VISCOUNT FINLAY—I am of the same opinion. If there was any contract at all it was a conditional contract of sale, and it appears to me to be clear that there is no foundation for the view taken by the Lord Ordinary that the Order does not strike at conditional contracts of sale but only at absolute contracts of sale. The words are perfectly plain—"No person shall (*a*) buy or enter into any contract for the purchase of any timber imported into the United Kingdom except under and in accordance with the terms and conditions of a permit granted by or on behalf of the Controller," and then the words under (*b*) are to the same effect, only if possible clearer. That seems to me to show beyond all doubt that before entering into any contract for the purchase of timber imported into the United Kingdom there must be an existing permit, and that you cannot enter into a contract until you have got that permit. A conditional contract of sale or purchase is none the less such a contract on account of the condition which exists in it. It seems to me that the order of the Lord Ordinary cannot be sustained on any reading of the effect of the Order.

There is another view, of course, which may be taken of the effect of the clause in this contract, but it would be even more fatal to the pursuer's case. The words of the note are—"Sold 1892 planks cypress . . . at 19s. 6d. per foot cube, *ex* store in Glasgow. This contract is issued subject to buyers obtaining permit from the Timber Controller to purchase." That may mean that it is to be taken as "issued" only after that permit is obtained, and that it does not form a contract at all until the permit is obtained. Then, of course, if that be so, it is absolutely fatal to the pursuer's case, because on that reading until the permit is obtained there is no contract of any sort or kind. If it is regarded as a conditional contract of sale it is hit by the Order; if the document is read in the way I have suggested, then there is no contract at all and no action could possibly be brought, because the event on the happening of which there was to be a contract of any kind has never happened.

VISCOUNT CAVE—I agree. Adopting and slightly varying the language of Lord Cullen, I think the meaning of the Order was that a buyer of timber should obtain a permit before he proceeded to buy or to enter into a contract to buy. I also think that a conditional contract to buy is a contract to buy. Accordingly this contract, which was entered into without any permit, was a breach of the Order and was illegal and void.

LORD DUNEDIN—I concur.

LORD SHAW—I concur.

Their Lordships dismissed the appeal, with expenses.

Counsel for Pursuer (Appellant)—Stuart Bevan, K.C.—Cooper. Agents—Turnbull & Findlay, Solicitors, Glasgow—Macpherson & Mackay, W.S., Edinburgh — Charles Nordon & Company, London.

Counsel for Defenders (Respondents)—Condie Sandeman, K.C.—Normand. Agents—Crawford & Laird, Solicitors, Glasgow—Simpson & Marwick, W.S., Edinburgh—Deacon & Company, London.

Friday, July 16.

(Before Viscount Haldane, Viscount Finlay, Viscount Cave, Lord Dunedin, and Lord Shaw.)

MACKINNON'S TRUSTEES *v.* INLAND REVENUE.

(In the Court of Session, July 16, 1919, 56 S.L.R. 559, and 1919 S.C. 684.)

Domicile—Husband and Wife—Succession—Revenue—Wife's Domicile stante matrimonio.

In 1893 a Scotsman, who had contracted dissipated habits, executed a voluntary deed of separation and, with his wife's approval, went to Australia. He lived in Brisbane from 1899 till his death in 1918. In 1902 he contracted in that city a bigamous marriage. His wife continued to live in Scotland till the date of her death, September 1915. *Held* (*aff.* judgment of the First Division) that as the husband had at the date of her death acquired a domicile in Australia the wife's domicile was also in Australia.

Question, would it have been otherwise had she obtained a judicial separation?

Dolphin v. *Robins*, 1859, 3 Macq. 563, *per* Lord Cranworth at p. 576 *et seq.*, *considered.*

This case is reported *ante ut supra.*

The defenders, the Inland Revenue, appealed to the House of Lords.

At delivering judgment—

VISCOUNT FINLAY—The question in the present case is whether the late Mrs Isabella Watson or Mackinnon, the testatrix, was at the time of her death domiciled in Queensland, and the liability of her estate in respect of legacy duty and succession duty depends upon the answer to this question.

