"Sustain the appeal: Recal *in hoc statu* the said interlocutors appealed against: Remit the cause to the Sheriff to allow the parties a proof of their averments before answer: Find the expenses of this appeal to be expenses *in causa*, and remit to the Sheriff to dispose of the same accordingly."

Counsel for the Pursuer — Kennedy — A. M. Anderson. Agent — W. R. Mackersy, W.S.

Counsel for the Defender—T. B. Morison. Agent—Peter Morison, S.S.C.

Wednesday, June 7.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

ROSS *v.* ROSS.

Jurisdiction — Domicile — Husband and Wife—Divorce for Desertion.

In an undefended action of divorce for desertion and for custody and aliment of two children brought on 14th October 1898 by a wife residing in Scotland against her husband residing in the United States of America, it was proved that the defender was born in Scotland and had been married to the pursuer in Glasgow in 1888, and that shortly after marriage they had gone to the United States, where the defender had remained ever since working as a compositor in various places. A letter was produced, dated New York, 12th September 1898, written by the defender to his sister, in which, after complaining of the state of trade in America, he wrote—"I will be in Scotland in the spring of next year."

Held (*aff.* judgment of Lord Kincairney, *diss.* Lord Young) that the defender had never lost his Scottish domicile and that the Court had jurisdiction.

Husband and Wife—Divorce for Desertion —Date at which Desertion Must be Proved.

The pursuer in an action of divorce for desertion must establish as matter of fact that the other spouse has been in wilful and malicious desertion for four years immediately preceding the time at which the decree is demanded, and such an action will not be allowed to remain in Court till the four years necessary to entitle a pursuer to decree have run their course.

Circumstances in which *held* (*aff.* judgment of Lord Kincairney) that a wife residing in Scotland was not entitled to a decree of divorce for desertion against her husband residing in the United States of America.

On 14th October 1898 Mrs Jane Orwin Carlyle or Ross, wife of James Buchan Ross, and presently residing at 2 Hutchison Buildings, Sandbank, raised an action of divorce for desertion and for custody and aliment of the two children of the marriage against the said James Buchan Ross, now or lately residing at 362 West Twenty-Third Street, New York, U.S.A., or elsewhere furth of Scotland. The summons was served edictally on the defender.

No defences were lodged, and on 17th December 1898 a proof was led before the Lord Ordinary.

The pursuer's evidence was to the following effect:—The pursuer and defender were both born and brought up in Scotland and were married in Glasgow on 7th November 1888. Shortly after the marriage the pursuer and defender went to America and lived in Philadelphia and Washington for some years, two children being born of the marriage. The defender was a compositor. He was a good tradesman, but irregular in his habits and unable to save funds. He was not very kind to pursuer. In the summer of 1893 the pursuer was poorly in health and her father wrote to her to come home. She did so with her husband's consent, taking the children with her. Her husband expressed his intention of following her to Scotland. She came to Glasgow in August 1893, and about May 1894 she went to stay at Sandbank, near Dunoon, where she had remained ever since. For some time after her return to Scotland she received letters from her husband. All the money she got from him was £3, and that was within the first six weeks of her return. She wrote letters to him asking him to do his duty to her—either to come home or send her money to go back or give her money to keep herself and her children. On 1st October 1894 she received a letter from her husband, which was produced. It was in the following terms:—"*Laurel Democrat* Office, Laurel, Ind., *October 1st* 1894.—My Dear Wife,—Your letter reached me safe, and I would have answered it a week ago, but I had neuralgia so bad that I was unable to do anything. Though your letter was very meagre, yet I was glad to hear from you. . . . When I sent you the last £1, I was out of work, and this past year has been an awful year in this country for idleness, and when I received your letter (the last one), in which you said if I did not send you money right away you would never write to me again. When I got that letter I was out of work. I would have sent you the money if I had had it, but God knows how it was with me. Many a day I went without a meal and could get work of no kind to do, and I went near no one that I knew. I put through a terrible winter, and I never will go through the same again—never. I wrote you in the month of , and that letter has never been answered, and I came to the conclusion that you did not want to write me. I have been here since May, and never one day has passed but I have thought of you and Charles and Cathie (the two children of the marriage). Now we have done very little since I came here, sometimes not more than two days a-week, but I will try and send you a little money in about a week from now. I will try and keep it up also for let me tell

you I would be only too happy to do so. You speak about ending our married life. About that let me say our lives have not been very happy, because of my own fault and drink, but if I do as I have been doing since I came here, and send you all the money I can, are you willing to try me and begin life with me again? Jane, I ask this in all true sincerity, and I hope you will not be too harsh on me. I know I have been wrong, but never hint to me about trying to end our married life (if not for my sake, then for the children's sake). I have undergone too much agony now. Let your feelings get over what trouble I have caused and tell me what you think." . . .

