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 Janvein* (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 C.A. 658.
1928 A.C. 83.
1931 P. 145.

[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.

clandestine and forbidden by the laws of both countries, with this difference that, by the laws of France, such marriages are, in all cases, absolutely null, whereas, by the laws of England, they are only **[396]** irregular, but not null unless under special circumstances that warrant the Court to put that construction upon them An allegation has been given in on the part of Mr. Scrimshire, which pleads that he was drawn in by surprise and terror to marry; that the marriage was celebrated in France; that by the laws of France the marriage of minors under twenty-five, unless with the consent of parents, is null and void; and that marriage can only be legally celebrated in that country by the proper priest, licensed to marry and exercise his functions within the jurisdiction where the parties live: that he was a minor, about eighteen; that Miss Jones was about fifteen: that the marriage was solemnized in a private house, by a priest not authorized, and without the consent of parents · that, under these circumstances, the marriage was null by the laws of France A sentence of the Parliament of Paris, declaring the marriage null, is also pleaded, not as a bar to entering into the question in this Court, whether the marriage be good or not, but as evidence of the law of France, which may be material for the consideration of this Court in determining whether this be a good marriage by the law of England or not

Before I enter into the merits of the case I shall take notice of some preliminary objections that have been made by the counsel Upon the return of the citation *viis et modis*, on the 23d of June, 1749, Mr. Bogg appeared for Mr. Scrimshire. On the 26th October, 1749, a libel was given in by Miss Jones, and admitted. On the same day, Mr Bogg exhibited a special proxy, and contested suit negatively, And it has been insisted **[397]** that by such absolute appearance, without protest, he had submitted entirely to the jurisdiction of this Court; and that the matter should be determined by the laws of this country, without any regard to the laws of France; and that he had waived all right to any benefit that might be derived from the sentence, which has been passed on this marriage in France.

It is further insisted that, after an absolute appearance, he had alleged the sentence in France to be a bar to any further proceedings; and that the Court having overruled that plea, the sentence of the Parliament of Paris and the French laws were entirely out of the case; and that the question before the Court, whether this is a good marriage or not, ought to rest solely on the English law, with respect to clandestine marriage, without any regard to the French law on that subject. This is the inference made by counsel. But, I apprehend, these consequences, as drawn by them, will not follow from Mr. Bogg's absolute appearance, nor from the Court's rejecting the plea offered by him as a plea in bar.

This is a cause for the restitution of conjugal rights. Mr. Bogg appears to the citation, &c. and denies the marriage. This surely is not a waiver of his client's right under the French law, but rather an assertion of it. The process is for restitution of rights; and the marriage being denied, a question arises incidentally, whether it is a marriage or not—to determine whether the party is entitled to restitution or not, under the marriage which has been pleaded. Mr. Bogg pleads a sentence at Paris, in bar to entering **[398]** further into the question of a marriage or not. This surely is far from waiving any right under the sentence, for he insists upon the force and effect of the sentence. The Court was of opinion then, and still is, that a foreign sentence alone could not, of itself, be a bar to entering into a consideration of the question, whether this marriage between English subjects was good or not by the law of England? The Court thought, however, that such sentence was proper to be pleaded, as a circumstance, or a fact, to make evidence of the law of France, with respect to the question here, on the validity of a marriage celebrated in France. Accordingly, the sentence was pleaded, and admitted in that light; and in that light it seems to be very properly before the Court; as I think the laws of France are very material to be considered, in determining, even by our law, on the validity of a contract of marriage had and made in France. So that the Court, by rejecting the sentence when pleaded in bar, has not determined that the sentence in France, when pleaded as a circumstance, is of no avail. Neither has Mr Bogg waived all benefit of the sentence, by appearing absolutely, and pleading the sentence as a circumstance, which is evidence of the law of the place where the marriage was had, and will, in my opinion, be material in considering the points on which the case depends.

The general questions are two 1st, whether there be full and legal proof that the parties did mutually, freely, and voluntarily celebrate marriage, in such a manner as

the laws of this country would deem to constitute marriage, if there was [399] nothing else in the case but a question on the fact of the marriage 2dly, whether, if the fact of the marriage should be proved, this marriage can, by the laws of this country, be effectuated, and pronounced to be good, being solemnized in France, where by law it is null and void, to all intents and purposes? For it seemed to be admitted in the argument that the law was so; but insisted that it ought not to be a rule of determination in this cause.

As to the fact of marriage, it is to be observed that it is a marriage between minors —that it is a clandestine marriage in a private house—not by the regular priest; that it is unfavourable and discountenanced by the laws of both countries. and if there had not been a special act of grace, none of the persons present at the marriage could have been, in this case, legal witnesses to prove it; since it is the constant practice in Ecclesiastical Courts to repel the testimony of persons present at clandestine marriages, till they have been absolved. Persons present at such marriages are excommunicate ipso facto: and in our Courts it is not thought necessary to have a declaratory sentence of an excommunication ipso facto, for the Court can ex officio take notice of it The practice on this point has been confirmed by constant use, under the received maxim that lex currit cum praxi; and it has been so determined lately by Dr. Andrew in the case of *Collis*.

