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DECLARATIONS OF STATUS

INTRODUCTION

Rights and privileges before the law are frequently determined with reference to marital or filial status.* In most cases one's status is more or less self-evident, or at worst one is presumed, on the basis of certain well defined indications, to have a given status. Rarely does one's status become a matter of dispute but when it does, it is necessary that the law provide a proper forum for the challenge to be met. The purpose of this paper is to examine the possibility and desirability of using declarations of status in independent proceedings to determine these important questions of marital or filial status.

PART I:
DECLARATIONS OF STATUS IN ENGLAND

The power, in England, to grant declarations in family matters stems from two sources: (1) enabling statute and (2) the inherent jurisdiction of the court. To see how this dichotomy emerged it is useful to review briefly the early history and development of declaratory judgments in family matters. Joseph Jackson, in *Formation and Annulment of Marriage* (2nd ed.) pp. 88, 89 spells it out nicely:

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*The word filial is here used after some considerable thought. In this context it is more common to speak only of declarations of legitimacy or legitimization, but it is felt that the adjective filial encompasses not only those declarations but also any others which might logically be considered in conjunction with the status of a child in relation to his parents.

Declaratory judgments

The Courts of Scotland had granted mere declarations ("declarators") since about the middle of the 16th century, and the absence in English law of the general right to grant a declaratory judgment was criticised.[4] The Chancery Act, 1850, sometimes called the Special Case or Sir George Turner's Act, provided that persons interested in any question as to the construction of any Act of Parliament or of written instruments, or as to the title or evidence of title to any real or personal estate, or as to certain other questions specified thereon would be able to concur in stating such question in the form of a special case for the opinion of the Court of Chancery, which might declare its opinion thereon, without proceeding to administer any relief consequent upon such declaration. The Court of Chancery Procedure Act 1852,[5] provided: "No suit in the said Court shall be open to objection on the ground that a merely declaratory decree or order is sought thereby, and it shall be lawful for the Court to make binding declarations of right without granting consequential relief." The Act of 1852 did not limit the power to grant declaratory decrees or orders to certain specific questions, and it did not require the parties to the proceedings to concur in stating a special case. However, the section was interpreted somewhat narrowly, in that it was said that the form of the section implied "that there is a consequential relief which might be granted in each case when the right has been so declared; but that the parties are not to be compelled to

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[4] *Mansfield* v. *Stewart* (1846), 5 Bell. Sc. App. 139, 160, per Lord Brougham.

[5] 15 & 16 Vict., c. 86, section 50.

ask for that relief, and they may satisfy themselves by simply asking a declaration of right, and not pursuing the matter further."[6]

The first statute which enabled the Court to make declarations though no consequential relief could be granted was the Legitimacy Declaration Act 1858.[7] The Supreme Court of Judicature (Consolidation) Act 1873 enabled the declaratory jurisdiction of the Court of Chancery to be exercised by any of the other Divisions of the High Court. Under the Act of 1875[1] Rules of the Supreme Court 1883 were made. These Rules contained Order 25, r. 5: "No action or proceeding shall be open to objection, on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether any consequential relief is or could be claimed or not." The difference between Order 25, r. 5 and s. 50 of the Court of Chancery Procedure Act 1852 is the addition of the words "whether any consequential relief is or could be claimed or not". The Order introduced "an innovation of a very important kind".[2]

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[6] *Rooke* v. *Kensington* (1856), 2 K. & J. 753, 761: contrast *Fletcher* v. *Rogers* (1853), 10 Hare, App. I, 13.

[7] 21 & 22 Vict., c. 93: Lord Brougham had failed in his endeavour to introduce a general "action of declaration": see A. D. Gibb, "International Law of Jurisdiction in England and Scotland" (1926), pp. 185-186.

[1] Act of 1875, s. 17.

[2] See *Ellis* v. *Duke of Bedford*, [1899] 1 Ch. 494, 515, per Lindley M.R.; *Har-Shefi* v. *Har-Shefi*, [1953] P. 161, C.A.; *Garthwaite* v. *Garthwaite* [1964], P. 356, C.A.; *Aldrich* v. *A.-G.*, [1968] P. 281.

The English Law Commission Working Paper No. 48, *Declarations in Family Matters* (pages 4 to 13), gives us the current English position with respect to these two sources of power.

1. Declarations under the Matrimonial Causes Act 1965, s. 39

7. Under the Matrimonial Causes Act 1965, section 39, the following applications for declaration of status may be made:

(1) Any person who

(a) is a British subject or whose right to be deemed a British subject depends wholly or in part on his legitimacy or the validity of any marriage, and

(b) is domiciled in England or Northern Ireland or claims any real or personal estate in England may apply for a declaration that

(i) he is the legitimate child of his parents; or

(ii) his marriage or that of his parents or that of his grandparents was a valid marriage (s. 39(1)).

(2) Any person may apply for a declaration that he or his parent or remoter ancestor[4] has been legitimated under the Legitimacy Act 1926 or recognised under s. 8 of that Act as legitimated (s. 39(2)).

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[4] Ancestor means lineal progenitor (not e.g., an uncle): *Knowles* v. *A.-G.* [1951] P. 54.

(3) Any person who is domiciled in England or Northern Ireland or claims real or personal estate in England may apply for a declaration that he is to be deemed a British subject (s. 39(4)).

8. Leaving aside for the present the jurisdictional criteria,[5] it will be seen that the declarations available under section 39 are:

(1) that the applicant is legitimate;

(2) that the applicant or any ancestor of his has been legitimated;

(3) that the applicant's marriage or that of his parents or of his grandparents was a valid marriage;

(4) that the applicant is a British subject. . . .

2. Declarations under the inherent jurisdiction of the court

11. In addition to its powers under the Matrimonial Causes Act 1965, section 39, the High Court has claimed and exercised power to make declarations as to matrimonial status, using the procedure of R.S.C., Order 15, rule 16, which provides that:

> No action or other proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether or not any consequential relief is or could be claimed.

. . . . . .

[5] These differ according to the type of declaration sought.

The rule does no more than make clear that the rules of court do not prevent the exercise of a declaratory jurisdiction: it does not create any such jurisdiction or specify what declarations are available. One must look to the cases to discover the nature of the jurisdiction and the declarations that a court can make.

12. Declarations have been made -

(a) that a foreign decree has validly dissolved[18] or annulled[19] a marriage,

(b) that a foreign divorce[20] or nullity[21] was not valid in English law.

It has been held that there is no separate power under Order 15, rule 16, to make a declaration of legitimacy[22] or validity of marriage[23] and that such declarations must be made under section 39; it has also been held[24] that there is no power under Order 15, rule 16, to make a declaration of invalidity of marriage and that such a declaration can be only be means of a decree of nullity.

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[18] *Har-Shefi* v. *Har-Shefi* (No. 1) [1953] P. 161, C.A.; *Wood* v. *Wood* [1957] P. 254, C.A.; *Lee* v. *Lau* [1967] P. 14.

[19] *Merker* v. *Merker* [1963] P. 283; *Abate* v. *Abate* [1961] P. 29.

[20] *Macalpine* v. *Macalpine* [1958] P. 35; *Middleton* v. *Middleton* [1967] P. 62; *Re Meyer* [1971] P. 208.

[21] *Lepre* v. *Lepre* [1965] p. 52, 57.

[22] *Knowles* v. *A.-G.* [1951] P. 54; *Aldrich* v. *A.-G.* [1968] P. 281.

[23] *De Gasquet James* v. *Mecklenburg-Schwerin* [1914] P. 53; see fn. 25 below.

[24] *Kassim* v. *Kassim* [1962] P. 224; *Corbett* v. *Corbett* [1971] P. 83.

13. Nevertheless, the position is not free from doubt as in a number of cases the court has entertained applications under Ordor 15, rule 16, to declare marriages valid or invalid.

The English Law Commission found the following defects in the present law and suggested comprehensive statutory reform.

16. The existing law contains, in our view, at least four unsatisfactory features -

(1) There is uncertainty as to the type of declarations which can be made under the inherent jurisdiction (paras. 12-13).

(2) Whereas declarations under section 39 have "built-in" safeguards, such as giving notice to persons who might be affected by the declaration, declarations under Order 15, rule 16, though operating *in rem*, have no safeguards other than the discretionary powers of the court.

(3) The jurisdictional criteria to make declarations under section 39 are anomalous; for instance, any person irrespective of his nationality, domicile or residence can apply for a declaration that he or any ancestor of his has been legitimated by reason of his parent's marriage subsequent to his birth and, in order to succeed, he must establish that his parents' marriage was valid; but if that person wants a declaration that his parents' marriage was valid and that he is legitimate, he must either be a British subject or show that his right to be a British subject depends on his legitimacy or the validity of any marriage and, in addition, he must be either domiciled in England or Northern Ireland or claim real or personal estate in England; unless he can Bring himself within these jurisdictional criteria, there appears to be no power to make a declaration of legitimacy or validity of marriage.

(4) It is not possible to state with confidence what are the jurisdictional criteria enabling the court to make declarations under Order 15, rule 16 (para. 14).

These unsatisfactory features are due in part to the outdated complexities of the statute (section 39), in part to the lack of any principle to guide the exercise of the inherent jurisdiction of the court (Order 15, rule 16) and in part to uncertainty as to the true relationship between the statutory and discretionary powers to grant relief. We propose, therefore, that legislative proposals should be formulated to take the place of the existing hotchpotch of statutory and discretionary relief. In effect the statute will determine the declaratory relief available in matters of matrimonial status and legitimacy.

17. Provisionally, we propose a new statutory provision to deal comprehensively with declarations as to matrimonial status and legitimacy. The statute should specify what declarations can be made, their effect (i.e., whether binding *in rem* or only *in personam*), the circumstances in which they can be made and the safeguards thought to be necessary.

PART II:
DECLARATIONS OF STATUS IN ALBERTA

Before evaluating the proposals of the English Law Commission, it becomes appropriate to consider the Alberta position. It is still possible to make use of the dichotomy between statutory and inherent powers, but really only for purposes of comparison and illustration. The Alberta equivalent to the inherent power would more properly be called general power to grant declarations, as the source of this power is no longer merely inherent, but statutory as well.

A. SPECIFIC STATUTORY PROVISIONS

1. Declarations under the Legitimacy Declaration Act, 1858, 21 and 22 Vict., c. 93

Parts of this Act are probably in force in Alberta, but certainly not its entirety. In a rather oblique dictum, referring to the Act, Montague J. in *Stockholder* v. *Stockholder* [1934] 1 W.W.R. 365 at 366 seemed to assume that the Act was in force in Manitoba. There are no other reported Canadian cases that have taken cognizance of the Legitimacy Declaration Act, 1858, much less assumed jurisdiction under it. The enabling provisions of the Act are found in sections 1 and 2.

