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THE recognition of American marriages and divorces in Canada depends on Canadian conflict of laws and this article will be concerned with discussing the relevant rules of this branch of Canadian law. However, it will be useful first to mention some provisions of Canadian constitutional law which provide the background against which the conflict rules operate. Under the Canadian constitution the provinces have legislative jurisdiction with regard to "property and civil rights in the province,"[1] which covers most areas of private law. However, the constitution specifies that "marriage and divorce" are federal matters,[2] although the provinces have jurisdiction with regard to the "solemnization of marriage in the province."[3] Even though the power to legislate on the question of the jurisdiction of courts in matrimonial matters has been exercised by the federal parliament,[4] the courts to whom this jurisdiction has been granted are the courts of the provinces,[5] and the province is the relevant unit for judicial jurisdiction in matrimonial (and most other) matters.[6] Likewise, the province is the appropriate legal unit for the purpose of choice of law, except with regard to some matters governed by federal law.[7]

The common law of England is in force throughout Canada except for the Province of Quebec where there is a civil code based upon French law. Subject to certain exceptions in the case of Quebec, the rules of conflict of laws in Canada are almost exactly the same as in England, and English cases and writers are usually followed by the courts. The main exceptions to this occur where legislation has been enacted. The English and Canadian authorities will therefore be discussed together except where the matter is governed by statute.[8] As the law of Quebec follows somewhat different principles from the rest of Canada (although English rules on conflict of laws are frequently applied

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1. British North America Act, 30 & 31 Vict., c.3, § 92, item 13 (1867).
2. *Id.* § 91, item 26.
3. *Id.* § 92, item 12.
4. The Divorce Jurisdiction Act, Can. Rev. Stat. c. 84 (1952).
5. There is, however, a right of appeal to the Supreme Court of Canada, which is the highest court in Canada since the abolition of appeals to the Privy Council in England in 1949. *See* Can. Rev. Stat. c. 259, §§ 35-42 (1952). Appeals which were pending in 1949 were allowed to continue: *See e.g.*, McKee v. McKee, [1951] A.C. 352, [1951] 2 D.L.R. 657, [1951] 2 W.W.R. (n.s.) 181 (P.C.) (Ont.).
6. Where the word "country" is used in this article it should be understood to mean a province in Canada and a state in the United States.
7. Even though marriage and divorce are federal matters, there are in fact differences between the law on these topics in the various provinces. The reason for this is that pre-confederation law has continued in force in the absence of federal legislation.
8. The leading English textbooks are: A. Dicey, Conflict of Laws (7th ed. 1958); G. Cheshire, Private International Law (7th ed. 1965); and R. Graveson, The Conflict of Laws (5th ed. 1965). J. Castel, Private International Law (1960) is a comparative study of Canadian and American conflict of laws.

there), the discussion that follows will be based mainly on the common law provinces.

DOMICILE

The Canadian conflict of laws rules on marriage and divorce are based to an important extent on domicile. This concept is of course well known to American lawyers but the rules of domicile are somewhat different in Canadian law and it is possible for a person to be domiciled in one country according to American law and in another according to Canadian law; it is therefore necessary to consider briefly the main differences between the Canadian and the American position.

The first difference concerns the domicile of origin,[9] which plays a more important role in Canadian than in American law. The main significance of the domicile of origin in Anglo-Canadian law is that if a person abandons his previous domicile without acquiring a new one, his domicile of origin revives so as to prevent his being without a domicile.[10] This is called the doctrine of revival and its operation can be illustrated by the following example:

> *X* has a domicile of origin in England and, after he reaches the age of majority, he settles in New York where he acquires a domicile of choice. After living most of his life in New York, he decides to retire to Vancouver, British Columbia and sets out to go there but is killed on the way.

A Canadian court would hold that he died domiciled in England because he abandoned his New York domicile but did not acquire one in British Columbia. The position would be the same if he left his New York domicile and spent the rest of his life travelling without settling permanently in any one place. An American court, on the other hand, would probably hold that *X* was still domiciled in New York and this could result in conflicting decisions between the courts of the two countries. A less important characteristic of the domicile of origin is that stronger evidence is generally required to prove the acquisition of a new domicile if the previous domicile was a domicile of origin than if it was a domicile of choice.[11]

The second difference is that the rules concerning domicile of dependence are stricter under Canadian law. Thus emancipation or marriage cannot give a person under twenty-one the power to establish a domicile of choice and a married man under twenty-one is still considered to have the same domicile as his father. It follows from this that the domicile of his wife will be the same as

9. The domicile of origin is a person's domicile at birth; it is usually the domicile of his father, if he is legitimate, and of his mother, if he is illegitmate. *Cf.* F. Goodrich, Conflicts of Laws § 24 (F. Scoles ed. 1964).

