Privy Council Appeal No. 16 *of* 1924.

The Attorney General of Alberta - - - - - - *Appellant*

v.

Reata E. Cook - - - - - - - - *Respondent*

FROM

THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 18TH FEBRUARY, 1926.

Present at the Hearing:

THE LORD CHANCELLOR.
VISCOUNT HALDANE.
VISCOUNT DUNEDIN.
LORD SHAW.
LORD PHILLIMORE.
LORD BLANESBURGH.
LORD MERRIVALE.

[*Delivered by* LORD MERRIVALE.]

This is the appeal of the Attorney-General of Alberta from the judgment of the Supreme Court (Appellate Division) granting a decree of divorce in an undefended suit which in the Trial Division had been dismissed for want of jurisdiction. The questions involved are of general importance, namely, whether a wife judicially separated from her husband may acquire a domicil of choice apart from the husband, and whether in the Courts of such her domicil she may obtain a decree of divorce upon grounds sufficient under the law there in force, although the husband is not there domiciled.

The respondent, the wife, was married to her husband in the Province of Ontario, in the Dominion of Canada, on the 16th July, 1913. Four years later they went to the United States. In 1918 she removed to Calgary in the Province of Alberta, and she resided there continuously until the hearing of the cause in question. "The husband," to cite the statement of the learned Trial Judge, Walsh, J., "drifted from one State of the American Union to another, then came to Calgary for a short time, and eventually left Alberta, going, as far as is known, to a logging camp in British Columbia." Since then nothing was known of him.

In November, 1921, the wife sued in the Supreme Court of Alberta for judicial separation from her husband and was decreed the relief she sought, upon evidence which satisfied the Court that both the spouses were resident within its jurisdiction. The husband had been served there. In 1922 the wife instituted her present suit for divorce. She alleged that her husband's latest

place of residence which was known to her was within the Province, and obtained an order for substituted service upon him of these proceedings.

As between the parties to the appeal it was assumed that there was such residence of the husband, and that there had been such service of the proceedings, as would have given jurisdiction to the Courts of Alberta in an ordinary action *in personam*. This assumption being made it was not thought necessary to consider —apart from the main questions in the case—whether there are conceivable grounds upon which, when jurisdiction depends upon domicil, it can be given by the rules of procedure of the forum resorted to, (not being the forum of the domicil), or can be made to depend upon the presence or absence of a party sued who is in fact domiciled elsewhere.

With regard to the domicil of the parties the Trial Judge, Walsh, J., " thought the evidence sufficient to justify a conclusion that Ontario was the domicil of origin of the husband and not to show that he had acquired any other domicil." The learned Judge further found in express terms that " the husband is not and never was domiciled in Alberta." As to the wife, this is said in the judgment—" the argument is that . . . as she has elected this as her domicil (as I think that she has so far as she can), this Court has jurisdiction to decree a dissolution of the marriage."

Walsh, J., held at the hearing that if there was jurisdiction in the Court to decree a divorce of this marriage it should be decreed upon grounds of cruelty, desertion and adultery, but in view of the facts as to domicil the learned Judge felt himself bound to act upon what he regarded as a well-established rule of law that so long as the married state continues the wife's domicil is that of the husband. He therefore dismissed the suit.

Upon the wife's appeal to the Appellate Division, the Attorney-General of Alberta intervened because of the general importance of the questions involved, and the Attorney-General as intervener is appellant in this appeal against the judgment of the Appellate Division, whereby the decision of Walsh, J., was, upon the majority of opinions, reversed.

In the Supreme Court, and upon the hearing of this appeal, a subsidiary question was raised as to whether the domicil of persons settled in one of the provinces of the Dominion of Canada is domicil not in the particular province, but in the Dominion, in such sense that rights dependent upon domicil within the Dominion may be determined in any Court in the Dominion having jurisdiction locally over the subject matter, and that each such Court may summon before it a person domiciled within the Dominion and deal with such person in matters of status according to the laws in force within the territorial area of its jurisdiction.

The proposition that persons domiciled in all the provinces of the Dominion of Canada have a Canadian domicil was founded upon the terms of the British North America Act, 1867, and the practice of the Canadian legislature in respect of divorce. The

statute in question enacts by s. 91, ss. 26, that the exclusive legislative authority of the Parliament of Canada shall extend to marriage and divorce, while by s. 92, ss. 22, the legislature in each province may exclusively make laws with regard to the solemnization of marriage in that province. As to the exercise of the legislative power of the Dominion in respect of marriage and divorce, the only relevant facts which were laid before their Lordships were that in 1924 marriage was dissolved by Acts of the Dominion Parliament in 134 cases, and that such statutes commonly, if not invariably, set forth that the parties are domiciled in Canada. No doubt was raised but that the Dominion Parliament has legislative power to dissolve the marriage here in question.

