1957
*May 7, 8
Oct. 1

EMMY GUDRUN HELLENS, FALSELY CALLED EMMY GUDRUN DENSMORE (*Suppliant*) ..... APPELLANT;

AND

ANDREW WILLIAM DENSMORE ..... RESPONDENT;

AND

THE ATTORNEY-GENERAL OF BRITISH COLUMBIA ..... INTERVENANT;

AND

THE ATTORNEY GENERAL OF CANADA ..... INTERVENANT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Divorce—Remarriage—Validity and effect of legislation—The Matrimonial Causes Act, 1857 (Eng.), c. 85, s. 57—An Act to amend the Law relating to Divorce and Matrimonial Causes in England, R.S.B.C. 1936, c. 76, s. 38, as amended by 1938, c. 13, s. 3.

The petitioner obtained from the Supreme Court of British Columbia a decree of divorce which was stated to be "subject to Section 38 of the Divorce and Matrimonial Causes Act, being Chapter 76 of the Revised Statutes of British Columbia [1936]". Section 38 of the statute (which first appeared as R.S.B.C. 1897, c. 62), before an amendment made by the provincial Legislature in 1938, was identical with s. 57 of the English *Matrimonial Causes Act*, 1857, and permitted the remarriage of a divorced person only after the determination of an appeal or the expiration of the time for appealing. Until the enactment of the

*PRESENT: Kerwin C.J. and Taschereau, Rand, Locke, Cartwright, Fauteux and Abbott JJ.

British Columbia Divorce Appeals Act, 1937 (Can.), c. 4, the Courts in British Columbia had held that there was no right of appeal. Before the expiration of the time for appealing, the petitioner went through a form of marriage with the respondent in the Province of Alberta, where the respondent was then domiciled. The parties subsequently became domiciled in British Columbia. By her petition in these proceedings, the petitioner asked that her "purported marriage" to the respondent be declared null and void.

Held (Kerwin C.J. and Locke and Abbott JJ. dissenting): The petitioner was entitled to judgment.

Per Taschereau, Cartwright and Fauteux JJ.: The enactment of s. 38 by the Legislature of British Columbia was unnecessary since s. 57 of the English statute was still operative in British Columbia. The incapacity to marry under s. 57 formed part of the substantive law of marriage and divorce in British Columbia which, although it was dormant so long as there was no right of appeal in divorce proceedings, became effective immediately upon that right coming into existence. There being no evidence that the general law of Alberta differed in this respect from that of British Columbia, the Court should have assumed that it was the same. Accordingly, at the time of her purported marriage to the respondent, the petitioner was under disability and the marriage was invalid.

Per Rand J.: Section 57 of the English statute was introduced into British Columbia before Confederation as a substantive measure, although it remained procedurally inefficacious until provision was made for an appeal. On that footing, the provision was now operative in British Columbia.

Per Kerwin C.J., *dissenting*: The history of the legislation showed that s. 38 of the British Columbia statute was an enactment by the Legislature of that Province, and it was *ultra vires* as legislation respecting "Marriage and Divorce", within head 26 of s. 91 of the *British North America Act.* It was not a mere matter of procedure but one of substantive law and had no relation to the solemnization of marriage in the Province.

Per Locke and Abbott JJ., *dissenting*: Section 57 of the English Act was "from local circumstances inapplicable" in the Colony of British Columbia and was therefore not introduced with the general body of English laws in 1867. The provincial legislation was *ultra vires* and there was, therefore, no impediment to the petitioner's marriage with the respondent.

APPEAL from a judgment of the Court of Appeal for British Columbia (1), affirming a judgment of Wood J. (2). Appeal allowed.

W. G. Burke-Robertson, Q.C., and *J. J. Sutherland,* for the petitioner, appellant, and the Attorney-General of British Columbia.

(1) *Sub nom. Densmore v. Densmore* (1956), 19 W.W.R. 252, 5 D.L.R. (2d) 203.

(2) (1955), 17 W.W.R. 174, 1 D.L.R. (2d) 138.

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J. M. Boucher and *A. K. Boucher*, for the respondent.

D. H. W. Henry, Q.C., for the Attorney General of Canada.

THE CHIEF JUSTICE (*dissenting*):—The appellant, when a spinster, was married on August 10, 1943, to Albert Robert Douglas Hellens in Alberta, where each was resident and domiciled. Some time later the husband moved to British Columbia, where he established his domicile. The appellant secured a divorce from him by a decree of the Supreme Court of British Columbia in Divorce and Matrimonial Causes, dated November 18, 1948, but not entered until November 27, 1948. On January 19, 1949, the appellant married the respondent, Andrew William Densmore, in Alberta, where he was domiciled; whether the appellant was also domiciled there is immaterial. One child, a daughter, was born to them on November 9, 1949. In 1953 they moved to Vancouver, British Columbia, where they established their domicile. In March 1955, the appellant filed a petition in the Supreme Court of British Columbia in Divorce and Matrimonial Causes asking that what she described as her "purported marriage" to Densmore be declared null and void and that she be given the custody of the child.

The matter came before Wood J. who, after notice to the Attorney-General of British Columbia, who was represented by counsel, and to the Attorney General of Caanda, who did not appear, dismissed the petition without costs (1). An appeal by the appellant and the Attorney-General of British Columbia (as intervenant) to the Court of Appeal for British Columbia was dismissed (2), the Court ordering the appellant to pay to the respondent, Densmore, his costs of the appeal. That Court granted leave to the appellant and to the Attorney-General of British Columbia to appeal to this Court and, by my order, the Attorney General of Canada was permitted to intervene.

The present proceedings originated in British Columbia, while the marriage to Densmore was celebrated in Alberta, but it was not suggested that there is any difference between

(1) *Sub nom. Densmore v. Densmore* (1955), 17 W.W.R. 174, 1 D.L.R. (2d) 138.

(2) (1956), 19 W.W.R. 252, 5 D.L.R. (2d) 203.

the relevant law of the two Provinces. If there were, it might be pointed out that since it was not pleaded that the law of Alberta applies, it should have been presumed in the Courts below that it is the same as that of British Columbia. In any event this Court requires no evidence as to what laws may be in force at any particular time in any of the Provinces of Canada and the question before us is as to the validity of the marriage in Alberta in 1949 which, in turn, depends upon the effect of the divorce in British Columbia in 1948.