10. Udny v. Udny, L.R. 1 Sc. & Div. App. 441 (H.L. 1869).

11. The tenacity of the domicile of origin is usually attributed to the fact that in the nineteenth century, where these rules were developed by the English courts, Englishmen were in the habit of going out to the colonies for long periods of time but always, it was assumed, with the intention of returning to their native land.

that of her father-in-law. Moreover, there are no exceptions to the rule that the domicile of a married woman is that of her husband and this rule applies even if she has been deserted by him or has been judicially separated from him.[12] The rule applies if the marriage was voidable (up to such time as the marriage is annulled) but not if it is void ab initio.[13] In many American states a wife who is separated from her husband can acquire a separate domicile, but such a domicile will not be recognized in Canada. For example:

> *W* is a married woman whose husband is domiciled in Ontario. After being deserted by her husband she settles in California with the intention of remaining there permanently.

On these facts *W* would probably be held by the California courts to have established a domicile in California, but in the eyes of a Canadian court her domicile will remain in Ontario and any divorce granted in California will not be recognized.

Finally, there is a stricter test for the intention necessary to establish a domicile of choice. In some older cases it was said that the person must intend to reside *permanently* in the country concerned and in one case it was held that a person who left his domicile of origin in Scotland and resided in England for thirty-five years had not established a domicile in England.[14] This is, however, a rather extreme example and today in Canada it is usually said that it is sufficient to intend to reside *indefinitely* in the relevant country.[15] A person can, however, acquire a domicile in a country even though he would be prepared to move elsewhere if some uncertain future event were to occur. Thus if he works for a corporation with branches across Canada or the United States, he could acquire a domicile at the place where the branch in which he works is situated even though he would be prepared to move to another branch in a different province or state if he were offered promotion.[16] It has also been held that a Hungarian refugee could establish a domicile in Ontario even though he admitted that he might return to Hungary if the Russians left.[17]

If a person wishes to establish a domicile in America his intention must be directed towards residence in a particular state. It is not sufficient if he intends to reside somewhere in the United States. For example:

> *Z* has a domicile of origin in Italy and acquires a domicile of choice in Ontario. He then immigrates to the United States and takes out papers preparatory to becoming an American citizen. Even though he

12. Atty.-Gen. of Alta. v. Cook, [1926] A.C. 444, [1926] 2 D.L.R. 762, [1926] 1 W.W.R. 742 (P.C.), *rev'g*, 19 Alta. L.R., [1923] 4 D.L.R. 366, [1923] 3 W.W.R. 705.
13. This is important for nullity jurisdiction: *see infra* text accompanying notes 49 and 50.
14. Ramsay v. Liverpool Royal Infirmary, [1930] A.C. 588 (H.L.).
15. Gunn v. Gunn & Savage, 2 D.L.R.2d 351, 18 W.W.R. (n.s.) 85 (Sask. C.A. 1956).
16. *Id.*
17. Osvath-Latkoczy v. Osvath-Latkoczy & Schneider, [1959] Can. S. Ct. 751, 19 D.L.R.2d 495.

> intends to remain permanently in the United States, he has not decided which state he wants to live in.

On these facts a Canadian court would hold that he had not acquired a domicile anywhere in the United States. As his Ontario domicile has been abandoned, his Italian domicile of origin would revive.[18]

From what has already been said it will be clear that the Anglo-Canadian rules of domicile are more rigid and technical and less realistic than those generally prevailing today in the United States. The English law has frequently been the subject of criticism, which has been directed in particular at the doctrine of the revival of the domicile of origin, the inability of a wife to acquire a separate domicile and the strict test for the establishment of a domicile of choice. In 1958 and 1959 legislation was introduced in the British Parliament to reform these aspects of the law in Britain (and to codify the law of domicile in general) and in Canada a Draft Domicile Bill along similar lines has been drawn up by the Conference of Commissioners on Uniformity of Legislation in Canada,[19] but none of these efforts has been successful.[20] A recent proposal to the Canadian Parliament for legislation to reform the law of divorce has included a provision by which a married woman would be able to establish a separate domicile apart from her husband for the purpose of divorce and nullity jurisdiction as if she were unmarried.[21] At the time of writing,[22] however, these proposals have not been put into effect. If the Canadian law of domicile is reformed to any substantial extent it will probably be brought closer to the American position.

