Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Cecil John Reginald Le Mesurier v. *Juliette Beatrice Armand Le Mesurier and others, from the Supreme Court of the Island of Ceylon; delivered 29th June* 1895.

Present:

The LORD CHANCELLOR.
LORD WATSON.
LORD HOBHOUSE.
LORD MACNAGHTEN.
LORD MORRIS.
SIR RICHARD COUCH.

[*Delivered by Lord Watson.*]

In February 1883, the Appellant, who is a member of the Ceylon Civil Service, was married in England to a French lady, the leading Respondent in this appeal, who will hereinafter be referred to as "the Respondent." From the date of their marriage until the commencement of this suit, the spouses had their principal residence in Ceylon, where the Appellant was necessarily detained by his official duties. In July 1892, he was Assistant Government Agent of the District of Matara; and, on the 12th of that month, he brought the present action before the District Court of Matara, against his wife and three other Defendants, praying for a divorce *a vinculo matrimonii*, and other remedies, upon the allegation that she had committed adultery with one of these Defendants in the year 1887, with another of them in the year 1889, and with the third of them at various times between May

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1891 and April 1892. Except on the last of these occasions, when the adultery was alleged to have taken place at Kandy, none of these matrimonial offences was said to have been committed within the jurisdiction of the Courts of Ceylon. The *loci* assigned for these acts on the two other occasions were, on the first, the steamship "Ghoorkha," during a voyage from England to Colombo; and, on the second, the steamship "Ravenna," during a voyage from Colombo to Marseilles, and a hotel at Marseilles and in Paris.

In her defence, the Respondent pleaded that the District Court had not jurisdiction to entertain the suit. Upon the merits, she denied all three charges of adultery, and, with respect to the first charge, pleaded alternatively that it had been condoned by the Appellant. Two of the other Defendants, who were alleged to have been participant in her adulterous acts on the first and third occasions, also lodged defences, denying the charges made against them, and pleaded that they were not subject to the jurisdiction of the Court. The Defendant in the first charge also set up the plea of condonation.

The Appellant is an Englishman by birth; and at the time when this action was instituted, although officially resident within the District of Matara, he admittedly retained, and still continues to retain his English domicile of origin. He had previously brought a divorce suit, founded on the same charges of adultery, and directed against the same parties, before the Divorce Court in England, and these proceedings appear to be still in dependence. At the time when they were cited to appear in the District Court of Matara, no one of the three persons who are co-Defendants with the Respondent, was resident in, or was alleged by

the Appellant to have any connection with the Island. They are described in his plaint, as " of Calcutta, India," and " of London, " England."

The District Judge ruled that jurisdiction to proceed in the suit was conferred upon him by Section 597 of the Civil Procedure Code, No. 2, of 1889, an enactment which their Lordships will have occasion to notice more fully. The case accordingly went to trial before him; and, on considering the evidence, he found that the first charge of adultery had been proved, but that it had been condoned by the Appellant, and that the second and third charges had also been established. In respect of the latter findings, he granted a decree *nisi*, to become absolute in four months unless good cause were shown against it. On appeal to the Supreme Court, that Order was reversed, and the Appellant's suit dismissed with costs.

Acting Chief Justice Lawrie, and Acting Puisne Justice Browne, who constituted the Court of Appeal, based their judgment upon two independent grounds. They held, in the first place, that the Courts of Ceylon had no jurisdiction to dissolve a marriage between British or European spouses resident in the Island. Such jurisdiction appeared to them to be expressly excluded by Section 53 of the Royal Charter of the 18th April 1801, which enacted that the jurisdiction of the Supreme Court of the Island,—at that time the only Court competent to try matrimonial causes,—should be exercised, " towards and upon all the " Dutch inhabitants of the said town, fort and " district, according to the laws and usages in " that behalf in force at the time the said " settlements, territories, and dependencies came " into our possession; and, towards and upon " the said British and Europeans, and licensed

" persons hereinbefore described, resident in any " the said settlements, territories and depen- " dencies, the Ecclesiastical Law, as the same " is now used and exercised in the Diocese of " London, in Great Britain." That enactment applied to British residents in Ceylon the matrimonial law of England, as it existed in the year 1801; and if it had stood unaltered, the conclusion of the learned Judges would have been irresistible. They held, in the second place, that the second and third charges of adultery, which were subsequent to condonation, had not been established by the evidence.

