The Court adhered.

Counsel for Appellant—Guthrie Smith—Shaw. Agents—Rhind, Lindsay, & Wallace, W.S.

Counsel for Respondent—Macdonald, Q.C.—Lang. Agents—Macbrair & Keith, S.S.C.

Tuesday, July 5.

SECOND DIVISION.

[Lord Lee, Ordinary.

CARSWELL *v.* CARSWELL.

Husband and Wife — Divorce for Desertion — Foreign—Domicile for Divorce—24 *and* 25 *Vict. c.* 86 (*Conjugal Rights Act* 1861), *sec.* 10.

A domiciled Canadian married in Canada, his wife previous to the marriage also being domiciled there. Being deserted by his wife in Canada for more than four years, during which he made several attempts to induce her to return, he came to Scotland and entered into business and established his residence in Scotland. He then raised an action for divorce against his wife in the Scotch Courts, in which he proved to the satisfaction of the Court the fact of wilful desertion, and that he himself had become a domiciled Scotchman. The defender did not appear, but it was not proved that she knew of the action, though efforts had been made to find her. *Held* that in the circumstances he had acquired a domicile for his wife as well as for himself, and therefore that the Conrt had jurisdiction to grant decree of divorce.

In August 1866 Robert Carswell, a law bookseller in Toronto, married, in Ontario, Martha Swan. Both parties were born in Canada, and at the date of the marriage were domiciled in Canada. They lived together as husband and wife till 1873, in which year differences on religious matters arose between them, and Mrs Carswell, apparently in consequence of these differences, suddenly left her husband's house, and after residing in lodgings in Toronto for several weeks, during which time she was visited by her husband, went to her father's house in the town of London, about 120 miles from Ontario, taking with her the two children of the marriage. Mr Carswell made several attempts to induce her to return to his home, both while she was thus residing in lodgings and while she was residing in London, and in Rochester in New York State, to which place she went for a time. In December 1874 he raised an action against her in the Court of Common Pleas of Ontario, to obtain the custody of his children, which action she defended. While this suit was pending, the parties, at the suggestion of the Court, met at the house of a friend for the purpose of terminating the suit if possible by a reconciliation. At this meeting a reconciliation was found impossible, as Mrs Carswell refused to return to her home, and the Court therefore pronounced judgment, giving to Mr Carswell the custody of the children. From the date of this meeting (January 1875) Mr Carswell never had any communication from his wife with the exception of a set of verses of a somewhat incoherent character addressed to him in February 1879.

In October 1879, after a preliminary visit in the early part of the same year, Mr Carswell came to Scotland, bringing with him the two children above mentioned and a daughter by a former marriage. He took and furnished a house in Edinburgh, took a lease for five years of a shop in Edinburgh, and purchased with the view of carrying on his business as a law bookseller in that shop a law library and the goodwill of a bookseller's business from which the proprietor was retiring. After thus taking up his residence in Edinburgh, he attempted by a letter to his wife, dated 5th December 1879, which he sent to the care of a person whom he believed to be in correspondence with her, to establish communication with her with the view of ascertaining whether she would join him in Scotland. He also attempted by means of advertisements in various newspapers published in parts of America to which he had ascertained that she had gone, to learn where she was. No answer was received to these inquiries.

On 28th July 1880 he raised this action against her, concluding for divorce on the ground of desertion. The summons was served personally upon the brother and sister of the defender, of whom the former resided in California, the latter in Canada.

The pursuer, after setting forth the facts as detailed above, pleaded—"(1) On the facts stated, and in particular the pursuer having acquired a Scotch domicile, the defender is subject to the jurisdiction of the Court of Session. (3) The defender having been guilty of wilful and malicious non-adherence to and desertion of the pursuer for the space of four years, the pursuer is entitled to decreet of divorce as concluded for."

The defender did not appear.

The pursuer having moved the Lord Ordinary to hold the summons relevant and to allow a proof, his Lordship reported the cause to the Second Division, with this note—"The Lord Ordinary reports this cause because it appears to him that the allegations of the pursuer disclose a case of an unnatural character, and raise questions of importance which in the present state of the authorities ought not to be decided in favour of the pursuer without the sanction of the Court. It was admitted by the pursuer's counsel that no case could be cited in which an action of divorce for desertion had been sustained against a defender who has never been in Scotland, and who, so far as appears, has had no notice of her husband's removal to this country, and of his requirement that she should here give her adherence to him.

"According to the averments in the condescendence, the pursuer and defender were married in Canada in 1866. Neither of the parties appears to have had any connection with Scotland, either at that time or during their cohabitation as married persons. Their residence from the time of the marriage down to 1873 was in Toronto, where the pursuer carried on business as a law bookseller. In 1873 the defender separated herself from her husband, and he states that although he subsequently saw her and cohabited with her in a lodging which she had taken, she declined all proposals that she should return to live with him. In 1875 he sued her in the Courts of Toronto for the custody of two children of the marriage. At that time, therefore, he appears to have recog-

nised her as having in Canada a separate *persona standi in judicio.* An attempt was made at that time, he says, at reconciliation, but she was irreconcilable, and from that time he has not seen her. The only communication which he has since received from her is the letter, or sheet of verses, dated from St Louis, Missouri, in February 1879. In 1879 he came to Edinburgh, and commenced business there as a law bookseller. He produces a contract of copartnership, from which it appears that the business in Edinburgh is a branch of the business of a Toronto copartnership to which he transferred his business in Canada, and of which he is still the leading partner. He alleges, however, that it is his intention to reside permanently in Edinburgh, and that he has thus acquired a Scotch domicile. He has resided in Edinburgh since October 1879. His wife appears never to have been in Scotland, and he alleges, notwithstanding strenuous efforts, that he has been unable to ascertain her present residence. Certain documents have been produced by him in support of this allegation, which may be held to afford *prima facie* evidence that she was last heard of in California, working in a photographer's establishment, and that his agents in America have failed to make delivery to her of a letter dated 21st May 1880 requiring her to come to Scotland and live with him as his wife.