She wrote twice in reply to this letter but got no answer. She wrote making inquiries as to his whereabouts but without avail. The letter of 1st October 1894 was the last letter she had received from her husband. In October 1898, after she had given instructions for the raising of the action, she received a letter dated 14th October 1898 from her husband's sister, who resided at Craigie, enclosing the following letter which the latter had received from the defender, and which was produced—"New York City, *September 12th* 1898.—My Dear Jane,—I write you this to let you hear from me. The letter I wrote to father was never answered. Well, I hope you are all well at home, and I would only be too glad to hear from you, and also you might send me my wife's address. If you can, let me know how Charles and Catherine are, and some news about them. Trade is in a fearful condition all over this country, and there is no prospect of it being any better for some time to come. I am doing nothing. I have been out west, but I will stay all winter, and I will be in Scotland in the spring of next year. Type machines have done mischief to the printing business in this country, and I am thoroughly tired looking for work at the printing business. I am willing to work at anything I can get to do, but it is just the same—too many people out of work looking for something to do. I will be very glad if you will send me all the news you can as soon as you can, and let me know how everyone at home is. I am very much disheartened, and this life is hard living, and merely existing. I am tired of it. If I were working, which I hope to be very soon, I would pretty soon get on my feet again, but I am not feeling well, and there is no one here to help me. Give my love to all, and do please write soon as you can. You can address my letter to James B. Ross, General Delivery, New York City. I will get it if you address it as I say, because I have no settled place of staying, as I cannot afford it. Do write soon, and believe me, your affectionate brother. Write as soon as possible."

She thought the explanation of the inquiry in this letter for her address was that her husband might have heard that her father had died and had left some little means. She had received no word from him since. When asked by the Court—Would you be willing to live with him if he came back, the pursuer replied—"Well, I suspect I have a very poor opinion of him since I came back. I think he has been trying to hide himself, and doing what he was afraid of those here to know. (Q) Why have you those suspicions?—(A) From the nature of the man; he always promised and never fulfilled any of his promises."

The only other witness was the pursuer's sister, who gave evidence as to the marriage, as to the pursuer and defender going to America after the marriage, and as to her sister returning to Scotland with her children in 1893. She deponed that she knew that her sister had received letters from the defender within the first month or so after her return, that thereafter a considerable interval elapsed, and that so far as she knew the last letter the pursuer received from the defender was in October 1894. She knew that the pursuer would have been willing to live with him if he had come back to this country, and was willing to go back to America if he had sent the means. The pursuer had been in very straitened circumstances and had to provide for herself by letting lodgings. Since her father's death she and her sister had both succeeded to a little means.

On 11th January 1899 the Lord Ordinary (KINCAIRNEY) pronounced the following interlocutor:—"Finds it not proved that the defender has been guilty of wilful and malicious desertion of the pursuer: Therefore dismisses the action: Finds no expenses due to or by either party, and decerns."

Note.—"I do not find myself in a position to grant decree in this case. The pursuer and defender were married in Glasgow in 1888, and immediately or shortly after the marriage they went to America, from which the defender has not returned. Notwithstanding of that, seeing that the evidence is that the defender was by origin a Scotchman, I would be disposed to hold that he is still, and that I have jurisdiction to entertain the action. But I cannot find sufficient evidence of malicious desertion or malicious non-adherence. The pursuer quitted the defender, not the defender the pursuer, in 1893, and she returned to this country. I take it, upon her word, that she did so with her husband's consent. But certainly there was no desertion by him at that time. Since that time she has lived in Scotland with two children of the marriage, whom she has supported, and the defender has lived in America. The evidence about him during that period is of the most meagre kind. But there seems no doubt that for several years back he has contributed nothing to her support. There is practically nothing else in the case until a very recent date. I do not know of any case where decree has been granted without better proof of desertion. I am unable to say when the desertion, if there was any desertion, commenced.

"A letter by the defender to his sister, dated 12th September 1898, has been produced. From that letter it appears that he did not know of his wife's address, and wished to know it, and also that he hoped to return to Scotland in the spring of this year. This letter was sent to the pursuer

on 14th October 1898. The summons was signeted on the same day, and therefore presumably before that letter was received.