Counsel for the appellant contends that the Densmore marriage is invalid because it took place on January 19, 1949, within the time limited for appealing from judgments, orders or decrees of the Supreme Court of British Columbia, *i.e.*, 2 months from their entry: The Court of Appeal Act, R.S.B.C. 1936, c. 57, s. 14, as amended by 1946, c. 18, s. 2. Whether the Courts in British Columbia were correct in holding in several cases decided after British Columbia entered Confederation in 1871 that there was no right of appeal in matrimonial causes to the Court of Appeal need not be considered. By the *British Columbia Divorce Appeals Act,* 1937, c. 4 (now R.S.C. 1952, c. 21), the Parliament of Canada provided that the Court of Appeal for British Columbia should have jurisdiction to hear and determine appeals from an order, judgment or decree of a Court of the Province or a judge thereof having jurisdiction in divorce and matrimonial causes. Section 2 of c. 11 of the statutes of British Columbia, 1938, enacting s. 8A of the *Court of Appeal Act,* R.S.B.C. 1936, c. 57, is to the same effect, with an added provision (subs. (2)) that: "The practice and procedure governing appeals to the Court of Appeal from a judgment or order of the Supreme Court or a Judge thereof shall apply to appeals to the Court of Appeal in divorce and matrimonial causes."

The divorce decree of November 18, 1948, dissolved the marriage to Hellens and made such dissolution absolute, but by its terms it was "subject to Section 38 of the Divorce and Matrimonial Causes Act, being Chapter 76 of the Revised Statutes of British Columbia", (*i.e.*, the Revised Statutes of 1936). The Revised Statutes of 1948 did not

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come into force until February 7, 1949, and therefore do not concern us. Section 38 reads as follows:

> 38. When the time hereby limited for appealing against any decree dissolving a marriage shall have expired, and no appeal shall have been presented against such decree, or when any such appeal shall have been dismissed, or when in the result of any appeal any marriage shall be declared to be dissolved, but not sooner, it shall be lawful for the respective parties thereto to marry again, as if the prior marriage had been dissolved by death: Provided always that no clergyman in holy orders of the United Church of England and Ireland shall be compelled to solemnize the marriage of any person whose former marriage may have been dissolved on the ground of his or her adultery, or shall be liable to any suit, penalty, or censure for solemnizing or refusing to solemnize the marriage of any such person.

By c. 13, s. 3, of the 1938 statutes s. 38 was amended by striking out the word "hereby" in the first line.

The history with reference to this section is curious. It suffices to commence with s. 2 of Ordinance no. 7, dated March 6, 1867, of the Colony of British Columbia (republished as no. 70 in the Compiled Law of British Columbia, 1871):

> From and after the passing of this Ordinance the Civil and Criminal Laws of England as the same existed on the 19th day of November, 1858, and so far as the same are not from local circumstances inapplicable, are and shall be in force in all parts of the Colony of British Columbia.

By force of this ordinance the substance of the law with respect to divorce in force in British Columbia at the time of its entry into Confederation is that found in the Imperial statute "An Act to amend the Law relating to Divorce and Matrimonial Causes in England", 1857, c. 85, as amended by 1858, c. 108, so far as it was not from local circumstances inapplicable. British Columbia became part of Canada on May 16, 1871, and by virtue of the application to it of s. 129 of the *British North America Act*, 1867, the laws in force therein at that date were continued, subject, nevertheless (except with respect to such as were enacted by or existed under Acts of the Parliament of Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland) to be repealed, abolished or altered by the Parliament of Canada or by the Legislature of the Province according to their respective authority.

In *M., falsely called S. v. S.* (1), the Full Court of British Columbia held that the Supreme Court of British Columbia had jurisdiction to grant a divorce in a proper case and this view was ultimately confirmed by the Judicial Committee of the Privy Council in *Watts et al. v. Watts* (2). Nothing germane to the present discussion occurred in British Columbia after 1871, when the Province entered Confederation, until 1897, when the Revised Statutes of British Columbia appeared. In that revision is found c. 62 intituled "An Act to amend the law relating to Divorce and Matrimonial Causes in England" (the same title, it may be noted, as that of the Imperial Act of 1857), containing 48 sections of the Imperial Act, including s. 57, which is s. 40 in the revised statute. However incongruous this is, s. 6 of "An Act respecting the Revised Statutes of British Columbia", 1897 (B.C.), c. 41, provides that on a day to be named by proclamation of the Lieutenant-Governor in council, the roll containing the statutes shall "come into force and effect as and by the designation of 'The Revised Statutes of British Columbia, 1897' to all intents as if the same were expressly embodied in and enacted by this Act to come into force and have effect on, from, and after such day". The necessary proclamation was promulgated.

If the proper conclusion be that the Legislature merely inserted c. 62 in the 1897 revision as a matter of convenience, then s. 57 of the Imperial Act (and hence s. 40 of R.S.B.C. 1897, c. 62) was, because of local conditions, not in force. In fact a mere reading of the provisions of the Imperial Act and of the British Columbia statute discloses that many of them could not apply to British Columbia for various reasons, including the references to certain Courts in England which did not exist in British Columbia. Section 57 of the Imperial Act and s. 40 of c. 62 of R.S.B.C. 1897, c. 62, and s. 38 as it appeared in R.S.B.C. 1936, c. 76, before its amendment by 1938, c. 13, are the same.

However, in view of s. 6 of c. 41 of the 1897 annual statutes of British Columbia, I cannot escape the conclusion that the British Columbia Legislature did enact R.S.B.C. 1897, c. 62, and it therefore becomes necessary to consider the validity of s. 40 thereof. If at that time it was beyond the competence of the Legislature it cannot affect

(1) (1877), 1 B.C.R. (Pt. 1) 25. (2) [1908] A.C. 573.

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the matter that subsequently there was a Court in the Province to which an appeal from a decree of divorce might be taken.