The facts placed before their Lordships do not show with precision the extent of the conflict of laws in the provinces of the Dominion with regard to marriage and dissolution of marriage, succession and testamentary disposition, though a passage in the judgment of Beck, J., in the Appellate Division adverts to the two matters last mentioned. It was common ground, and is beyond question, that the provinces have divers laws in respect of jurisdiction as to marriage and divorce, and that in some provinces no means exist for divorce *a vinculo* by judicial process. No reference was made to any statute of the Dominion Parliament which deals with the question of jurisdiction in the Courts of the provinces, *inter se*, to decree dissolution of marriage as between parties not alleging themselves to be domiciled in the same province. But in *Board* v. *Board*, 1919 A.C. 756, it was established by the decision of the Judicial Committee that when the Province of Alberta was, in 1905, formed out of the North West Territory by Dominion Act, the laws of England as to divorce established by The Matrimonial Causes Act, 1857, became applicable to Alberta, and that the Supreme Court of the Province obtained jurisdiction to enforce them. *Board* v. *Board* will be again referred to later on.

The purpose of ascertaining domicil is, as was said by Lord Westbury in *Bell* v. *Kennedy**, "to determine which of two municipal laws may be invoked for the purpose of regulating the rights of the parties." Lord Westbury also said in *Udny* v. *Udny*† that "domicil is the condition in virtue whereof is ascribed to an individual the character of a citizen of some particular country . . . on the basis [of which] the personal rights of the party, that is to say, the law which determines his majority or minority, his marriage, succession, testacy or intestacy must depend." In *Bell* v. *Kennedy** Lord Westbury said this also: "Domicil . . . is an idea of law. It is the relation which the law creates between an individual and a particular locality or country."

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* H.L., 1 Sc. and Div. at p. 320. † H.L., 1 Sc. and Div. at p. 457.

Uniformity of law, civil institutions existing within ascertained territorial limits, and juristic authority in being there for the administration of the law under which rights attributable to domicil are claimed, are *indicia* of domicil, all of which are found in the provinces. Unity of law in respect of the matters which depend on domicil does not at present extend to the Dominion. The rights of the respective spouses in this litigation, therefore, cannot be dealt with on the footing that they have a common domicil in Canada, but must be determined upon the footing of the rights of the parties and the remedies available to them under the municipal laws of one or other of the provinces.

The competency of the wife's suit for divorce depends, then, first, upon her power during her marriage to acquire domicil in Alberta, her husband not being domiciled there, and, secondly, upon the jurisdiction of the Supreme Court of Alberta at her instance to change the matrimonial status of her husband. The first of these questions engaged most of the attention of counsel in the argument of the appeal. The second is also of high importance. It touches the due administration of justice and the mutual relations of self-governing communities.

Propositions of law in respect of domicil were advanced on the respondent's behalf to this effect : that the identity of the domicil of a wife with that of her husband is a legal fiction or presumption of law ; that domicil depends upon the capacity in law of individuals to choose a permanent home ; and that when this capacity exists in a wife by reason of judicial separation, and has in fact been exercised, the rights arising from domicil result in her favour. The mode of giving effect to such rights must, it was argued, be matter of procedure for the tribunals of the State within which domicil has been gained. A separate contention was raised upon the construction of the statute, the Matrimonial Causes Act, 1857, under which the separation here in question was decreed.

The contention that husband and wife may be domiciled apart and may resort to different jurisdictions and different codes of law to seek thereunder dissolution of the marriage between them appears to challenge directly the rule laid down in *Le Mesurier* v. *Le Mesurier** in 1895, and affirmed in the House of Lords in *The Lord Advocate* v. *Jaffrey*,† that matrimonial status is governed by the law of domicil of the parties. In the former case the rule was stated by Lord Watson to be that " the domicil for the time being of the married pair affords the true test of jurisdiction to dissolve their marriage." In the latter it was epitomized by Lord Haldane in these words : " Nothing short of a full juridical domicil within its jurisdiction can justify a British Court in pronouncing a decreee of divorce." Both pronouncements are declaredly founded on a principle which was stated in the judgment of Lord Penzance in *Wilson's* case : " The differences of married people should be adjusted in