It is to be observed that this marriage was performed by a Romish priest, according to the Roman ritual. The Romish Church acknowledges several orders; though bishops, priests, and deacons, corresponding to those orders in the Church [400] at Rome, are only allowed by us; and in the form of making and consecrating bishops, 3 & 4 Edw. 6, c. 12. 5 & 6 Edw 6, c. 1, s. 5. 13 & 14 Car. 2, c. 4, it is declared that no man "is to be accounted or taken to be a lawful bishop, priest, or deacon, or suffered to execute any function, except he be admitted thereto, according to the form following, or hath had formerly episcopal ordination and consecration."

Bishop Gibson observes that this last clause was designed to allow Romish converted priests, who had been before ordained by a bishop, that such priests might be received without reordination; namely, that they might be received to exercise the functions of a priest, and to do the duties of the English clergy—but not to allow them to celebrate marriage according to the Roman ritual; for by the law of this country, it is, I apprehend, prohibited under severe penalties, for a Roman Catholic priest to be in this country, and to exercise any part of his office as a Popish priest in this kingdom *[1] But as a priest Popishly ordained is allowed to be a legal presbyter, it is generally said that a marriage by a Popish priest is good; and it is true, where it is celebrated after the English ritual, for he is allowed to be a priest. But upon what foundation a marriage after the Popish ritual can be deemed a legal marriage, is hard to say. Indeed the canon law received here calls an absolute contract ipsum matrimonium, and will enforce solemnization according to English rites, but that contract, or ipsum matrimonium, does not convey a legal right [401] to restitution of conjugal rights, though an English priest had intervened, if it were otherwise than according to the English ritual. Upon what reason or foundation then should a contract of marriage entered into by the intervention of a Popish priest, not in the form prescribed by law, be deemed a legal marriage in this country, more than any other contract that is considered by the canon law as ipsum matrimonium?

There may be other instances, but I have not met with any but that of *Arthur* v. *Arthur*,*[2] where a marriage by a Popish priest, by the Roman ritual, has been pronounced for: but that was a marriage in Ireland between parties, both Catholics, where the laws with respect to Papists are different; which laws, as the laws of the country in which the contract was made, the Court would respect. And in that case there was consummation, that purified any condition in the contract. There can be

*[1] 11 & 12 W. 3, c. 4, s. 8 Repealed 18 G 3, c. 60. 31 G. 3, c 32.

*[2] This was a case of appeal from the Consistorial and Metropolitical Court of Dublin (Deleg. 24 June, 1720) in a suit of restitution of conjugal rights on the part of the wife, in which the lawfulness of the marriage was denied on the other side, "as contrary to the laws, statutes and canons, and the provisions of the Act of Parliament (6 Anne, c. 16 See also 12 G. 1, c. 3, 19 G. 2, c. 13) in Ireland, for the prevention of clandestine marriages of minors of certain estate and condition," &c. The Court below had pronounced the libel of the wife not proved; but the Delegates reversed that sentence and decreed to the effect of her prayer.

no doubt but that a marriage here by him who is in allowed orders, according to the English ritual, would be good by our laws But I much doubt whether a marriage in England by a Romish priest † after the Romish ritual would be deemed a perfect marriage in this country: the act of Parliament having prescribed the form of marriage in this country and changed that condition, in the con-**[402]**-tracting part in the Roman ritual, "if Holy Church permit," to "according to God's Holy Ordinances;" and Acts of Parliament having prohibited to Roman Catholic priests the exercise of their functions. And I apprehend, unless persons in England are married according to the rites of the Church of England, they are not entitled to the privileges attending legal marriages, as thirds, dower, &c. How can a bishop try or certify such a marriage? Can he certify that English subjects, residing in England, were lawfully married according to the laws of England, if they were not married according to the rites prescribed by Act of Parliament for marriages in this country? Would a contract only by the intervention of a Romish priest, or any priest, be deemed a legal marriage? The Roman ritual not being the same with ours, such a ceremony is nothing more than a contract

What I have said relates only to marriages in England by Popish priests. For there can be no doubt but a marriage properly celebrated abroad by a Popish priest, after the Roman ritual, would be deemed here a good marriage; for I apprehend that by the law of England marriages are to be deemed good or bad, according to the laws of the place where they are made. It has been determined at common law that, if a man marries two wives, the first in France and another here, he may be tried and indicted here for that as felony; * therefore a marriage in France is deemed a good marriage, though not agreeable to our law, for in matrimonial causes all laws take notice of the law of other countries.