In my opinion it was *ultra vires*. Under head 26 of s. 91 of the *British North America Act*, "Marriage and Divorce" is within the exclusive legislative jurisdiction of the Parliament of Canada. Under head 12 of s. 92, "The Solemnization of Marriage in the Province" is within the competence of a provincial Legislature and, under head 14, "The Administration of Justice in the Province including the Constitution, Maintenance and Organization of Provincial Courts, both of Civil and Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts". This was not a mere matter of procedure, but one of substantive law and has no relation whatsoever to the solemnization of marriage: *In re Marriage Legislation in Canada* (1); *The Attorney General for Alberta and Neilson v. Underwood* (2). There is no inconsistency between the decision of the President of the Probate Division in *Warter v. Warter* (3) and the decision of the High Court of Australia in *Miller v. Teale* (4), on the one hand, and that of the Judicial Committee in *Marsh v. Marsh* (5), on the other. In fact the latter must be read with care in view of what was there in issue and the Australian case depends upon the constitution of that country, which differs from ours.

The appeal should be dismissed subject only to a variation as to costs. There should be no costs in this Court or in either of the Courts below. At the present time the child is in the actual custody of the appellant and she should be left to take what proceedings she may be advised, if any, in that connection.

The judgment of Taschereau, Cartwright and Fauteux JJ. was delivered by

CARTWRIGHT J.:—This is an appeal, brought pursuant to leave granted by the Court of Appeal for British Columbia,

(1) [1912] A.C. 880, 7 D.L.R. 629.
(2) [1934] S.C.R. 635 at 639, [1934] 4 D.L.R. 167.
(3) (1890), 15 P.D. 152.
(4) (1954), 29 A.L.J. 91.
(5) [1945] A.C. 271.

from a judgment of that Court (1) affirming a judgment of Wood J. (2) whereby the petition of the appellant, asking that her purported marriage to the respondent be declared null and void, was dismissed.

The view of the facts on which the Courts below acted may be briefly stated. On August 10, 1943, the appellant, who was then a spinster, was married in the Province of Alberta to Albert Hellens. On November 18, 1948, on her petition, a judgment was pronounced by Whittaker J. in the Supreme Court of British Columbia dissolving the last-mentioned marriage. This judgment was entered on November 27, 1948. On January 19, 1949, the appellant went through a form of marriage in Alberta with the respondent. On November 9, 1949, a daughter was born of this union. On March 10, 1955, the appellant left the respondent and has since then resided and worked in Alberta.

The Courts below have proceeded on the footing that, while prior to the commencement of the divorce proceedings against Hellens he and the appellant had become domiciled in British Columbia, she acquired a domicile of choice, or regained her domicile of origin, in Alberta immediately upon the granting of the divorce and so was domiciled in Alberta at the time of going through the form of marriage there with the respondent. At the commencement of the present proceedings the respondent had acquired a domicile in British Columbia.

It should be mentioned that counsel for the Attorney-General of British Columbia stated that he made no admission as to the domicile of the appellant at the time of her marriage to Densmore, but neither he nor any other counsel asked that any of the findings of fact recited above should be varied. In dealing with the questions of law I will therefore proceed on the assumption that the facts are as stated above.

The time limited for appealing against the judgment dissolving the marriage of the appellant to Hellens was 2 months from the date of the entry of that judgment. The appellant's purported marriage to the respondent was

(1) *Sub nom. Densmore v. Densmore* (1956), 19 W.W.R. 252, 5 D.L.R. (2d) 203.

(2) (1955), 17 W.W.R. 174, 1 D.L.R. (2d) 138.

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therefore solemnized before the time limited for appealing against that judgment had expired, and the question is whether by reason of that fact her purported marriage to the respondent is void.

By the *English Law Ordinance,* 1867, Ordinances of British Columbia, 30 Vict., no. 7, it was enacted that from and after its passing "the Civil and Criminal Laws of England as the same existed on the 19th day of November, 1858, and so far as the same are not from local circumstances inapplicable, are and shall be in force in all parts of the Colony of British Columbia".

Up to May 16, 1871, the date on which British Columbia became part of the Dominion of Canada, no legislation affecting the question before us had been passed in the colony.

A number of decisions culminating in that of the Judicial Committee in *Watts et al. v. Watts* (1), have established that the Supreme Court of British Columbia has jurisdiction to entertain a petition for divorce between persons domiciled in that Province, and that the jurisdiction is derived from the *Matrimonial Causes Act,* 1857, 20 & 21 Vict. (Eng.), c. 85.

Until 1885, no Court to hear appeals had been constituted in British Columbia. In his reasons for judgment Sidney Smith J.A. reviews the decisions which have held that even after a Court with appellate jurisdiction was constituted no appeal lay from a judgment in a divorce action. I share the view of the learned justice of appeal that it is not necessary in this appeal to express an opinion as to the correctness of those decisions since the existence of the right of appeal in divorce actions has been put beyond controversy by the *British Columbia Divorce Appeals Act,* 1937 (Can.), c. 4 (now R.S.C. 1952, c. 21), and the *Court of Appeal Act Amendment Act,* 1938 (B.C.), c. 11, which was made retroactive to February 23, 1937. It appears to me to be equally unnecessary to express an opinion as to whether either of the two last-mentioned enactments was necessary.

The course followed by the Legislature of British Columbia in regard to the *Matrimonial Causes Act,* 1857, is traced in the reasons of Sidney Smith J.A. and it will be sufficient,

(1) [1908] A.C. 573.

for the purpose of understanding the grounds on which the learned justices in the Courts below based their conclusions, to point out that commencing with the revision of 1897 that Act with some sections omitted was printed in the Revised Statutes of British Columbia. In 1897 s. 57 of the English Act was printed without alteration as s. 40 of c. 62. It appeared in the same form and with the same section number in R.S.B.C. 1911, c. 67, and in R.S.B.C. 1924, c. 70. In R.S.B.C. 1936, c. 76, it appeared, still in its original form, as s. 38, reading as follows:

> 38. When the time hereby limited for appealing against any decree dissolving a marriage shall have expired, and no appeal shall have been persented against such decree, or when any such appeal shall have been dismissed, or when in the result of any appeal any marriage shall be declared to be dissolved, but not sooner, it shall be lawful for the respective parties thereto to marry again, as if the prior marriage had been dissolved by death: Provided always that no clergyman in holy orders of the United Church of England and Ireland shall be compelled to solemnize the marriage of any person whose former marriage may have been dissolved on the ground of his or her adultery, or shall be liable to any suit, penalty or censure for solemnizing or refusing to solemnize the marriage of any such person.