The inquiry falls under two heads—1. Had Robert Mackinnon, the husband of the testatrix, acquired at the date of her death a domicile in Queensland? 2. If he had, was the testatrix as his wife also domiciled in Queensland?

Robert Mackinnon was born and brought up in Scotland. He served in the Royal Navy for twenty-four years. In 1878 he married the testatrix, and from 1886, when he retired from the navy with a pension, until 1893 he resided with her in Scotland. He had contracted drunken and dissipated habits, in consequence of which arrangements were made by the testatrix through her law agent for his leaving this country and going to Australia, the expense of his passage being paid by his mother-in-law. He landed at Sydney, and after some time

went thence to Queensland, where he remained until his death in 1918. There was no communication whatever between him and the testatrix from the time when he left this country in 1893. He resided at various places in Queensland, latterly (for some seven years) at Brisbane, and never expressed any desire to return to Scotland. In 1902 he contracted a bigamous marriage with a woman in Queensland, who lived with him until his death.

His domicile when he arrived in Australia was unquestionably Scottish. The Lord Ordinary (Lord Ormidale) found that having regard to his long-continued residence in Queensland he acquired a domicile of choice in Queensland, and that this domicile had been acquired at the date of his wife's death. There was an appeal to the First Division, and all the Judges — Lord Mackenzie, Lord Skerrington, and Lord Cullen — concurred with the Lord Ordinary in holding that Robert Mackinnon had acquired before his wife died a domicile in Queensland. There are therefore concurrent findings upon this point by the Court of the first instance and the Inner House. The burden of proving a change of domicile is, of course, upon those who assert it. As both the Courts below have found that there was in this case such a change of domicile, I do not think that upon the facts in evidence in this case it would be proper to disturb the conclusion at which they have arrived. It must therefore be taken that Robert Mackinnon was at the date of the death of the testatrix domiciled in Queensland.

It remains to consider whether the testatrix as the wife of Robert Mackinnon shared his domicile in Queensland. On this point the Judges in the Court of Session were equally divided. The Lord Ordinary in the first instance, and Lord Mackenzie in the Inner House, took the view that under the special circumstances of this case the ordinary rule that the domicile of the wife is that of the husband has no application, and that she retained her Scottish domicile. But the majority of the Judges in the Inner House held that there were no circumstances in the present case sufficient to exclude the application of the rule of law that the domicile of the wife is that of the husband.

The appellants, the Commissioners of Inland Revenue, relied upon what was said by Lord Cranworth in *Dolphin* v. *Robins*, 1859, 3 Macq. 563, and 7 House of Lords 390, and Sir Robert Phillimore in the case of *Le Sueur* v. *Le Sueur*, 1876, One Probate Division 139. Lord Cranworth in the first of these cases indicated that the inclination of his opinion was that if the wife had obtained a decree of judicial separation that would be enough to exclude the general rule as to the domicile of a wife being that of her husband. He observed, however, that it did not at all follow that the existence of facts which would have enabled the wife to obtain a decree for judicial separation would have the same effect in the absence of an actual decree. Lord Cranworth added that there might be exceptional cases which even without a judicial separation would exclude the general rule. He refers 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." The first and third of these cases need not be considered. The abjuration of the realm has disappeared with the right of sanctuary, and transportation for felony would not in itself involve a change of domicile on the part of the husband. As regards the second case suggested by Lord Cranworth — desertion — there was as a matter of fact in the present case no desertion by the husband. On the contrary, it was at the express desire of the wife that, no doubt for very sufficient reasons, he was shipped off to Australia. In *Le Sueur* v. *Le Sueur* 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. 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.

As no judicial separation was obtained in the present case it is unnecessary and undesirable to express any opinion on the question whether such a decree would have prevented the wife's domicile from following that of the husband. This is a point of great importance, and its decision should be deferred until it arises on the facts of some particular case.

