with another person's right over the stream, to provide against every contingency. And although it was an extraordinary flood in that case which occasioned the bursting of the dam, it was one which he ought to have provided against. He ought to have made the dam capable of resisting any force which might be directed against it.

That being so, the question then is, whether the finding in point of law is correct, that there being no proof whatever of any negligence upon the part of the defender, he is not liable to the pursuer for the injury which has happened? I apprehend, that there can be no doubt at all, that this was an extraordinary and unprecedented flood, as it is called; nor that it was one which it is impossible for any person merely building a wall to enclose his grounds to provide against, nor which it was necessary for him to provide against.

Under these circumstances, therefore, I agree entirely with my noble and learned friends that the interlocutor appealed from ought to be affirmed.

Interlocutors affirmed, with costs.

Appellant's Agents, Campbell and Smith, S.S.C.; Uptons, Johnson, and Upton, 20, Austin Friars, London. — *Respondent's Agents*, Tods, Murray, and Jamieson, W.S.; Maitland and Graham, Westminster.

APRIL 6, 1864.

MRS. ELEANOR SUTOR or PITT, *Appellant*, *v.* THE HON. HORACE PITT, *Respondent.*

Husband and Wife—Divorce—Jurisdiction—Domicile—*P., a younger son of an English peer, and born in England, married there Mrs. P. in* 1845. *Being greatly in debt in* 1854, *and leaving his wife in England, where she ever since remained, he went to Scotland to avoid his creditors, and joined a friend in shooting quarters there. In* 1858 *he took a six years' shooting lease of a place in Scotland, and remained there till* 1860. *From* 1854 *to* 1860, *he resided continuously in Scotland, making a flying visit occasionally to England, to see his friends and Mrs. P., with whom he corresponded all that time. In* 1860 *he raised, in the Court of Session, an action of divorce against Mrs. P. on the ground of her adultery in England in* 1858.

HELD (reversing judgment), *That P. had not acquired a domicile in Scotland, his main object in going there being to hide from his creditors*—(Dubitante *Lord Kingsdown*).

QUESTION—*Even if P. had acquired a domicile in Scotland, whether the domicile of Mrs. P. could be deemed constructively to be in Scotland, so as to give jurisdiction to the Scotch Court*—(*Lord Kingsdown* affirmative—*Lord Westbury* negative).

OPINION—*Where an English husband, leaving his wife in England, goes to Scotland and resides there, but not so as to acquire a Scotch domicile, and even though his object was not to institute a suit of divorce there, the Scotch Court has no jurisdiction to entertain such suit*—Per *Lord Westbury L. C.*[1]

The pursuer (the respondent) having brought an action of divorce in 1860 in the Court of Session against his wife, in which she, *inter alia*, pleaded "no jurisdiction," the Lord Ordinary allowed "the pursuer a proof of the grounds set forth in the record on which he founded jurisdiction in this Court, and the defender a proof of her allegations on that head, and to both a conjunct probation."

The Lord Ordinary thus stated the outline of the facts after hearing the evidence.

"The present is an action of divorce by reason of adultery, purporting to be raised by Horace Pitt, commonly called the Honourable Horace Pitt, formerly Lieutenant Colonel in Her Majesty's Royal Regiment of Horse Guards, residing at Kilninver, in the county of Argyle, *pursuer;* against Mrs. Eleanor Sutor or Pitt, wife of the said Horace Pitt, residing at the Dell, Englefield Green, in the parish of Egham, in the county of Surrey, England, or elsewhere abroad, *defender.*"

"The defender objects to the jurisdiction of the Court, on the ground, that the pursuer is a domiciled Englishman. The pursuer maintains, that his domicile, as well as constructively that of his wife, is in Scotland, and that therefore the action is competent.

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[1] See previous report 24 D. 1444; 1 Macph. 106; 35 Sc. Jur. 59. S. C. 4 Macq. Ap. 627; 2 Macph. H. L. 28; 36 Sc. Jur. 522.

"The pursuer has resided in Scotland, with from time to time a short occasional absence, since the year 1854. He has been, since May 1858, tenant of the house and shootings of Kilninver, near Oban, on a lease of six years from that date. He has resided there since then, was residing there at the date of the present action in December 1860, and still resides there. But the defender maintains, that this is a mere temporary residence, assumed for the purpose of being out of the reach of English creditors, not intended to last beyond the passing exigency, and ineffectual to displace the original domicile in England.