Section 3 of the *Divorce and Matrimonial Causes Act Amendment Act,* 1938 (B.C.), c. 13, reads as follows:

> 3. Section 38 of said chapter 76 [*i.e.,* c. 76 of R.S.B.C. 1936] is amended by striking out the word "hereby" in the first line.

It should be mentioned that the operative part of the formal judgment of Whittaker J., dissolving the first marriage of the appellant, is as follows:

> THIS COURT DOTH ADJUDGE AND DECREE that the marriage had and solemnized on the 10th day of August 1943 at Grande Prairie in the Province of Alberta between your Petitioner, Emmy Gudrun Hellens and the Respondent, Albert Robert Douglas Hellens, be and the same is hereby dissolved, by reason that since the celebration thereof, the said Respondent, Albert Robert Douglas Hellens, has been guilty of adultery with the Woman Named, Olive Roller.
>
> AND THIS COURT DOTH ORDER AND ADJUDGE that the said Decree of Dissolution of marriage be and is hereby made absolute.
>
> PROVIDED THAT THIS DECREE shall be subject to Section 38 of the Divorce and Matrimonial Causes Act, being Chapter 76 of the Revised Statutes of British Columbia.

At the trial Wood J. was of opinion (i) that the amendment of 1938, striking out the word "hereby" in s. 38, created an incapacity to marry which did not previously exist and was *ultra vires* of the provincial Legislature as

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being in relation to "Marriage and Divorce", and (ii) alternatively, that if the amendment could be regarded as legislation in relation to the "Solemnization of Marriage in the Province" it would not affect a marriage solemnized in Alberta. He accordingly dismissed the petition.

In the Court of Appeal, O'Halloran, Davey and Coady JJ.A. were of opinion that the appeal failed. Sidney Smith and Sheppard JJ.A., dissenting, would have allowed the appeal and declared the marriage void.

Coady J.A., with whom O'Halloran J.A. and, subject to certain observations, Davey J.A. agreed, did not find it necessary to decide whether the amendment of s. 38 in 1938 was *intra vires* of the Legislature. Assuming its validity, he stated that there were two views as to its effect, (i) that the decree dissolving the marriage, while restoring the parties to the status of single persons, is conditional and inconclusive until the time for appealing has expired with a consequential residual incapacity inherent in and arising from the decree itself—a continuation of the incapacity which existed during the marriage and operates to prevent the parties from remarrying; and (ii) that the decree dissolving the marriage was final and complete in every respect and restored the parties to the status of single persons but that by another provision in the statute under which the decree was granted there has been enacted an impediment on remarriage separate and distinct from the divorce decree. The learned justice of appeal did not have to choose between these views as he went on to hold that there being no evidence as to the law of Alberta, the Court ought not to assume that the Courts of that Province would give effect either to the incapacity mentioned in the first view or to the impediment mentioned in the second.

The main ground upon which Sidney Smith J.A. proceeded was that the enactment and amendment of s. 38 by the Legislature were unnecessary as s. 57 of the Imperial Act continues to operate in British Columbia *mutatis mutandis*, that the incapacity to marry, until the time for appealing from a decree dissolving a marriage has expired or in the result of any appeal a marriage has been declared dissolved, forms part of the substantive law of marriage and divorce in British Columbia which, while dormant so long

as there was no right of appeal, became effective immediately upon that right coming into existence. I agree with this conclusion and with the reasons for it given by the learned justice of appeal. It appears to me to follow from the reasoning of Gray and Crease JJ. in *M., falsely called S. v. S.* (1), and that of Martin J. in *Sheppard v. Sheppard* (2), approved by the Judicial Committee in *Watts et al v. Watts, supra.*

The nature and effect of the incapacity existing, under s. 57, until the time for appealing has expired was dealt with as follows by the Judge Ordinary in giving the judgment of the Court in *Chichester v. Mure* (3):

> The introduction of such a clause [*i.e.*, a clause permitting remarriage] into divorce Bills probably caused the Legislature to make express provision as to the consequences of a decree of dissolution of marriage pronounced by the Court about to be created. If no express power to marry again had been given, it might have been argued, from the practice in divorce Bills, that no such power was conferred by the decree of the Court; and certainly, if no such power had been expressly given, and it had been enacted that it should not be lawful for the parties to marry again until a certain time had elapsed after the making of the decree, a marriage solemnized before that time would have been void, for the parties would have been thereby rendered incompetent to contract. Thus, if by the 57th section it had been enacted "that it shall not be lawful for the respective parties to a marriage dissolved by a decree of this Court to marry again before the expiration of a certain time," no doubt could have existed as to the prohibitory effect of those words; it seems to us their meaning and effect must be held to be the same, although they are preceded by words making it lawful to marry after the expiration of that time.

In *Warter v. Warter* (4), Sir James Hannen, dealing with the effect of a provision in the Indian Divorce Act substantially the same as that contained in s. 57 of the Imperial Act, said at p. 155:

> Mrs. Tayloe was subject to the Indian law of divorce, and she could only contract a valid second marriage by shewing that the incapacity arising from her previous marriage had been effectively removed by the proceedings taken under that law. This could not be done, as the Indian law, like our own, does not completely dissolve the tie of marriage until the lapse of a specified time after the decree. This is an integral part of the proceedings by which alone both the parties can be released from their incapacity to contract a fresh marriage.

(1) (1877), 1 B.C.R. (Pt. 1) 25.
(2) (1908), 13 B.C.R. 486.
(3) (1863), 3 Sw. & Tr. 223 at 231-2, 164 E.R. 1259.
(4) (1890), 15 P.D. 152.

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This reasoning was approved and adopted in the judgment of the majority of the High Court of Australia (Dixon C.J. and McTiernan, Fullagar and Taylor JJ.) in *Miller v. Teale* (1), a judgment which, in my opinion, correctly states the law, both as to the nature and effect of the incapacity to remarry pending the expiration of the time limited for appealing against a decree dissolving a marriage which results from s. 57 of the Imperial Act, and as to the recognition of that incapacity by the Courts of jurisdictions other than that in which the decree was pronounced.