Their Lordships, in deciding this appeal, must observe the limits which the law of Ceylon imposes upon the matrimonial jurisdiction exerciseable by the tribunal before which the action was originally brought. It therefore becomes necessary to consider whether the District Court of Matara was competent to entertain the action and to pronounce decree of divorce *a vinculo*. To that point, which is one of some importance to British and other European residents in the Island, the arguments of Counsel on both sides of the bar were exclusively directed.

Jurisdiction in matrimonial causes, which, by the Royal Charter of 1801, was vested in the Supreme Court of Judicature, has by subsequent legislation been extended to the District Courts of the Island. The last of a series of enactments to the same effect is to be found in Section 597 of the Procedure Code of 1889, which provides that " any husband or wife may present a plaint to " the District Court within the limits of which " he or she, as the case may be, resides, praying " that his or her marriage may, by the law " applicable in this Colony to his or her case, be " dissolved." The enactment, like those which preceded it, refers to procedure only, and distributes the matrimonial jurisdiction which may

be competently exercised by its tribunals among the various Courts of the Colony. The Judge of the District Court assumed that it gave him jurisdiction to try the present case, but it is clear that neither Section 597 of the Code, nor previous enactments to a similar effect, empowered him to entertain any divorce suit which was not previously cognizable by the Courts of Ceylon.

If Section 53 of the Charter of 1801, upon which the learned Judges of the Supreme Court relied, had continued in force, it would have been beyond the competency of the District Court of Matara to give the Appellant a more stringent remedy than separation *a mensâ et thoro*. But it does not appear to have been brought under the notice of the Appellate Judges that the whole clauses of the Charter of 1801, including Section 53, were revoked and annulled by the Ceylon Charter of Justice, of the 18th February 1833. Since that date there has been no legislation regulating the jurisdiction of the Courts of Ceylon in matrimonial causes arising between British or European spouses. In these circumstances, it becomes necessary to consider, in the first place, what is the present law of the Island by which such jurisdiction is regulated; and, in the second place, whether according to that law, the present suit is maintainable.

The first of these questions appears to their Lordships to admit only of one answer. After the annexation of the Dutch Settlements in the Island of Ceylon to the British Crown, a commission was granted on the 19th April 1788, to Frederick North, appointing him to be Governor and Commander-in-Chief, and containing instructions to him with respect to the administration of justice and other matters. In pursuance of these instructions, the Governor issued a Royal Proclamation, promulgated at Colombo, on the 23rd September 1799, which declared that the

administration of justice and police was thenceforth and during His Majesty's pleasure, to be exercised by all Courts of Judicature, Civil and Criminal, "according to the laws and institutions "that subsisted under the ancient government of "the United Provinces, subject to such devia- "tions and alterations by any of the respective "powers and authorities herein-before mentioned, "and to such deviations and alterations as We "shall by these presents, or by any future "Proclamation, and in pursuance of the autho- "rities confided to Us, deem it proper and "beneficial for the purposes of justice to ordain "and publish, or which shall or may hereafter be "by lawful authority ordained and published."

The matrimonial law of the Colony established by the Proclamation of 1799 was superseded, or at least modified, in so far as it related to British and European residents, by the enactments of the Royal Charter of 1801. But it does not appear to their Lordships to admit of doubt, that, as soon as these enactments were swept away by the legislation of 1833, the Proclamation was restored to its original force, and the matrimonial law applicable to British or European residents in Ceylon again became the Roman Dutch law which had prevailed in the Colony before its annexation.

Accordingly the præjudicial question which their Lordships have to decide is, whether the Roman Dutch law, or any modification of it introduced into the Colony before the year 1798, gives the Courts of the Island jurisdiction to dissolve a marriage contracted in England by British subjects, who, though resident within the forum, still retain their English domicile. No authority can have a material bearing upon that point which does not relate to the dissolution of marriage; because there are unquestionably other remedies for matrimonial misconduct,

short of dissolution, which, according to the rules of the *jus gentium*, may be administered by the Courts of the Country in which spouses, domiciled elsewhere, are for the time resident. If for instance, a husband deserts his wife, although their residence be of a temporary character, these Courts may compel him to aliment her; and, in cases where the residence is of a more permanent character, and the husband treats his wife with such a degree of cruelty as to render her continuance in his society intolerable, the weight of opinion among international jurists, and the general practice is to the effect that the Courts of the residence are warranted in giving the remedy of judicial separation, without reference to the domicile of the parties. But the considerations which justify the Courts of the residence in administering remedies for the protection of mutual rights incidental to marriage, which do not involve disruption of the marriage bond, have little or no application to proceedings taken for the purpose of putting an end to the marriage, and remanding the spouses to the condition of single persons.

