[HIGH COURT OF AUSTRALIA.]

AINSLIE . . . . . APPELLANT;
PETITIONER,

AND

AINSLIE . . . . . RESPONDENT.
RESPONDENT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *April* 4, 5.

MELBOURNE, *May* 30.

Knox C.J., Isaacs, Higgins, Powers, Rich and Starke JJ.

Husband and Wife—Restitution of conjugal rights—Suit by husband on ground of desertion—Defence—Order of Court of another State for separation having effect of decree for judicial separation—Consent by husband to order being made—Conflict of laws—Recognition of foreign judgment—Final order—Summary Jurisdiction (Married Women) Act 1896 (*W.A.*) (60 *Vict. No.* 10), *secs.* 2, 3, 5 *—Summary Jurisdiction (Married Women) Amendment Act* 1902 (*W.A.*) (1 & 2 *Edw. VII. No.* 7), *sec.* 2*—Matrimonial Causes Act* 1899 (*N.S.W.*) (*No.* 14 *of* 1899), *sec.* 5.

In 1919, a husband and wife being then domiciled and resident in Western Australia, the wife made an application to the Court of Petty Sessions at Perth, under secs. 2 and 3 of the *Summary Jurisdiction (Married Women) Act* 1896 as amended by sec. 2 of the *Summary Jurisdiction (Married Women) Amendment Act* 1902, by a complaint that the husband had deserted her on 5th August 1919. In November 1919 the husband signed an agreement by him to an order being made for separation, for maintenance at a certain weekly rate and for a certain sum for costs, and an order was made by which it was adjudged that the complaint was true and it was ordered that the wife be no longer compelled to live with the husband, that maintenance should be paid at the agreed rate and that costs at the agreed sum should be paid to the wife. In 1925, when the husband was domiciled and resident in New South Wales and the wife was temporarily resident there, the husband instituted proceedings in the Supreme Court of New South Wales against the wife for restitution of conjugal rights on the ground that she had in or about July 1919 without just cause or excuse withdrawn from cohabitation with him and had kept and continued away from him and from cohabitation

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with him without any just cause. The trial Judge found that that ground was substantiated and that the order of November 1919 was not an answer to the husband's petition. On appeal the Full Court held that the order of November 1919 was an answer to the husband's suit. On appeal to the High Court,

Held, by *Knox* C.J., *Isaacs*, *Rich* and *Starke* JJ. (*Higgins* and *Powers* JJ. dissenting), that the appeal should be dismissed :

By *Knox* C.J., *Isaacs* and *Starke* JJ., on the ground that the order of November 1919 was, so far as separation was concerned, a final and conclusive order and, since it had the effect of a decree for judicial separation and was given by a Court of competent jurisdiction in the country where the parties were domiciled, was binding on the parties in the Courts of New South Wales and was an answer to the husband's suit ;

By *Isaacs* J., on the ground also, and by *Rich* J. on the ground, that the agreement by the husband to the order of November 1919 being made afforded just cause for the wife living apart from the husband and was an answer to the husband's suit.

Decision of the Supreme Court of New South Wales (Full Court) : *Ainslie* v. *Ainslie*, (1926) S.R. (N.S.W.) 567, affirmed.

APPEAL from the Supreme Court of New South Wales.

By petition to the Supreme Court in its Matrimonial Causes Jurisdiction dated 6th October 1925 Archibald Ainslie sought a decree for restitution of conjugal rights against his wife, Adriana Kate Ainslie. In the petition it was alleged that the respondent did in or about the month of July 1919 without any just cause or excuse withdraw from cohabitation with the petitioner and had kept and continued away from him and from cohabitation with him without any just cause whatever, and thence onwards had refused and still refused to render him conjugal rights ; and that the petitioner wrote to the respondent on 24th September 1925 asking her to return and live with him and that she, after a reasonable opportunity had been offered, had refused and neglected to cohabit with the petitioner and continued so to refuse and neglect without just cause. The respondent by her answer denied that she had without just cause or excuse withdrawn from cohabitation ; admitted that she had ceased to live with the petitioner ; and said that on 21st November 1919, before the Court of Petty Sessions at Perth in Western Australia, on her complaint that the petitioner had on 5th August 1919 at Perth wilfully deserted her, that Court adjudged her

complaint to be true and ordered that she be no longer compelled to cohabit with the petitioner and that the petitioner should pay to the respondent £2 per week and a sum of £2 2s. for costs; and that that order still remained in full force and effect. The following issues were then tried by *Owen* J.: (1) whether the petitioner was married to the respondent on 25th August 1914 and (2) whether the respondent had withdrawn from cohabitation with the petitioner and had kept and continued away from him without any just cause whatsoever and without any such cause had refused and still refused to render him conjugal rights. Having heard evidence, the learned Judge found both the issues in favour of the petitioner and made a decree for restitution of conjugal rights. On appeal by the respondent the Full Court allowed the appeal and dismissed the petition: *Ainslie* v. *Ainslie* (1).

From that decision the petitioner now appealed to the High Court.

Other material facts are stated in the judgments hereunder.

Evatt (with him *Levy*), for the appellant. The question is: Is an order for separation and maintenance made by consent by a Court of Petty Sessions of Western Australia under the *Summary Jurisdiction* (*Married Women*) *Act* 1896 (W.A.) as amended by the *Summary Jurisdiction* (*Married Women*) *Amendment Act* 1902 (W.A.), at a time when husband and wife were domiciled in Western Australia, a complete bar and defence to a suit for restitution of conjugal rights brought in New South Wales when the matrimonial domicile is changed to New South Wales? The order of November 1919 is not a complete defence or bar to the present suit for three reasons:—(1) It is not a final and conclusive order but is an order subject to be discharged at any time by the Court which made it (*Summary Jurisdiction* (*Married Women*) *Act* 1896, sec. 5). No British Court will enforce affirmatively, or regard as of binding effect negatively, any foreign judgment which may be discharged at any time by the Court which made it (*Nouvion* v. *Freeman* (2); *Harrop* v. *Harrop* (3); *De Brimont* v. *Penniman* (4); *In re Macartney*;

(1) (1926) 26 S.R. (N.S.W.) 567.
(2) (1889) 15 App. Cas. 1, at p. 13.
(3) (1920) 3 K.B. 386, at p. 397.
(4) (1873) 10 Blatchford's Circuit Ct. Reps. 436, at p. 443.

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Macfarlane v. *Macartney* (1); *Beatty* v. *Beatty* (2); *Davis* v. *Davis* (3); *Plummer* v. *Woodburne* (4); *Halsbury's Laws of England*, vol. VI., p. 290; *Dicey's Conflict of Laws*, 4th ed., p. 472)). The status of a husband and wife is not affected by a decree for judicial separation. (2) The order of November 1919 was made without jurisdiction. The history of the legislation shows that a separation order was intended to be available only in cases of cruelty and not in cases of desertion (*Harriman* v. *Harriman* (5)).

[KNOX C.J. referred to *Eastbourne Guardians* v. *Croydon Guardians* (6).]

(3) The order of November 1919 should not, on general grounds of policy, be recognized in New South Wales as binding for the purposes of this suit. The New South Wales law does not provide for any similar order and the order for separation is entirely inapplicable where the only complaint is desertion. On the assumption that the order of November 1919 is equivalent to an order of the Supreme Court of Western Australia for judicial separation, the order is not sufficient in itself to bar a suit for restitution of conjugal rights in New South Wales. There is no case in which a foreign decree of judicial separation has been given effect to in England. [Counsel referred to *Attorney-General for Alberta* v. *Cook* (7); *Armytage* v. *Armytage* (8); *Halsbury's Laws of England*, vol. VI., pp. 264, 265.]

