

DIVORCE LAW IN ENGLAND

It is desirable that American students of law should study the developments of the law relating to marriage, divorce and matrimonial causes as it exists in England, and more particularly consider the general tendencies of the law and the legislation on the subject which came into force on January 1st of the present year. For this reason I was glad to accept the courteous invitation of the Editor of this REVIEW, extended to me a year ago, to write something upon the subject for American readers, especially as I was officially connected with the Royal Commission that reported on the subject in 1912. My brief paper has been delayed by reasons beyond my control, but in fact the delay has been useful as it enables me to summarize the effects of the new legislation and also the new Rules of Courts affecting Poor Persons seeking relief in matrimonial matters.

It would be impossible to understand the English law without a brief historical retrospect. The early Christian Church was faced with a Roman Society which, having abandoned the old formal marriages (*confarreate* and *coemptionate*) after the Punic Wars, had drifted into a condition of moral corruption which made it possible for St. Jerome to record a case of a wife who was married to her twenty-third husband, she being his twenty-first wife. The official Christian Church—after the time of Constantine the Great—inevitably reacted from this state of social affairs, but the Fathers differed on one special issue raised by the New Testament texts: was re-marriage to be allowed after divorce for adultery? St. Chrysostom (d. 407 A. D.) finally held that adultery itself dissolved the marriage, while St. Augustine (d. 430 A. D.) finally adopted the strict doctrine of the indissolubility of marriage, each eventually holding the view originally held by the other. A century and a half later Justinian imposed a new check upon marriage itself by the invention of the doctrine of spiritual affinity (*cognatio spiritualis*)¹ which extended the bars to marriage implied in certain natural and adoptive relationships to the affinities which were supposed to arise from the relationship of godparent and godchild. This

¹ Cod. 5.4.26, and see Inst. Lib. i Tit. 10, etc.

played a part in the mediæval history of divorce. It was not until the twelfth century that the doctrine of the strict indissolubility of marriage was enforced in England by the Canon law in the Court of the Bishop. From that time onwards there were in these courts two kinds of divorce:

- (1) Nullity of marriage due to some initial impediment, including spiritual affinity, which gave the right of remarriage, and
- (2) Divorce *a mensâ et thoro* on the ground of adultery, heresy or cruelty, which did not give the right of remarriage.

By the beginning of the sixteenth century in England a canonical flaw could be found in almost any marriage, and remarriage was possible, while the issue of the first marriage was legitimate, at any rate in the fourteenth century. Moreover, if the marriage though invalid was not in fact dissolved, the issue were legitimate and for this reason, since after the Reformation a nullity suit had to be brought in the joint life of the spouses, marriage with a deceased wife's sister was possible until the passing of Lord Lyndhurst's Act in 1835.² The Council of Trent (1563) reformed the Canon Law of Divorce, while the Marriage Act of 1540³ also in Protestant England abolished the scandal of pre-contracts and declared that consummated marriages between lawful persons were indissoluble notwithstanding any unconsummated pre-contracts of marriage. But pre-contracts in England were revived in 1548 and were not fully abolished until Lord Hardwicke's Act of 1753.⁴ A modified form of the pre-contract still survives in Scotland if followed by consummation. In Scotland divorces *a vinculo* with a right of remarriage were recognized by statute in 1563, and the statutory right to divorce for desertion, which purported to declare a common law right, followed in 1573 and is still in full force.

No such statutory relief was to be vouchsafed to England until nearly three centuries later by the Matrimonial Causes Act

² 5 & 6 Wm. IV, c. 54.

³ 32 Hen. VIII, c. 38.

⁴ 26 Geo. II, c. 33.

of 1857⁵, but some relief was afforded by private Acts of Parliament dealing with individual cases—a practice that still obtains in the case of Ireland, where marriage has always remained indissoluble. The Parliamentary practice began with the extremely romantic case of Sir Ralph Sadler in 1545,⁶ a case so cruel that Parliament had to interfere. But the mind of the Church of England hardened against any other relief, and after the Restoration of 1660 the Legislature alone, acting *ad hoc*, could end a marriage unless it was ended under those laws of nullity which continued to make many marriages uncertain until, at any rate, the year 1753. It was only from 1753 to 1857 that the doctrine of indissolubility was really effective and incapable of any evasion, save the evasion afforded to the rich by the Legislature, and to all by the now closely limited law of nullity.

