DOLPHIN, ... APPELLANT.
ROBINS AND ANOTHER, ... RESPONDENTS.

1859.
Feb. 24th, 25th.
July 26, 27th.
August 4th.

English Marriage.—Scotch Divorce.— Per Lord Cranworth: I believe your Lordships are all of opinion that it must be taken now as clearly established that the Scotch Court has no power to dissolve an English marriage where the parties are not really domiciled in Scotland, but have only gone there for such a time as, according to the doctrine of the Scotch Court, gives them jurisdiction in the matter; p. 575.

Per Lord Cranworth: Whether the Scotch Court could dissolve an English marriage, where there had been a *bonâ fide* domicile, is a matter upon which I think your Lordships will not be inclined now to pronounce a decided opinion; p. 575.

A Scotch decree of divorce, purporting to dissolve an English marriage, where there is no real Scotch domicile, will not enable the wife to acquire a domicile distinct from that of her husband; and such a Scotch decree of divorce will not have the effect of a divorce *à mensâ et thoro.*

Per Lord Cranworth: Where by judicial sentence the husband has lost the right to compel the wife to live with him, and she can no longer insist on his receiving her, the argument that she cannot set up a home of her own, and so establish a domicile different from that of her husband, is not to my mind altogether satisfactory; p. 577.

Deed of Separation: A deed of separation will not enable the wife to acquire a separate domicile,—*Tovey* v. *Lindsay* commented upon; p. 579.

Per Lord Cranworth: The circumstance that the wife might have a valid defence to a suit for restitution of conjugal

DOLPHIN v. ROBINS.

rights would not be equivalent to a judicial sentence enabling the wife to live away from her husband; p. 578.

Per Lord Cranworth: There may be exceptional cases, in which the wife, even without judicial separation, may acquire a separate domicile, as where 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; p. 579.

Per Lord Kingsdown: If any expressions of my noble and learned friend have been supposed to lead to the conclusion that his impression was in favour of the power of the wife to obtain a foreign domicile after a judicial separation, it is an intimation of opinion in which, at present, I do not concur. I consider it to be a matter, whenever it shall arise, entirely open for the future determination of the House; p. 581.

Collusion.—A decree of divorce procured by the execution of a preconcerted scheme corruptly concocted between the parties, is a mere mockery, and leaves the wife under the marital control of her husband.

Bigamy.—Remarks by Lord Cranworth on the Statutes. 1 Jac. 1. c. 11. and 9 Geo. 4. c. 3.

THIS was an Appeal from the English Court of Probate, but the question turned entirely on the effect to be attributed to a sentence of divorce pronounced by the Court of Session in Scotland, purporting to dissolve an English marriage. The decision is therefore as interesting to the Scotch as to the English lawyer; and a desire was intimated that it should be included in these reports.

In delivering judgment in the Court below on the 5th March 1858, the Right Honourable Sir *Cresswell Cresswell*, the Judge of the Court of Probate, stated the facts and arguments in the following terms:—

"In 1822 Mr. Dolphin, an Englishman, domiciled in England, married an English lady in England; and they afterwards lived together at his house in Glouces-

tershire. In 1839, differences having arisen between them, they agreed upon a separation, and afterwards lived apart. At that time a settlement was executed, by which certain property was secured to Mrs. Dolphin for her life, with power of appointment by deed or will. In April 1854 Mrs. Dolphin, then living in England, executed a will as required by 1 Vict. c. 26., of which Messrs. Robins and Paxton were appointed executors. In the same year Mr. Dolphin went to Edinburgh, and in the same year Mrs. Dolphin also went there and instituted against him an action of divorce before the Lords of the Court of Council and Session, on the ground of adultery. On the 20th of July a decree was pronounced, dissolving the marriage and declaring her to be at liberty to marry again as if he were dead. On the 8th of October 1854, she married, in Edinburgh, Amedée Theodore Davesies de Pontes, a Frenchman domiciled in France, and they were afterwards re-married in France, and all necessary steps were taken to render such marriage a valid marriage according to the law of France. Mrs. Dolphin having accompanied De Pontes to France, continued to live with him there as his wife until a short time before her death, when she was placed by him in a convent in Paris, where she died. When there, Mrs. Dolphin, by the name of De Pontes, wrote and signed a paper, intended to be a will, in these words:—

