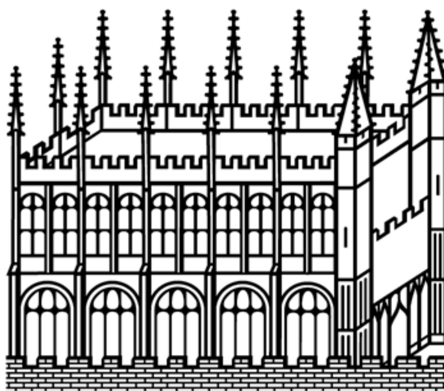

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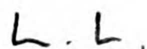
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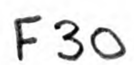
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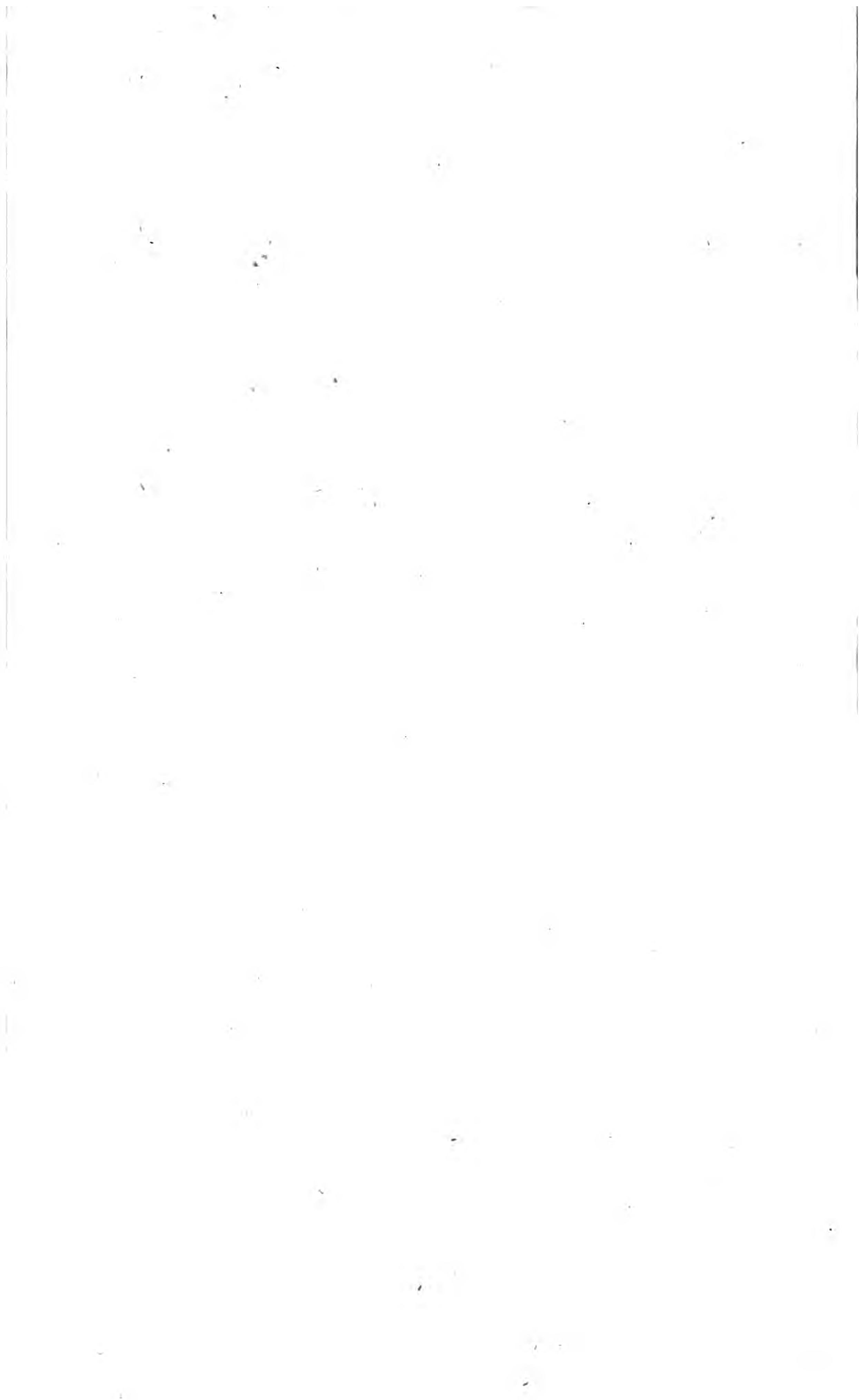
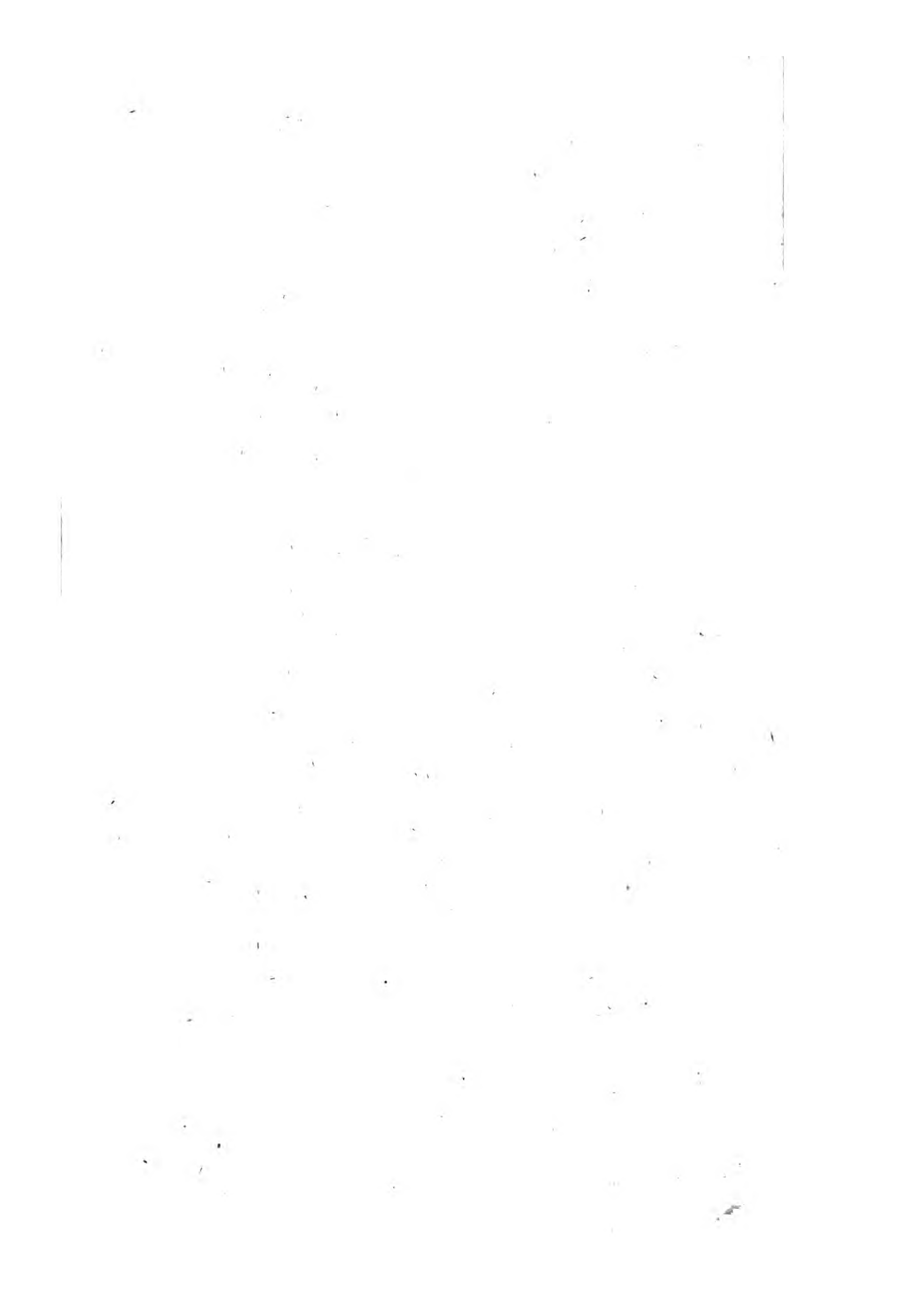




# REPORTS

OF SOME

# RECENT DECISIONS

BY

## THE CONSISTORIAL COURT OF SCOTLAND.

8°. B.S.
P. 187

Ut curiæ de jurisdictione digladientur et conflictentur, humanum quiddam est; eoque magis quod per ineptam quandam sententiam (quod boni et strenui sit judicis ampliare jurisdictionem curiæ), alatur plane ista intemperies, et calcar addatur, ubi fræno opus est. Ut vero ex hac animorum contentione curiæ judicia utrobique reddita (quæ nil ad jurisdictionem pertinent) libenter rescindant, intolerabile malum, et a Regibus, aut Senatu, aut Politia plane vindicandum. Pessimi enim exempli res est, ut curiæ, quæ pacem civibus præstant duella inter se exerceant.

*De Augmentis Scientiarum*, Lib. 8. Cap. 3.

Printed by George Ramsay and Company,
Edinburgh, 1817.

# REPORTS

OF SOME

# RECENT DECISIONS

BY

**The Consistorial Court of Scotland,**

IN

## ACTIONS OF DIVORCE,

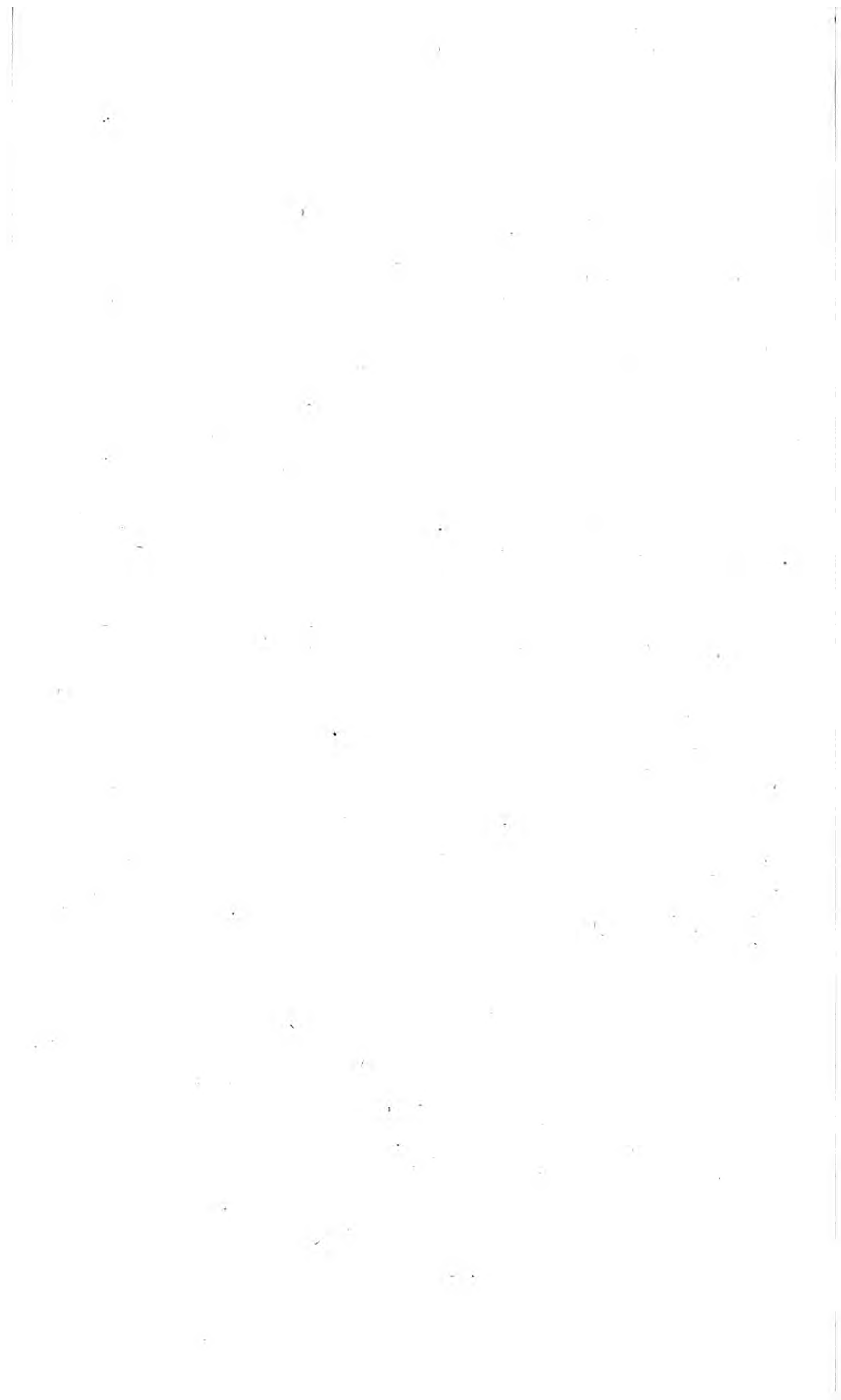
CONCLUDING FOR DISSOLUTION OF MARRIAGES
CELEBRATED UNDER THE ENGLISH LAW.

BY

JAMES FERGUSSON, Esq. Advocate,
ONE OF THE JUDGES.

EDINBURGH:
PRINTED FOR ARCHIBALD CONSTABLE AND COMPANY;
AND CHARLES HUNTER, BELL-YARD, TEMPLE-BAR,
LONDON.

1817.



# CONTENTS.

Pages.

INTRODUCTION, - - 1—22

Case of UTTERTON *against* TEWSH.

Question, Whether the jurisdiction of the Consistorial Court of Scotland is competent in an action of divorce between English parties, upon the ground that the defender has been cited and convened in Scotland ? - - 23—67

Case of DUNTZE *against* LEVETT.

Question, Whether divorce *a vinculo* should be granted, in conformity to the law of the Scottish jurisdiction, although the parties are English, and have been married in England, and retain their real domicil in that country at the date of the action ; upon the ground that the defender has been cited and convened in Scotland for adultery committed there ? - 68—167

Case of EDMONSTONE *against* LOCKHART.

Question, Whether the redress for adultery should not be restricted to separation *a mensa et thoro*, because the marriage had been celebrated in England, although the parties were Scotch, and had their only domicil in Scotland at the date of the action ? - - - 168—208

Case of BUTLER *against* FORBES.

Question, The same as in the case of Levett, but between Irish parties who had been married in Scotland, where the defender was likewise cited and convened during a transient residence, although the real domicil of both then was and had always been in Ireland. - 209—225

Pages.

Case of KIBBLEWHITE *against* ROWLAND.
Parties English, and married and domiciled in England, but defender cited upon action of divorce for adultery during a visit of less than two months in Scotland. Question, Whether divorce *a vinculo* should be granted? - 226—248

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## APPENDIX.

Series of precedents referred to in the Reports from the year 1691 to the year 1816, - 250—276

Notes of the opinions of the majority of the Judges of the Commissary Court upon the general question, printed by order of the Court of Review, in case of Gordon against Pye, 25th August 1815, - - - 277—362

Decisions upon questions as to collusion, - 363—376

Report for the Faculty of Advocates of decision of the Court of Session on the bill of advocation for Mrs Edmonstone, and first bills of advocation for Mrs Levett and for Mrs Forbes, 383—423

Statutes and precedents in favour of divorce *a vinculo* for adultery in Scotland before the Reformation, - - - 423—429

Second application of Mrs Levett for review, 430—436

Second judgment of remit by the Court of Session, - - - - 436—443

Canons as to divorce of the Roman Catholic church before Reformation, - 443—448

Laws of Protestant states, &c. as to divorce, 448—455

Practice of ecclesiastical judicatories in Scotland before Reformation as to separation *a mensa et thoro* for adultery, - - 455—462

Case in the year 1705 of divorce for adultery without conclusion or decerniture that the pursuer should be free to enter into a second marriage during the life of the defender, her first husband, - - - 428—431

Application for review of Mrs Rowland, - 466—469

Miscellaneous Notes referred to in the Text, 376—470

# INTRODUCTION.

THE Cases stated in the following Reports have been selected for publication, from notes taken in the ordinary course of judicial duty, because they seem to involve consequences of the greatest importance to the people at large in every part of this Empire.

By the rule of the English law, marriage cannot be dissolved for adultery by judicial sentence. The Consistorial Court of Scotland has this power. Hence an alarming collision between the respective judicatures of the two countries in the same island and state has arisen, which equally affects the sister kingdom of Ireland, and all the other British dominions.

Some idea of the nature of these cases may be given, by mentioning the general questions which they embrace. These are

Whether all who contract marriage under the English law, may have it judicially dissolved, upon proof of adultery, if the party accused shall be locally found in Scotland, and cited in an action of divorce before the Consistorial Court there? or, Whether a marriage, celebrated in any place subject to the rules of the English law, even by Scotch parties, is indissoluble in Scotland? or, Whether, by correct application of the principles of international law, a more just and convenient rule than either of these extremes may not be found, and the integrity of both municipal systems be preserved?

The task of reporting would not, however, have been assumed by the individual who now undertakes it, but under the belief that some further explanation is requisite of the proceedings upon these cases in the Primary Tribunal to which he belongs, than even a perusal either of its own record, or of the published decisions of the Court of Review, could furnish. There are, indeed, obstacles arising from the nature of the

causes and conduct of the parties in these, as well as other disadvantages, which must render the performance extremely imperfect. But publication has appeared to him unavoidable, and the authorities and examples of which it has the unqualified sanction, have been carefully weighed.

Lord President Stair, in the Preface to his Decisions, published near the close of the seventeenth century, mentions, that, in former times, the office of collecting the judgments of the Supreme Civil Court of Scotland, was regularly assigned to one of the Senators of the College of Justice. Accordingly, it is to reports by the Judges that our jurisprudence is chiefly indebted for useful precedents in the common law, previous to the date of the last collection published by Lord Kaimes in 1770. But of the decisions of the Scotch Consistorial Court there are no printed reports. They lie scattered through nearly 120 large folios of record, which are not even numbered, and to infinitely the greater part of which there is no index or guide whatever. There is no Institute of the Consistorial

law of Scotland. Neither does the practice of this law now form a separate profession to any individual. The solicitors of the Commissary Court are at the same time agents in the courts of common law. The advocates who plead in it are the counsel before the Supreme Civil and Criminal Tribunals. The Judges are of the same class, have no peculiar or preparatory course of education, and continue their practice at the other bars. However differently esteemed in former times,* such have

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* Lord Dirleton, himself originally a Judge of the Commissary Court, and then in the Court of Session, gives his idea of "the usefulness and necessity" of the former, in these terms: "The gravity and difficulty of matrimonial and testamentary "causes is so notour, and the favourable elogies of law "recommending thereby a circumspect, and, as it were, a re- "ligious handling of them, are so obvious and frequent, that "they need not be repeated: And it is certain, that there is "no subject debated either in the law itself, or in the large "volumes of the Doctors, with greater prolixity and subti- "lity, than the causes of marriages and testaments.

"It is to be observed from law and history, that, for "these reasons, matrimonial causes, and *publicatio et insinu- "atio testamentorum*, (which is with us the confirmation of "testaments,) were never entrusted to the lower sort of "judges, neither to the judges of great employment, about

been the circumstances of this judicature for a century past. The jurisdiction it exercises is likewise purely civil. No comparison, therefore, can be fairly instituted between the procedure in it, and that in the Consistorial Court of London, especially at the present period, when the latter tribunal has been raised to the highest celebrity.

Still, it is one consequence of this situation itself, that the members of the Primary Court here are perhaps the only persons who have means and leisure to communicate full information respecting a branch of our municipal system so little cherished; and it seems thus to be left with them either to withhold from the general view doctrines and precedents, which, by the obligations of their office, they alone are

---

"the decision of other civil actions, to be decided in a tu-
"multuary way; but by a considerate choice of judges, sin-
"gled out for these causes, it was provided, that neither the
"meanness of the judge, nor the greatness nor multitude of
"his other employments, should prejudge causes of so great
"gravity and importance."

Doubts and Questions in the Law of Scotland, p. 29, 30.

bound to make an object of constant study, or to publish these, when urgent occasions justify that endeavour to promote the improvement and advantage of the law.

In the prosecution of the present attempt, the plan proposed is, to select for the text of this volume a few cases which embrace the general points that have been recently agitated in the Consistorial Court of Scotland. From the date of its institution, in the year 1563, this Tribunal has possessed jurisdiction to dissolve the bonds of marriage on proof of adultery; and the evidence which exists upon the subject leads to the conclusion, that this power was then bestowed in conformity to a previous rule of law that had subsisted in this kingdom from the earliest period of which there is any record. It will further appear, from many precedents, that, till lately, no distinction was in general made between the cases of foreign parties or of foreign marriages, and those of Scotchmen married in their own country. But the alarming increase of the former instances led the Commissaries, in the year 1811, upon the

first case to be now reported, that of Elizabeth Utterton against Frederick Tewsh, to attempt a more deliberate mode of investigation than that previously in use, where the conclusion maintained was for dissolution of an English marriage; and they dismissed the action of the pursuer in that case, because her *Condescendence* * did not seem to allege sufficient grounds for holding that the defender had a domicil in Scotland at the date of the action, by virtue of which his *status* of husband became liable to be disposed of according to the municipal rule of the Scotch law. But the Court of Review, by interlocutor of remit, upon a bill of advocation, "Found, that, in this case, "the pursuer had condescended sufficiently on the defender's residence in "Scotland, to enable her to institute her "claim, in justice, against him before the "Commissaries, according to the dictates "of the law of Scotland, in the matter libelled;" and, therefore, directed them "to

* Statement of allegations according to the Scotch form of judicial process.

" recal the interlocutor complained of, to
" sustain the jurisdiction, and thereafter to
" proceed in common form, as to them may
" seem just." This deliverance was likewise accompanied by a full exposition of principles laid down for the direction of the Primary Court in future, by the late Lord Meadowbank, as Ordinary; which, from the deference due to the opinions of that learned Judge, as well as from obedience to the authority of the Superior Court, could not fail to command all possible attention and respect.

In particular, his Lordship there gave his opinion, that " the establishment of a
" domicil has no sort of connection with
" either the obligation to fulfil the obliga-
" tory duties of the domestic relations, or
" the competency of enforcing it:" which he illustrated by observing, that " a person,
" the instant he sets his foot in Scotland, is
" as much bound to maintain his wife and
" child, as after forty days residence there;
" and if he turned them out of doors desti-
" tute the first day he arrived, he is un-
" questionably as liable to be sued for ali-

" ment, adherence, &c. as if he had com-
" mitted this outrage and resided forty days
" in one house. If not found in person to
" receive a citation, a domicil is of conse-
" quence, but it is of no consequence in
" such a case, if the foreigner is cited in
" person, or his residence is sufficiently as-
" certained. The *animus remanendi* may be
" of great consequence to establish the pre-
" sumptions on which the distribution of
" succession in moveables is supposed to
" depend; but it does not seem to enter
" into the constitution of a domicil for ci-
" tation by forty days residence, nor form
" any requisite for the validity of a personal
" citation to an action for obtaining redress
" of civil wrongs, more than for punishment
" of a crime. Nor can those suits for re-
" dress which involve *quæstiones status* admit
" of any different consideration."

While following the course thus pointed out to them, the Commissaries, however, soon afterwards learnt, from the fate of the subsequent case of Lolly, that an Englishman, divorced by their sentence, might

be tried and punished for bigamy, if he married again in England. The opinions delivered in the House of Lords upon the case of Lindsay against Tovey, were also understood to hold the general question, whether an English marriage could be lawfully dissolved by a decree of the Scotch Consistorial Court, as at least open and doubtful; and the remit actually made by the Supreme Court of Review in that case, did accordingly direct this very question to be solemnly discussed in the Court below. But the death of the pursuer disappointed this object, and prevented a decision.

Upon the occurrence, therefore, of subsequent cases, of a similar description, the Commissaries were bound to resume the discussion of the general question. The cases of Edmonstone against Lockhart, Duntze against Levett, and Butler against Forbes, came to be in dependence at the same time; and are the first of this kind which have been decided by direction of the whole Court of Review. The first was a case of

parties in every other respect Scotch, who had been married in England. In the second, the parties were English, and had been married in England; and the case was brought before the Consistorial Court of Scotland, by citation of the defender, during a residence that had subsisted for a year and a half in this country, though apparently unfixed. And the third was one of parties married in Scotland, in which country also the defender received his citation, but both in every other respect Irish. Antecedently to the last judgments of the Superior Tribunal, upon the two latter of these three cases, that of Kibblewhite against Rowland came also to be in dependence. In this case, the defender received a regular citation, during a visit of a few weeks to Scotland; but both parties, and their contract and domicil, were, by the pursuer's own statement, not contradicted by any other evidence, exclusively, and in every sense, English.

In the Primary Court, a conclusion for divorce *a vinculo matrimonii* was rejected in all of these actions; two of the four Judges

being of opinion, in the *first*, that the *lex loci contractus* ought to govern; *—the other two Judges, in the *third*, that the *lex domicilii* should be preferred;—and all agreeing, as to the *second* and *fourth case*, that the principles of international law did not permit dissolution of marriage in opposition to the law, both of the contract and domicil; and that the provisions of the foreign law fell to be adopted, under such circumstances, as rules of justice in the administration of our own.

But the judgments of the Superior Court, upon applications for review, have been to proceed in the divorces according to the municipal rule of the law of Scotland, in all of these cases, and no appeal has been taken to the House of Peers. Consequently, every point which has been agitated, may now be held as settled by the competent authority; and a report of each of these four cases should be sufficient to complete the infor-

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* When the Division is equal, by the rule of Court, judgment goes for the defender.

mation proposed to be given upon the present state of the law. Unnecessary repetition, it is imagined, may be avoided by thus reporting no more cases than are requisite for a statement of the several questions involved.

The precise issues which came to be considered in these various cases by the Radical Court, may be distinguished as follows. In the *first* place, Is a citation, either given personally to an Englishman within Scotland, or left at his dwelling-place, after he has been forty days here, sufficient to subject him to the *jurisdiction* of the Consistorial Court, in an action of divorce for adultery? The argument upon this point will be found in the Report of the case of Tewsh, which is the first in this volume. *Secondly,* When England is both the place of the contract and of the permanent domicil of the parties, at the date of the action, can their marriage be dissolved by the Scotch Court, in an action of divorce, although it is indissoluble by judicial sentence in England? or, in other words, ought the rule of the law of England, or that of the municipal law of Scotland, to be adopted,

in such circumstances, as the ground of determination? This point will be particularly discussed in the Report of the case of Levett, and again occurs in the Report to be given in the case of Rowland. *Thirdly,* When England has been the *locus contractus,* will this circumstance bar the dissolution of the marriage, although the domicil of the parties has always been in Scotland? The argument upon this point will be found in the Report of the case of Edmonstone. *Fourthly,* Will the circumstance that Scotland has been the place of celebration, authorize the dissolution by judicial sentence, of a marriage between Irish parties, who have always had their real domicil in Ireland? The Report to be given of the case of Forbes contains the discussions upon this point.

A separate question, common to all of these cases, occurred, Whether, if dissolution of the marriage shall be refused, in respect either of the foreign contract or domicil, it is competent to give the inferior redress for adultery, of separate aliment and separation *a mensa et thoro?*

With regard to the proceedings in the

Court of Review, the Report of these by the learned Collector for the Faculty of Advocates has been adopted, and will be presented separately, in the Appendix, without alteration. All other decisions which have been referred to, and all authorities, or documents, which admitted of separation from the main issues, have likewise been annexed in notes at the end of this volume.

