

defenders gave joint instructions, and the successful defender was entitled to relief from the other; here there was no joint defence, and this defender was not entitled to relief. Accordingly, he was entitled to the whole of his agent's fees.

The Court repelled the objection, on the ground that the real test was the amount the defender would be out of pocket, and that he would only be liable to pay one-third of the charges in question, the other two defenders being respectively liable each for one-third.

The LORD PRESIDENT was absent.

Counsel for the Pursuer—Salvesen—Clyde. Agents—Drummond & Reid, W.S.

Counsel for the Defender—Lindsay—Younger. Agents—Menzies, Bruce Low, & Thomson, W.S.

Counsel for the Defender—Jameson—Glegg. Agents—Menzies, Bruce Low, & Thomson, W.S.

Tuesday, July 16.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

DOMBROWIZKY v. DOMBROWIZKY.

Husband and Wife—Divorce—Jurisdiction—Domicile.

Spouses who were Jews, born in Russia, left that country owing to the husband's inability to get employment, and came to Scotland, where the husband started business as a hawker. Ten years after they had taken up their residence in this country the wife raised an action of divorce for adultery against the husband, who pleaded "no jurisdiction."

Evidence upon which the Court (*aff.* judgment of Lord Kincairney) repelled this plea, *holding* that the husband had acquired a domicile in Scotland.

Opinion by Lord Kincairney, founded upon the authority of *Jack v. Jack*, 24 D. 467, that for purposes of divorce there may be a matrimonial domicile different from the absolute domicile which will rule succession.

Opinion by Lord Trayner *contra*.

Opinion reserved by Lord Young on this point.

In November 1894 Dina Dombrowizky raised an action of divorce for adultery against her husband Joseph Dombrowizky. No appearance was made for the defender until the proof. After the proof defences were lodged, the defender pleading, *inter alia*, "no jurisdiction."

The following facts appeared from the statements of parties and proof:—The pursuer and defender were both Jews, natives of Russia. They had been married in Russia in 1877. The defender had been employed as clerk in a Government office

in that country. In 1885 he lost his employment in consequence, he said, of an edict discharging all Jews in Government employment. Being unable to earn a livelihood in Russia he left that country, and in company with a friend—Preteca by name—came to Glasgow. In June 1885 his wife and her younger sister joined him in that city, which they had chosen as their place of residence, because they had some friends there. The defender and his wife and her sister continued to live in Glasgow in various houses rented by him until about the beginning of the year 1892. During this period the defender carried on business as a hawker. Three children were born to the spouses in Glasgow, of whom one died and was buried in a burial place, which the defender purchased in the Jewish Cemetery there. In the end of 1891 or the beginning of 1892 the defender was, according to the evidence of the pursuer and her sister, detected by them in an act of adultery. The pursuer stated that after this discovery she discontinued cohabitation with him as his wife. Shortly after this alleged discovery she removed to Edinburgh, where she resided with her sister, who had married a Mr Eisenberg. The defender also came to Edinburgh, where he attempted to start a business, but failed. The spouses did not, however, resume cohabitation. Two acts of adultery were alleged to have been committed by the defender in Edinburgh, in March and August 1894, but these were spoken to by only one witness. The pursuer's sister also spoke to an act of adultery committed in the middle of July 1891.

With reference to the question of domicile the pursuer deponed—"When my husband came to Scotland in 1885 it was with the intention of settling here, and he never expressed any intention of returning to Minsk or to Russia. In conversation with me he always said that he would never leave Scotland; that this was his first place and it would be his last." Mrs Eisenberg deponed—"After the defender came to Scotland first he spoke of remaining here. Throughout the whole time I lived with him in Glasgow he never spoke of going back to Russia; he said he would never go back, but that he would remain here and start business, and so he did." Charles Preteca deponed—"When the defender and I came to Scotland, we came with the intention of remaining here just to find a livelihood. Throughout the years the defender and I have been staying in Glasgow he has never hinted at an intention on his part of going back to Russia. I prefer Scotland to Russia, and from anything that I heard from the defender he seemed to prefer it too. *Cross*.—When we left Russia we left with the intention of taking up a residence in Scotland. We did not come to Scotland to see if it was a good place to live in or not." Isaac Salberg, who had been acquainted with the parties since 1886, deponed—"I have had private talks with the defender on several occasions about his prospects in business and his intentions and so on. He never hinted to me that he meant to leave Scotland and go back to Russia. From any conversation