"In this state of matters it is obvious that the question whether the non-adherence of the wife has resulted from 'malicious and obstinate defection' within the meaning of the statute of 1573, or whether she can allege and establish a 'reasonable cause' for it, is one which cannot very conveniently be tried in this Court; indeed, it was stated that most of the evidence would have to be taken by commission; and probably the only evidence that would be taken here would be that of the pursuer himself. It was argued, however, by the counsel for the pursuer, that if he should prove his possession now of a Scotch domicile, this Court has jurisdiction in the cause, by reason of the domicile of the wife following that of the husband; and if it had been clear that the matter of jurisdiction in such a case depends exclusively upon the present domicile of the husband, and that the pursuer's allegation on that subject is sufficient, the Lord Ordinary would have allowed proof of the averments bearing on that point. It is here, however, that some of the authorities to which the Lord Ordinary is about to refer raise serious difficulty.

"In the first place, assuming that the pursuer could establish that he has acquired a Scotch domicile, it appears to be doubtful whether the jurisdiction in such a cause against a wife depends entirely upon the domicile of the husband. In the case of *Pitt* v. *Pitt*, on appeal to the House of Lords (4 Macq. 627, and 2 Macph., H.L. 32), the Lord Chancellor (Westbury), after stating the grounds upon which in his judgment a Scotch domicile had not been established, added—'If it had been necessary (which I trust it will not be) to arrive at a different conclusion as to the fact of his (the husband's) 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 purpose of divorce, to the jurisdiction of the tribunal of any country in which the husband might choose, even for that purpose alone, to fix and to declare that he intended to acquire an absolute domicile.' The Lord Ordinary is of opinion that the difficulty here pointed out is one which has been recognised in the law of Scotland, and which affects in a very special manner divorce on the ground of desertion, as against a wife who has never been in Scotland, and whose non-adherence has taken place in a foreign country to which the married pair have always hitherto belonged. In the case of *Ringer* v. *Churchill* (2 D. 307), Lord Moncreiff explained very fully the necessity of not pushing too far the presumption of the law that the wife's domicile follows that of the husband. And in the case of *Jack* v. *Jack* (Feb. 7, 1862, 24 D. 467) the opinion of the Lord President, and of Lords Ivory and Curriehill, contains the following passage:—'The general rule that the domicile of the wife follows that of the husband is not absolute, universal, or invariable; and it has never been applied to such a case as the present. It is truly inapplicable to such a case. The husband here did not transfer, or attempt or intend to transfer, to any other country the home or domicile of the married pair which had been established in this country, and which, being in this country, made the Court of this country the proper *forum* for trying any action to be brought for dissolution of the marriage. In that respect the condition of matters continued unaltered, with the acquiescence of both parties, until the present action was raised.' Lords Neaves and Mackenzie in the same case stated their opinion to be that no Court can entertain an action of divorce except one which has power to deal with the marriage of the parties, and to affect the status of both of them as persons subject to its jurisdiction; and in that view, dealing with a case in which the wife remained in Scotland, and the pursuer was in America, admittedly *animo remanendi,* they thought it doubtful if the wife 'could be subjected to the jurisdiction of another country where she has never resided, and in which the marriage can never be said to have subsisted.' In the earlier case of *Shields* v. *Shields* (15 D. 142) the same view was expressed by the Lord Justice-Clerk, and the other Judges concurred with him. That was a case similar to *Jack* v. *Jack.* The husband, pursuer, was alleged to have acquired a domicile in America, and his wife, who had been left in Scotland, pleaded that as her domicile followed his, the Scotch Courts had no jurisdiction. The Lord Justice-Clerk said—'This plea rests entirely on the ground assumed, viz, that the domicile of the husband not only is in all circumstances to be that in which it is competent for the husband to cite the wife, but the only *forum* in which she is called upon to answer to a suit at the instance of the husband. I think these are not conclusive propositions. The ground adopted by the defender seems to arise from a misconception of the case of *Warrender,* and an unwarranted application of some expressions in the opinions stated in that case. That case lays down, no doubt, the general proposition that the proper domicile of the husband is the domicile of the wife, and that though she has left him, and is living abroad, he shall not be deprived thereby

of the remedies against her competent to him by the laws of his own country. But that proposition was stated in reference to a case in which the husband continued in the original domicile of the spouses as married parties, and by the law of which country the wife's provisions, in case of his death, were secured. The proposition was not laid down in an abstract manner, to the effect or with the intention of establishing that in all circumstances, and whenever a husband chooses to leave his wife behind him in their native country, and to remove to different parts of the world, that the wife is bound to follow him, and meet in that country in which he finds it most easy to obtain a divorce, or that such foreign country is the only forum in which it is competent for him to proceed against her; and accordingly, when the case of *Warrender* was quoted in one of the former cases to establish such a proposition, Lord Mackenzie at once corrected the error, and said he drew no such consequence from it.'

"In short, according to the views expressed in these cases, the domicile of the husband cannot be said to be the domicile of the wife to the effect of founding jurisdiction in an action of divorce against her, unless the place where that constructive domicile is situate is, in the words of Lord Mackenzie in the case of *Ringer* v. *Churchill*, 'the place where the wife may reasonably be held bound to be present and to answer to all actions against her.'