The reader will not fail to perceive, that the Judges in the Primary Tribunal have in these causes been obliged to struggle with difficulties of no ordinary kind. For there is but one instance, in all the actions that have been maintained before them for the dissolution of English marriages, where the *lex loci contractus* has been seriously pleaded by the defender; and not one where the *lex domicilii* has ever been really maintained at the bar. Indeed, all the parties, in all their pleadings, have, with the greatest anxiety, excluded from view a point, which, to the radical Court, has seemed extremely material, namely, Whether a distinction does not exist betwixt those circumstances which are necessary to found

*jurisdiction*, and those which determine whether the municipal or the foreign rule of law is to be applied? If this conduct has proceeded from a mutual wish of both pursuers and defenders, that the divorce should take place, it is evident, that they had a joint interest to suppress the objection arising from the want of a real domicil here, and they have certainly accomplished their purpose with singular ability and address. The same motives may also account for a fact, which, considering the nature of the interests at stake, and on the idea of any serious opposition having ever been in the view of the defenders, appears inexplicable, that no appeals have been taken in any of these important questions, to the tribunal of the last resort. This circumstance has, however, the effect of removing all doubts as to the propriety of publishing these Reports, the cases being no longer *sub judice*.

While the litigation was of this complexion, the objection of collusion was not overlooked by the Judges. But, by the law of Scotland, this objection could not be act-

ed upon in any case, without establishing, that the pursuer was, directly or indirectly, a party to the offence of collusion. If mere presence of the defender within this territory, and the fact of conjugal infidelity, must be held sufficient, both to found jurisdiction over a foreigner, by affording opportunity for personal citation, and to authorize the dissolution of a foreign marriage by decree of divorce, a husband and wife, who desire to have their bonds loosed in this manner, need no concert. It is enough if the one can ascertain the presence of the other in Scotland, and can prove the guilt. Besides, all are aware that a very solemn oath, purging the pursuer of collusion, must be taken *in initio litis*. To prepare for this test, the conduct of the parties will therefore be arranged beforehand, and it may be fairly presumed, that the oath *per se* can be of little avail as a check against fraudulent devices. On this account, the Commissaries, accordingly, did very anxiously endeavour to employ other means of inquiry; but, in doing so, it was decided by the Court of Review, that they had exceeded

their powers. Thus the result of the experiments they made only serves to confirm, by authority, the conclusions which arise from every other view of the subject.

These conclusions evidently demonstrate, that, unless the remedy in this judicature shall be limited, either to that which the *lex loci contractus* affords, or to that which the *lex domicilii*, taken in the same fair sense, as in questions of succession, might give, the public decrees of the only Court of Scotland which is competent to pronounce one in such consistorial causes, become proclamations to invite all the married who incline to be free, not in the rest of the British empire alone, but in all countries where marriage is indissoluble by judicial sentence, to seek that object in this tribunal. Adultery, and presence within our territory, are the only requisites to found the jurisdiction by citation. What numbers of foreign parties may accept such an offer, and may even commit the crime here for the very purpose of affording ground for the action, it is impossible to conjecture. But it is manifest, that, in exact proportion to their

number, injury to the morals of this country must follow; and, by setting at nought the laws of other nations, reproach must be brought upon our own. For all foreign parties, while matters stand upon this footing, have it in their power, with the help of evidence, as easily provided as it may be disgusting and impure, to oblige the Scotch Consistorial Court to entertain the whole mass of their foreign causes, although there is no fair interest to insist that the municipal law of Scotland shall decide these by its own peculiar rules. To what extent, therefore, the good order of society may eventually be disturbed by this compulsory abuse and pollution of its jurisdiction, in consequence of the doubts and contests that must ensue as to rights of legitimacy and succession, no calculation can be made.

Painful as is the predicament for a court of justice to be placed in, of being obliged to dissolve all foreign marriages, when jurisdiction merely has been constituted, although this shall be done in evident hostility to the law both of the contract and of the real domi-

cil of the parties; and, at the same time, of exposing all who, after marrying in any part of the empire, beyond the limits of Scotland, obtain divorce in this country, to the punishment of bigamy, in case they shall contract a second marriage under the English law; it is nevertheless manifest, that Judges, in no department, have power to go beyond that law which they are appointed to dispense. Remedial provisions are the concern of the Legislature.

The serious evils and dangers which must necessarily arise from this state of the law, both to the innocent offspring of parties, and to society at large, have been slightly adverted to. But they are evidently of such a nature and magnitude as must strike the most superficial observer, and excite general alarm.

In the relative situation also of Scotland to the sister kingdoms, it is obvious, that the delicacy, difficulty, and importance, of those legal questions which have been under review, are infinitely augmented by the complete political incorporation of all their subjects as one people, while the municipal

law of this country, as well as that of England, is, by its national compact of union, maintained in perfect sovereignty and independence. But the same arrangement has bestowed a Parliament common to the whole, which can, by statute, remove collision, and reconcile their different interests, whenever the slow and still feeble operation of international law, the sole mediator between the conflicting jurisdictions of unconnected States, is found to be insufficient for that purpose. Nor can it be doubted that, if the collision of independent laws and judicatures is really attended with consequences injurious in a high degree to the private but invaluable rights and interests of the people in the respective nations under its care, the work of adjusting these for the general good, as it is unquestionably not beyond the competency, so it will not be deemed beneath the wisdom, of the most enlightened legislature in the world.

To contribute information, however defective, upon matters of so great moment, and develope views, however imperfect, which may eventually lead to improvement

of the system, or even to a more full knowledge of the law, as it exists, seems then to be the duty of every one to whom the opportunity has been afforded, and certainly cannot be considered incompatible with the duties of a judicial station. According to the just and liberal spirit of the British constitution, indeed, such endeavours have been ever accepted as a service to the community; and, if he shall have reason to think that this object may be, in any degree, attained by the present compilation, the author will neither regret his anxiety and toil, nor can he be disappointed of his reward.

# REPORTS, &c.

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ELIZABETH UTTERTON, otherwise TEWSH,

AGAINST

FREDERICK TEWSH.

Oct. 25, 1811.

THE defender in this case was cited at Tranent, in the county of Edinburgh, on the 29th of May 1811, by personal service of a summons, in which the pursuer stated, that the parties had been married in England on the 22d of July 1790, and had cohabited in that kingdom till the beginning of the year 1806; but alleged that he had then deserted her society, and had afterwards lived in adultery with different women,

both in England and in this country; and upon these grounds she concluded, in the usual style, for divorce *a vinculo matrimonii.*

He appeared, and in defences admitted "that he has for some time past resided in "Scotland," adding merely as to the cause, "that he is under *the protection of the* "*Court;* and with that impression, *he leaves* "*the pursuer to adopt such steps as she may* "*judge proper.*"

The Commissaries apprehended collusion, and did not appoint the pursuer to depone *de calumnia,* and afterwards proceed to allow a proof of the defender's guilt, according to previous usage in cases where no objection to the action was maintained *in limine,* but gave this deliverance: "In respect that the parties appear to "be English, and that the marriage is "stated to have been an English contract, "before further procedure, appoint the pur- "suer to state, in a condescendence, the "grounds, both in fact and in law, on which "she maintains that this Court is compe- "tent to entertain her action."

July 12, 1811.

In her condescendence as to the "grounds

First Condescendence of Pursuer.

"in fact," the pursuer stated, that "the de-"fender was resident in Scotland *for more "than* 40 *days* before the present action "was raised. Several of the acts of adul-"tery charged in the libel were committed "in Scotland. He was personally cited "here. He has made appearance in the "action, and has given in defences *in causa*."

Hence it was assumed by her to "fol-"low in law, that the defender was subject "to the jurisdiction of this Court, first, *by "reason of his domicil;* and, secondly, by "having *prorogated* the jurisdiction of the "Court, if it had required prorogation."

The last of these propositions was held to be proved by the record. In support of the other, it was pleaded in this paper, "that foreigners *acquiring a domicil* in "this country, became equally amenable "to its laws as natives;" except as to actions affecting heritable property abroad, or concluding for punishment of crimes not committed within the territory of this king dom. In particular, it was observed, "that, "in all personal actions, all real actions with

" regard to moveables, and in all questions of
" *status*, jurisdiction arises from domicil
" alone, and falls to be sustained from the
" most obvious considerations of expediency,
" because access could only be had there to
" the defender, who must be amenable to
" the jurisdiction of the territory in which
" he is found."

As to what was termed " the doubt
" started by the Court itself," it was admitted, that, " if the law of England is
" to govern the case, adultery is no relevant ground for setting aside the marriage. But," it was observed, that, " if
" the law of Scotland is to be followed, the
" opposite conclusion is indispensable." And
it was contended, that, " while domicil created jurisdiction in questions of *status*, these
" likewise fell to be decided according to
" the law of the domicil where the act took
" place, out of which they originate. Thus
" the law of the *domicil of constitution*
" must determine as to the validity of a
" marriage, or the contract of a servant
" with his master, or the incapacities aris-

"ing from *infamia juris*, imposed by legal "sentence, but only so far as not incon- "sistent with morality or religion in the "territory to which the party removes."

Rights of personal *status*, in particular, which a foreigner imports, it was further pleaded, become subject to dissolution or alteration by the law of the *new domicil* to which he subjects himself. Here the right of the pursuer of this action to the *status* of husband resulted from the relation of marriage itself, and not from any express or implied covenant of the parties, like those contained in a deed of contract relative to patrimonial concerns. Although the law of England would afford the rule as to the interpretation and effect of an English patrimonial contract of marriage, the law of Scotland must dictate the remedy for violation, within this kingdom, of the duties of the conjugal *status* imposed by the relation of marriage itself. But even the patrimonial interests of the parties, in the event of the dissolution of their marriage by the death of one of them, without a deed of

contract, would be regulated by the law of the husband's domicil at the time. Thus, if spouses who had married in Scotland without a contract were to be domiciled in England at the date of such dissolution, by the death of the wife without issue, it could not be held that her executors might divide the goods in communion with the husband, by the rule of the law of Scotland, upon the presumption that it was the implied will of the parties, when they married, that the *lex loci contractus* should regulate all their patrimonial interests under that marriage.

In the next place, the right of prosecuting a divorce on the head of adultery, (it was said,) is a consequence of the pursuer's *status* as a wife, which she holds, independently of all contract of parties, which no stipulation in a contract of marriage can control or modify, and which must receive effect according to the law of the domicil. On this point, the following authorities of the Civil law were referred to, *Rodenburgius, De jure conjugum*, tit. 2. cap. 1. § 1. Joan a Sande, ad l. 9. De reg. juris, § 18. as to the

repetitio dotis, &c. Hertius, De collisione legum, § 4.

The law of England, too, was held to confirm this view. Because no divorce, by judicial sentence, had ever been granted in that kingdom, *a vinculo* of a Scotch marriage between Scotch parties, although domiciled in England, when adultery was committed by the one, for which the other sought redress, and because a Gretna Green marriage, by English parties, within the territory of Scotland, did not bestow the patrimonial rights of a Scotch marriage, along with the *status*; and, accordingly, in the case Ilderton *versus* Ilderton, reported by Henry Blackstone, 2 Ff. p. 145, the surviving wife of such a marriage did not obtain a Scotch terce, but an English dower.

The decrees of divorce, given by the Consistorial Court of Scotland, although the *locus contractus* had been within the territory of the English law, in the cases of Lindsay against Tovey, 26th January 1807, Lady Paget against Lord Paget, 12th October 1810, and Rogers against Wyatt, 28th June

1811, were referred to as proving that an English marriage might be dissolved here for adultery, if the defender had a domicil in Scotland when cited in the action.*

Answer by Defender to First Condescendence.

To this condescendence the defender answered, in obedience to an order of Court, so far as regarded the form of debate, by merely observing, that, "as the condescen-"dence for the pursuer has been prepared "and lodged in consequence of an order of "the Court itself, to enable the Commissa-"ries to deliberate on the competency of "the present action, it would be unbecom-"ing in the defender to interfere. He shall "therefore satisfy himself by stating, in an-"swer to this elaborate paper, his entire "confidence that the Commissaries will de-"cide this point of competency, agreeable "to law and justice. He therefore leaves "it with the Commissaries, remarking only, "that if the pursuer, on the one hand, be "entitled to discuss the merits of the action "which she has thought proper to institute,

* Appendix, Note (A.)

" he must, on the other, be equally entitled
" to bring forward and insist on all relevant
" and competent points of defence."

The deliverance of the Court upon these papers was, (August 21, 1811,) " The Com-
" missaries, having considered the conde-
" scendence for the pursuer, and whole pro-
" cess, in respect there are no circumstances
" condescended upon to shew that the de-
" fender is in this country *animo rema-*
" *nendi*, and that he has formed a real and
" permanent domicil here: Find the con-
" descendence insufficient to establish the
" competency of the Court to entertain the
" present action, but allow the pursuer to
" give in an additional condescendence,
" stating all facts and circumstances tend-
" ing to prove that the defender has come
" to this country *animo remanendi*."

The pursuer, as the terms of this interlocutor imply, hearing the opinion of the Court, had offered an additional condescendence, upon the ground that the meaning of the Court had been mistaken,

when the paper which had been under consideration was framed. In that pleading, the presumptive domicil only had been alleged, which is founded upon 40 days residence, and affords opportunity to constitute jurisdiction by citing the defender at his dwelling-place, only had been alleged, whereas the Court had now signified that they required evidence of the real domicil at the date of the action. Accordingly, an additional condescendence was lodged by the counsel for the pursuer, in which she alleged,

" I. That the pursuer and defender were " married at Waltham, Holy-cross, in the " county of Essex, on the 22d day of July " 1790. They lived happily together, as " man and wife, for several years, during " which time they had two children, both " of whom are since dead.

" II. After their marriage, the parties " lived for some years at Chingford, in the " county of Essex, and afterwards at Ches- " hunt, in the county of Herts, till it be- " came evident that the affections of the

" defender were alienated from the pursuer,
" his wife, and he fell into courses of adul-
" tery with different women. At length he
" deserted the pursuer altogether, and left
" her unprovided of the means of subsist-
" ence. She has for some time past been
" supported by her own relations, a small
" annuity, which was secured to her by her
" marriage-articles, not being sufficient for
" that purpose.

" III. The defender did every thing to
" avoid the pursuer, and to elude her just
" claims while he remained in England.
" At last he thought proper to make an
" elopement to this country. This took
" place, as the pursuer has every reason to
" believe, in the end of the last, or in the
" beginning of the present year. The pur-
" suer was unable to ascertain the place of
" his retirement until the month of March
" 1811, when it was discovered that he had
" come to Scotland, and was living at Por-
" tobello with a woman who had accompa-
" nied him from London."

The other articles of this condescendence

related in part to the circumstances of the alleged criminal connection. But as to the fact of residence in Scotland, it was likewise farther averred, that " the pursuer had " not learned where they resided from the " month of January to the month of March. " But on the      day of that month, they " were found living at the house of Mrs " Mackinnon at Portobello, and there they " lived at bed and board together as hus- " band and wife, till towards the end of " April. The defender, with the said wo- " man, then removed to Mrs Gray's in " Greenside Street of Edinburgh, and lived " there at bed and board, as husband and " wife, during the space of about one " month, immediately after which he re- " ceived his citation in the present action " of divorce."

To this last condescendence no answer was made by the defender, nor did he at the bar deny the facts therein alleged.

The Court having proceeded to decide the cause, two of the Judges were of opinion, that the facts alleged could not, if proved, be held sufficient to esta-

blish that the defender had really changed his original domicil of England, by dwelling in this country a few months. For he might have come here not *animo remanendi*, but merely to avoid legal claims against him in his own proper *forum* of England, or to afford opportunity for dissolving his marriage, in defraud of the English law. The concealed and unsettled nature of his abode at different places in Scotland, as alleged by the pursuer, and the tenor of his own pleadings *in judicio*, afforded, even upon the face of the record, strong reasons for inferring, at least, that he had no intention of making Scotland the place of his permanent abode. At all events, if the pursuer's allegations were fully proved, it would not follow, that Scotland had become the defender's peculiar domicil, according to the law of which, if he had died intestate at the date of citation, his moveable estate would have been distributed in preference to the law of England. *

* Cod. Jur. Civ. lib. i. tit. 16. Leg. 239, § 2. *Ibid.* lib. x. tit. 39. Leg. 2, 3, 4. *J. Voet*, lib. v. tit. 1. § 92 and 97;

They observed, that there were only two kinds of domicil known in the law of Scotland, with relation to such actions as the present. The one was the real domicil chosen by the party, with the intention of making this kingdom the seat of his fortunes, and place of his permanent abode, or, in other words, his country and home. The other was the *presumptive* domicil assumed by a fiction of law, in the case of a foreigner from forty days residence, to afford opportunity of founding jurisdiction in ordinary civil suits, by citation left for him at his dwelling-place, when it might happen that he could not be served with a personal execution.* This presumptive domicil, however, made no alteration as to the nature of the obligations or duties to be performed by a foreigner in his own country. In particular, as to any condition of

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7th June 1791, Hog against Hog, Fac. Dec.; 9th February 1789, Brunsdon against Wallace, Fac. Coll.; 27th June 1801, Morcombe against Macclelland, *Mor*. Dec.

* *Ersk*. Inst. b. i. tit. 2, § 16, p. 29.

a contract entered into there, and with a view to fulfilment in that country, the rule as to redress or remedy to be afforded for violation, must be sought in the law of the place where the defender stood bound to perform his engagements to the pursuer. Both were strangers in Scotland, where confessedly they had never cohabited, and the only duty of the law of this kingdom towards them, was to adopt their own, to which they still remained permanently subject, and to give them such decision as it would have pronounced. This, too, was the more necessary, because the judicatures of the kingdom to which the parties belonged, might decline to respect the judgment of the Scotch Consistorial Court, if contrary to their own rule in a matter so important as the dissolution of marriage. The English law, it was understood, did not permit such dissolution by judicial sentence. Here, on the contrary, divorce *a vinculo* was granted upon proof of adultery. But if it should be held in England that such violence upon our part to the conditions of an English marriage in a suit between English parties carried on

here was illegal, our divorce, supposing it to be given, might be disregarded in England. The spouses, consequently, might still be held as bound to each other there, although declared free in this kingdom. Subsequent marriages might thus be considered valid in the one country, and null in the other, to the great danger of the parties, and with the most fatal effects to their offspring, and to the good order of society. To avoid these evils, there was no other course but to dismiss as incompetent an action, which, like the present, concluded only for dissolution of an English marriage.

It was further observed, that, according to the authority of several recent decisions, the Consistorial Court ought directly to decline its jurisdiction, when that jurisdiction could only be exercised to the effect of dismissing the process. Thus, in the case of Brunsdone against Wallace, 7th February 1789, Fac. Col. upon an advocation of the defender, who had not appeared before the Commissaries, the Court of Review remitted to them "with instructions to dismiss the action,"

on the grounds, that, although a Scotsman by birth, his domicil was foreign, and he had only been cited edictally. Afterwards, in the case of Pirie against Lunan, 8th March 1796, the Commissaries, " in re-" spect that the domicil, both of the pur-" suer and defender, is situated in Lon-" don, and that the facts founded on in the " libel, as inferring the defender's guilt of " adultery, are stated to have happened " there, dismissed the action as incompe-" tent."

Again, in the case of Wyche against Blount, 27th June 1801, " The Commis-" saries, (20th February 1801,) having con-" sidered and compared the libel with the " proof, found it not proved, either that the " marriage of the pursuer or defender, who " are not Scotch but English by birth, was " celebrated in Scotland, or that they co-" habited in Scotland as husband and wife, " any time after their marriage, or that the " defender has had any sufficient or settled " residence in Scotland, or even that the " crime on which the divorce was founded " was committed in Scotland: Therefore,

"found, that the action is not competent in "Scotland, and ought not to have been "brought before this Court, and dismiss "this process for want of jurisdiction."

In both of these two last cases, the Court of Review, upon pleadings for the pursuers, *ex parte,* no doubt altered the interlocutors. But the principle of the first of these decisions by the Superior Tribunal, can only be gathered from the statement given by the reporter of the Judges' opinions. These, he says, were, that "in this case there can "be no harm in allowing the action to "proceed, and decree to be obtained in ab-"sence, *valeat quantum valere potest.*" In the second, the pursuer offered to refer to the oath of the defender the fact, that he had subscribed a certificate of their marriage at Gretna Green; and the Court of Review remitted to the Commissaries, with instructions to find this reference competent, and to grant commission for taking his oath, as well as to sustain their jurisdiction, "in re-"spect the summons was executed against "the defender when resident in Scotland, "and possessing a domicil there." So far,

however, was the principle adopted in the Consistorial Court from being shaken by these judgments, that, in another case, Morcombe against Macclelland, remitted upon the same day with that of Blount, the Superior Tribunal supported, without alteration, a judgment of the Commissaries, by which they, "considering that the Courts "of one country ought not to be converted "into engines for either eluding the laws "of another, or determining matters foreign "to their territory, and that decrees of di-"vorce, pronounced by incompetent courts, "cannot, effectually and securely, either "loose the bonds, or dissolve the marriages, "or fix the states of the parties thereto, but "might become causes or snares to involve "other persons, as well as the parties and "their children, in deep distress; and ob-"serving it to be admitted in the libel, "that the marriage of the pursuer and de-"fender was celebrated in England; that "they resided constantly in England since "their marriage; and even that the crime "on which divorce is here demanded to "be decreed was committed in England;

" therefore find, that the action is not com-
" petent in Scotland, and ought not to have
" been before this Court; and dismiss the
" process in all its parts, for want of juris-
" diction and of power."

Another of the Judges agreed in thinking, that the action should be dismissed, but upon different grounds. He observed, that the marriage sought to be dissolved is an English contract, by its own inherent condition and essential quality, perpetual, and incapable of dissolution during the joint lives of the parties.* The relation of husband and wife has likewise subsisted between them only in England, and under the English law, for the whole period of their cohabitation. But the conclusions of the pursuer rest upon a criminal transaction of the defender with a third person in this country, which could have no effect to alter the condition of his marriage, considered as a contract with her.

* Inst. Jur. Can. lib. ii. tit. 16; Coke upon Littleton, b. 3; Inst.

The law of England, according to the authorities * of greatest weight, both of our municipal system and *juris gentium*, therefore, fell to be preferred as the *lex loci contractus*, even if the defender had really changed his proper domicil of permanent residence, so as in the eye of law to have ceased to be a subject of the law of England, and to have become a subject of the law of Scotland, at the date of the action. For the law of England declared a marriage under it to be indissoluble by any judicial sentence, and certainly had power to establish this rule. The parties had also, by express stipulation, according to the ritual of marriage in their own country, bound themselves to each other indissolubly as husband and wife. Their contract was, consequently, not only valid in England, but

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* *Huber*, De Conflictu Legum, Vol. II. b. i. tit. 3, § 11. *et seq.*; *Dirleton*, Doubts and Questions of Law, No. 227 and 229; *Bank.* b. i. tit. 1; *Ersk.* b. iii. tit. 3, § 40; Delvalle against Creditors of York Buildings Company, 1786, Fac. Coll.; Brunsdon against Wallace, 9th February 1789, Fac. Coll.; Morcombe against Macclelland, 27th June 1801, *Mor.* Dec.

to be held as equally valid in any other country to which either of them might afterwards migrate.

The remaining Judge of the Primary Court gave his opinion, that the Court ought to sustain its *jurisdiction*, so far as to go into the question; because the action of the pursuer undoubtedly was of a class which it had competency to entertain. That action was likewise regularly laid in the usual form, and the defender had been duly cited and convened.* The question, *What rule of law*, whether municipal or foreign, should govern the decision? was a matter altogether different. In the phraseology of several former decisions, these points seemed indeed to have been confounded; and the Superior Court had not corrected the style adopted by the Primary Tribunal when interlocutors of this description came to be reviewed there. But the general import of the interlocutors, as these affected the causes

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* Ersk. Inst. b. i. tit. ii. § 16

and the parties, was all that fell to be considered in questions of remit; consequently, the mode of expression could not be held to form part of the precedents, and, if inaccurate, should have no influence upon future cases.

The pursuer, in the present case, did relevantly allege and undertake to prove injuries, for which redress somewhere must be competent. But in England it was asserted that she could have none; for without personal citation of the defender in that kingdom, there could be no suit at her instance against the defender in the consistorial judicature there; and she could not apply for a divorce to Parliament, at least without a previous judgment of a court of law. Thus the elopement and flight of the defender to this country, one of the very wrongs of which the pursuer complained, obliged her to resort to this tribunal, as the only court where a remedy could be given while her husband remained in Scotland. It was evident, too, that he might remain here all his life if he chose, for there was no power to send him back to England in or-

der to meet her claims. These, too, he might always have the same motives to avoid which were now imputed to him.

Refusal to entertain a cause of this description would even place a very considerable part of the ordinary population of this kingdom entirely beyond the reach of the law, as to conjugal duties and wrongs. The English and Irish, by the several treaties of union, enter Scotland as citizens at their pleasure. Great numbers of the latter, especially, settle permanently here after they have married in their native country under the English law. In this situation, are they to be amenable neither to the consistorial jurisdiction they have left, nor to that under which they have placed themselves? That proposition cannot be maintained, for such a rule would evidently produce the greatest evils and disorder in society at large. Competency then must exist here to afford redress for all conjugal wrongs, when jurisdiction arises from convening the party *in judicio*; and in this instance the defender has been regularly convened, and the wrongs alleged are of the most aggravated kind.

The plea, that, nevertheless, it is incompetent to give divorce *a vinculo* of an English marriage, and that the action falls to be dismissed, because this happens to be the only remedy now sought, seems not to be a *preliminary* point affecting the *jurisdiction*, but one upon the relevancy of the grounds alleged to support the conclusion of the libel to this extent on the merits of the cause. That conclusion is for dissolution of an English marriage by decree of the Consistorial Court of Scotland. The objection is, that a marriage celebrated under the English law is indissoluble by judicial sentence in England, and must on that account also be indissoluble in Scotland. But even upon the first branch of this proposition, there is hitherto little information to be found in the record. The second involves points of the utmost difficulty, some of which cannot be solved without previously ascertaining whether, in fact, the defender really has made this country his domicil. But the precise state of the fact upon this head can only be ascertained by a proof. That proof, however, may be taken "*before*

"*answer*,"* as not proceeding upon an interlocutor which has decided the relevancy, but as preparing the materials for judgment on that head.

If it is certain that the English rule of law in no case permits dissolution of a marriage by sentence of any ordinary judicature, it is also certain that English marriages may be dissolved by Parliamentary divorce; consequently, that remedy cannot be regarded as inconsistent with the principles of justice and expediency recognised in the municipal system of England. But the cognizance of the English law is excluded, and that of the law of Scotland cannot be refused as to the wrong committed by the defender, and as to the redress to which the pursuer has right, because he is at present under the jurisdiction of the latter, and not of the former. The only remaining question, therefore, seems to be, Whether the municipal rule of the English

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* "Before answer" are the *voces signatæ* used in Scotch judicial proceedings, to intimate that the relevancy is reserved for after discussion.

law, or the opposite one of the Scotch system, should be followed in disposing of the action?

