felt it to be my duty not to answer, as it certainly is no part of my public duty to answer private inquiries upon questions which may come judicially before me. Some of the marriages which gave occasion to those letters have been contracted under circumstances similar to the present, and it will be too much to expect that I should instantly give a judgment upon such questions in an undefended suit, and in which I can hear no argument in support of the validity of the marriage.

It appears that the husband here was an officer of the army of occupation, and it may, therefore, very well be doubted whether he was at all subject to the French law, as pleaded in the libel I shall give no decided opinion on that point at present; but I shall admit the libel, in order that the party may be the better enabled to obtain an appearance, and bring the cause to a regular decision upon proper argument.

No further proceedings have taken place.

[371] RUDING v. SMITH, FALSELY CALLING HERSELF RUDING. 13th July, 28th July, 1st August, 1821.—Nullity of marriage, alleged on the lex loci of Holland, as not conformable thereto, with reference to a marriage celebrated between British subjects at the Cape by the chaplain of the British forces then occupying that settlement under capitulation. Libel not admitted.

[Referred to, *Armitage* v. *Armitage*, 1866, L. R. 3 Eq. 347 Followed, *Bates* v. *Bates*, [1906] P. 220]

This was a case of nullity of marriage, brought by the husband, to set aside a marriage celebrated in a room in a private house, between the parties, being British subjects, at the Cape of Good Hope, on the 22d October, 1796, by the chaplain of the English forces, by virtue of a licence or permission from General Sir James Craig, the commander of the British forces at the said colony.

The libel pleaded the surrender of the Cape to the British forces in 1795, and the terms of capitulation, "that the inhabitants of the Cape should preserve their prerogatives and the exercise of public worship which they at present enjoy:" and that the laws of the United Provinces, which were in force at that time, had never been repealed or altered It then set forth the law of Holland * respecting marriage,

* The fourth article of the libel pleaded, "that in and by the laws of the United States prevailing in the said settlement or colony, every marriage between persons who were respectively of the religion established by law within the said settlement or colony, must be celebrated in the parochial church of the parish in which one of the said persons resided, by the priest or minister thereof, otherwise the same would be void and of no effect: that in and by the said laws, every marriage between persons both or either of whom were dissenters from the religion established by law within the said settlement or colony, must be so solemnized or contracted before a magistrate at his ordinary place of session, otherwise the same would be void and of no effect; and the party proponent doth further allege and propound that in and by the said laws no legal and valid marriage could be had or solemnized within the said settlement or colony, either between persons who were respectively of the religion by law established, or both or either of whom were dissenters from the same, without due publication of banns three several times, or without a licence or dispensation from the same, granted by the supreme authority of the States, in whom the power of granting such licence or dispensation was exclusively vested, and that such licence or dispensation was never granted by the said supreme authority, for more than one or two of the said necessary publications of banns: that in and by the said laws, no man under the age of thirty years could lawfully contract marriage without the consent of his parent or parents, if living, first had and obtained, or if dead, of his guardian or guardians lawfully appointed; and that no woman under the age of twenty-five years could lawfully contract marriage without the consent of her parent or parents if living, or if dead, of her guardian or guardians lawfully appointed, and that all marriages where the man was under the age of thirty years, or the woman under the age of twenty-five years, had and solemnized without the consent of the parents or parent, if living, or if dead, of the guardian or guardians lawfully appointed of the party so under the age of thirty or twenty-five years, were absolutely null and void to all intents and purposes in law whatsoever; and that no difference or exemption whatever was made or allowed for or on account of any person or persons whatever,

[372] and alleged that between persons both, or either of them, dissenting from the religion established by law, marriage must be solemnized or contracted before a magistrate, or otherwise the same would be null and of no effect; and that no exception was allowed for persons being strangers or foreigners. It then pleaded the principal circumstances in the situation of these parties, "that the wife was born at Fort Saint George, in India, in November, 1777, and Mr Ruding in 1774, in England: that they were resident at the Cape in September and October, 1796," and prayed that the marriage [373] being had in a private house, not in the parochial church, without banns or licence, and without consent of parents as required by the law of Holland, might be pronounced to be null and invalid.

