1789. *February* 10. DAME ISOBELLA BRONSDEN *against* SIR THOMAS WALLACE.

FORUM COMPETENS.

A marriage celebrated in England between two natives of Scotland, residing in England *animo remanendi*, not dissoluble in the Scottish Courts.

[*Fac. Coll. X.* 105; *Dict.* 4784.]

ESKGROVE. The *forum originis* was never sustained in civil cases, excepting in the case of *Smart Tenant*, and that was decided on the specialty of the Scots at Campveer being subject to the laws of Scotland. The case is very different here. We are called upon to determine as to the constitution of a marriage celebrated in a foreign country, and of the committing of adultery in a foreign country. If a woman marries a Scotsman in England, she must know that she can obtain nothing on her husband's infidelity but a *separatio a mensa et toro*: had the parties ever come to Scotland, and cohabited there, and so established themselves married persons, action might have lain.

HENDERLAND. There are two questions here: 1. Whether Sir Thomas Wallace has a *forum* to be tried? 2. By what rule is the marriage breach to be tried? As to the first, I think that he has a *forum* here. The most eminent writers on the laws of civilized nations in Europe hold that, *ratione domicilii nativitatis*, there is a jurisdiction. A man, by leaving a country, does not say that he gives up all rights derived by marriage or blood. A judge, in this country, has a right to decide in the causes of natives. This is clear from the form of edictal citation, an extraordinary form, which proves that there is an inherent right of jurisdiction. The second question is, by what law must this case be determined? Marriage is a contract *juris gentium*: it must be celebrated in the form of the country where it takes place; but, having been once established, it must be judged of in the country where the party has a competent *forum*. Differences of opinion in religion may influence the law, and make a difference as to consequences.

GARDENSTON. Were this interlocutor to be altered, we should have a plentiful crop of divorces never heard of. [And why not upon cause shown?] I admit that there is here a *forum competens*. A man cannot disengage himself from his country, or from contracts entered into in a particular place. But Sir Thomas Wallace did not contract in this country, but in another place, and he has relinquished Scotland altogether.

MONBODDO. The question is, Whether ought the *forum originis* to get the better of the *forum domicilii* or *forum loci contractus*. The Roman law does not apply; for the edict of Caracalla made all the inhabitants of the empire citizens of Rome. This applies not to independent states.

SWINTON. I doubt whether the *forum originis* can have any farther effect than as to allegiance. Besides, the question of jurisdiction is foreign to this case. The form of marriage is municipal, and so are its consequences.

JUSTICE-CLERK. I never was clearer of any proposition than in the present case. The first question is, Whether Sir Thomas Wallace be amenable here? Different *fora* are treated of by all our lawyers. As to the *forum ratione delicti*, that is not good unless the man be here; for a man cannot be condemned in absence. *Forum domicilii* is a general *forum; forum ratione rei sitæ* only goes to the subject situated in such territory. *Forum domicilii* is a very uncertain thing, especially when a man does not fix his residence in any one place. *Forum originis* is the most complete forum of any; and there is no decision to the contrary. Suppose Lady Wallace had children, and Sir Thomas should deny his marriage with her, as the interlocutor now stands, she could not declare her marriage, or the *status* of her children. If Sir Thomas has a *forum* here, what is it which differences this case from many others. Wherever he has a *forum* he is convenable. It is said that the marriage was contracted in England; but what then? If that is a good objection, it would be good although Sir Thomas resided in Edinburgh or Glasgow. A declarator of a marriage contracted in England would be good here. But then it behoved the commissaries to try the question by the law of England. Does it follow that the dissolution of the marriage must be tried in England? No: the dissolution must be tried by the law of the place where the parties have a *forum*. What is a divorce? It is an *actio injuriarum*. If a man should beat his wife in Scotland, could he plead, I was married in England, and therefore am not answerable at any instance in a Scottish court? The same is the case as to an action for aliment. If a marriage be once established, it must have effect everywhere. It is impossible to bring an action against Sir Thomas Dunlop, in Doctors' Commons, for he has no *forum* in England; and, without a previous process in Doctors' Commons, there can be no bill for divorce brought into Parliament.

