

Court with a Special Case instead of raising an action of reduction in the Outer House—a far less summary mode of procedure, as I think.

The Lords, on the motion of the compeerer, sisted procedure.

Counsel for Petitioners—Lord Advocate (Balfour, Q. C.)—Mackintosh. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for Compeerer—Robertson—Pearson. Agents—Graham, Johnston, & Fleming, W.S.

Friday, February 3.

FIRST DIVISION.

[Lord Lee, Ordinary.]

STAVERT *v.* STAVERT.

Husband and Wife—Divorce—Foreign—Domicile.

A domiciled Englishman sold his house and property in England, and eloped to the Continent with a paramour. He consulted a Scotch agent as to how a divorce could be obtained in Scotland, and was informed that he must come to Scotland with the intention of remaining there. He came to Scotland, taking the lease of a house and shootings for six months, and continuing to cohabit for a period of upwards of five months there with his paramour. A summons of divorce was personally served upon him in Scotland. He disputed the jurisdiction of the Court. *Held*, upon consideration of his evidence, in which he said he never had intended to remain in Scotland after obtaining his divorce, and of the whole facts and circumstances, that a domicile had not been acquired, in respect that there was no intention of remaining permanently in Scotland.

Foreign—Divorce—Jurisdiction ratione delicti commissi.

Jurisdiction in actions of divorce cannot be established *ratione delicti commissi*, coupled with personal service of the summons upon the defender.

Husband and Wife—Matrimonial Domicile—Divorce.

Will the Court recognise in actions of divorce a matrimonial domicile—*i.e.*, a domicile of a less complete character than that required to determine questions of succession so as to found jurisdiction? *Negative per* Lords Deas and Shand; *per* Lord President (Inglis)—“If the answer depended on the decisions pronounced by this Court it is pretty clear what it would be.”

Expenses—Action of Divorce—Where Plea of no Jurisdiction sustained.

A husband had by his conduct and representations invited his wife to bring an action of divorce for adultery against him in Scotland, and thereafter pleaded that the Court had no jurisdiction. This plea was sustained, but the Court awarded expenses to the wife, holding that the objection to their jurisdiction did not affect their power to pronounce such a decree.

This was an action of divorce on the ground of adultery at the instance of Mrs Emma Ward or Stavert, “presently residing at 53 Castle Street, Edinburgh,” against her husband Thomas Stavert, “residing at Castlehill House, Blairgowrie, Perthshire.”

The defender pleaded—“(1) No jurisdiction. The defender not being a domiciled Scotchman, the Court of Session has no jurisdiction to entertain the present action.”

The Lord Ordinary (LEE) allowed the parties a proof of their averments *quoad* the defender's domicile.

The result of the proof was to show that the defender was born in Manchester in 1836, and had lived in and about that city till 1880, being connected with the mercantile house of Stavert, Zigomala, & Co. there. His father was a domiciled Englishman. In 1870 he married the pursuer, an Englishwoman, at Manchester, and they lived together there and in the neighbourhood until July 1880, when the defender eloped with Miss Amy Fisher, with whom he resided on the Continent until the spring of 1881, and thereafter at a furnished cottage, Castlehill, Blairgowrie, in Perthshire, which he took for six months from the 12th of May. With regard to his object in coming to Scotland, the defender's evidence was as follows:—“I came to Scotland, and finally took Castlehill, Blairgowrie, from Mr Anderson. I took it for six months, and entered into possession on 12th May. (Q) Had you ever any intention of remaining in Scotland beyond six months?—(A) Certainly not. Towards the end of July 1881 I saw an article in the *Standard* newspaper which showed me that I was committing a fraud on the Scotch law. (Q) Did that lead you to reconsider your intention of remaining even six months in Scotland?—(A) Yes. I went to Edinburgh to consult Mr Haddon (his law-agent) on the subject. I said he knew the purpose that I had come for; that according to the article in the *Standard* I saw that I was committing a fraud on the Scotch Courts, and that I wished to right myself on that matter; that there was no chance of marrying Miss Fisher with a Scotch divorce, and consequently I wanted to leave at once. I also told him that I was very sorry to have done anything of the kind as to come here and take advantage of the Scotch law. Mr Haddon advised taking the opinion of Scotch counsel. That opinion was communicated to me about 8th September; it confirmed my view, and I wanted to leave Blairgowrie at once. Mr Haddon wrote that there was no necessity for leaving at once, and I stayed at Blairgowrie till November. I was served with the summons in the present action on 27th or 28th September. (Q) Did it take you by surprise?—(A) Of course it did; after learning from Mr Haddon that the action could not go on, and Mr Haddon advising Mr Purves (the pursuer's law-agent) that I was only here temporarily, according to my instructions. (Q) Is it the fact that you were here only temporarily?—(A) Yes. (Q) And that you never had any intention of staying?—(A) I never had any intention at all of staying.”

The article in the *Standard* referred to was dated 30th July 1881. The passages in it most appropriate to Mr Stavert's position were as follows:—“There is, however, one broad rule of private international law which hitherto all States alike have agreed to recognise. By ac-

quiring a domicile a man thereby acquires the right of regulating his affairs by the laws of the country to which he has so attached himself. But if he has left his own country and acquired a domicile elsewhere, with the view of defeating the laws of his own country and evading their operation, he thereby puts himself out of Court. . . . The matter may be summed up thus: A man's rights and relations are regulated by the law of the country in which he has his domicile. Should he, however, shift his domicile with the view of availing himself of a different law, and one more suited to his private purposes, the fraud that is thus contemplated vitiates the whole proceeding. In such a case no properly constituted tribunal would give him the benefit of the *lex domicilii* if it were in conflict with the laws of his own country." This article contained references to *Lolley's case*, and the case of *Brook v. Brook*, quoted *infra*.

In the defender's correspondence with his lawyer, Mr Haddon, whom he had consulted as to his position, and the course which he should adopt in order to facilitate proceedings for a divorce from his wife, the following passages occurred. On 4th August 1880 he wrote from Paris—"If it is necessary for me to live in Scotland for some time, Amy, accompanied by her mama, are to reside in the same place—we of course having perfect liberty of seeing and being with each other as often and as long as we may desire. Now, this arrangement is perfectly satisfactory until such time as a divorce can be obtained; and I trust you have succeeded in inducing that woman to accede to your demands. It will be better for her. Now, of course, by your meeting us in London all together, you can listen to and hear all the arrangements that have been made, and of course must be strictly adhered to; and in this case of having to live *in Scotland*, in England it will be as well for the present not to give the address to other parties, who may ask the why and wherefore. On 9th August Mr Haddon wrote—"If you come to Scotland and acquire a domicile, so as to make yourself subject to the Scotch Courts, I have no doubt Mrs S. will, after a little quiet consideration, sue for a divorce with success; but probably, after all that has happened, your best course would be to go abroad, where you are not known, and where you are not likely to be troubled by anyone; but, of course, you and Miss F. will be guided by your own feelings and inclination in the matter." On 16th August Mr Haddon wrote—"I am this morning favoured with yours of 14th inst., in which you state you have been consulting a Paris lawyer, and from what you say I gather that in material points his opinion has been very much the same as the one I gave you. Were you to come to Scotland and take up your abode here, with the intention of making this country your home, you would, after the expiry of 40 days, become subject to the jurisdiction of the Scotch Courts, and as it would be very much to the interest and advantage of Mrs S. to obtain a divorce in those Courts, I have no doubt she would not lose such a very favourable opportunity of getting quit of an unfaithful husband, and at the same time securing to herself a nice little fortune. But after what has taken place, and seeing that a Scotch divorce would cause you to sacrifice the half of your means, I should think you would be of opinion that it was not worth the money, and

