THE HONOURABLE MRS. PITT, (THE WIFE) . . APPELLANT.
THE HONOURABLE HORACE PITT, (THE HUSBAND) . . . . . RESPONDENT.

1864.
Feb. 25*th*, 26*th*, *and* 29*th*, *March* 1*st*, *April* 6*th*.

Divorce à vinculo—Jurisdiction—Domicil.—1. The Lord Ordinary being of opinion that the Respondent had acquired a real domicil in Scotland, repelled the Appellant's objection to the jurisdiction of the Court to grant divorce *à vinculo*. The House, however, holding that the Respondent had *not* acquired a real domicil in Scotland, reversed the Lord Ordinary's Interlocutor.

2. The doctrine that there can be divorce *à vinculo* where the parties have not their real domicil within the jurisdiction, abandoned by the Respondent's Counsel as untenable.

3. The Second Division of the Court below being of opinion that a real domicil was not necessary to authorize divorce *à vinculo*, refused to alter the Lord Ordinary's Interlocutor. This decision of the Second Division reversed by the House, the Counsel for the Respondent having declined to support it.

Per the Lord Chancellor: The concession of the Counsel at the Bar is, I trust, in the opinion of your Lordships quite in accordance with the law of the case.

Per Lord Chelmsford: The Respondent's Counsel disclaimed the idea of supporting his case on any other ground than that of the acquisition by him of a legal complete domicil in Scotland.

4. *The Wife's Domicil.*—Where a husband acquires a new domicil, his wife remaining in the country left by him, whether under all circumstances, even to her injury, the rule or fiction that *his* domicil is *her* domicil must be deemed inflexible.

Per the Lord Chancellor: I should have the greatest difficulty in holding that the wife must be subject, for the purposes of divorce, to the jurisdiction of any country in which the husband may choose to fix his domicil.

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Per Lord Kingsdown: I confess I do not share in the doubts which my noble and learned friend on the woolsack has expressed.

Appendix No. 1.—The case of Mrs. Bulkley as to the recognition of foreign divorces in countries where divorce is prohibited.

Appendix No. 2.—Report from the Lords Committees as to divorce jurisdiction in England and Scotland.

On the 10th of April 1845 Colonel the Honourable Horace Pitt, a younger son of an English noble family, was lawfully married to Eleanor Sutor in St. Alphage Church, Greenwich.

Both parties at the date of the marriage had their domicil in England.

The wife had an income amounting to about 1,000*l.* a year, settled to her separate use.

Shortly after the marriage they repaired to the Continent, where they remained together for some months. On their return they cohabited in a house (No. 2, Tilney Street, London) which the wife had previously occupied.

Early in 1846 Colonel Pitt purchased a house in Park Lane, but owing to pecuniary difficulties he never entered it; and matrimonial disagreements arising, the husband and wife separated; she alleging, and he denying, desertion on his part.

In 1854 the husband sold out of the army and went to Scotland, leaving Mrs. Pitt in England.

Colonel Pitt, while in Scotland, pursued for several years the life of a sportsman, occupying different shooting quarters in the Highlands, separated from, but occasionally corresponding with, his wife.

In the year 1858 he took for a term of six years the house and shooting of Kilninver, near Oban, in Argyleshire, and there he was resident at the institution of the present suit, which commenced by sum-

mons, dated 20th December 1860, whereby he called upon the Court of Session at Edinburgh to pronounce divorce *à vinculo* against the absent Mrs. Pitt for adultery, alleged to have been committed by her in England (*a*).

Mrs. Pitt by her defence raised the question of jurisdiction, insisting that the Court of Session was not the *forum competens*, her husband's real domicil being not Scotch but English. She averred that his resort to and residence in Scotland was not by choice, but from compulsion.

Secondly, she maintained that, inasmuch as her husband had acquired no real domicil in Scotland, her domicil, as well as his, continued English, and unchanged.

Thirdly, even assuming that her husband's real domicil had become Scotch, and was Scotch at the commencement and during the progress of the proceedings, still she denied that in her special case the usual consequence followed, because she insisted that her domicil did not follow his, inasmuch as he had interdicted her from joining him in Scotland, or at all events had discouraged any attempt on her part to resort to him in that country.

Colonel Pitt, on the other hand, in vindication of the Scotch jurisdiction, insisted that his real domicil had become Scotch, and had ceased to be English.

Secondly, he maintained that, his real domicil being Scotch, his wife's domicil followed it, and was the same. Her absence from Scotland he insisted was immaterial.

(*a*) It is right to mention that in July 1860 the Colonel presented a petition to the Divorce Court at Westminster, praying divorce against his wife. But upon this petition no proceedings followed, and it was ultimately dismissed by consent.

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The *Lord Ordinary* sustained the jurisdiction, and in a note intimated his opinion that the case was shown by the facts to be one in which a real Scotch domicil had been established; his Lordship holding moreover that the court of the real domicil was the only court competent to take cognizance of the question raised by the suit. On this last point he made the following observations:—

> The Lord Ordinary thinks it right to say, that notwithstanding the observations quoted to him from very high authority, he would have great difficulty in holding that the domicil for governing succession is different from that for regulating *status*, and giving jurisdiction to decide on it. After the recent decisions, which, in the Lord Ordinary's apprehension, have rendered unauthoritative a great deal of the former practice, he would hesitate to hold that the constructive domicil (as it has been termed) of forty days' residence,—sufficient to give jurisdiction in ordinary civil actions,—authorized the Scottish Courts to pronounce judgment in questions of *status*. In the case of *Ringer* v. *Churchill*, 15th January 1840, 2 D. 307, it was found that mere residence for forty days in Scotland, on the part of a husband, was not by itself sufficient to give the Court jurisdiction in an action of divorce at his instance against his wife, resident abroad. And although the inference may not be absolutely necessary, it seems to the Lord Ordinary to be a sound deduction from the decision, that, had the husband been the Defender, not the Pursuer, in the suit, jurisdiction would as little have lain. So it seems to have been thought by the learned Lords who decided, in the High Court of Appeal, the recent case of *Dolphin* v. *Robins*, 4th August 1859, 3 Macqueen, 563. But if the constructive domicil of forty days' residence is set aside, the Lord Ordinary can find no middle term between this and that true domicil which is to regulate at once *status* and succession.

Mrs. Pitt presented a reclaiming note to the Lords of the Second Division, who, on the 5th December 1862, adhered to and confirmed the *Lord Ordinary's* Interlocutor; not, however, on the ground that there was in the case a real Scotch domicil, but on the ground that there was a consistorial domicil, falling short of a real domicil, but nevertheless sufficient to warrant the pronouncing of divorce *à vinculo matrimonii*.

The following remarks were made in pronouncing this decision :—

The *Lord Justice-Clerk*.—I am of opinion that the proper matrimonial domicil of this husband and wife was, at the date of the summons of divorce, in Scotland, and I therefore concur with the Lord Ordinary in repelling the objection stated by the Defender to the jurisdiction of the Court. But I am unable (in common, I believe, with all your Lordships) to adopt the grounds of judgment assigned in the note appended to the Interlocutor under review. The Pursuer's domicil of origin was unquestionably English, and if it were necessary to determine whether he has lost his domicil of origin to all effects, and acquired a Scotch domicil which would lead to his succession, in the event of his death, being regulated by the law of this country, I should have greater difficulty in forming an opinion. But it is quite unnecessary for the present purpose to consider such a question. The Pursuer's English domicil of origin might subsist for many purposes, and yet he might be domiciled in this country so as to give jurisdiction to a Scotch Consistorial Court. I think he is to this effect, and in this sense domiciled in Scotland, and that the residence which he has in this country is of so fixed a character that it is in law the domicil of the Defender also in all questions of consistorial jurisdiction.

Lord Cowan.—The Defender, it is true, never came to Scotland to live with the Pursuer, and has never been in this country,—the citation being directed against her while resident, as she still is, in England. This is the peculiarity which distinguishes this case. Nevertheless, if the Pursuer had a domicil in Scotland as regards consistorial causes, if his residence here was such as truly to make him have his home in Scotland and nowhere else, his domicil became that of his wife,—his home her's; and that jurisdiction, to which by his residence he had subjected himself to the courts of this country, in personal actions, and in questions of *status*, attached equally to her. The authorities leave no doubt on this point.

Lord Benholme concurred with the Lord Justice-Clerk.

Lord Neaves.—I am also for adhering to the Interlocutor, but on grounds somewhat different from those on which the Lord Ordinary has placed his judgment. His Lordship seems to doubt whether any domicil is sufficient to found jurisdiction in a case of this kind, except the domicil of succession; and holding that view, he has gone into a deeper and wider inquiry than would otherwise have been necessary. I think it clear that there may be a consistorial domicil sufficient for the disposal of matrimonial actions independent of any inquiry as to the domicil of succession.

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Against these judgments of the *Lord Ordinary* and of the Inner House, Mrs. Pitt appealed to the House, and the case came on for argument in February 1864.

The *Attorney-General* (*a*) and Mr. *Fleming* (Mr. *Mundell* with them) for the Appellant contended, in the first place, that the Interlocutor of the *Lord Ordinary* was wrong in holding that Colonel Pitt's domicil had become Scotch. He had gone to Scotland merely to escape from creditors. His residence there, in the words of Lord Chancellor *Loughborough*, was "from the necessity of his affairs" (*b*). An exile could not by his banishment acquire a foreign domicil, *De Benneval* v. *De Benneval* (*c*); nor an invalid by resorting for health to a warm climate, *Moorhouse* v. *Lord* (*d*).

Secondly, the Appellant's Counsel urged that the Interlocutor of the Second Division was clearly unsustainable, for it rested on the ground of a supposed consistorial domicil falling short of the proper permanent domicil, which proper permanent domicil alone they insisted could warrant the pronouncing a sentence of divorce *à vinculo*, altering the personal status of the parties.

Thirdly, they insisted that as in this case the domicil of Colonel Pitt continued unchanged, that of his wife remained unchanged also. So that both parties were beyond the reach of the Scottish jurisdiction.

Fourthly, the Appellant's Counsel argued that even if the House should be of opinion that the husband's domicil had become veritably Scotch at the institution of the suit, the circumstances of the case ought to

(*a*) Sir Roundell Palmer.

(*b*) *Bempde* v. *Johnstone*, 3 Ves. 202.

(*c*) 1 Curt. 864.

(*d*) 10 House of Lords Ca. 282. See also *Heath* v. *Sampson*, 14 Beav. 441.

save the Appellant from being prejudiced by the change (*a*), as he had in fact deserted her, and ought not to be allowed to gain a benefit at her expense by resorting to a country in which divorces were more easily obtained than in England (*b*).

The *Queen's Advocate* (*c*), with whom was Sir *Hugh Cairns*, on behalf of the Respondent, said that after much consideration he and his learned friend had come to the resolution of abandoning as untenable the ground on which the Second Division of the Court of Session had rested their decision, namely, that divorce *à vinculo* might be validly granted to strangers not domiciled, though temporarily resident, within the jurisdiction.

The *Lord Chancellor* asked of the Respondent's Counsel whether they were quite decided on taking that course?

The *Queen's Advocate* and Sir *Hugh Cairns* answered in the affirmative. Their contention, therefore, would be confined to the *Lord Ordinary's* proposition, namely, that the domicil had in fact become completely Scotch (*d*), a view which they would

(*a*) *Tovey* v. *Lindsay*, 1 Dow. 136; Merlin's Questions de Droit, tit. Divorce, s. 11, case of Le Sieur D——.

(*b*) The bar of recrimination is said to be disregarded in Scotland.

(*c*) Sir R. Phillimore.

(*d*) The following is a short extract from the Lord Ordinary's note:—"The difficulty in this case is created by the undoubted fact that the origin of the Pursuer's residence in Scotland was a desire to escape from the hands of his English creditors; from which circumstance the Defender draws the not unfair inference, that no change of domicil was intended by him, but a temporary abode for a specific purpose, to be terminated when the exigency ceased. The Lord Ordinary has given this argument all the consideration which its unquestionable weight deserves. But the conclusion at which he has arrived is that notwithstanding this circumstance, a domicil in Scotland must still be held to have been acquired. Having come to Scotland freely and voluntarily, though under the pressure of pecuniary difficulties, Colonel Pitt finds circumstances to combine to render it advisable he should

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content themselves with endeavouring to sustain, although it had not been adopted by the Second Division. Hence the argument of the Respondent's Counsel went to demonstrate by the evidence that Colonel Pitt had lost his original English domicil, and permanently reside in Scotland. In Scotland, therefore, he takes up his residence, not for a short specific time, but for a period of indefinite duration; and gathers round him all the attributes of a settled habitation. Whatever first led him to Scotland, he has come, as the Lord Ordinary thinks, to have his existing home in that country, and nowhere else.

"The question was asked by the Defender, and with perfect fairness, Would the Pursuer not return to England if his debts were paid, and is not such a return to England a part of his plan of after-life? Supposing this question was answered in the affirmative, the Lord Ordinary does not think that this would necessarily involve a conclusion unfavourable to the acquisition of a Scottish domicil. The hope, or even resolution, of an ultimate return to the land of birth will not prevent the acquisition of a domicil in a foreign country.

"The Defender strongly pressed on the Lord Ordinary the well known *dictum* of Lord Alvanley in the case of *Somerville* v. *Somerville*, 5 Vesey, 750—'That the original domicil, or as it is called 'the *forum originis*, or the domicil of origin, is to prevail until 'the party has not only acquired another, but has manifested 'and carried into execution an intention of abandoning his 'former domicil, and taking another as his sole domicil.' The observation is one of great general importance; but it must not be misapplied, as it sometimes has been. Rightly construed, it expresses the undoubted truth, that a mere change in the locality of residence will not, by itself, suffice to change the original domicil; but that a true mental purpose is a necessary element of the alteration. But the purpose pointed at regards matter of fact not matter of law. The observation does not mean (else it would be obviously unsound), that to change the original domicil requires it to be clearly shown that the individual intended to alter his legal position. The legal position of the individual will be determined not by his will, but by the facts of the case, with the law soundly applied to them. That which must be clearly shown is such an intentional change of permanent abode as will warrant the law in inferring a change of domicil. If a permanent abode of this legal character be established, as in the case of a merchant settled in business abroad, it would be of no avail though the individual had protested during all the period that he did not intend to alter his legal position. The thing to be inquired into, in the present as in all questions of domicil, is not the purpose of the individual as to legal position, but his purpose as to permanency of abode."

had acquired a Scotch one at the institution of the suit.

Then supposing that the Respondent's domicil was truly Scotch, the next question was as to the Appellant's domicil. It was said it could not be Scotch, because she had never been across the Tweed. But neither had the wife of Sir George Warrender (*a*) ever been in Scotland when she married him in England. Her domicil of origin was English; she was the daughter of an English peer; but from the moment of the marriage her domicil, like her husband's, became Scotch, and the marriage itself was deemed dissoluble for adultery by Scotch law at a time when the law of England did not allow divorces. Such was the decision of this House in that celebrated case. But the same doctrine as to the essential unity of the matrimonial domicil was further recognized by their Lordships in the more recent case of *Dolphin* v. *Robins* (*b*).

Lord Chancellor's opinion.

The LORD CHANCELLOR (*c*):

My Lords, this is an Appeal from the Interlocutors pronounced by the *Lord Ordinary* of the Court of Session, and also affirmed and adhered to by the Inner House.

The Cause was instituted in Scotland by Colonel Pitt against the present Appellant, Mrs. Pitt, for a divorce. Preliminary defences were put in, and among them a plea to the jurisdiction of the Court; and on that question of plea to the jurisdiction of the Court an issue was raised, tried, and determined in favour of that jurisdiction.

My Lords, it was admitted by the *Lord Ordinary*, and also by the Court of Session, that the jurisdiction of the Court depended upon the question of the domicil of Colonel Pitt, the present Respondent, the

(*a*) *Warrender* v. *Warrender*, 2 Clark & Finn. 488.
(*b*) 3 Macq. 563.
(*c*) Lord Westbury.

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Pursuer in the action in the Court below. The *Lord Ordinary* was of opinion that Colonel Pitt's domicil was in Scotland for all intents and purposes, that his domicil was complete in Scotland, and that he had not merely acquired in Scotland a sufficient domicil for the purposes of the jurisdiction of the Court in Scotland. The Inner House did not quite agree with the *Lord Ordinary* in that conclusion. The majority of the Judges seem to have been of opinion that Colonel Pitt was not absolutely domiciled in Scotland, but they seem to have thought that some domicil, short of an absolute and complete domicile, would be a sufficient forensic domicil to confer jurisdiction on the Court, and therefore they adhere to the Interlocutors of the *Lord Ordinary.*

My Lords, at the Bar, it was admitted by the Counsel for the Respondent, Colonel Pitt, that the proper view of the case, and the only view that they seemed disposed to maintain, was that taken by the *Lord Ordinary*, that Colonel Pitt had acquired a complete domicil in Scotland, and had thereby put off and lost his original domicil in England. It becomes unnecessary, therefore, to consider the very important questions of jurisprudence that might be involved in this cause if your Lordships came to the conclusion that Colonel Pitt had not an absolute or complete domicil in Scotland. If he was not domiciled in Scotland to all intents and purposes, having relinquished his original domicil and acquired a domicil in Scotland, then by the concession of the Counsel at the Bar, a concession which is I trust in the opinion of your Lordships quite in accordance with the law of the case, it will be impossible to maintain the order which has been pronounced in the Court below.

Now, my Lords, the facts are extremely simple, and there is very fortunately about them no uncer-

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tainty and no contradiction in point of evidence. Colonel Pitt being in a state of the greatest pecuniary embarrassment was obliged to quit England and to fly the country, by reason of the demands of his creditors. In the autumn of 1854 he went to Scotland. His object was to find a secure and convenient hiding place. He endeavoured to accomplish that end by assuming different denominations; and at a late period, after he had been resident in Scotland three or four years, he very graphically and correctly described himself as tired of the life which he lead there, and that he was weary of "dodging about" as "Parsons" and "Phillimore,"—those being the aliases which he had at different times assumed.

The *Lord Ordinary* came to the conclusion that there was no ground for imputing to Colonel Pitt a final intention to relinquish his English domicil until the month of May 1858, when he took from a gentleman of the name of Meynell a lease for the term of six years of a shooting lodge at Kilninver, in the neighbourhood of Oban, on the west coast of Scotland, and which he took, as I have already mentioned, for a period of six years only. The *Lord Ordinary* appears to have arrived at the conclusion that immediately upon his acquiring a settled place of residence, by way of contrast to the mode in which he had spent his time at different places of residence during the three antecedent years, he must be properly considered to have a settled dwelling place, a place that might be regarded as his home, and that therefore he ought to be considered as absolutely domiciled in Scotland. But, my Lords, I cannot at all concur in that conclusion. Colonel Pitt left England, as he himself says, in one of his letters, from necessity, and not from choice. He speaks of the whole of his residence in Scotland as a residence still under the influence of

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that necessity; and the intentions of Colonel Pitt, the real objects that he had in view, are abundantly illustrated by his own declaration in letters written both at the time of his acquiring this settled residence at Kilninver, and also subsequently down to the period at which it is material to ascertain his position, namely, the month of December 1860, when the suit for the purpose of obtaining the divorce was instituted in the Court of Session.

Now, my Lords, from those letters it is apparent that Colonel Pitt was, both before he took the lease of this sporting lodge and subsequently, in constant communication with his solicitor and his friends for the purpose of ascertaining in what manner he could be released from his debts and liabilities. On one occasion, as I will presently show your Lordships by reference to one of his letters, he had formed a design, about which he corresponds with his solicitor, of first of all making an assurance and conveyance of the reversionary interest or remainder which he had in the estate of his brother, and after the title of the purchase of that remainder was secured by lapse of time, then taking the benefit of the Insolvent Act, and passing through the Insolvency Court.

Now, my Lords, the letters which refer to that your Lordships will find particularly mentioned at page 48 of the Appellant's case, and the letter to which I am now first referring is a letter the date of which is given as of the month of May 1858, and that is followed by another letter of the 9th of May 1858; this was after the time when he had treated and concluded the treaty for Kilninver. The letter of the 9th of May 1858 is very material, because the expressions there are, "I care very little where I live, and shall probably never again feel as at home in any place as in the Island," (that is in reference to the Isle of

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Lewis,) "although the two will not bear a comparison, and if I get free and have not this place on my hands I might more easily have managed to live with mother in some place." That refers, my Lords, to an anxious correspondence which he had at that time with his solicitor, that if even he took Kilninver lodge for six years he should be still at liberty to sub-let it, so that he might not be obliged, whenever he got free of his liabilities, to remain the tenant of that place of abode.

My Lords, at a subsequent time we find him expressing great joy in the prospect of being able to get released from his debts through the medium of the provisions of a Bill which was brought in for the consolidation of the Bankruptcy Laws in the year 1860, and at a subsequent period of time, in that year 1860, he expresses his determination to get rid of his debts through the medium of a Scotch Bankruptcy, a proceeding which at that time was a very common one, but upon which some restraint was put by the provisions of the Bankruptcy Act of 1861.

I find, therefore, Colonel Pitt throughout the whole of this period of time chafing under the necessity of his abode in Scotland, anxiously meditating a mode of finding some escape from his debts and liabilities, and evincing throughout the whole of this correspondence the greatest possible anxiety to return to his old habits of life in England, and to return to England in such a manner that he might have free and unrestrained intercourse with the members of his family, for whom he appeared to have entertained the warmest affection.

Now, my Lords, under these circumstances is it possible to attribute to this gentleman an intention of quitting altogether, both *de facto et ex animo*, his English domicil, and acquiring a Scotch domicil with the intention of permanently remaining there, by way

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of preference to a return to the place of his original domicil? I think, my Lords, that that very letter which I have quoted contradicts that feeling and that impression, and that, taking the evidence of Colonel Pitt's letters, and the evidence of his desire and intention as to what he would do if he could obtain freedom from his debts, by means which he had various hopes of acquiring, there can be no possibility of doubt that he would have quitted Scotland instantly, with the greatest possible alacrity, and would have returned immediately to the place of his original domicil.

My Lords, under these circumstances it is impossible to say, as I humbly conceive, that there was the *animus* of acquiring deliberately a new domicil, and of altogether putting off the old domicil which he had acquired in England. My Lords, if that cannot be imputed to Colonel Pitt under these circumstances, then it is impossible to hold, according to the just rule of law as embodied in the admission of the Respondent's Counsel, that the Court of Session had jurisdiction.

If it had been necessary, which I trust it will not be, to arrive at a different conclusion as to the fact of his domicil, I should still have had the greatest possible difficulty in holding that the domicil of the husband was in a case of this kind to be regarded in law as the domicil of the wife by construction or by attraction, so as to compel the wife to follow the husband, and to become subject for the purposes of divorce to the jurisdiction of the tribunal of any country in which the husband might choose, even for that purpose alone, to fix, and to declare that he intended to acquire an absolute domicil (*a*). But it will

(*a*) In *Tovey* v. *Lindsay*, 1 Dow. 136, Lord Chancellor Eldon, in the House of Lords, said, "But suppose the husband were

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be unnecessary to enter into that question, for I trust your Lordships will agree with me in the conclusion that there is nothing here to warrant the inference that Colonel Pitt had put off his English domicil, and had deliberately, as I have said, *de facto et ex animo*, acquired and put on a Scotch domicil. And if that is the conclusion which can be arrived at, it will be, as I humbly conceive, your Lordship's duty to reverse the orders of the Court below, and to assoilzie the present Appellant, the Defender in that action, from the conclusions of the summons.

Lord Chancellor's opinion.

Lord Chelmsford's opinion.

Lord CHELMSFORD:

The question to be decided upon this Appeal is whether the Appellant is amenable to the jurisdiction of the Court of Session in Scotland in an action of

domiciled in Scotland, the question still remained whether he could institute a suit against his wife with effect, unless she had changed her forum likewise, merely upon the ground of the fiction which had been stated." And Lord Redesdale remarked, "When it was considered that on the principle of this decision of the Court below any one from any quarter might go and establish a domicil in Scotland, and by that means draw his wife to a Scotch forum, and proceed against her for an absolute dissolution of the marriage, the question must appear to be one of the very greatest importance. It could not be just that one party should be able at his option to dissolve a contract by a law different from that under which it was formed, and by which the other party understood it to be governed." It is laid down in Merlin's Questions de Droit, v. Divorce, sect. 11, that the wife has of right her domicil where her husband's is, but he cannot, by changing his domicil, aggravate against her the legal consequences to which she might otherwise have been subject. Speaking of the case of Sieur D——, Merlin affirms that the wife there having continued French, she could not have sued her husband for divorce even for facts posterior to his naturalization in Belgium, because from thenceforth it was impossible for him to sue her for divorce not only for facts anterior, but for those which had followed it. Such being the necessary consequence of Ulpian's short maxim, *Non debet auctori licere quod reo non permittitur*. Digest, b. 50, tit. 17, De Regulis Juris, sect. 41.

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divorce raised against her by the Respondent, her husband. The *Lord Ordinary* and the Court of the Second Division upon a reclaiming note sustained the jurisdiction, but upon different grounds.

The *Lord Ordinary* was of opinion that nothing short of an actual domicil in Scotland by the husband would give the Court jurisdiction in the action of divorce at his instance against his wife resident abroad, but thought that the facts of the case proved such a domicil. The Court of Session held that there might be a domicil short of the domicil regulating the succession, which would found a consistorial jurisdiction, and that the residence of the husband in Scotland, not being of a mere passing and temporary character, was sufficient to constitute the matrimonial domicil, where it would be the duty of the wife to reside. It is unnecessary to decide between these conflicting opinions, because the Counsel for the Respondent distinctly disclaimed the idea of supporting his case upon any other ground than that of the acquisition by him of a legal complete domicil in Scotland.

In the observations which I have to make I shall therefore confine myself entirely to this point. A disputed question of domicil is always one of difficulty, on account of the impossibility of arriving at a satisfactory definition which will meet every case that can arise, and also because it generally presents a conflict of evidence as to acts and declarations of intention upon which it depends. Where the contest arises upon a supposed change of domicil, I do not see how less evidence can be accepted than will show "a fixed intention of abandoning one domicil and permanently adopting another."

The opinion which I recently expressed on this subject in the case of *Moorhouse* v. *Lord* appears to me to

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be correct, and to be so applicable to the present occasion that I will venture to repeat it. I there said that "the present intention of making a place a person's permanent home can exist only where he has no other idea than to continue there, without looking forward to any event, certain or uncertain, which might induce him to change his residence. If he has in his contemplation some event upon the happening of which his residence will cease, it is not correct to call this event a present intention of making it a permanent home, it is rather a present intention of making it a temporary home, though for a period indefinite and contingent. And even if such residence should continue for years, the same intention to terminate it being continually present to the mind, there is no moment of time at which it can be predicated that there has been the deliberate choice of a permanent home."

Trying the present case by this rule, can it be said that there is any sufficient proof that the Respondent had entirely given up his domicil of origin, and had manifested an intention to fix his abode permanently in Scotland?

Colonel Pitt is the brother of Lord Rivers, and only one weakly boy stands between him and the succession to the title. We find him occasionally speculating upon the arrival of the time when he would become the heir presumptive. Whether the happening of this event would bring him back to England it is impossible to say; but if he ever becomes Lord Rivers it is not very probable that he will continue to hide himself in a remote part of Scotland. The expectation, or, at the lowest, the possibility of this change in his station and fortunes, must have kept his mind in such a state of uncertainty as to the future as would tend

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to prevent any fixed determination of abandoning England altogether.

But his residence in Scotland can hardly be considered the act of a free agent. He originally fled to avoid the pursuit of his creditors, and he continued there for some time, in studied concealment, indulging the hope that his affairs might be arranged through friendly assistance, and that he might then be able to choose a way of life and a place of residence more agreeable to him. This state of things continued from the year 1854 down to 1858, when he took the lease of Kilninver lodge, upon which the proof of his abandonment of the domicil of origin and the acquisition of a Scotch domicil principally rests. This lease, which the Respondent calls a shooting lease, was only for the term of six years, and that he had not at the time he took it any fixed intention of occupying, even during this short term, appears from his anxiety to secure the right of sub-letting, upon the refusal of which by the landlord he complains that, unless the exigency arises, "which means" (he says) "his going to quod," he is held hard and fast for the six years.

