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## THE CRIMINAL PROCEDURE BILL.

The history of the measure proposed in England for the codification of the law of Criminal Procedure is related by a correspondent of *The Nation* as follows:—"The bill in the House of Commons for the creation of a Court of Criminal Appeal and that codifying Criminal Procedure were referred to the large standing Committee on Law and Courts of Justice, commonly called the Law Grand Committee. * * * The course of the two law bills has been less prosperous. The Court of Criminal Appeal Bill passed its second reading with little objection, apparently because everybody thought that, after the often repeated demands for something of the kind, it was a matter of course to try the experiment. When its provisions came to be considered in detail the difficulties with which the subject bristles began to be felt. The committee cut the bill about a good deal, but in the opinion of many of our most sensible lawyers the more they changed it the worse it became. The Government declare that they intend to pass it, restoring it in some respects to its original form. But the session has now only eight or nine working days to run; there is a good deal of opposition to the measure and very little zeal for it. Most of the judges are known to disapprove it, and it is quite possible that even if it is forced through the House of Commons, it will perish in the House of Lords. Still more inglorious were the fortunes of the far more ambitious measure which was intended to codify the whole law of Criminal Procedure. It was originally drafted some six years ago by Sir J. F. Stephen, now one of the Justices of the Queen's Bench Division of the High Court of Justice. It was then submitted to two of our most skillful lawyers, Mr. Justice (now Lord) Blackburn and the late Mr. Justice Lush, afterwards a Lord Justice of the Appeal Court. They altered it in many points, and handed it over to Sir John Holker, then Attorney-General, who gave it a further polish, and intended to get it passed in the session of 1879. However, he had to drop it, nor was the present Attorney-General any more successful in 1881 and 1882. This year it at last advanced to a second reading, and was sent, with good expectations of success, to the Grand Committee. When it came on there Mr. Parnell and several of his Irish allies objected to some of its provisions as unduly severe and despotic, and found some support among a section of the Liberals who sat on the committee. After a while obstruction began, and then it was clear that the bill, which the law officers of the Government did not themselves wholly like, as it was really not their work but that of judges from whose views they differed in important points, could not be carried. It was accordingly abandoned, and is not likely to be taken up until the attitude of Irish Nationalists alters; for at present they can, as indeed any other small but resolute section can, arrest the progress of any measure which has not the full force of the Government to push it through."

## LIBEL.

A curious point came before the Queen's Bench Division in *Tompson* v. *Dashwood* (48 L.T. Rep. [N.S.] 943). The defendant wrote a letter to W. containing defamatory statements of the plaintiff, intending to send it to Col. W., but under such circumstances that it would have been privileged if it had been sent to W. The letter was not sent to him, but by a *bona fide* mistake was inclosed in an envelope addressed to another person who got the letter and communicated the contents of it to the plaintiff. The latter brought an action for libel. The Court held that the letter did not lose its character of a privileged communication. Williams, J., observed: "If a person publish untrue and defamatory statements about another, the law implies malice, and the plaintiff need not prove more than that the statements complained of were untrue and defamatory. But there are occasions when the law negatives the presumption of malice arising from the publication of untrue and defamatory matter; that is, when the party making the statement has a certain interest in the subject-matter of the libel. The question in this case is, whether the defendant stood in such a position with regard to the parties as that privilege would attach to the letter which is the subject of the action. It is admitted that he does stand in this rela-