> 1. Any natural-born subject of the Queen or any person whose right to be deemed a natural-born subject depends wholly or in part on his legitimacy or on the validity of a marriage, being domiciled in England or Ireland, or claiming any real or personal estate situate in England, may apply by petition to the court for divorce and matrimonial causes, praying the court for a decree declaring that the petitioner is the legitimate child of his parents, and that the marriage of his father and mother, or of his grandfather and grandmother, was a valid marriage, or for a decree declaring either of the matters aforesaid; and any such subject or person, being so domiciled or claiming as aforesaid, may in like manner apply to such court for a decree declaring that his marriage was or is a valid marriage, and such court shall have jurisdiction to hear and determine such application and to make such decree declaratory of the legitimacy or illegitimacy of such person, or of the validity or invalidity of such marriage,

as to the court may seem just; and such decree, except as hereinafter mentioned, shall be binding to all intents and purposes on Her Majesty and on all persons whomsoever.

2. Any person, being so domiciled or claiming as aforesaid, may apply by petition to the said court for a decree declaratory of his right to be deemed a natural-born subject of Her Majesty, and the said court shall have jurisdiction to hear and determine such application, and to make such decree thereon as to the court may seem just, and where such application as last aforesaid is made by the person making such application as hereinmentioned for a decree declaring his legitimacy or the validity of a marriage, both applications may be included in the same petition; and every decree made by the said court shall, except as hereinafter mentioned, be valid and binding to all intents and purposes upon Her Majesty and all persons whomsoever.

What specifically is left of this Act in Alberta today? In its original form it enabled the court to make these kinds of declarations:

(1) that the petitioner is the legitimate child of his parents;

(2) that the marriage of his father and mother was valid;

(3) that the marriage of his grandfather and grandmother was valid;

(4) that the petitioner's marriage was or is valid;

(5) that the petitioner has a right to be deemed a natural born subject of Her Majesty.

Some of these matters have been dealt with by the Alberta Legislature in the Domestic Relations Act, S.A. 1927, c. 5, Part VIII, s. 56.

> 56. Any natural born British subject, or any person whose right to be deemed a natural born British subject depends wholly or in part on his legitimacy or on the validity of a marriage, being domiciled in Alberta and claiming any property situate in Alberta, may apply by petition to a judge of the Supreme Court for a decree declaring that the petitioner is the legitimate child of his parents, and that the marriage of his father and mother or of his grandfather and grandmother was a valid marriage, or for a decree declaring either of the matters aforesaid.

The final dispoisition of these provisions was in the Domestic Relations Act, R.S.A. 1955, c. 89, Part VII, s. 38.

> 38.(1) Any person domiciled in Alberta and claiming any property situate in Alberta, and being
>
> (a) a natural born British subject, or
>
> (b) a person whose right to be deemed a natural born British subject depends wholly or in part on his legitimacy or on the validity of a marriage,

may apply by petition to a judge of the Court for a decree declaring that the petitioner is the legitimate child of his parents, and that the marriage of his father and mother or of his grandfather and grandmother was a valid marriage, or for a decree declaring either of the matters aforesaid.

(2) The petition shall be accompanied by such affidavit verifying the petition and verifying the absence of collusion as the Supreme Court may by any general rule direct.

The Legitimacy Act, S.A. 1960, c. 56, s. 8, repealed Part VII of the Domestic Relations Act. Another provision which affects the same matters is in the Marriage Act, R.S.A. 1970, c. 226, s. 23.

23. (1) A marriage is not invalidated by reason only of a contravention of or non-compliance with this Act

(a) by the person who solemnized the marriage, or

(b) by the person who issued the licence for the marriage,

and the Supreme Court may, if satisfied it is proper to do so, declare that the marriage was lawfully somenized notwithstanding any such contravention or non-compliance.

(2) An application for an order under subsection (1) may be made on petition by

(a) a party to the marriage, or

(b) the Attorney General, or

(c) the Director,

either *ex parte* or upon such notice as the judge directs.

The Alberta Legislature must be taken as having spoken on some of the things that are in the Legitimacy Declaration Act, 1858. The specific kinds of declarations which have been dealt with are as follows:

(1) that the petitioner is the legitimate child of his parents, (repealed);

(2) that the marriage of the petitioner's father and mother was valid, (repealed);

(3) that the marriage of his grandfather and grandmother was valid, (repealed);

(4) that the petitioner's own marriage was validly solemnized, (Marriage Act, R.S.A. 1970, c. 226, s. 23).

The only unaffected provision remaining from the Legitimacy Declaration Act, 1858, was the anomalous provision allowing petitions for declarations as to the right to be deemed a natural born subject of Her Majesty. According to the rules governing the reception of English law into Alberta, Imperial Statutes are only in effect insofar as they have not been "repealed, altered, varied, modified, or affected by an Act . . . of the Legislative Assembly."* It has been suggested, and some good authority cited to support the statement, that the courts have and will give a broad interpretation to the word "affected".** The legitimacy declarations, then, are a dead letter. There may, however, be a vestige of the declarations of validity of marriage. Considering the matter as a matrimonial cause it may be

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*The Northwest Territories Act, R.S.C. 1970, c. N-22, s. 18, adopted by the Alberta Act (Can.) 4-5 Ed. 7, c. 3, s. 16.

**Cote, *The Introduction of English Law into Alberta*, (1964) 3 Alta. L. Rev. 262 at 277.

that the province is not competent to legislate on the subject matter in all of its aspects. Obviously, the province has covered declarations with respect to questions of validity arising out of possible defects in the solemnization process. Would a federal aspect be declarations arising out of possible defects in the dissolution of marriages? If the question is answered in the affirmative it means (1) that the Legitimacy Declaration Act, 1858, is in force to an undefined degree, and (2) that the province is constitutionally incompetent to either repeal it in its entirety or to define the degree to which it remains in force.

2. Declarations under The Marriage Act, R.S.A. 1970, c. 226, s. 21

21.(1) The consents required under section 18 and the medical certificate required under sections 16 and 19 are a condition precedent to the valid marriage of a person under 18 years of age, and where a form of marriage is solemnized between persons, either of whom is under 18 years of age without a required consent or medical certificate, the marriage is void unless

(a) carnal intercourse has taken place between the parties prior to the ceremony, or

(b) the marriage has been consummated, or

(c) the parties have after the ceremony, cohabited and lived together as man and wife.

(2) Where a marriage is void under subsection (1) the Supreme Court has jurisdiction and power to entertain an action by the person who was at the time of the ceremony under 18 years of age to declare and

> adjudge that a valid marriage was not effected and entered into, and the Court shall so declare and adjudge if it is made to appear
>
> (a) that a consent required under section 18 or a medical certificate required under section 16 or 19 was not obtained prior to the ceremony, and
>
> (b) that
>
> (i) carnal intercourse did not take place between the parties prior to the ceremony,
>
> (ii) the marriage has not been consummated, and
>
> (iii) the parties have not, after the ceremony, cohabited and lived together as man and wife,
>
> and
>
> (c) that the action was brought before the person bringing it attained the age of 19 years.

This provision presents some considerable problems of interpretation. Section 21(1) sets out the requirements of a "void" marriage. Section 21(2) incorporates those requirements to give the Supreme Court jurisdiction to declare that a "valid marriage was not effected and entered into", and then the section 21(1) requirements are reiterated and a new condition, s. 21(2)(c), slips in; a limitation period, the action must be brought before the petitioner attains the age of 19 years. One is left to speculate as to the status of someone whose marriage is void by all the standards of s. 21(1), and yet the person is denied access to the courts by s. 21(2)(c) because he is now 19 years of age or over. It would seem that this is an

area where limitation periods are not appropriate, unless what was really meant was that the marriage is voidable, and the action to avoid must be brought within a certain time.

On the other hand, the words of the statute specifically indicate that the court acquires jurisdiction "to declare and adjudge that a valid marriage was not effected", and just as limitation periods are not appropriate for marriages void *an initio*, neither are bare declarations appropriate remedies for marriages which are voidable. When a court voids a voidable marriage it is exercising a power of dissolution that is not present in declarations of nullity of void marriages. Even the Rules of Court recognize the distinction, as Rule 579 provides that: "In an action to annul a voidable marriage the court shall in the first instance, grant a decree nisi not to be made absolute for three months. . . ." Admittedly this is a mere procedural distinction, but it has the effect of equating nullity in voidable marriages with divorce actions and of emphasizing the declaratory nature of declarations of nullity in void marriages as they are final in the first instance. In the final analysis, it is submitted that Rule 579 must be taken to apply to s. 21. Properly speaking s. 21 is not a provision which falls within the parameters of the problem under consideration in this paper because it provides for an action which not only declares status, but also alters it. It is declaratory in the same sense that a divorce action is declaratory. It is respectfully submitted that in order to remove an inconsistency the word "void" in s. 21 should be changed to "voidable".

3. Declarations under the Marriage Act, R.S.A. 1970, c. 226, s. 23

This provision which is quoted above at page 12 enables the court to declare marriages valid which are suspect because of some "contravention of or non-compliance with" the Act. The Act only applies to marriages taking place in Alberta, as the British North America Act, s. 92, limits the capacity of the provinces to deal with solemnization of marriages in the province.

This status determination can be brought by a party to the marriage, the Attorney General, or the Director of Vital Statistics, and it may be an *ex parte* application. The judge has discretion as to whom he will join. That would appear to be the extent of the jurisdictional requirements to give the courts the power to act. It is a simple remedy, but it fails to encompass a considerable proportion of the instances where a declaration of validity of marriage might be required, that is, the cases where foreign marriages, divorce or other actions have had an undetermined effect on the status of an Alberta resident.

B. GENERAL DECLARATORY POWERS OF THE COURT

1. Introduction to the Issues

There is a considerable body of recent case law which gives support to the proposition that the courts have a general power to grant declarations of status that is not restricted by the above statutes which attempt to proscribe specific uses of that power. The English Law Commission commented on these cases in a general way at page two.

