

THE CANADIAN BAR REVIEW

Vol. IX.

TORONTO, FEBRUARY, 1931.

No. 2

THE DIVORCE JURISDICTION ACT, 1930.

I.

Lord Justice Brett in his classic statement of the basis of jurisdiction for divorce in the international sense in *Niboyet v. Niboyet* said:

The status of marriage is the legal position of the married person as such in the community or in relation to the community. Which community is it which is interested in such relation? None other than the community of which he is a member, that is the community with which he is living as a part of it. But that in fact is the community in which he is living so as to be one of the families of it. That is the community in which he is living at home with intent that among or in it should be the home of his married life. But that is the place of his domicile. *It follows that upon principle the only law which should assume to alter his status as a married man is the law of the country of his domicile.*¹

In a recent important piece of social legislation,² made necessary by an unfortunate decision of the Judicial Committee of the Privy Council,³ the Parliament of Canada has departed from this cardinal principle. The operative part of this legislation is as follows:

A married woman who either before or after the passing of this Act has been deserted by and has been living separate and apart from her husband for a period of two years and upwards and is still living separate and apart from her husband, may, in any one of those province of Canada in which there is a court having jurisdiction to grant a divorce *a vinculo matrimonii*, commence in the court of such province having such jurisdiction proceedings for divorce *a vinculo matrimonii* praying that her marriage may be dissolved

¹ (1878), L.R. 4 P.D. 1 at p. 13. Italics are by the author.

² The Divorce Jurisdiction Act, 1930, 20-21 Geo. V. c. 15.

³ *Attorney-General for Alberta v. Cook*, [1926] A.C. 444. See Explanatory Note to Bill No. 111, 1st Session, 16th Parliament, 17-18 Geo. V. 1926-27.

on any grounds that may entitle her to such divorce *provided that immediately prior to such desertion the husband of such married woman was domiciled in the province in which such proceedings are commenced*.⁴

The effect of this enactment is clear. Suppose, for example, that H. and W., husband and wife, are domiciled in Nova Scotia on January 5th, 1931, and on that day he deserts her. H. journeys to Florida, and on January 5th, 1933, has bigamously married and has acquired a domicile there. W. can commence proceedings for divorce *a vinculo matrimonii* in the proper court in Nova Scotia on the latter date, and the Nova Scotia court must take jurisdiction and grant the divorce despite the fact that both H. and W. are, according to Nova Scotia law, domiciled in Florida on the day on which the action is commenced in Nova Scotia.⁵

As the *Divorce Jurisdiction Act*, 1930,⁶ is a part of the law of every province, Canadian law districts or territorial units for the application of law being the provinces,⁷ the Nova Scotia decree *a vinculo matrimonii* granted in the example set out above would necessarily be recognized as valid by the courts of all of the provinces of Canada. But would it be recognized as valid elsewhere, in England for example, where the common law is extant? It is submitted that it would not, at least, unless the peculiar factual situation discussed in the next paragraph exists, as it is elementary learning that when neither party is domiciled within a law district at the time action is commenced no divorce can validly be granted by its courts due to lack of jurisdiction in the international sense. So-called "matrimonial domicile" is not recognized as being sufficient.⁸

If, however, the jurisdiction assumed in the example set out above were recognized as valid by the law of the state of Florida, it is probable that the decree of the Nova Scotia court would also be recognized in England and elsewhere at common law. This is

⁴ The *Divorce Jurisdiction Act*, 1930, s. 2. The proviso is italicized by the author. It is submitted that this statute is undoubtedly *intra vires* of the federal parliament. See Blumenstein, "Matrimonial Jurisdiction in Canada," (1928), 6 C.B. Rev. 570; Raney, *Marriage and Divorce in Canada*, (1915), 51 Can. L.J. 84.

⁵ *Attorney-General for Alberta v. Cook*, *supra cit.* The domicile of a married woman is always the same as that of her husband. See F. D. Hogg, "Domicile of a Married Woman in Relation to Divorce," (1928), 6 C.B. Rev. 655.

⁶ *Supra cit.*

⁷ *Valin v. Langlois* (1879), 3 Can. S.C.R. 1 at pp. 19, 20. For meaning of "law district" see *Dakota Lumber Co. v. Rinderknecht* (1905), 6 Terr. L.R. 208 at pp. 220-221, quoting Dicey, *Conflict of Laws*.

