

doubt, and they state that they are of opinion that the pictures which they ask authority to sell ought to be disposed of in the interests of the trust as a whole. I have no doubt that they have come to that decision with the sole view of discharging their duty as trustees, and, if so, their decision cannot afterwards be successfully challenged.

I agree with your Lordship, as we all think that they have the powers which they ask us to confer, this petition is unnecessary and should be dismissed.

LORD GUTHRIE concurred.

The Court pronounced this interlocutor:—

“... Allow the petition to be amended as proposed at the bar; and having considered the petition as amended, along with the reports by Mr Fleming and Mr Hannen respectively, and having heard counsel for the petitioners, dismiss the petition as unnecessary, and decern: Find the expenses incurred in connection with the present application and proceedings are chargeable against the trust estate in the hands of the petitioners.”

Counsel for the Petitioners—Macmillan, K.C.—D. P. Fleming. Agents—Webster, Will, & Company, W.S.

Wednesday, July 16.

## FIRST DIVISION.

[Lord Ormidale, Ordinary.]

### MACKINNON'S TRUSTEES v.

#### LORD ADVOCATE.

*Succession—Domicile—Husband and Wife—Acquisition of Independent Domicile by Wife stante matrimonio.*

A husband and wife were both originally domiciled in Scotland. The husband became addicted to drink and maltreated his wife. They executed a voluntary deed of separation, and he proceeded to Australia, where he lived in Brisbane from 1899 to January 1918, when he died. The wife continued to live on in Scotland, and there was no communication whatever between the spouses. In 1902 the husband contracted a bigamous marriage in Australia. In 1910 the wife heard of the bigamous marriage, and in 1915 she raised an action of divorce against her husband on the grounds of desertion and adultery. She died on 9th September 1915, when the service on the husband of the divorce summons had not been carried out. In a question of the liability of her estate to succession duty, held (dis. Lord Mackenzie) that although the husband had deserted the wife in a popular sense, though perhaps not in the sense of the Act 1573, c. 55, the wife was never in a position to acquire a domicile independent of that of her husband, that the husband was domiciled in Queensland at the date of the

wife's death, and that her domicile was therefore in Queensland at the date of her death.

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

Thomas Jaffrey and another (Mrs Mackinnon's trustees), *pursuers*, brought an action against the Lord Advocate as representing the Commissioners of Inland Revenue, *defender*, and, for any interest he might have, against Robert Mackinnon, the husband of the pursuer, who died *pendente processu*, concluding, *inter alia*, for declarator (first) that Mrs Mackinnon died domiciled in Queensland; (second) that legacy duty and residue duty were not exigible in respect of the bequests of legacies and residue contained in her trust-disposition and settlement; and (third) that succession duty was exigible for the estate of Mrs Mackinnon only in respect of the heritable property situated in Scotland of which she died possessed.

The pursuers *pleaded*—“(1) The deceased Mrs Isabella Henderson Watson or Mackinnon having been domiciled in Queensland at the date of her death, her estate is not liable in payment of legacy or residue duty, and is liable to succession duty only in respect of her heritage situated in Scotland, and the pursuers are therefore entitled to decree in terms of the declaratory conclusions of the summons.”

The defender *pleaded*—“(5) The said Mrs Isabella Henderson Watson or Mackinnon having been domiciled in Scotland at the date of her death, this defender should be assolizied from the conclusions of the summons.”

On 18th March 1919 the Lord Ordinary (ORMIDALE) assolizied the defender from the conclusions of the summons. To his interlocutor was appended the following opinion, from which the *facts* of the case appear.

*Opinion.*—In this case three questions were presented for determination. (*First*) Whether at the date of Mrs Mackinnon's death on 9th September 1915 her husband Robert Mackinnon had acquired a domicile in Queensland? (*Second*) In the event of its being held that he had, whether the domicile of Mrs Mackinnon was at the date of her death also in Queensland in respect of the rule that a wife's domicile follows that of her husband? and (*Third*) If Mrs Mackinnon's domicile was at the date of her death in Queensland, whether succession duty is exigible from her estate only in respect of the heritable property situated in Scotland of which she died possessed?

*First.*—The domicile of Robert Mackinnon at the date when he left Aberdeen for Australia was in Scotland. He was born at Campbeltown in Argyll, and it is not suggested that he had at that date lost his domicile of origin.

“After leaving Scotland Mackinnon proceeded to Australia, and in Australia he continued to live until his death on 7th January 1918, that is to say, for a period of between twenty-four and twenty-five years. Residence, whatever may be its duration,

is not of itself sufficient to infer the acquisition of a domicile—*Winans*, 1904, A.C. 287. *In re Patience*, 29 Ch. Div. 976—but in every case it may be of importance—greater or less according to the circumstances of each case—as helping to ascertain the *animus* or intention of the individual whose domicile is in question.

“Mackinnon’s object in going to Australia was, it is said, if possible by the aid of change of scene and surroundings, to overcome the habit of drinking to excess which he had acquired after leaving the naval service, a habit which had made him a nuisance to his friends and a positive danger to his wife. There seems to me little doubt that it was the anxiety of his wife and friends to get rid of him, rather than any wish of his own, that led him to leave this country. Whether he had resolved at that time never to return to Scotland there is no evidence to show. It is to be regretted that a contract of separation entered into by him and his wife just before his departure has not been recovered.