In order to sustain the competency of the present suit, it is necessary for the Appellant to show that the jurisdiction assumed by the District Judge of Matara was derived, either from some recognised principle of the general law of nations, or from some domestic rule of the Roman Dutch law. If either of these points were established, the jurisdiction of the District Court would be placed beyond question; but the effect of its decree divorcing the spouses would not in each case be the same. When the jurisdiction of the Court is exercised according to the rules of international law, as in the case where the parties have their domicile within its forum, its decree dissolving their marriage ought to be respected by the tribunals of every

civilized country. The opinions expressed by the English Common Law Judges in *Lolley's Case* (2 Russ. and Ry. 237) gave rise to a doubt, whether that principle was in consistency with the law of England, which at that time did not allow a marriage to be judicially dissolved. That doubt has since been dispelled; and the law of England was, in their Lordships' opinion, correctly stated by Lord Westbury in *Shaw* v. *Gould* (3 E. & I. Ap. 85), in these terms:— "The position that the tribunal of a foreign "country having jurisdiction to dissolve the "marriages of its own subjects, is competent to "pronounce a similar decree between English "subjects who were married in *England*, but "who before and at the time of the suit are "permanently domiciled within the jurisdiction "of such foreign tribunal, such decree being "made in a *bonâ fide* suit without collusion or "concert, is a position consistent with all the "English decisions, although it may not be con-"sistent with the resolution commonly cited as "the resolution of the judges in *Lolley's* case." On the other hand, a decree of divorce *a vinculo*, pronounced by a Court whose jurisdiction is solely derived from some rule of municipal law peculiar to its forum, cannot, when it trenches upon the interests of any other country to whose tribunals the spouses were amenable, claim extra-territorial authority.

Mr. Mayne, in his elaborate and able argument for the Appellant, did not assert the existence of any special rule in the Roman Dutch law giving jurisdiction to entertain a divorce suit in such circumstances as occur in the present case. He maintained that, in addition to jurisdiction arising from the fact of the spouses having their domicile of succession within the territory, which he admitted to be universally acknowledged, the general law of nations recognizes that a con-

current and equally effective jurisdiction to divorce is created by the spouses' residence within the territory of such permanence as to constitute what has been termed a "matrimonial "domicile," although not of sufficient permanence to fix their true domicile there. In support of the theory of a matrimonial domicile, as distinguished from the domicile of succession, the learned Counsel relied mainly, if not exclusively, upon certain decisions by the Courts of England and Scotland, which he represented as conclusive in his favour. Their Lordships will at once proceed to examine these authorities, beginning with the English cases, which do not appear to them to be either consistent or satisfactory. The Scotch cases are not, in their Lordships' opinion, more satisfactory than the English; but, so far as they go, they have at least the merit of consistency.

The first in date of the English cases is *Tollemache* v. *Tollemache* (1. S. & T. 557) which was decided by Williams J., Martin B., and the Judge Ordinary. The suit was for divorce at the instance of the husband, who was throughout a domiciled Englishman. The parties were first married at Gretna Green, and thereafter entered into a regular marriage in London in August 1837. From that date, with the exception of occasional visits to England and Wales, they resided continuously in Scotland; and, on the 3rd of July 1841, the husband obtained a decree of divorce from the Scotch Courts for adultery of the wife committed in Scotland. In her answer to the English suit, which was instituted 18 years afterwards, the wife also prayed the Court for a decree, declaring her marriage with the petitioner to be dissolved. The Court granted decree of dissolution, with the observation:—"Sitting here "as an English Court, we cannot recognize "that divorce (*i.e.* the Scotch) as putting an

"end to the marriage bond of a domiciled "Englishman."

The next case in order, *Yelverton* v. *Yelverton*, (1. S. & T. 574) was a suit at an alleged wife's instance for restitution of conjugal rights, which was dismissed by the Judge Ordinary. The husband who was called as Respondent was not resident, and had never been domiciled in England.

Their Lordships have noticed these cases because they were founded upon in the argument addressed to them. They need hardly observe that in neither of them was any question raised in regard to matrimonial domicile In *Tollemache* v. *Tollemache*, it might very well have been contended that four years' residence there had given the spouses a matrimonial domicile in Scotland; but that view of the law does not seem to have occurred either to the parties or to the Bench.

