they separated, and the arrangements foresaid for the common residence and maintenance came to an end, and was held by all concerned to have come to an end, and the defender, as was admitted at the bar, declined to support, and now refuses to support, the pursuer any longer. In these circumstances, find that the said sum of £500 must be held to have become payable at or about the date when the parties separated as aforesaid, and that the defender's right to occupy the foresaid premises rent free must be held to have terminated at the next term after said separation, *videlicet* Martinmas 1871: Therefore decern against the defender for the said sum of £500, with interest from and after the 29th July 1871, being the date of citation in the present action, but without interest prior to that date; and *quoad ultra* assoilzie the defender from the conclusions of the action; reserving to the pursuer all claim competent to him for rent of the said premises from and after the said term of Martinmas 1871, and reserving, farther, all claims competent to the parties *hinc inde* against each other, so far as not inconsistent with the foregoing findings, and all defences competent thereagainst as accords, and decern: Find no expenses due to either party."

Agents for Pursuer—Webster & Will, S.S.C.
Agent for Defender—Lindsay Mackersy, W.S.

Friday, March 8.

MRS HALKETT INGLIS OR WILSON *v.* GEORGE JAMES WILSON.

Jurisdiction—Husband and Wife—Domicile — Lis alibi pendens.

Circumstances in which it was held that a husband had not lost his Scotch domicile of origin, and, though resident in England, was liable to a divorce suit in the Scotch Courts at his wife's instance.

Held, farther, that the wife's having pleaded to a divorce suit, at the husband's instance, in the English court, without taking the objection of want of jurisdiction, did not prevent her coming herself into the Scotch Courts, which had the proper jurisdiction over the parties.

Question, whether there could be a matrimonial domicile different from the absolute domicile of the parties.

This was an action of divorce on the ground of adultery at the instance of Mrs Inglis or Wilson, against her husband George James Wilson, ironmaster, Kinneil Ironworks, Linlithgow. The pursuer set forth that she and the defender were both born in Scotland, and both have their domicile there, although the defender was believed to be furth of Scotland at the date of raising the action. They were married in the parish of Cramond in the year 1861. They lived together till 1866, when they separated. The pursuer then specified various acts of adultery.

In his defence the defender stated that he was born in Glasgow in the year 1839. From 1851 till 1856 he was resident in England and Germany. In 1858 he accepted a commission in the Lancashire Militia Artillery, and served at Portsmouth and Dover. In 1859 he resigned his commission, and took up his residence in London. In 1861 he was married, and lived in Scotland in cohabitation with his wife until 1866. In November of that year facts came to his knowledge which caused him to cease cohabitation with his wife; and he then left Scotland, and took up his residence permanently in England, with his mother, first at Surbiton, in the county of Surrey, and subsequently at Anerly, in the same county. He had so resided in England from 1866 until now, and during that time had only visited Scotland three or four times, and only for very short periods, on no occasion exceeding a week. These visits had been altogether incidental, and had in no degree interfered with the continuity of his residence in England, which, since 1866, had been *animo remanendi*. He continued still to be resident in England, and had no intention of returning to Scotland again, and had acquired an English domicile, and lost his Scotch domicile. He had no heritable property in Scotland.

The defender farther stated that since 1866 the pursuer had resided continuously at Hastings, in the county of Sussex, in England. That since 1866 the pursuer had been subject to the jurisdiction of the English Court. On the 13th of April 1871, proceedings for dissolution of the marriage between the pursuer and defender, on the ground of adultery committed by the pursuer, were instituted by the defender in the English Court for Divorce and Matrimonial Causes against the pursuer and one Archibald Howell, the co-respondent. The pursuer had appeared, pleaded, and joined issue in that action. And the fact of her having appeared and pleaded, as above stated, had, of itself, according to the law of England, the effect of subjecting her to the jurisdiction of the said Court.

The defender therefore pleaded *inter alia*—(1) No jurisdiction; (2) *Lis alibi pendens*; and (3) *Forum non competens*.

