I therefore agree with the Lord Ordinary that the appellants have in the circumstances no claim to be ranked for the expenses in question—no claim to be ranked either preferably or at all. [*His Lordship proceeded to deal with the details referred to supra, which are beyond the scope of this report.*]

I therefore, as I have said, agree with the Lord Ordinary with respect to the only matter really in controversy. Our interlocutor will, I suppose, be to affirm the Lord Ordinary's interlocutor and the deliverance of the trustee in the sequestration in so far as relating to the expenses of the litigation with Somerville's executor.

LORD KINCAIRNEY — I have found this case one of extreme difficulty, but I assent to the interlocutor of the Lord Ordinary and am prepared to affirm it.

LORD STORMONTH DARLING concurred.

The Court adhered.

Counsel for the Appellants and Reclaimers — Hunter—T. B. Morison. Agent —A. C. D. Vert, S.S.C.

Counsel for the Respondent — A. M. Anderson—J. Christie. Agents — Watson & Mathers, W.S.

Thursday, July 6.

SECOND DIVISION.

[Lord Dundas, Ordinary.

BUCHAN *v.* GRIMALDI.

Process — Jurisdiction — Foreign — Forty Days' Residence — Departure Prior to Raising of Action—Domicile and Jurisdiction.

The Court has no jurisdiction over a foreigner who at the date of the raising of an action against him has left Scotland, although fourteen days prior thereto he has been resident in Scotland continuously for forty days.

Corstorphine v. *Kasten*, December 13, 1898, 1 F. 287, 36 S.L.R. 174, *approved.*

Observations by Lord Kyllachy on the relation of domicile to jurisdiction in ordinary non-consistorial cases.

Opinion of Lord Stormonth Darling in *International Exhibition 1890* v. *Babty*, May 26, 1891, 18 R. 845, 28 S.L.R. 649, *reconsidered.*

Process — Jurisdiction — Foreign — Possession of Heritage in Scotland—Sale with View to Escape Jurisdiction.

A foreigner owning heritage in Scotland and *bona fide* disponing it immediately prior to the raising of an action against him, cannot be subjected to the jurisdiction of the Court on the ground that the disposition was effected with the purpose of escaping jurisdiction.

Jeannie Buchan, residing at the Bungalow, Milltimber, Aberdeenshire, on 28th December 1904 brought an action against George Frederick Grimaldi, carrying on business as a meat salesman, Central Markets, London, and described in the summons as residing at No. 74 Hamilton Place, Aberdeen, in which she sued him for £1000 damages for seduction.

The defender pleaded, *inter alia*—"(1) No jurisdiction."

The averments of parties on record bearing on the question of jurisdiction were the following:—"(Cond. 1) The defender . . . carries on an extensive business in London and Aberdeen as a meat salesman. At the date of this action he had his residence at 74 Hamilton Place, Aberdeen, where he had resided at least a year previous. The defender has funds and effects in Scotland which have been arrested." "(Ans. 1) . . . Admitted that the defender . . . carries on business in London. *Quoad ultra* denied. He does not reside in Aberdeen or elsewhere in Scotland, and has not done so since 1st October 1904. He is a domiciled Englishman."

The Lord Ordinary (DUNDAS) allowed a proof on the question of jurisdiction. The general character of the evidence appears from his opinion as given below.

Apart from those which bore on the question whether the defender, who was English by origin, had acquired a Scotch domicile (a point which ultimately did not bulk largely in the case), the important facts proved were (1) that the defender left Scotland a fortnight prior to the serving of the summons, having at the date of leaving been resident continuously in Scotland for upwards of forty days, and (2) that he had been possessed of heritable property in Scotland which he disponed to a Mrs Mitchell, a married daughter, on 16th December, a few days before the action was raised, in the knowledge that the fact of possessing heritable property in Scotland subjected a foreigner to the jurisdiction of the Scotch courts.

