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## DOMICILE OF A MARRIED WOMAN IN RELATION TO DIVORCE.

There have been many definitions of the term "domicile." It has been stated that:

> All those persons who have, or whom the laws deems to have, their permanent home within the territorial limits of a single system of law are domiciled in the country over which the system extends; and they are domiciled in the whole of that country, although their home may be fixed at a particular spot within it. . . . Every person has a domicile at every period of his life, and no person has more than one domicile at one time.[1]

The question of domicile has a special significance in its relationship to the rules of law dealing with dissolution of marriage and it has been the subject of discussion and of judicial pronouncement in many instances. The Courts in England have held diverse views on the subject and it is difficult to arrive at a fixed and definite conclusion as to the actual rule of law with regard to domicile, to be applied under certain circumstances which may be present upon the application of a married woman for a decree of dissolution of marriage.

Throughout the Empire the foundation upon which rests the right of a husband or wife to seek the relief of dissolution of the marriage tie, is the domicile of the parties at the time proceedings for divorce are commenced.

A condition precedent to the right to apply for divorce to the Courts of those Provinces of the Dominion which have jurisdiction over this subject or to the Parliament of Canada, is that the domicile of the party instituting such proceedings is within the

[1] 6 Halsbury 183.

territorial jurisdiction of the Provincial Court entertaining the action or within Canada if the petition is made to Parliament.

It is immaterial where the ceremony of the marriage may have been performed, whether in a foreign country or other part of the Empire, provided that the marriage is legal according to the law of the place where it has been celebrated and is not one of a type not recognized in general by Christendom.[2]

It is immaterial also whether the petitioner is a British subject or not or where the infidelity which is alleged as the ground for divorce, is committed.

This statement of the law as to the domicile of the parties, is laid down and affirmed in a series of Judgments of the House of Lords and of the Judicial Committee of the Privy Council as well as by decisions of our own Courts.

In 1857 the English Divorce and Matrimonial Causes Act enabled divorce *a vinculo,* to be granted for the first time by a Court of general law in England. Lord Haldane in his judgment in *Salvesen* v. *Administrator of Austrian Property*[3] states as follows:

> Before that year it was the prevalent view that a marriage duly celebrated in England could not be got rid of (except by Act of Parliament) validly so far as England was concerned, even by a foreign decree, at least when the domicil at the time of the marriage was English. . . . After 1857 the indissoluble character of an English marriage disappeared, and the effect of this disappearance is noticeable in the later decisions. In the judgment in *LeMesurier* v. *LeMesurier,*[4] the modern doctrine of domicil as the true test prevails unrestrainedly.

In the same judgment Lord Haldane also says at page 653:

> But at least it is now established, since the decisions in *LeMesurier* v. *LeMesurier (supra); Lord Advocate* v. *Jaffrey*[5] *and Attorney-General of Alberta* v. *Cook,*[6] that for a decree of dissolution of a marriage the Court of the domicil is the true Court of jurisdiction. That jurisdiction ought on principle to be regarded as exclusive.

The rule as to domicile was pronounced by Lord Watson in *LeMesurier* v. *LeMesurier (supra)* to be that:

> The domicil for the time being of the married pair affords the only true test of jurisdiction to dissolve their marriage.

[2] *Hyde* v. *Hyde,* L.R. 1 P. & D. 130; *In re Bethell, Bethell* v. *Hildyard* (1888) 57 L.J. Ch. D. 487.
[3] [1927] 96 L.J.P.C. 105 at p. 112; (1927) A.C. 641 at p. 657.
[4] [1895] A.C. 517; 64 L.J.P.C. 107.
[5] [1921] 1 A.C. 146; (1920) L.J.P.C. 209.
[6] [1926] A.C. 444; [1926] 95 L.J.P.C. 102.

Lord Haldane stated the same principle in *Lord Advocate* v. *Jaffrey* (*supra*) at p. 152, when he said:

Since *LeMesurier* v. *LeMesurier* (*supra*) was decided . . . it has been clear that nothing short of a full juridical domicil within its jurisdiction can justify a British Court in pronouncing a decree of divorce, and that the old notion is now obsolete, that there can be, short of such a full domicil, a so called "matrimonial domicile" which can give the same result.

