Bombay High Court
Alfred Wilkinson vs Grace Emily Wilkinson on 4 April, 1923
Equivalent citations: (1923) 25 BOMLR 945
Author: K Norman Macleod
Bench: N Macleod, Kt., Crump, Marten
JUDGMENT Norman Macleod, Kt., C.J.

1. This is a reference under Section 17 of the Indian Divorce Act IV of 1869 to the High Court of Bombay for the confirmation of a decree for dissolution of marriage in a suit filed in the Court of the District Judge of Poona by the petitioner Alfred Wilkinson against his wife Norah Wilkinson as the respondent and a Captain D' Arcy as co-respondent.

2. The petitioner alleged that he was married to the respondent on August 8, 1914, at Poona. That he resided in Poona till 1317 and in Bombay until 1920 when he went to England with his wife and two children. That he returned on March 18, 1921, and resided at Poona. From May 1, he was employed in Bombay while his wife remained at Poona and they last resided together at Poona. In Poona the respondent became familiar with the co-respondent and on various occasions committed adultery with him. On August 22, the respondent came to Bombay to the petitioner and on the 23rd left him to go away with the co-respondent who left her that night at the Apollo Hotel. On September 1, the respondent wrote to him that she was going away altogether. The petition was filed on September 7. The respondent denied that she had committed adultery on various occasions at Poona. She alleged that on August 23 the petitioner turned her out of the house when the co-respondent gave her a helping hand and found a room for her at the Apollo Hotel where she stayed till her father arrived and took her back to Poona. The co-respondent in his written statement adopted the same defence as the respondent. When the case came on for trial, the following issues were raised:

1. Whether plaintiff proves adultery between respondents 1 and 2?

2. If plaintiff proves adultery, has he condoned it by his subsequent conduct?

3. Although no issues were raised with regard to the domicil of the petitioner or the jurisdiction of the Court to deal with the petition, it appears that the question of jurisdiction was argued on the basis that the parties were domiciled in England. The learned Judge said:

The jurisdiction depends on the Indian Divorce Act, 1869, and so long as that Act is in force, this Court cannot decline jurisdiction. Moreover the Courts in India are not subject to the Probate Division of the High Court of Justice in England. As apparently divorces granted in India between parties of non-Indian domiciles are not recognised in England, now, the present position of the law is anomalous but that is a matter for the Legislature and not for the Courts in India.

4. In this Court the petitioner has put in an affidavit, alleging that before the date of the institution of the petition he had given up his English domicil, but such a statement was too clearly prompted by the occasion, and for the purposes of this reference we must take it that the petitioner was not domiciled in India.

5. By Section 2 of the Act nothing thereinafter contained shall authorise any Court to grant any relief under the Act, except in cases where the petitioner professes the Christian religion and resides in India at the time of presenting the petition, or to make decree of dissolution of marriage except in the following cases: (a) where the marriage shall have been solemnized in India, or (b) where the adultery, rape or unnatural crime complained of shall have been committed in India, or (c) where the husband has, since the solemnization oil the marriage, exchanged his profession of Christianity for the profession of some other form of religion.

6. By Section 7 subject to the provisions contained in the Act, the High Courts and District Courts shall, in all suits and proceedings thereunder, act and give relief on principles and rules which, in the opinion of the said Courts, are as nearly as may be conformable to the principles and rules on which the Court for Divorce and Matrimonial Causes in England for the time being acts and gives relief.

7. By Section 10 any husband may present a petition for dissolution of his marriage on the ground of his wife's adultery and any wife may petition for dissolution of her marriage on any of the grounds mentioned in the section.

8. Section 22 enables a husband or a wife to obtain a decree for judicial separation on any or the grounds therein mentioned.

9. It has been contended before us that the District Court of Poona had no jurisdiction to pass the decree under reference for two reasons: (1) because the Indian Councils Act, 1861, could not be deemed to warrant the making of laws by the Indian Government to interfere with the status of subjects of the Crown not domiciled in India, (2) because even if the Indian Councils Act did warrant the making of such laws, the Indian Divorce Act itself did not give such jurisdiction to the Indian Courts. It cannot be disputed that ever since Act IV of 1869 was passed, the Indian Courts have assumed to themselves jurisdiction to divorce non-domiciled parties. It has never been questioned that decrees of divorce in such cases were valid in India and it has been taken for granted that they were also valid in England: Thornton v. Thornton (1886) 11 P.D. 176; Warier v. Warier (1890) 15 P.D. 152; and In re Norton's Settlement, Norton v. Norton [1908] 1 Ch. 471. The decision of the President of the Probate, Divorce and Admiralty Division in Keyes v. Keyes [1921] P. 204 has necessitated a reconsideration of the 1 nature and extent of the powers of the Indian Courts under Act IV of 1869. In that case the petitioner Reginald Keyes had obtained a decree for the dissolution of his marriage from the Chief Court of the Punjab in 191S. Apprehending that the validity of that decree might not be recognised in England, he filed a petition for divorce in England. It was not defended, but considering the importance of the case, the Secretary of State obtained leave to intervene, in consequence of which the King's Proctor also appeared. The Attorney-General said that the question was whether having regard to the clear words of Section 7 of Act IV of 1869 the word 'resides' in Section 2 was to be read as meaning merely resident or with the more pregnant meaning of domiciled. The jurisdiction of the English Courts rested not on residence but on domicil. He referred to Armytage v. Armytage [1898] P. 178 in which Mr. Justice Gorell Barnes said (p. 185):

The jurisdiction to dissolve marriages was conferred upon this Court by the Matrimonial Causes Act, 1857, and, although that Act) does not expressly make domicil a test of jurisdiction, that test is applied by the Court to the exercise of jurisdiction in cases of dissolution of marriage. It is derived from the principles of private international law, an adherence to which is necessary, as Lord Penzance said in Wilson v. Wilson (1872) L.R. 2 P. & M. 435, 442 in order to 'preclude the scandal which arises when a man and woman are held to be man and wife in one country and strangers in another.

10. Sir Erie Richards for the Secretary of State pointed out that the doctrine that divorce jurisdiction must be based on domicil did not obtain in 1861 when the Indian Councils Act was passed. He relied on the user of the last fifty years and on the fact that the Indian Divorce Act was within the authority given by the Imperial Parliament and was binding everywhere within the British Empire.

11. The President in giving judgment said that the substantial question to be decided was whether the Governor-General of India in Council was authorised by the Indian Councils Act, 1861, to establish Courts having jurisdiction in India with power to decree the dissolution of the marriage of persons domiciled elsewhere, and whether the authority, if any, thereby given was so exercised in the enactment of the Indian Divorce Act, 1869. It was pointed out that so far from it having been recognised in 1861 that divorce jurisdiction need not be based on domicil, the law of nations with regard to the power of communities to deal with the status of marriage between strangers resident among them had long been declared by jurists to be that afterwards laid down in Le Meaurier v. Le Meaurier [1895] A.C. 517. In Warrender v. Warrender (1835) Cl. & F. 488 Lord Brougham had said with the assent of Lord Lyndhurst that the parties to the marriage contract must be deemed to enter into it with reference to their own domicil and laws and that jurisdiction must depend on domicil. These pronouncements seemed to be material in the inquiry whether upon the true construction of the Imperial Statute of 1861 power was thereby conferred upon the Governor-General of India in Council to legislate for British subjects merely resident in India so as to affect their status as to marriage in the country of their domicil. Accordingly the learned President decided that Section 22 of the Indian Councils Act could not be deemed to warrant the making of laws by the Indian Government to interfere with the status of subjects of the Crown not domiciled in India. As between two possible constructions, that which was conformable to international law as declared in English tribunals was to be preferred to that which would involve infringement of the rights of other communities.

12. With the very greatest respect it might be said that for the purpose of the decision in Keyes v. Keyes it was only necessary to discuss the question whether extra-territorial effect could be given to the decree of the Chief Court of the Punjab, but in the present case it must be taken as granted that if we confirm the decree of the District Judge, it will have no validity in England, so we have to decide whether we have jurisdiction to confirm a decree which will only be valid in India, and on that question the judgment in Keyes v. Keyes has to be carefully considered. There are three courses open to us.

13. We may follow the decision in Keyes v. Keyes that the Indian legislature has no power to give the Courts jurisdiction to grant decrees for dissolution of marriage to non-domiciled parties; or

14. we may hold that the Indian legislature has the power and has not exercised it; or

15. we may hold that the Indian legislature has the power and has exercised it.

16. I am not prepared to differ from the decision in Keyes v. Keyes. For the argument that jurisdiction in matrimonial causes was based on a so-called matrimonial domicil when the Indian Councils Act was passed in 1861 can hardly be said to be grounded on fact. Niboyet v. Niboyet which forms its chief support was decided in 1878, and as was pointed out in Le Mesurier v. Le Mesurier it could not be said that at any time the doctrine was completely established, so that we could safely say that the Indian Councils Act was passed on the understanding that it was a part of international law. I do not deny that there is considerable force in the argument that there is nothing in the Indian Councils Act itself to impel us to construe it in the restricted manner for which Mr. Binning has contended. In The Queen v. Burah (1878) L.R. 5 I.A. 178 their Lordships said (p. 193):

The Indian Legislature has powers expressly limited by the Act of the Imperial Parliament which created it, and it can, of course, do nothing beyond the limits which circumscribe these powers. But, when acting within those limits, it is not in any sense an agent or delegate of the Imperial Parliament, but has, and was intended to have, plenary powers of legislation, as large, and of the same nature, as those of Parliament itself. The established Courts of Justice, when a question arises whether the prescribed limits have been exceeded, must of necessity determine that question; and the only way in which they can properly do so, is by looking to the terms of the instrument by which, affirmatively, the legislative powers were created, and by which, negatively, they are restricted. If what has been done is legislation, within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited..., it is not for any Court of justice to inquire further, or to enlarge constructively those conditions and restrictions.

17. It may be said, therefore, that unless we can read into the Indian Councils Act an express provision prohibiting the Indian legislature from giving the Indian Courts of Justice powers to divorce non-domiciled parties, an Act of the Indian legislature giving such powers would not be ultra vires.

18. Apart, however, from the undesirability of a conflict of judicial opinion between the Indian and English Courts on the question of the construction of an Imperial Statute, the discussion may be said to be purely academical, if my view is correct that the Indian Divorce Act does not confer jurisdiction on the Courts to dissolve the marriages of non-domiciled parties, since the Legislature would not be likely in the future to suggest the amendment of the Act so as to enable the Courts to grant decrees for divorce which would only be valid in India.

19. The argument that the Legislature intentionally made residence the test of jurisdiction and not domicil, must also include the proposition that the Legislature omitted or declined to recognize that in matrimonial cases which involved dealing with the status of the parties the Courts follow the principles of international law Unless they are expressly excluded by the municipal law. In Jogendra Nath Barterjee v. Elizabeth Banerjee (1898) 3 C.W.N 250. Jenkins J. said that residence and not

domicil had been made the teat of jurisdiction, but apart from the fact that in that case there was no question with regard to the domicil of the parties, I doubt very much whether the argument is sound that because the Court can only give relief to a petitioner who is resident in India the question of domicil may be disregarded altogether. Relief not involving the status of the parties may be granted under the Act if the condition of residence is satisfied, but that is in accordance with the principles and rules of the Ecclesiastical Courts which by Section 22 of 20 & 21 Vic. Clause 85 were to be acted upon by the Matrimonial Court in all suits and proceedings other than proceedings for the dissolution of marriage. The question whether the Court of Divorce in England had jurisdiction to entertain a suit for judicial separation where the husband was domiciled in Australia and the act of cruelty alleged was said to have been committed in Italy was very fully considered in Armytage v. Armytage [1898] P. 178. The petitioner maintained that the test of domicil was not applicable as in a suit for dissolution of marriage and that the Ecclesiastical Courts would have given her relief when she and her husband were both residing in England in the circumstances proved. The respondent contended that no relief would have been given because the parties were not domiciled in England and no act of cruelty had bean proved within the jurisdiction. Gorell Barnes J. raid in conclusion at page 197:

It may, I think, be safely laid down that the Ecclesiastical Courts would formerly, and this Court will now, interfere to protect a wife against the cruelty of her husband, both being within the jurisdiction, when the necessities of the case require such intervention.