"'I revoke all foregoing wills made by me up to this date, the 23rd day of June 1856, Paris;' and this was alleged to be by the law of France a valid will. Mrs. Dolphin died soon afterwards. A caveat was entered on behalf of Mr. Dolphin; and the executors named in the will of 1854 having propounded it, the proctor of Mr. Dolphin brought in an allegation pleading the several matters above-mentioned.

DOLPHIN v. ROBINS.

"This was opposed on the ground that the facts alleged afforded no answer to the claim of the executors to have probate of the will of 1854, for that the Scotch Court had no power to dissolve a marriage solemnized in England between English people domiciled in England, and that consequently Mrs. Dolphin, although resident in fact in France with De Pontes, remained domiciled in England, and the document executed by her in the convent in Paris, not being attested as required by the statute 1 Vict. c. 26., could not have any effect upon the will executed in 1854. The cases of *Rex* v. *Lolley* (*a*) and *Conway* v. *Beazley* (*b*) were cited in support of this view.

"The allegation in its then state was very vague as to the nature and duration of Mr. Dolphin's residence in Scotland before the suit for divorce was instituted; and I requested that it might be reformed, so as to enable me to judge how far the case was similar in circumstances to that of Conway and Beazley. That has been done.

"The allegation does not state that Mr. Dolphin had given up his house and establishment in England, or that he had left it without intention of returning, or that he had gone to Scotland with the intention of remaining there. It appears to me that the case in this respect is governed by *Lolley's* case and *Conway* v. *Beazley*; and that the marriage was not dissolved.

"But it was contended, secondly, that admitting that the Scotch Court had not power to dissolve the marriage, yet that the sentence would have the effect of a divorce *à mensâ et thoro*; and that the domicile of the wife would no longer be presumed to be that of the husband, for which *Williams* v. *Dormer* (*c*) was cited as an authority. But the sentence of

(*a*) Rus. & Ry. 237. (*b*) 3 Hagg. 639.
(*c*) 2 Robertson, 505.

the Scotch Court was no otherwise a sentence of separation from bed and board and mutual cohabitation than by dissolving the marriage. As a dissolution of the marriage it cannot be recognized in this Court; and therefore I think it could not destroy the legal presumption that the domicile of the husband is the domicile of the wife.

"It follows, then, that the revoking instrument not having been executed by Mrs. Dolphin in conformity with the law of her domicile is inoperative; the will remains unrevoked; and the allegation, if admitted, would afford no answer to the claim of the executors to have probate of that will. It must therefore be rejected."

Dr. *Deane*, Q.C.: I do not know whether this is the proper time to make the application; but this being an interlocutory decree, we are unable to appeal without your Lordship's permission, which we should be glad to obtain.

Sir *C. Cresswell:* Oh, certainly.

Dr. *Deane:* That, I presume, would include an order to stay proceedings?

Sir *C. Cresswell:* Of course.

The appeal was presented to the House in due time, and was subsequently set down for hearing in the usual course.

The *Solicitor-General* (*a*), Dr. *Twiss*, and Dr. *Deane* appeared and were heard as Counsel for the Appellant.

Mr. *Roundell Palmer*, Dr. *Addams*, and Dr. *Spinks* addressed their Lordships on the behalf of the Respondents.

At the close of the argument the further consideration of the case was ordered to be adjourned.

(*a*) Sir Hugh Cairns.

DOLPHIN v. ROBINS.

On the 4th of August 1859, the following opinions were pronounced:—

Lord Cranworth's opinion.

Lord CRANWORTH:

My Lords, this Appeal from the Court of Probate was heard at your Lordships' bar early in the present year. Its object was to reverse a decree of Sir *Cresswell Cresswell*, dated the 5th of March 1858, whereby he rejected an allegation brought in by the Appellant.