that you had better stay abroad for two years and see what then turns up. Of course, as to which of these courses you are to follow you must be the judge. If you wish an early divorce, and are prepared to sacrifice half your means, come to Scotland and make it your home. If you do not care about making such a sacrifice, and can wait for two years, keep away from Scotland. If you resolve to remain abroad I will advise Mrs S. to consult an English lawyer as to what course she ought to follow, and I would suppose she will be advised to raise an action against you in the English Courts for judicial separation and alimony or aliment, in which action it will be settled what allowance she is to receive from you while your desertion continues. If your desertion continue for upwards of two years, she will then have a good ground for applying to the English Courts for a divorce. Of course collusion between the parties would destroy the effect of any of these proceedings." On 18th August the defender replied from Paris—"I am in receipt of your two favours of 13th and 16th inst., and you appear to contradict in the latter the statement made in previous one—"I think you must give up all idea of a Scotch divorce." Now, I want the following information so far as you are able to give it—(1stly), Is there any doubt as to the obtaining a Scotch divorce? (2ndly), Should such divorce not be granted in the Scotch Courts, what allowance would be made to Mrs S., *if for life*, or could she again apply for divorce? (3rdly), Should such divorce not be granted, would she, at lapse say of two years, be entitled to sue for a divorce in the English Courts? Now, as regards collusion, it would appear, should I return at once to reside in Scotland, that my intentions would be to get married, and certainly such would be the case, and I do not know who might give information to such effect, and such would have to be kept as quiet as ever possible. There is also another point—The lawyer I saw here said he did not think that a divorce in the Scotch Courts would be legal in England, so that one could re-marry in that country and hold legal rights there. Can I legally at the present time make a gift of shares or stocks?" Mr Haddon replied on 28th August—"In answer to your *first* question, as to whether there would be any doubt of Mrs S. obtaining a divorce in Scotland, I beg to state, as I have done in previous letters, that if you come to Scotland with the intention of making it your home, you will after a residence of 40 days become subject to the jurisdiction of the Scotch Courts, and were Mrs S. to raise an action of divorce she would in my opinion succeed, unless old Fisher, or some one on his behalf, were to appear and prove that you had come from Scotland not to make it your home, but merely to enable Mrs S. to obtain a Scotch divorce. *Second*, The English Courts will allow Mrs S. an alimony of about one-third of your income for two years or so, and if you do not then return to her, but continue your desertion, she would be entitled to an English divorce, with a permanent allowance for life, which would be fixed by the Court, and in fixing that allowance the Court would take into consideration the position of the wife previous to marriage. *Third*, As before stated, she would, after adultery, with over two years' desertion, be entitled to a divorce in England. *Fourth*, A divorce in Scotland is good everywhere, and if you were divorced in the

Scotch Courts you could re-marry in Scotland, and that marriage would be good over the whole world." Mr Haddon on 8th September again wrote:—"So far as I can see, there are just two courses open to you—(1) You must stay abroad for two years or more, on the chance of her, at the expiry of that time, obtaining a divorce against you in the English Courts; or (2) You must come to Scotland with the intention of making it your home, and settle down there, so as to acquire a Scotch domicile and make yourself subject to the Scotch Courts, in the hope that she will raise and succeed in obtaining a Scotch divorce, which will entirely free you from the marriage." On August 6th 1881, the defender, writing from Castlehill, said—"As it is a matter of the utmost importance to me to know exactly how the matter would stand legally in England, and at once. I certainly came here under the impression, both from yourself and Mr Henderson's advice, that it would hold good everywhere, and you can well imagine how harassing it is to me that this question should crop up at the eleventh hour."

Mr Haddon had during the same period been in communication with Mrs Stavert, and of this Mr Stavert was aware. On June 8th 1881 he wrote—"Your husband is now settled in Perthshire, where he has taken a house and grouse-shooting. I fear his means will soon be exhausted." And on June 27th 1881 he again wrote—"I have yours of 24th inst., and, in reply, beg to state that as your husband is now settled in Scotland, I think your best course would be to go to Edinburgh and consult a Scotch lawyer as to the course you ought to follow." He subsequently introduced her to Mr Purves, W.S., who acted as her agent in the action.

The summons in the present action was signed on 28th September 1881.

There was some evidence in the proof to show that the defender had occasionally visited an uncle who owned a farm in Roxburghshire, and that he had some expectation of possibly succeeding to the lease at a future period.

The Lord Ordinary (LEE) found "that at the date of the execution of the summons the defender had abandoned his domicile in England, and had acquired a domicile in Scotland: Therefore repels the plea of no jurisdiction, sustains the relevancy of the action," &c.

His Lordship's opinion was as follows:—"Being of opinion that the question of jurisdiction depended in this case on the domicile of the defender at the date when the action was raised, I allowed parties, by the interlocutor of 16th November, a proof upon that point. The facts bearing upon it are within a narrower compass than is usual in questions of domicile; but they raised the question of domicile under circumstances of considerable difficulty.

"The parents of the defender appear to have belonged originally to Roxburghshire, but they had settled in Manchester before the date of the defender's birth in 1836, and his father continued to reside and carry on business in Manchester until his death in 1856. He was predeceased by his first wife, the defender's mother, and had married again. His death took place at Scarborough, through an accident, and although it is possible that he may have had some remote prospect of returning to Scotland, it was not disputed, and does not appear to have admitted of dispute,

that at the time of his death the defendant's father was a domiciled Englishman.

"The defender himself, with the exception of three years spent in a school in Germany, and a short time spent in America in connection with the business of his father's house, resided generally in Manchester. His marriage with the pursuer took place in Manchester in the year 1870, and subsequently to his marriage he and his wife continued to reside there. He himself was employed in the business of his father's firm of Stavert, Zigomala, & Company, without being a partner, until he ceased his connection with that firm in the spring of 1880. His income latterly appears to have amounted to £1500 per annum, and to have consisted partly of a salary of £1000 per annum, and partly of a percentage of profits. There is evidence that he had been in the habit of coming down every year with his wife to visit an uncle and aunt in Roxburghshire, who occupied the farm of Saughtree, by virtue of a lease from the Duke of Buccleuch expiring in 1883, but which is said to have been repeatedly renewed. There is also evidence that the defender had some expectations of possibly succeeding to this lease at a future period. But there is nothing to suggest that during his residence in Manchester the defender's domicile was other than English.