"There can be no doubt that, at the time of the pursuer's coming to Scotland in 1854, he was a domiciled Englishman. England was his domicile of origin. It continued to be that of his choice. A younger son of an English peer, Lord Rivers, he held a commission in the Royal Horse Guards Blue; and lived, for the most part, in barracks in England, with his regiment. His relatives and connexions were English. In England were at once his avocations and his pleasures. London seems to have been his favourite, it may perhaps be added, fatal haunt.

"In 1845 he was married to the defender, Eleanor Sutor, in circumstances which seem to have precluded his introduction of his wife into general society. In a letter to her of date 2d June 1855, he says with reference to their marriage—'Your great complaint against me was my cowardice for not better braving the world and openly living with you; and I admit this error, though the feeling was a natural one.' After his marriage he continued with his regiment in barracks; but occasionally lived with the defender in a house in Tilney Street, which had belonged to her before the marriage, and where her own proof shews he had visited her before marriage in exactly the same way as after. The defender ultimately occupied a country house of her own called The Dell, in the county of Surrey, and there the pursuer made her temporary visits of a like character.

"In the year 1854 the pursuer had fallen into pecuniary embarrassments, of a character apparently hopeless. He had become indebted to money lenders, chiefly of the Jewish persuasion, in many thousand pounds. Judgments had been taken out for large sums against him, and the creditors were urgent. He had apparently no means of satisfying, or even of pacifying them. The result was, that in that year he was compelled to sell his commission, and to leave England for the protection of his personal liberty.

"He came to Scotland in the autumn of 1854. His first places of abode were the shooting quarters of friends whom he visited in the islands of Harris and Lewis. In May 1855 he arranged with one of these friends, the Rev. Mr. Hutchison, to board with him at his shooting quarters of Soval, in Lewis, paying him £100 per annum 'as well for his board as for his share in the sport.' On this footing he continued to live at Soval till September or October 1857, when he went on a visit to another friend at Athline, in the same island, and with him he continued till near the time when he took the house and shootings of Kilninver in summer 1858.

"During this period of nearly four years, he appears occasionally to have gone up to England for a week or two; chiefly for the purpose of seeing his mother, Lady Rivers, to whom he seems to have been much attached. A more important absence occurred in the autumn of 1855, when he went to the Crimea in search of military employment. He was unsuccessful, and returned to Soval, in Lewis. His absence, even on this occasion, was not long. He left the country in August or September 1855; he was back in Soval before Christmas of that year.

"It is plain, from the proof, that during this period it was a leading object with Colonel Pitt to keep himself out of the reach, and even from the knowledge, of his creditors. His arrangements for this purpose were chiefly necessary when he left his friendly island for a great city like Glasgow; or ventured into England to meet his mother. The correspondence produced is full of his plans for concealing his movements, including the device of assuming a fictitious name. He was at one time Parsons, at another Percival, at a third Philips. On one occasion of his meeting his mother in Lancashire, it was proposed, that she should be Mrs. Parsons, 'and dispose of her coronets;' but he afterwards writes, 'we decided on her being herself here, and I am Mr. Parsons, her nephew, who has lived with her quite like a son.'

"In May 1858 occurred the circumstance already adverted to, and which cannot but be thought of great consequence in the present question: he became the tenant of the house and shootings of Kilninver, on a lease of six years from that date. These were at that time in the occupancy of Captain Meynell, who held them from Lord Breadalbane, the proprietor, on a lease of twenty-one years, expiring in 1872. The pursuer, in May 1858, became subtenant of Captain Meynell for six years from that date, at a rent of £300 per annum for the furnished house and shootings. It would appear, that the pursuer received an allowance to this amount from his brother, Lord Rivers; and he avowedly proposed to add to his income from the produce of his rod and gun. Captain Meynell states in the proof—'I think it was agreed, at the first taking in 1858, that he might renew his tenancy at the end of the six years, if I had no objection. Our understanding was, that after the six years he should take the remainder of my lease, with the consent of Lord Breadalbane, if I did not wish to return myself.'

"Since this date of May 1858 the pursuer has maintained a residence at Kilninver, possessed, at least ostensibly, of all the attributes of a settled dwelling place. He lived there throughout

the year, with the short intervals of absence already alluded to. He made some additions to the furniture. He kept an establishment of servants, both within doors and without. He paid the taxes of an occupant. He visited the country gentlemen around. He received visits from his relatives and friends. So far as his immediate neighbourhood was concerned, he practised no disguise or concealment. He became, to appearance, what he calls himself in one of his letters, 'Colonel Pitt of Argyleshire, to all intents and purposes.'

