July 12, 1813.

CASE UPON THE AUCTION ACTS, 17 AND 19 GEO. III.

Lord Redesdale concurred in this opinion. The point appeared to him perfectly clear. The second Act was passed for the purpose of further regulation, and to prevent evasions; and after pointing out who were the persons who must take out licences, it proceeded to describe what should be considered as a sale at auction. It was to be a sale "by outcry, knock-"ing down of hammer, candle, by lot, or parcel, "or any other mode of sale at auction, *or whereby* "*the last, or highest bidder, is deemed to be the* "*purchaser.*"

The words, "or whereby the best or highest bid-"der is deemed to be the purchaser," he considered as explanatory of what was meant by the word "*auction*," and he conceived that all such sales were, for the purposes of this act, to be deemed sales at auction. Under this construction of the act, there was, in the present instance, clearly a sale at auction.

Judgment of the Court below affirmed.

SCOTLAND.

APPEAL FROM INTERLOCUTORS OF THE COMMISSARY COURT AND COURT OF SESSION.

May 24, 1813.

WHETHER A SCOTCH COURT HAS JURISDICTION TO DISSOLVE AN ENGLISH MARRIAGE.

AUGUSTA M. TOVEY—*Appellant.*
Major M. E. LINDSAY—*Respondent.*

Marriage at Gibraltar of a Scotchman (in the army) to an English woman. While retired on half-pay he resides with his family at *Durham*, for the education of his children, and is again employed in the military service, but still keeps his family at Durham, where it remains for about ten years.

English deed of separation between the husband and wife, by which he permits her to choose her own residence, and she resides in England. Two actions of divorce against her in the Scotch Courts, on the ground of adultery; one laying the acts of adultery in England, the other laying them in Scotland. Question, Whether the Scotch Court, under these circumstances, has jurisdiction to dissolve the marriage?

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THE parties in this case differed in a variety of particulars in their statements of facts, but appeared to be agreed in those which were most material.

The Respondent, eldest son and heir of Mr. Bethune, of Kilconqhuar in Fife, was born in Scotland, where he chiefly remained till he went to Gibraltar in 1781, with the 73d regiment. The Appellant was a native of England, and spent her youth there according to her own statement, though according to that of the Respondent, she left England at five years of age for Scotland, where she remained till she was sixteen years of age, and then went to Gibraltar, where her father, Col. Tovey, was stationed. There the parties met and were married in 1783, by the Chaplain of the 73d regiment, according to the rites of the Church of England, as the Appellant stated. In 1783, or 4, the regiment was ordered home and disbanded; and the parties resided at Perth till 1786, when the Respondent was put on full-pay in the 26th regiment, which he joined in Ireland, but soon returned to Scotland. He afterwards, in 1789, went to Canada with the regiment, leaving his family at Perth, but returned in 1790, when he retired on half-pay, and resided in Fife till the end of the year 1792. Up to this time

Marriage at Gibraltar.

it seemed to be admitted, that the Respondent's domicil was in Scotland.

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In 1792, the Respondent removed with his family to Durham for the purpose, as was stated, of the education of his children. In about a year after, he was again employed in the army; sold out in 1794, but soon after procured an appointment in the Commissariat department, in which he still remains as Deputy Commissary General. During this period he was occasionally absent on duty in various places, but his family remained at Durham, where he himself joined it as often as he had an opportunity.

While retired on half pay he resides at Durham.

In 1802, a misunderstanding having arisen between him and his wife, they agreed to separate; and a deed of separation according to the law of England was executed, by which he agreed to pay to her trustees an annuity of 125*l.* for her life, whether sole or married. By this deed also it was specially agreed, "*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 Martin Eccles Lindsay, in such place and places as she shall think proper: and shall not, nor will at any time during their joint lives, sue, prosecute, or molest the said Augusta Margaret Tovey Lindsay, 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 the said Martin Eccles Lindsay.*"—From this time the Appellant appears to have resided chiefly in England, though she was occasionally in Scotland. The Re-

Deed of separation, December 1802.