"It has been served edictally, and no effort seems to have been made to bring it to the knowledge of the defender. If it had been proved that he knew of the action, I should have accepted the fact that he did not defend it as some proof in aid of the case for desertion."

The pursuer reclaimed, and argued—The proof was sufficient to show that the defender had deserted the pursuer. Since 1893 he had not contributed to the maintenance of herself or his children, and he had not written to her since October 1894. A wife had a right to her husband's society, and there might be desertion notwithstanding a mere casual and fitful correspondence—Fraser's Husband and Wife, 1211. The case fell within the scope of *Mason* v. *Mason*, June 29, 1877, 14 S.L.R. 592, and *Stickland* v. *Stickland*, 1876, 35 L.T. 767. The letter of 12th September 1898 would not bar decree if the Court was satisfied that four years of desertion had elapsed before decree was pronounced—Bell's Prin., sec. 1535; Ersk. Inst., i. 6, 44. An action of divorce for desertion might be raised one year after desertion, but the pursuer had to wait till four years after the date of desertion before she was entitled to a decree.

Lord Young having intimated that he would like argument on the question of jurisdiction, the pursuer argued—The Lord Ordinary was with her on this point. The Court was not entitled because a domiciled Scotsman had been absent for ten years from Scotland to assume that he had changed his domicile. There was nothing in the evidence to lead the Court to believe that the defender had abandoned his domicile of origin. Indeed, the evidence pointed the other way, for the pursuer gave evidence that when they separated in 1893 her husband expressed an intention of following her to Scotland. And in September 1898 the defender wrote to his sister that he would be in Scotland in the spring of this year—*Vincent* v. *Earl of Buchan*, March 19, 1889, 16 R. 637, opinion of Lord President Inglis, 648; *Low* v. *Low*, November 19, 1891, 19 R. 115; *Hood* v. *Hood*, June 24, 1897, 24 R. 973; *Patience* v. *Main*, 1885, L.R., 29 Ch. Div. 976.

At advising—

Lord Justice-Clerk—The pursuer in a case of divorce for desertion requires to establish as matter of fact that the other spouse has been in wilful and malicious desertion for four years immediately preceding the time at which the decree is demanded. I am unable to hold that in the circumstances of this case the pursuer has discharged the onus resting upon her. The remedy which she seeks is an extreme one, and it can only be granted in circumstances clearly pointing to direct intention permanently to forsake the other spouse—in short, maliciously to desert. I cannot hold that this has been proved in the present case, and I therefore agree with the Lord Ordinary that the action must be dismissed.

Lord Young—As I pointed out in the course of the discussion, in my opinion the first question is whether the Court has any jurisdiction to entertain this action against a defender who has been resident in America for ten years prior to the raising of the action. There is no appearance for the defender, and therefore the question of jurisdiction cannot be raised at all unless raised by the Court. If the defender had appeared, there might have been prorogation of jurisdiction, but even in that case it would have been for the Court to consider whether or not they would assent.

The most recent case of this kind where an objection to jurisdiction occurred to the Court is the case of *Hood* v. *Hood*, decided in 1897. The circumstances of that case are in some respects so similar to the present that it has been referred to as a conclusive authority on the question of jurisdiction. In that case the Lord Ordinary (Lord Pearson), after evidence led to show that the Court had jurisdiction, was of opinion that the Court had not, and dismissed the action in respect of no jurisdiction. On a reclaiming-note this decision was reversed and the present Court held that there was jurisdiction, I dissenting. The case of *Hood* was therefore decided by three Judges as against two, and although it may be treated as an authority there is great distinction between such a judgment and a *series rerum judicatarum*. Being of opinion that the judgment in *Hood* was erroneous and that it would be still more erroneous to affirm the judgment in the present case, I think it is according to my duty to say that I think that the Court has no jurisdiction in the present case, and that the case of *Hood* ought not to be strengthened by mere repetition but should be so treated as to show that the matter is still open. This will make it impossible for anyone to argue in the future that the decision in *Hood* must be held to settle the point because that case had been frequently acted upon without dissent.