“He landed in Australia at Sydney in January 1894. How long he remained there is uncertain, but possibly until 1899. He then proceeded to Queensland which he never afterwards left. In 1902 he entered into a bigamous marriage, and thereafter for sixteen years until his death resided with his companion, by whom he had two children, in Brisbane or its vicinity. His drinking habits continued, and while he engaged in casual labour—chiefly gardening from time to time—his principal and latterly his only means of subsistence appears to have been a pension which he drew through the British Admiralty.

“The evidence of what was Mackinnon’s mind on the subject of domicile is meagre and scanty, but along with the fact of his long residence in Australia, it is in my judgment sufficient to infer a settled purpose to make Queensland his permanent home.

“His companion Williamina Mackinnon—examined on commission—depones that she asked him in private talk between themselves would he like to take a trip back to Scotland, and he said ‘No,’ he would sooner stop in Queensland because it suited him better; that he said he did not intend to return to Scotland. ‘(Q) Can you say where the said Robert Mackinnon intended to make his permanent home?—(A) Yes. (Q) Where?—(A) In Brisbane.’ Asked by the Commissioner, ‘Did he have enough money to go to Scotland?’ She said ‘No. He said that if he did go back he would have to work his passage there on the boat, but had no intention to go back.’

“Mr Fitzgerald, a Brisbane solicitor, who handed him the letter, says that in the conversation he had with him he appeared to be quite an intelligent person, a person who must have had a fairly good education. That is of importance, because Mr Fitzgerald also says that he read the letter over to him and explained the contents to him, and that he appreciated the contents. That was in answer to the question, ‘Did you explain to him that if

he were domiciled in Scotland he would have certain rights in the estate of his deceased wife?’

“It is to be noted that the letter also stated that the trustees of his wife were advised that he had lost his Scots domicile and become domiciled in Australia, by the law of which country he was entitled to no right or interest in his wife’s estate.

“Now in reply to a question by Mr Fitzgerald whether he understood the contents of the letter, he said that he understood from the letter that his position was that he was not entitled to anything from his wife’s estate. In one view of that answer it was tantamount to an admission that he was domiciled in Australia. It was suggested to him that it might be advisable for him to get advice on the matter, and he said he did not intend to bother.

“It is true that at the date of this interview, 16th March 1916, Mackinnon was very ill, and that he remained very ill until his death in January 1918, but still there was ample time for him—if he considered himself a domiciled Scotsman—to do something towards trying to get his right to a share of his wife’s estate established.

“It may be that the knowledge that he had contracted a bigamous marriage acted as a deterrent to his returning to Scotland, but his entering into that marriage was a deliberate act on Mackinnon’s part, and indicates that he had by that time made up his mind to say good-bye to Scotland and settle in Queensland.

“In my opinion the pursuers have proved that Mackinnon had at the date of his wife’s death abandoned his Scottish and acquired a Queensland domicile.

“*Second.*—Mackinnon having acquired a domicile in Queensland, was that of his wife also in Queensland? The defenders contend that it was in Scotland? They do not maintain that she had acquired a new domicile, but only that she retained the domicile she had at the time when her husband left her. This distinction it is said is of importance. It certainly is so in determining questions of jurisdiction in actions of divorce. If after a cause of action has arisen the husband leaves his wife and acquires a new domicile, she is nevertheless entitled to convene him to the courts of the country which had been the joint domicile. On the other hand she could not acquire for herself a new domicile and sue him in the courts of that domicile—*Redding v. Redding*, 15 R. 1102; *Le Sueur*, L.R., 1 Prob. Div.

“This, however, is not an action of divorce, and no question of jurisdiction is raised. The sole matter of inquiry is whether the domicile of Mrs Mackinnon—the domicile which falls to regulate the succession to her moveable estate—is in Scotland or Australia.

“The general rule undoubtedly is that the domicile of a wife during coverture follows that of her husband—*Stair*, i, 4, 9; *Fraser*, H. & W. 867; *Dacey*, 132; *Bar* (*Gillespie’s Transl.*, 2nd ed.), 117. The rule was recognised in many of the cases cited to me. Most of these cases were consistorial actions in which the main topic was the question of

jurisdiction, and they do not therefore directly apply. The rule is referred to in *Jack v. Jack*, 24 D. 467; *Warrender*, 2 Sh. and Cl. 1, 546; *In re Daly's Settlement*, 25 Beavan 456; and *Low v. Low*, 19 R. 115. In the latter case Lord Trayner states the rule to be undoubted that the wife cannot have or acquire a domicile different from her husband's.

"Exceptions have, however, been indicated if not expressly affirmed by decisions. *Divorce a vinculo* terminates the rule, and Lord Cranworth in *Dolphin v. Robbins* is obviously of opinion that a decree for judicial separation has the same effect. 'The question,' he says, '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 *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 the case of her death is to prevail?' He lays emphasis on the fact of a judicial decree having been obtained—'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 the husband from insisting on her return.'

"He further says—'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.'

"The illustrations given are concerned with circumstances which, as I understand them, would not in themselves give the wife any right to obtain a judicial decree for separation, 'desertion' not then affording a ground for judicial proceedings at the instance of the wife any more than abjuration of the realm.