These facts in themselves are wholly insufficient to establish a case of domicil, but it is contended that abundant proof of the Respondent's intention to take up his permanent abode in Scotland is to be found in his letters which have been produced in evidence. The impression, however, which these have left upon my mind is against the notion of the Respondent having any such settled intention. All the earlier letters exhibit his disposition to make the best of his situation, under the necessity of keeping out of the reach of his creditors. They generally contain allusions to his desperate affairs, and to his hopes and disappointments as to their settlement, and seem to speak of each

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residence which he selects as merely a temporary one. Even when the lease of Kilninver lodge has been taken (notwithstanding his previous efforts to get rid of it altogether) he never appears to contemplate a residence there beyond the term; and in a letter to his wife, written on the 11th of June 1858, he says, "One must live somewhere, and I and my friend can manage to pay the rent, and the rod and the gun pretty nearly keep the table, but somehow or other it does not quite please me to think of myself settled here on a lease, though, as I did it more from the wishes of my family than any fancy of my own, I am sure I did the right thing."

Again, in a letter to his sister, Mrs. Bruce, after everything had been settled as to the lease, he writes, "The place is very charming, and will do very well; but since I became aware of mother's future life, and that I can in a short time effect my liberty by means of the Court, it was but the belief that I could occupy this place as a home without trouble or risk to any one that made me the least anxious about it, and now that I find I have been misinformed I would rather not have had it, and been more free to act for the future with reference to mother." It is unnecessary to refer to other letters, and particularly to those written as late as the year 1860, to show that the Respondent had all along in his mind the desire to get rid of his creditors, and to be able to select a place of residence for himself, instead of being forced to continue in Scotland as a matter of necessity rather than of choice.

Great stress was laid by the Counsel of the Respondent upon one of his letters, of the date of 3rd September 1859, in which he says, "I am Colonel Pitt of Argyleshire, to all intents and purposes," from which they inferred that his plan of life for the future was finally settled, and that he intended thenceforth to

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make Scotland his permanent residence. But that appears to me to be giving undue force to, and even putting a wrong interpretation upon, these expressions. It is evident, from the letter immediately preceding, that down to that time the Respondent (as he writes) "never saw anyone but the few who came to him by stealth." He declares life not to be worth having on these terms, and so in the letter in question he says, "I have seen several old Londoners at Oban, and made other new country acquaintance, and am Colonel Pitt of Argyleshire to all intents and purposes." Can anything more be meant by this than that he had thrown off all disguise, had appeared in his real character, and was known and visited by his friends and neighbours without any further attempt at concealment?

The *Lord Justice Clerk* might, under all the circumstances, well say, "The Pursuer's domicil of origin was unquestionably English; and if it were necessary to determine whether he had lost his domicil of origin to all effects, and acquired a Scotch domicil, which would lead to his succession in the event of his death being regulated by the law of this country, I should have greater difficulty in forming an opinion."

The Respondent's case, however, depends, as his Counsel admit, upon the establishment of this complete legal domicil, in which they appear to me to have completely failed; and I therefore agree with my noble and learned friend on the woolsack that the Interlocutors appealed from ought to be reversed.

Lord Kingsdown's opinion.

Lord KINGSDOWN:

My Lords, I do not regret the conclusion at which you have arrived with respect to the decision upon this Appeal, for I believe that the result is one which will be equally for the benefit of both parties.

With respect to the question of domicil, I must con-

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fess that I entertain much more doubt upon the point than has been expressed by either of your Lordships who have addressed the House (*a*); and I was very much struck, not only with the able judgment of the *Lord Ordinary*, but also with the powerful argument which was addressed by the Respondent's Counsel at your Lordships' Bar. Having, however, suggested those doubts to your Lordships, and not meeting with any support from you with respect to them, of course I very readily concede my own opinion upon that point.

With respect to the last point (*b*) which has been adverted to by my noble and learned friend on the woolsack, I confess I do not share in the doubts which my noble and learned friend has expressed. It is not necessary to decide it, and therefore I do not desire to express any decided opinion upon that point, but my present impression is that if the domicil were established as the *Lord Ordinary* held it to be established, the jurisdiction in the present case might be maintained.

Mr. *Attorney-General*: I presume that your Lordships' order will be to reverse the Interlocutors, and to remit the cause to the Court below, with a direction that the Appellant is to be assoilzied from all expenses.

LORD CHANCELLOR: I see no difficulty in our pronouncing a decree of *absolvitur* here. We pronounce the order which in our opinion the Court below ought to have pronounced. And that will be that the Appellant ought to be assoilzied from the conclusions of the summons.

(*a*) This does not mean that Lord Kingsdown doubts the necessity of domicil as a basis of divorce jurisdiction, but that the Lord Ordinary was probably right in holding that the domicil was in fact really Scotch. The Editor has a note to this effect from Lord Kingsdown.

(*b*) This refers to the wife's domicil. See the Lord Chancellor's remark, *suprà*, p. 640.

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Ordered and *Adjudged*, That the said Interlocutors complained of in the said Appeal be, and the same are hereby reversed, and that the said Appellant (Defender in the action in the Court below) be assoilzied from the conclusions of the summons, with the expenses of the Court below; and it is further ordered, that the said cause be and is hereby remitted back to the Court of Session in Scotland, to do therein as shall be just and consistent with this judgment.

ROGERS & JULL—TENNANT & DARLEY.

The principal question in the preceding case was not argued by the Respondent's Counsel at the Bar of the House. That question was whether divorce *à vinculo* can be validly granted by any other than the Court of the domicil, meaning by domicil, the real domicil, which in the event of death would give the law for the regulation of personal succession. Mrs. Pitt insisted in the Court below, and by her printed Appeal case, as well as at the bar of the House, on this cardinal proposition,—that married parties in order to be divorced effectually *à vinculo* must of necessity have their real domicil within the Judge's territory. This proposition, as of universal application, was denied and resisted by her husband, the Respondent, whose contention had the support of the final judgment below. The only objection to the Scotch jurisdiction was the want of the needful Scotch domicil. The House, by reversing the decree, in effect sustained that objection;—in other words, held that the domicil was not shown in fact to have been Scotch. This in effect affirms the legal necessity of a real Scotch domicil to give validity to a Scotch divorce. And had the point been argued on both sides such would have been the true construction. But it was not urged for the Respondent; whose able and experienced Counsel were not likely to give up any contention that would have benefitted their client. Hence it became unnecessary for the Respondent's Counsel to say a word upon this topic in reply. The result therefore seems to be that the question of jurisdiction (sorely vexed for 50 years) is still open,—the Lords deeming it "unnecessary" (*a*) to decide it.

The following important foreign case stands well with the concession and the reversal in Pitt *v.* Pitt. Its introduction here may, it is hoped, be of use, as showing the exclusiveness of the proper divorce jurisdiction, and the deference which is paid to its decision in foreign countries. It may also tend to bring about an accommodation on the points which have so long divided the English and Scottish legists.

(*a*) See *suprà*, p. 636 and p. 642.

APPENDIX TO PITT *v.* PITT, NO. 1.

MRS. BULKLEY'S CASE,

SHOWING

THE RECOGNITION OF FOREIGN DIVORCES IN COUNTRIES WHERE DIVORCE IS PROHIBITED.

A LETTER FROM THE PRESIDENT OF THE COUR DE CASSATION (*a*).

MONSIEUR, Paris, le 1 Décembre 1860.

JE m'empresse de répondre à votre lettre du 16 courant, et de vous envoyer tous les documents de nature à vous éclairer sur la décision rendue par la Cour de Cassation le 28 Février 1860, dans l'affaire de la femme Bulkley, étrangère, divorcée en pays étranger. Vous trouverez sous ce pli, 1°, les conclusions de M. Dupin, Procureur Général Impérial, devant la Chambre des

(*a*) The English Divorce Act (20 & 21 Vict. c. 85, 28th August 1857,) introduced a new and easy mode of dissolving the marriage tie. The rules and orders tended to the purposes of despatch; and the consequence was, that a great number of married persons, male and female, were speedily restored to the single state, with liberty to enter into fresh nuptials at home, or in the colonies, or in foreign countries, Scotland included. How far such divorces were valid,—how far strangers were safe in relying on them,—depended on the jurisdiction of the Court, as to which the Act said not a word, but left the matter to be regulated by the science of jurisprudence. In an international point of view this was well, because no definition or basis of divorce jurisdiction fixed by the British Parliament would be regarded by the Courts of other States, unless sanctioned by general principle. It happened that in 1860 a remarkable decision was pronounced by the Cour de Cassation in the case of Mrs. Bulkley, an Englishwoman legally divorced in Holland, the country of her domicil, and permitted afterwards to marry a Frenchman at Paris, her first husband being still alive. In arriving at their conclusion, the highest tribunal of France reviewed and overturned some prior authorities. The object was to place the doctrines involved on a rational, wide, and permanent foundation. Inquiries were sent to the President to ascertain authoritatively the grounds and extent of the decision. The liberality of the reasoning and the reach of thought displayed by the responses struck Lord Lyndhurst so much, that he declared they ought at once to be published. Lord Brougham (who was present when Lord Lyndhurst said this) joined in the encomium. The "Conclusions" of M. Dupin, the Report of M. Sevin, and the ultimate adjudication of the Cour de Cassation, will not only prove interesting to the legal mind, but afford comfort (not encouragement) to those whose domestic misfortunes may compel them to resort to Her Majesty's Divorce Court; because those litigants will here see, that when their liberty has been *properly* granted in their own country, effect will be given to it in others, even where divorce is prohibited. Foreign Courts order divorces to be entered on the margin of the marriage register. This prevents frauds, and facilitates proof; because the certificate will show the marriage and its annihilation at once.

It appears that divorce *à vinculo* properly obtained from the Court of the domicil will always be deferred to in France. The rule may occasionally prove hard on the wife, as where an English husband goes abroad with a mistress, and establishes a foreign domicil, leaving his injured wife behind. In such a case she may obtain a judicial separation from the Court at Westminster, but not divorce *à vinculo*, because it would seem that divorce *à vinculo* can emanate from no other Court but the Court of the domicil. On the other hand, suppose a foreign couple come to England or Scotland *animo revertendi*, and suppose that either of them while there is guilty of matrimonial delinquency; all that can be done in the way of redress will fall short of divorce *à vinculo*, because divorce *à vinculo* to be effectual must emanate from the Court of the domicil. *Sed quære:* Would mere judicial separation satisfy the requirements of "order" insisted on by the Scotch lawyers, and the requirements of "compassion" urged by Merlin and other French jurists? Ought an adulterous husband to be allowed the privilege of defeating his wife's remedy by changing his domicil from a country where divorce is allowed to another country where divorce is prohibited?

APPENDIX TO PITT *v.* PITT, No. 1.

COMMUNICATION FROM THE PRESIDENT OF THE COUR DE CASSATION.

Requêtes; conclusions à la suite desquelles cette chambre a admis le pourvoi, et renvoyé l'affaire à la Chambre Civile; 2°, le rapport de Monsieur le Conseiller Sévin devant la Chambre Civile, ensemble les conclusions itératives de M. Dupin, et l'arrêt rendu par la Cour de Cassation (Chambre Civile) sous ma présidence. Par cet arrêt, la Cour a cassé l'arrêt de la Cour Impériale de Paris du 1er Juillet 1859, qui refusant de tenir compte du divorce de la femme Bulkley, avait autorisé le refus de l'officier de l'état civil de passer outre à son mariage avec un Français; elle a, en même temps, renvoyé la connaissance de l'affaire devant la Cour Impériale d'Orléans. Vous trouverez, dans les motifs de cet arrêt de Cassation, de raisons de droit qui (si je ne me trompe) paraîtront invincibles à tous les jurisconsultes.

La Cour d'Orléans, jugeant d'après les principes consacrés par la Cour de Cassation, a décidé que le divorce de l'étrangère prononcé en pays étranger, conformément à son statut personnel, la rendait libre en France, elle a en conséquence ordonné qu'il serait passé outre au mariage; ce qui a été fait. C'est donc une affaire maintenant terminée, et où l'autorité de la chose jugée est pleinement acquise.

Vous remarquerez le point capital de cette décision; c'est qu'il s'agissait de statuer sur la capacité d'une *étrangère*, mariée avec un *étranger*, à *l'étranger*, et divorcée à *l'étranger*, d'après des actes valables à *l'étranger*.

Or, quand il s'agit de régler l'état d'un étranger, la loi Française veut que le statut personnel suive cet étranger, même résidant en France. C'était donc par la loi de son propre pays que la dame Bulkley devait être jugée. La Cour de Cassation n'a fait que se conformer à ce principe élémentaire en matière de droit civil et de droit de gens (*a*).

Veuillez agréer, Monsieur, l'assurance de ma considération la plus distinguée.

PRÉSIDT. TROPLONG.

A M. John Fraser Macqueen,
Jurisconsulte Anglais.

(*a*) "You will remark the capital point in this decision, namely, that it professes to decide upon the capacity of a foreigner, married to a foreigner *abroad*, and divorced *abroad*, after proceedings for that purpose, *valid abroad*. When the question is as to the status of a foreigner, the French law intends that his personal status shall follow that foreigner even while resident in France. It was therefore by the law of her own proper country that Mrs. Bulkley ought to be judged. All that the Court of Cassation did was to follow that elementary principle in a matter of civil right and international law."

This reminds us of what Sir W. Scott said in the Dalrymple case as to the law of England, which, after furnishing a principle, "withdraws from the scene" (1 Consistory Rep. 59). The same jurisprudential refinement was disclosed judicially by Lord Mansfield in Holman *v.* Johnson, 1 Cowper, 343, where he said, "There can be no doubt but that every action tried here must be tried by the law of England; but the law of England says, that in a variety of circumstances, with regard to contracts legally made abroad, the laws of the country where the cause of action arose shall govern."

When M. Troplong speaks of Mrs. Bulkley's "own proper country," he means the country, not of her birth, but of her domicil; for she was an Englishwoman by origin, married to and divorced from a Dutchman domiciled in Holland.

COUR DE CASSATION

(CHAMBRE DES REQUÊTES.)

AFFAIRE BULKLEY

CONTRE

LE MAIRE DU VII^e ARRONDISSEMENT.

Audience du 16 *Janvier* 1860.

PRÉSIDENCE DE M. NICIAS GAILLARD.

CONCLUSIONS DE M. LE PROCUREUR GÉNÉRAL DUPIN.

LA FEMME ETRANGÈRE divorcée conformément à la Loi de son Pays, et dont le Mari est vivant, peut-elle se remarier en France avec un Français ?

MESSIEURS,

The marriage contract.

LE mariage est le fondement de la société humaine. Il est à la fois du droit naturel, du droit des gens, et du droit civil.

Il est du droit naturel, car il a commencé avec la création ; il a eu pour but de la perpétuer : *crescite et multiplicamini.*

Aussi, "partout où il y a une place où deux personnes peuvent vivre commodément, a dit Montesquieu, il se fait un mariage. La nature y porte assez, lorsqu'elle n'est point arrêtée par la difficulté de la subsistance."

Le mariage est du droit des gens ; la faculté de se marier n'appartient pas seulement aux individus de la même famille ou de la même nation ; et, sauf certaines restrictions imposées par la jalousie ou la superstition de quelques nations de l'antiquité, chez tous les peuples, et surtout chez les peuples chrétiens, il est de droit commun que les nationaux peuvent se marier avec les étrangers. On peut même remarquer que c'est la coutume spéciale des maisons souveraines.

Le mariage est aussi essentiellement du droit civil. Un contrat aussi général, aussi nécessaire, ne pouvait pas être abandonné à la licence et aux caprices passionnés des individus ; chez tous les peuples, les conditions et les formes du mariage ont été l'objet de l'attention spéciale du législateur.

Its substance the consent of the spouses.

D'un autre côté, on voit que presque toutes les nations ont fait intervenir la religion dans un engagement qui a une si grande influence sur l'avenir et sur la vie entière des époux. Mais les cérémonies religieuses s'ajoutent au contrat sans en altérer la substance, qui repose, avant tout, sur le consentement des époux ; et elles n'empêchent pas que tout ce qui tient à la validité du

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contrat et à ses effets civils ne soit essentiellement du ressort de la puissance civile.

Dans le seizième siècle, au milieu des troubles religieux et des guerres civiles qui en furent la suite, on perdit de vue cette distinction. Dans le désir obstiné de tout ramener à l'unité catholique, l'ordonnance de Blois en 1579, soutenue depuis et corroborée par d'autres édits, livra l'état civil aux ministres de cette religion devenue dominante et exclusive; le sacrement vint alors absorber le contrat: on ne put désormais se marier qu'à l'église, et l'on sait ce qu'il en advint! Pendant près de deux siècles, les sectateurs des cultes dissidents, quatre millions de Français, n'eurent aucun moyen légal d'assurer l'authenticité de leurs mariages et la légitimité de leurs enfants! On pouvait même enlever ces pauvres creatures à leurs familles dès l'âge de sept ans, pour les convertir au catholicisme, sans que les pères et mères y pussent mettre aucun empêchement (*a*).

Et cependant, même au milieu de cette déplorable confusion des institutions civiles avec les institutions religieuses, les jurisconsultes, les magistrats instruits reconnaissaient qu'elles pouvaient être séparées (*b*). Ils avaient demandé "que l'état civil des hommes fût indépendant du culte qu'ils professaient." Ce retour au vrai rencontrait de grands obstacles, et c'est à grand'peine que sous Louis XVI., et par les conseils de Malesherbes, un premier adoucissement fut apporté à la triste condition d'un si grand nombre de familles Françaises.

Declaration of 1789, Marriage a civil contract.

Enfin 1789 arriva! date immortelle! Bientôt la liberté des cultes fut proclamée; et, suivant l'expression du premier Portalis: "il a été possible de séculariser la législation."

Ressaisissant son empire, le législateur Français déclara que la loi ne considérait le mariage que "comme un contrat civil," et il plaça la tenue des registres de l'état civil dans les mains d'officiers municipaux.

Le Code Civil a maintenu ce grand principe; il a déterminé avec précision, 1°, les qualités et conditions requises pour contracter mariage; 2°, les formalités relatives à sa célébration, et par une disposition formelle du Code Pénal de 1810, des peines sévères sont édictées contre tout ministre d'un culte qui procèdera aux cérémonies religieuses d'un mariage, sans qu'il lui ait été justifié d'un acte de mariage *préalablement* reçu par l'officier de l'état civil (Art. 199 et 200 du Code Pénal).

No religious ceremony without anterior civil sanction.

Divorce allowed in 1792, but abolished in 1816.

Le Code Napoléon avait maintenu le divorce qu'avait admis la loi de 1792; mais, sous la restauration, la loi du 8 Mai 1816 a aboli le divorce; de même qu'une autre loi du 31 Mai 1854, en abolissant la mort civile, a fait cesser la disposition de l'Article 25 du Code, qui déclarait le mariage des condamnés à une peine emportant la mort civile dissous, quant à tous ses effets civils.

Mais ces deux lois n'ont porté aucune atteinte aux effets légaux attachés, avant leur promulgation, à la dissolution du mariage opérée, soit par un divorce régulièrement accompli, soit par une condamnation antérieurement prononcée. Les époux, ainsi rendus à leur liberté pleine et entière, ont conservé le droit, chacun de son côté, de convoler à de secondes noces.

Pourquoi donc serait-il interdit à un Français qui, s'il le voulait,

(*a*) Edit du 17 Juin 1681; Laferrière, *Histoire du Droit Français*, t. Ier, p. 345.
(*b*) Lettre du Chancelier de Pontchartrain du 3 Septembre 1712 au premier Président du Parlement de Bordeaux.—Prévost de la Jannès, *Principes de la Jurisprudence Française*, t. IIe, titre 1er, N° 296.

pourrait épouser une Française divorcée avant 1816, conformément au Code Civil, d'épouser également une étrangère divorcée conformément aux lois de son pays?

On lui objecte les lois Françaises! mais cette femme ne demande rien qui leur soit contraire? Elle ne demande pas le divorce, elle n'est plus mariée, elle se présente libre de tout engagement préexistant; tel est son état, garanti par les lois de son pays; elle les invoque, et sur quel fondement veut-on la priver de leur bénéfice?

On connaît la célèbre distinction entre les statuts réels et les statuts personnels. Suivant cette distinction, les biens sont soumis invariablement à la loi de leur situation, et par conséquent, "les immeubles, même ceux possédés par des étrangers, sont régis par la loi Française." (Cod. Civ. Art. 3.)

Mais les personnes sont régies, en ce qui touche leur état, par la loi de leur origine.

Je dis les lois concernant leur état, car les lois de police et de sureté, qui ne sont pas de droit privé, mais de droit public, obligent indistinctement tous ceux qui habitent le territoire; c'est une condition indispensable imposée dans tous les pays à la résidence des étrangers. (Cod. Art. 3.)

Quant aux lois qui règlent l'état des personnes, que dit le Code Civil? Il dit que "les lois concernant l'état et la capacité des personnes régissent les Français même résidant en pays étranger." (*ibid.*)

Et réciproquement, il faut dire la même chose à l'égard de l'étranger; son état et sa capacité sont régis par les lois de la nation à laquelle il appartient.

M. Merlin professe hautement cette doctrine: "Du principe que les lois Françaises concernant la capacité et l'état des personnes, régissent les Français même résidant en pays étranger; il suit tout naturellement, dit ce savant jurisconsulte, que, par réciprocité, les lois qui régissent l'état et la capacité des étrangers les suivent en France, et que c'est d'aprés ces lois que les tribunaux Français doivent juger s'ils ont ou n'ont pas tel état, s'ils sont ou ne sont pas incapables. (Rép., t. 16, p. 693, col. 2, N° 6.)

M. Tronchet a proclamé le même principe dans la séance du Conseil d'Etat du 6 Vendémiaire an X. "Un Français, dit-il, demeure soumis aux lois de son pays par rapport au mariage; mais ces lois ne s'étendent pas à l'étrangère qu'il épouse. Il lui est donc permis de prendre une fille à qui les lois du pays où il se trouve donnent la capacité de se marier." (Locré, t. 3, p. 213, 1re subdivision.)

Il est tellement vrai que l'état de l'étranger résidant en France est fixé par la loi de son pays, que les auteurs et la jurisprudence sont d'accord pour reconnaître que les jugements rendus par les tribunaux étrangers, sur des questions d'état concernant la personne de leurs nationaux, n'ont pas besoin, pour produire leur effet, d'être rendus exécutoires par les tribunaux Français. (Fœlix, Droit International, Nos 65 et 333; Demolombe, t. 1, N° 103; Aubry et Rau sur Zachariæ, 3° édit., t. 1, p. 85.)

C'est donc d'après la loi personnelle de chaque individu que l'on doit juger de sa capacité ou de son incapacité: car cela est vrai de l'une et de l'autre.

Suivant ce principe appliqué à un Français, il faut dire que le Français incapable, par exemple, de se marier avant l'âge de vingt-cinq ans sans le consentement de ses parents, ne pourrait pas valablement aller se marier dans un royaume étranger où la loi dispenserait de ce consentement. Un tel mariage serait annulé en France.

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Madame Bulkley's status is guaranteed by the laws of her own country.

Statuts reels et statuts personnels.

Merlin cited. Doctrine of reciprocity

M. Tronchet.

Fœlix, Demolombe, and Zachariæ.

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Engagé dans un commerce illégitime en France, il ne pourrait pas, en vue d'éluder la disposition qui veut que le mariage soit célébré au grand jour dans le lieu de son domicile, passer brusquement la frontière pour aller contracter en pays étranger un simulacre de mariage religieux, même en le décorant du titre spécieux de mariage *de conscience*. Un tel mariage ne serait pas reconnu en France (*a*).

Marriage *in fraudem* of the law of the domicil bad.

Le Français marié, à qui la loi Française interdit le divorce, ne pourrait pas aller demander et faire prononcer ce divorce dans les pays où le divorce est permis. S'il revenait en France, on le tiendrait pour marié ; et s'il contractait un second mariage sous prétexte de son divorce, il se rendrait coupable de bigamie.

Divorce *in fraudem* of the law of the domicil bad.

Il ne le pourrait même pas, en recourant à une naturalisation à l'étranger, s'il résultait des faits reconnus et déclarés constants par les tribunaux Français, que le Français n'a eu recours à ce moyen que pour faire fraude à la législation de son pays d'origine. C'est ce qui résulte d'un arrêt de la Chambre des Requêtes, du 10 Décembre 1846.

A foreigner incapable of marrying in his own country, incapable of marrying in France.

Réciproquement, si un étranger absolument incapable, d'après les lois de son pays, de contracter mariage, essayait de se marier en France, il ne pourrait pas s'autoriser de ce que la loi Française ne prononce pas les mêmes incapacités. La loi personnelle qui fixe son état, et qui le suit partout, lui serait opposée, et les tribunaux Français jugeant comme jugeraient les tribunaux de son pays, le déclareraient incapable de se marier en France. C'est ce qu'a décidé la Cour d'Appel de Paris en audience solennelle, par arrêt du 13 Juin 1814. La fille Styles, Américaine, avait épousé en France le nommé Busqueta, moine Espagnol, ignorant son état. Dès qu'elle le sut, elle demanda l'annulation de son mariage, motivée sur ce que les lois civiles et religieuses de l'Espagne déclarent absolument incapables de se marier les individus engagés dans les vœux monastiques.

Case of a Spanish monk and the girl Styles.

Busqueta alléguait que les lois Françaises ne reconnaissent pas de tels vœux. Mais on jugea sa capacité par les lois de son pays, et son mariage fut déclaré nul : "Attendu, dit l'arrêt, qu'il ne peut y avoir de mariage qu'entre personnes que la loi en rend capables : que cette capacité, comme tout ce qui intéresse l'état des personnes, se règle par le statut personnel qui affecte la personne, et la suit en quelque lieu qu'elle aille et se trouve ; que Busqueta, capucin et diacre Espagnol, était à ce double titre inhabile au mariage, en vertu des lois de son pays."

An Englishwoman divorced in her own country. Why should she not marry in France?

Lorsqu'au contraire l'étranger qui veut se marier en France, est libre d'après les lois de son pays, n'est-il pas évident, qu'en vertu du même principe, c'est par les lois de son pays qu'il faut apprécier sa capacité? Prenons un exemple qui rentre précisément dans l'espèce du procès actuel. Une Anglaise, après avoir été mariée à Londres, a divorcé conformément aux lois Anglaises ; elle est devenue libre par les lois de son pays ; aussi libre que si jamais elle n'eût été mariée, aussi capable par conséquent de contracter un second mariage que si elle n'en avait pas contracté un premier. En cet état de pleine liberté légale, elle vient en France ; elle veut s'y marier ; de quel droit ira-t-on lui dire qu'elle ne le peut pas? Qui osera soutenir, qu'encore bien qu'elle soit pleinement divorcée suivant les lois qui sont les siennes, et qui règlent son état partout où elle jugera à propos d'aller habiter, elle est

(*a*) Gretna Green marriages were *in fraudem* of the law of the domicil. They were disapproved of by Lord Mansfield, but subsequently upheld on the principle *locus regit actum*. The House of Lords, as a House, never once *adjudged* directly in their favour. This is said subject to correction.

encore censée engagée dans les liens de son mariage! (Et cela quand, de son côté, son ancien mari, redevenu libre comme elle, s'est peut-être déjà très-valablement remarié, car l'espèce peut se présenter avec cette complication.)

Mais la Cour d'Appel de Paris a décidé qu'un tel mariage ne pouvait pas avoir lieu! Elle a jugé, le 30 Août 1824, que Mary Bryan, divorcée en Angleterre le 28 Février 1821, conformément aux lois du pays, ne pouvait pas, quoique devenue libre, épouser en France le Sieur Maurion (*a*).

La Cour de Paris a jugé ainsi, mais la Cour de Nancy a jugé le contraire, par arrêt du 30 Mai 1826, dans l'espèce d'un militaire Français qui, après avoir épousé en Prusse une femme divorcée, demandait en France la nullité de son mariage, sous prétexte que la loi de 1816 ayant aboli le divorce en France, ne pouvait pas reconnaître la validité d'un divorce Anglais.

La Cour de Nancy a rejeté cette demande odieuse, et déclaré le mariage valide. Dans ses motifs se trouve un considérant remarquable qui va droit au préjugé qui s'agitait au fond de la question: "Attendu que les incapacités sont de droit étroit, et ne peuvent se tirer, par induction ou argumentation, de l'harmonie qu'on supposerait devoir exister entres les lois civiles et religieuses d'un Etat."—La Cour de Nancy a prononcé ainsi sur les conclusions remarquablement énergiques d'un magistrat qui, à cette époque, préludait, dans l'exercice du ministère public, aux éminentes dignités où l'ont porté depuis ses services et sa haute science de publiciste et de jurisconsulte. On objectait à M. Troplong l'arrêt de Paris, et voici comment il y répondait.—Permettez-moi, Messieurs, d'appeler ici à mon aide cette partie des conclusions de l'éloquent magistrat:

"On oppose l'arrêt de la Cour de Paris, disait-il, mais qu'est-ce qu'un arrêt en présence des principes? Cet arrêt ne peut faire autorité. Il choque les premières règles. Il dit que la loi Française ne peut reconnaître un divorce fait en Angleterre. C'est là une des plus grandes erreurs que l'on puisse professer. Car, sous le rapport de la capacité, les lois Françaises doivent reconnaître tout ce qui est légalement fait en Angleterre. Sans cela, il y aurait hostilité perpétuelle entre les nations, et impossibilité de communiquer et de commercer.