The wide and general principle of law throughout the Empire is that the domicile of the wife is that of her husband and that she cannot acquire a domicile apart from her husband and must therefore if desirous of instituting proceedings for divorce, do so in the tribunals of her husband's domicile.

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.

This statement of the law was pronounced by Lord Merivale who delivered the judgment of the Judicial Committee of the Privy Council in *Attorney-General of Alberta* v. *Cook* (*supra*) at p. 465.

In *Lord Advocate* v. *Jaffrey* (*supra*) at p. 161 Lord Dunedin states:—

Now that the domcil of the wife is that of the husband, and follows any change which he makes, even though she is not de facto resident with him, is acknowledged law and not controverted by the appellant.

Dicey *Conflict of Laws*,[7] in referring to this principle of the law of domicile in its relation to divorce in England sets out his Rule 63 as follows:—

Subject to the possible exception hereinafter mentioned, the Court has no jurisdiction to entertain proceedings for the dissolution of the marriage of any parties not domiciled in England at the commencement of the proceedings.

He remarks that:

This rule is certainly in conformity with the general run of authorities.

Jurisdiction cannot be given by the consent of the husband to a Court outside of the domicile of the husband, to entertain an application by the wife for divorce.[8]

[7] 4th Edition, 1927, p. 292.
[8] *Armitage* v. *Attorney-General*, 75 L.J.P. 42; (1906) P. 135.

This question of domicile as affecting divorce, has been the subject of several decisions in the Courts of the Provinces of Canada. One of the cases in point is *C* v. *C*,[9] in which it was held that the domicile of the married pair at the time when the question of divorce arises is the test of jurisdiction to dissolve the marriage.

The hardship that would be caused by the rigid application of the general principle of domicile to a married woman having good and sufficient grounds for a dissolution of her marriage but who has been deserted by an adulterous husband who up to the time of such desertion was domiciled within the jurisdiction, is at once evident. So also in the case where the husband is of foreign domicile and the country of the husband's domicile refuses to recognize the marriage and therefore cannot and will not entertain a suit for divorce against him, the hardship which would be suffered by the wife is very apparent. The Courts in England have from time to time endeavoured to interpret the law of domicile in such manner as to give relief to the woman under the above circumstances, and there have been a number of cases in England, the judgments in which purport to make an exception to the general rule of domicile as applied to divorce.

In *Dolphin* v. *Robins*[10] Lord Cranworth, in a certain dictum, stated that there might be exceptional cases which even without a judicial separation would exclude the general rule as to the domicile of a wife being that of her husband. He referred to cases in which the husband, "Has abjured the realm, has deserted his wife, and established himself permanently in a foreign country, or has committed felony and been transported."

In *Pitt* v. *Pitt*[11] Lord Westbury in the House of Lords said he would have great difficulty under certain circumstances where a husband had left his wife, in holding that the domicile of the husband was to be regarded in law as the domicile of the wife.

In *LeSueur* v. *LeSueur*[12] Sir Robert Phillimore expressed the opinion that desertion by the husband would entitle the wife, without a decree of judicial separation, to choose a new domicile for herself.

In *Niboyet* v. *Niboyet*[13] the majority of the Court of Appeal

[9] 38 O.L.R. 481; 33 D.L.R. 151.
[10] (1859) 29 L.J.P. 11; 7 H.L.C. 390.
[11] (1864) 4 Macq. 627.
[12] (1876) 45 L.J.P. 73; 1 P.D. 139.
[13] (1878) 48 L.J.P. 1; 4 P.D. 1.

held that the Court had jurisdiction to grant a divorce to the wife against her husband of foreign domicile.

In 1898 this subject of an exception to the general rule of domicile was considered by Sir Gorell Barnes (later Lord Gorell) in *Armytage* v. *Armytage*.[14]

This case is referred to by Lord Merrivale in *Attorney-General for Alberta* v. *Cook* (*supra*), as one of the group of English cases in which the 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 domicile of the parties.