⁸ *Le Mesurier v. Le Mesurier*, [1895] A.C. 517; 64 L.J.P.C. 97; *Cox v. Cox*, [1918] 2 W.W.R. 422; 40 D.L.R. 195. *Attorney-General for Alberta v. Cook*, *supra cit.*; *Harris v. Harris*, [1930] 4 D.L.R. 736. See Dicey, *Conflict of Laws*, 4th ed., at pp. 422 *et seq.* and 892 *et seq.*; Foote, *Private International Law*, 5th ed., p. 144. Westlake, *Private International Law*, 7th ed., at p. 86.

the effect of the application of the somewhat troublesome *renvoi* doctrine⁹ in *Armitage v. Attorney-General*.¹⁰ In that case the husband was domiciled in New York. The wife went to South Dakota where she obtained a divorce, the South Dakota court taking jurisdiction on the ground that her residence for a required period of time, not her domicile, was within the State. The wife, after obtaining the divorce married a second husband in England and brought a petition there to have her second marriage declared valid. Gorell-Barnes, P. found that the South Dakota divorce would be recognized as valid according to the law of New York. He held that as the husband was domiciled in New York, the law of which thus governed his status, and as by the law of New York the South Dakota divorce decree was valid, it must be recognized as valid in England. From the foregoing it is apparent that the doctrine of the *renvoi* of *Armitage v. Attorney-General*¹⁰ may be applied by courts where the common law is in force to enable them to recognize the jurisdictional validity of divorces that are granted by divorce courts of Canadian Provinces under authority of the new Act, whenever at the time the action is commenced the errant husband is domiciled within one of the provinces of Canada. For example, suppose that H. and W. are domiciled in New Brunswick at the time that H. deserts W. Two or more years later W. brings action against H. for divorce in New Brunswick and a decree absolute is granted on grounds good according to New Brunswick law. If, at the time action is commenced in New Brunswick, H. is domiciled anywhere in Canada, say in British Columbia, the decree will probably be recognized by English courts. Applying *Armitage v. Attorney-General*,¹⁰ as the *Divorce Jurisdiction Act, 1930*, is part of the law of British Columbia the New Brunswick decree must be recognized as valid in British Columbia. H. is domiciled in British Columbia, the law of which law district governs his status.¹¹ Therefore, the decree should be recognized internationally.

⁹ See Falconbridge, *Renvoi and Succession to Movables* (1930), 46 Law Q. Rev. 465.

¹⁰ [1906] P. 135; 75 L.J.P. 42. At [1906] P. p. 141, Gorell-Barnes P. said: "The evidence, in the present case, shows that in the State of New York the decision of the Court of South Dakota would be recognized as valid. The point then is: Are we in this country to recognize the validity of a divorce which is recognized as valid by the law of the domicile? In my view this question must be answered in the affirmative. It seems to me impossible to come to any other conclusion, because the status is affected by the decree that is recognized in the State of New York—the state of the domicile—as having affected and determined it."

¹¹ Domicile for divorce purposes in Canada is within the respective provinces: *Attorney-General for Alberta v. Cook*, *supra cit.* at p. 450.

Although the effect of *Armitage v. Attorney-General*¹² may be to gain recognition in foreign territorial units for a large number of otherwise internationally invalid Canadian divorces to be granted in the future under the local jurisdiction conferred by the new Act, many other decrees so granted will doubtless be refused recognition outside of Canadian territory. Particularly difficult problems will be presented by cases with facts similar to those of a recent Saskatchewan case, decided before the new Act came into force. The essential facts in *Harris v. Harris*,¹³ were that H., who was born in Minnesota and had acquired a domicile of choice in Saskatchewan deserted his wife, W., and left that province in the year 1921 and ever since had been living at various places in the United States. In 1922 H. went through a form of marriage with another woman in California. In 1927, W. sued H. for divorce in Saskatchewan. On the relevant facts which appear in the reported decision the Court held that H. had abandoned his Saskatchewan domicile before the proceedings for divorce were commenced and that the court had therefore no jurisdiction to try the cause. It is submitted that not only does this case fall within the terms of the *Divorce Jurisdiction Act, 1930*, but it presents a typical illustration of the sort of injustice to a wronged wife caused by adherence to the rule affirmed in *Attorney-General v. Cook*,¹⁴ that during marriage the domicile of a wife is always the same as that of her husband, which the new statute was designed to avoid. But the practical difficulty involved in establishing the facts necessary in order to apply the doctrine of *Armitage v. Attorney-General*¹⁵ so as to be able to predict international recognition of the decree with any certainty would usually be great in such a case, especially if after abandoning his domicile of choice the husband has disappeared "in parts unknown." Is he in such a case to be arbitrarily ascribed to his domicile of origin under the artificial "reverter" theory?¹⁶ If he is, he may, nonetheless, at any future time when the validity of the decree happens to be in issue, prove that he had actually acquired a new domicile of choice in a law district different from that of his domicile of origin at the time the divorce proceedings were commenced by his deserted wife in one of the Canadian provinces.¹⁷