What we have to consider is whether, in the absence of any judicial decree, conduct by the husband which would have enabled the wife to obtain such a decree if she had applied for it, or which would have justified her in point of law in refusing to live with her husband, can after her death be sufficient to establish that she had a domicile of her own different from that of her husband. It appears to me clear that they cannot,

The view that I take upon this point is in accordance with the opinion of Lord Cranworth himself in a passage in his judgment in *Dolphin* v. *Robins*, to which I have already referred. There was no desertion by the husband either in going to Australia, which was at the instance of his wife, or in his remaining there, which was by her desire. The fact, however, that Robert Mackinnon contracted a bigamous marriage in Australia would undoubtedly have enabled the wife if she had sued in the proper tribunal to obtain a decree of judicial separation. But there are the strongest reasons for saying that however clear the facts may be that the wife was not bound to adhere, this cannot of itself suffice to prevent the wife's domicile being that of her husband. That questions of succession should depend upon an inquiry after the death of the parties into their conduct would be dangerous in the last degree. It would introduce great uncertainty as to the rights of the parties to the succession, and when the parties are dead it might not be possible to arrive at any satisfactory conclusion upon such a question of fact.

Lord Kingsdown in *Dolphin* v. *Robins* expressed dissent from Lord Cranworth's dicta as to the effect of a judicial separation in questions of succession. However this may be, it appears to me that it would be contrary to all principle to allow succession to be regulated by the result of an inquiry after death as to the existence of circumstances which might have given ground for a decree.

A great many authorities have been referred to on the subject of marriage and domicile which suggest most interesting questions for consideration. These questions however it is for purposes of the present case quite unnecessary to consider. I rest my decision simply on the fact that the testatrix died without obtaining a decree for judicial separation, and that therefore the ordinary rule of law as to domicile must be applied. As to the existence of the rule there is no doubt. It would at once be undesirable and mischievous to enter into an examination of the reasons on which the rule was based, and, if it should appear on inquiry after the death of one or both of the parties that these reasons might not apply in any particular case, to say that the rule should be treated as inapplicable.

In my opinion this appeal should be dismissed.

VISCOUNT HALDANE—[*Read by Viscount Cave*]—On the first of the questions argued by the Lord Advocate—that as to whether Robert Mackinnon, the husband of the testatrix, died domiciled in Queensland—I think there can be no doubt that our answer must be in the affirmative. The evidence adduced and the concurrent findings of the two Courts below are conclusive as to this.

A more serious question is, however, raised independently of this answer. It is said that as her husband had contracted in 1902 a bigamous marriage at Brisbane, and was in effect living in adultery, the testatrix could not have been compelled to live with him, and indeed could have obtained a divorce against him. As the result of this, which may well be true, it is further said that she could and did acquire an independent domicile in Scotland where she died, and that consequently the right to succeed to her moveable estate and the liability to legacy duty depended on the law not of Queensland but of Scotland.

I think it is clear that the one question on which what remains turns is whether in the circumstances the lady had acquired a particular and definite juridical status independent of her husband. The status I refer to must be one which would have enabled her to invoke a Court other than that of her husband's domicile as having jurisdiction to dissolve her marriage. That status must also have been such that the succession to her moveables came to depend on the law of her domicile instead of his.

It may well be that, as was said by Lord Watson in *Le Mesurier* v. *Le Mesurier* (1895, H.L. & P.C. 517) there may be residence, without the acquisition of complete domicile, sufficient to sustain proceedings for restitution of conjugal rights, for separation, or for aliment. But the status which such residence can confer is far short of that which domicile proper confers. As was pointed out by Lord Watson, agreeing with what was said by Lord Westbury in *Shaw* v. *Gould* (L.R., 3 H.L. 55, at p. 83) the accepted canon of international law is expressed in the words which they both quote from Rodenburg—"Unicum hoc ipsa rei natura ac necessitas invexit, ut cum de statu et conditione hominum quaeritur, uni solummodo Judici, et quidem Domicilii, universum in illâ jus sit attributum." Since *Le Mesurier* v. *Le Mesurier* was decided in terms that gave effect to the spirit as well as to the letter of this principle it has been clear that nothing short of a full juridical domicile within its jurisdiction can justify a British Court in pronuncing a decree of divorce, and that the old notion is now obsolete that there can be, short of such a full domicile, a so-called "matrimonial domicile" which can give the same result. I think that it is implied as a consequence not less plain that there can be only one real domicile. 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 otherwise the consequences in such circumstances as those before us would be extraordinary. Proceedings for dissolving the status of marriage might be carried through in two jurisdictions, possibly with different results. The status itself resulting from marriage might become modified without judicial interposition. The very evils, the exclusion of which has been said by eminent writers on international law to require the acceptance of the principle of domicile unrestrictedly, would be again introduced, and introduced under conditions so vague that no definite limit could be assigned to their operation.