The other cases referred to in this connection by Lord Merrivale are *Ogden* v. *Ogden*,[15] *Stathatos* v. *Stathatos*,[16] and *DeMontaigu* v. *DeMontaigu*.[17]

In *Armytage* v. *Armytage* (*supra*) at p. 185 the learned Judge is of the opinion that:

> The Court 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 circumstances 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 same series of cases is that of *Ogden* v. *Ogden* (*supra*). Here the marriage in England 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 brought before the Courts in England. 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 domicile of the parties, the action had been dismissed. Subsequent to the judgment obtained in France, the woman married a second time and this second marriage ceremony was held to be bigamous and annulled.

[14] (1898) 67 L.J.P. 90; (1898) P. 178.
[15] [1908] P. 46; [1908] 77 L.J.P. 34.
[16] [1913] P. 46.
[17] [1913] P. 154.

Sir Gorell Barnes, then of the Court of Appeal and one of the Judges who heard the appeal in this case, was of the 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 domicile.

In *Stathatos* v. *Stathatos* (*supra*), an English woman had gone through a ceremony of marriage with a man of Greek domicile who afterwards deserted her. The marriage was declared null by the Greek Courts and the wife then sued in England for divorce, which was granted.

Another case upholding the same principle is that of *DeMontaigu* v. *DeMontaigu* (*supra*); the facts were very similar to those in *Stathatos* v. *Stathatos* (*supra*), an Englishwoman having married a man of French domicile. After several years the husband obtained a decree of nullity in France and left his wife. It was held that in certain cases a wife may be treated as having a domicile in her own country.

Halsbury *Laws of England*,[18] gives the following opinion on this subject:

> But (probably) the English Courts may decree a divorce in favour of a wife who has been deserted by her husband, or whose husband has so conducted himself towards her that she is justified in living apart from him, provided that at the moment when the desertion or separation took place she was domiciled with her husband in England, and that at the time of the commencement of the suit she is still in England.

And in a note to the above paragraph, it is stated that, "There is no direct decision to this effect but it is supported by several *dicta*."

A further comment in Halsbury (*supra*) at p. 192 on this aspect of the domicile of a wife is:

> This does not depend, at all events, necessarily, on the ground that the wife can acquire a separate domicile, but rather, on the ground that the husband will not under the circumstances, be allowed to rely on his new domicile.

Dicey *Conflict of Laws* (*supra*) at p. 192, holds, that the possible exception to the general rule that the Court has no jurisdiction to entertain proceedings for the dissolution of the marriage of any parties not domiciled in England at the commencement of the proceedings, arises under the circumstances set out in *Stathatos* v. *Stathatos* (*supra*), and *DeMontaigu* v. *DeMontaigu* (*supra*). He

[18] 6 Halsbury, 263.

cites these two cases as authority for the exception to the rule and is of the opinion that the Courts probably have under these circumstances jurisdiction to entertain a petition for divorce on the part of the wife.

In a note to this statement of the law, Dicey at p. 295 says there is dicta in *Niboyet* v. *Niboyet* (*supra*), and other cases for a further possible exception (to the general rule) in the case of the deserted wife whose domicile is changed by her husband's action depriving her of the right to sue for divorce. He further states, that:

> No formally reported English case has yet been decided on this basis although it has statutory authority in some parts of the Empire and is admitted in Scotland.

And also states at p. 845:

> It is clear that if the jurisdiction should be held to exist, to the extent of allowing a deserted wife to petition for divorce, it can be justified on the ground of estoppel or some similar device.

Westlake *Private International Law*,[19] gives the following statement of the law on this subject:

> But to the doctrine that, 'the [English] Court does not now pronounce a decree of dissolution where the parties are not domiciled in this country,' it must be added, '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 justified, was domiciled with her husband in this country.'

As authority for this opinion the case of *Armytage* v. *Armytage* (*supra*) is cited.