In the next case, *Brodie* v. *Brodie* (2. S. and T. 259), the petitioner, being the husband, was resident, but had not his domicile in England. He had been married to the Respondent in Tasmania, and left her behind him in Melbourne, when he came to Great Britain. His wife never came to England, and the acts of adultery charged in his petition were committed in the Colony. In giving decree, the Court, consisting of the Judge Ordinary, with Wightman and Williams, J.J., observed:—"We think "that the petitioner was *bonâ fide* resident here, "not casually, or as a traveller; after he "became resident here, his wife was carrying "on an adulterous intercourse in Australia. He "is, therefore, entitled to a decree *nisi* for a "dissolution of his marriage." These observations go the whole length of affirming that the residence of the husband in a country where he has not a domicile, if such residence be not casual or that of a traveller, gives the Courts of that country divorce jurisdiction over him, and

also over his wife, although she should continue to reside in the country where they both have their domicile of succession.

In *Manning* v. *Manning* (2 P. & D. 223) the Judge Ordinary dismissed a petition for divorce at the instance of an Irish husband, upon the ground that he was not a *bonâ fide* resident in England.

The next authority adduced for the Appellant was *Wilson* v. *Wilson* (2 P. & D. 435), which their Lordships notice because of its connection with a Scotch case between the same parties to which they will have occasion to refer. At the time of their marriage in 1861, both the spouses had their domicile of origin in Scotland, and they continued to reside there until November 1866, when the husband discovered that the lady had been guilty of adultery. He then went to England, and lived there with his mother until April 1871, when he presented his petition to the Judge Ordinary. During its dependence, he brought an action in the Court of Session, and obtained a decree of divorce, after it had been found that he was still domiciled in Scotland. Lord Penzance, upon the evidence before him, held that the petitioner had, in April 1871, acquired an English domicile, and he accordingly pronounced a similar decree, upon the ground that the Scotch Courts had no jurisdiction. No question as to what is called matrimonial as distinguished from true domicile was raised in the case. The petitioner was admittedly resident in England, and was found to have his domicile there; but Lord Penzance, in delivering judgment, expressed his opinion to the effect that actual domicile afforded the only true test of jurisdiction in such cases.

The last, and not the least important of the English authorities requiring to be considered is *Niboyet* v. *Niboyet* (4 P. D. 1). Shortly stated, the facts were these. A Frenchman and an

Englishwoman were married at Gibraltar, in the year 1856. In 1875, the husband went to Newcastle-on-Tyne, and continued to reside there until October 1876, when his wife filed a petition in the Divorce Division of the High Court of Justice, alleging adultery, coupled with desertion, for two years and upwards. It was admitted that the Respondent, being in the Consular service of France, had never lost his domicile of origin. The Judge Ordinary (Sir R. Phillimore) held that he had no jurisdiction to dissolve the marriage (3 P. D. 52). On appeal, his judgment was reversed by James and Cotton, L. J. J., the present Master of the Rolls (then Lord Justice Brett) dissenting. The main reason assigned for their decision by the learned Judges of the majority was, that, before the Act of 1857 became law, the petitioner would have been entitled to sue her husband in the Bishop's Court, although he was not domiciled in England, and to ask either for restitution of conjugal rights, or for a divorce *a mensâ et thoro*, and in either case for proper alimony; and consequently that, after the Act of 1857 passed, jurisdiction in divorce might be exercised in the same circumstances. There appears to their Lordships to be an obvious fallacy in that reasoning. It is not doubtful that there may be residence without domicile sufficient to sustain a suit for restitution of conjugal rights, for separation, or for aliment; but it does not follow that such residence must also give jurisdiction to dissolve the marriage. Their Lordships cannot construe Section 27 of the Act of 1857, as giving the English Court divorce jurisdiction in all cases where any other matrimonial suit would previously have been entertained in the Bishop's Court.