"After the termination of his connection with the firm of Stavert, Zigomala, & Company, on 31st March 1880, the defender remained but a short time in Manchester. His establishment at Little Lodge appears to have been broken up in the month of June or early in July 1880. His whole furniture and effects, with the exception of clothing and a teapot which had belonged to his mother, and one or two silver cups which he had won as prizes, were sold by auction on 7th and 8th July 1880, the catalogue bearing that the sale took place 'by order of Thomas Stavert, Esq., who is leaving Manchester.' Down to this time he appears to have lived with his wife on terms of affection. At all events, his letters show that he professed to be living on such terms; and it had been arranged, as she understood from him, that she was to go to London for ten days or a fortnight, until the sale should be over and the lease of the house got quit of, when he was to rejoin her, and they were then to travel on the Continent and afterwards to go to Scotland. The evidence of the pursuer upon this point seems to be corroborated by the evidence of the table-maid Alice Robinson, who states that when the defender was informed by his wife that she had not room to pack the silver cups among her things he replied—"Very well, let them go with the things that are going to Saughtree"—whereupon they were put into a portmanteau containing superfluous clothing belonging to him, and which his wife thought was going there. It appears from the table-maid's evidence that both she and the cook had been spoken to as to their willingness to go into the service of the defender and his wife in Scotland after their return from foreign travel.

"Up to this time, however, I see no room to doubt that the defender was a domiciled Englishman; and I think that, according to a principle well established and often applied, that domicile must be held to have continued until another domicile had been acquired by actual residence, combined with the intention of acquiring a new domicile.

"It was at this time that the events occurred which are said to have given ground for the present action. The defender never rejoined his wife. On or about 17th July he went to Paris with Miss Amy Fisher, a young woman who had been on terms of intimacy with the pursuer, and was the daughter of a friend of the defender, and it appears to be undisputed that he has lived with her as his wife ever since. From July 1880 to April 1881 they appear to have resided at various places in France and Spain, chiefly in hotels. The father and brother of Miss Amy Fisher appear to have made an attempt to get her to leave the defender, and to return to her home, but without success; and the defender's letters to his agent in Scotland shew that as early as 29th July 1880 he resolved to do all in his power to compel his wife to sue for a divorce. He was advised that a divorce could not be got in England until the elapse of two years, but that if he came to Scotland and acquired a domicile so as to make himself subject to the Scotch Courts, his wife, 'after a little quiet consideration,' would probably sue for divorce with success. His correspondence with Mr Haddon shews that he was fully advised as to the necessity of avoiding any collusive arrangement for a divorce, and also as to the necessity of establishing a real domicile in Scotland in order to give his wife an opportunity to sue him in the Courts of that country. The letter which Mr Haddon wrote to him on 8th September 1880 puts in a very distinct form the advice which he received—'So far as I can see, there are just two courses open to you—(1) You must stay abroad for two years or more, on the chance of her, at the expiry of that time, obtaining a divorce against you in the English Courts; or (2) You must come to Scotland with the intention of making it your home, and settle down there, so as to acquire a Scotch domicile and make yourself subject to the Scotch Courts, in the hope that she will raise and succeed in obtaining a Scotch divorce, which will entirely free you from the marriage.'

"His answer at that time was—'As I certainly do wish the earliest release from Mrs S., we shall go to Scotland as soon as you let me know what part of Scotland or place you would advise me to go to, so that I could conveniently see you at times, and some place quiet and private.'

"Subsequently, however, he seems to have hesitated, and to have spent the winter months in France and Spain. In March 1881 he appears to have made up his mind to come to Scotland. He writes to Mr Haddon on 17th March—'As you will see from the address, I have arrived as far as Boulogne, so after hearing from you I could immediately start for Scotland. In the meantime you will please advise Mrs S. that you are not authorised to pay her any more money (as you have none on my account now), and that you cannot hold any further communication with her on my account; and on 24th March he writes expressing a hope that he should receive early advice that a loan of £2000 which he wished to raise on his interest in the farm stock on Saughtree had been obtained, and adds—'I want this affair settled as soon as ever possible, so then I can at once come to Scotland, and then let the affair take its course. I am sorry the cottage in the West Highlands is let. What I should like you to advertise for would be a furnished cottage,

say for six months, where I could employ my time in fishing. Neither Portobello nor Trinity would at all suit me, being too near Edinburgh. Any place, say not nearer than 20 miles from there, would do, but not particular as to locality for the time if the place is suitable.'

"It appears that in April his agent did accordingly advertise in a Scotch newspaper for a furnished house in Scotland for six months, and that in the end of April 1881 he personally visited and took for the season, at a rent of £50, a house called Castlehill, near Blairgowrie. He went there in May along with Miss Amy Fisher, whom he passed off as his wife, and established himself with servants and carriages and horses of a kind suitable to the place. He continued to reside there until November 1. I see that on 10th May he wrote to Mr Haddon to get his 'wading stockings and boots, rods, &c.' sent to him 'from Saughtree;' and it is proved that in the beginning of September he acquired for the season 1881-82 a right to some low-ground shootings in the neighbourhood of Blairgowrie.

"The defender's wife in the meantime had continued to reside at the boarding-house in London to which she had gone on leaving Manchester in July 1880. She seems to have been informed of her husband's having come to Scotland by Mr Haddon's letter of 6th May, written in answer to hers of May 3rd applying for money to pay her monthly board. Although it is not proved that Mr Haddon had authority from the defender to make to the pursuer the communication contained in that letter, I think that it, and the letters which followed it, are important, as showing Mr Haddon's understanding at the time of the position and intentions of his client. His statements may not be binding on the defender, but if it appears from the evidence (as I think it does appear) that they were made upon reasonable and sufficient grounds, they would afford not merely competent but weighty evidence on the question *quo animo* did the defender come to reside in Scotland. . . . There had undoubtedly been hesitation on the part of the defender between an English and a Scotch divorce. Mr Haddon says that this hesitation continued even after the defender's arrival at Castlehill. But I am of opinion that the evidence on the whole supports the view that on 27th June the defender had made up his mind, and had given Mr Haddon to understand, that he was settled in Scotland, in the hope that the pursuer might sue him there for a divorce.

"The consequence was that in the beginning of August the pursuer came to Scotland and put her case into the hands of a man of business, and that on 27th September the summons in the present action was served.

"It is said that even if the defender had established a domicile in Scotland, in the month of July he had changed his mind, and ceased to retain it before the execution of the summons, in consequence of advice which he took in the month of August. That is a separate question. The first point to be ascertained is whether he did or did not abandon his English domicile and acquire a domicile in Scotland.