MARRIAGE

The recognition of American marriages in Canada depends on the Canadian rules of conflict of laws of marriage and when these rules are different from those prevailing in America it is likely that marriages valid in America may be invalid in Canada. The traditional rule in American conflict of laws is that the law of the place where the marriage is celebrated governs its validity. In England and Canada the orthodox formula is that the law of the place of celebration decides only whether the marriage is valid as to form, while questions of capacity and essential validity are determined by the law of the domicile[23] of each party immediately prior to the marriage. At first sight, therefore,

18. Trottier v. Rajotte, [1940] Can. S. Ct. 203, [1940] 1 D.L.R. 433.

19. *See* Tarnopolsky, *The Draft Domicile Act—Reform or Confusion?* 29 Sask. B. Rev. 161 (1964).

20. It has been said that the British legislation failed to be adopted because of the opposition of Commonwealth and American businessmen in Britain who were afraid that it might make them liable to British income tax and estate duty. See Graveson, *supra* note 8, at 149.

21. *See* A. Roebuck, Report of the Special Joint Committee of the Senate on Divorce, Draft Bill § 9(2)(b), in S. Deb. app., June 27, 1967.

22. July, 1967.

23. When the word "domicile" is used in this paper it will be in the Canadian sense, *i.e.*, as determined according to the rules outlined above.

it appears that there is a substantial difference between the conflicts rules of the two countries and that there might be many situations in which marriages celebrated in America might not be recognized in Canada. But in fact the differences are not as great as they seem: in America the law of the domicile (or something very close to it) is today given substantial weight in determining many aspects of the validity of marriage,[24] while in Canada, as will be seen, the traditional formula is qualified in a number of ways.

Under the first branch of the English formula a marriage must comply with the formalities of the place of celebration; if it does it will be recognized as being valid as to form in Canada; if it does not and is for this reason invalid according to the law of the place of celebration, it will be invalid in Canada.[25] In Anglo-Canadian law the word "form" has an extended meaning for the purpose of this rule and includes various matters beyond those questions which obviously relate to form. The most important of these is the question of whether the consent of the parties' parents is necessary; this is classified by the courts as a question of form (despite the protests of some writers) and is consequently governed by the law of the place of celebration.[26] The question of whether a civil (as distinct from a religious) marriage is valid is also considered a question of form[27] even though it is classified as a matter of capacity by the law of certain foreign countries whose law regards a religious ceremony as obligatory.[28] Thirdly, the question of whether a proxy marriage is valid is also considered a question of "form" within the rule.[29]

Questions of consanguinity, affinity and non-age are considered to be matters of "capacity" or "essential validity"—these two terms apparently being synonymous. Subject to the exception below, these matters are decided by the pre-marital domicile of each party.[30] Thus if the marriage is invalid by reason of the relationship of the parties under the law of the domicile of either party it will be held to be invalid. In the only case on non-age[31] the man, who was of age, was domiciled in England and the woman, who was fifteen, was domiciled in Hungary. The marriage took place in Austria and was valid under Austrian and Hungarian law but was invalid under an English statute which

24. *See, e.g.*, Restatement (Second) of Conflict of Laws §§ 122, 132 (Tent. Draft No. 4, 1957) ("state of paramount interest").

25. Berthiaume v. Dastous, [1930] A.C. 79, 47 Que. K.B. 533, [1930] 1 D.L.R. 849 (P.C. 1929).

26. Simonin v. Mallac, 2 Sw. & Tr. 67 (1860); Ogden v. Ogden, [1908] P. 46; Solomon v. Walters, 3 D.L.R.2d 78 (B.C. 1956); Hunt v. Hunt, [1958] Ont. W.N. 332, 14 D.L.R.2d 243.

27. Lepre v. Lepre, [1965] P. 52, 60. *See also* Gray v. Formosa, [1963] P. 259. *But see* Papadopoulos v. Papadopoulos (No. 1), [1930] P. 55, 64.

28. *E.g.*, E. Rabel, The Conflict of Laws: A Comparative Study 230-33 (2d ed. 1958).