The admission of the libel was opposed by Dr. Jenner and Dr. Phillimore, who submitted that though the principle of lex loci, which was assumed in the libel, might be very just, as an affirmative position; it would not follow that the converse of that proposition was true, that no marriage contracted in a foreign country could be good unless it was solemnized according to the law of the place. that the general principle could not apply to persons being at the Cape, as British subjects, under the protection of the British forces then in possession of the settlement, by virtue of the recent surrender; that such persons must be supposed to contract with reference to the law of their own country, according to the distinction maintained even by Huber,* and admitted by Lord Mansfield in the case of *Robinson* v. *Bland* (2 Burrows, 1077), that marriage is to be considered not so much with respect to the locus contractûs as of the place where it is to be exercised. That the terms of the capitulation might preserve to the inhabitants the enjoyment of their former laws, but it would be unreasonable to impose them as paramount authority on all English subjects who might be with the British army in the condition of conquerors; that in Gibraltar, in the East Indies, and in other places, the exercise of particular religions is reserved to inhabitants; yet the marriages of English [374] subjects in those places, under the English laws, had never been disputed.

In support of the libel Dr. Lushington and Dr Dodson contended that it had been established by the highest authority that, in conquered countries, the laws remained in force till altered by competent authority (*Calvin's case*, 7 Coke's Rep. 17, 18). That the authority of the laws, so continued, was binding on all persons; and there was no distinction as to contracts between natives and strangers, except as to property situated in another country.† That it had been laid down in this Court, in the recent case of *Dalrymple* v. *Dalrymple* (vid. supra, p. 54), that all persons contracting marriage are bound to celebrate such marriage according to the lex loci. it had been so held in older cases, in *Compton* v. *Bearcroft* (Deleg. 1769), and in *Ilderton* v. *Ilderton* (2 H. Bl. Rep. 145), and the distinction now contended for, as to persons in the character of conquerors, could not be maintained. In *Burn* v. *Farrar* (vid. ante, p 369), which was a case of British subjects married in France by licence, and permission of the Duke of Wellington, the Court admitted the libel; but intimated that it was a question of moment in which it was not disposed to proceed further in the absence of the husband, who was said to be gone to South America If that marriage could be held good, it must be owing to the particular situation of the British armies in France there was no conquest, and no [375] natural communication with the civil authorities, nor opportunity of resorting to the tribunals of the country. In this instance such a plea could not be advanced, as the laws had been recognized; and there was a special provision in those laws for the case of strangers and dissenters from the religion of the place, by which the celebration of this marriage might have been had as easily as by the mode which had been adopted. The principle of resorting to English law would carry with it a great inconvenience, as the law so imported would be, not the present law of England, but such as had been in force seventy years ago. The case of British subjects in India was peculiar and sui generis, as they were

being foreigners, or in itinere, or otherwise; but the same were binding upon all persons whatever desirous of contracting matrimony within the said colony."

* Prælectiones Juris Civilis De Conflictu Legum, l. 1, tit 3, § 10.

† *Campbell* v. *Hall*, 1 Cowper, 208. On that subject see also 2 P Wms 75, and the exception therein stated, "unless it be contrary to the law of England, or malum in se, or an omitted case" And the very able argument of Mr. Nolan upon it in the case of *Governor Picton*, St. Tr. vol. 30, p. 833 et seq.

exempted from the law of the country, and lived as persons in factories, under the faith of treaties and the provisions of sundry charters and acts of parliament In the case of *Middleton* v. *Janverin* (vid. post, p. 437) a marriage solemnized in Flanders, but not according to the lex loci, had been set aside; and it was submitted on those authorities that this marriage, being had without publication of banns, and without a licence from any competent authority, or according to the laws of Holland, was null and void.