"In a later case (*Le Sueur v. Le Sueur*, *supra*) Sir Robert Phillimore expressed the opinion that in the case of desertion a decree of judicial separation was not a *sine quo non*. 'The doctrine,' he says, 'that the domicile of the wife is necessarily that of the husband must surely admit of some exceptions, such as those referred to by Lord Cranworth. It is

founded indeed upon the duty of the wife to live with her husband, but also on the presumption that he will be faithful to his married vow.'

"His Lordship concludes—'Upon the whole I am disposed to assume in favour of the petitioner the correctness of the opinion that desertion on the part of the husband may entitle the wife without a decree of judicial separation to choose a new domicile for herself, and in coming to that conclusion I am aware that I am going a step further than judicial decisions have yet gone.'

"That opinion has never been challenged, and I am disposed to follow it. Except that in the present case the question of domicile is raised after the death of the wife, the circumstances here are no less clamant than in *Le Sueur's* case. Mrs Mackinnon on the facts disclosed might have obtained a judicial decree of separation, indeed of divorce *a vinculo*, and she had taken steps to obtain such a decree before her death, so that her mind with regard to terminating the marital rights of her husband is clearly ascertained. This appears to me a fact of vital importance, and to differentiate the case from that figured by Lord Cranworth in *Dolphin v. Robbins*, and to distinguish it also from the case of *Mackenzie v. Mackenzie*, 1911, 1 Ch. 578. As I have indicated already, Mackinnon did not at the date of his leaving Scotland desert his wife, but by the time he contracted his bigamous marriage I am satisfied that he had deserted her and he was also guilty of adultery. I am not satisfied that the Scots Court had jurisdiction to try the divorce action raised by Mrs Mackinnon, because no cause of action had arisen when her husband left her, and in my opinion he changed his Scots domicile in perfect good faith, but that does not appear to me to be of any materiality in the present case. In point of fact he had very clearly abandoned his wife and been unfaithful to his marriage vow, and had thus destroyed completely the basis on which the rule that the wife's domicile follows that of her husband is founded. In my judgment, therefore, Mrs Mackinnon's domicile at the date of her death was in Scotland.

"*Third*.—As I have held that Mrs Mackinnon's domicile was in Scotland and not in Queensland, this question does not arise for decision, but I may say that in my opinion the defender's contention is not well founded. Under reference to the case of *Wallace v. Attorney-General*, L.R., 1 Ch. App. 1, and the commentary thereon in Hanson (8th ed.), pp. 607-8, succession duty in the case of the will of a testator who dies domiciled abroad falls to be imposed only on those who claim title by virtue of the law of this country. The will here was made not out of the United Kingdom but in Scotland, and in accordance with the law of Scotland. That being so it is validly executed, according to the law of Queensland. Mr Harney's evidence and opinion are conclusive on that point. No doubt he says that the Wills Act operates in Queensland, and that it is by operation of the provisions of that Act that Mrs Mackinnon's

will is good according to the law of Queensland, but that again is because the Wills Act is part of the law of Queensland in virtue of the incorporation of the general law of England which took place in 1861, when Queensland was formed into a state."

The pursuers reclaimed, and argued—Mrs Mackinnon's husband was at the date of her death domiciled in Queensland. On that part of the case the Lord Ordinary was right. The evidence showed that he had made his permanent home there. The only question arose from the fact that he had contracted a bigamous marriage there. The adoption of such a step was a strong indication of the intention to settle in Australia. The fact that he thereby rendered himself liable to be criminally prosecuted in Scotland at best merely operated as a consideration to deter him from returning to Scotland; it did not prevent him doing so, and in any event it had no effect on his freedom of choice of a home outside Scotland. A sentence of transportation probably only operated as a change of domicile when the question arose in the jurisdiction pronouncing the sentence—Dicey, Conflict of Laws, 2nd ed., p. 147. The liability to sentence if the person involved returned to the country of his domicile did not in itself prevent his acquiring a domicile elsewhere—*In re Martin* [1900] P. 211, *per* Lord Lindley, M.R., 232, *per* Rigby, L.J., at p. 234, and Vaughan Williams, L.J., at p. 237. If Mackinnon was domiciled in Queensland at the date of his wife's death she also was domiciled there. Even on the assumption that a married woman could acquire a domicile independent of her husband's during marriage, there was no evidence that Mrs Mackinnon ever in fact acquired such a domicile. The action of divorce begun by her was not conclusive evidence. She might have dropped it, and it was not prompted by moral repugnance to her husband, but by a desire to exclude him from her succession. Mrs Mackinnon simply lived on in exactly the same way from the time when Mackinnon went to Australia. She did no overt act indicating that she was acquiring an independent domicile. Further, the only conditions alleged in the present case under which Mrs Mackinnon could acquire a domicile of her own were that she had been deserted by her husband, or that the husband had been guilty of adultery. As regards adultery, she first knew of it in 1910, and only thereafter on that ground, assuming it to have been good, could she have acquired a domicile for herself. As regards desertion, the effect of the evidence was that Mrs Mackinnon acquiesced in her separation from her husband. She made no attempt to get him to provide a home for her, and until she knew of the bigamous marriage she could not have placed him in desertion without indicating a desire to resume cohabitation. Consequently Mackinnon was not in desertion until his bigamous marriage at least. But a married woman could not acquire a domicile independent of her husband's unless the spouses were separated by judicial decree of separation or of divorce. On that point

