No 2.

Answered, That the statute and contract referred to have no other view than to exclude foreign Courts; and there is not a word in either of them that can import an exclusion of the Court of Session. The Conservator's court, it is true, is exclusive of the courts of this country with respect to matters criminal, not by the authority of the statute or contract, but by the constitution of the Court of Justiciary, which has no jurisdiction in crimes perpetrated abroad. But with respect to all civil matters betwixt Scotchmen, wherever transacted, the Court of Session has a jurisdiction; and the party against whom the process is brought, if out of the kingdom, can be summoned at the market-cross of Edinburgh, pier and shore of Leith. So far indeed it is true, that the Court of Session, though a supreme Court, has no authority over the Conservator's court, because it has no authority over any foreign court; and, therefore, a bill of advocation from the Conservator's Court was justly refused. For the same reason, the decrees of our judges in the colonies cannot be reviewed by any ordinary court in Britain. The appeal must be to the King and council; to which Court an appeal will also lie of any decree pronounced by the Conservator. But this concludes nothing against an original process brought before the Court of Session.

'The Lords repelled the declinator.' *See* Jurisdiction.

Sel. Dec. No 164. *p.* 226.

1789. *February* 9.

Dame Elisabeth Brunsdone *against* Sir Thomas Wallace, Baronet.

No 3.
A marriage celebrated in England between two natives of Scotland residing in England *animo remanendi* not dissoluble in the Scottish Courts.

Sir Thomas Wallace, a native of Scotland, left this country when thirty years old, without any intention of returning.

Having gone to England, he made his addresses to Mrs Elisabeth Brunsdone. She also was a native of Scotland, but had for many years resided in England.

They were married in London according to the rites of the English church. Soon after, they went to France, from whence the Lady returned to England, and then commenced, in the Commissary-court of Edinburgh, a process of divorce on the head of adultery. The criminal acts were said to have been committed in France.

Sir Thomas Wallace, as being out of Scotland, having been cited at the market-cross of Edinburgh, and at the pier and shore of Leith, the Commissaries proceeded in the usual way to allow a proof. But a bill of advocation to the Court of Session was preferred, in which it was

Pleaded; Jurisdiction and the power of putting the sentence of the judge in execution, are counterparts of each other; without the latter, the former would be nugatory and absurd. In order to constitute a *forum*, therefore, either the party called as defender, or, where the question is purely of a pecuniary nature, some part of his effects must be subject to the orders of the Court. Thus the Judges in Scotland cannot regularly exercise any judicial authority

with regard to a Scotsman who has left this country, and who has no effects remaining in it. No 3.

The *forum originis*, which might be necessary while mankind continued in a migratory state, is now only regarded in questions concerning allegiance, which, according to the maxims of political law prevailing in modern Europe, is due to the governing power of that state where a person happens to be born; or if it is to be of any effect at all in questions of private right, it can only be sustained in ordinary actions of debt, where, from a recognition of its authority, little injustice can arise. But in that most important part of civil jurisdiction which respects a man's state and condition in society, it ought never to be resorted to. In questions of this sort, no proper example will be given of any judicial proceedings having been held against a native of this country, who had no effects here, and who, long before the commencement of any suit, had abandoned Scotland for ever.

Although, however, the Scottish Judges could in general take cognisance of every question in which a native of Scotland was interested, the present action must be altogether inadmissible. In all agreements which are entered into in a foreign country, the *lex loci contractus* has been held to be the governing rule, and it is agreeable to the probable intention of parties, that this should be the case. And in England, where the marriage between the pursuer and defender was solemnized, an action of divorce, as a consequence of conjugal infidelity, is unknown. The dissolution of a marriage on this ground can only be obtained by the interposition of the Legislature, of which there is no instance where the woman is the injured party. In France, too, it may be farther noticed, where the criminal acts are said to have been committed, and where the defender still resides, as well as in all other countries in which the authority of the Roman Pontiff is acknowledged, a marriage can be dissolved by no other.

Thus, with regard to persons married in England, although they are immediately subject to the Scottish courts, no action of this nature ought to be admitted; unless perhaps, where the parties, by continuing for a considerable time in Scotland, have become liable to its peculiar laws. But in the case of those who, in consequence of their birth alone, are in any degree, connected with this country, this must be peculiarly expedient and just. If, in circumstances such as these, the determination of the Scottish Judges were to be attended to in foreign countries, an effect would be given to an agreement quite opposite to the intention of the parties. If otherwise, the greatest embarrassment would ensue; a man thus being unmarried in one country, and married in another, while all the consequential rights would be placed on the same uncertain footing. Historical Law Tracts, *voce* Courts; Kilkerran, January 1747, Hodgeson *contra* Anderson, No 1. p. 4779; *Voet.* lib. 2. tit. 1. § 46.; lib. 5. tit. 1. § 96. *in fine;* Inst. Jur. Can. lib. 2. tit. 16.; Blackstone's Commentaries, book 1. c. 15. § 7.

Answered; A native of Scotland, from the moment of his birth, is entitled to the protection of its laws. He, in the same manner, becomes amenable to

No 3. those laws, and to the courts of justice which have been established for enforcing them.