"The defender now alleges that he always had a mental reservation to the effect that he was not really and truly to be domiciled in Scotland. I think that his statements on this subject are not consistent with the evidence, and they did not

appear to me to be credibly or even intelligibly reconciled by him with his conduct. No doubt his connection with Scotland was a feeble one; his residence there was secured only for a short period. It was not the kind of residence that is usually regarded as a home. He does not appear to have been much known and visited there, or to have had business in Scotland beyond his interest in the residue of the Saughtree trust, and his desire to give his wife an opportunity of divorcing him. But it was all the home he had. He had effectually separated himself from his old home in Manchester, and if he had not a home at Castlehill he had no home at all of the kind from which he could transact any business or set out as on a journey. If sufficient in kind and in duration to enable a man to constitute for himself a domicile, I am of opinion that his residence at Castlehill must be held to have been with the *animus* necessary for that purpose. I think that the result of the decisions on this point is that it is not necessary to prove that residence was with an intention of always staying there; and that it is sufficient that such residence has been fixed 'without any present intention of removing therefrom.' This is the doctrine of Storey, who says ('Conflict of Laws,' sec. 43)—'Vattel has defined domicile to be a fixed residence in any place with an intention of always staying there. But this is not an accurate statement. It would be more correct to say that that place is properly the domicile of a person in which his habitation is fixed without any present intention of removing therefrom.' And the doctrine is supported by the recent decisions, to which reference was made during the debate. I do not go over these, because I think that a sufficient illustration of the doctrine is to be found in the recent case of *Carswell v. Carswell* (18 Scottish Law Reporter, 643, 8 R. 901). I am not of opinion that the decision in that case sanctions the view that a domicile may be acquired in Scotland merely for the purpose of divorce. I think that the judgment is rested on the view that Mr Carswell had acquired a real domicile in Scotland to all effects and purposes. But it is important to notice—and it is for this that I refer to it—that there was no allegation in that case of any intention to remain permanently in Scotland. [His Lordship referred to the evidence of the pursuer and the opinion of the Lord Justice Clerk in that case]. The other Judges concurred in arriving at the same decision upon the same facts; and I cannot avoid the conclusion that it was held sufficient to prove (irrespective of motive) the intention to acquire a domicile in Scotland, and unnecessary to prove an intention to make that a permanent domicile.

"But a question is raised also in regard to the sufficiency of the residence,—the *factum*, without which the *animus* is of no avail. On this point it appears to me to be settled that the possession of a permanent residence is not essential. There are classes of society, no doubt, in which the idea of domicile is usually incomplete without some residence of a permanent kind. But there are other classes in the social scale in which, though every individual has a domicile, the idea of a permanent place of residence is almost an impossibility. And there are classes intermediate. My opinion is that everything depends on the position of the individual whose domicile is in ques-

tion. And I think there is authority for the proposition that even lodgings or a hotel may be sufficient in point of fact, if the *animus* of making a domicile is proved. The theory is, I think, distinctly expressed by Lord Cranworth in the case of *Bell v. Kennedy*, 6 Macph. (H. of L.) 76. He says—'I think the theory goes to this, that if you establish that there was a determination to live in Scotland, and if the party goes and lives at an hotel, that is enough. He is there—that is the *factum*; and there is also the *animus*; and these two unitedly constitute the domicile.'

"My view of the present case is, that in July 1881 the defender had adopted and acted on the advice of Mr Haddon, that if he wanted a Scotch divorce to be possible he must come to Scotland with the intention of making it his home, and settle down there, so as to acquire a Scotch domicile.

"It was, however, contended that whatever the position of the defender in July 1881, something happened which changed that position before the summons was executed on 27th September. It appears that the defender read an article in the *Standard* newspaper of 30th July 1881, which gave rise to a doubt in his mind as to the prudence of the course which he had adopted. It suggested difficulties of a legal kind in regard to the validity of a subsequent marriage which he might make. He took legal advice on the subject, and it was apparently received about 6th or 7th September. The consequence was that he changed his mind, and told his agent that he had done so; and his agent then wrote to the agent of the pursuer this letter:—'14th September 1881. Dear Sir,—Have you done anything regarding a divorce in Mr Stavert's case? Since I last saw you I have been considering the matter, and am now inclined to think that Mr Stavert's residence in this country, which appears to be of a temporary character, would not give the Court of Session jurisdiction in such a case. What think you?' It appears to me that this was a mere expression of a doubt in the mind of Mr Haddon. It was no intimation of a change of mind or residence on the part of the defender. And at all events I am of opinion that a change of mind on the part of the defender was not sufficient (assuming he had acquired a domicile) to restore the original domicile which he had abandoned. A very slight degree of acting upon that change of purpose might have been sufficient to cause loss of the new domicile and a revival of the original domicile. But mere change of mind was, I think, insufficient.

"On the whole, I am of opinion that on 27th September the defender had done nothing to cast off the domicile which I think he had taken some pains to acquire in Scotland.

"I need not say that in arriving at this conclusion I reject altogether the notion of its being possible to make a domicile in Scotland by agreement for purposes of divorce; and equally the idea of deciding such a question upon the ground of personal exception."

The defender reclaimed, and argued—Stavert's intention was to remain until he had got a divorce, and no longer. The facts were in strong contrast to those which existed in *Carswell's* case, 6th July 1881, 8 R. 901. There was most clearly the acquisition of a permanent home within the jurisdiction of the Court. The nature of the residence

here was quite insufficient to satisfy the definition of domicile required by the authorities—Storey, secs. 41-44; *Farnie v. Harvey*, 22d April 1880, L.R. 5 Prob. Div. 153; *Wilson v. Wilson*, 10 Macph. 573, and L.R. 2 Prob. Div. 435. The last case is of importance as showing the weight to be attached to the evidence of the party whose domicile is in question. *Shaw v. Gould and Moore*, 3 H.L. E. and I. App. 55. As to the permanency of intention, see also Guthrie's Savigny, sec. 353, p. 99. In Mr Haddon's correspondence with the defender there were expressions used as to a residence of forty days, which Mr Haddon no doubt represented as the period which must elapse before proceedings could be instituted, but which the defender evidently had taken to be the period of residence necessary to acquire a domicile and so found jurisdiction. Then, even if he had had any intention of remaining here, that intention was changed before he was cited, viz., at the time of reading the article in the *Standard*. *Morcombe v. McLellan*, June 27, 1801, M. v. "Forum Competens," No. 3, showed how unwilling this Court was to exercise jurisdiction unless their right to do so is clear. The question of a matrimonial domicile did not arise here, but after Lord Westbury's *dicta* in *Pitt v. Pitt*, 4 Macq. 627, that doctrine could hardly now be maintained. Nor was the doctrine of jurisdiction *ratione delicti commissi* any longer tenable—That was ignored in *Jack v. Jack*, Feb. 7, 1862, 24 D. 467; Fraser, 1289. It was also argued that as the English Courts will not recognise a marriage, although it may be valid according to foreign law, when parties have resorted to that foreign country to evade their own law (*Burk v. Burk*, 9 H. of L. Cases, 193, and *Dolphin v. Robins*, 3 Macq. 563), neither could a divorce be recognised when obtained by a person coming to a foreign country merely in order to obtain it, and so should not be given.