* 1895, A.C. 517. † 1921, 1 A.C. 146. ‡ L.R., 2 P. and M., 442.

accordance with the laws of the community to which they belong and dealt with by the tribunals which alone can administer those laws." The decision in *Le Mesurier* v. *Le Mesurier* does not deal with the case of spouses judicially separated, and that case is expressly reserved for future decision in the opinions of the noble and learned Lords who decided *Lord Advocate* v. *Jaffrey*.* The judgment delivered by Lord Watson in *Le Mesurier's* case, however, brings inevitably into view the fact that divorce obtainable under different systems of municipal law by spouses living in separate jurisdictions is irreconcilable with the existence of any axiom in private international law that there is in the case of every marriage one sole jurisdiction in which dissolution of the marriage tie can be decreed.

It was common ground in this case that the rule propounded on behalf of the respondent has not been heretofore laid down by any express judicial decision which binds this Board. The decision under appeal was arrived at upon examination of conflicting opinions, some of them declared by distinguished judicial persons, and others expressed by eminent jurists. These opinions have received the consideration to which they are entitled.

Williams v. *Dormer*,† which was heard in the Court of Arches in 1852, appears at first sight to be a case in point. It was cited to show that in the opinion of an eminent Judge of the Ecclesiastical Courts, Sir John Dodson, divorce *à mensâ et thoro* annulled, for the purposes of those Courts, the presumption that a wife's domicil is that of her husband. Examination of the report does not establish this proposition. The suit was a husband's suit for nullity brought in the diocese of Canterbury. There had been at an earlier date a decree of divorce *à mensâ et thoro* at the wife's instance. A question arose as to the competence of the suit by reason that in order to found jurisdiction the actor in the suit must show the respondent to be resident within the jurisdiction of the Court whose authority was invoked. The libel as framed did not show this fact, and the husband proposed to amend it by averring that he " was and is resident at Tunbridge within the jurisdiction . . ." and that by reason thereof " the said . . ."—the wife—" is subject to the jurisdiction of the Court." With regard to this topic only, Sir John Dodson is reported to have used the words following :—

> " Would it follow that the wife, in this case, was also resident in the same jurisdiction ? Certainly not. It was properly observed by her counsel that there has been a sentence of separation from bed, board and mutual cohabitation ; consequently, that the presumption of law, which usually obtains, namely, that the wife is legally domiciled where the husband has his domicil, cannot in this case prevail. On the contrary, the probability is she is resident somewhere else ; and on referring to the former suit of nullity it appears that such suit was instituted in the diocesan Court of London ; therefore, if her residence is to be presumed to be in any jurisdiction in particular, it would be rather in the diocese of London than in the diocese of Canterbury. I must say I consider these objections well founded, and that the defects in the libel are not removed."

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* 1921, 1 A.C. 146. † 2 Rob. Eccl. 505.

The observations of the learned Judge were directed solely to a question of residence within a local jurisdiction. He used the word domicil in a popular sense in relation to this topic in course of determining whether a married woman was to be presumed in point of fact to be resident in the diocese in which her husband alleged himself to have his abode. The case throws no light on the questions which have here to be determined.

Lord Brougham, in 1835, in *Warrender* v. *Warrender** "left open for discussion" the question whether divorce *à mensâ et thoro* would enable a wife to acquire a domicil of her own. The matter became, in 1859, a subject of discussion between some of the learned Lords who decided *Dolphin* v. *Robbins*,‡ though, as was carefully pointed out, it did not arise for decision. Adverting to the hypothetical case of a wife separated by divorce *à mensâ et thoro*, Lord Cranworth said: "The argument which goes to assert that she cannot set up a home of her own and so establish a domicil different from that of her husband is not to my mind altogether satisfactory." Lord Kingsdown thought it necessary to dissent even from this tentative suggestion of uncertainty. Lord Campbell withheld the expression of any opinion, as the question did not arise in the case.

In *Pitt* v. *Pitt*† Lord Westbury expressed a doubt such as Lord Cranworth had indicated in *Dolphin* v. *Robbins*‡, and Lord Kingsdown again recorded his dissent. "I," he said, "do not share the doubts which my noble and learned friend has expressed."

