As I have said, however, the 4th clause of the Act of 1867 is not of much, if any, importance in the decision of this case. The part of the Act with which we are really concerned is the Schedule (B) annexed to the Act, which is specially declared (sec. 1) to be a part of the Act. The terms of that schedule leave no room for doubt as to the cases in which stamp duty is exigible, or as to the amount of the duty required to be paid. It provides that "for every policy of sea insurance for time" where the time does not exceed six months, there shall be paid a duty of 3d. in respect of every full sum of £100, and in respect of any fractional part of £100 thereby insured." Now, apply that to the present case. We have a time policy of sea insurance for less than six months, whereby there is insured a sum of £34,690. There must be paid a duty of 3d. per £100 on each of the 346 hundreds insured, and 3d. more for the odd £90, the fractional part of a hundred. This has been done. It will be observed that the schedule does not say that the duty is at all dependent on the number of subjects which the insurance covers, but gives as the only standard for ascertaining the duty payable the amount insured. And that this is not only in accordance with the words of the schedule, but is in full accordance with its intention, becomes I think plain when the concluding part of the schedule is considered. That part of the schedule to which I am about to refer has been repealed, but it may still be referred to, as I propose to do, for the purpose of throwing light upon the meaning and intent of the provisions preceding it which are still operative. The schedule provides that where "separate and distinct interests of two or more persons" shall be insured by one policy, duty shall be payable on each separate interest at the same rate according to the amount or value of the interest "thereby insured." What the separate and distinct interests are which are here referred may be learned from the terms of the 4th or definition clause I have already quoted. They are the interests of the shipowner in his ship, the merchant in his cargo, it may be of a charterer in the freight, or a mortgagee for his debt secured over the ship. These interests may be involved in, and insurance thereof may cover, one or many subjects in which the interest is centred. Thus the merchant or shipper may insure a cargo at £10,000, but he may have declared or estimated in a list appended to the policy the value of different parts of the cargo at various sums. This would not make a separate policy for each part of the cargo, each paying its appropriate stamp duty. The interest is £10,000—that is the sum insured—and the fact of that aggregate interest or value being distributed over different parts of the cargo would make a difference, according to the Act, in the duty payable in respect of the insurance. So in the present case what is insured is the shipowner's interest to the extent of £34,690 distributed over various vessels. It is, however, one interest. The fact that the statute provided for the separate insurance stamp duty in respect of separate interests, and made no reference to the several subjects in which that interest might be centred, seems to indicate clearly that in estimating the stamp duty the several interests were to be regarded, and that the several subjects in which the interest insured exists were not. The words of the statute are that stamp duty is to be paid on the sum insured under the policy, and this was the correct language to use. It is said popularly that the ship is insured—the cargo and freight are insured. But in fact it is not the ship cargo or freight that is insured. It is the insurers' money interest in any or all of these subjects, and therefore I say that the language of the statute is strictly accurate when it speaks of the sum as insured and not the subject of which that sum is the expressed value.

I am of opinion that the interlocutors appealed against should be recalled, the defender's second plea-in-law repelled, and the case remitted back to the Sheriff to proceed therein.

LORD JUSTICE-CLERK — I have had considerable difficulty in making up my mind upon this case. I was very much moved by the able argument addressed to us for the respondent, but after reconsidering the case with the aid of your Lordships' advice I have come ultimately to the opinion that the judgment of your Lordships is right, and I concur in the opinions expressed.

The Court recalled the interlocutors of the Sheriff and Sheriff-Substitute, repelled the second plea-in-law for the defenders, and remitted the case to the Sheriff for further procedure.

Counsel for the Pursuers—Ure. Agents—J. & J. Ross, W.S.

Counsel for the Defender—D.-F. Balfour, Q.C. — Salvesen. Agents — Emslie & Guthrie, S.S.C.

Thursday, November 19.

SECOND DIVISION.

[Lord Wellwood, Ordinary.

LOW *v.* LOW.

Husband and Wife—Divorce—Domicile—Jurisdiction

A Scotsman, who in 1862 had entered the Royal Navy, in 1866 married in Malta a native of that island, where from 1867 till 1873 he was employed in a Government office. He then retired, and after some months' residence in Great Britain he again returned with his wife and family, on account of his health, to Malta, where he remained until 1879, when he was appointed to an office there which he was entitled to hold for a period of twenty years. While abroad he

maintained constant communication with his relatives in Scotland, and his sons were sent to this country for education. He had no property or residence in Malta other than his official apartments. In 1887 the spouses separated under an extrajudicial agreement, which by the law administered in Malta required judicial consent. The deed of separation provided that in the event of the wife's adultery the remedy of divorce "before the competent tribunals in England" would still be competent to the husband.