Argued for the pursuer and respondent—The evidence showed that the fact of residence was here sufficiently established. Lords Westbury and Cranworth in *Bell v. Kennedy*, 6 Macph. (H. L.) 76-78. The only question was as to the *animus*. Haddon's instructions were clear, and the defender certainly intended to comply with them, for he desired a divorce. Now that intention was quite legitimate (Lord Young in *Carswell*; Sanchez. Disput. iii. 18-29; Storey, sec. 123 a). His own evidence now was not sufficient to contradict the intention manifested in his correspondence at the time. Granting a change of intention after reading the article in the *Standard*, that was not coupled with any *factum*, and was therefore ineffectual to change the Scotch domicile then acquired—*Bell v. Kennedy*, Lord Chelmsford, 76; *Donaldson v. McClure*, March 1, 1870, 22 D. 7. Besides, the defender had invited his wife to believe in his *bona fide* change of domicile, and even in a consistorial action he could not plead his own fraud—*Graham v. Graham*, Dec. 15, 1881, *supra*, 210, opinion of Lord Young. Even if there was not an absolute domicile in Scotland to all effects, there was a matrimonial domicile, to which the wife must look for the vindication of her rights. The law of Scotland recognised such a domicile—*Warrender v. Warrender*, 2 Shaw & Maclean, 226; *Pitt v. Pitt*, Dec. 5, 1862, 1 Macph. 115; *Jack v. Jack*, *ut supra*; *Wilson v. Wilson*, Mar. 8, 1872, 10 Macph. 573. Jurisdiction

ratione delicti commissi had never been abandoned in Scotch law as a ground for deciding such actions as the present.—See cases cited by Lord Brougham at p. 224 of his opinion in *Warrender v. Warrender*; also *Oldaker*, Feb. 20, 1834, 12 S. 468; *Forrester v. Watson*, July 18, 1844, 6 D. 1358; *Christian v. Christian*, June 14, 1851, 13 D. 1149. In *Jack v. Jack*, which Lord Fraser quotes as an authority for saying this ground of jurisdiction has been abandoned, jurisdiction was sustained on other grounds.

At advising—

LORD PRESIDENT—This action of divorce is raised by Mrs Emma Ward or Stavert, who designs herself as "presently residing at 53 Castle Street, Edinburgh," and is directed against her husband, "residing at Castlehill House, Blairgowrie, Perthshire." It is based on allegations of adultery, committed in Paris and other places abroad, with a person called Amy Fisher in the year 1880, and also on alleged acts of adultery committed in Scotland in the subsequent year 1881. The defender pleads that this Court has no jurisdiction, and the record has been made up on that preliminary question. Proof has been led, and now the question merely is, whether we have jurisdiction to entertain the action?

It appears from the evidence that the defender's domicile of origin is English. He was born in Manchester in the year 1846, and he seems to have lived there during the greater part of his life, having been connected with a mercantile house in that city. He was married to the pursuer in 1870 in Manchester. She was previous to her marriage a domiciled Englishwoman, and after her marriage she resided and cohabited with the defender in Manchester for about 10 years. The only connection, in short, that the defender can be said to have had with Scotland in his past life is that his uncle was tenant of a farm in Roxburghshire, where it appears the pursuer and defender occasionally visited. This uncle died in 1878, and left some money to the defender, and among other things the stock and crop of his farm, which he directed to be paid to the defender on the expiry of the existing lease of the farm in 1883. The defender, however, had no interest in the lease of the farm; it was not assigned to him, neither was he the heir entitled to succeed to it, the unexpired term of the lease being left by the will to other persons. That, then, was his single tie to Scotland previous to the proceedings which gave rise to this action.

In July 1880, after having lived for about ten years with his wife, the defender eloped from Manchester with Amy Fisher, and went to Paris, and remained with her on the Continent till April 1881. During that period he distinctly intimated to the pursuer that he had no intention of resuming cohabitation with her—in fact he was determined that he would not give up Amy Fisher. In this state of matters the pursuer naturally desired to procure a divorce, and it is clear that the defender was equally desirous that she should obtain it. In these circumstances the defender not unnaturally commenced a correspondence with his law-agent Mr Haddon, who told him firmly and distinctly that if Mrs Stavert brought an action of divorce in the English Courts she could not succeed on the ground of adultery alone, but there must also be proof of cruelty, of which there

is no allegation, or of desertion during two years, which had not yet occurred. On the other hand, he advised him that if the action was raised in the Scotch Courts adultery alone would be sufficient, but then, further, that the Scotch Courts would have no jurisdiction unless he, the defender, came to Scotland. Now, the question is, of course, whether he has acquired a domicile in Scotland such as to give this Court jurisdiction in the cause. I do not think that if an Englishman or a foreigner shall acquire a domicile in Scotland sufficient in character to found jurisdiction in a consistorial cause that it is a ground of objection to that domicile or to the jurisdiction of this Court that the husband has come to Scotland with this view among others, namely, to subject himself to the jurisdiction of this Court, or even that that was his main or only object, provided that it is proved that there is a complete and sufficient change of domicile and acquisition of one in this country. The domicile must not in any way be fictitious; it must be real, and must be acquired *animo et facto*. Now, a very important question arises in some such cases, whether the domicile necessary to found jurisdiction is the same as that which would regulate the intestate succession of the husband, or whether it is not sufficient that Scotland has been the settled home of the marriage for some period with no intention of leaving, in which the spouses have settled down to live, and the household gods have been set up for the time, and which, if a separation, judicial or otherwise, has been arranged, would be the place where one party owes the duty of returning for the restitution of the conjugal relation. There has been a good deal of speculation on this point, but fortunately it is not necessary to deal with the question here. It has not yet been decided in the Court of last resort whether it is so, and I merely notice the matter in passing. If the answer depended on the decisions pronounced by this Court, it is pretty clear what it would be, but, as I have said, there is no reason now to consider the matter, for I am of opinion that the defender here had not acquired a domicile either of one sort or the other. No doubt the defender's great object in leading the pursuer to raise an action of divorce against him was that that he might have the means provided whereby he might lawfully marry his mistress, and to gain this object he was willing to do everything that was necessary to gain his end. But it would not have suited his purpose that the decision in this Court should have been open to objection, and that his subsequent marriage should have been in any way doubtful—above all it would not have suited him if that marriage had been good in one country and bad in another. What the defender wanted was a decree of divorce which would liberate him from his wife and entitle him to marry Amy Fisher, and which would make that marriage good anywhere. Having that very distinct object in view, he entered into a correspondence with his agent, and it appears to me that in the course of that correspondence the parties to it somewhat misunderstood one another. In saying this I do not wish to blame Mr Haddon; on the contrary, I think the advice he gave was sound, and generally well expressed, but there is a recurrence of phrases and words which were not used in the same sense by the two correspondents. The words "home" and "domicile" are constantly used, and if Stavert had understood these words in the sense in which they were used by his