The question as to which, in 1835, Lord Brougham thought it advisable in *Warrender* v. *Warrender** to reserve his opinion related to the effect of the divorce *à mensâ et thoro* under the ecclesiastical law, and the discussion in *Dolphin* v. *Robbins*‡, though it occurred two years after the passage of the Matrimonial Causes Act, 1857, appears to have been directed to the same question and not to the effect of a decree of judicial separation under the statute. Lord Westbury's observations five years later in *Pitt* v. *Pitt* were suggested by one of the cases of hardship which, in 1898, were more definitely considered by Sir Gorell Barnes, as he then was, in *Armytage* v. *Armytage*.§

Armytage v. *Armytage*§ is one of a group of English cases in which Sir Gorell Barnes, P., Sir Samuel Evans, P., and Bargrave Deane, J., as Judges of the Divorce Division of the High Court of Justice, dealt with circumstances of hardship and asserted or exercised jurisdiction in divorce on grounds other than that of domicil of the parties. A case of *Le Sueur* v. *Le Sueur*‖, which was also mentioned in argument, was one in which Sir Robert Phillimore, in the same Division, was disposed to assume that desertion on the part of a husband would enable the wife to choose a new

* 2 Cl. and Fin. 488 (1835). † 4 Macq. 627. ‡ 7 H.L. 390.
§ 1898 P. 178. ‖ 1 P. D. 139.

domicil. This assumption has since been held in *Lord Advocate* v. *Jaffrey** to be contrary to principle. The cases relied upon were *Armytage* v. *Armytage*,† *Ogden* v. *Ogden*,‡ *Stathatos* v. *Stathatos*,§ and *De Montaigu* v. *De Montaigu*.‖ In the cases of *Armytage* and *Ogden* the judgments were those of Sir Gorell Barnes.

Armytage v. *Armytage*† is of authority for a proposition, now well established, that the jurisdiction to decree judicial separation depends upon residence and not upon domicil. In the course of his judgment Sir Gorell Barnes explicitly accepted the rule as to domicil laid down in *Le Mesurier* v. *Le Mesurier*,¶ but appeared to specify an exception to it.

> "This Court," said the learned Judge, "does not now pronounce a decree of dissolution where the parties are not domiciled in this country except in favour of a wife deserted by her husband, or whose husband has so conducted himself towards her that she is justified in living apart from him, and who, up to the time when she was deserted or began so to be, was domiciled with her husband in this country, in which case, without necessarily resorting to the American doctrine that in such cases a wife may acquire a domicil of her own in the country of the matrimonial home, it is considered that in order to meet the injustice which might be done by compelling a wife to follow her husband from country to country, he cannot be allowed to assert for the purposes of the suit that he has ceased to be domiciled in this country."

In the later case of *Ogden* v. *Ogden* (*otherwise Philip*),‡ the marriage in France of an Englishwoman to a domiciled Frenchman had been declared null in France, and a question of the validity of the French decree of nullity was litigated in the High Court here and in the Court of Appeal. Before the decree of nullity was obtained in France the wife had sued in England for divorce, and, on the ground of lack of jurisdiction by reason of the foreign domicil of the spouses, the suit had been dismissed by Sir Francis Jeune, as he then was.

Sir Gorell Barnes, as a member of the Court of Appeal, concurred in affirming the validity of the French decree of nullity, but in the course of his considered judgment stated an opinion** that a wife situated as was the wife in question might, consistently with principle, be allowed to obtain relief in the Court of her original domicil. This opinion, it is to be observed, was in conflict with the view of Lord St. Helier, who heard the wife's suit and dismissed it for want of jurisdiction. Whether it can be in part sustained, consistently with authority, may be open to discussion.

In *Stathatos* v. *Stathatos*§ an English woman had gone through a ceremony of marriage with a man of Greek domicil. In 1910

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* 1921, 1 A.C. 146. † 1898, P. 178. ‡ 1908, P. 46. § 1913, P. 46.
‖ 1913, P. 154. ¶ 1895, A.C. 517. ** *Ogden* v. *O.*, 1908, P at p. 82.

a Greek Court declared the marriage a nullity. In 1912 the wife sued in England for divorce. Bargrave Deane, J., on the faith of *Armytage* v. *Armytage*, decreed divorce, but said :—

> " It is undoubtedly giving the go-by to what has always been the rule of law and practice here, namely, that the wife's domicil is the husband's, whatever that may be. I should feel very much happier in the course I am going to take if I knew that my decision were coming before the Court of Appeal."