As to the proofs relating to the asserted marriage in the present case it is not necessary to state them particularly. It is in proof from the **[403]** witnesses, and the answers of Miss Jones, that the parties became acquainted in June, 1741, that Mr. Scrimshire went two or three times afterwards to France and visited her, that he was intimately acquainted with her, had great attachment to her, and expressed a great desire to marry her. He proposes marriage, buys a ring, and applies to persons to get a priest to marry them, and declares his intention to marry. Three witnesses speak to the fact of the marriage, and all of them swear that it was free and voluntary. He goes home and returns to be married, which shews that it was done voluntarily. The paper, which is all of his own handwriting, and which is proved by Keating, the only surviving witness, to be free and voluntary, owns her to be his wife He claims her two or three days after the marriage, owns her to be his wife, but desires that it might be kept secret. He made declaration to Mr Asgel in 1744 that, if it was to do over again, he would marry her. In June, 1749, there is a recognition, when he seriously owned her to be his wife to her brother and Major Blagney. There were also many declarations on her side, and there is not a tittle of proof of any force or terror having been practised upon him, though it was pleaded.

The witnesses to the marriage indeed are not of the fairest character. The general character of the priest is bad. There has been a sentence against Macgrah, condemning him to the galleys They were all present at a clandestine marriage, which in some measure affects their credit, and would have gone to their competency, had it not been for the act of grace. They differ in some circumstances. The priest says "that it was after **[404]** the Roman ritual." Macgrah and Keating and Jones say "that it was after the English ritual." The form is pretty much the same, they might mistake, but I am inclined to think that it was after the Roman ritual. Macgrah says "the priest set out for Bologne before Macgrah, and he did not see him again till he came into the room." The priest says "they set out together and arrived in the evening. That Macgrah left him and returned in three hours to the inn, and carried him to Mrs. Dunbar's house." Macgrah says "Bagot gave the priest five guineas" The priest says "Macgrah did this." Macgrah says "Cummins asked the parties if they continued in the resolution to marry." Keating says "that Bagot asked that question." Cummins says "Macgrah asked it," and

† But see the proof of marriage by a Popish priest of the Imperial Envoy, in *Fielding's case* for bigamy, A.D 1706. State Trials, vol. 14, p. 133, 4, et seq

* Kelyng, 79, 1 Siderfin, 171, vid. infra, p. 416

there are some other differences. But yet, on the whole evidence taken together, there seems to be full proof of affection, courtship, recognition, and a fact of marriage, by the intervention of a priest, without which undoubtedly by our law it could only be a contract. The priest swears "that he was ordained a priest, and is so, and he is reputed as such." And though his orders are not produced, yet I apprehend that this evidence is sufficient to make legal proof of it; in which I am warranted by the determination in *Arthur's case*, where a marriage by a Popish priest was pronounced for, it having been sworn "that he was ordained and reputed so."

By the particular municipal laws of this country, a clandestine marriage by a Popish priest after the English ritual is not void, though irregular, though the priest and the parties marrying and present at it **[405]** may be liable to punishment for a breach of the law. But I am not satisfied, as I have before intimated, that a marriage in this country by a Popish priest after the Roman ritual could be deemed a good and legal marriage; especially where there has been no consummation But as this marriage was had abroad, where the Roman ritual is in use, I should have had no doubt in pronouncing for it, had there been evidence that it was a marriage agreeable to the laws of that country.

But the great difficulty arises on the second question from the marriage being celebrated in France where, as it appears from Young's evidence, and the sentence of the Parliament of Paris, such marriage is null by the laws of France. It has been much insisted on, however, that the laws of France are of no consideration in this case, the parties being both English subjects, and not domiciled in France, which alone, as is contended, could subject them to the French laws.

The general principles which have been referred to on the subject of domicil are that a minor son is domiciled where his father lived, until the son comes of age, or settles in another kingdom; that domicil by birth is presumed to continue till the contrary is proved; that he only is said to have changed his domicil, "Quando quis re & facto animum manendi declarat;" and that "domicilium non procedit, si ille haberet animum revertendi:" and, therefore, "Qui studiorum causa aliquo loco morantur, non domicilium ibi habere creduntur;" that minors who may be with a mother or guardian in another country, or may be carried there by a mother's orders, cannot be said to have an intention to change their domicil, or to have a mind to be domiciled there; and "requiritur neces-**[406]**-sario animus ut domicilium acquiratur, et domicilium ex animo contrahitur, et pendet ex animo." *

With respect to Miss Jones, it is contended that she is by birth English, and that her father is now living; that she has no estate in France, and is to be considered as domiciled in the country where her father lives; that there is no proof shewing any intention on her part to change her domicil; that she only went to France to visit a relation by order of her father, and for education; and had been there about eighteen months; and, being a minor, could have no animus manendi longer than her father would permit, particularly at the house of her aunt Mrs Dunbar, where she was only a lodger; that she must be considered on principles of legal construction as being there for temporary purpose only, and with the animus revertendi

