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There are two great systems of law, the Roman Law and the English Common Law. Roman Law, beginning as the law of the City of Rome, became the law of the Roman Empire and thus of the ancient world, and eventually, by absorption or reception from the 12th to the 18th century, the law of modern Continental Europe. In its original form, it consisted of the legislation of Roman Emperors. Even today in a French Court, the statute rather than judicial decision, is the source of a rule of law. In Continental Europe a judicial decision has no authoritative force in any other case, whether in the same or any other court. In England and in this country, judicial decisions of appellate courts are precedents for future cases, i.e., a point solemnly decided has the force and effect of law, binding the judges in future cases. In England and the United States, the unwritten or common law as declared by judicial decisions of our appellate courts, is the source of a rule of law, unless it has been changed by statute, and even then a judicial decision construing such statute would control future decisions. To this general rule there are exceptions such as is found in the law of divorce. The early English courts had no jurisdiction or authority to grant a divorce. There was no such thing as a "judicial divorce." Only parliament or the church could grant a divorce. Divorce was a special privilege which only the influential person could obtain. This obvious injustice was remedied by the American colonists through legislation. Legislation is a necessary adjunct of the common-law system. For example, it is for the legislature and not for the courts to modify the common-law rules.

In North Dakota, and throughout the United States, matters pertaining to divorce, separation, and alimony or support money are regulated by statute. The courts look to the statutes as the source of their power in these matters. The origin of judicial divorce is purely statutory. The courts in this state have no common-law jurisdiction over the subject of divorce. Likewise, the courts of England have no common-law jurisdiction over the subject of divorce. In England too the origin of judicial divorce is purely statutory. But it was not until 1857 that the courts of England had jurisdiction and power to hear and determine and grant divorces, sepa-

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rations and annulments. Prior to 1857, divorces could not be obtained except through an act of the English Parliament — this is called a "legislative divorce." Legislative divorces are prohibited in the United States. Thus, section 69 of the North Dakota Constitution provides that "the Legislative Assembly shall not pass * * * special laws * * * for granting divorces."

In England, prior to 1857, the Church Courts of England, known as ecclesiastical courts, could hear, determine and grant annulments and separations. So, prior to 1857 the English Courts could not sever or modify the vinculum matrimonii, or bond of matrimony. Unlike the United States, where there is separation of church and state, England had two bodies of laws, Church law as well as state law. The Church law was administered in ecclesiastical courts. Since the purpose of exercising eccelesiastical jurisdiction was to vindicate the divine law, the "vinculum" of marriage was not severed for causes occurring subsequent to marriage; but only for causes occurring prior to marriage, or because of canonical impediments existing prior to marriage, which prevented the creation of a marital status or vinculum matrimonii. Among such impediments to marriage were (1) previous marriage (2) consanguinity, and (3) affinity. Such canonical impediments rendered the marriage a nullity. In 1857, the Parliament of England enacted the "Statutes of 1857, abolishing the civil jurisdiction of the ecclesiastical courts" over matters of divorce, separation and annulment, and transferred such jurisdiction to the temporal or secular courts.

This historical sketch is given to explain why the American courts have no common-law jurisdiction over divorce and why the origin of judicial divorce is purely statutory. Inasmuch as jurisdiction over matters of divorce, separation and annulment of the bond of matrimony were exclusively committed to the spiritual or ecclesiastical courts in England, or to Parliament, and inasmuch as such jurisdiction had never been exercised by the common-law courts, the same could not be exercised by the courts in the United States until it had been vested in the State courts by the law-making power of each State, namely, the state legislatures. Inasmuch as we have never had any ecclesiastical courts in this Country which could execute this branch of the law, it was held in abeyance until our courts were properly clothed with jurisdiction over it by legislative enactment, i. e., by State statutes. England, on the other hand, has had its ecclesiastical courts for several centuries. And the legal power to annul marriages has been recognized as existing in

England from a very early period, but its administration, instead of being committed to the common-law courts, was exercised by the church courts.