De Montaigu v. *de Montaigu* * was a case of hardship, where Sir Samuel Evans, P., relying on the decision in *Armytage* v. *Armytage*, departed from the rule that jurisdiction in divorce depends upon domicil with this observation :—" I think it better, where necessary, in a case like this, to make an exception from the ordinary rule that domicil governs these cases and to grant a decree as a practical way of giving [the petitioner] the redress to which she is entitled."

The doubts expressed by Lord Cranworth and Lord Westbury —and indicated by Lord Brougham—in opinions delivered by them in the House of Lords, and the views pronounced and action taken by the learned Judges of the Divorce Division, involve a question not directly raised upon this appeal, namely, whether without express legislative sanction, Courts having jurisdiction in divorce may by estoppel or like device ensure that one of the spouses shall not resort to a jurisdiction other than that in which both were domiciled, and invoke its powers, on the ground of domicil newly acquired within its authority, to change the status of the spouse left resident in the original place of domicil. It is not necessary on this occasion to deal specifically with that question.

In *Hastings* v. *Hastings*,† which was heard in the Supreme Court of New Zealand in 1922, a wife resident in New South Wales had obtained a decree of judicial separation, and after the lapse of three years sued her husband in New Zealand, where he resided, to obtain dissolution of her marriage by virtue of a statute of the New Zealand legislature. Adams, J., who tried the case, thought the balance of opinion among jurists to be in favour of the view that a wife who has obtained a decree of judicial separation may acquire a domicil independently of her husband, but he dismissed the suit because—quoting the language of the report—" the husband for want of domicil owed no obedience to this Court." The case is, so far as decision goes, adverse to the respondent's contention that a wife judicially separated may proceed for divorce in the Courts of a State where her husband is not domiciled.

The cases most like in general character to the present, cited on behalf of the respondent, were a series of judgments in the

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* 1913, P. 154. † N.Z.L.R., 1922, 273.

Supreme Court of the United States—*Barber* v. *Barber*,* *Cheever* v. *Wilson*† and *Haddock* v. *Haddock*.‡ Delivered respectively in 1859, 1870 and 1905, they embody in judicial decisions determinations of the highest authority with regard to the juridictional relations *inter se* of the States in the United States which, if they were decisions upon the law of the Canadian Dominion, the Province of Alberta, or the Canadian provinces *inter se*, might be held to conclude the present inquiry in the respondent's favour. These cases, however, are primarily decisions upon questions dependent upon the constitution of the United States, the jurisdiction and procedure of the States individually, and the nature and effect of residence and domicil respectively to found jurisdiction in divorce under the laws by which the States collectively and individually are governed.

A case more nearly in point than most of those before mentioned is that of *Lord Advocate* v. *Jaffrey*.§ Although the question of domicil which arose for decision arose with regard to a wife not separated by judicial decree, discussion took place with respect to the decision in *Le Mesurier* v. *Le Mesurier*,‖ which was directed to the general question of jurisdiction in divorce, and to the grounds upon which in our law domicil and jurisdiction in divorce depend.

Lord Haldane said this in *Lord Advocate* v. *Jaffrey* :—" Since *Le Mesurier* v. *Le Mesurier* nothing short of a full juridical domicil within its jurisdiction can justify a British Court in pronouncing a decree of divorce," and this—" There can be only one real domicil " ; and further- " There is no authority for the proposition that husband and wife can have, while they continue married, distinct domicil. . . . If it were otherwise proceedings for dissolving the status of marriage might be carried through in two jurisdictions, possibly with different results."

Lord Cave said :—

> " I doubt whether the rule as to a wife's domicil following that of her husband is founded only upon her obligation to live with him. It appears to me to be more correct to say that it is a consequence of the union between husband and wife brought about by the marriage tie. . . . The rule is no doubt abrogated by a divorce *a vinculo* and possibly (although this has not yet been finally decided) by a divorce *à mensâ et thoro* or a judicial separation. . . . As to a possible exception in a case where a husband who having been guilty of desertion or some other matrimonial offence in this country, endeavours to deprive his wife of her remedy by changing his domicil, there is no doubt authority (which it is not now necessary to examine) for the proposition that in such a case the husband will not be allowed to set up his own wrong as an argument for prejudicing his wife's rights."