tion to Col. Wood, so that if the letter had been sent to Col. Wood, as was intended, no action would lie, unless there was proof of actual malice. But it is said that the defendant having carelessly, though unintentionally, sent the letter to the secretary, instead of to Col. Wood, is thereby deprived of the privilege which otherwise would have attached to the letter. It seems to me that this is a fallacy and that all the defendant could be accused of is a want of care in putting the letter in a wrong envelope. There is nothing in this mere accident sufficient to take the case out of the law of privilege and make it actionable, without proof of actual malice. There is no express authority on this point, though cases have been quoted to show that mere accident or inadvertence in publishing defamatory matter, when the occasion is privileged, will not be sufficient to destroy the privilege, nor supply the necessary evidence of malice to sustain the action I am of opinion therefore that the direction of the learned judge was right, and that this rule should be discharged." Mathew, J., said: "I am of the same opinion. There is no evidence here of a malicious publication, but only of accidental and negligent publication. The writing of the letter was honest, the preparation of it for the post was honest, and sending it to the wrong person was due only to negligence. This act of negligence is not sufficient to deprive the defendant of the privilege, which, it is admitted, he otherwise would have had. It has been argued that the defendant ought to be held responsible for this negligence; but if this were so, and if an action would lie in this case, it would enable a plaintiff to bring an action in a case where it might be that all the defendant had done was to leave a letter carelessly about his room, so that another person could read it. I think the evidence of negligence here is extremely slight, as the person to whom the letter was sent had only to look at the first line of it, to see that it was not intended for him, and that it had been put into the wrong envelope by mistake." The rule was discharged.

### *MUTUAL ADMIRATION MISPLACED.*

The *Solicitor's Journal* (of London) states that a good deal of interest was excited by the development of a new feature in the August number of the Law Reports (Chancery Division). At p. 427, the following passage appears: "[Name of counsel] in reply.—"I regret the "absence of Mr. Davey in this important case. "Baggallay, L. J.—I do not think that your "clients have suffered by its being left in your "hands."

The *Solicitor's Journal* asks with some indignation, what view the editor and the reporter can take of their respective functions. Reports are intended for the information of the profession as to the state of the law, and everything which does not conduce to that end ought to be suppressed. Commendation of a junior counsel, however well deserved, does not contribute to the enlightenment of the profession, and is utterly misplaced. We have observed a like impropriety. Counsel, in reporting the decision in a case in which they have succeeded, are sometimes inclined to give the judge a pat on the back by referring to the "able and learned decision of the Court," or to the observations "savamment élaborées" of the hon. judge who has sustained their view of the question. These encomiums are quite uncalled for, and only tend to derogate from the dignity of the Court. They are almost as improper as would be the public expression of the maledictory remarks in which the losing suitor is popularly supposed to indulge during the twenty-four hours after defeat.

## NOTES OF CASES.

### SUPERIOR COURT.

MONTREAL, August 22, 1883.

*Before* MATHIEU, J.

GRAHAM et al. v. BENNETT.

*Capias—Fraud—Person carrying on business as his own, but his name not appearing in registered firm.*

*The defendant carried on a business as his own, and, in the opinion of the Court, was the real owner of the stock-in-trade; but in the registered firm his name did not appear as a partner. Held, that fraud being clearly established, and the registered firm being merely a prête-nom for the defendant, who was the real owner of the business, the capias issued against him for secretion of the assets should be maintained.*

A capias was issued against the defendant B. F. Bennett, on the ground of secretion. It was alleged that the defendant had been doing business at St. John's, P. Q., under the name of Bennett & Co., and had made promissory notes in the name of the said firm, on which there was a balance due of $704.67; that he had secreted his effects, etc.

The defendant, in his petition to quash the capias, denied the making of the notes, but did not produce any affidavit to state that the signature was forged. He pretended that he was merely acting under a power of attorney from the registered firm of Bennett & Co. Ada E. Hatch, who constituted the registered firm of Bennett & Co., was examined, and stated that she signed the notes, and that the signatures were in her own handwriting.

The COURT held that a clear case of fraud had been established. The person registered as the firm of Bennett & Co. was merely a *prête-nom* for the defendant, who was the actual owner of the business. The secretion charged against him was proved, and the *capias* must be maintained.