¹² *Supra cit.*

¹³ *Supra cit.* Decision of the Court of Appeal for Saskatchewan. Haultain, C.J.S., dissented.

¹⁴ *Supra cit.*

¹⁵ *Supra cit.*

¹⁶ *Udny v. Udny* (1869), L.R. 1 H.L.Sc. 441.

¹⁷ Of course the burden would be upon the husband strictly to prove his change of domicile: See discussion and cases cited in (1928), 6 C.B. Rev. at pp. 668-669.

From the few illustrations, in no way exhaustive, just discussed it seems to be apparent that by disregarding the counsel of Lord Penzance given in 1872 in the course of his judgment in *Wilson v. Wilson*¹⁸ to the extent of departing in the *Divorce Jurisdiction Act, 1930*, completely from the domicile requirement for divorce jurisdiction, the Parliament of Canada has not avoided the unhappy consequences that he advised must result from such a departure. He said:

It is the strong inclination of my own opinion that the only fair and satisfactory rule to adopt on this matter of jurisdiction is to insist upon the parties in all cases referring their matrimonial differences to the courts of the country in which they are domiciled. . . . 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.¹⁹

II.

As already mentioned, it is well known that the *Divorce Jurisdiction Act, 1930*, was enacted with the avowed object of circumventing within Canada the effect of a decision of the Judicial Committee of the Privy Council²⁰ that was out of accord with Canadian social conditions and thought. In this matter the Dominion legislature was but in active agreement with the admonition of a great jurist of the present day who writes:

Let us not be afraid of legislation, and let us welcome new principles introduced by legislation, which express the spirit of the time. Let us look the facts of human conduct in the face.²¹

Fortunately, due to the flexibility and adaptability of a large part of the substance and technique of the common law, it is not very often necessary to resort to legislation to correct anachronisms and to enable legal results to approach justice. Usually a judge is able to say with Swift, J., in *Aria v. Bridge House Hotel*,²² that his judgment in a case is

An illustration of how the common law of England continues and continues applicable to the changing circumstances of the every day life of the people.

¹⁸ (1872), L.R. 2 P. and D. 435 at p. 442.

¹⁹ Quoted with approval by Lord Watson in *LeMesurier v. LeMesurier*, *supra cit.* at pp. 540-541. It is interesting to notice that in the case in which an English court has departed farthest from the domicile requirement as a basis of divorce jurisdiction, the motive which impelled the court was its desire in a hard case to avoid the very scandal above mentioned by Lord Penzance: *DeMontaigne v. DeMontaigne*, [1913] P. 154.

²⁰ *Attorney-General for Alberta v. Cook*, *supra cit.*

²¹ Roscoe Pound, *Law in Books and Law in Action* (1910), 44 Am. L. Rev. 12 at p. 35.

²² (1927), 137 L.T.R. 299.

But in *Attorney-General for Alberta v. Cook*,²³ the facts of which are probably familiar to most Canadian lawyers, the Judicial Committee, using deductions based primarily upon a pre-determined mediaeval conception—that of the unity of husband and wife²⁴—affirmed the common law rule that, even after having obtained a decree of judicial separation, a wronged married woman cannot acquire a separate domicile from that of her husband while the marriage relation or status continues to exist.