agent—had comprehended what was meant—I do not think he would ever have attempted to found this jurisdiction. I am satisfied that he was under the impression that all he required to do was to come to live in Scotland till his wife obtained her decree of divorce, and that he never had any intention of remaining here after that was done. The position of Stavert was one of some peculiarity. He knew that his sole prospect of earning a livelihood lay in his place of birth and domicile, that is, in Manchester. Certainly there was no prospect of any business in Scotland which could enable him to live here and earn an income. The only prospect he had, so far as I can see, was to return to Manchester, or, if Manchester had become too hot for him owing to his misconduct, then he had some prospect of obtaining a foreign agency for the mercantile house with which he was connected; but that he had no prospect of business in Scotland is clearly shown by the evidence. It is said that on the expiry of the lease of his uncle's farm in Roxburghshire he might have got a renewal and used the stock and crop he got from his uncle on the farm. That was a very distant and uncertain prospect, if indeed it ever was in his mind. He could hardly have expected the landlord to be very willing to take a tenant whose character and reputation would not bear much investigation, and who had had no experience of farming. I think it never entered his mind that he could settle there as tenant. That being so, let us see what Mr Stavert himself says was his condition of mind when he came to Scotland for six months. He took a furnished house at Blairgowrie and shooting for that time, and settled down there with his mistress for that limited period. He says that he took Castlehill on 12th May. "(Q) Had you ever any intention of remaining in Scotland beyond six months?—(A) Certainly not. Towards the end of July 1881 I saw an article in the *Standard* newspaper which showed me that I was committing a fraud on the Scotch law. (Q) Did that lead you to reconsider your intention of remaining even six months in Scotland?—(A) Yes; I went to Edinburgh to consult Mr Haddon on the subject. I saw he knew the purpose that I had come for—that according to the article in the *Standard* I saw that I was committing a fraud in the Scotch Courts, and that I wished to right myself on the matter; that there was no chance of my marrying Miss Fisher with a Scotch divorce, and consequently I wanted to leave at once. I also told him that I was very sorry to have done anything of the kind as to come here and take advantage of the Scotch law. Mr Haddon advised taking the opinion of Scotch counsel. That opinion was communicated to me about 8th September; it confirmed my view, and I wanted to leave Blairgowrie at once. Mr Haddon wrote that there was no necessity for leaving at once, and I stayed at Blairgowrie till November. I was served with the summonis in the present action on 27th or 28th September. (Q) Did it take you by surprise?—(A) Of course it did. After learning from Mr Haddon that the action could not go on, and Mr Haddon advising Mr Purves that I was only here temporarily, according to my instructions. (Q) Is it the fact that you were here only temporarily?—(A) Yes. (Q) And that you never had any intention of staying?—(A) I never had any intention at all of staying."

The question is, whether Mr Stavert is to be

believed in this? If his conduct were inconsistent with this evidence, or if a consideration of all the facts and circumstances of the case pointed to an intention on his part of making a fixed domicile here, then there might be good reason for disbelieving what he here states. But it appears to me that all the facts and circumstances go to support the truth of what is said in his disposition. I am satisfied from the evidence in the case, independently of this statement, that he never intended to remain in Scotland, but that, on the contrary, he was under the impression—erroneously taken up no doubt, but still *bona fide*—that if he came and lived in Scotland, while the divorce was proceeding, and went away thereafter and never returned, that a good jurisdiction was thereby founded. This, no doubt, was an entire mistake, founded on an erroneous construction of the correspondence he had had with his agent. In the circumstances, then, I am bound to believe the evidence I have read, and I think that Stavert had acquired no domicile sufficient to found jurisdiction.

It is said, however, that the action may be sustained on another ground, namely, on the *locus delicti* combined with personal citation in Scotland. I should have been very willing to avoid saying anything on this subject if it had not been distinctly tabled by the pursuer. But that being so, I am bound to say that the previous decisions on the subject are a little embarrassing. The early cases, no doubt, proceed on the ground that that combination creates jurisdiction in cases of divorce, but the later decisions, while not expressly repudiating the doctrine, do very clearly by implication hold that that is not a good ground of jurisdiction. I refer to the cases of *Jack v. Jack* and *Pitt v. Pitt*, which I hold I am bound to follow rather than the earlier cases. I think, therefore, that is not a good ground of jurisdiction in cases of divorce.

I am of opinion, on the whole matter, that the Lord Ordinary's judgment should be recalled and the action dismissed.

LORD DEAS—This is an action of divorce on the ground of adultery against a husband at the instance of his wife. The adultery is not doubtful, and the only question is, whether we have jurisdiction to entertain the case? The Lord Ordinary finds that the case depends on the domicile of the husband at the date when the action was raised, and finds that at that date he was domiciled in Scotland, and therefore sustains the jurisdiction. I am not inclined to affirm that interlocutor. The defender is an Englishman by birth; he was born at Manchester. Now, a domicile of origin is easily restored if it is lost, and I think that it follows that it is not easily lost or changed. I think here, with your Lordship, that there was no final and fixed intention on the part of the husband to change his domicile. He was anxious to have a domicile in Scotland sufficient to give the Courts of that country jurisdiction, but he had no intention of residing permanently in Scotland, an intention which, on the authority of the case of *Bell v. Kennedy* (6 Macph., H. of L. 76), as decided by the House of Lords, reversing the Court of Session, is absolutely necessary to that change.

There is undoubtedly in this case one fact which, if a certain view is taken of it, is conclusive

in favour of the pursuer's view, namely, that Scotland was the *locus delicti*. Adultery may have been committed in England or elsewhere as well, but it undoubtedly was committed in Scotland, and if the rule of law founded on the combination of the *locus delicti* and personal citation was to prevail it could not affect the result that there had been delict in two countries. I agree, however, that that ground of jurisdiction, though not distinctly negated by the decisions, has been shaken in a very serious way. The Court refused to go on that ground in cases where I cannot doubt it would have been adopted if it had been thought possible to do so, instead of seeking other and far more difficult grounds for the decision of the case.

The House of Lords has expressly affirmed the rule that the intention of acquiring the new domicile must be fixed and final, and it certainly is not proved that such was the intention here. It is not favourable to such a view that there should have been so much communing and consulting on the subject between the defender and his solicitor, because the substance of those communings was to find out how easily the domicile might be changed for the purposes of divorce without being actually changed. But if there was no final intention to reside here permanently, it becomes unnecessary to decide various questions which we might otherwise have required to decide. For example, whether the wife as well as the husband must be subject to the jurisdiction of the Court, or whether there is such a thing as a domicile of marriage as contradistinguished from any other domicile known to the law. I observe that in a case which came before the whole Court—*Jack v. Jack*—I expressly stated my opinion that there was no such domicile. I have read over the opinion I there delivered, and, so far as I am concerned, I entirely adhere to it now. I think nothing can more expose the insufficiency of that kind of jurisdiction than the case of *Jack*, where the husband had acquired a domicile in America, having originally been a Scotchman and married in Scotland, but had long resided in America with the apparent intention of remaining there. It was held that his domicile did not regulate the domicile of his wife,—indeed, if it had been otherwise, the decision must have been precisely the reverse of what it was. If the husband's domicile is to regulate the matter of jurisdiction, how had the Scotch Courts jurisdiction in that case? The decision just shows the difficulties which the Courts of this country would have to meet through having separate grounds of jurisdiction in questions of divorce to those in any other class of action. If the case of *Jack* was well decided, some of the other decisions ought to have been different to what they were. In the case of *Pitt v. Pitt* the action of divorce related to parties who were domiciled and married in England. The husband was in the army, he sold out and came to Scotland, and the House of Lords took the view, reversing the judgment of the Court of Session, that the domicile which affected questions of divorce was the same domicile as regulated the succession of the parties. I confess I think that is much more rational law than that which would make it possible to establish some particular kind of domicile for this class of actions. My opinion remains just as I expressed it in *Jack v. Jack*, with this qualification, that I should not be pre-

pared to say that I should wish to sustain any jurisdiction for divorce which would not also regulate the succession of the parties. It is not necessary to decide that question now, but I think I am bound to state my opinion on it. In this case the consultations as to what would or would not found jurisdiction go a long way in my mind to show that it was not the real resolution of the husband to change his domicile, but that he just wanted to come to Scotland and do as little as was absolutely necessary to found jurisdiction to try an action of divorce. I am clearly of opinion that he has not succeeded in so changing it, and I therefore concur in thinking that the Lord Ordinary's interlocutor should be recalled.