"Je vais montrer, dit M. Troplong, que cet arrêt est contraire à la principale doctrine des auteurs, et même que si la femme Bryan eût demandé à la Cour de Paris de prononcer son divorce, elle auraît dû le prononcer.

"M. Merlin, Répert. v° *Divorce*, page 770, col. 1re, examinant la question, fait cette hypothèse: "Supposons, dit-il, pour nous rapprocher plus particulièrement de l'espèce qui nous occupe, qu'avant l'introduction du divorce en France, deux époux mariés en Pologne, où la loi admettait le divorce, et le déclarait compatible avec les dogmes catholiques, fussent venus s'établir en France, et que l'un d'eux eût actionné l'autre devant nos tribunaux en dissolution de leur mariage, très-certainement nos tribunaux n'auraient pas repoussé cette action, sous le prétexte que la loi Française ne reconnaissait pas le divorce. Ils l'auraient, au contraire, accueillie, sur le fondement que le divorce était reconnu, par la loi de Pologne."

"Voilà, dit M. Troplong, une doctrine qui renverse le système de la Cour de Paris; voilà des juges Français qui, suivant M. Mer-

(*a*) See a long account of Mary Bryan's case in Merlin's Questions de Droit v. *Divorce*, sect. 13.

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Yet the Cour d'Appel de Paris, in Mary Bryan's case, held in 1824 that she could not.

But the Cour de Nancy ruled the contrary in 1826.

Relying on the conclusions of the great publicist and jurist M. Troplong, who denounced the ruling in Mary Bryan's case.

A judgment repugnant to principle is worthless.

The French Courts will grant divorce to strangers according to the law of their own country. This is carrying comity a great way.

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lin, devraient prononcer le divorce de Polonais! Tant il est vrai que, pour juger de la capacité des étrangers, il faut qu'un tribunal Français ferme le livre de ses lois, pour n'ouvrir que la loi qui régit les étrangers!"

Remontant plus haut, et interrogeant les monuments de l'ancienne jurisprudence, M. Troplong invoque et cite encore d'autres exemples:

They will shut their own books and look only into those of the stranger's country.

Jews have their own laws in France.

"On sait, dit-il, que les Juifs admis en France avaient, avant la révolution, le privilége de se gouverner suivant leurs usages. Henri II., qui les accueillit, donna des lettres patentes qui les autorisaient à vivre selon leurs usages, et fit défense de les y troubler tant en jugement qu'en dehors. Louis XVI. confirma ce privilége en 1776 par lettres patentes.

"On voit, dit M. Troplong, qu'il y avait entre les Juifs et les étrangers assimilation parfaite. De même que l'état d'un étranger est réglé, même en France, par les lois de son pays; de même l'état du Juif était réglé par ses usages. La loi civile avait fait à l'égard des Juifs ce que la loi politique a fait à l'égard des étrangers.

One of their usages was divorce, which the French courts granted to Jews though the French law deemed divorce a profanation. In Italy, and even at Rome, the same rule prevailed.

"Or, un des usages des Juifs était le divorce; leurs mariages se célébraient sans solennités et se dissolvaient de même. Eh bien, les tribunaux Français (quoique le divorce fût alors pour les lois Françaises une profanation), les tribunaux Français prononçaient le divorce des Juifs lorsqu'ils le demandaient et qu'il était contesté. (Sentence du Châtelet de Paris du 10 Mai 1779, dans la cause entre Peixote, Juif, de Bordeaux, demandeur en divorce, contre Sarah Mendès d'Acosta.)

"Bien plus, à Rome, ils divorçaient, et ni le pape, ni l'inquisition, n'y mettaient obstacle, parce que c'était une de leurs immunités, de même que, pour un étranger, c'est une immunité d'être gouverné par les lois de son pays, quant à l'état.

"Ainsi voilà les tribunaux Français et Italiens, des tribunaux composés de catholiques, prononçant le divorce entre des Juifs.

"Par la même raison, ils l'auraient prononcé entre étrangers appartenant à des pays où le divorce est reconnu. Donc, poursuit M. Troplong en revenant à sa cause, si la femme Nass fût venue demander à la Cour son divorce, vous auriez dû le lui accorder. Et on voudrait que vous ne puissiez pas reconnaître la validité de ce divorce prononcé par les tribunaux Prussiens, conformément aux lois du pays! On voudrait que vous considérassiez la femme Nass comme engagée; tandis que, sur sa réquisition, vous auriez dû la délier vous-mêmes!"

Non content de cette première argumentation, M. Troplong continue: "Il y a plus, dit-il, on va voir les autorités Françaises marier des personnes divorcées avec des Françaises.

A baptised Jew whose wife refused baptism might get a divorce.

"Lorsqu'un Juif se faisait baptiser, si sa femme refusait de le suivre, il pouvait faire prononcer le divorce. Alors, il était libre de se remarier avec une catholique: on le considérait comme libre de tout engagement. Cet usage était suivi à Metz, à Toul, à Verdun et dans l'Alsace, attesté par les évêques, suivi par le conseil souverain de Colmar; et l'officialité, en prononçant le divorce, ne manquait pas de déclarer le Juif converti apte à épouser une catholique (*a*).

(*a*) En 1720, un infidèle s'étant converti, il divorça d'avec sa première femme, et il se remaria à Paris du consentement de M. de Noailles.

Un arrêt du conseil souverain de Colmar, du 29 Mars 1769, jugea qu'une Juive convertie avait pu valablement divorcer d'avec son mari et se remarier. (Denisart, v° *Divorce, Moyens du Juif Lévy*).

Cet usage était fondé sur l'opinion de quelques docteurs, et les décrétales de plusieurs papes, qui décidaient que le baptême faisait du néophyte un homme nouveau, et rompait ses engagements avec les infidèles.

"Je sais que des lettres patentes du 10 Juillet 1784 abrogèrent cet usage, et décidèrent que les Juifs et Juives mariés légitimement ne pouvaient, en cas de conversion, se remarier avec des catholiques qu'en cas de veuvage. Mais cette loi reconnaît l'existence de l'usage dans les provinces; et il a fallu qu'elle fût promulguée pour l'abolir."

"Autre exemple. — Prince de Nassau Pieghen. (Denisart, v°. *Divorce*, Répert. t. xv. p. 425, col. 3, alin. 4.)

A Polish Catholic Princess, divorced by Polish law, engaged to marry the Prince de Nassau Pieghen. Letters patent transferring the domicil to Strasbourg.

"La Princesse de Saluski Sambuco, catholique Polonaise, après avoir divorcé conformément aux usages de Pologne, où le divorce était permis, passa en France. Le Prince de Nassau Pieghen la demanda en mariage, elle y consentit. Les deux parties étaient domiciliées à Paris; M. de Beaumont, archevêque, ne voulut pas approuver ce deuxième mariage, par la raison qu'il croyait que le premier subsistait encore. Que fit alors le roi? Il accorda des lettres patentes pour transférer à Strasbourg le domicile des parties, et le mariage y fut célébré sans difficulté. Ainsi le roi intervient pour faire cesser des scrupules, respectables sans doute, mais contraires aux principes.

The ancient tribunals allowed remarriage on legal divorces.

"Les anciens tribunaux mariaient donc des personnes dont le mariage avait été légalement dissous par le divorce. Ils ne croyaient pas choquer les principes. Au contraire, ils y rendaient hommage, et jamais ils ne virent d'obstacles dans ce qui a soulevé les scrupules de la Cour de Paris."

The Paris decree of 1824 therefore overturned, and if there were ten such, the maxim would still hold: *non exemplis, sed legibus judicandum est.*

Voilà, certes, le premier arrêt de Paris amplement réfuté. Mais, dit-on, depuis il en est intervenu deux autres, cela fait trois! Eh! qu'importe! tant qu'une jurisprudence erronée n'est pas rectifiée, une Cour ne veut pas se déjuger, elle suit la même pente; au lieu de trois arrêts, il pourrait y en avoir dix! Et depuis quand d'ailleurs, l'allégation de quelques arrêts de Cour d'Appel ferait-elle un argument devant la Cour suprême qui a pour devise: "La loi," et pour laquelle semble avoir été formulé l'axiome: *Non exemplis, sed legibus judicandum est.*

La Cour de Cassation n'a-t-elle pas elle-même offert plusieurs fois le noble modèle d'une Cour qui sait préférer à toutes autres considérations le retour aux vrais principes! La chambre criminelle de cette Cour n'avait-elle pas, sous la Restauration, rendu quarante-deux arrêts qui proclamaient l'impunité des duels, lorsque la Cour entière, chambres réunies, examinant à fond cette grande question, a changé la jurisprudence et déclaré que le duel était un fait atteint par le Code Pénal.

Continuons donc à interroger seulement les principes et le texte de la loi.

The abolition of divorce in 1816 left the question untouched whether those legitimately divorced should be allowed to remarry.

On objecte la loi de 1816 qui a aboli le divorce. Personne ne le conteste, et ce n'est pas là ce qui fait question. Mais cette loi, en abolissant le divorce, a-t-elle interdit le mariage à ceux qui seraient valablement divorcés? Telle est la question.

Or, le législateur Français n'a rien dit de pareil. Bien loin qu'il ait entendu établir une prohibition vis-à-vis des étrangers valablement divorcés suivant les lois de leur pays, il n'a pas même eu l'idée, en abrogeant le divorce en France, d'etablir une défense de se remarier pour les Français déjà divorcés. Ce n'est qu'à l'égard des époux divorcés entre eux qu'il a maintenu, en la laissant subsister, la disposition pénale de l'Art. 295 qui leur interdisait de se réunir.

Argument to show that divorced parties may remarry each other.

On a si bien senti que l'absence de prohibition laissait la liberté aux divorcés de contracter d'autres mariages, qu'on a essayé, après coup, de réparer cette double omission en présentant un

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projet de loi dont l'Article 2 portait: "Les conjoints dont le divorce a été prononcé et ne sont pas actuellement engagés dans un autre mariage, pourront se réunir. Tout autre mariage leur est interdit jusqu'après le décès de l'un d'eux."

Si ce projet eût été converti en loi, nul doute que, par là, la difficulté eût été tranchée. La prohibition eût produit l'incapacité.

Mais ce projet, pendant qu'il se discutait à la Chambre des Pairs, a tellement soulevé l'opinion, et il est devenu si évident pour le Gouvernement qu'il serait rejeté par la Chambre des Deputés, qu'on n'a pas osé le soumettre à cette épreuve. Ainsi la loi, jugée nécessaire, n'a pas été portée: les époux divorcés en France ont conservé la liberté de se remarier, si bon leur semblait, et beaucoup ont usé de cette faculté. On a d'abord essayé de la leur contester; mais le savant Merlin, dans une dissertation spéciale insérée dans ses Questions de Droit, au mot *Divorce*, § 13, a pulvérisé les sophismes de ceux qui voulaient raisonner en présence de ce projet avorté comme s'il eût réussi, ou comme s'il n'eût pas été nécessaire. La jurisprudence s'est prononcée dans le même sens: tel est notamment un arrêt rendu par la Cour d'Aix le 6 Avril 1825, rapporté dans la *Gazette des Tribunaux* (1826, N° 154, Mardi 25 Avril):

"Attendu que la loi du 8 Mai 1816, sur le divorce, ne peut avoir d'effet rétroactif; quelle ne peut empêcher un Français d'épouser une Française divorcée *avant ladite loi*;

"Que dans la séance de la Chambre des Pairs du 7 Décembre 1816, le Gouvernement présenta un projet qui autorisait la réunion des époux divorcés, et prohibait tout autre mariage jusqu'après le décès de l'un d'eux, et que le projet de loi fut ensuite retiré après la discussion, ce qui prouve que la loi du 8 Mai 1816 n'a réglé que l'avenir;

"Que les incapacités doivent être prononcées par la loi et que les tribunaux ne peuvent suppléer à son silence, etc."

Voilà les vrais principes.

Spouses divorced prior to 1816 would scarcely think now of re-marrying.

Maintenant on remplace ces attaques directes par des considérations d'une singulière nature. "Cette question, dit-on, autrefois débattue, résolue, il est vrai, en faveur des époux Français divorcés, a perdu aujourd'hui son importance et son intérêt. Elle a fait son temps; transitoire, elle ne saurait plus se reproduire aujourd'hui. En effet, il y a plus de quarante-trois ans que le divorce a été aboli, et serait-il dès lors possible de trouver encore aujourd'hui des époux Français divorcés avant 1816, demandant à convoler à de secondes noces?"

Why not? they might now be only 63.

Eh! oui, cela serait très-possible; des époux divorcés à vingt ans en 1816, n'auraient aujourd'hui que soixante-trois ans. Ils pourraient en avoir le désir, et fussent-ils plus âgés, ils en auraient le droit. On fait, dit-on, des folies à tout âge. Et puis, la rareté des cas possibles dans lesquels une question peut se présenter est-elle donc un motif de se dispenser de la résoudre par les principes et par la loi? surtout dans une question où bientôt nous verrons qu'on veut faire intervenir l'ordre public et les bonnes mœurs; comme s'il pouvait être indifférent de permettre encore une ou deux fois le mal avant d'arriver à ce qu'on appelle le bien!

D'ailleurs, cette raison évasive tombe devant la loi toute récente de 1854, qui a aboli les effets de la mort civile sur le mariage des condamnés. Cette loi donne lieu à des questions absolument identiques, et il y en aurait pour longtemps encore.

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Tenons donc pour certain et pour démontré : qui la loi du 8 Mai 1816, en abolissant le divorce, n'a point interdit aux époux divorcés de se remarier. Ce fait, purement négatif quand on ne considère que cette loi, est devenu un fait positif par l'avortement de la tentative de suppléer à ce qu'elle n'avait pas dit, par une loi qui aurait interdit aux époux divorcés de se remarier jusqu'après le décès de l'un d'eux (*a*).

A plus forte raison cette loi n'a pas dit que les Français ne pourraient pas épouser des femmes étrangères devenues libres par des divorces régulièrement prononcés conformément aux lois de leur pays.

On reste donc, en fait de seconds mariages en face de l'Article 147, suivant lequel : " On ne peut contracter un second mariage avant la dissolution du premier."

Autrement, le second mariage, non-seulement serait nul, mais constituerait la bigamie, c'est-à-dire un crime prévu par l'Art. 340 du Code Pénal, lequel dispose en ces termes : " Quiconque étant engagé dans les liens du mariage, en aura contracté un second avant la dissolution du précédent, sera puni de la peine des travaux forcés à temps."

Ainsi, en résumé, le Code Civil en son état actuel, c'est-à-dire après la promulgation de la loi du 8 Mai 1816, contient les deux dispositions suivantes :

1° Le divorce est aboli.

2° La bigamie est défendue.

There is nothing in the Code Civil opposed to Mrs. Bulkley's supplication (*b*).

Mais on cherche vainement en quoi l'une ou l'autre de ces dispositions pourraient être opposées à la demanderesse en cassation.

Le divorce est aboli en France : il est interdit aux Français engagés dans les liens du mariage de divorcer ; mais dans l'espèce, aucune des parties ne demande le divorce, elles demandent au contraire à se marier.

La bigamie est défendue, c'est-à-dire, en reprenant les termes des Articles 147 du Code Civil et 340 du Code Pénal, qu'il est défendu à toute personne engagée dans les liens d'un premier mariage d'en contracter un second avant la dissolution du premier.

Mais cet Article 340 du Code Pénal, comme l'Article 147 du Code Civil, ne reçoit d'application dans l'espèce à aucune des parties.

Her admirer, Le Sieur V., is free to marry, and she is no less so.

Le Sieur V..., qui se présentait pour épouser Marie-Anne B..., est parfaitement libre de tout engagement matrimonial.

M^me^ B... est également libre, elle n'est pas non plus engagée dans les liens d'un mariage subsistant ; elle a été mariée, il est vrai, en Hollande, mais ce mariage n'existe plus, il a été dissous le 18 Mai 1858 par un jugement du Tribunal Civil de La Haye qui a été transcrit en marge de l'acte de mariage sur les registres de l'état civil Hollandais.

Cet acte de divorce est un fait légal et judiciaire irrévocablement accompli. Il a fixé l'état de Madame B... ; aucune autorité n'a droit de le remettre en question.

Divorcée en Hollande, conformément aux lois de ce pays, elle

(*a*) See case before Vice-Chancellor Wood, where his Honour seems rather to doubt whether divorced parties can again intermarry ; but he holds it to be clear that children born of such re-marriage would not be entitled to the benefit of a settlement made on the occasion of the former marriage upon the children of the same parties. Dec. 11, 1862, Bond *v.* Taylor, 2 Johnson & Hemming, p. 472. and Law Journal, Chancery of 1862, p. 784.

(*b*) She had returned to her maiden name, and would be called Miss or Mrs, Bulkley in England. Macq. on Div. p. 112.

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est dans la même position que serait une Française divorcée en France avant la loi de 1816; et si le maire du 10e arrondissement, au lieu de céder aux doutes qu'on avait fait naître dans son esprit, avait passé outre au mariage, j'ose bien affirmer que personne ne se serait cru autorisé à en demander la nullité en le qualifiant de bigamie.

Au surplus, si tel était le droit du ministère public, tel serait aussi son devoir; et alors, je demanderais pourquoi, dans le 2e arrondissement de Paris on tolère ce qu'on prétend interdire dans le 10e? Au dossier qui est entre les mains de M. le rapporteur, se trouve 'expédition authentique d'un extrait des actes de mariage du 2e arrondissement, attestant que le Jeudi 18 Février 1858, M. Ancelle, maire, a déclaré, au nom de la loi, unis en mariage, le Sieur Louis G..., Français, avec Pauline L..., née en Belgique, divorcée à Bruxelles le 22 Janvier 1856.

A Frenchman pronounced validly married, his wife, being a Belgian, divorced at Brussels.

Dira-t-on que, s'il n'y a pas eu poursuite, c'est quo'n a ignoré le fait? Un fait aussi éclatant qu'un mariage, annoncé par des publications, énoncé dans les journaux!—Eh bien! le voilà connu, ce fait: le poursuivra-t-on?—Non; aucune loi n'autoriserait une telle action, ou plutôt un tel trouble à une union paisible et honorable.

Si un tel fait est immoral, pourquoi la loi Française, qui avait toute autorité sur les sujets Français, a-t-elle laissé aux époux divorcés cette faculté? Il y avait, dit-on, droit acquis! Mais y a-t-il donc, en fait de mariages nouveaux à accomplir, un droit acquis contre ce qu'on appelle l'ordre public et la morale? Y a-t-il une date qui puisse en pareil cas autoriser, même transitoirement, ce qu'on déclare avec emphase être contraire à la morale?

C'est pour le coup qu'on pourrait, avec Pascal et Montaigne, se railler d'une morale et d'une justice qui dépendraient d'une date ou d'une rivière en decà ou au delà.—Vérité dans le 2e arrondissement, erreur dans le 10e.

M. le Procureur General no partizan of divorce.

Certes, je ne suis point partisan du divorce; chaque fois qu'il en a été question dans nos assemblées délibérantes, j'ai constamment voté ou parlé contre les propositions qui avaient pour objet de le rétablir dans notre législation (*a*). Je crois la législation actuelle meilleure que celle qui l'a précédée. M. Troplong exprimait des sentiments semblables devant la Cour de Nancy; puis il ajoutait, et je répète ses paroles en m'y associant pleinement:

Nor M. Troplong.

"Il ne faut pas que notre aversion pour le divorce soit aveugle; la loi ne peut pas être plus intolérante que la religion dont elle est le complément. Il faut distinguer les peuples, faire la part des préjugés nationaux, se garder de les juger avec nos croyances, et ne pas imiter ces philosophes audacieux qui, mesurant les mœurs et les idées de tous les pays avec les opinions et les usages du dix-huitième siècle, ont voulu tout asservir au despotisme de leur secte, et flétri avec arrogance tout ce qui ne flattait pas leurs modernes doctrines."

Si on disait devant moi: Il y a au monde une nation plus brave que la nation Francaise, je répondrais hardiment: Cela n'est pas vrai. Mais si, parce que, après avoir longtemps admis le divorce, notre législation a fini par le répudier, elle est en cela devenue plus parfaite, et, si l'on veut, plus morale; il n'en faut pas induire que les autres peuples qui ont retenu le divorce dans leurs usages, dans leurs lois, dans leur religion, sont des peuples

Divorce, however, does not imply immorality.

(*a*) En 1832 et en 1848, t. iii. de mes *Mémoires*, p. 18.

immoraux, et que les Français, parce qu'ils ne peuvent plus divorcer entre eux, ne puissent pas, sans offenser la morale, épouser des femmes étrangères qui sont devenues libres conformément aux lois de leur pays.

N'abusons point de ce nom de morale pour nous en attribuer orgueilleusement le monopole! Parmi les choses contraires aux bonnes mœurs, il faut distinguer ce qui blesse la morale de tous les siècles et de tous les peuples, de ce qui blesse seulement les mœurs publiques de telle ou telle cité: *Quædam naturâ turpia sunt, quædam civiliter et quasi more civitatis*, dit Cujas d'après Ulpien, tit. 42, *De verbor. signif. occit. solem. Cod. de Sponsalibus.*

La loi naturelle défend le meurtre, le vol: ces choses sont contraires aux bonnes mœurs de tous les pays: *naturâ turpia sunt.* Mais il n'en est pas de même du divorce; il est défendu plutôt par la loi religieuse et civile, *more civitatis*, que par la loi naturelle. A la vérité, ce sont des motifs d'ordre public très-élevés qui ont armé le rigorisme de la loi civile et religieuse; c'est la sainteté du contrat de mariage, c'est l'intérêt des enfants et de l'épouse; c'est le besoin de réprimer une inconstance déréglée, et d'imprimer à l'union conjugale ce respect qui s'attache à tout ce qui est immuable. Mais, malgré ces hautes considérations, dont on peut regretter que tous les peuples n'aient pas senti l'importance et la gravité, on ne peut pas dire que la loi naturelle et la loi morale universelle s'opposent au divorce.

The Jews, Greeks, and Romans had divorces.

Aussi, le divorce a-t-il été admis, et il l'est encore chez beaucoup de nations. Il était admis par la loi que Moïse avait donnée au peuple Hébreu, appelé par excellence le peuple de Dieu. Il le fut dans la Grèce antique, il le fut chez les Romains; il est inscrit avec toutes ses conditions dans le Code que publia Justinien dans le sixième siècle de l'ère Chrétienne; l'introduction du christianisme motiva même, de la part de cet empereur, l'addition de deux causes nouvelles: le vœu de chasteté et la profession religieuse par l'un des deux époux, autorisaient l'autre à demander le divorce. Il était pratiqué chez les Francs; le moine Marculfe en donne la formule; et, depuis, au plus fort de la catholicité, on en a vu des exemples. Les rois mêmes ne s'en sont pas fait faute; témoins, dans le douzième siècle, le divorce de Louis le Jeune avec Eléonore de Guienne, qui y avait donné lieu par ses désordres commis (*horribile dictu!*) pendant la croisade. Au quinzième siècle, le Roi Louis XII. répudia Jeanne, fille de Louis XI., pour épouser Anne de Bretagne dans l'église de Saint-Denis, en 1499, du vivant de Jeanne, morte seulement en 1505. Enfin, on connaît le divorce de Henri IV. et celui de Napoléon.

So had the early Christians and the Franks.

Regal examples.

The Greek church admits divorce.

L'église Grecque, longtemps régie par le droit Romain, n'a pas cessé d'admettre le divorce. Dans la Grèce moderne, le nouveau Code, dont les premiers titres ont été publiés au nom du Roi Othon, le 22 Octobre 1856, et traduits du Grec par M. Rhally, président de la Cour de Cassation d'Athènes (qui a conservé le nom d'Aréopage), admet le divorce, et porte, Article 89: "Le jugement qui admettra définitivement le divorce sera inscrit dans les registres de l'état civil."

Divorce allowed in Russia.

En Russie comme en Grèce, et sous la même allégation d'orthodoxie, le divorce est autorisé. C'est la loi civile elle-même qui précise les cas de divorce qui son t 1°, l'adultère, cause reconnue par le droit canonique de l'églis «Grecque; 2°, la condamnation à une peine emportant la privation des droits civils, &c. &c.

And in Poland among those of the Greek church.

En Pologne, jusqu'en 1825, le divorce a été permis, en vertu des dispositions du Code Napoléon, que nous y avons porté. En

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Divorce allowed in England and its dependencies, in Prussia, in Protestant Germany, in Holland, and in Catholic Belgium, yet the people of those countries are not immoral.

1825, il a été interdit dans le royaume de Pologne, par la loi civile Polonaise, entre personnes de religion catholique; mais il est resté permis entre ceux qui professent la religion Grecque d'après le droit canon de cette Eglise.

Enfin le divorce est admis en Angleterre, et dans les vastes possessions de cette grande puissance; il est admis en Prusse, et dans tous les états protestants d'Allemagne; il l'est en Hollande, il l'est à notre frontière, par la catholique Belgique!

S'ensuit-il donc que ces peuples soient immoraux? Et parce que nous avons introduit dans nos lois une réforme utile à nos mœurs, résulte-t-il de cela seul entre eux et nous une barrière qui nous empêche de reconnaître aussi le droit qu'ils ont de régler l'état de leurs citoyens d'une autre manière? S'ensuit-il en particulier que ceux d'entre eux qui, après avoir été mariés, ont cessé de l'être, et sont redevenus libres, ne puissent pas contracter des alliances avec nos nationaux ?

Notre loi aurait pu le dire, mais l'a-t-elle dit? Non, messieurs; c'est en présence de cette diversité de lois chez les différents peuples qui nous entourent et se mêlent incessamment avec nous, que nos législateurs se sont contentés d'interdire le divorce aux époux Français, sans, du reste établir de prohibition entre eux et les étrangers.

Certes, ils auraient pu établir cette prohibition, à l'exemple des Juifs, auxquels il était défendu d'épouser les filles des Amalécites et des Philistins; à l'exemple des premières lois de Rome, qui refusaient aux plébéiens le droit de s'allier avec les patriciens, et de cette politique jalouse qui, pendant plusieurs siècles, déniait ou n'accordait qu'avec parcimonie le *jus connubii* aux Latins et aux peuples conquis.

Nos législateurs auraient pu replacer, comme au moyen âge, la disparité de culte au rang des empêchements dirimants du mariage; ils auraient pu spécialement dire qu'on ne reconnaîtrait pas en France la validité des divorces prononcés en pays étranger, conformément aux lois des pays qui admettraient cette manière de dissoudre le mariage. Mais, je le répète, le législateur Français n'a rien pensé, rien osé, rien décidé de pareil.

Reste donc le murmure vague d'un scrupule qui n'ose pas se produire à découvert, et qui s'enveloppe comme dans un nuage, en allégeant l'ordre public et les bonnes mœurs, comme s'il y avait dans le titre du mariage un article qui, après les causes de nullité précisées avec tant de soin, eût ajouté: "Et en outre, les juges pourront annuler ou empêcher le mariage quand l'ordre public et les bonnes mœurs leur paraîtront l'exiger."

Mais, dit-on, dans le système de l'arrêt, jusqu'où n'ira-t-on pas si l'on prétend d'une manière absolue qu'un étranger peut faire en France tout ce dont il est capable dans son pays? Personne n'a jamais élevé cette prétention. Tous les jurisconsultes, au contraire, accordent que les tribunaux Français ne peuvent pas appliquer à un étranger son statut personnel, lorsqu'il est de nature à porter atteinte aux lois prohibitives ou aux lois d'ordre public en France. Mais on soutient précisément qu'il n'y a pas de loi prohibitive qui défende au Français d'épouser une femme divorcée, là où il y a eu divorce légalement prononcé. Cela est acquis en France pour les divorces antérieurs à 1816; et si le divorce Français ne met pas obstacle au remariage de l'époux divorcé en France, on se demande seulement pourquoi il n'en serait pas de même de l'époux divorcé en pays étranger avec un Français célibataire? "Quoi! dit un jurisconsulte Belge qui a écrit sur cette

matière (*a*), un divorce juridique accompli dans le chef d'une personne Française ne constitue point, aux yeux des lois Françaises elles-mêmes, un empêchement à ce mariage; et, le même fait juridique, légalement accompli dans le chef d'une personne étrangère, formerait un empêchement au mariage à l'égard d'une personne Française!...Mais le simple bon sens répugne à un pareil raisonnement."