The Lord Ordinary afterwards referred to other matters bearing on the pursuer's own intentions when he resided in Scotland.

The Court of Session held, that it had jurisdiction to entertain the divorce, and that Scotland was the matrimonial domicile, whether it was the principal domicile or not.

This was an appeal from two interlocutors.—1. The Lord Ordinary's interlocutor, 16th July 1862, sustaining the jurisdiction on the ground, that the pursuer was domiciled in Scotland; 2. The interlocutor of the Second Division, 5th December 1862, sustaining the jurisdiction, and adhering to the Lord Ordinary's interlocutor on the ground, that there was a sufficient matrimonial domicile of the parties in Scotland.

The appellant (defender), in her *printed case* stated the following reasons for a reversal:—1. Because on the 20th Dec. 1860, when the summons in the present action of divorce was raised before the Court of Session in Scotland, the respondent, Horace Pitt, had his principal domicile in England. 2. Because at the date of raising the summons in the present action, the proper domicile of the respondent being in England, the appellant had not a constructive domicile in Scotland, and was not liable to the jurisdiction of the Courts of that country in an action for divorce *a vinculo matrimonii*. 3. Because even on the assumption, that in the ordinary case the appellant would have been rightly held to have a constructive domicile in Scotland, she is not liable to the jurisdiction of the Court of Session, in the present action, in respect, that her domicile did not in the circumstances of the present case follow that of the respondent. 4. Because, apart from the principle of constructive domicile, there exist no grounds for subjecting the appellant to the jurisdiction of the Courts of Scotland in the matter of the present action.

The respondent in his *printed case*, supported the interlocutors for the following reasons:—1. Because the domicile of the respondent for the purposes of this suit was in Scotland. 2. Because the domicile of the appellant is that of her husband, the respondent.

The *Attorney General* (Sir R. Palmer), and *Fleming* Q.C., for the appellant.—Both the interlocutors of the Court below are wrong. 1. As to the ground taken by the Lord Ordinary, that the domicile of Colonel Pitt was in Scotland: It is apparent from the whole circumstances, that the husband went to Scotland solely because his creditors were pressing him, and he wanted to secure a hiding place. The LORD CHANCELLOR, in *Bempde* v. *Johnson*, 3 Ves. 202, expressly stated, that in cases were a man was driven by necessity of his affairs to a foreign country, no domicile was acquired by foreign residence—and because the character of permanency was wanting. The letters here shew the constant and overruling motive to be to get rid of the creditors. There was nothing voluntary in his Scotch residence. He was in the position of an exile, which Sir H. Fust said in *De Bonneval* v. *De Bonneval*, 1 Curt. 864, was no evidence of the acquisition of a foreign domicile.

[LORD CHANCELLOR.—Suppose the case of a political exile, who leaves his country voluntarily, but from motives of personal safety, would you say he would not acquire a foreign domicile?]

That might be a case of difficulty. But many cases assume, that if there is merely a temporary purpose in view, which might be accomplished soon, and after which the party would at once return, that does not amount to a domicile abroad—*Moorhouse* v. *Lord*, 10 H. L. Cas. 282; *Heath* v. *Sampson*, 14 Beav. 441. Thus the case of an invalid going to a warmer climate was put in *Moorhouse* v. *Lord*, as an instance where no foreign domicile would be acquired. Here the sole object of going and living in Scotland was to avoid the creditors. If at any moment he had got rid of his debts, he would have at once returned to England. 2. But even if the domicile be Scotch, it did not follow, that the Court of Session would have jurisdiction. The evidence shewed, that the husband had in effect deserted the wife, or at the utmost, that they were living apart by mutual consent. There was, therefore, no duty in the wife to be with the husband, nor could it be assumed, in point of law, that she was constructively residing with him. There were some cases where the wife's domicile was taken to be that of the husband; but this fiction has no place where the husband has gone abroad, leaving the wife by mutual consent in their original domicile, and, moreover, where the object of the husband in the foreign court was to dissolve the marriage. The cases of *Warrender* v. *Warrender*, 2 S. & M'L. 154, and *Ringer* v. *Churchill*, 2 D. 307, shew, that where the wife is not living in the foreign country, there is no jurisdiction in the foreign court, and a residence of forty days is of no use.