With respect to Mr. Scrimshire, it is said that he was also a minor, by birth domiciled in England where his father died; that he had no estate in France and is to be presumed to be domiciled in England, the contrary not being proved; that he had gone to France on several occasions to visit his mother who had been living in France about two years and a half, and the last time he went, about fourteen days before this marriage, in order to proceed to Angiers for education; that the animus revertendi was to be presumed as to him as much as any traveller, and there was no act done by him or declaration which shewed that he had an intention to stay there, or any thing from **[407]** which such an intention can be inferred. The mother, as guardian, could not, by obliging him to live with her, effect a change of his domicil, since there could be no animus manendi, if it was done by order and constraint; and "ex animo domicilium contrahitur." On these representations it is insisted that both parties being subjects of England, born here and sent over to France for education, and not having any estate on which the marriage in France could operate there, a

* C. 10, 39, De Incolis, &c. l. 2 and 7.

D. 50, 1, Ad Municipalem & de Incolis, l. 27, § 1, and many other authorities, especially Mascardus et Probationibus, conclus. 534

residence such as there appeared to be could not give a foreign Court any jurisdiction; for that if it did, the consequence would be that the right of English subjects must be tried by foreign law, and the estates of English subjects lying in England must be governed by French law, which is not to be endured. This was, in general, the purport of the argument for Miss Jones. But I apprehend the case in judgment before me does not turn or depend on the mere question of domicil The question before me is not whether English subjects are to be bound by the law of France, for undoubtedly no law or statute in France can bind subjects of England, who are not under its authority, nor is the consequence of pronouncing for or against the marriage, with respect to civil rights in England, to be considered in determining this case. The only question before me is, whether this be a good or bad marriage by the laws of England? and I am inclined to think that it is not good

On this point I apprehend that it is the law of this country to take notice of the laws of France, or any foreign country, in determining upon marriages of this kind. The question being in substance this, whether, by the law of this country, marriage contracts are not to be deemed good or **[408]** bad, according to the laws of the country in which they are formed; and whether they are not to be construed by that law? If such be the law of this country, the rights of English subjects cannot be said to be determined by the laws of France, but by those of their own country, which sanction and adopt this rule of decision By the general law, all parties contracting gain a forum in the place where the contract is entered into All our books lay this down for law; it is needless at present to mention more than one. Gayll, lib. 2, obs. 123, says, "In contractibus locus contractus considerandus sit. Quoties enim statutum principaliter habilitat, vel inhabilitat contractum, quoad solemnitates, semper attenditur locus, in quo talis contractus celebratur, et obligat etiam non subditum." And again, lib 2, obs. 36, "Quis forum in loco contractus sortitur, si ibi loci, ubi contraxit, reperiatur; non tamen ratione contractus, aut ratione rei, quis subditus dicitur illus loci, ubi contraxit, aut res sita est, quia aliud est forum sortiri, et aliud subditum esse." "Constat unumquemque subjici jurisdictioni judicis, in eo loco in quo contraxit."

This is according to the text law and the opinion of Donellus and other commentators There can be no doubt, then, but that both the parties in this cause, though they were English subjects, obtained a forum, by virtue of the contract, in France. By entering into the marriage contract there, they subjected themselves to have the validity of it determined by the laws of that country. So long as they resided there, each party might sue the other and bring the case before that jurisdiction, to be determined by the law of France. And this cause seems to have **[409]** been begun very properly in France against Miss Jones, while she was resident in France, and subject to that forum, in order to have it tried by its proper forum. For it appears that Mrs. Scrimshire, the mother of the minor, protested of the nullity of the marriage, by a protest, in which she gives a large account of the transaction, on the 3d March, 1744; and this protest was personally notified to Miss Jones in France.

It appears further that Mrs. Scrimshire, having had notice that some affidavits and a certificate of marriage were enrolled in an office in France on the 13th March, 1744, petitioned the seneschal, setting forth the protest and clandestine marriage, and the enrolment of the affidavits, acts, and certificate, and prayed to have the acts, &c. communicated to her, in order that she might draw such conclusions from them as might be lawful, in the proceedings to be had in regard to her son; and that the acts might be brought to be inspected by the judge for that purpose, and declared her intention to prosecute the parties for the raptus seductionis, as it is termed in the laws of France. On the 14th March this was likewise notified personally to Miss Jones, and in her answer she admits that she had such notice

A proctor appears there for Miss Jones, and alleges that she was a minor, and not properly cited, being a foreigner. His objection was overruled; and I must suppose lawfully. The seneschal orders the acts, &c. to be delivered to Bagot: he giving security to produce them on an appeal. From this sentence Mrs Scrimshire appeals to the official of Bologne, and sets forth the decree, and that she is materially interested to cause the marriage to be annulled; and prays that the acts may be **[410]** brought into Court, which are necessary to prove the marriage fraudulent, for the purpose of annulling it; and protests of presenting a petition to him for that purpose. The official inhibits the seneschal from delivering out the papers; but the official

having only authority over the seneschal, and to try the validity of the marriage, and not having criminal jurisdiction, it was thought proper to drop that proceeding by the advice of counsel, and to proceed before the Parliament of Paris, where effectual justice could be done, by securing the papers, and punishing the parties guilty of the raptus seductionis, and the marriage might also be annulled. On the 18th April, 1744, an appeal was accordingly interposed "from the sentence of the seneschal at Bologne, and from the celebration of marriage."