I have considered the authorities referred to by the Lord Advocate in his argument at the Bar. They are not everywhere completely consistent, and there are expressions in them which are not always easy to reconcile. But the principle on which the conclusions to which I have just referred are based is no new one. It is the foundation of the judgment of this House in *Warrender* v. *Warrender* (2 Cl. & F. 488, 2 Sh. & McL. 154), and in no decision which I have found and which is binding on your Lordships has it been departed from.

More I do not think it necessary to say. I move your Lordships that this appeal be dismissed with costs.

VISCOUNT CAVE—The appellant, the Lord Advocate, put forward two contentions, namely, first, that there is no proof that Robert Mackinnon had lost his Scottish domicile and acquired a domicile in Queensland, and, secondly, that even if this be proved, his misconduct in Queensland had the effect of excluding the general rule that the domicile of the wife follows that of her husband, and accordingly that Mrs Mackinnon retained her Scottish domicile.

As to the first question, which is one of

fact, I agree entirely with the findings of the Lord Ordinary and the First Division of the Court of Session. Mackinnon in 1893 signed a contract of separation from his wife, and with her consent, and indeed by her desire, emigrated to Australia. In or about 1899 he went to Brisbane and settled there. In 1903 he contracted a bigamous union with a woman by whom he had children, and lived with her in or near Brisbane until his wife's death in 1915, and thenceforth until his own death in 1918. I think it is clear that he abandoned his Scots domicile and acquired a domicile in Queensland in or before 1902.

Upon the second question, which is one of law, the argument put forward by the appellant was to the effect that the rule as to a wife's domicile following that of her husband is founded upon the duty of the wife to live with her husband; that by Mackinnon's unfaithfulness his wife was freed from that obligation; and that, accordingly, the rule as to domicile had no application to her. The decision of the Lord Ordinary to the above effect was reversed by the First Division, and your Lordships have to determine whether it be restored.

I doubt whether the rule as to a wife's domicile following that of her husband is founded upon her obligation to live with him. It appears to me to be more correct to say that it is a consequence of the union between husband and wife brought about by the marriage tie (see Code xii, 1, 13; Stair, i, 4, 9; Phillimore on Domicile, sec. 40); and while the rule is no doubt abrogated by a divorce *a vinculo*, and possibly (although this has not yet been finally decided) by a divorce *a mensa et thoro* or a judicial separation, 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. Indeed, the decision of your Lordships' House in *Dolphin* v. *Robins*, 1859, 7 H.L.C. 390, appears to be an express authority to the contrary. In that case the wife of a domiciled Englishman, having obtained in Scotland a decree of divorce on the ground of her husband's adultery in that country, went through a ceremony of marriage with a domiciled Frenchman and lived with him in France until her death. It was held, first, that the Scottish decree of divorce was void as there was no Scottish domicile, and, secondly (on an argument first raised in this House), that the adultery of the husband did not entitle the wife to choose a domicile for herself in France. On the latter point Lord Cranworth said (p. 417)—"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 proceeding 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 anyone, 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 her 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 her death for the purpose only of regulating the succession to her personal estate, would be to the last degree inconvenient and improper."

Lord Campbell, the Lord Chancellor, agreed with the above view, saying (p. 423)—"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 separation as would even amount to a divorce *a mensa 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." The other learned Lords concurred, Lord Kingsdown even expressing a doubt as to the power of a wife to acquire a separate domicile after a judicial separation.