A person who reads the judgment of Lord Merrivale in *Attorney-General for Alberta v. Cook*²⁵ can find little to criticise from an analytical point of view. It is a good example of logical, mechanical case law and adherence to precedent. In fact it falls comfortably within Dean Pound's description of the mass of legal precepts:

For the most part they represent juristic or judicial search for a rule that will follow logically from the traditional legal materials, or for a rule that may be said to have authority behind it. They are the technical workings over of the traditional precepts. . . .²⁶

But anyone who approaches the problem presented in that case convinced that the law is not an end in itself, that logical symmetry or mere certainty, though desirable *per se*,²⁷ should not prevail against social utility and suitability to the conditions—whether social, economic, political or geographical²⁸—to which the law is designed to apply as criteria for the shaping of legal precepts, is apt to derive more satisfaction from the judgment of the majority of the Appellate Division of the Supreme Court of Alberta in the same case.²⁹ There he finds judicial recognition of the truism that,

Social life, like all life, is change and development. Law would be neglecting one of its most important functions if it ceased to meet the demands of this ceaseless evolution.³⁰

²³ *Supra cit.*

²⁴ Also on an interpretation of the Matrimonial Causes Act, 1857. (Imp.), (20-21 Vict. c. 85), ss. 16, 25, 26.

²⁵ *Supra cit.*

²⁶ Roscoe Pound, *Law and Morals*, at p. 123.

²⁷ See Pollock, *Expansion of the Common Law*, at pp. 107-108.

²⁸ Roscoe Pound, *Scope and Purpose of Sociological Jurisprudence* (1911), 24 Harv. L. Rev. 591 at p. 596: "In the pursuit of principles there is a tendency to forget that law is a practical matter. The desire for formal perfection ceases to be their aim. Instead, they aim at thorough development of the logical content of established principles through rigid deduction, seeking thereby a certainty which shall permit judicial decision to be predicted in detail with absolute assurance. . . . One need not say that it is impossible to realize this ideal. But the attempt to do so, whether upon the basis of a code or upon that of a body of case law, brings about a mechanical administration of justice which, in the long run, must break down."

²⁹ *Sub nom. Cook v. Cook and Attorney-General for Alberta*, [1923] 4 D.L.R. 366.

³⁰ Wundt, *Ethik*, 2nd ed., 556.

In the United States, where the geographical conditions to which the law must be adapted more closely approximate those in Canada than do those in England, the courts have long since translated into positive law their realization that to force a wronged abandoned wife to follow her husband to any domicile he may establish is an intolerable hardship. As early as 1869, in *Cheever v. Wilson*,³¹ Swayne, J., who delivered the opinion of the Supreme Court of the United States, in answer to the contention that the rule was that the domicile of the husband is the wife's and that she cannot have a different one, was able to say:

The converse to the proposition is so well settled that it would be idle to discuss it. The rule is that she may acquire a separate domicile whenever it is necessary or proper that she should do so. The right springs from the necessity for its exercise, and endures as long as the necessity continues.

Apart altogether from the hardship necessarily occasioned in particular cases by the application of the rule imposing her husband's domicile on a wife unconditionally during coverture in a country of vast geographical distances and divided into a number of legal territorial units, a decision adhering to the rule in the face of the general trend of the law and other human institutions toward sex equality seems rather incongruous. Its singularity appears specially when it is remembered that the decision in *Attorney-General for Canada v. Cook*³² was not dictated by a strict *stare decisis*.³³ Married women's property acts, female suffrage, Canadian women Senators, and their socio-legal concomitants are here to stay, and women, even though married, have emerged politically and civilly with separate egos, separate interests and separate rights. Early in the last century, Chief Justice Shaw of Massachusetts, speaking of the rule that the domicile of the wife is that of her husband, said:

It is probably the juster view to consider that the maxim is founded upon the theoretic identity of person and of interest between husband and wife, as established by law. . . .³⁴

He then said that he would recognize a separate domicile for the wife when that identity was *de facto* destroyed:

Otherwise the parties in this respect would stand upon very unequal grounds. . . .³⁴

³¹ 9 Wall. (U.S.) 108 at pp. 123-124. For the various doctrines concerning a wife's domicile and divorce jurisdiction now applied in the United States, see Conflict of Laws Restatement, (Am. L. Inst., 1930), secs. 30, 31, 117, 118, 119.