"If any effect is to be given to these views, and if the difficulty stated by Lord Westbury in the case of *Pitt* v. *Pitt* has any foundation in law, the Lord Ordinary is of opinion that the present action cannot be sustained. He thinks it impossible to hold, upon the allegations in this summons, that Scotland is the place where the pursuer's wife may reasonably be expected to be present and to answer to an action at the pursuer's instance, and more especially to an action of divorce on the general ground of desertion under the Statute of 1573. For although such an action now proceeds without any previous process of adherence (that process being dispensed with by the Conjugal Rights Act 1861), the first point to be established is the breach of the obligation to adhere. In such a case the question is, as stated by Lord Fullerton in *Gordon* v. *Gordon* (9 D. 1293), 'Is this a Scotch desertion or not?' In this case, not only has the defender never been in Scotland, but the pursuer himself has been here for little more than a year. His wife remains abroad, where she had been living separate from him for many years. She knows nothing of his removal to Scotland, or of his arrangements for that purpose. In such a case the difficulty of sustaining the constructive domicile as sufficient to found jurisdiction *ratione domicilii* appears very clearly, and if the circumstances of the case of *Pitt* v. *Pitt* suggested the point, the Lord Ordinary thinks it worthy of consideration here before the forum is sustained.

"The Lord Ordinary was referred to the case of *Warrender*, 2 Sh. and M'L. 1541, and to the opinion of Lord Penzance in the case of *Wilson* v. *Wilson* (2 L.R. Prob. and Div. Cases, 435), as contrasted with the judgment of the Court of Session in a case between the same parties, reported in Macpherson's Reports, vol. x., p. 573. It was contended that these authorities prove that the present domicile of the husband is the only question in all cases. The authorities already mentioned seem to establish that the case of *Warrender* does not support this contention, and it is indeed difficult to apply to a case like the present the observations made in a case where Scotland was the actual domicile of the wife. For Lady Warrender had married into Scotland. Her husband was throughout the married life of the parties a domiciled Scotchman. Her residence in England was under a revocable contract of separation. In the present case the home of the parties is in Canada, and although it is alleged by the pursuer that he has acquired recently a Scotch domicile, he does not say that his wife is aware of his removal to Scotland. Her refusal to live with him when his home was in Canada seems to have been acquiesced in, and the letter written by him since he came to Scotland has not been delivered.

"With regard to the judgment of Lord Penzance in the case of *Wilson*, the Lord Ordinary of course recognises it as of high authority in the law of England. But there is nothing in it which can justify him in declining to recognise as of higher authority in Scotland the judgment of Lord Ormidale, unanimously affirmed by the Judges of the First Division of the Court. Nor can he hold that the rule stated by Lord Penzance in that case, assuming it to have been correctly applied to the circumstances of Mr and Mrs Wilson, is at all applicable to the case presented by the present pursuer. The statement of Lord Penzance was as follows:—'The only fair and satisfactory rule is to insist upon the parties in all cases referring their matrimonial differences to the Courts of the country in which they are domiciled. Different communities have different views and laws respecting matrimonial obligations, and a different estimate of the causes which should justify divorce. It is both just and reasonable, therefore, that the differences of married people should be adjusted in accordance with the laws of the community to which they belong, and dealt with by the tribunals which alone can administer these laws.' The rule so stated does not differ substantially from the rule applied in *Shields* v. *Shields* and *Jack* v. *Jack*. It assumes that both parties have an actual domicile in one country, and that both are *de facto* members of the community to the tribunals of which an appeal is made. In the present case the defender is not a member of that community. She has never *de facto* belonged to Scotland, or been subject to the laws of Scotland. If she has a domicile here by reason of her husband having come here in 1879, it is a mere legal fiction, and not at all the kind of domicile which Lady Warrender had. Actual jurisdiction over her person this Court has none, and if it could affect her status by giving decree of divorce in terms of the conclusions of the present summons, the exercise of such a power, at the instance of the pursuer and in the circumstances stated, would be altogether without example in the law of Scotland.

"I. This leads the Lord Ordinary to notice, in the second place, another difficulty in the way of sustaining the present action. The allegations disclose no case of Scotch desertion. Divorce for desertion is in Scotland founded on statute.

The statute is applicable to Scottish spouses. It used to be thought that the only persons who could be sued in the process of adherence 'are such as continue within the kingdom'—'Ersk. i. 6, 44. The statute has not been so read, however, in practice as to exclude altogether action against a Scottish husband or wife going out of the country, and deserting his or her home. But it has not been in use to be applied where there was nothing of the nature of desertion by a Scottish husband or wife from a Scottish home. (See the cases of *Black* v. *Anderson*, 4 D. 615; *A B* v. *C D*, 7 D. 556; *Gordon* v. *Gordon*, D. 1293; *O'Rourke*, 11 D. 976; *Hume* v. *Hume*, 24 D. 1342). The opinion of Mr Fraser (2 Husband and Wife, 1332) does not appear to be supported by any decision. It is true that in divorce for adultery the *locus delicti* is held to be immaterial, but no divorce for desertion can take place in Scotland without constituting in some form the obligation to adhere in this country, and establishing with reference to that obligation the 'malicious and obstinate defection' required by the statute. In the present case there is nothing to show that the defender could have been compelled to adhere in Canada during the period when the pursuer was admittedly a domiciled Canadian; and as the pursuer has been in Scotland only for a year, and apparently without his wife's knowledge, the Lord Ordinary has difficulty in finding the allegations relevant."

The Second Division, on 18th November 1880, before further answer as to the competency or relevancy of the action, remitted to the Lord Ordinary, with instructions to allow the pursuer a proof of his averments on record.