I had with him about himself or his affairs I distinctly understood that his intention was to remain in Scotland. The defender deponed—"My intention is to return to Russia. I have not gone back before this, because I have not got money to pay my expenses. I wrote to my father on the subject eight weeks ago, but I have not received an answer yet. I wrote to him to try to arrange for my going back to Russia. I never said I had no intention of going back to Russia. *By the Court*—I left Russia because I had no means of livelihood. When I left that country it was my intention to return to it if I should not be able to get a living in this country. I have resolved to go back to Russia because the climate of this country does not agree with me. It would not be lawful for me at present to act as clerk in a Government office in Russia, but I expect it will be so when the new laws come out by the present Czar."

Upon January 31st 1895 the Lord Ordinary (KINCAIRNEY) pronounced this interlocutor—"Finds (1) that the domicile of the defender at the date of the action was in Scotland; (2) that even if the absolute domicile of the defender was not in Scotland, the courts of Scotland have jurisdiction to entertain this action, in respect of the cohabitation of the defender and pursuer as husband and wife in Glasgow for seven years or thereby: Finds facts, circumstances, or qualifications proved relevant to infer that the defender Joseph Dombrowizky has committed adultery: Finds him guilty of adultery accordingly: Therefore divorces and separates the defender from the pursuer, her society, fellowship, and company in all time coming, and finds and declares in terms of the conclusions of the summons to that effect, and decerns: Finds the pursuer entitled to the keeping of Sarah Fanny Dombrowizky and Marcus Barnet Dombrowizky, the surviving children of the marriage between the pursuer and defender, and interdicts, prohibits, and discharges in terms of the conclusions for interdict as regards said children, and decerns.

"*Opinion.*—[After reviewing the facts of the case]—It thus appears that the defender and the pursuer lived the ordinary life of Scotch people in a very humble position; and there is no evidence at all that he ever expressed to anyone any intention to leave Scotland and return to Russia. There is evidence that he expressed the opposite intention, that is, the intention never to leave Scotland, to his wife and his sister-in-law Mrs Eisenberg. He does not seem to have said so in so many words to Preteca, who depones that the idea of returning to Russia never was suggested or came into their minds.

"The defender now depones—"My intention is to return to Russia. I have not gone back before this because I have not got money to pay my expenses." He afterwards depones—"From 1885 to 1892 my home has been in Glasgow, and I have made my living there during that time. I have resolved to go back to Russia because the

climate of this country does not agree with me;" and then he says that he expects to make a living in Russia "when the new laws come out by the present Czar," whose accession was subsequent to the raising of this action.

"It remains to be noticed that the defender's father lives in Russia, and the defender was in use to write him once a-year. Preteca says that he does no business there and is in poverty.

"Such appear to be the whole facts available for judging of this question of domicile. I do not say that it is a clear case, but my opinion is that, at the date when this action was raised, the defender had abandoned his Russian domicile and had adopted a Scotch domicile. From the defender's obscure position the elements for my judgment are necessarily few, and they may be stated very shortly.