The only Scotch authority cited by Mr. Mayne was *Pitt* v. *Pitt* (1 Sess. Ca. 3rd Series 106, and 4 Macq. Ap. Ca. 627). But, in order to ascertain

whether, and if so to what extent, the doctrine of matrimonial domicile is regarded in Scotland as a good foundation for the exercise of divorce jurisdiction, their Lordships find it necessary to refer to the other cases in which the doctrine has been applied or discussed by a Scotch Court. Although the Matrimonial Courts of Scotland had previously exhibited no lack of ingenuity in discovering grounds for exercising divorce jurisdiction in cases where the parties had their domicile elsewhere, it was not until the year 1862 that the idea of a matrimonial domicile, other than true domicile, and resting upon a somewhat indefinite permanency of residence, which had been foreshadowed in *Shields* v. *Shields* (4 Sess. Ca. 2nd Series 142), was first formulated and applied in *Jack* v. *Jack* (24 Sess. Ca. 2nd Series 467.).

In that case, both spouses were Scotch, and after their marriage they continued to live together in Scotland until the year 1855, when the husband went to America, and became a Minister of the Gospel at Newburgh, in the State of New York, the wife continuing to reside in Scotland. Four and a half years afterwards, the husband, who was still in America, brought his action founded on adultery committed by his wife in Scotland. It was met by the plea of no jurisdiction, and was heard before twelve judges of the Court of Session, who upheld the jurisdiction of the Court by a majority of eleven to one. The late Lord President Inglis (at that time Lord Justice Clerk), went upon the ground of matrimonial domicile, which he thus defined:—"The true enquiry, I apprehend, in "every such case is, where is the home or seat "of the marriage for the time; where are the "spouses actually resident if they be together; "or if from any cause they are separate, what "is the place in which they are under obligation

" to come, and renew, or commence, their co-
" habitation as man and wife?" Five other Judges took substantially the same view expressed in different language. Lord President M'Neill, with two of their Lordships, concurred in the judgment, holding that the domicile of the married pair had never been transferred to any other country. Lord Kinloch and Lord Jerviswoode intimated their opinion that the true domicile of the husband was the only test of jurisdiction, but held that the husband was not shown to have lost his Scotch domicile. Lord Deas held that there was no jurisdiction, because the pursuer had acquired a new domicile in the United States. With regard to the matrimonial domicile, which found favour with some members of the Court, his Lordship observed:—" Neither
" can I solve this case by what has been some-
" times called the domicile of the marriage. The
" phraseology appears to me to be calculated to
" mislead. It is figurative, and wants judicial
" precision. There is no third domicile involved
" apart from the domicile of the husband and
" the domicile of the wife. Domicile belongs
" exclusively to persons. Having ascertained
" the domicile of the husband and the domicile
" of the wife, the enquiry into domicile is
" exhausted."

The doctrine of matrimonial domicile, as explained by the Lord Justice Clerk in *Jack* v. *Jack*, was subsequently applied by his Lordship and the other Judges of the Second Division, in *Hume* v. *Hume* (24 Sess. Ca. 2nd Series 1342) where they granted a decree of divorce for adultery to a wife whose husband had been in America for seventeen years, and was living with a woman whom he had married there.

The next case, which is also the last case in which the so-called matrimonial domicile has been made the ground of divorce jurisdiction in

Scotland, is *Pitt* v. *Pitt* already mentioned In that case, Colonel Pitt, a domiciled Englishman and married there, went to Scotland, chiefly for the purpose of avoiding his creditors, leaving his wife in London. With the exception of occasional visits, in disguise, to relatives in England, he continued to reside in the Hebrides for six years, and then brought an action for divorce on the ground of adultery. His wife, who had never been in Scotland, appeared to defend, and pleaded that, her husband being domiciled in England, the Court of Session had no jurisdiction. After proof, the Lord Ordinary (Kinloch) found that the pursuer had acquired a domicile in Scotland, and gave him decree of divorce. His decision was affirmed by the Second Division of the Court, who, differing from him on that point, came to the conclusion that the pursuer still retained his English domicile, but held that his residence in Scotland had been of such a character as to make that country the domicile of the marriage. On appeal to the House of Lords, these judgments were reversed, and the defender assoilzied from the conclusions of the action. At the bar of the House, the pursuer's counsel (Sir R. Phillimore, then Queen's Advocate, and Sir Hugh Cairns) intimated that "they 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 *a vinculo* might be validly granted to "strangers not domiciled, though temporarily "resident, within the jurisdiction." They accordingly confined their argument in support of the judgments appealed from to an endeavour to show that Colonel Pitt had acquired a Scottish domicile. The Lord Chancellor (Westbury), in delivering judgment referred to the course taken by Counsel in these terms:—"If he was not

" domiciled in Scotland to all intents and pur-
" poses, having relinquished his original domicile
" and acquired a domicile 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 pro-
" nounced in the Court below." Neither Lord Chelmsford nor Lord Kingsdown, who sat with the Lord Chancellor, took any exception to that statement.