The Matrimonial Causes Act of 1857,⁷ which provided the law still in force, was introduced into the House of Lords by the Lord Chancellor, Lord Cranworth, with the object of constituting "a Court which should be competent to decree as a matter of right that relief in favour of persons who had just matter of complaint, which could now only be obtained by means of an Act of Parliament." After much discussion it was passed by both Houses, an effort having failed to amend the Bill by making the position of a woman the same as that of a man with regard to the grounds of divorce, and for making wilful desertion a ground. The Act abolished all ecclesiastical jurisdiction in respect to matrimonial causes and conferred all jurisdiction on "the Court for Divorce and Matrimonial Causes," substituting a decree of judicial separation for the old ecclesiastical divorce *a mensâ et thoro* (bed and board). The twelfth section enabled the Court to sit in London or Middlesex or elsewhere as should be from time to time appointed by the Privy Council. In fact until quite recently (with the exception of a few cases heard on assize in 1860) the Court has only sat in London. Section sixteen extended the old law that judicial separation might be granted

⁵ 20 & 21 Vict., c. 85.

⁶ Pat. Roll 785, membrane 18; Parliament Roll 153 (19); 37 Hen. 8, c. 30. Report of Royal Commission on Divorce and Matrimonial Causes (1912), App. I, p. 19.

⁷ *Supra*.

for adultery or cruelty to cases of desertion without cause for two years or upwards. Relief in matters other than divorce followed, in the main, the principles and rules of the old ecclesiastical courts. By Section 27 a husband might present a petition for a divorce on the ground that his wife since the celebration of the marriage had been guilty of adultery; and a wife might present a petition for divorce on the ground of certain forms of adultery or moral offences, or of adultery coupled with such cruelty as without adultery would entitle her to a divorce *a mensâ et thoro*, or of adultery coupled with desertion, without reasonable excuse, for two years or upwards.

As this Act of 1857 represents with comparatively small amendments the law now in force, it is desirable to note certain points of practice arising under the Act. The Court was directed to dismiss the petition if it should find that the petitioner had, during the marriage, been accessory to or conniving at the adultery of the other party to the marriage or had condoned the adultery complained of or that the petition was presented or prosecuted in collusion with either of the respondents. Moreover, if the case of the petitioner was proved and the petitioner had not been found guilty of connivance with, or condonation of, it, the Court was not to be bound to pronounce such divorce if it should find that the petitioner had during the marriage been guilty of adultery or if the petitioner should, in the opinion of the Court have been guilty of unreasonable delay in presenting or prosecuting such petition or of cruelty towards the other party to the marriage or of having deserted or wilfully separated himself or herself from the other party before the adultery complained of, and without reasonable excuse, or of such wilful neglect or misconduct as had conduced to the adultery. The large discretion vested by this provision in the Court was unfortunately soon after the passing of the Act of 1857 brought within narrow limits. As recently as the year 1920 a broader interpretation was adopted in the case of *Wilson v. Wilson*⁸ when the President Sir Henry Duke (now Lord Merrivale) held that in exercising the discretion the whole circumstances of the case, the interest of the children and of all other parties should be taken into

⁸ [1920] P. 20.

account. On the other hand "this discretion is not to be exercised eagerly or indeed readily, but with some degree of stringency." The Act further enabled the husband to claim damages and costs from an adulterous co-respondent. Section 57 provided that after a decree dissolving a marriage became final it should be lawful for the respective parties to marry again as if the prior marriage had been dissolved by death. But the Act went on to say that no clergyman in holy orders was to be compelled to solemnize the remarriage of the guilty party, but that if he refused he should permit some other properly qualified minister to perform the marriage service in his church or chapel.