LORD MURE—The question now raised depends almost entirely on this fact, whether or not the "defender did in 1881 come to Scotland with the intention of making it his home, and so changing the domicile which he had as an Englishman?" The Lord Ordinary has found that the defender had abandoned his English domicile and acquired a Scotch one at the date when this action was raised. On the first question which naturally arises, as to his original domicile, there seems to be no dispute. He was born in England and resided there, chiefly in Manchester, and continued to do so for ten years after his marriage to the pursuer, until the year 1880. When he left his wife and came to Scotland in the spring of 1881, he had made up his mind to come here and get a domicile of some sort—having considered whether he would do better to wait for the two years which would be a necessary preliminary to his wife obtaining a divorce in the English Courts—and determined to come to Scotland, where a more immediate form of divorce seemed feasible. That is the result of the evidence, and it was the defender's professed purpose, but it appears now that though Mr Haddon told him to come and make Scotland his home, his intention throughout was to come and stay for a limited time only and with a limited purpose, for the pursuer herself says that at the meeting in London he spoke about "forty days," pointing to a short period of residence only, and Mr Haddon says this was in point of fact the defender's view. The evidence thus shows that he had no further intention of remaining in Scotland than for such period as might be necessary to enable him to obtain a divorce. But after he had resided at Blairgowrie for six weeks there is evidence of a change of intention, assuming his previous intention to have been as I have stated, for the evidence all goes to show that after he saw this article in the *Standard* he gave up the idea of founding jurisdiction in Scotland, and things remained so till he was served with the summons in this action, and his wish was to leave Blairgowrie at once. Mr Haddon's evidence is important on this point. He says—" (Q) Except the conversation about the chance of his getting a continuation of the lease of Saughtree, did defender ever speak to you about remaining in Scotland beyond the summer months, or the six months?—(A) No. That conversation took place before I wrote the letter to pursuer in May, I think. . . . Defender telegraphed to me to meet him in Edinburgh about the end of July or beginning of August 1881, and I did so. He then showed me a copy of the *Standard* newspaper of

30th July 1881, containing an article pointing out the dangerous consequences of an Englishman coming to Scotland for the purpose of getting a divorce. [Shown No. 48]—That is the newspaper. Defender told me that had alarmed him. He told me that from that article he gathered that it would not be legal for him to marry Miss Fisher in the event of his being divorced here, and as that was really the object he had in obtaining a divorce he thought that the sooner he got out of the country the better." That evidence seems to show that the defender's intention had completely changed, assuming it was otherwise to begin with. Then we have this passage in the evidence of Anderson, the hotel-keeper at Blairgowrie—" (Q) In the course of your conversations did he tell you that he was not going to stay in Scotland?—(A) I never understood that he was to stay but for the summer months. (Q) But do you remember his telling you that he was not going to stay in Scotland?—(A) Oh! yes. (Q) Did he tell you that more than once?—(A) Yes; he often referred to going away, sometime before he did go. (Q) Did he do that in August and September?—(A) Yes, I should think about that time, but more particularly after that—after the weather got very bad, in the end of August." Now, on that evidence I think it would be impossible to hold that it was Mr Stavert's intention to acquire a Scotch domicile during any other period than from the end of May to the end of July 1881. We have no evidence of a deliberate and permanent intention on his part to acquire a domicile in Scotland; on the contrary, any intention which he may have had of becoming a domiciled Scotchman to any effect whatever seems to have existed till the end of July only.

On the other question, no doubt, there are several authorities to the effect that where the *locus delicti* is Scotland, and personal citation is there executed, the Scotch Courts will have jurisdiction, but it seems from the decision in *Jack's* case and some others that the older doctrine has been partially abandoned. I think, if the question were new, there might be a great deal to say in support of such jurisdiction, but the present case does not seem very well calculated to raise the question, for here the man crosses the border after the adultery is committed, and for a particular purpose; and it is not quite clear from the evidence that there was not a kind of arrangement between the spouses, which would come very near collusion according to some of the older cases.

On the whole matter, I am satisfied that the defender was not a domiciled Scotchman when this action was raised, and that the Lord Ordinary's interlocutor is therefore wrong, and ought to be recalled.

LORD SHAND—I have also come to be of opinion, and without difficulty, that the pursuer has failed to make out the jurisdiction of this Court. Apart from the question whether jurisdiction can be sustained because the adultery was committed in this country—and that is accompanied by personal citation here—I think the question is one of fact, viz., whether Mr Stavert in fact resided in Scotland, and whether his residence was such as to give our Courts jurisdiction.

Now, the fact of his residence is unquestion-

ably made out. He did live in Scotland for a number of months, and there is no reason to doubt that that would have been sufficient if his case had been otherwise made out. But the question of intention—also a fact from which we must draw an inference—is this, Did he come to Scotland with the purpose and intention of settling here as his permanent home, meaning to remain unless something unanticipated should occur? I am decidedly of opinion not only that he had no such intention, but also that the evidence shows clearly that his purpose in coming to reside in Scotland was only a temporary one, for the purpose of enabling his wife to raise an action of divorce against him. Your Lordship has gone very fully into the evidence, and I shall not go over it again. But, I may say for myself that there is one part of this case which is to me conclusive. If a person, as in this case, confessedly having a domicile of origin in another country, come here under the alleged intention of settling down, I should inquire, What is to be his future life, how is it to be maintained, what does he look forward to doing? Now, it is clear from the evidence, and from the confidential letters between the defender and his agent—the truth of which as expressing what was passing in his mind at that time no one has doubted—that though the defender's uncle had left him some money, it had been in great part lost, and so, having been previously engaged in a mercantile house in Manchester, he had to look forward to that for his future livelihood. There is no suggestion in the evidence that he looked for any business opening in Scotland. There are passages in the correspondence bearing materially on this matter. In a letter to Mr Haddon on 1st September 1880 Mr Stavert writes—“She” (that is, his wife) “will have to get from the Court what alimony the Court may allow; but as *I at present am living out of capital, and have no income*, she must recover what she can, and I can prove it will be little now, having lost so much money on the Stock Exchange and otherwise, as she well knows.” Again, on 11th September he says—“However, as it will rid me of her, I am quite willing to sacrifice it and commence working again, as *I shall certainly have to do*.” And in a letter of 20th March 1881 Mr Stavert thus writes—“Can you give me any particulars about the cottage you told me about in the West Highlands, and what rent it would be if taken for six months. I understood you to say it was furnished, and if from your information it would be suitable, I would go and look at it, as live cheap I must, before getting into business again, which under present circumstances is impossible.” Then in his evidence the defender says—“I intended to go into business again, either in England or abroad. Stavert, Zigomala, & Company were American commission agents, and I intended to go into the same line of business.” All this goes to satisfy me that Mr Stavert came to Scotland for no other than a temporary purpose, and there is no suggestion but that he would eventually have to return to business elsewhere. The only way this matter was met by his counsel was by stating that there was some idea of his ultimately settling at his uncle's farm—an idea which seems to me to have been in the highest degree visionary and uncertain. He had no right to the farm. Even at the expiry of the current lease he would have been in no better posi-

tion than anyone else in competition for it with the landlord, while the open scandal of his private proceedings would probably have been a fatal obstacle to his success in that direction. Again, what does his agent Mr Haddon say? His evidence is as follows:—“(Q) Did he speak to you about Saughtree this year?—(A) Yes, I think he did. I remember on one occasion when I was pointing out to him that his means were running short, his saying that if the worst came to the worst he could fall back on Saughtree—that when the lease expired he was entitled to the farm stock, and he might go there then. I said I did not think there would be any chance of his getting the farm in the circumstances. (Q) What did he say to that?—(A) I don't remember. (Q) Did he say it would blow over by that time?—(A) Yes, I believe he did.” I am clearly of opinion that Mr Stavert never lost his English domicile of origin, and that he came here for a temporary purpose only; but further, I think there was a date at which he distinctly gave up all intention of residing in Scotland, and so on that second ground I should be prepared to say, even if it could be maintained that at one time he had gained a Scotch domicile, he had abandoned it, and that the effort to establish the jurisdiction of this Court has failed.