20. The argument that the Indian Divorce Act has made residence and not domicil the test of jurisdiction may best be refuted by referring to the following passage in the judgment of the Privy Council in Le Mesurier v. Le Mesurier when dealing with the decision in Niboyet v. Niboyet (p. 531):

The main reason assigned for their decision by the learned judges of the majority was, that, before the Act of 1857 became law, the petitioner would have been entitled to sue her husband in the Bishop's Court, although he was not domiciled in England, and to ask either for restitution of conjugal rights, or for a divorce a mensa et thoro, and in either case for proper alimony; and consequently tint, after the Act of 1857 passed, jurisdiction in divorce might be exercised in the same circumstances. There appears to their Lordships to be an obvious fallacy in that reasoning. In is not doubtful that there may be residence without domicil 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. Their Lord-ships cannot construe Section 27 of the Act of 1857 as giving the English Court jurisdiction in all cases where any other matrimonial suit would previously have been entertained in the Bishop's Court.

21. It must follow that the Indian Courts have not a more extended jurisdiction than the English Courts. Undoubtedly a country by its municipal law may lay down its own teats for creating jurisdiction within its own boundaries even in cases where the status of the parties is involved. Their Lordships in Le Mesurier v. Le Mesurier, when dealing with the question of matrimonial domicil, said (p. 537):

It is a circumstance not, undeserving of notice that the learned judges, whether English or Scottish, who have expressed judicial opinions in favour of a matrimonial domicil, have abstained from reference to those treatises on international law which are generally regarded as authoritative, in the absence of any municipal law.

22. And that it would be competent for municipal law to create jurisdiction valid within its own boundaries is clear from the following passage in the judgment at p. 527:

In order to sustain the competency of the present suit it is necessary for the appellant to show that the jurisdiction assumed by the district judge of Motara was derived, either from some recognised principle of the general law of nations, or from some domestic rule of the Roman-Dutch law. If either of these points were established, the jurisdiction of the District Court would be placed beyond question; hub the effect of its decree divorcing the spouses would not in each case be the same. When the jurisdiction of the Court is exercised according to the rules of international law, as in the case where the parties have their domicil within its forum, its decree dissolving their marriage ought to be respected by the tribunals of every civilized country.

23. But with regard to the dissolution of marriage the provisions of the Indian Divorce Act are with a few variations identical with those of 21 & 22 Vic. Clause 85. Under Section 27 of that Act any husband may petition for dissolution of his marriage etc., but it may b6 taken now as settled that the Court in considering such a petition will follow the principles of international law, whatever doubts may have been felt on the question until the decision in Le Mesurier v. Le Mesurier. As the Legislature has not directly given to the Indian Courts the power to dissolve marriages between non-domiciled parties. I do not think it is open to us to hold that we have the power by implication, even if I thought that the argument that residence has been made the test of jurisdiction was a sound one. I am prepared to go further and hold that Section 7 of the Indian Divorce Act set out above directly excludes the idea that the Act gives jurisdiction to decree divorce in the case of non-domiciled parties. Professor Dicey in the second edition of his Conflict of Laws, considered that such a construction of Sections 2 and 7 would be forced on two considerations. Residence was designedly made the basis of divorce jurisdiction in India, regardless of domicil, and the Indian Courts exercised jurisdiction on that basis. The second consideration merely begs the question, the first is also open to that defect, unless it could be said that it was intended to recognise the doctrine of matrimonial domicil. Considering that nearly all Englishmen in India were non-domiciled and that it may have been intended by the Act to provide them with a forum for deciding their matrimonial disputes, it is quite possible that the legislature thought that they were giving effect to such an intention, and were not enacting divorce legislation for the domiciled community only. But granting that was the intention, and admitting that for fifty years it was considered that effect had been given to that intention by the Act, the fact remains that we have to construe the Act as it stands now free from all such matters of prejudice. To my mind the same considerations on which it was held that the Indian Courts cannot grant divorces to non-domiciled parties which will be treated as valid in England must operate on the validity of such divorce in India. I can see no difference in terms between the provisions of the Indian Divorce Act and the Matrimonial Causes Act, certainly no difference which gives the Indian Courts a wider jurisdiction. After the decision in Keyes v. Keyes Statute 11 & 12 Geo. V, Clause 18 was passed, whereby any decree granted under the Act of the

Indian Legislature known as the Indian Divorce Act, 1869, and confirmed or made absolute under the provisions of that Act for the dissolution of a marriage the parties to which were at the time of the commencement of the proceedings domiciled in the United Kingdom, and any order made by the Courts in relation to any such decree shall, if the proceedings were commenced before the passing of the Act, be as valid and be deemed always to have been as valid in all respects as though the parties to the marriage had been domiciled in India. But the power to grant divorces in such cases in the future was withheld.

24. In my opinion, therefore, the District Court of Poona had no jurisdiction to pass a decree for dissolution of marriage in this case.

25. [His Lordship then dealt with the question of fact whether it was proved that the respondent had committed adultery with the co-respondent, and expressed his conclusion thus:] In these circumstances my opinion is that the petitioner has failed to prove facts from which the Court would be justified in holding that adultery was committed at Lonavla.

26. As my learned brothers are of a contrary opinion there will be a decree for judicial separation, the questions relating to alimony and the custody of the children to be determined by the District Judge. The costs of respondent No. 1 must be paid in the first instance by the petitioner but he will be entitled to recover those costs and his own from respondent No. 2.

Marten, J.

27. This is a husband's petition for divorce on the ground of his wife's adultery with the co-respondent. The wife in her answer has prayed for a judicial separation on the ground of her husband's cruelty. The learned trial Judge found in favour of the husband on all points, and the decree for dissolution of the marriage which he has passed is now before us for confirmation under Section 17 of the Indian Divorce Act, 1869.

28. The two main points before us are (1) whether the wife committed adultery with the co-respondent, and (2) if so, whether the Court has jurisdiction to grant a divorce, as opposed to a judicial separation, should it be the fact that the matrimonial domicil was English. The defences of cruelty and condonation were not persisted in before us, and it is clear that they were rightly decided in favour of the husband.

29. His Lordship here discussed in detail the evidence bearing on the question whether adultery between the respondents was proved and found that it was. The judgment then proceeded:

30. I now turn to the second main point in the case, viz., the question of jurisdiction. The want of jurisdiction was not pleaded, nor was any issue raised upon it. On the contrary the wife made a cross-claim for a judicial separation. But at the trial the point was raised, though I regret that it was not dealt with in the way which its great importance deserves. In the first place, no proper evidence was taken as to domicil. Before us both the husband and wife have put in affidavits on that point, and the husband applied for a remand to produce further evidence. It was admitted, however, that

his domicil of origin was English, he having been born in England of English parents and having lived there till he came oat to India as an assistant in the chemists' firm of Thomson and Taylor, Counsel also stated that on that remand, it' granted, he could not put the case higher than is contained in the husband's affidavit.

31. It was not seriously suggested that the husband had abandoned his domicil of origin prior to his return to India in 1921. The very fact that in 1920 he gave up his business appointment in India and apparently tried to make a living in England is almost sufficient to negative that despite his alleged purchase of return tickets. Moreover in his evidence he states that he only returned to India, because his wife insisted on his returning. It also appears from the learned Judge's judgment of July 26 on the application for custody of the children that the husband proposed, on the termination of the present proceedings, to send his children to his sister in England. In my opinion, therefore, the husband's affidavit falls far short of what is required to effect an abandonment of his domicil of origin, and an acquisition of an Indian domicil of choice. I am satisfied that the husband never intended to make his permanent home in India. Consequently the case must be decided on the basis that the husband's and therefore the matrimonial domicil was English.

32. This then raises a most important question, viz., whether this Court has jurisdiction to dissolve a marriage, as opposed to granting a judicial separation, in cases where the parties are not domiciled in India. That depends on two points, viz., (1) whether the Indian Divorce Act 1869 purports to confer that power upon the Indian Courts, and (2) if so, whether that Act was within the legislative powers conferred upon the Indian Legislature by the Indian Councils Act 1861 (24 & 25 Vic. Clause 67).

33. I will deal with these point? in the above order, which is the order in which they were presented in argument to Sir Henry Duke in Keyes v. Keyes [1921] P. 204. The learned trial Judge does not, however, appear to have considered the second point. He seems to have thought that the jurisdiction was clear and depended on the Indian Divorce Act 1869, and that so long as that Act was in force, the Court could not decline jurisdiction. But that was not the ratio decidendi in Keyes v. Keyes. What the learned President held there was that the Indian Divorce Act, 1869, was ultra vires the Indian Legislature as not being within the powers conferred on that Legislature by the Indian Councils Act, 1861. But he gave no express decision as to the true construction of the Indian Divorce Act, 1869.

34. Taking, then, the first point, the argument against the jurisdiction of this Court under the Indian Divorce Act, 1869, may be put in two alternative ways. The first is that, having regard to Section 7, the word "reside" in Section 2 should be construed as equivalent to "domiciled", seeing that, according to the principles now accepted in England, domicil along can confer jurisdiction in divorce. That was the argument presented to the learned President by the Attorney-General in Keyes v. Keyes. For reasons which I will state later. I do not accept that argument. It is sufficient to state here that if it were accepted, it would prevent this Court from exercising its jurisdiction to grant decrees for judicial separation on the ground of cruelty or other adequate reason, in cases where the parties are resident, though not domiciled, within the jurisdiction. This jurisdiction over residents, with reference to judicial separations as opposed to decrees for dissolution of the marriage itself, is now well-recognised by the English Courts as a principle of private international law (see Le

Mesurier v. Le Mesurier [1895] A.C. 517 526 531 and Armytage v. Armytage [1898] P. 178 192 194 and a similar jurisdiction has been exercised by this Court or its predecessor the Supreme Court for a hundred years. (See Supreme Court Charter 1823, Clause 42.)

35. The alternative argument is that assuming the word "reside1' in Section 2 means what it says, viz., reside and not domiciled, even then the dominating words of Clause 7 and the general principles of private international law compel this Court to give a limited construction to the Indian Divorce Act, despite its wide wording, in just the same way as the English Courts have eventually limited the even wider wording of the Matrimonial Causes Act, 1857.