In Canada also, this subject of an exception in the case of a married woman to the general law of domicile was considered in an Appeal to the Supreme Court of Canada in 1885 in the case of *Stevens* v. *Fisk*.[20] The Court held that the wife who was the petitioner, had at the time of the institution of the action for divorce a sufficient residence in New York to entitle her to sue there although her husband's domicile was in Montreal. The American doctrine of allowing a wife to establish a separate forensic domicile in divorce cases was approved. This question was also a matter of discussion in the debate in the House of Commons, in 1887, upon the Susan Ash divorce bill. On this occasion Sir John Thompson, the Minister of Justice at that time, in speaking of a decree of

[19] 7th Ed., 1925, at p. 89.
[20] 8 Legal News 42; Cameron's Cases 392.

divorce obtained by the respondent, in the United States, stated that he considered the Parliament of Canada would grant divorce, "on the same evidence and under the same circumstances as such applications would be granted before a judicial tribunal in the Mother Country which had jurisdiction over such a subject."[21]

He stated that the general principle of law is that before any tribunal can alter the marriage status and dissolve a marriage the applicant must be domiciled within the jurisdiction of such tribunal, but he was also of the opinion that under certain circumstances a marriage could be dissolved upon the petition of a wife not actually domiciled within the jurisdiction. In support of this opinion he cited Dicey "On Domicile" and the English cases of *Niboyet* v. *Niboyet* (*supra*), *Pitt* v. *Pitt* (*supra*), *and Harvie* v. *Farnie*,[22] and he also cited the Canadian case of *Stevens* v. *Fisk* (*supra*).

A further Canadian case, in the Province of Alberta, in which it was held that the rule in divorce cases that the domicile of the wife is that of the husband is subject to the exception that the wife may acquire a separate domicile when she has been deserted by her husband, is that of *Payn* v. *Payn*.[23] Here the *Stathatos* and the *DeMontaigu* decisions were followed.

There is, however, another side to this question of an exception in favour of the wife, to the general rule of domicile, and there must be considered the decisions in several cases decided in recent years in the House of Lords and by the Judicial Committee of the Privy Council which deal with the point under discussion.

It is submitted that these judgments throw very grave doubt upon the correctness of the opinions expressed in the cases above mentioned in support of the doctrine that there is an exception to the rule that the wife can apply for divorce only to the Courts of her husband's actual domicile.

The House of Lords in *Lord Advocate* v. *Jaffrey* (*supra*) disapproved of the dictum of Lord Cranworth in *Dolphin* v. *Robins* (*supra*). In his judgment in *Lord Advocate* v. *Jaffrey* (*supra*), Lord Haldane at p. 152 holds that:

> . . . there can be only one real domicil. Not only is there no authority for the proposition that under the laws of these islands husband and wife can have, while they continue married, distinct domiciles; but if it were

[21] *House of Commons Debates*, 1887, at p. 1017.

[22] 52 L.J.P. 33; A.C. 43.

[23] (1924) 3 W.W.R. 111; [1924] 3 D.L.R. 1006.

otherwise the consequences in such circumstances as those before us would be extraordinary.

Referring to the opinion of Sir Robert Phillimore in *LeSueur* v. *LeSueur* (*supra*) that desertion by the husband would entitle the wife, without a decree of separation, to choose a new domicile for herself, Lord Finlay in the course of his judgment says at p. 155:

For the reasons which I shall hereafter state this opinion appears to me to be erroneous, and I am unable to concur with the decision given by Sir Robert Phillimore upon this point.

Lord Cave says at p. 158:

I do not think there is any reliable authority for the proposition that the mere existence of grounds for a decree of divorce or separation is of itself enough to enable a wife to set up a separate domicile.

And referring to Lord Cranworth's opinion in *Dolphin* v. *Robins* (*supra*), Lord Cave says at p. 160:

Lord Cranworth can hardly have intended to suggest that in every case where a husband deserts his wife and settles abroad the wife retains her former domicile; . . . Possibly he had in mind the case of a husband who, having been guilty of desertion or some other matrimonial offence in this country, endeavors to deprive his wife of her remedy by changing his domicil; and 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. . . . But if so, the proposition can have no bearing upon the present case.