In reply, Dr. Jenner and Dr. Phillimore. The proposition advanced on the other side would amount to this, that officers serving in the British forces at the surrender of the Cape would be instantly subject to the laws of the conquered country in all cases and in all transactions even between themselves, which would be a manifest absurdity. That the general principle of the lex loci could not **[376]** be applied universally as a negative proposition. It necessarily contained in it many qualifications and exceptions as with respect to polygamy and other customs, which could not be reconciled to the laws and the religion of this country. The present case also necessarily formed another exception. The authority of the decision in *Campbell* v. *Hall* referred to persons settling in a foreign colony, and was not applicable to the question before the Court. Military persons and others accompanying the military occupation are to be considered in a different point of view; with respect to such persons Voet (in Dig. lib. 23, tit. 2) and Huber admit the distinction that they must be understood to contract according to the laws of their own country; as an exception founded on the nature of their situation. In *Compton* v. *Bearcroft* the question did not turn on the validity of the marriage by the law of Scotland, because nothing appeared respecting that law; the libel pleaded only the marriage act and the nullity of the marriage as alleged, contracted by persons going to Scotland to celebrate a marriage there in evasion of the law of their own country. The Court held that the marriage act in its terms did not apply to Scotland, and could not be extended on the principle of evasion. On that ground it did not sustain the libel, but gave no opinion on the effect of the law of Scotland on that marriage, as that question had not been raised in the pleadings.† In *Dalrymple* v. *Dalrymple* the **[377]** parties were inhabitants of the country, and one a native inhabitant. If Mr. Ruding had married a Dutch lady, it might perhaps have imposed on him an obligation to conform in such marriage to the laws of the settlement; and a departure from them might have been fatal. In *Middleton* v. *Janverin* the marriage was designed to be according to the law of Austrian Flanders without any intention to adhere to the British law.

Court. Could it be laid down conversely that all marriages abroad according to the British law would be good?

Dr. Jenner. I will not undertake to offer an opinion on that point, as I do not feel myself called upon to maintain that proposition; at present it may be sufficient to say that there are no cases which establish the contrary: the present case rests on special grounds; the impossibility of subjecting all individuals accompanying a conquering army to the laws of the conquered country. Among other requisites of the Dutch law is the consent of parents, which must in almost all such marriages be impossible to be obtained, as it was peculiarly in the present instance from the circumstances of the case.

[378] *Judgment—Lord Stowell.** This is a suit brought by Walter Ruding, Esq.,

† It appears from the argument in *Compton* v. *Bearcroft* that soon after the Marriage Act many instances had occurred of persons going into Scotland to evade the restrictions of that Act. The cases of *Bedford* v. *Varney*, 1762, before Lord Northington, and *Brook* v. *Oliver* at the Rolls, before Sir Thomas Clarke, 1759, were mentioned, being cases of bequests, dependent on the validity of such marriage, in which it had been contended that the marriage was not valid: but the objection was overruled, and the points in those cases adjudged accordingly. It was said also that Lord Northington must have been well acquainted with the spirit and intention of that act, as he had been much concerned in procuring it.

The notion of impeaching those marriages, on the ground of evasion stated in the libel, is there supposed to have proceeded from the observations of Lord Mansfield in *Robinson* v. *Bland*, as to the exception that might be admitted in such cases on that principle as suggested by Huber.

* On 14th of July, Sir Wm. Scott was created a peer of the United Kingdom of

against Jemima Claudia Smith, for the purpose of praying this Court to pronounce null and void his marriage had with that lady under the following circumstances:—She was born at Fort St George, in the East Indies, in the month of Nov., 1777. His birth took place at Kineton, in the county of Warwick, on the 13th day of May, 1774. In September, 1796, she was at the Cape of Good Hope; the Cape had surrendered a year before: for what purpose she came thither, or how long she meant to remain, does not appear. At the same time Mr. Ruding came thither also, in his way to the East Indies, being at that time a captain in the 12th Regiment of Foot. On the 22d of October, 1796, they were married by the chaplain of the British garrison, under the authority of a licence granted by General Craig, the commander in chief of the British forces in that country. When the marriage was performed Mr. Ruding was of full age, but the lady was under the age of nineteen The consent of parents or guardians, required by the Dutch law then generally prevailing at the Cape, was not obtained, as regarded either of the contracting parties. Her father had died some years before, and her mother had married a second husband; and no appointment of guardians had taken place. It is contended by the husband that by the Dutch law at that time in force at the Cape [379] this marriage was null and void: and on that ground he seeks the aid of this Court to pronounce a sentence declaratory of its nullity.