Lord Shaw said this :—

> " I must not myself be held as assenting to the view that it has ever yet been decided by law that even a judicial separation properly and formally obtained would operate as a change in the so-called, and, in my opinion,

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* 21 Howard 582. † 9 Wall. 108. ‡ 21 U.S. Sup. Ct. Rep. 562.
§ 1921, 1 A.C. 146. ‖ 1895, A.C. 517.

very doubtfully named *domicilium matrimonii*. I see the greatest difficulty in any invasion of the principle which appears to me to be fundamental—namely, that that unity which the marriage signifies is regulated by one domicil and one domicil only, *i.e.*, that of the husband. I am quite sure that Lord Watson in *Le Mesurier* v. *Le Mesurier* treated the matrimonial domicil as the real domicil and nothing but the real domicil, but considered that as the real domicil of one person—namely, the husband. Much confusion may be caused by the introduction of the idea of there being two domicils of the marriage or two domicils of succession while the marriage tie continues."

In a later passage Lord Shaw adds this :—

"In the great fundamental issues of status and succession the domicil of the wife is the domicil of the husband until divorce *a vinculo matrimonii* has been obtained."

The questions to be here decided, with such guidance in principle as may be obtainable from the opinions to which attention has thus been directed, are these : Upon what law does the jurisdiction in divorce depend in the Province of Alberta ? Under that law may a married woman—the marriage subsisting—choose her own domicil irrespective of her husband's domicil ? To the jurisdiction of such independent domicil of hers may she cite her husband in a suit for divorce ? As to the first of these questions no dispute is possible. Upon an appeal to His Majesty in Council from Alberta in 1919,* it was ascertained that the law applicable in Alberta in respect of divorce and judicial separation, is that which is laid down for England by a statute of the Imperial Parliament, the Matrimonial Causes Act, 1857. The case therefore depends upon the true view of the general rule of law with regard to the domicil of husband and wife and the effect in respect of domicil, as between husband and wife, of divorce *à mensâ et thoro* and of judicial separation under the Act of 1857. For the respondent it was contended that if the decree of divorce *à mensâ et thoro* did not, before 1857, enable a wife who obtained it to choose an independent domicil, the terms of the Matrimonial Causes Act, 1857, are such that a decree pronounced thereunder must be held to have that effect. What, then, is the nature and effect in our law of the rule as to domicil of husband and wife ? How does it originate ? How, if at all, is it affected by the statute of 1857 ?

The opinion expressed by Lord Cave in *Lord Advocate* v. *Jaffrey*† is in point here. "I doubt," said the noble and learned Lord, "whether the rule as to a wife's domicil following that of her husband is founded only upon her obligation to live with him. It appears to me to be more correct to say that it is a consequence of the union between husband and wife brought about by the marriage tie (see Code XII, i, 13 ; Stair I, iv, 9 ; Phillimore on Domicil, s. 40)." "As the wife takes the rank so does she the domicil of her husband," is the statement of Sir Robert Phillimore, in his treatise on the "Law of Domicil," published in 1847, to

* *Board* v. *Board*, 1919, A.C. 956. † 1921, 1 A.C. 158.

which reference is made. In support of a proposition that this is the maxim of the Roman as well as of continental civilians the learned author cites the following texts of Roman law :—

> " Item rescripserunt mulierem quam diu nupta est incolam ejusdem civitatis videri, cujus maritus ejus est, et ibi unde originem trahit non cogi muneribus fungi. (Digest 50, l. 37.) Mulieres honore maritorum erigimus genere nobilitamus et forum ex eorum personâ statuimus et domicilia mutamus." (Code XII, l. 13, X 40, 9.)

Underlying the English rule as to a wife's domicil is a principle of the common law, uniformly declared during six centuries before 1857, and not dependent upon any maxim of the civilians, whatever may have been its origin. Four citations may be made which set forth this rule : " Vir et uxor sunt quasi unica persona " (Bracton, De Legibus, lib. v., c. 25, s. 10) ; " Le baron et sa feme ne sont forsque un person en ley " (Littleton, Tenures s. X, 168, 291) ; " The husband and wife are one person in the law " (Coke, Institutes I, 112 a.) ; " By marriage husband and wife are one person in law " (Blackstone, Commentaries I, 442).

The rule thus declared was not a fiction or presumption which, within the competence of the tribunals concerned, might control procedure but must be disregarded upon questions of substantive right. It was of unquestioned operation under the common law to an extent which is only partially indicated by the instances comprised under the title Baron and Feme in the " Table " annexed to Coke's First Institute. By this rule the wife's property was disposed of and her jurisdictional status ascertained, and it determined her situation as to domicil.