It appeared that the defender, though a partner in the Kinneil Ironworks, took no active share in the business. And also that, in the action at his instance in the English Court for divorce against his wife, she had neglected to plead want of jurisdiction as a preliminary plea, or, in the English law terms, had entered appearance without protest, the consequence of which was, according to English practice, that she was obliged to go to trial on the merits, it being competent to the Court *ex proprio motu* to take up the plea of want of jurisdiction with the merits. The case in the English Court was still pending. Proof was led on the matters involved in the first three pleas of the defender, the import of which will sufficiently appear from the following interlocutor of the Lord Ordinary (ORMIDALE):—

"*Edinburgh*, 15*th February* 1872.—The Lord Ordinary having heard counsel for the parties on the defender's first three pleas in law, and having considered the argument and proceedings, including the proof, Repels said pleas, and appoints the case to be enrolled with the view to further procedure.

"*Note.*—The preliminary pleas now repelled are —1*st* No jurisdiction; 2*d*, *Lis alibi pendens;* and 3*d*, *Forum non competens*. As the Lord Ordinary has not felt much hesitation in repelling these pleas, and does not think that any of them are attended with difficulty, a very few observations will be sufficient in explanation of the grounds on which he has repelled them.

"1. In regard to the question of jurisdiction, it is true that the defender is at present, and has since November 1866, a period of about five years, been resident in England. But, on the other hand, it is unquestionable, and was not disputed, that both he and