The conclusion of the judgment was in the following terms:

"Considérant qu'il résulte de la preuve faite en cette cause que le dit défendeur était le seul propriétaire du fonds de commerce de la maison de commerce de St. Jean, tenue sous le nom de Bennett & Compagnie; qu'il a permis qu'on se servit du nom de Bennett dans le but de laisser croire au public qu'il était membre de cette société; qu'il a fait contracter les deux sociétés ci-dessus mentionnées par son prête-nom Ada E. Hatch, et a fait enregistrer les déclarations susdites dans le but de s'approprier le fonds de commerce sans payer ses créanciers, comme il l'a fait; que la dite Ada E. Hatch n'était là que pour rendre service au défendeur et n'agissait que comme son prête-nom; qu'elle s'absenta pendant un assez long espace de temps, de janvier à avril 1882, en laissant le défendeur seul comme administrateur de cette maison de commerce; qu'elle était même absente lors de la cession du 10 janvier 1883, et que l'acceptation de cette cession faite par les créanciers du dit défendeur au nom d'Ada E. Hatch qui la faisait, ne peut être considéré comme une renonciation de leurs droits contre le défendeur leur débiteur;

"Considérant que le dit défendeur est réellement le débiteur personnel des dits demandeurs en cette cause; que les billets qui font la base de la présente action et qui sont mentionnés dans la déposition sur laquelle a émané le bref de *capias* en cette cause, sont dûs par le dit défendeur, vû qu'ils ont été signés pour ses affaires, et avec son autorisation, au nom d'une société qu'il avait formé lui-même dans le but de frauder ses créanciers;

"Considérant qu'en général le tiers n'a d'action contre les co-associés qu'autant que celui qui a traité avec lui s'est donné comme le représentant de la société, et que s'il contracte en son propre et privé nom sans parler de l'association que le tiers ignore, ce tiers ne pourrait agir que contre lui;

"Considérant que le défendeur en cette cause n'a pas représenté qu'il agissait pour une société dont il ne faisait pas partie, mais au contraire a représenté et laissé croire aux demandeurs en cette cause qu'il agissait pour lui-même ou pour une société dont il faisait partie;

"Considérant qu'en supposant même que la dite Ada E. Hatch et le dit Alexander Bennett eussent eu quelqu'intérêt dans le commerce que faisait le défendeur, il n'en résulte pas moins de la preuve que le défendeur était au moins leur associé, et que comme tel il est responsable des dettes de cette société;

"Considérant qu'il est permis à un tiers de prouver l'existence d'une société par preuve testimoniale, et que les demandeurs pouvaient prouver par témoins que les sociétés formées comme susdit étaient simulées ou n'étaient que les prête-noms du défendeur;

"Considérant que celui qui fait commerce au nom d'un autre est responsable des obligations qu'il contracte, si le commerce est fait pour son propre compte, et si le tiers entend contracter avec lui personnellement;

"Considérant que le dit défendeur a de fait recelé et tenté de receler et soustraire, avec l'intention de frauder ses créanciers, ses biens et effets, en transportant, comme il l'a fait, en différents temps, et par différentes quantités, son fonds de commerce de St. Jean à Montréal, de Montréal à Farnham-Est, et de Farnham-Est à Sherbrooke;

"Considérant que les allégations de la requête du dit défendeur demandant la cassation du dit

bref de *capias ad respondendum* ne sont pas prouvées, mais qu'au contraire les allégations de la déposition sur laquelle le bref de *capias* a émané sont amplement prouvées," etc.

Petition rejected.

*L. N. Benjamin* for plaintiffs.

*Greenshields, Busteed & Guerin* for defendant.

## SUPERIOR COURT.

MONTREAL, September 17, 1883.

*Before* RAINVILLE, J.

LALONDE v. ARCHAMBAULT, and LECLERC, party moving.

*Quebec Controverted Election Act—Costs of witnesses.*

An application was made on behalf of Joseph Leclerc, one of the witnesses summoned by the petitioner in the matter of the Verchères contested election (Quebec), praying that he be paid the amount for which he had been taxed for attendance as witness, out of the deposit made with the prothonotary as security for the costs in the cause. The suit in which the witness was examined is still pending before the Court.