Consideration must be given to the effect of the decree of divorce *â mensâ et thoro* in the Ecclesiastical Courts, for two reasons : Counsel for the respondent relied upon judicial dicta in relation to this decree ; and the Matrimonial Causes Act, 1857, provides (ss. 7 and 16) that a decree for a judicial separation thereunder " shall have the force, consequence and effect of a divorse *â mensâ et thoro* under the existing law " and " such other legal effects as are in this Act mentioned "—that is to say, the effects attributable to ss. 25 and 26 of the Act. The substance of the sections so mentioned is indicated in the side notes thereto : (XXV). " In case of judicial separation the wife to be considered a feme sole with respect to property she may acquire, etc." (XXVI) ; " also for purposes of contract and suing."

The terms and the effect of the sentence of divorce *â mensâ et thoro* under the Ecclesiastical law are well known. Oughton's " Ordo Judiciorum," published in 1728, sets forth (tit. CCXV) the operative words :—

> " Dictos N. et M. . . . à thoro mensâ ac mutua cohabitatione atque obsequiorum conjugalium impensione donec et quosque duxerint invicem reconciliandos et non aliter neque alio modo separamus et divortiamus."

The learned author states in a note that "often the word divortiamus is omitted." It is in effect redundant.

In more modern times the decree of divorce *à mensâ et thoro* was expressed in English, in a form which will be found in the text books (*see* Paynter's "Practice of the Ecclesiastical Courts Relative to Marriage and Divorce,"* and Shelford on Marriage†). The material words are these :—

> "We do pronounce decree and declare that the said A.B. ought by law to be divorced and separated from bed board and mutual cohabitation with the said C.B. her husband until they shall be reconciled to each other ; and we do by these presents divorce and separate them accordingly."

What is most strikingly apparent in the language of the decrees in question is the limited scope within which they purport to operate. The status of marriage remained. The decree lapsed if the parties were reconciled. The compulsory provision of maintenance by the husband to the wife during the period of separation under the name of alimony was, as the text books show, a mere means of enforcement by process of ecclesiastical law—in the first instance by excommunication—of marital obligations which were cognizable by the Ecclesiastical Courts (*see* Oughton, tit. 206 ; Ayliffe's Parergon, *p.* 58). Except in the last-mentioned particular it is difficult to find in the decree of divorce *à mensâ et thoro* anything more in point of operative effect than a licence to the wife which protects her from suit in the Ecclesiastical Courts for restitution of conjugal rights. The capacity of the wife to sue in the Ecclesiastical Courts invested her with no status or persona in courts of temporal jurisdiction.

After divorce *à mensâ et thoro* obtained by the wife the husband retained, notwithstanding the decree, whatever property of the wife, real or personal, was already vested in him by marriage, and his rights in respect of property which might accrue to the wife during the separation. If he was tenant by the curtesy of her hereditaments he remained tenant by the curtesy. The accruing income of her personalty, not secured to her separate use, accrued to him. If after divorce *à mensâ et thoro* a legacy bequeathed to the wife became payable, it fell to the husband ; he might release it.‡ Upon his death—the decree of divorce subsisting—she was, as his widow, entitled (subject to the discretion of the ordinary) to call for a grant of administration under the statute 21 Hy. VIII, c. 5. And as widow she had her right of dower.§ "A wife shall be endowed, though she was divorced *à mensâ et thoro* " (Comyn's Digest A. 10 (1) ; Coke upon Littleton, 33, *p.*).

It is instructive to contrast the transient and limited effects of the decree of divorce *à mensâ et thoro* with the effect of two conditions, known to the common law, which did destroy the unity in law of husband and wife—profession of religion and abjuration

* 2nd Ed., at p. 182. † p. 364, *n.* ‡ *Stephens* v. *Totty*, Cro. Eliz. 908.
§ *In the goods of Jas. Davies*, 2 Curteis, 628.

of the realm. These are said by Coke, in his notes to Littleton, s. 200, to dissolve the tie of marriage. Coke adds that in 8 Edw. II "an abjuration is called a divorce"—and he says as to each, "it is called a civil death."

The further argument on the respondent's behalf that a decree of judicial separation under the statute of 1857 so enlarges the effect of a divorce *à mensâ et thoro* as to enable a wife so separated to acquire separate domicil depends upon implications sought to be founded upon secs. 25 and 26 of the Act of 1857.