3. It might appear from a consideration of the statutory history that the legislature had decided that no declaratory relief other than that provided by statute was to be available in family matters. Nevertheless, there is now a substantial number of decided cases in which without resort to the statute the courts have granted declarations of matrimonial status and of legitimacy. The basis of this case law is not beyond challenge. R.S.C., Order 15, rule 16, provides that the Supreme Court has a power to make "binding declarations of right" but the rule is purely procedural and gives no indication as to the scope or extent of the power, which is part of the court's inherited inherent jurisdiction. Since the ecclesiastical courts did not, it seems, grant declarations of status other than declarations of nullity, it is at least open to doubt whether the courts have any inherent jurisdiction to grant such declarations. Nevertheless, the courts have acted upon the basis that such a power exists.[2]

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[2]See, in particular, the judgment of Denning L.J. in *Har-Shefi* v. *Har-Shefi* [1953] P. 161, 169, C,A.

2. The Case of *Har-Shefi* v. *Har-Shefi*

In the case of *Har-Shefi* v. *Har-Shefi*, [1953] 1 All E.R. 783 mentioned above by the English Law Commission, the wife, before her marriage, was domiciled in England and the husband was at all times domiciled in Israel. They were married in 1950 in Israel, moving afterwards to England until the husband was deported in 1951. They were divorced by a Jewish bill of divorcement issued by the husband before he left England. In this action by the wife, she prayed

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for "(i) A declaration that the said marriage has been validly dissolved on, and no longer subsists since September 6, 1951. (ii) Alternatively, a declaration that your petitioner is no longer married to the respondent." (p. 784). Lord Denning put the substance of the action in very clear terms:

> . . . I would only say that the petitioner is an Englishwoman resident in this country, intending to make her life here, and she wants to know how she stands in this country. All she asks the English courts to do is to tell her whether she is to be regarded in this country as a single or as a married woman. It is a matter of the utmost importance to her and to others. . . .
>
> (p. 787)

He viewed the question of whether or not the Divorce Court had jurisdiction to grant the declaration as "one of procedure only" (p. 787). Rightfully, I think, the English Law Commission has doubted the validity of thus merging the concepts of power and procedure.

The ratio of the *Hari-Shefi* case, that under the Rules of the Supreme Court the court could exercise an inherent jurisdiction to make declaratory orders in matrimonial matters even though no other relief is sought, has been widely followed in England. See, for example, *Qureshi* v. *Qureshi* [1972] Fam. 173, *Re Meyer* [1971] P. 298, *Garthwaite* v. *Garthwaite* [1964] P. 356, C.A., *Merker* v. *Merker* [1963] P. 283, *Woyno* v. *Woyno* [1960] 1 W.L.R.986 and *Dunne* v. *Saban* [1955] P. 178. In this same respect the *Hari-Shefi* case has been applied in British Columbia; see *Khan* v. *Khan* (1960) 21 D.L.R. (2d) 171 and *Sara* v. *Sara* (1962) 36 D.L.R. (2d) 499, Ontario; see *Alspector* v. *Alspector* [1957] O.R. 454

and *Friedman* v. *Smookler* (1963) 43 D.L.R. (2d) 210, and Newfoundland; see *Re Gould* (1959) 18 D.L.R. (2d) 54.

3. The Judicature Act, s. 32(p)

But the situation in most of the provinces in Canada, and even those mentioned above, is quite different from that in England. It is common in Canada to find the equivalent section to R.S.C. Order 15, rule 16, in the statute books rather than in the rules of court. The Judicature Act, R.S.A. 1970, c. 193, s. 32(p) contains Alberta's statutory equivalent to England's rule.

> (p) no action or proceeding is open to objection on the ground that a judgment or order sought is declaratory only, and the Court may make binding declarations of right whether or not any consequential relief is or could be claimed;

Consequently, the debate in England as to whether or not the so-called inherent power exists is not a consideration in the Alberta perspective. In fact, it never really has been, as this provision has been in force in Alberta since 1907 and was a part of the Rules of Court in the Judicature Ordinance of the Northwest Territories before that.

Although this ensures that the Supreme Court can grant declarations, the authorities are quite clear that this kind of general power can only be exercised when the court is competent to entertain the action with reference to such other jurisdictional criteria as the subject-matter of the action and the parties thereto. As Bankes, L.J.

pointed out in *Guaranty Trust Company of New York* v. *Hannay & Co.*, [1915] 2 K.B. 536, at 572, when considering the effect of the English rule.

> It is essential, however, that a person who seeks to take advantage of the rule must be caliming relief. What is meant by this word "relief"? When once it is established, as I think it is established, that relief is not confined to relief in respect of a cause of action, it seems to follow that the word itself must be given its fullest meaning. There is, however, one limitation which must always be attached to it; that is to say, the relief claimed must be something which it would not be unlawful or unconstitutional or inequitable for the court to grant, or contrary to the accepted principles upon which the court exercises its jurisdiction. Subject to this limitation, I see nothing to fetter the discretion of the court in exercising a jurisdiction under the rule to grant relief, and having regard to general business convenience and the importance of adapting the machinery of the courts to the needs of suitors, I think the rule should receive as liberal a construction as possible.

See also *Sara* v. *Sara* (1962), 40 W.W.R. 257 at 262 (B.C.C.A.).

4. The Ways the Courts have Assumed Jurisdiction

(1) *Cox* v. *Cox* - the direct method*

The idea that cases involving declarations of status could be treated outside the category of matrimonial cause was introduced in Alberta in the decision of *Cox* v. *Cox* [1918] 2 W.W.R. 422. The facts, briefly stated, are as follows:

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*This "direct method" and subsequent so-called methods are not meant to be mutually exclusive, or even logically exclusive ways used by the courts, but are presented rather as a tool of analysis and illustration.

(1) In 1897 one Edwin Bell married the defendant in England.

(2) In 1903 Bell and defendant immigrated to Saskatchewan.

(3) In 1906 Bell left his wife, the defendant, and went to England, subsequently he went to Minnesota, U.S.A., subsequently he returned to Canada, residing in Calgary, but he has never since cohabited with the defendant.

(4) In 1908 Bell started divorce proceedings in Minnesota.

(5) The defendant filed an answer but the divorce was declared absolute in 1909.

(6) In 1915 the plaintiff married the defendant.

(7) After one week the defendant left the plaintiff.

(8) The plaintiff sued for a declaration that the marriage of 1915 was void because of the previous marriage of the defendant.

Hyndman J. stated that there were two main questions to resolve:

(1) Whether when the second marriage was entered into the plaintiff and defendant had the capacity to contract marriage, that is, was the divorce relied on valid

> and such as to enable the defendant to contract a valid marriage which in the absence of such divorce she could not have done; and
>
> (2) Has the Court the jurisdiction to make a declaratory judgment to the effect that the marriage between the parties hereto was null and void.

How he found that the divorce was invalid is not central to our problem and is outdated law in any event. (See the discussion of *Kish* v. *Director of Vital Statistics* 2 W.W.R. 678 at pages 36 & 37 of this report.) But the second question is deserving of comment. In a way the answer to the second question may have been fashioned by an accident of history. *Cox* v. *Cox* was decided just one year previous to the landmark case of *Board* v. *Board* [P.C.] [1919] 2 W.W.R. 940 which established for the first time that the Alberta Supreme Court had marriage and divorce jurisdiction by virtue of the Matrimonial Causes Act, 1856. In 1918 Hyndman J. expressed the prevailing opinion when he said: "There is no question of course but that our provincial court has no jurisdiction to grant a divorce or to dissolve a marriage on any grounds" (p. 426). It was this consideration which led, no doubt, to an easy acceptance of the idea that the case at bar was "not a case which should be considered as strictly falling under the head of marriage and divorce" (p. 426). From that premise it was a short step to decide that since the court could determine status as an ancillary matter in other actions (bigamy prosecutions for instance) it would make such declarations in independent proceedings as well. "Why should not the court do directly, what it may do indirectly?" queried Hyndman J. (p. 427).

(2) *Hardie* v. *Hardie* and *Ancelle* v. *Ancelle* - the equitable method

In coming to this conclusion Hyndman J. was impressed by the arguments of Wetmore J. in *Hardie* v. *Hardie* VII Terr. L.R. 13. In that case the plaintiff was asking for a declaration that the marriage between him and the defendant was null and void on the ground that the defendant was already married to another person at the time of their marriage. Being "much influenced" by *Lawless* v. *Chamberlain* 18 O.R. 296, Wetmore J. accepted the plaintiff's arguments that the Court had jurisdiction:

> 1st. By virtue of Rule 152 of *The Judicature Ordinance*.[3]
>
> 2nd. That the jurisdiction to make such a decree was inherent in the Court of Chancery in England on the 15th July, 1870, and therefore appertains to this Court.
>
> I have reached the conclusion that the plaintiff's contention is correct, and I am very much influenced in doing so by the reasoning of Boyd, C., in *Lawless* v. *Chamberlain*.
>
> There is no doubt that if the facts set out by the plaintiff in his statement of claim are true the marriage was not merely voidable but it was null and void from the beginning, and that being so, I am of opinion that this Court has as much authority to declare such a marriage null and void as it would have to declare one null and void by reason of fraud or

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[3] C.O. 1898, c. 21.

> by reason of other absence of some essential preliminary. This judgment is not at all at variance with the one I gave in *Harris* v. *Harris*[4] on 25th January, 1895. That judgment went on an entirely different ground. And I do not decide that this Court has jurisdiction to dissolve a valid marriage or declare a voidable marriage void or to decree a judicial separation. I merely decide that it has power to make a judgment declaring a marriage void which was void *ab initio*.

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[4] 3 Terr. L.R. 289.

(Rule 152 of the Judicature Ordinance is the equivalent of our section 32(p) of the Judicature Act.)

Lawless v. *Chamberlain* was a case where the plaintiff wanted his marriage declared null and void because of duress. Boyd C. held that the case failed on its merits, but he did assume that he had the jurisdiction to declare a marriage null and void when proper facts were proven and when the case was one of a marriage void *ab initio*. He based this on the two grounds quoted later in *Hardie* v. *Hardie*: (1) statutory authority to make binding declarations of right, and (2) the inherent jurisdiction springing from the Court of Chancery. Here is the way he developed these reasons:

> When a marriage correct in form, is ascertained to be void *de jure*, by reason of the absence of some preliminary essential, the action of the Court does not annul, but declares that the marriage is and was from the first null and void. There is jurisdiction to grant this measure

> and manner of relief now vested in the Superior Courts of Ontario. The Court is now empowered by Revised Statutes of Ontario ch. 44 sec. 52, sub-sec. 5 to make declaratory judgments, embodying binding declarations of right, whether any consequential relief is or could be claimed or not. The Court may now, therefore, do *per directum* what it could always have done *per obliquum*. The essence of the ecclesiastical jurisdiction in this class of cases was merely declaratory: *Bowzer* v. *Ricketts*, 1 Hagg. Con. R. 214; *B———n* v. *B———n*, 1 Spinks at p. 250, (i.e., of course after due investigation) and this formal jurisdiction is now conferred upon the Provincial Courts.
>
> Apart from this the inherent jurisdiction of the Court of Chancery extends to all cases of fraud, and to cases in which there was no adequate remedy at law: R.S.O. ch. 44, secs. 21 and 23. It may be said that these sections are to be measured by the jurisdiction of the English Chancery in 1837. It is true that the jurisdiction now invoked, was not then exercised by Courts of Equity in England, yet it would be difficult to shew that such a power was not possessed, though held in abeyance, on account of the special tribunals for matrimonial causes.
>
> The ancient jurisdiction of Chancery was exercised in this direction: *Tothill*, Rep. 61, and particularly so during the Protectorate, when "Courts Christian," in the technical sense, ceased to be: Anon. 2 Showers R. 283 (Case 269).