[ISAACS J. referred to *Walter* v. *Walter* (9).

[RICH J. referred to *Wirth* v. *Wirth* (10).]

Reasonable belief by a wife that she had just cause for refusing to cohabit with her husband is not relevant to a suit by the husband for restitution of conjugal rights (*Oldroyd* v. *Oldroyd* (11)). Assuming the order of November 1919 to be conclusive evidence of the desertion by the husband upon which that order was founded, that is not enough to constitute an answer to the husband's present suit for restitution of conjugal rights (*Ex parte Scarlett* (12)). In

(1) (1921) 1 Ch. 522, at p. 531.
(2) (1924) 1 K.B. 807.
(3) (1922) 22 S.R. (N.S.W.) 185.
(4) (1825) 4 B. & C. 625, at p. 637.
(5) (1909) P. 123, at pp. 138, 145, 149, 151.
(6) (1910) 2 K.B. 16, at p. 28.
(7) (1926) A.C. 444, at pp. 462, 465
(8) (1898) P. 178, at pp. 195, 196.
(9) (1921) P. 302.
(10) (1918) 25 C.L.R. 402.
(11) (1896) P. 175, at p. 184.
(12) (1921) 21 S.R. (N.S.W.) 148, at p. 158.

proceedings of this nature the Court must be satisfied of the truth of the facts relied on (*Harriman* v. *Harriman* (1)).

Studdert, for the respondent. The necessity for a foreign judgment being final and conclusive is applicable only to cases of judgment for debt and not to cases like the present one (*Dicey's Conflict of Laws*, 3rd ed., p. 448). The order of November 1919 affects the status of the parties and, being made in a Court of the domicile, should be recognized by the Courts of New South Wales as binding. The order is final and conclusive as to the matter in dispute here. It is a final and conclusive determination that the appellant had deserted the wife. That order having been made, there could not be desertion by the respondent while the order stood (*Harriman* v. *Harriman* (2)). The order being given the effect of a decree for judicial separation releases the spouses from any duty to cohabit (*Robinson* v. *Robinson* (3) ; *Miles* v. *Miles* (4)), and in Western Australia it would be an answer to a suit by the husband for restitution of conjugal rights (*Sibbald* v. *Sibbald* (5)). A decree for judicial separation made by a competent Court of the domicil will be recognized in other countries (see *Le Mesurier* v. *Le Mesurier* (6) ; *Connelly* v. *Connelly* (7) ; *Foote's Private International Jurisprudence*, (4th ed.), pp. 112, 124 ; *Burge's Colonial and Foreign Law*, vol. III., p. 938 ; *Armytage* v. *Armytage* (8) ; *Anghinelli* v. *Anghinelli* (9)). Even if the order of November 1919 cannot have extra-territorial effect as a judgment of a Western Australian Court, it nevertheless is a bar to the appellant's suit. It is still in force and was made with the consent of the appellant. Being made with his consent it is equivalent to a covenant by him that he would not sue for restitution of conjugal rights, and would bind him wherever he was (*Wirth* v. *Wirth* (10)).

Evatt, in reply. The consent of the appellant has not been relied on before. An agreement to separate is not a bar to a suit for

(1) (1909) P., at pp. 131, 144.
(2) (1909) P., at p. 138.
(3) (1919) P. 352, at p. 355.
(4) (1922) 22 S.R. (N.S.W.) 117.
(5) (1907) 26 N.Z.L.R. 135.
(6) (1895) A.C. 517.
(7) (1851) 7 Moo. P.C.C. 438, at p. 451.
(8) (1898) P. 178.
(9) (1918) P. 247.
(10) (1918) 25 C.L.R. 402.

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restitution (*Sawyers* v. *Sawyers* (1)). The consent of the husband is not a ground for making an order under the Western Australian Act (*Joss* v. *Joss* (2)). [Counsel also referred to *Russell* v. *Russell* (3) ; *Foote's Private International Jurisprudence*, 4th ed., pp. 513, 526 ; *Piggott's Foreign Judgments*, 3rd ed., Part I., p. 73.]

Cur. adv. vult.

May 30.

The following written judgments were delivered :—

KNOX C.J. The appellant sued the respondent in the Supreme Court of New South Wales for a decree for restitution of conjugal rights. The respondent denied the allegations of fact contained in the petition and set up as a defence an order dated 21st November 1919 made by the Court of Petty Sessions at Perth in Western Australia under the Act 60 Vict. No. 10 of that State, containing a provision that she should be no longer compelled to cohabit with the appellant. By that Act such a provision while in force is to have the effect in all respects of a decree for judicial separation on the ground of cruelty, and the effect of such a decree is that the wife, so long as it remains in force, is released from her duty to cohabit with her husband. At the time when the order in question was made the parties were domiciled in Western Australia, but the appellant before the presentation of his petition had abandoned that domicile and acquired a domicile in New South Wales. The respondent continued to reside in Western Australia, and when the suit was instituted still had her home there, though she was temporarily resident in New South Wales. The learned Judge in Divorce found that the wife was not justified in withdrawing from cohabitation in July or August 1919 and that, when the order of November 1919 was made, she had withdrawn from cohabitation without just cause and accordingly the husband had not then deserted her. He found further that even if the order must be regarded as establishing just cause for withdrawal there was at the time of hearing the suit no just cause for the wife refusing to return, and that the efforts made by the husband to induce her to

(1) (1911) 28 N.S.W.W.N. 63. (2) (1924) S.A.S.R. 461.
(3) (1895) P. 315, at pp. 339, 340.

return were genuine. On the question whether the order of the Western Australian Court operated as a bar to the relief claimed, he was of opinion that the order absolving the wife from her duty to cohabit with her husband did not affect the status of the parties and had no effect outside Western Australia, and that the Act, which gave to the order the effect of a decree for judicial separation, also had no force or effect outside Western Australia. Accordingly, he made a decree for restitution.

On appeal the Full Court by majority (*Street* C.J. and *Gordon* J., *Ferguson* J. dissenting) reversed the decision of the primary Judge and dismissed the suit. *Gordon* J., in whose reasons the Chief Justice concurred, thought that the order of 21st November 1919, having been made by a Court of competent jurisdiction in the State in which the parties were then domiciled, ought to be held binding on the parties wherever they might be, supporting that view by reference to the dictum of *Gorell Barnes* J. in *Armytage* v. *Armytage* (1), and that, if that order had force and effect in New South Wales, it showed a good and conclusive reason for the wife refusing to live with her husband, and therefore afforded a complete answer to his suit for restitution. *Ferguson* J. thought that the position of the wife was that by the law of Western Australia she was not bound to live with her husband and would have a complete answer to any proceeding in Western Australia based on an alleged duty to live with him, but that, as the parties were now domiciled in New South Wales, their matrimonial rights and obligations must be regulated by the law of that State, and not by the laws of Western Australia to which they owed no allegiance.

On the hearing of the appeal to this Court Dr. *Evatt* for the appellant raised a question which does not appear to have been discussed in the Supreme Court. He contended that in proceedings in the Courts of New South Wales no effect should be given to the order of November 1919, because it was not a final and conclusive order. The Act under the authority of which it was made contains a provision that a Court of summary jurisdiction in which any order under this Act has been made "may, on the application of the married woman or of her husband, and upon cause being shown

(1) (1898) P., at p. 196.