All this appears from the proceedings; and I am to presume that it was agreeable to the laws of France. The criminal proceedings for the raptus seductionis lasted from the 18th April, 1744, to the 27th February, 1749. On which last day, the French subjects, who had been privy to this transaction, were condemned to the galleys; and Miss Jones and others were banished for five years And on the 26th of August, 1749, the marriage was annulled

It has been much insisted in argument that a citation was taken out here in June, before the sentence at Paris, and that an absolute appearance was given by Mr. Bogg then But it is to be observed that issue was not joined till the 26th October, 1749, after the sentence, and that the appeal to the Parliament of Paris was in April, 1744. And I do not apprehend that the mere appearance given here by Mr. Bogg, before the sentence in **[411]** France, is, in point of law, a waiver of proceedings in France, or of the law of France, or an electing of another Court

The suit here is for restitution of conjugal rights, and a sentence in France is not of itself a bar to such suit It is only evidence of what the French law is, by which the Court is to try the validity of the marriage or contract If there had been no sentence in France, the party might have shewed that it was not a good marriage by the laws of France, and he might equally have denied the marriage, whether there had been proceedings and sentence or not at Paris, as I take it to be clear that both parties in the cause had obtained a forum in France, where the marriage contract was entered into; and by marrying there had subjected themselves to be punished by the laws of the country for a clandestine marriage; and had also subjected the validity of the contract to be tried by the laws of that country; as the contract itself, or the marriage, being according to the form of that country, was meant to be a marriage, or not, according to the laws of that country, which is still more strongly shewn in this case, by inserting the words, if Holy Church shall it admit.

I must observe also that the suit was commenced against Miss Jones, concerning the marriage in France, before she left that country, for, from the beginning, the proceedings by Mrs. Scrimshire were in order to annul the marriage and though Miss Jones left France before the direct question on the marriage was brought before the Court in France, yet she was there during the time when Mrs Scrimshire was taking proper steps to annul the marriage, and, on that account, I must consider **[412]** the cause as begun against her before she left France, and when undoubtedly, by her residence and marriage, she was subject to the jurisdiction of that country. She ought, therefore, to have staid in France, to have defended her rights there. She might have done so, notwithstanding the war. And there have been instances of persons doing so in this country

As both the parties, by celebrating the marriage in France, have subjected themselves to the law of that country relating to marriage; and as their mutual intention must be presumed to be that it should be a marriage or not, according to the laws of France, I apprehend it is not in the power of one of the parties, by leaving the place, to draw the question of the marriage or contract, "ad aliud examen," to be tried by different laws than those of the place where the parties contracted. They may change the forum, but they must be tried by the laws of the country which they left. This doctrine of trying contracts, especially those of marriage, according to the laws of the country where they were made, is conformable to what is laid down in our books, and what is practised in all civilized countries, and what is agreeable to the law of nations, which is the law of every particular country, and taken notice of as such.

This subject is much discussed by Sanchez,* to the following effect, that as to the maxim or general rule, "Ut non teneantur peregrini legibus et consuetudinibus loci per quem transeunt," this rule has exceptions; "1st, Quoad contractuum solemnitatem; nam quicunque forenses, **[413]** et peregrini tenentur servare solemnitates in

* De Matrim. lib. 3, De Clandestino Consensu. disput. 18, § 10.

contractu requisitas legibus et consuetudinibus oppidi in quo contrahunt, ratione enim contractus quilibet forum sortitur in loco contractus, hinc est contractum absolutè initum, censeri celebratum, juxta consuetudines et statuta loci in quo initur. Quod ita provenit, quia contractus sequitur consuetudines et statuta loci in quo celebratur." And a case (ibid. § 27) is put, as to inhabitants of a place where the decree of the Council of Trent, for avoiding clandestine marriages, is not received; suppose from England they go to places "per modum transitus, ubi obligat decretum," and marry there according to the laws of their own domicil Some think that such marriage is good in the case of strangers, as agreeable to their own laws, to the law of the country in which they are domiciled, though not to the law of the place where they are married. But Sanchez thinks the marriage void, because it wants the solemnities, "quæ petunt leges loci ubi contractus initur, et quoad solemnitatem adhibendam in contractibus, solæ leges loci in quo contractus celebratur inspiciuntur." These authorities fully shew that all contracts are to be considered according to the laws of the country where they are made And the practice of civilized countries has been conformable to this doctrine, and by the common consent of nations has been so received.