On dit encore, et cette objection est dans le texte même de l'arrêt: "La capacité d'un étranger, résultant de son statut personnel, ne saurait relever le Français avec lequel il contracte de l'incapacité dont celui-ci est frappé par les lois de son pays." —Eh quoi! toujours la même pétition de principe! Cela serait vrai si, en effet, les lois de France prononçaient cette incapacité. Dans ce cas, oui; personne ne pourrait relever le Français de cette impuissance. Que défendent donc les lois Françaises aux citoyens Français? Elles leur défendent de divorcer. Mais là où se trouve un divorce fait, la personne étant devenue libre, le mariage est permis; le Français n'a besoin d'être relevé d'aucune incapacité, puisqu'il ne se trouve en face d'aucun obstacle légal.

To say that the capacity of the stranger does not take off the incapacity of the French person is a *petitio principii*.

On insiste encore et l'on dit: Cela est vrai pour les divorces prononcés en France avant la loi du 8 Mai 1816; mais cela ne peut pas s'appliquer aux divorces prononcés à l'étranger postérieurement à cette date."

Ici nous cèderons la parole à M. Merlin, c'est lui -même quiva répondre à cette objection.

No difference between French persons divorced before 1816 and strangers legally divorced since.

"Sans doute, en abolissant le divorce, le 8 Mai 1816, le législateur Français a virtuellement déclaré qu'il ne reconnaîtrait plus pour divorcés que les époux qui avaient précédemment fait dissoudre leur mariage par cette voie, mais il n'a disposé et n'a pu disposer ainsi que pour les époux régis par les lois Françaises; il n'a disposé ni pu disposer ainsi pour les époux régis par les lois étrangères, et la raison en est simple; c'est qu'il n'a aboli et n'a pu abolir le divorce que pour les époux Français, c'est qu'il ne l'a pas aboli et n'a pu l'abolir pour les époux étrangers. Quelle différence y a-t-il donc entre les époux étrangers qui ont été divorcés dans leur pays depuis la loi du 8 Mai 1816 et les époux Français qui ont été divorcés en France avant cette loi? Aucune. Ceux-là ont été, ni plus ni moins que ceux-ci, divorcés hors de l'empire de la loi du 8 Mai 1816. La loi du 8 Mai 1816 n'a donc pas plus neutralisé les effets du divorce des premiers qu'elle n'a neutralisé les effets du divorce des seconds. En deux mots, le mariage des uns est dissous ni plus ni moins que le mariage des autres. Il n'est donc pas possible d'appliquer aux uns plus qu'aux autres la disposition de l'Article 147 du Code Civil, par laquelle il est dit: "Qu'on ne peut contracter un second mariage avant la dissolution du premier."

Case of Mrs. Bryan in 1824.

Cette autorité n'est pas la seule que l'on pourrait invoquer. M. le rapporteur convient que "presque tous les auteurs sont opposés à la doctrine de l'arrêt attaqué." Il rappelle même qu'en 1824 cette opinion fut soutenue dans une consultation à laquelle j'ai donné ma signature. C'était dans l'affaire de la Dame Bryan,(*b*) et j'ajouterai, puisqu'on en a parlé, que cette dame fut défendue par un jeune avocat (M. Ferey lui-même) qui, dès ses premiers débuts, fit preuve de cette solidité de jugement qui l'a constamment distingué dans le cours de son honorable carrière. M. Merlin cite ce plaidoyer dans sa dissertation, il en reproduit les principaux

(*a*) M. Lubliner, avocat à la Cour d'Appel de Bruxelles.
(*b*) See *infra* as to the case of Mrs. Bryan.

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Conclusion of M. Ferey in her case.

Her marriage was dissolved by Act of Parliament.

Her consequent capacity to re-marry followed her everywhere.

moyens. Après une lumineuse discussion sur le caractère du statut personnel, le jeune avocat en tirait cette conclusion : " On ne peut donc être gouverné, sous le rapport du mariage, que par la loi du pays auquel on appartient.—Or, disait-il, il résulte des pièces que quand, en Angleterre, un mariage a été dissous par un Acte du Parlement, les époux dont le mariage a été ainsi annulé sont tous les deux libres de contracter de suite un second mariage avec qui bon leur semble, sans même qu'il soit nécessaire que la permission de se remarier soit formellement introduite dans l'acte de divorce." Ainsi, reprenait l'avocat, " Le mariage de la Dame Bryan a été véritablement dissous ; et il est impossible de ne pas reconnaître que cette dame est devenue libre et capable de contracter légitimement un second mariage. Cette capacité ne lui est pas acquise seulement en Irlande, mais partout où elle voudra résider, parce que cette capacité résulte du statut personnel, qui règle le sort des personnes d'une manière générale et absolue." —L'avocat consultant et l'avocat plaidant ne purent triompher alors ; mais les principes qu'ils ont défendus survivent, et ce sont eux que j'invoque encore aujourd'hui.

Je regrette en vérité d'être aussi long dans une question qui, en soi, paraît si simple ; mais comme le disait Target dans son célèbre mémoire pour la Dame d'Anglure : " On peut bien abréger lorsqu'on a des raisons à combattre ; mais on ne sait guère où il est permis de finir quand on n'a contre soi que l'illusion des préjugés."

On prévoit mille scandales !

Polygamy will not be countenanced by these doctrines.

Case of a Turk having sundry wives easily answered.

" Qui peut dire que bientôt on ne tentera pas de faire admettre la polygamie ? Cela est impossible ! " vous a dit M. le rapporteur.

Je réponds : oui, cela est impossible. Si un Turc, ayant déjà plusieurs femmes dans son harem, venait en ce pays-ci pour y épouser une Française, on lui répondrait, par l'Article 147, qu'il est engagé dans les liens de mariages existants. On ajouterait que si, en France, la polygamie n'est plus un cas pendable, c'est néanmoins un cas puni des travaux forcés par l'Article 340 du Code Pénal, qui range ce fait au rang des crimes. Ici le polygame n'aurait point à relever le Français de son incapacité : ils seraient arrêtés tous les deux directement par la loi pénale qui prohibe la bigamie aux étrangers comme aux nationaux.

Bigamy alike prohibited to strangers and natives.

Quant à l'assimilation du divorce avec la polygamie, parce que, dit-on, le divorcé peut épouser successivement plusieurs femmes, c'est une métaphore inadmissible. Ce qui constitue la polygamie, ce qui choque en elle, c'est la promiscuité et la simultanéité. Mais il n'y a rien de semblable dans la seconde union formée après que la première a été légalement dissoute, et que les premiers époux sont devenus aussi complétement étrangers, aussi morts l'un à l'autre, que s'ils n'avaient jamais été mariés ensemble !

Veut-on savoir ce qui serait véritablement un scandale et un désordre publics ? Le voici :

Strangers are invited to France, and have a guarantee of protection.

Case of a Frenchman marrying an English divorcée, and a family ensuing.

Nos lois autorisent et nos mœurs libérales invitent les étrangers à venir en France, à y acheter, à y posséder des immeubles, à y fonder des établissements de commerce et d'industrie. Le droit des gens, tel qu'il existe, et tant qu'il n'y aura pas été hautement dérogé, leur garantit la protection attachée à leur nationalité, à leur état et à l'exercice des droits qui en résultent. Eh bien ! qu'arriverait-il ? Par exemple, un Français, habitant en Angleterre, se marie avec une Anglaise divorcée. Postérieurement à leur mariage, ils viennent en France, ils y ont plusieurs enfants,

ils y achètent des immeubles. Le mari décède. Il s'agit de partager la succession. Si la doctrine des arrêts de Paris est vraie, si le mariage contracté par le Français est nul parce qu'il ne pouvait pas épouser une femme divorcée; on demandera à celle-ci, quand elle plaidera devant nos tribunaux, l'autorisation de son premier mari, qui, ne la pouvant plus considérer comme sa femme, ne la lui donnera certainement pas. Ce sera la réduire à l'impossible, autant qu'à l'absurde.

Ce n'est pas tout. Partant de ce point que le Français en épousant une femme divorcée a commis un acte de bigamie, les collatéraux Français soutiendront que les enfants nés de cette union illicite sont des enfants adultérins, qui, à ce titre, n'ont droit qu'à des aliments et sont incapables de succéder! Et tout cela, au nom de la morale Française et de l'ordre public!

Ce n'est pas tout encore: voici une autre espèce que j'emprunte à l'ouvrage d'un jurisconsulte Belge, intitulé: "Concordance entre le Code Civil de Pologne et le Code Civil Français relativement à l'état des personnes," in-8° qui a paru à Bruxelles et à Paris en 1846. Cet auteur, après avoir savamment discuté la doctrine des arrêts de Paris, s'exprime en ces termes, à la page 212:

"Voici le cas qui peut se présenter: un Français habitant la Belgique depuis plusieurs années se marie dans ce pays avec une femme Belge qui a été antérieurement divorcée conformément aux lois en vigueur en Belgique. Postérieurement à leur mariage, les époux transfèrent leur domicile en France, et là le mari trouve sa femme en flagrant délit d'adultère; il porte plainte contre elle; mais celle-ci, désirant pouvoir continuer ses liaisons adultères sans entraves, répond à la justice Française en ces termes...."

Ici l'avocat Belge met dans la bouche de la femme une allocution que j'abrége, pour établir que son second mariage étant nul, sinon d'après la loi Française, au moins d'après la jurisprudence, son second mari est sans qualité pour se plaindre de sa conduite. "Ainsi cette dame serait impunément adultère! Et violà, s'écrie le jurisconsulte, le bel ordre moral qui résulterait du système de ces arrêts!"

A cette hypothèse du jurisconsulte Belge, il ne manquerait plus que d'ajouter celle-ci: Si le mari Français ne peut pas se plaindre de l'adultère de sa femme parce que son mariage avec cette femme divorcée est nul, c'est apparemment le mari divorcé de celle-ci qui pourra se plaindre, puisque, dans cette hypothèse mystique, le divorce, quoique légal, a été impuissant pour rompre le premier mariage! C'est ainsi que par le ridicule on irait jusqu'à l'absurde!

Il faut revenir au vrai.

The tribunals of France must decide according to the text of the law.

Les tribunaux Français ne sont ni une officialité, ni un synode. Ils doivent juger par le droit civil et non autrement. En matière d'incapacités, ils ne peuvent rien suppléer; ils doivent se tenir strictement au texte de la loi. En présence de notre législation et dans cette grave matière du mariage, ils doivent juger comme l'a fait la Cour de Cassation, chambre civile, par son arrêt du 21 Juin 1858, par application de la loi du 31 Mai 1854, abolitive de la mort civile, en disant, après avoir rappelé le fait: "Attendu que de tout ce qui précède, il résulte que la femme Soulat, défenderesse, a cessé, aux yeux de la loi civile, d'être engagée dans les liens du mariage qui l'avait unie à Briois, avant la mort civile de celui-ci; que dès lors, on ne peut opposer à cette femme

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la prohibition de droit civil portée par l'Art. 147 du Code Napoléon, qui défend de contracter un second mariage avant la dissolution du premier; d'où il suit qu'elle est libre, après comme avant la loi du 31 Mai 1854, de contracter un nouveau mariage, sans autres obstacles que ceux que peut lui opposer sa conscience..."

Quant à celle du juge, elle est satisfaite quand il a prononcé conformément à la loi.

Il est temps de clore cette discussion, et nous terminerons par cette conclusion: En matière de mariage, le Code Civil n'a rien voulu laisser à l'arbitraire de l'homme; il a défini avec soin tous les cas d'empêchement, d'incapacité, de nullité absolue ou relative. Deux vérités surnagent, à l'abri de toute controverse:

Result: Marriage lawful by a Frenchman in France with a woman who has ceased to be married by means of a divorce legally obtained.

1° Aucun Français marié ne peut divorcer;

2° Mais tout Français non engagé dans les liens du mariage, peut se marier en France ou à l'étranger avec toute femme également libre, soit qu'elle n'ait été jamais mariée, soit que l'ayant été, elle ait cessé de l'être par un divorce légalement prononcé, soit en France, à l'époque où cela se pouvait, soit dans les pays où la législation qui règle l'état de leurs nationaux n'a pas cessé de le permettre.

En jugeant autrement, en créant un empêchement dirimant qui n'est établi par aucune loi, la Cour de Paris a faussement appliqué la loi du 8 Mai 1816 et l'Art. 147 du Code Civil, et commis un excès de pouvoir.

Nous estimons, en conséquence, qu'il y a lieu d'admettre le pourvoi.

Conformément à ces conclusions, la Chambre des Requêtes a admis le pourvoi (*a*).

REPORT TO THE COUR DE CASSATION ON MRS. BULKLEY'S CASE.

BY M. LE CONSEILLER SEVIN.

February 1860.

RAPPORT de Monsieur le Conseiller Sévin dans l'affaire de la Dame Marie Anne Bulkley, présentant la question de savoir si la femme étrangère, mariée en pays étranger, et dont le mariage a été dissous par le divorce, conformément à la loi du pays où il avait été contracté, peut être admise à contracter avec un Français, un nouveau mariage en France où cela ne peut plus être permis entre Français par suite de la loi du 8 Mai 1816 qui a aboli le divorce?

Statement of the case.

La dame Marie Anne Bulkley, née à Antigoa, aux Antilles Anglaises, avait épousé le 19 Août 1831, à La Haye, un Hollandais du nom d'Anthony Bouvens. Le 18 Mai 1858, le divorce a été prononcé entre les époux par jugement du tribunal de La Haye, transcrit en marge de l'acte de mariage sur les registres de l'Etat Civil Hollandais.

(*a*) That is to say, the Chamber of Requests has "admitted the appeal." The Chamber of Requests has a jurisdiction analogous to that of a grand jury. By admitting an appeal the Chamber of Requests decides that there is an arguable question, and thereupon the application for cassation goes to the Civil Chamber; in other words, is put in a train of formal examination and judgment before the tribunal of last resort, namely, the Cour de Cassation.

En Mars 1859, la dame Bulkley qui habitait à Paris, rue des Saints Pères, No. 8, se présenta, pour contracter, avec un Français, un nouveau mariage en France, devant le maire du Dixième Arrondissement, qui refusa de passer outre à la célébration de ce mariage. La dame Bulkley fit citer le maire devant le Tribunal de la Seine pour l'y faire contraindre. Le Tribunal rejeta sa demande. Elle interjeta appel de ce jugement devant la Cour Impériale de Paris. Elle fut déboutée de son appel par arrêt du 4 Juillet 1859. Enfin, elle forma un pourvoi en Cassation contre cet arrêt. La Chambre des Requêtes a accueilli ce pourvoi et a autorisé la demanderesse à en développer les moyens devant la Chambre Civile de la Cour.

Argument of the "Maire" against Mrs. Bulkley.

La dame B . . . invoque un moyen unique tiré de la violation des Art. 3 et 147 du Code Napoléon, et de la fausse application des Art. 6 et 147 du même Code et de la loi du 8 Mai 1816.

En présence du mémoire en défense, qui se borne, au nom du maire du Dixième Arrondissement de Paris, à s'en rapporter purement et simplement à justice, notre rapport ne serait pas complet si nous nous bornions à analyser les arguments de la demanderesse en Cassation. Nous croyons devoir mettre sur les yeux de la Cour, avec des développements semblables, les deux systèmes entre lesquels elle devra se prononcer. Nous commençons par exposer celui adopté par l'arrêt dont nous venons de donner lecture.

Ce n'est pas pour la première fois que la Cour de Paris manifeste son opinion sur la question grave que soulève l'affaire actuelle. Déjà, en 1824, le Tribunal de Première Instance de la Seine ayant repoussé une demande semblable à cette aujourd'hui formée par la dame B . . ., son jugement fut confirmé par arrêt du 30 Août 1824 (s. 2,203). Plus tard, le Tribunal de la Seine ayant changé sa jurisprudence, et autorisé le mariage, en France, d'un Israélite divorcé en Pologne, la Cour Royale, présidée alors, comme en 1824, par M. Séguier, maintint sa doctrine antérieure, et déclarer impossible en France la célébration du mariage alors projeté. Voici sur quelles graves considérations de droit et de morale on se fondait pour voir, dans la loi Française, un empêchement dirimant au mariage de l'étranger divorcé selon les lois de son pays.

Some divorces allow both parties to marry, others only the innocent.

Sans doute, disait-on, il faut reconnaître la distinction des statuts personnels et les statuts réels; par suite, les époux mariés en pays étranger suivant les formes et usages de leurs pays, jouissent en France de l'état d'époux, et leurs enfants, de l'état d'enfants légitimes. Mais le divorce n'est pas, comme le mariage, admis par toutes les nations; même parmi celles qui l'ont autorisé, ses effets varient suivant les diverses législations, les unes déclarant indistinctement les deux époux capables de contracter un nouveau mariage; les autres, au contraire, donnant cette faculté à l'époux innocent, et la réfusant à l'époux coupable. En France, la loi civile dispose qu'on ne peut contracter un nouveau mariage avant la dissolution du premier, et ne reconnaît plus le divorce comme un motif de dissolution du mariage. Dès lors, une personne engagée dans les liens d'un premier mariage, même contracté en pays étranger, ne peut, à la faveur d'une divorce que la loi Française ne reconnaît pas et dont les tribunaux Français ne sauraient apprécier les effets, contracter un second mariage en France.

The case of two foreigners different from that of a native and a stranger—the case in hand.

Admettons, dit-on encore, que le statut personnel de l'étranger le suive en France et continue de le régir quand à sa personne; ce principe est constant, mais seulement lorsqu'il s'agit d'apprécier la capacité de l'étranger insolément, sans relation avec la capacité

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d'un Français. Ainsi ce statut suivra l'étranger quant à l'âge nécessaire pour le mariage, si la puberté fixée par la loi de son pays n'est pas la même que celle de la loi Française. Si donc il s'agit de deux étrangers soumis au même statut, c'est ce statut, et non la loi Française qui devra être appliqué. Mais lorsqu'au lieu de deux étrangers, c'est entre un étranger et un Français que le contrat doit se former, la qualité du Français ne saurait être relevée par le statut personnel de l'étranger, qui lui seul peut invoquer. D'un autre côté, le mariage n'est pas une convention privée, c'est une institution d'ordre public, et les lois qui en règlent les conditions, sont obligatives pour tous en France. Le statut personnel de l'étranger ne peut donc prévaloir en cette matière, en tout qu'il est contraire aux empêchements dirimants contenus dans les lois Françaises. La loi abolitive du divorce doit être maintenue à l'égard de tous; et de même que deux étrangers ne pourvaient réclamer en France, devant nos tribunaux, la proclamation du divorce, bien que le divorce fût autorisé par la loi de leur pays, de même l'étranger ne saurait être admis à invoquer ce mode de dissolution, proscrit par la loi Française, pour contracter en France un second mariage.

A ces raisons, puisées dans la jurisprudence de la Cour de Paris, M. Mailher de Chasses, qui adopte cette jurisprudence, sans en approuver tous les motifs, ajoute les considérations suivantes, qui lui paraissent décisives:

"Le divorce n'est pas seulement une atteinte grave portée au mariage, il est encore une modification plus ou moins profonde de l'état des personnes dans tous les pays civilisés. Mais chez nous, il intéresse au plus haut degré les mœurs, l'ordre public, le bonheur, la dignité des familles; il tient même par le lien religieux à notre droit public, car, dans le silence de la loi civile, l'indissolubilité du lien conjugal resterait encore en vigueur chez nous, comme l'une des maximes fondamentales du Royaume. Cette dernière considération doit être la même pour tous les pays chez lequels vivent encore les dogmes du catholicisme, le respect pour les règles de la foi et de l'antique discipline, l'attachement à la purité des mœurs. C'est dans cet esprit général, et d'après ces considérations, que doit être résolue la question suivante (c'est la nôtre) . . . . Le juge Français reconnaît dans l'étranger sa qualité de national de tel pays, époux divorcé, c'est-à-dire la nationalité même de cet étranger, modifiée par celle d'époux divorcé, comme elle pourrait l'être par l'état de mort civilement, de faillite, d'interdiction, au tout autre; et s'il est appelé à statuer sur cette nationalité ainsi modifiée, il aura recours à la loi de l'étranger, qui definit et sa nationalité, et la modification qu'elle a subie, pour en faire l'application; mais il refusera à cette nationalité ainsi reconnue et constante en France, les effets ou les conséquences, même formellement consacrées par la loi étrangère, qui peuvent blesser la législation, les mœurs, l'opinion, l'ordre public Français, ou les droits des tiers: car, magistrat Français, son premier devoir est de faire respecter et d'appliquer les lois de son pays, lorsqu'on se prevaut devant lui d'une législation étrangère pour accomplir un fait qu'elle réprouve. Il refusera donc, dans l'espèce, de consacrer la disposition de la loi étrangère, qui autorise l'époux divorcé à se remarier, comme contraire à la loi Française."—Traité des Statuts, p. 262.

Ainsi donc, conclut-on, la jurisprudence de la Cour de Paris, sans porter atteinte à la distinction des statuts personnel et réel, donne satisfaction aux sentimens de morale publique et religieuse qui ont dicté la loi du 8 Mai 1816, loi d'ordre public au

premier chef, une de ces lois de police, à prendre le mot dans son acception la plus élevée, qui, aux termes de l'Art. 3 du Code Napoléon, obligent tous les habitants de la France, sans distinction d'étrangers et de nationaux; elle empêche des scandales, des immoralités; elle défend les mœurs et protège la famille; elle doit donc être adoptée et consacrée par la Cour de Cassation.

Nous passons à l'exposé du système opposé.

Argument of Mrs. Bulkley against the "Maire."

Il ne faut pas, dit-on dans ce système, qu'une nation, qu'une législation, quelque avancées, quelque parfaites qu'elles se prétendent, entreprennent de ranger à leur imitation le reste du monde. Personne n'a le droit de dire: "*Legis ad exemplar totus componatur orbis.*" De tous temps, au contraire, chaque souveraineté a reconnu l'indépendance des autres souverainctés: "Chacun chez soi, chacun son droit." Les limites territoriales d'une nation sont les limites naturelles données à l'autorité de ses lois; elle ne pourra les faire respecter à l'étranger que si elle respecte elle même les lois étrangères.

Ce principe, de toute justice, de toute évidence, reçoit une confirmation, plutôt qu'une exception, de la distinction fondamentale établies entre les lois personnelles et les lois réelles. Si les premières ont force et vigueur hors du territoire où elles ont été edictées, c'est que, constituent l'état des personnes, elles s'attachent à ces personnes, les suivent en tous lieux, comme une émanation toujours présent du pouvoir souverain qui a conféré à la personne de son sujet telle capacité, telle incapacité, tel état indélébile, et que doivent respecter, en quelque lieu que ce soit, tous ceux qui ne peuvent toucher à la souveraineté d'origine qui a agi dans la limite de ses pouvoirs.

Delà ces expressions si énergiques de nos anciens auteurs, posant la règle fondamentale du statut personnel: "*Et hæc plane discrimen ostendunt*, dit d'Argentré, *quod personalia nullo territorio finiantur realia territoriis omnibus.....Personale denique illud censendum est quod personæ legem ponit.....veluti ætatis, interdictionis, legitimationis, excommunicationis, infamationis.....*"

Ecoutons aussi Boulnois: "*Statutum valiturum extra territorium est conditio statutorium personalium;* et ce principe est vrai par rapport aux qualités personelles et d'état que la loi du domicile (d'origine) imprime dans l'homme, qui par cette raison est affecté de ces qualites, et qu'il porte partout, l'homme étant le même partout quant à ses qualités personnelles et d'état, et les lois d'une autre domination ne pouvant agir sur une personne qui ne leur est pas soumise. Il est encore vrai par rapport aux actes personnels, parce que ces actes étant attachés à la personne, leur validité dépend entièrement des qualités et capacités personnelles de celui qui les passe . . . ." C'est ce que le même auteur qualifie en citant un jurisconsulte plus ancien, Vandermeulin: "*Subjectus enim, extra territorium subjectionem quamdam radicalem seu habitualem retinet, quam qualitatem ut ossibus ipsius inhærentem ubique secum fert.*"

"Tous nos jurisconsultes Français ont pris ces règles pour base de leurs écrits les plus autorisés. Loysel, Ricard, Lebrun, Duplessis, en font l'application aux matières qu'ils traitent; les Parlements les maintiennent avec une jalouse vigilance. Bourgon les résume en quelques lignes comme l'expression incontestée de la doctrine et de la jurisprudence de son temps."

The law of the domicil fixes the status, which other countries must accept.

"Le statut personnel . . . . suit la personne dans tel lieu qu'elle soit. C'est l'effet naturel du statut personnel qui milite abstraction faite de la résidence de la personne, et qui la suit partout; c'est sa loi . . . *Celui qui par la loi de son domicile est*

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interdit ou infâme, ou universellement incapable de disposer, porte partout avec lui cette infamie, cette interdiction, cette incapacite universelle; . . . et tel est le vrai statut personnel, loi qui influe sur la capacité. De même, lorsqu'il a capacité par la loi de son domicile, cette capacité le suit partout, même dans l'étendue d'une coutume qui la lui dénierait.—(Droit Commun de la France, t. 1, page 111.)"

Le Code Napoléon a-t-il dérogé à ces principes? Il les a confirmés, au contraire, de la manière la plus formelle. L'Art. 3 du Code pose la distinction des lois réelles et des lois personnelles: les premières sont seules applicables à l'étranger possédant des immeubles en France; les secondes, celles concernant l'état et la capacité des personnes, régissent les Français même résidant en pays étranger, ce qui veut dire, sans doute par application du principe de réciprocité qui fait la base de notre Code, quant aux relations internationales Art. 11 et autres, que les lois concernant l'état et la capacité des personnes régissent les étrangers, même résidant en France; et si le législateur ne l'a pas dit en termes plus explicites, c'est que, faisant une loi civile, et non une loi du droit des gens, il lui a semblé suffisant et plus convenable à son sujet de s'expliquer seulement sur les droits personnels des Français, sur les droits réels attachés au territoire de France, en posant d'ailleurs le principe de réciprocité. C'est ce que professe Merlin (Repertoire, v° Loi, § 6), s'appuyant sur de nombreux arrêts de la Cour de Cassation; c'est ce qu'avait expliqué Tronchat au cours de la discussion devant le Conseil d'Etat, lorsqu'il disait, posant une hypothèse voisine de celle de l'affaire actuelle: "Un Français demeure soumis aux lois de son pays par rapport au mariage, mais ces lois ne s'étendent pas à l'étrangère qu'il épouse. Il lui est donc permis de prendre une fille à qui les lois du pays où il se trouve donnent la capacité de se marier."

On le voit, Tronchet parle du mariage contracté par le Français, portant avec lui sa capacité personnelle, avec une étrangère dans le pays de celle-ci. Mais le principe n'est-il pas le même, quelque soit le lieu de la célébration du mariage? Réciprocité parfaite entre les deux législations, respect de tous pour le statut personnel de chacun, appréciation de la capacité ou de l'incapacité de chaque époux suivant sa loi propre; telle est la règle de droit et d'équité universellement suivie, règle que la Cour de Paris fausse par sa jurisprudence tout en faisant professions de la respecter.

Quel est le fondement de ces arrêts? Ils ne peuvent en avoir qu'un seul, l'Art. 147, Code Napoléon, portant "qu'on ne peut contracter un second mariage avant la dissolution du premier."

Que doit donc prouver, pour établir sa capacité, celui des futurs conjoints qui a été précédemment dans les liens du mariage? Il doit prouver la dissolution de son premier lien. De quelle manière devra-t-il faire cette preuve, et conformément à quelle législation?

La réponse ne semble pas difficile. La dissolution d'un mariage contracté à l'étranger, entre étrangers, sous la loi étrangère, ne pourra êtra prononcée à l'étranger que conformément à la loi du pays; et la dissolution ainsi prononcée par le juge compétent, en vertu de la loi personnelle du parties, devra être respectée partout comme un fait légalement accompli: elle devra l'être en France, quoique les motifs de la dissolution du mariage puissent ne pas être conformés à la loi Française.

When a stranger brings proof that he is solutus matrimonio, by showing that his marriage has been dissolved, he does enough.

Ne parlons pas encore de divorce. Les causes de nullité ou de dissolutions de mariage varient selon les lieux. La France aurait-elle la prétention d'imposer aux nations étrangères sa législation propre, qui n'a pas toujours été invariable? Et lorsque un étranger

viendra devant l'officier de l'état civil Français, présenter la preuve authentique que son mariage a été annulé ou dissous par la loi et par le juge de son pays, n'aura-t-il pas fait tout ce qu'on peut exiger de lui pour prouver qu'il est *solutus matrimonio*, et qu'il a capacité pour convoler à un second mariage?