29. Apt v. Apt, [1948] P. 83; Ponticelli v. Ponticelli, [1958] P. 204; Frustaglio v. Barbuto, [1960] Ont. W. N. 551.

30. It is often said that the marriage must also comply with the law of the place of celebration although there does not seem to be any judicial authority for this as far as questions of capacity are concerned.

31. Pugh v. Pugh, [1951] P. 482.

stated that all marriages where either party was under the age of sixteen were void. The English court held the marriage to be void, which suggests that the rule may be that each party must be of the requisite age under the law of the domicile of *both* parties. The question of insanity has also been held to relate to capacity,[32] but it is probable that a foreign law on this matter which differed substantially from the law of the forum would be refused application on the ground of public policy.

The exception to the principle that the law of the domicile decides questions of capacity is known as the rule in *Sottomayer v. De Barros (No. 2)*[33] and is as follows: if the marriage is celebrated in the country of the forum and if one of the parties is domiciled there, it is valid if it is valid under the law of the forum even though it is invalid as to capacity under the law of the domicile of the other party. The origins of this rule are partly historical and it has been heavily criticised by some writers; however, it serves the function of protecting local domiciliaries whose marriages might otherwise be invalidated.[34]

Legal provisions which forbid the remarriage of divorced persons do not seem to fall under any of the above rules. A provision of the law of the country where the divorce was obtained prohibiting remarriage for a limited time for the purpose of allowing for an appeal against the divorce decree will be applied by Canadian courts irrespective of where the new marriage takes place or where the parties are domiciled;[35] but if the prohibition is considered to be penal, *e.g.*, if it prohibits the guilty party from marrying the co-respondent, it will be held to be against public policy and will not be recognized in any situation.[36]

Finally it should be noted that the above rules are subject to public policy, but that Canadian courts are much more reluctant than American courts to resort to this doctrine.[37] However, a religious or racial bar to marriage would probably be disregarded on the basis of public policy.[38]

The above outline of the law will show that Anglo-Canadian conflict rules

32. Capon v. McLay, [1965] 2 Ont. 83, 91, 49 D.L.R.2d 675, 683.

33. [1879] 5 P.D. 94. For another possible exception, *see supra* note 30.

34. A different theory of the law is put forward by G. Cheshire, *supra* note 8, at 276-289, who states that all questions of capacity to marry are governed by the law of the "intended matrimonial home," which seems to be a concept similar to that of the Restatement's "state of paramount interest." See Restatement, *supra* note 24. For a criticism of Cheshire's views, *see* A. Dicey, *supra,* note 8, at 252-53.

35. Miller v. Teale, 29 Aust. L.J. 91 (C.A. 1955); Hellens v. Densmore, [1957] Can. S. Ct. 768, 10 D.L.R.2d 561. *See also* Warter v. Warter, [1890] 15 P.D. 152; Sakellaropoulo v. Davis, [1960] Ont. W.N. 345, 24 D.L.R.2d 524; Colvin v. Colvin, [1952] 3 D.L.R. 510 (B.C.); Gill v. Gill [1947] 2 W.W.R (n.s.) 761 (B.C.); Matter of Eaton, 30 B.C. 243, [1922] 1 W.W.R. 236 (B.C.).

36. Scott v. Att'y-Gen. of Eng., 11 P.D. 128 (1886), *as interpreted in* Warter v Warter, 15 P.D. 152 (1890).

37. *See, e.g.,* Cheni v. Cheni, [1965] P. 85.

38. American anti-miscegenation statutes would probably not be recognized in Canada, though the question now seems academic in view of the recent United States Supreme Court decision of Loving v. Virginia, 388 U.S. 1 (1967).

on marriage are not basically divergent from the American rules although there are differences in detail.

Divorce and Nullity Decrees

The recognition in Canada of American decrees of divorce and nullity depends primarily on whether the American court granting the decree has jurisdiction according to the rules of Canadian law. Today in matrimonial cases Canadian courts apply the same principles in determining a foreign court's jurisdiction as they use in deciding their own jurisdiction.[39] These rules differ for divorce and nullity.

The basic principle in divorce is that the court of the domicile has jurisdiction, but a decree of another court will be recognized in Canada if the court of the domicile would recognize it.[40] Thus if a husband and wife were domiciled in New York (according to the Canadian rules of domicile), a divorce decree granted by the New York courts would be recognized in Canada. If the decree is granted in another state (*e.g.*, where the wife has established a separate domicile according to American law) that decree will be recognized if it would be recognized in New York. The effect of this rule is that as long as the couple is domiciled somewhere in the United States according to Canadian law, an American decree will be recognized in Canada provided it would be given full faith and credit in the United States.