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WHETHER A SCOTCH COURT HAS JURISDICTION TO DISSOLVE AN ENGLISH MARRIAGE? Action of divorce.

Jurisdiction of the Commissaries sustained by the Courts below.

spondent some time after raised an action against her before the Commissaries of Edinburgh, for a divorce, on the ground of adultery; and libelled in his summons, that the defender "had both before and since the separation given herself up, *at many different times and places*, to adulterous practices, and particularly at Bishop Auckland, near Durham." The defender denied the jurisdiction, but it was sustained by the Commissaries, and afterwards by the Court of Session, on the ground, 1st, That the Respondent had a domicil in Scotland; and 2d, That his domicil must fix that of his wife. From the interlocutors of the Commissaries, dated respectively April 5th, and May 2, 1805; and from those of the Court of Session, dated May 22, 1806, and 27th January 1807, the defender appealed. Pending this last mentioned process, the Respondent instituted another suit of the same nature, but libelling on acts of adultery committed in Scotland, "particularly in the House of Logie, in the county of "Perth, and at various places in the counties of Perth "and Inverness, and other parts of Scotland, in the "months of June, July, August, September, and "October, in the year 1807." The Commissaries and Courts of Session decided in this action also in favour of the Respondent. The interlocutor of the Court of Session, to which they afterwards adhered, is in these terms: "The Lords having resumed consideration of this petition, and advised the same with the answers thereto, in respect that the pursuer is now *confessedly* domiciled in Scotland, and that the deed of separation is revoked, they adhere to the interlocutors reclaimed against, and refuse

Feb. 8, 1811.

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the desire of the petition." From this judgment the defender likewise appealed, and both causes were heard the same day, but argued separately; it being imagined that the acts of adultery being in the one case laid in England, and in the other, in Scotland, might possibly be held to form a material distinction.

First cause. Acts of adultery in England.

Sir S. Romilly and *Mr. Holroyd* (for the Appellant.) In order to decide whether the Scotch Courts had jurisdiction in this case, two questions were to be considered: 1st, Whether the Respondent's domicil was in Scotland? 2d, Whether, if it was, the wife's domicil followed his? As to the first point, Mr. Lindsay went to Durham by choice, and established his family there for ten years; and though his original domicil was in Scotland, he must now be taken to be domiciled in England, and any subsequent residence in Scotland, as he was in the military service of government, could not change his last domicil properly acquired. A boy residing at any place, merely for education, by the doctrine of the civil law acquired no domicil; but this did not apply to the case of a man residing with his whole family, even though only for the education of his children. The Respondent had cited the following authority in his favour as to the question of domicil: "Domicilii quoque intuitu conveniri quis-
"que potest, in eo scilicet loco, *in quo larem, re-*
"*rumque ac fortunarum suarum summam con-*
"*stituit, unde rursus non sit discessurus, si nihil*
"*avocet*, UNDEQUE CUM PROFECTUS EST, PERE-
"GRINARI VIDETUR." But this rather made against

Voet. ad Panda. lib. 5. t. 1. sec. 92.

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him, for the residence at Durham came exactly within this definition. He had established his home there, his household gods, his family. The claim of jurisdiction *ratione domicilii* was therefore altogether unfounded. The facts of his being born in Scotland, and being heir to an estate there, only proved that his original domicil was in Scotland. When he could select for himself, he chose another; and their Lordships would overturn the most solemnly decided cases if they were to say that he did not thereby acquire a new domicil. *Lord Thurlow* had decided that a native of Scotland, an Officer in the East India Company's service was domiciled in England, (*secus* if he had been in the government service), though there were letters of his produced stating his intention to return and end his days in his native country; and *Lord Eldon* afterwards confirmed the doctrine laid down by *Lord Thurlow*. These and the case of Sir T. Wallace were decisive authorities against the claim of jurisdiction *ratione originis*. It was monstrous to say that the place where a man first drew breath was always to be his domicil wherever he might reside. The case of Sir T. Wallace was also an authority against any claim of jurisdiction *ratione rei sitæ*, though that reason was stronger in the case of Sir T. Wallace, who had an estate and a dignity in Scotland, whereas the Respondent here had only an expectation. The *ratio rei sitæ* was good to support an action of debt or damages, but it was totally inapplicable where the object was to have a marriage declared void, or to obtain a divorce. The *ratio loci contractus* was quite out of the question, as the

Bruce and Bruce, 2 Bos. and Pull. 229. Dom. Proc. April 1790.