> Section 25.—In every case of judicial separation the wife shall, from the date of the sentence and whilst the separation shall continue, be considered as a feme sole with respect to property of every description which she may acquire or which may come to or devolve upon her; and such property may be disposed of by her in all respects as a feme sole, and on her decease the same shall, in case she may die intestate, go as the same would have gone if her husband had been then dead; provided, that if any such wife should again cohabit with her husband, all such property as she may be entitled to when such cohabitation shall take place shall be held to be her separate property, subject, however, to any agreement in writing made between herself and her husband whilst separate.
>
> Section 26.—In every case of a judicial separation the wife shall, whilst so separated, be considered as a feme sole for the purposes of contract, and wrongs and injuries and suing and being sued in any civil proceeding; and her husband shall not be liable in respect of any engagement or contract she may have entered into, or for any wrongful act or omission by her, or for any costs she may incur as plaintiff or defendant; provided that where upon any such judicial separation alimony has been decreed or ordered to be paid to the wife, and the same shall not be duly paid by the husband he shall be liable for necessaries supplied for her use; provided also that nothing shall prevent the wife from joining at any time during such separation in the exercise of any joint power given to herself and her husband.

Words could not well have been better chosen than those in secs. 25 and 26 to confine within precise limits the inroads intended to be made upon the pre-existing legal relationship of husband and wife. The period during which the wife separated by decree is under s. 25 to be considered as a feme sole with respect to property which she may acquire or which may devolve upon her is limited to the term "from the date of the sentence and whilst the separation shall continue." Under s. 26 the wife "whilst so separated" is to be "considered as a feme sole for the purposes of contract and wrongs and injuries, and suing and being sued in any civil proceeding." The statute does not purport to discharge the wife from her character of wife. It suspends certain obligations of matrimony. Upon a reconciliation the wife, rescinding the suspension, returns home as wife; upon a departure from the obligation of sexual continence she may as a wife be divorced *à vinculo*. By the practice in divorce in England, if after separation she has cause for divorce against her husband, she may require him as husband to provide for the costs of the suit in which she seeks that relief. So also, under the settled practice of the Probate Division of the High Court, upon the

death of a woman judicially separated from her husband, the letters of administration granted to the next of kin have been always limited to that part of her estate which by virtue of the decree of separation vested in her as a feme sole, reserving the right of the husband to claim a grant in respect of the residue.*

Singular anomalies must arise in respect of the causes for divorce—strictly limited and carefully defined in the Act of 1857—if upon the true construction of the clauses relating to judicial separation a wife who is judicially separated is thereby qualified to choose an independent domicil. A husband may be, and sometimes has been, a suitor for judicial separation for cruelty or for adultery. Assuming secs. 25 and 26 to have the suggested effect with regard to domicil, it would seem to follow that a guilty wife judicially separated may by virtue of domicil acquired in a foreign jurisdiction become entitled to cite her husband to answer there a suit for divorce upon grounds sufficient by the local law but unknown in the law of his domicil. The marriage of British subjects would thus become liable to dissolution by authority to which they owe no obedience.

The contention that a wife judicially separated from her husband is given choice of a new domicil is contrary to the general principle on which the unity of domicil of the married pair depends; divorce *à mensâ et thoro* gave no such right; and the statute of 1857 was not framed with that intention and does not effect that purpose.

Under British law one of the effects of marriage is to give to the spouses a common domicil—the domicil of the husband. Within the jurisdiction thereby arising, and by the marriage laws to which the spouses are there subject, the claims of either of them to a decree of dissolution of marriage ought to be determined. In so far as British tribunals are concerned it is a requisite of the jurisdiction to dissolve marriage that the defendant in the suit shall be domiciled within the jurisdiction. In such cases *actor sequitur forum rei.* This is the true effect upon the present proceedings of the rule laid down in *Le Mesurier* v. *Le Mesurier.*

The appeal of the Attorney-General succeeds. There will be no order as regards costs.

Their Lordships will humbly advise His Majesty accordingly.

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* Tristram's and Coote's "Probate Practice," 15th ed., 105, 106; 1 S. and T 515; L.R. 1 P. and M. 287.

In the Privy Council.

THE ATTORNEY-GENERAL OF ALBERTA

v.

REATA E. COOK.

DELIVERED BY LORD MERRIVALE.

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