The present case does not raise the question whether any domicile short of a domicile which will regulate succession will ever serve to ground an action of divorce, and anything which is now said is therefore not authoritative; but your Lordship has expressed the view that were the question raised there would be little doubt what would be the result in this Court, rather indicating that such a domicile would be sustained as founding jurisdiction. Now, I have great difficulty in finding any sound principle of general application which would induce foreign Courts to give weight to a decree in this country based on such jurisdiction; and I have further great difficulty in finding any rule or standard as to the nature and extent of the residence which would be necessary to found such a jurisdiction. Where there is a domicile such as will regulate succession, we know what we are appealing to, but in the case of what has been called a “matrimonial domicile,” I should have great difficulty in determining what standard to look to, and all I can say is, that I think it would be most unsatisfactory to leave it as a jury question for the Court to say in each case what is or is not to amount to a “matrimonial domicile.”

As to the point with regard to the *locus delicti*, if that question had never been discussed, I should have had a very clear opinion on it. It is all very well in mercantile questions of contract and the like that the Court shall look to the place where the contract is entered into and implemented, and where there has been personal citation also; but when we come to the marriage relations we are out of the region of contract and into that of status—the status of the married persons and of their children it may be—and the rules as to jurisdiction must be very different in questions of contract and in those of status. In sustaining the jurisdiction of the Courts of this country it is clearly desirable that our Courts should proceed only on principles which would command the assent of the Courts of other countries, else results might arise most disastrous to the parties. Now,

it has not been said—and I question if it could be said—that the Courts of any civilised country look upon the *locus* of the adultery, combined with personal citation in that country, as a sufficient ground to entitle their Courts to entertain an action of divorce. I am clearly of opinion for myself that that is a bad ground of jurisdiction, and the only question in my mind is whether we are bound by the decisions of our predecessors in this matter. It is true that some of the decisions, and not very long ago, have gone to a view opposed to that which I hold, but, on the other hand, I think the case of *Jack* entitles us to disregard these views. The whole Court came in that case to a careful decision after full arguments, and their jurisdiction was sustained, but it is clear from the report that if the Judges who decided that case had been prepared to sustain their jurisdiction *ratione delicti commissi*, following the authority of the earlier cases, there was no need for the very elaborate discussion of the other grounds of jurisdiction that took place there. Besides, I observe that in the opinion of Lords Neaves and Mackenzie the following passage occurs:—“It is plain that the *locus delicti* has nothing to do with jurisdiction in such a case. A Scotch Court is entitled to grant divorce for adultery wherever the adultery may have been committed, and the mere fact that adultery has been committed within its territory cannot entitle it to deal with the status of parties not otherwise subject to its laws.” That is a very distinct repudiation of the doctrine sustained in the earlier cases, and in the opinion so expressed I quite concur. I think the place where the adultery is committed has nothing to do with the question of jurisdiction.

The Dean of Faculty for the pursuer moved for expenses. The defender's counsel objected on the ground that he had been successful, and further that if the Court had no jurisdiction to give decree in the action neither could it give decree for expenses.

LORD PRESIDENT—The Court are of opinion that the pursuer must have her expenses. No difficulty arises on that point from the question of jurisdiction. Expenses are always awarded according to the way in which the litigants have proceeded, and it is necessarily inherent in the power of the Court which deals with a case, even where they finally dismiss the action on the ground that they have no jurisdiction to entertain it, to deal with the matter of expenses.

The Lords recalled the Lord Ordinary's interlocutor, sustained the defender's first plea-in-law, found that they had no jurisdiction to entertain the action, accordingly dismissed it, and decerned, finding the pursuer entitled to expenses.

Counsel for Pursuer—D.-F. Macdonald, Q. C.—J. M. Gibson—Gillespie. Agent—A. P. Purves, W. S.

Counsel for Defender—Mackay—Wallace. Agent—Adam Shiell, S. S. C.

Friday, February 3.

FIRST DIVISION.

[Sheriff-Substitute of Lanarkshire.

BUCHANAN v. WALLACE.

Bankruptcy—Discharge of Bankrupt—Concurrence—Oath—Bankruptcy (Scotland) Act 1856 (19 and 20 Vict. cap. 79), sec. 146.

The 146th section of the Bankruptcy (Scotland) Act 1856 provides that a bankrupt might petition for his discharge six months after the date of the sequestration, with concurrence of “a majority in number and four-fifths in value of the creditors who have produced oaths,” and twelve months after sequestration with the concurrence of “a majority in number and two-thirds in value of the creditors.” *Held* that in the second case, as well as in the first, the concurrence must be the concurrence of creditors who had produced oaths.

Bankruptcy—Discharge of Bankrupt—Concurrence—Mandate.

A mandate by a creditor authorised the mandatory “to attend, act, and vote for us and on our behalf at all meetings in the sequestration of the estates of John Wallace, pork butcher, 305 Argyle Street, Glasgow, with the whole powers belonging to us.” *Held* that this mandate empowered the mandatory to concur in a petition for the bankrupt's discharge, although the concurrence was not given at a meeting in the sequestration.

This was an appeal in a petition for discharge by John Wallace, pork butcher, Glasgow, whose estates were sequestrated by the Sheriff of Lanarkshire on 10th August 1880. Buchanan, a creditor, objected to the granting of the discharge on a variety of grounds, two of which only were insisted in on appeal.

The first objection related to the concurrence of William C. Johnstone, as mandatory for the Heritable Syndicate (Limited), whose debt was £4505, 11s. 9d., and of the same person as mandatory for the Clydesdale Land Company (Limited), their debt being £779, 1s. 1d. The mandates empowered the mandatory “to attend, act, and vote for us and on our behalf at all meetings in the sequestration of the estates of John Wallace, pork butcher, 305 Argyle Street, Glasgow, with the whole powers belonging to us.” The objection was that the mandate did not empower the mandatory to act except at meetings in the sequestration, and consequently did not empower him to concur in a petition for discharge, unless where the concurrence was given at such a meeting, which had not been done in the present case, and was not the practice.

The third objection was thus stated—“The bankrupt has not made a full and sufficient disclosure of his estate, and has not accounted for his means, and has kept no books showing his transactions. His deposition in his examination and his state of affairs show liabilities exceeding £20,000, and that moneys to the extent of nearly £20,000 passed through his hands during the four years prior to his sequestration; and there