36. To appreciate this argument, one must, I think, make some enquiry into the history of divorce legislation in England, and as far as practicable put oneself in the position of the English and Indian legislators, who framed the Matrimonial Causes Act 1857, the Indian Councils Act, 1861, the Indian High Courts Act, 1861, and the Indian Divorce Act, 1869. It is vital to remember that up to 1857 there was no jurisdiction in England for any Court to dissolve a marriage. A special Act of Parliament alone could effect that. In 1857 a new Court called the Court for Divorce and Matrimonial Causes was founded by the Matrimonial Causes Act. 1857. And in 1873 this new Court became part of the Probate, Divorce and Admiralty Division of the High Court as established by the Judicature Act 1873 (see Section 16). But up to 1857 the Ecclesiastical Courts alone had any jurisdiction in matters matrimonial, and they could only grant a divorce a menas et thoro, which is the equivalent of the modern decree for judicial separation Further, the Ecclesiastical Courts rested their jurisdiction on the residence of the parties, and not on their domicil. Thus in Niboyet v. Niboyet ()1878) 4 P.D. 1 James L. J. said as follows (pp. 4, 5):

Can there be any doubt that before the English Act of Parliament transferring the jurisdiction in matrimonial causes, from the Church and her Courts to the sovereign and her Court, the injured wife could have cited the adulterous husband before the bishop, and have asked either for a restitution of conjugal rights or for a divorce a menas et thoro, and in either case for proper alimony? The jurisdiction of the Court Christian was a jurisdiction over Christians, who, in theory, by virtue of the baptism, became members of the one Catholic and Apostolic Church. The church and its jurisdiction had nothing to do with the original nationality or acquired domicils of the parties, using the word domicil in the sense of the secular domicil, viz., the domicil affecting the secular rights, obligations, and status of the party. Residence, as distinct from casual presence on a visit or in itinere, no doubt was an important element; but that residence had no connection with, and little analogy to, that which we now understand when we endeavour to solve, what has been found so often very difficult of solution, the question of a person's domicil. If a Frenchman came to reside in an English parish his soul was one of the souls the care of which was the duty of the pariah priest, and he would be liable for any ecclesiastical offence to be dealt with by the ordinary, pro salute animae.... And although the laws of the state sometimes interfered by way of coercion, regulation, or prohibition, with the Courts Christian, the latter acted pruprio vigore, and they administered their own law, not the law of the state, and they administered it in their own name and not in the name of the sovereign. The language of the Act creating the existing Court strikingly illustrates this, when it enacts that all jurisdiction vested in or exercised by any Ecclesiastical Court or person in England, &c, shall belong to and be vested in Her Majesty. It was not previously vested

in her, although she had appellate jurisdiction as supreme Ecclesiastical judge.

37. Accordingly when the English Legislature by the Act of 1857 founded the new Court, two separate jurisdictions were conferred on it, viz., the old ecclesiastical jurisdiction of divorce a menas et thoro, or judicial separation as it was thenceforward to be called, and the new statutory jurisdiction of divorce a vinculo. But the 1857 Act gave this new jurisdiction in the widest terms. Section 27 runs :

It shall be lawful for any husband to present a petition to the said Court, praying that his marriage may be dissolved, on the ground that his wife has since the celebration thereof been guilty of adultery....

38. As regards this new jurisdiction the only express limitation to be found in the Act is the preamble which states that It is expedient to amend the law relating to divorce, and to Constitute 4 Court with exclusive jurisdiction in matters matrimonial in England, and with authority is certain cases to decree the dissolution of a marriage.

39. As regards the old jurisdiction, Section 22 runs:

In all suits and proceedings, other than proceeding to dissolve any marriage, the said Court shall proceed and act and give relief on principles and rules which in the opinion of the said Court shall be as nearly as may be conformable to the principles and rules on which the Ecclesiastical Courts have heretofore acted and given relief, but subject to the provisions herein contained and to the rules and orders under this Act.

40. In effect, therefore, the Legislature was not prepared to lay down any very clear guiding principles on the question of jurisdiction, but left it to the Courts to say how the Act should be construed and applied in practice. As to this, there were at least three possible but different views, viz., (1) to make domicil the test both for divorces and judicial separations, or (2) to make residence the test for both, or (3) to make domicil the test for divorce, and residence the test for judicial separations. But it took the English Courts some forty or fifty years to decide which of these views was the correct one. The first view was that adopted in 1878 by Lord Esher in Niboyet v. Niboyet(1878) 4 P.D. 1 19. The second view was that adopted by the majority of the Judges in Niboyet v. Niboyet, viz., Lords Justices James and Cotton. And as that was a considered decision of the Court of Appeal, it must be taken to be the then prevailing view of the law. Substantially it was to the same effect as Brodie v. Brodie (1861) 2 Sw. & Tr. 259 260 decided by the Full Court in 1861. The third view was that laid down in 1898 by the Privy Council in Le Mesurier v. Le Mesurier [1895] A.C. 517 and subsequently adopted in 1898 by Lord Gorell in Armytage v. Armytage [1898] P. 178 and in 1906 by the Court of Appeal in Eater v. Bater [1906] P. 209. And this third view may now be said to represent the true principles of English law on this all-important question of jurisdiction.

41. What course then was open to the Indian Legislature in 1869? It had to legislate not only for Englishmen but also for Scotsmen and Irishmen, the laws of whose countries on the subject of divorce differed from those of England. It almost must have felt some uncertainty as to what view

the English Courts would eventually take on the questions of domicil and residence. But this much is clear, viz., that in Section 2 of the Indian Divorce Act, the Indian Legislature imposed certain conditions precedent to the exercise of any jurisdiction whatever under the Act, for it enacted that "Nothing hereinafter contained shall authorise any Court to grant any relief under this Act except in cases where the petitioner professes the Christian religion and is resident in India at the" date of the petition And if the petition is one for divorce, it is a further condition precedent that either the marriage shall have been solemnized in India, or else that the adultery shall have been, committed there, or else that the husband has exchanged his profession of Christianity for some other religion.

42. Then comes Section 7 which I regard as the dominating clause in the Act. It runs as follows:

Subject to the provisions contained in this Act, the High Courts and District Courts shall, in all suits and proceedings hereunder, act and give relief on principles and rules which, in the opinion of the said Courts, are as nearly as may be conformable to the principles and rules on which the Court for Divorce and Matrimonial Causes in England for the time being acts and gives relief.

43. In my opinion the Indian Legislature intended by this clause to ensure reasonable uniformity between the various High Courts of this country and the English Courts, and as far as practicable to avoid the scandal of parties being regarded as married persons in India, though not in England, or perhaps as married persons in one Indian Province but not in another. I think it also intended to provide for the then uncertainty of the law on the subject, and for the possibility that the principles of the English Courts might be modified in course of time. Accordingly the Indian Courts are to give relief "on principles and rules which...are as nearly as may be conformable to the principles and rules on which the Court for Divorce and Matrimonial Causes in England for the time being acts and give relief." I draw particular attention to the words "for the time being." In my opinion, they were inserted to prevent the principles of law being rigidly fixed as at 1869.

44. It cannot be said that the "principles" referred to in Section 7 do not include such a vital principle as the foundation of jurisdiction itself. Section 7 is evidently modelled closely on Section 22 of the Matrimonial Causes Act 1857 which I have already quoted, except that it applies to divorce as wall as all other proceedings, and that the principles to be adopted are those of the English Divorce Court for the time being and not those "on which the Ecclesiastical Courts have heretofore acted." In Armytage v. Armytage the point for decision was whether the English Divorce Court had jurisdiction to grant a judicial separation on the ground of cruelty in a case where the husband was domiciled in Australia, but was living in England at the date of the suit. Lord Gorell held in effect that this was a question of principle within the meaning of Section 22, and that its answer depended on what were the principles of the old Ecclesiastical Courts. After quoting Section 22, the learned Judge said (p. 183):

There are no special provisions of the Act or rules or orders which directly affect the present question The present suit is for judicial separation on the ground of cruelty. Before the Act it would have been a suit for divorce a mensa et thoro on the same ground, and the inquiry is as to the principles and rules on which the Ecclesiastical Courts would have acted in the circumstances.

45. Then, after exhaustively considering the authorities on the subject including the various text books on private international law, the learned Judge held at p. 194 as follows:

In my opinion, if the parties had a matrimonial home, but were not domiciled within the jurisdiction of an Ecclesiastical Court, that Court would have interfered, if the parties were within the jurisdiction at the commencement of the suit., to protect the injured party against the other party in respect of the adultery or cruelty of the latter.

46. And then at p. 195 he said:

It may be objected that a decree of judicial separation affects the status of the parties, and that a change of status ought on principle only to be effected by the Courts of the domicil. But the relief is to be given on principles and rules which, in the opinion of the Court, shall be as nearly as may be conformable to the principles and rules on which the Ecclesiastical Courts gave relief. According to those principles and rules cruelty and adultery were grounds for a sentence of divorce a mensa et thoro which did not dissolve the marriage, but merely suspended either for a time or without limitation of time some of the obligations of the parties. The sentence commonly separated the parties until they should be reconciled to each other.

47. Lord Gorell then concluded his learned and interesting judgment by holding that domicil was not the test for jurisdiction in cases of judicial separation: that in chat particular case a decree for judicial separation ought to be made: and that consequently the Court had jurisdiction to provide for the custody of the children of the marriage.

48. Turning again to the Indian Divorce Act 1869, the qualifying opening words in Section 7, viz., "subject to the provisions contained in this Act" must of course receive their full effect. But they can be given their lull effect by considering the express conditions laid down in the Act. The conditions precedent in Section 2 are an example of this. Another example will be found in Section 10, which entitles a wife to a divorce should her husband exchange his profession of Christianity for some other religion, and go through the form of marriage with another woman. In both these examples, the English divorce law is expressly varied.

49. I also recognise fully that if Clause 2 be construed apart from Clause 7, it might well be argued that on the express conditions laid down in Section 2 being satisfied, the Court was intended to have jurisdiction. I however regard Clause 7 as imposing yet a further condition, viz., to act and give relief on the principles of the English Divorce Court for the time being. And in determining this difficult question of construction, I may call in aid the principle of construction which was conceded by Lord Justice James in Niboyet v. Niboyet (1878) 4 P.D. 1. He there says (p. 7):

Of course it is always to be understood and implied that the Legislature of a country is not intending to deal with persons or matters over which, according to the comity of nations, the jurisdiction properly belongs to some other sovereign or state.

50. So, too, in Armytage v. Armytage [1898] P. 178 Lord Gorell says (pp. 185-6):

The jurisdiction to dissolve marriages was conferred upon this Court by the Matrimonial Causes Act, 1857, and, although that Act does not expressly make domicil a test of jurisdiction, that test is applied by the Court to the exercise of jurisdiction in cases of dissolution of marriage. It is derived from the principles of private international law, an adherence to which is necessary, as Lord Penzance said in Wilson v. Wilson (1872) L.R. 2 P. & M. 435 442 in order to preclude the scandal which arises when a man and woman are held to be man and wife in one country and strangers in another.' These principles are expounded by many jurists in this and other countries, 'they are based on the principle that a person's status ought to depend on the law of his domicil, though there may be limitations and exceptions to this principle: see Dicey's Conflict of Laws, 1896, cap, 18, p. 474 et seq. (conf. Savigny, Section 362, Guthrie's translation, 2nd Ed., p. 148).

