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.

May 24, 1813.

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

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

May 24, 1813.

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

stand in the way of the jurisdiction; as this, he repeated, would be giving a sanction to adultery. This action was partly criminal as well as civil, and, as was the custom in such cases, the Procurator Fiscal was a party.

Sir S. Romilly insisted that it was merely a civil action, he did not know what the judges meant by saying, that the Respondent was *confessedly* domiciled in Scotland, as no such confession had been made on the part of the Appellant.

Several authorities not particularly dwelt upon at the bar, were stated by the *Respondent in his case*, viz. To show that the *forum* of the wife must follow that of the husband, Cod. lib. 10. tit. 39. sec. 9.—Voet. lib. 23. tit. 2. sec. 40. lib. 5. tit. 1. sec. 101. —Stair, b. 1. tit. 4. sec. 9.—Ersk. b. 1. tit. 6. sec. 19.

As to the effect and revocability of a voluntary contract of separation, Voet. lib. 24. tit. 2.—Blackstone, b. 1. c. 16. v. 1. p. 457. 8vo.—Ersk. b. 1. tit. 6. sec. 30.—Fac. Coll. v. 10. No. 44.

To show that the Respondent had a competent *forum* in Scotland, Ersk. b. 1. tit. 2. sec. 19. p. 20. —*Galbraith v. Cunningham*, Nov. 15, 1626.—*Lord Blantyre v. Forsyth*, Dec. 6, 1626.—*Anderson v. Hodgson and Ormiston*, July 1744.—*Hay v. Tenant*, June 27, 1760.—Voet. lib. 5. tit. 1. sec. 98. lib. 5. tit. 1. sec. 92.—lib. 5. tit. 1. sec. 99.

June 9, 1813. Judgment. The two causes involve points of the greatest importance.

Lord Eldon, (Chancellor,) solicited the particular attention of their Lordships to the facts of these two appeals, as they involved points of the greatest importance. In the first of them the Appellant stated,

June 9, 1813.

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

that she had been born and educated in England: the Respondent controverted that; but the fact did not either way appear to be material in this case. It seemed beyond all doubt that Lindsay was domiciled in Scotland, till he went to Gibraltar, where the marriage took place. Mrs. Tovey and Major Lindsay differed too as to the manner in which the marriage was solemnized. She asserted that it was solemnized according to the rites of the Church of England; while on his part it was said that the marriage was performed after the manner of the Scottish Church, by a person not in Holy Orders, according to the English requisites for that purpose. He, therefore, insisted that it was a Scotch marriage; she, that it was an English marriage.

From the time of this marriage, which took place in or about the year 1781, till 1792, Major Lindsay continued to be considered as a domiciled Scotchman. In 1792, having before retired from the army on half-pay for a time, he went to Durham, as he said, for the education of his children; formed an establishment there, and resided, or at least kept his family in that place till the year 1803. The question then was, Whether Major Lindsay had, by this means, lost his original domicil, and acquired a new one? and he confessed that he appeared to him to have been so much established at Durham, that if he had died in 1802, he should have felt no hesitation in saying that he had been a domiciled Englishman. Then an English deed of separation was executed between the parties; and afterwards, upon the ground of alleged misconduct in the Lady, he commenced a suit of divorce against her,

The Respondent had become a domiciled Englishman.

June 9, 1813.

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

and there the Court granted divorces, not *a mensa et thoro*, as in the case of the courts in this country, but *a vinculo matrimonii*. The Lady declined the jurisdiction, but the Commissaries refused the defence, and the matter was, in the usual way, brought before the Court of Session, who affirmed the judgment of the Commissaries, and found the letters orderly proceeded in, and from this decision of the Court of Session she appealed.

First cause. Statement of the summons and observations.

Their Lordships would observe, that the allegagations in the summons were very loose. The Procurator Fiscal was a party, and this fact deserved attention, because an argument was founded upon it at the Bar; the circumstance of his being a party having been relied upon, as evidence to shew that this was, in some measure, a criminal procedure. Their Lordships would observe, that the summons merely stated the fact of the marriage, without specifying the place where, or the form in which it had been solemnized. And then the summons went on to state, that the parties were reputed man and wife, in Scotland; with a view to lay the foundation for the argument, that the marriage was completed only by their living as man and wife in Scotland, and that it was therefore a Scotch marriage. Here it ought to be observed, that it might be one thing to say, that being habit and repute man and wife, should be evidence of a marriage,—and another thing to say, that it should be held as constituting, or admitted as incontrovertible proof of, a marriage, even though it should be shewn that there was in fact originally no marriage. Here it must be taken that the parties were married abroad. The summons then

stated the cohabitation, and laid the acts of misconduct as being *committed in England*, to which, in his opinion, the allegation was substantially confined; and it then concluded in the usual manner of summonses of divorce in Scotland.