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upon fresh evidence to the satisfaction of the Court at any time alter, vary, or discharge any such order." No doubt, the general rule is that effect will not be given to a foreign judgment unless it be final and conclusive (see *Nouvion* v. *Freeman* (1)). But it seems to me that this rule has no application to the facts of the present case. The effect of the order on which the respondent seeks to rely is that so long as that order stands the respondent, wherever the order is operative, is relieved of the obligation to live with her husband. The order does finally and conclusively determine that, until it is discharged, the wife is not bound to cohabit with her husband, and its discharge cannot affect retroactively the right to live apart which it confers on her. It is not like an order for payment of alimony, which remains subject to the control of the Divorce Court, which has a discretion to vary it, even as to arrears (*Robins* v. *Robins* (2)). Not is there any analogy between the provision of this order on which the respondent relies and the provisions of the orders under consideration in *Harrop* v. *Harrop* (3) and *In re Macartney*; *Macfarlane* v. *Macartney* (4). The real question to be answered is that stated by *Gordon* J., namely, whether a decree of judicial separation or an order having the same effect pronounced by a Court of competent jurisdiction in the country of the domicile of the parties will be recognized as binding on the parties by the Courts of another country in which they may happen to be. On the whole, I am of opinion that this question should be answered in the affirmative, and I have nothing to add to the reasons given by the learned Judge in support of that conclusion.

In my opinion the appeal should be dismissed.

ISAACS J. The facts are sufficiently stated in the judgment of *Gordon* J., concurred in by *Street* C.J. I agree in the conclusion arrived at by the majority of the Supreme Court and substantially with the reasons. Having regard to the great importance of the matter and the difference of opinion, I shall state why I have arrived at the same result. It appears from the judgment of the learned trial Judge, *Owen* J., that the order of the Court of Petty

(1) (1889) 15 App. Cas. 1.
(2) (1907) 2 K.B. 13.
(3) (1920) 3 K.B. 386.
(4) (1921) 1 Ch. 522.

Sessions, Perth, Western Australia, made on 21st November 1919, was relied on in two ways. First, it was relied on as an answer *simpliciter* to the petition, and next, as part of the evidence of an agreement acted on by the parties that the wife might remain apart from the husband. The validity of those contentions is challenged on this appeal on the grounds (1) that the order is not final; (2) that it has no operation in New South Wales, and (3) that a suit of this nature must be determined on considerations that prevailed in the old Ecclesiastical Courts, and agreements for separation were not amongst the recognized legal causes justifying separation.

(1) As to finality of the order, some argument was addressed to us that the principle of *Nouvion* v. *Freeman* (1) was confined to claims for debt. I do not find it necessary to say anything about that. The order in this case was said to be not final because the Act under which it was made, the *Summary Jurisdiction* (*Married Women*) *Act* 1896 (60 Vict. No. 10), as amended by 1 & 2 Edw. VII. No. 7, provided by sec. 5 that any two Justices acting within the district "may, on the application of the married woman or of her husband, and upon cause being shown upon fresh evidence to the satisfaction of the Court at any time, alter, vary, or discharge any such order, and may upon any such application from time to time increase or diminish the amount of any weekly payment ordered to be made." If a judgment is put forward as a bar because by it a matter in contest in another proceeding is *res judicata*, it must, in my opinion, be final in its nature. I also accede to the contention that an order such as the one under consideration, so far as it directs payment of a weekly sum, is, in view of sec. 5 quoted, not final, and therefore not capable of being made the foundation of an action to recover the money. The statutory method of recovery (sec. 7) must be followed. But it is stating the relevant proposition much too widely to say that, because the Court that makes an order may revise it or discharge it, that conclusively shows the order is not final in the required sense. Still more is that so when the order is a composite order, as here, ordering (a) separation, (b) maintenance and (c) costs. One part may be final and another not. For instance, the order was unquestionably final as to costs. As to maintenance, it is as clearly

(1) (1889) 15 App. Cas. 1.

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not final, because there is nothing to qualify the provisions of sec. 5 above quoted, and therefore there is never at any moment a finally fixed sum in the nature of a "debt," which can be sued for and be considered by another Court as a certain liability. To this *Nouvion* v. *Freeman* (1) applies, and it finds illustrations in such cases as *Harrop* v. *Harrop* (2) and *In re Macartney*; *Macfarlane* v. *Macartney* (3), for the principle does not depend on the judgment being foreign. But as to the "separation" part of the order, it may, and in my opinion does, stand in a different position. In *Macartney's Case* (4) *Astbury* J. points the distinction. The order of the Court of Appeal of Malta declared that the infant was the natural daughter of the testator, and condemned his estate in £75 each six months as aliment. *Astbury* J. says: "The declaration as to paternity determines the status of the child and is clearly *in rem*." That part was final.

The true rule is to see whether or not the Legislature has by its enactment left the order entirely floating, so to speak, as a determination enforceable only as expressly provided and in the course of that enforcement subject to revision, or whether the order has been given the effect of finality unless subsequently altered. This can only be ascertained by construing the Act as a whole. An instructive instance is *Austin* v. *Mills* (5). There it was held that a County Court judgment was pleadable in bar to an action for the consideration on which it was founded. It was urged that, as sec. 100 of the Act 9 & 10 Vict. c. 95 enabled the Judge of the County Court to rescind or alter his order, the order itself was not final. But the Court held that the order was nevertheless a final and complete decision, and the question determined by it could not again be litigated. It is palpable, if the argument of non-finality were to prevail because of the power to vary, that no employee could sue at common law for his award wages under a Federal award. Yet the contrary has been held. And instances might be multiplied.

I therefore look to the Act itself (60 Vict. No. 10) as amended to see what the Legislature intended with respect to this order for

(1) (1889) 15 App. Cas. 1.
(2) (1920) 3 K.B. 386.
(3) (1921) 1 Ch. 522.
(4) (1921) 1 Ch., at p. 532.
(5) (1853) 9 Ex. 288.

separation. Sec. 2 enables any married woman whose husband shall have deserted her and shall have caused her to leave and live separately and apart from him, to apply to any two justices for an order under the Act. Sec. 3 enables an order to be made containing (*a*) " a provision that the applicant be no longer bound to cohabit with her husband (which provision, while in force, shall have the effect in all respects of a decree of judicial separation on the ground of cruelty) " ; (*b*) a provision for the custody of children under 16 ; (*c*) a provision for a weekly sum ; (*d*) a provision for costs. It could not be seriously contended that in Western Australia—and if not there, then not anywhere—the order as to custody of children was not final until revoked or varied, so as to be set up in any Court should the question of the right to custody be raised. As to costs, of course it is final. As to weekly provision, it is not. But as to the remaining provision—separation (the severability of which is markedly shown by *Bragg* v. *Bragg* (1))—it is expressly stated to have " in all respects " the effect of a judicial separation for cruelty. As to the meaning and effect of this, see *Harriman* v. *Harriman* (2). What, then, is the " effect " of such a judicial separation ? It is undoubtedly " final " in the same sense as the County Court judgment referred to, " while in force." " In force " means until discharged or varied under sec. 5. If a decree for judicial separation is " final," so is the Magistrate's order as to sec. 3 (*a*). Such a decree is always as between the parties an estoppel, though not on the Court itself when asked for a decree of divorce on account of public policy. To deny the force of such an order while existing is wholly contrary to the considerations I have stated, and indeed to the important case of *Harriman* v. *Harriman* (3).