Thereafter the Lord Ordinary granted commission to examine certain witnesses in Toronto, St. Louis, and San Francisco. On 3d June 1881, the proof taken in America having been reported, the pursuer's further proof was led before the Lord Ordinary. The pursuer deponed that he was born in Canada, and was the son of a Scotchman who had emigrated to Canada. He further deponed to the facts relating to his wife's desertion of him summarised above. With regard to the facts relied on as conferring jurisdiction on the Scotch Courts he deponed as follows:—"Ever since she left me she has shown her determination not to come back to me. In the autumn of 1877 I sold my business as a law bookseller in Toronto to Messrs Frankish, Collins, & Poole, retaining an interest myself in it. (Shown No. 50)—That is the contract. It discloses the whole conditions of the arrangement. I sold everything I had of a moveable character in Toronto. In February 1879 I brought my eldest daughter to Scotland, and subsequently my two younger children. They are getting their education here. I have no near relatives in Canada except a married sister at St Louis. I have commenced business as a law bookseller in St. Giles Street, Edinburgh. I have taken a lease of the premises for five years. I have stocked the shop, and have purchased the law department of the business of James Stillie. My business has been profitable so far. . . . One main reason of my leaving Toronto was my desire to obtain a divorce. I found I could not obtain a divorce in Canada. (Shown No. 81)—That is the opinion which I got from lawyers there. The signatures appended are the original signatures of the counsel consulted. I read up the law of Scotland and the laws of different States in the United States. I found I could have got a divorce in the States, but I should have had to become a citizen of the States, and I wished to retain my nationality. I have also a liking to Scotland and to Scotland's laws, and my idea is that they are what they ought to be. It is my present intention to remain in Scotland as my home. My intention is not to return to Canada. I have reasons for not returning there. I have abandoned Canada as my home. *By the Court.*—The action which I raised in 1874 was entirely for the custody of my children. I never raised any action against my wife for the purpose of compelling her to return home." The only other evidence led for the pursuer before the Lord Ordinary was that of his law agent, who detailed the means taken by his firm on pursuer's behalf to inform the defender of the pursuer's place of residence. The evidence led on commission was to the effect that the defender had been seen in various towns of the United States; that she supported herself by her own industry, concealing the fact that she was married, and passing under an assumed name; and that to those persons to whom her identity was known she had in any interviews she had with them stated her determination not to live with her husband. Her whereabouts at the time proof was led was unknown to any of the witnesses examined, but it was proved by them that search had been made for her by advertisement and otherwise without success.

The Lord Ordinary reported the proof, with this note:—"In case it should be desired by the Court, the Lord Ordinary thinks it right to report his opinion upon the evidence. The only witness examined before him (with the exception of the agent who was called to prove certain documents) was the pursuer himself. He gave his evidence with candour, and impressed the Lord Ordinary favourably as a reliable witness. But the result of the evidence as a whole is, in the Lord Ordinary's opinion, that the pursuer has failed to establish facts and circumstances sufficient to authorise the Courts of Scotland to adjudge the absent defender guilty of malicious and obstinate desertion, and to pronounce decree of divorce between the spouses.

"The primary defect in the evidence which the Lord Ordinary observes is, that the domicile which the pursuer has set up in Scotland since 1879 is not established as in any real sense the domicile of the defender. It was not acquired as a domicile *for* her, but as a domicile *against* her, and in order to enable the pursuer to obtain a divorce. The pursuer's evidence is quite frank on this point. 'One main reason of my leaving Toronto,' he says, 'was my desire to obtain a divorce.'

"But it further appears that any domicile which the pursuer has established in Scotland has been acquired without his wife's knowledge; and although it may be the pursuer's misfortune more than his fault, it is nevertheless the fact that, so far as appears, the defender has never yet received notice of his change of home, or of his desire to have her society in this country. No steps appear to have been taken by the pursuer between 1873 and 1879 for the purpose of enforcing his conjugal rights in Canada; and the evidence does

not show that anything which can be held equivalent to a demand for adherence in Scotland has been notified to the defender. The letter of 5th December 1879 appears never to have been delivered; and although the reason of this may be that she cannot now be found, the Lord Ordinary is not satisfied that he can apply to such a defender the provisions of the Conjugal Rights Act 1861, to the effect of holding her duly cited. She has never been in Scotland, and is not in any way subject to the law of Scotland, unless the pursuer's domicile can by construction of law be held to be her domicile. This, in the opinion of the Lord Ordinary, cannot be held in the present case. For further explanation of the view upon which he has arrived at this conclusion the Lord Ordinary refers to the note to his interlocutor of November 1st 1880.

"On the merits—if the Lord Ordinary were called upon to deal with them—he would say that the cause of separation between the spouses is proved to have been incompatibility of temper and disagreement on matters of opinion. This, in law, is no sufficient cause for remaining separate, and would afford the wife no defence in an action of adherence. But it rather appears from the evidence that although the pursuer sent certain messages to his wife, he practically acquiesced, at least down to 1879, in her remaining separate. Prior to 5th December 1879 he had given her no intimation of the kind contained in the letter of that date, and that letter unfortunately is not proved to have been delivered. On the whole, the Lord Ordinary could not affirm, on the evidence before him, that the defender has been for four years in 'malicious and obstinate defection.'"