The facts of the case are shortly as follows:—In the year 1822 the Appellant, an Englishman domiciled in England, married Mary Ann Payne, an Englishwoman, at St. George's, Hanover Square. He and his wife afterwards lived together at different places in England, and there was issue of the marriage one child only, who died shortly after its birth. In the year 1839, differences having arisen between the Appellant and his wife, they separated, and deeds were then executed whereby provision was made for the separate maintenance of the wife, then Mary Ann Dolphin, for her life, and it was agreed that the trustees named in the deeds should hold certain property therein specified upon such trusts as the said Mary Ann Dolphin, notwithstanding her coverture, by any deed or deeds, instrument or instruments in writing, to be sealed and delivered by her in the presence of and attested by two or more credible witnesses, or by her last will and testament in writing, or any codicil or codicils thereto, or any writing in the nature of or purporting to be her last will, to be signed and published by her in the presence of and attested by two or more credible witnesses, should, from time to time, declare, direct, and appoint.

Mary Ann Dolphin died on the 28th of September 1856, and in the following year the Respondents

propounded in the Court of Probate certain papers purporting to be her last will and a codicil thereto, both dated on the 11th of April 1854, whereby she appointed them to be her executors.

It is not disputed that the will and codicil so propounded were both duly executed by her in manner required by the deeds giving her the power to make a will. But the Appellant opposed the grant of probate, and brought in an allegation setting up another will subsequent in date to the will and codicil of April 1854. This allegation was afterwards amended, and was ultimately rejected by the decree of the Judge, dated the 5th of March 1858. And it is against this decree that the present appeal is brought.

In order to enable us to say whether the decree was or was not right we must look carefully at the contents of the allegation. It begins by stating the marriage of the Appellant in 1822, and his subsequent cohabitation with his wife, the birth of their child, and its subsequent death very shortly after it was born, the separation of the Appellant from his wife in 1839, and the deeds making a separate provision for her, and giving her the power to make a will. This power is set out in the very words to which I have already called your Lordships' attention.

The allegation then proceeds as follows:—"That in the month of February 1854 the said Vernon Dolphin (*a*) left England and went to Scotland, that on the 23rd day of February 1854 he arrived at Edinburgh, and from such time until the 25th of the said month he resided at the Waterloo Hotel in Edinburgh aforesaid, when he left the said hotel, and from such time until the 3rd day of April following he resided

(*a*) The Appellant.

DOLPHIN v. ROBINS. — *Lord Cranworth's opinion.*

at a cottage, called South Cottage, which he had hired as a residence, at Wardie, near Edinburgh, and that on the said 3rd day of April he returned to the said Waterloo Hotel, where he resided until the 9th of the said month, when he left the said hotel and went to England for a few days, and returned to Scotland, and resided again at Edinburgh and Stirling, in Scotland, until the 6th day of June following, when he again returned to and took up his abode at the said hotel, and there remained till the 19th of the said month. That the said Vernon Dolphin had by such residence, and in intention as well as in fact, become a domiciled Scotchman. That the said Vernon Dolphin's wife having ascertained that he was living in adultery during the said time in Scotland, on the 17th of the said month of June a summons was personally served upon the said Vernon Dolphin at her instance in an action of divorce before the Lords of the Court of Council and Session in Scotland, on the ground of adultery, and thereupon proceedings were taken and proofs adduced. That on the 19th day of the said month of June the said Vernon Dolphin again went to England, but returned afterwards to Scotland, and was there resident for some days in the month of July 1854. That on the 20th day of the said month of July, the said Lords of the Court of Council and Session in Scotland, by their decree dated the 20th day of July 1854, found the said Vernon Dolphin guilty of adultery, and therefore divorced and separated him from the said Mary Ann Dolphin, her society, fellowship, and company in all time to come, and declared that he had forfeited all the rights and privileges of a lawful husband, and that the said Mary Ann Dolphin was entitled to live single or to marry any free man as if she had never been married to the said Vernon Dolphin, or as if he were naturally

dead. And the said Vernon Dolphin expressly alleges that by such decree the said Mary Ann Dolphin became and was from and after the said 20th of July 1854 absolutely divorced from the bond of matrimony with the said Vernon Dolphin and free to marry any other man."