At one time Canadian courts would assume jurisdiction in divorce cases only if the couple were domiciled within the forum, but this caused hardship to the wife in view of the fact that she was unable to acquire a separate domicile. The Canadian Parliament therefore passed the Divorce Jurisdiction Act[41] which provides that a Canadian court has jurisdiction to grant a divorce in the wife's suit if she has been deserted by her husband for at least two years, provided that her husband was domiciled in the province concerned immediately prior to the desertion. This rule goes part of the way (but not the entire way) towards mitigating the effects of the rule that a wife cannot acquire a separate domicile.[42] Under the principle in *Travers v. Holley*,[43] a Canadian court will

39. Travers v. Holley, [1953] P. 246 (C.A.); Robinson-Scott v. Robinson-Scott, [1958] P. 71; Capon v. McLay, [1965] 2 Ont. 83, 49 D.L.R.2d 675.

40. Armitage v. Att'y Gen of Eng., [1906] P. 135; Plummer v. Plummer, 31 D.L.R.2d 723 (B.C. 1962); Walker v. Walker, [1950] 4 D.L.R. 253, [1950] 2 W.W.R. 411, *aff'g* [1950] 2 D.L.R. 90, [1950] 1 W.W.R. 849 (B.C.). In the past it was assumed that the decree must be recognized by the courts of the country in which the parties were domiciled *at the time when the decree was granted,* but a recent case suggests that it will also be recognized if it would be recognized by the courts of a country in which the parties become domiciled *at any subsequent time. See* Schwebel v. Ungar, [1964] 1 Ont. 430, 42 D.L.R.2d 622 (1963), *aff'd* [1965] Can. S. Ct. 148, 48 D.L.R.2d 644.

41. Can. Rev. Stat. c. 84 (1952).

42. There is a similar provision in English law except that the desertion need not have lasted for any fixed time. Matrimonial Causes Act 1965, § 40(1)(b). In addition, the English courts have jurisdiction if the wife has been ordinarily resident in England for three years even if her husband was never domiciled in England. *Id.* § 40(1)(b).

43. [1953] P. 246 (C.A.).

also apply this rule to a foreign court and recognize an American decree if the court granting it comes within the rule. For example:

> A husband and wife are domiciled in Michigan when the husband deserts his wife and acquires a domicile in Ontario. If the Michigan courts grant the wife a divorce after she has been living apart from her husband for two years, it will be recognized in Ontario. It does not matter what the grounds of the divorce were.

An American court will be recognized as having jurisdiction to grant a decree of nullity in the following cases:

> 1. If either party is domiciled in the state where the court is situated;[44]
> 2. If both parties are resident there,[45] (or possibly if the respondent alone is resident there[46]);
> 3. If the marriage was celebrated there (provided it is void and not merely voidable);[47]
> 4. If the decree would be recognized by the courts of the country where the parties are domiciled.[48]

Under Canadian law the wife shares the husband's domicile if the marriage is voidable until such time as it is annulled, but the decree of nullity does not operate retroactively to change her domicile before the date of the decree.[49] Therefore, for the purpose of nullity jurisdiction her domicile must always be considered to be that of her husband in the case of a voidable marriage. If, however, the marriage is void, she is free to establish her own domicile. Thus, under the first of the above rules, if the marriage is voidable the husband's domicile alone has jurisdiction, while if it is void the domicile of each party may have jurisdiction.[50]

Even though the foreign court has jurisdiction in accordance with the above rules, its decree will nevertheless not be recognized if the proceedings were contrary to natural justice.[51] This doctrine is not very often invoked by