there was no decision, but there were dicta either way. The *obiter dicta* in *Warrender v. Warrender*, 1835, 2 Sh. & M'L. 154, of Lord Brougham at p. 195, and Lord Lyndhurst at p. 233, were to the effect that where the spouses had executed a voluntary deed of separation the wife obtained no power to acquire an independent domicile. In *Dolphin v. Robbins*, 1859, 3 Macq. 563, it was held that a deed of voluntary separation did not give the wife power to acquire an independent domicile. The dicta of Lord Cranworth were difficult to read as a consistent whole; he considered that the rule that a married woman was incapable apart from divorce of acquiring an independent domicile was not absolute (at p. 576), that where there had been a judicial decree she could acquire an independent domicile, but only in that case (at p. 578), and that the mere fact that the husband had committed an offence which would have entitled the wife to resist an action of adherence, provided that the wife had not actually judicially obtained the right to live separate, was not enough (p. 578). Even that opinion, which was not adverse to the pursuers, was not concurred in by Lord Kingsdown at p. 581, nor by Lord Campbell, L.C. But Lord Cranworth at p. 579 further considered that where there was no judicial decree of separation a wife might acquire an independent domicile if her husband had abjured the realm, deserted her, and established himself permanently in a foreign country, or had committed a crime and been transported. The Lord Ordinary had misunderstood that passage, for as the mere acquisition by the husband of a permanent home in a foreign country admittedly did not give the wife power to acquire an independent domicile, Lord Cranworth contemplated only two exceptional cases—(1) where these requisites concurred, (a) abjuration of the realm, (b) desertion of the wife, and (c) acquisition of a permanent home in a foreign country, and (2) where those requisites concurred, (a) conviction for felony, and (b) sentence of transportation. So read that dictum had no application, for it referred to a state of affairs long obsolete. On the nature of abjuration of the realm Stroud's Judicial Dictionary, vol. i, *sub voce* "Abjuration," and *Newson v. Bowyer*, 1729, 3 P. Wms. 38, were referred to. Further, in any event in both cases figured by Lord Cranworth a judicial determination that the wife was not bound to adhere was implied. A sentence of banishment appeared to have the same effect—Fraser, H. & W., p. 868. *Le Sueur v. Le Sueur*, 1877, 1 P.D. 139, was not in point, for it merely raised the question of jurisdiction in an action of divorce, and Sir Robert Phillimore's opinion at p. 142 was *obiter*, and went further than Lord Cranworth in *Dolphin's* case. In *in re Mackenzie*, [1911] 1 Ch. 578, Swinfen Eady, J., at pp. 592-4, merely followed Lord Cranworth. It was doubtful if a judicial separation gave power to acquire an independent domicile—Dicey, Conflict of Laws (2nd ed.), p. 132; Westlake, Private International Law (5th ed.), p. 352; Fraser, H. & W., ii, 867, 907, and 1255. Gillespie, Bar (2nd ed.), pp. 117-118, appeared to refer to the German practice.

There was no analogy between the present case and cases such as *Jack v. Jack* 1862, 24 D. 467; *Ogden v. Ogden*, [1908] P. 46; *Ringer v. Churchill*, 1840, 2 D. 307; and *Redding v. Redding*, 1888, 15 R. 1102, 25 S.L.R. 459, where the husband after having committed a matrimonial offence changed his domicile, and the wife was allowed to sue him in the courts of the country in which he was domiciled at the date of the offence. The question there was one of *forum*. In America the attempt to admit exceptions to the rule that at least a judicial separation was required to give the wife the right to acquire an independent domicile had led to a mass of conflicting decisions. Upon principle that attempt could not be supported, for it involved taking the wife out of the class who were by law *alieni juris*, and for one purpose placing her in the class of those *sui juris*. Thus her husband would remain liable for her debts, whilst she could alter her domicile to exclude him from right of succession in her estate. If Mrs Mackinnon was domiciled in Queensland succession duty was exigible only in respect of her heritable property in Scotland. On that the Lord Ordinary was right, but in any event there was no record upon which the defender's argument could be founded. The averment by Hanson, *Death Duties* (6th ed.), pp. 607-8, was not justified by the decision referred to, viz., *Wallace v. Attorney-General*, 1865, L.R., 1 Ch. App. 1. The legatees under Mrs Mackinnon's will became entitled to their legacies in virtue of the law of Queensland, not of Scotland. The Wills Act 1861 (24 and 25 Vict. cap. 121), Wharton, *Conflict of Laws* (3rd ed.), p. 105, and *Parish Council of Rutherglen v. Parish Council of Glasgow*, 1902, 4 F. (H.L.) 19, 39 S.L.R. 621, were referred to.