The allegation then goes on to state that in the month of October 1854, the said Mary Ann Dolphin was duly married in Scotland to Amedée Theodore Davesies de Pontes, all proper steps having been taken to make that marriage valid in France, where he was domiciled, being then a general in the French army, so that he and the said Mary Ann became, according to the laws of France, lawful husband and wife; and that they from and after the marriage lived and cohabited together as man and wife, and took up their permanent residence at Paris, never again visiting Scotland or England; and that the said Mary Ann, in the beginning of the year 1855, abjured the Protestant religion, was baptized by a Roman Catholic priest, and became herself a Roman Catholic.

The 18th Article is as follows:—"That the said Mary Ann Dolphin, having herself a mind and intention finally to make her last will and testament, and thereby to revoke all former wills and codicils by her made and executed, did, in pursuance of the power vested in her by the aforesaid indenture of the 15th day of November 1839, and of all other powers and authorities her enabling, with her own hand draw up and write the very will now remaining in the archives of Ferdinand Léon Ducloux, a notary in Paris, the said will being in words following, to wit,—'I revoke all foregoing wills made by me up to this date, the twenty-third June, one thousand eight hundred and fifty-six. Paris.' And having so done, and in approbation thereof, she, on the said twenty-third day of

DOLPHIN v. ROBINS.

Lord Cranworth's opinion.

June 1856, subscribed her then names of 'Marie Eustelle Davesies de Pontes' thereto, at the foot or end thereof; and after she had so done, she sealed the same in an envelope, which she then indorsed and signed as follows,—'Last will, which I have made this day, twenty-third June 1856, Marie Eustelle Davesies de Pontes.'"

The allegation then avers that by reason of the premises the deceased was on the 23rd of June 1856, and at the time of her death, lawfully domiciled in France; and then the 22nd Article proceeds thus: "That by the laws, usages, and customs which were in force on the said 23rd day of June 1856, and at the time of the deceased's death, and which still are in force in France, any holograph will, codicil, or testamentary instrument made, dated, signed, and executed in manner and form as pleaded and set forth in the 18th Article of this allegation," (that which I have just read,) "was and is good, valid, and effectual to all intents and purposes whatsoever."

The very learned Judge of the Court of Probate rejected this allegation of the Appellant on the ground that it stated no case impeaching the validity of the will and codicil propounded by the Respondents.

The grounds on which the Appellant relied were that by the proceedings in Scotland the marriage with the Appellant was dissolved so as to enable the deceased to contract a new marriage; that she did, in fact, contract a new marriage in 1854 with General de Pontes, a domiciled Frenchman, and became herself domiciled in France, and so continued from the time of her marriage till her death; and that while so domiciled she made the will of 23rd June 1856 in the mode required by the laws of the country of her domicile, which, therefore, was a valid revocation of the will and codicil of April 1854. The Appellant further con-

DOLPHIN v. ROBINS.

Lord Cranworth's opinion.

tended that even if the divorce was not valid so as to enable the deceased to contract a second marriage, still it operated as a divorce *à mensâ et thoro*, and enabled her to select a domicile of her own; and that, in fact, she did select France as her domicile, where she lived and died.

The learned Judge of the Court below was of opinion that the English marriage was not dissolved by the Scotch divorce, and that so the deceased remained up to the time of her death the wife of the Appellant, whose domicile was and had always been in England; that his domicile was her domicile, and that the will, or alleged will, of June 1856, not having been executed in the mode required by our laws, had no effect on the will and codicil of 1854. He further held that the Scotch decree did not operate as a divorce *à mensâ et thoro*, and so made a decree rejecting the allegation.

The same arguments were renewed and urged with great ability at your Lordships' bar; but they failed to convince me, or, as I believe, any of your Lordships who heard the case.

On the first question, the validity of the Scotch divorce to dissolve the English marriage, the decision in *Lolley's* case is conclusive.