In *Brown v. Brown* (2), the Court of Appeal for British Columbia was composed of the same five learned justices of appeal who heard the appeal in the present case and their reasons appear to indicate agreement with the view expressed by Sidney Smith J.A. in the case at bar as to s. 57 forming part of the substantive law of British Columbia and as to the nature of the incapacity to remarry resulting from it. If I have understood the reasons in *Brown v. Brown* correctly, it would appear that in the case at bar the Court of Appeal would have been unanimous in holding the appellant's marriage to the respondent void, but for the circumstances that at the time it was solemnized the appellant was domiciled, and the marriage ceremony was performed, in a jurisdiction other than British Columbia.

In my opinion the majority in the Court of Appeal in the case at bar erred in holding that the petition failed because of the lack of evidence as to the law of Alberta. In the absence of such evidence the British Columbia Court should proceed on the basis that in Alberta the general law, as distinguished from special statutory provisions, is the same as that of British Columbia. It is the general law which determines whether the Courts of one jurisdiction will recognize an incapacity to remarry until the lapse of a specified time forming an integral part of the proceedings of the Courts of another jurisdiction dissolving a former marriage of the parties, and I have already expressed my opinion that that general law is correctly stated in *Warter*

(1) (1954), 29 A.L.J. 91.

(2) (1956), 20 W.W.R. 321, 6 D.L.R. (2d) 693.

v. Warter, supra, and in *Miller v. Teale, supra.* I refer particularly to the judgment of the majority in the last-mentioned case at p. 94:

> In English law a restraint on remarriage so as to allow time for appealing appears to be regarded as designed to give a provisional or tentative character to the decree dissolving the marriage so that it does not yet take effect in all respects. It is regarded as ancillary to the provision of the law which for a comparatively brief time makes the decree absolute for dissolution contingently defeasible in the event of appeal. It is as if there is a residual incapacity to remarry arising out of the previous marriage and not yet removed by the process provided for dissolving it.
>
> As the foreign law effecting the dissolution which alone sets the party free to marry treats the dissolution as incomplete and not yet productive of that consequence, the law by which the validity of the subsequent marriage is determined cannot disregard it. And that will be so whether the question is referred to the *lex domicilii* as a matter of capacity, or is governed by the *lex loci celebrationis* as one of the essentials to the marriage.

In the case at bar, the assumption that the general law of Alberta on the points which are decisive of this appeal is the same as that of British Columbia is well-founded. The law of both Provinces in these matters is, in my opinion, accurately stated in *Warter v. Warter, supra,* and *Miller v. Teale, supra.*

I do not find it necessary to express an opinion on the questions other than those dealt with above which were discussed before us.

For the above reasons I would allow the appeal and direct that judgment be entered declaring that the purported marriage of the appellant to the respondent solemnized on January 19, 1949, is null and void. At the present time the child is in the actual custody of the appellant and the parties are left to take such proceedings, if any, as they may be advised in that connection. Counsel informed us that in the event of the appeal succeeding neither the appellant nor the Attorney-General of British Columbia would ask for costs. I would direct that there be no order as to the costs of any party or of the intervenants in any Court.

RAND J.:—This appeal raises a question in the law of divorce of British Columbia: it is whether a clause in a decree restraining remarriage of the parties until the conclusion of an appeal that is or might be taken is valid.

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In *Watts et al. v. Watts* (1), the Judicial Committee held that the adoption by the Province in 1858 of the law of England as it then existed embraced the substantive law of divorce as prescribed by the *Matrimonial Causes Act*, 1857 (Eng.), c. 85; and that it was within the jurisdiction of the provincial Supreme Court of that time to enforce it. An examination of that statute shows the special tribunals and procedures provided, and in many respects they were deeply involved with the substantive provisions. The holding stands, as I view it, for the enactment by adoption of those provisions as they are fairly to be drawn from the statute, and that the law so adopted is to be accommodated to the judicial organs administering the law generally in the Province. But the provision of the *Matrimonial Causes Act* which forbade remarriage pending the period within which an appeal from the special Court set up could be brought to the House of Lords was an essential incident of the decree: is the law of the latter to be held to be adopted but the annexed disability disregarded? I am unable to agree that law adopted in such a wide and general fashion is to be so interpreted.

The governing fact is the intention of the adopting legislature: is it to be taken to have intended to introduce only those positive provisions that at the moment could, in accordance with their precise language and by the existing juridical machinery, be carried into execution? The Province was in its infancy: divorce was unknown to its judicature; the blanket law gathered up by the enactment was, by the principle then and now applied, to be confirmed or rejected by the Courts as it was or was not adjudged to be appropriate to the social conditions of the Province, an act of judicial legislation involving adaptation. That with the increase of population and the general development of its political, social and economic life, the apparatus of justice would undergo major modifications must be attributed to the understanding of the legislators; and that with the extension of the court system after the patterns then in existence in England and the United States, such a provision originally inoperative because of the absence of an appeal Court within the Province would then become efficacious through the furnishing of procedure is, in my

(1) [1908] A.C. 571.

opinion, the sound view of what was intended to be done. It was impossible for the legislators, lacking omniscience, at that time to appreciate the particulars of such a body of law: their idea was to introduce rules of civil order and relations which the experience of England had converted into law. The Province was not at that moment contemplating a constitutional change which would take it out of its power thereafter to deal with divorce; what was intended was to infuse the life of the Province with the matured rules of conduct of an older society to which resort, present or future, could be made: to fill, as it were, the *lacunae* in its legal order. I see nothing incompatible with a legal system in the early stages of organization that laws be so enacted generally even though at the time the machinery for enforcement is not then in existence. The adopted restraint, for example, would be during the time of appeal as and when that should be available. If for some reason an appeal, existing in 1858, were temporarily abrogated, would the substantive rule thereupon disappear? I should say not.

For these reasons, I take the provision restraining remarriage pending appeal to have been introduced as a substantive measure; and that it remained procedurally inefficacious until, by provincial law, provision was made for appeal. That after Confederation a right of appeal could be given by provincial law appears to me to be unquestionable although the opposite opinion seems to have been held in the provincial Courts: the administration of justice by the Province surely extends to the final determination within the Province of the judgments of its own Courts. But in the circumstances of this case, the particular jurisdiction giving an appeal would be irrelevant to the question of adoption.

