The LORD PRESIDENT and LORD KINNEAR concurred.

LORD M'LAREN was absent.

The Court answered the first question in the affirmative.

Counsel for First Party—Sol-Gen. Dickson, Q.C.—Craigie. Agents—Carmichael & Miller, W.S.

Counsel for Second Party—W. Campbell—Graham Stewart. Agent—John Hay, Solicitor.

Thursday, June 24.

SECOND DIVISION.

[Lord Pearson, Ordinary.

HOOD *v.* HOOD.

Jurisdiction — Domicile — Husband and Wife—Separation and Aliment

A wife residing in Scotland raised an action of separation and aliment, and for custody and aliment of the two children of the marriage against her husband, an engineer residing in England. The defender was born and married in Scotland, but had resided in England for eleven years in the employment of engineering firms in different towns. He stated that he had no doubt that he would come back to Scotland to work if he could get as good a wage there as he was earning in England.

Held (*rev.* judgment of Lord Pearson *—diss.* Lord Young) that the defender had not lost his domicile of origin, and that the Court had jurisdiction.

On 10th December 1896 Mrs Mary Smart or Hood, residing at 182 East High Street, Forfar, wife of Charles Hood, engineer, "presently residing at No. 48 Shere Road, Deptford, London," raised an action against the said Charles Hood praying the Court to declare that the defender had been guilty of cruelly maltreating the pursuer, to find that the pursuer had full liberty to live separate from the defender, and to ordain the defender to separate himself from the pursuer *a mensa et thoro* in all time coming; further, to find the pursuer entitled to the custody of John Hood and Isabella Smart Hood, the children of the marriage, and to ordain the defender to make payment to the pursuer of the sum of £40 yearly for aliment to herself during the joint lives of herself and the defender, and of the sum of £12 yearly for aliment to each of her said children so long as they should be unable to earn a livelihood, and should remain in the custody of the pursuer, and to interdict the defender from interfering in any way with his children, or with the pursuer as the custodier of them.

No defences were lodged by the defender, but when proof was led he appeared and defended in person.

The proof showed the following facts:—The defender was born in Inverkeillor, Forfarshire, in 1863. In 1886 he went to England and worked there as an engineer. On 27th December 1889 he was married at Forfar to the pursuer, who was also a native of Forfarshire. After a few days the defender returned to Newcastle, where he was then employed, the pursuer accompanying him. They resided there about eleven months, and then went to London. They were there about two months, and then removed to Portsmouth, where they lived seven months. In September 1891 they returned to London, where they lived ten months, and then removed to Newcastle. In the summer of 1893 they again went to London, and lived there in lodgings in various districts till April 1896, when the pursuer left the defender and returned to the residence of her parents in Forfar. Two children, John Hood and Isabella Smart Hood, were born of the marriage, on 1st December 1890, and 18th September 1894, both being born at the residence of the pursuer's parents at Forfar.

The pursuer deponed—"I have been eleven years with London firms since I left Scotland, and have only been a fortnight out of work all the time. I have been with Humphrey Tennants, London, about eight years out of the eleven. During the other three years I have been in the employment of other engineering firms. . . . *By the Court*—I only lived two or three days in Scotland with my wife after we were married; we went straight to Newcastle, where I was employed. I had been working in England for some years before that. I was born in Forfar thirty-four years ago, and I have been eleven years in England. I was brought up in Forfarshire, and served my apprenticeship in Forfar. After my time was out I worked in Dundee and Arbroath for a few months, and then went to England. With that exception, and the few days after my marriage, I have been in England ever since. . . . *Cross.*—I was born in Inverkeillor. My father died some ten years ago in Forfar, and was buried there. My mother is still living in Forfar. I have three sisters living with my mother. I was working in Arbroath for a short time when I was in Scotland looking after the case in the Sheriff Court. If I got as good a wage in Scotland as I have been getting in England, I do not doubt but I would go there to work. I only want a living wage. *By the Court*—. . . I would go back to Scotland to work if I got a good job. I would not expect to get the same money as I have, but if I got something steady I would be quite willing to go."

On 23rd March 1897 the Lord Ordinary (PEARSON) pronounced the following interlocutor:—"Finds that the defender is domiciled in England, and in respect of no jurisdiction dismisses the action, and decerns."

Note.—"A general proof has been led in this case, and if the merits were now to be decided I should have no doubt that the pursuer was entitled to decree. Her wit-

nesses seem to me entirely straightforward and reliable, with no tendency to exaggeration, and I cannot regard the defender's evidence as of any weight against them.