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44. Capon v. McLay, [1965] 2 Ont. 83, 49 D.L.R.2d 675. The court held that any ground which gives a Canadian court jurisdiction will also give a foreign court jurisdiction and the first three rules in the text are the three grounds on which a Canadian court will assume jurisdiction in nullity.
45. Merker v. Merker, [1963] P. 283, 296-7.
46. *See* A. Dicey, *supra* note 8, at 350-351, 354.
47. Merker v. Merker, [1963] P. 283. *See also* Smith v. Smith, [1963] A.C. 280 (H.L.).
48. Abate v. Abate, [1961] P. 29.
49. De Reneville v. De Reneville, [1948] P. 100 (C.A.)
50. In a recent report to the Canadian Senate on divorce it was recommended that the courts of a province in Canada should have jurisdiction in divorce and nullity if either the husband or wife is domiciled in *any* province of Canada (the wife for this purpose being able to establish a separate domicile as if unmarried) and if the petitioner or respondent has resided in the province concerned for a year. It was also recommended that the Divorce Jurisdiction Act be repealed. If these recommendations are put into effect they will probably also be applied by the courts to the question of jurisdiction of foreign courts. *See* S. Roebuck, *supra* note 21, at § 9.
51. *See, e.g.,* Gray v. Formosa, [1963] P. 259; Lepre v. Lepre [1965] P. 52.

the courts and the decree will not, for example, be refused recognition merely because the foreign court did not fully comply with its own rules of procedure;[52] nor does the fact that the respondent was not informed of the proceedings necessarily result in the non-recognition of the decree unless absence of notice is the result of fraud on the part of the petitioner (*e.g.*, if he falsely swears that he does not know the respondent's whereabouts), but if such fraud does exist the decree will not be recognized even if the foreign court has jurisdiction.[53] On the other hand, recognition will not be refused because evidence at the trial establishing the ground for divorce was fraudulent, provided that the decree has not been set aside in the place where it was obtained.[54]

In Canada the principle of estoppel has a certain limited application with regard to decrees of divorce and nullity.[55] If a foreign court grants a decree which is invalid in Canada, the person who obtained the decree will be estopped from denying its validity in subsequent proceedings of a pecuniary nature. The usual situation in which the doctrine is applied involves a wife[56] who obtains a foreign decree from a court which does not have jurisdiction and subsequently claims alimony from her husband on the basis that the marriage is still valid,[57] or claims a share in his estate upon his death intestate on the basis of being a surviving spouse.[58] In both these cases the courts will refuse to allow her to impugn the validity of the decree she obtained and her claim will fail. This doctrine does not, however, mean that the decree will be recognized generally, as illustrated by the following example from a decided case:

> The first wife divorced her husband in the State of Washington when he was domiciled in British Columbia. Subsequently, he married his second wife in British Columbia and then died intestate domiciled there. It was held that neither wife could claim in his estate as a surviving spouse: as the State of Washington lacked jurisdiction the divorce was invalid and the second marriage was therefore void; consequently the second wife's claim failed. But the first wife was estopped from denying the validity of the decree and her claim also failed.[59]

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52. Pemberton v. Hughes, [1899] 1 Ch. 781 (C.A.).

53. Macalpine v. Macalpine, [1958] P. 35; Maday v. Maday, 4 Sask. 18, 16 W.L.R. 701 (1911); Delaporte v. Delaporte, 61 Ont. L.R. 302, [1927] 4 D.L.R. 933; Bavin v. Bavin & Serrane, [1939] 2 D.L.R. 278 (Ont.), *modified on other grounds,* [1939] Ont. 385, [1939] 3 D.L.R. 328; Rothwell v. Rothwell, 50 Man. 249, [1942] 4 D.L.R. 767, [1942] 3 W.W.R. 442.

54. Macalpine v. Macalpine, [1958] P. 35.

55. It has not been applied in England and this may be one difference between English and Canadian conflict of laws which is not the result of legislation.

56. For a case where the doctrine was used against the husband, *see* Swaizie v. Swaizie, 31 Ont. 324 (1899).

57. Nunn v. Nunn. [1965] 1 Ont. 143, 47 D.L.R.2d 128; Rossrom v. Rossrom, 7 Ont. W.N. 583 (1914).

58. Capon v. McLay, [1965] 2 Ont. 83, 49 D.L.R.2d 675.

59. Matter of Graham & Nolan, [1937] 3 W.W.R. 413 (B.C.).

ALIMONY AND MAINTENANCE[60]

In the English case of *Simons v. Simons*[61] the wife obtained a divorce and an order for maintenance from a court in Massachusetts where she and her husband were resident but not domiciled. When she tried to enforce the maintenance order in England on her husband's return, the court held that since the divorce was invalid, as the parties were not domiciled in Massachusetts, the maintenance order also could not be enforced, being ancillary to the divorce, even though the Massachusetts court had jurisdiction in personam against the husband. This case has been followed in several Canadian cases,[62] although it seems that in each the foreign court did not actually have jurisdiction in personam against the husband.[63]

In the early case of *Swaizie v. Swaizie*[64] an American maintenance order was enforced in Canada even though the divorce to which it was ancillary was invalid in Canada for lack of jurisdiction; here, however, the doctrine of estoppel[65] was applied: it was the husband who had obtained the foreign divorce and he was estopped from denying its validity when his wife tried to enforce the ancillary maintenance order.