This famous Statute was amended in various matters as to procedure, practice and the powers of the Court by Acts passed (*inter alia*) in 1860, 1866, 1868, 1873 and 1884. It is necessary to refer very briefly to these as they affected the law as now in force. By the Matrimonial Causes Act, 1860,⁹ decrees for divorce were not to be made absolute until after the expiration of not less than three months (a period increased to a maximum of six months in 1866)¹⁰ so as to provide a period of intervention by the King's Proctor or other persons in which to show that the decree *nisi* had been improperly obtained. It has been found in practice that intervention by the King's Proctor and the consequent rescission of a decree *nisi* is not infrequent. This principle of intervention was extended to suits for nullity of marriage in 1873.¹¹ The Act of 1884¹² abolished the power of enforcing a decree for restitution of conjugal rights by attachment but gave the Court power to order provision for the wife by the husband, and power to order a settlement to be made of any property of the wife's for the benefit of the petitioner and the children of the marriage, and also to order a reasonable part of any profits of trade or earnings of which the wife was in receipt to be paid to the husband for the benefit of himself and the children of the marriage. The same Act provided that failure to comply with a decree for restitution of conjugal rights was desertion without

⁹ 23 & 24 Vict., c. 144.

¹⁰ 29 & 30 Vict., c. 32, § 3.

¹¹ 36 & 37 Vict., c. 31.

¹² 47 & 48 Vict., c. 68.

reasonable cause involving a sentence of judicial separation. This provision had far-reaching consequences since such desertion coupled with adultery enabled the wife to present her petition for dissolution of the marriage. It is said, probably with some reason, that the provision led to many divorces practically by consent. The husband failed to comply with a decree for restitution. Evidence of cohabitation at an hotel was secured, though in many cases it was more than probable that there had been no adultery in fact, and the decree followed as of course. In such cases there was no collusion in any legal sense. The matter went through by a tacit understanding. In quite recent times the Court has met the evasion by insisting on strict and overwhelming proof of actual adultery.

As a result of the Judicature Acts of 1873¹² and 1875¹⁴ the jurisdiction of the Court was transferred to the High Court of Justice in the Probate, Divorce and Admiralty Division, which consisted of the President and one puisne judge. Two puisne judges are now allotted to this Division of the High Court in pursuance of Section 4 (1) (iii) of the Supreme Court of Judicature (Consolidation) Act, 1925.¹⁵ In the large number of divorce suits in 1919 and 1920, that followed the rash and hasty marriages which took place during the war of 1914-1918, the President and the puisne judge were assisted by other judges of the High Court and at least two ex-Lord Chancellors. Arrears were rapidly overtaken and the present cause list, in view of the fall of the number of divorce causes (despite the considerable number of "poor persons" suits), is normally within the grasp of the President and his colleagues.¹⁶

¹² 36 & 37 Vict., c. 66, § 5.

¹³ 38 & 39 Vict., c. 77.

¹⁴ 15 & 16 Geo. 5, c. 49.

¹⁵ The figures rose from 1075 in 1914 to 5085 in 1919, and 4481 in 1920. But these figures included a large number (exceeding 2000 in 1919) of the "poor persons" suits. In 1923 the total number of divorce suits had fallen to 2591, and in 1924 to 2454 (see *Judicial Statistics (passim)*).

It will be convenient to indicate for the three years 1922, 1923 and 1924 the relative frequency of decrees *nisi* for dissolution of marriage and decrees for judicial separation in England and Wales. The figures are contained in the *Civil Judicial Statistics* for the years 1922, 1923, 1924 (Cmd 2001, Cmd 2277 and Cmd 2492). They are as follows:

Decrees *nisi* for dissolution of marriage: 1922, 2455; 1923, 2591; 1924, 2454.

Decrees for judicial separation: 1922, 46; 1923, 56; 1924, 34.

An innovation to which reference must also be made was due to statutes which conferred powers upon the local magistrates to deal with cases of separation between husband and wife in certain events. The Acts were The Summary Jurisdiction (Married Women) Act, 1895¹⁷ and the Licensing Act, 1902.¹⁸ Legislation in 1878¹⁹ and 1886²⁰ had been passed to give protection to married women with respect to their maintenance and safety, but these Acts were replaced by the Act of 1895²¹ which provided power to local magistrates to order reasonable maintenance for the wife and infant children in cases where the husband's cruelty or desertion had necessitated, or involved, separation in fact. The order might provide (*inter alia*) that the applicant should no longer be bound to cohabit with her husband, a provision having the effect in all respects of a decree of judicial separation on the ground of cruelty. The Licensing Act, 1902²² moreover, gave powers both to a husband and a wife of applying for an order under the Act of 1895 in case the respondent was an habitual drunkard within the meaning of the Habitual Drunkard's Act, 1879.²³ These acts have been widely used. In the year 1909, for instance, there were no less than 5227 separation orders and 7120 maintenance orders. The Royal Commission on Divorce and Matrimonial Causes of 1909 condemned the system on the ground that a Superior Court was desirable in so serious a matter, and that the ready opportunity for applications for orders of this grave character by a Court of Summary Jurisdiction was undoubtedly likely to lead to hasty and ill-considered action by the applicants. In fact, persons separated by such