This reasoning, insofar as it applies to Ontario at least, has been discredited by the cases of *Reid* v. *Aull* (1914) 19 D.L.R. 309 and *Vamvakidis* v. *Kirkoff* [1930] 2 D.L.R. 877.

The first case where a declaration of validity of marriage was granted in Alberta was *Ancelle* v. *Ancelle* [1919] 1 W.W.R. 620. However, the declaration was granted

in conjunction with other relief and the basis of the court's jurisdiction to grant such an order was dealt with only obliquely. At the end of the judgment we find this interesting note:

> Authorities referred to by plaintiff's counsel included the following: . . .
>
> As to decree of validity of marriage, jurisdiction to grant same; *Hardie* v. *Hardie*, 7 Terr. L.R. 13; *Evans* v. *Manchester, Sheffield and Lincolnshire Ry.*, 36 Ch. D. 640, 57 L.J. Ch. 153; *London Association of Shipowners* v. *London and India Docks*, [1892] 3 Ch. 242, 62 L.J. Ch. 294; *The Supreme Court Act*, Alberta, 1907, ch. 3, sec. 9.

In actual fact the *Hardie* case lends little support to the decision in *Ancelle* v. *Ancelle*. Indeed, Wetmore J. specifically qualified his judgment by stating of the Court's powers that: "I merely decide that it has power to make a judgment declaring a marriage void which was void *ab initio*." Nothing was said concerning declarations of validity, although there is a hint of support for the proposition that under the jurisdiction inherited from the Chancery Courts of England the Court has power to grant declaratory relief where no other relief is available. This hint is contained in a brief discussion of the Chancery powers and also in a concluding statement to the effect that if the defendant's contentions were to be given effect "a person could never get authoritative relief from a bigamous marraige, ..." But although such an interpreation is stretching *Hardie* v. *Hardie* beyond the ordinary limits of logic and judicial interpretation, the English cases must have been cited to substantiate that very argument of extensive equitable jurisdiction.

Evans v. *Manchester, Sheffield and Lincolnshire Ry.* *supra* at p. 27 is a negligence case, a *Rylands* v. *Fletcher* situation, where an injunction was prayed for, but because the court felt that would be an inappropriate and ineffective remedy a declaration was granted even though it was a novel declaration, declaring future liability. Similarly, in *London Association of Shipowners* v. *London and India Docks* *supra* at p. 27 in a dispute over shipping regulations the court found that there was no proper plaintiff joined to the actic so they granted a declaration as no other relief was possible without a proper plaintiff. The Supreme Court Act, Alberta, 1907, c. 3, s. 9, is the provision that *inter alia* confers the powers of the Court of Chancery on the Supreme Court. Apparently, then, the argument which convinced the court to assume jurisdiction to declare a marriage valid in *Ancelle* v. *Ancelle* was based on the proposition that where normal channels of relief are not appropriate, but relief is nevertheless dictated by the circumstances, equitable jurisdiction may be invoked, and a declaration of right may be granted.

(3) *Stockholder* v. *Stockholder* - the ordinary method

Turning from powers derived from the Court of Chancery, the Manitoba case of *Stockholder* v. *Stockholder* [1934] 1 W.W.R. 365 provides yet another novel approach to this problem. In *Stockholder* the only relief sought was a "decree" that the petitioner and the respondent had been legally married and a declaration that the marriage was still subsisting. Montague J. considered the question of jurisdiction in some detail. He held that under the matrimonial jurisdiction of the court, which came from the Divorce and Matrimonial Causes Act, 1856, and the

Legitimacy Declaration Act, 1858, the court had no power to grant the relief sought by the petitioner. However, under section 62(8) of the King's Bench Act, S.M. 1931, c. 6, "the Court in an ordinary action could make a declaration as to the validity of a marriage" (page 367). He cited *Hardie* v. *Hardie*, *Cox* v. *Cox*, and *Ancelle* v. *Ancelle* as authority. Although jurisdiction was assumed the petitioner's declaration was denied as the marriage was found to be initially invalid.

In *Januszkiewicz* v. *Januszkiewicz* (1965) 55 D.L.R. (2d) 727 at 728 Nitikman J. followed the *Stockholder* case claiming that this same authority extends to a declaration as to the validity of a foreign decree of divorce.

(4) *Garthwaite* v. *Garthwaite* - the matrimonial method

The proposition that petitions for declarations of status do not fail under the rubric of matrimonial cause and so should not be subject to the same jurisdictional and procedural demands has been recently argued in England, albeit that it has never been accepted in that persuasive jurisdiction. Counsel in *Garthwaite* v. *Garthwaite* [1964] P. 356 raised the argument in the Court of Appeal. The following facts were agreed upon for the purpose of determining the issue of jurisdiction:

> (1) The wife was born and brought up in England where she had lived all her life and where she had her home. (2) On December 1, 1950, she married the husband, then a domiciled Englishman, in London. (3) After the marriage the parties lived together in England and there was one child of the marriage. (4) On July 27, 1956, the husband obtained a decree in Nevada, U.S.A., which purported to dissolve his

> marriage to the wife. (5) For the purpose of the trial of the issue only, the wife did not dispute that the husband was domiciled in the state of New York at the date of the Nevada decree and admitted that he was so domiciled and resident at the date of the filing of the petition in the present suit.

If this was to be treated as a matrimonial cause, jurisdiction would depend upon such factors as domicile of the petitioner and since the wife was alleging a valid and subsisting marriage, her proleptic domicile was the same as her husband's, New York. In other words the very thing that she was asking for would deprive the court of jurisdiction and the court naturally refused to proceed on that tenuous basis. There is a certain absurdity to the case, however, because it is clear that had the wife reversed her pleadings, and asked for a declaration that the marriage was invalid, then, proleptically her domicile would have been her domicile of origin, England, and the court would have assumed jurisdiction on that basis. In an attempt to avoid this jurisdictional pitfall counsel put this argument before the court (pp. 373-374):

> It is not a matrimonial cause. Matrimonial causes include divorce, nullity, jactitation of marriage and restitution: see section 225 of the Supreme Court of Judicature (Consolidation) Act, 1925. The grounds of jurisdiction vary from one of those to another, and, if this is a matrimonial cause, which matrimonial cause is it? In those cases, too, something is being done to the marriage, whereas in the present case the wife seeks simply a declaration that she is married--the husband in spite of this, says that it affects status.
>
> It is an application for a declaration, which need have no cause of action and can be brought in any division. Instances where a question of

> of the validity of a marriage could arise are: (a) in connection with a settlement, where a declaration is sought that a person is married to another. (b) An action for tort where the defence is that the complainant is the defendant's wife: the husband asks for a declaration that he is married to her. (c) A suit for a declaration that A is married to B because A wants the married woman's earned income allowance for tax purposes. (d) The same declaration because she wants her husband to pay income tax and surtax. (e) National insurance; (f) employment--a regulation, for example, that married women are not to be employed as teachers or are to have days off; (g) in connection with a beauty contest; there was a recent instance of this in Florida, where a woman was disqualified because she was a married woman; (h) defamation; (i) where the husband is applying to get married, saying he has been divorced: *Rex* v. *Hammersmith Superintendent of Marriages, ex parte Mir-Anwaruddin.*[26] So to liken this to a petition for nullity or divorce is fallacious. It is not that. It is for a declaration such as could be made in any of these cases, and in other divisions of the High Court.

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[26] [1917] 1 K.B. 634; 33 T.L.R.

Lord Willmer felt that "such a declaration, would be just as much a declaration of status as is involved in a decree of nullity or a decree of divorce" (p. 383). He considered the action as analogous to a suit for restoration of conjugal rights. With respect, there is a great difference between a bare declaration of status and a decree of divorce or nullity of a voidable marriage where status is not so much declared as changed. In a note on the *Garthwaite* case Anthony Hooper made this same point and then went on to discuss the analogy made by Willmer L.J.:*

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*Jurisdiction to Grant Declaratory Judgments as to Marital Status (1965) 14 Int. & Comp. L.Q. 264 at 269-70.

It is submitted that a distinction ought to be drawn between first, a bare declaration as to marital status,[31] secondly, a declaration combined with an order affecting the rights of the parties, e.g., a decree which annuls a void marriage and orders ancillary relief, or a decree ordering the restitution of conjugal rights, and thirdly, a decree altering the status of the parties, e.g., a decree of divorce or a decree annulling a voidable marriage. In the third case the jurisdiction of an English court must obviously be limited. Some restrictions may be justified in the second case but it is submitted none may be justified in the first case for the following reasons.[32]

First,* the "relief" sought in an action for a declaration as to marital status is the definition of the rights of the "spouses", where a petitioner for the various matrimonial decrees is seeking either more than their mere definition or, alternatively, their alteration.[33] For example, a decree for the restition of conjugal rights, which automatically includes a declaration that the marriage is valid and subsisting, also orders the respondent spouse to resume cohabitation within a fixed period, and his failure to do so entitled the petitioner to certain ancillary relief and a decree of judicial separation. Willmer L.J. was therefore giving an incomplete picture when he said

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[31]This heading would include a decree annulling a void marriage but ordering no ancillary relief: however it is intended to concentrate in this note solely on the bare declaration.

[32]The authors of the case-notes to which references are made in note 4, *supra*, suggest that the court should take jurisdiction if the pettitioner is resident in England.

[33]With the exception of a petition for a decree of nullity in respect of a void marriage not combined with any application for ancillary relief.

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*Only the first of six reasons is given here.

> in the present case that the declaration was "substantially that which would be appropriate to a suit for restitution of conjugal rights."[34] Since the relief claimed in an action for a declaration is different, the jurisdictional rules should not (necessarily at least) be the same.