The cases mentioned in the French advocate's opinion, as well as that quoted by Dr. Pinfold, from the Journal des Audiences, lib. 1, c. 24, establish this principle. It is likewise said that if the inhabitants of a country where clandestine marriages **[414]** are forbid go to a country where they are allowed, and marry there in transitu, the marriage is good; "peregrinos a domicilio absentes non teneri legibus illius, si contrariæ vigeant in loco ubi reperiantur." According to this authority also it is plain that the laws of the country where a marriage is celebrated are to be the rule by which the validity of it is to be tried.

Voet *[1] also puts the point in the same manner. "Qua solemnitate, quibus modis, contractus quisque celebrandus sit, quando solemniter initus ac perfectus intelligatur, ex lege loci in quo contractus celebratur dijudicandum est, non vero ex statutis regionis illius, ubi sitæ sunt res immobiles, circa quas, primario, aut per consequentiam, contractus versatur." Mynsinger † also may be cited to the same effect.

And a case is stated of a French man of Paris and a minor going to Lorrain and marrying there according to law, the wife has a child, and then leaves Lorrain and goes to Paris and claims her husband. His friends institute a criminal prosecution to annul the marriage for want of consent of parents One Court thought this marriage the raptus seductionis, but on an appeal the Parliament reversed that determination.

[415] So in Holland, Voet says,*[2] if an inhabitant of Holland contract a marriage in Flanders or Brabant, with a woman of the country, observing those rites which by the laws of Flanders or Brabant are required, it would appear that such marriage would be deemed good in Holland, "eo quod sufficit in contrahendo adhiberi solemnia loci illius, in quo contractus celebratur, etsi non inveniantur observata solemnia, quæ in loco domicilii contrahentium, aut rei sitæ, actui gerendo prescripta sunt." And the States of Holland have given two sentences in that manner. His own opinion however is that the marriage was bad, not upon general principles of law, but on account of a particular and positive law in Holland, which makes all marriages whatever of Dutchmen, wherever they be, void, unless the banns are published in Holland.

As to the practice of England, there is the case quoted by Dr Paul of Miss Fairfax, daughter to Lord Fairfax, who was publicly married to Lord Abergavenny at Paris, she being a minor, and not having her mother's consent. A suit was instituted before the Parliament of Paris to annul the marriage, and it was annulled. She came to England and was maid of honour to King James's Queen, and was after-

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*[1] Voet, in Dig. lib. 23, tit. 2, n. 85, fol. 55

† Singul. Observat. cent. 5, obs 20, n. ult. "Si quis in loco aliquo actum gerens, neglectis loci illius solemnibus, adhibuerit ea quæ vel domicilii vel rei sitæ statuta requirant, sive diversa illa sint sive pauciora Ita gesta nullius fore momenti pronunciat, sive actum gerens extra domicilii locum servaverit solemnia domicilii, sive ea quæ requirebantur in loco rei immobilis sitæ"

This passage appears to be an abstract of the substance of the chapter, and not an extract from Mynsinger.

*[2] Voet, in D lib 23, De Ritu Nuptiarum, tit. 2, n. 4, fol. 20.

wards married to Sir Charles Carter; and Lord Abergavenny married Lord Bellasis' daughter. This shews that in marriages abroad by English subjects, the English law takes notice of the foreign law. For if the French sentence in that case was not to be taken notice of here, they might both have been prosecuted for **[416]** bigamy, and the children of the second marriage would have been bastards.

Kelyng also lays it down, that if a man marries in France and afterwards here, his first wife being living, he may be prosecuted for felony. And for this reason—because the law takes notice of foreign marriage *

So where a foreign issue which is local arises, it may be tried here by a jury, according to the laws of the foreign country; and upon nihil debet pleaded the laws of that country may be given in evidence (2 Salk. 651. 6 Mod 195, S C)

Why may not this Court then take notice of foreign laws, there being nothing illegal in doing it? From the doctrine laid down in our books—the practice of nations—and the mischief and confusion that would arise to the subjects of every country, from a contrary doctrine, I may infer that it is the consent of all nations that it is the jus gentium, that the solemnities of the different nations with respect to marriages should be observed, and **[417]** that contracts of this kind are to be determined by the laws of the country where they are made. If that principle is not to govern such cases, what is to be the rule, where one party is domiciled, and the other not? The jus gentium is the law of every country, and is obligatory on the subjects of every country. Every country takes notice of it; and this Court observing that law, in determining upon this case, cannot be said to determine English rights by the laws of France, but by the law of England, of which the jus gentium is part.