In the present case the husband went to America in 1888, and has lived there ever since. In 1893 the wife, who had resided with him in America and borne him two children, voluntarily and with her husband's permission came to this country to visit her relations, taking the children with her. The original separation was therefore not of the nature of desertion. She has lived here and he has lived in America ever since, and I think on the evidence that he has earnestly invited her to return to him and to bring back the children. I think that this is important on the matter of jurisdiction as showing that it is his intention to reside in America with his wife and family. She did not return to America. I asked her if she had means to enable her to do so and was told that she had. She has therefore continued in this country of her own choice. But I repeat that this has relevancy only in so far as it shows that the husband desired to continue his residence in America. In these circumstances I think it is plain that this Court has no jurisdiction to control the relation between this man and

his wife I asked if the fact of the wife having returned home made any difference and was answered (and I assent to the answer) that it made no difference, and that the question of jurisdiction would have been precisely the same if the wife had been residing in America and had raised this action in this Court against her husband. She asks that her husband shall be ordered to give over the custody of the children to her, and to pay her aliment for this. I am of opinion that we have no jurisdiction to do that. He is not here and has no funds here, nothing indeed can be said in favour of the contention that we have jurisdiction except that he was born in Scotland. I have said enough to make clear my dissent and protest against the view that this Court has jurisdiction. If we have not, then we cannot determine whether the husband is in malicious desertion or not. That is for the American Courts to determine.

I would therefore for my part have declined to hear the proof. If your Lordships hold that this Court has jurisdiction, and that it was right to take the proof, I would be bound to express my view that the proof does not show malicious desertion on the part of the defender. But I wish to express my strong opinion that we have no jurisdiction.

LORD TRAYNER—I am of opinion that the Lord Ordinary is right. The pursuer has failed to prove that the defender deserted her and has continued in wilful and malicious desertion for four years. I entertain no doubt that this Court has jurisdiction in this case in so far as it concludes for divorce. The parties were domiciled in Scotland when they were married, and there is no proof, and indeed nothing to suggest that the defender has lost that domicile or acquired another. Mere length of residence by a Scotchman in a foreign country does not infer loss of the Scotch domicile or prove the acquisition of another.

LORD MONCREIFF—On the question of jurisdiction I agree with Lord Trayner that the Lord Ordinary has decided rightly in sustaining the jurisdiction of this Court. This is an undefended case, but evidence has been led which shows that both the pursuer and defender were born in Scotland, that the defender, when he went to America, intended to return to Scotland, and that as late as 1898 he expressed his intention in a letter to his sister of returning to this country in the spring of this year. Looking to the authorities, I do not think that we can hold that the defender has lost his Scottish domicile. I agree with the opinions expressed by the majority of the Court in the cases of *Hood* and *Low* which were based upon former decisions both in this Court and in the House of Lords. Therefore, with all respect for the view expressed by Lord Young, who also dissented in the cases of *Hood* and *Low*, I am of opinion that the Court has jurisdiction.

On the merits of the case I do not think that the pursuer has made out a case for our granting decree of divorce on the ground of desertion. I am of opinion that she has not proved that her husband has been in malicious desertion for the requisite period of four years. In these circumstances, I think that the proper course for us to take is to dismiss the action. Whatever may have been the former practice of the Commissaries, it has not been the practice in more recent times to allow a case to remain in Court till the four years necessary to entitle a pursuer to divorce for desertion have run their course.

The Court adhered.

Counsel for the Pursuer—Deas—Wilton. Agent—William Douglas, S.S.C.

Wednesday, June 7.

FIRST DIVISION.

[Lord Pearson, Ordinary.

EDINBURGH AND DISTRICT WATER TRUSTEES *v.* CLIPPENS OIL COMPANY, LIMITED.

Res Judicata — Medium Concludendi — "Competent and Omitted" — Pursuer and Defender.

Under a private Act of Parliament the predecessors of the Edinburgh and District Water Trust in 1825 acquired a way-leave for a pipe conveying water from the Crawley Spring to Edinburgh. Under subsequent private Acts, which incorporated the provisions of the Water-works Clauses Act, 1847, the Water Trust laid a second (the Moorfoot) pipe in 1876 alongside of the Crawley pipe. In 1897 they sought but failed to interdict the lessees of the minerals under the said pipes and pipe-track from working the minerals within 40 yards of the said pipe-track. The complainers' first plea-in-law was stated in general terms, but the case was argued upon the Waterworks Clauses Act 1847 alone.

At a subsequent date the Water Trust raised an action of declarator and interdict against the lessees of the minerals, to prevent them from working the minerals within 45 yards of the pipe-track on one side and 145 yards thereof on the other. This action was based upon the common law right of support implied in the grant of way-leave in 1825. The defenders pleaded *res judicata* on the ground that in the previous action the pursuers' right to interdict the working of the minerals in question had been negatived, and alternatively that the plea of support at common law now proponed might competently have been put forward in the previous action but had been omitted. The defenders further maintained that in the previous action the Water Trust