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[34] [1964] 2 W.L.R. at 1118.

The most telling denial of counsel's argument that the Court should assume jurisdiction as if the matter were not a matrimonial cause came from Diplock L.J. at page 346:

> If the court had jurisdiction to make such a declaration, the declaration would create an estoppel *per rem judicatam* to prevent any party to the suit from asserting as against any other party the contrary of what was declared. The court, which *ex hypothesi* is not the court of the spouses' domicile, would thus by means of estoppel purport to affect their matrimonial status, and this it has no jurisdiction to do. On the other hand, a mere finding by the court incidental to other relief claimed that the marriage was valid or invalid, subsisting or not subsisting, would not operate as an "issue estoppel" between the spouses as to their matrimonial status (see *Thoday* v. *Thoday* [1964] 1 W.L.R. 371) since the issue would be one which the court had no jurisdiction to determine in such a way as to affect their matrimonial status.

Hooper argues that this refusal to determine the marital status of the petitioner is based on a "misunderstanding of the concept of status" and he quotes further from Diplock L.J. before laying out his argument (*Garthwaite* at 397, Hooper *supra*, 31 at 271).

> Any rule which restricts the jurisdiction of an English court to vary or to pronounce upon the matrimonial

> status of a woman who is resident in England may work hardship in particular cases. Such potential hardships have to be weighed against the advantage of recognising a single tribunal as alone competent to determine the matrimonial status of both husband and wife, thus avoiding 'limping marriages' to which the parties are spouses in one country and single in another.

The assumption is that a court in New York, where her husband was domiciled, *could* have told Mrs. Garthwaite what she wanted to know. Likewise the implication that a foreign court could have told the petitioners what they wanted to know is apparent in *Har-Shefi* v. *Har-Shefi*[44] and *Lee* v. *Lau*,[45] although in both cases it was in fact decided that the court had jurisdiction to grant a declaration. But in these cases the petitioners wanted to know whether they were married or not in English law and it does not follow from the fact that by a foreign law they had a particular marital status[46] that they will *automatically* have the same status in England.[47] By their respective domiciliary laws, for example, the petitioners in *Simonin* v. *Mallac*,[48] *Chetti* v. *Chetti*[49]

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[44] [1953] P. at 167, 171.

[45] [1964] 2 All E.R. at 255.

[46] Indeed in the case of a wife we do not always know her domiciliary law until we know whether she is validly married.

[47] See to the same effect (1953) 30 B.Y.I.L. at 526. The same misconceived use of the concept of status is apparent in the decision in *Schwebel* v. *Ungar* (1963) 42 D.L.R. (2d) 467, noted in (1964) 27 M.L.R. at 727.

[48] (1860) 2 Sw. & Tr. 67.

[49] [1909] P. 67.

and *Macalpine* v. *Macalpine*[50] apparently had the status of single women, but in English law their marriages were both valid and subsisting. If the *lex causae* is English law[51] then to determine whether a person is married two questions should, it is submitted, be asked:

1. Was a valid marriage created?[52]
2. If so, has it been validly terminated?

The answers given to these questions by an English court may well differ from the answers given by the foreign domiciliary court because, for example, their choice of law rules may be different. So if Mrs. Garthwaite were to have asked a New York court whether her marriage had been validly terminated by the Nevada decree, the answer might well be in the positive, yet an English court might refuse to recognise the decree if, for example, it were to conclude that it had been obtained by fraud.[53] Since only an English court can tell Mrs. Garthwaite whether or not she is married in English law, it should follow that an English court ought to be very reluctant to refuse to give her an answer to her query.

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[50] [1958] P. 35.

[51] As it will be, for example, in any petition for matrimonial relief or in an action for a declaration as to marital status, brought in England.

[52] To answer this question an English court applies certain choice of law rules, which vary according to the nature of the defect.

[53] Dicey's *Conflict of Laws*, 7th ed., p. 306.

(5) Other considerations

An Alberta court could well decide tomorrow to follow the Garthwaite decision, or by either ignoring English

precedent (which is relatively easy to do in cases where only one of the parties is represented by counsel a frequent occurrence in this area of the law) or by disapproving of it, the court could follow the *Cox* and *Stockholder* line of cases which maintain that declarations of status are not matrimonial causes. In practical terms, in Alberta, these issues are largely avoided today because the majority of cases which might well be declaratory are framed in the form of *mandamus* actions. A very recent example is *Kish* v. *Director of Vital Statistics* [1973] 2 W.W.R. 678.

In this case the two applicants had been living together for a number of years and wished to get married, but the Director of Vital Statistics refused to issue a marriage license on the grounds that Mr. Kish had contracted a marriage in Hungary in 1928 which was still subsisting. The applicants argued that a Hungarian divorce in 1970 had dissolved the marriage and thus Mr. Kish had the status of a divorced man and was free to marry. The decision by Milvain C.J.T.D. to recognize the Hungarian decree is a Canadian landmark, as it is the first to follow the House of Lords decision of *Indyka* v. *Indyka* [1969] A.C. 33.* This represents a considerable relaxation in the rules for the recognition of foreign decrees and also introduces an element of uncertainty which makes it that much more important that there be a proper forum in which a person can have his status determined. The test for recognition is briefly as stated by Milvain C.J.T.D. at page 693.

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*Strong doubts had been expressed that the *Indyka* case could be followed in Canada because of section 6(2) of the Divorce Act, R.S.C. 1970, c. D-8. See Mendes Da Costa *Studies in Canadian Family Law*, Vol. 2, p. 975.

> I am satisfied that this court has inherent power to give recognition in foreign decrees, granted in situations where strict adherence to rules of domicile would dictate otherwise. I feel that the court must be satisfied that there is some real connection with the country whose court has granted the decree. I am sure too that we shall be guided in part also by the factual situation which exists.

Defining just what a "real connection" is is a matter for the courts in each instance. It would not seem reasonable to force the person concerned to wait until he has another cause of action before having his status decided. Neither is it fair to parties such as the Director of Vital Statistics to have to make these decisions and then defend their position in a *mandamus* action. Milvain C.J.T.D. commented in this case that the Director was a "public official placed in a difficult position," and in fact he did not issue the *mandamus* order against him, the result in the final analysis was that the judgment amounted to a declaration. Milvain put it this way, p. 693:

> I am satisfied that the Hungarian decree is valid and should be given recognition here. Such being the case the required marriage licence should be issued. I feel sure that the respondent will do so without my ordering him to do so. If, however, he prefers a formal order, the same is directed.

There are a few other Alberta cases reported where *mandamus* applications have been used to test the validity of foreign divorce decrees. These were reported because of the principles of recognition that were discussed therein.

(See *Yeger and Duder* v. *Registrar General of Vital Statistics* (1958) 26 W.W.R. 651; *B & B* v. *Deputy Registrar of Vital Statistics* (1960) 31 W.W.R. 40; *Re Allarie and Director of Vital Statistics in Alberta* (1963) 41 D.L.R. (2d) 553 and *Bednar and Bednar* v. *Deputy Registrar General of Vital Statistics* (1960) 24 D.L.R. (2d) 238.) It is not without interest to note that Ontario law has developed in another way. The Ontario Law Reform Commission Study on Family Law, Vol. VII, p. 293, contains the following information.

> Section 12(2) of the Ontario Marriage Act, provides that no issuer shall issue a marriage licence to a person whose previous marriage has been dissolved or annulled elsewhere than in Canada, unless the authorization in writing of the Provincial Secretary is obtained.[230] *Walden and Raicovich* v. *Provincial Secretary of Ontario*[231] stands for the proposition that *mandamus* is not the remedy of a party who challenges the refusal of the Provincial Secretary to issue such an authorization. An action for a declaration would seem the way in which a judicial determination could be obtained - yet there seems no reported case where this course has been followed. Presumably the issue is tested in some other fashion; for example proceedings for ancillary relief.

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[230] R.S.O. 1960, c. 228, as amended.

[231] (1960) 23 D.L.R. (2d) 159.

Finally with respect to the kinds of declarations available under the general powers of the court, the Ontario case of *Alspector* v. *Alspector* [1957] O.R. 454 (C.A.) established that the power comprehended declarations that a marriage was initially valid (p. 463).

> If one party to a purported marriage has a right, for the purpose of having his or her status defined by a competent Court, to ask the Court to declare the marriage a nullity, it seems to me the other party to it has the opposite right and for the same purpose to have it declared valid and that either party may initiate the proceeding. What is a good reason in the one instance is equally good in the other. I can conceive of a situation in which both parties would be desirous of having the marriage ceremony declared valid in order to squelch rumours that it was not. Is there no competent forum in which they can have their status declared? In my opinion, either party can ask for such a declaration and s. 15 of The Judicature Act empowers the Court to grant it. In *Har-Shefi* v. *Har-Shefi*, [1953] P. 161, the Court of Appeal held that the Divorce Court had justification to declare a divorce valid. In so holding, Denning L.J. at p. 169 expressed the opinion that the Ecclesiastical Courts though they did not grant declarations of validity had a general jurisdiction to make declaratory orders as to the existence or non-existence or nullity of a marriage even though no other relief was sought.

He continued:-

> But even if the ecclesiastical courts had no such jurisdiction, I am of the opinion that the Divorce Courts have outgrown the disability. Since 1924 they have acquired under Ord. 25, r. 5, a jurisdiction to make declaratory orders just like other Divisions of the High Court.

It may be argued that this jurisdiction under the general powers of the court has been taken away in Alberta by section 23 of the Marriage Act (see page 17 *supra*) which allows declarations under the same circumstances as are evidenced in *Alspector*. This brings into focus the

whole weakness of the general powers of the court position, so often a declaration made on this basis is flying in the face of a statute that has either established the right to such relief, or revoked it.

5. Filial Status

As has been noted, there previously existed specific statutory provisions for declarations of legitimacy which have subsequently been repealed (see pages 9-14 of this report). Nevertheless legitimacy is often determined in conjunction with other actions and using the same reasoning as Hyndman J. in *Cox* v. *Cox* (see pages 21-23, *supra*) it remains possible that declarations of legitimacy could be granted as an exercise of the court's general power in the same way that declarations of validity of marriage are granted even though specific enabling statutes have subsequently been repealed.

C. DECLARATIONS AVAILABLE

By way of summary of the Alberta situation, the following kinds of declarations are probably available, at least they have been granted in the past:

A. Under specific statutes

(i) that the petitioner is a British subject (Legitimacy Declarations Act, 185);

(ii) that the infant's own marriage was void due to lack of parental consent (Marriage Act, R.S.A. 1970, c. 226, s. 21, although not properly a declaration of status);

(iii) that the marriage was valid despite some "contravention of or non-compliance with" the Marriage Act (Marriage Act, R.S.A. 1970, c. 226, s. 23).