Terminology used in England differs from that in the United States, although terminology is not uniform in the United States. In North Dakota the word "divorce" means a severing of the bond of matrimony, or marriage status, for causes arising subsequent to marriage . "Annulment" means a severing of the bond of matrimony for causes existing prior to marriage. "Separation" means just that, a mere separation of the spouses from "bed and board" without a severance of the bond of matrimony, or marriage status. In England the term "divorce" applies to annulments as well as to what we in North Dakota call a "divorce". In England, both an annulment and a divorce are called "divorce a vinculo matrimonii", and, as previously indicated, such Latin form of expression means "divorce from the bond of matrimony." In England a "legal separation" is called a "divorce a mensa et thoro" or "judicial separation", which means a legal separation from bed and board without a severance of the vinculum or bond.

So, "judicial divorce" is an American "invention" and not an English one. Divorces were granted in our American courts long prior to 1857. However, there is no uniformity among the states (of the United States) as to the various causes of actions for divorce; and this makes it more apparent that the causes of action for divorce are purely of statutory rather than of common-law origin.

THE JURISDICTIONAL BASIS OF DIVORCE IS "DOMICIL"

England has the unitary system of government, as distinguished from the federated system that exists in Canada and the United States. This is because England is not subdivided into Provinces or States. In England there is only one final authority, namely Parliament. In the United States, each State is a sovereign power, even though all of the states are federated or bound together into a single, united nation. Thus, England with its unitary system cannot have the problem arise as to the validity of a divorce which probelm so often arises in the United States because neither party was domiciled in the state of forum, that is, neither party was a legal resident of the state wherein the divorce was granted. It is for this reason that occasionally Nevada divorces have been adjudged null and void outside of Nevada.

Section 1 of Article IV of the Constitution of the United States reads: "Full Faith and Credit shall be given in each State to . . . the judicial proceedings of every other state. . . . " The full faith and credit clause requires state courts to recognize and respect as valid the decrees and judgments of a sister state if, but only if, the court had jurisdiction to render judgment. Why is it that Nevada divorces have been adjudged null and void by the United States Supreme Court as well as by Nevada's sister states? It is because a divorce decree entered by a court in a state wherein neither of the parties (husband or wife) has a domicil is void for lack of jurisdiction, and is not entitled to full faith and credit in any other state.

"Jurisdiction" means the power of a court to hear and determine a cause of action — the power to decide incorrectly as well as correctly, subject only to the remedy of appeal. A person's domicil is in that state in which he either has, or is deemed by law to have, his permanent home and residence. The courts have devised and adopted the "legal fiction" that the bond of matrimony, or marriage status, is situated in such a state. The bond or status must be present within the state of forum, otherwise the court is without jurisdiction or power to sever such bond and destroy such status. This legal fiction as to the situs or location of the bond of matrimony, or marriage status, is founded upon the legal principle that the state wherein one or both of the spouses is domiciled or residing is most concerned with such bond and status. In brief, the state of domicil is most concerned with the family life of those whose home is within its territory.

If a North Dakota resident went to Nevada and obtained a divorce, and his wife prevailed in a North Dakota court in having the Nevada divorce adjudged null and void, then the question could arise in the United States Supreme Court as to which judgment was valid, the Nevada judgment, or the subsequent one in North Dakota. Inasmuch as the states are federated into a united nation, in a conflict of laws between two co-equal sovereign states, each of which has jurisdiction over the marriage status of its subject citizens, there must be an arbiter. The United States Supreme Court, as the ultimate expounder of the Federal Constitution, acts as the final arbiter. In such a conflict between states, that court is expounding the minimum requirements of the full faith and credit clause of the Federal Constitution, and it exercises an independent judgment as to what the law is, and is not bound by the local law of either state. The United States Supreme Court has ruled, in

effect, that judicial power (i. e. "jurisdiction") must be founded on "domicil" if a divorce decree is to be given extraterritorial recognition. Thus the requirements of "domicil" is a federal restriction upon the state courts, with respect to extraterritorial recognition of their divorce decrees.