51. It may be objected that this construction of the Act would give different results at different dates. But that objection applies equally to England as to India. In Niboyet v. Niboyet the English Court of Appeal in 1878 dissolved a marriage between non-domiciled parties. According to the decision of the Courts in and after 1896, there was no jurisdiction to grant that decree. But technically Niboyet v. Niboyet was not overruled until the decision of the Court of Appeal itself in 1906 in Bater v. Bater [1906] P. 209 for Le Mesurier v. Le Mesurier was a decision of the Privy Council. So here in India the Courts in effect adopted the same principles as those in Niboyet v. Niboyet. And though the point arose in some cases, it was not until 1921 that the decision in Keyes v. Keyes showed that the matter required serious reconsideration. If, therefore, the Indian jurisdiction be now limited as the English jurisdiction is limited, the history of litigation in the two countries will be very similar. Nor will Divorce be the only subject to exemplify the uncertainty of litigation. Leading cases, such as, Taff Vale Railway v. Amalgamated Society of Railway Servants [1901] A.C. 426 or Bourne v. Keane [1919] A.C. 815 illustrate that other branches of the law have also had their ups and downs.

52. On the other hand there will be this advantage in adopting this construction. It will be consistent with the principles of private international law as now laid down by the highest Courts of the British Empire. Accordingly it will not enable a Scotsman with a Scottish domicil to be divorced by an Indian Court according to obsolete principles of the English Divorce Court. Nor will the Indian Courts be asked as in Giordano v. Giordano (1912) I.L.R. 40 Cal. 215 to divorce Italians with an Italian domicil, although by the law of Italy divorce is not permissible, and nationality as opposed to domicil is alone recognised as conferring jurisdiction in matrimonial matters in that country, (See Dicey, 1898 Ed., p. 276. Note 1 and pp. 390-1 and p. 758.) And this construction is, I think, consistent with the course adopted by Parliament itself. By the Indian Divorces (Validity) Act 1921, Parliament has ratified the past decrees of the Indian Courts as regards parties domiciled in the United Kingdom. The future, it has so far refused to legislate about.

53. My conclusion then is that the main principles of divorce jurisdiction in England having now been well established and brought to our express attention, we ought in India to follow those main principles, having regard to Clause 7 of the Indian Divorce Act, 1869, and no longer to claim jurisdiction to dissolve the marriages of persons not domiciled in India. This casts no reflection either on the Indian Legislature or on the past decisions of the High Courts of this country. On the contrary the construction of the Act which I would adopt shews that the Indian Legislature dealt with a very difficult question in a most skilful manner for by its flexibility it enabled all Courts both

in India and in England to act on the same principles, despite the passage of time and the change of circumstances. And as regards our High Courts, their past decisions can well be justified by Clause 7. The Act obliges them to follow the principles of the English Courts. That they have done. But if, as is the case, the principles of the English Courts as laid down from time to time in those Courts have altered in a vital particular, then it is not the fault of the Indian Courts if they have to make corresponding changes. No doubt in theory the law as finally laid down by the English Courts must be taken to have been the true view of the construction of the Matrimonial Causes Act, 1857, all along. That Act can only have one right construction. If different constructions are given at different dates, both cannot be right. But that does not imply that the earliest construction must be adopted whether right or wrong. The final and true view of the English Courts is now shown to us, and Section 7 assists us materially in adopting it.

54. Accordingly in my judgment this Court has now no jurisdiction to dissolve the marriage of the present parties. On the other hand I am clearly of opinion that it has jurisdiction to grant a judicial separation, as the parties were resident within the jurisdiction at the commencement of the suit. Therefore, in my judgment, a decree for a judicial separation ought to be granted on the ground of the wife's adultery with the co-respondent, and the order of the trial Judge should be varied accordingly.

55. It follows from what I have just said that I disagree with the argument of the Attorney-General in Keyes v. Keyes to the effect that "reside" in Section 2 means domiciled. Further it becomes unnecessary for me to come to a conclusion on the ratio decidendi of the learned President in that case, viz., that the Indian Councils Act 1861 itself did not give power to the Indian Legislature to pass any law for the divorce a vinculo of non-domiciled persons. But in deference to the judgment of the learned President, and to the arguments of counsel before him and before us, and having regard to the importance of the subject, I venture to state my own views on those points.

56. In the first place as regards Section 2 of the Indian Divorce Act, it is generally quite erroneous to regard domicil and residence as synonymous terms. They are far from that, and the clear legal distinction between the two is illustrated by the cases I have already cited shewing that in general the test for jurisdiction is domicil in divorce cases, and is residence in judicial separation cases. It may be that in the United States the Courts there have required such a high standard of residence for the purposes of divorce under their local Acts, that the word residence as there used has become in practice to be closely akin to our notion of domicil. (See Bater v. Bater [1906] P. 209 233). But that is hardly a reason why in the Indian Divorce Act we should give to the word reside, what to a lawyer is an unnatural meaning.

57. Another reason why we should not adopt this forced construction is that prima facie the word reside in Section 2 must have the same meaning as in Section 3, where in the definitions of "High Court" and "District Court" there are references to the Court "within the local limits of whose...jurisdiction...the husband and wife reside or last resided together." The word "resided" here surely cannot mean domiciled. It would be a novel experience to me to hear persons described as being "domiciled together.' And normally one speaks of domicil with reference to a country as a whole, and not to the local limits of one or other of its superior or subordinate Courts. But in fact the

words "reside or last resided together" are clearly borrowed from Section 17 of the Matrimonial Causes Act, as for the matter of that is the greater portion of the Indian Divorce Act mutatis mutandis. Thus Section 17 provides that petitions for judicial separations may either be presented to the new Court itself "or to any Judge...at the assizes held for the county in which the husband and wife reside or last resided together." Residence here must mean residence and not domicil, and none the less so because as we know from Armytage v. Armytage (1898) P. 178 the test of jurisdiction in judicial separations is residence and not domicil. This is further borne out by Section 21, which enacts that "a wife...may...if resident within the metropolitan district apply to a police magistrate or if resident in the country to justices in petty Sessions or in either case" to the new Court for a protection order in certain cases. Does any lawyer ever speak of being domiciled in the country or in a metropolitan district?

58. Bui if any doubt still remains, it must surely be dissipated by considering the point I have already mentioned, viz., that this construction of Clause 2 would deprive our High Court of part of its old jurisdiction and be contrary to the principles of international law. Section 4 of the Indian Divorce Act provides that the then existing jurisdiction of the High Court of divorce a mensa et thoro and in all other matters matrimonial should be exercised subject to the provisions in that Act and not otherwise. Section 22 provides that decrees are to be made for judicial separation and not for divorce a mensa et thoro, but are to have the same effect as under the existing law and certain other effects, This corresponds to Section 7 of the Matrimonial Causes Act.

59. What then was the jurisdiction of the High Court and of its predecessor the Supreme Court? It is perhaps unfortunate that in Keyes v. Keyes the High Court then in question, viz., that of the Punjab, was not established till 1918. But in Bombay the Supreme Court, and its successor the High Court, has exercised a wide jurisdiction not only in matrimonial matters bat in practically every other branch of the law, except revenue matters, for over a hundred years. Speaking very generally it was given in 1823 within certain local limits the same extensive jurisdiction as that given to the High Court in England when first established in 1873 by the Judicature Act, 1873, but which up to that date no single Court in England had possessed. Thus the Supreme Court Charter of 1823 conferred upon the Supreme Court of Bombay thereby established a general jurisdiction over "all such persons as have been heretofore described and distinguished, in our Charters of Justice for Bombay, by the appellation of British subjects, who shall reside within any of the Factories subject to or dependent upon the Government of Bombay." (See Clause 23). So, too, by Clause 5 a jurisdiction similar to that of the King's Bench in England, and by Clause 36 an equitable jurisdiction similar to that of the Court of Chancery was conferred on the Supreme Court, while Clause 37 conferred jurisdiction over infants and lunatics and Clause 38 gave a wide criminal jurisdiction. Then Clause 42 provides:

That the said Supreme Court of Judicature at Bombay shall be a Court of Ecclesiastical Jurisdiction, and shall have full power and authority to administer and execute, within and throughout the Town and Island of Bombay, and the limits thereof, and the Factories subordinate thereto, and all the territories which now are, or hereafter may be subject to or dependent] upon the said Government, and towards and upon all persons so described and distinguished by the appellation of British subject, as aforesaid, there residing the Ecclesiastical Law, as the same is now used and exercised in the Diocese of London in Great Britain, so far as the circumstances and occasion of the said town,

island, territories, and people shall admit or require.

60. Then after conferring powers to grant probate and letters of administration, Clauses 48 and 49 gave full jurisdiction in Admiralty matters. I should explain that the clauses of the Charter itself are not numbered, but for convenience I have numbered them, beginning from the operative part.

61. The Bombay High Court was established in 1861, and if the High Courts Act and Letters Patent be looked at, it will be found that the old powers of the Supreme Court are still to a substantial degree retained, Thus the Indian High Courts Act, 1861, Section 9, provided that the High Court should have all such Civil, Criminal, Admiralty, Testamentary, and Matrimonial jurisdiction as Her Majesty by Letters Patent might direct. By the Letters Patent of 1862 the old Ecclesiastical jurisdiction of the Supreme Court was to cease except as thereinafter mentioned, and by Clause 35 the High Court was to have "jurisdiction in matters matrimonial between our subjects professing the Christian religion." Clause 35 of the Amended Letters Patent of 1865 was to the like effect except that the jurisdiction was extended to the Presidency of Bombay. Further, Section 130 of the Government of India Act, 1915, expressly provides that the repeal of the Acts there mentioned is not to affect "the validity of any.... Charter or Letters Patent...under any enactment thereby repealed and in force at the commencement of this Act." In practice, therefore, we have still sometimes to refer to the Charter to ascertain our present-day jurisdiction though not in matrimonial cases.

62. That being briefly the history of our Courts, it follows that in 1861 Parliament had had some thirty-eight years' experience of their practical working before t passed the Indian Councils Act, 1861. The Indian High Courts Act 1861 was therefore no new experiment. Substantially it effected an amalgamation of the King's Court then existing in the City of Bombay with the Courts of the East India Company in the rest of the Presidency. But what is there in that amalgamation or in the previous history to suggest that the old jurisdiction to grant judicial separations to residents was to be taken away? To do so would not only be contrary to the guiding principles referred to in Clause 7 of the Indian Divorce Act, 1869, It would also be contrary to the accepted principles of private international law. Thus in Le Mesurier v. Le Meaurier [1895] A.C. 517. Lord Watson says at p. 526:

There are unquestionably other remedies foe matrimonial misconduct, short of dissolution, which, according to the rules of the jus gentium, may be administered by the Courts of the country in which spouses, domiciled elsewhere, are for the time resident. If, for instance, a husband deserts his wife, although their residence be of a temporary character, these Courts may compel him to aliment her ; and, in cases where the residence is of a more permanent character, and the husband breath his wife with such a degree of cruelty as to render her continuance in his society intolerable, the weight of opinion among international jurists and the general practice is to the effect that the Courts of the residence are warranted in giving the remedy of judicial separation, without reference be the domicil of the parties.

63. And in Armytage v. Armytage (1898) P. 178. Lord Gorrell says at p. 197:

Could anything be more unreasonable than for this Court to hold that it has no power to suspend the wife's obligation to live with her husband while in this country, and leave her to proceed in the

Courts in Australia to protect herself against her husband in England? It may, I think, be safely laid down that the Ecclesiastical Courts would formerly, and this Court will now, interfere be protect a wife against the cruelty of her husband, both being within the jurisdiction, when the necessities of the case require such intervention.