The above decision, which was followed in *Yelverton* v. *Yelverton*, 1859, 1 Swabey & Tristram 574, appears to me to conclude this, but doubt has been caused by some further observations added by Lord Cranworth in the same speech (p. 418)—"I have already observed," he said, "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."

The above observations were cited with

approval by Sir R. Phillimore in *Le Sueur* v. *Le Sueur* (1876 L.R., 1 P.D. 139 at 141), and were again referred to by Swinfen Eady, J., *in re Mackenzie; Mackenzie* v. *Edwards Moss*, [1911] 1 Chancery 578, and they formed the basis of the judgment of the Lord Ordinary in this case. I am disposed to think that the argument based upon Lord Cranworth's dictum—which was general and tentative in form—has been carried too far. 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, for such a suggestion would be inconsistent with his own earlier reasoning quoted above, and with the actual decision in *Dolphin* v. *Robins*. Possibly he had in mind the case of a husband who, having been guilty of desertion or some other matrimonial offence in this country, endeavours to deprive his wife of her remedy by changing his domicile, 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. (See *Pitt* v. *Pitt*, 1864, 4 Macq. 627, at pp. 640 and 647; *Redding* v. *Redding*, 1888, 15 R. 1102, 25 S.L.R. 459; *Armytage* v. *Armytage*, [1898] P. 178; *Armitage* v. *Att.-Gen.*, [1906] P. 135; and *Ogden* v. *Ogden*, [1908] P. 46, at p. 78.) But, if so, the proposition can have no bearing upon the present case, where the husband emigrated with his wife's consent, and before any matrimonial offence had been committed, and where it is not the guilty husband but the representative of the wife who insists that her domicile followed his.

In my opinion, therefore, the argument for the appellant fails, and the decision of the Court of Session is right and should be affirmed.

LORD DUNEDIN—[*Read by Lord Shaw*]—All the learned Judges of the Court of Session came to the conclusion that Mackinnon at the time of Mrs Mackinnon's death had acquired a domicile in Queensland. From this conclusion I am not prepared to differ. It is a question of fact, and I am satisfied that their Lordships approached that question of fact in full recognition of the *onus* lying upon anyone who asserts that a domicile of origin has been abandoned—a doctrine laid down in many cases, and particularly by this House in the cases of *Cunliffe Brooks*, [1906] A.C. 56, 8 F. (H.L.) 4, 43 S.L.R. 112, and *Winans*, [1904] A.C. 287. Now, that the domicile 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. His only argument is that there is an exception to this general rule when the circumstances are such that a wife, had she chosen, would have been entitled to divorce or at least to judicial separation. The case of divorce need not be considered, for if there is divorce the foundation of the rule is gone. She has no longer a husband, and she could not therefore be bound by the changes of domicile of a person to whom she is connected by no family tie.

The sheet anchor of the appellant's argument is a certain dictum of Lord Cranworth in the case of *Dolphin* v. *Robins* (*sup.*). In that case Mrs Dolphin, the wife of a domiciled Englishman, had obtained a decree of divorce in the Scottish Courts on the ground of adultery against her husband, who at that time was temporarily resident in Scotland. She had then gone to France, where she had gone through the ceremony of marriage with a Frenchman. The question in the case was whether Mrs Dolphin on her death was by domicile an English woman or a French woman. This House first decided that the Scottish decree of divorce was null for want of jurisdiction, no courts having a power to divorce *a vinculo* except the courts of the country of the domiciled husband—a view followed long after in the case of *Le Mesurier* (*sup.*); and then put the question for argument, "whether the circumstances are such as to render the wife capable of gaining for herself a domicile, and if so, did she do it?" The noble and learned Lords unanimously held that, the null decree of divorce being in no sense equivalent to a decree of separation, Mrs Dolphin remained a married woman not separated from her husband by judicial decree, and therefore incapable of acquiring a different domicile from that of her husband.