On 23rd March 1905 the Lord Ordinary pronounced the following interlocutor:—"Finds (1) that the defender's domicile of origin was in England, and that he had never changed that domicile or acquired a domicile in Scotland; and (2) that on 30th December 1904, when the summons in this action was served, the defender was not the owner of heritable property in Scotland: Therefore sustains the first plea-in-law for the defender, dismisses the action, and decerns," &c.

Opinion.—"In this action, which is one of damages for alleged seduction, the defender's first plea-in-law is 'no jurisdiction.' The averments of parties in regard to this plea are of the most meagre description, and are to be found at the end of answer 1 and condescendence 1 respectively. I allowed a proof of them, which has now been led at considerable length. The defender avers that 'he is a domiciled Englishman.' His case, as disclosed by the proof, is that his domicile of origin was in England, and that he has never abandoned that domicile or acquired any other. There is, I think, no room for doubt that the

defender's original domicile, and that of his father and grandfather before him, was in England, and its alleged abandonment by him and the acquisition of a domicile of choice in Scotland are only within quite recent years. It is, I apprehend, well settled that a very heavy burden lies upon anyone who seeks to prove that another has thrown off his domicile of origin and has acquired a domicile of choice elsewhere. The gravity of that onus and the character of the evidence requisite to discharge it, are fully dealt with in the well-known case of *Steel* v. *Steel*, 15 R. 896. It is true that the burden may not be so great where it is sought to establish that an Englishman has acquired a Scots domicile, or *vice versa*, as where the proposition is that an Englishman or a Scotsman has acquired a domicile in a purely foreign country—*Vincent* v. *Earl of Buchan*, 16 R. 637. But even under such circumstances a heavy onus lies upon the pursuer in the issue, and in the present case I am of opinion that the pursuer has failed to prove that the defender threw off his English domicile of origin and acquired a domicile of choice in Scotland. . . . [*His Lordship reviewed the evidence*]. . . .

"The theory of the pursuer's case is that the defender's actings and utterances, since the time when he came to Aberdeen after his sojourn in America, establish an intention and determination on his part to divest himself of his English domicile and to take up his permanent residence in Aberdeen as his home. So far as the matter rests upon his actings in the way of residence, there is a good deal of vagueness in the evidence as to dates and periods, but I think that the general result is that which I have already described. When one comes to consider other alleged actings by the defender, and his utterances as bearing upon the question of his domicile, the counter evidence is given exclusively by three Aberdeen solicitors, who at one time or another acted as his agent, and the termination of whose agency seems, in the case of two of them at least, to have been attended with more or less friction between the agent and the client. [*His Lordship reviewed this evidence.*] Upon the whole matter, therefore, my opinion is that the evidence adduced by the pursuer is inadequate in character and quality to prove that the defender's original domicile was ever abandoned or lost by him.

"Holding as I do this opinion, it is unnecessary for me to decide or even to discuss the question whether or not, assuming that the defender did acquire a Scottish domicile of choice, his original domicile revived upon his departure from Scotland in December 1904, before the raising of the action—2 Fraser on Husband and Wife, 1270; *Udny* v. *Udny*, 7 Macph. (H.L.) 89.

"But an entirely separate and distinct answer is pressed by the pursuer to the defender's plea of 'no jurisdiction,' and must now be considered. It is not distinctly stated on record, but it is based upon his alleged ownership of heritable property in Scotland, viz., 74 Hamilton Place, Aberdeen, as at the date of service of the summons. This argument has, of course, nothing to do with the aspect of the case previously considered, and would, if well founded, subject the defender to the jurisdiction of this Court, even upon the assumption that he was and is a domiciled Englishman. But, *prima facie* at least, the pursuer's case fails upon the facts. The summons was served on 30th December 1904, at the house in Hamilton Place, which was then uninhabited. The house itself had been conveyed by the defender to Mrs Mitchell by absolute disposition, dated 16th and recorded 20th December. The present case is therefore even a stronger one for the defender than that of *Bowman* v. *Wright*, 4 R. 322. Nor do I think that the defender's position would be in any way weakened or altered if it were clear that the disposition, assuming it to be an absolute one, and with no back letter—and there is no evidence of any such document—was made with the intention and for the purpose of escaping the jurisdiction of the Scottish courts. The defender admits that he had been told of and had in view the law of the matter, and depones that under the circumstances he thought the occasion a good one for carrying out his original intention, to which I referred at an earlier portion of my opinion, of gifting the house to his daughter. And the conveyance being duly made before service of the summons, the matter would, in my judgment, there take an end, except for a disagreeable topic which is introduced into the evidence, and which, the pursuer urges, is sufficient to bar the defender from founding upon the disposition as excluding jurisdiction.