64. In Keyes v. Keyes the learned President has referred to Sir Charles Wood's Dispatch dated May 14, 1862, which will be found in the 1907 Edition of our High Court Rules at pp. 41 to 50. That was the Dispatch accompanying the Letters Patent for the High Court of Bengal which are similar to our own. I find noting in that Dispatch to warrant the suggestion that some of the old powers of the Supreme Court were to be curtailed in matters matrimonial. On the contrary in para 33 the Secretary of State wrote:

Her Majesty's Government are desirous of placing the Christian subjects of the Crown within the Presidency, in the same position under the High Court, as to 'matters matrimonial' in general, as they now are under the Supreme Court But they consider it expedient that the High Court should possess, in addition, the power of decreeing divorce, which the Supreme Court does not possess; in other words, that the High Court should have the same jurisdiction as the Court for Divorce and Matrimonial Causes in England, I request that you will immediately take the subject into your consideration, and introduce into your Council a Bill for conferring upon the High Court the jurisdiction and powers of the Divorce Court, in England, one of the provisions of which should be to give an appeal to the Privy Council in those cases in which the Divorce Court Act gives an appeal to the House of Lords.

65. The construction which I venture to adopt of the Indian Divorce Act, 1869, is in strict compliance with the intentions of Government as expressed in that Dispatch of 1862. It receives some support from Sir Henry Duke himself when he says in Keyes v. Keyes at p. 217:

To create a jurisdiction in divorce snob as is exercised in the Courts of this country [i.e. England] was, I have no doubt, within the powers conferred upon the Governor-General in Council by the East India Councils Act of 1861.

66. And I attach importance to the fact that the learned President nowhere expresses any approval of the argument which Sir Gordon Hewart addressed to him on Section 2. Its acceptance would mean that the Courts of this country could not even grant a protection order under Section 27 or alimony under Section 36, unless the parties were domiciled in this country, but would have to say to perhaps the Indian wives of English engine-drivers or clerks that they must travel to England some 6000 miles away before they could obtain any redress. This answer would mean that in many cases there would in practice be no redress. And I am glad to think that in the view I take of the construction of the Act, no such hardship is enforced on the residents of the country. In my judgment, the word "resides" in Section 2 means resides and not "is domiciled." Domicil involves the intention to establish a permanent home in a particular country. For residence a temporary home suffices, and perhaps less. In Nusserwanji Wadia v. Eleonora Wadia . Sir Basil Scott said: "The residence of the petitioner must be bona fide, and not casual or as a traveler.

67. I will now consider the true construction of Section 22 of the Indian Councils Act 1861, and the decision which Sir Henry Duke has given. This section is in very wide terms. It empowers the Governor-General in Council to:

make taws and Regulations for all Persons, whether British or native, foreigners or others, and for all Courts of justice whatever, and for all Places and Things whatever within the said Territories, and for all Servants of the Government of India within the Dominions of Princes and States in alliance with Her Majesty.... Provided always, that the said Governor-General in Council shall not have the power of making any Laws or...Regulations...which may affect the Authority of Parliament...or any Part of the unwritten Laws or Constitution of the United Kingdom of Great Britain and Ireland, whereon may depend in any Degree the Allegiance of any Person to the Crown of the United Kingdom, or the Sovereignty or dominion of the Crown over any Part of the said Territories.

68. How then has this Act to be construed? On that point the learned President expressed his view in Keyes v. Keyes (1921) P. 204 as follows (pp. 216, 217):

Without this proviso I should have thought it to be clear that the enacting words which I have quoted, reading them in their every-day meaning, could not be deemed to warrant! the making of laws by the Indian Government to interfere with the status of subjects of the Crown not domiciled in India, The laws to be made are to be of local operation. The status of a citizen domiciled elsewhere is not a condition having local effect in India, or local limitations.... A statute must be construed with due regard to its subject-matter and object, and the object of this Act is to provide for the Government of India by laws binding upon persons and things in India. As between two possible constructions, that which is conformable to international law as declared in our own tribunals is Co be preferred to that which would involve infringement of the rights of other communities.

69. In other words, Sir Henry Duke was I think of opinion that the Act ought to be construed as if it contained a proviso to the effect that the Indian Legislature should only have power to pass laws which were in conformity with the comity of nations.

70. Even accepting such a proviso, the English Court of Appeal thought as late as 1878 that the comity of nations was not violated by legislation for the divorce of residents within the jurisdiction. In Niboyet v. Niboyet (1878) 4 P.D. 1. Lord Justice James said at p. 7:

But I do not find any violation of that comity in the legislature of a country dealing as it may think just with persons native or not native, domiciled or not domiciled, who elect to come and reside in that country, and during such residence to break the laws of God or of the land.

71. No doubt in 1895 the comity of nations was held to require domicil and not residence, but we are dealing with an Act of 1861 at which date the new jurisdiction of divorce a vinculo had only been in operation some three years. On the other hand it would seem clear that the learned President was of opinion that Section 22 gave the requisite legislative powers as regards persons domiciled in India, for at p. 217 he says:

To create a jurisdiction in divorce such as is exercised in the Courts of this country [i.e. England] was, I have no doubt, within the powers conferred upon the Governor-General in Council by the East India Councils Act of 1861.

72. In this connection I will refer to the leading case of The Queen v. Burah (1878) 3 App. Cas. 889 905 : L.R. 5 I.A. 178 194 where the Privy Council laid down the principles which should guide our Courts in India in determining the legislative powers of the Indian Legislatures. Their Lord* ships had there to consider whether a certain Act of the Indian Legislature was inconsistent with the Indian High Courts Act 1861, or with the Charter of the Calcutta High Court. In delivering the judgment of the Board, Lord Selborne stated at pp. 9015-5 as follows:

The ground of the decision...of the majority of the Judges of the High Court was, that the 9th section was not legislation, but was a delegation of legislative power. But their Lordships are of opinion that the doctrine of the majority of the Court is erroneous, and that it rests upon a mistaken view of the powers of the Indian Legislature, and indeed of the nature and principles of legislation. The Indian Legislature has powers expressly limited by the Act of the Imperial Parliament which created it, and it can, of course do nothing beyond the limits which circumscribe these powers. But, when acting within those limits, it is not in any sense an agent or delegate of the Imperial Parliament, but has, and was intended to have, plenary powers of legislation, as large, and of the same nature, as those of Parliament itself. The established Courts of Justice, when a question arises whether the prescribed limits have been exceeded, must of necessity determine that question and the only way in which they can properly do BO, is by looking to the terms of the instrument by which, affirmatively, the legislative powers were created, and by which, negatively, they are restricted. If what has been done is legislation, within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited (in which category would, of course, be included any Act of the Imperial Parliament at variance with it) it is not for any Court of Justice to inquire further, or to enlarge constructively those conditions and restrictions.

73. Adopting that test, does a law for the divorce of non-domiciled person? come "within the general scope of the affirmative words which give the power," viz., Section 22 of the Indian Councils Act, 1861? In my judgment, such a law is prima facie within the wide terms of section 22, for that section gives power to make laws for all persons within British India. Then adopting the second branch of the same test, does this law violate any "express condition or restriction by which that power of legislation is limited?" The only express limitations in Section 22 which I need mention are those dealing with the authority of Parliament, and the allegiance of the subject. But nobody contends that the Indian Councils Act affects the authority of Parliament. The power of Parliament still remains supreme. (See for instance Sections 65 and 131 of the Government of India Act 1915 which Act consolidated a mass of previous legislation and is consequently convenient for reference).

74. It was, however, argued before us that as marriage conferred a status, the allegiance of the subject to the Crown depended in part on that status not being altered. This argument I do not accept. Section 22 refers to "the unwritten laws or constitution of the United Kingdom". But up to 1857 no English Court had power to dissolve a marriage. Divorce a vinculo could only be obtained by a private Act of Parliament as is or was until recently the case in Ireland, and that was a remedy only

open to persons of ample means. Accordingly in 1861 it could not, I think, be said that this status of marriage depended on the unwritten laws of the United Kingdom, for those laws had been altered by Parliament. Nor I think can it be said that this status formed part of the constitution of the United Kingdom either written or unwritten. Even if I am wrong in this, I think it would be going too far to say that the very allegiance of the subject depended on this status.

75. In the result, therefore, in the view I take, there is no such express condition or restriction to be found in Section 22 as is referred to in The Queen v. Burah (1878) 3 App. Cas. 889, 905 : L.R. 5 I.A. 178, 194. Why then should the prima facie meaning of the wide operative words of Section 22 be cut down in construing the Act as a whole?

76. One main ground relied on by the learned President was that "no one would suppose...that the legislative authority created by Section 22 could extend to the making of a law which should affect the heritable capacity of a man resident in India in respect of land in England, or control his conduct in any matter of purely English concern." (p. 216). One answer to this is that presumably the British Parliament anticipated that the wide powers thereby conferred on the Indian Legislature would be exercised reasonably, both as regards domiciled and non-domiciled persons. The wide words of Section 22 would enable oppressive laws to be passed, even if they were to be confined to domiciled persons. But the practical checks were that even if the Indian legislature was so minded, there would still be safe-guards, having regard to the powers of the Secretary of State, and Parliament and the Grown. (See for instance Section 21 of the Indian Councils Act, 1861, and Sections 68 and 69 of the Government of India Act, 1915). Further, Section 131 of the Government of India Act, 1915, runs:

(1) Nothing in this Act shall derogate from any rights vested in His Majesty, or any powers of the Secretary of State in Council, in relation to the Government of India.

(2) Nothing in this Act shall affect the power of Parliament to control the proceedings of the Governor-General in Council, or to repeal or alter any law made by any authority in British India, or to legislate for British India and the inhabitants thereof.

77. Again Section 112 of the Government of India Act, 1915, expressly provides that Original Side suits "against inhabitants of Calcutta, Madras or Bombay,...in matters of inheritance and succession...and in matters of contract and dealing between party and party" are to be decided according to the personal law or custom of the parties The practical answer, therefore, is that though Parliament gave wide powers with the one hand, it retained strong practical checks with the other hand. So any real injustice should be sure of a remedy.

78. The other main ground urged by the learned President was that as between two possible constructions of the Indian Councils Act, 1861, one should prefer that which is conformable to international law as declared in the British tribunals. Now we are dealing with an Act of 1861, and if at that time there were old established Divorce Courts in England in which the principles of jurisdiction had long been laid down with abundant clearness, I should be disposed to attach more weight to this argument than I in fact do. But what are the real facts? As I have already pointed out the English Divorce Court only dates from 1857 or to be more precise January 1, 1858, which was the

earliest date for the Act to come into operation. (See Matrimonial Causes Act, 1857, Section 1). Consequently it cannot be said that by 1861 sufficient time had elapsed to see on what principles this new jurisdiction of dissolving marriages would be exercised by the Court.

79. Further, to my mind the authorities show that at that time and up to a very much later date there was much difference of opinion or confusion as to the principles on which the Court should act. If, for instance, in Niboyet v. Niboyet (1871) 4 P.D. 1 4-6 19, 21 Judges of the eminence of Lord Justice James, Lord Justice Cotton and Lord Esher could hold these differing and to some extent incorrect views of the law in 1878, how can one say that the law on the subject was clearly settled some seventeen years before. A reference to Dieey's Conflict of Laws, 1896, Appendix Notes 8 and 9, pp. 753 to 759, will shew that the theories or principles on which divorce should be granted have been the subject of much difference of opinion in earlier days. And even now difficult cases may arise as to the effect of the law of a foreign domicil. (See Rex v. Hammersmith Superintendent Registrar of Marriages (1917) 1 K.B. 634.)