"The pursuer and defender did not leave Russia for any temporary purpose but for the permanent purpose of making a livelihood. When they left they went to a great distance, and it cannot be imagined that people in their position would have taken so long a journey as that between the East of Russia and Glasgow with any prospect or intention of returning. The defender says that it was his intention to return if he should not get a living in Scotland, which is tantamount to saying that, if he was successful in his search for a livelihood in Glasgow, he would not return; and he did earn his livelihood there, at least until 1892. He and his wife continued to live in the same place in Scotland and carried on their business there, and never (so far as appears) indicated by word or act any dissatisfaction with their new home or any regret for or hankering after their old country. Their life in Glasgow, it is true, was perfectly uneventful, and no particular act or incident decisive on the question—such, for example, as the purchase of a residence—can be pointed to; for I do not regard his purchase of a burial-place in the Jewish cemetery as important. Anything like the purchase of a residence his poverty forbade; but, considering the distance he had placed between himself and his native country, his settled residence in Glasgow, and the absence of indications of any desire to quit it, there is, I think—or apart from his own evidence would be—adequate proof of change of domicile. Preteca and Mrs Eisenberg were exactly in the same predicament, and it does not seem doubtful that they acquired a Scotch domicile. It may not be an important point, but I think it is not to be left wholly out of consideration, that these people are Jews who were in some respect aliens in the land of their birth, and probably might relinquish their domicile of origin with less than the usual reluctance.

"The defender's position in regard to domicile is not distinguishable from that of Preteca except in this, that he has given evidence and expressed his intention to return to Russia. Of course in a question as to change of domicile, there is probably

nothing of greater importance than the intention of the person whose domicile is in question; and if I were satisfied that at the date of this action the defender entertained a deliberate intention of returning to Russia and resuming his old life there, I could hardly have held that he had lost his Russian domicile. But I distrust his evidence on that point; and even he does not say that before the date of this action he entertained that intention. I doubt whether he ever deliberately entertained any such intention. No doubt now that he has quarrelled with his wife, lost his business, and got into bad health, he may feel unhappy and discontented, and anxious for a change of any kind, a feeling which may readily assume the appearance of a desire to return to Russia. But I consider that the evidence for a Scotch domicile deducible from his unbroken residence in Glasgow and his unbroken silence as to Russia for seven years, is not met by a mere assertion made during the proof of a vague intention to return to Russia.

"No doubt, however, the assertion by the defender that he intended to return to Russia, may raise a doubt as to his acquisition of an absolute domicile in Scotland; and it was therefore maintained for the pursuer that, even if it should be held that the defender still retained his domicile of origin, there was jurisdiction in the courts of Scotland in this action, in respect of the cohabitation of the pursuer and defender in Glasgow for seven years or thereby, that is to say, in respect of what has been not very happily denominated their matrimonial domicile.

"If there be such a ground of jurisdiction recognised in our law, there is, no doubt, abundant foundation for it in fact, that is to say, in the residence as husband and wife in Glasgow.

"Lord Fraser says that 'in cases of divorce the courts of the country where there has been a settled residence for a considerable period, although the domicile be elsewhere, have jurisdiction to pronounce decree of divorce.'—(Law of Husband and Wife, p. 1255.) The question is whether that proposition expresses the law of Scotland. It has Lord Fraser's authority; and at p. 1276 and the following pages he sets forth his reasons for considering the doctrine in accordance with expediency, with justice, and legal principle.

"The chief legal authority for the doctrine is the case of *Jack v. Jack*, February 7, 1882, 24 D. 467, where the whole Court (Lord Deas dissenting) affirmed and applied that principle, and sustained their jurisdiction in respect of what they called the matrimonial domicile. There is no doubt that in this case the plea against jurisdiction must be repelled if the judgment in *Jack v. Jack* is to be followed. It was, in its time, an authority of the first rank; and sitting in the Outer House, I consider that I have no choice but to follow it whatever my own individual opinion may be.

"The judgment in *Jack v. Jack* has been challenged on very strong grounds, and the

phrase 'matrimonial domicile' has been severely criticised. Still I think that Lord Fraser has advanced very important considerations of expediency and justice in favour of the view that the Courts of a country in which married persons are permanently resident ought to have power to entertain actions of divorce between them, although it may not be clear that the succession of the husband would be regulated by the laws of that country.

