

appeared that the wife was at the date of the marriage domiciled in Scotland, but the husband was *ratione originis* a domiciled Englishman. He had joined the Royal Scots Regiment in 1874, and after serving for a year with his regiment in Edinburgh, he there married his wife according to Scots form. The parties lived together as man and wife in Scotland for one year and two months, when he went with the regiment to Ireland. The desertion took place there. The pursuer had made every effort to find out where the defender had gone, but had not succeeded, and had now returned to reside with her friends in Scotland.

Proof was led, and the Lord Ordinary (ADAM) indicated an opinion that the evidence was sufficient to warrant decree of divorce on the ground of desertion, but desired to hear argument on the question as to whether in view of the defender's English domicile the Court of Session had jurisdiction to entertain the action.

The pursuer's counsel accordingly argued—It was settled in the law of Scotland that where the parties are domiciled in Scotland, if a husband desert his wife there, the latter is entitled to bring an action of divorce against him although he had subsequently acquired a domicile in a foreign country—*Hume v. Hume*, July 15, 1862, 24 D. 1342; *dicta* in *Jack v. Jack*, Feb. 7, 1862, 24 D. 467; *per* Lord J.-C. Inglis in *Pitt v. Pitt*, Dec. 5, 1862, 1 Macph. 116; and Lord Westbury, *ibid.*, 4 Macq. App. 627. The principle on which this depended was stated by Lord Deas in the case of *Jack v. Jack* to be “that the husband could not destroy the jurisdiction to entertain an action founded on desertion by the very act of desertion which constituted the ground of action.” If this was the true principle, then it was expedient to extend the application of the doctrine to this effect, that where the husband had deserted his wife, and had acquired, it might be, some domicile different from that of his origin, the wife should be entitled to appeal to the Courts of her own country for a remedy against the wrong. In France the law recognised that a husband could not by a change of nationality force a like change upon his wife so as to alter the rights of the spouses and the remedies for conjugal offences—see the cases cited in the *Journal du Droit International Privé*, 1876, p. 183, “Naturalisation;” and also the volume of the same for 1878, p. 165, under the same heading. In these cases the wife was held entitled to plead the law of what had been for a time the domicile of the marriage, and was now her own independent domicile. The law of America was to the like effect—*Fraser's Husband and Wife*, p. 1289; 4 Phillimore's Inst. Law, p. 349; Wharton's Conflict of Laws, sec. 224; Story's Conflict of Laws, sec. 229, note A. It had been decided in many cases in the Supreme Court of the United States that the wife may acquire a domicile different from her husband's whenever it is necessary or proper that she should have such a domicile, and in that domicile may institute proceedings for divorce although it be neither her husband's domicile nor the domicile of the parties at the time of the marriage or of the offence—*vide Cheever v. Wilson*, 9 Wal. 107; and cases collected in note 3 to sec. 224 of Wharton's Conflict of Laws. The principle was also recognised in England *vide* L. J. Brett in *Niboyet v. Niboyet*, 1878, 4 L.R. p. 14. To decide, then, against the

Scots jurisdiction would be (1) to allow the defender to found on his own wrong, which is against the policy and principle of the law in this and other countries; and (2) it would deprive the pursuer of her remedy for what has been proved in point of fact to be her husband's desertion. She cannot appeal to the English Courts for a remedy, because the law of England does not entertain actions of divorce founded on desertion alone, and she cannot follow her husband abroad (if he is there), as she is unable to find him.

The Lord Ordinary (ADAM) having heard counsel, dismissed the action on the ground that the Court of Session had no jurisdiction to entertain it.

In his opinion his Lordship said—“When the pursuer married the defender she voluntarily and knowingly cut off all connection with Scotland as a domicile. She married a man whose duties as a soldier demanded that he should follow his regiment wherever it went and whenever it went, either at home or abroad. This was only what he was bound to do. It cannot be said, then, that this is the case of both parties being domiciled in Scotland. The wife followed the domicile of her husband, which was English. I know of no instance in Scotland where such an extension as demanded by the pursuer's counsel has been made. There is really nothing to support jurisdiction here except the fact that the pursuer was a Scotswoman, and that the marriage was in Scotland. These two facts are not enough. I must therefore refuse to entertain the action on the ground of want of jurisdiction.”

Counsel for Pursuer—Forbes. Agents—Cuthbert & Marchbank, S.S.C.

Thursday, May 18.

FIRST DIVISION.

[Sheriff of Caithness-shire.

M'KIDD v. MANSON.

Sheriff—Process—Wakening—Effect of no Procedure within Year and Day from Diet of Compearance on a Summons.

Where a petition in a Sheriff Court was served, but no further procedure took place for more than a year and a day after the diet of compearance, *held* that the cause had never come into existence so as to be capable of being wakened.