The Court rejected the application on the ground that the witness had no right to be paid out of the deposit pending the suit.

Motion rejected.

*Choquet* for party moving.

*Lacoste, Globensky & Bisaillon, contra.*

## *HOUSE OF LORDS.*

November 30, 1882.

HARVIE v. FARNIE.

*Domicile of Married Woman—Validity of Foreign Divorce.*

*Where a marriage has been duly solemnized according to the local law of the place of solemnization, the wife no longer retains any other domicile than that of the husband; and, therefore, when an Englishwoman married in England, according to English law, a foreigner with a foreign domicile, and resided with him abroad.*

*Held (affirming the judgment of the Court below), that the Courts of the country of the husband's domicile had power to dissolve the marriage for a cause for which a divorce could not have been granted in England, and that such decree would be recognized in England.*

*Lolley's case, Russ. & Ry.* 237, *explained.*

*McCarthy* v. *De Caix*, 2 *Russ. & My.* 614, *disapproved.*

This was an appeal from a judgment of the Court of Appeal, James, Cotton and Lush, L.JJ. reported in 6 P. Div. 35, and 43 L. T. Rep. (N. S.), 737, affirming a decision of Sir James Hannen, President of the Probate Division, reported in 5 P. Div. 153, and 42 L. T. Rep. (N. S.), 482, dismissing a petition for a declaration of nullity of marriage.

The facts of the case were as follows:

In 1861 the respondent, Farnie, married in England an Englishwoman, according to the forms of English law. He was then a domiciled Scotchman, and after the marriage he continued to live in Scotland with his wife. In 1863 a decree of divorce was pronounced against him by the Scotch court at the suit of his wife, upon grounds, which it was admitted, would not have been sufficient to sustain a petition for divorce in England. He then settled in England, and in 1865 he married the appellant, then a Miss Harvey, in England, and has continued to live there.

His first wife was still living at the date of his second marriage, and this petition was brought by the second wife for a declaration of nullity, on the ground that the Scotch decree of divorce was not, under the circumstances, binding in England.

*Benjamin*, Q.C., and *Fooks* (*Webster*, Q.C., with them) for the appellant, contended that the marriage of an Englishwoman domiciled in England, if celebrated in England, is an "English marriage" as defined by *Lolley's* case, Russ. & Ry. 237; 2 Cl. & F. 567, and can only be dissolved in accordance with English law. (The Lord Chancellor—Is not this case within the decision in *Warrender* v. *Warrender*, 2 Cl. & F. 488?) No; we say it is distinguishable. [Lord Watson referred to *Pitt* v. *Pitt*, 4 Macq. 627; 10 L. T. Rep. (N. S.), 626.] The precise point was decided in *McCarthy* v. *De Caix*, 2 Russ. & My. 614; 2 C. L. & F. 568, but the courts below declined to follow it. They referred to *Tovey* v. *Lindsay*, 1 Dow. 117; *Shaw* v. *Gould*, L. Rep., 3 H. L. 55; 18 L. T. Rep. (N. S.), 833; *Birtwhistle* v. *Vardill*, 2 Cl. & F. 571; 7 id. 895; *Munro* v. *Munro*, 7 id. 842, and argued that in all of them the manner of a dissolution of a marriage was not under consideration, but its civil consequences while still existing. They also cited *Geils* v. *Geils*, 1 Macq. 254; *Maghee* v. *McAllister*, 3 Ir. Chan. 604; *Dolphin* v. *Robins*, 7 H. L. Cas. 390; *Brook* v. *Brook*, 9 id. 193.

The effect of the respondent's contention in this case would be to overrule *Lolley's* case.

*Winch* and *A. Ward*, who appeared for the respondent, were not called upon.