"The decision in *Jack v. Jack*, although much questioned has not as yet been gone back upon or overturned by any decision in the Court of Session or in the House of Lords. Its position as an authority is somewhat peculiar. It was followed in *Pitt v. Pitt*, December 5, 1862, 1 Macph. 106, which was not a very strong case for the application of the principle of matrimonial domicile; but on appeal the judgment was supported on the ground that the absolute domicile of the husband was in Scotland, and the respondent's counsel formally declined to support it on the ground of matrimonial domicile. The point was therefore not argued or decided in *Pitt v. Pitt*, although the Lord Chancellor (Westbury) indicated his opinion that it had been rightly conceded. The House held that an absolute Scotch domicile of the husband was not proved, and reversed the judgment of the Court of Session (April 6, 1864, 4 Macq. 627).

"In the case of *Wilson v. Wilson*, March 8, 1872, 10 Macph. 573, Lord Ormidale, as Ordinary, expressed the view that the effect of the judgment in *Pitt v. Pitt*, was that a matrimonial domicile must be held to be unknown to the law, but in the Inner House the Lord President reaffirmed his opinion—expressed in *Pitt* and in *Jack*—'that for the purposes of divorce there may be a matrimonial domicile different from the absolute domicile which will rule succession.'

"In *Stavert v. Stavert*, February 3, 1882, 9 R. 519, Lord Deas renewed the expression of his opinion against the doctrine, in which he was supported by Lord Shand; and in the recent case of *Low v. Low*, November 19, 1891, 19 R. 115, Lord Trayner expressed a clear opinion that no domicile but an absolute domicile could confer jurisdiction in actions of divorce. I do not think, however, that the question was involved in these two latter cases, and I must regard the opinions expressed as to some extent, *obiter dicta*.

"Other judges have expressed the like opinion. Still it does not appear that any of the judges who formed the majority in *Jack v. Jack*, ever modified their opinions, and whatever view might be taken of the case of *Jack v. Jack*, I cannot see any ground for holding it other than a binding authority in the Outer House; and I am therefore clearly of opinion that I am bound to repel the plea of 'no jurisdiction' whether the defender effected a complete change in his domicile or not.

"In regard to the evidence of adultery, I was much impressed by the very able argument for the defender, but after carefully

reconsidering the evidence in the light of that argument, I have on the whole formed an opinion in favour of the pursuer. It is not certainly a very strongly proved case. Still, I think the proof is sufficient, although not more than that. The alleged act best proved is that which is said to have been committed in January 1892, which is deplored to very distinctly by the pursuer and her sister, and is proved, unless both of these witnesses were committing perjury. For the defender it was urged that this should have been better proved, and that the woman with whom the adultery was committed should have been discovered and adduced. It was urged that she might have been detained when she came back for her boots, and there would have been force in that view if the pursuer had then had the intention of raising an action of divorce on the ground of adultery, but that she apparently at that time had not. The pursuer now says that she does not know who the woman was. I find no sufficient reason for discrediting the evidence led by the pursuer on this point.

"I think I must also accept the evidence of Mrs Eisenberg as to the alleged act in June previously. It is given in detail, no suggestion of mistake is open, and my impression from the evidence is that what she alleges happened. It is not suggested that the witness William Berman had any motive for committing deliberate perjury in this case; still I do not regard the acts in Edinburgh spoken to by him as so well proved as the acts in Glasgow. I disregard the evidence as to the alleged adultery in Hamburg as confused, unsatisfactory, and unreliable.

"Defender's counsel naturally placed reliance on a discrepancy between the evidence of the pursuer Mrs Eisenberg and Preteca as to whether Preteca was living with them or not. It is certainly a point not cleared up. Still I do not think that it justifies much suspicion. It might have done so had Preteca been a witness to any of the alleged acts of adultery, as he might have been if they were all regardless of truth. But he is not.