Argued for pursuer—On the evidence there seemed no room to doubt that the defender had deserted the pursuer, and has wilfully remained absent from him ever since. The evidence further established that the pursuer was now domiciled in Scotland. If so, his wife's domicile was Scotch also, and the Scotch Courts had jurisdiction to dissolve his marriage. The dictum of Lord Westbury in *Pitt* v. *Pitt*, 4 Macq. 627, quoted by the Lord Ordinary on first reporting the cause as being against the pursuer, was *obiter* as being unnecessary for the case in hand. Lord Kingsdown expressly said in the same case that he did not share the doubt expressed (p. 647). That case was one which touched on the *quæstio diu vexata*, whether a domicile short of actual domicile for all purposes will give jurisdiction for the purpose of divorce. A case touching the same point, though with a different leaning, was *Jack* v. *Jack*, 7th Feb. 1862, 24 D. 467. That question need not be decided in this case. There was nothing in the case of *Ringer* v. *Churchill*, 15th Jan. 1840, 2 D. 307, against the pursuer here, because in that case it did not appear that the pursuer had truly become domiciled in Scotland *animo remanendi*. The Lord Ordinary took an erroneous view of the case of *Warrender*, 2 Sh. and M'L. 1541 (see Lord Chancellor's opinion in *Shaw* v. *Gould*, 7th May 1868, 3 L.R., E. and I. Ap. 55). Nor was there any discrepancy, as the Lord Ordinary seems to think, between *Wilson* v. *Wilson*, 8th March 1872, 10 Macph. 573, and the English case between the same parties, 14th March 1872, 2 L.R. Prob. and Div. 435. Both the English Court and the Scotch Court sustained their jurisdiction, because they came to different conclusions on the question of fact whether the husband had abandoned his Scotch domicile.

Additional authorities—*Harvey* v. *Farnie*, 5 L.R. Prob. and Div. 153; *Briggs* v. *Briggs*, 5 L.R. Prob. and Div. 163. *Lauder* v. *Van Gent*, 1692, p. 252 of Ferguson's Divorce Reps.; *Bell* v. *Kennedy*, 14th May 1868, 6 Macph., H. of L. 69.

At advising—

LORD JUSTICE-CLERK—In this case some very important questions are raised by the Lord Ordinary in the note to his report.

The action is an action of divorce at the instance of Robert Carswell, who says he is domiciled in Scotland—describing himself as a law bookseller, residing at Warrender Park Road, Edinburgh—against his wife, whom he married in Toronto, and who he says has deserted him since 1873. There seems no doubt whatever that his wife did desert him in that year. The Lord Ordinary expresses a doubt on the proof of this matter. He seems to doubt whether the evidence establishes that the wife has been guilty of malicious and obstinate desertion. That is certainly an element in the case, and I must say that so far as it is concerned I never saw a case in which malicious and obstinate defection was more clearly proved in the sense of a resolute determination of the wife not to return to cohabitation with her husband. I fancy that is a state of matters which truly fulfils the entire and most absolute meaning of the words "malicious and obstinate desertion." No doubt it is necessary that a wife should be asked to return to her husband, or that her husband should not show any disinclination to receive her should she manifest a desire to return, but I can find nothing in the evidence to indicate any disinclination on the part of the pursuer to receive the defender; still less is there any proof of a refusal on his part. And if the case had rested there I should have been of opinion that in the conduct of this wife the words of the old Scottish statute had been fulfilled. She has gone away from him, separated herself from him, hid herself from him, expressed her determination over and over again not to live with him, and as far as the evidence leads us to an opinion on the point, there is no palliation of her conduct or excuse for it. There is nothing in the pursuer's treatment of his wife—and only one or two instances of his conduct are alleged—which can for a moment justify the absence of the defender from her husband.

But the other question raised by the Lord Ordinary is surrounded with difficulty; and while I have come to the conclusion that the pursuer is entitled to prevail in this action, I must own it is not without very considerable difficulty.

It is quite true that the domicile of the wife follows that of the husband. It is also quite true that the husband here has done all that he could to acquire a domicile of this kind—that is to say, all that he could if he could shake himself free of the circumstances under which he first came into this country. But that is a difficult matter. He was a domiciled Canadian. The domicile of the marriage was Canadian. The wife when he left her, or

when she left him, was a Canadian. He has never been able to communicate with her, for he does not know where she is. Consequently, if we have jurisdiction to pronounce this decree, it is because the wife's domicile follows that of the husband.

Now, the authorities quoted to us at the debate certainly prove this, that in such a matter as that of divorce it is not in every case or to every effect that the wife's domicile follows that of the husband. If the wife were here resisting the action—if she were here complaining that Toronto was her domicile, and that she was compelled to assume a new domicile because her husband had gone away to Scotland, and in that way had obliged her to follow him to a foreign court and a foreign country—foreign so far as she is concerned—and a country not the country of her marriage, grave difficulties might present themselves. There might be a hardship and a want of expediency also—perhaps a want of principle—in following the course which now suggests itself to us.

But I want to save my opinion on that matter. I am of opinion that it is not in every case that we should hold that the wife's domicile follows that of her husband.

On the other hand, I am of opinion that the husband has done all he could in the present case to acquire a new domicile for himself in Scotland. He has set himself up in business, he has acquired property, he has made provision for the future, he has done everything that a man honestly could do who had the intention of remaining here for the future. He has been here two or three years. There is, it is true, another consideration to be taken into view. The origin of his Scottish domicile, supposing him to have acquired it, was under peculiar circumstances. That origin beyond all question was the pressure of an immediate object, and that object was the obtaining of a divorce from the laws of this country, which the laws of his own domicile would not afford him. It is impossible to tell for how long it was his intention to remain here. We have to take his own statement of that. It is impossible in the meantime to say whether it will turn out in the end that the man was or was not domiciled in this country in the sense that he had an *animus remanendi* apart altogether from the question of his obtaining a divorce.

While I have thus stated the difficulties which have presented themselves to my mind, and presented themselves I may say very strongly, I am not prepared to refuse the remedy which the pursuer seeks. I think the desertion has been entirely causeless, malicious, and obstinate. The defender has also debarred herself from making any reply to the accusations of the pursuer. She does not wish to reply to them, and, so far as I can see, she could make no good answer to the charge of wilful and malicious and obstinate desertion. For my own part, therefore, and taking and weighing all those difficulties that occur on both sides, I think we shall do more justice, and not infringe on the abstract principle of law, in giving the pursuer the remedy he seeks.