B. Under the powers of the court

(i) that the marriage was initially valid (*Alspector* v. *Alspector*);

(ii) that the marriage was void *ab initio* (*Cox* v. *Cox*);

(iii) that the petitioner's marriage is subsisting (*Ancelle* v. *Ancelle*, *Stockholder* v. *Stockholder*).

(iv) that the marriage has been dissolved (*Januszkiewicz* v. *Januszkiewicz*).

PART III
SPECIAL CONSIDERATIONS AND PROPOSALS

Merely listing the kinds of declarations available does not serve to answer some of the more important questions that should be asked about declarations of status. Some of the questions have been touched upon in the preceding discussion of the law in Alberta and England, such as whether or not a declaration of status is a matrimonial

cause, but others have not been considered. I now propose to follow quite closely the format of the English Law Commission to examine the general adequacy of the law in this area and to suggest possible remedial action.

A. WHAT KINDS OF DECLARATIONS SHOULD BE AVAILABLE?

1. Marital Status

Problems which affect marital status can either arise out of irregularities with respect to the marriage ceremony and related circumstances, such as licences and banns, or they can arise out of attempts to dissolve a marriage, the initial validity of which is not in question.

(1) Declarations concerned with initial validity

An alleged marriage may give rise to the following circumstances:

(a) the parties contract a valid marriage which may not be impugned by any means other than proper divorce proceeding;

(b) the parties contract a voidable marriage which may not be impugned unless one of the parties avoids the marriage by seeking an annulment or unless the proper divorce proceedings take place;

(c) the parties fail to contract a marriage, in which case no court action is necessary to impugn the

> marriage, as none has come into existence. This does not mean that court action is not useful in correcting the official marriage register (see *Bevand* v. *Nevand* (1954) 35 M.P.R. 244) and otherwise informing society that what was thought to be a marriage is not.

Situation (a) is the opposite of (c). Situation (b) is a mutant that grew out of legal necessity and defies logical classification with the others, and as such it should be dealt with separately. In fact, voidable marriages are not within the subject matter of this paper, unless it is suggested that provision be made to declare a marriage voidable. It is difficult to see what useful purpose would be served by such a novel declaration. On the other hand a declaration to the effect that a valid marriage has been contracted is a very useful remedy. Likewise, a declaration that no marriage has been contracted is a socially desirable remedy. These would be useful remedies because much of human conduct is ordered by marital status and if there is uncertainty as to that status, conduct must of logical necessity also become uncertain.

At first glance it would seem desirable to provide a single forum to determine either side of this issue. That is, an action should exist whereby a person can simply demand an adjudication as to the effect of certain named proceedings on his marital status. In that way if one spouse wished to argue for the contract the other would be free to argue against it, and the issue could be resolved within the same proceedings. But certain problems work against this simple solution.

The problem lies in the confusion surrounding the time honoured remedy of a declaration of nullity of a marriage void *ab initio*. It has come about that there are two separate actions for this same remedy. In England one is called a declaration and the other a decree of nullity. This is not always a useful guide in Canada (see *Sara* v. *Sara* (1962) 40 W.W.R. (ns) 257 where declaratory relief is sought but the court refuses to grant a "decree"). In Alberta they are both called declarations of nullity. The one is the exercise of the courts equitable jurisdiction to grant declarations at its discretion. The other is the exercise of the courts matrimonial jurisdiction. Actually the Alberta position is much the same as that of Ontario, so it is useful to examine the Ontario Law Commission's discussion of this dichotomy (Family Law Project, Vol. VII, pages 298-300):

> Unlike the position in England, a decree of nullity of a void marriage is, it would seem, initially a final judgment. This is the result of reading Rule 776[250] of the Rules of Practice with Rule 799[251] and Rule 2(j).[252] The result is to introduce a difference between a decree of nullity of a void marriage and a decree of nullity of a voidable marriage (which

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[250] Rule 776(1): "Rules 777 to 810 apply only to matrimonial causes."

[251] Rule 799(1): "Every judgment for the dissolution of marriage or for the annulment of marriage shall be a judgment nisi not to be made absolute until the expiration of three months from the pronouncing thereof."

[252] Rule 2(j): "'matrimonial cause' means an action under the Divorce Act (Ontario) for the dissolution of a marriage or for the annulment of a voidable marriage;"

requires a decree nisi),[253] but to equate the former decree with a declaration of status which likewise does not need to be made absolute. Substantive differences do, however, exist between proceedings for a declaration and proceedings for a decree of nullity.

(i) Discretionary

A decree of nullity will follow *ex debito justitiae* if the court has jurisdiction and if grounds for relief are proved.[254] Relief by way of declaration is within the discretion of the court.[255] This discretion is exercised with great care and caution and it is necessary to balance the reasons for and against the granting of relief: where there has been no invasion of any right of the plaintiff, it is necessary to consider the plaintiff's interest in obtaining a declaration.[256]

(ii) Availability of consequential relief

In *Kassim* v. *Kassim* the object of the wife's application to amend her petition and to pray in the alternative for a decree of nullity was to protect her thereafter on questions affecting

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[253] *Fisher* v. *Fisher*, [1960] O.R. 290, must now be read subject to the 1960 amendment to Rule 2(j) which added "annulment of a voidable marriage".

[254] *Welsh* v. *Bagnall*, [1944] 4 D.L.R. 439.

[255] *Kassim* v. *Kassim*, [1962] P. 224.

[256] *Sara* v. *Sara* (1963), 36 D.L.R. (2d) 499.

maintenance and in relation to the child of the marriage. For if a bare declaration is granted, it appears that, under English law, the petitioner is not, in the same proceedings, entitled to claim ancillary relief. Ormrod J. said,[257] "The gravemen of the matter is that it is said that if I grant the husband the declaration for which he prays, the court is then *functus officio* and has no jurisdiction to make orders for the maintenance of the petitioner or for the custody and maintenance of the child of this union, whereas if I pronounce a decree of nullity, the court is not *functus officio* and has the necessary jurisdiction to deal with both forms of ancillary relief." In both *Alspector* v. *Alspector*[258] and *Friedman* v. *Smookler*,[259] consequential relief was claimed, though for reasons mentioned in the judgments, such relief was not dealt with by the Court at the time of the declaratory proceedings. Indeed, in *Alspector* v. *Alspector* the claim for consequential relief was a factor referred to by the Court of Appeal, apparently in favour of the exercise of declaratory jurisdiction. For after referring to *Har-Shefi* v. *Har-Shefi*, Roach J.A. said,[260] "Moreover consequential relief was sought by the plaintiff in this action. The claim for that relief has not been disposed of merely because all parties requested that it be allowed to stand." The reason why a court is *functus officio* after a grant of declaratory relief was not clearly articulated in *Kassim* v. *Kassim*. The ancillary relief there referred to related to maintenance and custody, and the

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[257] *Supra*, note 255, p. 232.

[258] [1957] O.R. 454.

[259] (1963), 43 D.L.R. (2d) 210.

[260] *Supra*, note 256 at pp. 463-464.

reasoning presumably turned upon the wording of the English matrimonial causes statute.[261] In the two Ontario cases, one party to the marriage was deceased and the consequential relief claimed concerned, apparently, distribution of the deceased's estate. Section 1 of the Matrimonial Causes Act,[262] which enables gross or annual sums to be secured to a wife, commences "In any action for divorce or to declare the nullity of any marriage, . . ." and other sections providing for ancillary relief commence in a similar fashion. It would seem, therefore, that the comments of Ormrod J. in *Kassim* v. *Kassim* may reflect also the position under the law of Ontario.

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[261] Rayden, Practice and Law of Divorce, (1967, 10th ed.), 366-68.

[262] R.S.O. 1960, c. 232.

A discussion of the principle of discretion as it applies to declarations of status follows on page 58.

It is at least arguable that some kinds of consequential relief are available in Alberta after a declaration of nullity granted under the declaratory jurisdiction of the court. The Domestic Relations Act, R.S.A. 1970, c. 113, section 23 and 24 reads:

> 23.(1) Where a decree of divorce or declaration of nullity of marriage has been obtained, the Court may order that the husband to the satisfaction of the Court secure to the wife such annual sum of money for any term not exceeding the lifetime of the wife as the Court deems reasonable having regard to the fortune, if any, of the wife, the ability of the husband to pay, and the conduct of the parties.

> (2) If it thinks fit the Court may in addition or in the alternative order that the husband pay to the wife during their joint lives such monthly or weekly sum for her maintenance and support, as the Court thinks reasonable.
>
> (3) On a decree of divorce an order may be made in favour of a wife notwithstanding that she has been guilty of adultery.
>
> 24. When a decree absolute of divorce or declaration of nullity of marriage is given, the Court may make such order as to the Court seems fit with regard to the property comprised in an ante-nuptial or post-nuptial settlement made on the parties to the marriage and with regard to the application of the property either for the benefit of the children of the marriage or of the parties to the marriage or both.

These provisions certainly do not require that the declaration of nullity be granted under matrimonial jurisdiction. However, it is true that the very nature of a declaratory judgment is that it does not order that anything be done, it merely states the rights of the parties or the opinion of the court on a point of law. Still it seems to be a *non sequiter* to draw from that that the court is *functus officio* after granting such a declaration.

The problem can be minimized, if not completely solved, by making sure that the jurisdictional requirements are the same for the exercise of both powers. In other words, merge the two remedies under statutory authority. It may be felt that the Domestic Relations Act, section 23, does that by providing that "where a declaration of nullity has been obtained, the Court may order" relief. It is this researcher's opinion that this interpretation should prevail, but nevertheless, *Kassim* v.

Kassim has not yet been considered in Alberta and until it is, it is difficult to be sure just what may develop.