In the years 1922, 1923 and 1924, respectively, 84, 26 and 47 decrees *nisi* were rescinded at the instance of the King's Proctor, so that the decrees absolute were, in 1922, 2371; 1923, 2565; 1924, 2407.

In the same three years there were decrees *nisi* for nullity of marriage in 84, 59 and 46 cases, respectively. Three of these were rescinded at the instance of the King's Proctor.

¹⁷ 58 & 59 Vict., c. 39.

¹⁸ 2 Edw. VII, c. 28, § 5.

¹⁹ 41 & 42, Vict., c. 19.

²⁰ 49 & 50 Vict., c. 52.

²¹ *Supra*, note 17.

²² *Supra*, note 18.

²³ 42 & 43 Vict., c. 19.

orders were found, possibly in 75 per cent. of the cases, to become reconciled. The Royal Commission, moreover, found as a fact that the result of such orders led in the case of men in numerous instances (and to a less extent in the case of women) to adulterous connections and general immorality.

Some reference must be made to the Royal Commission on Divorce and Matrimonial Causes which was issued on November 8, 1909 to

inquire into the present state of the law of England and the administration thereof in divorce and matrimonial causes and applications for separation orders, especially with regard to the position of the poorer classes in relation thereto, and the subject of the publication of reports of such causes and applications; and to report whether any and what amendments should be made in such law, or the administration thereof, or with regard to the publication of such reports.

Lord Gorell, a former President of the Probate, Divorce and Admiralty Division of the High Court of Justice, was the Chairman of the Commissioners who included the Archbishop of York, various eminent lawyers and other persons, including one lady, with special knowledge of working-class conditions. After an exhaustive investigation of evidence on the subject, English and foreign, the Commissioners reported on November 2, 1912, a Minority Report being signed by the Archbishop of York, Sir William R. Anson and Sir Lewis T. Dibdin. The Minority Report had many points of agreement with the Majority Report for the reform of the existing law, but on the subject of the extension of the grounds of divorce there was a sharp conflict. "The evidence, so far from showing any great or general demand on the part of the poorer classes for divorce on other grounds beside that of misconduct, very clearly proves the absence of any such demand." The Minority Report met many of the real hardships by agreeing with the Majority Report in a larger extension of the principle of nullity of marriage, and it accepted the right of re-marriage in cases where a Court had presumed the death

of one of the parties to the marriage. The Majority Report recommended the decentralization of sittings for the hearing of divorce and matrimonial cases to an extent sufficient to enable persons of limited means to have their cases heard by the High Court locally. This principle has since been put into operation on the various assize circuits by the first section of the Administration of Justice Act, 1920.²⁴

Secondly, the Majority Report recommended abolition of the powers of Courts of Summary Jurisdiction to make orders for the permanent separation of married persons; and, thirdly, recommended the placing of men and women on an equal footing with regard to grounds for divorce. This was the practice of the old Ecclesiastical Courts; the principle was accepted in the Minority Report; and, by the Matrimonial Causes Act, 1923,²⁵ it has now become part of the general law of the land. Henceforward any wife may present a petition praying that her marriage may be dissolved on the ground that her husband since the celebration of the marriage and since the passing of the Act has been guilty of adultery. A substantial grievance has thus been swept away. The Majority Report also proposed the addition of five grounds for divorce: namely, Desertion for three years and upwards; Cruelty; Incurable Insanity after five years' confinement; Habitual Drunkenness found incurable after three years from the first order of separation; Imprisonment under commuted death sentence. The Minority Report opposed any extension of grounds for divorce. The Majority Report also proposed the addition of various grounds for obtaining decrees of nullity of marriage in certain cases of unfitness for marriage (which were accepted by the Minority Report), and many amendments of the law, procedure and practice in a number of details, which were also accepted by the Minority Report. The body of reform jointly advocated by both Reports would have met practically all the grievances which to-day undoubtedly exist in respect to matrimonial causes. The second Lord Gorell, immediately before the War, introduced a Bill into the House of

²⁴ 10 & 11 Geo. V, c. 81, s. 1.