LORD YOUNG—I am of the same opinion. Of course we can only consider the fact of desertion on the assumption that the pursuer is a domiciled Scotchman. Agreeing with your Lordship that we can effectually consider the question, I concur with what your Lordship has said as to the result. I think the wife is proved to be in malicious—in the proper sense of that term—and obstinately continued desertion of her husband.

Passing now to the interesting question which your Lordship has touched upon, whether or not the pursuer is really a domciled Scotchman, I think that is mainly a question of fact, for the legal subtleties upon the subject are much more perplexing than useful. To begin with, the pursuer is no foreigner in the sense of being an alien. He is a born subject of the Queen, if that makes any difference, which I think it does not—at least no material difference. His home, and therefore his domicile, which simply means home, was in Canada. He married there, and both he and his wife were entitled to look to the Canadian law as governing the relations between them as husband and wife; and it is our duty, without any doubt, to see that no fraud is practised upon that law, or upon the rights of the wife to have her position as a wife determined by it. I need not say that in the decision we are to pronounce we shall be on our guard against that.

However that may be, every Canadian—indeed every free and intelligent human being—is according to the views of the law of Scotland at liberty to change his domicile. He may leave the country where he was born, where his domicile and his home have been since his birth, and he may adopt another country and make it his home. That is always in his power if, as I say, he is a free man and intelligent enough to be left at liberty to use his freedom. That is his right. Now the question of fact is, Has the pursuer exercised that undoubted right of his or not? Any Canadian is at perfect liberty, being free and intelligent, to come to Scotland and adopt it as his home—making it his domicile, which he does by making it his home. Of course no man acts at all, certainly not in so serious a matter, without a motive. The motive which has influenced anybody's actions is very important to consider in determining the question of fact whether a man has really adopted another country and made it the country of his domicile or home. But the moment the fact is determined that he has changed his domicile, his having had the former domicile ceases to be material. If I could think the pursuer was making a mere pretence in having adopted Scotland as his home—that he had come here merely as a visitor in order to invoke the Scotch law against his wife, and that having achieved that end he intended to return to the country which *ex hypothesi* had never ceased to be his home—I should not entertain his action for a moment. But I am satisfied upon the evidence here that the pursuer, in the exercise of his undoubted liberty and legal right, has adopted Scotland and made it his home, and that there is no fraud in the matter at all. And I think so none the less that I think it is extremely likely—indeed I should think it quite certain—that if his wife had made his home a happy one in Canada he never would have left it. We may even con-

sider it quite certain that he has made Scotland his home because he prefers the law which in that view will govern his domestic relations and enable him to be free of the woman who has maliciously and perseveringly deserted him, and who, according to the evidence before us, evidently had the intention of taking up with anybody she met with and thought a nice person to live with.

Now, if he took advice, as I think as a prudent man he probably did, he would be advised in this way—"If you adopt Scotland as your country, and make it your home really, and your new domicile, in that case it being your new domicile it will be your wife's also." For I think that is a universally accepted principle, that when a free man, being married, changes his domicile, at all events to Scotland, he changes it not only for himself but for his wife. There is a good deal of talk of fictitious domiciles—about a man having been long enough in a country to acquire a domicile of citation, and so on. I do not think that has anything to do with the matter. Certainly a man may come here and subject himself to the jurisdiction of the Courts of this country and be cited in it, having what is called a domicile of citation, without that having the slightest effect upon the domicile of his wife. But if he comes here and makes Scotland his home—comes *animo remanendi*—then his domicile is changed not only for himself but for his wife. And I know of no exception to that proposition. For it is not the case of a substitution of one country for another for himself alone. His household are subject to the change. It is his home that he changes, and his wife must change with him.

The Lord Ordinary says here that the pursuer has acquired his domicile in Scotland without his wife's knowledge. How is that? Simply because she has deserted him. It is very questionable, I think, if she is ignorant of his whereabouts. But whether she is or not, it is because she is not doing her duty. According to the law of the pursuer's domicile, or I suppose to any law whatever, she remains in ignorance because of a breach of her duty, and it is for that same breach of duty that the law affords the remedy. Her duty as a wife is to be with her husband here and I cannot accept the language of the Lord Ordinary that the pursuer's domicile in Scotland was acquired as a domicile not for her but as a domicile against her. It is a domicile for her, assuming that he has made Scotland his home. And I have arrived at the conclusion that he has done so without any difficulty. I think he has made it his domicile from no unworthy motive, although I cannot enter into motive at all, being satisfied of the fact, and motive being material only where inquiry is necessary to ascertain whether the fact be so or not. The pursuer, I repeat, has made this country his domicile, and it is the domicile for his wife. I cannot say, in such a state of the facts, that the law of Scotland is an unfair law to govern the domestic relations of a man who has adopted this country as his home. The duty of his wife is to be here, and subject to the same law as her husband. If he had deserted her, she might have appealed to our law for the remedy which our law affords. Our law governs equally, and I assume justly and equitably, the rights and interests of both parties. Now, it is because she has gone away from him that she does not know he is here, and is not here with him—if indeed she is ignorant, which I have already said I consider extremely doubtful—for although she is keeping herself concealed from him, he has not done anything to keep his movements concealed from her. Therefore I entirely agree with your Lordship, and I confess that my mind is not disturbed by any difficulties as to the conclusion we should reach either in point of fact or in point of law. I think as matter of law and justice the pursuer is entitled to appeal as he has done to our law, and upon the evidence to appeal with success.

Lord Craighill—This case, which comes before us on the report of the Lord Ordinary, is an undefended action of divorce at the instance of Mr Carswell, formerly of Toronto, who is in business as a bookseller in Edinburgh, against his wife, who is not now and never has been in Scotland. Three questions are presented for decision,—First, Our jurisdiction to grant divorce? second, Whether ground for divorce has been established? and third, Whether service of the summons edictally ought in the circumstances to be sustained as sufficient execution of the summons?