In an action of divorce on the ground of adultery, raised by the husband in Scotland, the wife pleaded no jurisdiction. *Held—diss.* Lord Young—(1) that the defender had not proved that the pursuer ever intended to abandon his Scottish domicile; and (2) that even assuming the separation to have been judicial, it did not, for the purposes of this action, affect the defender's *status* as the pursuer's wife, and further, that she was excluded by its conditions from pleading it in bar of action.

This was an action by David James Low, son of David Low, silk mercer in Edinburgh, for divorce from his wife Marianna Micalley or Low on the ground of her adultery.

The defender pleaded "no jurisdiction."

The pursuer was born in Edinburgh of Scottish parents. He entered the navy in 1862, and until 1873 he served in various of Her Majesty's ships. He married the defender, a native of Malta and the daughter of Maltese parents, on the 15th September 1866, in Malta, according to the laws of Malta in both the Roman Catholic and the Protestant Churches. The spouses lived together when the pursuer was not on duty in his ship. In 1873 he retired from the navy with a pension, and in that year both parties came to Scotland, and lived with the pursuer's father for some months. The pursuer then obtained employment in London, but while there he became delicate, and was ordered by his medical advisers to proceed to a warmer climate. He returned to Malta, where from 1873 till August 1879 he was engaged in the dockyard. In August 1879 he was appointed, under an Admiralty order, storekeeper and cashier at the Naval Hospital. At that date he was thirty-five years of age, and under the order appointing him he was entitled to hold the office till he reached the age of fifty-five. As a retired naval officer he was liable to service in the event of war. In his evidence, taken at Malta on commission, he deponed—"I consider Scotland as my home, to which I intend, D.V., to return on the expiration of my present appointment." Three children of the marriage were alive at this time—David, twenty-three, who held an appointment in Demerara; John, eighteen, who was in a business office in Edinburgh; and a younger son, who lived with his father. The sons had been sent to Scotland to be educated, and the pursuer had always maintained communications with his relatives in this country.

Upon 12th February 1887 the parties presented a petition in the Second Hall of Her Majesty's Civil Court at Malta to the effect that the "petitioners, considering that cohabitation between them is impossible, and in order to avoid publicity and costs, have agreed to solicit from this Court the authorisation to enter into a voluntary separation, and they have to that effect drawn the herein enclosed draft." The draft of the separation deed contained a number of conditions regarding the custody of the children, the amount of aliment to be paid to her, division of the furniture between the spouses—"Sixth, that this deed shall not be prejudicial to the rights appertaining to the appearer David Low, in case the appearer Marianna Low shall incur in any grievous fault as foreseen by Article 44 of Ordinance, No. 1 of 1873, the commission of which fault according to the aforesaid Ordinance, No. 1 of 1873, would make her forfeit the allowance as established in clause third of the present deed. Seventh, that in the event foreseen in clause six" (*i.e.*, the wife's adultery) "the present deed shall not bar the exercise of the divorce actions to be, if ever, entered into before the competent tribunals in England."

Upon 14th February the Court pronounced this order—"The Court having ineffectually recommended a reconciliation to petitioners, and after having duly warned them, has granted the request, and has authorised petitioners to execute the deed of separation according to the terms of the draft countersigned by the Judge."

The parties afterwards lived separately. The evidence as to the alleged adultery is fully given in the Lord Ordinary's note.

Upon 11th June 1891 Lord Ordinary (WELLWOOD) pronounced this interlocutor:—"Having considered the summons, proof, and productions, repels the first plea-in-law stated for the defender, and sustains the jurisdiction of this Court: Finds facts, circumstances, and qualifications proved relevant to infer the defender's guilt of adultery: Finds her guilty of adultery accordingly: Therefore divorces and separates the defender Mrs Marianna Micalley or Low from the pursuer David James Low, and from his society, fellowship, and company: Finds and declares in terms of the declaratory conclusions of the summons and decerns, &c.

"*Opinion.*—Two questions of some nicety are raised in this case, but they both admit of being somewhat shortly stated.

"(1) The defender's first plea-in-law is 'no jurisdiction.' She maintains that the pursuer has lost his domicile of origin in Scotland, and acquired a new domicile in Malta. It is never an easy matter to establish that a domicile of origin has been lost, and it is specially difficult to do so where the person who is said to have lost his domicile is alive, and strongly protests that he never intended to abandon it, as is the case here. The pursuer's statements

as to his occupations and places of residence in condescendence 1 are substantially correct, so far as they go, and they only need to be supplemented in one or two particulars. When he returned to Malta in 1873 it was on account of his health. He seems to have become gradually better, and during his convalescence, between 1873 and 1879, he obtained work in various positions at the dockyard at Malta. In August 1879 the appointment opened of storekeeper and cashier in the Royal Naval Hospital at Bighi. That is an office which under the Admiralty rules he is entitled to hold until the age of fifty-five, when he will be superannuated. Being a retired naval officer, the pursuer is liable to service in the event of war when required.

