

No. 5. Answered: The defender had completely abandoned his residence in his native country, and established a domicil in Scotland, by residing in it with his family for a number of years. He went to England merely with the view of obtaining a commission; and his living there, while following the quarters of his regiment, cannot be inferred as a change of his domicil. Scotland being the last place where he had a fixed domicil, he remained amenable to the courts of this country, until he established a permanent residence in another; and still more so, when it is considered that he was personally cited. But, even supposing the objection originally well founded, the jurisdiction of the Commissaries was prorogated by the defender compearing before them, and joining issue on the merits of the cause; and he is not entitled afterward, upon perceiving the case likely to be decided against him, to make any objections to the competency of the court. It is an established maxim, that a party, by proposing peremptory defences, abandons all such as are of a dilatory nature; Voet, B. 2. T. 1. § 81; Ersk. B. 1. T. 2. § 29; Stair, B. 4. T. 37. § 12; Bankt. v. 2. p. 472; Kames' Law Tracts, Tr. 7th.

The Court, upon advising the petition, with answers, were of opinion, That the jurisdiction had been prorogated; and therefore adhered to the interlocutor of the Lord Ordinary, refusing the bill of advocacy.

Lord Ordinary, *Cullen.*
Alt. *W. Erskine.*

For Petitioner, *Gillies.*
Agent, *Ja. Horne, W. S.*

Agent, *Ro. Playfair.*
Clerk, *Walker.*

J.

Fac. Coll. No. 206. p. 462.

1807. *January 26.*

LINDSAY *against* TOVEY.

No. 6.

Action of divorce at the instance of a Scotsman against his wife, before the Commissaries of Edinburgh, sustained, although she resided in England, in consequence of a voluntary separation.

MARTIN ECCLES LINDSAY, the eldest son and heir of entail of Mr. Bethune of Kilconquhar, in the county of Fife, was born and educated in Scotland. He entered into the army, and went soon after with his regiment to Gibraltar, where, in 1781, he married Miss Tovey, an Englishwoman, and remained there till 1784; from which period, till about the end of 1792, they resided together in Scotland, except when Mr. Lindsay was occasionally absent with his regiment.

In 1792, they went to live at Durham, for the benefit of the education of their children, where he purchased a freehold house.

Soon afterward he went to Ireland with his regiment, and from that period continued in the military service, moving about from place to place, his residence being regulated by the orders of his superiors.

Of this date (4th December 1802) a deed of separation was executed between the parties at Durham, by which Mrs. Lindsay accepted of an annuity.

The deed also declares, "That the said Martin Eccles Lindsay shall and will permit and suffer the said Augusta Margaret Tovey Lindsay, to live, inhabit, and reside separate and apart from the said Major Eccles Lindsay, in such place or places as she shall think proper; and shall not, nor will, at any time during their joint lives, sue, prosecute, disturb, or molest the said Augusta &c. or any person or persons in whose house or family she shall reside, or be entertained, for or on account of such residence or entertainment, or of her living separate and apart from him."

Lindsay after this (12th December 1804) raised an action of divorce on the head of adultery, before the Commissaries of Edinburgh, in which it was charged, that she "had, both before and since the separation, given herself up at many different times and places to adulterous practices."

The summons was executed at the market-cross of Edinburgh, and pier and shore of Leith: Mrs. Lindsay at the time being at Durham.

A preliminary defence was stated, by objecting to the jurisdiction of the Commissaries, who found (5th April 1805) "That the Commissaries of Edinburgh have a proper jurisdiction in the present instance."

This question was brought before the Court by advocacy, and, (22d May 1806), reported by the Lord Ordinary, when the bill was refused.

Mrs. Lindsay reclaimed, and

Pleaded: All actions must be brought in the forum of the defender; in the courts of that territorial jurisdiction within which the defender's home is situated. It is true, that by law, a wife is so completely identified with her husband, that her residence is his, and she must be held to be domiciled where he is domiciled. But a deed of separation makes it otherwise. Here the wife's residence is no longer her husband's; he has himself consented to her living apart; he has voluntarily dissolved the identification of person and residence. She has continued to reside where she did when the deed of separation was entered into. This is her domicile, and it cannot be altered unless by mutual consent.

It is only by a fiction that the husband's forum is held to be the wife's forum; and in the present case, it is also by a fiction that the husband claims to be domiciled in Scotland. He has no house nor property there; but in England, he holds an office which binds him to residence there. The only claim he has upon this county as his forum, is, that it is the *forum originis*, which in no case of itself has been held to found a jurisdiction; *Brunsdone* against Sir Thomas Wallace, 9th February 1789, No. 3. p. 4784.

Answered: When a Scotsman marries a foreigner, she becomes entitled to all the privileges which the subjects of Scotland enjoy; she will be entitled, if not expressly excluded, to the *terce* and *jus relictae*. When she thus takes the privileges of the wife of a Scotsman, she unavoidably takes along with them the obligation and responsibility connected with them. She would be entitled to raise an action of divorce against her husband in this coun-

No. 6. try, and she must herself be liable to the same jurisdiction, if her conduct offers any foundation for such a procedure. The forum of her husband is her forum. The voluntary contract of separation can make no difference on this principle; for it may be put an end to at the instance of either party, and is virtually revoked by executing the summons of divorce. Now, Scotland is the husband's forum *ratione originis*; Ersk. B. 1. Tit. 2. § 19. Hog against Tennant, 27th June 1760, No. 2. p. 4780; Pirie against Lunan, 8th March 1796, No. 104. p. 4594. He is also heir of entail of a Scotch estate, and is a freeholder in this country.

The Court (27th January 1807) adhered.

Lord Ordinary, *Bannatyne*. Act. Solicitor-General Clerk, *Moncrieff*. Agent, *Jas. Gibson*, W. S.
 Alt. *G. Jos. Bell*, *Grahame*. Agent, *Geo. Clapherton*, W. S. Clerk, *Mackenzie*.

F.

Fac. Coll. No. 266. p. 594.