After the observations made by Lord Westbury in *Pitt* v. *Pitt*, from which the other noble and learned Lords present did not express dissent, it would be very rash to affirm that, according to the law of Scotland, mere matrimonial domicile affords any ground for jurisdiction to divorce. There is no trace of the doctrine to be found in the Institutes of Scottish law, or in the earlier decisions of the Court; and, during the thirty-one years which have elapsed since the case of *Pitt* v. *Pitt* was decided by the House of Lords, the divorce jurisdiction of the Court of Session has never been exercised on that ground. It has however been twice referred to since that date, first in the year 1872, in *Wilson* v. *Wilson* (10 Sess. Ca. 3rd Series 573), and again, ten years afterwards, in *Stavert* v. *Stavert* (9 Sess. Ca. 4th Series 529).

In *Wilson* v. *Wilson* the parties were the same as in the English case already noticed. On his finding that his English suit was met by the plea that he retained his Scottish domicile, the husband brought an action of divorce in the Court of Session, and was there met by the plea that he had acquired an English domicile. The Lord Ordinary, whose judgment was affirmed by the First Division, found that he was domiciled in Scotland, and, notwithstanding the dependence

of the English suit, granted decree of divorce. In the note appended to his judgment, the Lord Ordinary (Ormidale) observed that "having "regard to the judgment in the House of Lords "in *Pitt* v. *Pitt* in April 1864, any such thing "as a consistorial or matrimonial domicile must "be held to be unknown to the law." In delivering the judgment of the Inner House, Lord President Inglis said:—"In cases of divorce, "jurisdiction depends upon domicile, and the "domicile in this case is here. And if the "domicile, and consequently the jurisdiction is "here, they can be nowhere else. I have always "been of opinion, as I expressed myself in "the case of *Pitt*, and I have never seen any "reason to change that opinion, that for the "purposes of divorce there may be a matrimonial "domicile, differing from the absolute domicile "which will rule succession." Their Lordships find it difficult to reconcile these statements. If there really were such a thing as a matrimonial domicile recognized by general law, it is not easy to comprehend why the jurisdiction could be nowhere else than in Scotland. On that assumption, the pursuer had certainly acquired a matrimonial domicile in England by five years' continuous residence there; and, in deference to international rules, the Scotch Court ought not to have entertained the same *lis* which was already pending in the proper Court of the matrimonial domicile.

In *Stavert* v. *Stavert* the Lord Ordinary refused to grant a divorce to a foreigner who had come to Scotland with his paramour, and had lived there for five months, with the sole object of obtaining a divorce from his wife. The pursuer maintained, alternatively, that he had acquired either a real domicile or a matrimonial domicile in Scotland. The Lord President (Inglis) held that he was possessed of neither; and with reference to matri-

monial domicile his Lordship said :—" There has been a " good deal of speculation on this point, but " fortunately it is not necessary to deal with the " question here. It has not yet been decided in " the Court of last resort." Lord Deas reiterated the views which he had expressed in *Pitt* v. *Pitt;* and Lord Shand, dealing with the same subject, said :—" I have great difficulty in finding any " sound principle of general application which " would induce foreign Courts to give weight to " a decree in this country based on such juris- " diction; and I have, further, great difficulty " in finding any rule or standard as to the " nature and extent of the residence which would " be necessary or sufficient to found such a " jurisdiction."

When carefully examined, neither the English nor the Scotch decisions are, in their Lordships' opinion, sufficient to establish the proposition that, in either of these countries, there exists a recognized rule of general law, to the effect that a so-called matrimonial domicile gives jurisdiction to dissolve marriage.