"It is proved that the pursuer kept up constant communication with his father and relatives in this country, and that as his sons grew up they were sent to Scotland for purposes of education.

"It may also be noted that the pursuer has no property or residence in Malta other than his official apartments.

"Against this there is to be put first—the fact that the pursuer married the defender in Malta, and that the defender and her family are Maltese, and reside in Malta; secondly, the pursuer's continued residence in Malta from 1873; and thirdly, that it is not, as I think, clearly proved that the pursuer ever spoke definitely of an intention to return to this country until after his separation from the defender in 1887.

"Balancing these considerations, I do not think that the advantage lies with the defender. The most serious point against the pursuer is his acceptance of the appointment which he at present holds That appointment, although not permanent, was one which at its commencement had about twenty years to run, and it is no doubt an important element in such cases going to establish a change of domicile that a man accepts such a post. But it is not conclusive, and on consideration of the whole circumstances of the case in the light of previous decisions, I am not prepared to hold that it has been proved against the pursuer's denial that his Scottish domicile has been lost. It lay on the defender to prove that it was abandoned *animo* as well as *facto*, and while she has established a length of residence on the part of the pursuer in Malta, which might be sufficient if intention were proved, she has not succeeded in proving directly or by implication that the pursuer ever resolved to abandon his Scottish domicile.

"(2) The next question is on the merits of the case, viz.,—Whether the pursuer has proved the adultery alleged?

"It may be at once stated in favour of the defender that there is no direct evidence of any act of adultery or indecent familiarities between her and Captain Kellie. It is not proved that before her separation from her husband there was any undue intimacy between her and Kellie, and even after the separation I do not think that there is any direct evidence of affectionate familiarities in the sense of endearments observed between them. But when this is said, practically all has been said that is to be found in the evidence in favour of the defender.

"It is proved, and indeed is not denied, that she has resided in more than one house alone with Captain Kellie, and in particular that she has so resided at a house No. 12 Strada Marina, Via Misida, Sliema, since June 1889. It is not proved directly that they occupied the same bedroom, or that they ever slept together, and there is no direct evidence that adultery was committed. But, on the other hand, their whole conduct was exactly that of persons who were cohabiting. They had apparently a common purse; they took their meals together; they drove and walked in public together; they went to the opera and places of public entertainment together; and this against the remonstrances of the pursuer, and in defiance of public opinion.

"The defender's excuse is that Captain Kellie was a lodger. If he was, he was the only lodger she ever had. It appears from the evidence that the defender's mother resides in Malta, and that after the separation she, the defender, at first resided with her—a very proper and natural arrangement. The defender says that she left her mother's because there was not sufficient accommodation, but it is a notable and unfortunate blank in the evidence for the defence that none of the defender's relatives are adduced to help to put an innocent construction upon the defender's subsequent actings.

"It is said that there is no evidence of affectionate passages between the defender and Kellie. There would have been no difficulty in the case if there had been such evidence, and it is quite in accordance with the pursuer's theory that such compromising demonstrations were carefully avoided. On the other hand, it is plain that all affection between the spouses was at an end from the date of the separation, and there is a singular letter from Kellie (who is adduced as a witness for the defender) to the witness Gatt, in which, in explanation or palliation of the footing on which he and the defender were living together, he says, 'As arrangements I trust will shortly be ready to enable me to marry Mrs Low, I feel your expressions towards Mrs Low as much as she does herself.' The letter shows that Kellie was conscious that the defender was compromised by living with him, and also that the difference in their ages did not affect their relations, and that those relations were not platonic.

"These being the facts of the case, it will be seen that the strength of the defence, such as it is, consists in the openness and audacity with which the defender and Kellie lived together. On this subject I may refer to the frequently quoted passage in Sir William Scott's judgment in *Loveden* v. *Loveden*, 2 Haggard, 1-3—'It is the consequence of this rule that it is not necessary to prove a fact of adultery in time and place. Circumstances need not be so

specially proved as to produce the conclusion that the fact of adultery was committed at that particular hour or in that particular room; general cohabitation has been deemed enough. Parties living for months and for years together, and hoping by that means to insult the feelings of a husband, and to elude the justice of the tribunals which have to decide upon such matters, have by such contrivances supposed that they were sufficiently protected, but the courts of justice have held that that is an evasion which was perfectly insufficient for such a purpose, and the parties have been concluded by general cohabitation.' The cases of *Cadogan* and *Rutton*, the particulars of which are given in the Notes, are good illustrations of this statement of the law.