"But the question of domicile and of jurisdiction is important, and upon the authorities it is narrow enough.

"The pursuer contended that upon the proof the defender's domicile of origin subsists, and that, although he has long resided in England, the character of his residence there is such as to preclude the idea that he has acquired an English domicile, the cases referred to being *Patience* (1885), 29 Chancery Div. 976; *Steel* (1888), 15 R. 896; *Low* (1891), 19 R. 115; *Dombrowitzki* (1895), 22 R. 906. The law is clear enough. Upon the facts the first two cases come nearer to the present than the others. But in the case of *Steel* the alleged Burmese domicile was repudiated by the Court in language (see page 909—'Nobody goes to Burmah to remain') not universally applicable to Scotsmen who go to England; while the alleged English domicile was regarded as incidental to the Burmese business, and as 'not affecting his position as a domiciled Scotsman any more than the establishment of a branch in Burmah.' In the case of Colonel Patience, a domiciled Scotsman, he had served in the army in foreign parts for fifty years, after which he retired, and lived a bachelor life for twenty-two years in England in lodgings, hotels, and boarding-houses. The Judge took into account the nature and character of the residence as 'showing a fluctuating and unsettled mind,' and pronounced for the domicile of origin. The present case differs widely from these in its circumstances. But the pursuer maintains that the principle applies; that the defender's going to England and staying there was in connection with the prosecution of his trade, and that while so engaged he moved about from place to place in England, and it is further pointed out that he not only says he would quite willingly return to Scotland if he could get the English rate of wages, but actually wrought at Arbroath for some weeks while he was detained in Scotland in connection with a petition for the custody of his child. After weighing all the circumstances here most carefully, I think it would be going beyond any decided case if I were to hold that the defender had not acquired an English domicile.

"It is indeed the law that the remedies of married persons other than divorce *a vinculo* are not confined to the courts of the country of the domicile properly so called. It has recently been laid down by high authority (in *Le Mesurier*, 1895, Law Rep. App. Cas. 517) that 'the Courts of the residence are warranted in giving the remedy of judicial separation without reference to the domicile of the parties' (*per* Lord Watson, pp. 526-7 and p. 531). But that principle has no application in the circumstances of this case, although (assuming a Scottish domicile) it might have supported an application by the wife to an English Court for the remedy of separation and aliment."

The pursuer reclaimed, and argued—The case involved a question of *status* as well as a mere money payment. The defender was born in Scotland, and therefore his domicile of origin was there. The *onus* was on him to show that he had lost this domicile. The defender had failed to discharge that *onus*. The mere assertion of a defender that he meant to acquire a new domicile was not sufficient proof, and in this case even such an assertion on the part of the defender was absent. He never had any intention of stripping himself of his domicile of origin and acquiring a new domicile—opinion of Lord President Inglis in *Steel* v. *Steel*, July 13, 1888, 15 R. 908.

No appearance was made for the defender.

LORD JUSTICE-CLERK—On the cases decided and cited to us my opinion is that the Court has jurisdiction. According to the evidence there has never been any intention on the part of the defender to give up his original Scottish domicile. He never seems to have settled in any place at all, He was and is a jobbing engineer, moving from town to town wherever he can get a job. He himself says that he would return to Scotland if he could get as good wages for his work. My opinion is that he has never lost his Scottish domicile.

LORD YOUNG—I regard this as a very important case, all the more important that it is quite new. There is no precedent for an action of separation and aliment brought by a wife against a husband resident in England for years, and who is designed in the summons as residing at Shere Road, Deptford, London. I should have thought it clear that the Courts of England had jurisdiction over any man residing in England who is not there as a visitor, or on the occasion of a jubilee, but is residing there and working for his livelihood. In my opinion it is not material that while in England he has moved about from one town to another. I think that for all purposes relating to his conduct, whether to his wife or to his children, or in the management of his affairs, the English Courts, and the English Courts only, have jurisdiction. That, I think, is clear upon principle, and if there is any decision to the contrary, one would gladly have heard it, but admittedly there is none. The conclusions of the action are based on alleged cruelty to the wife in England. Decree is asked against his keeping his son with him in England and ordering him to pay the pursuer money periodically. I should have thought it clear upon principle and authority, that while the English Courts have jurisdiction, this Court has none. It is admitted that this Court would have no jurisdiction over such a defender in questions of debt, whether ordinary debt or damages for misconduct. What is the distinction here? The defender is said to have misconducted himself to his wife in England so as to subject him to be deprived

of her society, and ordered to make payment of money to her periodically. It is said that he was born in Scotland. The domicile of origin may have a great deal to do with a question of succession, but has nothing to do with an action of damages for misconduct similar to the present. I should have thought that a case of this kind admittedly new and unique was too serious and important to be determined by a majority of the Court, but might very well have merited further consideration, and possibly a reference to a larger Court than the present. In my opinion the judgment of the Lord Ordinary is right.