It was, indeed, contended in the argument here that Lolley's case did not necessarily govern that now under consideration, for that since that decision the principles applicable to this question have been materially changed by the Statute 9 Geo. 4. c. 31. But this seems to me altogether a mistake. In Lolley's case it appeared that he, having been married in England, afterwards went to Scotland, and while he was there not having become a domiciled Scotchman (for that must be assumed to have been the state of the facts), his wife obtained a Scotch decree for a divorce on the ground of adultery committed by him

DOLPHIN v. ROBINS.

Lord Cranworth's opinion.

in Scotland. After the decree was pronounced he returned to England, and married a second wife at Liverpool. This was held by the unanimous opinion of the Judges to be bigamy on the ground "that no sentence or act of any foreign country or state could dissolve an English marriage *à vinculo matrimonii*," meaning, I presume, could dissolve the matrimonial *vinculum*, and that no divorce of an Ecclesiastical Court was within the exception in 1 Jac. 1. c. 11. s. 3., unless it was the divorce of a Court within the limits to which the 1 Jac. 1. extends. The exception in the Statute 1 Jac. 1. was "of any person divorced by sentence in the Ecclesiastical Court." It was contended at the bar that the decision might have been different if the case had arisen since the 9 Geo. 4. c. 31., which repeals the Statute 1 Jac. 1. c. 11., and by s. 22, again makes bigamy a felony, but with a proviso that the enactment shall not extend to any person who at the time of the second marriage shall have been divorced from the bond of the first marriage. It was said that the Scotch Court was not the Ecclesiastical Court contemplated by the Statute 1 Jac. 1., and that so Lolley was not within the exception contained in that statute, but that as he had been in fact divorced, he would now have been within the proviso of the Statute of 9 Geo. 4. c. 31. This, however, is evidently a mistake. He was not and could not be divorced, for according to the express opinion of the Judges, no Court can dissolve the bonds of an English marriage.

Lolley's case has been frequently acted on. In the case of *Conway* v. *Beazley*, Dr. *Lushington* after much consideration acted on it, treating it as settled law where there is no *bonâ fide* domicile in Scotland, meaning by "*bonâ fide* domicile," a real domicile, and not a domicile assumed merely for the purpose of

DOLPHIN v. ROBINS.

Lord Cranworth's opinion.

giving jurisdiction. And I believe your Lordships are all of opinion that it must be taken now as clearly established that the Scotch Court has no power to dissolve an English marriage where, as in this case, the parties are not really domiciled in Scotland, but have only gone there for such a time as, according to the doctrine of the Scotch Courts, gives them jurisdiction in the matter. Whether they could dissolve the marriage if there be a *bonâ fide* domicile is a matter upon which, I think, your Lordships will not be inclined now to pronounce a decided opinion.

On the other point decided in the Court below (*a*), I think there can be no doubt. If the Scotch divorce did not operate as a dissolution of the marriage, it clearly did not operate as a divorce *à mensâ et thoro*. It was not intended so to operate, and it is by no means certain that the deceased wife would have desired to obtain such a decree.

It appears therefore to me that on both the points raised in argument before him the learned Judge below was clearly right. But on the argument here a new point was started. It was contended that without any dissolution of the marriage, or any divorce *à mensâ et thoro*, the deceased was, by the acts of the husband appearing on the allegation, placed in a situation enabling her to choose a domicile for herself separate from that of her husband; and that, in fact, she did choose Paris as her domicile, and there lived and died; that when so domiciled she made the will of the 23rd June 1856, valid according to the laws of the place of her domicile, which therefore ought to have been admitted to proof; or at all events that as her domicile was, at her death, French, the English will and codicil ceased to be operative.

(*a*) The Court of Probate.

DOLPHIN *v.* ROBINS.

Lord Cranworth's opinion.

This point was urged with considerable ability and force, and as it was one which had not been put forward below, and therefore had not been considered by Sir *Cresswell Cresswell*, your Lordships desired to have a second argument at the bar confined to this single point. Accordingly, your Lordships, a few days since, heard Sir *Hugh Cairns* for the Appellant on this point, and Mr. *Roundell Palmer* for the Respondents, both of whom did full justice to the question argued.