80. As regards the earlier English authorities, it must be remembered that rightly or wrongly it was at one time thought that the Scottish Courts claimed to dissolve English marriages, provided the parties had resided in Scotland. As the English Ecclesiastical Courts had then no jurisdiction to make such a decree themselves, it is perhaps not surprising that they objected to the Scottish Courts assuming such a jurisdiction in the case of English domiciled persons. But as I have already indicated, it was really after 1857 when the new jurisdiction of divorce a vinculo was created, that the question of domicil became of importance. Lord Gorell thus sums up the position in Armytage v. Armytage [1898] P. 178 (pp. 189, 190):

Most of the writers on private international law and the conflict of laws treat at length the question of the laws and principles upon which the dissolubility or indissolubility of marriage depends, hub there is little to be found in the works of such writers on the question of jurisdiction to decree the separation or divorce a mensa et thoro of married persons who are residing but not domiciled in the country of the forum. The reasons are not far to seek. Dissolution of marriage has been permitted in some States and not in others, and hag been allowed in some States on grounds different from those on which it could be obtained in others. There has been want of unanimity as to the forum which ought to take cognisance of the question of divorce, and as to the laws to be applied and the recognition to be accorded in one State to a decree of dissolution of marriage pronounced in another. Persons domiciled in a country where divorce has not been permitted or only permitted on certain grounds, have, in order to obtain divorces, temporarily resided or assumed domicil in another country where divorce has been permitted or more easily obtained than in the former country, Hence numerous difficult and varied questions have arisen and been discussed in reported cases and by different jurists upon the question of dissolution of marriage. But in practice suits for judicial separation or divorce a mensa et thoro and restitution of conjugal rights do not appear to have given rice to similar difficulties, and, therefore, cases and discussions as to jurisdiction in these suits are not often met with. Such suits generally occur before the tribunals of the country in which the parties are in not domiciled, and a case like that before me was not so likely to occur in former days as at the present time, when large numbers of people are to be found residing for more or less lengthy periods away from the place of their domicil.

81. If then the Indian Councils Act, 1861, had been expressly restricted to legislation in conformity with private international law as then understood, I think it by no means follows that such restriction, if written out in full, would have excluded non domiciled persons. At that date there were at least two conflicting decisions. As Lord Watson says in Le Mesurier v. Le Meaurier [1895] A.C. 517 (pp. 586):

Tollemache v. Tollemache (1859) 1 Sw. & Tr. 557,...was decided by three Judges in 1859, shortly after the passing of the Divorce Act.... The learned Judges sustained the jurisdiction of the English Court, which was the forum of the husband's domicil, and disregarded as incompetent a decree of the Court of Session dissolving his marriage, although he had a matrimonial domicil in Scotland, where he had bona fide resided for four years with his wife, neither casually nor as a traveller. Then in Brodie v. Brodie (1861) 2 Sw. & Tr. 259, in the year 1861, three learned judges decided the opposite, holding that residence of the kind, which had been found in Tollemache v Tollemache to be insufficient to give jurisdiction to a Scottish Court where the domicil was English, was nevertheless sufficient to give juris diction to themselves when the domicil was Australian.

82. The learned President has laid stress on Shaw v. Gould (1868) L.R. 3 H.L. 55 which was decided in 1868. But that case did not necessarily negative the right of divorce if bona fide residence was proved, although falling short of domicil. On the contrary there are some observations from Lord Colonsay at p. 96 which, though obiter, would tend to support the view that residence alone was sufficient. But the precise point did not arise, and on the facts of the case it is not surprising that the English Courts refused to accept the validity of the divorce that had been obtained in the Scottish Courts. One Buxton had married a minor by fraud, for which he was sentenced to three years imprisonment. After the end of his sentence he lived with another woman. His wife wanted to marry some one else, and after first presenting a petition for divorce to the English Ecclesiastical Court, a collusive agreement was made with Buxton by which he was for a money payment to cross the border into Scotland, and submit to a divorce there as soon as practicable. This he did, and then returned to England. It appeared that a forty days' stay in Scotland was then sufficient to give the Scottish Courts jurisdiction in any suit whether for divorce or otherwise. The decision of the House of Lords was mainly based on the ground that an English marriage between domiciled English spouses could not be dissolved in this collusive way by a short trip over the border. Thus Lord Chelmsford said (p. 79):

My opinion in this case is founded entirely upon the peculiar circumstances attending it; the first marriage having taken place in England between parties having an English domicil which they never changed, and the divorce in Scotland having been obtained by preconcerted arrangement, the parties resorting to the Scotch Courts for the sole purpose of making it instrumental to the attainment of their objects. If this does not amount to collusion.... I do not think that the tribunals of this country can regard a divorce thus obtained as binding on their judgment.

83. Lord Colonsay's decision was based on much the same grounds (see p. 95). So also I think was Lord Cranworth's. At p. 70 he said:

The domicile to produce that result (i.e. found jurisdiction) must be a bona fide domicile for all purposes, not, that which alone existed in this case, a mere residence of forty days, so as to give jurisdiction to the Scotch Courts.

84. And Lord Westbury in referring to Lolley'a case: M 'Carthy v. De Caix (1835) 2 Cl. & F. 567 said (p. 8 6):

There are other and legitimate grounds of decision to which the judgment in Lolley'a Case may, and...ought to be referred. Throughout the Scotch proceedings the domicile of both parties was in England, and the residence in Scotland was temporary only, and intended only for the purpose of having a suit for divorce instituted. The Judge, therefore, was not the Judge of the domicile; the suit was not bona fide, and the whole proceeding was in fraud of English law, and injurious to English interests.

85. I cannot therefore regard Shaw v. Gould as a clear authority against the sufficiency of bona fide residence. If it had been, the Court of Appeal in Niboyet v. Niboyet (1878) 4 P.D. 1 would have been obliged to follow it instead of deciding as they did after full arguments and four months of deliberation that bona fide residence was sufficient.

86. I appreciate to the full the importance of, so far as practicable, construing legislation so as to comply with the comity of nations. I have already cited what Lord Justice James and other Judges have said on that point. But I do not think that that principle binds one down to a limited construction of the Act of 1861. Nor do I think that there is necessarily any inconsistency in applying that principle on the other hand to assist the wide construction I give to Section 7 of the Indian Divorce Act 1869. If one holds that the Act of 1861 finally bound the Indian Legislature to accept the principle of domicil as opposed to that of residence, what might have been the result, supposing the principles laid down in Niboyet v. Niboyet in 1878 bad been eventually adopted by the Privy Council in 1895 instead of the decision which their Lordships in fact gave. The result in such a case would have been a hopeless variance between the Indian Courts and the Home Courts, unless further legislation was passed on the subject by the British Parliament.

87. With very great respect, therefore, to the learned President I prefer the view that the British Parliament intended to give the widest powers to the Indian Legislature, and that though relying on the latter's good sense not to abuse those powers, it yet retained practical checks in case of necessity. As I have already pointed out, in the view I take of the Indian Divorce Act 1869, the Indian Legislature framed its divorce laws in such a way as to comply with the principles of the comity of nations as enunciated from time to time in the English Courts. If in some respects it went further and imposed restrictions which are nowadays not essential in the English Courts, that after all was only keeping well within the wide powers conferred upon it by the Act of 1869.

88. The conclusion then which I have arrived at is that the Indian Divorce Act 1869 is, and always has been, within the legislative powers conferred upon the Indian Legislature by the Indian Councils Act 1861.

90. For simplicity I have so far not dealt with any of the exceptions to the modern theory that jurisdiction in divorce is founded on domicil, One of those alleged exceptions is where a guilty husband deliberately changes his domicil in order to prevent his wife obtaining relief against him in the country where their domicil has hitherto been, That exception does not arise here, and I need not therefore deal with it.

91. But one other alleged exception I should mention lo whew that it has not been overlooked, although it was not referred to in argument. I have already stated that both the wife and the co-respondent have appeared absolutely and without protest; that the wife counter-petitioned for a judicial separation ; and that the question of jurisdiction was not raised till the trial. In the 1896 Edition of Dicey, the case of Zycklinski v. Zycklinski (1862) 2 Sw. & Tr. 420 was quoted as an authority for holding that in such a case where the parties have appeared without protest, the Court has jurisdiction to entertain the proceedings, even though the parties are not domiciled within its jurisdiction. (see Dicey, p. 276 Exception to Rule 49; and p. 394, Note 1)

92. But that case was decided in 1862 when the jurisdiction in divorce was of recent date; it would seem wrong in principle: and no detailed reasons are given. Further the proposition in question has been expressly dissented from in Armitage v. Attorney General : Gillig v. Gillig (1906) P. 135 by Lord Gorell who says at p. 140: "That (proposition), I think, is not in accordance with the law of this country." In my judgment, therefore, the Court in the present case has not any jurisdiction to dissolve the marriage by reason of the appearance of the parties without protest. So I need not consider the possible operation of Section 45 of the Indian Divorce Act and the relevant provisions of the Code of Civil Procedure.

93. At the trial a further point was raised, viz., that the parties had last resided together at Bombay, and that the Poona Court had no jurisdiction. That contention was negative by the learned trial Judge, and as it was not renewed before us, I need say no more about it except that in my opinion there is no substance in it.

94. I may also state that having regard to the express terms of the Indian Divorce Act, I consider that the fact that the present case arises in the District and not on the Original Side of the High Court is immaterial on the question whether there is any jurisdiction to grant a divorce between non-domiciled persons.

95. It may be convenient if after this lengthy judgment I summarize my conclusions. They are: (1) that the wife committed adultery with the co-respondent. (2) That the husband's and consequently the matrimonial domicil is English. But that on the other hand both spouses were at all material dates bonfires residents in India, and professed the Christian religion. (3) That the domicil of the spouses being English, this Court has no jurisdiction to dissolve their marriage, notwithstanding that it was solemnized in India and that the adultery in question was committed in India. (4) But that on the other hand the Court has jurisdiction in these circumstances to grant the husband a decree for judicial separation and to provide for the custody of the children. This is because the word "reside" in Section 2 should be construed as such, and not as meaning "domiciled," and because under Section 7 we should apply the principles of the English Courts which in such cases will grant

judicial separation to non-domiciled parties. (5) That having regard to Section 7 our Courts give or withhold relief on the principles of jurisdiction now finally established in the English Courts, and it is no objection to their so doing, that those principles as now enunciated are not the same as those enunciated in the English Court of Appeal in Niboyet v. Niboyet (1878) 4 P.D.I. In this connection it must be borne in mind that the jurisdiction to dissolve a marriage, as opposed to granting a judicial separation, did not exist until it was given by the Matrimonial Causes Act 1857. (6) Accordingly the decree of the lower Court should be varied by granting a judicial separation instead of a divorce. In other respects the decree of the lower Court should, in my opinion, be confirmed, including the findings as to damages and costs.

96. As regards the costs of the confirmation proceedings before us, I would direct the co-respondent to pay the whole of these costs, having regard to Section 35 of the Act. In my judgment, he has committed adultery with the respondent, and I see DO adequate reason why he should escape paying the costs, because we think the appropriate jurisdiction in this country is to grant a decree for judicial separation and not for divorce having regard to the domicil of the injured husband. I, however, agree with the Chief Justice's proposal that the costs here and below of respondent No. 1 be in the first instance paid by the petitioner, and then be recovered by him from the co-respondent.

97. If the husband wishes to obtain a divorce, it will be necessary for him to petition the English Courts for that relief. I recognise the hardship that this causes, but possibly the Probate Division might allow the evidence to be given by affidavit and thus avoid the expense of a commission to India, at any rate if the fact of adultery was there no longer contested.

98. The question as to the custody of the children has not yet been argued before us.

Crump, J.