²⁵ 13 & 14 Geo. V, c. 19.

Lords incorporating the reforms common to the two Reports, but the Bill had to be abandoned in view of the War and subsequent efforts in the same direction have received very little support.

Professional opinion on the subject is most outspoken. In the second edition of Rayden's "Practice and Law in the Divorce Division of the High Court of Justice and on Appeal Therefrom," published in the present year, it is said that thirteen years have elapsed since the Reports of the Divorce Commission and with one exception, the placing of the two sexes upon an equal footing as regards the grounds upon which divorce is granted, effected by the Matrimonial Causes Act, 1923,²⁶ the recommendations of the Royal Commission "have not been given effect to and the Court is still condemned to administer a system, in its essential features unaltered for over sixty-eight years and now in many respects at variance from public opinion." Nevertheless legal decisions have involved considerable variations in practice, and the measure of the change is seen in the fact that Rayden's very careful work on Divorce, originally published in 1910, has had, after the lapse of sixteen years, largely to be re-written. Part VIII of the Supreme Court of Judicature (Consolidation) Act, 1925,²⁷ which came into force on January 1, 1926, has codified the substantive statute law of Divorce and Nullity of Marriage, Judicial Separation and Restitution of Conjugal Rights and kindred provisions, into comparatively brief space (Sections 176-200). The statute made no changes in the law, the main provisions of which have been indicated above.

Certain points of general importance require some special notice. The first is the question as to the persons who can find a remedy for matrimonial troubles in the English Courts. Briefly it may be said that in suits for judicial separation a decree (if the evidence justifies it) can be obtained when the parties to the suit were resident in England at the time of the institution of the suit, even though the alleged offence has taken place outside the jurisdiction of the Court. A different rule ob-

²⁶ *Supra*, note 25.

²⁷ 15 & 16 Geo. V, c. 49.

tains in the case of a suit for nullity of marriage. The Court has jurisdiction when the marriage was celebrated in England, or when both parties to the suit are resident in England at the time of the institution of the suit, but it is not wholly clear if there is jurisdiction where both parties are domiciled in but are not both resident in England. The jurisdiction of the Court is much more limited in cases of a decree for dissolution of marriage. Such a decree involves a change of status and the Court is, therefore, specially alive to the necessary or desirable limitations of its jurisdiction. With certain exceptions no decree for dissolution of marriage will be pronounced in England unless the husband, and therefore the wife in English law, are domiciled in England at the commencement of the proceedings. The Court allows no variation from this rule. The parties cannot by consent, either expressed or implied, confer upon the Court jurisdiction. In Admiralty cases the Court often accepts jurisdiction by consent of the parties, and suits between persons of foreign nationality are not infrequently heard. But no such practice obtains in the case of Divorce. Two exceptions have, however, been forced upon the English Courts to meet cases of manifest injustice to persons of English birth. In the case of a deserted wife, domiciled in England up to the time of desertion, the husband cannot, by changing his domicile, drag his unfortunate wife in search of a remedy from country to country. The English Courts hold that in such a case a husband cannot be allowed to assert in an English Court, for the purpose of evading the suit, that he has changed his domicile. The other exception meets an even harder case. If a woman domiciled in England marries a foreigner domiciled abroad who afterwards, in his own domicile, obtains a decree of nullity, though in England the marriage is good, she is allowed in England, though she has in English law the domicile of her husband, to present a petition for dissolution of the marriage if due grounds exist. This practice sprang from the notorious and hard case of *Ogden v. Ogden*.²⁸ It should be noted that if domicile is once established the Court has jurisdiction, even if the marriage were contracted abroad, or if the par-

²⁸ [1908] P. 46.

ties were not domiciled in England at the date of the marriage; and it is immaterial that they are not British subjects, that they do not live here, or where the matrimonial offence took place. Domicil at the commencement of the proceedings is the only test of the jurisdiction of the English Court in the case of petitions for divorce.