In the cases of *French* v. *Pilcher*, 13 June 1800, F.C., and *Lindsay* v. *Tovey*, 26 Jan. 1807, F.C., though the Court assumed jurisdiction, these were cases where the husband was a domiciled Scotchman, or assumed to be so. The other cases in Scotland confirm the doctrine, that the wife must be resident in Scotland, when sued in an action of divorce—*Forrester* v. *Watson*,

6 D. 1358; *Christian* v. *Christian*, 13 D. 1149; *Shields* v. *Shields*, 15 D. 142; *Tulloh* v. *Tulloh*, 23 D. 639. The first case where the contrary doctrine was adopted, that the husband's residence in Scotland for a period short of domicile will suffice to give jurisdiction to the Scotch court in an action of divorce, was *Jack* v. *Jack*, 24 D. 467. But that case was different from the present, for the marriage there was Scotch, the wife was residing in Scotland, and the *locus delicti* was Scotch. The only mode of supporting the present judgment was by holding, that the wife was constructively in Scotland. How was a wife to be served with the summons, if this fiction be pushed to the full extent, especially when in Scotland personal service is not required to found jurisdiction?

[LORD CHANCELLOR.—It would lead to this, that the wife might be served by the husband laying the summons on his dressing table.]

What would be the use of a judgment of the Scotch Court pronounced in a case like this, where the party never was in Scotland, nor was bound to be in Scotland? No Court in England would pay any attention to it, for it would be contrary to the first principles of justice—*Buchanan* v. *Rutter*, 1 Camp. 63. In *Dolphin* v. *Robins*, 7 H. L. C. 390, it was observed, that the domicile of a married woman, who is living apart by mutual consent, cannot be taken to be constructively the domicile of the husband.

The *Queen's Advocate* (Phillimore), and *Sir H. Cairns*, Q.C., for the respondent.—We do not propose to found our argument on the ground taken by the Inner House, viz. that a residence, less than what would suffice to create a domicile in Scotland, will give jurisdiction to the Scottish Court in an action to dissolve the marriage. We rest the argument solely on the ground, that here the domicile of Colonel Pitt was Scotch. It cannot be said there was desertion by the husband when he went to Scotland, for the evidence shews, that he asked the wife to accompany him, but she refused. The letters and conduct of the respondent shew, that whatever may have been the original motive that led him to Scotland, he at last became attached to the country, and chose it for his home. If, then, the domicile was Scotch, the domicile of the husband attracts that of the wife, and she must be taken to be domiciled in Scotland also. The case differs from *Warrender* v. *Warrender* only in the fact, that here the parties were English, while in that case they were originally Scotch.

[LORD CHANCELLOR.—No, that was substantially a Scotch marriage, for it was the marriage of Scotch persons in England, while *in itinere* to Scotland.]

That was not the *ratio decidendi*, and that case supports the present judgment. The doctrine that the wife's domicile is that of the husband has always been acted on in the Ecclesiastical Courts of England, and the wife has been often served while abroad in suits of nullity commenced in England.

[LORD CHANCELLOR.—Then, if that is the case, what is there to prevent an English husband going abroad, say to Berlin, and there commencing a suit of divorce, where he would succeed on grounds which would be inadmissible in the English Court of Divorce. Would an English Court recognize such foreign divorce?]

That is the old question alluded to in *Lolly's case*, Russ. & Ry. 237, which is still the law. There is nothing remarkable in the circumstance, that a man may be deemed married in one country, and not married in another, and this legal result often happens. The Judges alluded to that anomaly as unavoidable in *Warrender* v. *Warrender*, 2 Sh. & M'L. 154; *Tovey* v. *Lindsay*, 1 Dow, 137. The English Courts allow a wife to be served with notice of the suit though living abroad—*Whitcombe* v. *Whitcombe*, 2 Curt. 351; *Chichester* v. *M. Donegal*, 1 Addams, 5; *Brodie* v. *Brodie*, 2 Sw. & T. 259. It may be said, that the Scotch Court ought not to entertain jurisdiction where the parties are foreigners, and where the Scotch decree would not be acted on. The law which was acted on in *Lolly's case*, however, seems now to be changed, seeing that it is no longer the doctrine of the law of England, that an English marriage is indissoluble except by Act of Parliament. In *Conway* v. *Beasley*, 3 Hagg. 644, Dr. Lushington said it had never yet been held, that an English marriage could not be dissolved by a foreign court. Here, at all events, there were no circumstances to take the present case out of the general rule, that the wife's domicile follows that of the husband, always assuming the husband's domicile to be Scotch.

Fleming replied.—The domicile cannot be seriously disputed to be still in England. Besides, it is a general principle of international law, that a husband has no power to change the domicile of his wife to a country, in which she has never been, and is under no duty to be, and thereby to affect her status. The proper jurisdiction here was in the English Court of Divorce. The only jurisdiction which the Scotch Courts have is, when the parties are both residing and domiciled in Scotland.