My Lords, I have given my best consideration to the able arguments then addressed to us, and have come to the conclusion that there is nothing in this new view of the case which ought to induce your Lordships to disturb the decision of the Court below.

On the part of the Respondents it was argued that even if there had been a divorce *à mensâ et thoro*, the wife could not have acquired a domicile of her own; and in support of that argument reliance was had on the clear and undoubted doctrine of our law that husband and wife are to be treated as one person; that their union, whatever decree may have been made by the Ecclesiastical Court, is by the common law absolutely indissoluble; that the wife can neither sue nor be sued without her husband; that the husband is bound to maintain her and to afford her a home; that with reference to the Poor Laws, her settlement is her husband's settlement; and, generally, that in the eye of the law they are so completely identified, that the notion of her acquiring a separate home could not for a moment be admitted.

I desire not to be taken to adopt this argument at once to the full extent to which it was pushed. If in this case the wife had obtained a divorce *à mensâ et thoro*, and had then gone to Paris and there established herself in a permanent home, living there till her death

as the wife of General de Pontes, I desire not to be understood as giving any opinion on the point whether in such a case her domicile would or would not have been French. The question where a person is domiciled is a mere question of fact,—where has he established his permanent home? In the case of a wife, the policy of the law interferes and declares that her home is necessarily the home of her husband; at least it is so *primâ facie;* but where by judicial sentence the husband has lost the right to compel the wife to live with him, and the wife can no longer insist on his receiving her to partake of his bed and board, the argument which goes to assert that she cannot set up a home of her own, and so establish a domicile different from that of her husband, is not to my mind altogether satisfactory. The power to do so interferes with no marital right during the marriage except that which he has lost by the divorce *à mensâ et thoro.* She must establish a home for herself in point of fact; and the only question is, supposing that home to be one where the laws of succession to personal property are different from those prevailing at the home of her husband, which law, in case of her death, is to prevail;—who, when the marriage is dissolved by death, is to succeed to her personal estate, those entitled by the law of the place where in fact she was established, or those where her husband was established? On this question it is unnecessary, and it would be improper, to pronounce an opinion, for here there was no judicial sentence of divorce *à mensâ et thoro,* no decree enabling the wife to quit her husband's home and live separate from him. I have adverted to the point only for the purpose of pointing out that the conclusion at which I have arrived in the case now under discussion would afford no precedent in the case of a wife judicially separated from her

DOLPHIN v. ROBINS.

Lord Cranworth's opinion.

husband; for whatever might have been the case if such a decree had been pronounced, I am clearly of opinion that without such a decree it must be considered that the marital rights remain unimpaired.

It was, indeed, argued strongly that here the facts show that the husband never could have compelled his wife to return to him. The allegation of the Appellant, it was contended, contains a distinct averment that the husband had committed adultery, and this would have afforded a valid defence to a suit for restitution of conjugal rights, and so would have enabled the wife to live permanently apart from her husband, which it is alleged he agreed she should be at liberty to do. But this is not by any means equivalent to a judicial sentence. It may be that where there has been a judicial prceeding, enabling the wife to live away from her husband, and she has accordingly selected a home of her own, that home shall for purposes of succession carry with it all the consequences of a home selected by a person not under the disability of coverture. But it does not at all follow that it can be open to any one, after the death of the wife, to say, not that she had judicially acquired the right to live separate from her husband, but that facts existed which would have enabled her to obtain a decree giving her that right, or preventing the husband from insisting on her return. It would be very dangerous to open the door to any such discussions, and, as was forcibly put in argument at the bar, if the principle were once admitted, it could not stop at cases of adultery; for if the husband, before the separation, had been guilty of cruelty towards the wife, that, no less than adultery, might have been pleaded in bar to a suit for restitution of conjugal rights. It is obvious, that to admit questions of this sort to remain unlitigated during the life of the wife, and to be brought into legal discussion after

DOLFHIN v. ROBINS.

