

against him, and to hold him liable for injuries sustained by the cattle and other agricultural produce of the farm in consequence of the condition of the buildings, of which he knew nothing, and to repair which he was never asked to furnish the means. I am therefore of opinion that Sir Archibald was discharged of all such obligations by the pursuer's deed of renunciation; and, on the other hand, I am of opinion that there is no relevant case against the other defenders.

The Lords adhered to the Lord Ordinary's interlocutor.

Counsel for Reclaimer—J. C. Smith—Rhind. Agent—R. H. Miller, L.A.

Counsel for Sir A. D. Stewart—J. P. B. Robertson—Dundas. Agents—Dundas & Wilson, W.S.

Counsel for Nichols Steuart—Solicitor-General (Asher)—A. Graham Murray. Agents—Tods, Murray, & Jamieson, W.S.

Thursday, November 24.

SECOND DIVISION.

(Sheriff of Renfrew and Bute.

LINDSAY v. STEEL.

(Before the Lord Justice-Clerk, Lord Craighill, and Lord M'Laren.)

Jurisdiction—Domicile—Absence for Educational Purposes.

In an action of filiation and aliment raised against a forisfamiated minor whose home was in Renfrewshire, the summons was there served and accepted by his agent while the defender was absent from home to attend classes at the University of Glasgow. The Court being satisfied that there was no evidence to show that he had by this absence severed himself *factis et animo* from his home, *repelled* a plea of no jurisdiction against the competency of the Sheriff of Renfrewshire to entertain the action.

Mary Ann Lindsay, residing in Johnstone, presented a petition in the Sheriff Court of Renfrew and Bute against William Steel junior, a student at the University of Glasgow, residing at Elderslie, to have him ordained to pay inlying expenses and aliment for an illegitimate child of which she averred he was the father. The summons was served and accepted by the defender's agent on the 7th December 1880. The ground of action was that the defender had seduced her in January 1880, when she was in his father's service as bar-keeper at Johnstone, and that in consequence of her intercourse with him she had been delivered of an illegitimate child on 27th October 1880.

She pleaded—“(3) The pursuer having been delivered of an illegitimate child, of which the defender is the father, is entitled to recover from the defender the inlying expenses connected with the birth of and aliment for said child.”

The defender had assisted his father as clerk,

and this took him to the shop where the pursuer was serving; but he denied the pursuer's averment as regards his intercourse with her. He further averred that he was eighteen years of age, and was at the date of citation attending the Arts Classes in the University of Glasgow, and resided in Glasgow. He had left Elderslie for good, and this fact had been intimated to the pursuer through her agent prior to the raising of the present action; and accordingly pleaded—“The defender having left Renfrewshire, and having acquired a new domicile, and these facts being known to the pursuer, he was not subject to the jurisdiction of this Court, and was entitled to absolvitor with expenses.” On the merits he pleaded that “The defender not having seduced the pursuer, he was entitled to absolvitor.”

The Sheriff-Substitute (COWAN) allowed a proof before answer on the defender's preliminary plea, and found “In fact, that the principal defender at the date of the present action being raised, 7th December 1880, was resident in Glasgow, where he still resides; that he went to live in Glasgow on 23d October preceding; that prior to said date he lived with his father, the other defender, at Elderslie, in Renfrewshire, and that he never has had any residence of his own, or carried on any business in Renfrewshire, with the exception that for a month or two in the summer of 1880 he was a clerk in an office in Paisley; that he was a student attending the University of Glasgow; that he had no intention of returning to live in Renfrewshire, and that his father, the other defender, had, partly on account of the present case, and partly on account of disagreements with his stepmother, intimated to the principal defender that he must not return to live in his house: And in law, that the principal defender having before the institution of the present process removed from Renfrewshire, was not subject to the jurisdiction of the Courts of Renfrewshire: Therefore sustained the first plea-in-law stated in the defence, and dismissed the action.”