The last arises only because Mrs Carswell, the defender, has not appeared in the suit, for her appearance would have obviated any objection that could have been stated to the sufficiency of the citation. Even, however, though the defender has not appeared—and it is possible, though highly improbable, that the institution of this action has not come to her knowledge—nothing more can be done to give her intimation, as the place where she is cannot be discovered. The action therefore may be allowed to proceed.

The 10th section of the Conjugal Rights Act (24 and 25 Vict. c. 86) leaves the course to be followed to the discretion of the Court. An opposite determination on this point would be a suspension of all procedure in the present action, which of itself is a consideration appearing to me conclusive of the way in which this point ought to be decided.

Passing now to the other questions, the first thing which is to be kept in view is that the non-appearance of the defender in no degree diminishes the responsibility of the Court in the administration of the laws of this country. On the contrary, it increases the anxiety which we must feel in deciding, if it does not also increase the difficulty in decision. Had the defender appeared here, her counsel would have assisted in the argument, but as she is absent, we must, as best we can, make up for the want of the aid which the Court receives when both parties in a suit are represented in the argument upon the points raised for judgment.

This being an action of divorce, and so including other than mere patrimonial interests, the Court is bound to see that both parties are, as in a question relative to their status as married persons, subject to its jurisdiction. The pursuer says he is, because he is domiciled in this country—that is, has his true domicile or domicile of succession in this country—and as a consequence his wife, the defender, must be amenable to our jurisdiction, her domicile being the domicile of her husband, the pursuer. Taking these points

in their order, has the pursuer shown by the evidence adduced that his domicile is now in Scotland? He is a Canadian by birth, and he married in Canada. His only business connection until 1879 was there. But he then left Canada, and since 1879 he has been in Edinburgh, where he has established a business. These things are perfectly compatible with the idea that his Canadian domicile is unchanged. But they all are material—one of them indeed is an all important conclusion. The pursuer is now in this country, and hence one of two elements essential to the constitution of domicile, namely, personal presence, has been secured. What, then, is required for the constitution of domicile? On this subject the statement of the law given by Lord Chancellor (Westbury) in *Udny* v. *Udny* (L.R., Scotch App. 458) has, I think, been generally received, namely, that "Domicile of choice is a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place with an intention of continuing to reside there for an unlimited time. This is a description of the circumstances which create or constitute a domicile, and not a definition of the term. There must be a residence freely chosen, and not prescribed or dictated by any external necessity, such as the duties of office, the demands of creditors, or the relief from illness; and it must be residence fixed not for a limited period or particular purpose, but g neral and indefinite in its future contemplation. It is true that residence originally temporary, or intended for a limited period, may afterwards become general and unlimited, and in such a case so soon as the change of purpose or *animus remanendi* can be inferred, the fact of domicile is established." What, therefore, is to be decided is, whether there is proof of a purpose to change the original domicile? The answer to this question depends on the credit to be given to the testimony of the pursuer. The shortness of the period during which he has been in Scotland necessarily must be taken into account, but as to this it may be well to bring into view a passage from the opinion of Lord Westbury in the case of *Bell* v. *Kennedy*. He there says:—"Residence and domicile are two perfectly distinct things. It is necessary in the administration of the law that the idea of domicile should exist, and that the fact of domicile should be ascertained, in order to determine which of two municipal laws may be invoked for the purpose of regulating the rights of parties. We know very well that succession and distribution depend upon the law of domicile. Domicile, therefore, is an idea of law. It is the relation which the law creates between an individual and a particular locality or country. To every adult person the law ascribes a domicile, and that domicile remains his fixed attribute until a new and different attribute usurps its place. Now, this case was argued at the bar on the footing that as soon as Mr Bell left Jamaica he had a settled and fixed intention of taking up his residence in Scotland. And if indeed that had been ascertained as a fact, then you would have had the *animus* of the party clearly demonstrated, and the *factum*, which alone would remain to be proved, would in fact be proved, or at least would result immediately on his arrival in Scotland." This I take to be an accurate statement of the law, and consequently the shortness of the time during which the pursuer has been in this country does not preclude the idea that his domicile is now in this country. The pursuer says that he has come for an indefinite period, that he has not come for any temporary purpose, and that he has no intention of leaving at any period which for the present is in contemplation. If he is to be taken as speaking the truth, then there is not only the fact of his presence here, but the intention to abandon his Canadian domicile and to acquire a domicile in this country. And these are the two elements, and the only two elements, which are required. I see no reason why the pursuer is to be discredited, and I credit his testimony. I think that the facts necessary for the constitution of domicile have been established. In so dealing with the case I am materially influenced by the views of the law which were explained in the judgment which was pronounced by Lord Penzance in the case of *Wilson* v. *Wilson*, March 14, 1872, L.R. 2 Prob. and Div. 435. He there rested his decision on the answer to the issue, was the pursuer to be credited or not? and having given credit to the pursuer, he held that the grounds for jurisdiction had been established. The other facts in that case, it may be added, were of course consistent with, but were no more suggestive of, a change of domicile than these which are before the Court. Assuming that the pursuer has his true domicile in this country, it is next to be considered whether the defender, his wife, is also domiciled in Scotland. This appears to me to be a plain, not to say necessary, result. Lord Penzance so held in the case referred to, and though I leave open for consideration the amenability of a wife to the Courts of this country if a more limited domicile than the true domicile is that upon which the husband sues, I give it as my opinion that in a case where the husband's true domicile is the source of jurisdiction, that must be held to be the domicile of the wife. On the whole matter I am of opinion that the Court has jurisdiction.