Cur. adv. vult.

LORD CHANCELLOR WESTBURY.—My Lords, this is an appeal from an interlocutor pronounced by the Lord Ordinary in the Court of Session, and also confirmed and adhered to by the Inner House. The suit was instituted in Scotland by Colonel Pitt against the present appellant, Mrs. Pitt, for a divorce. The preliminary defences were put in, and among them a

plea to the jurisdiction of the Court, and on that plea to the jurisdiction of the Court the issues raised were tried, and determined, as I have already said, in favour of that jurisdiction. It was admitted by the Lord Ordinary, and also by the Court of Session, that the jurisdiction of the Court depended upon the question of the domicile of Colonel Pitt, the present respondent, the pursuer in the action in the Court below. The Lord Ordinary was of opinion, that Colonel Pitt's domicile was in Scotland, and that he had not merely acquired in Scotland a sufficient domicile for the purposes of the jurisdiction of the Courts of Scotland. The Inner House did not quite agree with the Lord Ordinary in that conclusion. A majority seem to have been of opinion, that Colonel Pitt was not absolutely domiciled in Scotland; but they seem to have thought, that some domicile short of the absolute and complete domicile would have been a sufficient forensic domicile to confer jurisdiction on the Court, and therefore they adhered to the interlocutor of the Lord Ordinary.

At the bar it was admitted by the counsel for the respondent, that the proper view of the case, and indeed the only view which they seemed disposed to maintain, was that taken by the Lord Ordinary, that Colonel Pitt had acquired a complete domicile in Scotland, and had thereby put off and lost his original domicile in England. It becomes unnecessary, therefore, to consider the very important question, that might be involved in this case, if your Lordships came to the conclusion, that Colonel Pitt had not an absolute and complete domicile in Scotland. If he was not domiciled in Scotland to all intents and purposes, having relinquished his original domicile and acquired a domicile in Scotland, then, by the concession of the counsel at the bar—a concession which is, I trust, in the opinion of your Lordships, quite in accordance with the law of the case—it will be impossible to maintain the order which has been pronounced in the Court below.

Now all the facts are extremely simple, and there is very fortunately about them no discrepancy or contradiction in point of evidence. Colonel Pitt being in a state of the greatest pecuniary embarrassment, was obliged to quit England, and to flee the country by reason of the demands of his creditors in the year 1854. He went to Scotland in the autumn of 1854. His object in going to Scotland was to find a secure and convenient hiding place. He endeavoured to accomplish that end by assuming different denominations, and at a late period after he had been visiting Scotland three or four years, he very graphically and correctly describes himself as tired of the life he led there, and that he was "weary of dodging about as Parsons or Philips," those being the *aliases* which he at different times assumed. The Lord Ordinary came to the conclusion, that there was no ground for imputing to Colonel Pitt a final intention to relinquish his English domicile until the month of May 1858, when he took from a gentleman of the name of Meynell a lease for the term of six years of a shooting lodge at Kilninver in the neighbourhood of Oban, on the western coast of Scotland, and which he took, as I have already mentioned, for a period of six years. The Lord Ordinary appears to have arrived at the conclusion, that, immediately upon his acquiring this settled place of residence by way of contrast to the mode in which he had spent his time at different places of residence during the three antecedent years, he must be properly considered to have a settled dwelling place. But I cannot at all concur in that conclusion. Colonel Pitt left England (as he himself says in one of his letters) from necessity, and not from choice. He speaks of the whole of his residence in Scotland as a residence still under the influence of that necessity; and the intentions of Colonel Pitt, and the real objects he had in view, are abundantly illustrated by his own declaration in letters written both at the time of his acquiring this settled residence at Kilninver, and also subsequently, down to the period at which it is material to ascertain his position, namely, in the month of December 1860, when the suit for the purpose of obtaining the divorce was instituted in the Court of Session.