Le divorce et la mort naturelle ne sont pas partout, comme dans beaucoup de pays, les seules causes de dissolution du lien matrimonial. Plusieurs nations n'ont pas aboli la mort civile comme cause de dissolution du mariage. L'Angleterre conserve encore, comme cause de nullité, *l'impuissance naturelle*, si sagement *écartée par nos lois*. Ailleurs, des causes religieuses peuvent faire annuler ou dissoudre l'union conjugal. Faudra-t-il donc, en ces différentes circonstances, donner aux tribunaux Français un droit de contrôle sur les décisions souverainement rendues par des tribunaux étrangers, dans la limite de leur compétence nationale; et pourra-t-on écarter comme non probantes ces décisions, par le motif que, conformes à la loi du pays, elles ne le seraient pas à la loi Française? Ce serait une usurpation de souveraineté.

Aussi est-il universellement admis que de pareils jugements ne sont pas de ceux qui ont besoin de la sanction de l'autorité Française pour obtenir, conformément aux Art. 2,133 du Code Napoléon, et 546 du Code de Procédure Civile, force exécutoire en ce qui concerne les biens qui se trouve en France. "Ce sont, dit M. Demolombe, des jugements qui, constitutifs d'état des personnes, doivent avoir en France le même effet que la loi personnelle en vertu de laquelle ils ont été rendus." (Demolombe, t. 1^er^, No. 103; Merlin, Rep. v°, question d'Etat, t. 17, p. 472; Fœlix, Droit international, N^os^ 65 et 333; Aubry et sur Zachariæ, 3^eme^ éd., p. 85.)

Aujoutons que si les tribunaux Français pouvaient s'emparer du droit de révision sur de semblables jugements, ils ne pourraient l'exercer qu'en se conformant à la loi étrangère, au statut personnel sous lequel le mariage aura été contracté et dissous. On revient donc toujours à cette consécration inévitable du respect dû à la loi personnelles toutes les fois qu'il s'agit d'apprécier la capacité ou l'incapacité des personnes.

C'est ainsi que la Cour de Paris, par arrêt du 13 Juin 1814, rendu en audience solennelle, déclare inhabile à contracter mariage en France un capucin Espagnol, incapable par les lois de son pays, quoique les vœux monastiques ne fussent plus reconnus en France.

Ainsi encore, un arrêt de la Cour de Cassation du Février 1818 (§ 19. 1. 41), rendus sur des faits antérieurs à le loi abolitive du divorce en France, a refusé à un étranger la faculté de faire prononcer son divorce, *parce qu'il était marié dans un pays et sous une loi qui regardait le mariage comme indissoluble.* "Incapacité par application du statut personnel de l'étranger."

Ainsi, enfin, un arrêt de la Cour de Nancy, du 30 Mai 1826, préparé par les savantes conclusions d'un magistrat (*a*) que de hautes convenances nous empêchent de nommer ici, reconnaît la capacité de l'étrangère à contracter mariage avec un Français, par application de son statut personnel; il s'agissait d'une Prussienne, divorcée selon les lois de son pays, mariée ensuite avec un Français depuis la loi de 1816; la nullité du mariage était demandée.

"Attendu, dit la Cour de Nancy, que Poirson n'est pas mieux fondé à prétendre que son mariage est nul à raison de l'incapacité attachée à la personne de Dorothée Charlotte Nass, résultant de sa qualité de femme divorcée, qui selon lui mettait obstacle à ce

(*a*) M. Troplong.

qu'elle épousât un Français à une époque où le divorce n'était plus admis en France comme opérant la dissolution du mariage....

"Attendu qu'il résulte des pièces de la procédure que Dorothée Charlotte Nass avait, dès le 24 Août 1815, fait prononcer par le tribunal compétent une sentence qui déclarait dissous le mariage qu'elle avait contracté avec Kretschmeger, et que d'après les lois Prussiennes, *et sans blesser les principes de la religion qu'elle professe*, elle était devenue au 8 Septembre 1816, capable de contracter une nouvelle union; que pour que cette capacité qu'elle tenait de son statut personnel dût souffrir quelque atteinte à raison de son mariage avec un Français, il faudrait que la loi Française contînt une disposition formelle et non équivoque; *car les incapacités sont de droit étroit;* et ne peuvent se tirer par induction ou augmentation de l'harmonie qui devrait exister entre les lois civiles et religieuses d'un état; que la loi du 8 Mai 1816, en abolissant le divorce en France, n'a point privé, d'une manière explicite, les époux divorcés avant sa publication, de la faculté qu'ils avaient de contracter une autre union d'après les dispositions combinés des Art. 147 et 227 du Code Civil; que dès lors la nullité invoquée par Poirson n'existe réellement pas dans l'état actuel de la législation Française, et qu'on ne pourrait la prononcer sans violer les principes relatifs à l'interpretation des lois; par ces motifs, etc." (§ 26. 2.)

Voilà donc, confirmés par la jurisprudence, les principes admis par la doctrine. Capacité, incapacité pour contracter mariage, dépendent du statut personnel de chacun des futurs époux. La liberté conquise par celui qui avait été dans les liens d'un mariage, *précédent le suit partout, s'il l'a obtenue par les moyens légaux dans son pays, et s'il le prouve conformément aux lois du méme pays.*

La Cour de Paris n'attaque pas ouvertement ces principes, mais elle veut établir une distinction. L'étranger serait bien protégé par son statut personnel, mais seulement lorsqu'il s'agit d'apprécier la capacité de l'étranger isolément, sans relations avec la capacité d'un Français; la capacité du Français ne saurait être relevée par le statut personnel de l'étranger que lui seul peut invoquer.

Ce raisonnement serait juste s'il s'agissait d'une cause d'empêchement qui fut commune aux deux futurs, par exemple de l'empêchement resultant de la parenté. Mais ici, il s'agit d'une qualité, d'une capacité, propre à chacun, et qui ne peut influer sur la capacité de l'autre.

"Ces empêchements, dit Merlin, qui a consacré une dissertation complète à réfuter l'arrêt de 1824 de la Cour de Paris, n'affectent que celui de ces individus qui, à raison de sa qualité de Français, est soumis aux dispositions du Code Civil par lesquelles ils sont établis; et par conséquent encore, ils ne peuvent porter obstacle au mariage, si, n'existant pas dans la personne du Français, ils sont lévés dans la personne de l'étranger par le statut de son pays."—(Questions de Droit v° Divorce, § XIII.)

Et M. Merlin cite à l'appui de cette doctrine l'Art. 170 du Code Napoléon portant du principe consacré par l'Art. 3, que les lois concernant l'état et la capacité des personnes regissent les Français, même resident en pays étranger, déclare que le mariage contracté en pays étranger entre Français et entre Français et étranger sera valable ... pourvu que le Français n'ait point contrevenu aux dispositions du chapitre précédent, dans lequel sont écrits les divers empêchements de mariage.... "On voit que l'article ne dit pas: Pourvu que l'époux étranger n'ait point contrevenu aux dispositions des Art. 144 et 148.... Et pourquoi ne le dit-il pas?

Parcequ'il considère ces empêchements comme restraints à la personne du Français, parceque sur le point de savoir si les mêmes empêchements existent dans la personne de l'époux étranger, il s'en rapport à la loi qui regit l'état et la capacité de celui-ci."

Ces principes auraient-ils été (*a*) par la loi de 1816, et l'arrêt de Nancy aurait-il en tort d'affirmer qu'il n'existe pas dans cette loi de disposition qui interdise le mariage, soit aux époux divorcés en France avant la loi de 1816, soit aux époux divorcés à l'étranger?

La Cour de Paris soutient l'affirmation contraire. Elle invoque, et le caractère de la loi de 1816,—loi d'ordre public, une de ces lois de police et de sûreté qui, aux termes de l'Art. 3 du Code Napoléon, obligent tous ceux qui habitent le territoire,—et l'esprit de cette loi, qui a vu dans le divorce une atteinte à la morale publique et religieuse, et qui n'a pu vouloir supporter le scandale d'un second mariage qui aux yeux de la loi nouvelle, ne serait qu'adultère ou bigamie.

Sans doute la loi abolitive du divorce est une loi d'ordre public; mais que declare-t-elle être d'ordre public? l'abolition du divorce en France. On conçoit donc que si un tribunal ou un officier de l'état civil oubliaient assez leur devoirs pour prononcer un divorce, il y aurait dans un pareil acte une nullité d'ordre public, opposable, même par les parties qui auraient consenti, opposable même par le ministre public. On conçoit encore que des étrangers, même mariés sous une loi qui autorise le divorce, ne pourraient pas venir demander à la justice Française la dissolution de leur union par cette voie abolie en France. Mais y a-t-il rien de semblable dans la demande d'un étranger qui ne demande pas le divorce, c'est-à-dire, la chose défendue par la loi Française, mais qui, en possession de son état d'époux divorcé selon la loi d'un pays où la loi Française n'a rien avoir, demande à user de la liberté qu'il a conquise et qui le suit partout?

The moral question.

Quant à l'empêchement tiré de l'honnêteté publique, de l'outrage fait aux mœurs du pays par le spectacle de l'union contractée par l'époux dont le conjoint est encore vivant, on a pu, à cette occasion, troubler des consciences, éveiller des scrupules; mais il n'y a là rien que doive arrêter le jurisconsulte, ni embarrasser l'organe de la loi.

Disapprobation of the abolition of divorce.

Il est certain qu'à l'époque où fut votée la loi de 1816, il régnait des préoccupations politiques et religieuses peu en harmonie avec les grands principes de cette époque mémorable qui avait sécularisé la législation. Peut être la loi abolitive du divorce fut elle due à ces tendances, mais il faut voir ce qu'il y a dans cette loi, et non ce qu'auraient voulu y mettre peut être ceux qui la proposaient. Car, lorsque peu de temps après cette loi (le 7 Décembre 1816), et obéissant à la pression d'une opinion extrême, le gouvernement proposa à la chambre des pairs une loi d'éxécution de celle portant abolition du divorce, il put bien obtenir de cette branche du pouvoir législatif, et malgré les plus vives protestations, le vote d'un article qui, autorisant la réunion des époux divorcés, leur interdisait tout autre mariage jusqu'après le prédécès de l'un d'eux; mais les réclamations furent si fortes contre cette disposition, visiblement entachée de rétroactivité, méconnaissant visiblement les droits acquis et la liberté régulièrement obtenue, que l'on n'osa porter à l'autre chambre un projet de loi qui n'était pas né viable. La loi du 8 May 1816 demeura seule.

(*a*) The word left blank cannot be deciphered.

Aussi lorsque s'éleva la question de savoir si l'époux divorcé avant la loi de 1816 avait conquis définitivement sa liberté, et pouvait contracter sous la loi nouvelle un second mariage, il n'y eut pas de difficulté sérieuse: la loi ne pouvait être entendue, puisqu'elle ne l'avait pas dit, dans un sens contraire au principe de nonrétroactivité; elle avait maintenu les divorces antérieurement prononcés, elle avait donc maintenu leurs effets légaux, au nombre desquels se trouvait la liberté de se remarier. La doctrine de Merlin (Quest. de Droit, v° Divorce, § XIII.) fut universellement suivre (Aix, 6 Avril 1826, Gazette des Tribunaux, Avril), (Trib. Seine, 17 Mars 1827, Moniteur du 20). Elle se trouve encore fortifiée par l'arrêt de cette chambre du 21 Juin, 1858, rendu pour le cas de mort civile, c'est-à-dire, pour un cas de dissolution de mariage supprimé par la loi du 31 Mai 1854, comme la cause de dissolution de mariage provenant du divorce avait été supprimée par la loi du 8 Mai 1816.

Ce point établi, peut-on voir quelque chose de contraire aux bonnes mœurs et à l'honnêteté publique, dans le mariage contracté en France par un étranger divorcé dans son pays, lorsqu'on ne trouve rien d'illégal, rien d'immoral, dans le mariage en France d'un Française divorcé dans le même pays, c'est-à-dire, sous les yeux d'une conjoint encore vivant?

Mais la loi de 1816, quelque tendance qu'on lui suppose, n'a voulu ni pu vouloir rien de ce qu'on lui prête. Si elle a été conçue sous l'influence de certaines préoccupations religieuses qui auraient volontiers condamné le divorce partout et toujours, n'oublions pas que cette loi, plusieurs fois attaquée depuis, a toujours été maintenue, même dans les temps les moins soumis aux préoccupations et aux scrupules religieux dont nous parlons. Echappée à ces attaques, elle n'a donc gardé que son caractère de loi civile, de loi fondée sur des motifs de moralité universelle, de droit naturel et social, indépendamment de toute appréciation religieuses. Une pareille loi ne peut être accusée d'avoir voulu violer, dans un intérêt qui lui reste étranger, les principes les plus élémentaires de la législation. Elle a respecté, on l'a vu, la règle de nonretroactivité des lois; elle n'a pas non plus porté atteinte au respect dû aux lois étrangères réglant l'état des personnes. Car, sur un point comme sur l'autre, le devoir du législateur est le même: son pouvoir est circonscrit dans le temps et dans l'espace; dans le temps, il ne statue que pour l'avenir, et respecte le passé; dans l'espace, il ne statue que pour son pays, et respecte les faits accomplis ailleurs; le passé et l'étranger échappent également à son autorité.

Si donc une loi avait formellement outrepassé ces bornes, si elle avait dit qu'elle interdisait le mariage, soit aux époux devenus libres antérieurement, soit aux époux devenus libres hors du territoire, il faudrait, tout en déplorant cet écart, obéir à une loi positive, tant qu'elle n'aurait pas été réformée.

Mais lorsque la loi ne dit rien de semblable, lorsqu'elle reste dans les termes généraux du droit, il y aurait témérité à lui supposer des intentions contraires à tous les principes. La Cour de Nancy a donc eu raison de dire, de la femme étrangère divorcée dans sons pays:

"Que, pour que la capacité qu'elle tenait de son statut personnel dût éprouver quelque atteinte à raison de son mariage avec un Français, il faudrait que la loi Française contînt une disposition formelle et non équivoque; car les incapacités sont de droit étroit, et ne peuvent se tirer, par induction ou argumentation, de

l'harmonie qui devrait exister entre les lois civiles et religieuses d'un Etat."

M. Demolombe (t. 1er, N° 101) examine et critique des deux arrêts de la Cour de Paris, de 1824, et de 1843.

"Ces décisions, dit-il, reposent sur plusieurs motifs: 1°. L'étranger, afin de pouvoir se marier en France, ne doit se trouver; dans aucun des cas de prohibition prévus par la loi Française; 2°. Sa capacité personnelle ne peut relever le Français des empêchements dirimants du Code qui le regit; 3°. Enfin, le divorce n'est pas admis en France, et il s'agit ici d'une prohibition d'ordre public.

"Je ne crois pas que ces deux arrêts soient bien rendus.

"En effet: 1°. Dire que l'étranger, pour se remarier en France, doit être, sous tous les rapports, capable d'après la loi Française, c'est nier absolument le principe de l'application des lois personnelles étrangères à l'étranger en France. Or, nous pensons avoir prouvé que ce principe est vrai et doit en général être observé.

"2°. Dire que la capacité personnelle de l'étranger ne relève pas le Français de son incapacité personnelle, c'est confondre tout-à-fait les deux lois, les deux capacités personnelles différentes. Je comprendrais cet argument, s'il s'agissait d'un empêchement fondé sur une qualité commune aux deux futurs époux, par exemple, si un étranger, capable, dans son pays, d'épouser sa nièce sans dispense, prétendrait épouser sa nièce Française sans dispense accordée par le Roi . . . . Mais il en est tout autrement du divorce qui a dissous le premier mariage de l'un des futurs époux. Ce divorce est un fait passé, et d'ailleurs tout est relatif et personnel.

"3°. Enfin, on a invoqué la morale publique. Il ne s'agit pas ici d'exprimer une opinion sur le divorce: je n'hésiterai pas à dire que je n'en suis point partisan, et que l'indissolubilité du mariage me paraît l'une des conditions les plus essentielles à maintenir dans l'intérêt des familles et de l'état. Mais pourtant, je ne crois pas non plus que l'on doive considérer le divorce à l'égal de la polygamie, comme un de ces attentats à la morale universelle, que les nations policées ne doivent pas absolument reconnaître. Le divorce est admis par plus d'une législation de l'Europe; il l'a été chez nous depuis 1792 jusqu'en 1816; et trois fois dans ces dernières années, l'une des branches du pouvoir législatif en a voté le rétablissement. C'est donc, après tout, un mode comme un autre de dissolution civile de mariage; et je ne vois pas de motifs suffisant pour que nous ne lui reconnaissions par cet effet dans la personne des étrangers. Eh! que dirait-on, si le mariage de l'étranger avait été dissous dans son pays, en vertu d'une autre cause, pour cause d'impuissance naturelle, par exemple? Si vous reconnaissez ce mode de dissolution, pourquoi nier le divorce? Et si vous ne le reconnaissez pas, comment n'être pas effrayé de toutes les conséquences qui vont s'en suivre? Il faudra donc alors juger d'après nos lois Françaises toutes les questions d'état relatives aux étrangers, et les considérer comme bigames, bâtards, adultérins et incestueux, s'il arrive qu'un mariage, valable d'après la loi étrangère, ne le soit pas d'après la nôtre! ....."

"Ajoutez enfin qu'on avoue que si un Français, divorcé en France avant la loi de 1816, abolitive du divorce, demandait aujourd'hui à se remarier, on ne pourrait pas l'en empêcher. Eh bien! n'est-ce pas reconnaître le principe même que nous défendons; savoir, que le mariage est valablement dissous lorsque cette dis-

APPENDIX TO PITT *v.* PITT, No. 1.

REPORT ON MRS. BULKLEY'S CASE.

solution a été prononcée en vertu de la loi par laquelle il était régi?"

Cette opinion est également professée par les derniers annotateurs de Zachariæ, MM. Massé et Vergé (§ 29, note 9, et § 126, note 3).

Tel est le tableau des principaux arguments pour et contre les deux systêmes entre lesquels vous êtes appelés à vous prononcer.

Interest and impatience felt as to the decision in Mrs. Bulkley's case. Many families affected.

Votre arrêt est attendu avec impatience: *il est nécessaire et urgent qu'il fasse cesser les incertitudes qui existent dans la jurisprudence et dans la pratique.* Car, tandis que la maire du 10e arrondissement de Paris refusait de célébrer la mariage de la demanderesse en Cassation, le maire du 2eme arrondissement en célébrait un contracté dans les mêmes conditions. Votre arrêt en rétablissant l'unité dans l'interprétation de la loi, *mettra un terme aux craintes et aux menaces qui pourraient paraître suspendues sur beaucoup de familles.*

(Le réquisitoire, que M. le Procureur Général Dupin a prononcé dans cette affaire, à la Chambre des Requêtes, et qu'il a reproduit à la Chambre Civile, a été imprimé et il en est joint aux présentes un exemplaire qui a été remis par lui.)

JUDGMENT OF THE COUR DE CASSATION.

JUDGMENT OF THE COUR DE CASSATION.

La Cour, après avoir entendu M. le Conseiller Sévin, en son rapport, M. Dareste pour la demanderesse, et M. Labordère pour le Défendeur en leur observations, ensemble M. le Procureur Général Dupin, en ces conclusions, et après en avoir délibéré;

Vu les articles 3, 6, 147 du Code Napoléon, et l'Art. 1er de la loi du 8 Mai 1816:

Attendu que le mariage, en France, est en contrat civil; qu'il ne peut être interdit qu'à ceux qui ont en eux un motif d'empêchement établi par la loi civile;

Attendu que si l'Art 147 du Code Napoléon défend de contracter un second mariage avant la dissolution du premier, cette défense *n'existe pas toutes les fois que la preuve de la dissolution du premier mariage est rapportée;*

Que cette preuve est faite de la part de l'étranger, marié à l'étranger, lorsqu'il établit *que son mariage a été dissous dans les formes et selon les lois du pays dont il était sujet;*

Que telle est la conséquence du principe, reconnu par l'Art. 3, Code Napoléon, de la distinction des lois réelles et des lois personnelles, que celles-ci, qui régissent l'état et la capacité des personnes, suivent les Français, même résidant en pays étranger, et suivent également en France l'étranger qui y réside;

Que c'est donc par les lois de son pays, par les faits accomplis dans ce pays *conformément à ses lois,* que doit être appréciée la capacité de l'étranger pour contracter mariage en France; qu'ainsi, l'étranger, dont le premier mariage a *été légalement dissous dans son pays, soit par le divorce, soit par toute autre cause,* a acquis définitivement sa liberté, et porte avec lui cette liberté partout où il lui plaira de résider;

Attendu que ces principes ne reçoivent aucune atteinte, en France, de la loi du 8 Mai 1816;

Qu'en effet, si cette loi et d'ordre public, et si en conséquence il n'est pas possible d'y déroger par des conventions particulières (Art. 6, C. Nap.); si, par une autre conséquence, il n'est pas permis aux tribunaux d'ordonner ou de sanctionner des divorces que les

officiers de l'état civil ne pourraient prononcer; la loi de 1816 doit être renfermée dans les limites qu'elle s'est tracées, par respect pour les principes de droit les plus incontestés;

Que la loi de 1816 n'a pa vouloir et n'a voulu statuer que pour l'avenir et pour la France; qu'elle n'a atteint, par sa disposition unique, ni les divorces antérieurement prononcés, ni les divorces prononcés regulièrement à l'étranger; que si, ce qui n'est pas contesté, un divorce prononcé en France avant la loi de 1816, a rendu aux époux la liberté de contracter un nouveau mariage, il en est de même de la liberté acquise par l'étranger, dans son pays, au moyen d'un divorce qui aura été légalement prononcé; qu'il n'y a d'atteinte à l'ordre public et aux bonnes mœurs, ni dans un cas ni dans l'autre; et *que la* loi Française, qui ne contient aucune disposition prohibant formellement des mariages contractés dans de pareilles circonstances, n'a fait, par son silence, que confirmer, d'une part, le principe de non-rétroactivité des lois, et d'autre part, le respect dû aux législations étrangères statuant sur l'état et la capacité des personnes soumises à leur souveraineté;

Attendu, en fait, qu'il était constaté, et qu'il n'est pas contesté par l'arrêt attaqué, que Mary Anne Bulkley, Anglaise d'origine, mariée en Holland avec Anthony Bouwens, sujet Hollandaise, avait été divorcée en 1858 par jugement du tribunal de La Haye, inscrit sur les registres de l'état civil conformément à la loi du pays;

Que, par conséquent, Mary Anne Bulkley, lorsqu'elle se présentait en 1859 devant l'officier de l'état civil du 10eme arrondissement de Paris, pour contracter mariage, justifiait de la dissolution de son précédent mariage, et ne se trouvait pas dans le cas de prohibition de l'Art. 147 du Code Napoléon;

D'où il suit qu'en autorisant l'officier de l'état civil à refuser de passer outre à la célébration demandée, l'arrêt attaqué a violé l'Art. 3 du Code Napoléon, et faussement appliqué les Art. 6 et 147 du même Code, ainsi que l'Art. 1er de la loi du 8 Mai 1816;

Par ces motifs, Casse et annulle l'arrêt de la Cour Impériale de Paris du 4 Juillet 1859; *remet les parties en même état qu'avant ledit arrêt;* et pour être fait droit, les renvoie devant la Cour Impériale d'Orléans, sans dépens, l'officier de l'état civil n'ayant fait qu'obtempérer à l'opposition du Ministère Public;

Ordonne la restitution de l'amende, et la transcription du présent arrêt en marge de l'arrêt cassé, à la diligence du Procureur Général près cette Cour, ordonne aussi l'impression du présent arrêt.

Ainsi jugé et prononcé publiquement à l'audience de la Chambre Civile de la Cour de Cassation, le Mardi vingt-huit Février mil huit cent soixante. 28th Feb. 1860.

Certifié véritable par le Greffier-en-Chef de la Cour de Cassation.

BERNARD.

Vu pour la légalisation de la signature de M. Bernard, Greffier-en-Chef de la Cour de Cassation.

LE PRÉSIDENT DU SENAT,

Président de la Cour de Cassation.

TROPLONG.

APPENDIX TO PITT *v.* PITT, NO. 2.

REPORT FROM THE SELECT COMMITTEE OF THE HOUSE OF LORDS,

AS TO

DIVORCE JURISDICTION IN ENGLAND AND SCOTLAND.(a)

10*th April* 1861.

LORDS PRESENT:

The LORD CHANCELLOR CAMPBELL.	LORD MONTEAGLE OF BRANDON.
EARL OF CAITHNESS.	LORD CRANWORTH.
EARL OF WICKLOW.	LORD CHELMSFORD.
LORD REDESDALE.	

THE LORD CHANCELLOR IN THE CHAIR.

JOHN FRASER MACQUEEN, ESQ., Q.C., is called in, and examined:

The Lord Chancellor: You have paid great attention to the subject of divorce?

Yes; for 20 years.

You were Honorary Secretary to the Commission which was appointed to consider the subject?

I was. The Commissioners of Divorce had in their contemplation the establishment of a court which should come, as it were, into the shoes of the Legislature, and which should grant divorces to persons domiciled, (or at all events to British

(a) In the "Conjugal Rights Bill" presented by Lord Chancellor Campbell to the House of Lords in the Session of 1860 there were two clauses as to divorce jurisdiction, in these terms:—

1. "It shall not be competent to raise and prosecute an action of divorce "unless the Defender has his or her domicil in Scotland; or, the action being "one for divorce on the ground of desertion, the Defender has deserted the "Pursuer at a time when the Pursuer had her domicil in Scotland, the Pursuer "continuing to retain such domicil or reside in Scotland until the action is "raised; and the domicil here referred to shall be held to be the domicil "according to the law by which the succession to moveable estate would be "regulated in cases of intestacy.

"2. A decree of divorce pronounced after the passing of this Act by the Court "of Session in terms of this Act shall be recognized and given effect to as a valid "decree, dissolving the marriage to all intents and purposes whatever, in all "parts of Her Majesty's dominions, notwithstanding that the marriage thereby "dissolved may not have been celebrated in Scotland."

These clauses were assented to by the House of Lords, and the Bill containing them went down to the Commons, who dissented from them and rejected them. On the 23rd August 1860, the Bill having returned back to the Upper House, the Lord Chancellor moved a resolution to disagree with the Commons, and for such disagreement prepared the following reasons:—

"1. Because a suit to dissolve the tie of marriage ought to be entertained only "by the Courts of the country in which the parties whose marriage is to be "dissolved are *bonâ fide* domiciled according to the well-known law by which "the succession to moveable estate is regulated in case of intestacy. 2. Because "the present practice in Scotland of entertaining such suits *ratione originis*, "*ratione delicti*, or upon a forty days' residence in Scotland, is inexpedient. "3. Because if the domicil of origin has been abandoned, and a new domicil "has been acquired in a foreign country by a native of Scotland, he ought not "for the purposes of such a suit to be considered domiciled in Scotland, unless "he should have duly recovered his domicil in his native country. 4. Because "jurisdiction over adultery, *ratione delicti*, applies where adultery is to be "prosecuted as a crime, and not to a suit to dissolve the tie of marriage.

subjects, domiciled) in any of Her Majesty's colonies or foreign dependencies. A Bill having a provision to this effect was drawn by myself, as Honorary Secretary to the Divorce Commission, early in 1853. Judging by what took place in this House, I have the impression that Lord Chancellor Cranworth had this intention. His Lordship's Act (*a*), indeed, contained no express clause as to the colonies, or our foreign dependencies, or as to Ireland, but neither did it contain any clause as to England itself specifically, the terms of the enactment being, however, wide enough to comprehend Ireland and all Her Majesty's dominions, foreign as well as domestic. It seems tolerably certain that the intention of Lord Cranworth was the same as that of the Divorce Commissioners. His Lordship's Bill of 1858 contained a clause (section 5) providing that "any person wherever resident or domiciled might ask divorce at Westminster, who, before the passing of the Divorce Act, might have obtained divorce, *a mensa et thoro*, in England, Ireland, India, or any of Her Majesty's colonies." This section was struck out by the House of Commons; but whether because they deemed it unnecessary, or because they deemed it objectionable, is now uncertain.

The system of Parliamentary divorce was a grievance to all our foreign dependencies. The new tribunal was intended to redress it. We collect from Mr. Burge that it was never the policy of the Home Government to permit dissolutions of marriage to be granted by tribunals of local jurisdiction. In the first vol., p. 660, of his work on Colonial Law, he states that "it was an instruction to the governors of colonies not to give their assent to any Act of the other two branches of their Legislature for dissolving marriages."