Although the former of these rules should be adopted, perhaps, suitable redress might be afforded to the pursuer in this action, yet not to the extent that she now insisted. It was the duty of the Court, therefore, to ascertain which of these rules they should prefer, and then to allow her to try to accommodate her claim to that rule, in case it should be requisite to restrict her conclusions. For example, besides his infidelity, as she alleged, her husband had withheld the aliment necessary for her support, and to which she was entitled from him. Could the Judicature of Scotland, even if limited to the remedy of the English law in the matter of divorce, refuse to enforce this right? If it ought not to do so, must it not also afford such redress for every other conjugal wrong as might fall within the same limitation, and which was also competent by our law?

But the previous question was, whether the English rule should be preferred, and this again was settled by the preceding inter-

locutors in the cause, to depend upon the quality of the defender's domicil. If that really was Scotch at the date of the action, would it not follow, that this country was also the true *situs*, or place in which the relation of marriage should be held to subsist between the parties at that date, because the defender was the husband, whose domicil became, by legal inference, that of his wife also? This matter of fact could only be cleared by proof, unless the pursuer had admitted herself out of Court by the terms of her Condescendence. That she did so, however, should not be rashly assumed. For it was often extremely difficult, especially between countries of the same state, governed by different laws, to decide whether a change of domicil had taken place as to their subjects or not. A judgment could only be formed from the whole circumstances of each particular case, in an action of divorce, just as in a question of intestate personal succession. Without further inquiry, could it then be taken, as established from the shewing of the Condescendence, that if the defender had died here at the date of the

action, such succession to him must nevertheless have been disposed of by the rule of the English law?

There was indeed too much reason to apprehend collusion of English parties in actions of divorce, and as to the establishment of a domicil, as well as with respect to the procedure.* Injury to morals, reproach to our law, and oppression, as well obloquy to the judicature which must administer that law, were the evident consequences which must follow from the influx of parties from other countries, to obtain dissolution of marriage here, in opposition to the rule of their own law. If decrees should be obtained by them, which might be afterwards held invalid by the Courts to which such parties were properly subject, the most distressing collision must arise, and the greatest uncertainty and danger to children of subsequent marriages, as to the rights of legitimacy and succession, as well as to the persons contracting

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* Appendix, Note (B.)

such new relations. But, nevertheless, it was necessary to proceed with the utmost caution, and step by step. For, upon the other hand, it was also clear, that the utmost disorder would follow from declining jurisdiction generally in this tribunal, because the parties had been married in another place, where the contract was indissoluble by judicial sentence, or from refusing even in that case to exercise the jurisdiction, so as to afford such redress here as might correspond with the conditions of the contract, and with the principles of international law.

It could not be taken for granted, that the conditions of her English marriage altogether excluded the pursuer from redress in Scotland, or even from divorce *a vinculo matrimonii* in this country, upon establishment of a domicil here. The municipal law in both countries did indeed provide the different remedies for the case of infidelity, which were allowed in each. While the spouses continued within the same territory where they married, they could therefore only look to the rule of municipal law, which prevail-

ed in that place. But if they might emigrate, and become citizens of another country, governed by a different municipal law, in that event, they would just as naturally look to the new municipal system for the rule. Upon no other principle than this could parties proceed rationally, if they formed any agreement or stipulation upon the subject in contracting marriage. Nay, it was even clear, that, in the case of an absolute and total change of domicil and country, the connection with the place of the marriage, and with the law of that territory, would be dissolved entirely, and a new connection would be formed exclusively with the new country and law of which the parties became subjects. In that event, there could not be any collision, or any just ground for referring them back to the municipal system, their subjection to which, according to this hypothesis, had altogether ceased.

Thus, the question again reverted to the point of fact, where the domicil of the defender truly was at the date of the action, which, consequently, in every view, there

must be jurisdiction and competency to investigate.

Sept. 6, 1811.

The judgment of the Court was, "In "respect the pursuer and defender are "English, and never cohabited as husband "and wife in Scotland, and that there are "no sufficient circumstances stated to prove "or render it presumable that the defender "has taken up a fixed and permanent resi- "dence in this country, Find, that the "Court has no jurisdiction in the present "instance; therefore, dismiss the present "action, and decern."

A bill of advocation having been presented *ex parte* to the Superior Court, for the purpose of bringing this judgment under review, Lord Meadowbank, Ordinary, pronounced this interlocutor: "Having con- "sidered this bill, and the proceedings be- "fore the Commissaries, and been attended "by counsel for the parties, according to "the order of the 9th current, who declar- "ed that they could not explain to the "Lord Ordinary, from the discussions or

"deliberations in the Commissary Court,
"the grounds of the interlocutor under re-
"view, further than appears from the terms
"in which it is conceived; * and the coun-
"sel for the defender having sgn ified that
"he had not advised his client to litigate in
"support of that interlocutor, and being, in
"that manner, left to his own unaided con-
"sideration of what might be said in behalf
"of the interlocutor, but having formed his
"opinion thereon, refuses the bill; and re-
"mits to the Commissaries, with this in-
"struction, to find that the relation of hus-
"band and wife is a relation acknowledged
"*jure gentium*. That the duties, obliga-
"tions, and rights to redress wrongs inci-
"dent to that relation, as recognised by the
"law of Scotland, attach on all married
"persons living within the territory subject
"to that law, wheresoever their marriage
"may have been celebrated, or been fol-
"lowed by cohabitation. That jurisdiction,
"or the right and duty of the courts of this
"country to administer justice, in such mat-
"ters, over persons not natural born sub-

* Appendix, Note (C.)

"jects of Scotland, arises from the person "sued being resident within their territory "at the time of their citation and compear- "ance, or being duly domiciled, and being "properly cited accordingly, at the instance "of a person having sufficient interest and "title, and proceeding in due form of law; "and that, in this case, the pursuer had con- "descended sufficiently on the defender's "residence in Scotland, to enable her to in- "stitute her claim, in justice, against him "before the Commissaries, according to the "dictates of the law of Scotland, in the "matter libelled; and, therefore, to recal "the interlocutor complained of, to sustain "their jurisdiction, and thereafter to pro- "ceed in common form, as to them may "seem just."

His Lordship also explained the principles of this decision by the following note:

"Had I been able to discover in this "and a similar case any thing, as far as "now under review, which appeared to "me at all doubtful in legal principle, I "should certainly have taken the cases to "report to the Division. For, unquestion-

" ably, the point at issue is one near the
" very sources of general jurisprudence;
" and, therefore, reaching to consequences
" of incalculable number and magnitude.
" But having been unsuccessful in the pur-
" suit of a doubt, it appeared to me unbe-
" coming and inexpedient to take any steps
" that implied a doubt to exist in a matter
" of so much importance; and that my
" duty was to record my opinion, as clearly
" as I could, with suitable succinctness, and
" leave it to its fate.

" The interlocutor complained of seems
" to hold that the Scotch courts have no
" right to take cognizance of the conduct
" of foreigners in Scotland, respecting the
" relation of husband and wife, unless they
" have acquired a domicil in Scotland *ani-*
" *mo remanendi* there. But it is thought
" no warrant whatever can be produced for
" such a doctrine. Foreigners, equally with
" natives, are subjects to his Majesty, and
" to the law while here, and of course un-
" der the protection of law. And those re-
" lations in which they stand towards one
" another, and which have been duly con-

" stituted before they came here, if relations
" recognised by all civilized nations, must
" be observed, and the obligations created
" by them fulfilled, agreeably to the dic-
" tates of the law of Scotland. If the law
" refused to apply its rules to the relations
" of husband and wife, parent and child,
" master and servant, among foreigners in
" this country, Scotland could not be deem-
" ed a civilized country, as thereby it would
" permit a numerous description of persons
" to traverse it, and violate, with utter im-
" punity, all the obligations on which the
" principal comforts of domestic life depend.
" If it assumed jurisdiction in such cases
" contrary to the dictate of the interlocutor,
" but applied not to its own rules, but the
" rules of the law of the foreign country
" where the relation had been created, the
" supremacy of the law of Scotland, within
" its own territories, would be compromised,
" its arrangements for domestic comfort vio-
" lated, confounded, and perplexed, and
" powers of foreign courts, unknown to
" our law and constitution, usurped and ex-
" ercised.

" And though, according to the implied
" doctrine of the interlocutor, foreigners, by
" a permanent residence, were to have the
" rights belonging to them, under those do-
" mestic relations, protected by the law of
" Scotland, still a great proportion of per-
" sons would, according to that doctrine,
" remain without law in this matter. If
" they kept changing their dwellings suffi-
" ciently often, they might remain, like the
" gypsies of former times, at full liberty
" each to do that which was good in his
" own eyes.

" But it is thought the establishment of
" a domicil has no sort of connexion with
" either the obligation to fulfil the obliga-
" tory duties of the domestic relations, or
" the competency of enforcing it. A per-
" son, the instant he sets his foot in Scot-
" land, is as much bound to maintain his
" wife and child as after forty days residence
" there; and if he turned them out of doors
" destitute the first day he arrived, he is un-
" questionably as liable to be sued for ali-
" ment, adherence, &c. as if he had com-
" mitted this outrage and resided forty days

" in one house. If not found in person to
" receive a citation, a domicil is of conse-
" quence; but it is of no consequence in
" such a case, if the foreigner is cited in
" person, or his residence is sufficiently as-
" certained. The *animus remanendi* may be
" of great consequence to establish the pre-
" sumptions on which the distribution of
" succession in moveables is supposed to
" depend; but it does not seem to enter in-
" to the constitution of a domicil for cita-
" tion by forty days residence, nor form any
" requisite for the validity of a personal ci-
" tation to an action for obtaining redress
" of civil wrongs, more than for punishment
" of a crime. Nor can those suits for re-
" dress, which involve *quæstiones status*, ad-
" mit of any different consideration. In all
" cases where the *status* claimed or decern-
" ed is *juris gentium*, the competency of
" trying such, wherever the person concern-
" ed is found, is obviously necessary. The
" domestic relations concern so much the
" most immediate comforts of life, and the
" well-being of society, that where the par-
" ties concerned are present, it is impossi-

" ble to leave to the Greek calends, as the
" interlocutor complained of does, the try-
" ing of them, without incurring the oblo-
" quy of a *denegatio justitiæ*.

" But though the jurisdiction seems in
" all views to be unquestionable, the ti-
" tle to sue must, in all cases like the pre-
" sent, be cleared of the legal suspicion of
" collusion ; and I am apt to think that a
" suspicion of a private purpose in the par-
" ties to avail themselves of the law of
" Scotland, in obtaining its remedies, where
" the marriage law is violated, instead of
" contenting themselves with the law and
" remedies of their own country, may have
" had some influence in dictating the inter-
" locutor. But if there is any thing in this,
" it ought to be considered and sifted in
" discussing the title of the pursuer, whe-
" ther fair and good, and the relevancy or
" sufficiency of her allegations of the de-
" fender's wrongs. The plain principles on
" which what is called collusion vitiates a
" title to sue is, that the pursuer has ren-
" dered herself participant of the wrongs
" she complains of, by instigating it, or con-

"nivance with the perpetration of it, for the
"sake of the remedy she seeks after, or some
"bye purpose. In this view, it is obvious,
"that though a married person should commit
"adultery in Scotland, in a way and manner
"calculated for detection by the innocent
"party, from the private expectation that
"such party would thereby be induced to
"seek the legal remedy of divorce, this
"could form no sort of objection to the
"title and interest of the innocent party
"to demand that remedy. Such party
"uses his own right in demanding it;
"and is entitled to maintain, that it is no-
"thing against that right how many bye
"or unjustifiable motives may have con-
"curred in instigating the commission of
"the injury, provided the sufferer is inno-
"cent of all participation in prompting it,
"or conniving at it. Hence no investiga-
"tion of such bye or unjustifiable motives
"on the mind of the wrong doer has ever
"been carried on *ex officio judicis*, or other-
"wise, in the Commissary Court. And it
"is obvious, that the availing one's self of
"the wrong, and of the publicity attending

" the commission of it, to obtain the redress
" allowed by the law, can create or infer
" no participation in those motives in the
" wrong doer. Innocence of the instiga-
" tion or perpetration is sufficient, however
" strongly the desire of the legal redress, or
" the determination to take that advantage
" of the wrong suffered, may be enter-
" tained.

" Now, if this is the case as to natives, it
" is obvious that foreigners cannot be in a
" less favourable situation. The purpose
" of the foreigner in choosing Scotland as
" the scene for the violation of his marriage
" vows, cannot disable the innocent party
" from claiming that redress which the law
" of Scotland affords for such a wrong.
" Such party having neither suggested the
" measure, nor furnished the means of per-
" petration, nor refrained from using means
" to prevent it, may surely, with a pure and
" good conscience, claim the redress afford-
" ed by law, though more ample than that
" afforded by the law of his own country,
" and of course more desired.

" But it has been said, with respect to

" the Gretna Green marriages, that there
" both parties concur in evading or defeat-
" ing the law of their country with respect
" to marriage; and the same, perhaps, may
" be said here as to evading or defeating
" the law of England, which confines di-
" vorce to those that can pay for the ex-
" pence of an act of Parliament. This ar-
" gument, however, though originating from
" a doubt thrown out in a most respectable
" quarter, could not stand the investigation
" it afterwards received. If persons have
" the free choice of the place where they
" reside or travel, or perform any act, they
" are guilty of no fraud against the law of
" their own country, when they avail them-
" selves of an opportunity of going to ano-
" ther civilized country to constitute the
" relation of husband and wife, in the man-
" ner and according to the rights allowed
" to persons the subjects of that country;
" all that such persons do is, to prefer in
" this matter the law of Scotland to the law
" of England; and in so doing they do no
" wrong; they merely *utuntur jure suo*; and,
" accordingly, this is now the settled law of

" England, which, by the bye, proves that
" no domicil is required to constitute in
" Scotland the relation of husband and wife
" among foreigners, who have just arrived
" there before celebrating their marriage,
" and which, nevertheless, is adjudged to be
" good and effectual all the world over.
" But if this is the case in the constitution
" of marriage, it is obvious that the guilty
" party's choice of Scotland for the scene of
" his guilt, because he may have preferred
" subjecting himself to the redress that law
" affords for it, to what is afforded by the
" law of his own country, can never conta-
" minate the rights of the innocent party to
" demand that redress. The innocent party
" neither chooses the country for the guilt,
" nor instigates the commission of it, but
" merely uses his own right in obtaining the
" redress that the conduct of the guilty per-
" son, under all its circumstances, entitles
" him to demand. This, therefore, implies
" no selection of the place for the commis-
" sion of the guilt in the innocent party,
" who merely exacts what of right belongs
" to him; whereas, in the Gretna Green

" marriage, both parties concur in selecting
" Scotland in preference to their own coun-
" try, and so creating a relation between
" them which that law would not permit.
" If there was any *fraus legis*, therefore, in
" the case, both are guilty of it. But here
" the circumstance of the wrong-doer's com-
" mitting the wrong from two bad motives
" (supposing it to be a *fraus legis* that dic-
" tated his selection of Scotland) does not
" vitiate the right of the innocent to take
" his redress, such as circumstances in which
" he had no instrumentality afford. I do
" not think, however, that the selection of
" Scotland for such a purpose is a *fraus legis*.
" It is the doing a lawful act from a crimi-
" nal motive of instigating his innocent party
" to divorce him, and is so far in him vi-
" tious, and he cannot plead it. But the
" law of England is not defrauded. It no-
" where enjoins that the violation of the
" marriage vow shall not dissolve the rela-
" tion. It only does not entrust the power
" of declaring it dissolved to any ordinary
" court of justice, but reserves it to the le-
" gislature. There does not appear, there-

"fore, to be the slightest ground of imput-
"ing impropriety to the innocent party,
"who demands that redress here which the
"legislature in England affords, and which
"the law of England nowhere reprobates
"as unjust or indecorous."

In consequence of the imperative remit from the Court of Review, which left no room for the exercise of discretion, the Commissaries, accordingly, in obedience thereto, altered their judgment. A proof was thereafter allowed in the ordinary course, and the allegations of the pursuer being satisfactorily established, decree of divorce *a vinculo matrimonii* was given in common form.

## JANE DUNTZE OR LEVETT,

AGAINST

## PHILIP STIMPSON LEVETT. *

Dec. 21, 1816.

IN this case, the parties were English. The defender did not enter appearance, and the Commissaries appointed the pursuer (2d De-

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* The first case which occurred after the remit from the House of Lords in the appeal of Tovey against Lindsay, was that of Gordon against Pye. By the judgment of the Primary Court in that case, the *lex loci contractus* was preferred as the rule of decision. But although it was submitted to review, the Lord Ordinary did not take it to report; consequently, the opinion of whole Court of Review was not obtained. For that reason, according to the plan of this compilation, the case of Gordon against Pye could not be selected for reporting. But, in fairness to the view of the question which was then taken by the majority in the Primary Court, the present case of Levett, which did obtain the review of the whole Court of Session, and is reported

cember 1814) "to give in an articulate con-
"descendence of the facts she avers relative
"to the contract of marriage betwixt the
"parties, and the defender's domicil in
"Scotland."

As to the first of these points of fact, she stated in her condescendence, "That the par-
"ties were regularly married, of this date,
"(28th July 1802,) in the parish of St Mary-
"la-bone, in the county of Middlesex, ac-
"cording to the forms adopted in the
"Church of England, &c. 2*d*, That the
"parties continued to cohabit together till
"the month of October 1810. At that
"time the pursuer's husband, Mr Levett,
"deserted his house at Greenwich, where
"he had been residing with the pursuer, and
"went to London," &c.; and "he took up
"his residence in the Temple Coffeehouse,

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also in the Collection for the Faculty, has been placed before that of Edmonstone. In this latter case of Edmonstone, the argument for the law of the domicil will be found as it occurred to two Judges of the Primary Court. An abstract of the case of Gordon against Pye, with the notes of the opinions of the Judges in favour of the law of the contract, is also given in the Appendix, Note A.

" and continued to live there for about 14
" months."

As to the second, she alleged, that
" The defender, of this date, (February
" 1813,) came to Scotland, and has con-
" tinued in this country ever since. He re-
" sided in the town of Dunse, in Berwick-
" shire, from the beginning of March till
" August 1813. He then removed to
" Coldstream, in the same county, where he
" continued till July 1814. He then re-
" moved to the city of Edinburgh, where
" he has since resided. From the time
" the defender came to Scotland, he coha-
" bited with a woman named Elizabeth
" Osborn, whom he described to the public
" as his wife, and he still continues to co-
" habit with her, and to give her that un-
" true designation. Since the month of
" February 1813, the defender has had no
" lodging or dwelling-house of any kind or
" description whatever, or place of business
" in England, and no one circumstance in-
" dicates an intention on his part to return
" thither," &c.

Upon consideration of this pleading, *ex*

*parte*, two of the four Judges were of opinion, that the action ought to be dismissed, not only because the marriage had been celebrated in England, but because the parties had their real domicil in that country; and, therefore, in every view, the law of England should be adopted as the rule of decision.

The first point, they observed, was the competency of the Court in respect of jurisdiction, and here there could be no doubt. The pursuer had unquestionable right to sue, (if cleared of the legal suspicion of collusion) and the defender, besides being personally cited, had acquired a domicil, which was sufficient for the purpose of convening him *in judicio*. For although a short, perhaps momentary, presence within the territory of the Judge, could never be sufficient to furnish the rule of law, by which a question affecting the *status personarum* ought to be determined; yet to the extent of citation and convention *in judicio*, it was enough.

But however clear the point of jurisdic-

tion might be, it was by no means so obvious by what rule the judicature was to be guided. Here, indeed, lay all the difficulty of a question, which, when viewed practically, involved the most perplexing consequences.

There exists a radical difference betwixt the municipal law of England and that of Scotland as to marriage and divorce. To trace the history of this difference is unnecessary. It is sufficient merely to state the fact, that in England marriage is indissoluble by judicial sentence, while, by the law of Scotland, divorce *a vinculo matrimonii* on the ground of adultery is permitted. The question thus arises, By which of these systems is the present case to be ruled? Whether by the law of Scotland, which, by the pursuer, is assumed to be the *locus domicilii*, or by the law of England, which is confessedly the *locus contractus*?

Some difficulties may be removed, by considering the precise nature and object of the action of divorce, as entertained in this Court; and, in particular, whether

divorce is not purely a civil remedy ad *privatum effectum*, or, whether it does not in some degree partake of the nature of a criminal suit *ad vindictam publicam*. To ascertain how the rule stands here with precision is the more material, because, in the previous discussions upon similar cases, there has existed a considerable degree of misconception, in consequence of not distinguishing sufficiently betwixt the criminal act of adultery and the civil remedy which it affords.

There is, however, no distinction better known than that which exists between civil and criminal law, and between criminal prosecutions and civil actions. The same facts may, indeed, be made the grounds either of criminal or of civil prosecutions, and even of both at the same time. But criminal actions differ completely from civil, as well in their form and object, as in the principles by which they are regulated. Facts are tried criminally in the proper criminal courts at the suit of a public prosecutor, to satisfy the ends of public justice, and by principles of law and rules of procedure, which are strictly municipal and local.

Civil actions, on the other hand, are brought into the civil courts by the private party for his own redress or indemnification; and more enlarged principles of jurisprudence, founded in considerations of equity and general expediency, may be applied to them.

Accordingly, by the law of this country, adultery may be made either the foundation of a criminal charge *ad vindictam publicam*, or of a civil remedy to the private party who has been injured.

But, with adultery, considered as a crime, or with a view to its punishment, it is certain that this Consistorial Court has no manner of concern. It is only as the ground of a civil remedy, and of a civil action betwixt the private parties, that this Court can take cognizance of the crime of adultery. The action of divorce, as entertained here, in a word, is purely civil. It no doubt draws after it the forfeiture of the personal *status* of one, and to some extent of both the parties. But actions only in this sense penal, in our system of jurisprudence, were never placed under the head of criminal law. It originates also in

a criminal act, and the concurrence of the fiscal is required to the summons; but this circumstance, in a question betwixt the husband and wife, does not affect the civil quality of the action, more especially as there is no conclusion either for a fine or for damages.*

In many cases, too, the civil courts are called upon to try incidentally facts of a criminal description, when pursued merely *ad civilem effectum*. Thus, in the case of assythment, the fact of murder may be tried incidentally by the Court of Session. Thus, again, in civil cases, the right of peerage may be discussed in ascertaining the vali-

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* From the date of the institution of the Consistorial Court, till the year 1785, the Judges and all the other officers of Court had no fixed salaries, and they were paid by fees. In actions of divorce, particularly, considerable fees were levied under the denominations of consignation and sentence money. It was the duty of the Procurator-fiscal to attend to the exaction of these, in which he also had a personal interest. In the Spiritual Court, it had likewise been the province of that officer to prosecute for ecclesiastical censures, when the crime of adultery might be detected; and, after the Reformation, he was the natural informer of the Lord Advocate, as criminal prosecutor for the public.

dity of a freehold qualification.* In like manner, the crime of adultery is tried incidentally in this Court, as the ground upon which, if the adultery is proved, the consequent decree of divorce is to proceed, as the mode of redress to the private party who complains.

The right of divorce, it will also be observed, may be prosecuted here, upon proof of adultery committed in any foreign country. An English party may thus sue for divorce here, upon acts of adultery committed in England as well as in Scotland. The *locus delicti*, while in the criminal prosecution for adultery it is every thing, is, therefore, in the civil action of divorce, really nothing. This circumstance, that it is even perfectly immaterial to the merits of the Consistorial process, where the adultery has been committed, does, of itself, clearly shew the legal character of the suit for divorce, and ranks it, with complete certainty, in the class of civil causes.

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* Sir William Dunbar and others against Sir James Sinclair, Feb. 2, 1790.—*Fac. Coll.*

Beyond what is necessary for explicating its own authority, it is also certain that the Consistorial Court possesses no criminal jurisdiction whatever, and in its institution, object, and forms of procedure, is absolutely civil. This, accordingly, is the view taken of it by Dirleton, a name of great and acknowledged authority in any question of Scottish jurisprudence, and more especially in a question regarding the constitution or jurisdiction of this Court, in which, for many years, he filled, with much ability, the situation of a Judge. "Commissariots," he distinctly observes, "are acknowledged to be "merely civil, because summonds are di-"rect by the Commissaries under the "Signet of Office, bearing his Majesty's "name and arms; the certification is civil; "witnesses are summoned under civil and "pecunial pains; and letters are directed "for compelling them to compear, under "the pain of horning; the execution of "sentences is civil, by poinding or com-"prising for liquidate sums; or by a charge "to fulfil what is *ex facto* upon the Com-"missary's precept; or, by a charge of

" horning upon the letters, and by intent-
" ing action of deforcement before the Com-
" missaries or the Lords of Session."

The *criterion* arising from the forms of procedure to which this eminent Judge refers, will appear to be supported by all the other qualities of this particular class of Consistorial causes, which are afterwards to be considered.

Keeping these observations in view, the general question to be now discussed is, Whether the law of the domicil should prevail in opposition to the law of the contract? The pursuer contends that it should, and, in effect, maintains, that in cases of divorce, neither the private agreement of the parties themselves, nor the law of the country in which the relation of marriage was constituted, can control or stand in the way of the law of the defender's domicil at the date of his citation. But it is necessary, before coming to a conclusion so extremely important, in the *first* place, to ascertain, with precision, what species of domicil this argument requires.

The residence of the defender within this territory, which has been alleged by the pursuer, is of no importance, except as to the point of jurisdiction, and is, in no respect, of a quality upon which she can found a plea, that the law of Scotland, as the *locus domicilii*, should regulate the decision in a question by which his *status* of marriage is affected. It amounts, indeed, to no more than what would have been enough to afford opportunity for a legal citation at his dwelling-place in his personal absence. Accordingly, Mr Erskine says, in direct terms, as to this constructive domicil, that, "to prevent disputes upon "this point, a rule is received by custom, "that where one has resided with his "family for forty days immediately pre-"ceding his citation, is to be deemed his "domicil as to the question of jurisdic-"tion."* To any further effect, this sort of residence is of no importance. It has not the least resemblance to the real domicil, which furnishes the rule of decision in

* Ersk. Inst. b. i. tit. 2, § 16.

questions, for example, of intestate personal succession.

This real domicil of a party is defined by Voet, as constituted* " in eo scilicet loco in " quo larem rerumque ac fortunarum sua- " rum summam constituit unde rursus non " sit discessurus si nihil avocet, undeque cum " profectus est perigrinari videtur." Her husband, Mr Levett, by the pursuer's own statement, certainly has not established this kind of domicil in Scotland.

The possession of jurisdiction with which this Court is vested in the present case, by virtue of the defender's citation and residence here, has then, in itself, nothing to found the further pretension, that the peculiar municipal law of this territory should govern in an action like the present. Such a claim is contrary to the principles even of municipal law, adopted in all civilized countries, as to causes and parties that are really foreign.

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* Voet, ad Pand. lib. v. tit. 1. § 42.

If the question, By what rule the cause should be determined? were to depend upon the fact where the real domicil of the defender, Mr Levett, truly was constituted at the date of the action, then, according to the pursuer's own statement in her condescendence, his real domicil would be found to have remained in England. No collision, therefore, could properly arise in this instance between the law of that country and the law of Scotland. In other words, the *lex domicilii* and the *lex loci contractus* are here the same. Had these been at variance, the Court would have to ascertain which, in this situation, ought to be preferred. But if the conclusion which has been drawn as to the defender's real domicil is correct, this point can only be considered here abstractly, and in a hypothetical view, not as the actual case which now stands for judgment.