I confess I think that decision rules this case, and, with great deference to Lord Cranworth, I cannot hold his remarks as free from the criticism of self-contradiction.

Having indicated a doubt as to whether, if there was a decree of judicial separation, the wife might not have acquired a domicile different from that of her husband—nay, having almost expressed his preference for the view that she might—he proceeds as follows (p. 577)—"On this question it is unnecessary and it would be improper to pronounce an opinion, for here there was no judicial sentence of divorce *a mensa 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 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." He then goes on to say (p. 579), and it is on these words that the appellants found—"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." I cannot reconcile these words with the plain sentence "without such a decree marital rights remain unimpaired."

Lord Kingsdown has carefully withheld

his assent to the idea that even a judicial separation would be sufficient. He does not give a decisive opinion, and I think, considering the importance of the subject, it will be well that we should follow his example and wait till the circumstance arises.

It is true that in *Le Sueur* Sir R. Phillimore puts into effect the suggestion of Lord Cranworth. Against that may be put the decision of Sir Creswell Creswell in *Yelverton* v. *Yelverton*, 1 Sw. & Tr. 574, where he said, p. 584—"The domicile of the husband is the domicile of the wife, and even supposing him to have been guilty of such misconduct as would provide her with a defence to a suit as for restitution of conjugal rights, she could not on that ground acquire another domicile for herself." He adds—"As was recently held by the House of Lords in *Dolphin* v. *Robins*," which shows that the learned Judge took the same view of that case as I do. The practical consequences of the other view would be, I think, extremely inconvenient. In the present case it is left in doubt at what precise date the husband acquired his Australian domicile. It may well have been before the adultery was committed. Assuming it was so, it seems impossible to suppose that a supervening adultery would alter the wife's domicile. There would therefore have to be inquiry as to the precise date. In other cases there may be allegations of adultery of dubious proof, and finally, as was ingeniously but I think soundly, argued by Mr Moncrieff, if the wife under this doctrine is entitled to assert a different domicile from that of her husband, it would induce great difficulty in carrying out the views in *Le Mesurier's* case, for if either spouse wished a divorce *a vinculo*, which would be the court which would be empowered to grant it?

I think the only safe course is to keep close to the well-established rule that the domicile of a husband and wife, undivorced and unseparated, is one and the same, and I am therefore of opinion that this appeal fails.

LORD SHAW—A demand has been made by the Commissioners of Inland Revenue upon the trustees of the late Mrs Mackinnon for payment of legacy duty, residue duty, and a certain proportion of succession duty, and the foundation of the claim of the Crown is that these payments are due out of Mrs Mackinnon's estate in respect that she died domiciled in Scotland. If the foundation—as to domicile—fails the case of the Crown disappears.

Mrs Mackinnon was married in 1878, her husband being a Scotchman. For some time prior to 1893 the husband and wife lived in Aberdeen. Four children were born of the marriage, but they all predeceased their mother without issue. Robert Mackinnon became addicted to heavy drinking, and it was arranged that he should go abroad. He did so in the year mentioned, *i.e.*, 1893, and he went to Australia. There he remained for a short time in New South Wales. Thereafter he lived in Queensland from at least 1902 till his death in 1918. On the 2nd July of the year 1902 he went through a bigamous form of marriage with a woman named Bennett, with whom he lived for sixteen years until his death. He continued to draw a small naval pension which he had from the home authorities, but beyond that he retained no connection with the home country. He never communicated with his wife.

Upon these facts, and upon other details brought out in evidence, I have no hesitation in agreeing with the judgments of the Court below, and in holding it to be proved that Mackinnon's domicile was in Queensland. It is perfectly true that his domicile of origin was Scotch. It is also perfectly true that facts must be clear and unambiguous before it can be concluded that such a domicile has been permanently changed. A long residence abroad is not sufficient to change it.