"The proof having been taken on commission for the most part, I have, in considering this case, been under the great disadvantage of not seeing any of the principal witnesses. I have also not had an opportunity of putting or causing to be put some questions which appear to me to be of importance. In particular, the defender's servant Maddalena Zammit should have been much more closely pressed as to what she observed. But on the broad facts of the case, and giving the defender the benefit of all the deficiencies in the proof, I am unable to come to any other conclusion than that the defender and Captain Kellie have for some time past been living in adultery. The whole conduct of the parties indicates a degree of familiarity which is quite inconsistent with the pretended footing of landlady and lodger, or indeed with any innocent relations, and taken in connection with frequent opportunity leads inevitably to that conclusion. That is the construction which was undoubtedly put upon their conduct in Malta, and that is the construction which I think, on the evidence, must be put upon it by the Court."

The defender reclaimed, and argued—It was admitted that the pursuer had a Scottish domicile in 1873 when he returned to Scotland, but he left Scotland and went to Malta, as being the place where he could live best. He was ordered by his medical adviser to go to a warmer climate, and he chose Malta. He had married there, and naturally that was the place to which he would go. When he got there he took employment in the dockyard, and finally accepted what might be described as a permanent position in the Royal Naval Hospital. He had thus acquired a Maltese domicile. It did not matter whether he intended to return to Scotland and end his days there. Before he could re-acquire a Scottish domicile it was necessary that he should have left the place where he had acquired a new domicile—Fraser on Husband and Wife, 1259; *Ommaney* v. *Bingham*, March 15, 1796, 3 Pat. App. 448; *Clark* v. *Newmarch*, February 16, 1836, 14 S. 488; *Commissioners of Inland Revenue* v. *Gordon*, February 4, 1850, 12 D. 657; *Pitt* v. *Pitt*, December 5, 1862, 1 Macph. 106, and 4 Macq. 627; *Bruce* v. *Bruce*, April 15, 1790, 3 Pat. App. 163. *Wauchope* v. *Wauchope*, June 23, 1877, 4 R. 945; *Jack* v. *Jack*, February 7, 1862, 24 D. 467. It was not now necessary to hold that a citizen of one country could not change his domicile unless he had made up his mind to give up all ties in the one country and become a citizen of another. The latter view had been held in *Moorhouse* v. *Lord*, March 19, 1863, 32 L.J., Chan. 295, and followed in *in re Capdevielle*, June 13, 1864, 33 L.J., Ex. 306. That doctrine had been displaced by *Udny* v. *Udny*, June 3, 1869, L.R., 1 Sc. & Div. App. 441. It was not material that he should have intended to return to Scotland when his period of service was up; he must have left the country where he had acquired a domicile—*Douglas* v. *Douglas*, July 17, 1871, L.R., 12 Eq. 617; *Allison* v. *Catley*, June 15, 1839, 1 D. 1025. Assuming that Low was domiciled in Scotland so as to give the Scottish Courts jurisdiction over him, it did not necessarily follow that they had jurisdiction over his wife. The parties in Malta had entered into a separation which was legal in that island, and which had to be authorised by a judge before it became binding. That was equivalent to a decree of judicial separation in the Scottish Courts, because (1) it needed the sanction of the Court, and (2) because there were a number of stipulations entered into between the parties to it which could only be carried out by reference to legal proceedings. Now in Scotland if a decree of judicial separation had been pronounced, the wife could acquire a separate domicile from that of the husband—Fraser on Husband and Wife, ii. 906; *Tovey* v. *Lindsay*, May 24, 1813, 1 Dow, 117; *Dolphin* v. *Robins*, August 4, 1859, 3 Macq. 563.

The respondent argued — He had no intention to acquire a Maltese domicile when he returned to Malta. He was ordered abroad by his medical advisers for a particular occasion, and his health was now re-established. The office he now held was not a permanent one, as he knew when he took it that he would be superannuated at the age of fifty-five. He deponed that his intention was to return to Scotland, and he had always kept up a close connection with Scotland. All these facts showed that he was still a domiciled Scotsman, as the defender admitted he was in 1873. It was not a case of re-acquiring his Scottish domicile; he had never lost it —*Wilson* v. *Wilson*, March 8, 1872, 10 Macph, 573, and March 14, 1872, L.R., 2 Pro. & Div. 435. In the report of this case the Judge (Lord Penzance) relied strongly on the evidence given by the husband that he intended to make England his domicile. Here the pursuer deponed that he intended to return to Scotland when his appointment came to an end. This circumstance must also be remembered when comparing this case with the cases on succession upon which the defender relied, as in these the person about whose domicile the question arose was dead. The case of an Anglo-Indian domicile did not apply, as that doctrine was raised when