the pursuer are natives of Scotland, that they were married in Scotland, and that the acts of adultery on which the present action is laid are all averred to have been committed in Scotland. Neither was it disputed, or could have been disputed, that down till November 1866 the domicile of the parties had been in Scotland, and nowhere else. The question comes therefore to be, whether it has been shown that the defender, in November 1866, or at any subsequent time, abandoned *de facto et ex animo* his Scotch domicile, and acquired an English one? The Lord Ordinary is very clearly of opinion that this question must be answered in the negative. Having regard to the judgment in the House of Lords in *Pitt* v. *Pitt*, in April 1864, 4 Macq. p. 627, any such thing as a consistorial or matrimonial domicile must be held to be unknown to the law; and therefore the only question is, whether or not the real and complete domicile of the defender still continues to be Scotch? Scotland was undoubtedly his domicile of origin; and it is not said, nor is there anything whatever to show, that prior to November 1866 he had intended to cast off his Scotch domicile, and acquire a new one in England; nor can the mere circumstance of the defender having in November 1866 gone to reside in England, and, with the exception of a few casual visits to Scotland since that time, resided there, be held as sufficient to establish a change of domicile. It appears, on the contrary, sufficiently from the proof, the Lord Ordinary thinks, that the residence of the defender in England has never been intended by him to be more than temporary, and to serve a temporary purpose—the avoidance of his creditors and the practice of economy,—and that he has never entertained the notion of throwing off his Scotch domicile. Accordingly, all his material and patrimonial interests have continued to be in Scotland since November 1866, as they had previously been. His business and his means of existence and sources of income are wholly and exclusively in Scotland, and there is nothing to show that any change in regard to these important matters has ever been contemplated by the defender. And while, on the one hand, the proof shows that the defender has no establishment whatever of his own in England, being there a mere inmate in his mother's house; it also shows that he has still a residence—Ptarmigan Lodge—in Scotland, although it is at present, and has been for sometime back, sublet, for which he has always evinced a great partiality, and a strong desire to retain. But if anything were awanting to demonstrate that the defender has not, either by his acts or conduct, or expressions of intention, shown that his domicile has been changed from Scotland to England, his own letters during the period in question appear to the Lord Ordinary to be quite conclusive to this effect. They all show the pecuniary difficulties with which he has been embarrassed, and that it was very much owing to those difficulties, and for the purpose of economizing, and for a time avoiding his creditors, that he broke up his establishment in Scotland, and went to live with his mother in the neighbourhood of London. Thus, in his letter of 17th April 1867 (No. 26 of process) to Mr French, one of his partners in trade in the extensive ironworks at Kinneill, Linlithgowshire, he says, in reference to a fund called "Knox's debt,"—"I have now to state that I have not touched a penny of it as yet, nor of any other sum since October, with the exception of what you sent me last year, and £17, 18s. of Mr Story. I mention this merely to show you how little I have had, also to satisfy my creditors that I have been treating them fairly. may add that I have sold my furniture, let Kinneill shootings, and the Ptarmigan, paid off all my servants, sent the diamonds to their rightful owner, and thus given no shadow of an excuse to any man that I have been extravagant during the last six months." In a subsequent letter to Mr French, of 8th August 1867 (No. 27 of process), he writes with reference to a club in Glasgow of which he is a member—"I wish you to pay my club subscription. It is not an impossibility that I should be in Glasgow again, and to renounce the club would involve, in the event of my ever wishing to become a member again, another subscription and another ballot. I have given up two clubs, one in Edinburgh and one in London, and with out wishing to be extravagant, I have a justifiable determination to pay my £5 subscription and retain some little hold upon Glasgow society.' Again, in his letter to Mr French of 27th October 1869 (No 28 of process), the defender expresses considerable anxiety to have certain arrears due by him, as a member of the Glasgow club, paid off. And in his letter of 8th April 1870 (No. 32 of process), he writes, 'Walter Mackenzie expects, I believe, to give R. D. money enough in May to pay all my debts, and if that be true, I don't see what is to hinder me going back to the Ptarmigan myself, at least so say my law advisers. I hope so.' In his letter, also of 16th April 1870 (No. 33 of process), the defender expresses his desire to get back to his Ptarmigan residence, and amongst other things says that 'Mr Gardner or Alexander, I don't know which, writes that they have heard from Mr Walter Mackenzie about the matter (his debts), and he says he has hopes of being able to finance for the remainder of my outstandings in May, and thus enable me to realise my desire of returning to the lodge. Now if this be the case, I shall get from him £350 interest, and if, as you say, you may be able to pay the interest on my full capital in Autumn, say that capital to be £8500, that would be £425 added to £350, would allow me £775 to live upon. Now I have been nearly four years away from the Ptarmigan, and my lease is fast running out, and there is danger of the Duke of Montrose declining to grant an extension if I keep constantly away.' And in his letters of 20th April 1870 (No. 34 of process), and 12th June 1871 (No. 35 of process), he alludes to the same subject in much the same strain. In the latter of these letters he says, 'What a nuisance it is to have to let the lodge again. Am I never to return to the home of my fathers?' The Lord Ordinary thinks it clear, therefore, from these letters, as well as the other circumstances of the case, that the defender has not changed his domicile from Scotland to England, and has never as yet at least intended to do so. On this point the Lord Ordinary may add, that although the defender himself could not competently have been adduced as a witness (*Tulloch* v. *Tulloch*, Feb. 1861, 23 D. 639), it is strange that his mother, with whom he resides in England, has not been adduced as a witness for him; and if it be really the case that his plea of want of jurisdiction was meant to be seriously insisted in, she would be much more likely to throw some light on the question than her coachman and maid, whose evidence on the point appears to the Lord Ordinary to be of no importance. Finally, on the plea of no jurisdiction, it appears to the Lord Ordinary that there was much more and better ground in

the case of *Pitt* v. *Pitt* than in the present for holding that a change of domicile had taken place, and yet it was decided otherwise in the House of Lords. And the same observation applies to the decision in the case of *Jopp* v. *Wood* (34 Law Journal, Chancery Reports, p. 212), where it was held that a Scotchman who had gone to reside in India in 1805, and died there in 1830, had not lost his domicile of origin. And in the recent case of *Douglas* v. *Douglas* (Law Reports, Equity Series, vol. 12, p. 617), where the leading previous cases on domicile were reviewed, principles were enunciated and given effect to inconsistent with a judgment in favour of the defender in the present case.

"2. The defender's plea of *lis alibi pendens* is founded on the proceedings for a divorce which have been taken in the Court for Divorce and Matrimonial Causes in England at the instance of the defender against the pursuer. But it is obvious, and is made clear by the testimony of the English Solicitors, Mr Crosse and Mr Cowburn, who have explained the nature and effect of these proceedings, and the practice of the English Court in regard to them, that the present plea is ill founded. Even were the defender to prevail in his suit in the English Court, the pursuer would not in that suit, as the proceedings now stand, obtain a divorce against him: and if it were to turn out that both parties were guilty, there could not, according to the English law and practice—differing in this respect from the law and practice of Scotland—be any divorce at all by either of the parties, the one against the other. In *Geills* v. *Geills*, Dec. 14, 1850, 13 D. 321, it was held that a wife who had sued and obtained decree of divorce *a mensa et thoro* against her husband in the Consistorial Court in England was not thereby precluded from suing for the fuller remedy of a divorce in this Court.