In the same appeal Lord Dunedin, at p. 164, is of the opinion that:

. . . the only safe course is to keep close to the well-established rule that the domicil of a husband and wife, undivorced and unseparated, is one and the same.

And Lord Shaw, at p. 168, in his judgment in the same appeal, holds as follows:

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, 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 alone—i.e., that of the husband. I am quite sure that Lord Watson in *LeMesurier*[24] treated the matrimonial domicil as the

[24] [1895] A.C. 517.

real domicil and nothing but the real domicil, but considered that as the real domicil of one person—namely, the husband.

And further in the same judgment Lord Shaw says, at p. 170:

. . . 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.

A further and later case on this subject is *Attorney-General of Alberta* v. *Cook* (*supra*).

The head note of this case as reported in 95 *Law Journal,* is as follows:

By the law of England, which prevails in the Province of Alberta, as long as the married state continues, a wife's domicil is that of her husband, and therefore a wife judicially separated from her husband cannot acquire a domicil of choice apart from her husband, and obtain a decree of divorce in the Courts of such domicil, upon grounds sufficient under the law there in force, if her husband is not there domiciled. In Canada, the rights of spouses cannot be dealt with on the footing that they have a common domicil in the Dominion, but must be determined under the municipal laws of the Provinces.

Lord Merrivale delivered the judgment of the Judicial Committee of the Privy Council, and in the course of his reasons says, at p. 106:

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 *LeMesurier* v. *LeMesurier* (*supra*) in 1895, and affirmed in the House of Lords in *Lord Advocate* v. *Jaffrey* (*supra*), that matrimonial status is governed by the law of domicil of the parties.

In referring to the case of *Armytage* v. *Armytage* (*supra*), Lord Merrivale says, at p. 108:

In the course of his judgment Sir Gorell Barnes explicitly accepted the rule as to domicil laid down in *LeMesurier* v. *LeMesurier* (*supra*), but appeared to specify an exception to it.

The case of *Ogden* v. *Ogden* (*supra*), is also referred to in the course of this judgment, and Lord Merrivale says, at p. 108:

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.

Lord Merrivale, in referring to *Pitt* v. *Pitt* (*supra*), *Stathatos* v. *Stathatos* (*supra*), and *DeMontaigu* v. *DeMontaigu* (*supra*), throws doubt on the correctness of these decisions. He points out that Bargrave Deane, J., in his judgment in the *Stathatos* case (*supra*) says, at p. 108:

> 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 domicil, 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 going before the Court of Appeal.

And referring to the *De Montaigu* case, Lord Merrivale remarks that Sir Samuel Evans, says at p. 109:

> 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.

These words from each of the judgments in the *Stathatos* case (*supra*) and the *De Montaigu* case (*supra*) are evidence of the fact that there was doubt in the minds of the Judges who decided these cases as to the soundness of the position taken by them.

Dicey, in commenting on an exception to the rule of domicile of the wife, says, at p. 877:

> The two cases of *Stathatos* (*supra*) and *De Montaigu* (*supra*) are, in one sense, of undoubted authority. They have not been overruled, although the Privy Council in *Attorney-General* v. *Cook* (*supra*) has referred to them in terms implying grave doubts of their correctness.

And commenting on the case of a deserted wife whose husband changes his domicile, Dicey remarks, at p. 845, that:

> The Privy Council left open this case, on which there is no conclusive English authority.

In his judgment in *Attorney-General of Alberta* v. *Cook* (*supra*) Lord Merrivale remarks that the point is not raised in this Appeal as to 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.

He stated, however, that in the New Zealand case of *Hastings* v. *Hastings*,[24] the decision was adverse to the contention that a wife judicially separated may proceed for divorce in the Court of a state where her husband is not domiciled.

In this Appeal, Lord Merrivale cites with approval the opinions expressed by their Lordships, in *Lord Advocate* v. *Jaffrey* (*supra*).

A very recent judgment in which the subject under discussion is touched upon, is the appeal to the House of Lords of *Salvesen* v. *Administrator of Austrian Property* (*supra*). In the course of his judgment in this appeal, Lord Haldane says, at p. 652:

> The status of married persons as dependent on divorce is a matter for which the Court of their domicil is the appropriate Court, and its decision is treated by our Courts as not only being valid but as conclusive.