The decision of the twelve judges of England in the Lolley case, was that "no sentence of any foreign court could dissolve an English marriage;"—a decision regarded by the Scotch lawyers as an outrage; they insisting that the prior judgment of the Scotch Court dissolving Lolley's English marriage was valid, although

"5. Because if a residence of forty days in Scotland is considered sufficient to "give jurisdiction to dissolve a marriage between parties married and domiciled "in another country, a facility is afforded to obtaining of collusive divorces, "and a scandal is brought on the administration of the law of marriage. 6. "Because the most grievous inconvenience arises from the existing state of the "law of Scotland and England on this subject, as declared by judicial decisions "in both countries; for, according to this, where parties have been married in "England, a sentence of divorce pronounced in Scotland is valid in Scotland, "and a nullity in England, so that the divorced woman still remains the wife "of the husband in England, but the husband and wife are free to contract "another valid marriage in Scotland, and the children of such second marriage "are legitimate in Scotland, but bastards in England, and the husband or wife "again marrying in England after the divorce in Scotland is liable to be in-"dicted for bigamy and punished by penal servitude." These reasons were adopted by the House of Lords, and sent down to the Commons. The Session of Parliament being then far advanced and near an adjournment, the Bill was abandoned. Soon afterwards Mr. Fraser, of the Scotch Bar (the well-known author of the valuable Treatise on the Law of Domestic Relations), published a pamphlet which excited much attention, on the "Conflict of Laws in Cases "of Divorce," which he justly said had been a subject of disputation between the English and Scotch lawyers "for more than half a century." Lord Campbell read this able brochure with much interest, and determined to take steps, if possible, to bring the "controversy" to an end. He further came to a resolution that it would be expedient to extend the divorce jurisdiction to our colonies and foreign dependencies. With this view, after much deliberation, he, on the 11th March 1861 (see Hansard's Parliamentary Debates,) moved for a Select Committee of the House of Lords to consider and report upon "the law respect-"ing the parties who are entitled or ought to be entitled to sue in the Divorce "Court in England and in the Court of Session in Scotland for a dissolution "of marriage." The report of the Committee as above was made on the 22nd of July 1861.

(*a*) 20 & 21 Vict. c. 85.

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Lolley's domicil was not in Scotland but in England. Lord Meadowbank observes, that divorce may be granted "wherever the person concerned is found," adding, that he becomes liable to the Scotch jurisdiction "the instant he sets his foot in Scotland." So Mr. Fraser, in his able pamphlet (*a*), says (p. 40), "that the Scotch law speaks to ambulatory foreign couples precisely as it speaks to domiciled native couples." "Once," says he, "we get rid of the arbitrary dogma that conjugal rights, and all violations of them, must depend on domicil, there is no difficulty in the matter."

The maxim of the twelve English judges was delivered without any reference to domicil. They simply gave enunciation to the principle of matrimonial indissolubility. Now, the Scotch judges were, I presume, right in asserting their power to dissolve an English marriage, supposing the domicil to have been Scotch at the time of the suit; and the English judges were, I presume, wrong when they affirmed the absolute impossibility of dissolution, wherever the domicil might have been. The reasonings of Lord Meadowbank, though able and attractive, are unsatisfactory in this respect, that they treat the matter of domicil, where strangers are concerned, as wholly immaterial; whereas all the Law Peers who have spoken on the subject seem to be of opinion that domicil is the true and the only general basis of divorce jurisdiction. Text writers and jurists concur in this view. Thus Mr. Burge, in his "Colonial Law," vol. i. p. 680–691, says, "The appropriate law by which the dissolubility of the marriage contract is to be determined is that of the actual domicil;" and Mr. Bishop, an eminent American writer on divorce, p. 721, affirms that "the tribunals of a country have no jurisdiction over a cause of divorce if neither of the parties have an actual *bonâ fide* domicil within the territory." Dr. Lushington has pointed out that it did not appear in the Lolley case, that "there had been any discussion on the very important question of domicil." In *Tollemache* v. *Tollemache*, the domicil being English, notwithstanding a divorce had in Scotland, the full Court at Westminster, on the 9th July 1860, deemed it necessary to divorce the parties over again, on the express ground that it could "not recognize that Scotch divorce as putting an end to the marriage bond of a domiciled Englishman." In the recent case of *Dolphin* v. *Robins*, 3 Macqeen, 581, Lord Cranworth intimated something more than the inclination of his opinion that where there is a *bonâ fide* Scotch domicil, the Scotch Court may dissolve an English marriage. And Lord Kingsdown did not demur to this doctrine, although he, in the same case, showed a disposition to dissent from another portion of Lord Cranworth's opinion. (See Macq. Div. 245.) The inference to be deduced from these high authorities is, that where the domicil is veritably Scotch at the time of the suit, there the dissolving power of the Scotch Court will be competent to put an end to a marriage had in England between parties who, at the time of entering into the marriage, were domiciled in England.

(*a*) The Conflict of Laws in Cases of Divorce, by Patrick Fraser, Esq., Advocate. Clark, Edinburgh, 1860. At p. 74 he remarks that the first step towards improvement will be to teach the English Courts the duty of paying more respect to Scotch decisions. The Southern "discourtesy" he attributes to an ancient wound. Will "these English," he exclaims, "never forget Bannockburn?" Here Mr. Fraser is himself "discourteous" and unkind. He calls up painful recollections. When a polite Scotsman addresses the Saxon nation, he studiously abstains from any allusion to a certain battle fought near Stirling. If obliged to mention it, he apologizes.

The Scotch lawyers vindicate their disregard of domicil by saying, in the language of Lord Meadowbank, that if they were to decide otherwise, a "great proportion of persons would be without law in this matter, and might remain like the gypsies of former times, at liberty each to do that which was good in his own eyes. Foreigners, equally with natives, while residents are subject to the law here, and, of course, are under the protection of the law. If the law refused to apply its rules to the relation of husband and wife among foreigners in this country, Scotland could not be deemed a civilized country. If it applied not its own rules, but those of the law of a foreign country, the supremacy of the law of Scotland within its own territories would be compromised." It is very remarkable that Professor Story is carried away by this skilful argument, which he quotes without dissent. But he quotes with commendation the opposite opinion of one whom he justly designates "a learned Scottish jurist," namely, Mr. Fergusson, who is the reporter of the very case in which Lord Meadowbank delivers the opinion quoted by Professor Story. Mr. Fergusson repudiates the proposition that "adultery and presence within the judge's territory" are sufficient to found a jurisdiction over foreigners. Mr. Fergusson, in the face of Lord Meadowbank, affirms that "by setting at nought the laws of other nations, reproach must be brought upon our own, and doubts and contests must ensue as to rights of legitimacy and succession." (Fergusson's Reports of Divorce Cases, Introduction, pp. 18 and 19.) It is also deserving of attention that in *Pye* v. *Pye* (Macq. Div. 240, 265) and in *Teush* v. *Teush* (Macq. Div. 246, 263), Lord Meadowbank established his own doctrines simply by reversing the decisions of very able and experienced commissaries, who had held that domicil was the sole proper basis of divorce jurisdiction. Mr. Fergusson, himself a commissary, appears to have considered Lord Meadowbank's rulings a little dictatorial; for he says, "the commissaries now understood that their duty of *obedience* was prescribed to them," and he adds that afterwards the Lolley case came before them, where they were, as it were, constrained to pronounce divorce without regard to domicil. (Fergusson on Scotch Consistorial Law, published in 1829, pp. 45, 46.) Mr. Fraser indeed asks, "Are we to hold that a woman resident among us is without redress, though married to a man faithless and cruel, who, not content with the sin of adultery, adds to it the barbarity and cowardice of personal violence?" Here, I apprehend, both Lord Meadowbank and Mr. Fraser forget, that to refuse divorce is not necessarily to refuse all other relief.

Mr. Fraser urges that adultery contaminates the public morals, and this is undeniable. But how does it appear that divorces will prevent adultery, or necessarily purify the public morals? Divorces are a public evil, although they are a just and, in many cases, a most proper relief to private injury.

The Scotch lawyers maintain that adultery is a crime, and, as such ought to be punished by divorce. But divorce is not always a punishment, it is often not only an accommodation to the injured party, but a great satisfaction also to the offending party. Mr. Fraser, discussing this topic, states (p. 37) that until 1830 there was a public officer in Scotland, whose duty it was to see that "no adulterer remained undivorced." Hence they say in Scotland that the guilt of both parties fortifies the claim to

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divorce, a doctrine which your Lordships cannot hear without astonishment (*a*).

If such are indeed the genuine doctrines of the Scotch law, how can Mr. Commissioner Todd, a Scotch judge of the first eminence in this branch of jurisprudence, be right when he says that "divorce is a mournful remedy which the Scotch law neither commands nor approves, and which it dispenses with an unwilling hand"? (Macq. Div. 47.) How can the plea of condonation—undoubtedly sanctioned by the Scotch law—be reconciled with the duties of Mr. Fraser's formidable official, who is to ferret out cases of adultery, and to prosecute divorce in spite of the entreaties of both parties to be let alone?

It would rather seem that in the case of foreigners visiting us transiently, judicial separation would satisfy all rational requirements. Judicial separation leaves the wife to enjoy the name of her children. For it is one of the evils of divorce, that when obtained at the suit of even the most meritorious wife, if there are children, and she has the custody of them, her position is anomalous and nondescript. Such a mischief is not a ground for refusing divorce, when demanded on sufficient grounds from the Court of the domicil, but it is a reason for refusing divorce when sought by a stranger, whose permanent status ought, as it would seem, to be fixed and established by the laws of his own country alone.

The great object is so to regulate the administration of a jurisdiction affecting permanent personal status as that the decisions pronounced in one country shall secure the respect and assent of all other countries. This can only be effected by proceeding on some known general basis of jurisdiction recognized throughout Christendom.

The conflict between the law of Scotland and the law of England can scarcely with propriety be called a conflict of international law. The Scotch and English are one people. They have different municipal codes, but in matters affecting permanent personal status there ought to be a common test of jurisdiction.

It is also desirable to prevent a conflict between the decisions of the Courts of this country (English as well as Scotch) and the decisions of the Courts of foreign and independent nations. Now, last summer there was the sentence pronounced in the case of *Malac* v. *Malac* (Macq., Div. 333), where, without saying who was wrong or who was right, this result arose, that a lady was first pronounced a spinster in France, where she had her domicil, and afterwards pronounced a wife in England, where she was a stranger. Mr. Fraser characterises the English decision as "a bold aggression upon the rights of foreign nations (*b*)."

Domicil has the sanction of universal acceptation, for it is adopted in Scotland, although there other elements are held to be sufficient;—as the *forum originis*, the *forum* of the *locus delicti*, the *forum contractûs*, to say nothing of the *forum* of 40 days' residence. In the Scottish Journal of Jurisprudence, we find the

(*a*) The plea of recrimination has latterly been rejected in Scotland. See a note to Lord Ivory's edition of Erskine's Institute, "holding it as inconsistent that the infidelity of one of the parties should be a sufficient ground of divorce, while the infidelity of both should secure the continuance of the matrimonial relation." On these principles it would seem that divorces ought to be pronounced as matter of police, without complaint or instigation from any private party. This opens a serious question.

(*b*) Mr. Fraser's pamphlet, pp. 47, 48.

following passage, which shows that the Scotch lawyers, or a section of them, are prepared to abandon these "elements." The 40 days' domicil is surrendered by all (*a*).

This article appeared in February 1861. "We are glad to learn that there is now some prospect of justice being rendered to Scotland in the matter of jurisdiction. The English Law Lords, finding that the opinion of the profession here was decidedly adverse to their pet plan of transferring all jurisdiction to Sir C. Cresswell, and not having met with the degree of support which they had anticipated from the London profession, appear to be now willing to come to reasonable terms. Accordingly, it has leaked out that the Lords are prepared to support a Bill defining and limiting consistorial jurisdiction, the provisions of such a Bill being made applicable to all parts of the United Kingdom. It is probable that the legal bodies in Edinburgh will be so far satisfied with this concession to their feelings as not to oppose any reasonable curtailment of the grounds of jurisdiction. Our opinion as to some of these grounds has never been concealed. The *forum delicti* we believe to be utterly at variance with principle. The maintenance of the *forum originis*, after the domicil of origin has been lost, is little better than an act of usurpation. It is clear, however, that the English Divorce Court, if left to itself, will far outstrip us in the race for extending jurisdiction; its decisions on this subject being neither governed by principle nor restrained by tradition. It is apparent, therefore, that it is not less necessary for the credit of the profession than it is due to the just interests of the public, that jurisdiction should be fairly apportioned between the several Courts of the United Kingdom. Probably domicil will be found, as we have more than once hinted, to be after all the only basis of jurisdiction as regards status. If this principle be adopted, we would suggest that a fixed period of residence should be adopted as a test of domicil for the purpose of determining jurisdiction instead of leaving it to be ascertained as matter of fact, from the great variety of elements which usually enter into the determination of domicil in questions of succession (*b*)."

The Code Napoleon enacts, that "The laws concerning personal status and capacity shall hold even in the case of Frenchmen resident in foreign countries." And so, on the other hand, it is affirmed by the French authorities that the status and capacity of a stranger in France is regulated not by the law of France, but on the principle of reciprocity, by the law of the nation to which the stranger belongs. Merlin lays it down that the French tribunals shall judge by the foreign law whether the stranger has, or has not, a given status, or a given capacity.

The stranger obtains a certificate from his own country, showing that he possesses there a given status and capacity.

If a Frenchman, who cannot in his own country marry before the age of 25 without consent of guardians, tries to elude this regulation by passing suddenly from the place of his domicil to contract in a foreign country a "simulated religious marriage, decorated with the specious title of *conscientious*," such marriage will be treated as a fraud, and will not be recognized as of any validity in France.

In Guepratte *v.* Young, before Vice-Chancellor Knight

(*a*) See the Report by the Committee of the Faculty of Advocates (31st July 1860), on the Scotch Conjugal Rights Amendment Act.
(*b*) Scottish Journal of Jurisprudence, February 1861, p. 85.

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Bruce (4 De Gex & Smale, 217), it was held, that "The law of the country in which a party is domiciled, regulates the capacity to contract; the law of the country in which the contract is made, regulates the form of the contract."

If after a Scotch divorce the adulterers, named in the decree, intermarry, the intermarriage will in Scotland be null, because, by the law of Scotland, the adulterers if mentioned in the decree (*a*), are by the Act of 1660 prohibited from marrying; and if such adulterers, after such marriage, came into England, their marriage would here be deemed void, and the issue illegitimate, although by the law of England adulterers after divorce are not prohibited from intermarrying, and do so constantly.

? 1600

On the other hand, if after an English divorce the respondent and co-respondent mentioned in the decree intermarry, the intermarriage will be good, and if after such intermarriage they go into Scotland, their marriage will there be deemed good, and the issue legitimate, although, had the case occurred in Scotland, the law of that country would have held the marriage bad, and the issue bastards.

So again, suppose a marriage dissolved in Scotland at the suit of the wife, for adultery alone. If the parties afterwards come to England they will here be regarded as well divorced, and as at liberty to marry in England, although the law of England does not authorize a wife to ask divorce on the ground of adultery alone.

A change of domicil releases the parties from the empire of the laws of the domicil they have quitted, and subjects them to those of the new domicil they have acquired.

If an Irish couple acquire an English or a Scotch domicil, and are lawfully divorced in England or Scotland, the Irish Courts must pay regard to such divorce, and acquiesce in all the consequences, although by the law of Ireland divorce is not allowed.

These propositions seem opposed to the doctrine of *Malac* v. *Malac*, "that personal status is to be ascertained by the *lex loci contractus*, and not by the law of the domicil."

Earl of Wicklow. With regard to French couples located in France, what power have they to obtain divorce?—The law of France as it at present exists does not allow divorce at all. The Code Napoleon continues, but that part of it which authorized divorce was repealed in 1816.

The difficulties of divorce jurisdiction are not solved by Professor Story, whose views on this subject are somewhat uncertain. He appears to advocate the necessity of domicil, but he also appears to favour the doctrine of order, which, according to the Scotch lawyers, gives jurisdiction without domicil. He says, the difficulty is to lay down principles where, after the marriage, "there is a change of domicil by one of the parties without a similar change of domicil by the other (*b*)," forgetting, apparently, that in the married state the domicil of both parties is the same. He further remarks that the continental jurists have not much cultivated this branch of law; and he asserts that "it is to the decisions of the English and Scottish Courts" that we must turn for light. The English Courts, however, have done little in this matter, because divorce is a new judicial remedy with them. The Lolley case is in fact the beginning and the end of their perform-

(*a*) As in *Ritchie* v. *Ritchie*, a Scotch Appeal decided by the House on the 16th April 1861.
(*b*) See pp. 307-324 of the Conflict of Laws.

ances. Professor Story must be supposed to have had the judgments of this House in his contemplation. But these were on appeals from Scotland, in *Tovey* v. *Lindsay*, and more especially in the great case of *Warrender* v. *Warrender*.

The Scotch Courts have indeed done much to advance the law of divorce. And here the encomium of the American professor is well founded.

Whoever will read the adjudications of the Scotch judges upon difficult divorce cases, must be struck with the learning, the science, the good sense, and the exemplary industry and patience constantly exhibited when any point of novelty or nicety arises before them.

What shall be the husband's right when he has repaired to a foreign country and established for himself a domicil there, his wife remaining behind? Suppose her to have committed adultery, is he to sue her in the country he has left, or in the country he has adopted? For the former course there are two precedents, *Shield* v. *Shield* (*a*), and *Jack* v. *Jack*, which last was decided in the husband's favour by Lord Neaves on the 1st June 1860; but the decision was carried by appeal to the Inner House of the Court of Session, and it was referred to all the Scotch judges.

The counter question arises, What shall be the wife's right when her husband has established himself in a foreign country and there committed such delinquencies as would in this country entitle her to a divorce? The doctrine of Merlin and Bouhier is that "the husband's change of domicil ought not to injure the wife." Lord Moncrieff's opinion seems to the same effect in *Ringer* v. *Ringer*, 15th January 1840; and see the authorities cited (Macq., Div. 251, 252). The very point arose in *Deck* v. *Deck* before the Divorce Court at Westminster in July 1860.

The grounds on which the three judges (Sir Cresswell Cresswell, Mr. Baron Martin, and Mr. Justice Willes) went were the following:—They first held that Mr. and Mrs. Deck were natural-born English subjects, owing allegiance to the Crown of England, and obedience to the laws of England. Now, they really were natural-born British subjects, and they really owed allegiance, not to the Crown of England, but to the Crown of Great Britain and Ireland. The defendant could hardly have owed obedience to the laws of England, for, according to the authorities, he had ceased to do so by changing his permanent domicil. If he had made a will it must have conformed to the laws of America, or have been invalid.

British subjects, that is to say, persons owing allegiance to Queen Victoria, unless they be domiciled in England, are not amenable to the jurisdiction of the Divorce Court at Westminster. Thus, the Scotch and Irish are as much subjects of Her Gracious Majesty as the English are. Yet the Court at Westminster cannot divorce Scotch or Irish couples not domiciled in England.

A British subject domiciled in France cannot, I apprehend, obtain divorce from the Divorce Court at Westminster, but must be content with the remedies of France. So, an Englishman domiciled in Scotland or Ireland must be content with the respective remedies of Scotland and Ireland.

If a Frenchman and his wife come to this country and establish here a permanent domicil, either of them may apply to the Court of Divorce at Westminster, although both may owe allegiance to, that is to say, be subjects of, the Imperial Crown of

(*a*) Macq. on Div. 271.

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France. So with respect to any other foreign couple, Spanish, Italian, German, or Russian. The domicil gives the remedy, without reference to allegiance.

I have not seen the element of allegiance judicially recognized as a ground of jurisdiction in any divorce case except this of *Deck* v. *Deck*. If it were received, it would, I presume, overrule domicil, and possibly exclude the effect of the rule which brings the wife within the same jurisdiction as that which affects her husband. The observation of Mr. Fraser, p. 52, is that allegiance, when viewed as a ground of divorce jurisdiction, corresponds with the *forum originis*, a forum demolished by Lord Eldon in *Grant* v. *Pedie* (*a*).

The judges in *Deck* v. *Deck* relied next on the 27th section of the Divorce Act, which enacts that it shall be lawful for "any wife" to sue for divorce. This, the Court said, meant any "English" wife. But what is the meaning of the expression "English wife?" Does it mean an Englishwoman married to a Frenchman, or does it mean a Frenchwoman married to an Englishman? May it not mean both? The Act of Parliament does not say any English wife, but "any wife." So it says "any husband." But this must always be understood to mean any wife or husband entitled to move the jurisdiction.

In *Bond* v. *Bond*, which came before Sir Cresswell Cresswell, Baron Martin, and Mr. Justice Willes, in the Divorce Court, on the 2nd of July 1860, the Court took time to consider whether it had jurisdiction to grant dissolution of marriage at the suit of a wife, there being circumstances in the case "from which it might be inferred that the husband's domicil was Irish." In ultimately pronouncing judgment of divorce, the presiding judge (Sir Cresswell Cresswell) said that "Ireland, for the purposes of this jurisdiction, must be treated as a foreign country. If the evidence on this point had been so cogent as to compel the Court to take notice that the respondent was not English, we must have decided whether or no the Court can, consistently with the principles of international law, assume a right to adjudicate on a petition presented against a foreigner, who is served abroad with a citation, to which he does not appear. But here the marriage was solemnized in England, and the respondent afterwards lived with his wife at various places in England, and although he has not submitted to the jurisdiction, he has not contested it, and we do not find evidence of so conclusive a nature as to compel us to deal with him as an Irishman. The case is, therefore, the same in substance as *Deck* v. *Deck*, and our decree is that the marriage be dissolved." This case appears to have gone on the doctrine of the *locus contractus*, a doctrine to which even the Scotch lawyers pay but little regard. The fact that the respondent did not contest the jurisdiction would hardly give jurisdiction if the Court was otherwise without it (*b*).

Persons domiciled in Ireland, however culpable, may enjoy an immunity from divorce jurisdiction. If the decree obtained by Mrs. Bond is of questionable validity, it is simply because her husband is an Irishman. The evil of the want of a divorce

(*a*) 1 Wilson and Shaw, 716.

(*b*) The marginal note to *Bond* v. *Bond* (2 Swab. & Trist. 93) is: "Semble, if a foreigner appears otherwise than under protest, he submits himself to the jurisdiction." *Jurisdictio in consentientes* (called by the Scotch law prorogated jurisdiction) was relied upon in *Ringer* v. *Ringer*, 15th January 1840, before the Court of Session. But Lord Moncrieff said: "I am decidedly of opinion that it must be laid wholly aside. If it were listened to, it would open a convenient and dangerous door to collusion in every case." The other judges concurred.

jurisdiction in Ireland is therefore not confined to Ireland. It is said that the Roman Catholic population of Ireland abhor divorces, but they cannot prevent those who have a mind from asking Parliamentary divorces. Accordingly, from 1804 to 1856, there have been 16 divorce bills from Ireland. The last was the Talbot case, which occupied the attention of this House for the best part of three weeks.

In Belgium, a country entirely Catholic (which Ireland is not), divorces are permitted, and the divorced parties marry again without any scruple of conscience. A divorce law embracing Ireland would be permissive only. No one is obliged to sue for dissolution of marriage. The relief is optional. It seems immaterial whether to bring Ireland within the territory of the Divorce Court at Westminster, or to give the jurisdiction to an Irish tribunal. It is observable that the Court at Westminster has already authority to deal with Irish cases, under the Declaratory Suits Act of 1858 (*a*).

Chairman. I believe you have had a correspondence with the French lawyers?—Yes, with Monsieur Troplong, the President of the *Cour de Cassation.*

20th June 1861.

LORDS PRESENT:

The LORD CHANCELLOR.	LORD BROUGHAM AND VAUX.
EARL of CAITHNESS.	LORD CRANWORTH.
EARL of WICKLOW.	LORD WENSLEYDALE.
LORD POLWARTH.	LORD CHELMSFORD.
LORD SOMERHILL.	

THE LORD CHANCELLOR IN THE CHAIR.

JOHN FRASER MACQUEEN, Q.C., is further examined:

In a recent case (*b*) before Sir C. Cresswell, Mr. Justice Wightman and Mr. Justice Williams, it has been decided that residence in England, without domicil, is sufficient to found a jurisdiction for divorce. The husband, a Scotchman, named Brodie, had, under a deed of separation, left his wife in Australia, so far back as 1851. He returned home with his children to Scotland, and remained in Scotland for about three years; he afterwards resided in London for about four years; he next went out again to Australia, where, as he might have expected, he found the wife whom he had forsaken living in adultery. He finally came back to England in 1859 and forthwith filed his petition in the Divorce Court, praying for a dissolution of his marriage. A decree of divorce was pronounced, although the wife had not been in England since 1833; the Court observing, that "if the suit had been a testamentary one, they gave no opinion as to what the effect might be upon the question of domicil." From this observation it is plain that they did not consider an English domicil to have been established; they, in fact, disclaimed a jurisdiction founded on domicil; they went on residential jurisdiction, similar to that exercised in Scotland. The Court did not state how long the residence must last, but they

(*a*) 21 & 22 Vict. c. 93.
(*b*) *Brodie* v. *Brodie*, 22nd April 1861. Swabey and Tristram.

said that *Brodie's* residence was a *bonâ fide* residence; a permanent residence, and not the residence of a casual traveller.

Now, in Scotland it is true that a 40 days' residence gives a divorce jurisdiction; but it is a jurisdiction which the Scotch lawyers have announced their readiness, or rather their wish, to surrender. This appears from the Report of the Advocates' Committee of the 31st July 1860, which contains a clause drawn up by them for the express purpose of abolishing this residential jurisdiction. It is never exercised in Scotland unless the defendant be within the territory. In the very important and much considered case of *Ringer* v. *Ringer*, Macq. Div. 268, Second series of Scotch Cases, 15 January 1840, it was laid down by nine judges of the Court of Session (including the Lord President, Lord Gillies, Lord Moncrieff, and Lord Fullarton) that an English husband did not, by a 40 days' residence in Scotland, alter the domicil of his absent wife, and that she was, consequently, not amenable to the Scotch jurisdiction; the husband's suit for divorce was therefore dismissed. The Scotch judges, in their admirable reasonings, distinguished between *residence* and *domicil*; they all admitted the maxim that the domicil of the husband is the domicil of the wife, but this meant the real domicil, not a mere residence.

The Scotch lawyers, in speaking of such cases, always assume that *both* parties are resident in Scotland. No one, so far as I know, has suggested a jurisdiction by the residence of one party only. In Scotland, the presence of the defender to make out the 40 days' jurisdiction is an absolute necessity. But it would seem from *Brodie* v. *Brodie* that no such necessity exists in the Divorce Court at Westminster, for the defendant in that case had not been in England for nearly 30 years.

It is difficult to see how, without domicil, the English Court could have had jurisdiction over Mr. Brodie's wife; for, according to the reasoning in *Ringer* v. *Ringer*, the defendant's absence is fatal when residence alone is gone upon. When the decree is pronounced by the Court of the domicil, the absence of the defendant is immaterial, because the domicil of both parties is, by presumption of law, the same; but there is no presumption which says that the *residence* of both parties is the same.

If residential jurisdiction was sufficient in *Brodie* v. *Brodie*, why, it may be asked, was it deemed insufficient in *Tollemache* v. *Tollemache*?

Mr. Tollemache was married in Scotland. His wife's adultery was committed in Scotland. The facts, as proved before the jury, showed a residence *bonâ fide* in Scotland, interrupted only by temporary visits to relatives in England. This residence in Scotland was for nearly four years; that is to say, about as long and as little like that of a "casual traveller" as Brodie's had been in England. Furthermore, Mr. Tollemache's wife was all the time within the Scotch territory. Thus there were several known elements of jurisdiction in *Tollemache* v. *Tollemache* which did not occur in *Brodie* v. *Brodie*.

In *Tollemache* v. *Tollemache* the Scotch Court granted a divorce The divorced wife afterwards married and had issue. Mr. Tollemache himself wished to marry again, but doubts were suggested to him as to the validity of the Scotch divorce. He applied to this House for leave to bring in a Bill to dissolve his marriage, as from the date of the Scotch sentence; but a select Committee reported against permitting such Bill to be introduced. Afterwards, Mr. Tollemache filed his petition in the Divorce Court at West-

minster, and Sir Cresswell Cresswell, Mr. Justice Williams, and Baron Martin, on the 9th July 1859, pronounced the Scotch divorce bad, simply because Mr. Tollemache was what they called "a domiciled Englishman."

The decree in *Brodie* v. *Brodie* is founded on residential jurisdiction alone. The Scotch decree in *Tollemache* v. *Tollemache* rested on more than residential jurisdiction. It rested on the ground that Scotland was the *locus delicti*, and on the ground not only that the Defendant was within the territory, but that she had been so throughout the whole married life. These circumstances suggest that the Scotch Divorce in *Tollemache* v. *Tollemache* was better than the English divorce in *Brodie* v. *Brodie*; but the English Court treated the Scotch divorce as a nullity, and if Mrs. Tollemache's second marriage had been in England, she would in England have been guilty of bigamy.