June 9, 1813.

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

Afterwards there was a supplementary proceeding; he did not very well know whether or not it could be called a new action, imputing to the Appellant adulterous practices in Scotland; and this seemed to have arisen from an idea, that it might produce a different result from the action laying the acts of adultery to have been committed in England.

The second action appeared to proceed upon an opinion of insufficiency in the first.

The wife pleaded, that she resided in England; that she was separated from her husband under an English deed of separation agreed upon by both parties; and that, as the marriage took place abroad, within the pale of the English law, the *locus contractus* was quite out of the question: that she was residing in England at the date of the citation, which, as usual, in cases of persons residing in foreign countries, was made at the Market Cross of Edinburgh, and pier and shore of Leith. She concluded by protesting her innocence.

An answer to this was given in, stating that the pursuer was born and domiciled in Scotland; that it was a Scotch marriage; and that the deed of separation was no bar to the suit. The defender, herself, it was alleged, had said that the marriage was informal; but it was nothing to the purpose what she said or thought; the question was—what was the fact?

March, 1806.

Now, if the first of these actions could be supported, and if the marriage was an English one,

If the first action can be supported, &c.

June 9, 1813.

WHETHER A SCOTCH COURT HAS JURISDICTION TO DISSOLVE AN ENGLISH MARRIAGE? the Scotch Court may, solely on the ground of origin, absolutely dissolve an English marriage: the actual domicil of both parties being also in England. The question had assumed a more serious aspect since this case was before the Judges below. Lolly's case. The consequences must be of the most serious nature.

and the Respondent was domiciled at Durham, and he had not subsequently changed that domicil, then the decision must go this length, That the Scotch Courts, founding their jurisdiction on the original domicil of the husband, could divorce *a vinculo matrimonii*, though the marriage was English, and the actual domicil of both parties was in England. The question, at the time it was before the Judges below, had not assumed so serious an aspect as it since bore. The twelve Judges of England had lately unanimously decided, that an English marriage could not be any where dissolved except by act of the Legislature. If then the present marriage was a good English marriage, the subject would deserve great consideration upon this first cause. The consequences must be of the most serious description to the lieges; and yet it appeared they still adhered in Scotland to their former doctrine on this subject. But, if they had not in the present case given all the attention to it which its magnitude deserved—and if the question, since they had it under consideration, had assumed an aspect so much more serious than before, it was proper that their Lordships should have the benefit of the amplest consideration that could be given to it in the Court below, before they should be called upon to come to a final decision.

Second cause.

Now, as to the second cause, Major Lindsay instituted a new suit, if it might be so called, against the Appellant, in 1810, for acts of adultery, alleged to have been committed in 1807, in Scotland, where she, as she alleged, had only been transiently, without any regular residence. In looking at the decision of the Court of Session upon this point, it

One ground of decision by the Judges be-

June 9, 1813.

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

would be found that one ground of it was, that the Respondent was then CONFESSEDLY domiciled in Scotland. Now, where the Court got that fact he did not know, for it certainly did not appear on the face of the papers produced. The Appellant insisted, that the Respondent had only gone to Scotland while in the commissariat department, so that being in his Majesty's service he had not changed his English domicil. But, at any rate, he had not changed it at the time of the alleged acts of adultery.

low was, that the Respondent was then confessedly domiciled in Scotland. But he had not changed his English domicil.

Here then was a case in which both parties were domiciled in England, and then the husband went to Scotland, where it was said he had a domicil by reason of origin and his being heir of entail of an estate there, and instituted a suit against his wife, which she said did not affect her in England; and, if his domicil was at Durham, the answer would be sufficient, though the rule of law should be admitted, that the domicil of the wife followed that of the husband. But if the jurisdiction by reason of the original domicil could be maintained, it would be attended with the most important consequences to the law of marriage. The decision in the second case appeared rather singular, when connected with the decision in the first. They stated as a main ground of the judgment in the second cause, that the Respondent was *confessedly* domiciled in Scotland, and that therefore they had jurisdiction, which appeared to imply a doubt whether they had jurisdiction in the first cause. If the first cause could be supported, there was no occasion for the second. But suppose the Respondent were domiciled in

One ground of their judgment in the second cause implied a doubt as to their jurisdiction in the first.

June 9, 1818.

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

Effect of the deed of separation.

Scotland at the time of the alleged acts of adultery there, the question still remained, whether in 1810 he could institute a suit against her with effect, unless she had changed her *forum* likewise, merely upon the ground of the fiction which had been stated. This was a question of the very highest importance.