Returning to the wish for a single forum to deal with both declarations of validity and declarations of invalidity. Besides the problems mentioned above with respect to the special nature of declaration of invalidity, there is also the problem illustrated by *Garthwaite* v. *Garthwaite* (see page 30, *supra*). The wife who pleads nullity has her own domicile, at least proleptically, while the wife who pleads validity retains her husband's domicile. The simple answer is to separate the concept of domicile from the law relating to declarations of status. In the alternative, the example of the Divorce Act, R.S.C. 1970, c. D-8, s. 6(1) could be followed, allowing the domicile of a married woman to be determined as if she were unmarried. Such a change would have to be legislated. Ideally, the principle should be that as long as the person has a sufficient connection with the province, the courts should be willing and able to declare that person's status in Alberta. These declarations would not pretend to alter a person's status, or to declare what it may be in another jurisdiction. In this context the condition of domicile is utterly inappropriate. The exact terms of the connection should be politically or philosophically determined, or they could be left to judicial discretion as is the practice now for determining the required connection with a foreign jurisdiction for purposes of recognition of foreign decrees (see *Kish* v. *Director of Vital Statistics* at pages 36-38, *supra*). It also seems reasonable that this connection could be determined in each case in much the same manner as the courts presently determine if the applicant has the required *locus standi* in other discretionary applications.

With these problems in mind, it is proposed that a single forum should deal with this one issue: Is the contract of marriage initially valid or not? The court should not become *functus officio* after the declaration, and the rules regarding jurisdiction should be the same whether one pleads in the affirmative or the negative.

(2) Declarations concerned with attempts to dissolve a marriage, the initial validity of which is not in question

The marriage contract can be terminated by death, nullity in the case of a voidable marriage, or divorce.

(a) Death of a spouse

In England, under the Matrimonial Causes Act, 1965, s. 14, the court is empowered, if satisfied that reasonable grounds exist for presuming death, to make a decree of presumption of death which has the effect of a divorce. The Canadian position is different and *Power on Divorce* (2nd ed.) explains the difference at pages 352 and 353:

> No Canadian statute goes that far. Moreover, in the absence of a statute empowering it to do so, the court has no jurisdiction to declare that an applicant's spouse who had not been seen or heard of for over seven years should be presumed to be dead where the applicant's only reason for asking for it is that he or she wishes to marry again.
>
> Such a statute has been enacted in all of the western provinces, but these statutes, being provincial Acts, cannot under our constitution authorize, as the English statute does, the decreeing of the dissolution of the petitioner's marriage. Therefore, even

> though the issuer of marriage licences in the province issues a licence to a petitioner armed with such a declaration the marriage is invalid if the former spouse declared dead is in fact alive. In Alberta it has been held that notice of the hearing of a petition under the Act should in all cases be given to the attorney-general of the province.

The Alberta provision is as follows (The Marriage Act, R.S.A., c. 226, s. 20):

> 20.(1) Any married person who alleges that reasonable grounds exist for supposing that the other party to the marriage is dead may present a petition to the Supreme Court to have it presumed that the other party is dead, and the Court, if satisfied that such reasonable grounds exist, may make a decree of presumption of death.
>
> (2) In any such proceedings the fact that for a period of seven years or upwards the other party to the marriage has been continually absent from the petitioner and the petitioner has no reason to believe that the other party has been living within that time is evidence that he or she is dead until the contrary is proved.

As was pointed out in *Power on Divorce* it is beyond the competence of the province to provide a declaration that the marriage has been dissolved by death. That would probably be the best solution to the problem, although it may not be necessary as section 4(1)(c) of the Divorce Act, R.S.C. 1970, c. D-8, provides grounds whereby just such a marriage can be dissolved.

> 4.(1) In addition to the grounds specified in section 3, and subject to section 5, a petition for divorce may be presented to a court by a husband or

> wife where the husband and wife are living separate and apart, on the ground that there has been a permanent breakdown of their marriage by reason of one or more of the following circumstances as specified in the peition, namely: . . .
>
> (e) the petitioner, for a period of not less than three years immediately preceding the presentation of the petition, has had no knowledge of or information as to the whereabouts of the respondent and, throughout that period, has been unable to locate the respondent;

In conclusion, it would appear that the termination of a marriage by death of a spouse is not the sort of problem which lends itself to a declaration of status solution, at least in the provincial content.

(b) Nullity and divorce

These two causes can be treated alike, with one small distinction. There is no need for declarations, in Alberta, as to the validity of a marriage where divorce or nullity proceedings have taken place in Alberta, as those proceedings cannot be questioned outside of the normal procedures of appeal. What concerns us here are foreign proceedings and their effect according to the law of Alberta.

"Foreign" means not Albertan, to paraphrase from *Dicey's Conflict of Laws* (7th ed.) page 30. An annulment in Ontario then, is foreign and could give rise to the need in Alberta for a declaration as to the status of the persons involved. The situation with regard to divorce was similar, but under the Divorce Act (Canada) all the laws relating to divorce come under the same jurisdiction.

Since the law relating to divorce is the same in Alberta as it is in Ontario, for example, then by definition there can be no "conflict of laws". So then the distinction must be made between nullity and divorce proceedings in that in matters of divorce foreign means not Canadian and in relation to nullity foreign means not Albertan.

As has been mentioned the common practice in Alberta when a foreign divorce or nullity action has occurred is for the party to seek a *mandamus* or some other action to have his status determined. There are cases where declaratory relief *simpliciter* has been granted and the remedy is available although it is clouded with uncertainty. There is a need for this remedy and as a matter of civil rights the Alberta Legislature should be competent to provide a forum for the consideration of the issue. It is proposed that legislation be passed to the effect that all persons with sufficient connection with the province be allowed to apply for a declaration as to their marital status in Alberta. In actual fact this would be a remedy much like that proposed for declarations as to initial validity, and the considerations as to consequential relief have the same application.

2. Filial Status

In 1960 the decision was made in Alberta that a specific provision for declarations of legitimacy was not necessary as The Legitimacy Act, S.A. 1960, c. 56, s. 8, repealed Part VII of the Domestic Relations Act (see pages 9-13, *supra*). The Legitimacy Act clearly outlines the conditions that govern legitimacy, and perhaps it was thought that with

those clear guidelines it would be sufficient for persons concerned to have their causes determined as a matter ancillary to other established claims.

The English Law Commission has, at page 56 of its Report, made a contrary recommendation.

> (1) The court should be empowered by statute to make the following declarations (paras. 18-36):- . . . .
>
> (iii) that the applicant is legitimate or has been legitimated pursuant to statute or at common law. We invite views as to whether legitimacy and legitimation declarations should be limited to the applicant's own status, or whether an applicant should be able to ask for a declaration that he or any other person is legitimate or has been legitimated (para. 32). We also raise the question whether it should be possible to obtain a declaration as to the parent-child relationship in cases where the applicant does not claim the status of legitimacy or legitimation (para. 34).

As is intimated by the latter part of this proposal, the English Commission considered the problem of filial status in its broadest sense (pages 27, 28 and 29 of the English Report).

> 34. There remains the question whether it should be possible to obtain a declaration establishing the existence of the parent-child relationship in cases where the applicant does not claim the status of legitimacy or legitimation. It is, of course, already possible to obtain a decision of the court as to the parent-child relationship wherever that is an essential element in establishing a claim. But a

> decision obtain in that way binds only the parties. What we have in mind here is a declaration *in rem*. At one time the relationship of legitimacy or legitimation was all important. The illegitimate child had no legal rights in respect of his father. But now the position is different: the Family Law Reform Act 1969[78] goes a considerable way towards removing the disabilities of illegitimacy from the law. At present what appears to be increasingly important for legal purposes is not whether a person is the legitimate child of another but whether he is the child (legitimate or illegitimate) of that person. This suggests that what is needed today is a right for an illegitimate child to be able to apply for a declaration that someone is his father. If no steps can be taken until the father dies and the child claims against his estate, the evidence will be stale. On the other hand, there is much force in the argument that if anyone could apply for a declaration that he was another person's child this could be used for blackmailing purposes. Since an alternative remedy[79]

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[78]Since the coming into operation of Part II of the Act, illegitimate children are for succession purposes almost in the same position as legitimate children. Illegitimate children are given succession rights against either of their parents who dies intestate equal to those of legitimate children. References to 'children' in dispositions made after 1 January 1970 are to be construed as including illegitimate children unless a contrary intention is shown in the disposition. Further, illegitimate children are treated as dependants for the purposes of family provision legislation.

[79]The question of paternity can be determined as and when a dispute arises in which the point is relevant, e.g., when a person makes a claim against the alleged father's personal representatives.

> is available it might be thought undesirable to introduce a new type of declaration *in rem* which could lend itself to such purposes.

Although the rights of a legitimate child are still very much greater than those of an illegitimate child in Alberta, it is clear that many rights and privileges are also determined by reference to the parent-child relationship whether legitimate or not. See for example the Child Welfare Act, R.S.A. 1970, c. 45, s. 49; the Family Relief Act, c. 134, s. 1(b); and the Intestate Succession Act, R.S.A. 1970, c. 190 , s. 15 and s. 16(1).

There appears to be no compelling need for declaratory relief in this area of the law. The English proposal gave no compelling reason why declarations should be available. No doubt the fact that English law already provides a measure of relief in this manner was an influence in the decision. As a matter of policy, it may be that this is a civil right that should exist, but such a right should only be allowed with full knowledge of the potential for abuse, which could be very high if the declaration is used as an instrument of blackmail. I make no proposal on this point.

3. Nationality

The provision in the Legitimacy Declaration Act, 1858, that a person could apply to be declared a British subject probably is still in force in Alberta. This is certainly a declaration of status. No need has been demonstrated for this provision and as it lies out of the mainstream of the general law regarding citizenship it should be repealed or at least transplanted to some other more fitting statute. In any event it embrances a subject that is beyond the terms of reference of this paper.

B. SHOULD DECLARATIONS OPERATE *IN REM* OR SHOULD THEIR BINDING EFFECT BE LIMITED TO THE PARTIES TO THE PROCEEDINGS?

The English Law Commission proposed that declarations of status should operate *in rem*. They gave these two reasons.

> (1) Unless the declaration is *in rem* it largely fails in its purpose; one might as well deny the possibility of obtaining a declaration and allow the question to be determined, if and when it is relevant, in an action *in personam*. The purpose of a declaration regarding status is to still doubts once and for all.
>
> (2) A decree of divorce or nullity operates *in rem* and it would be anomalous and inconvenient if a distinction were drawn between two types of decree both of which determine the status of a marriage. If a decree that a marriage was void operates *in rem*, so, surely, should a decree that it was valid.

This proposal is consistent with the present law, which is outlined in *Lepre* v. *Lepre* [1965] P. 52 at 62, by Sir Jocelyn Simon P.

> A judgment declaratory of the status of some subject-matter legally situated within the national and international jurisdiction of the court pronouncing the judgment constitutes a judgment *in rem* which is universally conclusive.

In respect of declarations of status we should be mostly concerned with national, as opposed to international,

jurisdiction, but in any event it is reasonable that the judgments should continue to operate *in rem*.