The case of facts which I have stated, and the Dutch law under which, if applied to these facts, the marriage is to be invalidated, are pleaded in the libel; and I think that there is little doubt that the Dutch law, with respect to persons to whom it really applies, is fairly represented, and would be so proved if the libel was admitted. As little doubt is there that the facts of the case would be established by clear proof; but the real question is whether the Dutch law so pleaded ought to govern entirely and exclusively this case of fact applying to these individuals? For if it ought not, the libel, which rests the case upon it, ought not to be admitted.

In order to maintain that the Dutch law ought to govern the case, the party pleads first an article in the capitulation under which the Dutch colony was surrendered to the British arms. That stipulation covenants that the inhabitants shall preserve the prerogatives which they enjoy at present. The meaning of this article, be it what it may, for the term used "prerogatives" is sufficiently indefinite and obscure, can never be extended to the British conquerors, ex vi terminorum They are the grantors, not the grantees. They were not in the enjoyment of any prerogatives whatever under the Dutch law; they had nothing under it which they could wish to preserve. It is impossible that the Dutch could intend to stipulate for them. It has therefore, I think, been nearly admitted that as to the British conquerors this article has no intelligible application; consequently, if the Dutch law binds them, it must be by some other obligation, by which, independent of this article of capitulation, [380] the Dutch law imposes itself upon them. In order to bring it a little nearer, after pleading in the following articles what the Dutch law of marriage is, it is stated also, "that that law binds all persons whatever within the colony, foreigners as well as natives, for that their laws say so, and that their learned lawyers will support that doctrine, and that their Courts will enforce it." Now if that be true, that the law binds the British conqueror immediately upon the capitulation (there being no express covenant to that effect) it must be either from some known rule of the law of nations, which subjects the conquerors to the laws of the conquered, or from some peculiar principle of the law of England, which imposes such an obligation upon the British conquerors of the possessions of the enemy, for clearly the Dutch law, taken by itself, cannot directly and by its own force bind them. Dutch authority could not impose it, for Dutch authority had ceased; and a Dutch Court, taking upon itself to force this law upon British parties only and in transactions purely British, might be thought to put forward no very just or moderate pretension; unless some authority superior to it had imparted to it a force which it did not itself directly possess. Such an authority, if it exists at all, must be found either in the law of nations or in the British law, for no other authority could give it. I am not aware that any such principle or practice exists in the general law of nations. It sometimes happens that the conquered are

Great Britain and Ireland, by the title of Baron Stowell, and on 14th of August resigned the chair of the Consistory Court. He was succeeded by Sir Christopher Robinson, LL.D., His Majesty's Advocate General.

left in possession of their own laws—more frequently the laws of the conquerors are imposed upon them; and sometimes the conquerors, if they settle in the country, are content to adopt for their own use such part of the laws prevailing before the conquest as they [381] may find convenient under the change of authority to retain. I presume that there is no legal difference between a conquered country and a conquered colony in this respect, as far as general law is concerned, and I am yet to seek for any principle derivable from that law which bows the conquerors of a country to the legal institutions of the conquered. Such a principle may be attended with most severe inconvenience in its operation. The laws may be harsh and oppressive in the extreme, may contain institutions abhorrent to all the feelings, and opinions, and habits of the conquerors: at any rate they can be but imperfectly understood, and that they should all of them instantaneously attach and continue obligatory upon them till their own Government had time to learn them, and select and correct them, is a proposition which I think a professor of general law would be inclined to consider cautiously before it could be unreservedly admitted.

But it is argued to be the doctrine of the law of England, if so, it is not the less hard, as the municipal code of our country is generally admitted to be more liberal and more indulgent than the codes of most other countries. It would be a most bitter fruit of the victories of its subjects, if they were bound to adopt the jealous and oppressive systems of all the countries, which they subdued, and to groan under all the tyranny,*[1] civil and ecclesiastical, of those systems, till their own Government, occupied by the pressure of existing hostilities, had time to look about to collect in-[382]-formation, and to prescribe rules of conduct more congenial to their original habits. To learn what the laws of a country are is not the work of a day, even in pacific times, and to persons accustomed to legal enquiries; and to construct a code, fit for such a new and mixed situation of persons and things, demands, not without reason, a very serious tempus deliberandi; and conquerors are, certainly, not the last men who are entitled to the protection of their country under new grievances.