Supposing, however, the conflict to exist, was it not possible, in the present instance, to reconcile the two opposing principles?

The law of the domicil was confessedly

entitled to the very highest consideration,* being in truth the main source of all jurisdiction, especially in questions of personal *status*, when constituted by the act of the law, without the intervention of agreement between parties. The rule, in the words of Hertius, is, "Quando lex in personam dirigitur 'respiciendum, est ad leges illius civitatis "quæ personam subjectam habet." But this learned author does not overlook the necessary qualification in the case of a preexisting contract, and observes, "Addimus "tamen limitationem si alteri, *v. g.* contra-"henti cum tali persona jus jam quæsitum "sit."

In all cases of *status* arising from marriage, there was a pre-existing contract betwixt the parties, which might found an exception against the influence of the law of the domicil, when, as here, it stood directly opposed. Hence the question came to be considered as one of civil right relative to a contract betwixt two parties, which was fo-

* Voet, de Statutis, § 7, 8, *et seq.*; Hertius, de Collisione Legum, § 4, 5, *in fine*, and § 8.

reign to the law of Scotland; and the effect of that contract was the matter at issue. This was a question of international law. The contract here, though sued in a Scottish Court, was an English contract; consequently, to us a matter of foreign law, and to be considered upon those principles of international jurisprudence, according to which, in the ordinary case of civil obligations, our courts of justice every day gave effect to the law of the foreign contract.

As to foreign contracts in general, Lord Dirleton has indeed long since observed, in his Doubts and Questions of Law, under the title "Strangers," "All nations are "*municipia*, and the world a great *civitas*. "They have that relation and necessitude "that οφέλειαι *sunt*, and owe justice to all "persons of whatsoever nation, according to "the law of the place where they contract. "With respect to that place, *sibi enim legem* "*dixerunt*. If justice be refused, *datur re-* "*medium pignorationis seu repressaliarum*." And Sir James Stewart, in his Answers, remarked, upon this maxim, "'Tis true, by the

"law of nations, all persons ought to have "justice done them against their parties, "where they find and attack them; and "that this justice should be done in the exe- "cution of personal contracts or bargains, "according to the law *loci contractus*. But "if it tend to affect the lands, or *res immo-* "*biles*, where the party convened lives, it "must be according to the law of their *situs*."

The principle of our law in such cases, as now thoroughly established, is well defined by Mr Erskine, the latest institutional writer, who observes, "That all per- "sonal obligations or contracts entered into "according to the law of the place where "they are executed, are deemed as effec- "tual when they come to receive execu- "tion in Scotland, as if they had been "perfected in Scotland, or according to all "the solemnities of the Scotch law."* Lord Bankton, too, had observed in particular, that "payment of an English bond may be "proved by witnesses, as that law allows, "though ours does not, because it is just

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* Ersk. Inst. b. iii. t. 2. § 40. Bank. Inst. b. i. t. 1. § 32.

"that the obligation should be dissolved by "the rules of the law whereby it is constituted: *Unum quodque eodem modo dissolvitur quo colligatum est.*"

In a case reported by Lord Stair, 28th June 1686, (M'Moreland,) payments made in England were found proveable in the Scotch Court by witnesses, or by the oath of a cedent, against an onerous assignee, according to the law of the sister kingdom, as entitled, in these circumstances, to be preferred to the opposite rule of our own law. By the decision in the case of Mitchell against Mowat, 11th December 1746, reported by Lord Kilkerran, a Dutch factor's right of retention over goods put into his custody, for security of credit given by him upon these, in the belief that they belonged to the party who lodged them, was sustained here against the true owner, in respect of the custom of Holland, where the transaction took place, although, by the law of Scotland, no such claim could have been admitted. In that of Lawson against Maxwell, 12th February 1784, Fac. Coll. a surgeon was not found to have a

preferable right to payment of his account against a patient in London, because this privilege of the Scotch law did not exist at the place of the contract. In the case of Delvalle against the York Buildings Company, Fac. Coll. 9th March 1780, the Court of Session had sustained the objection of the Scotch negative prescription of 40 years, against action upon bonds of that English company. But upon appeal, heard *ex parte*, this judgment was reversed. And in the subsequent case of the same English company against Richard Cheswell and others, 14th February 1792, this objection was again made, and was repelled by the Scotch Court, although the debtors in that case were amenable to the jurisdiction, as proprietors of considerable estates situated in Scotland. In the case of Campbell against Ramsay and Company, decided on the 15th February 1809, Fac. Coll. action was sustained for recovery of interest, at the rate of 8 per cent. upon an obligation granted in India, notwithstanding that the transaction was usurious by our law.

March 12, 1788.

In the ordinary case of civil obligations

of a pecuniary nature, the application of the *lex loci contractus* is then undoubted. To the *constitution*, at least, of marriage, considered as a contract, the same rule unquestionably applies; for every one knows, that, by the law of nations, marriage, duly celebrated according to the law of the place, is valid and effectual all the world over. Can a different rule be adopted with consistency as to the *dissolution* of the contract of marriage? Or can the rule as to the dissolution of marriage be modified and controlled by an arbitrary change of domicil at the will of either or both of the parties? The question in each of these aspects must be regarded as one of infinite delicacy, and its importance to the decision of the present cause was evident.

The danger of admitting any arbitrary principle in questions affecting the existence of the conjugal relation, appeared, at first sight, serious and alarming. Marriage itself has a fixed and indelible character. The relation constituted by it is the most sacred and important of all the relations in civil society, and that which it most con-

cerns the citizens of every state should be fixed and determined. But change of residence for a single day might subject the party to a new jurisdiction by personal citation. Or, this consequence might follow from longer residence as a stranger, like that of the defender, Mr Levett, in Scotland, without any real change of domicil. Even when the new domicil was apparently most permanent and fixed, the inference that a change had really taken place, was but matter of construction from all the circumstances,* and was liable to much uncertainty. It was, however, indisputable, that the most important interests of the parties, of their children, and of society at large, depended upon the security of the conjugal relation. Hence the necessity of resorting to some principle less dangerous in its consequences to the sacred bond of marriage.

In all respects, the law of the contract was free from these objections, and might be adopted, at least, with safety to the indelible nature of the contract and relation

* Voet, Lib. v. t. 1. § 97.

of marriage. In the case of the relation constituted by marriage, it appeared even more necessary than in any other case whatever, that the principle of concession by one foreign state to another should be allowed to operate. The mode of constituting the relation is accordingly received, as well as the relation itself, and, in consistency, the modifications established by the law of the place of celebration ought likewise to be admitted. By analogy, at least, it is clear, that the principle of *comitas*, when adopted, should be extended thus far. The established doctrine upon the point also corresponds, and is thus expressed by Huber: "Porro non tantum ipsi contrac-"tus ipsæque nuptiæ certis locis rite cele-"bratæ ubique pro justis et validis haben-"tur, sed etiam *jura et effecta* contractuum "nuptiarumque in iis locis recepta ubique "vim suam obtinebunt."*

While the law of the contract thus appeared to be the safest rule to follow in such a case, it likewise harmonized finely

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* Huber, De Conflictu Legum, § 9.

with the nature of marriage, and with the intention of parties, as appearing on the face of an agreement, by which they voluntarily contracted an indissoluble union, indefeasible by its own nature, and by the law of the country where it was made.

But, assuming that the law of the contract is every where entitled to obedience from consideration of its equity, yet this, like every other general rule, cannot be received without limitation. Wheresoever the foreign law stands opposed to the principles of religion or of morality, or to the municipal institutions established in the country where it is sought to be applied, it must cease to operate. For, it is clearly the first duty of every state, to keep its religion and morals pure, and its institutions entire. This necessary concession, therefore, leads to the important inquiry, Whether there is any thing in the quality of indissolubility attached to marriage by the law of England, either so immoral in itself, or so hostile to established principles and institutions in this country, as to require that it should not be respected here?

By the definition of the civil law as to the spouses, the relation of marriage is *conjunctio maris et fæminæ consortium omnis vitæ divinarum humanarumque rerum communicatio.** In its origin, the eminent and enlightened Judge who decided the case of Gordon against Dalrymple,† has observed that it is "a contract of natural law. It is "the parent, not the child, of civil society. "In civil society it becomes a civil contract, regulated and prescribed by law, "and endowed with civil consequences. In "most civilized countries acting under a "sense of the force of sacred obligations, it "has the sanction of religion superadded; "it then becomes a religious and civil contract, for it is a great mistake to suppose, "that because it is the one, therefore it "may not likewise be the other. Heaven "itself is made a party to the contract; and "the consent of the individuals pledged to

* Voet, ad Pand. lib. xxiii. tit. 2. 1.

† Dodson's Rep. of Sir William Scot's judgment in the case of Dalrymple.

" each other is ratified and confirmed by a
" vow to God."

The law of Scotland, too, in particular, has ever regarded marriage not merely as a civil contract, the creature of civil society, but as founded in the divine institution. " The " first obligations," Lord Stair has observed, * " put upon man by God, were the " conjugal obligations, which arose from the " constitution of marriage."

Lord Bankton, † in his remarks on the rule, *nuptias non concubitus sed consensus facit*, says, " The law before us being from Ul-" pian, a Gentile lawyer, who did not own " marriage to be a divine contract, must " hold more strongly in Christian states who " regard it as such ; and particularly with " us marriage is esteemed a divine contract." And Mr Erskine ‡ observes, that " the cha-" racter of perpetuity seems to have been " impressed on marriage by God himself in " its first institution, when he declared the

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* Stair, b. i. t. 4. p. 1. † Tit. 45. b. 4.
‡ Lib. 1. tit. 5.

"two common parents of all mankind to "form one flesh, Gen. ii. 22, *et seq.* which "was afterwards improved by our Saviour's "injunction, that no man should put asun-"der whom God had joined; Matt. xix. 6." It is "for these reasons," he concludes, "marriage cannot, by the usage of Scot-"land, be dissolved till death, except by di-"vorce, proceeding either upon the head of "adultery, Matt. xix. 8, 9; Mark x. 2, or "of wilful desertion; 1 Cor. vii. 15."

These views perfectly accord with the more ancient regulations of the canon law before it converted marriage into a sacrament. The doctrines of that code, while not infected by the corruptions to which the Council of Trent gave its sanction, have likewise, since the date of the Reformation, continued under various modifications to be the acknowledged basis of the matrimonial law in all the Protestant states of Europe. As to Scotland, within half a century after the date of the Reformation, Sir Thomas Craig * observed, "*Totam hanc quæs-*

* B. ii. dieg. 18. § 17.

"*tionem pendere a jure Pontificio.*" Hence, although the idea of a sacrament in marriage and the quality of indissolubility, are in our municipal institutions alike disregarded, nevertheless, in strict conformity to the decretals and other books of the more ancient canon law, we still reverence marriage as being of divine institution, and regard its obligations as sacred and irrevocable.

The genius and tendency of the law of Scotland, as well as of England, are therefore clearly in favour of the perpetuity of marriage. The former as well as the latter encourages adherence to the contract, and discourages its dissolution. Every facility is afforded towards entering into the married state. Suspicion and alarm watch every step to dissolve it. For upon the security of that relation between the parents, the legitimacy of their offspring, with every consequence attached to that character in society, must depend. "*Solutionem matrimonii difficiliorem debere* "*esse favor imperat liberorum,*"* was the

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* L. 8. Cod. de Repud.

maxim even of the Roman Code, as it is unquestionably of our own. This is manifest from the principle which governs the whole procedure in consistorial causes, under the law of Scotland. A jealous disregard prevails of every admission made by a party who is suspected of collusion; no judgment passes by default without proof; and if the defender declines to appear, the Judges are nevertheless bound to proceed in the investigation and discussion of the merits, just in the same manner as if he were present, and had maintained the keenest opposition. In the same spirit every objection against the suit which presents itself to support the marriage, must be carefully weighed. Not only collusion between the parties, but *dissimulatio injuriæ*, or *remissio injuriæ* and *lenocinium*, as personal bars, are relevant exceptions to the action of divorce. In cases where the injured spouse has, by affording any of these exceptions, forfeited the remedy of divorce, and in all the more numerous cases where the right to dissolve the marriage is not prosecuted at all, or not to the length of final decree, the consisto-

rial law itself never interferes between the parties, however flagrant the adultery.

Thus, it appears, that there is nothing in our own system which should prevent us from respecting the quality of an English marriage, that it is indissoluble. It is not immoral to hold, that marriage should not be dissolved on account of adultery, for the characteristic feature of the conjugal relation, even in this country, is its permanency. So it has been viewed by Stair, Bankton, and Erskine, and though, in certain cases, the dissolution of the marriage union is *permitted*, yet it is in no slight degree important to this view of the case, that the law of divorce is here barely *permissive*, not *imperative*.

It is upon the same principle, that the right of divorce is regarded in the law of Scotland as a mere personal cause of complaint, in which no third party, and not even the public, can be permitted to interfere. If not claimed by the innocent spouse, or if abandoned before obtaining a decree, the marriage, by the law of Scotland, is not affected by this right of divorce, and continues to subsist, with all the rights and privileges

attached to it, just in the same manner as if the adultery had never been committed. In these respects, too, our rule is in unison with the general principle on which the law of divorce rests in other nations.* In a word, there cannot be a doubt, that divorce for adultery is, in every view of the subject, matter purely of private right, the exercise of which is not enjoined, but merely permitted, even by those peculiar rules of municipal law, which, in Scotland, and in some other Protestant States, allow the injured spouse to sue for dissolution of the marriage on that ground.

Neither is it necessary, in order to punish the guilty, or to prevent the prevalence of the crime in this country, that divorce should in any case follow, because adultery has been committed by a foreigner in Scotland. In our criminal code, that offence still ranks in the list of crimes which may be prosecuted at the public instance before the Criminal Courts. † The statute appoint-

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* D'Esprit de Loix, cap. iii. lib. 26.

† Hume's Com. Vol. IV. p. 302.

ing a capital punishment, when it is flagrant,* is understood to be in desuetude. But the inferior punishments are still competent. Foreigners, and also our fellow-subjects of the sister kingdoms, are liable, in the same manner as natives of Scotland, to be brought to trial and punishment for the crime of adultery, just as for other delinquencies committed within this territory. But if this crime had been altogether overlooked by the penal law, the circumstance could afford no pretence for mingling considerations of criminal law with the cognizance of the civil action of divorce between private parties. Indeed, if the complete separation between these two perfectly distinct departments shall be lost sight of, it is obvious, that the subject can no longer be investigated with accuracy in any case, or so as to lead to a rational conclusion.

It is equally clear, that the sovereignty and independence of the law of Scotland can be in no degree affected by following

* Notour, in the language of the Scotch law.

the rule of their own contract, in deciding cases like the present, between the citizens of another country who have become subject to this jurisdiction. Indeed, if it were to follow, as a necessary consequence, from the possession of jurisdiction here, that the law of Scotland must also furnish the rule of decision, international law must be altogether disregarded. But, in Scotland, the *jus gentium* is acknowledged, as it is in all other civilized countries. According to its dictates, the foreign law confessedly regulates here in questions relative to all other foreign civil contracts, excepting marriage. It is, therefore, next to be carefully considered, whether this particular contract has not likewise the common claims, at least, if not peculiar and stronger claims to respect, *according to the principle of international law* which regulates.

*Comitas* is the term used to express the principle upon which courts of independent countries, in deciding questions upon foreign contracts, adopt the rule of the foreign law, under which the contract was made. This concession, however, is not

a duty of obedience, but merely a debt of justice. Still it cannot be lawfully refused, unless where it would be attended with injurious consequences. In other words, the ultimate question here is one of legal expediency; and, in the language of the civilians, *comitas* is only to be observed, "quatenus sine præjudicio indulgentium fieri potest."*

Into this final issue the whole discussion then resolves. But, before any opinion can be formed in this instance, it is necessary to ascertain, with precision, what is the nature and amount of the acknowledged difference between the English and Scotch laws. The engagements of perpetual fidelity, and inseparable union, which the spouses pledge to each other during their joint lives, are as little qualified, by any exception in favour of divorce for adultery in the ritual of marriage under the one of these laws as under the other. It cannot, therefore, be said, that the municipal laws of the two kingdoms are at variance in their abstract and general prin-

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* Hertius, De Collisione Legum, Vattel, p. 6, § 14, 16.

ciples. But if the municipal laws of the two countries could not be reconciled, and if our own did not admit of this accommodation, there is a higher ground upon which the *lex loci contractus* is preferable even to that of the defender's true domicil of residence.

It is evidently most essential, according to every view of public expediency, as well as of justice, between private parties, that of all contracts, that of marriage should have a fixed and indelible character, which it shall not be in the power of the husband to alter at pleasure. But the municipal laws as to divorce, in almost every state, ancient and modern, are peculiar and local. These, too, are sometimes quite opposite, even in neighbouring provinces of the same state. No example can be more striking than that of the three kingdoms of the British empire, in two of which, marriage is indissoluble by judicial sentence, while, in the other, it may be dissolved either for adultery or continued non-adherence, after legal requisition. By the law of the French revolutionary governments, and by the law

of Russia, as to certain classes, incompatibility of temper has been made a ground of divorce. In the Netherlands, opposite rules prevail. Those of the several states of Germany are altogether different from each other, and at variance. The municipal systems of the other countries of Europe are equally discordant on this head. In America, while some of the United States follow the English rule; in others, six weeks absence is a sufficient ground for divorce; and the European colonies throughout the world follow each the law of the kingdom to which they belong. Indeed, quotations from each would only prove that perfect agreement between any two of these codes, as to the extent of the remedy to be afforded for conjugal wrongs, if it exists at all, is extremely rare, and that there is scarcely any other point on which such unbounded freedom of judgment has been exercised by each legislature. Every person, *sui juris*, may, however, in ordinary cases, remove from one domicil to another, as he thinks fit. Can it then be either expedient or just, that by such change of

place, one of the spouses, without the consent of the other, should have power altogether to subvert one of the most important conditions of the relation between them? Upon that footing no quality, indeed, of marriage, established either by the contract of the parties, or by the law under which their union takes place, could be secure from alteration at the pleasure of the husband. Total insecurity to the most important interests of the other spouse, and of the children, must follow. Nor would the evil stop here; for the law of the contract does not yield, and may, within its own territory, maintain the essential conditions of that contract, as indefeasible against the decisions of every foreign tribunal to which the parties may become amenable. Yet each sentence of divorce *a vinculo*, is a permission and warrant from the authority which pronounces it, for the parties to marry anew with other individuals. Hence, these new connexions will be lawful in one country, as founded upon the most sacred of contracts, and in the neighbouring country will be crimes calling for degradation and

severe punishment. The children of these will be legitimate, and entitled to succeed to all inheritance of honour or estate in the one, and bastards incapable of legal succession in the other. In other words, a rule so inexpedient and unjust, must produce great confusion and distress if it shall prevail in any country of the civilized world; but to a degree infinitely aggravated, where opposite laws with regard to the dissolubility of marriage by judicial sentence exist in different realms of the same state, the nations of which form one people, as in Great Britain.

These views are in no respect inconsistent with the admission, that jurisdiction to try the action of divorce has, in this instance, and will always become vested in the Consistorial Court of Scotland, when the defender is regularly convened before it, by citation within the territory. The error and confusion lie in not distinguishing the *jurisdiction* from the *rule of decision.* The sovereignty of every independent municipal system of law, does indeed require that this jurisdiction should be exercised

and supported in freedom from all foreign control, as well as universally in all actions upon contracts of every kind, brought under its cognizance. But it does not require that the law of a foreign contract should be disregarded in questions arising upon that contract between citizens of another country.

If it shall still be contended, that it is nevertheless the paramount interest of every sovereign and independent system of law, to decide by its own rules upon actions against strangers, who have become subject to its jurisdiction, as it does in the cases of its own permanent subjects, it is answered, that the sole object of law in the suits of private parties is to do justice between them, and can be attained only in questions arising from their contracts, by giving effect to their covenants in these, according to that sense in which the parties themselves must be held to have understood such covenants at the time they were entered into; that is to say, according to the plain meaning of their engagements, *et secundum legem loci contractus*. Refusal to discharge this

debt of justice, as Dirleton has observed, could only serve to provoke similar iniquity towards our own citizens when found within the territory of the law which had been disregarded, by way of reprisal. The *status* of a stranger, as married or unmarried—divorced *a vinculo matrimonii*, or only separated *a mensa et thoro*, by judicial sentence for adultery, cannot be a matter of any concern to the law of the country, before the tribunal of which he happens to be convened during a transient residence, except as to the duty of the Judges to pronounce a right decision.

The example of the law of England, and the want of *comitas*, which the courts of justice there are said to shew towards the municipal system of this country, in not affording to Scotch parties sentence of divorce *a vinculo* of Scotch marriages for adultery, and in not respecting a sentence of divorce pronounced by a Scotch Court *a vinculo* of an English marriage, has likewise been urged as proof, that it would be inexpedient to abandon our own law of divorce to that of England, which will

make no concession in return. It is sufficient to reply, that if this charge were well founded, it would not therefore follow, that *comitas* upon our part must be prejudicial to ourselves, and consequently inexpedient. Reprisals and retaliation are extraordinary measures, which independent states may sometimes find reason to adopt, but which are totally foreign to the duties of courts of law. It is only competent for them to consider what is just in each particular case they decide. Thus only can they obtain or merit respect at home or abroad, and it is by the force of reason alone, that the opinions they adopt as to the due operation of international law can be entitled to any weight beyond the limits of their own territory. Even in point of fact, too, it may be presumed, that the assumption is erroneous, that *comitas* towards the Scotch law, and towards the decision of a Scotch Court in this matter, is refused in England. For, as to the remedy of divorce *a vinculo* of a Scotch marriage, power may be wanting to give that remedy to citizens of Scotland in the Court of the sister king-

dom, the law of which only authorizes divorce *a mensa et thoro*; because, when this power has not been vested in Judges for any purpose, or in any case, it cannot be assumed by them to accommodate strangers. Application to the Legislature itself for that measure of redress, may consequently, in snch circumstances, be the only resource competent. Again, as to the Scotch sentence of divorce, which was not respected by the English Judges in the trial of Lolly for bigamy, it may have been proved, that the decree had been fraudulently and unlawfully obtained by the device of that party, and this decree may therefore have been held to be of no avail to him, or it may have been concluded, that this decree was a nullity, because it set aside a marriage which was incapable of dissolution by judicial sentence. It is likewise to be remembered, that he was tried in a criminal Court for bigamy, and that the decree of this Consistorial Court was a civil sentence. The first hypothesis, as to the reason of disregarding the Scotch divorce, may, therefore, be illustrated by observing, that no

judgment of a civil Court, fraudulently obtained, can bar a criminal action. For example, a decree of a competent civil Court, sustaining action for payment of a forged bond, will not, after the crime has been detected, prevent trial and penal conviction in the criminal Court. Upon the other hypothesis, the Scotch decree of divorce, dissolving the relation of husband and wife, constituted by an English marriage, may have appeared in the same light as if it had dissolved the relation of parent and child arising from that union, by judicial sentence, both being equally incapable of dissolution by judicial sentence in the view of the English law. To explain the decisions or principles of the law of England, is not, however, requisite here, if that task could be performed by a Scotch Court. The rule of that system must be considered here only as a fact.

The sole remaining argument upon the head of expediency, maintained by the pursuer, is derived from an assumption, that impunity will induce the profligate among the married people of England and Ireland

to take up their residence in this kingdom, for the purpose of forming or preserving adulterous connections beyond the reach of the law. But, it is denied that such impunity can exist. For it is the province of the criminal law to protect the interests of morality and social order against offenders of every description, and it is not to be doubted that any just occasion would again call into activity those penal statutes of our law against adultery, which have not been abrogated by disuse.

It is, at the same time, but too plain, that the dissolution of English marriages, by our divorce for adultery, must operate as a public and general invitation to all the married of the sister kingdoms, who are tired of their union, and profligate in their manners, to come into Scotland and pollute this country with their crimes, for the very purpose of regaining freedom. The records of the Consistorial Court, within these last ten years, afford too much reason for believing, that this danger is not ideal; and it is easy to foresee, that if the practice of granting such divorce in these cases shall be once fully established, the evil must in-

crease to a degree infinitely prejudicial to the purity of morals among the people of Scotland. Thus, in truth, it is not refusal, but giving divorce *a vinculo* of English marriages, which must produce serious injury to our own municipal system, and to the moral and social interests of this nation.

Hence, in every view, as well of justice as of expediency, and regarding the present case as a civil question of right between private parties, the decision ought to be given according to the rule of that law by which their rights have been established. By the acknowledged principles of international jurisprudence, the pursuer is, however, entitled to the same remedy she would have obtained from the judicature of her own country, but to nothing more. Separation *a mensa et thoro*, with separate aliment, is understood to be the redress she might have, if the defender were convened there *in judicio*. But for this she does not conclude in the present action, and, therefore, as it now stands, it must be dismissed.

The other two Judges of the Primary Court were also of opinion, that divorce *a vinculo matrimonii* could not be pronounced in this case; but only upon the ground, that the real domicil of the parties appeared from the condescendence of the pursuer to be in England at the date of the action. And a judgment was given in these terms (9th December 1814): " The Commissaries, " having considered this condescendence, " with the libel and certificate produ- " ced, and whole process, in respect that " the parties confessedly are English, and " the marriage between them was cele- " brated in England, and that the perma- " nent domicil and true residence of both " since their marriage has always been, and " now is, in that kingdom: Find, that the " alleged commission of adultery by the de- " fender in Scotland, and his residence here, " which, by the pursuer's own statement, " appears to be temporary and transient, " can have no effect to alter the condition " of the marriage between the parties as in- " dissoluble *secundum legem loci contractus*: " Therefore, find that this Court cannot pro-

" nounce sentence of divorce *a vinculo ma-*
" *trimonii*, in terms of the conclusions of the
" libel; assoilzie the defender, and decern."

The case being thereafter submitted to the review of the Superior Court by bill of advocation for the pursuer, this deliverance was given by Lord Reston, Ordinary (6th February 1815): " The Lord Ordinary, on
" considering this bill and inferior Court
" process, appoints the bill to be printed,
" that it may be reported to the Court
" along with the case of Edmonstone *versus*
" Lockhart; and also ordains this bill and
" deliverance to be intimated to the de-
" fender."

Afterwards his Lordship gave this further deliverance and order (11th July 1815):
" The Lord Ordinary, having considered
" this bill, with the proceedings before the
" Commissaries, and also the bill of advo-
" cation for Thomas Stirling Edmonstone,
" Esq. residing at Moorhouse, near Carn-
" wath, against Mrs Annabella Lockhart,
" otherwise Edmonstone, with answers
" thereto, also the bill of advocation for
" the Honourable Mrs Mary Butler, or

"Forbes, spouse of the Honourable Fre-
"derick Augustus Forbes, lately residing
"in Edinburgh, and Richard Hotchkis and
"James Tytler, Esqrs. writers to the signet,
"her attorneys; and having advised with
"the Lords of the Second Division, before
"whom and the Lords of the First Divi-
"sion, and the permanent Lords Ordinary
"of both Divisions, counsel were heard in
"behalf of the complainer in this bill, and
"the said other two complainers, and for
"the said Mrs Edmonstone, respondent, as
"one of them, appoints memorials to be
"lodged, which are to be seen and inter-
"changed, and put into the Lords' boxes
"by the second box-day of the ensuing va-
"cation, under an amand of L. 20 Sterling,
"agreeably to the interlocutor pronounced
"of this date upon the bill of advocation
"for the said Thomas Stirling Edmonstone,
"which interlocutor is here referred to." *

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* The whole proceedings in the Superior Court will be found in the Appendix to this volume; but, for convenience of the reader, the questions put by the Second Division of the Court of Review to the other ten Judges of that Court, and their answers, are also annexed here. These are,

At the close of the discussions before the whole Court of Session, and in the Second

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" Is it a valid defence against an action of divorce in Scot-" land, on account of adultery committed there, that the " marriage had been celebrated in England?