Now, from those letters, it is apparent, that Colonel Pitt was, both before he took the lease of this sporting lodge, and subsequently, in constant communication with his solicitor and his friends for the purpose of ascertaining in what manner he could be released from his debts and liabilities. On one occasion, as I will presently shew by reference to one of his letters, he had formed a design, about which he corresponds with his solicitors, of first of all making an assurance—a conveyance of a reversionary interest or remainder which he had in the estates of his brother, after the title of the purchaser of that remainder was secured by the lapse of time, and then afterwards of taking the benefit of the Insolvent Act, and passing through the insolvent courts. Now, one of the letters which refer to that is of the date of May 1858, and that is followed by another letter of the 9th May 1858. This was after the time when he had treated, and had concluded the treaty of Kilninver. The letter of the 9th May 1858 is very material, because the expressions there are: "I care very little where I live, and shall probably never feel as much at home as in the island, (that is a reference to the isle of Lewis,) although the two will not bear a comparison; and if I get free, and have not this place on my hands, I might more easily have managed to live with mother in some other place." That refers to an anxious correspondence which he had at that time with his solicitor, that if even he took Kilninver Lodge for six years, he should be still at liberty to sublet it, so that he might not be obliged, whenever he got free of his liabilities, still to remain tenant of that place of abode.

At a subsequent time we find him expressing great joy in prospect of being able to get released from his debts through the medium of the provisions of the bill that was brought in for the consolidation of the Bankruptcy Laws in the year 1860. At a subsequent period of time in the year 1860, he expressed his determination to get rid of his debts through the medium of the Scotch Bankruptcy Act, a proceeding which at that time was a very common one, but upon which some restraint was put by the provisions of the Bankruptcy Act of 1861. I find, therefore, Colonel Pitt, throughout the whole of this period of time, chafing under the necessity of his abode in Scotland, anxiously meditating a mode of finding some escape from his debts and liabilities, and evincing throughout the whole of this correspondence the greatest possible anxiety to return to his old habits of life in England, and to return to England in such a manner, that he might have free and unrestrained intercourse with the members of his family, for whom he appears to have entertained the warmest affection.

Now, under these circumstances, is it possible to attribute to this gentleman both *de facto et ex animo* the intention of quitting altogether his English domicile, and acquiring a Scotch domicile with the intention of permanently remaining there by way of preference to a return to his original domicile? I think every letter contradicts that feeling and that impression, and that, taking the evidence of Colonel Pitt's letters, the evidence of his desire and intention as to what he would do if he could obtain freedom from his debts by means which he had various hopes of acquiring, there can be no possibility of doubt that he would have quitted Scotland instantly, and with the greatest possible alacrity, and would have returned immediately to the place of his original domicile.

Under these circumstances, it is impossible to say, as I humbly conceive, that there was an *animus* of acquiring deliberately a new domicile, and altogether cutting off the old domicile that he had possessed in England. If that cannot be imputed to Colonel Pitt under these circumstances, then it is impossible to hold, according to the just rule of law, as embodied in the admission of the respondent's counsel, that the Court of Session had jurisdiction. If it had been necessary, as I trust it will not be, to arrive at a different conclusion as to the fact of the domicile, I should still have had the greatest possible difficulty in holding, that the domicile of the husband was, in a case of this kind, to be regarded in law as the domicile of the wife by construction or by attraction, so as to compel the wife to follow the husband, and to become subject, for the purposes of divorce, to the jurisdiction of the tribunals of any country which the husband might choose, even for that purpose alone, to fix upon, and to declare that he intended to acquire a domicile.

But it will be unnecessary to enter upon that question, for I trust your Lordships will agree with me in the conclusion, that there is nothing here to warrant the inference that Colonel Pitt had put off his English domicile, and had deliberately, as I have said, *de facto et ex animo*, acquired and put on a Scotch domicile; and if that is the conclusion arrived at, it will be, as I humbly conceive, our duty to reverse the order of the Court below, and to absolve the present appellant, as defender in that action, from the conclusions of law.

LORD CHELMSFORD.—My Lords, the question to be decided upon this appeal is, whether the appellant is amenable to the jurisdiction of the Court of Session in Scotland, in an action of divorce raised against her by the respondent, her husband. The Lord Ordinary and the Court of the Second Division upon a reclaiming note sustained the jurisdiction, but upon different grounds. The Lord Ordinary was of opinion, that nothing short of an actual domicile in Scotland by the husband would give the Court jurisdiction in an action of divorce at his instance against his wife resident abroad, but thought, that the facts of the case proved such a domicile. The Court of Session held, that there might be a domicile short of the domicile regulating the succession which would found a consistorial jurisdiction, and that the residence of the husband in Scotland, not being of a mere passing temporary character, was sufficient to constitute the matrimonial domicile, where it would be the duty of the wife to reside. It is unnecessary to decide between these conflicting opinions, because the counsel for the respondent distinctly disclaimed the idea of supporting his case upon any other ground than that of the acquisition by him of a legal and complete domicile in Scotland.