All nations allow marriage contracts, they are "juris gentium," and the subjects of all nations are equally concerned in them, and from the infinite mischief and confusion that must necessarily arise to the subjects of all nations, with respect to legitimacy, successions, and other rights, if the respective laws of different countries were only to be observed, as to marriages contracted by the subjects of those countries abroad, all nations have consented, or must be presumed to consent, for the common benefit and advantage, that such marriages should be good or not, according to the laws of the country where they are made It is of equal consequence to all, that one rule in these cases should be observed by all countries—that is, the law where the contract is made. By observing this law no inconvenience can arise, but infinite mischief will ensue if it is not. For instance, supposing this marriage should be declared good, might not Mr. Scrimshire nevertheless go into France and marry another woman there, the first marriage being null there. he might come into England after his marriage in France, and live here, and could not be prosecuted for **[418]** bigamy, according to Kelyng; for the felony, being done abroad, could not be tried here. The consequence of which would be that he might have two wives, and might have lawful issue by both in different places. His children in France would be bastards in England, but would be legitimate in France, and might inherit there; and the children by Jones would be legitimate in England, but bastards in France, and would not inherit there. The French woman that he married in France would have no right to English effects, for Jones is the lawful wife here. Jones would have no right to French effects, for she is not the lawful wife in France. And if, as it may happen, after they have had children, both should go to France, and should marry again, and have children in France—what infinite confusion would attend all these consequences of such a principle, to the great detriment and inconvenience of themselves and their issue, and the subjects of both countries?

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* This question was moved to me at the Old Bailey, a man marrieth two wives, one in France and another in England, whether he may be indicted and tried for that felony here in England, and I took this difference that if his first marriage was in France, and the second marriage which maketh the felony was in England, then I was of opinion that he might be indicted and tried here for it, and the jury might on evidence find his first marriage in France, being a mere transitory act, and having nothing of felony in it, and our juries usually find such transitory acts, though they are done in a foreign nation; but if the first marriage was in England, and the second in France, then I was of opinion that he could not be tried for it here, because the act which made the felony was done in another kingdom, and felonies done in another kingdom are not by the common law triable here in England Kelyng's Rep page 79.

Again—If countries do not take notice of the laws of each other with respect to marriages, what would be the consequence if two English persons should marry clandestinely in England, and that should not be deemed a marriage in France? Might not either of them, or both, go into France and marry again, because by the French law such a marriage is not good? And what would be the confusion in such a case? Or again—Suppose two French subjects, not domiciled here, should clandestinely marry, and there should be a sentence for the marriage, undoubtedly the wife, though French, would be entitled to all the rights of a wife by our law But if no faith should be given to that sentence in France, and the marriage should **[419]** be declared null, because the man was not domiciled, he might take a second wife in France, and that wife would be entitled to legal rights there, and the children would be bastards in one country and legitimate in the other. So that in cases of this kind the matter of domicil makes no sort of difference in determining them, because the inconvenience to society and the public in general is the same, whether the parties contracting are domiciled or not. Neither does it make any difference, whether the cause be that of contract or marriage, for if both countries do not observe the same law, the inconveniences to society must be the same in both cases. And as it is of consequence to the subjects of both countries, and to all nations, that there should be one rule of determining in all nations on contracts of this kind, it is to be presumed that all nations do consent to determine on these contracts, by the laws of the country, where they are made; as such a rule would prevent all the inconveniences that must necessarily arise from judging by different laws, and is attended by no manner of inconvenience, but is for the advantage of the subjects of all nations.

In the present case, there has been a sentence of the proper forum, pronouncing on the whole facts of the case, and the principles of the laws of France, as applied to them. In matters that belong to the jus gentium, our Courts always regard the sentences of a proper Court. As to sentences in England, by a proper Court, on a matter within its jurisdiction, without doubt they may be pleaded in bar to a suit here for the same matter.

[420] The probate of a will, or a sentence for or against a marriage in the Ecclesiastical Court, will be received in bar, where the same is attempted to be drawn into dispute at common law. But the law of this country goes farther than the sentences of our own Courts. If an Englishman makes a will abroad, and makes a foreigner executor, and has no effects in England, and the executor proves the will lawfully abroad, that probate or sentence of the proper court establishing the will, as to effects there of a man domiciled there, would be a bar to a discovery in Chancery of effects abroad.

In commercial affairs under the law merchant, which is the law of nations, there are instances where sentences for or against contracts abroad have been given, and received here on trials, as evidence, and have had their weight. And this has been allowed on a principle of the law of nations, which all countries by consent agree to, for the sake of carrying on commerce which concerns the public in general. There are instances of the same kind in the Court of Admiralty, the sentences of all Courts of Admiralty are taken notice of by one another; they are obligatory by the law of nations. By the mutual consent of all nations they take notice of one another's sentences, and give mutual faith to their proceedings. All courts of admiralty in Europe are governed by the same law—the law of nations. And it is just, by the law of nations, for nations to be aiding and assisting to each other. And therefore, as the law of England takes notice of the law of nations in commercial and maritime affairs; because all countries are interested in those ques-**[421]**-tions, and as all countries are equally interested to have matrimonial questions determined by the laws of the country where they are had, and the mischief would be infinite to the subjects of all nations if it was not so; I am of opinion that this is the jus gentium of which this and all courts are to take notice.