The LORD CHANCELLOR (Selborne)—My Lords: This case has been argued by the learned counsel for the appellant at considerable length, and the legal principle involved in it is not new to your Lordships. If it were not that there has been much consideration and discussion, if not in cases in specie exactly resembling the present, yet in cases involving principles bearing upon the present, I have no doubt that your Lordships would have desired to hear the case fully argued on both sides; but looking to the nature of this particular case, and to the state of authority upon the subject, I believe your Lordship are all of opinion that it is not necessary to call upon the counsel for the respondent here. Now the ground upon which this Scotch divorce is impeached appears to be this, and this alone, that by the law of England a divorce for such a cause (adultery) as was alleged here is only granted at the suit of the husband, except under particular circumstances which in this case do not appear to have existed. The husband's adultery, without anything more, would not in England be a ground of divorce. It is a ground of divorce in Scotland, and this divorce was upon such a ground at the suit of the wife. The circumstances under which this divorce was obtained were these: The marriage had been solemnized in England, but at the time of the marriage the husband was domiciled in Scotland. That matrimonial domicile was never changed. The husband and wife lived in Scotland; the adultery was committed in Scotland, and when both parties were resident there the suit for divorce was instituted in Scotland, and a decree was regularly pronounced in those circumstances by the Scottish courts. The judge of the Divorce Court and the Court of Appeal have both held, that under those circumstances, the sentence of divorce not being impeached for any species of collusion or fraud, was the sentence of a court of competent jurisdiction, not only effectual within that jurisdiction, but entitled to recognition in the courts of this country also On the other side it has been contended that there is a general rule of English law supposed to have been established in *Lolley's* case, Russ. & Ry. 237; 2 Cl. & F. 567, and not to have been since departed from in such a way as to make it now otherwise than binding on this house, to the effect that if an Englishwoman is married within the limits of the English jurisdiction to a foreigner (a Scotchman being for this purpose in the same position with a foreigner), that is a marriage which the English courts must regard as indissoluble by any other than an English jurisdiction; or if not that, at all events only dissoluble in the view of an English Court, if dissolved by some other competent jurisdiction for a cause for which it might have been dissolved in England. Now I must take the the liberty of saying, that if this question is to be tested upon principle apart from authority, although it cannot be denied that the varying jurisprudence, and perhaps legislation also, of different countries may and do introduce some undesirable cases of conflict between the laws of those different countries on questions of matrimonial status, yet if the question is to be approached on principle, I should certainly say that in such circumstances as those which exist in the present case all the principles of private international law point in the direction of the validity of such a sentence and of its recognition by the courts of other countries. Of course I assume that in the way of that recognition on the principle of international law, there would not be interposed any positive legislation bearing upon the point, or any positive prohibition binding upon the court in which the question arises. Upon the point of principle how does the matter stand? Let it be granted (and I think it is well settled) the general rule internationally recognized as to the constitution of marriage is, that when there is no personal incapacity attaching upon either party or upon the particular party who is to be regarded by the law to which he is personally subject, that is, the law of his own country, then marriage is held to be constituted everywhere, if it is well constituted *secundum legem loci contractus*; but that merely determines what in all these cases is the point you start from. When a marriage has been duly solemnized according to the local law of the place of solemnization the parties do become husband and wife, but when they become husband and wife what is the character which the wife assumes? She