On appeal the Sheriff-Principal (MONCREIFF) sustained the appeal, recalled the interlocutor appealed against, and found “that the defender William Steel junior was a minor, and that it was not disputed that until 23d or 27th October 1880 he resided in family with his father William Steel senior, at Elderslie, in Renfrewshire, except when he was attending college or absent for some temporary purpose; that previously to October 1880 the defender William Steel junior had attended classes at the University of Glasgow, and that on 23d or 27th October 1880 he returned to Glasgow to attend classes at the University there; that at the raising of this action, on 7th December 1880, the said defender was living in Glasgow, in lodgings taken for him there by his father; that he was then attending classes at the University as a student, and was following no trade or profession, and that it was not proved that he had any means of subsistence other than what he received from his father; that the said defender said that when he so returned to Glasgow on 23d or 27th October 1880 he did not intend to return to his father's house in Renfrewshire, and that the defender William Steel senior said that he told his son that he was not to come back; but that it was not proved that at the raising of the action the defender William

Steel junior had left Elderslie for good: And in reference to the foregoing findings, Found in law that the defender William Steel junior had failed to establish that he had ceased to be subject to the jurisdiction of the Courts of Renfrewshire at the date of the raising of the action: Therefore repelled the first plea-in-law stated for the defender William Steel junior, and remitted to the Sheriff-Substitute to proceed with the cause."

He added this note:—"The defender's first plea-in-law is as follows—"The defender having left Renfrewshire, and having acquired a new domicile, and these facts being known to the pursuer, he is not subject to the jurisdiction of this Court, and is entitled to absolvitor with expenses."

"The Sheriff-Substitute has sustained this plea and dismissed the action. After anxious consideration the Sheriff has come to be of opinion that the plea is not well founded.

"The action is grounded on the averment that the defender William Steel junior seduced the pursuer in January 1880, when she was in his father's service as bar-keeper at Johnstone; and that in consequence of her intercourse with the said defender she became pregnant, and was delivered of an illegitimate child on 27th October 1880. It seems to be admitted that at the date of the alleged seduction, and at or until shortly before 27th October 1880, the defender William Steel junior, who is a minor, resided with his father at Elderslie, in Renfrewshire. Thus the *delict* or *quasi delict* which is the ground of the action was committed, if the pursuer's statements are correct, in Renfrewshire, and the defender's residence was within that jurisdiction until within six weeks of the raising of the present action on 7th December 1880. These facts of course are not conclusive on the question of jurisdiction, but they make it proper and necessary to scrutinise somewhat closely the defence now stated.

"The defender William Steel junior says, in the second article of his statement of facts—"While not at the University the defender assisted his father as clerk, and this took him to the shop while the pursuer was serving, and so they became acquainted with each other." It thus appears that previously to October 1880 the said defender had been attending classes at the University of Glasgow. At the commencement of the winter session in October 1880 he returned to Glasgow to resume his studies, and he states that he was attending classes there when the action was raised.

"So far there was apparently no change in his circumstances. He lived in lodgings in Glasgow, taken and paid for by his father; and it may fairly be assumed from the evidence that he had no separate means of subsistence apart from what he got from his father. He says—"I carry on no business, but I am a student attending the University in Glasgow."

"The said defender's contention is, that when he left his father's house in October 1880, he resolved not to return, and that he thereby at once ceased to be subject to the jurisdiction of the Courts of Renfrewshire. In support of this, his father, William Steel senior, says he told his son when he went back to College in October that he was not to return to Elderslie. The evidence of the two defenders on this point is far from satisfactory. The defender William Steel junior

represents that the only reason for his resolution not to return was that he was not on good terms with his stepmother and her family. The other defender gives the same reason in his examination-in-chief, but in cross-examination he says that the reason why he told his son that he was not to return was because he heard that his son was accused of being the father of the pursuer's child. He adds, no doubt, that it was partly the one reason and partly the other; but those statements are not ingenuous, and throw doubt upon the *bona fides* of the defence.