Lord Cranworth's opinion.

her death for the purpose only of regulating the succession to her personal estate, would be to the last degree inconvenient and improper. The observations of Lord *Eldon* and Lord *Redesdale* in the case of *Tovey* v. *Lindsay* (*a*) evidently had reference only to the facts of the case then before the House, where the question was not as to what would be the wife's domicile as regarded succession to her personal estate, but as to the place where she was to be considered as resident for the purpose of her being served with process.

I am therefore clearly of opinion that, without going into questions as to whether the facts are or are not duly pleaded, they afford no ground of defence to the claim of the Respondents, and that the Respondents are entitled to insist on the will and codicil of April 1854 as being the last will and codicil of the deceased.

I have already observed that the decision in this case will be no precedent where there has been a decree for judicial separation. And before quitting the subject I should add, that there may be exceptional cases to which, even without judicial separation, the general rule would not apply; as, for instance, where 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. It may be that in these and similar instances the nature of the case may be considered to give rise to necessary exceptions. I advert to them only to show that the able argument of Sir *Hugh Cairns* has not been lost sight of. It is sufficient to say, that in the Appeal now before the House no such case of exception is to be found.

(*a*) 1 Dow. 138.

DOLPHIN v. ROBINS.

Lord Cranworth's opinion.

Mr. *Palmer*, at the close of his argument observed, that whatever might become of the will and codicil of 1854, the French will of the 23rd June 1856 could not be admitted to probate, for want of due attestation, not having been executed in the manner and with the formalities required by the power. I incline to think he is right in this suggestion. But whether that would be decisive as to the validity of the prior will and codicil, supposing the domicile of the deceased to have been French, might turn on nice questions which have not been argued in this case, as to how far the doctrine that a will of personalty, to be valid, must be a will valid according to the law of the domicile of the deceased at his death, would apply to the case of a will of a married woman made under a power. Into this question it is unnecessary for us to travel.

I cannot conclude without saying that, although I am sorry for the delay which the second argument has occasioned to the parties, I cannot regret the course your Lordships took in requiring it. The question was one of great importance, and, not having been raised in the Court below, it required a special consideration when brought for the first time under the notice of this House. I must add that my noble and learned friends, Lord *Chelmsford*, Lord *Brougham*, and Lord *Wensleydale*, before leaving town, told me that they entirely concurred in this view of the subject. Lord *Brougham* had expressed some little doubt upon the matter, but he stated that he did not think it necessary to remain in order to express that doubt, as his single opinion could not affect the decision.

I shall conclude by moving your Lordships to affirm the decree below, and to dismiss the Appeal. But as the questions discussed have arisen from the conduct

of the wife, no less than from that of her husband, and as the case was one of some nicety, and the Appeal was presented under the express sanction of the learned Judge of the Court below, I think it should be dismissed without costs.

DOLPHIN v. ROBINS.

Lord Cranworth's opinion.

Lord KINGSDOWN:

Lord Kingsdown's opinion.

My Lords, my noble and learned friend has done me the favour to communicate to me the opinion which he proposed to express to the House, and I have had an opportunity of communicating with him my views upon it; and as I concur generally in the result at which he has arrived, and for the reasons upon which that conclusion is founded, I think it will be most conducive to the administration of justice in your Lordships' House in a satisfactory manner, to content myself with expressing that assent instead of repeating the arguments or going in detail into the facts to which he has already alluded.

One thing only I am anxious to guard against. If any expressions of my noble and learned friend have been supposed to lead to the conclusion that his impression was in favour of the power of the wife to acquire a foreign domicile after a judicial separation, it is an intimation of opinion in which at present I do not concur. I consider it to be a matter, whenever it shall arise, entirely open for the future determination of the House.

My Lords, there is only one other matter which I will take the liberty of pointing out to your Lordships, which is this, it was not mentioned, I think, in the course of the argument, but it appears to show most distinctly that no question of law really can arise with respect to this divorce, that it was a mere collusion from the beginning to the end between the husband and the wife. My Lords, the

DOLPHIN *v.* ROBINS.