³² *Supra cit.*

³³ *LeMesurier v. LeMesurier*, *supra cit.*, and *Lord Advocate v. Jaffrey*, [1921] A.C. 146, on which Lord Merrivale rested his decision were both decided by the House of Lords.

³⁴ *Harteau v. Harteau* (1833), 14 Pick. (Mass.) 181 at p. 185.

In a similar case, decided in 1913, Mr. Justice Oliver Wendell Holmes, who has exerted so profound an influence toward shaping the Anglo-American common law along socially progressive lines, delivering the judgment of the entire Supreme Court of the United States, said:

The only reason that could be offered for not recognizing the fact of the plaintiff's (wife's) actual change (of domicile), if justified, is the now vanishing fiction of identity of person. But if that fiction does not prevail over the fact in the relation for which the fiction was created, there is no reason in the world why it should be given effect in any other.³⁵

There is a strong temptation to linger over the equally enlightened language of Stuart, J.A., when expounding his decision that after having been granted a decree of judicial separation the wronged wife could acquire a domicile in Alberta distinct from that of her husband.³⁶

There are one or two objections to this course to which I wish to refer. There is first the objection that grave inconvenience and confusion will result if the possibility of a separate domicile be admitted. My answer to this objection is this: When married women have now, at least in this Province, and indeed in most, if not all of the Canadian Provinces, obtained by statute a recognition of their complete equality or indeed, on some points, superiority in regard to property rights as well as to political rights, why should the existence of the possibility of inconvenience and confusion lead to the retention of the superior or controlling position of the husband in such a matter? The inconvenience and confusion could be avoided by making the wife's domicile alone control just as much as by continuing to make the husband's domicile alone control. But I admit that this is not a complete answer. If I may venture to suggest what would seem to me to be a sound principle to follow I would say that it might not be unreasonable to declare that the spouse upon whose application or suit a decree of judicial separation had been made, who was therefore not at fault, should control the domicile of both. . . . Another objection is with regard to the recognition of our jurisdiction in other provincial or colonial or in foreign or in British or Irish Courts. But some Court must make the beginning and I doubt if on this ground there would be much hesitation at least in some of these other Courts.

It is to be regretted that the Judicial Committee in *Attorney-General for Alberta v. Cook*,³⁷ did not approach the problem with the attitude of mind expressed by Lord Chancellor Sankey recently when confronted with a legal problem the solution of which involved equally important social considerations and consequences. He said:

³⁵ *Williamson v. Osenton* (1913), 232 U.S. 619 at p. 625. (This was not a divorce action). Cf. Gray, *Nature and Sources of the Law*, at pp. 36-37.

³⁶ *Cook v. Cook and Attorney-General for Alberta*, *supra cit.* at p. 367. See Lippman, *The Breakdown of Consortium* (1930), 30 Colum. L. Rev. 651.

³⁷ *Supra cit.*

. . . Their Lordships do not think it right to apply rigidly to Canada of to-day the decisions and the reasons therefor which commended themselves, probably rightly, to those who had to apply the law in different circumstances, in different centuries, to countries in different stages of development.³⁸

It is submitted that in *Attorney-General for Alberta v. Cook*,³⁹ a socially sound solution of the legal problem in issue both required and indicated a

conscious departure from a known rule, and the deliberate adoption of a new one, in obedience to the promptings of a social need so obvious and so insistent as to overrun the ancient channel and cut a new one for itself.⁴⁰

III.

It is an interesting, although of course not unusual, fact that the *Divorce Jurisdiction Act, 1930*,⁴¹ as finally enacted, after enduring the hazards of committee and debate, is completely different in its legal effect from the Bill originally introduced in the Canadian House of Commons with the object of attaining the same purpose.⁴² That Bill went further than the decision of the Appellate Division of the Supreme Court of Alberta in *Cook v. Cook and the Attorney-General of Alberta*,⁴³ and reached the common law position of most of the courts of the United States.⁴⁴ Also, the Bill had the virtue of not jettisoning the domicile requirement as the basis of divorce

³⁸ *Henrietta Muir Edwards v. Attorney-General for Canada*, [1930] A.C. 124 at pp. 134-135.