I am perfectly aware that it is laid down generally, in the authorities referred to,*[2] "that the laws of a conquered country remain till altered by the new authority." I have to observe, first, that the word remain has, ex vi termini, a reference to its obligation upon those in whose usage it already existed, and not to those who are entire strangers to it, in the whole of their preceding intercourse with each other. Even with respect to the ancient inhabitants, no small portion of the ancient law is unavoidably superseded by the revolution of government that has taken place. The allegiance of the subjects, and all the law that relates to it—the administration of the law in the sovereign, and appellate jurisdictions—and all the laws connected with the exercise of the sovereign authority—must undergo alterations adapted to the change. This very libel furnishes instances of this sort. In the third article it is stated "that dispensations from the publication of banns must be had from the authority of the States of Holland" That, [383] I must presume, could not be continued during the existence of the war, and the extinction or suspension of the sovereignty of that nation But, secondly, though the old laws are to remain, it is surely a sufficient application of such terms "that they shall remain in force," if they continue to govern (so far as they do continue) the transactions of the ancient settlers with each other, and with the new comers. To allow that they shall intrude into all the separate transactions of these British conquerors is to give them a validity, which they would otherwise want, in all cases whatever.

It is certainly true that in *Hall and Campbell* that most eminent Judge, Lord Mansfield, a person never to be named but with accompanying expressions of reverence, has laid down the following proposition:—"That the law and legislative government of every dominion equally affects all persons, and all property, within the limits thereof; and is the rule of decision for all questions which arise there. Whoever purchases, lives, or sues there, puts himself under the law of the place. An Englishman in Ireland, Minorca, the Isle of Man, or the Plantations, has no privileges distinct from the natives." Huber, too, speaking upon general principles, had before promulgated the same doctrine: "Pro subjectis imperio habendi sunt omnes, qui intra terminos

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*[1] See on this point the argument in the case of *Governor Picton*, St. Tr. vol 30, p 833 et seq., and note supra, p. 374.

*[2] *Calvin's case*, 7 Coke's Reports, and *Hall and Campbell*, Cowper, p. 208

ejusdem reperiuntur, sive in perpetuum, sive ad tempus ibi commorantur" (De Conflict. Leg. l. 1, t. 3, § 2). But to such a proposition, expressed in very general terms, only general, truth can be ascribed; for it is undoubtedly, subject to exceptions

[384] It is not to be said that embassadors and public ministers are subject to the whole body of the municipal law of the country where they reside. They belong, in great part, to the country which they represent. Even the native and resident inhabitants are not all brought strictly within the pale of the general law. It is observed by the learned Dr. Hyde that there is in every country a body of inhabitants, formerly much more numerous than at present (and now generally allowed to be of foreign extraction) having a language and usages of their own, leading an erratic life, and distinguished by the different names of Egyptians, Bohemians, Zingarians, and other names, in the countries where they live: upon such persons the general law of the country operates very slightly, except to restrain them from injurious crimes; and the matrimonial law hardly, I presume, in fact, any where at all. In our own country and in many others, there is another body, much more numerous and respectable, distinguished by a still greater singularity of usages, who, though native subjects under the protection of the general law, are, in many respects, governed by institutions of their own, and particularly in their marriages; for it being the practice of mankind to consecrate their marriages by religious ceremonies, the differences of religion in all countries that admit residents professing religions essentially different, unavoidably introduce exceptions in that matter to the universality of that rule, which makes mere domicile the constituent of an unlimited subjection to the ordinary law of the country. The true statement of the case results to this, that the exceptions, when admitted, **[385]** furnish the real law for the excepted cases; the general law steers wide of them. The matrimonial law of England for the Jews is their own matrimonial law, and an English Court Christian, examining the validity of an English Jew marriage, would examine it by that law, and by that law only, as has been done in the cases that were determined in this Court on those very principles (vid. supra, vol. i pp. 216, 324). If a rule of that law be that the fact of a witness to the marriage having eaten prohibited viands, or profaning the Sabbath-day, would vitiate that marriage itself, an English court would give it that effect when duly proved, though a total stranger to any such effect upon an English marriage generally. I presume that a Dutch tribunal would treat the marriage of a Dutch Jew in a similar way, not by referring to the general law of the Dutch Protestant Consistory, but to the ritual of the Dutch Jews established in Holland.