" Or, that the parties had been domiciled there, when the " marriage had been celebrated in Scotland?

" Or, will it materially affect the defence, that the parties, " though married in England, were Scots persons, who had " thereafter cohabited in Scotland, and continued domiciled " there?

" The ten Judges, to whom the above question has been " referred, having maturely considered it separately, and " having also conversed together on the subject, are unani-" mously of opinion,

" That it is not a valid defence against an action of di-" vorce in Scotland for adultery committed there, that the " marriage had been celebrated in England.

" Nor that the parties had been domiciled there, when the " marriage had been celebrated in Scotland.

" And, *lastly*, they are of opinion, where the parties are " Scots persons happening to be in England when their mar-" riage was celebrated, but who thereafter returned to Scot-" land, and cohabited and continued domiciled there, that " these circumstances can never aid the defence against an " action of divorce in Scotland for adultery committed there, " on the ground that the marriage had been celebrated in " England. On the contrary, they are of opinion, that " these circumstances will materially support the plea of the " pursuer of the divorce.

" In giving this opinion, they think it necessary to add, " that they take it for granted that there is no objection to

Division of that judicature, this interlocutor was given by Lord Reston (9th March 1816): "The Lord Ordinary, having again "considered the bill and procedure, with "the condescendence, and advised with the "Second Division, and the Court being of "opinion that the case ought to be remitted "to the Commissaries, with instructions to "recal their former interlocutor, and allow "further inquiry as to the domicil; but be-"ing equally divided in opinion, whether "this inquiry should be limited to the do-"micil of the defender, or extended to that "of both parties, supersedes advising the "case till May next."

The opinion of Lord Pitmilly being afterwards obtained, a judgment remitting the

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"the jurisdiction of the Court from the want of that resi-"dence or domicil in the parties which is necessary to found "civil jurisdiction. And also, that there is no proof of "collusion between the parties, either by direct evidence or "necessarily arising out of the circumstances of the case, as "they mean to give their opinion only on the abstract ques-"tion put to them, and to say that the mere fact of the "marriage having been celebrated in England, whether be-"tween English or Scots parties, is not *per se* a defence "against an action of divorce for adultery committed here."

cause was then pronounced in these terms (1st June 1816): "The Lord Ordinary, "having resumed consideration of this cause, "and again advised with the Lords of the "Second Division, when Lord Pitmilly was "present, remits to the Commissaries to re- "cal their former interlocutor, to allow the "pursuer to prove that the defender was "domiciled and resident in Scotland when "the action was raised, and also to make "what inquiry they may think proper and "competent, in order to ascertain whether "the present process be collusive, and there- "after to proceed according to law."

In obedience to this remit, the Commissaries (7th June 1816) recalled their former interlocutor, and proceeded in the action, according to the directions of the Superior Court. At the same time, the case of Edmonstone, referred to in the interlocutors of the Lord Ordinary, was likewise before them by another remit, * and, in that case, the Second Division of the Court of Session, in conformity to the opinion of the other ten

* See following Report.

Judges, had decided, that it is not a valid defence against an action of divorce in Scotland, for adultery committed there, that the marriage had been celebrated in England.

The proof led by the pursuer, Mrs Levett, was extremely concise, with respect to the quality of the defender's residence in Scotland, and altogether failed to establish that he had lost his native domicil in England, or acquired a new domicil in this country.

Under the oath of calumny, the pursuer herself was likewise very fully examined as to collusion, and her answers were completely negative of that objection.

In these circumstances, all the Commissaries were of opinion, that the conclusion for divorce *a vinculo matrimonii* could not be sustained, and an interlocutor was therefore now pronounced in the following terms :— " July 19, 1816. The Commissaries, hav- " ing resumed consideration of this process, " and having particularly considered the " answers made by the pursuer to the ques- " tions put to her under the oath of ca- " lumny, in obedience to the instructions

" contained in the last part of the remit
" from the Superior Court, find, that there
" is no ground in this case for suspecting
" any collusion, either relative to the insti-
" tution of this action, and procedure there-
" in, or relative to the defender's coming to
" Scotland, and continuing here till he re-
" ceived his citation. Having also attend-
" ed particularly to the instruction contain-
" ed in the first part of said remit, which,
" although the defender had been personal-
" ly cited, directs the Commissaries " to al-
" low the pursuer to prove that the defender
" was domiciled, and resident in Scotland
" at the date of the action ;" and consider-
" ing that the personal citation of a foreign-
" er within this territory, is attended with
" the very same effect as an execution left
" at the dwelling-place, where he had re-
" mained forty days, which law regards as
" his presumptive domicil, the Commissa-
" ries apprehend that the Superior Court
" requires evidence, not of this presumptive
" domicil, the necessity of inquiring into
" which appears to the Commissaries to be
" superseded by the personal citation against

" the defender in process, but that the de-
" fender had established a real domicil in
" Scotland, at the date of the action : Find,
" upon full consideration of the proof led
" by the pursuer, and of her pleadings on
" record, that both parties in this case are
" confessedly natives of England, and that
" the real domicil of both, when married at
" London in the year 1802, and also during
" their whole cohabitation as husband and
" wife, has always continued to be in Eng-
" land, or in other places subject to the
" English law : Find, that the defender, in
" particular, continued to reside in his Eng-
" lish domicil, until he came to Scotland in
" February 1813, after having previously
" deserted the pursuer in England : Find,
" that he afterwards did remain in Scot-
" land till this action was raised in October
" 1814, but merely as a lodger, from week
" to week, at inns and lodging-houses in
" various places, without any change of his
" real domicil in England, and without any
" fixed residence here. In respect that such
" mere presence of a foreigner in this coun-
" try, as may suffice to found jurisdiction,

" however long continued, does not neces-
" sarily and always infer that the law of
" Scotland must apply its municipal rules
" upon questions where he is a defender,
" in preference to those of his own country,
" and that our law, on the contrary, as in
" the case of intestate personal succession,
" allows inquiry to be made as to this real
" domicil, and upon principles of interna-
" tional law, adopts the foreign rule of that
" domicil, when this course may seem just
" and expedient; and in respect also, that
" a change of the real domicil made *bona*
" *fide et animo remanendi* at the date of the
" action, seems, in a peculiar degree, requi-
" site to authorize the adoption of our mu-
" nicipal rule, in preference to that of the
" English law, upon a question by which
" this English defender's *status* of husband,
" arising from an English contract, is affect-
" ed: Find, that the pursuer has not esta-
" blished by evidence, that the defender
" held that real domicil at the date of this
" action, which was requisite to be proved.
" *Separatim*, find the allegation that Scot-
" land is the *locus delicti* or *rei gestæ*, in re-

"spect the defender committed adultery "here, of no importance or relevancy to "the present action, because, in consistorial "processes of divorce, acts of adultery are "founded upon merely *ad civilem effectum*, "and for redress to the private parties in-"jured, and decrees have accordingly been "hitherto pronounced in these by this "Court, without distinction, whether the "crime had been committed in Scotland, "or in any other country of the world; * "although, in criminal causes before the "competent tribunal, when the crime of "adultery is prosecuted *ad vindictum publi-"cam*, the *locus delicti* is an essential cir-"cumstance: Therefore, assoilzie the de-"fender from the conclusions of the present "action, as laid for divorce *a vinculo matri-"monii*; but in respect there is no rule of "the law of Scotland, which prohibits the "Commissaries from granting a decree of "separation *a mensa et thoro*, and for sepa-"rate aliment to this pursuer, on the "grounds alleged in her libel; while a de-

* Appendix, Note (D.)

" cree, so qualified, would correspond with
" the principles of international law ; ap-
" point the pursuer to state whether she
" will restrict her conclusions to this inferior
" remedy."

In explanation of the grounds of this decision, the officiating Judge * observed, that the first duty of the Radical Court, under the remit from the Tribunal of Review, was to give obedience, in full conformity to the spirit, as well as to the letter, of the instructions contained in the interlocutors transmitted upon the bill of advocation.

With respect to the point of collusion, this duty had been performed without any difficulty. No circumstance had appeared in the cause which gave the slightest indication that the pursuer had any concert or understanding with the defender, directly or indirectly, relative to his placing himself under this jurisdiction, or as to the action she had raised. Her oath, consequently, was the only mean of inquiry upon this head to which recourse could be had, and

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* Appendix, Note (E.)

her deposition was sufficiently explicit, consistent, and satisfactory, to remove all ground for suspecting any collusion on her part. The judgment of the Court must, therefore, in the first place, clear the suit in the most unqualified manner of that objection.

The other object to which the investigation of the Primary Court had been directed, was to ascertain from the proof which the pursuer might lead, whether the defender was domiciled and resident in Scotland when the action was raised?

No difficulty had occurred as to the questions to be put to the witnesses, or as to the import of the answers which they gave. In terms of the remit, the pursuer had been left to take her own course in this proof. She cited such witnesses as she thought proper. Every question suggested was put to them, and their whole answers were fully entered upon the record.

Thus far the duty of obedience was plain in its nature. Neither was there any difficulty in estimating the amount of the proof with respect to the true quality of the de-

fender's domicil and residence in Scotland previous to and at the date of this action. The pursuer had indeed established, by her evidence, with the utmost precision, that her husband, the defender, had travelled from England to this country in spring 1813, and had remained here as a stranger, from week to week, at inns and in furnished lodgings, until he received his citation on the 6th of October 1814. But there had been no attempt made by her to shew, that he had any home, establishment, or concerns of business in this country. All the explanation given of his conduct or of his motives for coming and remaining here, was the pursuer's statement in her condescendence, that he had previously deserted her society in England, after he had been sued there for restitution of conjugal rights, and that, before he came here, he had formed an adulterous connection with Elizabeth Osborne, which continued to subsist in this country. Unless it were to be supposed that he wished to give the pursuer an opportunity of dissolving their marriage by this action, no farther indication of his

reasons for coming to Scotland, and continuing here, could be any where found in the record of this cause. Consequently, it was clear, that the defender had acquired no real domicil in Scotland; and that he was, at the date of the action, in every sense, according to the construction of law, as exclusively a citizen of England as he had been when he first crossed the Tweed.

In these circumstances, the question for decision now came to be, Whether the conjugal relation between the parties and the defender's *status* of husband should be considered according to the municipal law of England, which was his own country, or according to the municipal law of Scotland? No direction had been given by the remit, except to ascertain what his domicil and residence had been at the date of his citation, and afterwards to proceed according to law. What quality of domicil and residence, then, was requisite to give the preference to the rule of the Scotch law? Was it the presumptive domicil assumed, for the purpose of founding juris-

diction, in the case of a stranger, from the fact of his dwelling forty days in this territory, or the real domicil chosen *animo remanendi*, by the rule of which, if he had died intestate on the day he was served with the summons, his personal succession would have been distributed?

The Second Division had not asked the opinion of the other ten Judges of the Superior Court, with respect to the legal consequences of the facts alleged as to the domicil and residence of the defender *at the date of the action;* and the questions and the answers, which appeared upon the record of their proceedings, bore relation only to the domicil *at the date of the marriage.* But the Judges of the Second Division, when they resolved, by their interlocutor of the 9th March 1816, "to allow further "inquiry as to the domicil," were equally divided in opinion, "whether this inquiry "should be limited to the domicil of the "defender, or extended to that of both par-"ties?" Evidently, therefore, the *real* domicil alone was then the subject of consideration; for one kind of domicil only is spe-

cified in this interlocutor. As to the pursuer, Mrs Levett, *that* could not possibly be the *presumptive* domicil assumed *fictione juris*, to afford opportunity for citation, because she was the party at whose instance the citation was given; and, for the purpose of founding jurisdiction and maintaining the action, it was not necessary that she should ever set her foot in Scotland, provided that she gave a mandate to some person here qualified to act for her.* As to the defender, again, it must be matter of necessary inference, that domicil, taken in the same sense, was the subject of consideration; for the very same phrase was used in relation to both parties. Besides, the execution returned upon the summons proved that he had been personally cited to the action at Edinburgh. A *presumptive* domicil, therefore, which might admit of citation in absence at the dwelling-place of the defender, could as little be requisite to

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* Even the pursuer's oath of calumny might be taken by commission in England upon cause shewn, of which there are many instances on record.

be proved with regard to him, as with regard to the pursuer, and, consequently, could not be supposed to have been in the view of the Superior Court when their interlocutors were pronounced.

The defender, indeed, had "*residence*" here, for it was proved that he continued in Scotland from some time in February or March 1813, till he got his citation upon the 6th of October in the following year. But it was also proved, that he did so remain without a house of his own, or establishment, or real property, or business, or permanent object of any kind in this country. Now, a stranger dwelling at inns and furnished lodgings, where he hires his accommodation for the week, does not, in the eye of law, thereby become even an inhabitant of this country, or cease to be one of the land in which he has his proper and permanent abode;* more especially when this last has been the place of his nativity. His description here con-

* Voet, ad Pand. lib. 50. tit. 1. § 1, 2, 3.

tinues to be that of a stranger merely, until he acquires a permanent home and establishment.* Nor will he even then become a citizen, unless there are facts inferring that he has transferred *his real domicil* from his native country to Scotland. By the Roman law, ten years residence of a foreigner as a student at an university was requisite to constitute such a domicil. Assuredly, then, in no legal view can the defender, Mr Levett, be regarded as having any domicil in Scotland, or any residence here, otherwise than transiently, and as an English stranger.

It must be remarked, too, that while under the interlocutor of remit, considered in connection with the previous interlocutors of the Court of Review, no inquiry as to the pursuer, Mrs Levett's, domicil has been competent; the real domicil of her husband, the defender, appeared, from her own proof, to have been in England at the date of the action, and *that,* by infer-

* Lib. 10. Codicis, tit. 39. leg. 2, 3, 4.
Ibid. lib. 1. tit. 16. Reg. 239. § 1, 2.

ence of law, consequently is her domicil also. The place or *situs* of the conjugal relation between them, by the law of which all their reciprocal duties as spouses fell to be regulated, was, therefore, unquestionably in England at the date of this action.

The only other ingredient of the case in point of fact, either alleged or proved, is the commission of the crime of adultery by the defender within this territory. But, from the date of the institution of the Consistorial Court in this kingdom to the present day, it has never been held necessary, or of importance to an action of divorce for adultery maintained here, that the *locus delicti* should be in Scotland. On the contrary, in many cases on record, the crime was committed beyond the limits of Scotland, sometimes altogether in another quarter of the globe.* In a very great number of cases, the decree dissolving the marriage has proceeded on proof of adultery abroad as well as in Scotland, without any distinction; and in

* See Appendix, Note (F.)

no instance was it ever sustained as an objection, that the proof offered was of a crime not committed within this territory. The principles, too, on which this uniform practice has been founded, seem evident and unquestionable. Divorce is the remedy of the party injured, for the private wrong, which that party may overlook or pardon at pleasure, and even at all stages of the judicial procedure after the action has commenced, until a final decree dissolving the relation with the guilty has actually gone forth. The injury consists in the breach of the vow of fidelity. It is neither aggravated nor lessened by the circumstance, that the crime has been committed within the territory of the domicil, or beyond the limits of that territory. Hence the *locus delicti* can furnish no plea either in support of the civil action, or in defence against that action.

A confusion has no doubt sometimes arisen even in the style of judgments and judicial proceedings, from the circumstance that this civil action is founded upon a criminal fact. But the instances are innumerable in the law of Scotland of actions pure-

ly civil which arise from delinquency, and are nevertheless maintained for civil reparation only to the private party.

Supposing these views of the facts and of the state of the question to be correct, the argument in favour of the law of the domicil rested on the following grounds:

The essential qualities of marriage, as unalterably fixed by divine institution, are the same throughout all Christendom, and it is in this sense that marriage is a contract *juris gentium*. Consent of the parties, seriously and deliberately given, is, indeed, the basis of this contract, as it is of every lawful and voluntary agreement. But the relation constituted by marriage, and which is the subject of the consent between the husband and wife, distinguishes it from all other civil contracts, as, according to the definition of Justinian, " viri et mulieris " conjunctionem individuam vitæ consue- " tudinem continentem," * or, " conjunc-

* § 1. Inst. de Pat. Pot. Voet, ad Pand. lib. xxiii. tit. 20. § 1. Stair's Inst. b. i. tit. 4. § 2.

" tionem maris et fœminæ consortium om-
" nis vitæ divini et humani juris communi-
" cationem," in the words of Modestinus.
And as to its origin and peculiar attri-
butes, Lord Stair has strikingly observed,
" That marriage itself, and the obligations
" thence arising, are *jure divino and natural,*
" appears thus; 1*st*, Obligations arising
" from voluntary engagement take their
" rule and substance from the will of man,
" and may be framed and composed at his
" pleasure. But so cannot marriage, where-
" in it is not in the power of parties, though
" of common consent, to alter any substan-
" tial, as to make marriage for a time, or
" take the power over the wife from the
" husband, and place it in her or any other,
" or the right of protection and provision
" of the wife from her husband, and so of
" all the rest. Which evidently demon-
" strateth, that it is not a human but a
" divine contract." Hence, in the general
view of the subject, and considering it as a
contract *juris gentium*, it is evident, that
no stipulation can be made a part or a
condition of a Christian marriage, which is

not implied in the nature of the contract itself as immutably fixed. Neither is there any difference as to principle in the several definitions that have been given. These only vary as to the mode of expression, and as to the degree of illustration which they afford.

Mutual fidelity and affection are among the reciprocal engagements of the parties, either expressed or necessarily implied, and these they must be held to pledge to each other, without any limitation. But no provision can be made by them in contracting marriage, as to the kind or measure of legal redress which shall be competent, if their engagements shall not be performed, or shall be violated on either side. For no equivalent or compensation can be stipulated as a substitute for performance of the essential conditions of marriage, and these admit of no qualification. In the event of failure, it is, therefore, necessarily left to the municipal law of each territory, to prescribe the nature of the reparation which the injured party may obtain, with reference to

the original standard to which all Christendom appeals. The legislative power, too, by which the means of obtaining redress must be applied, is altogether independent of the will or control of the private parties, and any stipulation entered into by them, contradictory to the law, which it imposes and alters at pleasure, would be nugatory if attempted. No additional agreement, then, of parties, either to provide or to exclude a particular remedy in case of adultery, can possibly enter into the essential conditions of a marriage, or can be confounded with them. It is equally impossible to control or influence the public law of any territory as to divorce by private paction.

To ascertain whether the municipal rules provided in each state for enforcing performance of conjugal duties, or affording redress in case of their violation, become *ipso jure* essential conditions of all marriages celebrated within its territory, seems to be the next step of the inquiry.

By the law of Scotland, dissolution of a

lawful marriage* is permitted only upon the ground of adultery, as expressly recognized in Scripture, or upon the ground of wilful and continued desertion, as conceived to be there permitted. Consequently, no rule of foreign law which authorizes divorce *a vinculo* for any cause not consistent with the essential conditions of the contract and with the Divine Law, by the interpretation of that authority to which we owe obedience, such as incompatibility of temper, involuntary and temporary absence, or the supervenience of mental or corporeal disease; and no decree of a foreign judicature proceeding on such a rule can affect the conjugal rights of a subject of Scotland in this *forum*.

The same principles apply to foreign rules of law and judicial decrees which regard the constitution of marriage. These also receive effect here only in so far as not inconsistent with the nature and institution of

* When marriage has been unlawfully contracted, it is set aside in Scotland by an action termed Declarator of Nullity.

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this peculiar contract. Thus a marriage contracted by a party beneath the lawful age, or within the forbidden degrees of propinquity, or a second marriage, while the first stood undissolved by death or divorce *a vinculo matrimonii*, could not be sustained here as the ground of any action for conjugal rights, however it might be supported by any foreign rule or decree.

All municipal regulations, whether relative to the constitution of marriage, or to divorce, which have been established by local statute or usage, and which the legislative power in each independent nation may impose or alter, are, likewise, even when not at variance with the nature of the contract or with holy writ, of a character and description entirely different from its inherent and essential qualities.

Therefore, while every legislature has the power of prescribing rules for its own subjects within its own territory, and while international law generally supports the decisions of the local judicature, pronounced according to the law of the place, in all other

countries where the *jus gentium* is acknowledged, there is a necessary limitation of this doctrine, and foreign rules of law cannot be respected here when these are opposite to the fundamental principles of morality, justice, or religion, which govern in our municipal system. Hence, as to questions of marriage and divorce, in particular, no inference or argument can be legitimately drawn from rules or decisions in other countries which rest upon opposite foundations, and where the principles are entirely different, all analogy fails. A right of polygamy, or of despotic power in the husband to inflict personal punishment upon his wife, for example, could not be enforced by a foreign party in this judicature, upon whatever authority it might be maintained in their native land.

But, in the two sister kingdoms of this island, it cannot be denied that the laws of both, as to divorce, although different, appeal to the same standard, and are consistent with the essential conditions of a Christian marriage. By the divine precept it is not imperative to grant divorce *a vinculo*

for adultery, but merely permissive. Therefore, the legislative power was equally at liberty to authorize that remedy to be given in Scotland, and to refuse it in England. The proper subjects of the realm, in each country, owe obedience to their own law only. But when the parties, as in the present case, are proved, by their real domicil, to be permanent subjects of the neighbouring kingdom, and not of Scotland, do not the principles of international law require that we should respect the English restriction of the right of divorce, in the due administration of justice, between these strangers?—And is it not enough for the solution of this point, that the true quality of the defender, Mr Levett's, domicil, at the date of the action, is ascertained to be English?

According to the remit of the Superior Court, there can be no question, that if his *real domicil* had appeared from the proof to have been in Scotland at the date of this action, it was the opinion of the Judges, who there decided this point, that the conclusion to dissolve the defender's marriage should be

sustained. For, although the law of the contract had been adopted, in the present case, by the interlocutor of the Primary Judicature, a special instruction has been given to recal that interlocutor. In another case, likewise, of Edmonstone against Lockhart, * where the parties had been married in England, but were, in every view, exclusively citizens and subjects of Scotland, two of the four Judges in the Primary Tribunal were of opinion, that divorce *a vinculo matrimonii* could not be granted ; and a special interlocutor to this effect having been accordingly pronounced, upon an application for review, the Superior Court remitted, with instructions, to alter the interlocutor complained of, and to sustain the action.

Dec. 9, 1814.

March 6, 1816.

It could, indeed, be of no importance, that Mr Levett's original domicil was English, if the evidence had established, that he had really changed his domicil, and, by per-

* See the following Report. See also Report of the decision of the Superior Court in the three cases of Edmonstone, Levett, and Forbes, by the collector for the Faculty of Advocates. Appendix, Note (G.)

manent settlement in this country, had become exclusively in this sense a citizen of Scotland at the date of the action. For such total change of domicil is lawful, and does actually take place permanently, and *animo remanendi*, in many cases, between these countries every day. The citizen of England, who thus becomes a Scotsman, by fixing his residence and the seat of his family and fortunes exclusively, and for life, in this country, forms thereafter his peculiar connection as a subject with the law of Scotland, and ceases to have any connection with the municipal law of England, which is foreign, and of no obligation as to our citizens here. Suits in this *forum*, especially relative to the personal condition of a citizen who has his real domicil within this territory, can only be tried under the law of Scotland, and according to its rules. This proposition is self evident, and applies, without exception, to all judicatures, whether primary or of the last resort, and wherever Courts may sit to try causes which are purely of the Scottish law.

Even the circumstance that the contract

has been entered into at a foreign place, is of no importance with respect to marriage. For it implies no intention of the parties to exclude the law of their future domicil, which must prevail independently of their will, if they shall afterwards change their country, and settle permanently in another territory. For example, two Protestants of France, who had been married there before the edict of Nantz was revoked, could not, by the rule of the municipal law in that country, be divorced *a vinculo* upon the suit of the one for adultery of the other. But they might afterwards, during their cohabitation, emigrate to Scotland, and settle here as naturalized citizens, under the act of the 7th of Queen Anne. After all connection with the French law had been thus dissolved, and after their allegiance and obedience had thus been completely transferred to the law of Scotland, could the husband's action for divorce *a vinculo*, according to the law of Scotland, for adultery of his wife, have been barred in this tribunal by the municipal rule of

Cap. 5.

France? Even in that country, the submission of parties of this description to that rule must have been contrary to their religious principles, and matter of pure necessity. Here they owed no obedience to the French law, and that law had no connection with them, or with their domestic condition, when actually citizens and subjects of Scotland.

No deduction could be necessary to prove, that, according to the principles of international law, a person who was originally an English citizen, might, in the same manner, by emigration from that kingdom, and permanent settlement in Scotland, become exclusively, as to all points of municipal distinction, a citizen of this country. Before the union of the Crowns of England and Scotland, at the death of Queen Elizabeth, England was as much a foreign state as France. By the incorporating union of the nations, no alteration was made in their respective laws which could affect such a point.

Great difficulties have, indeed, been con-

ceived, in ordinary cases, to stand in the way of ascertaining the fact, whether parties, by origin English, have abandoned their native domicil, and really settled in Scotland. These difficulties had likewise been supposed to lead to much uncertainty, with regard to the state of the conjugal relation between the spouses, and, consequently, with regard to the rights of their offspring as to legitimacy and succession, if the law of the real domicil shall be preferred to that which prevails at the place of the contract. But any argument which might be reared upon these grounds, had already been rejected by the decision of the Superior Tribunal, in the case of Edmonstone, * which was binding and conclusive here. *2dly*, If the point were open, the danger was imaginary. In the legal sense, according to every definition, a permanent settlement was essential to the establishment of a new domicil. A clear proof of change, too, was always requisite to

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* See next Report.

warrant an inference, that the native domicil has been abandoned, and a new one constituted *animo remanendi.* Thus, the most judicious and accurate of the commentators on the civil law had observed: * "Quoties "autem non certo constat, ubi quis domici-"lium constitutum habeat; et an animus sit "inde non discedendi; ad conjecturas pro-"babiles recurrendum, ex variis circumstan-"tiis petitas, etsi non omnes æque firmæ, "aut singulæ solæ consideratæ non æque "urgentes sint. Sic enim in dubio, *in loco* "*originis et domicilio paterno* quemque præ-"sumi continuasse domicilium jam ante "dictum." In the 3*d* place, That danger to the good order of society, which really must arise from any uncertainty as to matters of such infinite and general importance, was to be apprehended, not from adopting the clear and universal principle of domicil, but from confounding municipal regulations as to divorce with the essential qualities of marriage.

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* Voet, ad Pand. lib. v. tit. 1. § 92, 97.