Other passages from this judgment have already been cited in support of the principle that for a decree of dissolution of marriage the Court of the domicile has exclusive jurisdiction.

Lord Haldane in this case, speaking of the jurisdiction to entertain a suit for declaration of the nullity of the marriage says, at p. 654:

> Whether there cannot be jurisdiction which is not that of the domicil in restricted instances to entertain a suit for nullity is a question we have not before us for determination. For, as I have pointed out, the only relevant issue is whether the German Court was competent as against all other Courts conclusively to declare the marriage in the present case void. I am unable as matter of principle to see how its competence as the Court of the domicil can be successfully challenged.

He also holds that the judgment of the majority of the Court in *Niboyet* v. *Niboyet* (*supra*) is no longer law.

These several decisions of the highest Appellate tribunals in the Empire appear to nullify the doctrine that there is an exception to the general rule of domicile as it relates to a married woman and would appear to firmly re-establish the law of domicile as it effects a wife, upon the rigid principle laid down in *LeMesurier* v. *LeMesurier* (*supra*).

It is submitted that the decision by the Supreme Court of Canada in *Stevens* v. *Fisk* (*supra*), and the opinion expressed in the House of Commons in the *Susan Ash* case so far as they refer to an exception to the rule of domicile in relation to divorce, are contrary to the modern principle as laid down in *LeMesurier* v. *LeMesurier* (*supra*) and in the recent decisions in the House of Lords and the

[24] (1922) N.Z.L.R. 273.

Judicial Committee of the Privy Council, which have already been discussed.

The judgment in *Attorney-General* v. *Cook* (*supra*) and the extract from Lord Haldane's judgment in *Lord Advocate* v. *Jaffrey* (*supra*) would appear to effectually dispose of the conclusion arrived at in *Stevens* v. *Fisk* (*supra*).

The whole tenor of the reasons for judgment in these modern cases in the House of Lords and the Privy Council appears to be contrary to the existence of any real exception to the rule stated by Lord Watson in *LeMesurier* v. *LeMesurier* (*supra*), namely, that the "domicile for the time being of the married pair affords the only true test of jurisdiction to dissolve their marriage."

It is possible, however, to gather from the judgments of Lord Cave, in *Lord Advocate* v. *Jaffrey* (*supra*), and Lord Merrivale, in *Attorney-General* v. *Cook* (*supra*), some measure of promise, that approval might be given, if the point should come up for future decision, of the doctrine set out in cases of the class of *Armytage* v. *Armytage* (*supra*) of the right of a deserted wife to maintain an action for divorce, not essentially on the ground of a separate domicile of the wife, but on the ground of estoppel, the husband not being allowed under the circumstances to set up or rely on his new domicile.

The Parliament of Canada in general has followed the principles upon which divorce is granted in England, but has not bound itself to follow inflexibly the principles and precedents upon which divorce was or is granted in England either in earlier years by the House of Lords, or in latter times by the Courts.

The Honourable Mr. Gowan in the year 1888, speaking in the Senate on the Tudor Divorce Bill, referring to the limited jurisdiction of a Court of Law, said:

> It is not so in respect to bills of divorce before Parliament. In all such cases Parliament, to use the words of Lord Brougham, "is engaged in making a law" and as Lord Thurlow said in the Addison case "governing ourselves by the exercise of our own wisdom and discretion." . . . The Senate as a constituent of Parliament, is possessed of this case and Parliament, I maintain in passing a law touching the *status* of the parties is not limited or restrained—any law it may deem in the interest of morals and the good order of society. In this therefore it is different from the ordinary tribunals. . . . We follow precedents where they commend themselves to our judgment and we decline to follow them where they do not.[25]

As Parliament is not strictly bound by precedent as is a Court

[25] *Senate Debates*, 1888, pp. 599 and 600.

of Law, it is respectfully submitted that the Committee on Divorce of the Senate of Canada could approve of and accept as a reasonable and just rule to be followed under the circumstances, the dicta of Sir Gorell Barnes in *Armytage* v. *Armytage* (*supra*) as to the right of a deserted wife, if facts of a similar nature should be brought before the Committee. Under this rule a wife, who has been deserted by an adulterous husband who has acquired a foreign domicile, would have the right to have her petition for divorce considered.