Lord Kingsdown's opinion.

will and codicils which are now propounded are of the most remarkable character. The will gives a legacy of 12,000*l.* to the husband. The codicil, executed on the same day and attested by the same witnesses, one I think being the solicitor or law agent of the parties, revokes that legacy. Now, at first sight one is very much perplexed to imagine what could have been the purpose of that contrivance, a gift by will of 12,000*l.*, and a revocation of that gift on the very same day on which it is given. But, my Lords, on referring to the instructions for this will and to the dates as they appear in these proceedings, the whole matter becomes perfectly clear. Mr. Dolphin went into Scotland in the month of February 1854. He returned, as it appears from the dates, on the 9th of April 1854, and at that time it is manifest that there was a negotiation between the husband and wife for the purpose of procuring this Scotch divorce. The will is dated two days after this gentleman comes to England, and in the memorandum of instructions for that document, though it is not very legibly written or very intelligibly expressed, we find these words,—"The sum of 12,000*l.* to Vernon Dolphin, Esquire, left as Mr. Robins thinks best," (I believe Mr. Robins was the solicitor,) "to be forfeited if by false or insufficient evidence to procure the present divorce in Scotland is established." The language is not very clear, but it is quite obvious what was intended. He was to have 12,000*l.*, provided he would establish in Scotland such a case as would enable her to obtain a divorce in that country. My Lords, on the 11th of April accordingly this document is executed, or rather, I should say, those two documents. He goes back afterwards to Scotland in the month of June, at least he is there in the month of June. On the 17th of June a summons for this action of divorce is served upon him for the purpose of being answered. He comes

DOLPHIN v. ROBINS.

Lord Kingsdown's opinion.

back to England; he returns to Scotland for a few days in the month of July, and on the 20th of July the sentence of divorce is pronounced. It is clear, therefore, my Lords, that it was mere mockery and collusion from beginning to end, and that this must be treated as a case in which the wife still remained under the marital control of her husband (*a*). And I entirely agree with my noble and learned friend that in the circumstances of this case there cannot be the smallest doubt that she was in no degree emancipated from marital control, and that she could not acquire that foreign domicile by which alone effect could be given to the paper propounded in this allegation.

If I had regarded this case as capable of being proved at all, I should still have thought that it would have been impossible to prove it under the present allegation. It would have appeared to me that the allegation that this lady had by an act of her own volition, by her own spontaneous act, chosen and acquired a foreign domicile, was quite inconsistent with the statement in this allegation that she had acquired that domicile not by her own volition, but in spite of her own volition (it might be), by becoming the wife of a domiciled Frenchman. But, my Lords, as the only effect of giving leave to amend this allegation would be that a case would be brought forward which it would be utterly impossible to sustain, I entirely concur in the conclusion which my noble and learned friend has proposed, that this Appeal should be dismissed, and, as he suggests, without costs.

Lord Chancellor's opinion.

The LORD CHANCELLOR (*b*):

My Lords, as I had not the advantage of hearing the whole argument, I refrain from giving any opinion

(*a*) See the *Duchess of Kingston's* case, 20 State Trials, as to the worthlessness of a sentence had by collusion. See also *Shedden* v. *Patrick*, 1 Macq. Rep. 535.

(*b*) Lord Campbell.

DOLPHIN v. ROBINS.

Lord Chancellor's opinion.

upon the general merits of the case. But I did hear one question,—a separate question,—very ably argued on both sides; and I think it may be proper that I should say, upon that question, that I entirely concur in the opinion which has been expressed by my two noble and learned friends. The first marriage in 1822 remained in full force, there was no dissolution of that marriage, nor any judicial separation *de corps*, as the French call it, there was no such separation as would amount to a divorce *à mensâ et thoro*. I am quite clear, therefore, that this lady was not in a situation to acquire a new domicile separate from that of her husband. Upon the other question, to which my noble and learned friend has referred, I also abstain from giving any opinion. It is quite clear that the mere consent of the husband, that she should live elsewhere, would confer no right upon her to acquire a foreign domicile.

Order affirmed, and Appeal dismissed.