In the observations which I have to make, I shall therefore confine myself entirely to this point. A disputed question of domicile is always one of difficulty, on account of the impossibility of arriving at a satisfactory definition which will meet every case that can arise, and also because it generally presents a conflict of evidence as to acts and declarations of intention upon which it depends. Where the contest arises upon a supposed change of domicile, I do not see how less evidence can be accepted than will shew a fixed intention of abandoning one domicile and permanently adopting another. The opinion which I recently expressed upon this subject in the case of *Moorhouse* v. *Lord* appears to me to be correct, and to be so applicable to the present occasion that I will venture to repeat it. I there said, "A present intention of making a place a person's permanent home can exist only, where he has no other idea than to continue there without looking forward to any event certain or uncertain which might induce him to change his residence. If he has in his contemplation some event, upon the happening of which his residence

will cease, it is not correct to call this even a present intention of making it a permanent home. It is rather a present intention of making it a temporary home, though for a period indefinite and contingent; and even if such residence should continue for years, the same intention to terminate it being continually present to the mind, there is no moment of time at which it can be predicated, that there has been a deliberate choice of a permanent home." Trying the present case by this rule, can it be said, that there is any sufficient proof that the respondent had entirely given up his domicile of origin, and had manifested his intention to fix his abode permanently in Scotland? Colonel Pitt is the brother of Lord Rivers, and only one weakly boy stands between him and the succession to the title. We find him occasionally speculating upon the arrival of the time when he would become the heir presumptive. Whether the happening of this event would bring him back to England it is impossible to say; but if he ever become Lord Rivers, it is not very probable that he will continue to hide himself in a remote part of Scotland. The expectation, or at least the possibility, of this change in his station and fortunes, must have kept his mind in such a state of uncertainty as to the future as would tend to prevent any fixed determination of abandoning England altogether. But his residence in Scotland can hardly be considered the act of a free agent. He originally fled to avoid the pursuit of his creditors, and he continued there for some time in studied concealment, indulging the hope that his affairs might be managed through friendly assistance, and that he might then be able to choose a way of life and a place of residence more agreeable to him. This state of things continued from the year 1854 down to 1858, when he took the lease of Kilninver Lodge, upon which the proof of his abandonment of the domicile of origin and the acquisition of a Scotch domicile principally rests. This lease, which the respondent calls a shooting lease, was only for the term of six years; and that he had not, at the time he took it, any fixed intention of occupying it even during this short time, appears from his anxiety to secure the right of subletting, upon the refusal of which by the landlord he complains that "unless an exigency arises," which means (he says) "going to quod," "he is held hard and fast for six years."

These facts in themselves are wholly insufficient to establish a case of domicile. But it is contended, that abundant proof of the respondent's intention to take up his permanent abode in Scotland is to be found in his letters which have been produced in evidence. The impression, however, which these have left in my mind is against the notion of the respondent having any such settled intention. All the earlier letters exhibit his disposition to make the best of his situation under the necessity of keeping out of the reach of his creditors. They generally contain allusions to his desperate affairs, and to his hopes and disappointments as to their settlement, and seem to speak of each residence which he selects as simply a temporary one. Even when the lease of Kilninver Lodge has been taken, notwithstanding his previous efforts to get rid of it altogether, he never appears to contemplate a residence there beyond the term; and in a letter of his, I think, written on the 11th June 1858, he says, "One must live somewhere, and I and my friend can manage to pay the rent, and the rod and gun pretty nearly keep the table; but somehow or other it does not quite please me to think of myself settled here on a lease, though as I did it more from the wishes of my family than any fancy of my own, I am sure I did the right thing." Again, in a letter to his sister, Mrs. Bruce, after everything had been settled about the lease, he writes:—"The place is very charming, and will do very well; but since I became aware of my mother's future life, and that I can in a short time effect my liberty by means of the Court, it was but the belief that I could occupy this place as a home without trouble or risk to any one, that made me the least anxious about it. Now that I find I have been misinformed, I would rather not have it, and be more free to act for the future with reference to mother."