Argued for the defender (respondent) — Mackinnon never acquired domicile in Queensland. The *onus probandi* upon that topic was on the pursuers, and the evidence was indecisive. Mackinnon did not leave Scotland of his own accord, but was shipped off to get rid of his evil habits. He never had a settled occupation in Queensland, and the bigamous marriage was a most flimsy tie, but it at least prevented him from returning to Scotland. *Martin's* case was not in point, and was very special in its circumstances. Mere residence in Queensland was all that was proved. In such circumstances *Winans v. Attorney-General*, [1904] A.C. 287, per Lord Halsbury, L.C., at p. 289, applied. But even if Mackinnon had acquired a domicile in Queensland, Mrs Mackinnon had before her death acquired an independent domicile in Scotland. She in point of fact had acquired a permanent home there. The only question was as to her legal power to acquire a domicile of her own. She was deserted by Mackinnon long before her death, and most certainly from the date of the bigamous marriage. A wife deserted by her husband could obtain a domicile independent of his — *Dolphin v. Robbins*, per Lord Cranworth; *Le Sueur's* case; *Ringer v. Churchill* (*cit.*), per Lord Medwyn at p. 323. There were also American cases in the defender's favour. The wife's

inability to acquire a domicile of her own depended upon her obligation to adhere to her husband. If she was under no such obligation there was no reason to deny her the right to acquire a domicile of her own, i.e., to chose her own permanent home. Desertion by the husband made the wife *capax* as regards suing and contracting debts. It was a very small step to hold that it also rendered her able to choose her domicile. If not, the husband though in breach of his marital obligations might vary his wife's domicile to his own advantage. The fact that the wife could sue in the courts of the husband's domicile at the date when he committed a matrimonial offence though he thereafter changed his domicile was also in favour of the defender's contention. In any event succession duty must be paid by the legatees, as even if Mrs Mackinnon was domiciled in Australia they took by virtue of the law of this country—Hanson, *Death Duties*; *Wallace's* case.

At advising—

LORD MACKENZIE—The question raised in this case is as to the domicile of Mrs Mackinnon, who died on 9th September 1915. The pursuers allege that at the date of her death she had a domicile in Queensland, because her husband was domiciled there. The defender maintains that it was in Scotland.

As regards the first step in this case the *onus* is upon the pursuers. They must show that the husband's domicile was in Queensland at the date of his wife's death. The Lord Ordinary has held that they have discharged it, and in this conclusion I agree.

Robert Mackinnon, the husband, was born in Scotland in 1844. He married his wife, who was born in Scotland in 1878, when he was chief quartermaster in the British Navy. He retired from the Navy in 1886, being then a chief petty officer. From then until 1893 he lived with his wife in Aberdeen. There were four children of the marriage, who all predeceased Mrs Mackinnon. He was constantly drinking and maltreating his wife. Her mother intervened, and Mackinnon consented to go abroad. His ticket was purchased for him and he went to Sydney. He was provided with £5 at the end of the voyage. No further sums were sent him. He was in receipt of a pension of some £47 a-year from the Navy. It is proved that a contract of separation was prepared and signed, but no trace of its terms can be found. There was no communication between the spouses after the husband left Scotland. He reached Sydney early in 1894. It is not clear on the evidence how long he remained there. There is evidence to the effect that he was only there for six months, though he drew his pension in Sydney until it was transferred in 1899 to Brisbane in Queensland. He remained in Brisbane or its vicinity until his death in January 1918. In 1902 he contracted a bigamous marriage, and he lived with the woman he so married until his death in a benevolent asylum in Brisbane, to which he had been removed some eighteen months before his death.

Mrs Mackinnon heard in Scotland in 1910 through a friend that her husband had gone through the form of marriage with this woman in Queensland. In 1915 she instructed an advocate in Aberdeen to raise an action of divorce on the ground of desertion. Her reason for doing so was that she was then possessed of means and was anxious to exclude her husband from any share in the estate she had by that time acquired. The summons was issued on 7th August 1915, and was sent out for service in Queensland. Mrs Mackinnon, however, died on 9th September 1915, and the instructions for service were cancelled. A copy of the summons of divorce is produced, from which it appears that it proceeds on two grounds—desertion and adultery. It contains the averments that the defender deserted the pursuer in 1893—"After his retreat from the naval service the defender obtained various situations in Aberdeen, but as a result of excessive indulgence in drink and irregular habits he lost one situation after another, until ultimately in the month of December 1893 he left the pursuer and his family without making any provision for them and proceeded to Australia. The pursuer never heard from the defender again, nor has he ever made any provision for her or his children." The pursuer in the divorce action states that she became aware for the first time in 1910 that the defender was living in adultery with a woman in Queensland who had borne two children to him. The averments conclude—"The defender has thus been in wilful and malicious non-adherence to and desertion of the pursuer for the space of four years, and having also committed adultery as condescended on the pursuer raises the present action of divorce."

On Mrs Mackinnon's death a letter dated 23rd November 1915 was addressed by Messrs Morice & Wilson, advocates in Aberdeen, to Robert Mackinnon, sending him a copy of his wife's settlement and explaining that she had left her means entirely to charities and personal friends:—"Your wife's trustees and executors desire also to inform you, as we now do, that if you had been domiciled in Scotland at the date of your wife's death you would have been entitled, in terms of the Married Women's Property (Scotland) Act of 1881, to one-half of your wife's personal or moveable estate in name of *jus relictæ*, notwithstanding the terms of her will, and that unless barred by the terms of the titles of her heritable properties or for some other reason you might also have had a claim in name of courtesy to a liferent of the free rental of these properties. As it is, however, your wife's trustees and executors are advised that, in the circumstances known to them and to yourself, you have now lost your Scots domicile and become domiciled in Australia, by the law of which country you are entitled, as our clients are advised, to no right or interest whatever in your wife's estate. Our clients have been advised to this effect by eminent Scots and Australian counsel. It may be that in addition to

these considerations there may be other reasons why you could make no claim on your wife's estate."