"My chief ground of hesitation on this point arises from the enfeebled and infirm appearance of the defender. I have not been able wholly to clear my mind of doubt on this point, but I consider that three years have elapsed since the alleged acts of adultery in Glasgow, and I am not satisfied that the defender was, in fact, so infirm as he appeared to be. Except the appearance of debility shown by the defender, there was nothing in the appearance of the witnesses or in their mode of giving evidence which calls for remark.

"On the whole, I have, after repeated consideration of the evidence, come to the conclusion that the adultery has been proved." . . .

The defender reclaimed, and argued—*On the question of jurisdiction.*—The defender had left Russia because he could not get work there, and come to Scotland to earn his livelihood, but that did not necessarily show his intention of giving up his original

domicile and acquiring a new domicile in Scotland. It was the intention of the defender that must be looked to, and the evidence to show that intention must be clear and decisive—*Steel v. Steel*, July 13, 1888, 15 R. 896; *Bell v. Kennedy*, May 14, 1868, 6 Macph. (H. of L.) 69. There was no sufficient evidence to show that the pursuer intended to abandon his Russian domicile, especially as the defender himself denied that he had any such intention. The mere length of time during which the defender had lived in Scotland did not show that he had abandoned his domicile of origin, because it had been decided that Scotsmen who had lived abroad for a much longer period had not lost their domicile of origin—*Low v. Low*, November 19, 1891, 19 R. 115. *On the merits.*—The evidence was insufficient to justify divorce. The one alleged act of adultery that was spoken to by two witnesses could not be held to be proved, because the witnesses were interested persons and were sisters, while the other alleged acts were only spoken to by one witness, and if the first was not proved they could not be used as proofs of substantive cases of adultery—*Robertson v. Robertson*, July 19, 1888, 15 R. 1001.

Argued for the pursuer—*On the question of jurisdiction.*—It was plain that the defender had abandoned his Russian domicile and acquired a domicile in Scotland. He was deprived of his means of living in Russia and came to Scotland to make a livelihood. He brought his family over, rented houses, established a trade and carried it on for seven years. All that showed a distinct intention to acquire a new domicile. The only thing against it was his statement at the proof that he intended to return to Russia. The Lord Ordinary had disbelieved his evidence; it was contradicted by his own acts, and all the parole evidence, except his own, showed that he had always spoken of Scotland and not of Russia as being his home. *On the merits.*—The adultery was amply proved. The Lord Ordinary had believed the evidence of his wife and her sister, and the evidence of other witnesses showed that he was a man of immoral character.

At advising—

LORD JUSTICE-CLERK—[*After reviewing the facts*]—The first question is whether we have jurisdiction to entertain this action of divorce. That depends upon whether Dombrowizky was settled in this country as his domicile at the time of the alleged adultery. I have carefully considered the evidence, and I have no doubt that that was so, that his domicile was in this country.

It is true that he says in the proof he intends to return to Russia, but he had given no sign of any such intention before this case was raised, and from the evidence I think he had no such intention. I am of opinion that we have jurisdiction to consider this action.

The next question is upon the merits of the case—whether the alleged adultery has been proved. I agree with the Lord Ordinary that the case is in some respects a difficult one. One case of alleged adultery

rests upon the evidence of the wife and her sister. Their evidence is competent, and if it is true then the defender has been proved guilty of adultery. The Lord Ordinary has given credence to these witnesses, and I can see in the proof no sufficient ground for doubting the accuracy of the conclusion at which he arrived.