99. On September 7, 1921, the petitioner Alfred Wilkinson filed a petition in the Court of the District Judge of Poona wherein he prayed for a decree for the dissolution of his marriage with the respondent Grace Emily Norah Wilkinson on the ground that she had committed adultery in British India with the co-respondent D'Arcy. The petition stated that the marriage was solemnized in St. Paul's Church, Poona, and further that the petitioner and his wife last resided together in Poona. The written statement of the respondent was filed on December 15, 1921. It contains a denial of the allegation of misconduct, alleges cruelty and puts forward a prayer for a judicial separation. The written statement of the co-respondent was filed on December 7, 1921, and is substantially to the same effect on the question of fact.

100. Upon these pleadings two main issues were raised:

I. Whether plaintiff proves adultery between the respondents?

II. If plaintiff proves adultery had he condoned it by subsequent conduct?

101. There were certain minor issues which need not be considered now. There was no issue as to jurisdiction. The plea of condonation has been abandoned before as. The learned District Judge upon the evidence recorded before him held that adultery was proved and made a decree nisi for dissolution of marriage. That decree comes before us for confirmation as required by Section 17 of the Indian Divorce Act, 1869.

102. In the ordinary course the only question for our decision would be one of fact, viz., whether adultery is proved, but though there was no defence in the pleading on the point of jurisdiction, it appears that that defence was raised at the hearing. The learned District Judge has dealt with it in his judgment, and has held that his Court has jurisdiction. The point has been fully argued before us, and it is necessary that we should decide it for if there was no jurisdiction we cannot deal with the case.

103. Procedure in oases under the Indian Divorce Act is regulated by the Code of Civil Procedure. Section 45 of the Act lays down that "subject to the provisions herein contained all proceedings under this Act shall be regulated by the Code of Civil Procedure." There is nothing in the Act which lays down any special rule as to pleadings. Section 7, as I understand it, applies, not to points of procedure, but to the general principles and rules on which the Court will act in giving relief. These are rules of quasi-substantive rather than of adjective law. It is therefore unnecessary to consider whether under the stricter system of pleading in force in England the respondents would be taken to have submitted to the jurisdiction. The only rule which need be considered is contained in Section 21 of the Code of Civil Procedure, and that rule has never been held to confer jurisdiction where jurisdiction is completely absent. In such cases, as remarked by their Lordships of the Privy Council in Ledgard v. Bull(1886) L.R. 13 I.A. 134, "when the Judge has no inherent jurisdiction over the subject-matter of a suit, the parties cannot, by their mutual consent, convert it into a proper judicial process" (p. 145). It is the settled practice of our Court to entertain objection to the jurisdiction taken for the first time even in second appeal. And even in England the Court can raise the question of jurisdiction at any time in proceedings for divorce.

104. The point of jurisdiction may be shortly stated. It is contended that the petitioner has an English domicil. The domicil of the wife is the domicil of the husband, and in the case of persons not domiciled in India it is contended that the Indian Courts have no jurisdiction to give a decree for dissolution of marriage.

105. The question of fact involved in this plea, viz., the domicil of the petitioner, does not (in my opinion) present much difficulty. It is clear that before the District Judge there was no contest on this matter, and the petitioner's evidence is too clear upon the point to leave any room for doubt. It is indeed conceded that the petitioner's domicil of origin was English. He came to India for business purples some twelve years ago. He returned to England with his family on February 14, 1920, and did not intend to return to India, He returned to India for business purposes on March 13, 1921. There is no evidence of an animus manendi which can suffice to change the domicil of origin. An affidavit has been put in here, but it is no more than a bare assertion of the petitioner's intention. The point must be taken to be concluded against the petitioner for the purposes of this case.

106. The parties have, therefore, an English domicil, and the question is whether as between such parties the Indian Courts have jurisdiction to decree dissolution of marriage. That question must be determined on a consideration of the Indian Divorce Act, 1869. There are two aspects of the matter.

(1) Did the Indian legislature intend to confer jurisdiction in such cases?

(2) Had that legislature power to do so?

There is no doubt a third question which may arise elsewhere, viz., (3) What is the effect of a decree granted by an Indian Court outside British India?

107. But this third question does not and cannot arise for determination here. If the Indian Courts can give a decree valid throughout British India, we are bound to grant that relief if due cause is shown. Whether our decrees will or will not receive extra-territorial recognition is a matter for those Courts before whom they are cited for any purpose outside our jurisdiction. We can have no judicial opinion upon that matter. But so far as concerns the first two questions these are matters for our determination and for our determination alone within this Presidencysubject of course to correction by a Court of Appeal. The opinions of jurists however eminent are entitled to our respectful consideration but we are not bound by those opinions and the judgments of English Courts stand in the same category.

108. Before coming more closely to these two points, it is not out of place to observe by way of preface that the jurisdiction which is now questioned has been exercised uninterruptedly since the legislature enacted the Act of 1869. So far as I am aware it has never been doubted that our Courts had jurisdiction in the cases now under considerationat least within the territories comprised within British India, and between European British subjects. It is unnecessary to cite cases in which that jurisdiction has been exercised. Nay more, the decrees granted by our Courts have received extra-territorial jurisdiction without contest. Thus the point which is now taken involves a novel doctrine, and very substantial grounds would have to be made before it could be conceded. The doubt has however arisen and as it is based upon a decision by the President of the Probate, Divorce, and Admiralty Division of the High Court of Justice of England, we are bound to re-solve it in one sense or the other, and cannot rest upon the uninterrupted practice since 1869.

109. The question arose in the case of Keyes v. Keyes [1921] P. 204. The petitioner there had obtained in 1918 a decree for dissolution of marriage from the Chief Court of the Punjab, Nothing turns on the status of that Court at the date of the decree as compared with the status of a Chartered High Court such as ours. In 1921 the petitioner filed a petition in the High Court of Justice in England. Clearly if the Indian divorce was good in England, there was no subsisting marriage which could be dissolved. It is material to note that the action was undefended. The King's Proctor was heard, and counsel was allowed to address the Court on behalf of the Secretary of State for India as amioua citriae. There was, it would seem, a conflict of views. The King's Proctor urged that the Indian divorce was bad in toto while for the Secretary of State it was argued that the Indian divorce was good not only in India, but also extra-territorially. The learned President, Sir Henry Duke, held that the Indian Divorce Act 1869 was ultra vires of the Indian legislature in so far as it purported to

give jurisdiction to decree dissolution of marriage between parties not domiciled in India. The decision is not confined to the extra-territorial validity of such decreesa matter with which as I have said this Court is not concerned. It lays down in express terms that such decrees are invalid even in India (see p. 217).

The Indian Divorce Act, 1869, accordingly furnished no sufficient authority for the divorce of the petitioner and the respondent which has been decreed by the Chief Court of the Punjab.

110. A decree for dissolution of marriage was pronounced. There was no appeal: indeed there could be no appeal for the Secretary of State, who alone was interested to contest the point, was not a party, and in any event the decree could not be impugned so long as it was conceded that an Indian divorce had no extra-territorial operation. The pronouncement was indeed to some extent obiter but it cast grave doubts on the validity of the Indian decrees since 1869. In consequence legislation became necessary, and a validating Act was passed by the Imperial Parliament. [The Indian Divorce Validity Act 1921]. No argument can be based on this legislative reversal of a judicial decision : it involves no admission that the decision is correct. No appeal was possible, and the decision affected or might affect the status of many persons not parties to the case who could not challenge it. Unfortunately the Act of Parliament does not assist the solution of the question before us. In substance it declares that past decrees granted by Indian Courts for the dissolution of marriage between parties domiciled in the United Kingdom are as valid as they would have been, had such parties been domiciled in India. But the question whether the Courts in India have or have not jurisdiction to grant divorces valid in India between such parties is not answered.

111. Now as to the first question: Did the Indian legislature intend to confer jurisdiction in these oases. The relevant portion of Section 2 of the Act of 1869 runs as follows:

Nothing hereinafter contained shall authorize any Court to grant any relief...except in oases where the petitioner professes the Christian religion and resides is India at the time of presenting the petition, or to make decrees for dissolution of marriage except in the following cases :-(a) where the marriage shall have been solemnized in India; or (b) where the adultery...complained of shall have been committed in India.

112. The above words are intended to restrict the powers of the Court. For those powers we must look to that which is "hereinafter contained." For the present purpose Section 10 is relevant. The jurisdiction given is so to speak universal: "Any husband may present a petition...." From that we come back to the conditions or restrictions laid down in the words of Section 2 set out above. Of those restrictions one only need be considered here viz.,

113. That the petitioner at the time of presenting the petition resides in India.

114. In the ultimate analysis the whole matter turns on the word "resides."

115. The word "resides" has no technical meaning and must be taken to be used in its ordinary sense. It would have been easy enough for the legislature to have substituted for "resides" the words "is

domiciled in India." The legislature did not do so. It is impossible to suppose that the legislature was not aware of the distinction. The Bill was introduced by no less eminent a jurist than Sir Henry Maine and it contains the solution of this very question of jurisdiction which had delayed the measure for eight years. What was that solution?

We (Courts) are bound to construe the section (of an Act) according to the plain meaning of the language used, unless...either is the section itself, or in any other part of the statute, anything that will either modify or qualify, or alter the statutory language even if the result of such construction lead to anomalies, or be productive even of absurdity." Per Macleon C.J. in Rajib Panda v. Lahhan Sendh Mahapatra (1899) I.L.R. 27 Cal. 11, 15 with reference to Vestry of St. John, Hampstead v. Cotton (1886) 12 App. Cas. 1, 6.

The proper course (in interpreting an Act intended to codify a particular branch of the law is first) to examine (its) language...(for) its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view" per Lord Herschell in Bank of England v. Vagliano Brothers [1891] A.C. 107, 144, 145.

116. There is, in my opinion, nothing in any other part of the Act to modify, qualify or alter the plain meaning of the word "resides." That which is enacted in Section 7 cannot be invoked for that section is expressly stated to be "subject to the provisions contained in this Act." Where a statute is plain in itself, it is out of place to consider the presumed intentions of the legislature but any argument of that nature favours the plain construction. The Government of India must have been well aware that to lay down domicil as the test would be to deny relief to those persons professing the Christian religion who were not domiciled in India. In 1869, even more than at the present time, there would have been in many cases difficulties almost insurmountable in the way of a petitioner who was barred from recourse to the Indian Courts. The cost would have been prohibitive, the evidence in many casess impossible to procure. There was nothing in the state of the law in 1869 which could have deterred the Indian legislature from enacting "residence" as the test. That is a point to which reference may conveniently be made later. I cannot find in the judgment in Keyes v. Keyes any definite pronouncement as to the intention of the Indian legislature. I am not aware that any doubt has hitherto been cast on the true construction of the Indian Divorce Act so far as this matter is concerned. Certainly I find nothing in Keyes v. Keyes bearing on this question, viz., the construction of the Indian Act. I do not know w hence the doubt has arisen.

117. I do not overlook the possibility of reading into Section 7 an intention on the part of the legislature to adopt whatever test the Court of Divorce in England might from time to time lay down upon this matter, but that is, in my opinion, a forced and unnatural construction. Also it would be necessary to omit the words "subject to the provisions contained in this Act." Indeed, had the Legislature intended any such result, it would have been easy to say in express terms that the provisions of the Act must be read as subject to the rules and principles applied from time to time by the Matrimonial Courts in England, They have chosen to say precisely the contrary. Any such construction would introduce an element of uncertainty where certainty is essential. The doctrine of

the English Courts has varied from time to time upon this point. Since 1895 domicil alone is recognized as conferring jurisdiction. It is perhaps an extreme hypothesis that the English Courts should ever revert to "residence" as the test, but it is not illegitimate to test in this way the suggested construction of the Indian Divorce Act. It is difficult to see how a statute can mean one thing in 1869, another in 1895, and possibly a third in 1930. I prefer the plain construction supported as it is by a long and uninterrupted current of decisions.