becomes the wife of the foreign husband in a case where the husband is a foreigner in the country in which the marriage is contracted. She no longer retains any other domicil than his which she acquires. The marriage is contracted with a view to the matrimonial domicil which results from her placing herself by contract in the relation of wife to the husband whom she marries, knowing him to be a foreigner domiciled and contemplating permanent and settled residence abroad; therefore it must be within the meaning of such a contract, if we are to inquire into it, that she is to become subject to her husband's law, subject in respect of the consequences of the matrimonial relation and of all other consequences depending upon the law of the husband's domicil. That would appear to be so upon principle, and that principle followed out would certainly apply in a case like this, where the domicil into which she has married has never undergone a change, where there has been no divergence of co-habitation or residence, and where the crime was committed in the country both of the domicil and of the forum. It would appear that if this question is to depend on any principle at all, it must be upon the principle of recognizing the law of the forum and matrimonial domicil, which in this case both concur. Well now, that being my view of the plain and clear conclusion to which we shall be driven upon this subject, let us see how the matter really stands upon the authorities. There are a number of different cases which may be mentioned, and may be distinguished from each other; but as far as I know there are only two or three cases in which an appeal has been made to this house which present concurrently all the circumstances relied upon for the foundation of the jurisdiction in the present case. It is said that those circumstances existed in the case of *McCarthy* v. *De Caix*, 2 Russ. & My. 614; 2 Cl. & F. 568, because there the solemnization of the marriage was also in England, but the husband was a Dane. As far as I recollect, the parties lived together in Denmark as long as they lived together at all, and in the courts of Denmark, while they both lived there, a sentence of divorce was pronounced. That sentence was not for a cause, which even under the present law, would be recognized in England; it was for what abroad I think is called—or at least that is our English translation of the foreign legal term—incompatibility of temper. But, except as to the nature of the cause of the divorce, that case would seem in its original facts to have been like the present. It is said that Lord Brougham in the case of *McCarthy* v. *De Caix*, decided that because the solemnization of the marriage with an Englishwoman had taken place in England, therefore the Danish court could not under those circumstances dissolve the marriage. I have great respect for the judicial decisions of all who have at any time filled the office of lord chancellor. I have great respect, also, for the high reputation of Lord Brougham; but I am compelled to speak without great respect of the decision in *McCarthy* v. *De Caix*, because not only does it appear to me to proceed upon a view of *Lolley's* case which is not really tenable, but also it is a decision, which upon principles universally recognized, would be incapable of being supported, even if it were true that the English court ought not to have recognized that Danish divorce; because beyond all doubt on that supposition, both the husband and the wife lived and died domiciled in Denmark, and the distribution of both their personal estates would, by a law which is beyond controversy, fall to be regulated in England and everywhere by the law of Denmark, and not by the law of England; and therefore, unless it had been ascertained that the law of Denmark under those circumstances would not distribute those estates in the same manner as if there had been a valid divorce, the decision manifestly lost sight of the true question in the cause. I do not therefore think it necessary to say more about the case of *McCarthy* v. *De Caix*. It has been commented upon on various occasions in a manner certainly tending to shake its authority; but to my mind, nothing more is necessary entirely to destroy its authority than to bear in mind the fact, that even if the English courts ought to have declined to recognize in that case the Danish divorce, still the English courts could not with propriety have applied the English law to the case, because the distribution of the movable property in question depended entirely upon Danish law, and the English courts were bound to treat it as depending upon Danish law; therefore the case of *McCarthy* v. *De Caix* may be put aside.

I am not quite sure, but I think that in the

case of *Geils* v. *Geils*, 1 Macq. 254, the circumstances were also parallel with these of the present case, because here, if I am not mistaken, not only was the Scotch matrimonial domicil unchanged at the time of the divorce, but I think the adultery was committed in Scotland, and I think at the time of the action brought both parties were resident in Scotland. In that case the decision of the Scotch court was upheld upon an appeal from Scotland to this house. No doubt that by itself does not show that an English court ought to have also recognized the validity of the decision; but having regard to what has constantly fallen from the judges who in this house have determined questions of that kind with reference to general principles, I think the presumption rather is, that an English court ought, unless some reason which at present I am unable to perceive be shown to the contrary, to recognize the decision of a Scotch court in a case in which this house has held that the Scotch court had proper jurisdiction to pass such a sentence.