There is, however, a further principle of the law of domicile as it relates to the dissolution of marriage, which may be invoked by a wife who has good and sufficient grounds against her husband for divorce, but who has been deserted by the husband who has possibly acquired a foreign domicile prior to the institution of divorce proceedings.

The onus of proving the change of domicile rests entirely upon the party asserting such change. In *Lord Advocate* v. *Jaffrey* (*supra*), Lord Finlay states, at p. 211 L.J.P.C.: "The burden of proving a change of domicil is, of course, upon those who assert it."

In the same case Lord Dunedin says at p. 215:

> I am satisfied that their Lordships approached that question of fact in full recognition of the onus lying upon any one who asserts that a domicil of origin has been abandoned; a doctrine laid down in many cases, and particularly by this House in the cases of *Huntley* (*Marchioness*) v. *Gaskell*[26] and *Winans* v. *Atty.-Gen.*[27]

In the latter case, the Lord Chancellor (Earl of Halsbury) says, at p. 288:

> Now the law is plain, that where a domicil of origin is proved it lies upon the person who asserts a change of domicil to establish it, and it is necessary to prove that the person who is alleged to have changed his domicil has a fixed and determined purpose to make the place of his new domicil his permanent home.

If a married woman whose husband has left her and gone to a foreign jurisdiction, remains in the domicile of her married life and there institutes proceedings for divorce, alleging that her domicile is unchanged and was unchanged when action was commenced, it is submitted that if the suit or petition is not contested, or if proof of the change of domicile of the husband is not advanced by him, the tribunal before whom the petition is presented, must accept the allegation of the wife as to her being domiciled within

[26] (1906) 75 L.J.P.C. 1; [1906] A.C. 56.
[27] (1904) 73 L.J.K.B. 613; [1904] A.C. 287.

the jurisdiction for the reason that there is no proof or not sufficient proof, to enable the Court, or Parliament, to hold that the husband has acquired a new domicile.

The petition of the wife could not be refused in such a case upon the ground that there may possibly have been change of domicile on the part of the respondent, before proceedings were commenced. Such change of domicile would require the strictest proof.

It is well established that a change of domicile must be strictly proved.

> The presumption of law is always against a change of domicile which must in every case be proved with perfect clearness by the person alleging it.[28]

In the House of Lords it was held in *Huntly* (*Marchioness*) v. *Gaskell* (*supra*), that in the acquisition of a new domicile more is required than a mere change of residence; there must be proved a fixed intention to renounce birthright in the place of original domicile and to adopt the political and municipal status invoked by permanent residence of choice elsewhere than in the domicile of origin.

There are a number of petitions brought before Parliament by married women that are not contested but where the facts indicate that the husband has been living in a foreign jurisdiction. Under such circumstances, possibly a new domicile may have been acquired by him; but it is submitted, unless substantial proof is advanced, that such new domicile has been acquired, the respondent should be considered not to have lost his original domicile.

This view of the matter as it affects a wife who is the petitioner to Parliament for a Bill of Divorce, was touched upon by Sir John Thompson, in the course of the debate in the House of Commons, already referred to, on the *Susan Ash* case. He said:

> Now, the only evidence that I find to show that he (the respondent) was domiciled in Massachusetts is simply the recital in the decree for the divorce, calling him "of Boston" and I submit to the House . . . that that statement is no evidence—is nothing more than it professes to be, namely, a simple assertion that, at the time he made his application in Massachusetts he was there; not an evidence of any kind that he had a domicil there.

A recent case in England of *Rudd* v. *Rudd*[29] shews that even upon the facts as there set forth, the Court held that the husband had not attained a new domicile.

F. D. Hogg.

Ottawa.

[28] 6 Halsbury 185.
[29] (1924) 93 L.J.P. 45.