(2) The next question is as to the operation of the order in New South Wales. It is highly important to remember that, as *Gordon* J. pointed out, the order of the Court of Petty Sessions was the order of the place of domicile. We find in many cases—even in some of the most recent and most authoritative, as *Lord Advocate* v. *Jaffrey* (4)—that " no Courts " have " a power to divorce *a vinculo*

(1) (1925) P. 20.
(2) (1909) P. 123, at pp. 134, 138, 139, 144.
(3) (1909) P. 123, particularly per *Buckley* L.J. (as he then was) at p. 149.
(4) (1921) 1 A.C. 146, at p. 162, per Lord *Dunedin*.

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except the Courts of the country of the domiciled husband." The same learned Lord, speaking for the Judicial Committee in *Sasson* v. *Sasson* (1), says of divorce *a vinculo*: "The case of *Le Mesurier* v. *Le Mesurier* (2) finally settled that the proper and only Court is the Court of the domicil." But if the law of the domicile (and I make no distinction here between "domicile" and "domicil") gives to a divorce *a vinculo* a force recognized everywhere, it must unquestionably give binding force everywhere—subject, of course, to local law to the contrary—to a judgment rendered by a Court having jurisdiction both *jure gentium* and *jure municipii*, and regulating personal rights and obligations consistent with the existence of a status of marriage. I do not need to rely on what Viscount *Haldane* in *Jaffrey's Case* (3) calls "the status which . . . residence can confer," referring to what Lord *Watson* said in *Le Mesurier's Case* (4). The order here relied on was not only an order recognized by the law of the domicile, as in *Armitage* v. *Attorney-General*; *Gillig* v. *Gillig* (5), as to which it is unnecessary for me to say anything, but it was an order of a Court of the domicile, and so conformed to the strictest statement of the rule. As long as it subsists and no personal countervailing circumstance alters the relations of the parties, I apprehend it governs those relations to the extent of its directions, even in the Court of any new country of domicile—certainly where there is no *lex fori* to the contrary. If the matter depended on residence alone, I think I should have to consider whether an order for separation, not aliment, on the ground of desertion fell within the international recognition referred to, which may be found to rest on the necessity of the case. I do not pursue or investigate this because domicile was present here at the crucial moment. But if, as I accept it, the order in this case was an order of the domicile, the husband cannot shake it off merely by changing his domicile, however bona fide in other respects that change may be. The order is therefore, in my opinion, a standing curial direction, as binding as any other curial direction of the domicile, that the wife is not bound during its continuance to cohabit

(1) (1924) A.C. 1007, at p. 1009.
(2) (1895) A.C. 517.
(3) (1921) 1 A.C., at p. 152.
(4) (1895) A.C., at pp. 526, 527.
(5) (1906) P. 135.

with the husband, although he remains her husband. If he wishes he may apply to get rid of it in the only way provided by law.

(3) But that, though sufficient, regards only one effect of the transaction which includes the order. I mean the agreement that was made to enable the speedy procuring of the order. The order was made by consent. It was urged that therefore, although it adjudged the complaint of desertion to be true and thereupon ordered "that the complainant be no longer compelled to cohabit with the defendant," yet that the Court making the order had no jurisdiction to act on consent. There is no foundation in law for such a contention. It is demolished by *Pemberton* v. *Hughes* (1), and particularly by the reasoning of *Lindley* M.R. (2), *Rigby* L.J. (3) and *Vaughan-Williams* L.J. (4). By the law of the domicile that order stands unimpeached in Western Australia, and no Court of New South Wales can challenge it for the reason put forward.

That objection failing, we have a valid order, made by consent for valuable consideration, the husband admitting his desertion, and—so long as the judgment stands—admitting it irrevocably for the purposes of that transaction. That then, in its totality, amounts to an agreement that the parties shall by a binding order of a Court of the domicile continue to be separated, if the wife so desires, as long as the order remains in force.

Then arises the question what is the effect in the New South Wales Divorce Court of such an agreement when, contrary thereto, the husband claims restitution of conjugal rights and the wife insists on the agreement as a just cause for refusal? In my opinion, the answer is not now doubtful. She has a just cause. It is now well recognized that *Russell* v. *Russell* (5) is a landmark in the law of restitution of conjugal rights. It is not only the decision of a Court of high authority, but it has been applied and acted on by the distinguished authority of Lord *Birkenhead* L.C. in *Walter* v. *Walter* (6). Since those decisions it must, I think, be implicitly accepted—unless some higher authority says differently—that, where there is a valid agreement to live apart, acted on by one party, and neither

(1) (1899) 1 Ch. 781.
(2) (1899) 1 Ch., at pp. 792-793.
(3) (1899) 1 Ch., at p. 795.
(4) (1899) 1 Ch., at pp. 796-797.
(5) (1895) P. 315.
(6) (1921) P. 302.

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party takes any step to set it aside, then to pronounce a decree for restitution of conjugal rights would be compelling the Court to treat the wife as having deserted her husband without reasonable cause, contrary to the fact. That such an agreement amounts to just cause has long been settled law, even before 1884, as in *Anquez* v. *Anquez* (1). By a number of authoritative decisions it has been determined that an agreement to continue apart is a personal right, which, if not set up, is no bar to a decree, though it may require the Court to investigate sincerity, but, if set up, affords a complete answer on the ground of just cause. The principal cases are *Williams* v. *Williams* (2), *Walter* v. *Walter* (3), *Mann* v. *Mann* (4), *Palmer* v. *Palmer* (5). To these I would add a reference to *Fielding* v. *Fielding* (6).

For the two reasons stated, namely, the existence of the order of the domicile, and the just cause arising from it and from the agreement constituted between the parties wherever made, I am of opinion that the order of the Full Court was correct, and that this appeal should be dismissed.

HIGGINS J. The main question discussed before us is whether the order made by the Court of Petty Sessions in Perth, Western Australia, in November 1919, that the wife " be no longer compelled to cohabit with " the husband, had an exterritorial effect, so as to bar the husband's suit in New South Wales for restitution of conjugal rights. In this case, unless the wife can demand separation, the husband can demand restitution (*Russell* v. *Russell* (7); *Oldroyd* v. *Oldroyd* (8)).

At the commencement of the suit, 6th October 1925, both spouses were in New South Wales—the husband domiciled there, and the wife not only having her domicil with her husband in New South Wales (*Attorney-General for Alberta* v. *Cook* (9)), but also temporarily resident there in fact.

The question has taken here an acute form. For the order in Western Australia was based on alleged desertion, by the husband,

(1) (1866) L.R. 1 P. & D. 176.
(2) (1921) P. 131.
(3) (1921) P. 302.
(4) (1922) P. 238.
(5) (1923) P. 180.
(6) (1921) N.Z.L.R. 1069.
(7) (1897) A.C. 395.
(8) (1896) P. 175.
(9) (1926) A.C., at p. 465.

of his wife on 5th August 1919 : whereas the learned Judge of the Supreme Court (*Owen* J.) has found that the husband had not deserted the wife, but that the wife withdrew from cohabitation without any justification, in July or August 1919.