What is the law of marriages in all foreign establishments settled in countries professing a religion essentially different? In the English factories at Lisbon, Leghorn, Oporto, Cadiz—and in the factories in the East, Smyrna, Aleppo, and others? in all of which (some of these establishments existing by authority under treaties, and others under indulgence and toleration) marriages are regulated by the law of the original country to which they are still considered to belong. An English resident at St Petersburgh does not look to the ritual of the Greek Church, but to the rubric of the Church of England, when he contracts a **[386]** marriage with an English woman.* Nobody can suppose that whilst the Mogul Empire existed, an Englishman was bound to consult the Koran for the celebration of his marriage. Even where no foreign connection can be ascribed, a respect is shewn to the opinions and practice of a distinct people. The validity of a Greek marriage in the extensive dominions of Turkey is left to depend, I presume, upon their own canons, without any reference to Mahometan ceremonies. There is a jus gentium upon this matter, a comity which treats with tenderness, or at least with toleration, the opinions and usages of a distinct people in this transaction of marriage. It may be difficult to say, a priori, how far the general law should circumscribe its own authority in this matter, but practice has established the principle in several instances, and where the practice is admitted, it is entitled to acceptance and respect. It has sanctioned the marriages of foreign subjects in the houses of the embassadors of the foreign country to which they belong: I am not aware of any judicial recognition upon the point, but the reputation, which the validity of such marriages has acquired, makes such a recognition by no means improbable, if such a question was brought to judgment.† In the case

* A register of English marriages celebrated at St. Petersburgh is transmitted to the registry of the Consistory Court of London.

† Vide supra, vol. i. p. 136. There has been no other decided case of that

which has now occurred—[387] the case of a conquering force, stationed in a conquered country or colony, for the purpose of enforcing the reluctant obedience of the natives, and composing, for the present, a distinct and immisceable body—can it be maintained that the success of their arms, and the service of vigilant control in which they are employed, lays them at the feet of the civil jurisdiction of the country, without any exception whatever? In a former case (vid. supra, *Burn* v. *Farrar*, p 370) the Court intimated its opinion [388] (for the case never reached a decision) that the law of France would not apply to an officer of the English Army of Occupation marrying an English lady; on the ground that at that time, and under such circumstances, the parties were not French subjects, under the dominion of French law; and surely the condition of a garrison of a subdued country is not more capable of impressing the domestic character, and all the obligations it carries with it, than the situation of the Army of Occupation at that time in France.

Much of the order of a society so peculiarly placed depends upon a discreet application of general principles to particular institutions, this can hardly be specified beforehand. But that the whole mass of law, formed for another state of things, and for a status personarum widely different, is to be immediately forced down upon these foreign guardians, in their own separate transactions, and without any reserve or limitation, is a proposition much too inconvenient in its consequences, to be perfectly just in its principle.

The time of this transaction is to be considered. The marriage took place at no great distance of time from the compelled surrender. This case therefore has no resemblance to the case of Ireland, the Isle of Man, the Plantations, or even Minorca, where recognised civil governments had been established, and a permanent system introduced, of which all must be supposed cognizant. The Cape was conquered, but not ceded, and it remained for a treaty of peace to decide to whom it was to belong The ancient civil sovereignty was suspended, and no other fully established [389] in its place. The character of the individuals is likewise to be considered The husband goes there, not as a volunteer or a settler, by intention of his own, or there to remain; but in the character of a British soldier, in the prosecution of a further voyage directed by British authority. He does not put himself under the law of the place; he goes there neither to purchase, sue, nor live. What the legal case of persons engaging in such concerns would be I am not called upon to inquire, much less am I disposed to determine. The party principal is a military servant of the British government, sent upon a public errand elsewhere, and though in itinere, is not so upon any movement of his own. Whatever a Dutch Court might determine upon the general case of a foreigner, or even of a passing traveller, however just in such cases, has no pertinent application to the present.