To prosecute this part of the inquiry farther was, however, unnecessary for the decision of the present case. Because, the proof taken by the pursuer left no room to doubt, that her husband had not established a real domicil in Scotland, so as to become, in construction of law, a citizen and subject of this country rather than of England. His residence here could merely have furnished opportunity to cite him in absence at his dwelling-place, if he had not been personally found. To constitute him a party *in judicio*, that citation was, nevertheless, sufficient. It would have been equally so, if he had arrived in Scotland for the first time in his life, immediately before it was given. Consequently, it was of no importance how long he has been here, if only in the character of a stranger; for the doubt was not with respect to the jurisdiction. No objection, on that head, opposed the suit. The pursuer was also exempted from suspicion of collusive concert, by the terms of her oath, and by the absence of all ground for such a charge against her. Granting, therefore, that the defender might

have come to Scotland, and resided here for the time specified by the witnesses, without any view to this action of divorce, the concession could have no effect upon the question at issue; since, if his intention had been to favour the suit, this circumstance, without the direct or indirect participation of the pursuer, in some arrangement to promote his purpose, could not have affected her action: and if his residence here was not with any such fraudulent intention, it could only weigh in support of the jurisdiction, which was admitted. Still, however, our jurisdiction attached to these English parties and their cause, to no other effect than it would have done, if the defender had got a personal citation within the first hour of his presence in this country. And the point remained entire, whether, when the Scottish judicature holds unexceptionable jurisdiction over English parties, neither of whom had a real domicil here, in an action of divorce for adultery, the rule of the English law, which did not permit dissolution of their marriage by judicial sentence, or the rule of the law of

Scotland, which did, should, in this situation, be preferred.

Upon this point no decision in any contested case had been found of prior date to the action of Elizabeth Utterton against Frederick Tewsh, instituted in May 1811, which could be regarded as a precedent. And since that time, the remit from the House of Lords in the case of Lindsay against Tovey, and the subsequent judicial discussions in other causes, had kept the question open. In those of Brunsdon against Wallace, 9th February 1789, Dic. Dec. and Morcombe against Macclelland, 27th June 1801, Fac. Col. the jurisdiction was not sustained, because the defenders had no domicil whatever in this country at the dates of the actions, and had been cited edictally, upon no other ground, except that they were alleged to be amenable *ratione originis*, which was found insufficient. The institutional writers of the law of Scotland likewise have furnished no direct authority.

With respect to ordinary civil actions, it was, however, certain, that the Judge should in general adopt the foreign rule in cases

relative to foreign contracts, and between foreign parties. This maxim was only qualified by the exception, that no injury shall thus be done to any important domestic interest of the state, or of its subjects, or municipal law. *Comitas* or courtesy had been assumed as the guiding principle here by jurists, upon the supposition, that such respect to foreign law was to be regarded as a concession. But it was evident, that when a foreign rule was necessary to be applied, in order to obtain the ends of justice, that rule in truth was then adopted for the use of the jurisdiction, and thus became part of the municipal law for that occasion. A debt contracted in the British Indian dominions became exigible here in this manner, with interest *secundum legem loci contractus*, at a rate which it would by statute be usurious and criminal to stipulate in a Scotch agreement, and many other instances were familiar. Of *jurisdiction*, certainly there was no surrender or abatement in choosing that rule, whether municipal or foreign, to guide the decision which the Court found would best promote the ends of justice in the particu-

lar case before it; and the sovereignty and independence of the municipal law entirely consisted in the free exercise of jurisdiction. When, without any prejudice to our internal interests, and even with advantage to these, the personal rights and condition or *status* of strangers under their own law, could be considered and preserved in administering justice to them in this *forum*, an extension of the beneficent influence of our jurisdiction only could take place by availing ourselves of the foreign rule. Situations might even be imagined, in which power to entertain the claim sued must be exclusively derived from a foreign rule. Thus, if our municipal code, as in ruder times, did not still allow any interest at all, *ex lege*, for money due, the action for interest upon a debt contracted in Bengal before a tribunal in Scotland, however clearly just, would rest entirely upon the foreign law of the contract.

It might, upon the other hand, be also sometimes convenient, and not unjust, to decline altogether to exercise jurisdiction between foreign parties and in foreign

causes, although there are legal grounds for maintaining in the abstract the competency of the action. For example, if Mr Levett had never been in Scotland at all, and while he remained at his domicil in England, if the pursuer had arrested some moveable property belonging to him in this country to found jurisdiction, she surely could not have been permitted in this manner to abandon the *forum* of their domicil, and to sue him here for divorce. Accordingly, in the case of Scruton against Gray,* it was decided, that an arrestment *jurisdictionis fundandæ causa* was insufficient to render a declarator of marriage competent against an Irishman not resident in this country at the date of the action, although it was alleged that he had married the pursuer when he was residing in Scotland. But by a well known rule of our municipal law, arrestment of the debtor's moveables founds jurisdiction *ratione rei sitæ* against him, though a foreigner or absent from this kingdom, for recovery of ordinary civil

* December 1, 1772, Dict. Dec.

debts, however much the amount of these might exceed the fund arrested. Consequently, the law of Scotland did recognise a distinction, according to which arrestment of a stranger's effects was sufficient to enable our Courts of justice to give effect to claims against him arising from ordinary obligations, while it was not sufficient in cases where his *status* of marriage in his own country was at stake. The reason, undoubtedly, was, that the *status* of the citizens in their own country was the most important concern of every municipal system, not even excepting rights of immoveable property. At the same time, a stranger's *status* in his own country never could be a matter of any concern to the law of another kingdom which he merely happened to visit.

With regard to suits of all descriptions, *actor sequitur forum rei* was the general rule, and great injustice might often arise from constituting a *forum* against a stranger upon slight grounds; because, in general, it was only in his ordinary and proper *forum* that he could meet the claim made against him with due preparation, and upon fair terms.

When both parties were foreign, and the rights to be affected by the decision were likewise foreign, the local judicature, by declining to exercise jurisdiction, might avoid the difficulty and burden of trying questions with which its own municipal system had no concern, and with the laws of which it is unacquainted. The necessity of submitting to this hardship, and of renouncing the privilege of declinature, only occurred, as in the present case, when the defender, although a stranger, does not return home, and while here could not be convened in the *forum* of his real domicil. Still, however, it was but *ex debito justiciæ* that the duty must then be undertaken, and while it was to be performed without prejudice to the internal system and interests of this kingdom. Regard, in so far as these were not affected, was certainly due to the law of the country of which the parties were truly subjects, and care should be taken not unnecessarily to violate the rules and arrangements of that law.

It must be evident, that the claims to mutual forbearance and respect, which the *jus gentium* supports between independent na-

tions, were infinitely strengthened and augmented in this case by the peculiar nature of the connection between the kingdoms of Great Britain. It was equally evident, that there was no subject upon which it was so essential that these claims should receive due attention, as the municipal laws of marriage and divorce; for while the three nations of England, Scotland, and Ireland, politically formed one people, their several municipal rules were so discordant, as to afford great temptation to married parties of the other countries to seek the dissolution of their conjugal relation in Scotland, and thus to defraud the law of England. We had likewise seen in the case of Lolly, that a divorce *a vinculo* of an English marriage would not protect an English party from the pains of bigamy for marrying again in England. But a second marriage of such a party in Scotland was valid by the law of this country. Hence the most distressing collision must frequently arise, and endless contests of the most painful and injurious description were to be apprehended upon the rights of legitimacy

and succession among the descendants of such parties, if the law of the real domicil should be disregarded.

All these evils to the subjects of the Scotch as well as of the English law, whose interests it was impossible to separate, might, however, certainly be avoided, by distinguishing between the right of jurisdiction and the rule of judgment; and as to the former point, by holding it sufficient that the defender should be regularly convened *in judicio*, whether by citation given to him personally, or left at his presumptive domicil; but as to the latter point, adopting the law of the real domicil. Thus, in the case of Scotch parties, if the wife were to obtain a decree of divorce against her husband *a vinculo matrimonii* in Prussia,* or any other country he happened to visit as a stranger, for incompatibility of temper, or because he had been imprisoned upon a criminal sentence, or had entered into an ignominious employment, or become an object of her

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* Prussian Code, Articles 703, 704, 707, 718. See Appendix, Note (G.)

rooted dislike, this would not prevent his suing with success here for restitution of his conjugal rights when he returned home. Such a foreign decree would be invalid here, because it would be held inconsistent with the essential conditions of marriage, and with our interpretation of the Divine Law. Suppose, again, that the foreign decree of divorce were to be given against a Scotch husband* during temporary absence from home, for any shorter period than that fixed by the municipal law of Scotland, as inferring desertion, it seemed equally clear that such a sentence could not be respected by this judicature, because he had not changed his real domicil, and had remained permanently subject to the law of Scotland, which, consequently, ought not to have been violated. Upon the same principles, the present action of Mrs Levett must either be dismissed, or sustained only to the effect of giving such redress as was consistent with the law of England, where the parties have their real domicil.

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* Prussian Code, Articles 690, 693.

Questions, by which personal *status* was affected, had no doubt been supposed to form an exception to the doctrine of international law, upon which the claim of respect to foreign rules is founded, and the maxim, "Major hic alibi *mutato domicilio* "incipiat fieri minor,"* had been cited to prove that the municipal code was exclusively to be consulted in the disposal of such cases. But even the very terms of this quotation shewed that domicil is the *criterion*, and assumed a previous change of domicil to be requisite for the application of the municipal law of the place, to the point at what age an emigrant from another country becomes *sui juris*. Nor could there be any doubt that the law of the real domicil must ultimately govern as to all permanent qualities of personal condition, since it was to that law that the party must be permanently subject. The greatest jealousy of foreign control or interference was likewise perfectly justifiable, and even unavoidable, in every municipal system, so far

* Hertius, p. 173.

as regards the personal condition of all who are truly citizens of the country; on account of the peculiar importance of those interests which are involved.

On the other hand, if the alternative of dismissing the action *simpliciter* were to be chosen, redress in this, and in many similar cases, would be altogether excluded for the greatest injuries, and married persons of the other kingdoms of this empire, in particular, who violated their conjugal engagements, would be invited to spend their lives in Scotland in licensed profligacy, and here to set at defiance the rights of their injured partners. The prejudice which would thus arise to the interests of morality and good order, both here and in the sister kingdoms, was great and evident. While our law afforded more ample redress for conjugal wrongs than that of our neighbours, we could not, however, be reduced to this necessity. It remained, then, to consider in what manner, and upon what principles of jurisprudence or authority, the other alternative of giving the remedy of separation *a mensa et*

*thoro*, with separate aliment, might be adopted in the present and similar cases of English parties.

Before the Reformation in Scotland, divorce *a vinculo* appeared to have been competent for adultery. There was also evidence, that separation *a mensa et thoro*, with separate aliment, had been commonly awarded for that offence by the consistorial judicature * of the Catholic church in this country. In the commission, statutes, and instructions relative to the establishment and jurisdiction of this Court after the Reformation, no precise rule could be found. In one instance upon record, an action of divorce for adultery, containing no conclusion, that the pursuer, a lady of the Catholic persuasion, should be free to enter into another marriage during the life of the defender, as if he had been naturally dead, was sustained in the year 1705, † notwithstanding a serious opposition, upon the

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* Appendix, Note (H.)

† Mrs Barbara Wauchope against Sir George Seaton of Garleton. See Appendix, Note (I.)

ground, that a decree so qualified was contrary to the principles of our modern law and of the Protestant religion. But in common practice, since the original appointment of the Commissaries anno 1563, divorce *a vinculo matrimonii* had, with this exception, been constantly concluded for in the present form, on the ground of adultery, and separation *a mensa et thoro,* upon the ground of maltreatment, which endangered the safety of the injured party, or rendered the performance of the conjugal duties impossible. Although the more complete remedy of dissolving the marriage had thus in practice been hitherto preferred by parties who were pursuers, yet adultery might in truth often become the most grievous kind of maltreatment. For example, the husband, by adulterous connections in his house, might render it impossible for his wife to submit to the pollution and disgrace of living with him. At the same time, she might resolve to prefer the interest of her children to her own freedom, and not to set him at liberty to marry his paramour. There was surely no

rule of law or justice which, in that situation, could prevent her from suing for separate aliment, although she would not claim the right of divorce *a vinculo*, nor had any principle been discovered which prohibited this Court from granting a decree for separation *a mensa et thoro*, if concluded for to protect her morals and person from contamination.

But supposing that the course of practice might absolutely exclude this redress for adultery as to Scotch parties, still separation *a mensa et thoro*, with separate aliment, was a species of reparation for conjugal wrongs, acknowledged and received in our municipal system, and no other redress could be given in the case of English or Irish parties, without producing very serious dangers both to ourselves and to our neighbours. With respect to form, and perhaps also in some of its consequences, the judicial separation *a mensa et thoro* of the English law was different. But in principle, and in its general nature, it appeared to correspond with this remedy in the law of Scotland. By neither was the marriage

dissolved; nor in either did the wife, if pursuer, obtain her patrimonial rights, as in the case of dissolution, but only a suitable provision for her support, appointed at the discretion of the Court.* The "alimony" of the English law seemed to be precisely upon the same footing with our aliment, and there appeared to be no essential difference in the other articles which this kind of redress comprehends. Since the Scottish Consistorial judicature had power to give the greater remedy of divorce *a vinculo* for adultery, when *that* was excluded from no fault of the party injured, and merely because the defender happened to be an English subject, it must have power to give the lesser remedy. At the same time, in all actions respecting foreign contract and between foreign parties, our own forms are retained; although we give effect to the rule adopted from another system of law, in so far as compatible therewith. Neither was there any call to depart from them

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* Burn's Ecclesiastical Law, 6th edition, anno 1797, Vol. II. p. 502, 503.

on the present occasion. For, in spirit and effect, the English remedy might be given to English parties in this *forum*, according to the Scottish form, and mode of judicial procedure, and justice might thus be done between the parties, without prejudice to either municipal system. Since this pursuer had not hitherto claimed the remedy of her own law, the Court, by its interlocutor, however, could only inform her, that her action might still be entertained, if she chose to restrict her conclusion to that extent.

The pursuer lodged a minute, * by which she declined to restrict her conclusion; and "the Commissaries (9th August 1816), having considered this minute, and resumed "consideration of the whole process, in respect the pursuer declines to restrict the "conclusions of her libel to a decree of separation *a mensa et thoro*, and for separate "aliment; therefore, upon the grounds assigned in the interlocutor of the 19th of "July last, assoilzied the defender from the

* Appendix, Note (K.)

" whole conclusions of the libel, and de-
" cerned."

Application was made for the review of the Superior Tribunal, by bill of advocation, which was presented, not to the Second Division of the Court of Session, which had given the special remit upon the former bill, but to the First Division of that Court, to be considered there *ex parte*; and Lord Cringletie issued an order upon the bill, in these terms (16th November 1816): "The
" Lord Ordinary, having advised this bill,
" with the process before the Commissaries,
" to which no answers have been given in,
" although ordered, In respect that the
" interlocutor of the Commissaries has been
" pronounced, in consequence of a remit
" from Lord Reston, Ordinary, after advis-
" ing with the Second Division of the
" Court, informed by the opinions of the
" whole Court, and that the Court ought
" to have an opportunity of judging, whe-
" ther the interlocutor of the Commissaries
" be or be not in conformity to the true
" spirit and object of the remit; appoints
" the bill to be printed and boxed, that the

" Lord Ordinary may report the same to
" the First Division of the Court."

But, upon his Lordship's report, the Judges of the First Division were unanimously of opinion, that the cause had been improperly brought by the pursuer before them, and it was accordingly remitted to the Second Division of the Court.

A judgment, remitting the cause to the Commissaries, was afterwards pronounced in these terms (21st December 1816): " The Lord Ordinary, having again con-
" sidered the bill and former procedure, with
" the proof and oath of calumny, and ad-
" vised with the Lords of the Second Divi-
" sion, remits to the Commissaries, with in-
" structions to alter their interlocutor, and
" to proceed in the divorce, according to
" the rules of law." *

Although the Primary Court had pronounced a special interlocutor upon all the points of the case, yet, as it was thus directed to alter the whole of that interlocutor, without any reservation, the Commissaries,

* Appendix, Note (L.)

in obedience to the remit of the Lord Ordinary, altered, *in toto*, their former interlocutor. They afterwards allowed a proof of the defender's guilt, in common form, and proceeded in the action of divorce, as directed by the Superior Court, in the same manner as if it had been maintained between parties who were citizens of Scotland.

## Thomas Stirling Edmonstone, Esq.

AGAINST

## Mrs Annabella Lockhart, *alias* Edmonstone. *

Both parties, in this case, were of Scotch families, and born and educated in Scotland. The pursuer entered into the army, and was sometime on foreign service, but afterwards retired, and settled in his native country. Having, at a subsequent period of his life, obtained a company in the Scotch militia regiment of his own county of Lanark, he was stationed with that corps in England, and was there married in 1805, according to the English ritual, to the de-

* This case was extrajudicially settled by compromise between the parties, after a proof had been allowed by the Court.

fender, who was sister of the commanding officer, and resided at the time in his family. In contemplation of that marriage, the pursuer's resignation had been previously proposed to the colonel of the regiment, and had been accepted. An antenuptial contract had also been executed in the Scotch form, relative to the patrimonial concerns of the parties, and for eight years they cohabited together as husband and wife in Scotland, on a farm granted in lease to the pursuer by the defender's brother. But the pursuer accused her of having there entered into an adulterous connection with one of his servants. Against his action of divorce she pleaded in defence, that her marriage having been celebrated under the English law, was indissoluble by judicial sentence. This case was seriously contested, and, at the close of the discussion, when the Court came to decide, two of the Judges in the Primary Tribunal were of opinion, that the conclusions and allegations of the pursuer ought to be sustained as relevant, for the following reasons.

The admissions of the defender, and evi-

dence in process, established that the only domicil of both parties was in Scotland at the date of the action;—indeed, that, during their whole lives, both had been citizens and subjects of this country. If the law of the defender's real domicil should govern the decision in such cases, no doubt, therefore, could exist, that the usual conclusion of our action for divorce *a vinculo matrimonii* must here be sustained. This was held to be the universal rule. At the same time, all the circumstances relative to the particular contract of these parties, except the place of its date, and all the general considerations of justice and expediency, on which the principles of international law were founded, likewise led to this result.

In the outset, it was impossible to overlook the singular nature and importance of the consequences which the question involved.

Certainly, the marriage of these parties had been entered into with the intention on both sides that they should cohabit and reside permanently in their native land. If the law of the domicil must yield to that of the place of the contract in this instance, it must then likewise give way in all other

cases which can possibly occur. It would follow, too, that every Scotchman who should marry at any place not within the limits of this kingdom, must return here subject to the conditions of a foreign law, in all that regards his conjugal relation and rights as a husband. With respect to the most important private interests, a decision which should adopt this principle must, therefore, often produce very serious consequences to individuals of this community, whose number it was impossible to calculate, and in a degree of which no precise estimate could be formed.

It would be necessary also to consider, in the proper place, to what extent the rights of the whole people of Scotland, as established by public statutes of this kingdom, and of the empire at large, and by the national compact of union, would be affected. For, by the acknowledged principles of international law, no rule of any foreign code could be admitted here, if prejudicial to essential rights and interests of this country, and authorities and views relative to this last point, ought even to have peculiar weight in guiding the judgment of

a Court to the exclusive jurisdiction of which, in the first instance, all Scotland is subject, as to this department of the law.

Let the question, however, be first considered merely as one between parties married in England, but who are nevertheless in every view exclusively subjects to the municipal law of Scotland, and as one for the cognizance of which, therefore, judicatures of the Scottish law only could have any jurisdiction. It thus resolved into the point, whether indissolubility by judicial sentence was an essential and indelible condition of all marriages, even when celebrated by strangers at any place under the dominion of the English law, which the parties bound themselves to preserve in their permanent domicil after they should return home, and which the *jus gentium* required the Courts of their own country to abstain from violating?

A decision in the affirmative upon this point, it was evident, would exclude all attention to the domicil of the parties in every sense of that term, either at the date of the marriage or at the date of the action of divorce; for, by licence duly obtained, and

with consent of parents or guardians when necessary, strangers might be lawfully married in England without acquiring any domicil there. The condition supposed would likewise become part of the contract itself at the time of celebration. But the argument of the defender, Mrs Edmonstone, could not be maintained to this extent, and it was certain that the mere locality of the transaction was not sufficient *per se* to attach inseparably to marriage the rules of the municipal system of the country in which it had been solemnized. The familiar example of marriages contracted by English parties at Gretna Green, or elsewhere within the territory of Scotland, which, nevertheless, are regarded as English, at least with respect to all consequences that affect the conjugal relation during their subsistence, clearly proved, that, even according to the construction of the English law, the quality of the real domicil outweighs this consideration. Indeed, an opposite doctrine would be manifestly irrational. Since strangers form no connection but during the time they are there with countries

they only visit, and by temporary absence in no respect dissolve their exclusive connection with their own country, or weaken their obligations of obedience to its municipal system of law when they shall return home. Besides, as to the present case, while it was indisputable that no private parties could make a valid agreement to annul or qualify the public law of Scotland relative to divorce in this *forum*, it was equally clear that the place of celebration of their marriage in England was much less matter of choice to this pursuer and defender, than Gretna Green in Scotland ever is to English fugitives; and that neither of them could possibly think or intend thus to set aside the rule of their own law as to a most important and general right of redress, should either afterwards commit the crime of adultery.

Parties, indeed, in all civil contracts, looked to the place of performance, and not to the place of date, for the law as to fulfilment or redress upon failure in every point which was not the subject of precise covenant, and in marriage, especially, could

only have in view the law of the real domicil in which they meant for life to cohabit. It was, therefore, as illogical to infer that the *lex loci contractus* had been in the contemplation or option of either of the present parties when they married in England, as it would have been to make this assumption, if the regiment they accompanied had formed a part of the regular army, and had then been stationed upon service in Italy, or Spain, or Russia, Denmark, Sweden, or Prussia, or in any other region of the world.

In an abstract view, the defender, notwithstanding all the adverse circumstances of her special case, did contend that indissolubility by judicial sentence truly is an inherent and indefeasible condition of her marriage with the pursuer. But, in the statement of this proposition, it must necessarily be assumed, that their marriage is to be regarded as English in respect of the place of celebration, and not as Scotch, in respect of the permanent and real domicil of the parties even at the date when it was solemnized. It must likewise be assumed, that

the municipal law of each country, as to divorce for violation of conjugal engagements, becomes part of the contract itself as to every marriage celebrated within its territory, and remains inseparably attached to that contract during the joint lives of the parties, although they should then be, and even should always have been, and at the date of the action should continue subjects and citizens of another kingdom, where a different rule prevails, and where they have their exclusive and permanent domicil.

The reasons for rejecting the assumption that the defender's marriage was to be regarded as English, had already been given. But a more extensive and deliberate consideration was due to the importance of the argument, that the law of the place of celebration became an inseparable part of the contract between these parties, supposing their marriage, by legal construction, to be truly English.

Certain qualities were essential to marriage by the Divine institution. These consequently were the same in all the states

of Christendom, and every where invariably described the contract itself, and the relation of husband and wife, which is the subject of that contract, not as local and municipal institutions, but as universal and *juris gentium.** Consent by a single man and woman, capable of contracting, and not within the forbidden degrees of propinquity, to be united for life, was indispensably required as essential to the constitution of the conjugal relation in all countries, where the Christian religion and the law of nations had been acknowledged. Therefore, no engagement of parties to each other, which wanted any of these essential requisites, or which contained any ingredient inconsistent with these, could be considered as a marriage, in conformity to whatever system of religion, government, or law, and in whatever region it might have been framed. And it was equally certain, that every contract, regularly entered into, which had these essential requisites, would be received as a

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* Stair's Inst. b. i. t. 4. from the beginning to the 8th section.

valid marriage in all civilized nations, however widely the rules established in each of them might differ from those of the country where it had been celebrated, with respect to the forms of lawful solemnization, or with respect to patrimonial arrangements and consequences, or with respect to the modes of enforcing performance of the conjugal obligations, or of affording redress to the injured spouse when these should be violated.

A great and very important distinction thus necessarily arose between the essential qualities of marriage, which were derived from no statutes of any human legislature, but from a far higher source, and municipal rules, relative either to the constitution or to the consequences of that peculiar contract. The former were universally and equally respected, according to the religion and jurisprudence of all communities of Christendom. The latter were provided by the legislative power in each state for the regulation only of its own subjects, and as had always been admitted, were not of imperative obligation beyond the limits of its

own territory, or as to the subjects of any other independent state.

Besides, there was not even a stipulation by the parties in the English ritual of marriage, or in any other form of the nuptial ceremony known in Europe upon the subject of divorce. Mutual fidelity was indeed pledged by them in all Christian marriages. But it was left to the legislature and municipal law in England, as well as in Scotland, and in all other countries, to provide and apply the redress in case this vow should be broken. Yet merely because the Consistorial judicatures in the neighbouring kingdom had not been invested, as we were here, with power to dissolve marriage by judicial sentence, for adultery during its subsistence, this state of the law, by a strange fallacy of argument, was held in the one country *to reflect back upon the contract itself* the condition of indissolubility, and, in the other, that of being *sua natura* dissoluble by judicial sentence. Certainly the familiar practice of parliamentary divorce in England, during the two last centuries, together with the nature of the process by which it was ob-

tained, and the state of the law in that kingdom, till near the close of the sixteenth century, if correctly reported by Burn, proved the fact to be the reverse as to both periods.* For, in the words of that author, "a divorce for adultery was anciently "*a vinculo matrimonii*; and, therefore, in "the beginning of the reign of Queen Eli-"zabeth, the opinion of the church of Eng-"land was, that, after a divorce for adultery, "the parties might marry again; but in "Foljambe's case aforesaid, H. 44. El. in "the Star-Chamber, that opinion was chang-"ed; and Archbishop Bancroft, by the ad-"vice of divines, held, that adultery was "only a cause of divorce *a mensa et thoro*." And he refers to the report of that case by Serjeant Salkeld, and to the larger work of Archdeacon Gibson on the Ecclesiastical Law of England.

An English marriage which suffered dissolution by judicial sentence for adultery

* Ecclesiastical Law of England by Richard Burn, LL.D.; sixth edition, published anno 1797, p. 503, Vol. II.

before the year 1603, and that English marriage which was last dissolved by act of Parliament, were nevertheless indisputably of the very same quality and condition with all other marriages that have been celebrated under the law of England, and did not differ as to the point now under consideration from Scottish marriages celebrated under the law of Scotland. All, therefore, have common qualities, which are independent of municipal regulation, and not derived from it. Beyond all doubt, it was from these qualities, too, that marriage itself, in the general view, became a contract *juris gentium*, which, without distinction, on account of the country where it was entered into, or peculiar forms and conditions under which it was there solemnized, or of the provisions there established to enforce performance, or give redress for violation of the conjugal engagements, was in all other nations received and respected as if it had been regularly celebrated under their own law.

The fact, whether a valid contract had been made or not, did, no doubt, depend upon

the conformity of the transaction to the law of the place where it bore date. Because, as to all forms and conditions, not inconsistent with the nature of the institution of marriage, and with those essential qualities which are *juris gentium*, it was the province of the municipal system to furnish the rule. But when the limitation was observed, that the essential qualities of marriage were not liable to be affected or varied by municipal rules, the circumstance that these rules governed as to the mode of constitution, with regard to marriage, as with regard to all other civil contracts, could not perplex the question.

It was of consequence also to distinguish carefully between municipal rules as to the constitution of contracts, and those which relate to claims for performance or redress. The former were derived from the local statutes or usages of the place where each contract bore date; the latter, from the same authorities in the place where fulfilment of its obligations was sued. Where these were at variance, international law might, no doubt, require that the peculiar

conditions of a foreign contract should be respected; and this demand was here made by the defender as to the English law of divorce. But it was denied that the municipal rule of the English law could be regarded as one of the conditions of her contract, or that this rule became an essential and indelible quality of every marriage celebrated even by strangers within the territories of England. On the contrary, regulations as to divorce, both in respect of their origin and of their nature, were held to form a subject altogether different, and to belong to a class entirely separate and distinct from the essential qualities of marriage.