As pointed out by the Court of Appeal in England in *Harriman* v. *Harriman* (1), it seems absurd to punish a husband for deserting his wife by making an order that the wife, who complains of desertion, shall be at liberty not to cohabit with him ; but the Western Australian Act, the *Summary Jurisdiction* (*Married Women*) *Act* 1896 as amended by the Act No. 7 of 1 & 2 Ed. VII., follows the English Act of 1895 of the same name in conferring the power to make such an order. It is conceded that if, in New South Wales, an order had been made for judicial separation, the petition for restitution must fail ; just as when in the old ecclesiastical jurisdiction a decree for divorce *a mensa et thoro* had been made (see *Attorney-General for Alberta* v. *Cook* (2)). It is taken for granted, also, that if in New South Wales there were an Act giving this summary jurisdiction to Courts of Petty Sessions, and if an order such as this were made by that Court, that order would be a bar to a decree in New South Wales for restitution of conjugal rights. But prima facie an order made under the authority of the Western Australian Legislature is binding only within the limits of Western Australia (Western Australian *Constitution Act* 1889, sec. 2). As Lord *Selborne* said, in *Sirdar Gurdyal Singh* v. *Rajah of Faridkote* (3), " all jurisdiction is properly territorial, and ' *extra territorium jus dicenti, impune non paretur.*' Territorial jurisdiction attaches (with special exceptions) upon all persons either permanently or temporarily resident within the territory while they are within it, but it does not follow them after they have withdrawn from it, and when they are living in another independent country." The burden of showing that this order is an exception to this general rule falls on the wife.

I take it now to be established that a decree for total dissolution of a marriage is to be treated as binding in other countries if the decree was made in the country where the parties were domiciled at the time, and not otherwise (*Le Mesurier* v. *Le Mesurier* (4) ;

(1) (1909) P. 123.
(2) (1926) A.C., at p. 462.
(3) (1894) A.C. 670, at p. 683.
(4) (1895) A.C. 517.

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Attorney-General for Alberta v. *Cook* (1); *Bater* v. *Bater* (2)); and it has been found here, and not disputed, that in 1919—from 1914 the time of the marriage to 1921 or 1922 (the time when the husband went to New South Wales)—the domicil of the husband, and consequently of the wife,—the domicil of choice—was in Western Australia. It is established also that a decree for judicial separation may be pronounced by a Court in a country where the parties are not domiciled, but merely resident (*Le Mesurier* v. *Le Mesurier* (3); *Armytage* v. *Armytage* (4)); and it is not contended that a decree for judicial separation obtained where the parties are merely resident, not domiciled, is binding in other countries, although it is binding in the country where it was obtained (see *Halsbury's Laws of England*, vol. VI., p. 264). But it is urged, on behalf of the wife, that if the decree for judicial separation has been pronounced by a Court of the parties' domicil for the time being, the position is different—that it is to be treated as binding everywhere. It is on this ground that the Full Supreme Court has reversed the decree made by the Judge of first instance for the restitution of conjugal rights; and this is the only point of difference between the Judge of first instance and the Full Court.

There is certainly no direct authority for such a distinction in favour of an order made in the Court of the domicil of the parties; and I am unable to find any ground in the nature of the case for accepting it. A decree for dissolution of marriage is universally treated as binding everywhere if it be made in the domicil; for marriage creates a status, and that status depends on the law of the domicil. The tie of marriage cannot be cut except by the law of the domicil. But judicial separation does not touch status—it leaves the *ligamen* uncut; it leaves the parties married. The jurisdiction is for provisional separation, for the protection of the injured party from cruelty, neglect of maintenance, or other misconduct, during the marriage; for police purposes (see citations from jurists and text-writers collected in *Armytage* v. *Armytage* (5); and see *Von Bar on Private International Law*, translated by *Gillespie*,

(1) (1926) A.C. 444.
(2) (1906) P. 209.
(3) (1895) A.C., at pp. 526, 527.
(4) (1898) P. 178.
(5) (1898) P., at pp. 189-194.

ed. 1892, pp. 381, 384). Domicil, as distinct from actual residence, has really nothing to do with such relief as that of mere judicial separation. By the New South Wales *Matrimonial Causes Act* 1899 (sec. 5) it is provided that " In all suits and proceedings *other than proceedings to dissolve any marriage* the Court shall proceed and act and give relief 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 of England acted and gave relief before the passing of the Imperial Act " 20 & 21 Vict. c. 85. Until that Act the Ecclesiastical Courts had no jurisdiction to grant dissolution of marriage, but they had jurisdiction to grant divorce *a mensa et thoro*, for which the name judicial separation has been substituted ; and this jurisdiction was quite irrespective of secular domicil. But residence was very relevant to divorce *a mensa et thoro* ; for " 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 parish priest, and he would be liable for any ecclesiastical offence to be dealt with by the ordinary, *pro salute animæ* " (per *James* L.J., *Niboyet* v. *Niboyet* (1), cited with approval by the Court of Appeal in *Anghinelli* v. *Anghinelli* (2)).

There is an interesting paragraph on the subject in the seventh edition of *Westlake's Private International Law* (par. 47, pp. 91, 92) :—" If the matter be considered on the ground of social rather than of legal principle, a doubt may be suggested whether it is necessary to identify the jurisdiction for judicial separation with that for divorce " (meaning divorce *a vinculo* (p. 83)). " The former decree " (for judicial separation) " leaves the parties man and wife, but gives to the injured party a protection against some of the consequences of that status ; and it may therefore be reasonable to allow its benefit to be enjoyed *within the territory by those who are resident in it*, even though the Court of their country or domicile should alone be held competent to dissolve the tie of marriage between them. In saying this—which was cited with approval by *Gorell Barnes* J. in *Armytage* v. *Armytage* (3)—I was led to reserve the question of legal principle owing to *Brett* L.J., in *Niboyet* v.

(1) (1878) 4 P.D. 1, at p. 5.
(2) (1918) P. 247.
(3) (1898) P., at p. 191.

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Niboyet (1), holding that the exclusive rule of domicile applies to the Court's 'power to grant any relief which alters in any way that relation between the parties which arises by law from their marriage. It applies, therefore,' he said, 'as it seems to me, to suits for judicial separation and to suits for the restitution of conjugal rights' . . . (2). But the Judicial Committee, per Lord *Watson*, in *Le Mesurier* v. *Le Mesurier* (3), adopted the other view. They said 'There are unquestionably other remedies for 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 being 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 treats 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 to the domicile of the parties.*' This was acted on in *Armytage* v. *Armytage* (4), and again in *Anghinelli* v. *Anghinelli* (5) . . . and must now be considered to be the law of the English Court." In the case of *Anghinelli* v. *Anghinelli* referred to, the decision of *Armytage* v. *Armytage* was attacked before the Court of Appeal, but upheld; and the quaint explanation was accepted that was given by *James* L.J. (*Niboyet* v. *Niboyet* (6)) (already stated) of the fact that the Ecclesiastical Courts never concerned themselves with domicil in dealing with divorce *a mensa et thoro*. All the residents of a parish were under the care of the parish priest, and therefore came under the jurisdiction of the Church; but the Church had nothing to do with the secular domicil. In *Anghinelli's Case* the question as to judicial separation affecting status was not necessary for the decision, but the Lords Justices were evidently of opinion that it did not affect status. *Swinfen Eady* M.R. said: "A doubt was expressed on that point by *Gorell Barnes* J. in

(1) (1878) 4 P.D. 1.
(2) (1878) 4 P.D., at p. 19.
(3) (1895) A.C. 517.
(4) (1898) P. 178.
(5) (1918) P. 247 (C.A.).
(6) (1878) 4 P.D., at p. 5.

