 1958 c. 8, s. 88.

[184]*Supra,* footnote 174, s. 19.

[185]*Supra,* footnote 167, s. 82. See also N.W.T. s. 12 and Yukon s. 15, *supra,* footnote 167. N.B., *supra* footnote 172, s. 32, (recognition is limited to Canadian orders only, save in P.E.I. *supra,* footnote 171, s. 15.)

[186]R.S.Q., 1941, c. 324, s. 22 and *Swartz v. Swartz* which recognized a foreign adoption before the Quebec statute was passed, *supra,* footnote 180.

[187]1954, c. 8, s. 78 recognition limited to Canadian orders see *Re McFadden, supra,* footnote 180.

[188]*Op. cit., supra,* footnote 176, at p. 562 embodied in the New B.C. Adoption Act *supra,* footnote 168. The new Act reshapes R.S.B.C., 1948, c. 7 as amended.

## XI—MINORITY — INFANCY

The status and rights of minors or infants are determined by the law of their domicile.[189] A tutor or guardian appointed to a minor by the court of his foreign domicile may validly represent him in the province of Quebec as those who have not the free exercise of their rights must be represented, assisted or authorized in the manner prescribed by the laws which regulate their particular status or capacity.[190] On the other hand, "Whenever an incapable person domiciled outside of the province possesses property or has rights to be exercised in the province and the law of his domicile does not provide for him to have a representative to his property or his rights, a curator to his property may be appointed for him to represent him in all cases where a tutor or a curator may represent a minor or an incapable person under the laws of this province. The appointment shall be made in the district wherein the property or rights of the incapable person is or are wholly or in part situated, with the formalities and according to the rules prescribed for the appointment of tutors or curators to minors or to incapable persons domiciled in the province."[191] Quebec courts cannot appoint a tutor to a minor domiciled in a foreign country.[192] Where a tutor has been appointed by the court of the foreign domicile of a minor there is no necessity for an additional grant of local letters of administration or local confirmation of the tutor's *prime facie* authority under the foreign law of the domicile.[193]

Although at common law a foreign guardian claiming property of the infant within the jurisdiction cannot do so by virtue of his appointment on the ground that his powers are limited to the territory of the state or province from which he derives his authority, Ontario courts have held that a guardian duly

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[189]Quebec C.C. 6. This is another area for circular reasoning. *Re Gripton* (1930), 38 O.W.N. 281; *Lucas v. Coupal* (1930), 66 O.L.R. 141; *Kavanagh v. Lennon* (1894), 16 P.R. 229 (Ont.).

[190]C.P.C. 78-79; *Schatz v. McEntyre,* [1935] S.C.R. 238, [1935] 1 D.L.R. 608; The capacity of a person to enter a legal relationship or to appear in court is considered in Quebec as an aspect of the civil status of a person and is governed by the personal law of that person, that is the law of his domicile, C.C. 6. *Jones v. Dickinson* (1875), 7 S.C. 313 (Que.) In the common-law provinces, on the other hand, there is no such general principle underlying the ascertainment of the capacity of persons to enter into a legal relationship. Capacity is not a status but a quality of a transaction which is governed by the law that applies to the whole transaction. But see *Lucas v. Coupal, ibid.* For the appointment and removal of a guardian in the common-law provinces see *Re McGibbon (an infant) supra,* footnote 105.

[191]C.C. 348 (a).

[192]*Coslett v. Germain,* [1949] K.B. 521 (Que. C.A.).

[193]Johnson, *op. cit.,* vol. III, p. 136, *et seq.*

appointed by the court of the domicile of the infant is entitled to have paid over to him money belonging to this infant in the province.[194]

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In view of the great diversity of laws and confusion in judicial thinking which exists in this field of the law, it seems that the time has now come for the Commissioners on Uniformity of Legislation in Canada to codify private international law rules relating to domestic relations.

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[194]*Hanrahan v. Hanrahan* (1890), 19 O.R. 396; *Kelly v. O'Brien* (1916), 37 O.L.R. 326: *Re Gripton, supra,* footnote 189; but see *Re Lloyd* (1914), 31 O.L.R. 476 where the refusal to recognize the right of the Texas guardian was based on the fact that it was affirmatively shown that the guardian intended to use the money in a way which was not deemed proper. As regards custody, a foreign guardian appointed by the court of the domicile of the infant has no absolute right over his person as such in the common-law provinces, but great weight will be given to the foreign order. *Re Davis; Re Guay, supra,* footnote 107. *In re Bergman & Waldron,* [1923] 3 W.W.R. 70, 17 Sask. L.R. 497, [1923] 4 D.L.R. 56 (C.A.).