James M'Kidd, farmer, Thurso, brought an action concluding for a sum of £65, being the sum contained in a bill against George Manson, farmer and builder, Thurso, the summons in which was served on the defender on 22d May 1880. The *inducia* were seven days, and the last diet of compearance was therefore 29th May. No defences were lodged, and no step whatever was taken by the pursuer till 7th June 1881, when a minute was lodged for him setting forth that the summons had been served on the defender personally, that no appearance had been entered, and that no procedure had been taken since the last-mentioned date, “so that the action has fallen asleep,” that the pursuer wished the action wakened, and craved the Sheriff to direct intima-

tion of the minute to be made to the defender and on the walls of Court. The Sheriff-Substitute, on 17th June, after intimation as craved, held the cause wakened. The defender lodged defences denying liability, and stating, *inter alia*—"The petition was not called within a year and day of its execution;" and pleaded—"The petition not having been called within a year and day of its execution could not thereafter be called, and it was incompetent to revive the action." Thereafter the Sheriff-Substitute allowed a proof of certain other articles in the defender's statement, and on appeal to him the Sheriff adhered, adding this note—"The *dicta* in *Aitken v. Dick*, 7th July 1863, 1 Macph. 1038, support the pursuer's contention that on execution this case became a depending action, and so could be competently wakened." Thereafter, after sundry procedure with regard to the competency of proof in the cause, the Sheriff-Substitute decerned against the defender in terms of the conclusions of the summons.

The defender appealed to the Court of Session, and argued—The cause was dead in consequence of its not having been called within year and day from 29th May, and could not be wakened. That was the rule as to the Court of Session at common law—*Drummond*, July 1708, M. 11,980; 2 Shand's Practice, 549; Ersk. Inst. iv. 1, 8. It was also the rule under the Act of Sederunt of 8th July 1831, sec. 3. The same was the rule in Sheriff Court practice—*Wilson's Sheriff Court Practice*, 113; *M'Glashan's Sheriff Court Practice*, secs. 1561 and 1562; *Maclaurin's Sheriff Court Practice*, 172, sec. 15; *Sheriff Court Act 1853*; *Cumming*, 12 Shaw 1261.

Argued for respondent—This was an "action" in the sense of the Sheriff Court Act of 1876 (39 and 40 Vict. c. 70), sec. 49, and it could therefore be competently wakened.

At advising—

LORD PRESIDENT—I do not think that there is any doubt that we must sustain this objection. It is a great pity that the case was allowed to go on after the objection was taken in the Sheriff Court, for the whole difficulty might have been got rid of by service of the action anew if the pursuer had seen his own interest at that time. The rule as to the effect of not calling a summons for year and day is, I think, perfectly fixed both in this Court and in the Sheriff Court. It is not disputed that it is fixed in this Court, and has been so from an early period. The rule is that after a summons is served, if it is not called within year and day from the last diet of compareance, it is at an end. It has no longer any existence, and the pursuer must bring a new action. A doubt has been raised whether the same rule exists in the Sheriff Court. The presumption is that this rule being a rule of practice equally applicable to all Courts, it applies to the Sheriff Court as well as to the Supreme Court, and in looking at the authorities we find that it is laid down by them without any distinction being made simply as a general rule of practice. Then if we look at the books of writers on practice in the Sheriff Courts, we find it laid down without hesitation by all these authorities. No doubt new regulations are from time to time introduced in the Sheriff Courts which are applicable to the raising and conducting of actions, and among other things rules as to the calling of and appearance in actions have been intro-

duced, but Mr M'Glashan states the rules thus (sec. 1561):—"Unless a summons was regularly executed within year and day of its date, and called within year and day of the date of compareance, the instance perished, and before the pursuer could again insist in his claim he must have brought a new action." That states the rule independent of all statute law. He then goes on:—"This rule appears applicable to the new form of process, though the mode of calling and entering appearance has been varied." In the next section (sec. 1562) we find what he means by the "new form of process," for he says—"The summons having been called (now enrolled) the same consequences do not result from delay, for the calling being considered a judicial step there is a depending process, which, although allowed to fall asleep, might formerly at any time within the years of prescription have been awakened, but will now be regulated by the limitation of three and six months and revival within the first-mentioned period," referring in that last sentence to the rules as to awakening which are contained in the Sheriff Court Act of 1853. The only other point that need be attended to is the argument which the respondent's counsel based on the language of the Sheriff Court Act of 1876, particularly of the 49th section of that Act. All that is necessary to be said upon that Act is, that it did not intend to introduce a new rule in this matter, and sec. 49 applies entirely to the mode of wakening causes, and the period at which they may be wakened, and not to the question when an action comes into existence and becomes a living process capable of being wakened. I can only say again that I regret that the case was allowed to go on after this objection was taken.

LOBDS DEAS, MURE, and SHAND concurred.

The Court recalled the whole interlocutors in the Court below, sustained the first plea-in-law for the defender (appellant), and dismissed the action.

Counsel for Petitioner—Rhind. Agents—Begg & Murray, Solicitors.

Counsel for Respondent—Lorimer. Agents—Hamilton, Kinnear, & Beatson, W.S.

Friday, May 19.

OUTER HOUSE.

[Junior Lord Ordinary,
Lord Kinnear.

WEIR AND OTHERS (BAIRD'S TRUSTEES),
PETITIONERS.

Expenses—Consigned Money—Lands Clauses Consolidation (Scotland) Act 1845 (8 Vict. c. 19, secs. 67 and 79).

A fiar of lands burdened with a liferent is not a person "having a partial or qualified interest only in such lands," in the sense of the 67th section of the Lands Clauses Consolidation Act, to the effect that money paid by a railway company for part of the lands and consigned in bank till the death of the liferenter requires to be uplifted under the authority of the Court.