"The evidence upon this matter stands as follows. It is proved that on 14th December 1904 the defender had an interview in Edinburgh with Mr Robert Stewart, S.S.C., at which Mr Stewart was instructed to prepare the disposition, which he did, and the disposition was signed on the 16th and recorded on the 20th. Now, on the same day, 14th December, Mr Stewart called upon Mr Mackay, the pursuer's Edinburgh agent, and after a conversation, which the latter gentleman narrates with clearness in his evidence, Mr Stewart asked and obtained from Mr Mackay an undertaking that nothing further should be done in the matter until Mr Stewart should communicate with him again. I think that Mr Mackay, who gave his evidence with marked moderation, was well entitled to trust and rely upon Mr Stewart, who was an old and intimate friend, to deal fairly with him in regard to this undertaking. It was not until 28th December that Mr Mackay learned from Mr Stewart that he had decided not to act for the defender in the case, and that the summons had better be served in the usual way, which was done on the 30th. By this time the disposition in favour of Mrs Mitchell had been executed and recorded as already explained. It is not proved whether or not, when Mr Stewart called upon Mr Mackay upon 14th December, he

had already had his meeting with the defender. But it is difficult, upon either hypothesis, to justify Mr Stewart's conduct, and he did not enter the witness-box to explain it. The pursuer's counsel maintained that in these circumstances I ought to hold that the defender is barred from pleading the execution of the disposition as exempting him from the jurisdiction of this Court. I have some sympathy with this view, but I do not think that I can give effect to it. It is not, in my opinion, proved or at all clear that Mr Stewart's request for delay, under whatever state of knowledge on his part it may have been made and acceded to, was necessarily the cause of the summons not being served until after the disposition had been executed. The execution and even recording of a simple conveyance such as this could obviously have been carried through in the course of a period of hours rather than of days. It seems to me, therefore, that if the defender desired to have the thing done, he would have been able to effect his purpose before the summons was prepared and served, quite apart from any delay asked from or granted by the pursuer's agent. For these reasons I think that upon this branch of the case also the pursuer's contention fails.

"It follows, in my judgment, that the defender's plea of 'no jurisdiction' must be sustained, and that the action must be dismissed, with expenses."

The pursuer reclaimed, and argued—The Court had jurisdiction on the following grounds:—(1) *Ratione domicilii.* The defender was at the date of the serving of the summons a domiciled Scotsman, the evidence clearly showing that he had abandoned his English domicile of origin and acquired *animo et facto* a domicile in Scotland. But even if this were not so, still by the law of Scotland forty days' continuous residence in Scotland subjected the person so residing although a foreigner to the jurisdiction of the Court—*Joel* v. *Gill*, June 10, 1859, 21 D. 929, Lord Justice-Clerk Inglis at 939; Mackay's Manual p. 54; and the jurisdiction thus founded lasted for a period of forty days after leaving Scotland—*Calder* v. *Wood*, January 19, 1798, F.C., and M. 2250; *Joel* v. *Gill*, *supra*; *International Exhibition* 1890 v. *Babty*, May 26, 1891, 18 R. 843, 28 S.L.R. 648, Act 6 Geo. IV, c. 120, sec. 53; A.S., December 14, 1805; Dove Wilson, Sheriff Court Procedure, pp. 72, 73. In the present case the defender had only been absent from Scotland fourteen days at the date of the serving of the summons, prior to which he had resided in Scotland for a lengthy period. The following cases were also referred to—*Brown* v. *M'Callum*, February 14, 1845, 7 D. 423; *M'Bean* v. *Wight*, October 24, 1868, 7 Macph. 23, 6 S.L.R. 18; *Pedie* v. *Grant*, June 14, 1822, 1 S. 460, *rev.* 1 W. & S. 716. (2) The possession of heritable property in Scotland by a foreigner founds jurisdiction. The present case must be taken on the footing that the defender was possessed of heritable property at the date of the action, because in the first place he had disponed his property on the eve of the action to avoid jurisdiction, and in the second place the summons would have been served before the defender could have disponed the property had it not been that the pursuer had at the request of the defender's agent delayed his summons.