India and Indian service stood in a very different relation to this country from what they did now. The *onus* of proving that the pursuer had ever lost his Scottish domicile and acquired one in Malta was on the defender, and she had not done it—*Steele* v. *Steele*, July 13, 1888, 15 R. 897; *Bell* v. *Kennedy*, May 14, 1868, 6 Macph. (H. of L.) 69; *Jopp* v. *Wood*, February 28, 1865, 34 L.J., Chan. 212; *Patience* v. *Main*, March 24, 1885, L.R., 24 C.D. 976. As regards the separation giving the wife a right to acquire a domicile of her own so that she did not necessarily follow her husband's domicile, there was no real authority for it, as the passage in Lord Fraser's work upon which the defender relied was there stated to be founded upon the Married Women's Property Act, which gave no ground for the statement. Even assuming the truth of this proposition, the separation did not amount to a judicial separation in this country—first, the parties had separated for their mutual convenience, and not for fault on one side or the other; and secondly, even if it was judicial, the husband had reserved right to sue this action. Again, assuming her husband's domicile was Scottish when the separation took place, the wife's was Scottish also, and she had done nothing since to change the domicile—*Dalton* v. *Roberts*, 3 Macq. 578; *Le Sueur* v. *Le Sueur*, March 9, 1876, L.R., Pro. & Div. 139.

At advising—

LORD JUSTICE-CLERK—The only important point in this case is the question whether the Court has jurisdiction to deal with the case on its merits. If we have that jurisdiction, then I think the pursuer is entitled to decree.

The question is, whether the Scottish Courts have jurisdiction over the pursuer, or whether, as alleged by the defender, he has ceased to have a domicile in Scotland, which is his domicile of origin, and has acquired one in Malta. Of course in a case of *status* it may make a great deal of difference to the relations of the spouses where the domicile of the husband is held to be, and various anomalies may arise. For instance, if it had been the husband who had committed adultery, then if his domicile was in Scotland, the wife, although a Maltese, would have had to come to Scotland to get her remedy, but then she would have had the remedy of divorce *a vinculo* which she would not have had in Malta. On the other hand, if the pursuer is domiciled in Malta, he is deprived of the power of divorce. Various other instances might be mentioned. Even as between English and Scottish domicile they are various. All these anomalies result only from this fact—that the law of marriage is different in different countries, and in my opinion we cannot take that fact into account.

It is admitted that the pursuer's domicile was at first in Scotland, and in his evidence he is very distinct in saying that he never gave up the intention of returning to Scotland, which is his domicile of origin. If he is to be believed, there is an end of case in my opinion. Now, is there any reason to disbelieve him? It is for the defender to prove that he had given up that intention, and formed an intention to take Malta as his domicile.

The facts are clear. This pursuer entered the navy a good many years ago, and served in the navy till 1867. He then got an appointment in the Admiral Superintendent's office in Malta, which position he held till 1873. He then retired on half-pay, and immediately returned to Scotland, where he attempted to get employment. He did get employment in London, but in consequence of the breakdown of his health in consequence of acute bronchitis, and on medical advice, he left this country and went back to Malta. I imagine he went to that particular place, because being suitable for his health he thought he had more chance of getting employment there, and partly because his wife was a Maltese. Then, after doing temporary work, he in 1879 obtained the post of storekeeper to the Naval Hospital at Malta. It is at this point that the case for the defender first assumes shape, because that is an appointment of some duration, as he might hold it until he was superannuated at the age of fifty-five. It may be noticed here that this appointment did not save him from the necessity of active service in time of war as a naval officer. To conclude the circumstances of the case, he has in consequence of this employment lived in Malta. He has made, it is true, very few journeys to Scotland since he went to Malta, but that, he says, is on account of the expense of the journey, which he cannot afford.

In these circumstances can it be said that the pursuer has lost his Scottish domicile? There does not appear to me to be anything in them to militate against his evidence that he never gave up the intention to return to Scotland. The only thing, I think, that can be said to have such a result is, that he has taken a post in Malta which must necessarily keep him there for some time. That is, however, just what many people have to do whose health or the necessity of business keeps them in foreign countries although they would much rather have stayed at home. It is to be remembered that it was bad health that drove him from Scotland, and it is quite conceivable that he would not wish to return there until his health was sufficiently recovered to prevent any recurrence of the illness which drove him away. Then, having got this position, which carries with it a pension on retirement, he thought it better to stay on so that he might have some provision for his later days. I do not think that Malta is a place in which anyone would prefer to take up his abode if he had power to go anywhere else. In my opinion, then, and looking only at his conduct in going from one country to another, I am of opinion that he has not lost his Scottish domicile.