LORD TRAYNER—I do not consider what decree the pursuer may be entitled to under the conclusions of the summons and the proof which she has led, because the only question at present for us to decide is whether the pursuer is entitled to convene the defender before us. The sole question is whether the defender is subject to the jurisdiction of the Scottish Courts. Upon that question I entertain no doubt. I think the defender is subject to the jurisdiction of the Scottish Courts. The defender is a Scotsman by origin, and has never lost his Scottish domicile. He has never acquired or shown any intention of acquiring an English domicile. I am therefore of opinion that the Lord Ordinary is wrong.

LORD MONCREIFF — I agree with the majority of your Lordships.

The Court recalled the interlocutor of the Lord Ordinary and remitted the case back to him to dispose of the merits.

Counsel for the Pursuer—Gunn. Agent —John Mackay, S.S.C.

Friday, June 18.

SECOND DIVISION.

GILHOOLY *v.* M'HARDY.

Process—Jury Trial—Abandonment—Act of Sederunt, 16th February 1841, *sec.* 46.

In an action of damages for slander a verdict in the pursuer's favour was set aside, a new trial granted, and a diet for the new trial fixed. Thereafter counsel and agents for the pursuer proposed to lodge a minute of abandonment, on the ground that no new evidence was obtainable, but the pursuer refused to consent to this, and they in consequence withdrew from the case, and the diet for trial was discharged. The defender then lodged a note praying the Court to grant decree of absolvitor in his favour with expenses, a copy of which was sent to the pursuer with an intimation that it would be moved on a certain day. The Court, on the motion being made in terms of the note for the defender, there being no appearance for the pursuer, delayed consideration of the case for two days, and ordered intimation to be made to the pursuer, and on this being done, and no answer from the pursuer received, *granted* the prayer of the note.

On 16th January an issue for the trial of an action of damages for slander was approved. On 4th February the trial took place before Lord Moncreiff, when the jury returned a verdict for the pursuer. On 3rd March the Second Division granted a new trial, which was fixed to take place before the Lord Justice-Clerk on Monday, 14th June. On the morning of Saturday, 12th June, the defender's agents received from the pursuer's agents a copy of a note to the Lord Justice-Clerk on behalf of the pursuer, which, *inter alia*, stated—"The pursuer has been unable to procure further evidence in the cause than that upon which he procured his former verdict, and in these circumstances he accordingly begs leave to state that he does not intend to proceed with said new trial, and consents to absolvitor of the defender with expenses." The pursuer's agents stated in their letter sending the copy-note that the principal note would be lodged with the Clerk of Court, and moved on that day. This was not done, and the pursuer's counsel appeared and informed the Court that after the said note had been intimated the pursuer had himself refused to sign it or allow it to be signed, and that his counsel and agents had consequently ceased to act for him. The diet for the trial of the cause was accordingly discharged, and the trial did not take place on Monday 14th June. No appearance was made for the defender on 12th June, and the jury was countermanded without the defender's consent.

In these circumstances a note for the defender was presented to the Lord Justice-Clerk, in which the facts were set forth as above narrated, with this exception, that the reason why the note for the pursuer was not presented on 12th June, as explained by the pursuer's counsel on that date, was not given, and it was stated that the defender's agents had been informed by the Clerk of Court that no such note had been lodged, but that on that day the trial had been countermanded on the motion of counsel for the pursuer, and that no notice of that motion had been given to the defender. It was further stated that in consequence of the trial being countermanded without due notice to the defender, considerable expense had been incurred by him; that his witnesses had been cited for Monday 14th June, and their attendance had to be countermanded; that counsel had been instructed, and that the defender himself had come from Tomintoul, Banffshire, to attend the trial. The note concluded with a prayer that his Lordship would move the Court to assoilzie the defender with expenses, or otherwise to find the pursuer liable in the expenses incurred by the defender in preparing for trial on 14th June, and to ordain that these expenses should be paid as a