"It is undoubted law that if a person who has a residence of his own breaks up his establishment and leaves the county, and takes up his residence in another county in Scotland, he ceases *ipso facto* to be subject to the jurisdiction of the Courts of the county in which the residence thus abandoned lies. On the other hand, a man does not cease to be subject to a jurisdiction by reason of a temporary absence from his residence, provided it is meanwhile retained and kept up for him. Now, when a minor resides in family with his father, the father's residence in ordinary circumstances is also the son's, and the domicile thus accruing to the latter will not, it is thought, be lost for the purposes of jurisdiction by reason of the minor's occasional absence from home for the purposes of education.

"The question then comes to this, Is it sufficient to oust the jurisdiction thus existing that on an action against the minor being brought or threatened during one of these temporary absences, the father, whose residence within the jurisdiction remains unchanged, says—"I shall not allow my son to return home;" and the son says, "I do not intend to return home,"—resolutions which, if ever really formed, may be recalled at a moment's notice.

"In the Sheriff's opinion this is not sufficient. It seems to him that in order to establish that a minor forisfamiliarated has ceased to be subject to the jurisdiction of the Courts of the county in which his father resides there must be some evidence that *facto* as well as *animo* his connection with his father's residence has been really severed. Now, the defender has failed to prove clearly and satisfactorily that there was such a change in his position at the date of the raising of the action as to lead to the conclusion that he had then abandoned the residence which he undoubtedly had in his father's house until the 23d or 27th of October 1880.

"To hold otherwise would be to place it in the power of a father to decide by a word that his son should cease to be subject to any particular jurisdiction. It is unnecessary to give illustrations to shew the inconvenience and injustice of such a view.

"The pursuer also contended that the defender William Steel junior was subject to the Sheriff's jurisdiction *ratione delicti*, and that acceptance of service by his agents in Paisley was equivalent to personal citation within the county. If the Sheriff's judgment on the defender's first plea-in-law is well founded, it is unnecessary to decide this point, but looking to the terms of the reservation under which service was accepted, viz., 'the plea of jurisdiction being reserved,' the Sheriff doubts whether the acceptance has the effect contended for. It is said that the plea reserved is only the plea which the Sheriff has just

repelled, but this, it is thought, is too narrow a view of the reservation."

On the merits the Sheriff-Substitute (COWAN) found in fact that the pursuer on 27th October 1880 gave birth to a female child, and that the defender was the father of the said child; and gave decree for the inlying expenses and aliment concluded for in the summons.

The defender appealed, and on his preliminary plea argued—It was clear on evidence that he had left his father's house in Renfrewshire for good and all, *factis et animo*, and therefore the Sheriff of that county had no jurisdiction to entertain the action against him—*Clarke v. Neumarsh*, December 20, 1833, 12 S. 255; *Brown v. Blaikie*, February 1, 1849, 11 D. 481; *Crichton v. Robb*, February 9, 1860, 22 D. 728; *Kermick v. Watson*, July 7, 1871, 9 Macph. 984; *M'Bey v. Knight*, November 22, 1879, 7 R. 255.

The pursuer replied—There was no doubt that till October 1880 the defender lived in his father's house in Renfrewshire. To establish that a minor forisfamiliarized has ceased to be subject to the jurisdiction of the Courts of the county in which his father resides, there must be evidence that *factis et animo* his connection with that residence had been severed. There was no evidence to establish this. The defender was merely absent in Glasgow in pursuit of intellectual studies. His father paid for his lodgings there. Moreover, to sustain the appeal would necessitate the whole proof being taken a second time in Glasgow—*Fraser on Husband and Wife*, 1260; *Phillimore on Domicile*, 54.