³⁹ *Supra cit.*

⁴⁰ See Cardozo, *The Growth of the Law*, at pp. 119-120.

⁴¹ Quoted above.

⁴² Bill No. 111, 1st Session, 16th Parliament, 17-18 Geo. V, 1926-27. The operative sections of Bill III were as follows:

"(2) For the purposes of this Act a married woman,

(a) who is judicially or otherwise separate and living separate and apart from her husband; or

(b) who either before or after the passing of this Act has been deserted by and lived separate and apart from her husband for a period of two years, and is still living apart from her husband; may acquire a domicile for herself as though she were a *feme sole* and may commence an action for divorce praying that her marriage may be dissolved on any grounds that entitle her to such divorce in any court having jurisdiction to grant a divorce *a vinculo matrimonii*.

"(3) For the purposes of this Act a wife deserted by and living separate and apart from her husband shall be deemed to retain the domicile of her husband at the time she was so deserted until she has acquired a domicile of her own choice."

⁴³ *Supra cit.*

⁴⁴ Most United States courts allow the injured wife to acquire a domicile where she pleases, and accordingly allow any competent court in whose territory she may have established an actual domicile to grant her a divorce.—(The Supreme Court of the United States and twenty-three state courts). See note (31) *supra*.

jurisdiction. However, as the statement in *LeMesurier v. LeMesurier*,⁴⁵ that

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

has been judicially interpreted to mean that divorce may be granted at the domicile of the husband only,⁴⁶ and for reasons ably and clearly set out by a learned contributor in a recent number of the Canadian Bar Review,⁴⁷ there would have been insuperable obstacles at common law to foreign recognition being accorded to decrees granted under the jurisdictional competence conferred by the proposed enactment.

Although Lord Merrivale in *Attorney-General for Alberta v. Cook*,⁴⁸ is emphatic in his affirmation that one court only, that of the territory in which the husband is domiciled, has jurisdiction in the international sense to grant a divorce, Lord Haldane was not so sure on this point of exclusiveness when dealing during the following year with nullity jurisdiction, which he treated generally as being essentially on the same basis as jurisdiction for divorce.⁴⁹

There can be no question but that the common law of England requires both parties to have been domiciled within the law district of the court when the proceedings were commenced in order that a marriage may be recognized internationally as dissolved by a decree of divorce *a vinculo matrimonii*.⁵⁰ From a purely theoretical viewpoint, however, this would hardly seem to be a necessary requirement. In the *Salvensen* case,⁵¹ Viscount Dunedin said:

A metaphysical idea, which is what the status of marriage is, is not strictly *a res*, but it, to borrow a phrase, savours of *a res*, and has all along been treated as such.⁵²

Divorce jurisdiction is thus *quasi in rem*. If, therefore, the spouses were allowed to acquire separate domiciles, it would seem that on

⁴⁵ *Supra cit.* at p. 540.

⁴⁶ *E. G. Bater v. Bater*, [1906] P. 209; *C. v. C.* (1917), 39 O.L.R. 571.

⁴⁷ Judicial Separation and Change of Domicil (1929), 7 C.B. Rev. 126. This was a commentary on a provision in the Domestic Relations Act of Alberta, 1927, 17 Geo. V. c. 5, s. 10 (b):

"After a judgment of judicial separation has been granted—

(b) the wife shall, during the continuance of the separation, be considered as a *feme sole* . . . and as an independent person for all purposes including the acquisition of a new domicile distinct from that of her husband."

⁴⁸ *Supra cit.* at p. 465.

⁴⁹ See *Salvensen v. Administrator of Austrian Property*, [1927] A.C. 641 at p. 654. (House of Lords). He did say that, "Jurisdiction on principle ought to be regarded as exclusive."