A rule in the law of evidence, the exclusion of evidence by the spouses as to the possibility of access between them when a child has been born, is regarded by some practitioners as bearing "hardly upon the poorer litigant, who cannot afford to call witnesses to prove absence from his wife when the child was conceived."²⁹ This ancient rule was affirmed in 1924 by the House of Lords in the case of *Russell v. Russell*.³⁰ The rule is based upon the principle laid down by Lord Mansfield in 1770 in the case of *Goodright v. Moss*³¹ that "the law of England is clear, that the declaration of a father or mother cannot be admitted to bastardize the issue born after the marriage." The practice of the Divorce Court since the case of *Russell v. Russell*³² is that affidavits containing allegations that a child born in wedlock is not issue of the marriage are subject to rejection if it appears to the Registrar that they contravene the decision. In the case of *Holland v. Holland*,³³ it was held, however, that the rule does not apply to a still-born child. Lord Dunedin in his judgment in the *Russell* case was firmly in favour of the existing rule:

"A judgment the other way would, in my opinion, open the door to gross abuse, put upon juries an almost impossible task, do the very cruellest of wrongs to persons who cannot lift a hand to protect themselves, and introduce into the law an uncertainty based on inquiring into the details of life which ought to be sacred between the persons concerned. I am, therefore, unhesitatingly of opinion that the evidence ought not to have been admitted, and that the verdict cannot stand. To hold otherwise would be to open wide a door through which in the sequel falsehood will enter oftener than truth."

²⁹ See the Preface to the second edition of Rayden's volume on Divorce.

³⁰ [1924] A. C. 687.

³¹ 2 Cowp. 591, 592, 594.

³² *Supra*, note 30.

³³ [1925] P. 101.

It is to be noted that the old rule by which a guilty mother must be forever deprived of access to her children is now finally discredited.²⁴

To the student of legal history the position of poor persons or paupers in the search for justice is an interesting feature of English law. It is clear enough from the Early (Mediæval) Chancery proceedings that the Chancellor would help a poor person seeking justice, and by statutes 11 Hen. 7, c. 12 (1495) and 23 Hen. 8, c. 15 (1531-2),²⁵ pauper suitors were exempted from the payment of any Court fees, were entitled to have counsel and a solicitor assigned to them by the Court without fee, and were in no case liable for costs. This system obtained in England until January 1, 1914, when new rules of Court came into force which were designed to secure the preliminary investigation of the legal claims of poor persons and to provide, as a system organized by a special department in the High Court of Justice, professional assistance and representation for persons qualified under the rules to sue or defend as poor persons. Under the Tudor system in its original form the poor person had to swear that he was not worth £5; the sum was increased to £25; today it is £50 (or in exceptional cases £100) with an income not exceeding £2 (or in exceptional cases £4) a week. The 1914 rules of the High Court gave way to rules that came into force in April of the present year (1926) which are designed to supply a thoroughly efficient system of dealing with the cases of poor persons, and there is special provision for the conduct of Matrimonial Causes. Divorce business can be dealt with by a Commissioner of Assize under the new rules at Birmingham, Cardiff (or Swansea when the Glamorgan Assizes are held at Swansea), Chester, Exeter, Leeds, Liverpool, Manchester, Newcastle, Norwich and Nottingham. It, therefore, may be said that no poor person, husband or wife, who has real grounds for presenting a

²⁴ B. v. B. [1924] P. 176.

²⁵ These statutes were repealed by 46 & 47 Vict., c. 49 (1883), as the subject matter had been otherwise dealt with by rules under the Supreme Court by Judicature Act, 1873, and the acts amending the same. The Scottish procedure for persons suing *in formâ pauperis* rests on the statute of 1424, c. 5, passed in the reign of James I, of Scotland.

petition for dissolution of marriage or other matrimonial relief, is any longer stopped from obtaining relief by the fact of poverty. The Law Society of London and the various Provincial Law Societies are now responsible for the whole system of legal relief for Poor Persons.

This reform is a very important one, but the Law of Divorce and Matrimonial Causes generally in England stands in need of the many reforms jointly indicated in the Majority and Minority Reports of the Royal Commission of 1909-1912. Until Parliament finds the time and the will to deal with these questions a considerable measure of justice is still withheld from a number of the lieges of the Crown.

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