On that footing, the provision is now operative within the Province. I agree that it is not law relating to solemnization of marriage. I take the decree of divorce to be absolute, with a disability imposed on the parties rendering

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them incapable of entering into another marriage during the time prescribed: *Marsh v. Marsh* (1) by Lord Goddard:

> This, of course, assumes that the decree absolute was a valid decree, and on that assumption the question admits of only one answer. It dissolved the marriage from the moment it was pronounced, and at the date when the appeal by the intervener abated it stood unreversed. The fact that neither spouse could remarry until the time for appealing had expired in no way affects the full operation of the decree. It is a judgment in rem, and unless and until a court of appeal reversed it the marriage was for all purposes at an end.

In *Miller v. Teale* (2), at pp. 93-4, language is used which is argued to treat the effect of the provision as withholding full force to the decree until disposed of in relation to appeal. The last sentence seems to state the pith of the idea: "It is as if there is a residual incapacity to marry arising out of the previous marriage and not yet removed by the process provided for dissolving it". I am disposed to accept the view of Lord Goddard. The conception of a "residual incapacity" withheld from the force of the decree seems to me to retain an incident when that to which it is annexed, the marriage, has ceased to exist.

That being the provincial law before Confederation, it became thereafter law as if enacted by Parliament. As paramount law, it would determine the capacity for marriage of the persons affected throughout Canada; and there could be no question of a Province not giving it recognition. Apart from questions of solemnization, with one source of law for marriage and divorce, personal capacity or incapacity is the same throughout the nation.

I would allow the appeal, set aside the judgment of Wood J., and direct a declaration that the remarriage in Alberta was a nullity. There will be no costs. At the present time the appellant has the actual custody of the child in relation to whom the parties should be left to take whatever proceedings, if any, they may be advised.

(1) [1945] A.C. 271 at 278. (2) (1954), 29 A.L.J. 91.

The judgment of Locke and Abbott JJ. was delivered by

LOCKE J. (*dissenting*):—This is an appeal from a judgment of the Court of Appeal for British Columbia (1) by which the appeal of the present appellant from a judgment of the late Mr. Justice Wood dismissing the petition (2) was dismissed. Sidney Smith and Sheppard JJ.A., dissenting, would have allowed the appeal and granted to the petitioner the relief sought.

The facts proven by the evidence, in so far as it is necessary to consider them, are as follows:

On August 10, 1943, the appellant was married at Grande Prairie, Alberta, to A. R. D. Hellens.

On November 18, 1948, a decree dissolving the said marriage was granted in the Supreme Court of British Columbia at Cranbrook. The decree was entered on November 27, 1948. After declaring the marriage to be dissolved, the decree read in part:

> AND THIS COURT DOTH ORDER AND ADJUDGE that the said Decree of Dissolution of marriage be and is hereby made absolute.
>
> PROVIDED THAT THIS DECREE shall be subject to Section 38 of the Divorce and Matrimonial Causes Act, being Chapter 76 of the Revised Statutes of British Columbia.

The reference in the decree was to c. 76 of R.S.B.C. 1936. The section, as contained in the revised statutes of that year, is a replica of s. 57 of the *Matrimonial Causes Act*, 1857 (Eng.), c. 85. After the revision of 1936, by c. 13 of the statutes of 1938, the Legislature assumed to amend s. 38 by striking out of the first line thereof the word "hereby" and, as thus amended, the section, so far as it is relevant, read:

> When the time limited for appealing against any decree dissolving a marriage shall have expired, and no appeal shall have been presented against such decree, or when any such appeal shall have been dismissed, or when in the result of any appeal any marriage shall be declared to be dissolved, but not sooner, it shall be lawful for the respective parties thereto to marry again, as if the prior marriage had been dissolved by death.

At the time of the entry of the decree, the time limited for appealing from a decree of divorce in British Columbia was 2 months from the time of entry.

(1) *Sub nom. Densmore v. Densmore* (1956), 19 W.W.R. 252, 5 D.L.R. (2d) 203.

(2) (1955), 17 W.W.R. 174, 1 D.L.R. (2d) 138.

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On January 19, 1949, the appellant assumed to enter into a contract of marriage with the respondent Densmore at Edmonton, Alberta, this being before the expiration of the 2-month period above mentioned. It is admitted that on January 19, 1949, both the appellant and Densmore were domiciled in Alberta.

The appellant's petition, after stating the facts as to the two marriages and the divorce decree, and that a child was born of the marriage to Densmore, asked for a declaration that what was described as the "purported marriage" be declared null and void and that the petitioner should be awarded custody of the infant child. There was no allegation that under the laws of the Province of Alberta the contract of marriage with Densmore was a nullity and no reference to the laws of that Province was made.

The answer filed by Densmore asserted that the petitioner and the respondent were lawfully married at Edmonton at the time stated and that the petitioner's previous marriage to Hellens had been dissolved by the decree pronounced at Cranbrook. The respondent, in addition to asking for the dismissal of the petition, claimed custody of the child and a declaration that the infant was legitimate. No reference was made to the law of Alberta. It may, however, be fairly contended for the respondent that the allegation that the parties were lawfully married at Edmonton should be construed as meaning that they were married in accordance with the laws of that Province.

The matter came on for hearing before the late Mr. Justice Wood and it was apparently that learned judge who considered that a constitutional question arose for determination by reason of the amendment of 1938, by which an alteration was made in s. 38 of R.S.B.C. 1936, c. 76, above mentioned. Accordingly, he directed that notice be given to the Attorneys General of the Province and of the Dominion to enable them to be heard. It should be said that no evidence had been adduced by either of the parties to the litigation as to the law of the Province of Alberta as of January 19, 1949.

Upon the ground that if the amendment of 1938 created an incapacity to marry which did not previously exist it was *ultra vires,* while if it had to do with the solemnization of marriage in the Province it did not affect marriages in Alberta, the learned judge dismissed the petition.