118. Now as to the second question : Had the Indian Legislature power to enact that which it has enacted? It is upon this point, not upon the construction of the Indian Act, that the decision in Keyes v. Keyes is in reality based. The question is thus formulated "whether upon a true construction of the Imperial Statute of 186 1 power is by that statute conferred upon the Governor-General in Council to legislate for British subjects merely resident in India so as to affect their status as to marriage in the country of their domicil 1" So stated the answer does not necessarily affect the power to decree divorce valid in India, bat the penultimate paragraph of the judgment, portion of which is cited above, goes far beyond this. The ratio decidendi is as follows. Up to 1878, when the case of Niboyet v. Niboyet (1878) 4 P.D. 1, 18 was decided, the doctrine of the English Courts was unsettled, but that case laid down that residence of the parties gave jurisdiction. This decision must however be held to have been incorrect in view of the decision of the Privy Council in Le Mesurier v. Le Mesurier [1895] A.C. 517 in 1895. Therefore when Parliament enacted the Indian Councils Act of 1861 it must be supposed that the true doctrine was present to their minds, and that therefore Parliament could not have intended to empower the Indian legislature to enact that residence should suffice to confer jurisdiction. Further, it is clear from Section 22 of that Act that Parliament could not have intended to give the Indian Government power to make laws to interfere with the status of subjects of the Crown not domiciled in India.

119. To follow this decision would be to escape from an undesirable conflict of laws but with all due deference I am unable to do so. I would, however, point out that this conflict can equally well be avoided if, as hitherto, the decrees of Indian Courts receive extraterritorial recognition. As I have already said the first canon of statutory interpretation is that the words of the statute should be read in their natural meaning. The general legislative powers of the Government of India were considered by the Privy Council in the leading case of The Queen v. Burah (1878) 3 App. Cas. 889 : L.R. 5 I.A. 178, 193, 194. Lord Selborne expressed himself as follows (pp. 904, 905):

I he Indian Legislature has powers expressly limited by the Act of the Imperial Parliament which created it, and it can, of coarse, do nothing beyond the limits which circumscribe these powers. But, when acting within those limits, it is not in any sense an agent or delegate of the Imperial Parliament, but has, and was intended to have, plenary powers of legislation, as large, and of the same nature, as those of Parliament itself. The established Courts of justice, when a question arises whether the prescribed limits have been exceeded, must necessity determine that question; and the only way in which they can properly do so, is by looking to the terms of the instrument by which affirmatively, the legislative powers were cheated, and by which, negatively, they are restricted. If what has been done is legislation, within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited (in which category would, of course, to included any Act of the Imperial Parliament at variance with it), it is

not for any Court of Justice to inquire further, or to enlarge constructively those conditions and restrictions.

120. This decision is binding on us, and it appears to me conclusive on the point The powers are conferred affirmatively by Section 22 of the Indian Councils Act 1861. They include power "to make laws and regulations for all persons whether British or native, foreigners or others and for all Courts of Justice whatever and for all places and things whatever" within the Indian territories. The express conditions and restrictions are set out in the same section, and in Sections 19 and 24. There are other statutory enactments bearing on this question which will be found fully set out at page 202 of Ilbert's Government of India, but nowhere is there any express restriction against "the making of laws to interfere with the status of subjects of the Grown not domiciled in India," It would not be difficult to cite instances where the Indian legislature has made laws "which may affect the heritable capacity of a man resident in India" who was a domiciled British subject (e. g., Section 31 of the Indian Succession Act). No doubt that Act only affects succession to immoveable property in British India in the case of such persons (vide Section 5) but its validity within British India has never been questioned. There is thus in the present case no express restriction, and the question is, in the words of their Lordships of the Privy Council, whether "the legislation is within the general scope of the affirmative words which give the power." With all respect I do not see that the answer admits of any doubt. The power could hardly be expressed in wider terms.

121. If it is admissible to consider the state of the law in England when Parliament enacted the Indian Councils Act of 1881, is there any thing from which an intention can be presumed to restrict the powers of the Indian legislature in the manner suggested? In 1878seventeen years laterthe English Courts held that residence within the jurisdiction was sufficient to empower the Courts to give a decree for divorce (Niboyet v. Niboyet). If in that year it had been suggested that Parliament could not have intended to empower the Indian legislature to give jurisdiction to the Courts to grant a divorce between British subjects domiciled in England, Niboyet v. Niboyet would have been conclusive to the contrary. How can the statute law of this country be affected by the later decisions of the English Courts? Had the Indian legislature thought fit to do so, they could have amended the Indian Divorce Act to bring it into conformity with the views expressed in Le Mesurier v. Le Mesurier. They have not done so, and in no other way save by an Act of the Imperial Parliament can the Act of 1869 be altered or modified. There has been no such legislation.

122. I find myself unable to hold that any restriction in the sense suggested was imposed by the Imperial Parliament on the powers of the Indian legislature, nor can I hold that the true construction of the Indian Divorce Act 1869 is open to any doubt. Still less can I hold that in enacting Section 7 of that Act the legislature intended that the power of the Courts to entertain a petition for dissolution of marriage should depend upon the views which might from time to time prevail in the English Courts as to matrimonial causes. I hold that the jurisdiction, whatever it may be, is conferred by the Act in express terms, and that the provisions which confer that jurisdiction are not in any way subject to any rules or principles which may from time to time be laid down by English Courts. Those provisions, in my opinion, confer upon the Courts in India jurisdiction to give decrees for dissolution of marriage between British subjects domiciled in England who in other respects are within the conditions prescribed by the Act

123. I regret that I am unable to agree with my Lord the Chief Justice and my learned brother Marten as to the true construction of the Indian Divorce Act. I have already dealt with what appear to me to be the main principles on which that Act should be construed. I would willingly have rested my conclusions upon those principles, but in this conflict of views I find it necessary to add a few words on the doctrines of private international law. It is not necessary to attempt to define that much-debated phrase. The principle involved, as I understand it, may be stated as follows :

It is a scandal when a man and a woman are held to be man and wife in one country and strangers in another. That scandal arises from a conflict of laws. That scandal can be avoided, if the Courts of one country decline to assume jurisdiction over the subjects of another country, who are merely resident within their jurisdiction. Alternatively if the Courts of all countries agree to accept domicil as the test that scandal is avoided.

124. It is conceded that municipal law can confer jurisdiction on the ground of residence but it is argued that in considering the intention of the legislature the principle stated must be kept in mind.

125. I agree that this is so. I do not propose to rely on the obvious difference in the position of a British subject as compared with the subject of an independent sovereign state. I would only point out that British subjects, whether in India or in England, owe allegiance to the same Crown and are subject to the authority of the same legislative body, the Imperial Parliament, and if the Imperial Parliament so wills, the scandal on which the argument rests can be avoided by enacting that the decrees under consideration shall have extra-territorial recognition. This they cannot do in the case of the subjects of an independent sovereign state. The object of these remarks is to elucidate what I believe to have been the true intention of the Indian legislature.

126. I concede as I have said that the Indian legislature desired to avoid the scandal stated above, and that it is reasonable to interpret their intention in that light, But, in my opinion, the Indian legislature acted in the belief that the decrees of the Indian Courts would receive extra-territorial recognition, and they chose that method of avoiding the difficulty. Nor were they unsuccessful. For over fifty years there was no scandal for until the decision in Keyes v. Keyes, so far as I am aware, there is no case in which the English Courts refused to recognize the validity of those decrees. The intention which I deduct from the principle of avoiding scandal leads me therefore to the conclusion not that the Indian legislature desired or intended to exempt British subjects domiciled in England from the jurisdiction of the Indian Courts, but rather that they intended that the decrees of those Courts should be valid outside India.

127. I do not desire to burden this judgment by reference to cases. I would, however, emphasize once again that it has been consistently affirmed by eminent Judges in India that the test of jurisdiction in these cases is residence not domicil. I also desire to add a few remarks on the scope of Section 7 of the Indian Divorce Act. It is true that in construing the Matrimonial Causes Act of 1857 the English Courts havenot without hesitationarrived at the conclusion that the general words of Section 27 must be cut down in view of the principles of private international law, but I must admit that for reasons which I have endeavoured to indicate I doubt if the argument is in the special case of the Courts of India as strong as is supposed. But apart from that the Indian Act contains what the

English Act does not contain, that is to say, a clear and definite statement (vide Section 2) of the conditions upon which jurisdiction can be exercisedexpressio uniua est exclusio alterius. I see no warrant for reading into the Act what is not expressed. If then Section 2 is exhaustive upon the point it is clear that Section 7 can lay down nothing more by any process of implication. If Section 7 is to have the dominating force, which is suggested, the rest of the Act might have been expressed in a few sections. With all deference I doubt whether it is safe to apply the decisions of the English Courts as to the meaning of another statute.

128. But it may be said what is then the scope of Section 7 ? It is, in my opinion, a residuary section intended to provide for any matters which by inadvertence or otherwise are not expressly dealt with in the Act. It is not unusual in statutory drafting to insert provisions of this nature ex mnjore cautela, more especially where an attempt is being made to codify in this country an unfamiliar branch of English law. In the words of Mr. Justice Jenkins (now Sir Lawrence Jenkins): "The expression rules and principles'...point rather to the rules and principles on which the Court deals with these matrimonial causes in requiring a certain degree of evidence and other cognate matters" (Bailey v. Bailey (1897) I.L.R. 30 Cal. 490 n. 491. Upon this construction of Section 7 that learned Judge declined to apply to the case before him a ruling of the Probate Court in England. In Ramsay v. Boyle (1903) I.L.R. 30 Cal. 489, 497 the same view was taken of the scope of this section.

129. I would conclude with a reference to a matter which has at least some historical interest. Since I wrote this judgment my attention has been attracted to the speech in which Sir Henry Maine moved the third reading of the Bill which became the Indian Divorce Act. The Bill had then passed through the hands of the Select Committee and it is interesting to note that this legislation was delayed for about eight years over this very question of jurisdiction. Maine clearly intended to base the jurisdiction on residence not on domicil, and expressed a confident hope that the decrees of the Indian Courts in the case of persons domiciled in England would receive extra territorial recognition. He further expressed himself as to the scope of Clause 7 of the Bill in terms not dissimilar to those which I have used in discussing Section 7 of the Act. I do not seek to support my views by these observations. Indeed, as I have said, the history of the legislation attracted my attention after my judgment was written But the point is not without interest and this contemporaneous exposition of what was then believed to be the law, is not without value in considering the intention of the legislature.

130. Dealing with the question of fact arising in the case, his Lordship was of opinion that it was proved that the respondent had committed adultery with the co-respondent.

131. The order of the Court accordingly was as follows:

The District Court of Poona had no jurisdiction to pass a decree for dissolution of marriage.

Adultery of respondent No. l with respondent No. 2 was proved.

Decree for judicial separation.

The District Court to determine question of alimony and the custody of the children.

The petitioner to pay the costs of respondent No. 1 and to recover such costs and his own from respondent No. 2.