C. SHOULD DECLARATIONS BE IN THE DISCRETION OF THE COURT OR SHOULD THEY BE OBTAINABLE AS OF RIGHT?

Presently declarations of nullity are available as a matter of right (*Welsh* v. *Bagnall* [1944] 4 D.L.R. 439) while declarations of validity are discretionary (The Marriage Act, R.S.A. 1970, c. 226, s. 23, "The Supreme Court may, . . . declare that a marriage was lawfully solemnized"). The declarations following the authority of *Har-Shefi* v. *Har-Shefi* are also discretionary. It would seem that there should be a consistent policy. The English Law Commission recommended that declarations of status be available as a matter of right.

> In practice it seldom matters whether a remedy is obtainable as of right or in the discretion of the court. We provisionally propose that declarations of marital status and legitimacy should be available as of right, not because there is any likelihood that the court, given a discretion, would exercise it against a bona fide applicant but because the right to determine one's matrimonial status or one's legitimacy is likely to be regarded as a human right that should not be subject to the court's discretion. We invite views.

This is a valid comment, but it is a matter of political policy whether or not new rights should be established. Naturally if the declarations are available as a matter of right then stricter safeguards to protect the rights of third parties have to be implemented than would be necessary if discretion were allowed. The English Report pages 61 to 63 suggests safeguards which seem feasible and highly effective

if it is decided to make the action available as a matter of right.

D. WHAT SHOULD BE THE POSITION ON THE DISMISSAL OF AN APPLICATION?

The English Law Commission answered this question very adequately with this statement (page 33),

> We suggest that the better view is that the Court should not grant a declaration (which operates *in rem*) for which no one has asked.

E. SHOULD PERSONS OTHER THAN A PARTY TO THE MARRIAGE BE ENTITLED TO APPLY FOR A DECLARATION AS TO THE MARRIAGE?

Presently a void marriage may be declared invalid at the suit of persons other than the parties to the marriage so long as that person has as his object in bringing the suit the protection of some right or interest of his own (*Power on Divorce* (2nd ed.) page 188). There are no reported instances of actions for declarations of validity of a marriage by persons other than parties to the marriage, although the Marriage Act, R.S.A. 1970, c. 226, s. 23, provides that applications for orders that the marriage was lawfully solemnized can be brought by "(a) a party to the marriage, or (b) the Attorney General, or (c) the Director (of Vital Statistics), either *ex parte* or upon such notice as the judge directs."

The English Law Commission expressed an opinion that other persons should not be allowed to obtain declarations operating *in rem*, concerning the marriage of others. The thrust of the argument that they present is that "the obtaining of an applicant of a declaration *in rem* in respect

of a marriage other than his own seems to us to be an unnecessary interference with third party rights." (pages 19-20). Nevertheless the Law Commission recognized the continuing need for some form of relief for third parties (pages 48, 49),

> The history of the matter demonstrates that where a third party has a sufficient interest in impugning the validity of a marriage, he should be entitled to do so; this principle should, we think, be preserved but we take the view that any decision on such proceedings should not have a binding effect *in rem*. We have already indicated our general view that only parties to the marriage should be able to apply for a declaration *in rem* as to the validity of their marriage and our examination of the law of nullity in this context leads us to propose that a decree of nullity of a void marriage should be available only on the application of a party to the marriage.
>
> 62. If this proposal is accepted, an interested person will remain entitled to impeach the marriage in proceedings concerning his interest, e.g., the administration of a settlement in which he has an interest, but any decision as to the validity of the marriage will be binding on the parties to the proceedings only and will not operate *in rem*.

It is submitted that these recommendations are acceptable with the possible exception that such public officials as the Attorney General and the Director of Vital Statistics be allowed to apply for declarations in order to preserve the integrity of the public records.

F. SHOULD AN APPLICATION TO DETERMINE THE VALIDITY OF A MARRIAGE BE AVAILABLE AFTER THE DEATH OF A SPOUSE?

Here we have the kind of consideration about which it is difficult, if not foolish, to formulate a rule. The English Law Commission points out that currently such applications are allowed, then it sets out the arguments for and against continuing to allow this kind of declaration (pages 35-38),

> **44.** We suggest, for the reasons set out in this paragraph, that the present rule should be retained, though we are aware that a case does exist for the view that neither nullity nor a declaration as to validity should be available after the death of a spouse. Our reasons are:
>
> (1) An existing right should not be taken away unless it is shown to work a mischief, or at least that it is undesirable.
>
> (2) The right of a spouse to apply after the death of the other spouse for a decree of nullity declaring his marriage to have been void has existed for centuries; the like right of a spouse to apply for a declaration that his marriage was valid has existed since the Legitimacy Declaration Act 1858. There is nothing to suggest that the exercise of these rights has caused harm or has been abused.

(3) The circumstances of *Aldrich* v. *Attorney General*[97] and *Re Meyer*[98] show that the obtaining of a declaration as to status of the former marriage can serve a useful purpose. Such a declaration can prove useful to a person such as Mr. Aldrich who is seeking to establish rights of succession in a foreign country and the foreign authorities indicate that they would be assisted by a declaration from the English court. Even if no financial advantage flowed from the declaration there is no good reason for depriving a woman in Mrs. Meyer's position of the chance of obtaining, if she so desires, a declaration *in rem* that she is her husband's widow and not his divorced wife.

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[97] [1968] P. 281 (a woman had died leaving a large estate in Switzerland, whose law gave extensive rights to her parents. The petitioner claimed that the deceased was his legitimate daughter and sought declarations that (a) he had been validly married to her mother, who had died before the petition, and (b) that he was her father. Ormrod J. granted a declaration under s. 39, Matrimonial Causes Act 1965 that the petitioner's marriage was initially valid but held that he had no jurisdiction to make a declaration of legitimacy of a person other than the petitioner).

[98] [1971] P. 298 (the wife divorced the husband in Nazi Germany under duress; both parties lived together in England for some years: on the husband's death his widow became entitled in Germany to a pension from a Compensation Fund for the benefit of victims of the Nazi regime; the wife applied for a declaration that the divorce decree was void, the German court intimating that it would accept the English court's decision as to the validity of the German divorce).

45. The arguments for abolishing the present rule may be stated thus:-

(1) In proceedings in which the status of the former marriage is relevant the court will continue to be able to make declarations as to the validity of that marriage and to make findings on questions bearning on its validity. Although such declarations and findings would operate *in personam*, that is all that is needed; there is no need for an *in rem* determination as to the status of a marriage, which cannot in any event be in existence because one of the parties is dead.

(2) The fact that *Aldrich* v. *Attorney-General* and *Re Meyer* appear to be the only reported decisions in which applications for an *in rem* declaration were made after the death of a party to the marriage demonstrates the lack of ne-d for such a remedy. In *Aldrich* v. *Attorney-General* the petitioner should have taken the appropriate proceedings in the Swiss court to establish his claim to assets which lay within the jurisdiction of that court. *Re Meyer* is a case which is unlikely to arise very frequently since in most cases foreign courts are not inhibited from deciding the sort of questions that arose in that case.

46. The arguments for and against the present rule are evenly balanced. Though an unusual case, *Re Meyer* did reveal facts in which the rule enabled justice to be done. We therefore recommend its retention.

It is proposed that no rule need be adopted in Alberta. There are no reported Canadian cases that have discussed the problem and there probably never will be any, but if one should arise the court should be free to determine the question on its peculiar merits.

G. JURISDICTION

The essence of this whole problem has been jurisdictional. The criteria for assuming jurisdiction have varied from one kind of declaration to the next and from one court to the next. If a significant reform is to be made it must above all else consolidate and clarify the position with regard to jurisdiction.

As has been stated the applicant should have a sufficient connection with Alberta. The English Law Commission recommended that the connection be the same as that required for divorce and nullity, so that "if one spouse seeks a declaration in respect of marriage, the other spouse would be able to cross-petition for divorce or nullity" (page 39). Presently the jurisdictional requirements are different for divorces and for nullity in Alberta. Also, inherent in the English proposal, there seems to be an unnecessary equation between *declarations* of status, and matrimonial causes giving rise to *alterations* of status.

The stringent jurisdictional rules that surround nullity of a voidable marriage and, strangely, to a lesser extent, divorce, are designed to prevent limping marriages, because a divorce in Alberta that isn't recognized in another country is socially undesirable. However, a declaration of status cannot cause a limping marriage, nor can it, by any stretch of the imagination prevent a limping marriage (no matter how strict the jurisdictional criteria may be). A declaration of status will only define the situation in the jurisdiction in which it is granted.

Nor is there any substance to the argument that there is a compelling need for a spouse to be able to cross-appeal for a divorce in the same proceedings. In fact, the value of holding divorce proceedings separately has been recognized in that Rule 563(3) of the Alberta Rules of Court states that no cause or action shall be joined in a divorce petition, except for claims for maintenance and custody. This has been the subject of a Report by this Institute (August, 1971, Report #7). Indeed, a declaration of invalidity would indicate the impossibility of a divorce action and a declaration of validity would have no effect on subsequent or even contemporaneous divorce proceedings. It has already been proposed the declarations of nullity for marriages void *ab initio* should be treated the same as other declarations of status. This applies to the basis of jurisdiction as well. Voidable marriages are very different, and beyond the scope of this paper.

What should the requirement be? On page 49, *supra*, it was suggested that an applicant must, in the discretion of the court have a substantial connection with Alberta. That is the extent of my proposal, a requirement of a years residency seems artificial as it may be a residency under circumstances which establish no connection, while, for example, an interest in land in Alberta may provide the connection without any residency whatsoever.

M. PROCEDURAL SAFEGUARDS

In order to protect the rights of third parties it is necessary to provide certain procedural safeguards. The Alberta Rules of Court in Rules 578 to 580 set out *Rules*

Relating to Matrimonial Causes Other than Divorce. It is submitted that the rules there outlined, that govern nullity proceedings in a marriage void *ab initio*, are sufficient if applied to all declarations of status.

I. SHOULD ANCILLARY RELIEF (i.e., FINANCIAL PROVISION FOR SPOUSE AND CHILDREN) BE AVAILABLE ON THE MAKING OF A DECLARATION?

Yes. (See discussion on pages 45-48, *supra*.)

J. CONCLUSION

The law in this area stands in need of a consolidating statutory provision, the substance of which could be drawn from the above proposals. The need is not compelling. The patch work provisions and common law rules which are now available seem to be causing no great hardship. Nevertheless, any comprehensive form of family law in Alberta should direct its attention to the needs of society with respect to declarations of status.

T. MATKIN