Marsh v. Hutchinson, 2. Bos. and Pull. 226. Brunsdan and Wallace, Feb. 9, 1789.

marriage took place at Gibraltar within the pale of the English law. The *ratio delicti* was also out of the question, as this was not a criminal prosecution, but a civil action. The Respondent had also relied upon the case of "*Pirie and Lunan*," but as the marriage there was contracted in Scotland, it had no application.

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2. There was no place here for the rule of Scotch law—that the husband's *forum* regulated that of the wife; for it was expressly stipulated by the deed of separation, that she should reside wherever she pleased; and she had chosen to reside in England, where she had been born. The very nature and operation of this suit supposed that the parties were separate. The rule was founded on the community of interests between the husband and wife; but it was absurd to apply that rule where these interests were directly opposed to each other. He was persuaded they could produce no good authority for their doctrine, and in the absence of authority it was fair to consider the consequences that would result from the establishment of the doctrine which they contended for. The consequence would be that Scotland would become a place where persons wishing to violate their most solemn engagements would assemble from all quarters of the globe for the consummation of their iniquity. A person having his original domicil there and returning to it, or going to it and residing a few months, might apply to the Commissary Court, and prove alleged acts of adultery against his wife, which she could have no opportunity of contradicting, and so obtain a divorce for ever.

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A third point was, that an English marriage being indissoluble by the the English law, could not be dissolved by a Scotch divorce, in any other way than by an act of the legislature.

Mr. Adam (for the Respondent). Major Lindsay, he apprehended, might have gone into evidence of acts of adultery committed in Scotland, even in the first cause, under the general words in the summons, "*at many different times and places.*" He was born in Scotland, and heir to a considerable estate in that country, and therefore his case re-

5. Ves. 750. sembled that of Lord Somerville, who was born in Scotland; but without being a Peer of Parliament, resided one-half of the year in London; and yet it was found that he had not lost his domicil in Scotland. Mr. Lindsay was married at Gibraltar, while in the army, at a time when it was admitted he had not changed his domicil.

Chancellor. This is a case of a Scotchman marrying an English woman in England, (for so it must be considered) where marriage was indissoluble.

Lolly's case. The twelve Judges had lately decided, that as by the English law marriage was indissoluble; a marriage contracted in England could not be dissolved in any way except by an act of the legislature.

Mr. Adam. This was too serious a point to be considered in this incidental manner upon a question of jurisdiction. It had not been at all started in the Court below. Their Lordships would hardly remit therefore on this ground, as the remit must be applicable to the state of the pleading.

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Chancellor. You say the marriage ought to be dissolved. Her answer to that is, that being contracted within the pale of the English law, it is indissoluble.

Mr. Adam. That was a question of international law, and the Commissaries had, since they knew of the decision of the twelve Judges here, still maintained their authority to dissolve an English marriage if the parties were domiciled in Scotland. But granting, for argument's sake, that they could not dissolve an English marriage which the English law declared to be indissoluble, still he should contend that this was not properly an English marriage, and was therefore one that they could deal with. But first, as to the domicil of Mr. Lindsay, if he went to Durham for the special purpose of educating his children, even though he took with him his whole family, he did not acquire a new domicil, as he did not go there *animo remanendi* but *animo revertendi*, and this brought the case within the reason of Lord Somerville's. Besides, the question of *forum* was not exclusive; and though it were admitted that he acquired a new one, it did not therefore follow that he lost his old *forum*.