At advising—

LORD CRAIGHILL—The question raised here is one of importance to the parties as well as to the law, and one also of some difficulty, as most questions about jurisdiction are; but the conclusion to which I have come is, that the Sheriff's judgment ought to be sustained. The question is as to whether at the 7th of December 1880, when the action was raised and service accepted by the defender, by his agent in Renfrewshire, the defender was or was not amenable to the jurisdiction of the Sheriff of the county of Renfrew? The ground on which I go is this:—The action has been raised by the pursuer against the defender for damages for seduction and aliment of an illegitimate child, of which she says the defender is the father. When the action was raised the defender was not within the county, but in Glasgow. However, up to the 27th October 1881 his home undoubtedly was within the county of Renfrew, and therefore if the action had been raised prior to the 27th October all possible ground for disputing the jurisdiction would have fallen. But the contention on the part of the defender is that he left Renfrewshire for good, and went to Glasgow intending to prosecute his studies at the University there, meaning at the end of his course of study to look out for a situation, and both he and his father concur in stating that it was not intended he should return home again "unless something unforeseen happened." Now, so far there is nothing to lead anyone unacquainted with the circumstances of the case at the time of the defender's departure to suppose that his father's house was not the defender's home. He was a member of the family at the time, his father had taken lodgings in Glasgow for him during the period of

the University session, and was to provide the rent and defray the expense of his son's maintenance. I am clearly of opinion that if it were not for the evidence of the defender that he had left Renfrewshire for good when he came to Glasgow, the mere circumstance of his studying at Glasgow would not act as a severance between him and the county of Renfrew. In that view, his home was still in his father's house. He had gone away at the period of the service of the summons for a particular purpose, and then returned to occupy the same relations as before with his family. I think it is a material circumstance that at the 7th of December there was nothing to show that he had any permanent intention of leaving Renfrewshire; on the contrary, the inference was that he was to return some day, as his father says, "unless something unforeseen happens." This being so, I am of opinion that on the 7th December 1880 the defender's home was his father's house. It is true that he was elsewhere at that time, but mere absence from home is not in itself sufficient to change his residence; and this being so, and apart from any other ground, I am of opinion that we have sufficient evidence to establish such connection between the defender and the county of Renfrew as shall subject him to the jurisdiction of the Sheriff of that county.

LORD M'LAREN—I concur entirely in the judgment which the Court is prepared to pronounce, and I also concur in the excellent judgment of the Sheriff on a point which is of considerable importance. A good deal has been said in argument regarding the distinction between domicile in the larger sense and domicile for purposes of jurisdiction. No doubt a man may have more than one in the latter sense, although he can have only one in the larger and former sense, but I think that the elements entering into the consideration of the two are really the same in kind though they differ in degree. A domicile in a local Court may be more easily lost or acquired than a domicile for jurisdiction in the Supreme Courts. And then, again, domicile in the international sense may more easily be acquired and lost for jurisdiction in ordinary actions than one to subject a person to the laws of a country in relation to marriage and the rules of succession, but still the elements are the same in kind. Now, amongst these elements one which seems to be considered as of the least importance is the party's own declaration as to his intentions. In a recent case—that of *Kennedy v. Bell*, July 17, 1863, 1 Macph. 1127, L.R. 1 Sc. App. 320—which went to the House of Lords, the principle was affirmed that of all ingredients the least satisfactory is the evidence of the party himself—not so much because he is consciously dishonest, but because he is speaking as to the impression in his mind on a period which is past. Now, in the present case we have really nothing to suggest a change of domicile on the part of Steel except his own declaration made *ex post facto*. The law requires the pursuer to follow the defender to his domicile, and that supposes that the pursuer must have means to find it out. She cannot see into the defender's heart to get at his intention, and therefore the domicile must be capable of being ascertained from extrinsic facts, and beyond doubt the pur-

suer here came to the only conclusion possible, which was that the defender's domicile was in Renfrewshire, at his parents' home, except when he was occasionally absent from time to time in Glasgow for educational purposes. I know nothing better settled than that a temporary residence for educational purposes does not infer loss of previous domicile. I do not think it may be easily lost. The fact of his residing in Glasgow is not to be taken into account, because he never showed a fixed resolution to quit his home. His own statements, and those of his father, do not show this, but, on the contrary, all the circumstances were similar to those in the previous session at the University, and do not infer such a change of residence as the law requires. I am therefore of opinion that the judgment is well founded, and that we should adhere.

