

1796. *March 8.* MARY PIRIE and her Attorney *against* ANDREW LUNAN.

No 104.

The Commissaries are competent in an action of divorce, where both the pursuer and defender reside in England, they being natives of Scotland, and domiciled there at the time of their marriage.

IN 1773, Andrew Lunan and Mary Pirie, both natives of Scotland, were married in Aberdeen, where they resided for some years.

Lunan afterwards settled in London, and carried his wife there; but he soon after deserted her, and connected himself with another woman, whom he brought on a visit to Scotland in 1794. After residing some months at Stonhaven among his friends, he returned with her to London.

Mary Pirie, who, after her husband's desertion, continued to reside in London, having brought an action before the Commissaries; they, 'in respect that the domicile, both of the pursuer and defender, is situated in London, and that the facts founded on in the libel, as inferring the defender's guilt of adultery, are stated to have happened there, dismissed this action as incompetent.'

A bill of advocacy against this judgment having been refused by the Lord Ordinary, the pursuer, in a reclaiming petition

Pleaded; As both parties are natives of Scotland, the jurisdiction of the Commissaries is competent *ratione originis*; Ersk. p. 30. § 19.; Galbraith, No 2. p. 4430; 8th December 1626, Blantyre against Forsyth, *voce* FORUM COMPETENS; July 1747, Anderson against Hodgson, *IBIDEM*; 27th June 1760, Hog against Tenent, *IBIDEM*; especially as Scotland was also the *locus contractus*, and the country where the parties, at the time of the marriage, intended to remain; a circumstance which materially distinguishes this case from that of Brunsdone against Sir Thomas Wallace, 9th February 1789, *voce* FORUM COMPETENS. Indeed, the object of the action being to dissolve the marriage, it can come before no Judges so properly as those of the country where it was contracted.

The Court, 15th December 1795, appointed the petition to be answered; and as the defender had hitherto made no appearance, they at the same time ordered it to be intimated to him personally in London.

A certificate, by a notary, of its regular intimation to Lunan was accordingly produced; and no answer having been given in, the Court advised the petition *ex parte*; when it was

Observed on the Bench; Even in the case of Sir Thomas Wallace, where the marriage took place in England, the Court were much divided in opinion; and the propriety of the decision which was given in it may be doubted, especially as Sir Thomas, at the period of the action, had no residence in England, more than in Scotland, but was living in France. In this case there can be no harm in allowing the action to proceed, and decree to be obtained in absence; *valeat quantum valere potest*.

The Court remitted to the Commissaries to proceed in the action. *See* FORUM COMPETENS.

Lord Ordinary, *Justice-Clerk*.
R. D.

For the Petitioner, *Williamson*. Clerk, *Home*.
Fac. Col. No 210. p. 496.