⁵⁰ *Attorney-General for Alberta v. Cook*, *supra cit.*

⁵¹ *Salvensen v. Administrator of Austrian Property*, *supra cit.*

⁵² *Ibid.* at p. 662. The other Law Lords concurred in this.

the principle expressed by Lord Justice Brett in the passage quoted at the beginning of this article, the community of the domicile of each party would have a vital interest in the existence of the marriage *res*, and thus have competence to destroy it. As the *res* is intangible there can be no physical difficulty in the way of allowing it to have an artificial situs in more than one place. Theoretically, it should then follow that the law district, in which either of the spouses were domiciled, which first exercised its power to dissolve the marriage status or *res* would destroy it effectively for all purposes everywhere. This solution would be no more out of accord with "legal reason" and would be more suited to the facts of social life than many of the doctrines that have been water-marked as "Law".⁵³

It seems rather anomalous that serious confusion and uncertainty should have been engendered by a decision for which the chief justification was that it aimed to perpetuate a simple rule of fixed application. When the judicial process fails,⁵⁴ however, the legislature may be expected to attempt to abrogate a rule that does violence to the social conscience.

In conclusion, it is suggested that, as the interests of an unfortunately large number of Canadians are now prejudiced by lack of certainty of recognition outside of Canada for many of the divorce decrees that will be granted under the authority of the Canadian legislative attempt⁵⁵ to rectify the effect of the decision in *Attorney-General for Alberta v. Cook*,⁵⁶ resort may be had to "treaties" with Great Britain and the other Dominions where the rule as affirmed in that case prevails.⁵⁷ These "treaties" might well provide that those

⁵³ Of course, it would be necessary to depart from the "requisite of the jurisdiction to dissolve marriage that the defendant in the proceedings should be domiciled in the jurisdiction:" see *H. v. H.*, [1928] P. 206 at p. 212. A husband who deserts his wife is not estopped from setting up that he has acquired a new domicile: *Harris v. Harris*, *supra cit.* Cf. E. V. Harper, *The Validity of Void Divorces* (1930), 79 U. Pa. L. Rev. 158, especially at p. 179 *et seq.*

⁵⁴ Cardozo, *The Growth of the Law*, at pp. 116 and 135, reads: "Some of the errors of courts have their origin in imperfect knowledge of the economic and social consequences of a decision, or of the economic and social needs to which a decision will respond." . . . "The adaptation of rule or principle to changing combinations of events demands the creative action of the judge. You may praise our work or criticize it. You may leave us with the name we have, or tag us with some other label, arbitrators or assessors. The process is here to stay." See Gray, *Nature and Source of the Law*, at pp. 272-273.

⁵⁵ The Divorce Jurisdiction Act, 1930, *supra cit.*

⁵⁶ *Supra cit.*

⁵⁷ The *lex fori* and *lex domicilii* together determine questions of domicile: see 7 C.B. Rev. at p. 128. Of course there is the remote possibility that *Attorney-General for Alberta v. Cook*, *supra cit.*, may some day be overruled: see *Beaumont v. Barrett* (1836), Moo P.C. 59; *Kielley v. Carson* (1842), 4

countries pass statutes concerning divorces granted in Canadian provinces under the *Divorce Jurisdiction Act, 1930*,⁵⁸ similar in effect, with necessary modifications, to Section 1, sub-section (1) of the *Indian and Colonial Divorce Jurisdiction Act, 1926*, concerning certain Indian divorces. It reads, in part, as follows:⁵⁹

1.—(1) Subject to the provisions of this Act, a High Court in India to which Part IX of the Government of India Act applies shall have jurisdiction to make a decree for the dissolution of a marriage, and as incidental thereto to make an order as to damages, alimony or maintenance, custody of children, and costs, where the parties to the marriage are British subjects domiciled in England or in Scotland, in any case where a court in India would have such jurisdiction if the parties to the marriage were domiciled in India.

Then follow four provisos, none of which should be necessary concerning decrees granted under the Canadian Divorce Jurisdiction Act, 1930.

HORACE E. READ,

Dalhousie Law School.

Moo. P.C. 63; *Read v. Bishop of London*, [1892] A.C. 644 at pp. 654-655. It would be untimely to suggest an "imperial" statute: see Report of the Conference on the Operation of Dominion Legislation and Merchant Shipping Legislation, 1921, at p. 23 *et seq.*

⁵⁸ *Supra cit.*

⁵⁹ 16-17 Geo. V, c. 40, s. 1, sub-s. 1. The self-governing Dominions of the British Commonwealth of Nations are expressly exempted from the application of this statute. (S. 2). Cf. *Overseas Domicile and Divorce* (1927), 163 Law Times 543.