Suppose the Dutch law had thought fit to fix the age of majority at a still more advanced period than thirty, at which it then stood—at forty—it might surely be a

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description, of which any trace can be discovered. In the argument on *Harford* v. *Morris*, the case of *Lacy* v. *Dickinson*, Consist. 1769, was mentioned, in which the parties, being both English subjects, who had resided at Amsterdam, went to Paris, and were married by leave of the Dutch Embassador in his hotel, and by his chaplain, in the absence of the English Embassador. They came afterwards to England, and the wife brought a suit of jactitation, in which Mr Dickinson justified under the marriage, as alleged. In reply, the wife pleaded the laws of Holland, "that marriages solemnized between the subjects of their High Mightinesses, or others, in a house of an Embassador of the States General in foreign countries, between the subjects of the States General, or others, unless the parties had been first contracted by the law of Holland, and such contract duly registered, and unless banns be duly published in Holland, before the performance of the same, is null and void, to all intents and purposes." It pleaded also "that, by the laws of France, a marriage solemnized, not in facie ecclesiæ, and on publication of banns, and by the priest of the church of the parish where the parties live, and where they are domiciled, unless by special licence and faculty, is null and void." That cause went no further, owing to the death of the husband. The case was cited in that argument to shew that the lex loci had been distinctly pleaded as the ground of nullity, and the allegation admitted to that effect. It is noticed here, as shewing on what principles a marriage, celebrated in an embassador's chapel, was pleaded, and what was opposed to it on the other side.

question in an English Court, whether a Dutch marriage of two British subjects, not absolutely domiciled in Holland, should be invalidated in England upon that account, or, in other words, whether a protection, intended for the rights of Dutch parents, *given to them* by the Dutch law, should operate to the annulling a marriage of British subjects, upon the ground of protecting rights, which do not belong, in any such extent, to parents living in England; and of which the law of England could take no notice, but for the severe purpose of this disqualification? The Dutch [390] jurists, as represented in this libel, would have no doubt whatever that this law would clearly govern a British Court. but a British Court might think that a question not unworthy of further consideration, before it adopted such a rule, for the subjects of this country. In the article of the libel which follows, it is alleged that such a marriage would be declared by Dutch tribunals and Dutch jurists, not only null and void in Holland and the colonies, but likewise in this kingdom, and in every other country. I should presume that this is a claim of universal jurisdiction, which Dutch jurists, and Dutch tribunals, would not make for themselves. In deciding for Great Britain upon the marriages of British subjects, they are certainly the best and only authority upon the question, whether the marriage is conformable to the general Dutch law of Holland; and they can decide that question definitively for themselves and for other countries. But questions of wider extent may lie beyond this: whether the marriage be not good in England, although not conformable to the general Dutch law, and whether there are not principles leading to such a conclusion? Of this question, and of those principles, they are not the authorised judges; for this question, and those principles, belong either to the law of England, of which they are not authorised expositors at all, or to the jus gentium, upon which the Courts of this country may be supposed as competent as themselves, and certainly, in the cases of British subjects, much more appropriate judges.

It is true, indeed, that English decisions have established this rule, that a foreign marriage, valid ac-[391]-cording to the law of the place where celebrated, is good every where else; but they have not è converso established that marriages of British subjects, not good according to the general law of the place where celebrated, are universally, and under all possible circumstances, to be regarded as invalid in England. It is therefore certainly to be advised that the safest course is always to be married according to the law of the country, for then no question can be stirred, but if this cannot be done on account of legal or religious difficulties, the law of this country does not say that its subjects shall not marry abroad. And even in cases where no difficulties of that insuperable magnitude exist, yet, if a contrary practice has been sanctioned by long acquiescence and acceptance of the one country, that has silently permitted such marriages, and of the other, that has silently accepted them, the Courts of this country, I presume, would not incline to shake their validity, upon these large and general theories, encountered, as they are, by numerous exceptions in the practice of nations.

The libel here states a case of marriage as nearly entitled to the privileges of strict necessity as can be. The husband was a person entitled, by the laws of his own country, to marry without consent of parents, or guardians, being of the age of twenty-one; but by the Dutch law, he could not marry without such consent till he is *thirty years of age*. Now, I do not mean to say, that Huber (De Conflict. Leg. l. i. tit. 3, s. 12) is correct in laying down as universally true, "that personales qualitates alicui in certo loco jure impressas, ubique cir-[392]-cumferri, et personam comitari"—that being of age in his own country, a man is of age in every other country, be their law of majority what it may; yet it is not to be laid out of the case that the Dutch law would impose, in this respect, a very unfavourable disability upon the British subject; and it was one which, in the situation of this individual, it was extremely difficult, indeed, almost impossible for him to remove, even supposing that the Dutch law contemplated the prosection of parental rights of British subjects living in England. His father lived in England, and he was pursuing his prescribed course to the East Indies for the military service The lady was a little younger, but her father had died in the East Indies, and her mother was married again, and no guardian had been appointed. It would puzzle the person most versed in that most difficult chapter of general law, the conflictus legum, to say how a marriage could be effected, under such circumstances, in a manner satisfactory to the Dutch requisitions Under such difficulties as regarded the Dutch law, the marriage naturally enough was