Yet the question still remains in all such cases, Did the citizen leave this country and betake himself to another for good—did he remain in his new abode *sine animo revertendi?* After all, that is a question of fact, and I cannot bring myself to hold that Mackinnon ever had any intention of again becoming a Scotch citizen. He formed a home in Queensland, he worked there, and such interests as he had in life, as he had, were all there. With the exception of drawing his pension he definitely cut every link binding him to his home in his native country, and he showed no sign whatsoever of returning.

It was argued, however, that when he contracted a bigamous marriage he interfered with his own freedom in returning or even in communicating with his domicile of origin. Probably he did, but I see no ground for thinking that he did so against his will, or that a court is entitled to conclude that his true intentions as to domicile are to be assumed to have been that he meant to return but could not. Such views are too astute to be practical. The man's intentions are best judged by his habits and his acts if he has never given any other expression or signification to them, and in my view his habits and his acts squared with his intention, which was to settle permanently in Australia.

The first question in the case, *i.e.*, as to Robert Mackinnon's domicile, is thus therefore settled. He was domiciled in Queensland.

The second question is whether the husband being thus domiciled in Queensland, his wife remained domiciled in Scotland. I do not doubt that she did not. If she did, the case would form a notable and unique exception from what in my opinion is a sound, reasonable, and long-settled principle of law. Assuming accordingly that Mackinnon went out to Australia in the circumstances mentioned, cutting, as I have said, the ties with Scotland completely, and becoming domiciled in Australia, then I am of opinion that the case is a clear one for the application of the ordinary principle to which I have referred. The wife continued to have the domicile of a married woman—a derivative domicile, the domicile of her husband.

When that changed the derivative result changed—the wife's domicile was changed from Scotch to Australian.

Any doubts that there are in the case have arisen in the legal sphere, but even there they have not arisen on account of the application of any well-known doctrines in law, but substantially upon a conjecture by way of reserve, for I call it so—a conjecture by way of reserve—expressed by Lord Cranworth in the case of *Dolphin* v. *Robins* (*sup.*). That conjecture has been repeated, and repeated in text books and succeeding cases. No case crystallising it in fact has ever yet arisen in which any exception to or aversion from the general doctrine of domicile has been given effect to.

To begin with, I am clearly of opinion that the present case is certainly not one to which any such conjectural exception could apply. I entirely agree with what has been said by my noble and learned friend Lord Dunedin with regard to Lord Cranworth's observations in *Dolphin*.

But I may be permitted to put the leading citations in this order. Lord Cranworth says (p. 577)—"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 *prima 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 *a mensa 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 *a mensa 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 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." To pause there, the judgment applies directly to the present case. This case is one, so to speak, of a domicile of succession, and it is one in which Mrs Mackinnon had obtained no decree of judicial separation. Under these circumstances it seems somewhat unnecessary to go on to consider the conjecture—for the learned Lord has declared that the marital rights were to be unimpaired without such a decree—to go on to consider the possible case under circumstances where there was no such decree, and yet curiously enough such impairment. The passage to which I refer is as follows (p. 579):—"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.' This passage put Lord Kingsdown on his guard at once, and he declared as follows (p. 581)—"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."

Lord Campbell (Lord Chancellor) expressed his view as follows (p. 584)—"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 even amount to a divorce *a mensa et thoro*. I am quite clear, therefore, that this lady was not in a situation to acquire a new domicile from that of her husband. Upon the other question to which my noble and learned friend has referred, I 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."

I have ventured to assert in my address these quotations for this particular purpose. 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 formerly 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 domicile and one domicile alone, *i.e.*, that of the husband. I am quite sure that Lord Watson in *Le Mesurier* not only treated the matrimonial domicile as the real domicile and nothing but the

real domicile, which is the real domicile of one person, *i.e.*, the husband. Much confusion may be caused by the introduction of the idea of there being two domiciles of the marriage or two domiciles of succession while the marriage tie continues.