No contrast, indeed, ever was more striking, than that which subsisted between them. Never was the different impress of divine and human origin more manifest. According to views of expediency and purposes of internal policy, often doubtful and transient, each legislature, following exclusively its own objects, had not only laid down peculiar rules, but had changed these from time to time, as the circumstances of its own

subjects happened to alter. Hence, in these municipal rules, there was so little of fixed and essential principle, that a collection of the whole, even upon the single article of divorce, would, at first sight, appear little better than a ludicrous exhibition of human inconsistency and caprice. Nor, even after a stricter examination, would satisfactory reasons always be found in the peculiar situation of each community for its peculiar provisions.

The canons of the Roman Catholic church itself, in which alone uniformity now prevails, afforded the most striking proofs of this proposition ;* for, till the date of the conclusion adopted on the 11th November 1563 by the celebrated popish Council of Trent, these had been constantly shifting to all points between the opposite extremes upon the subject of divorce. Then, no doubt, the anathema was issued against dissolution of marriage by judicial sentence, which still hang over the heads of the members of that church. But the reformed religion

* Appendix, Note (M.)

had been established by law in Scotland more than three years before,* and in England under Edward VI. by the proceedings anno 1547. It might be farther observed, that a canon of the Council of Trent, which had then sat seven years and a half, from the date when it first met upon 11th March 1544, for the very purpose of averting or suppressing the Reformation, was surely of no weight in the present discussion.†

In the Protestant states of Europe, and under the Greek church, the utmost diversity of rule on this subject continued still to prevail, from the extreme of refusing to give divorce *a vinculo,* even for adultery, in any case, to the opposite extreme of allowing dissolution of marriage for causes which our law accounted perfectly frivolous.‡

If these observations were well founded, it

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* Act of the Regent and Estates of Parliament, 24th August 1560, ratified by act 2d, first Parliament James I. 15th December 1567, "anent the abolisching of the Pope and "his usurped authoritie."

† See Father Paul's History of the Council of Trent.

‡ Appendix, Note (N.)

must then plainly follow, that the municipal laws, with respect to divorce, of particular kingdoms and states, also were things altogether different from the essential conditions of marriage. All other views which could be taken of the subject likewise led to the same conclusion.

The restraints imposed to prevent improper marriages, the solemnities of celebration, and the requisite evidence, by which that fact may be proved, like the rules as to divorce and other provisions to enforce performance of conjugal duties, or to afford redress for conjugal wrongs, were various in different countries, and had, in each state, been appointed and altered by municipal regulations, at the pleasure of the legislative power. Thus, in England, till the statute of the 26th Geo. II. cap. 33, swept away, in the language of Blackstone, the whole subject of clandestine and irregular marriages from the English jurisprudence, this contract, as to the requisites for its constitution, and the proof of celebration, rested upon the same basis on which

it still does in Scotland. "Any contract,"* says that author, "made *per verba de præ-*"*senti*, or in words of the present tense, and "in case of cohabitation *per verba de futuro* "also, between persons able to contract, "was, before the late act, deemed a valid "marriage to many purposes; and the "parties might be compelled, in the Spi-"ritual Courts, to celebrate it *in facie ec-*"*clesiæ.*"

Still the statutory enactments which required permission to marry, in certain cases, and which regulated the solemnities or the mode of proof, could not be said, in any just sense, to have altered the essential qualities of an English marriage. For, assuredly, if any English parties still survived, who were united before the year 1754, their marriage could not be regarded as a different contract *jure gentium*, from that of parties married under the English law since the date of the act which was then passed. The Dutch law, † which, in general, as to this

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* Blackstone's Comm. b. i. cap. 15. p. 439.

† Vinnius, in Inst. lib. i. tit. 10.

department, corresponded with that of Scotland, also differed from it, in requiring the consent of parents to the marriage of their children, viz. for sons till 25, and for daughters till 20 years of age. But it could not be maintained, that thus an essential difference existed between the quality of a Dutch and of a Scotch marriage, Indeed, it was quite unnecessary to multiply illustrations in support of the proposition, that municipal rules, as to the requisites for permission to marry, and as to the forms, and evidence of the contract, like the laws as to divorce, formed a subject of jurisprudence quite distinct from the essential qualities of marriage.

By this train of reasoning it was not, however, meant to deny, that the laws, as to divorce, which, in the present case, were the particular object of consideration, must be of the highest importance in each municipal system. On the contrary, the argument of the pursuer, that the rule of their own country must be now followed, in administering justice to these parties, rested upon this very ground. But municipal rules,

provided by the legislative power in each separate state, regarded only those persons who are at the time subjects of that state, as having their real domicil then within its territory. The importance of all provisions, relative to marriage and divorce, to every state in regard to its own subjects, was the circumstance which demanded careful observance of this necessary limitation. For here, no concession could be safely made to foreign interests, which might disturb internal arrangements, that affect the whole frame and order of society. If, therefore, it should be found, that in Scotland we must apply our own law of divorce, in questions between our own citizens, it would follow, that, for the very same reasons, when the parties were citizens of England, we ought to consult the English rule on principles of international law. Thus, the adoption of the real domicil, as the *criterion*, was the only method by which justice could be done between parties, with safety to the municipal systems, both of the territory in which the jurisdiction over them was con-

stituted, and of the country from which they came when strangers. When the parties, as in this instance, were indisputably natives, as well as really permanently subjects of Scotland, it was likewise obvious that no collision, in the proper sense, could arise from applying our own rule. Because, by this proceeding, no English, or other interest that was foreign, could be affected, and no tribunal or judge could have competency afterwards to review the sentence, except in the administration exclusively of the Scottish municipal law. Although the supreme judicature of appeal was common to the whole empire, it had, accordingly, always been acknowledged, that the municipal law of each of the respective kingdoms was in that tribunal most sacredly observed.

In this view, the real domicil afforded a principle of decision, which was universal in its application, and against which no good objection occurred. No rule of law, indeed, could be chosen, which the fallibility of human judgment might not sometimes misapply. Here, however, the

advantage of all the security against error which could exist, was furnished by a legal presumption, every where admitted, in favour of the *original* domicil, and which could only be removed by conclusive proof of a change. This point was so perfectly settled, that it would be a waste of time to cite authorities upon it. The maxim of law, in the words of Voet,* was, "In loco originis "et domicilio paterno quemque presumi "continuasse domicilium;" and, although the original domicil might be abandoned, and a new one constituted, the burden of proving the alteration was laid upon the proper side, and supposing the judicature to perform its duty with accuracy, all risk of confusion and uncertainty must be avoided. A result more satisfactory could not well be imagined, since thus the personal condition of the subjects of each state must be regulated by the municipal law of that state, and never can be disturbed by the interference of foreign rules. While, for example, we should refuse, in this jurisdic-

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* Lib. v. § 97, 100.

tion of Scotland, to dissolve marriage in an action of divorce between parties who had their real domicil in England, from respect to the English law, we must, on the very same ground, administer the municipal law of Scotland to these Scottish parties.

Upon the other hand, if the *lex loci contractus* should be preferred to that of the real domicil, the diversity of rule as to divorce which prevailed in the various states of Christendom was so infinite, and the freedom of intercourse and of emigration for temporary and transient residence merely so great, that no municipal system of jurisprudence could, upon this footing, remain at all consistent or uniform as to the administration of civil justice in the most important of all departments among the permanent and undoubted subjects of the realm. In no other country, too, of the world could consequences more anomalous and revolting follow from this situation than in Scotland. There was no region which our citizens did not visit. All Scotchmen holding any employment in all the other dominions of this empire, whether civil or

military, must often place themselves under the law of England, and at the period of life when it is usual to marry. A great proportion, especially of those in the upper ranks, spend their youth abroad for purposes of study, amusement, and private business. If, then, all who marry in any other country must bring home, when they return to Scotland, the laws of divorce from each place of celebration as essential qualities of their conjugal relation, we must, instead of one rule, have all the incongruous regulations of the rest of the world on the subject of divorce established in the municipal law of Scotland, as to individuals or as to classes of our countrymen and fellow-citizens. The inconveniences of so unpleasant a situation must be endured, too, according to this hypothesis, for the sake of foreign systems, with which these very parties have no longer the slightest connection, and which can derive no possible benefit from our preference.

Now, the *jus gentium* has, in every text upon the subject, uniformly rested the claim to *comitas*, on the ground that prejudice

must arise to important interests of another country from refusal to observe it. And in the annunciation of the principle upon which respect to a foreign rule is in that situation required, the conditions have always been added, that this shall be conceded only when no injury shall thereby arise to the country or people to which the right of jurisdiction belongs, in whatever regards the independence of their own system of law, or the interests of religion, morality, and good order within the state. In the words of Vattel,* "a nation owes "to herself in the first place, and in pre-"ference to all other nations, to do every "thing she can to promote her own hap-"piness. When, therefore, she cannot con-"tribute to the welfare of another nation "without doing an essential injury to her-"self, her obligation ceases on that par-"ticular occasion, and she is considered as "lying under a disability to perform the of-"fice in question." The claim that *comitas* shall be observed, must therefore always be

* P. 62, § 14 and § 16.

qualified by the inherent condition, *quatenus sine prejudicio indulgentium fiere potest*: And the questions, whether the remedy concluded for cannot, in point of fact, be granted without prejudice to our neighbours, or refused without prejudice to ourselves, or, *vice versa*, and how the balance lies, must necessarily become matter of judicial cognizance whenever *comitas* is claimed in a depending cause. When the real domicil of the defender happened to be foreign to the country of the jurisdiction, it was plain that, in this situation, the decision could only affect the foreign law, and respect to its rules, in so far as not inconsistent with the general principles of religion, morality, and justice, established in the country to which the jurisdiction belonged, could not create any prejudice to domestic interests there. When, on the contrary, as in the present case of Mr and Mrs Edmonstone, the real domicil of both parties was within the territory of the jurisdiction, no foreign interest was at all involved. Consequently, there was no ground on which *comitas* could in this situation be required, and it would indeed be

*comitas comitatis* spontaneously to abandon the rule of our municipal law as an unsought and unlooked for tribute of imaginary respect to that of England, or of any foreign system.

At all events, it was quite clear that the municipal rule of the law of Scotland could not, according to the principles of international law, be sacrificed when essential injury to our own system must plainly follow. Whether, in point of fact, such injury would really take place, if we were to deny the right of divorce *a vinculo* for adultery to all Scotch citizens, who had been married in any country where that remedy could not be given by judicial sentence, must, however, be determined from the value in our municipal system of the rule which it is proposed to surrender, as well as from the number of cases in which the demand for this sacrifice might occur.

Ever since the date of the Reformation in this kingdom, divorce *a vinculo*, by judicial sentence, had been a very important part of the Scottish consistorial law. Previous to that date, there was some evidence

to shew that it had not been unknown in the practice of the consistorial judicatures of the Catholic church in this country, and in the authentic statutes and precedents of our common law, no reference appeared to the existence of an opposite rule in more ancient times. * That remedy for adultery, therefore, was regarded by the whole people of Scotland as their undeniable right, and, surely, there could be no just reason for placing Scotchmen, who marry abroad, under any peculiar and partial disadvantage in this *forum*. Certainly, too, the substitution of the inferior redress, by separation *a mensa et thoro*, for the greatest of conjugal injuries, would, according to the national habits of thinking, and to the principles of honour, morality, and religion, which prevail in Scotland, be most unsatisfactory here. In every rank, the injured parties usually conceived it a duty to expel the pollution of adultery from their families and bosoms. It was the universal opinion of the Scottish people, that

* Appendix, Note (O.)

the innocent party could not, without injustice, be compelled afterwards to submit, under any modification, to the bond of marriage, which, in that situation, could only subsist as an intolerable burden and grievance. Accordingly, since this judicature was instituted, in the year 1563, there had not been a single instance found, of a suit for separation *a mensa et thoro*, on account of adultery, or one in which the action did not conclude for dissolution of the marriage. In a single case only, which occurred in the year 1705, the usual conclusion for freedom to marry again appeared to have been omitted, the pursuer in that instance being of the Roman Catholic faith. Parliamentary divorce, from the expence and difficulty of the process, it must be evident was altogether beyond the reach of the great body of this people. Yet the conjugal relation had stood not less, but infinitely more sacred and secure in Scotland since the religion of the kingdom became Protestant, and since separations *a mensa et thoro* for adultery, which were extremely common under the Popish

jurisdiction, fell into total disuse. * While it had been competent and open to persons so injured, in whatever rank of society, to obtain divorce *a vinculo*, the number of actions, in proportion to that of the population, seemed to have remained nearly the same at all periods, since the Commissaries were first appointed in 1563, down to the present time. The procedure, too, had been always so conducted, as not to offend against decency, or lead to the corruption of manners, by the infectious exhibition of profligacy in the higher ranks of society. Hence, the estimation of the privilege of judicial divorce for adultery, was so high in this kingdom, that a few examples of forfeiture, incurred by the innocent act of contracting marriage, under the law of England, could not fail to operate as a discouragement to intermarriage between citizens of Scotland and their fellow-subjects of the British empire, and as a temptation to the former, to prefer illicit connections to lawful union, when residing out of their own

* Appendix, Note (P.)

country. For, the peculiar and novel hardship of being thus obliged, without fault, to remain united to an adulterous partner for life, would, undoubtedly, be deemed both galling and degrading in the extreme.

Granting, then, that the English municipal rule of law, with regard to divorce, was entitled not only to high consideration, but to an absolute preference, when the real domicil was in England, and when the application of our opposite municipal rule would therefore produce injury to the good order of society, and to the rights of legitimacy and succession in the sister kingdom, there could be no question, that a Scottish judicature must, on the same principles, owe superior regard to these invaluable interests at home. In this action, both parties, indisputably, were Scottish citizens and subjects, who now have, and always have had, their real domicil in Scotland. A decree of divorce against the defender, Mrs Edmonstone, could therefore, in no possible way, affect the English municipal rule, or operate to its prejudice within the territory, and among the subjects of England. But if it could,

the connection between the law of Scotland and its own subjects, must be held infinitely more certain and important. In this situation, therefore, if so extreme a case can be thought ever to have been considered by jurists as doubtful, the *jus gentium*, according to the opinion of Vattel, prohibited the surrender of our own rule.

It had, indeed, been supposed, that questions, by which *status*, or personal condition, may be affected, form an exception *against* the application of the law of the real domicil. But when properly understood, all authorities of public law would, on the contrary, be found to exclude such an assumption. Rights even of immoveable property are not so important to the internal system of a realm, as those which affect the personal condition of the people. As to these last, consequently, the greatest jealousy of foreign interference has always prevailed. It is on this account that natives of other countries, when they emigrate, must submit to the laws affecting personal condition in that territory where they permanently settle. Surely, then, as to native

citizens, whose *sole domicil* was within the territory of the jurisdiction at the date of the action, and had never been really constituted any where else, no doubt could be entertained. At least, the footing on which the citizens of all foreign and independent nations stood with England, seemed to furnish proof of this proposition; and the peculiar nature of the connection between the sister kingdoms of Britain had been so established and regulated by treaties and statutes, as to place their several municipal rights upon a much more secure foundation.

By the laws of the United States of America, of Holland, of Prussia, and other Protestant States of Germany, of Sweden, of Denmark, and of Russia, divorce *a vinculo matrimonii* may be granted for adultery. But it could not be alleged that when the marriage of a citizen of any of these countries had been celebrated in England, the plea of indissolubility by judicial sentence was on that ground ever sustained, or even stated against the action of divorce in the *forum* of his real domicil. It was, however, between separate and in-

dependent states, that international law had its proper theatre of action, and became the sole authority. Besides, it had never been denied hitherto, that a *foreign citizen*, who had obtained the divorce of his own law *a vinculo* of a marriage entered into by him in England, might again return to England in any station, public or private, free to marry a second time there. For this innocent and lawful act of a second marriage, *a foreigner* surely could not be apprehended and tried for bigamy under the English statute. On the contrary, in England, where, in a peculiar degree, liberal and enlightened principles of jurisprudence prevail, it was conceived, that his condition of freedom from the former marriage, declared by a judicial decree in his own country, would certainly continue to be respected.

The result in the case of Lolly might appear adverse to this view of the subject; but, in truth, it served only to shew to what length the law of the real domicil could be supported and enforced according to the opinion of the twelve Judges of England. Although the wife of that person had ob-

tained a decree of divorce from the proper tribunal in Scotland for adultery committed here, that judgment was given in conformity to the decision and direction of the Superior Court in the previous case of Tewsh, and contrary to the opinions which the Commissaries had formed at the original discussion, and to which, conceiving the point to be again laid open for judicial consideration by virtue of the remit from the House of Lords in the subsequent appeal of Tovey against Lindsay, they unanimously returned. For Lolly was an Englishman by birth, and had his sole domicil in England at the date both of his first and of his second marriage. His real domicil also continued to be in England when his wife sued him and obtained decree of divorce against him in this *forum*. Consequently, whatever defence it might afford to him in the criminal trial for bigamy instituted upon his second marriage, the Scotch decree could not be effectual to dissolve his conjugal relation with his first wife, and as to all *civil* consequences, was invalid, according to the very principles which have been now adopted in the pre-

sent case of Mr Edmonstone. There was not, however, any ground to presume, that if Lolly had been a Scotchman, and had never visited England but upon the occasions of his first and of his second marriage, he could have been lawfully apprehended, and tried for bigamy as soon as the latter was solemnized. On the contrary, the notorious fact, that of all the Scotch parties, frequently in high rank, who have married a second time under the English law during the lives of their original partners, but after obtaining divorce in this *forum*, not one had on that account been subjected to any criminal cognizance or inquiry, proved that no such measure had ever been deemed competent.

It must, indeed, be regarded as impossible, that the validity of a final decree of divorce regularly pronounced by this Court against a defender whose real domicil was confessedly in Scotland, and in an action between parties who were exclusively subjects to the law of Scotland, could be afterwards considered in any English judicature but as a matter of fact like the statutory di-

vorce of the legislature ; for, by the treaty of Union between the two kingdoms, it was specially provided in the 18th article, that the laws then observed within the kingdom of Scotland, in so far as not changed by that compact itself, should " remain in the same " force as before," and, in particular, " that " no alteration be made in laws which con- " cern private right, except for the evident " utility of the people of Scotland ;" and, in the next article, " that no causes in Scotland " be cognoscible by the Courts of Chan- " cery, Queen's Bench, Common Pleas, or " any other Court in Westminster Hall, and " that the said Courts, or any of the like " nature, after the Union, shall have no " power to cognosce, review, or alter the " acts or sentences of the judicatures with- " in Scotland, or stop the execution of the " same." Even as to matters regarding which all interference or alteration had not been prohibited by these federal engagements, it was not left to the feeble mediation of international law to regulate the intercourse and connection between the two nations of Great Britain. By the same

treaty, a Parliament common to both had been provided to legislate upon concerns of such delicacy and moment. But if the principles of international law could be appealed to in the present question, the reasons had been already stated for concluding that these likewise supported the plea of the pursuer.

The other two Judges of the Primary Court were of opinion, that this was an extreme case against the law of the contract, but that, nevertheless, the English rule ought to be preferred, upon the principles explained on former occasions, and which they held to be of universal application.

By the rule of Court, in the case of equality, they accordingly gave an interlocutor, which, "In respect it is admitted, that "their marriage was regularly solemnized in "England, FOUND, that neither the alleged "domicil of the parties in this kingdom, "nor the alleged commission of adultery "here by the defender, can have the effect of altering the condition of the contract between the parties, as indissoluble "*secundum legem loci contractus*, so as to au-

Dec. 9, 1814.

" thorize this Court to pronounce sentence
" of divorce *a vinculo matrimonii*."

Upon a bill of advocation, at the close of the procedure in the Court of Review,* Lord Reston, Ordinary, by his interlocutor, remitted to the Commissaries, with instructions to alter the interlocutor " complained " of; to sustain the action, and proceed " therein according to law." But the pursuer, after a proof had been allowed, compromised the action, by an extrajudicial settlement with the defender.

March 5, 1816.

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* Appendix, Note (Q.)

The Honourable Mrs MARY BUTLER, otherwise FORBES, and Messrs HOTCHKIS and TYTLER, Writers to the Signet, her Attorneys,

AGAINST

The Honourable FREDERICK AUGUSTUS FORBES.

March 7, 1817.

BOTH parties in this case were confessedly Irish; but their marriage had been celebrated at Port Patrick in Scotland, and was of the same description, in all respects, with the marriages of English parties at Gretna Green, excepting that it was solemnized regularly by the clergyman of the parish. They had immediately afterwards returned to their native country, and had lived there during the whole period of their cohabitation. According to the allegations of the pursuer, in her summons and condescendence, the defender had afterwards come to Scotland, and had re-

sided here, without any establishment or fixed abode, from December 1813, to the 14th of March 1814, when he was personally cited at Edinburgh, and, during this residence, had committed adultery in this kingdom. On these grounds, she insisted for divorce *a vinculo matrimonii.*

The defender gave no opposition to the action, although, at an early stage of the process, he made appearance, which he afterwards withdrew.

Two of the Judges of the Primary Court were of opinion, that the decision of the case would depend upon the circumstance, whether the marriage must, in legal construction, be considered as an Irish contract, from the domicil of the parties, or as a Scotch contract, from the place of celebration. An interlocutory order was therefore given (1st July 1814) for the discussion of that point.

After this order had been obeyed by the pursuer, judgment was pronounced in these terms (16th February 1816): "The Com-
" missaries, having considered the memorial
" for the pursuer, with the protestation ad-

"mitted against the defender, for not lodg-
"ing his memorial, and having resumed
"consideration of the whole process, find,
"that the circumstances alleged in the pur-
"suer's libel and condescendence are in-
"sufficient, if proved, to entitle this Court
"to hold that the defender had changed
"his original domicil of Ireland, where he
"was subject to the English law, so as at
"the date of this action to have acquired a
"real and true domicil in this kingdom,
"his residence in which, for the period al-
"leged, might even have been adopted for
"the purpose of founding this action: Find,
"that transient or temporary residence of
"a foreigner, and citation within this ter-
"ritory, although sufficient to convene him
"as a defender, and to found jurisdiction,
"do not, according to the principles of in-
"ternational law, warrant this Court to ap-
"ply its own law as the rule of decision in
"a question affecting *status*, so as to enter-
"tain a conclusion for dissolving his mar-
"riage by sentence of divorce, in opposi-
"tion to the law of his proper domicil:
"Find, that the right of divorce is a mat-

"ter purely of municipal regulation, and "to be carefully distinguished from those "qualities of marriage which are essential "to the relation itself, as a contract *juris* "*gentium*: Find, that all municipal regu-"lations regarding marriage, while they "cannot in any way be controlled by the "will of parties, are not in their nature in-"delible, but may be affected by every "change in the real and true domicil: "Farther, find, that the alleged commis-"sion of adultery within this kingdom, "does not warrant this Court to apply its "own law, with regard to conclusions of "divorce against a foreigner; because, in "consistorial cases, acts of adultery are "founded upon by the pursuer, merely for "his private redress *ad civilem effectum*, and, "in these cases, the *locus delicti* is of no im-"portance, although in criminal cases, "where the offence is prosecuted *ad vindic-*"*tam publicam*, the *locus delicti* is an essen-"tial circumstance: Therefore, assoilzie the "defender from the conclusions of the "libel, and decern." This interlocutor was accompanied by the following note:

"The point to be determined in this case, "is the same which occurred in the case "of Edmonstone against Lockhart, lately "decided by this Court, namely, Whe- "ther the law of the contract, or the "law of the real and true domicil at the "date of the action of divorce, is to be the "rule of decision? In the case of Edmon- "stone, the Court being equally divided in "opinion, agreeable to immemorial usage, "judgment went in favour of the defender, "who maintained the plea of the contract. "If there had been an actual majority of "the Court in favour of the judgment, the "present case would have been decided in "conformity to it; but as there was no ma- "jority on that occasion, the decision has "not been followed as a precedent so as to "regulate the present case, when an equal "division of the Court again occurs, and, "consequently, the defender here has been "successful, although maintaining the op- "posite plea of the domicil."

By bill of advocation for the pursuer, this case was submitted to review, along with those of Edmonstone and Levett, and,

at the close of the discussions in the Court of Session, it returned, with an interlocutor, remitting to the Commissaries (12th July 1816) "to recal their former interlocutor, "to allow the pursuer to prove that the de- "fender was domiciled and resident in "Scotland when the action was raised, and "also to make what inquiry they may "think proper and competent, in order to "ascertain whether the present process be "collusive, and thereafter to proceed ac- "cording to law."

The pursuer had been examined at the commencement of the suit, on the point of collusion, under the oath of calumny, and the defender had been personally cited. From the proof now led by the pursuer, the residence of the defender in this country appeared very clearly to have been transient and altogether unfixed. In particular, there was not the slightest indication of any purpose having ever been formed by him to settle in Scotland *animo remanendi*. On the contrary, there was reason to conclude from the evidence, that he had always retained his connection as a

citizen with his native country, and had even actually returned to Ireland to settle permanently there.

This judgment was, therefore, pronounced (13th September 1816): "The Com-
"missaries, having considered the whole
"evidence, now and formerly led, as to the
"defender's residence and domicil at the date
"of this action, and having resumed con-
"sideration of the whole process,—In respect
"that the pursuer, in her oath of calumny,
"emitted in Court upon the 13th of June
"1814, has already deponed, "That there
"has been no concert or collusion between
"her and the said defender in raising this
"action, in order to obtain a divorce against
"him, nor does she know, believe, or sus-
"pect, that there has been any concert or
"agreement between any other person on
"her behalf, and the said defender, or any
"other person on his behalf, with a view
"or for the purpose of obtaining such di-
"vorce;" and, in respect that these asse-
"verations of the pursuer seem to the Com-
"missaries to exhaust the inquiry as to
"collusion by means of her oath, and that

" with due regard to the recent judgments
" of the Supreme Court in the cases of
" Newte and O'Bryan against their procu-
" rator-fiscal, * they are not aware of any
" other means by which the investigation
" on that point can be further prosecuted
" in the circumstances of this case : Find,
" that there is no sufficient and legal ground
" for concluding, that there has been any
" collusion between the pursuer and defen-
" der, either as to the defender's residence
" and domicil at the date of the action, or
" as to the institution thereof and proce-
" dure therein : Having also attended par-
" ticularly to the terms of the remit, and to
" the execution returned on the summons,
" which bears that the citation was deliver-
" ed to the defender personally, apprehend-
" ed on " Leith Terrace at Edinburgh, upon
" the 14th day of March 1814," and consi-
" dering that personal citation of a foreigner
" who has no fixed residence or domicil in
" this country, is attended with the very
" same effects which would follow from ex-

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* See Appendix, Note (B.)