Argued for the defender and respondent—There was no jurisdiction. (1) The question of a defender's domicile was only important in consistorial cases. In this case, however, it was clear that the defender's domicile was English, and the jurisdiction acquired by a foreigner's forty days' residence did not last after he had left Scotland. Bankton iv. 6, 5 and 6, Erskine i. 2-16, Darling's Practice i. 148, Shand's Practice 238-239, while laying down that forty days' residence founded jurisdiction, never suggested that such jurisdiction lasted after residence ceased. The question was settled by *Corstorphine* v. *Kasten*, December 13, 1898, 1 F. 287, 36 S.L.R. 174, in which *International Exhibition 1890* v. *Babty* was disapproved; *Colley* v. *Cameron*, February 18, 1902, 9 S.L.T. 462; *Watt* v. *Watt and Another*, 9 S.L.T. 400; *Johnston* v. *Strachan*, March 19, 1861, 23 D. 758; *Ritchie* v. *Fraser*, December 11, 1852, 15 D. 205; *Prescott* v. *Graham*, February 2, 1883, 20 S.L.R. 573; *Pickering* v. *Aitken*, February 2, 1883, 20 S.L.R. 574. Act 6 Geo. IV. c. 120, sec. 53, and A.S., December 14, 1805 dealt only with citation and not jurisdiction, as also did the case of *Calder*, and all that *Joel* v. *Gill* settled was that if an Englishman came to Scotland and resided for forty days he was subject to the jurisdiction so long as he remained in Scotland thereafter. (2) At the date of the action the defender had no heritable property in Scotland. The purpose with which he had sold it was immaterial, and the facts on which the pursuer's last argument was founded were not proved.

LORD KYLLACHY—I agree generally with the interlocutor of the Lord Ordinary, subject to a certain addition to his Lordship's findings which I think is necessary—an addition to the effect that on 30th December 1904, when the summons in the action was served, the defender was not resident in Scotland and had not been so for the preceding fourteen days.

I do not at all differ from the Lord Ordinary's conclusion that the defender being by origin a domiciled Englishmen had not, *animo et facto*, acquired a domicile of succession in Scotland. I think that is so. And I think, further, that even if that were otherwise it is sufficiently clear that he had prior to the service of the summons renounced, *animo et facto*, any Scotch domicile which he had acquired.

I rather wish, however, to guard against the assumption which rather seemed to pervade the argument that in ordinary civil jurisdiction—that is to say, in actions for debt as distinguished from actions affecting status—the defender's domicile of succession is necessarily an important circumstance. For apart from the ownership of heritage in Scotland, or arrestment

jurisdictionis fundandæ causa, residence and not domicile is what in ordinary actions determines the jurisdiction. Domicile—that is to say, domicile of succession—may be important in judging of the character of a residence or in questions of continuity. But while that is so, it would not, I apprehend, be possible to sue, say for debt, in the Scotch courts and to cite edictally a Scotsman who had resided abroad for many years, supporting the jurisdiction upon the ground merely that having been born in Scotland he had not yet lost his domicile of origin. Neither, on the other hand, is there, as we all know, any difficulty in sustaining jurisdiction against a foreign debtor irrespective of his domicile, and on the ground simply that he has resided in Scotland for the requisite period. These are all matters more or less elementary, and I only refer to them to avoid misconception. But I may just add that the two cases mentioned at the close of the argument do not appear to have much bearing one way or the other. The question in the case of *Calder* was a question of citation, not of jurisdiction; and as to the case of *Pedie* v. *Grant* all that was there decided was that the Scotch courts had not jurisdiction, *ratione origis*, merely over a defender who though born in Scotland had been long domiciled and resident in England.