After he had received the letter Mackinnon was interviewed on 8th March 1916 by Mr Fitzgerald, a solicitor in Brisbane, who has been examined on commission. He says Mackinnon at that time appeared to be an object of pity and practically dying; that he was quite an intelligent person, who must have had a fairly good education; and that Mackinnon told him he understood what was contained in the letter. He said that he understood from the letter that his position was he was not entitled to anything from his wife's estate. The indications Mackinnon gave to Mr Fitzgerald were that he was in a very poor state of health and that he was in a very poor condition financially; that he had lived in Brisbane for a considerable number of years; and that he was going to write to a relative, Mrs Jackson, for financial assistance. The evidence of the woman with whom Mackinnon lived was also taken on commission. She was an inmate of the same benevolent asylum. He seems while in Sydney to have assisted gentlemen who had yachts, but did not do any other work. She had two children of her union with Mackinnon, whom she described as State children. When she went through the form of marriage she took his word his wife was dead, and thought so until the letter came from Messrs Morice & Wilson. After the marriage they resided in various places in and near Brisbane. Mackinnon was for a short time caretaking and cleaning the State school, and thereafter gardening in different places. In 1916 they were living in a poor-looking place, a dirty wooden house with two storeys, at the back of a yard. The woman did odd days' work as a laundress. The police inspector who was examined says when he saw them in March 1916 the woman was very dirty and emaciated looking. She presented the appearance of having been drinking heavily. These appear to be the material points as regards the facts of the case.

As regards the question *quo animo* was Robert Mackinnon in Queensland, there is the evidence of what passed between him and the woman, which is summarised by the Lord Ordinary. The import of it is that he said he would rather stop in Brisbane than return to Scotland. He would sooner stop in Queensland because it suited him better. He had been in Australia altogether for twenty-four years before his death, and for sixteen of these he had been in the same part of Queensland. The long residence, coupled with the evidence as to wishes, leads inevitably to the conclusion reached by the Lord Ordinary that *animo et facto* Mackinnon had his domicile in Queensland.

The next question is whether Mrs Mackinnon had at the date of her death a derivative settlement in Queensland? She was born in Scotland and lived and died there. The argument for the pursuers is that there is a hard-and-fast rule of law that a wife cannot have or acquire a domi-

cile different from that of her husband except in the case where by judicial sentence the husband has lost his right to compel his wife to live with him. It is, no doubt, true that *prima facie* the home of the husband is the home of the wife, and this is the reason for the general rule that the domicile of the husband is the domicile of his wife. But I am unable to hold that there may not be exceptional cases in which, short of judicial sentence, the facts may be so strong as to exclude the possibility of this *prima facie* rule being applicable. In such cases the reason for this rule ceases and the rule itself ceases also. It is difficult to figure a case stronger than the present for holding that the general rule does not apply. When the wife died the spouses had been living, the husband in Australia, and the wife in Scotland, for the years between 1893 and 1915. No word had passed between them. Whatever the terms were on which they parted there is no question that in the popular sense of the word the husband had deserted his wife and children. He never thereafter sent them a penny. It may be that in the legal sense there was not desertion which would have warranted divorce after four years, and this because the parties signed a deed of separation. There was, however, a complete rupture when the husband entered into the bigamous marriage. This is a fact established in a judicial process, and is independent of whether there was desertion in the sense of the law of Scotland. A copy of the certificate of the bigamous marriage is produced and deposed to. The fair inference from the evidence is that it was subsequent to the date of that marriage that Mackinnon formed the intention of settling permanently and did settle in Queensland, making his permanent home there. This permanent home was not, in the circumstances of the case as they existed down to his wife's death, one to which she was under legal obligation to go. It was for the whole thirteen years from 1902 to 1915 in the occupation of her husband and another woman, to whom he had given the title to call herself his wife.

There might have been difficulty in the case if there had been any ground for holding that the husband acquired a domicile in Queensland before the bigamous marriage. It might then have been possible to argue that the husband's domicile attached to his wife. In my opinion, however, the acquisition of the new domicile was not before the bigamous marriage but subsequent thereto.

The case of *Dolphin v. Robbins*, 3 Macq. 563, was relied on by the pursuers. I am unable to hold that this case lays down a rule of law of universal application. The general principle admits of exceptions, as Lord Cranworth points out at p. 579—"I should add that there may be exceptional cases to which even without judicial separation the 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."

The Lord Ordinary quotes this passage. Lord Cranworth further says—"It may be that in these and similar instances the nature of the case may be considered to give rise to necessary exceptions." It was contended on behalf of the pursuers here that Lord Cranworth was here referring to two classes of cases only, and that both involved what was equivalent to a judicial sentence. Abjuring the realm, it was explained, has a technical significance according to the law of England, and transportation follows on sentence. I am not satisfied that Lord Cranworth's dictum is to be so limited. It appears to me that the passage is expressed in popular language, and that there are three categories—(1) abjuring the realm, whatever that may have meant at the date when Lord Cranworth spoke; (2) desertion by the husband of his wife and establishment of himself in a foreign country—desertion is not here used in any technical sense; and (3) commission of felony followed by transportation. In support of this I refer to the view of Sir R. Phillimore as expressed in *Le Sueur's* case, mentioned by the Lord Ordinary. When the facts are so strong as they are in the present case, I am of opinion that the doctrine of derivative domicile ought to have and has no application.