The Attorney-General of British Columbia, as intervenant, and the present appellant appealed to the Court of Appeal. The constitutional question was argued in that Court but Coady J.A., with whom O'Halloran J.A. concurred, and Davey J.A., who were agreed that the appeal should be dismissed, did not consider it necessary to determine it, considering that the petition should be dismissed in the absence of evidence that under the laws of Alberta the marriage entered into with Densmore was a nullity. Sidney Smith J.A. was of the opinion that deleting the word "hereby" from the section had neither taken away nor added anything to the section and that its effect was to create an incapacity to marry during the period limited for appeal. Sheppard J.A. considered that the section as amended dealt with a matter of procedure within head 14 of s. 92 of the *British North America Act* and was, therefore, within the legislative jurisdiction of the Province and that its purpose was to fix the time when the decree for divorce should become operative for the purpose of removing the incapacity to remarry.

The disposition of these important and difficult matters necessitates a consideration of the manner in which the jurisdiction in divorce and matrimonial causes is vested in the Supreme Court of British Columbia.

By Ordinance No. 70, made on March 6, 1867, the Governor of British Columbia, with the advice and consent of the Legislative Council of the Colony, enacted that:

> From and after the passing of this Ordinance, the Civil and Criminal Laws of England, as the same existed on the 19th day of November, 1858, and so far as the same are not from local circumstances inapplicable, are and shall be in force in all parts of the Colony of British Columbia.

British Columbia became part of the Dominion of Canada by an order of Her Majesty in Council made pursuant to the terms of s. 146 of the *British North America Act* on May 16, 1871. By virtue of s. 10 of the Terms of Union and of s. 129 of the *British North America Act,* the laws in

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force in the Province at the time of its admission were continued, subject, except with respect to such as were enacted by or existed under Acts of the Parliament of Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland, to be repealed, abolished or altered by the Parliament of Canada or by the Legislature of the Province according to the authority of the Parliament or of that Legislature under the Act.

It was decided by the Full Court of the Province in *M., falsely called S. v. S.* (1), that the Supreme Court of British Columbia has in that Province all the jurisdiction conferred on the Court for Divorce and Matrimonial Causes under the *Matrimonial Causes Act,* 1857, 20-21 Vict., c. 85, as amended by 21-22 Vict., c. 108. While this decision was not followed by Clement J. in the case of *Watt v. Watt* (2), the jurisdiction of the Court was affirmed in the appeal taken to the Judicial Committee from that decision: *Watts et al. v. Watts* (3).

As head 26 of s. 91 of the *British North America Act* vests exclusive legislative authority in the Parliament of Canada in relation to divorce and as the Province is, accordingly, excluded from that field, save as to matters of procedure, it is to the Imperial statute that one must look to determine the extent of the Court's jurisdiction. In the Colony of British Columbia, the Governor and the Legislative Council might have legislated but they did not do so, and while Parliament has by the *Divorce Act,* 1925, c. 41, dealt in part with the subject-matter, nothing is contained in that legislation which affects the powers of the Court under the statute of 1857 as amended.

Much of that statute is inapplicable to British Columbia, such as the sections setting up a Court for Divorce and Matrimonial Causes, declaring who shall be the judges of that Court, defining the jurisdiction of the Judge Ordinary, and providing for appeals to the House of Lords. Section 57, where it read:

> When the Time hereby limited for appealing against any Decree dissolving a Marriage shall have expired,

had reference to the times for appeal limited in other sections of that statute, none of which are applicable.

(1) (1877), 1 B.C.R. (Pt. 1) 25.
(2) (1907), 13 B.C.R. 281, 7 W.L.R. 29.
(3) [1908] A.C. 573.

The question as to whether an appeal might be taken from a decree granted in British Columbia was considered by the Full Court of the Province in *Scott v. Scott* (1), which decided that there was no appeal in such matters to the Full Court. This decision was followed in *Brown v. Brown* (2).

In 1937 Parliament enacted as c. 4 the *British Columbia Divorce Appeals Act,* which declared that the Court of Appeal of the Province should have jurisdiction to hear and determine appeals from any judgment or decree of a Court having jurisdiction in divorce and matrimonial causes. In the year following, by c. 11, the Legislature of the Province amended the *Court of Appeal Act* by adding sections which declared the jurisdiction of the Court of Appeal to hear such appeals, and directed that the practice and procedure governing appeals should be the same as applied to appeals from other judgments of the Supreme Court.

It was in the same year that the Legislature, by c. 13, assumed to amend s. 38 of R.S.B.C., c. 76 in the manner above indicated and to repeal s. 37 of c. 76, which was s. 55 of the *Matrimonial Causes Act,* 1857, *verbatim* and dealt with appeals from the Judge Ordinary to the Full Court in England.

It is to be remembered that the power vested in the Court to grant decrees of divorce is conferred by the statute of 1857 as amended and by c. 41 of the statutes of Canada for 1925. The Province, as pointed out, could not legislate on this aspect of the matter, though the course that has been followed in British Columbia since 1938 would rather indicate that the Legislature has assumed that it could do so.

For reasons which are not clear to me, part of the Imperial statute has appeared as a numbered chapter of the revised statutes of the Province since 1897, as if it had been enacted by the Legislature.

The preamble to the statute (c. 41) passed on May 8, 1897, which authorized the revision of that year, recites that

> it has been found expedient to revise and consolidate a new edition of the laws of this Province, including the Statute Law of England in force in and applicable here.

(1) (1891), 4 B.C.R. 316.

(2) (1909), 14 B.C.R. 142, 10 W.L.R. 15.

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The revision contained, as c. 62, an Act which bore the following heading: "An Act to amend the law relating to Divorce and Matrimonial Causes in England." These words were preceded by the following: "Imperial: 20 & 21 Victoria, Chap. 85; 21 & 22 Victoria, Chap. 108." The entire Act was not included and the numbers of some of the sections as they appeared in the Imperial statute were changed. Section 57 appeared as s. 40.

Following the revision of 1897, by c. 40 of the statutes of 1898, the revision was approved. The Act, however, contains no specific reference to c. 62.

It is abundantly clear that while the Act was thus given a number as if it had been passed by the Legislature, the purpose was merely to include it as one of the Imperial statutes which, to the extent that it was not from local circumstances inapplicable, was in force in the Province.