In Scotland a commercial contract may be enforced by arrestment *ad fundandam jurisdictionem*; but it was decided by the Court of Session 90 years ago, that a jurisdiction so created was not applicable to cases of personal status; hence it is unavailable for divorce. The distinction is approved of by Lord Chancellor Cranworth in the *London and North-western Railway Company* v. *Lindsay*, which will be found in the 3rd volume of my Reports, page 99.

Sir JOHN DORNEY HARDING, Knt., Q.C., D.C.L., Queen's Advocate General, is called in, and examined as follows:

The Chairman (*a*). We shall be glad to have your opinion upon the two great questions which this Committee has under consideration. First, as to what persons, with reference to the country in which they live, as the law now stands, have a right to sue for a dissolution of marriage in the Court at Westminster: and, secondly, we should like to hear your opinion as to what change, if any, should be made in the law?—Upon the first question I ought to say that by accident I only received your Lordships' summons yesterday, and, therefore, I have not had sufficient time to prepare myself; and in the next place, I should mention that I have practised very little, scarcely at all, in the Divorce Court; my duty to the Crown in effect prevents it. As to what the law is now, and as to what founds the jurisdiction, I have a very strong impression, but it is little more than my private impression. I conceive that Mr. Justice Cresswell has administered the law exactly as he found it, and as he was bound to administer it, and has not deviated at all, and, as far as I am aware, no statutory enactment is required at all upon that point. My impression is that it would do more harm than good; and I will state shortly what that impression is. Marriage, for the purpose with which we are dealing to-day, must be considered as entirely and solely of Christian origin all over Europe, and emphatically so in England and Scotland. Some misapprehension, I apprehend, has been caused by the use of the word "contract" as applicable to it by later writers. I conceive that the Book of Common Prayer, which is of high legal authority as part of the Act of Uniformity, is as legally correct upon that as it is theologically accurate; it defines it over and over again as a status, "which is an honourable estate instituted of God," and calls it "the holy estate of matrimony;" and, owing to its Christian

(*a*) Lord Chancellor Campbell.

APPENDIX TO PITT *v.* PITT, No. 2.

origin, it comes of course under the Christian jurisdiction. It was a Christian institution, and concerned the "*Civitas Dei*" as opposed to the "*Imperium Romanum;*" it was exercised "*pro salute animæ,*" and arose from the "*cura animarum.*" No pastor could deal with another pastor's sheep; that was their theory and principle. It was founded upon theological views, but it fell in so remarkably with the feudal idea, that some people supposed it had a feudal origin, just as the "*homo regis*" born upon the king's land was the king's man, so the "*homo episcopi,*" whether born upon the bishop's land or dwelling in his diocese, was the bishop's man. The Bishop of London could only deal with souls in *his* diocese, and the Bishop of Winchester could only deal with souls in *his* diocese, and they could not meddle with each other's sheep. For that reason, as I understand it, the jurisdiction of the Ecclesiastical Courts being exercised "*pro salute animæ,*" was necessarily and consistently local. The statute of Citations, the 23 Hen. 8. c. 9., which was held to be merely in affirmance of the common law, "consecrated" (as the French would say) or embodied and affirmed the principle of the common law; and it forbade the citing of persons out of the diocese in which they were "inhabiting and dwelling," coming as near the word "domicil" as an English statute in the time of Henry 8 could do. So the jurisdiction remained, until it was given to Sir Cresswell Cresswell by the 2d section of the 20 & 21 Vict., in these words, "to exercise all jurisdiction now exerciseable in any Ecclesiastical Court in England." It was and is clearly therefore local. The limits of the ecclesiastical jurisdictions *inter se*, the differences between the provinces and dioceses and peculiars were abolished, but the circumscription was the same. Sir C. Cresswell had all the English ecclesiastical jurisdiction, and that was the limit, as if it had been in a schedule.

That jurisdiction of the Ecclesiastical Courts did not extend to the dissolution of marriage?—Certainly not; I am speaking of jurisdiction in its local sense. Sir Cresswell Cresswell had a much greater jurisdiction in the sense of the power of breaking a marriage; but he had the same jurisdiction locally. The question is, what is the local limit or definition of Mr. Justice Cresswell's jurisdiction?

Geographically, might we not say?—Geographically. Then, that being so, I apprehend that Sir Cresswell Cresswell has adhered to it as far as he can. In the cases of *Tollemache* v. *Tollemache*, *Simonin* v. *Malac*, *Beck* v. *Beck*, *Palmer* v. *Palmer*, and *Yelverton* v. *Yelverton*, so far as I am aware, he has rigidly adhered to that, as far as he could. I do not find that there has been any conflict of cases or any trouble. I will take the important case of *Yelverton* v. *Yelverton;* supposing that there had been a jury, and that the jury were right upon the facts, and Major Yelverton had never acquired an English domicil, then Sir Cresswell Cresswell, I apprehend, was perfectly right in his application of the law, in saying that he had no jurisdiction. In the same way as regards the domicil of the husband being the domicil of the wife; Mr. Tollemache had an English domicil which he had never abandoned; and Sir C. Cresswell held that his wife had the same domicil. If the husband had obtained a divorce in Scotland, in Spain, or in France, he had a right, nevertheless, to come and say, "Now give me an English divorce." Again, in corroboration of this view, it seems to me that the Government (if I may use such a word) has acted with respect to a subject mentioned by Mr.

Macqueen (a very curious one), that of the Colonial Divorce Jurisdiction. It is not within Mr. Macqueen's cognizance, possibly, and is not generally known, that on the passing of the Divorce Bill, Lord Stanley (who was, I think, then Secretary for the Colonies) sent a circular to the different colonies, bringing the altered state of the English law to their attention, and recommending, or rather suggesting, that they might, if they chose, pass laws of the same kind; that has been done extensively. Some of the colonies have passed laws; in some cases I have advised the Government to reject them, because they differ in important particulars from the English law; others I have advised the Government to pass into law, because they adopted the English law *ipsissimis verbis*.

Ought not a careful watch to be maintained, to see that the colonial legislatures do not introduce any discrepancy into the the law of marriage?—No doubt. A most curious case of discrepancy lately occurred, and upon inquiry, we were informed that it entirely arose from the preponderance of the "Scotch element" in the colony; they do require very close looking after. That is still, however, proceeding upon the theory of local jurisdiction; those colonies that have vested in their Supreme Court the same powers as are vested in Sir Cresswell Cresswell are provided for; they are like foreign countries with a law analogous to our own. I do not think that I need trouble your Lordships any further with my ideas upon the question of the present local limit of the jurisdiction.

Allow me now to call your attention to the vexed question, whether an English subject, who is a native of England and has acquired an Anglo-Indian domicil (his wife being in India, and adultery having been committed there), can sue for a divorce before Sir C. Cresswell in the Court at Westminster?—First, I should say, with the greatest deference, that in my humble opinion the question of the parties being English subjects or not, although imported into some cases upon high authority, has no more bearing upon it than the colour of their hair.

Be good enough to answer the question as I propound it; and we will discard any circumstance that is not essential. An English born subject goes to India, and acquires an Anglo-Indian domicil; his wife, being in India, is guilty of adultery; and he, having this Anglo-Indian domicil, proposes to sue in the Court at Westminster for dissolution of marriage; has the Court jurisdiction?—In answer to the first branch of the question I should say no; but that would depend upon the character of the Anglo-Indian domicil.

The English domicil is supposed to be lost?—Then, I say, that inasmuch as no English Ecclesiastical Court would have had jurisdiction, Sir Cresswell Cresswell can have none; it must be left to the Legislature, or to the legislative power of India, whatever that may be.

Suppose that an English subject goes to one of the Australian colonies, intending to remain there for the rest of his life, and his wife commits adultery, may he sue for a dissolution of his marriage in the Court at Westminster?—Certainly not in any colony which has already the same power vested in its supreme Court; nor do I think in any colony.

But if that jurisdiction is vested, it may be doubted whether it could be taken away by another Court having power conferred upon it?—I adopt your Lordship's correction; the proper answer would have been, that Mr. Justice Cresswell would never have

had any jurisdiction over him, because no English bishop would have had any.

Lord Chelmsford. It would not come within your map?—It would not.

Chairman. You would say that a domiciled Scotchman could not sue for a dissolution of marriage before Sir Cresswell Cresswell?—I should say not.

Lord Wensleydale. You say that the right is confined to the inhabitants of English dioceses?—I only had an opportunity yesterday of looking into it for ten minutes, and I may be quite wrong, but that is my present impression.

Chairman. Does it not follow, then, that persons married in Ireland, and domiciled there, could not, in your opinion, sue for dissolution of marriage before Sir C. Cresswell?—I think *Yelverton* v. *Yelverton* rightly decided upon that point.

Earl of Wicklow. Do you believe that an Irish gentleman, wishing to obtain a divorce in the Court of Sir Cresswell Cresswell, could, by coming over to this country, and residing for any length of time, solely for the purpose of entitling himself to come into Court, obtain a hearing?—Taking your Lordship's question as it is put, certainly not; he could do it, but he could not do it in the way suggested.

Chairman. Would you regard that, which we call permanent domicil, which regulates the succession to personal property, as the test?—I would only say that, in the few cases in which the question of jurisdiction was considered under the old ecclesiastical system in Doctors' Commons, the test was practically not so severe; my personal view would be, that there could be no substantial distinction.

Residence would be regarded more than that which we call permanent domicil?—It was, in every case in which the question was raised under the old system in Doctors' Commons; appearance to the citation was held to cure all defects, and parties generally appeared. Again, as the Ecclesiastical Courts could only grant separation, it was not such a question of life and death as it is now; and, therefore, the question was seldom raised, and the Court was naturally indisposed to shorten its jurisdiction on a technical point of that kind; or rather, it disposed of the question without going into the matter *au fond.*

Lord Brougham. The jurisdiction being confined to separation?—The jurisdiction being confined to separation, except in cases of nullity of marriage, which were very rare.

Chairman. Suppose the case of a native-born Scotchman coming to England, and marrying in England, but not changing his permanent domicil, meaning to return to his own country, and having resided seven years in England, and that his wife commits adultery in England; where is he to sue for a divorce?—The only answer that I can safely give at present, according to my impression of the decision in *Yelverton* v. *Yelverton*, is, that he ought to be allowed to sue in England; what he could do in Scotland I cannot say.

You would not regard permanent domicil, which regulates succession to personal property, as the test?—I can only say at this moment that I cannot recall any sound or substantial trustworthy legal distinction between domicil for one purpose and domicil for another: that has been thrown out, but it is almost impossible to define it.

All lawyers agree that permanent domicil is that which

regulates the succession to personal property; but a man may have a domicil with regard to forensic jurisdiction, which may be regulated by different considerations from those determining his testamentary domicil?—It would be for the Court to say, upon consideration, whether, under the facts and circumstances, he had such a domicil, if the point were raised.

What would be the test of that domicil, as we have no municipal law in England respecting that forensic domicil?—There would be no difficulty in pointing out many authorities as to what would constitute such a domicil. If I were to attempt to lay down what would be the least that would do it, I might have some difficulty. In the first place, your Lordship knows that practically the Court would not be astute to raise the point; and, when the point is raised, the Court must determine upon the evidence submitted to it *pro* and *con.*; which might not always be the real state of circumstances.

Upon what principle would you ask the Court to decide?—As far as I can say, I presume it might decide it on a principle something short of such a domicil.

Lord Cranworth. You say the Court would not be astute to discover that it had not jurisdiction; but supposing it had not jurisdiction, would the dissolution be valid?—I think not; there might be an objection taken afterwards that the Court had only jurisdiction in cases in which the bishops had jurisdiction.

Chairman. Be good enough to state anything further you have to say as to your opinion of the law as it exists; and then I would ask you to tell us whether you think that there should be any and what alteration in the law?—As to adding any statement of the law as it exists I should ask to be allowed to decline to do that this morning, without some intimation upon what points your Lordships wish an opinion. I would only remark (in consequence of something that fell from Mr. Macqueen) upon the proposition that the domicil for the husband is the domicil of the wife, and *that*, although very strong circumstances may exist *contrà*, and great hardships may be thereby caused, yet that has been lately affirmed by the Court of the last resort, the House of Lords, in *Dolphin* v. *Robins*. In that case there was a judicial separation in France; the husband's change of domicil might affect the validity of the wife's testamentary appointments under a power from time to time; the wife being in perfect ignorance of where her husband might be; all that was strongly put, and yet the Court adhered to the principle that the domicil of the husband must be the domicil of the wife.

The exception, perhaps, ought to be introduced, that if the husband changes his domicil, and the wife's domicil be changed thereby, she might be deprived of all remedy?—She might; that is the law at present.

Do you think that a person having an Anglo-Indian domicil ought not to be allowed to sue for a divorce in the Court at Westminster; ought that to be the permanent law?—If I were a legislator I would vote against the Bill; that is all I have to say. Let the Indian legislative power, which is a superior body, having the best legal assistance, make a law, as other colonies have done. India is now, in effect, merely a colony for this purpose.

You have stated your opinion, upon consideration, to be that English subjects living in colonies that have that jurisdiction, would be deprived of that right of suing in the Court at Westminster for a dissolution of marriage?—I may be quite wrong;

but I hold that the residents in a colony are deprived of access to the Divorce Court at Westminster, because no one in that colony would be subject to the jurisdiction of an ecclesiastical court, or a bishop in England. They would be outside the line, as I should draw it on the map. There is an additional reason against altering that state of things, *quoad* the colonies that have already adopted our law, and made marriage judicially dissoluble.

You think that that ought to continue to be the test as to jurisdiction, namely, whether under the former Ecclesiastical Law the Ecclesiastical Court would have had jurisdiction over the soul?—I have not heard anything as yet sufficient to satisfy me that it ought not.

Your opinion, as I understand it, is that a person living in India must apply to the Legislature for a divorce. In this session of Parliament, a petition has been presented by an officer in the army as to an Anglo-Indian domicil, for a divorce under the old system. He brought an action for crim. con., and had a suit for a divorce *a mensa et thoro*, at Calcutta; and now his petition for a bill dissolving the marriage has passed the two Houses of Parliament; do you think he ought to be driven to that, instead of being allowed to sue for a dissolution of marriage before Sir C. Cresswell?—I have a strong opinion individually that he ought not to be allowed to do so. The mischief to both parties either of bringing witnesses in a disputed case to England, or of an examination of witnesses (some of them native witnesses) by commission in India, and reading those depositions in Court, would be so great as almost to amount to a denial of justice. The remedy is easy. Why has not India followed the example of many other colonies? It is a colony with ample legislative powers. Let it pass an Act in the same words as the English Divorce Act.

Lord Brougham. The same difficulty and expense and hardship would apply to the proceeding by bill in Parliament?—Exactly; but it is the only remedy open to the party. I would correct that by Indian legislation. India ought to have done the same as other colonies have done, namely, passed a Divorce Court Act.

Lord Somerhill. As regards the particular case, do you think that it would be well that any colony should pass a special Act divorcing the party in that colony?—I can only say that *that* in my opinion is a question entirely of the capacity of the legislature of a particular colony. There are many of them in which it might be done; in others, it might be followed by the grossest iniquity and perversion of justice.

Earl of Wicklow. What would you recommend with regard to those colonies in which there is no legislature?—They are in a better position for my purpose than others. *Fortunati nimium sua si bona norint;* those colonies are best governed which the Queen governs by Order in Council, subject to a convenient local power exercised by the Governor, with an Executive Council, of making ordinances.

Chairman. How would parties obtain a dissolution of marriage in such a colony?—I have never had to consider this particular question, but with great hesitation I answer it thus: that the Queen by Order in Council might confer upon the Supreme Court the same power as is vested in Sir C. Cresswell; and that would be in my opinion a valid act on the part of the Queen.

Do you think it advisable that an Order in Council should be made conferring such a power?—That would depend (as I

said before), upon the individual case of a colony enjoying the blessings of representative Government. It would depend upon how that Government was constituted. I have the honour of knowing a Colonial Chief Justice who never had any legal education except that which he acquired as a medical man, and afterwards as a military man; and I would not trust his Honour with the execution of such a power. Of course it is possible that the Supreme Court and the Legislature might in time, like the colonies, degenerate; but whenever they ceased to be proper parties to execute the power, the Crown might revoke the Order in Council; as to many of the smaller colonies, I conceive that any local proceeding for a divorce *a vinculo*, either by a Supreme Court or by a Legislature, is practically impossible.

Your opinion is, that no person domiciled or resident in Ireland, could sue in the Court at Westminster for a divorce?—I think that *Yelverton* v. *Yelverton* was rightly decided on that very point.

How do you think that Ireland ought to be dealt with, in respect of dissolution of marriage?—If I am asked that question as a legislator, I find this fearful question introduced. I may say that it is beyond my province to deal with this question; but I cannot set aside altogether the circumstance, that so large a proportion of the people of Ireland are Roman Catholics; and their idea, to a certain limited extent, has operated upon the Protestant portion of the population; namely, that marriage is indissoluble; and I think that you will get into unforeseen difficulties of vast magnitude if you attempt to make, in Ireland, that revolution which you have only recently made in the Protestant country of England.

Lord Brougham. Do you take the tendency of Protestant opinion, in Ireland, to be that marriage is a sacrament and is indissoluble?—Certainly not. But according to the very limited impression I have been able to form from having been bred amongst Irish people, from having visited Ireland, and having Irish connexions, I can only say, that the idea of the indissolubility of marriage, which is always agreeable to a certain order of mind, has, to a certain extent, penetrated even the Protestant population of Ireland; and I doubt whether they would like to see marriage treated as we treat an action upon a horse case (popularly speaking), and to see such a question settled, in five minutes, before a single judge.

Chairman. According to your opinion, an Irishman can only have his marriage dissolved by Act of Parliament, in consequence of the adultery of his wife?—By Act of Parliament.

Do you think that such a state of things ought to continue?—My own private impression, if I were absolute Governor of Ireland, would be, that it should not continue; but I am unable to say, at this moment, what should be the modifications. I think that the operation of the Divorce Court, as at present constituted, has taken the people of England by surprise. It was not what they calculated upon, that a single judge should try a case of divorce, and settle it as a case of contract for the delivery of goods. I do not individually object to it; but I think that it was not contemplated, and that something very different must be adopted in Ireland.

Lord Brougham. To avoid the expense and difficulty of bringing witnesses over from Ireland to England, would you suggest the establishment of a local jurisdiction similar to the

Court at Westminster?—If I were to legislate upon the subject I would first of all endeavour to come to an understanding (if I may say so) with the Roman Catholics; for my own impression would be, that if you endeavour to force it upon them, it would ludicrously fail.

Chairman. We cannot compel them, nor do we wish to compel them, to change their opinion about marriage being indissoluble; but would it be any injury to them if their Protestant fellow-subjects in Ireland were allowed to sue for divorce in the Court at Westminster?—I think one step might be taken consistently with policy and justice; namely, to erect a Divorce Court in Ireland for Protestants alone; in cases where both parties were Protestants. I cannot see that that would be any injustice to the Roman Catholics; that might be tried as an experiment to see how it worked.

Lord Brougham. What would be the test of Protestantism in that case?—There would be a difficulty in that, no doubt; but I think it might be overcome by requiring a judicial declaration from each of the parties, that they were Protestants, for that purpose. No conscientious Roman Catholic would make such a declaration.

Earl of Wicklow. Is it your opinion that it would be giving less offence to the Roman Catholics to establish such a Court in Ireland, than to allow persons to come to the Court at Westminster?—If I consulted the feeling of the Roman Catholics of Ireland, I think it would shock their feelings much less, if such a thing is to be done, that it should be done out of Ireland, but the injustice to Protestants, in bringing them and their witnesses here from Ireland, would be very serious.

Chairman. Would that not be a less injustice than bringing the witnesses over to this country upon an application to pass a bill through the House of Lords?—No doubt it would be much better than that, but less than they are entitled to.

Lord Somerhill. How, in such a Court, would you deal with the question of mixed marriages?—That is beyond my province, I have not formed any opinion about it. I would begin with those cases in which both parties are Protestants, and see how that worked. I would go on gradually, coming to an understanding, if I could, with the Roman Catholics, and I would avoid shocking their feelings more than necessary. It has not been found impossible to introduce such a tribunal in some other Roman Catholic countries.

Earl of Wicklow. Do you think that such a declaration made at the time of applying for a divorce would be sufficient?—I think that no decent Irishman or Irishwoman who was a Roman Catholic would make such a declaration falsely.

Would you make that declaration absolutely binding, no further inquiry being made about it?—According to my present impression, I would do so.

Chairman. You are aware that in the case of mixed marriages in England, the Act of George 2 allowed all parties within 12 months to declare themselves Protestants?—I am afraid that that was one of a series of Acts offering to the people various temptations to change their religious views, and it was a highly discreditable piece of legislation, in my opinion, which ought never to be repeated.

Lord Brougham. Is it not the fact that a strict Roman Catholic does not regard a Divorce Act, even if passed by the

Legislature, as binding upon him to relieve his conscience? and secondly, that there have been cases in which Roman Catholics of high rank have been divorced by Act of Parliament, but have considered to the end of their lives that they were still married?—I may be permitted to say that, in my opinion, that is a state of things which, as a question of jurisprudence, should be carefully avoided. There is no greater evil than that of a Court passing a decree which the litigants ignore or repudiate afterwards; it creates a direct hostility to the law, the whole theory of the law being that it is made by the consent of all, and that all are bound by it, and ought to obey it *ex animo*.

Chairman. According to your opinion would further legislation upon the subject be inexpedient?—I am not prepared to go so far as that; I think that further legislation, *quoad* the Protestants of Ireland, might be expedient; and I think that further legislation is highly expedient also for Her Majesty's subjects in those colonies which have either Supreme Courts, or are fit to be entrusted with the legislative jurisdiction of divorce *a vinculo*. In Scotland further legislation, I think, might be expedient, because it is now a foreign land, although in the Queen's dominions, in conflict with English law; nothing is more injurious than internal conflict of law, as between England, Ireland, Scotland, the Isle of Man, and the Channel Islands, for instance, they all have separate laws of their own. I do not feel competent to go into that question, because I am not familiar with the Scotch law.

Lord Wensleydale. How far, in point of law, does the jurisdiction of the province of Canterbury extend, has it an inland limit, or does it go over the sea?—According to my impression it goes over the sea upon the land, that is, the Channel islands are within the diocese of Winchester practically, and subject to the questions arising out of their peculiar constitution; they are part of the diocese of Winchester, although they are not part of the realm of England, but of the ancient duchy of Normandy, and have a peculiar government of their own, a mixed legislative, judicial, and executive government.

In your opinion, might the inhabitants of Guernsey and Jersey sue in the Divorce Court at Westminster?—I do not feel positive as to that, because they might be interdicted by some of their own insular laws; supposing they are not so, then they are within the diocese of Winchester.

The Isle of Man, I suppose, is within some English bishopric?—It is included in the bishopric of Sodor and Man.

No part of the sea is within an English bishopric, is it?—We have never had to discuss the question of jurisdiction over the high seas as to adultery, that I am aware of. A man cannot be domiciled on the high sea.

Lord Cranworth. Is it not a wrong notion, that the jurisdiction of the Bishop of London extends to the Continent?—That is legally a fiction, but it is to a great extent a fact, notwithstanding, because it is exercised in this very effective method, that the clergy in foreign countries, the consular chaplains, and such as are resident in foreign countries, are removable at the will and pleasure of the Secretary of State for Foreign Affairs. As a general rule, he consults the Bishop of London, and, in nine cases out of ten, acts upon his advice in ecclesiastical matters.

Chairman. Surely that cannot apply to voluntary places of worship, such as those at Paris or at Baden-Baden. The Se-

cretary of State cannot have anything to with those, he may have something to do with the chaplain of a factory, but not with the chaplain of a voluntary place of worship, opened, as it may be, by any independent member of the Church of England?—There are hardly any factories now, and, although what your Lordship says is strictly accurate, yet it is to be taken with this modification, that in many cases where there are neither legatine chapels nor factory chapels, yet, inasmuch as the English Government contributes to the maintenance of the chapel, the Secretary of State thereby acquires the power of dismissing a chaplain, just as the Secretary of State for War may dismiss an officer in the army, without reason. In that way, from the Bishop of London being sometimes consulted, the notion has sprung up that he has jurisdiction abroad.

Lord Brougham. Does not the Bishop of London exercise some discretion in granting a licence in Paris, for instance, for a chaplain?—I believe practically he has no power at all of interfering. The Secretary of State may (if he chooses) be guided by his advice; but I remember a case, a few years ago, with reference to the chaplain of Madeira, in which the Bishop of London was minded to remove him, and the Secretary of State (I rather think) declined to remove him, and the chaplain remained there in spite of the Bishop, he could not revoke his licence, because the Secretary of State would not "endorse" the revocation, as the Americans say.

Lord Somerhill. Was there not some case also at Antwerp?—I do not recollect it. We have frequent cases of discussion of every kind, ecclesiastical, moral, and so on, between chaplains and consuls, and the members of congregations, and in those matters (so far as I am aware) the Secretary of State acts either upon the advice of the Queen's Advocate, or upon his own view, without reference to any bishop.

Chairman. Do you not think that the test as to the jurisdiction of the Divorce Court at Westminster, as tried by the jurisdiction of the Ecclesiastical Courts, would be too vague a test to be permanently established?—If Sir Cresswell Cresswell, in whom we all place the most entire confidence, thinks it too vague a test, and requires the assistance of the Legislature, I should say give it to him, only let him draw the Act, and do not let it be altered in Committee and then put into operation as altered, to assist Sir C. Cresswell, who would rather be embarrassed than assisted by it. He can steer the ship without an Act of Parliament, but if he wants one, let him make it.

According to the test adopted, in a suit in which the parties are domiciled in America, all who bear allegiance to England can sue in the Divorce Court at Westminster?—That question of allegiance was rather imported by judges who are familiar with criminal law, but with great submission to them, it has no more to do with the question than the colour of the man's coat. The place where he was born does not signify in the least in the world. A bishop in the olden time never regarded where a man was born, the question was where he was "inhabiting and dwelling," and the allegiance has no necessary connexion with the domicil. If anything has been said about it, this may be considered as *obiter dictum*. I am quite satisfied that none of the cases were decided wrongly. *Brodie* v. *Brodie* I know nothing about. The decision in *Tollemache* v. *Tollemache*, in which I was counsel, was in my

opinion right; also that in *Yelverton* v. *Yelverton*. Unless the learned judge says he wants the assistance of the Legislature, I do not think that he wants it.

Lord Wensleydale. Under those circumstances, you would have the law as it is?—Unless Sir Cresswell Cresswell wants some alteration.

Chairman. You would advise that the petition of the officer with an Anglo-Indian domicil should pass into law?—If I were in the House of Lords I would give him his bill if he deserved it; but at all events I would send out to India a copy of Lord Stanley's Circular, and say, Pray pass an Act, as other colonies have done.

Would not that be a dangerous power to confer upon any colonial tribunal?—It has already been done in such instances as these; the settlements on the Gold coast, which are rich in gold, but not in law; South Australia, which is rich in both; and the Bahamas, which are not very rich in either.

Have they power to grant divorce?—They have; the Virgin Islands can grant divorces *a vinculo*; I believe New Brunswick has also the power, and Tasmania. Some of the colonial bills have been stopped because they introduce into them such extraordinary provisions. As responsible to a certain extent, although under a limited responsibility, I may state that, in my opinion, Lord Stanley's Circular, which was an act of the Executive Government, settled the principle; and the only question remaining for me was, "Does the Act proposed by the colony substantially agree with the English law?" If it did, I passed it; if it did not, I stopped it.

Do you say that in those colonies marriage may be dissolved for the same cause?—I believe so.

For the adultery of the wife, or the adultery of the husband, with aggravations?—Yes.

The West Indian colonies, I think, have no legislative or judicial power as to divorce. In the Mauritius the French "Code Civil" obtains?—They are under the French law.

Lord Wensleydale. They cannot dissolve marriage under the French law?—Whatever they do, they do under the French law; British Guiana, the Cape of Good Hope, and Ceylon, are under the Anglo-Dutch law, so far as I am aware. As to the Mauritius, the alteration in the French law, forbidding divorce in France, only dates from the second Restoration of the Bourbons in 1816, subsequently to the conquest of that island. My impression is that in the Mauritius they do grant divorce *a vinculo*.

Lord Cranworth. I think that the Mauritius became our property before the alteration?—Certainly; the law forbidding divorce in France dates from 1816; the last peace with France was in 1815, and therefore that settles the question.