There is, however, another ground on which it is claimed that the Scottish Courts have not jurisdiction over the spouses. In 1887, in consequence of disagreements be-

tween the spouses, they agreed to separate, and we were told that, for the separation to have a binding force, it was necessary for it to have the imprimatur of the Courts of Malta. That may to some extent support the defender's view, because it shows that the pursuer submitted to the Courts of Malta. If that had stood alone it might have been a point of some weight, but there is a remarkable provision in the deed of separation, and one which is evidently put in for the advantage of the pursuer in this case, and is quite inconsistent with the view that he had *animo* given up his Scottish domicile. The provision is this—"Seventh, that in the event foreseen in clause six" (which simply means the wife committing adultery), "the present deed shall not bar the exercise of the divorce actions to be entered into before the competent tribunals in England." I take England as meaning Great Britain. Therefore the pursuer had it in his mind that the tribunals in this country were the competent tribunals for him to seek redress in the event of his wife's fault, and he took care that he should not deprive himself of the right to come to the tribunals of his own country.

I think there is no evidence to prove that the pursuer either *animo* or *facto* ever gave up his Scottish domicile. Therefore I think that the Lord Ordinary is right, and that we should adhere to his interlocutor.

LORD YOUNG—This case presents no feature of interest except the leading question of whether or not we have jurisdiction to consider the case, and that is an important and interesting question. I agree with your Lordship in thinking that the adultery is clearly proved. I cannot help regretting that the evidence was taken in the manner it was, viz., on commission, where the Judge had no opportunity of seeing the witnesses, but I do not think the adultery doubtful.

The legal question, however, I think, is one of vast importance. We are familiar with the subtlety and difficulty which arise in questions of domicile, and the difficulty has not been decreased by the decisions and the *dicta*, *obiter* or not, upon the subject. In the very nature of the case there must be difficulty and argument, as we cannot proceed without vague and indefinite language. The phrases temporary and permanent must be relative terms; the *animus remanendi* or *revertendi* must always depend upon the fluctuating intentions of human beings varying according to the circumstances of each case.

After all, I think we go as far as we can towards reaching any general rule which might govern such cases as this when we see what are the considerations of expediency and utility which apply to the convenience of the parties. I cannot help thinking some difficulty has been created by the language which is used about this. A man is said to have lost his Scottish or English domicile. That sounds a serious thing, but it is not worth talking about if he may resume it whenever he pleases, and according to much of the argument addressed to us he may regain it if it has been lost merely by changing his mind.

Now, having regard to these considerations of expediency and utility, and supposing that a Scotsman has gone to some foreign country, what is the question we have to consider? A Scotsman born in Scotland sets out into the world to make his way. There is a well-settled and fixed rule that no change of domicile can be effected by anyone when he is moving about according to the exigencies of the service with his regiment if he is in the army, or with his ship if he is in the navy. That is an expedient rule, but it does not raise any question here. This pursuer was in the navy, and he retired in 1873. In 1866 he married in Malta a Maltese lady, and he makes his home there, in the ordinary sense of the word. In the ordinary meaning of the word, that is his home where he lives with his wife and family, he having no home elsewhere. He comes to Scotland for a few months in 1873, but with that exception he has lived at Malta from then till now, nearly a quarter of a century. The climate suits him, his business lies there; indeed it is the only place where he can make a livelihood. Then a matrimonial offence is committed, and the question for the considerations of utility and expediency is whether that offence and the consequences of it are to be judged of by the law of that country where he has lived for twenty-five years or by the law of Scotland. The consequences may be very different to the parties according to whether the law of the foreign country or of Scotland may prevail.

Now, I must say, to my mind, every consideration of expediency and utility and of good sense is against such a result. I quite feel the force of the opinions which were expressed in the other view of the question, but I go back to what Lord Thurlow said a long time ago. It is of no use to inquire what is the intention of the person about whose domicile the inquiry is being made, because his intentions are fluctuating, He may change his mind at any moment, but is the jurisdiction to fluctuate with his intention?

Suppose him to be examined as a witness, and to have said—"When I brought this action I fully intended to have returned to Scotland, but now I have changed my mind and I do intend to return there, but to stay in Malta." Would that have ousted the jurisdiction? On the other hand, is it the intention he has at the time of bringing the action that is to fix the domicile so that no change in his mind after that can change his domicile.