Armytage v. *Armytage* (1)." Now, it is on this very passage, at p. 196, of *Armytage* v. *Armytage*, that *Gordon* J. in the Full Supreme Court relies for treating the order made in the domicil for release from cohabitation (or judicial separation) as having an operation in other States or countries. The passage cannot be fully understood unless what *Gorell Barnes* J. said on the previous page (2) be considered :—" 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 . . . on which the Ecclesiastical Courts gave relief. According to those principles . . . 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. *The relation of marriage still subsisted, and the wife remained a feme covert . . . The effect of the sentence was to leave the legal status of the parties unchanged . . .* It may be further objected that, as domicil is considered a test of jurisdiction in cases of dissolution of marriage, in order that the decree may be recognized in countries other than that of the domicil, for the same reason a similar test should be applied in cases of judicial separation. But the reasons which apply in the one case are not applicable to the other ; and *even if the principle should be established* that the Courts of the country of the domicil of the parties are the only Courts which can pronounce a decree of judicial separation which ought to be recognized in other countries, in my opinion, no valid reason can be urged against the Courts of a country, in which a husband and wife are actually living, pronouncing a decree which will protect the one against the other so long as they remain within the jurisdiction." That is to say, the learned Judge, having expressed his own opinion that the decree for judicial separation " leaves the legal status of the parties unchanged," holds that whether the decree in the country of domicil has international efficacy or not, superior to that of a decree in a country of mere residence, a decree may be made in the latter country for protection while the spouses remain within its

(1) (1898) P. 178, at p. 196. (2) (1898) P., at p. 195.

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jurisdiction. It decides nothing as to the doctrine of the alleged superior international efficacy of a decree for judicial separation made in the domicil. It is to be noted that the learned editors of *Halsbury's Laws of England*, in dealing with this very case of *Armytage* v. *Armytage* (1), question any such doctrine (vol. VI., pp. 264-265). For my part, I agree with *Ferguson* J. that a dissolution of marriage brings about a change of status, and for that reason the decree of the domicil has an international effect; but that the same principle does not apply to a decree for judicial separation or its equivalent.

I desire not to be misunderstood. The recent case of *Eustace* v. *Eustace* before the Court of Appeal (2) seems to establish that a decree for judicial separation can be made in a country in which the spouses are domiciled though not actually resident. I merely say that there is no case, and no principle, that I can find which justifies us in holding that this order made by a Court of Petty Sessions in the State where the spouses were at the time both domiciled and resident, an order giving to the wife freedom not to cohabit, has any operation, by way of comity or otherwise, in New South Wales, such as would deprive the husband of his right, otherwise clear, to a decree for restitution of conjugal rights. In this view of the authorities I am confirmed by the statement made by the late *Salmond* J. in *Jackson* v. *Jackson* (3): "I am not aware of any authority for the suggestion that an order made in England by a Court of summary jurisdiction for the separation of husband and wife will be recognized outside of England as having any extra-territorial operation so as to affect the matrimonial status or the mutual rights and obligations of the parties."

Counsel for the appellant have pressed upon us another argument, an argument which was not used before the Full Supreme Court—the argument that the order made by the Court of Petty Sessions on 21st November 1919, was not final and conclusive, and that therefore the principle laid down in *Nouvion* v. *Freeman* (4) prevents the order from being any objection to the petition for restitution of conjugal rights. There is no doubt that the order could be rescinded

(1) (1898) P. 178.
(2) (1924) P. 45.
(3) (1923) N.Z.L.R. 608, at p. 614.
(4) (1889) 15 App. Cas. 1.

or altered on fresh evidence at any time in any of its parts, even as to the adjudication that the husband had deserted the wife, by the Court of Petty Sessions (sec. 5 of the Act of Western Australia); but the argument seems to me based on a misapprehension. We are not dealing here with an action brought in country B to enforce actively a judgment pronounced in country A, to make the judgment in A a judgment in B also; for such an action does not lie to enforce an order of this kind. Mr. *Dicey* puts the rule very simply (3rd ed., p. 448)—"A valid foreign judgment *in personam* may be enforced by an action for the amount due under it, if the judgment is (1) for *a debt or definite sum of money*, and (2) final and conclusive, *but not otherwise.*" This order, so far as it adjudges that the complaint of desertion is true and relieves the wife from cohabitation, is not such a judgment. Certain foreign judgments *in rem*, especially Admiralty judgments *in rem*, may also be enforced; but this order is not *in rem* (see also *Westlake's Private International Law*, 7th ed., p. 394). The principle of *Nouvion* v. *Freeman* (1) is wholly irrelevant here. I might add that all, or nearly all, decrees for judicial separation, like all decrees for divorce *a mensa et thoro* in the former Ecclesiastical Courts, are provisional—"until they shall be reconciled to each other" (see *Alberta Case* (2)); but the want of finality does not prevent them from being used in opposition to petitions for restitution of conjugal rights.

There is, however, a point which has not been mentioned in the argument, but which appears to me to become stronger in favour of the appellant the more I consider it. This order of Western Australia is based on agreement between the parties, not on proof of the true facts; and nothing is more dangerous in the divorce jurisdiction than to act on agreement (see per *Cozens-Hardy* M.R. and *Farwell* L.J., *Harriman* v. *Harriman* (3)). Undefended proceedings require to be very narrowly scrutinized, because of the possibility of connivance (*Pemberton* v. *Hughes* (4)); and orders by consent also. Under the New South Wales Act (sec. 7) the Court has no jurisdiction to decree restitution of conjugal rights unless it is "*satisfied of the truth of the allegations contained in the petition*" as well as "that there is no legal

(1) (1889) 15 App. Cas. 1.
(2) (1926) A.C., at p. 462.
(3) (1909) P., at pp. 131, 144.
(4) (1899) 1 Ch. 781 (C.A.).

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ground why the same should not be granted." (No discussion has taken place before us as to the meaning of " legal ground.") Here, one of the allegations of the petition is (par. 4) that the wife " did in or about the month of July 1919 without any just cause or excuse withdraw from cohabitation with your petitioner, and has kept and continued away from him and from cohabitation with him without any just cause whatsoever." This allegation has been found to be true, and it is in flat contradiction of the adjudication in the order as to desertion by the husband—" On hearing the complaint the same is adjudged to be true." The material on which this order was based is this agreement, which was put in evidence—" I Archibald Ainslie . . . do hereby agree to an order being made on the summons for separation issued against me by my wife . . . (a) for separation (b) for maintenance at the rate of £2 per week . . . (c) for costs £2 2s. It is understood that my wife do immediately return to me the wedding presents " &c. This agreement was signed by both spouses two days before the order; and on the strength thereof the ordinary printed form was filled in and signed by the Police Magistrate—the words " on hearing the complaint the same is adjudged to be true " being in the print (we have seen the original). I recognize, of course, that a finding of a foreign Court, whether of fact or law, cannot usually be impeached when an attempt is made to enforce it elsewhere; but it will not be enforced if it can be shown that it was obtained by fraud, or that the foreign law, or at least *some part of the proceedings* in the foreign Court, is repugnant to natural justice (*Henderson* v. *Henderson* (1)); and, according to *Robinson* v. *Fenner* (2), it is repugnant to natural justice if a decision has been " *arrived at in a mode which is according to our notions unjust*," or unless it " offend against English views of substantial justice " (per *Lindley* L.J., *Pemberton* v. *Hughes* (3); see also *Von Bar on Private International Law*, translated by *Gillespie*, ed. 1883, p. 378; and *In re Macartney* (4)). No principle is more deeply imbedded in the practice of British Divorce Courts than the principle that the facts must be proved, and the Court satisfied of the truth apart from

(1) (1844) 6 Q.B. 288.
(2) (1913) 3 K.B. 8.5.
(3) (1899) 1 Ch., at p. 790.
(4) (1921) 1 Ch. 522.

agreement or consent (see *Joss* v. *Joss* (1)) ; there was no jurisdiction in the Western Australian Court of Petty Sessions to make the order for freedom from cohabitation unless the husband had in fact deserted the wife ; and there was no evidence of desertion apart from the agreement. But I do not venture to decide this appeal on this ground in the absence of discussion. I prefer to decide on the point which has been argued.