Earl of Wicklow. When you speak of the feelings of the Roman Catholics, are you aware that there is such a law existing in Belgium, which is chiefly a Roman Catholic country?—I am not aware of the fact as to Belgium; but I think your Lordship's suggestion will be found true, not only as to Belgium, but as to several other Roman Catholic countries; I believe that the difficulty has not been found insuperable in certain countries of Europe, which, although more or less Roman Catholic, have a liberal and enlightened judicial and legislative system; I would take some of those instances, and see how it could be treated in Ireland upon that basis. Of course, I need not say that in arguing

with a Roman Catholic, you to a certain extent displace his objection, if you can show that in certain Roman Catholic countries the thing has been done. A great deal of light may be thrown upon the subject by looking at the law on this subject, which obtains in the 33 heretofore United States of America. They have every kind of question. Mr. Bishop's book almost exhausts this subject. I would say respectfully, read "Bishop" instead of asking my opinion. As to divorce, each State is sovereign; North Carolina has never yet permitted a divorce, judicial or legislative; you have there Roman Catholic states, as Maryland and Louisiana, and you have rigidly Protestant states, such as Massachusetts and Rhode Island; and therefore, it may be considered that there is there a "museum" of jurisprudence. There you have a strong Roman Catholic element, because Louisiana and Maryland may be considered as much Roman Catholic as Ireland, whilst Massachusetts and Rhode Island are as Protestant as Scotland.

Lord Wensleydale. Do I rightly understand you to say that there can be two domiciles; does not the general law, that a person may have two or three domiciles, apply only to succession to personal property?—I am hardly able to deal with that question this morning; I think it possible a man may have more than one domicil; it is recognized by many countries, that a domicil for jurisdiction requires a much slighter evidence than any other domicil. I do not see the necessity of adopting one rigorous rule as to domicil; I think the judge might decide whether, in a particular case, he was satisfied as to the domicil for the purposes of the suit. The ecclesiastical judges in Doctors' Commons used to put it upon that ground.

The witness is directed to withdraw.

R. J. PHILLIMORE, Esq., Q.C., D.C.L. (*a*), is called in, and examined as follows:

The Chairman (*b*). We are well acquainted with your writings as a jurist; and we believe that you have practised very extensively in the Divorce Court?—Yes; I believe I may say that.

Will you be good enough to tell us, according to your opinion, first, geographically, what persons have a right to sue in the Court at Westminster, for dissolution of marriage?—Perhaps your Lordships will allow me in answering your questions to make a few observations by way of preface, because I think that that will make my answers clearer. When I received your Lordships' intimation, that you did me the honour of wishing me to be examined, I endeavoured to arrange my ideas in a particular order. The new Divorce Act, as your Lordships are well aware, in part continued to the judge the jurisdiction exercised by the Ecclesiastical Courts, and in part conferred a new jurisdiction; and I think it is necessary to observe that distinction in any observations that may be made upon the present subject. That part of the statute which continued to the judge the jurisdiction exercised by the old Ecclesiastical Courts, may contribute to throw some light upon the question, as to whether the new jurisdiction which is given to him should be exercised over English subjects or English domiciled subjects, or whether it should be

(*a*) Now Queen's Advocate General, having succeeded Sir John D. Hardinge, who resigned in 1862.
(*b*) Lord Chancellor Campbell.

further extended. I do not entirely agree with the theory of my learned friend, Her Majesty's Advocate, on the mode in which the Ecclesiastical Court exercised its jurisdiction was strictly according to the Canon Law; that is to say, each bishop had his own diocese, within which he exercised jurisdiction *pro salute animæ*, with an appeal to the archbishop of that province, and ultimately with an appeal to the Pope; for whom the delegates were substituted at the time of the Reformation. The consequence of that was, that when a suit was instituted in an Ecclesiastical Court the question of domicil very rarely arose; and so far as my researches have gone, there never was an instance of a person being refused leave to institute a suit in that Court on the ground of want of domicil. I do not believe that such a case has ever been found.

He dwelling within the diocese?—He dwelling within the diocese. The cases in which a party was refused permission to prosecute a suit were cases of this description: where a wife brought a suit against the husband, and could not satisfy the Court that the husband was resident in the diocese; and the Canon Law having early adopted the doctrine, that the domicil of the wife followed the domicil of the husband, it considered its jurisdiction founded by the residence of the husband. There are one or two cases upon this point which, with your Lordships' permission I will refer to. There is the very important case, familiar to many of your Lordships, of Lord Herbert's, decided by Lord Stowell in the Consistory Court of London. The person who sued in that case was a foreigner married to Lord Herbert. The marriage had taken place, I think, in Naples, and she sued him in London for restitution of conjugal rights. Dr. Lushington, referring to this case in a judgment in *Collett* v. *Collett*, says this: "In this case the party cited occupies a house within the diocese, and was actually resident there before and at the time of the citation." Not a word is said about domicil. "What was the course pursued by Lord Stowell in the case of *Herbert* v. *Herbert*? According to that case the evidence was the same (perhaps not so strong as in the present case) as to the habitation of Lord Herbert from the time of that *quasi* commencement of the suit up to the serving of the citation. Lord Stowell did not hesitate to pronounce Lord Herbert in contempt. There was not in that case any personal service but service *viis et modis*, by leaving a copy of the citation at the house of the parties cited." He had been there resident a very short time, and the Ecclesiastical Court considered the jurisdiction well founded by serving a citation at his house. Then Dr. Lushington goes on to refer to Tenducci's case in the Arches Court; but it was as a very important and remarkable suit, and says, "It was a suit brought after a party, a foreigner, had quitted the country, and by reason of a residence in the Haymarket he was served by having a copy at that place, and pronounced in contempt; and that, too, in a suit for annulling a marriage, and not merely for a separation by reason of adultery. The Court of Arches stopped only just before the final determination, in order that the party might have personal notice given to him in Naples. Here, then, in the Court of Arches personal service was ordered to be made upon an individual in the kingdom of Naples." Dr. Lushington went on to pronounce nullity of marriage. Tenducci's case was a suit for nullity of marriage by reason of impotency.

Lord Brougham. It was declared that service at the house

was perfectly good service?—Yes; and in *Collett* v. *Collett* the party was served on board a steamer.

As the Ordinary interfered *pro salute animæ*, he would take care of the soul of any person within the diocese without considering how long he had resided there; residence, therefore, seems to have been the test of jurisdiction?—No doubt, and residence of the slightest kind. When the learned judge reviewed these cases in *Yelverton* v. *Yelverton*, he did not deny the authority of those cases; but inasmuch as we were unable to show that Major Yelverton had ever had a residence in England at all, he decided that he had no jurisdiction in that particular case. The consequence of this would be, that, as to that new part of the jurisdiction conferred upon Sir C. Cresswell, he found his jurisdiction, so to speak, the creature of the statute; and he said all those cases which were cited to him were good cases as regards judicial separation, nullity of marriage, and restitution of conjugal rights, because he inherited that from ecclesiastical law, but did not necessarily apply to the consideration of divorce *a vinculo*. It appeared to me that there was not in the reason of the thing, or according to any question of public policy or private morality, any reason for distinguishing between the two cases. The consequence surely is absurd that a person may have his marriage set aside by reason of any cause which proves nullity upon a citation at his house which he may have occupied for only 24 hours; and yet that when he comes for a divorce, unless he can show a domicil, he is not to have his remedy.

Is there not much greater peril from the power of dissolving marriage, than there is merely from the power of decreeing a restitution of conjugal rights, or a separation; would it not open the door to monstrous abuses, if residence were made the test as to jurisdiction in respect of dissolution of marriage?—The case goes a little further than your Lordship has put it; it goes now to the extent of annulling or pronouncing null a marriage, which practically is a destruction of a *de facto* existing marriage bond.

Lord Chelmsford. That is declaring that there never was a marriage?—That is the form.

Chairman. So far the Ecclesiastical Court had jurisdiction, but not to dissolve a marriage?—When you come to look at the latter part of the statute, it seems to me, with great submission to your Lordships, that the difficulties in distinguishing between residence and domicil, in cases of this sort, are practically insuperable. I may put three or four instances to your Lordship. A testamentary domicil is founded *animo et facto*. A person might come to England, and reside anywhere in London, and, after he had been here five or six days, might say, "I am very much pleased with England; I mean to live here for the rest of my life," and bring his suit as duly domiciled.

If he said so, *bonâ fide*, it might be sufficient?—Then comes the question, how are you to ascertain his *bonâ fides?* In a case for dissolution of marriage, by reason of adultery, his evidence cannot be admitted. Then, by the rules of evidence, you exclude the very best evidence upon the question, namely, his intention as to remaining in this country, because you cannot examine him as to any matters relating to divorce, by reason of adultery. In the case of *Brodie* v. *Brodie* the husband had left his wife in Australia, and came over here; we proved the act of going away by writing and by declarations; the judge declining to give any opinion as to whether he could be examined. We

proved then, to the satisfaction of the judge, that he had come and taken the lease of a house for several years; and it was that which mainly weighed with the learned judge, and induced him to say that there was a *bonâ fide* residence or domicil, for the purpose of founding the jurisdiction. It seems to me that all the attempts which have ever been made to limit the period have not been successful; and I believe Mr. Macqueen has given evidence to the effect that the rule as to 40 days in Scotland is continually evaded.

You would not propose to admit simple residence; because going down by the mail-coach to Edinburgh, and stopping a night there, would hardly give jurisdiction?—It would not; and therefore it comes very much to this question, whether it is a matter upon which positive legislation can be exercised at all, and whether these matters must not be left to the discretion of the judge.

But must he not have something to guide his discretion?—The Gretna Green Marriage Act defines the time as 21 days. It seems to me also that this question, in order to be thoroughly understood, must be considered in two ways; first, with regard to England and its dependencies, and, secondly, with relation to foreign countries. Now, with regard to England and its dependencies, to which I must, perhaps, confine myself to-day (your Lordships will not ask me for names, because after what Lord Cranworth has said it is just possible that these sentences may be invalidated hereafter), practically speaking, to my knowledge, parties domiciled in Scotland, Ireland, India, or Australia, for any purpose at least which would go to constitute a testamentary domicil, have successfully sued and obtained divorces in the Court at Westminster. There being no time prescribed which shall constitute a residence, the mode of evasion is very easy. I know of a case in which an Irish gentleman said he considered himself extremely ill-used, that he could not obtain a divorce without going through the expensive and dilatory process of obtaining an Act of Parliament, and bringing an action for criminal conversation; and that he would rather give up his house in Ireland, and come to England, and become an Englishman, than be left without his remedy. Some one suggested to him that that was not necessary, but that if he came and took a house in England for a limited time, no one could say whether he dined at his club or at his house. He acted upon that suggestion, and obtained a divorce.

Lord Brougham. How long had he remained in the country?—Not very long. Your Lordships will not ask me to state more definitely than that. I know that practically the strictly English domicil is evaded; there have been many cases. How is it to be otherwise? It very frequently happens that the person interested in opposing the dissolution has no substantial defence on the merits; how is it to be brought to the mind of the learned judge?

Chairman. That must open the door to collusive proceedings?—If it is to be called collusion. It opens the door for this proceeding, that where the wife has no defence, she does not say "I can prove you have an Irish domicil;" but she lets him get his remedy. That is hardly collusion in the shape of suppressing material facts.

It would enable parties who are minded to change wives to accomplish their object?—It may be so. The cases I have known have been *bonâ fide* cases on the merits, and cases where it was a

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mere accident for the parties to be domiciled in Scotland, or Ireland, or the colonies.

Does it not appear to you to be advisable to have some more certain test as to the jurisdiction of the Court?—I can assure your Lordships, unfeignedly, that I have turned that over in my mind in every possible way. I had the great advantage of a long conversation with Sir Cresswell Cresswell the other day, and the result to my mind was, although I quite agree that it would be desirable, yet the impossibility of finding any proper test is so great, that I almost abandon it in despair. You may require an affidavit from a man that he is domiciled in this country, or you may prescribe a limited time; but there is a curious illustration of how that is evaded. The Marriage Act requires 21 days' residence, and I have known a person say, "I have been in this diocese 21 days, but I have slept away three nights." In such cases I have given the advice that the place of residence does not mean that a person shall be there every night during that period. What test could really be applied which might not be evaded? Take the usual test of the lease of a house; a man may live in the house for two or three days, or he may come over for five or six days at long intervals.

How are you to prevent a person coming to England to have a marriage dissolved fraudulently, that is, contrary to the laws of his own country; if residence would be enough, according to your opinion?—My belief is, that, with respect to the minor remedy, so to speak, of judicial separation, practically the Court in England administers that remedy to all persons whatever, resident within the diocese for any limited period, if served within the diocese, and that is attended practically with no inconvenience. Let me refer your Lordships to the remarkable case of *Dasent* v. *Dasent*, almost the last case decided by Dr. Lushington upon this point. It was the case of a petition for divorce by reason of cruelty and adultery promoted by Elizabeth Dasent against Barry Irwin Dasent her lawful husband, described as of the parish of St. James, Westminster. The citation was extracted in October 1848, and on the 17th November 1848 a proxy was exhibited for Mr. Dasent, and the citation was brought in with a special certificate endorsed, stating that an officer attended at 11, Pall Mall, in the parish of St. James, Westminster, the last known place of residence of Mr. Dasent, for the purpose of serving the citation personally on him; that the officer was informed that he had left that residence, and it was not known there where he was at that time, and it was reported he had left England, and was in the West Indies. The officer was referred to the brother of Dasent; that gentleman refused to inform the officer where he was, but he stated he knew where he was, and was in communication with him, and would forward any communication. On application, the judge decreed a decree by ways and means to issue, and on the 18th January 1849 that decree was returned with a certificate endorsed, stating that the decree was duly executed on the 11th January, by affixing it on the outer door of the last known usual place of residence of Mr. Dasent. No more information than that he had gone to some place in the West Indies could be obtained. On the 21st April 1849 the citation was brought in, personally served on Mr. Dasent at Kingstown, in the Island of St. Vincent. On the 5th February preceding, Mrs. Dasent, describing herself as residing at 82, Sloane Street, Chelsea, in an affidavit sworn on the 20th June 1849, stated that she was married to Mr. Dasent, party

in this case, in February 1845, and that the issue of the marriage was an only child, born in November in that year; that about two months after her marriage she was compelled to leave her husband by reason of his cruel treatment of her, but at the expiration of one month, was prevailed upon by his entreaties and promises of amendment to return to cohabitation. That they then resided together for about 14 months, when Mr. Dasent left England for Germany, where he remained for about two months. That he then returned to England, but remained in concealment for about half a year; at the expiration of which, namely, in March 1847, he proceeded to the Island of St. Vincent, in the West Indies, where, to the best of her knowledge and belief, he has since resided. That at the end of May, or the beginning of June 1846, when living with her husband at 11, Pall Mall, where he practised as a surgeon, she was struck by him with such violence as to be knocked down and bruised severely. That she was then only withheld from taking legal proceedings against him by his threatening (which she believed it was in his power to execute) to deprive her of the care of her only child. She, lastly, stated that she was not apprised of any adulterous connexion having been formed by her husband, or of any act of adultery committed by him, until the month of October 1848. On the above facts the Court was applied to to pronounce the husband cited in contempt for the purpose of proceeding, in order to put upon record proof of the cruelty and adultery. Dr. Adams, in support of the motion, said that to grant the present application, the Court would be carrying the case a little further only than that of *Collett* v. *Collett*. The circumstances of the two cases differ, I admit, in these respects; Mr. Collett was residing in London at the time when the citation was issued, and went abroad a few days only before an attempt was made to serve him in London; he had also a house in London. Mr. Dasent had no place of residence in London when the citation was issued; but the cases agree in this respect; that Mr. Collett and Mr. Dasent were personally served abroad. In the case of Tenducci, personal notice of the proceedings was served on the husband at Naples. Then the inquiry is made by the Court, "How was the jurisdiction of the Court of Arches founded in that case? *A*. By letters of request, I apprehend. *Q*. Is there any ecclesiastical jurisdiction in the West Indies to try such a case as this? *A*. None whatever; unless the wife be allowed to proceed here, she can have no redress." Then Dr. Lushington pronounced his opinion, "That the only obstacle in the way was the matter of the jurisdiction," but said, "I have fully considered that question, and I think it right that I should pronounce for the divorce." That was the case of a person who had been resident in the sense of passing through London, and who was served by a citation affixed on the outer door of his house long after he had left it, and yet, nevertheless, the Ecclesiastical Court of London proceeded to pronounce a divorce *a mensa et thoro*, which was all it could do. All I would say on this point of the question, is this, that if the present Divorce Court were to have the power of granting a divorce to all persons owing allegiance to England, from wheresoever they come, served with process in England, it would have the same power exactly as the old Ecclesiastical Court had in cases *a mensa et thoro*.

That would allow a domiciled Scotchman or Irishman to come and apply for a divorce in the Court at Westminster?—It would.

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Lord Wensleydale. Anyone?—Anyone served with process in England.

Chairman. According to your notion of the law, it might be done?—If it were done, it would be putting divorces *a vinculo* upon the same footing as divorces *a mensa et thoro.*

What do you say was the intention of the Legislature?—I do not think that it was the intention of the Legislature to make in this matter any distinction between the two kinds of jurisdiction.

What do you say was the intention of the Legislature, as regards the Irish and the Scotch?—It is not difficult to say, knowing what passed in Parliament at the time, and we know that both the Irish and the Scotch remonstrated against the Divorce Bill.

Earl of Wicklow. Is not the result of the statement you have made this, that an Irish person suing in the Court at Westminster may obtain a divorce provided there is no opposition on the part of his wife; but that if there be an opposition on the part of his wife on the ground that he has an Irish domicil, he is thereby defeated?—He must prove residence. If the suspicions of the judge are aroused, he has power to send for the petitioner and examine him, although I think he would exercise that power with great hesitation, because he declined the other day to do it.

Chairman. We understand from high authority that gentlemen of the bar advise their clients that the Court at Westminster has not jurisdiction where there is an Anglo-Indian domicil. After the six months have elapsed, how could that question be raised?—I hope it could not be raised. I do not believe that, practically, it could be. We had to consider that in the Irish case I have alluded to, and we thought it practically impossible to raise it after the six months had elapsed. It has been said that, if the Court has not jurisdiction, the divorce is a nullity. The words in the Act not specifying any time, how could that be inquired into? If the Court had said that within 21 days that might be inquired into, that would have been another matter. The words are "any husband" and "any wife." I would ask to be allowed to say a few words about foreign states, with regard to the present branch of the question of divorce *a mensa et thoro,* the restitution of conjugal rights, and the protection of the wife from cruelty, and so on. I think that almost all jurists are agreed that the court of the place, in which the parties are resident, is entitled to administer that protection. They are almost all agreed, considering the peculiar contract of marriage, that it is a contract *juris gentium,* and a question of status, as well as of contract, and that it is a contract of municipal, natural, and international law. They are all agreed that it is a question of status as well as a question of contract, and that the parties have a right to the protection of the courts of justice of the country in which they happen to be.

That is regulating what shall be done under the marriage, for which residence ought to be sufficient?—That is so; and, therefore, as far as the lesser remedy is concerned, I think we may assume that all jurists are agreed that the forum is a *competens forum,* where the parties happen to reside. As to the greater remedy, *a vinculo,* questions of the most serious kind do arise, whether the place of the contract is to be considered, or the law of the domicil, or the law of origin. The case of *Simonin* v.

Malac was not a case of seeking a divorce by reason of cruelty and adultery, but a case of seeking in England sentence of nullity upon an English marriage. In that case, two foreigners came over to England, for the purpose, no doubt, of evading the law of their own country. Mdlle. Simonin came over with Mr. Malac to this country and remained in London five days, neither of them being able to speak a word of English. They made an affidavit, obtained a licence, and were married, and went away the next day to Paris. The lady had reason to suspect that the husband was playing some trick upon her, and refused to sleep with him until the marriage was pronounced valid in France. A suit was instituted in France, and the Court in France set aside the marriage, on the ground that the parties came over to England with a personal incapacity attached to them, which it was not competent to them to shake off, that incapacity being the want of consent of the parents. The consequence of that was, that the unfortunate woman was pronounced a spinster in France, and coming over to England, and wishing to know what her character was, she instituted a suit in England for the purpose of having the decree of the French Court confirmed, and it was argued, I think, for the first time upon that point, upon the international question as to whether this Court ought not by comity to take notice of an incapacity of that kind, just as we have chosen to affix an incapacity on the marriage of the members of the Royal Family; but it was overruled after long argument, and the point would have been brought before your Lordships by appeal, but there was a defect in the mode of prosecuting it, and the six months were allowed to elapse, so that it fell through on that ground. There is no doubt that the question of foreign marriages deserves the greatest consideration upon this point of personal incapacity, and also as to whether the law of the place of the contract should prevail, or whether the Court in England ought to administer the same relief as that given by the law of the place of the contract.

For that purpose would you consider Scotland and Ireland foreign countries?—I should.

Lord Brougham. If that had prevailed in Scotland, it would have set aside Gretna Green marriages, would it not? In *Brook* v. *Brook*; Sir Cresswell Cresswell said that that law did not extend to England, and he decided that case mainly upon that ground. That was one of the grounds upon which we hoped to succeed in *Simonin* v. *Malac.* Then arose the question, what is to be done in respect to colonies which have no Court, and with persons who having resided therefore 10 years come over here, and are uncertain whether they will go back or not. The question they ask is, why they should not have the same relief as any other English colony?

Chairman. We shall be glad now to have the advantage of your opinion as to what ought to be done to escape from the terrible anomaly that a divorce pronounced legally in Scotland, is not recognized in England. It is now highly desirable that a divorce pronounced by any court of competent jurisdiction in the United Kingdom should be universally effective over the whole of the empire. At present, the objection to making a Scotch divorce efficient in England is, that in Scotland a divorce may be obtained for different causes to those for which it may be obtained in England, and that if such facilities were given, there would be frequent attempts to obtain divorces in Scotland by persons domi-

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ciled in England. How is that to be dealt with?—No case has arisen since the new Divorce Act has been passed, in which it has been sought to maintain the validity of a Scotch divorce between English subjects in England. The marriage in that case, to which your Lordship refers, took place before the Act. Supposing it had happened that the Scotch Court had pronounced a dissolution as between English parties, properly resident in Scotland, for the same reason as would have obtained sentence in England, there seems to be no precedent against that being recognized in this country, because the principle upon which Lolley's case was decided was the broad principle that no State is bound to recognize a foreign judgment in its own limits, which is contrary to the public policy of its own State. That cannot be said to be the case now.

The principle upon which Lolley's case might have been supported was probably that Lolley was not domiciled in Scotland at the time of the divorce?—Exactly. Now that it is no longer contrary to the public policy of this land that there should be a dissolution of the marriage bond, there seems to be no reason why the sentence of a competent foreign court, pronouncing a sentence of divorce for reasons recognized in this country, should not be upholden.

You would look to the cause for which the marriage was dissolved to see whether that is consonant with the law of the country in which the parties are domiciled?—In the case of English subjects.

Lord Brougham. A very important qualification to that has been distinctly stated, that a marriage is valid in the country where it is made, provided it is not a marriage contrary to the laws of the country from which the parties come? That question of your Lordship's divides itself into two heads. Ought we to recognize a sentence of dissolution for the same grounds as we should recognize it, and ought we to recognize it if they go a step further?

Chairman. The ground upon which Lolley's case proceeded in England was, that no marriage was dissoluble by the law of England. Now the objection arises that it may be dissolved for a clause in Scotland which would not be a cause in England?—It would seem to me that the English Court would now look to the *ratio decidendi* in Scotland, and if it was one upon which it might have been so decided here, it would uphold that sentence.

If the parties are *bonâ fide* domiciled in Scotland, so as to regulate the succession to personal property, you believe the dissolution of marriage might take place according to the Scotch law, and that ought to be valid all over the world?—I do.

But, for a mere temporary residence of 40 days, to give a power to dissolve for a cause that would not be a just cause for dissolution in the country where they are domiciled would be an abuse?—Certainly; and that, perhaps, is a case in which a definite period of time might be usefully introduced.

Will it not come to this, that, wherever the parties are domiciled according to the domicil of succession, if the divorce is pronounced by a court of competent jurisdiction, it must be valid all over the world; but if it is only in respect of domicil giving a forensic jurisdiction, it must be according to the law of the country in which the parties are domiciled?—Yes; that distinction is quite evident.

Lord Cranworth. Would not there be great difficulty in

looking behind the decree of the Court to see upon what grounds the Court had proceeded?—No doubt there would be that difficulty, but I suppose that the sentence would declare the divorce by reason of adultery. Perhaps, I ought to say, that any limitation which is founded upon a declaration of the parties would probably fail, because such a declaration as my friend, the Queen's Advocate, suggested with regard to the religious convictions of the parties, has always been found to fail. Persons have always made such a declaration as they wished to obtain their end at the moment. There is a famous case in which Sir John Nichols said that a man went up a Protestant, and came down a Roman Catholic. In the case of *Swift* v. *Kelly*, Sir J. Nichols held the Roman Catholic marriage invalid, but the Privy Council reversed the sentence and held it valid.

Lord Brougham. What is your opinion as to the expediency of requiring that in each case a specific declaration of the particulars of the adultery, and other matters, which from the grounds of the application should accompany the petition, leaving it in each case to the judge to say, whether or not the rule has been complied with?—I have a natural leaning to that mode of proceeding, because it could assimilate it to the former mode. I think that the present form of declaration is too vague, but, perhaps, something between the old form and the present declaration would be the happy medium. Your Lordships are aware of the singular state of the law in France; namely, that they refuse to entertain any suit at all between foreigners; and therefore we should not be met by any comity in that respect. It is a matter very much deplored by the French jurists.

Earl of Wicklow. Is that the case where one of the parties only is a foreigner?—If one is a foreigner and the other a Frenchman the suit may be instituted.

Chairman. Can you suggest anything that can be done to assist our Protestant fellow-subjects in Ireland?—I confess I am not pressed by the arguments as to the difference of religion, because it seems to me, that if a Roman Catholic does not choose to have recourse to the Court, he may stay away; there is no power to compel him. It has happened to me to be consulted by Roman Catholic clients, who have said, that all they wished was to obtain a judicial separation, and that they come before the Court for that purpose. I conceive that the lesser remedy would always be open to them; and those who had no conscientious objection would take the other.

Lord Somerhill. Would there not be a difficulty as to mixed marriages?—No doubt; at the same time there is nothing to prevent a Protestant at this moment who has married a Roman Catholic in Ireland, petitioning the House of Lords for a divorce.

Chairman. Is it not rather that the very notion of having a Divorce Court shocks the feelings of Her Majesty's Roman Catholic subjects in Ireland, than that there is any real objection to it in practice?—Large bodies of Englishmen objected to the establishment of a Divorce Court; but it was said that no injury was done to them by a measure which was demanded by the country; they need not have recourse to the Court.

Earl of Caithness. Did not they complain that a Protestant clergyman would be compelled to marry such persons?—That was altered so as not to render it compulsory.

Lord Somerhill. Were the Roman Catholic clients, to whom

you have just referred, English or Irish?—I believe they were English.

How many cases of mixed marriages have been before the Court, or cases in which both parties were Roman Catholics?—Very few; I have been concerned in some, but those were for judicial separations only.

Was the petitioner a Protestant or a Roman Catholic?—A Roman Catholic in one case; but that was for a judicial separation only.

Lord Wensleydale. As I understand, you think the case of *Yelverton* v. *Yelverton* wrongly decided?--If I am supposed to be under torture as a witness to speak the truth, I do think that it was. I think that the military domicil sufficed; and then I think that it came within the precedent of Dasent and the other case.

Lord Chelmsford. In your opinion there is no distinction between the residence necessary to found jurisdiction in case of nullity of marriage, and in case of divorce *a vinculo?*—I am not able to say in what that distinction should exist. There is nothing said about it in the Act of Parliament.

Your opinion is that the same residence ought to be sufficient, as it regards the question of jurisdiction?—I think so.

Chairman. As I understand you, you think that that is the law now?—I do; I do not think that there is any distinction made in the statute, except that it is said you shall proceed according to ecclesiastical principles and laws in the case of divorce *a mensa et thoro*, and not in divorce *a vinculo;* I can conceive that it might be expedient to fix a limited period of time; that qualification was quite sufficient for the House of Lords to pass an Act of Parliament in favour of an individual. I do not know any instance in which the House of Lords has inquired into the domicil of the parties.

Lord Chelmsford. My reason for putting the question was, that I understood you to say, that as to the preceding jurisdiction exercised by the Ecclesiastical Courts, the Judge of the Divorce Court inherits that jurisdiction, and that as to all the rest, he is rather the creature of the statute?—I did use that expression, and that is, I believe, the opinion of Sir C. Cresswell as to this part of his jurisdiction.