As I regard the present as an exceptional case I do not consider it necessary to go further into the matter. My view has been arrived at after giving due consideration to the writers referred to—Dicey, *Conflict of Laws*, 2nd ed., p. 132; Westlake on *International Law*, 5th ed., pp. 352-353; Wharton, *Conflict of Laws*, 3rd ed., p. 105.

This view renders it unnecessary to express any opinion upon the third point dealt with by the Lord Ordinary. Before this could properly be raised amendment of the record would be necessary.

The reclaimers opened on the question of expenses, maintaining that the proof was directed to the question of the husband's domicile in Queensland, on which they had been successful. I do not think the interlocutor should be altered on this point.

I am of opinion that the interlocutor reclaimed against should be affirmed.

LORD SKERRINGTON—The question in controversy relates to the domicile, *i.e.*, the true domicile for purposes of succession, of the late Mrs Isabella Mackinnon who lived in Aberdeen and who died there on 9th September 1915. In order to solve this question it becomes necessary to consider whether her husband Robert Mackinnon, who died in Queensland in January 1918 subsequent to the raising of this action, had or had not abandoned his original Scottish domicile, and had or had not acquired a domicile of choice in Queensland which he transmitted to his wife prior to her death. We are not concerned with the question whether up to the time of his wife's death Mackinnon remained liable to the jurisdiction of the Court of Session so that his wife might have obtained a divorce from that Court on the ground of his desertion or adultery.

As regards Mackinnon's domicile of succession I agree with the Lord Ordinary and also with the opinion of your Lordship which I have had the advantage of reading. Although the evidence is scanty, it is sufficient to justify the conclusion that before his wife's death Robert Mackinnon abandoned his Scottish domicile of origin and acquired a domicile of choice in Queensland.

The second question is whether Mackinnon's conduct in combination with the other circumstances of the case was such as to give to his wife the capacity to possess a domicile for purposes of succession different from that of her husband. At first sight it does not seem to be unreasonable to suggest that this lady who lived and died in Scotland should be considered to have retained her domicile in that country, and that her domicile need not necessarily be the same as that of the husband who failed to provide her with a home or to support her either in Scotland or in Queensland, who insulted her publicly by making a bigamous marriage, and who may truly be said to have deserted her though not probably in the technical sense of the Scots Act 1573, cap. 55. On consideration, however, it will be seen that if we attribute to Mrs Mackinnon the capacity to retain for herself a domicile which her husband had abandoned, she must equally have possessed the capacity to acquire for herself a new domicile in any other country in exactly the same way as if she had been a widow. It would not be easy to find a more thorough-going example of the violation of conjugal duty than is afforded by the facts of the present case. The flagrancy and thoroughness, however, of Mackinnon's misconduct do not seem to me to provide a good reason for applying to his wife a different rule from that which ought to be applied to any and every wife whose husband has by his fault lost the right to require her to live with him in his own home.

The identity of a wife's domicile with that of her husband is in my opinion a consequence of the marriage tie, and it must continue so long as that tie remains in full force. Though it has never been so decided in this country, it is probable that a wife judicially separated from her husband would be held to be in the same position as a widow as regards the capacity to possess or to acquire a domicile in her own right. Seeing that a decree of separation *a mensa et thoro* puts an end to the wife's duty of adherence, it might reasonably be construed as also entitling her both to hold and to acquire a domicile different from that of the husband from whom she has been separated. Considerations of this kind have no application to a case where the nuptial tie is not merely undissolved but remains unaltered by the act of any public authority.

The Lord Ordinary does not appear, any more than did Lord Cranworth in the case of *Dolphin v. Robbins* (1859, 3 Macq. 563, 578), to favour an opinion which at least has the merit of being intelligible, simple, and logical, viz., that a wife's capacity to have and to acquire a separate domicile must depend upon whether her husband has for-

feited the right to compel her adherence, and whether she has availed herself of her liberty to live separate from him. If this opinion is not accepted as furnishing the test, I fail to see any halting-place between it and the hard-and-fast rule that so long as the marriage tie remains undissolved and also unimpaired by a judicial separation the wife's domicile must be that of her husband. The Lord Ordinary states that he attaches "vital importance" to the fact that Mrs Mackinnon a month before her death commenced proceedings in the Court of Session for obtaining a divorce on the ground of her husband's desertion and adultery. It is impossible to say whether this abortive action could or could not have been successfully resisted on the ground of no jurisdiction and also on the merits so far as regarded the alleged "wilful and malicious" desertion. A decree of divorce or of separation is material in a question of domicile because it directly affects the status of the wife, and not because it indicates that the injured wife resented her husband's misconduct. If Mrs Mackinnon had acquired from her husband a derivative domicile of succession in Queensland at the time when she instituted her action of divorce, I fail to see that the service of the summons could reinstate her in her original Scottish domicile. On the other hand if in consequence of her husband's misconduct she ought to be held to have retained her Scottish domicile of succession the materiality of the action of divorce is still more difficult to understand.

If I rightly appreciate your Lordship's opinion it proceeds largely upon the special circumstances of the present case, following very much the line of thought expressed by Lord Cranworth in the dictum (3 Macq. 579) which has given rise to so much argument as to its meaning and application. I prefer what may be called "the hard-and-fast" rule to a course which appears to me to be both illegitimate and dangerous, viz., to substitute for a rule of positive law the reason on which the rule itself is supposed according to certain legal theories to rest. For my own part I do not believe that the identity of the domicile of husband and wife depends upon a combination of two legal fictions, viz., that a dutiful husband and a dutiful wife always reside in the same place, and that this place is in the country where he has his legal domicile.