Then with regard to the deed of separation, even if the fiction or rule of law were admitted that the *forum* of the wife followed that of her husband, so as to give jurisdiction to the Scotch Courts in this case, the effect of the deed must be to put an end to that rule or fiction till the deed was revoked. He himself had agreed that their *forum* should be different, if his wife so pleased; and then he endeavoured by this process to get rid of the effect of his own agreement. Under these circumstances, remembering all that had passed relative to this question, since it had been before the Courts below; and considering the very serious effect that the decision might have upon the civil relations of families, and even upon questions of property, he thought the best step that could be now taken, would be to desire the Court below to review its own decision. And availing themselves for this purpose of the provision in the act for dividing the Court of Session into two Courts, they would probably think it right, not only to remit these causes, but to desire the opinion of the whole Court upon them, in order to have all the light which they could possibly derive from that source.

Lord Redesdale agreed that the subject deserved

much more consideration than they could well give it with the limited information now before them. He could not conceive why the second suit had been instituted, if the grounds of the first were good. The second appeared to proceed upon the supposition that the ground taken by the first was untenable. This case was a most important one, not only with a view to marriage itself, but with a view to contracts relating to it. Upon this ground of original domicil, and the fiction that the wife's domicil followed that of her husband, they had proceeded to judge according to the Scotch law, not only of the marriage but of the deed of separation.

June 9, 1813.

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

The case most important, not only with a view to marriage itself, but also to contracts relating to it.

The marriage took place at Gibraltar; and the question, whether it was valid or not, must be decided by the law of England, as applicable to Gibraltar. The deed of separation too was English, and ought to be judged of by the law of England, and the ground upon which it had been held to be revoked, was therefore unfounded. But as to the fact respecting the domicil, if the Appellant's statement was correct, the domicil of the Respondent was in England, and therefore the ground of the judgment of the Court below failed, for the *ratio domicilii* had no place in this instance, and could give no ground of jurisdiction.

The question as to the validity of the marriage must be decided by the law of England, as applicable to Gibraltar.

The Respondent domiciled in England, and the Scotch Court could have no jurisdiction, *ratione domicilii.*

An attempt had been made at the bar, to found an argument on the *ratione delicti,* by stating, that the Procurator Fiscal was a party, and that this must be considered as partly a criminal suit. This point, however, had never been considered at all by the Court below, and the mistake at the bar seemed to have arisen from the supposition that the commis-

No foundation for the jurisdiction *ratione delicti.*

June 9, 1813.

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

sary Court of Scotland was more like our Ecclesiastical Courts than it really was. The Commissary Court in Scotland he believed was entirely a civil Court.

When it was considered that, on the principles of this decision of the Court below, any one from any quarter might go and establish a domicil in Scotland, and by that means, even in the face of a deed of separation, draw his wife to a Scotch *forum* and proceed against her for an absolute dissolution of the marriage, the question must appear to be one of the very greatest importance. If this were to prevail, any person had it in his power to alter the nature of his most solemn engagements. The wife might say that such was not her contract, and if this were held not to be a sufficient answer, the Court below might, on the same principle, judge all other contracts by their own law, as well as that of marriage. A more important case could not possibly be offered to their Lordships' attention. The principle might involve the relations of families and the ownership of property to an unknown extent in both countries. The case ought, therefore, to be considered dispassionately, without partiality or prejudice either on one side or the other; but solely with a view to what was necesssary for the purposes of justice: and it could not be just that one party should be able at his option to dissolve a contract by a law different from that under which it was formed, and by which the other party understood it to be governed.

On the principle of this decision, any one might alter the nature of his most solemn engagements.

The causes were accordingly remitted for review, generally, upon the whole matter.

TOVEY AND LINDSAY.

June 9, 1813.

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

June 18, 1813.

Lord Eldon (Chancellor). He had before stated some important features in this case, which rendered it proper to send it back for review—more particularly as it introduced, or might introduce, that extremely important question which had been lately under the consideration of the Judges here, relative to the effect of a Scotch divorce on an English contract of marriage; and as this question arose in both cases, he thought it right to remit both. The cases, in fact, embraced a variety of important questions, and it would be desirable to have the deliberate judgment of the Court below on all of them.

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FROM SCOTLAND.

WIGHT—*Appellant.*

DICKSONS—*Respondents.*

LEASE of lime-works, with stipulation on the one side to furnish, and on the other side to take, a certain quantity of coals from particular collieries. The full quantity not raised by the lessor from the collieries in question.—The lessee cannot, on account of this failure, resort to other collieries for the whole of what he requires, but only for the quantity he may want beyond the supply from the particular collieries.

Feb. 22, 1813.

CONSTRUCTION OF A LEASE.

SIR JOHN DALRYMPLE, of Cousland, desirous of making the minerals on his estate subservient to each other, granted a lease to the Respond-