The other cases of alleged adultery are proved only by one witness, and if these instances were the only ones relied on, I think the case would have been more difficult. We do not require, however, to consider these as substantive cases. The view I take of them is this, that, while the evidence of a single witness would not be sufficient to prove one isolated act of adultery, yet if a number of witnesses each speak to one act of an improper kind, such as going with prostitutes in a manner to excite suspicion, such evidence of single witnesses may be taken as tending to throw light upon such a case as that spoken to by the two witnesses. My opinion is, that taking the whole proof together, the act of adultery spoken to by the wife and her sister is proved, and that is sufficient for the decision of the case.

LORD YOUNG—I do not differ.

LORD TRAYNER—Two questions have been raised by the claimer under this reclaiming-note: the first—a question of law—has the Court jurisdiction to entertain and decide this case? the second—a question of fact—has the defender been guilty of the adultery alleged? The first question involves considerations of some nicety. Had I thought that on the evidence before us it could not be affirmed that the defender's domicile was a Scotch domicile—had it appeared on the contrary that the defender's domicile in Russia had not been abandoned but still subsisted—I would have sustained the plea of no jurisdiction, and that for the reasons stated by me in the case of *Low* to which the Lord Ordinary refers. Matrimonial domicile, as affording jurisdiction in cases of divorce, can scarcely now be maintained notwithstanding of the decision in the case of *Jack*. That decision was practically overruled by what took place in the House of Lords in the subsequent case of *Pitt*, and the whole current of recent judicial opinion is against the view that jurisdiction in divorce cases can be so founded. But, in my opinion, the defender has more than a matrimonial domicile in Scotland. The evidence adduced is sufficient to show that the defender abandoned his domicile in Russia, that he came to Scotland with the intention of making it his place of permanent residence, and that he has given effect to that intention by his constant residence there for the last ten or eleven years. No doubt the defender now says that he has not abandoned his domicile in Russia, and means now and has always meant to return there. I do not believe that statement. It is inconsistent with his words and actions during the past ten years, and it is now made by the defender only to aid him in

supporting the plea which he has stated. I agree with the Lord Ordinary, therefore, in thinking that the defender having his domicile, and his only domicile, in Scotland, is subject to the jurisdiction of this Court.

On the question of fact also I concur in the opinion of the Lord Ordinary.

LORD YOUNG—I wish to say that I desire to abstain from expressing any opinion upon the question whether the Scottish Courts may not have jurisdiction to grant divorce in the case of married people in Scotland, although Scotland may not be the domicile of the spouses for all purposes.

LORD RUTHERFURD CLARK was absent.

The Court adhered.

Counsel for the Pursuer—A. S. D. Thomson—Trotter. Agent—George Jack, S.S.C.

Counsel for the Defender—Blackburn. Agent—William Green, S.S.C.

Tuesday, July 16.

## FIRST DIVISION.

[Lord Low, Ordinary.

### LANARKSHIRE AND DUMBARTONSHIRE RAILWAY COMPANY v. MAIN.

*Arbitration—Railway—Land Taken under Compulsory Powers—Compensation—Allowance for Prospective Profits.*

In estimating the amount of compensation to be paid to a market gardener for land occupied by him, and taken by a railway company under compulsory powers, the arbiter awarded a considerable sum as compensation for loss of profits which, after hearing evidence, he considered the market gardener might reasonably have expected to make, by using the ground taken from him for the purpose of cultivating fruit and flowers in greenhouses of a particular kind, which he had intended to erect, but which had not been erected at the date of the notice to treat.

In an action by the company for reduction of the award, held (aff. judgment of Lord Low) that the arbiter had not acted *ultra vires* in awarding compensation on this ground, and therefore that his award was not subject to review by the Court.

Mr Thomas Main, market gardener, Milton, Dumbartonshire, was tenant from Mr Buchanan of Auchentorlie of a piece of ground extending to 10½ acres, on a 19 years' lease from Whitsunday 1888, at a rent of £4 per acre. He occupied the ground for the purpose of market gardening, and had the liberty of erecting on it certain forcing houses. In 1892 the Lanarkshire and Dumbartonshire Railway Company, whose line, as authorised by their Act, intersected the