And in regard to the credibility of the pursuer in making the statements he has made about his change of domicile, I only desire to add this, that the case appears to me to be as strong as the case of *Wilson* v. *Wilson* which I have already referred to, and in which the jurisdiction as regards the pursuer was sustained by Lord Penzance. The pursuer here has come to this country, and has established himself in business in this country. All that he has done since he came to this country is consistent with the facts as he alleges them. There being nothing to throw discredit on that testimony, we are not entitled—nothing calls upon us—to criticise it as at all doubtful. We must take the fact from him that he has come here making this country his home, and because it is his home his domicile is now in this country. If his domicile is in this country, I concur with my brother Lord Young and with your Lordship in thinking that the domicile of the wife is in this country also. The domicile now acquired by him is acquired not for himself alone but also for his wife. Hence as regards both pursuer and defender—for we must have jurisdiction over both before we can give the remedy which is asked—they are, in my opinion, subject to jurisdiction in this country because they are domiciled in Scotland.

There being no doubt in my mind that the defender wilfully and maliciously deserted the pursuer, according to the ordinary administration of the law in such cases the pursuer is entitled to have decree of divorce as concluded for.

On the question whether the desertion has been established, I think that the facts proved in evidence establish the desertion, and consequently, there being jurisdiction, decree of divorce ought to be pronounced.

The Lords granted decree as craved.

Counsel—W. C. Smith. Agents—Pringle & Dallas, W.S.

Tuesday, July 5.

SECOND DIVISION.

[Sheriff-Substitute of Lanarkshire.

DICKSON AND ANOTHER *v.* MARSHALL AND OTHERS.

Private Letters — Right of Receiver to Publish.

It is always a question of circumstances whether the receiver of letters written in the course of private correspondence is entitled to publish them. Interdict against the publication of letters written in the course of a family dispute, and following upon an action and proof between the parties in the Sheriff Court, *refused.*

Observed that the question would have been different had there been any peculiar literary value to be protected, or if the letters of which the publication was threatened had been of a peculiarly confidential nature.

This was a petition brought in the Sheriff Court of Lanarkshire by Mrs Margaret Marshall or White and others against Thomas Dickson and Mrs Calderhead Eadie White or Dickson, his wife, in which the pursuers craved the Court "To interdict the defenders or either of them from circulating or publishing a pamphlet headed 'Correspondence between Mrs White, Miss White, Mr and Mrs Begg, Mr Thomson, and others, and Mr and Mrs Dickson, also record in action raised in Sheriff Court, with shorthand writer's notes of the proof taken, and Sheriff-Substitute's interlocutor,' and commencing with a letter from the pursuer Jane Calderhead Begg, dated Monday evening; and from otherwise making public said pamphlet or any letters written by the pursuers or any of them to the defenders or either of them without the consent of the several pursuers, the writers of said letters, being first had and obtained; and to grant interim interdict." It appeared from the averments of parties that disputes having arisen between the pursuer Mrs White and the defenders, her son-in-law and daughter, a correspondence had passed between her and them, and also between them and the other pursuers. The dispute, which related to the property of certain articles, had been taken into Court and decided by an interlocutor of one of the Sheriffs-Substitute of Lanarkshire. The pursuers averred that the defender proposed to print and circulate without their authority, in the pamphlet against the publication of which interdict was craved, private letters by them, the publication of which would serve no useful purpose and would be hurtful to their feelings. They pleaded—"The defenders intending to publish, without consent of the pursuers, private letters written by the latter, the pursuers are entitled to interdict with expenses, all as craved."

The defenders admitted that they proposed to publish letters written by the pursuers. They averred that certain portions of the correspondence having been shown by the pursuers to a number of relatives and friends of both parties, it was in their opinion necessary to the removal of certain false impressions which had been thereby created that the correspondence should be printed and circulated as a whole. They stated that they only proposed to print and circulate 50 copies of the pamphlet containing this correspondence, and that for the perusal of persons already partially acquainted with the circumstances. They pleaded, *inter alia*—"(3) The circulation of the said pamphlet being limited as above set forth, and being for the vindication of the character of the defender Mrs Dickson, the interdict should be recalled and the defenders found entitled to expenses."

The Sheriff-Substitute (Guthrie) on 30th Nov. 1880 found that the defenders had not stated any relevant defence, and declared an interdict formerly granted perpetual.

He added this note:—"Interdict is asked for against circulating or publishing a pamphlet, the title of which is given in the prayer of the petition, and against otherwise making public said pamphlet, or any letters written by the pursuers or any of them to the defenders, without the pursuers' consent. The title of the pamphlet, of which eight pages are produced (having been sent by the defender Mr Dickson to Mrs White, his mother-in-law), bears that it is to include the record in an action between the parties, and also the letters of the defenders to the pursuers, as well as those of the pursuers to the defenders. But the interdict asked and granted is against the circulation of the pamphlet as a distinct subject or compilation; and this judgment determines no question as to the defenders' right to print or circulate in some other form the proceedings in the action or the letters which they have themselves written. With regard to these I give no opinion in point of law, though I take leave to suggest to the defenders that in such matters silence and endurance would probably be better, even if they have been unkindly treated.

"The law as to the right of the writer of a private letter is simple. It appears from a modern English authority (*Oliver* v. *Oliver*, 11 C.B. N.S. 139), as it may also be gathered from the Scotch cases on the subject reported in Morrison's Appendix S.V. Literary Property, Nos. 1 and 4, that the receiver has a property in the manuscript—in the *ipsum corpus* of the letter, but that he has no right to alter its nature or use it otherwise than as a manuscript. See also *Gee* v. *Pritchard*, 2 Swans. 402 (1818); *Percival* v. *Phipps*, 2 Ves. and B. 28; Bell's Prin. 1357.