With respect to the marriage, it was performed by the Chaplain of the 73d regiment, which is a Scotch regiment. The Chaplain was probably a Clergyman of the Church of Scotland, and, it was to be presumed, did not use the ritual of the English Church. It was therefore a marriage over which the Scottish Courts had jurisdiction. But it was said, that the marriage took place within the pale of the English law. Why, then, it could not be a good

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26th Geo. 2. c. 33.

English marriage, as the solemnities required by the Marriage Act had not been complied with, and the marriage had only become valid by the subsequent co-habitation in Scotland; so that it was in fact a Scotch marriage. As to the deed of separation, that only gave the wife liberty to live separate from her husband, but did not give a sanction to adultery, and therefore the adultery put an end to the deed as to the present purpose. It would be *contra bonos mores* to establish a different rule. Then the wife was a proper object of the suit; and, if she was, her husband's forum was her's. The case of *Pirie and Lunan*, was a strong authority for this; the wife and husband being there domiciled in England, (but the wife still following his original forum.

Mr. Brougham (on the same side). He would state the reasons why he thought that the question of indissolubility had no place here. The marriage was not celebrated in such a way as to make it a good English marriage; and it only became such, or rather the marriage was altogether constituted in Scotland, by the parties living there together, and being habit and repute man and wife. It was therefore a Scotch marriage, and the rule which governed Lolly's case, that an English marriage was indissoluble, had nothing whatever to do with the present question. But suppose this were an English marriage, their Lordships were there sitting as a Scotch Court, and must decide according to the law of Scotland, and not be governed by the decisions of foreign judges and the rules of a foreign law, for such the English law was as to this purpose. The Scottish Courts below had, since the decision of

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the English Judges in Lolly's case, repeatedly confirmed their own judgment upon long and elaborate argument. If the decision in Lolly's case were cited in the Court below, what would be the answer? That it was a case of foreign law: that the opinion of the English Judges was intitled to great weight by way of illustration, but that it was no authority. Their Lordships sitting there as a Scotch Court could not judicially even know that an English marriage was indissoluble, except the fact were averred on the record, and proved. There was here no such averment. The same observation applied to the deed of separation. He need not argue what was the effect of a deed of separation according to the law of England; because, if that was intended to be relied upon, it ought to have been pleaded and proved. They treated these points on the other side as matters of law, whereas here they were matters of fact, and ought to have been proved.

But this case did not at any rate come within the decision in Lolly's case, of which he had a note taken by himself at the time the judgment was delivered; the judges "were unanimously of opinion upon the points reserved, that a marriage solemnized in England was indissoluble by any thing, except an act of the legislature." Now it was one thing to say, that such was the law in regard to marriages solemnized in England, and another to say that the same law was applicable to marriages contracted in the colonies. By the 26th of George the Second, c. 33, certain solemnities were strictly required to constitute a marriage; but these were not necessary in the colonies, and it was offered to be proved in this

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case, that the most material of them had not been complied with. Granting then for a moment, that the decision in Lolly's case could be judicially noticed here, it did not apply, as it only related to marriages solemnized in England. At all events, no lawyer in the Scottish Courts had ever questioned their power to dissolve an English marriage, and their Lordships therefore would be cautious how they broke in upon what had always been considered as the legitimate power of the Scottish Courts.

His friends on the other side, however, had confined their observations chiefly to two points. 1st, That the Respondent's domicil was in England. 2d, That even if he were domiciled in Scotland, the deed of separation had given the Appellant a distinct domicil. In regard to the domicil, he contended that Major Lindsay was domiciled in Scotland, and not in England, and cited the case of

5. Ves. 750. *Somerville and Somerville*, where the Master of the Rolls, who decided it, relied chiefly on the *forum originis*. Lord Somerville without being a Peer of the British Parliament, resided half the year in London; but the Master of the Rolls, as his connections, his estate, and his hereditary honours were Scottish, and as he returned to Scotland every year, and resided there the half of the year, decided that he was to be considered as domiciled in Scotland. So it was with Major Lindsay. He had for a time, for the purpose of educating his children, resided in England, but returned again to Scotland, which he always considered as his home, and he was heir to a considerable landed estate in that country. Taking it for granted, then, that his domicil