The same course was followed in later revisions of the statutes and the Act appeared as c. 67 of R.S.B.C. 1911, c. 70 of R.S.B.C. 1924, c. 76 of R.S.B.C. 1936, and c. 97 of R.S.B.C. 1948. In all of these revisions the heading "An Act to amend the Law relating to Divorce and Matrimonial Causes in England" was retained. The description of the Imperial Act, by giving the reference to the statutes of 1857 and 1858, was omitted after 1897.

It should be noted that s. 37 of R.S.B.C. 1936, c. 76, which the Legislature assumed to repeal in 1937, was merely a replica of s. 55 of the Imperial statute, which provided that any person dissatisfied with any decision of the Court in any matter which, according to the provisions of that Act, might be made by the Judge Ordinary alone, might, within three calendar months, appeal therefrom to the Full Court. This was one of the many sections which were inapplicable to the Colony and to the Province of British Columbia and had never been in force in either. Thus, the Legislature was assuming to repeal a section of the Imperial statute, which was, of course, beyond its powers by virtue of s. 129 of the *British North America Act* above referred to: *Dobie v. The Temporalities Board* (1).

As appears, however, from the revision of 1948, s. 37 was excluded as if it had been repealed. Conceivably, this may have been done simply to indicate that the section was one

(1) (1882), 7 App. Cas. 136.

of those which, by their terms, were clearly inapplicable, though other sections, such as ss. 1 and 3, still appear in the Revised Statutes of 1948.

The action of the Legislature in 1938 in assuming to strike out the word "hereby" from the opening phrase of s. 38 appears to have been done on the assumption that c. 76 was a statute of the Province of British Columbia which its Legislature might amend, rather than being a reprint of an Imperial statute in force in the Province. The amendment clearly cannot be supported on that basis and appears to me to be wholly ineffective, unless s. 38 of c. 76 is to be treated as part of an Act of the Legislature of British Columbia and the section itself as one dealing, as suggested by Mr. Justice Sheppard, with the procedure in civil matters in the Courts of the Province, and thus falling under head 14 of s. 92.

In my opinion, this cannot be done. As the above-recited history shows, the Legislature has never assumed to legislate on the subject of divorce otherwise than to provide rules for the exercise of the jurisdiction vested in the Supreme Court by the Imperial and the Dominion statutes, and, in the exercise of the further powers given by head 14, constituted the Court where such jurisdiction may be exercised. It may perhaps be suggested that in this indirect manner the Legislature, by the statute of 1938, was simply declaring the time at which divorce decrees granted in the exercise of the jurisdiction should become effective. This might, in my opinion, have been done by an Act dealing with the matter as one of procedure in the Courts, but this is not what was done, but rather an attempt to amend the Imperial statute.

The question to be determined is whether s. 57 of the *Matrimonial Causes Act,* 1857, was, in the language of Ordinance no. 70, "not from local circumstances inapplicable" to the Colony of British Columbia.

The portion of the section to be considered, since it prohibits remarriage within the time limited for appealing, affects the marriage status of those to whom it applies and is substantive law. It is not a matter of procedure. The date as of which this question is to be determined is, in my opinion, November 19, 1858.

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The disability, according to s. 57, remains until the time limited for exercising the right of appeal given by that section has expired or until any such appeal shall have been dismissed. The appeal sections, as I have pointed out, were held not to be applicable and there has been no suggestion on the argument before us that *Scott v. Scott, supra,* and *Brown v. Brown, supra,* were wrongly decided. The provisions of s. 57, which depended for their efficacy on the appeal sections thus found to have been inapplicable, must, in my opinion, be held equally inapplicable.

Sidney Smith J.A. has expressed the view that whether or not the 1938 statute, which assumed to delete the word "hereby" from s. 38, was *intra vires,* that section was in force in the Province and applied to the appeal provided for by the Dominion legislation of 1938. There is, I think, some support for this view to be found in a passage from the judgment of Martin J., as he then was, in *Sheppard v. Sheppard* (1) at p. 503, which, in turn, refers to a passage from the judgment of Gray J. in *S. v. S., supra,* and of Crease J. in that case. However, as the passage relied upon indicates, the learned judges in *S. v. S.* were talking about "a partially dormant or abeyant principle of jurisdiction, to become effective later on as the machinery arrived" and their consideration was not directed to a matter such as that to be decided in this case. It may be added that while the judgment of that learned judge, Martin J., was approved by the Judicial Committee in its judgment in *Watts et al. v. Watts, supra,* that approval was directed to that portion of the decision which held that the Supreme Court of British Columbia had jurisdiction in divorce and not to any question such as the present one. In *Brown v. Brown,* which was decided by the Full Court of British Columbia the year following the decision in *Sheppard v. Sheppard,* it was not suggested in argument or in the judgments that what had been said by Martin J. in *Sheppard's Case* affected the matter.

Applying the language quoted from the earlier cases, Sidney Smith J.A. has expressed the view that the part of the section creating the disability during the periods limited by the English sections should be regarded as having been in abeyance until the time in 1937 when the Dominion

(1) (1908), 13 B.C.R. 486.

statute vested jurisdiction in the Court of Appeal to entertain such appeals, and the amendment to the *Court of Appeal Act* thereafter defined the manner of its exercise. Thus, while the language of the section by its very terms refers to a right of appeal which never existed in British Columbia, it would be applied *mutatis mutandis* from that date.

As to this, it is to be remembered that, from the time the Colony of British Columbia entered Confederation in 1871, the exclusive legislative authority of the Parliament of Canada extended to marriage and divorce under head 26 of s. 91. The same legislature which passed the *Matrimonial Causes Act*, 1857, passed the *British North America Act* and, to give effect to the argument, it would be necessary to decide that the exclusive legislative authority in divorce matters given to Parliament by the later statute could be displaced by a provision in an earlier Act affecting marital status which had remained dormant from 1858 to 1938, but then came into force and became part of the substantive law of the Province. With the greatest respect, I think this to be unsound.

There was, in my opinion, no impediment to the marriage of the appellant and Densmore.

The question of the custody of the child should be dealt with in the Court of first instance.

I would dismiss this appeal.

Appeal allowed without costs, KERWIN C.J. *and* LOCKE *and* ABBOTT JJ. *dissenting.*

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