I think the rule ought to be, that where a man makes his home, in the ordinary sense of the word, there is his domicile. When a Scotsman goes to England, for instance, and makes his home there, although he may be passionately attached to the land of his birth, and may intend to return there to spend his last days, nevertheless his domicile for all purposes ought to be in the place where he has made his

domestic home, he having no other, and his love for his birthplace and his intention to return there ought not to come into the matter at all.

Suppose a Maltese, born in Malta, who had spent his boyhood there, should come to Scotland as the only place where he can get a livelihood, and he obtains a situation in Edinburgh; he marries a Scottish lady, and takes up his abode in Edinburgh, and is resident there for twenty-five years; he complains of some matrimonial offence committed by his wife in Scotland, and he brings an action against her in the Scottish Courts. The wife, however, says—"Oh, no, you are a domiciled Maltese, and I will prove that you were very much attached to Malta, and intend to return there before you die, so that our relations are subject only to Maltese law, and a Maltese court must inquire into the facts and give judgment upon them." Would she be listened to? Yet such in effect is the contention of the pursuer here.

I do not think it is much to the purpose to say, as was said in a recent case, that no Scotsman in his sober senses would ever think of making his home in some distant country—Burmah it was in that instance. I do not know what any Scotsman in his sober senses would think of doing, but I do know that the facts of this case, as they have been disclosed in the proof, seem to me to show that the pursuer had made his home, in the ordinary sense of that word, in Malta. He was married there, he lived there with his wife and family, and he had no means of living anywhere else. Many Scotsmen go to reside in England, and if they were asked whether they renounced Scotland, they would certainly say no, their affection for Scotland was as strong as ever, and they had a fixed determination to return to Scotland and end their days there. A Scotsman has risen to be Chief-Baron or Vice-Chancellor, yet such would have scorned the idea that by going to England they had renounced Scotland, but if any matrimonial dispute had arisen in England, I do not think they would have been very respectfully treated if they had said—"We are Scotsmen and claim that only the Scottish Courts have jurisdiction to determine such matters." These are a few of the considerations that have occurred to my mind—and there are many others—of the difficulties and dangers that would arise if we are to determine these cases by any other rule than that I have indicated.

My opinion is that this Maltese man, who has been in Malta for twenty-five years, and who since 1873 has not been in Scotland except for a few weeks, when he came to give instructions as to instituting this process, and who has since 1867 been in a situation there, if he has complaint to make against his wife, ought to have resorted to the Maltese courts for the redress they can give. I think it is not fair to her that she should be forced to come to this country to defend herself.

LORD RUTHERFURD CLARK—I agree with your Lordship in the chair.

LORD TRAYNER—Two questions have been argued before us under the defender's reclaiming petition, (1) whether the defender is subject to the jurisdiction of this Court, and (2) whether the pursuer's averments of adultery on the part of the defender have been proved? On the second question—that is, on the merits of the case—I shall say nothing beyond this, that the proof adduced, in my judgment, is quite sufficient to establish the pursuer's averments and to entitle him to decree of divorce.

The question of jurisdiction is, at first sight, attended with more difficulty, but upon consideration of the arguments offered and the authorities cited I have come to be of the opinion expressed by the Lord Ordinary, and that without any doubt.

Speaking generally, and apart from a specialty in this case which I shall afterwards consider, I suppose that there is no doubt that the defender's domicile is the same as that of her husband. A wife cannot have or acquire *stante matrimonio* a domicile different from her husband's. His domicile of origin is admittedly in Scotland, and that domicile is and must continue to be the only domicile by which his succession can be regulated until he abandons it and acquires another. I say the domicile which regulates his succession, because after what took place in the House of Lords in the case of *Pitt*, and the opinions delivered by Lord Deas and Lord Shand in the case of *Stavert*, I regard it as practically settled that the domicile which regulates succession is the domicile from which jurisdiction arises to deal with questions of divorce. Such jurisdiction will not be afforded by what has been called the matrimonial domicile, nor by the *locus delicti* combined with personal service, nor by the mere residence in this country for forty days. Nothing short of what was termed in the case of *Pitt* a complete or absolute domicile—and that is one which regulates succession—affords jurisdiction to deal with a case of divorce. In this sense, therefore, the pursuer's domicile is in Scotland, unless, as I have said, he has lost it by abandonment and by the acquisition of another somewhere else. In support of her plea, which I am now considering, the defender avers that the pursuer has lost his Scottish domicile and has acquired one in Malta, which he now holds. The *onus* of proving this averment lies upon the defender, and it is essential to the success of her plea that she shall establish the averment she has made. In my opinion she has entirely failed to do so. There is not a tittle of evidence to support this averment beyond her own statement, while, on the contrary, the evidence of the pursuer, his conduct at Malta, his reasons and motives for going to and remaining there so long as he has done, as well as the evidence of other witnesses examined on his behalf, satisfy me that he has not abandoned his Scottish domicile, but has retained and intended to retain it. The pursuer's domicile being in Scotland, it follows that the defender's domicile is there

also, and she is therefore subject to the jurisdiction of this Court in the present case.