There remains over a question in regard to the Succession Duty Act upon which the parties have still to be heard.

LORD CULLEN—I agree with your Lordships and the Lord Ordinary in thinking that the proof shows that the husband settled permanently in Queensland so as to acquire a domicile there.

As regards the domicile of the wife I concur in the conclusion reached by Lord Skerrington. The general rule under which a wife takes the domicile of her husband is well fixed, however the reason for it may be expressed. Where the relations of the spouses have been definitely altered by a judicial decree of separation there is much to be said for the view that the rule should



suffer an exception. Here, however, there was no such decree. The living apart of the spouses began by mutual consent. It is not clear that it ever changed its character in this respect. There is no evidence that the wife desired her husband's return or was willing to resume cohabitation. During the long period that they lived apart, whatever may have been the wife's view regarding the possibility of renewed cohabitation, it is clear enough that the husband treated his wife practically as if she were non-existent and entered into adulterous relations with another woman. Probably, however, such conduct is not unique in cases where spouses have agreed to live apart and continued to do so for the rest of their lives. The fact of its occurrence does not in itself alter the quality of the living apart as taking place by mutual consent.

Now I think it is good law that the general rule as to a wife taking her husband's domicile is not excluded by an agreement between the spouses to live apart. Accordingly I think that Mrs Mackinnon's domicile at the time of her death was in Queensland. Whether there may be other kinds of cases where without a judicial decree of separation the rule should suffer exception, I think it unnecessary to express an opinion.

The LORD PRESIDENT was absent.

The Court found that Robert Mackinnon died domiciled in Queensland, that Mrs Mackinnon's domicile at the date of her death was also in Queensland, and continued the cause.

Counsel for the Pursuers—Watson, K.C.—Dykes. Agents—Macpherson & Mackay, S.S.C.

Counsel for the Defender—Solicitor-General (Morison, K.C.)—R. C. Henderson. Agent—Stair A. Gillon, Solicitor of Inland Revenue.

Wednesday, July 9.

## SECOND DIVISION.

{Sheriff Court at Glasgow.

### TREVALION & COMPANY v. BLANCHE & COMPANY.

*Contract—Sale—Implied Condition—Clearance of Wine from Bond—Permit—Sale of Permit.*

A firm of wine shippers purchased from a firm of wine merchants a permit, which under certain emergency legislation was necessary for the clearance of wine from bond. In payment they sent a cheque. On the day previous to the receipt by the buyers of the permit, the restrictions which necessitated it were withdrawn, thereby rendering it useless. The sellers passed the cheque through the bank, which returned it to them marked "payment stopped." They thereupon raised an action against the buyers to recover the money. *Held* that, there being no implied condition

that at the time of performance a permit would be required in order to clear wine from bond, the buyer was, so far as this plea was concerned, bound by his contract.

### *War—Emergency Legislation—Intoxicating Liquor Orders—Contract—Illegality.*

Certain Orders were made which prevented wine merchants from obtaining subsequent to 1916 more than fifty per cent. of the amount of liquor supplied to them during 1916. An infringement of these was declared to be a punishable offence under the Defence of the Realm Regulations. *Held*, on a construction of the Orders, that it was illegal to transfer permits for the clearance of wine from bond, and that accordingly an agreement for the sale of such a permit was illegal.

F. W. Trevalion & Company, wine merchants, London, *pursuers*, brought an action in the Sheriff Court at Glasgow against J. J. Blanche & Company, wine growers and shippers, Glasgow, *defenders*, to recover the sum of £1750, with interest, the amount of a cheque sent to them by the defenders, which, having been presented to the bank, was returned marked "payment stopped."

The defenders made the following averments in a statement of facts—" (Stat. 1) The defenders on 31st May 1918 were desirous of obtaining some wine from bond, the output of which at that time was controlled by the Government authorities. (Stat. 2) On said date last mentioned the defenders offered to purchase from the pursuers a wine clearance certificate which they had advertised in *Wine and Spirit Gazette* newspaper as belonging to them, for sale. The price arranged to be paid for said wine clearance certificate is the amount sued for. (Stat. 3) Pursuers duly sent them on the wine clearance certificate, which, however, did not reach the defenders till the morning of 3rd June 1918, and on this date the defenders sent them their cheque for the £1750, the amount sued for. The authority to clear the wine from bond was not issued to pursuers but to Evans, Marshall, & Company, 62-63 Mark Lane, London, and was not a valid document which would have entitled the defenders to have obtained from bond the quantity of wine stated therein. The pursuers are called upon to produce said wine clearance certificate. The pursuers' statements in answer to the defenders' statement of facts are denied. Explained that the defenders' name which appears on the said wine certificate was adhibited by them with an indiarubber stamp for identification purposes, and that the pursuers had no right in said wine certificate which they could transfer to the defenders so as to enable them to obtain delivery of the quantity of wine from bond mentioned in the said wine certificate which had been issued by the Advisory Committee (Customs and Excise) under the authority of the Commissioners of Customs and Excise to the said Evans, Marshall, & Company for their business purposes and not for that of the defenders. (Stat. 4) The restriction by the Government authorities had been with-