LORD STORMONTH DARLING—The Lord Ordinary has sustained the plea of 'no jurisdiction' and dismissed the action. Certainly the defender states that plea in circumstances that do not entitle him to any favour, but unless jurisdiction has been constituted in one of the recognised modes it cannot be exercised.

The action is one of damages for seduction alleged to have been committed in Wales. A great part of the proof is directed to show that the defender, whose domicile of origin was undoubtedly English, has abandoned that domicile and adopted Scotland as his domicile of choice. I do not mean to say or imply that it is necessary to establish domicile such as would regulate a man's succession for the purpose of giving jurisdiction in an action for a civil debt. But since issue has been joined on that question I am content to say that I agree with the conclusion of the Lord Ordinary.

It is also urged that jurisdiction is constituted by the defender's ownership of heritable property in Scotland, *i.e.*, a house in Hamilton Place, Aberdeen, of which he was owner from May 1903 to 16th December 1904. But the answer is that the summons was not served upon him till 30th December 1904. It is attempted to get rid of this obvious difficulty by urging that the transfer on 16th December was a mere trick or device which the defender's agent was not enabled to carry out by asking for and obtaining delay in raising the action. But I agree with the Lord Ordinary that it is not proved that the request for delay was necessarily the cause of the summons not being served until after the disposition had been executed. Nor do I think that the defender's plea is affected even if it were clear that the disposition, assuming it to be an absolute and not merely a simulate one, was made with the intention and for the purpose of escaping the jurisdiction of the Scottish courts.

Again, it is said that in an action of this kind a residence of forty days is enough to give jurisdiction. That may be if the summons had been served while the defender was still in this country. But he had left Scotland fourteen days before the summons was served. As I am responsible for some observations in *Babty's* case (18 R. 843) to the effect that jurisdiction which had been acquired over a foreigner by forty days' residence in Scotland endured for forty days after he had left it, it is right that I should say that the fuller discussion which this question received in the case of *Corstorphine* (1 F. 287) has convinced me that there is no sufficient warrant for this artificial extension of time. Be it observed at the same time that both *Babty's* and *Corstorphine's* case related to the citation of foreigners, and nothing that was said or decided in either of them can affect the case of a man whose usual place of abode is in Scotland.

I am of opinion that we should adhere to the Lord Ordinary's interlocutor, with the slight variation proposed by Lord Kyllachy.

The LORD JUSTICE-CLERK and LORD KINCAIRNEY concurred.

The Court pronounced this interlocutor—

"... Refuse the reclaiming-note, and with the following finding in fact—(3) that the defender was not resident in Scotland on 30th December 1904, and had not been so residing for at least fourteen days previous to said date: Affirm the said interlocutor reclaimed against, and decern," &c.

Counsel for Pursuer and Reclaimer—G. Watt, K.C.—Gunn. Agents—Mackay & Young, W.S.

Counsel for Defender and Respondent—Solicitor-General (Salvesen, K.C.)—Mackenzie Stuart. Agents—Macpherson & Mackay, S.S.C.

Friday, July 7.

SECOND DIVISION.

[Sheriff of Ayr.

BRITISH LINEN COMPANY *v.* PURDIE.

Lease—Lease of Shop—Reasonable Use of Premises—Erection of Show Cases Outside Shop.

Certain premises were let to be used as a shop in connection with the tenant's business of draper and milliner. *Held* that the erection of show cases by the tenant, and their attachment to the outside wall, was not such a reason-