The principle and rule of law, as laid down in our books, is—

"Quod justæ nuptiæ solum dicuntur, quæ rite et secundum præcepta legum contrahuntur.

"Quod non dicuntur conjuncti, qui contra leges juncti sunt.

"Quod contra jus non sunt nuptiæ."

And Lindwood says,* "Verum est quod ubi lex vel statutum resistit obligationi,

* Fol. 155, lib. 3, tit. 9, De Locato et Conducto v. Non Teneant et v. Obligatur.

tunc nec initur civilis, nec naturalis obligatio. Ratio est quia obligatio naturalis dicitur de jure gentium. Sed de jure gentium debemus obedire majoribus, ille ergo qui contrahit contra præcepta legum, facit contra jus gentium, unde merito non obligatur etiam naturaliter."

So that it is certain that, by the law of all countries, a contract against law has no moral or natural obligation.

Therefore, under the circumstances of this case, as here is satisfactory evidence from the proceedings and sentence in France, and from the evidence of witnesses that this marriage was celebrated in France, contrary to the laws of France, and is null, and not obligatory, either civiliter or naturaliter, by the laws of France, as there is no positive **[422]** law of this country, which prohibits the Court from taking notice of the jus gentium; and as the law of the country, where the contract is made, seems to me, according to the law of nations, to be the only rule of determining in these cases; I cannot pronounce for the marriage, but must pronounce against it, and dismiss Mr. Scrimshire from the suit. But under the particular circumstances of this case, in which there is no doubt that a marriage was had freely and voluntarily; and that this affair has been prejudicial to Miss Jones, who is a lady of good character. I shall, agreeably to precedent, give a sum to her nomine expensarum, and fix it at £400. The lady may be happy, I hope, in a man that deserves her better, if she does not think so, it is a great satisfaction to me that she may have the opinion of better judges.

The Court pronounced for the form of sentence corrected by Bogg, viz. "That the proctor for Sarah Jones, calling herself Scrimshire, had not fully and sufficiently founded or proved his intention, and that the said John Scrimshire ought by law to be dismissed from the instance of the said Sarah Jones as to the matters deduced and prayed by her in this cause, and from all further observation of judgment in this behalf."

[423] HARFORD *v.* MORRIS. 2nd Dec., 1776.—Nullity of marriage by reason of forcible or fraudulent abduction of a ward of very tender age by her guardian: 2dly, of invalidity of the ceremony performed not according to the lex loci, sustained ultimately on appeal on the facts applying to the first point. the libe having been rejected in the Court of Arches.

[Referred to, *Field's Marriage Annulling Bill*, 1848, 2 H. L. C. 60.]

This was a case of nullity of marriage brought in the Court of Arches by letters of request from the Consistory Court of St. David's, on a marriage had abroad, as alleged, contrary to the lex loci, between a guardian and ward of very tender age, under circumstances of force or fraud as pleaded. The admission of the libel was opposed, and it was rejected, but afterwards admitted on appeal *

Judgment—Sir George Hay. This cause comes before the Court in the name of Frances Mary Harford, by her guardians Hugh Hamersley and Peter Prevost, against Robert Morris, praying the Court to pronounce for the nullity of marriages, which she admits to have been celebrated, the one at Ypres in Austrian Flanders, the other at Ahrensburgh in Denmark, with Mr. Robert Morris. In all cases of this nature it is highly necessary that great caution and deliberation should be observed by the Court, because of the consequences of the nullity of marriage to the parties and to the public. It is of the utmost consequence, therefore, and extremely necessary to allow of every delay that could be allowed properly, in order to bring the whole circumstances of the case before the Court.

The party Morris does not appear here under any protest but absolutely; therefore a libel has been exhibited. In that libel it is stated that Miss Harford is the illegitimate daughter of Lord Baltimore, that she is extremely young, was born upon **[424]** the 28th November, 1759, and was placed at a boarding-shool by Morris, who was one of her testamentary guardians. It is alleged that he first frequently visited her there, wrote notes to her, and formed a scheme of marriage, carried her to public places here in England, and conveyed her at last to France, and from thence to the Austrian Netherlands, thence to Hamburgh, thence to Wandsbeck and Ahrensburgh

* This case is printed from a MS. of the whole proceedings collected from the documents in the cause, and from the notes of a short-hand writer, by Mr. Dodwell, a very intelligent practitioner of that time.