It is said, however, by the defender that in respect of a judicial separation between her and the pursuer, she (the defender) no longer follows the domicile of her husband, but may and has acquired in Malta a separate domicile of her own. I am not satisfied that the separation of the parties was a judicial separation as we understand these terms. The separation did not proceed on any judicial inquiry as to the alleged cause therefor; indeed, the deed of separation produced, and which was sanctioned by judicial authority, bears in terms that the parties had entered into it "by mutual consent." It rather appears to me that the separation of the parties was the result of an extrajudicial agreement into which they had entered, but which required by the law administered in Malta the consent or interposition of the Judge to allow of them acting upon it by living apart from each other. All that the Judge seems to have done being—all that his duty required him to do—was to endeavour to bring about a reconciliation between the spouses, failing in which he authorised the separation.

But even taking the separation to have been judicial, it is certainly not clear that it so separates the parties to the effect of enabling the defender to acquire a domicile different from the pursuer. It may have the effect of enabling her to carry on business for herself, to sue and defend questions arising out of such a business without the consent or intervention of her husband, may give the courts at Malta a jurisdiction over her which, apart from the separation, they would not have had, and even give her a domicile to found such jurisdiction. But it does not, so far as I see, affect her *status* as the pursuer's wife, or the rights and privileges which that *status* confers except in so far as by the agreement she had renounced them.

Assuming, however, that the separation was judicial, the terms of the agreement —that is, the conditions on which separation was decreed—bar the defender from pleading it as she now does. For one of those conditions was, to state it shortly, that in the event of the defender committing adultery, the separation should not prevent the pursuer seeking the remedy of divorce "before the competent tribunals in England," by which I understand the competent tribunals of the United Kingdom. The defender cannot now, therefore, in respect of the separation, object to the pursuer seeking here that remedy which by a rather remarkable provision was reserved to him by the conditions of that separation. On the whole matter I am of opinion that the interlocutor of the Lord Ordinary should be affirmed.

The Court adhered, and found the wife entitled to the expenses of the reclaiming-note.

Counsel for the Reclaimer—Younger—Shennan. Agent—Walter C. B. Christie, W.S.

Counsel for the Respondent—Shaw—C. N. Johnston. Agents—Curror, Cowper, & Curror, W.S.

Friday, November 20.

SECOND DIVISION.

[Sheriff of Forfarshire.

THE GRANITE CITY STEAMSHIP COMPANY, LIMITED *v.* IRELAND & SON.

Ship — Discharge — Charter-Party — Excepted Causes—Demurrage.

A charter-party allowed forty-eight running hours for discharging cargo "except in cases of . . . strikes . . . detention by railway . . . or any other cause beyond the control of the charterers which may impede the ordinary loading and discharging of the vessel," and stipulated for demurrage at the rate of 10s. per hour for any time expended over and above the forty-eight hours. The charterers failed to discharge within the stipulated time, and were sued by the shipowners for demurrage. The defenders alleged that the delay was due to the impossibility of getting railway waggons owing to a strike of railway servants.

Held that the delay was not due to any of the causes specified in the charter-party, and that the defenders were liable in demurrage.

David Ireland & Son, coal exporters and steamship brokers, Dundee, chartered the steamship "Linn o' Dee," belonging to the Granite City Steamship Company, Limited, Aberdeen, to carry coals from a port on the Tyne to Leith Docks.

The charter-party provided that after loading her cargo the vessel should proceed "to Leith Docks and deliver the same agreeably to bills of lading to the said affreighters or their assignees, alongside any safe wharves, crafts, or depôts, as ordered by receivers, on being paid freight at the rate of three shillings and ninepence per ton of 20 cwt. . . . The freight to be paid on unloading and right delivery of the whole cargo, in cash, at current rate of exchange.

running hours to be allowed the said freighters for loading, as per colliery guarantee, and forty-eight running hours for discharging the said cargo, except in case of holidays, Sundays, colliery pay-days, idle days, riots, strikes, lock-outs, idle time, or restriction of out-put at the colliery or collieries with which the steamer is booked to load, frosts, storms, floods, detention by railway or cranes, accidents to machinery, or any other cause beyond the control of the charterers which may impede the ordinary loading and discharging of the vessel.