PRESIDENT. It would be dangerous were this interlocutor altered. Some of the judges do not seem to see all the consequences of a different judgment. [I for one never could see them. Adultery, by the law of God, dissolves marriage; and it is difficult to understand how such a contract as that of marriage should, contrary to the nature of all other contracts, subsist while one of the parties breaks bargain. There is here some root of superstition remaining. Sir Thomas Dunlop is the only Scotsman, within my memory or knowledge, who ever abjured his country voluntarily, and without the fear of the gallows before his eyes; and yet, should his mother die to-morrow, he would then become a Scotsman, and petition the sovereign to order the proper measures for ascertaining his descent and his right to a good estate in Scotland. That a man should abjure his own country, without asserting that he belongs to any other country, is a thing of which I never heard an example.] The *forum ratione originis* is the least founded of any,—to say that a person being dropt here becomes a Scotsman. [This is most illogical, to argue from what very rarely happens to what happens every day. Could it be shown that, in general, men who beget children in Scotland, and women who bear them, have no purpose of forming or of maintaining a connexion with Scotland, I should then suppose that such a dropt child might find a law and a sovereign elsewhere. But this is to suppose that we are a nation of vagabonds, without house or home.] The sovereigns of feudal states have extended this principle to matters of treason. [Such sovereigns did not extend the principle,—they found it: and if we look back

to times before the establishment of feudal states, we shall find the notion of one's native country stronger without compulsion than it could be in feudal states upon compulsion or contract.] The *forum originis* has the effect of founding an action, should the party ever come into Scotland. [A very weak effect; for then the *forum domicilii* would generally serve the purpose of the *forum originis*.] Here is a *quæstio status*, to be governed by principles totally different from the *forum originis*. We are not here speaking of a Frenchman and a Frenchwoman, but of two persons subject to the same sovereign. In order to found her action, she produces evidence of her marriage in England; and she concludes, that, on account of the adultery of Sir Thomas Wallace, she should be divorced from him. Protestant states admit of divorce for adultery or wilful desertion. In England, such divorce can only be obtained by Act of Parliament. People who marry in England must lay their account with being tied together for life, unless a divorce can be obtained by Act of Parliament. What Lady Wallace asks is what no woman in England can complain for not getting.

On the 10th February 1789, "The Lords remitted to the commissaries to dismiss the action;" adhering to their interlocutor, 9th August 1788.

Act. Henry Erskine. *Alt.* R. Blair.

Diss. Alva, Justice-Clerk, Henderland, Hailes, Ankerville, Dunsinnan.—[Dreghorn did not vote, having not read the papers, as being of the Outer House, second division, by Act of Sederunt, but he inclined to the interlocutor.] This question was carried by the President's casting vote; and the more I consider the case, the more I am satisfied that the judgment is erroneous.

1789. *February* 15. ROBERT COLT *against* GEORGE WADDELL.

GENERAL ASSIGNATION.

Disposition of all sums of money due by bond, does not comprehend those due by heritable bonds.

[*Fac. Coll. X.* 111; *Dictionary*, 5,022.]

HAILES. Mr Waddell improperly affects ignorance of the relation of Mr Colt to the testator; and still more improperly insinuates that Oliver Colt was an *heredipeta*. One might imagine, from Mr Ross's information, that Oliver Colt gave Garturk a good dinner once a-week, whereas they lived at a great distance from each other, and had very little communication. Such liberties ought not to be taken. It seems impossible that wadsets and adjudications, rights of property, can fall under a clause where *bonds* is the leading word. But I doubt how moveable bonds should be comprehended under the generality, and not heritable bonds also?

SWINTON. I had great hesitation in pronouncing this interlocutor; but I chose to follow the precedents of the Court. I think that wadsets do not fall under the clause; but may not adjudications come under the word *decreets?*