application for a review. Whether that decision be a sound one or not, and whether it would be upheld by the Judicial Committee of the Privy Council, it is not necessary now to consider. The present case is of a different description ; and for the reasons which I have given, I think that orders made by the Court under s. 15 of the Act of Parliament ought to be subject to appeal to Her Majesty in Council. The result therefore is that we dismiss the present appeal with costs.

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HURDEO NARAIN SAHU *v.* GRIDHARI SINGH.

Jackson, J., who is not able to be present to day, concurs in this judgment.

Appeal dismissed.

ORIGINAL CIVIL.

Before Mr. Justice Pontifex.

1874 *March 5 & 21.*

E. L. GASPER (FALSELY CALLED GONSALVES) *v.* W. GONSALVES.

Matrimonial Suit—Suit for a Declaratory Decree—Jurisdiction—Indian Divorce Act (IV of 1869), ss. 4 & 18—Act VIII of 1859, s. 15—Invalid Marriage.

The High Court cannot entertain a suit of a matrimonial nature otherwise than as provided by the Indian Divorce Act; and therefore has no jurisdiction to make a decree of nullity on the ground that the marriage was invalid.

Semble.—A marriage celebrated in accordance with the law of the domicile of the parties may be valid, although it would be invalid by the law of the place where the marriage was celebrated.

THIS was a suit for a declaratory decree that the plaintiff was a *feme sole,* and not the wife of the defendant, and for an injunction that the defendant might be restrained from asserting that she was his wife, and from attempting to enforce as against her any right as her husband. The facts of the case were as follows :—The plaintiff, an infant of the age of 18 years, was, on the 14th May 1855, residing in Calcutta, where her mother, her only parent then alive, was domiciled. It was not proved whether the plaintiff was a Protestant or a Roman Catholic. On the same date the defendant Gonsalves was also living in

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Calcutta, and the plaintiff alleged, but it was not proved, that he was a minor and a Roman Catholic. The plaintiff deposed that the defendant had before the 14th of May 1855 more than once proposed marriage to her, but that her mother was against it. It was further proved that on the 14th May 1855, the plaintiff and defendant went from Calcutta to Chandernagore, and that a religious ceremony of marriage between the plaintiff and defendant was solemnized in the Roman Catholic Cathedral at Chandernagore by a Roman Catholic priest. A certificate of such marriage signed by the priest and attested by two witnesses was entered in the Register of the Church at Chandernagore, and a certified copy of such entry was produced, which ran as follows :—" I, the undersigned, certify that Mr. William Gonsalves, aged 20 years, has been married to Miss Emeline Letitia Gasper, aged 18 years, on the 14th May 1855. She, being a Protestant, promised on oath to bring up the children their marriage may be blessed with in the Catholic religion in the presence of two witnesses, Mr. David John Martin and Mr. Richard Burnham, who signed with us."

One of the attesting witnesses David Martin was a cousin of the plaintiff, and had since died. The other attesting witness Richard Burnham was examined, and he said he was thirty-two years old at the time of the marriage ; he and the plaintiff both deposed that no civil officer was present at the marriage, and that no notices were given in accordance with the requirements of the French law. Charles Martin, a brother of the plaintiff's mother, also stated that the morning after the marriage the plaintiff's mother told him that she had not consented to the marriage. Immediately after the marriage the plaintiff and defendant returned to Calcutta, and from that time until 1867 lived together as man and wife, and it appeared that four children were born of their union, all of whom died infants. Since 1867, the parties had lived separate from one another, and the plaintiff had supported herself by her own exertions. The plaintiff deposed that she first became aware of the alleged invalidity of the marriage very shortly before filing the plaint in this suit, that the defendant had no employment and had taken to intemperate habits, and that he now sought to live upon

her earnings derived from her business as a milliner, which business she had established alone and without any aid or assistance from the defendant.

The suit was undefended.

Mr. *Kennedy*, for the plaintiff, contended that she was entitled to a decree under s. 15 of Act VIII of 1859. It is in the discretion of the Court to grant a merely declaratory decree, but here more than that is asked for, *viz.*, an injunction to restrain the defendant from asserting his' rights as a husband. [PONTIFEX, J,—Does not that section only refer to rights of property, not of status ?] There is no provision in the Indian Divorce Act for a decree for nullity of marriage on the ground that the marriage is invalid : if this suit will not lie, the plaintiff has no remedy. The decree would not be a judgment *in rem*, but only declare the status as between the plaintiff and defendant ; see *The Duchess of Kington's* case (1). As a Court of Equity, this Court can grant relief in this suit. The defendant claims rights against the plaintiff to her injury. A Court of Equity will grant relief where injury, as trespass, is threatened ; see *Stanford* v. *Hurlstone* (2). On the question of the invalidity of the marriage, the following cases were cited :—*Scrimshire* v. *Scrimshire* (3), *Middleton* v. *Janverin* (4), *Lacon* v. *Higgins* (5), and *Kent* v. *Burgess* (6).

Cur. adv. vult.

PONTIFEX, J. (after stating the facts as above, continued) :—The defendant has not appeared at the hearing, and, therefore, I am under the disadvantage of not having heard any argument in defence of the marriage.

The plaintiff's Counsel claimed a declaratory decree under s. 15, Act VIII of 1859. This suit, however, is clearly a matrimonial suit. It would, in my opinion, be most unadvisable for me, sitting as a Court of first instance, to make any decree

(1) 2 Sm. L. C., 6th ed., 679.
(2) L. R., 9 Ch., 116.
(3) 2 Hagg. Cons., 395.
(4) 2 Hagg. Cons , 437.
(5) 3 Starkie, 178.
(6) 11 Sim., 361.