In my opinion, the appeal should be allowed on the main ground stated, and the judgment of *Owen* J. restored.

POWERS J. The question to be decided on this appeal is—as stated by the majority of the Full Court of New South Wales (2)—" Has a decree of judicial separation or an order like the present one releasing the spouses from the duty to cohabit, if pronounced or made by a Court of competent jurisdiction in the country of the domicile of the parties, force and effect merely within the limits of the jurisdiction of that Court, or will such decree or order be recognized as binding on the parties by the Courts of the country wherever they may be," even if the domicile of the parties has been changed and it is an order which can at any time be varied, modified or discharged by the foreign Court which made it ? The order in this case was made in Western Australia by a foreign Court—so far as New South Wales is concerned. It was made by a magistrate, with the consent of both parties, when both parties were domiciled in Western Australia. It was made by a competent Court. The domicile of both parties is now in New South Wales.

The wife has not given up her permanent residence in Western Australia, but she has been resident in New South Wales since July 1925 and she gave evidence at the hearing of the petition in New South Wales. It was admitted during the hearing of the appeal that, apart from the order in question, all the facts necessary to entitle the petitioner to the order granted by the New South Wales Court which heard the petition were found in favour of the petitioner by the Court. The New South Wales Court found that the wife had no just cause in 1919 for leaving her husband ; and it also held that, even if the Western Australian order had to be accepted as evidence

(1) (1924) S.A.S.R. 461.

(2) (1926) 28 S.R. (N.S.W.), at p. 573.

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that there was desertion in August 1919, the Court was satisfied that there was no just cause in November 1925 or in 1926 for the wife refusing to return to her husband and that the efforts made by the husband to induce her to return were genuine. It was admitted that a decree, judgment or order of a foreign Court, which was final and conclusive and could not be altered or varied by the parties or by the Court which made it (such as a decree for divorce, which altered the status of the parties), would be binding on the New South Wales Court, but in this case it is admitted that the order releasing the spouses from the duty to cohabit could at any time be ended by the parties, or altered or varied or discharged by the Court which made it.

I agree with the reasons given in the judgment of *Ferguson* J. in the Full Court, in which he held that the appeal to the State Court should be dismissed. I do not propose to repeat those reasons. I, however, think it right to refer to three cases relied upon at the hearing of the appeal before this Court.

The case of *Nouvion* v. *Freeman* (1), quoted by counsel for the appellant, dealt with the question of what "foreign" judgments ought to be accepted as "final" judgments, and therefore binding on all Courts. In the case mentioned Lord *Watson* said (2):—"But no decision has been cited to the effect that an English Court is bound to give effect to a foreign decree which is liable to be abrogated or varied by the same Court which issued it. All the authorities cited appear to me, when fairly read, to assume that the decree which was given effect to had been pronounced *causa cognita*, and that it was unnecessary to inquire into the merits of the controversy between the litigants, either because these had already been investigated and decided by the foreign tribunal, or because the defendant had due opportunity of submitting for decision all the pleas which he desired to state in defence. In order to its receiving effect here, a foreign decree need not be final in the sense that it cannot be made the subject of appeal to a higher Court; but it must be final and unalterable in the Court which pronounced it; and if appealable the English Court will only enforce it, subject to conditions which will save the interests of those who have the right of appeal. The case of *Patrick*

(1) (1889) 15 App. Cas. 1.

(2) (1889) 15 App. Cas., at p. 13.

v. *Shedden* (1) appears to me to be very much akin to the present. There the executive decree of the Court of Session for costs was final in this sense that it was not appealable, and that it was enforceable in Scotland; but the Court of Queen's Bench refused to recognize it as a final and conclusive judgment, mainly on the ground that it might be at any time recalled or modified by the Court of Session on just cause shown." That case has not been overruled. On the contrary it has been approved of in a line of cases since 1889. The judgment or order of the foreign Court, on which the wife relied, was not a "final judgment" in the sense used by Lord *Watson*, because it was one which might at any time be recalled, varied or modified by the Court which made it on just cause shown.

It was contended on behalf of the respondent that the decisions of this Court in *Wirth* v. *Wirth* (2) and in *Smythe* v. *Smythe* (3) applied in this case. I do not think so. In *Wirth's Case* this Court held that, where there is an existing deed of separation between husband and wife containing mutual covenants not to institute proceedings for restitution of conjugal rights, the New South Wales Court had a discretion to refuse a petition for restitution of conjugal rights. This Court in that case affirmed the decision of *Gordon* J., who exercised his discretion and dismissed the petition. In *Smythe's Case* this Court held that the dismissal of the petition could not in the circumstances be regarded as an exercise of the learned Judge's discretion because he refused it on the ground that he thought himself bound by the decision of this Court in *Wirth's Case*. Because he failed to consider the matter from the point of view of an exercise of his discretion, it became the duty of the Court to make the order he should have made—granting the petition.

Neither of the cases just referred to seems to me to affect the decision to be given in this case, because the learned Judge in Divorce in the New South Wales Court did exercise his discretion after full inquiry into the facts alleged in the petition and defence, and he found that the wife had without any just cause or excuse withdrawn from cohabitation with the petitioner in 1919, and that she had kept

(1) (1853) 2 E. & B. 14.
(2) (1918) 25 C.L.R. 402.
(3) (1922) 30 C.L.R. 165.

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and continued away from him since without any just cause whatever I hold that the appeal should be allowed.

RICH J. The real question for determination in this case is whether the facts or the true inference from the facts prove that there has been desertion on the part of the wife without good cause. "A suit for restitution is based on the separation of the spouses being without good cause" (*Wirth* v. *Wirth* (1)). One of the issues for the learned primary Judge in this case is stated thus: "Whether the respondent has withdrawn from cohabitation with the petitioner and has kept and continued away from him without any just cause whatsoever and without any such cause has refused and still refuses to render to him conjugal rights." This issue is raised by the allegations in the petition, which are denied by the respondent's answer. Pars. 4 and 5 of the petition are as follows:—"(4.) That your petitioner's said wife did in or about the month of July 1919 without any just cause or excuse withdraw from cohabitation with your petitioner, and has kept and continued away from him and from cohabitation with him without any just cause whatsoever, and from thence hitherto has refused and still refuses to render him conjugal rights. (5.) That your petitioner wrote to his said wife on 24th September 1925 asking her to return and live with him, and your petitioner's said wife after a reasonable opportunity has been offered, has refused and neglected to cohabit with your petitioner and continues so to refuse and neglect without just cause as aforesaid." Respondent by her answer (par. 1) denies "that she without any just cause or excuse withdrew from cohabitation with the petitioner and that she has kept and continued away from him and from cohabitation with him without any just cause whatsoever." By par. 4 she sets up desertion by the petitioner on 5th August 1919, and pleads an order made on 21st November 1919 by the Court of Petty Sessions sitting at Perth in the State of Western Australia, which adjudged her complaint to be true and ordered that the respondent be no longer compelled to cohabit with the petitioner.