The third case is *Maghee* v. *McAllister*, 3 Ir. Ch. 604, a case in Ireland before Blackburn, L. C. There, as in the Danish case, the cause of divorce was one which would not be sufficient in England, desertion and non-adherence, but the parties there also had been from the first matrimonially and actually domiciled in Scotland. They were not both in Scotland when the action was brought, and that makes it stronger. I rather think that the cause of action arose out of the fact that the wife had withdrawn herself, and she was elsewhere. Nevertheless the jurisdiction was upheld on the same principles on which this house upheld the Scotch jurisdiction in *Warrender* v. *Warrender*, 2 Cl. & F. 488; 9 Bli. (N. S.), 89, where the matrimonial domicile had all along been Scotch, but the crime was alleged to have been committed out of Scotland, and the wife was resident there; still this house held, in a Scotch appeal undoubtedly, that the Scotch court had proper jurisdiction; and the Lord Chancellor of Ireland, under circumstances similar in principle, held that an Irish court ought, upon principle, according to the comity of nations, to recognize the competency of the Scotch jurisdiction to pronounce the divorce which had been pronounced in *Maghee* v. *McAllister*. I believe that those are the only cases which are in their circumstances exactly like the present case. Much of illustration and of valuable and important doctrine is undoubtedly to be found in other authorities. I will just glance at some of those authorities in order to see precisely what they do and what they do not determine. I will begin with *Lolley's* case, Russ. & Ry. 237. Now what was *Lolley's* case? It was a case of this class, that persons who had married, and had always been and always continued to be matrimonially and actually domiciled in England, had recourse to Scotland for the purpose of constituting a merely collusive domicil, and there obtained a divorce for a crime, I take it, committed in Scotland. It was held by the English courts that that was not a valid sentence. I do not myself think that there was certainly any great hardship upon Mr. Lolley, the husband, because, whether there was collusion on the part of his wife or not, it is quite certain that he went through the whole proceeding in order to get rid of his wife and marry another woman, with whom he had already entered into a conditional engagement. But there was a total absence of matrimonial or actual domicil. We need not consider whether a change of domicil would or would not have been sufficient. The domicil was throughout English, and the recourse to Scotland was merely for the purpose of getting rid of the marriage. That case decided, and every subsequent case is consistent with the decision, that in those circumstances the Scotch Court had no proper jurisdiction, or at all events not such a jurisdiction as could be recognized as giving any effect to its sentence in England. There arose a somewhat similar question in the case of *Tovey* v. *Lindsay*, 1 Dow. 117, and it is remarkable that there Lord Eldon did, in the course of the argument, according to the report which I hold in my hand, once or twice before he came to deliver judgment, express himself in terms not different from the terms used at your Lordship's bar, by the learned counsel for the appellant, as to the point decided in *Lolley's* case. He is reported to have said, on page 124 of the report, that the twelve judges had lately decided, that as by the English law marriage was indissoluble, a marriage contracted in England could not be dissolved in any way except by an act of the legislature, which is very much the way in which Mr. Benjamin put it. And again, on the top of the next page, "You say that the marriage ought to be dissolved. Her answer to that is, that being contracted within the pale of the English law, it is indissoluble." So that Lord Eldon during the argument once or twice expressed himself, with regard to *Lolley's*