If a Scotsman enters into the service of a foreign state at enmity with this country, even although he may have lived in it for many years, he will be subject to the punishment of high treason. If he has committed a crime in Scotland, sentence of outlawry will, in his absence, be issued against him. So that in those instances in which the presence of the defender would seem to be most requisite, this circumstance is, with respect to a native of Scotland, held to be of no importance.

With regard to actions of debt, too, of the greatest extent, it is admitted, that the Scotch Courts are vested with sufficient authority to pronounce a decreet against a Scotsman, although he has left Scotland for ever. Where then is the line to be drawn? Indeed so much is the jurisdiction *ratione originis* acknowledged in Scotland, that a form of citation at the market-cross of Edinburgh, and pier and shore of Leith, has been introduced for summoning those who cannot be found personally, and who have no known place of residence in this country.

A jurisdiction so constituted, it might be farther observed, seems to be absolutely necessary for the purposes of justice. As the *forum domicilii* almost entirely depends on the will of the party himself; as those arising from the *locus contractus*, and the *locus delicti*, can only be resorted to, if the defender can be personally apprehended where the agreement was made, or where the crime was committed; while, in that of the *rei sitæ*, the proceedings are necessarily confined to particular subjects; it is evident, that some other tribunal ought to be established, which shall be unlimited both in its duration and in its effects.

It does not therefore seem to admit of dispute, that the defender may, notwithstanding his absence, be sued in the Scottish Courts. And the other argument, arising from the celebration of marriage in England, is equally erroneous. It is true, that in order to maintain a regular intercourse with foreign countries, as in matters of private right England is with respect to us, it has been settled, that those agreements which are entered into abroad, shall, if solemnized according to the law of the place, be effectual in Scotland, although the formalities here required have not been observed. Still, however, no agreement entered into in a foreign country, can be more obligatory in Scotland than it would have been, if it had been celebrated in Scotland with all the forms which are requisite here. This seems to be quite decisive. An agreement between two natives of Scotland, that their marriage should not be dissoluble for adultery, would be illegal and void. And every marriage celebrated in Scotland may be dissolved on this ground.

Were a different rule to be adopted, the utmost confusion and injustice would follow. The Judges in Scotland, in all questions arising from contracts exe-

cuted abroad, would be obliged either to forego the law of Scotland, which they know, in order to adopt the law of a foreign country, of which they are ignorant; or they must abstain from judging altogether. Thus, instead of pronouncing a sentence of divorce in consequence of adultery, where the marriage had been celebrated in England, they would be under a necessity of awarding, as is done in Doctors Commons, a separation *a mensa et toro*, or of leaving the injured party without any redress whatever. All the other subordinate rights too, those of alimony, of terce, and courtesy, the legitimacy of the children, &c. would be judged of in the same manner. Compared with these, the inconveniences suggested on the other side are of no weight. While the laws of different countries are different, some embarrassment will unavoidably arise; as in the case of a person born out of wedlock in England, who, notwithstanding the subsequent marriage of his parents, will be reputed a bastard in England, though capable, in this country, of succeeding as a lawful child to the most important rights. But where a marriage has been dissolved in a competent court, there is no reason to suppose, that the parties will not be considered as disengaged from each other in every country where they may chuse to reside. Dict. *voce* FORUM COMPETENS; Erskine, book 1. tit. 2. § 16. 17. 19.; Id. lib. 1. tit. 4. § 34.; Galbreath, No 2. p. 4430.; Blantyre, No 24. p. 4813.; Hog *contra* Tenent, No 2. p. 4780. No 3.

In support of the foregoing general argument, the pursuer also *contended*, that the defender, as inheriting a Scotch title of honour, and as the substitute in the entail of a considerable landed estate in Scotland, was amenable to the Scotch Courts. But the question was decided on general principles. The majority of the Court seemed to be of opinion, that there was a *forum ratione originis*, so as to found a jurisdiction in the Commissaries; but that it was not competent for them, in the circumstances of the case, to pronounce a judgment of divorce between the parties.

One of the Judges expressed an opinion, that marriage, as regulated by the laws of Christianity, was to be considered as in some degree *juris gentium*, and that where the municipal constitutions of different countries in which the Christian religion was acknowledged were at variance, recourse might be had to the rules laid down in holy writ, by which adultery was declared to be a sufficient cause of divorce.

THE LORD ORDINARY refused the bill of advocation; and a petition reclaiming against this judgment, being followed with answers, was also refused.

But after advising a second reclaiming petition with answers, the LORDS "remitted the cause to the Commissaries, with instructions to dismiss the action."

And a reclaiming petition having been preferred, and answers being given in, the LORDS adhered to this judgment.

Lord Ordinary, *Monboddo*. Act. *Dean of Faculty, Wight*. Alt. *Blair, Craig*. Clerk, *Home*.
C. *Fol. Dic. v. 3. p. 238. Fac. Coll. No 59. p. 105.*

*** *See* The case of Farquharson against Farquharson, in the APPENDIX to this Title.