It appears from the facts that at the date of this order the parties

(1) (1918) 25 C.L.R., at p. 408.

were resident and domiciled in Perth. Endorsed on the complaint made by the respondent on 23rd October 1919 is an agreement by the petitioner to (*inter alia*) an order being made for separation. The material facts of the order dated 21st November 1919 are " whereas one Adriana Katie Ainslie (hereinafter called the complainant) having made a complaint that one Archibald Ainslie (hereinafter called the defendant) being the husband of the said complainant on 5th August 1919 at Perth aforesaid wilfully deserted the complainant and the complainant prayed for an order for (1) separation (2) maintenance (3) costs. On hearing the complaint the same is adjudged to be true and it is ordered that the complainant be no longer compelled to cohabit with the defendant." Then follows an order for maintenance and costs. This record contains an admission by the petitioner that he had wilfully deserted the respondent on the date now claimed by him as the date of her desertion of him. And it also contains an agreement to live separately. This is reinforced by an order made by a competent Court. I do not stop to consider whether this order has any extra-territorial operation but proceed to the effect of the agreement. No steps have been taken by the petitioner to set aside or repudiate the agreement in any way. Both it and the order are still subsisting. In the Ecclesiastical Courts a separation deed or an agreement to live separate was not an answer to a suit for restitution. Legislation in England and New South Wales has, however, altered the old law. The New South Wales *Matrimonial Causes Act* 1899 makes disobedience to a decree for restitution equivalent to desertion without reasonable cause and allows a suit for *dissolution of marriage* or for judicial separation to be brought forthwith after the non-compliance with a decree for restitution. The effect of such a decree is so altered that the Court will not grant that decree in a case which would force the Court to treat one of the spouses as guilty of deserting the other without reasonable cause when he or she has merely acted on an agreement between them. The relevant sections of this Act, secs. 5, 6, 7 and 11, are set out at length in *Wirth* v. *Wirth* (1), and are traced to the corresponding English legislation. The effect of this legislation is also dealt with at pp. 406-408 of that case.

(1) (1918) 25 C.L.R., at p. 405.

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In an English case decided some years later Lord *Birkenhead* L.C. stated the law and applied it in the same manner. After citing the well-known passage from the judgment of *Lopes* L.J. in *Russell* v. *Russell* (1), his Lordship continues:—"That expression being binding on me, I must apply the law so laid down to the facts of the present case. Here there is an agreement to live apart. Neither party took any step to set that agreement aside. Accordingly to pronounce a decree for restitution of conjugal rights now would, in the words I have quoted, be compelling the Court to treat the husband as having deserted his wife without reasonable cause, contrary to the justice of the case" (*Walter* v. *Walter* (2)). There is in the case under consideration, coupled with the admission of desertion, the same dominant fact as in those cases, namely, a subsisting agreement to live separately and the same principle must be applied.

I adopt the words of *Knox* C.J. in *Smythe* v. *Smythe* (3): "The learned Judge having failed to consider the matter from the point of view of an exercise of his discretion, it becomes our duty to make the order he should have made."

I agree that the appeal must be dismissed.

STARKE J. A petition was presented to the Supreme Court of New South Wales in its Matrimonial Causes Jurisdiction by Archibald Ainslie, claiming restitution of conjugal rights by his wife. She pleaded and proved an order made in 1919 by the Court of Petty Sessions at Perth in Western Australia that she be no longer compelled to cohabit with her husband. This order was made upon a complaint by the wife that her husband had deserted her, and was founded upon the provisions of Acts 60 Vict. No. 10 and 1 & 2 Edw. VII. No. 7 of Western Australia, which correspond with the English *Summary Jurisdiction* (*Married Women*) *Act* 1895 (58 & 59 Vict. c. 39). The order, by force of the Acts of Western Australia, has in all respects, while in force, the effect of a decree of judicial separation on the ground of cruelty. At all times material to the proceedings in Western Australia, both husband and wife were domiciled and resident there.

(1) (1895) P., at p. 334. (2) (1921) P., at p. 304.
(3) (1922) 30 C.L.R., at p. 168.

A decree for judicial separation of the spouses by the Supreme Court of Western Australia would, in my opinion, have afforded a good answer to the husband's petition in this case (*Le Mesurier* v. *Le Mesurier* (1); *Armytage* v. *Armytage* (2); *Wirth* v. *Wirth* (3), and the cases there cited). It is said, however, that the order of the Court of Petty Sessions does not stand in the same position as a decree for judicial separation: firstly, because its operation is protective only so long as the spouses remain within the territorial jurisdiction of Western Australia; secondly, because the order is not final and conclusive (*Nouvion* v. *Freeman* (4)). Neither contention can in my opinion be sustained.

English law recognizes the jurisdiction of the Courts "of the existing bona fide domicil for the time being" of the married persons to dissolve their marriage (*Le Mesurier* v. *Le Mesurier* (5); *Bater* v. *Bater* (6)). If the *forum domicilii* can affect the status of the married persons it must, *a fortiori*, have jurisdiction to affect the personal rights of the parties arising out of that status in proceedings relating to the separation of the spouses or the restitution of their conjugal rights (*Dicey, Conflict of Laws*, 3rd ed., p. 296). Indeed, English Courts claim for themselves a more extended jurisdiction in dealing with such rights and found a jurisdiction based upon the matrimonial home of the spouses or residence within the jurisdiction, but whether they concede a similar jurisdiction to the Courts of other countries does not yet appear to be settled (*Le Mesurier* v. *Le Mesurier*; *Armytage* v. *Armytage* (2)).

In this case the order relied on was made by a Court of the domicil of the parties; it was pronounced by a proper and competent Court, that is, a Court authorized by the law of the country to which it belongs to make such an order. Such an order, on settled principles of English law, is entitled to recognition in the Courts of New South Wales and other States and countries. It may be that the order is also founded upon the fact that, at the time it was made, the matrimonial home and residence of the parties was in Western Australia, but it is unnecessary to express any opinion upon that matter when the fact of domicil lawfully founds it.

(1) (1895) A.C., at p. 531.
(2) (1898) P. 178.
(3) (1918) 25 C.L.R. 402.
(4) (1889) 15 App. Cas. 1.
(5) (1895) A.C. 517.
(6) (1906) P. 209.

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The contention that the order of the Court of summary jurisdiction in Western Australia is not entitled to recognition in New South Wales because it does not finally and for ever establish the personal rights of the spouses, is based upon a provision in the Acts already mentioned to the effect that the Court of summary jurisdiction may, on the application of the married woman or her husband, upon fresh evidence to the satisfaction of the Court at any time alter, vary or discharge the order. The order is an adjudication and determination in relation to the rights of the parties—it is not in any sense interlocutory. The fact that it can be altered, varied or discharged upon fresh evidence does not destroy its effectiveness as an adjudication whilst it subsists. A judgment is not the less final because it may be reversed on appeal or set aside because of mutual mistake of the parties; and so, in my opinion, a judgment is not the less final because an application may be made on fresh evidence to alter, vary or discharge it. The order remains and is an adjudication of a final and conclusive character until discharged.

Owen J., who heard the petition, was satisfied that, apart from the order made in Western Australia, the wife was never justified in withdrawing from cohabitation and, in view of this finding, I have thought it necessary to consider the effect of the order itself without regard to any consent given by the husband to the order or to any admissions thereby involved.

In my opinion the appeal should be dismissed.

Appeal dismissed with costs.

Solicitor for the appellant, *Leon L. Cohen.*

Solicitors for the respondent, *Shaw, Lewis & Co.*

B. L.