Tollemache v. *Tollemache*, which was decided by three Judges in 1859, shortly after the passing of the Divorce Act, appears to be an authority to the contrary. The learned Judges sustained the jurisdiction of the English Court, which was the forum of the husband's domicile, and disregarded as incompetent a decree of the Court of Session dissolving his marriage, although he had a matrimonial domicile in Scotland, where he had *bonâ fide* resided for four years with his wife, neither casually, nor as a traveller. Then in *Brodie* v. *Brodie*, in the year 1861, three learned Judges decided the opposite, holding that residence of that kind, which had been found in *Tollemache* v. *Tollemache* to be insufficient to give jurisdiction to a Scotch Court where the domicile was English, was nevertheless

sufficient to give jurisdiction to themselves where the domicile was Australian. In *Wilson* v. *Wilson* jurisdiction was sustained by Lord Penzance upon the ground that the petitioner had acquired an English domicile, with an expression of opinion by his Lordship, that such domicile ought to be the sole ground of jurisdiction to dissolve marriage. In *Niboyet* v. *Niboyet*, Sir Robert Phillimore expressed a similar opinion, and dismissed the suit of the petitioner, who had a matrimonial domicile in England, which fully answered the definition of such domicile given either in *Brodie* v. *Brodie* or in *Pitt* v. *Pitt*. His decision was, no doubt, reversed in the Court of Appeal ; but it had the support of the present Master of the Rolls, and their Lordships have already pointed out that the judgment of the majority was mainly, if not altogether, based upon a reason which will not bear scrutiny.

The Scotch decisions appear to their Lordships to be equally inefficient to show that a matrimonial domicile is a recognised ground of divorce jurisdiction. So far as they go, they are consistent enough, but the doctrine appears to have had a very brief existence, because the three cases in which it was applied all occurred between the 7th February and the 14th December in the year 1862. Although, owing to the course taken by the Appellant's Counsel in *Pitt* v. *Pitt*, the House of Lords had not an opportunity of expressly deciding the point, there can be little doubt that the approval of the course adopted by Counsel, which was openly expressed by Lord Westbury, has had the effect of discrediting the doctrine in Scotland ; and it is impossible to affirm that the Court of Session would now give effect to it. The eminent Judge, who, in 1862, was the first to give a full and clear exposition of the doctrine of matrimonial domicile, spoke of

it, in the year 1882, not as a doctrine accepted in the law of Scotland, but as matter of speculation.

It is a circumstance not undeserving of notice that the learned Judges, whether English or Scotch, who have expressed judicial opinions in favour of a matrimonial domicile, have abstained from reference to those treatises on international law which are generally regarded as authoritative, in the absence of any municipal law to the contrary. The reason for their abstinence is probably to be found in the circumstance, that nothing could be extracted from these sources favourable to the view which they took. Their Lordships are of opinion that in deciding the present case, on appeal from a Colony which is governed by the principles of the Roman-Dutch law, these authorities ought not to be overlooked.

Huber (Lib 1. tit. 3. s. 2. De Confl. Leg.) states the rule of international law in these terms:—"*Rectores imperiorum id comiter agunt,* "*ut jura cujusque populi intra terminos ejus* "*exercita, teneant ubique suam vim, quatenus* "*nihil potestati aut juri alterius imperantis* "*ejusque civium præjudicetur.*" That passage was cited with approbation by Lord Cranworth, and Lord Westbury, in *Shaw* v. *Gould* (3 E. and I. Ap. 72 and 81). To the same effect, but in language more pointed, is the text of *Rodenburg* (De Stat. Divers tit. 1. c. 3. s. 4) cited in the same case by Lord Westbury:—"*Unicum* "*hoc ipsa rei natura ac necessitas invexit, ut cum* "*de statu et conditione hominum quæritur, uni* "*solum modo Judici, et quidem Domicilii, uni-* "*versum in illâ jus sit attributum.*" The same rule is laid down by *Bar*, the latest Continental writer on the theory and practice of international private law. He says (Sec. 173. Gillespie's Translation, p. 382) "that in actions of divorce— "unless there is some express enactment to the

" contrary—the judge of the domicile or nation-
" ality is the only competent judge." And he adds:—" A decree of divorce, therefore, pro-
" nounced by any other judge than a judge of the
" domicile or nationality, is to be regarded in all
" other countries as inoperative."