It has been held in Ontario that if the foreign court has jurisdiction to grant the divorce, an ancillary maintenance order will be recognized even if the court lacks jurisdiction in personam over the party against whom the order was made.[66] It is possible therefore that an ancillary order for maintenance will always stand or fall, as far as jurisdiction is concerned, with the divorce or nullity decree on which it is dependent. If the order for maintenance or alimony is not ancillary to a decree, the question of jurisdiction is determined by the ordinary rules for jurisdiction in personam.[67]

Even if the problem of jurisdiction is overcome there is another difficulty in the enforcement of foreign orders for alimony or maintenance in Canada. This is the requirement that a foreign judgment cannot be enforced in England

60. Strictly speaking, the term "alimony" is used when the parties are still married, and "maintenance" after the marriage has been dissolved by divorce or annulled; see B. Power, Divorce 512-13 (J.D. Payne ed. 1964).

61. [1939] 1 K.B. 490.

62. Matter of Needham, [1964] 1 Ont. 645, 652, 43 D.L.R.2d 405, 412; Matter of Ducharme, [1963] 2 Ont. 204, 207, 39 D.L.R.2d 1, 4; Casavallo v. Casavallo, 4 Alta. 6, [1911] 1 W.W.R. 212.

63. It is suggested by Dicey that this rule will only apply if the foreign court has no power under its own law to grant maintenance without also granting a divorce. A. Dicey, *supra* note 8, at 312.

In two of the cases cited in the previous note, Matter of Needham, [1964] 1 Ont. 645, 43 D.L.R.2d 405, *and* Casavallo v. Casavallo, 4 Alta. 6, [1911] 1 W.W.R. 212, it was stated that, in the opinion of the court, the foreign court would not have granted maintenance unless it had also granted a divorce.

64. 31 Ont. 324 (1899).

65. *See* text accompanying *supra* notes 51-59.

66. Matter of Summers, [1958] Ont. W.N. 73, 13 D.L.R.2d 454. It is, however, unclear whether the court was correct in holding that the foreign court had jurisdiction to grant the divorce. *But see* Matter of Needham, [1964] 1 Ont. 645, 43 D.L.R.2d 405.

67. *See* A. Dicey, *supra* note 8, at ch. 29.

or Canada, apart from statute, unless it is "final and conclusive," and it has been held that an order for alimony or maintenance is not final and conclusive if an order has to be obtained in the foreign court for its enforcement there,[68] or if the foreign court has the power to alter or vary it.[69] In many countries the courts have the power to vary maintenance orders not only as to the future but also as to past payments which have become due; if this is the case, such an order cannot be enforced in Canada.[70] However, if the foreign court has no power to vary its orders as regards past maintenance but only as to future payments, its order will be final and conclusive as to such past payments and these may be claimed.[71] The position is the same if a lump sum is awarded.[72]

Statutes have been passed in all the provinces and territories of Canada to provide for the reciprocal enforcement of maintenance orders,[73] and where these are applicable they provide great advantages over the common law. The Ontario statute will be taken as an example.[74] Arrangements under this statute have been entered into with only one American state, Michigan, and it is therefore applicable only to judgments from that state.[75]

The statute envisages two situations: first (taking Michigan as an example), the case where the Michigan court has jurisdiction over the husband[76] at the time when the order is made, but he subsequently moves to Ontario; secondly, the case where he is already resident in Ontario when the Michigan court wishes to make the order (*e.g.*, if the wife and children are in Michigan).[77] The first situation is dealt with under section 2 of the act which provides for the registration of the Michigan order in Ontario through the Ontario Attorney General. When it has been registered it is of the same force and effect as if it had been originally made in Ontario and can be enforced accordingly; the question of whether it was final and conclusive does not, of course, arise.