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was in Scotland, and that by the rule of law, the domicil of the wife followed that of the husband, the next question was, as to the effect of the deed of separation. By the Scottish law a deed of separation between married persons was revocable at the will of either party, and their Lordships being then a Scotch Court, must decide according to the Scotch law. By the English law, a deed of separation between husband and wife could not be revoked, but by the consent of both parties, (although that was taken for granted rather too rashly); but supposing it to be so, still their Lordships could not take notice of that doctrine, as it was contrary to the principle of the Scotch law of marriage; its validity, as a deed of separation irrevocable except by the consent of both parties, was confined to the territory of England. The Scotch Courts could not notice it as such; they knew no more of irrevocable deeds of separation, than they did of indissoluble marriages. Whoever appealed to the law of any particular country must be concluded by it; and the Appellant, by bringing forward this deed, appealed to the Scotch law. But it was quite out of place here on another ground; for the fact of its being irrevocable by the law of England was not pleaded below, and therefore no notice could be taken of it by their Lordships. By the law of England, however, the question of irrevocability did not appear to be clearly established, but it was at any rate clear, that by the law of Scotland, such a deed might be revoked at the option of either party; and here there was an express revocation by the husband. No case could be cited where the Scotch

Marshall and Rutton. 8 T. R. 545.

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Courts refused to sustain their jurisdiction to dissolve a marriage, merely because it had been contracted in another country.

Sir S. Romilly in reply. It made no difference in this case, whether the marriage was solemnized in England itself, or in a colony, where the laws of England prevailed. The point did not depend upon the marriage act; an English marriage was indissoluble by the common law. The question then was, whether an indissoluble English marriage could be dissolved by the Scotch Courts? and this brought it directly to the point in Lolly's case: their Lordships sat as a Scotch Court, it was true; but when they were called upon to decide a question of English law, they must of necessity take the English law into consideration. The case of Lord Somerville had no resemblance to the present. Lord Somerville kept an establishment in Scotland, and always resided there one half of the year. In the present case there was a total abandonment of residence in that country. But it was said, that this was for the purpose of educating his family. Suppose it were so, the abandonment was not the less complete. The argument on the other side went this length, that there could be no abandonment of a domicil in Scotland, if any reason could be assigned for leaving it. The case of a boy or young man at school or college was totally distinct from the present; he did not change his domicil, because he was still supposed to form a component part of his father's family. The case of Sir Charles Douglas was also in point, and was in some respects stronger than the present. With respect to the deed of separation,

Bingham and Trustees of Sir Charles Douglas, 1794.

they did not contend on the part of the Appellant, that it made her *a feme sole*; they only said, that it expressly provided that she should have a separate domicil if she chose. *Mr. Brougham* said that the deed was clearly revocable by the husband, without the consent of the wife; but he did not know where *Mr. Brougham* found that law. It was directly the reverse, except the husband's object was to revoke for the purpose of residing with her, and even then he could only revoke when there was no just cause of separation, such as harsh treatment, &c.; instead of being more revocable, it was less revocable by the law of Scotland, than by the law of England.

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Erskine, 105.

SECOND CAUSE.

TOVEY—*Appellant.*
LINDSAY—*Respondent.*

Sir S. Romilly and *Mr. Holroyd.* The only distinction in this cause was, that the acts of adultery were laid in Scotland, which the Appellant had transiently visited without residing so as to acquire a domicil. The only ground of jurisdiction that could be stated, therefore, was the *ratio delicti*, which amounted to nothing, as this was a civil action, not a criminal proceeding.

ACTS OF ADULTERY IN SCOTLAND.

Mr. Adam and *Mr. Brougham.* The judges had in the present case stated in their interlocutor, "that the Respondent was *confessedly* domiciled in Scotland." The deed of separation ought not to