I desire further to say that I think in this connection too little regard has been paid to the judgment of this House in *Warrender* v. *Warrender*. The case was powerfully argued by Sir J. Campbell, Attorney-General, on the one side, and Sir William Follett on the other; and the point with which I am dealing was a matter of direct controversy. Sir J. Campbell's argument (p. 498, 2 Clark & Finnelly) was—"The application of the legal fiction which makes the husband's house the legal and proper domicile of the wife is excluded in this case by the deed of separation." This was strongly countered by Lord Brougham, who thus deals with the point (p. 523)—"It is admitted on all hands that in the ordinary case the husband's domicile is the wife's also. . . . Actual residence—residence in point of fact—signifies nothing in the case of a married woman, and shall not in ordinary circumstances be set up against the presumption of law that she resides with her husband. . . . Had the parties lived in different places, from a mutual understanding which prevailed between them, the case would still be the same. The law could take no notice of the fact, but must proceed upon its conclusive presumption and hold her domiciled where she ought to be, and where in all ordinary circumstances she would be, with her husband. Does the execution of a formal instrument, recognising such an understanding, make any difference in the case?" His Lordship then proceeds to discuss whether the agreement founded on in the case was sufficient for its purposes, and finds that there is a fundamental difficulty in so holding. But the Lord Chancellor did not leave the matter there; he adds this sentence (p. 526)—"But suppose we pass over this fundamental difficulty in her case, and which appears to me decisive of the exception with which I am now dealing, I am of opinion that there is nothing in the separation, supposing it had been ever so formal and ever so full in its provisions, which can by law displace the presumption of domicile raised by the marriage and subsisting in full force as long as the marriage endures." So far Lord Brougham in *Warrender* v. *Warrender*. I do not find that this stated as a general principle has ever been departed from. Smaller inconveniences may be remedied and jurisdiction assumed almost *ex necessitate* to find a remedy for these on the spot, but in the great fundamental issues of status and succession the domicile of the wife is the domicile of the husband until divorce *a vinculo matrimonii* has been obtained. This view humbly appears to me to be in entire accord with that of Lord Watson when in *Le Mesurier* (1895 A.C. 517 at p. 531), and dealing with the case of *Niboyet*, (1878) L.R., 4 P.D. 1, and the appeal made to the remedial provisions of the English Statute of 1857, his Lordship observed—"It is not doubtful that there may be residence without domicile sufficient to sustain a suit for restitution of conjugal rights, for separation, or for aliment, but it does not follow that such residence must also give jurisdiction to dissolve the marriage." His Lordship refers to a so-called "matrimonial domicile," having quoted with manifest approval the judgment of Lord Deas in the Scotch case of *Jack* v. *Jack* (24 D. 467, at p. 473), where that distinguished judge observed—"Neither can I solve this case by what has been sometimes called the domicile of the marriage. The phraseology appears to me to be calculated to mislead. It is figurative, and wants judicial precision. There is no third domicile involved apart from the domicile of the husband and the domicile of the wife. Domicile belongs exclusively to persons. Having ascertained the domicile of the husband and the domicile of the wife, the inquiry into domicile is exhausted." After an exhaustive summary of cases, both in England and in Scotland, Lord Watson in *Le Mesurier* concludes (p. 536)—"When carefully examined, neither the English nor the Scottish decisions are, in their Lordships' opinion, sufficient to establish the proposition that in either of these countries there exists a recognised rule of general law to the effect that a so-called matrimonial domicile gives jurisdiction to dissolve marriage." It appears to me to be a question which has certainly never been settled in the affirmative, whether even a judicial decree of separation can affect the domicile of the spouses permitting thereafter separate domiciles to be acquired. The ordinary rule has not yet been so invaded. It works conveniently. It prevents confusion. It regulates succession by one set of rules instead of possibly by two, and it preserves that unity of idea and fact with regard to the domicile of married parties which has hitherto always been upheld by law.

I should desire further to observe that I should have the greatest doubt in any event, whether, if one of the spouses fails during the continuance of the marriage to obtain a divorce *a vinculo matrimonii*, it is legitimate to raise the question after the death of the other. *A fortiori* I think this to be also the case when the question is raised after the death of the spouses, as in the present case, in order to promote or regulate ulterior interests.

I agree that the appeal fails.

Their Lordships dismissed the appeal with expenses.

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