If the husband is resident in Ontario and the Michigan court has no jurisdiction over him when it wishes to make the order, the provisions of section 5 apply. Under this section the Michigan court can make a provisional order

68. Martin v. Trofimuk, 32 W.W.R. 520 (Alta. 1960).

69. Harrop v. Harrop, [1920] 3 K.B. 386; Ashley v. Gladden, [1954] Ont. W.N. 558, [1954] 4 D.L.R. 848; McIntosh v. McIntosh, [1942] Ont. 574, [1942] 4 D.L.R. 70; Maguire v. Maguire, 50 Ont. L.R. 579, 64 D.L.R. 180 (1921); *see also* Smith v. Smith, [1955] 1 D.L.R. 229, 13 W.W.R. (n.s.) 207 (B.C.).

70. *See* cases cited in *supra* note 69.

71. Beatty v. Beatty, [1924] 1 K.B. 807; Wood v. Wood, 37 Ont. L.R. 428, 31 D.L.R. 765 (1916); Meyers v. Meyers, [1935] Ont. W.N. 547. All these cases concerned New York judgments.

72. Burpee v. Burpee, [1929] 3 D.L.R. 18, [1929] 2 W.W.R. 128 (B.C.).

73. J. Castel, *supra* note 8, at 136.

74. The Reciprocal Enforcement of Maintenance Orders Act, Ont. Rev. Stat. c. 346 (1960).

75. Arrangements have been made with all the other provinces and territories of Canada as well as many Commonwealth countries.

76. For the sake of convenience it will be assumed that the order is made against the husband, though the act is not limited to such orders.

77. This distinction has not been made very clear in the act but it nevertheless forms the basis of the legislation. *See* Matter of Ducharme, [1963] 2 Ont. 204, 39 D.L.R.2d 1.

without any notice to him. It must also make a statement of the grounds on which he could have opposed the order under Michigan law and send a copy of the order together with the depositions of the witnesses and the statement of defenses to the Ontario Attorney General who will pass them on to the appropriate court in Ontario. The provisional order has no force in itself but may be confirmed by the Ontario court after which it will be treated as if it had been originally made in Ontario. Before it will be confirmed, however, the husband must be summoned to show cause why it should not be confirmed, and he may raise any defenses which would have been available to him in the original action if he had been a party to it; however, he may raise no others, *i.e.*, he may raise defenses under Michigan law but not under Ontario law, and the statement of defenses prepared by the Michigan court is conclusive evidence of what those defenses are. In confirming the order, the Ontario court may make such modifications as it thinks just, and may subsequently modify or rescind the decree in the same way as if it had originally been made in Ontario. This legislation avoids the difficulties which exist under the common law and makes the enforcement of orders for maintenance and alimony[78] much easier. It is unfortunate that similar arrangements have not been made with other states in the United States.

Custody Orders

As the welfare of the child is considered to be of paramount consideration, an American custody order will never be automatically recognized and enforced in Canada. In each case the court will review the merits and decide what is in the best interests of the child. It will, however, take the American order into consideration and the weight that will be accorded it will depend on the circumstances.[79]

These principles are illustrated in the leading case of *McKee v. McKee*.[80] In this case a court in California, which was assumed by the Canadian court to have jurisdiction, had made a custody order in favor of the mother. The mother and father were both American citizens and had been divorced in California some time previously. When the father heard that his appeal against the California order had failed, he took the child to Ontario and settled with him on a farm, evidently with the intention of remaining there permanently. The mother then instituted habeas corpus proceedings in Ontario to obtain the child. The court ordered that the issue of custody be tried and awarded custody to the father. This decision was upheld when the case eventually went on appeal to the Privy Council in England. The court considered that the best

78. Although the term "maintenance order" is used in the act it is defined to include alimony. *See* The Reciprocal Enforcement of Maintenance Orders Act, Ont. Rev. Stat. c. 346, § 1(c) (1960).

79. Less weight will be given to it if the circumstances of the child or parents have altered since it was made.

80. [1951] A.C. 352, [1951] 2 D.L.R. 657, [1951] 2 W.W.R. (n.s.) 181 (P.C.).

interests of the child would be served by his remaining in Ontario with his father, even though the father had broken one of the terms of an agreement with the mother in taking the child out of the United States. It was held that proper weight must be given to the American custody order, but that it was not conclusive.[81]

81. *See also* Matter of E., [1967] 1 W.L.R. 37, [1967] 1 All E.R. 329 (Ch.); Matter of Wright, 49 D.L.R.2d 460 (N.S. 1965); Matter of Snyder, 38 B.C. 336, [1927] 3 D.L.R. 151, [1927] 2 W.W.R. 240.