There can, in their Lordships' opinion, be no satisfactory canon of international law, regulating jurisdiction in divorce cases, which is not capable of being enunciated with sufficient precision to ensure practical uniformity in its application. But any judicial definition of matrimonial domicile which has hitherto been attempted has been singularly wanting in precision, and not in the least calculated to produce a uniform result. The definitions given in *Brodie* v. *Brodie*, and in *Pitt* v. *Pitt* appear to their Lordships to be equally open to that objection. *Bonâ fide* residence is an intelligible expression, if, as their Lordships conceive, it means residence which has not been resorted to for the mere purpose of getting a divorce which was not obtainable in the country of domicile. Residence which is " not that of a traveller " is not very definite; but nothing can be more vague than the description of residence which, not being that of a traveller, is not to be regarded as " casual." So also, the place where it is the duty of the wife to rejoin her husband, if they happen to be living in different countries, is very indefinite. It may be her conjugal duty to return to his society although he is living as a traveller, or casually, in a country where he has no domicile. Neither the English nor the Scotch definitions, which are to be found in the decisions already referred to, give the least indication of the degree of permanence, if any, which is required in order to constitute matrimonial domicile, or afford any test by which that degree of permanence is to be ascertained. The introduction of so loose a rule into the *jus gentium*

would, in all probability, lead to an inconvenient variety of practice, and would occasion the very conflict which it is the object of international jurisprudence to prevent.

Their Lordships attach great weight to the consideration that the theory of matrimonial domicile for which the Appellant contends has never been accepted in the Court of last resort for England and Scotland. The matter does not rest there; because the theory is not only in direct opposition to the clear opinion expressed by Lord Westbury in *Pitt* v. *Pitt*, but appears to their Lordships to be at variance with the principles recognised by noble and learned Lords, in *Dolphin* v. *Robins* (7 H. L. Ca. 390), and in *Shaw* v. *Gould* (3 E. & I. Ap. 55). It is true that in these cases, and especially in *Dolphin* v. *Robins*, there was ground for holding that the spouses had resorted to a foreign country and a foreign tribunal, in order to escape from the law and the Courts of their English domicile. But in both, the international principle, upon which jurisdiction to dissolve a marriage depends, was considered and discussed; and the arguments addressed to their Lordships in favour of matrimonial domicile appear to them to run counter to the whole tenor of the observations which were made by noble and learned Lords in these cases. In *Dolphin* v. *Robins*, Lord Cranworth stated that "it must be taken now as clearly "established that the Scotch Court has no power "to dissolve an English marriage, where, as in "this case, the parties are not really domiciled "in Scotland, but have only gone there for such "a time as, according to the doctrine of the "Scotch Courts, gives them jurisdiction in the "matter." In *Shaw* v. *Gould*, the *dicta* of noble and learned Lords upon the point raised in this appeal were even more emphatic. Lords Cranworth and Westbury expressed their entire approval of the doctrine laid down by *Huber*

and *Rodenburgh* in those passages which have already been cited. Their Lordships did not go the length of saying that the Courts of no other country could divorce spouses who were domiciled in England; but they held that the Courts of England were not bound, by any principle of international law, to recognise as effectual the decree of a foreign Court divorcing spouses, who, at its date, had their domicile in England. The other noble and learned Lords who took part in the decision of *Shaw* v. *Gould* were Lords Chelmsford and Colonsay. Lord Chelmsford did not express any opinion upon the subject of matrimonial domicile. Lord Colonsay rested his judgment upon the fact that the spouses had resorted to Scotland for the very purpose of committing a fraud upon the law of their English domicile; but he indicated an opinion that, in the absence of such fraudulent purpose, they might have obtained a valid divorce in Scotland, after a residence in that country which was insufficient to change their domicile of succession.

Their Lordships have in these circumstances, and upon these considerations, come to the conclusion that, according to international law, the domicile for the time being of the married pair affords the only true test of jurisdiction to dissolve their marriage. They concur, without reservation, in the views expressed by Lord Penzance in *Wilson* v. *Wilson* (1 P. and D. 442) which were obviously meant to refer, not to questions arising in regard to the mutual rights of married persons, but to jurisdiction in the matter of divorce:—"It is the strong inclination "of my own opinion that the only fair and "satisfactory rule to adopt on this matter of juris-"diction is to insist upon the parties in all cases "referring their matrimonial differences to the "Courts of the country in which they are domi-"ciled. Different communities have different

" views and laws respecting matrimonial obliga-
" tions, and a different estimate of the causes
" which should justify divorce. It is both just
" and reasonable, therefore, that the differences of
" married people should be adjusted in accordance
" with the laws of the community to which they
" belong, and dealt with by the tribunals which
" alone can administer those laws. An honest
" adherence to this principle, moreover, will
" preclude the scandal which arises when a man
" and woman are held to be man and wife in one
" country, and strangers in another."

Their Lordships will, therefore, humbly advise Her Majesty to affirm the Order appealed from. The Appellant must pay to the 1st and 4th Respondents their costs of this appeal.