"3. The observations now made in regard to the defender's second plea are substantially applicable also to his third plea of *non forum competens*, by which, as was explained at the debate, it is meant that the English Court, where the defender has instituted his proceedings, would be more convenient than this Court for trying and determining the disputed questions between the parties. But, for the reasons already adverted to, these questions cannot be tried and determined at all in the English Court—at least to the same effect as in this Court. Besides, it may be remarked, in reference to this as well as to the defender's second plea, that, for anything yet known, the defender's suit in the English Court may possibly be ultimately dismissed for want of jurisdiction, without anything whatever touching the merits of the disputed matters between the parties being determined."

Against this interlocutor the defender reclaimed, with the leave of the Lord Ordinary.

LANCASTER for him.

SOLICITOR-GENERAL and BALFOUR for the respondent.

At advising—

LORD PRESIDENT—We think it quite unnecessary to call for any reply from the respondent's counsel. There is only one question of any real importance raised, and that is, whether the defender has lost his domicile of origin in Scotland and acquired a domicile in England? It is certain that he was born a Scotchman, and retained his domicile of birth until he was twenty-nine or thirty years of age. All that can be said is, that he has now gone to reside with his mother in England. And that being so, he asserts that England is the proper place for the pursuer to institute this suit. It is true that he himself has raised in the Court of that country a suit against the pursuer, and that she has neglected to plead in time the want of jurisdiction of the English Courts. Whatever inconvenience the pursuer may have subjected herself to by reason of this omission, does not alter the real fundamental question of jurisdiction. It is a mere matter of procedure: not having pleaded want of jurisdiction, the case goes on. But if it turns out that there is no jurisdiction, divorce cannot be given. In cases of divorce, jurisdiction depends upon domicile, and the domicile in this case is here. And if the domicile, and consequently the jurisdiction, is here, it can be nowhere else. I have always been of opinion, as I expressed myself in the case of *Pitt*, that for the purposes of divorce there may be a matrimonial domicile differing from the absolute domicile which will rule succession. I refer to that only for the purpose of saying that no such question arises in this case, for the defender's domicile is in no respect in England, where he has no residence of his own. This being the case, the Court have no choice but to entertain the action.

The plea of *forum non competens* is also quite inadmissible. It can only be entertained where the Courts of two different countries have both of them jurisdiction, which, as I have said, is not the case here. I think, therefore, we must adhere to the interlocutor of the Lord Ordinary.

The other Judges concurred.

Agents for Pursuer—Macnaughton & Finlay, W.S.

Agents for Defender—Hamilton, Kinnear, & Beatson, W.S.

Saturday, March 9.

BANNATINE'S TRS. *v.* CUNNINGHAME.

(*Ante*, p. 209.)

Expenses—Count and Reckoning.

In an action of count and reckoning the defender, who at the outset of the cause had tendered a sum exceeding what was ultimately fund due by him, found entitled to his whole expenses, without any special inquiry into the amount of success of the parties on the several points of dispute.

In accordance with the remit by the Court, of date 12th January 1872, the accountant, Mr A. W. Robertson, C.A., issued a Supplementary Report, in which the balance due by the defender as at 8th January 1869 was brought out as £187, 13s. 3d., with interest on £74, 8s. 11d., the capital sums forming part thereof, from that date until paid.

The case again came up on the accountant's report, and for discussion of the question of expenses.

At advising—

LORD PRESIDENT—There has been a great deal of litigation in this case with a very small result, and one cannot help inquiring whose fault it has been that this should be the case. This is the only pertinent inquiry remaining. Now, looking to the whole history of the cause, I cannot help thinking that the proceedings of the pursuers have been nimious in the extreme. This is an accounting which should have been, and which might have been, conducted on an amicable footing, and