case, in the terms of the appellant's argument in this case; but when he came to deliver his judgment, it is quite plain that upon mature consideration he saw reason to take a different view. The material facts there were these: The original domicil of the husband was Scotch; he had afterwards lived a good deal in England, particularly in Durham. He had separated from his wife. His wife remained at Durham, and he afterwards sued her for a divorce in Scotland, she being out of the jurisdiction, and there being no *corpus delicti* in Scotland. The Scotch courts had treated it as a confessedly Scotch domicil. Lord Eldon in the whole of his judgment treats domicil as the point upon which the question ought properly to depend; not however ultimately deciding anything, and certainly not deciding the very important question which might have arisen if the change to an English domicil had been established, namely, how far a subsequent change of domicil would affect the jurisdiction to dissolve the marriage; but he considered the fact of domicil to be necessary to be ascertained, which according to the view of *Lolley's* case taken by the appellant's counsel at your Lordship's bar, could not possibly have been necessary at all. Therefore I think we may infer very clearly that in Lord Eldon's mind it could not be determined off-hand that the Scotch court had no jurisdiction merely on the ground that the marriage had taken place in England. Then I come to observe upon two other classes of cases, or rather one other class, because really *Dolphin* v. *Robins*, 7 H. L. Cas. 390, and *Shaw* v. *Gould*, L. Rep., 3 H. of L. 55; 18 L. T. Rep. (N. S.), 833, seem to me to be very nearly the same in their circumstances as *Lolley's* case, and I will not therefore dwell upon those cases. The other class of cases is that which was last mentioned, namely, *Niboyet* v. *Niboyet*, 4 P. Div. 1; 39 L. T. Rep. (N. S.), 486, where the forum which dissolved the marriage was not that of the matrimonial domicil, but was that of the *bona fide* residence of both parties, both being within the jurisdiction, and the crime having been committed there. Now if that case was well decided, it is not certainly an authority in the appellant's favor, because it goes to this length, that at all events under the English statute, if those circumstances are found concurring, even domicil is not necessary to give jurisdiction to dissolve a marriage. Whether or no another country, the country of those parties (France, I think) would have recognized the decision we need not at present inquire, because either it is applicable, on the present occasion, or it is not. If it is applicable, it is certainly an authority against the appellant; if it is not applicable, it does not really help her. The case of *Pitt* v. *Pitt*, 4 Macq. 627; 10 L. T. Rep. (N. S.), 626, no doubt was a case which did not unite the circumstances which your lordships have to consider here, because, in *Pitt* v. *Pitt*, in which this house on an appeal from Scotland reversed an order, which had affirmed the jurisdiction of the Scotch court, and therefore determined that the court had no jurisdiction, the circumstances were these: "The matrimonial domicil was English, the solemnization of the marriage was in England. Mr. Pitt, the husband, had gone to Scotland. It was in controversy whether he had there acquired an actual domicil or not, but it was decided that he had not. He therefore retained his English domicil. The wife was not in Scotland, and alleged adultery was not committed in Scotland. In those circumstances the house came to the opposite decision from that which it had arrived at in *Warrender* v. *Warrender ubi sup.*, the circumstances being very parallel, except that in the one case there was, and in the other there was not, a Scotch domicil. In *Warrender* v. *Warrender*, where there was a Scotch domicil, the jurisdiction was upheld, though the crime had not been committed in Scotland, and though the wife who was the defender, was not resident in Scotland. In *Pitt* v. *Pitt*, the jurisdiction was denied, because there was not a Scotch domicil, the other circumstances being the same. Now, I do not say that the case of *Pitt* v. *Pitt* would of necessity govern cases like *Niboyet* v. *Niboyet*, for example, if they were to arise in Scotland. That is not a question which your lordships have now to determine, and it is not desirable that you should go beyond the case which you have to determine; but this I will say, without going through the authorities, or all the cases which have been cited, that when they are carefully examined you find that the current of the best authority which pervades them is in favor of regarding and not disregarding international principles upon this subject, when you do not find the positive law of the country where the forum is in conflict with those principles, unless *McCarthy* v. *De Caix* may be considered to be an exception. The present decision in the Court of Appeal is in accordance with international law and with the whole stream of sound authority, including Lord Lyndhurst, Lord Brougham himself (though no doubt from the view which he took of *Lolley's* case he not infrequently contended against it in terms which your Lordship probably would not unreservedly adopt), Lord St. Leonards, Lord Westbury, Lord Cranworth, Lord Chelmsford and Lord Kingsdown, all of whom concur. I have no hesitation in saying, that from the passages which have been read from the judgments of each and every one of those noble and learned Lords, I should confidently infer, that if the present case had been argued before all or any one of them, they would have concurred in the judgment which I now move your lordships to pronounce, which is, that the present appeal be dismissed with costs.

LORD BLACKBURN and LORD WATSON concurred.

Appeal dismissed.