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disturbing this marriage, unless I was very clearly convinced that the Court had jurisdiction to do so. But I am more than doubtful whether this Court has jurisdiction to entertain this suit under the law as it now stands. The Indian Divorce Act (IV of 1869) by s. 4 enacts that the matrimonial jurisdiction of this Court shall be exercised subject to the provisions in that Act contained, and not otherwise. Now that section, I am of opinion, takes away all matrimonial jurisdiction from this Court other than what is to be found in the four corners of the Act. S. 18 enacts in general terms that "any husband or wife may present a petition to the Court, praying that his or her marriage may be declared null and void." But s. 19 enacts that the decree on such petition "may be made" on any one of four grounds which are stated in that section. None of the four grounds there stated includes the ground on which the plaintiff seeks to rest the decree she asks for in the present suit. If s. 4 did not stand in the way, it might perhaps be argued that the language of s. 18 did not necessarily exclude the Court from making a decree on any other sufficient ground than those mentioned in that section. I do not think it can be so argued when s. 4 has expressly confined the matrimonial jurisdiction of the Court to the provisions in the Act contained. It further seems to me that the exception contained in the last clause of s. 19, preserving the jurisdiction of the Court in cases of force or fraud, shows that the Legislature intended that the four grounds mentioned in s. 19 should be exhaustive, and should not be construed as being by way of example only. On the ground, therefore, that the Court has no jurisdiction to entertain this suit, I feel bound to make a decree dismissing it.

In this view of the case it is not necessary for me to express any opinion on the validity or invalidity of the marriage. But although I express no considered opinion upon that question, it may perhaps be as well to point out that in the English cases which were cited—*Scrimshire* v. *Scrimshire* (1) and *Kent* v. *Burgess* (2)—the marriages were invalid according to the law of the domicile of the parties, and consequently were invalid altogether, unless valid by the law of the place of celebration.

(1) 2 Hagg. Cons. Rep., 395. (2) 11 Sim., 361.

It is true that in *Scrimshire* v. *Scrimshire* (1) the latter part of the judgment does lay down formally that the marriage must comply with the law of the place of celebration. But the former part of the judgment found that the marriage was invalid according to the law of the domicile of the parties. That under certain circumstances a marriage may be good by the law of the parties' domicile, though bad by the law of the place of celebration, is not altogether without authority. In *Ruding* v. *Smith* (2), Lord Stowell, after having the case of *Scrimshire* v. *Scrimshire* (1) quoted before him, makes these remarks at p. 389:—"Suppose, the Dutch law had thought fit to fix the age of majority at a still more advanced period than thirty, at which it then stood—at forty—it might surely be a question in an English Court whether a Dutch marriage of two British subjects not absolutely domiciled in Holland, should be invalidated in England upon that account; or, in other words, whether a protection, intended for the rights of Dutch parents, given to them by the Dutch law, should operate to the annulling a marriage of British subjects, upon the ground of protecting rights which do not belong, in any such extent, to parents living in England and of which the law of England could take no notice, but for the severe purpose of this disqualification?" Again, at the bottom of page 390, he says:—"It is true, indeed, that English decisions have established this rule that a foreign marriage, valid according to the law of the place where celebrated, is good everywhere else; but they have not, *e converso*, established that marriages of British subjects, not good according to the general law of the place where celebrated, are universally and under all possible circumstances, to be regarded as invalid in England." It was not necessary for the purpose of deciding the case of *Ruding* v. *Smith* (2) that Lord Stowell should make those observations, but coming from him, those remarks seem to me to be of very great force. The parties in this suit had an Indian domicile at the time of the celebration of the marriage, and I am not prepared to say that the marriage, solemnized at Chandernagore, was invalid according to the

(1) 2 Hagg. Cons. Rep., 395. (2) 2 Hagg. Cons. Rep., 371.

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law of the parties' domicile in 1855. As at present advised, it appears to me that a marriage *per verba de presenti in facie ecclesiœ* that is, in the presence of an episcopally ordained priest (which was good by the common law) would have been sufficient according to the law of the domicile in the year 1855. Indeed, there is authority for this position in the case of *Lautour* v. *Teesdale* (1).

So that even if I considered that I had jurisdiction to entertain this suit, I should hesitate very long before I would make a decree, in an undefended suit, which would disturb a marriage acquiesced in by the parties for a period of twelve years, and which, in the words of the first marriage Statute of Henry VIII, was "a marriage contract, and solemnized in the face of the church, and consummate with bodily konwledge and fruit of children" (2).

Suit dismissed.

Attorney for the plaintiff: Mr. *Carruthers.*

APPELLATE CIVIL.

Before Mr. Justice Markby and Mr. Justice Birch.

KHERODA MAYI DASI (DECREE-HOLDER) v. GOLAM ABARDARI (JUDGMENT-DEBTOR).*

1874 *January* 13.

Execution-sale—Defaulting Purchaser—Resale—Act VIII of 1859, s. 254.

In execution of a decree certain property of the judgment-debtor was attached and put up for sale and a portion thereof was knocked down to a purchaser for a sum sufficient to satisfy the decree. The purchaser, however, having made default in payment of the purchase-money, the property was again put up for sale, and the portion previously sold was purchased by the decree-holder at a price less than the amount bid for it at the former sale *Held* that the decree-holder was not debarred by what took place at the former sale from proceeding to satisfy his decree by sale of other portions of the attached property than that originally sold.

* Miscellaneous Special Appeal, No. 278 of 1873, against the order of the Judge of East Burdwan, dated the 17th May 1873, reversing the decree of the Munsif of Chowki Jehanabad, dated the 5th April 1873.

(1) 8 Taunt., 830. (2) 32 Hen. VIII, c. 38.