not solemnized with any reference to that law, but under a formal licence from the British Governor, and by the ministration of an English clergyman, the chaplain of the English garrison. The Crown, it is admitted, has the power of altering all the laws of a conquered country. This is an act passing under the authority of the representative of the British Crown, and between British subjects only, in which Dutch subjects have no interest whatever, for the parties were no settlers there. It is to be presumed that the representative was not acting without [393] the knowledge and permission of his government, if that permission was absolutely necessary to legalize that act. It was not so in my opinion, unless the Dutch law involved such persons in its obligations; for otherwise no Dutch law was invaded by the act, though the sanction of government might be requisite for the purposes of order and notoriety.

It is therefore, under all these circumstances that I am called upon to dissolve a marriage of twenty-five years' standing, upon a ground of nullity, which is alleged to have existed in its formation, though the vinculum has remained untouched, by either party, during the whole time. I know that, in strict legal consideration, I am to examine this marriage in the same way as if it had taken place only yesterday. It is likewise not improbable that the stability of many marriages may depend upon the fate of this; for, doubtless, many have taken place in a way very similar. But I know that I must determine it upon principles and not upon consequences. Authority of former cases, there is none: the decision in *Middleton and Janverin* (vid infra, 437) turned upon a ground of impeachment, that was directly the reverse of what is attempted in the present case; for the ground there was, that it was a bad marriage under the lex loci, to which it had resorted: so in *Scrimshire* v. *Scrimshire* (vid. infra, 395), marriage celebrated according to the French ceremonial, and by a priest of that country, but totally null and void, as clandestine under its law. the ground here is that it did not resort at all to the lex loci.

[394] In my opinion, this marriage (for I desire to be understood as not extending this decision beyond cases including nearly the same circumstances) rests upon solid foundations. On the distinct British character of the parties—on their independence of the Dutch law, in their own British transactions—on the insuperable difficulties of obtaining any marriage conformable to the Dutch law—on the countenance given by British authority, and British ministration to this British transaction—upon the whole country being under British dominion—and upon the other grounds to which I have adverted; and I therefore dismiss this libel, as insufficient, if proved for the conclusion it prays.

1923 P. 134. 1927 A.C. 658. 19[illegible] A.C. 83. 1931 P. 45.

[395] Cases on Foreign Marriage referred to in the Preceding Judgment.

SCRIMSHIRE *v.* SCRIMSHIRE.* Consist. 29th July, 1752.—Validity of marriage of British subjects contracted abroad, how far considered, by the law of England, to depend upon the law of the country where it is celebrated. Marriage held to be null and void in this case.

[Referred to, *Sottomayor* v. *De Barros*, 1879, L. R. 5 P. D. 100; *Ogden* v. *Ogden*, [1908] P. 63.]

This was a suit for restitution of conjugal rights, in which the validity of the marriage was denied, as being a foreign marriage, not celebrated according to the laws of the country in which it was contracted. The question appears to have been then brought, for the first time, to judicial determination in the Ecclesiastical Court; and the effect of that decision, in legal authority, has been the subject of much discussion in subsequent cases. It is introduced here, with the two following sentences on the same subject, as elucidating the references to former authorities, on this important subject, in the preceding case.

Judgment—Sir Edward Simpson. This is a case, primæ impressionis, and of great importance, not only to the parties, but to the public in general. The suit is brought by Miss Jones,† for restitution of conjugal rights. She pleads a marriage in France,

* This case is printed from a MS. note of Sir Edward Simpson, communicated by Dr. Swabey.

† This lady was the daughter of Theophilus Jones, Esquire, Accountant-General of the Bank of England.