LORD JUSTICE-CLERK—I concur. The case is narrow, and raises questions which are always attended with difficulty. Your Lordships have adverted to the tenuity of proof as to the *animus* of the defender to abandon his residence in Renfrewshire. I quite agree with this view of the case, and I have only to add a single sentence. I think the case fails on the facts more than on the *animus*. It might have been a narrower case if the son had taken lodgings in order to look out for a situation; but the fact remains that he was living in lodgings taken for him by his father, and he was just in such a position as he would have been if he had been a delicate child, and his father had taken lodgings for him at a bathing-place. His residence in Glasgow was just his father's house, and therefore on the whole matter I concur.

The Lords therefore adhered.

Thereafter, having heard counsel for the defender against the Sheriff-Substitute's judgment on the merits, the Lords adhered.

Counsel for Appellant—Dickson. Agent—James M'Gaul, S.S.C.

Counsel for Respondent—M'Kechnie—Watt. Agents—J. & A. Hastie, S.S.C.

Thursday, November 24.

OUTER HOUSE.

[Lord Lee.

M'AVOY v. YOUNG'S PARAFFIN LIGHT AND MINERAL OIL COMPANY.

(Sequel to case reported *ante*, p. 61, 5th November 1881.)

Process—Jury Trial—Issue—Act 43 and 44 Vict. cap. 42 (Employers Liability Act 1880), sec. 6, sub.-sec. 1.

Terms of issue settled for the trial of an action for damages raised by the widow and children of a miner alleged to have been killed while in the service of defenders, through fault for which they were responsible, and which concluded for damages both at common law and under the Employers Liability Act 1880.

Held by Lord Lee that an action concluding for damages at common law, and alternatively for damages under the Employers Liability Act 1880, and raised in the Sheriff Court in respect of sec. 6 of that Act, may be removed as a whole to the Court of Session under that section, and the question both at common law and under the statute tried under one issue.

On the Lord Ordinary resuming consideration of this case the pursuers proposed the following issue for the trial of the cause:—“Whether, on or about 9th April 1881, the said James M'Avoy, while in the employment of the defenders as a miner in a pit at Addiewell belonging to them, was struck by a hutch, or a piece or pieces of wood projecting from a hutch, through the fault of the defenders or those for whom they are responsible, and thereby sustained injuries from the effects of which he died on or about 23d April following, to the loss, injury, and damage of the pursuers.— Damages laid at £1000.”

The defenders objected to this issue, on the ground that the pursuers were not entitled to an issue at common law, but only to an issue under the Employers Liability Act, they having removed this action to the Court of Session under sec. 6 of that Act, which had not the effect of allowing the action to be removed from the Court in which it had been brought, except in so far as it had been brought under the statute. But, at all events, there must be at least a separate issue under the statute, or otherwise it would not be possible to say whether the jury in the event of their affirming the issue, did so on grounds rendering the defenders liable under the statute alone, or on grounds applicable to the common law. The result of the jury finding more damages to be due than £300 would be ambiguous, and the expense of a new trial might be caused.

The pursuers' counsel maintained his right to a single issue, raising the questions of liability both at common law and under the statute, on the ground that by the recent decision of the Second Division in this case the Court decided that the Act was only intended to destroy a ground of defence formerly competent, and thereby to amend and simplify the law. It would be an odd result of such a change if the number of questions left to the jury were to be thereby enlarged. Any difficulty of the kind represented would be prevented by the charge of the presiding Judge. He was willing, however, to restrict the damages claimed as at common law to the same sum which might be awarded under the Act; and put in a minute restricting the conclusion of his petition, which was rested on the common law, to the sum of £300. He also agreed to strike out of the issue the words “or those for whom they are responsible,” as being unnecessary.

LORD LEE—The issue proposed by the pursuers is objected to, in the first place, because it presents to the jury a question which assumes that the action is laid upon the ground of responsibility at common law. It is contended that the action, in so far as founded on the common law, is not competently before the Court, not having been removed from the Sheriff Court in the manner applicable to such cases. There is