It is unnecessary to refer to other letters, and particularly to those written as late as the year 1860, to shew, that the respondent had all along in his mind the desire to get rid of his creditors, and to be able to select a place of residence for himself, instead of being forced to continue in concealment, as a matter of necessity rather than of choice. Great stress was laid by the counsel for the respondent upon one of his letters dated 3d September 1859, in which he says,—"I am Colonel Pitt of Argyleshire to all intents and purposes," from which they infer, that his plan of life for the future was finally settled, and that he intended thenceforth to make Scotland his permanent residence. But that appears to me to give undue force to, and even to put a wrong interpretation upon, those expressions. It is evident from the letter immediately preceding, that down to that time the respondent (as he writes) "never saw any one but the few who came to him by stealth." He declares life not to be worth having on those terms; and so, in the letter in question, he says, "I have seen several old Londoners at Oban, and made other new country acquaintances, and am Colonel Pitt of Argyleshire to all intents and purposes." Can anything more be meant by this than that he had thrown off all disguise, had appeared in his real character, and was known and visited by his friends and neighbours, without any further attempt at concealment? The Lord Justice Clerk might, under all the circumstances, well say,—"The pursuer's domicile of origin was unquestionably English, and if it were necessary to determine whether he lost his domicile of origin, to all effects, and acquired a Scotch domicile which

would lead to his succession in the event of his death being regulated by the law of this country, I should have greater difficulty in forming an opinion." The respondent's case, however, depends, as his counsel admit, upon the establishment of this complete legal domicile, in which they appear to me to have completely failed, and I therefore agree with my noble and learned friend on the woolsack, that the interlocutor appealed from ought to be reversed.

LORD KINGSDOWN.—I do not at all regret, that your Lordships have arrived at the conclusion which you have arrived at with respect to this appeal, and I believe the result is equally for the benefit of both parties. With respect to the question of domicile, I must confess, that I entertain much more doubt upon that point than has been felt by either of your Lordships who have addressed the House, and I was very much struck not only with the able judgment of the Lord Ordinary, but with the powerful arguments which were addressed by the respondent's counsel at your Lordships' bar. Having, however, expressed those doubts to your Lordships, and not meeting with any support from your Lordships, of course I very readily yield my own opinion upon that point, which, I dare say, is erroneous.

With respect to the last point adverted to by my noble and learned friend on the woolsack, I confess I think it necessary to enter my humble protest against being considered to concur in the doubts which my noble and learned friend has expressed upon that point. It is not necessary to decide it, and therefore I do not think it necessary to express any decided opinion upon the point, but I confess, if it were so, I should not be prepared to hold, that if the domicile were established, as the Lord Ordinary held it to be established, the jurisdiction might not probably be maintained. I mention this only in order that it may not be supposed, that the domicile of the wife would not follow the actual domicile of the husband.

The *Attorney General.*—I presume your Lordships' order will be to reverse the interlocutor, and to remit the case to the Court below, with the direction that the appellant be assoilzied with expenses.

LORD CHANCELLOR.—We have pronounced the order which in our opinion the Court below ought to have pronounced, and that is, that the appellant ought to be assoilzied from the conclusions of the action with expenses.

Interlocutor reversed.

Appellant's Agents, C. and A. S. Douglas, W.S.; Rogers and Jull, 40, Jermyn Street, London.—*Respondent's Agents,* Macrae and Ross, W.S.; Tennant and Darley, Gray's Inn.

MAY 27, 1864.

CHARLES WILLIAM CAMPBELL, *Appellant*, *v.* JOHN ALEXANDER GAVIN CAMPBELL, *Respondent.*

Succession—Competition of Heirs—Status of Legitimacy—Presumption of Law—Sequestration of Entailed Estates—Judicial Factor—*A claimed to be heir apparent of M, the last heir of entail in certain estates, having for fifty years been treated by all interested parties as next heir, and been cited as such by M, in proceedings under the Montgomery and Rutherfurd Acts. Four months after M's death, before A was served heir, B, the heir next in succession to A, petitioned the Sheriff of Chancery to be served heir to M, on the ground, that the father of A, and through whom A claimed, was illegitimate, owing to the mother of A's father being already married to another man alive at the time of her marriage to A's grandfather. The petitions of A and B for service being conjoined, B then petitioned the Court of Session to appoint a judicial factor, till the question of competition in the succession should be settled.*

HELD (affirming judgment), *That A having long enjoyed the status of legitimacy, and the case set up by B not being strong enough to displace the* primâ facie *right of A, the Court ought not to appoint a factor*—(LORD WENSLEYDALE *dissentiente*).[1]

The appellant, Charles William Campbell, younger, of Boreland, and John Alexander Gavin Campbell of Glenfalloch, were both claimants to the succession of the Breadalbane estates. The late Marquis of Breadalbane died on 8th November 1862, and the deeds of entail under which his estates were held, described the next successor to be "the heir male of the body of William

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[1] See previous reports 1 Macph. 991: 35 Sc. Jur. 577. S. C. 4 Macq. Ap. 711: 2 Macph. H. L. 41: 36 Sc. Jur. 538.