" ecution left at his dwelling-place after
" abiding forty days here: Find, that the
" general instruction of the Superior Court,
" to allow the pursuer a proof of the defen-
" der's domicil at the date of the action,
" must imply, that it was further incumbent
" on the pursuer to prove, that the defender
" then had a real, and not merely a pre-
" sumptive, domicil in Scotland: Find, that,
" in point of fact, both parties are confess-
" edly natives of Ireland; and, according
" to the import of the whole evidence of
" the pursuer in this cause, must be held to
" have retained their real domicil exclu-
" sively in that country, both at the time of
" their marriage, and during the whole pe-
" riod of their cohabitation as husband and
" wife: Find, that the evidence now led by
" the pursuer only tends further to prove
" that the defender came to the hotel kept
" by Francis Mackay, in this city, by the
" mail coach from Carlisle, on the 25th of
" December 1813, and remained as a lod-
" ger at that hotel, and afterwards at differ-
" ent lodging-houses here, from week to
" week, without any domestic establish-

" ment, the only person with him being a
" female, with whom he lived at bed and
" board, but who was not the pursuer his
" wife, till some time in April or May 1814,
" when he left this city, in order, as he gave
" out, to go to his brother the Earl of Gra-
" nard, in the kingdom of Ireland, with the
" hope of obtaining employment in the of-
" fice held there by that nobleman : In re-
" spect that such mere presence, however
" long continued, of a foreigner in this coun-
" try, as may suffice to found jurisdiction,
" does not necessarily and always infer that
" the law of Scotland must apply its muni-
" cipal rules upon questions where he is a
" defender, in preference to those of his
" own country, and that our law, on the
" contrary, as in the case of intestate per-
" sonal succession, allows inquiry likewise
" to be made as to the real domicil, and,
" upon principles of international law, a-
" dopts the foreign rule of that domicil
" when this course may seem just and ex-
" pedient : And, in respect also, that a
" change of the real domicil, made *bona fide*
" *et animo remanendi*, at the date of the ac-

" tion, seems, in a peculiar degree, requisite
" to authorize the adoption of our munici-
" pal rule in preference to that of the Irish
" law upon a question by which this Irish
" defender's *status* of husband is affected,
" Find, that the pursuer has not established,
" by evidence, that the defender held that
" real domicil, at the date of this action,
" which was requisite to be proved. *Sepa-*
" *ratim,* find the allegation that Scotland
" is the *locus delicti* or *rei gestæ,* in respect the
" defender committed adultery here, of no
" importance or relevancy to the present
" question, because, in consistorial processes
" of divorce, acts of adultery are founded
" upon merely *ad civilem effectum,* and for
" redress to the private parties injured, and
" decrees have accordingly been hitherto
" pronounced in these by this Court, with-
" out distinction, whether the crime had
" been committed in Scotland, or in any
" other country of the world, although, in
" criminal causes before the competent tri-
" bunals, where the crime of adultery is pro-
" secuted *ad vindictam publicam,* the *locus de-*
" *licti* is an essential circumstance: There-

"fore, assoilzie the defender from the con-
"clusions of the present action, as laid for
"divorce *a vinculo matrimonii*; but, in re-
"spect there is no rule of the law of Scot-
"land which prohibits the Commissaries
"from granting a decree of separation *a*
"*mensa et thoro*, and for separate aliment to
"this pursuer, on the grounds alleged in her
"libel, while a decree so qualified would
"correspond with the principles of interna-
"tional law, appoint the pursuer to state
"whether she will restrict her conclusions
"to this inferior remedy."

Oct. 18, 1816.

By minute, the pursuer declined to restrict her conclusions, and the action was dismissed by the Primary Court.

The reasons of the judgment were likewise fully explained in this case, and were the same with those which had been assigned in deciding the case of Levett, except as to the circumstance, that the marriage had been celebrated within the territory of Scotland.

Upon this point, it was observed by the Judge officiating in Ordinary during the

vacation of the other tribunal, that, beyond all doubt, the parties had, in the act of their marriage, intended that the relation of husband and wife should be constituted between them to subsist, not in Scotland, but in Ireland; and that in Ireland all the conjugal duties and obligations should be reciprocally performed. They had likewise their domicil in Ireland at the date of their marriage, and had cohabited together only in that country. Even if the law of the contract were to be preferred, it must follow that the municipal law of Ireland should regulate in the present question; for the parties had visited Scotland merely to marry; and when their union was accomplished, their connection, if it could be so called, with Scotland, which had taken place for no other purpose, had altogether ceased.

It was also now ascertained, by satisfactory evidence, that the defender continued to have his real domicil in Ireland at the date of the action; for the pursuer's own proof had established this fact. And that circumstance alone was sufficient to decide the case, by rejecting the conclusion of the

pursuer for divorce *a vinculo matrimonii*, according to the municipal rule of the Scottish law. Such, at least, must be the necessary inference, if it could not be maintained, that the Scottish rule of divorce was impressed upon the contract of these parties as an essential quality of their marriage, because it had been celebrated at Port Patrick. But that proposition was directly opposite to the doctrine of the municipal laws, both of Scotland and of Ireland,—indeed, of all nations.

The Scottish ceremony of marriage, no doubt, differed from that of the English and Irish law, as to the ritual. It was not requisite by the former, that the marriage should be solemnized at the parish-church of the parties. Nor was any permission requisite in this country, to enable persons of lawful age, and not within the forbidden degrees of relationship, nor affected by any personal disability, to marry.

But a marriage, solemnized according to the rule of the place of celebration, however peculiar that municipal rule might be, was, by the law of nations, valid in all other coun-

tries. In other words, like every other contract *juris gentium*, marriage, wherever celebrated, had the same consequences and effects in any other country, to the law of which the spouses might be afterwards subject, as if it had been celebrated under that law. Thus, a marriage of English parties, made at Gretna Green, on the Scotch side of the Border, without form or solemnity of any kind, except a mutual and deliberate declaration of consent by the parties before witnesses, was received in England just in the same manner as if it had taken place there, with every condition of the English law and ritual. * That of Irish parties at Port Patrick was precisely on the same footing.

While such was the view of the English law, it was surely impossible that a different construction could be adopted in Scotland as to the quality of a marriage, on account of the place where it had been celebrated. For the recent decision in the case of Edmonstone had established, that the *lex loci*

* Appendix, Note (R.)

*contractus* was of no obligation here in the case of Scotch parties married in England. Without departing altogether from the principle of that decision, the judicature of this country could not, therefore, now regard our municipal rule as an essential quality of the marriage between these Irish parties, on account merely of the place of celebration, a circumstance which had been found of no weight in the case of citizens of Scotland, who had married within the bounds of the sister kingdom of England.

The *locus delicti*, it had been previously ascertained, was of no consequence whatever in the civil action of divorce. If, then, the place of celebration were also to be laid out of view as unimportant, it was evident that either the municipal law of the jurisdiction in which the cause came to be tried, on account merely of the defender's citation, or the municipal law of his real domicil, must govern the decision. But unless the authority of international law, and with it all regard to foreign contracts and rights, should be entirely disclaimed in this *forum*, as to ques-

tions affecting the conjugal relation, the latter must, on this occasion, be preferred.

A second bill of advocation was presented, upon which a remit by Lord Cringletie, Ordinary, was obtained, directing the Commissaries to alter their interlocutor, and proceed in the divorce.

Feb. 21, 1817.

In obedience to this instruction, upon full proof of the defender's guilt, decree was accordingly pronounced, in terms of the libel.

March 7.

### Mrs LUCY KIBBLEWHITE, otherwise ROWLAND, and her ATTORNEY,

AGAINST

### DANIEL ROWLAND.

April 7, 1817.

IN this action of divorce, which was moved in Court, and entered in the roll upon the 28th of October 1814, the defender made no appearance. The pursuer, in obedience to an order upon her to condescend, explicitly stated, that both of them were citizens of London, where they had been married in the year 1807, and where only they had cohabited, her husband following the profession of an attorney in that city. But in the month of August 1814, he had, according to her allegation, departed upon a jaunt to the English Lakes. Afterwards, he had proceeded to Edinburgh, whence he wrote to a female in London, whom the pursuer

named, with directions to come to him; and this person having complied with his request, it was farther asserted, that they had lived together in adultery here, till the summons was served upon him personally at the hotel in which he lodged, on the 5th of October 1814. It was only added, that the defender, so soon as he received this citation, returned to England.

Thus, there was no reason given to presume, that either of the parties ever had any connection with Scotland, except the defender's visit, for a period not exceeding six or seven weeks, during an autumn vacation, in the course of which time the ground for the action of divorce had been laid and communicated to his wife, so that she was enabled to convene him in the Consistorial Court of Scotland, before the approach of the term required his presence again in London.

Upon this case, as it stood by the pursuer's own statement, the Judges of the Primary Court were unanimously of opinion that the following interlocutor should be pronounced (26th July 1816): "The "Commissaries, having considered the con-

" descendence for the pursuer, and resumed
" consideration of the libel, execution, and
" certificate of marriage produced; in re-
" spect that both parties appear to be na-
" tives and citizens of England, and that
" the defender confessedly is an attorney
" of Gray's Inn, London, and was married
" to the pursuer at London in the year
" 1807, and has since cohabited with her
" in England till the month of " August
" 1814," when, as she alleges in her con-
" descendence, he left her at their dwelling-
" house in London, " to visit the Lakes
" in Cumberland;" and in respect that the
" pursuer merely alleges further in this con-
" descendence as to the defender's domicil
" and residence at the date of the action, that
" the defender " proceeded to Edinburgh,
" and arrived at Mackay's hotel on the 26th
" of August, and afterwards went with his
" servant to reside at Newhaven," where
" the execution returned upon the summons
" bears that he was personally cited " in
" Simpson's hotel, or lodgings, on the 5th
" of October 1814," to appear in this ac-
" tion; while she also states in her conde-

" scendence that the defender lodged " at
" Mrs Simpson's at Newhaven," but that,
" finding himself pursued into Scotland, and
" made the subject of prosecution there, he
" departed into England :" Find these alle-
" gations, if proved, clearly irrelevant to es-
" tablish any change of the defender's real
" domicil in England, and, consequently,
" that these cannot be admitted to proof:
" *Separatim*, find the only other allegations
" of the pursuer's condescendence, that the
" defender " wrote to one Lucinda Wilson
" in London, and she immediately came to
" Scotland by the mail-coach. The defen-
" der received her in Edinburgh at Mac-
" kay's hotel, and falsely represented her as
" his wife, Mrs Rowland. He next took
" her to his lodgings at Mrs Simpson's at
" Newhaven, and there also represented her
" as his wife," and that they " slept toge-
" ther one night in Mackay's hotel; and
" that they cohabited together openly at
" bed and board for some time at New-
" haven," are of no importance or relevancy
" in the present question; because, while
" these allegations, if proved, would esta-

" blish with respect to the guilt of the de-
" fender, that, in point of fact, Scotland has
" been the *locus delicti* or *rei gestæ*, by the
" rules and practice of our law in consisto-
" rial processes of divorce, acts of adultery
" are founded upon merely *ad civilem effec-*
" *tum*, and for private redress to the parties
" injured; and decrees have accordingly
" been hitherto pronounced by this Court
" without distinction, whether the crime had
" been committed in Scotland or in any
" other country of the world, although, in
" criminal causes before the competent tri-
" bunal, where the crime of adultery is pro-
" secuted *ad vindictam publicam*, the *locus*
" *delicti* is an essential circumstance: There-
" fore, and in respect that the marriage of
" the parties was indissoluble by judicial
" sentence, according to the law of Eng-
" land, which was both the *locus contractus*
" and the country in which the parties have
" always had their real domicil: Refuse to
" sustain the conclusions of the present ac-
" tion as laid for divorce *a vinculo matri-*
" *monii*: But in respect there is no rule of
" the law of Scotland which prohibits the

"Commissaries from granting a decree of
"separation *a mensa et thoro,* and for sepa-
"rate aliment to the pursuer, on the grounds
"alleged in her libel, while a decree so qua-
"lified would correspond with the prin-
"ciples of international law, appoint the
"pursuer to state whether she will restrict
"the conclusions of her libel to this inferior
"remedy."

In addition to the reasons which were thus entered upon the record, it was observed from the Bench by the Judge officiating in Ordinary when this interlocutor was given, that, although the whole Court had been of opinion, that there was no difference between this case and the preceding case of Levett, and those of the other English parties, which had been recently decided, with respect to their legal merits; yet, in its circumstances, it certainly reached the extreme point to which the exclusive application of the municipal law of the jurisdiction could be carried. For, if the alleged criminal connection of the defender with Lucinda Wilson, the per-

son mentioned in the pursuer's condescendence, had subsisted only in London, and if he had proceeded no further upon his jaunt than merely to cross the Tweed, and had been served with a citation by the macer of this Court on the instant that he reached the northern bank of that river, the action would have stood upon more fair grounds, although supported by no other imaginable connection of either party with the country or law of Scotland than it actually now does.

In this hypothetical case, the pursuer might have made such a seizure of an English party to found the Scottish consistorial jurisdiction, with her summons of divorce, entirely by surprise; and thus there could at least have been no reason to suspect any concert or collusion between them. But, on the contrary, the proceedings of the defender in this case, and the minute information of these, which the pursuer had obtained, did savour very strongly of arrangement to found and carry through the present suit in this judicature.

Nevertheless, the mere circumstance that

a guilty husband might happen to have no wish to preserve his marriage from being dissolved, could as little afford an objection to the suit of the wife on the ground of collusion in the case of English parties, as in the case of parties who were natives of this country. In either case, the right of the wife to such redress as might be competent, could only be barred by her own acts and conduct. Satisfactory evidence that she had, directly or indirectly, entered into a concert with the defender to procure the dissolution of their marriage, was, therefore, requisite to authorize the dismission of her suit on the ground of collusion, as that objection has always been understood in the law of Scotland. Many decisions which had been pronounced at all periods, from the date of the institution of the consistorial judicature, united to prove this proposition. Indeed, when the husband, as in this instance, happened to be the defender, he often shewed no aversion to the success of the suit. But the action could not be affected by his wishes; and various recent judgments of the Superior

Court had furnished strong illustrations of the rule of our municipal law on this head, which in itself might be held unquestionable. It would, however, in the present action, be both competent and necessary to examine the pursuer fully as to collusion under the oath of calumny, and if, by that mode of inquiry, or otherwise, sufficient evidence of her accession to any collusive practice could be obtained, the process must be dismissed. Yet without disregarding the whole course of previous practice, it was impossible at this stage to reject the suit upon an assumption that it was collusive. That point had consequently been left untouched by the present interlocutor.

Grounds altogether different had occurred, for declining to sustain the pursuer's conclusion for divorce *a vinculo matrimonii.* The interlocutor contained such explanation of these as had been conceived by the Court to be requisite to be entered upon the record. But the peculiar circumstances of this extreme case seemed to illustrate, in a manner so striking, the importance and necessity of abstaining from

the exercise of the power to give decree of divorce to the extent of dissolving an English marriage, in opposition to the law both of the contract and of the domicil of the parties, as to call for some further notice.

If Mrs Rowland, who appeared never to have visited Scotland in her life, and who certainly never cohabited with her husband in this country, nor had a domicil here, is entitled to a decree of the Consistorial Court of this country, dissolving her English marriage, because he has committed adultery, and has resided for a few weeks at this place, during which her summons was served upon him; then, beyond all doubt, such a decision not only must invite, as by open proclamation, all other spouses of every nation, who wish to obtain divorce *a vinculo* by judicial sentence, and cannot accomplish that object under the rule of their own law, to resort to this jurisdiction, but also must have the effect of a regulating precedent to compel this Court, in future, to entertain all their actions of divorce indiscriminately.

It were vain to hope that the plea of collusion might be employed to resist these in-

truders. For parties must always be aware of the nature of the oath to be taken, and would arrange their conduct to meet that test. When informed as to the state of our law, it was likewise plain that no motive could exist for their entering into any actual concert. The commission of a crime by the defender, on which the action might be laid, and his presence here to receive a citation, would alone be found requisite. Information of these circumstances might reach the pursuer without the direct knowledge, if not contrary to the wish of the defender, in a thousand different ways. Why, then, should any pursuer hold unnecessary communication, which could have no other possible effect but to defeat the action of divorce? Conduct so absurd was not to be expected; and, perhaps, if this very case were to proceed, it might be ascertained that Mrs Rowland stood as clear of collusion as any party that ever sued for divorce, although it could scarcely be doubted that her husband had, of deliberate purpose, thrown in her way the temptation and the opportunity to prosecute for divorce *a vinculo*, as a result equally desirable to both parties.

This Court, if compelled to proceed, must also, upon evidence of the crime, be compelled, *debito justiciæ,* to give decree. Presence to receive a summons, and guilt as the ground of conclusion against themselves, were the only requisites in causes of this description. These, it was to be presumed, that defenders in such causes would contrive to supply, at the peril of their partners in crime and of themselves, and also to the prejudice of this community, whose morals they must taint and infect. What must next follow, as the inevitable consequences of divorce, thus generally proclaimed and bestowed? Subsequent marriages of strangers, set at liberty in this manner from their first engagements, would lead to criminal prosecutions for bigamy, of which there had been already one most painful example, in the case of Lolly, and to afflicting contests upon the rights of legitimacy and of succession among the innocent children of their new connections. It was likewise a self-evident proposition, that these evils, in their worst and most aggravated form, could not fail to affect, in a very peculiar degree,

the people of Great Britain, where such collision of the laws, if permitted, must take place between two countries within the same empire and island, and must continue to increase till the Legislature shall provide a remedy.

It might, however, be still argued, that the present question was, in truth, one affecting the right of jurisdiction, which no court could surrender, without betraying its duty.

This point, therefore, remained to be considered, and in the discussion, it might be safely conceded, that, if the sole alternative really were either to refuse all redress for conjugal wrongs, in the case of parties who have no real domicil in Scotland, when convened in this *forum*, or to give that highest species of redress only which our municipal law had provided for its own subjects, there might then be ground for maintaining, that the right of jurisdiction would be virtually surrendered by declining to award divorce *a vinculo matrimonii* for adultery, in the circumstances here alleged.

But, upon a former occasion, the reasons

were stated for concluding, that this Court had also power to give the remedy of separate aliment and separation *a mensa et thoro* for adultery, in correspondence with the rule of the law of the contract and domicil of English parties, when such remedy shall be sought.

In either way, therefore, the right of jurisdiction might be exercised; and the choice between them ought to be determined according to the principles of justice and expediency, supposing these to be clearly on one side, and the question to be open. Now, there could be no doubt in the abstract, that it was both just and expedient, in the present case of English parties, not to exceed that measure of redress which their own law permitted. And it had appeared, that, previous to the date of the case of Utterton against Tewsh in 1811, there was no precedent in any contested question upon the point. The remit by the House of Lords, in the subsequent case of Lindsay against Tovey, held it to be undecided, and the directions of the Superior Court of Scotland, given in the interlocutors of remit

upon the recent cases of Levett and Forbes, as to the defender's domicil, had merely required the Commissaries to ascertain what was its real quality at the date of the action.

In the present case, it was not less clear, that the real domicil of the defender was, according to the pursuer's own allegation, in England, than that their marriage was an English contract. Nor could it be denied, that all ordinary civil contracts and transactions entered into abroad, receive effect from the law of Scotland, according to the rule which obtained where they were entered into.

Questions affecting the conjugal relation or other personal condition of parties, formed, indeed, a peculiar class. But the difference was merely that, as to these, the law of the real domicil must govern; since, otherwise, the internal arrangements of each municipal system would be constantly exposed to danger from the interference of the judicatures of the neighbouring countries. This collision, too, would always occasion prejudice to both nations. At least, that this

must be the consequence in the case of the sister kingdoms of Great Britain, there could be no doubt. For it must be not less injurious to our own moral and social interests, to invite English strangers fraudulently to seek the privilege of divorce here, by the commission of adultery, than the consequences of decrees of dissolution of the marriages of English subjects valid here, but not respected in England, must be injurious to our neighbours.

The circumstance that there were peculiar statutes of our criminal code against adultery, afforded no specialty by which the claim for the application of our municipal rule in a case of divorce, between strangers from another kingdom, could be supported. A forgery at Edinburgh of a title to an English estate, by a stranger from England, would authorize the conviction and execution of the perpetrator by our criminal law; but certainly would afford no pretence for a civil judgment in this *forum* as to the effect of the forged title, to establish a right in the lands to which it related by our ci-

vil court, according to the municipal law of Scotland. We had statutory penalties for usury as well as for adultery, by the criminal law of Scotland, and remedies, likewise, by civil action, and for reparation to private parties. Yet justice was administered to foreign parties, and as to foreign contracts upon pecuniary claims, by the rule of the foreign law. Neither was the circumstance of any importance, that adultery is in its own nature a crime, while usury is only penal by statute. For the separate provinces and boundaries of the criminal and civil laws were perfectly distinct, and the latter could derive nothing from the former in a question of divorce. If the act of the Scottish Parliament, anno 1563, cap. 74, were still in observance, supposing it to be proved that Mr Rowland had lived in open and flagrant adultery with Lucinda Wilson, the person condescended upon by the pursuer as his partner in guilt, he would be liable to capital punishment. He is liable, if apprehended and convicted, to those penalties of our criminal code, which are still competent. It was in this manner that the cri-

minal law of Scotland protected the people of this kingdom against the injury and pollution which their morals might sustain by the guilt of strangers.

No doubt, in the department of criminal justice, our municipal system could not suffer its own regulations to be impeded by any plea drawn from rules of another code, without compromising its independence and sovereignty. Here it avenged for the public, in order to repress guilt by suitable punishment, and because the crime had been committed within that territory of which it is the guardian. Therefore, while the criminal law took no cognizance of delinquencies which have occurred any where else, it admitted of no interference as to these within the limits of its own exclusive jurisdiction. On the contrary, the civil law of Scotland, in adjudging reparation to a private party, looked only to the nature of the right, and of the claim which is the subject of the suit. No public interest of the community in Scotland, for example, could be directly affected, whether Mrs Rowland persevered in this indi-

vidual action or abandoned it, or, whether persisting, she should obtain a dissolution of her marriage, or only a separate aliment and separation *a mensa et thoro.*

Was the alternative, however, matter of equal indifferency in other views, and with respect to the law of England? On the contrary, reliance upon a decree of divorce, if granted here *a vinculo matrimonii,* might produce second marriages of these parties in England, and thus expose their persons to the pains of bigamy, and their offspring to the most serious calamities. The precedent also would involve an alarming collision between the laws of the two countries of this island. It was, therefore, inexpedient to pronounce such a judgment without necessity. It would be unjust to do so, since the conjugal relation between these parties, with its consequent rights and duties, in truth remained under the regulation of the English law, and must still be held locally to subsist at their real domicil in England, rather than here.

In this predicament, our jurisdiction could be endangered only by exercising it erro-

neously. But considering the relative situation of the two kingdoms, it was not difficult to foresee, that if we were to assume, that the possession of power to try and decide cases of divorce between English parties in this *forum*, likewise implied a necessity to disregard the rules of the law of England, and were, in consequence of this assumption, to do violence to the municipal system of our neighbours, and thus to produce uncertainty and confusion in the most important concerns of civil society and of human life, among the people of the British empire at large, the subsistence of such a jurisdiction might be considered not as a benefit, but a calamity. *

Apprehension of such a consequence, could indeed afford no good reason to a court of justice for not applying the law as it now stood. But it was conceived, that the interlocutor upon the general question, all the points of which had again occurred in this particular cause, was the fair result of a consideration strictly ju-

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* Appendix, Note (S.)

dicial, and in no respect extending beyond the limits of the legal arguments and investigation. For unless the authority of international law were to be altogether rejected, it was not only proper but indispensable, to inquire with freedom, as upon an open subject, whether our municipal rule, which permits divorce *a vinculo matrimonii* for adultery by judicial sentence, or the opposite rule of the English law, should be preferred in a case depending between English parties who had no domicil in Scotland. Sufficient reasons had been found for concluding, that, especially with regard to the decision of a suit affecting their conjugal relation as it subsisted in their own country, respect was due in this *forum* to the rule, which was established in the neighbouring kingdom of the empire. At the same time, redress for the injuries she alleged might be given to the pursuer here, which perfectly corresponded in principle and material effect with the rule of her own law. In this manner, too, while the jurisdiction, according to the law of Scotland, possessed by the Consistorial

Court, was exercised to its full extent, and in the way which was upon the whole most beneficial, as well as most just, the municipal systems of both kingdoms would be securely preserved from all risk of violation, or prejudicial interference and collision, in a department of peculiar importance in the administration of civil justice.

The judgment of the Commissaries was submitted to review, by bill of advocation for the pursuer, and Lord Cringletie reported the case to the First Division of the Court of Session, at her motion, along with that of Levett. But it was there remitted to the Second Division of that Court. Afterwards, both cases were decided together, and this deliverance was given, in conformity to the opinions of the Judges * (21st December 1816): "The Lord Ordinary, "having again considered this bill and former procedure, and advised with the "Lords of the Second Division, remits to "the Commissaries, with instructions to al-

* Appendix, Note (T.)

" ter their interlocutor, and to proceed in
" the divorce according to the rules of law."

In obedience to this instruction, the pursuer was fully examined under the oath of calumny, with a view to ascertain whether there had been collusion, and she not only gave answers which were explicit and satisfactory to all questions upon this head, but also produced a letter received by post during her husband's absence in August 1814, which bore all the marks of authenticity, and which she deponed had conveyed to her the first information of her husband's guilt. A proof was, therefore, allowed, and the action afterwards proceeded in common form. *

Feb. 14, 1817.
April 7, 1817.

* Appendix, Note (U.)

# APPENDIX.

## Note (A.) p. 30.

THE decisions, of which the following brief summary is given in illustration of the point upon which reference has been made to them in the text, are to be found at the places indicated by their dates in the MS. record. During the whole discussions since the general question came to be agitated, as well as in preparing this compilation, the reporter has derived valuable assistance, which he takes this opportunity gratefully to acknowledge, from a MS. Dictionary of Consistorial Decisions, and separate abridgment of the cases, collected by Lord Hermand while he officiated as a Judge of the Commissary Court, beginning upon the 19th of July 1684, and ending in the year 1777 : Also from another MS. dictionary, beginning in 1684, and ending in 1744, collected by the late Mr Murray of Henderland, while he held the same situation : And likewise from a MS. collection of consistorial cases selected from the records of the last century by the late Mr Cay, while officiating as a Commissary, previous to his appointment as Judge of the Court of Admiralty.

Although the decisions of previous date to the case of Tewsh only could be referred to while it was under discussion, in order that the whole series may be presented together in one unbroken view, those which have been pronounced since are also included in this note.

*27th February* 1692.

LAUDER *against* VANGHENT.

THE pursuer, Colonel Lauder, when serving as a Scotch officer in the army of the seven United Provinces of the Low Countries, married the defender, a Dutch lady, at Bommelwert, in Guelderland. During the whole period of their cohabitation, they resided exclusively in the Low Countries. But Colonel Lauder having afterwards returned to reside at his estate in Scotland, and having left his wife in her native country, he raised an action of divorce against her before the Consistorial Court of Scotland, on the ground of adultery, which crime he alleged that she had committed in Holland. The summons was served edictally,* and she made no appearance. A proof was allowed, and taken upon commission abroad; and the evidence being found satisfactory, decree of divorce *a vinculo matrimonii* was pronounced in the usual form.

*2d February* 1693.

MONTGOMERY *against* MARSHALL.

ANNA MONTGOMERY, the pursuer, was a Scotch lady, who had been married in Scotland to Captain James Marshall, of New Portown, in the county of Armagh, and kingdom of Ireland. She cited him edictally as residing out of this kingdom upon a summons of divorce, in which he was accused of having committed adultery while in Scotland with his regiment; and no appearance being made for the defender, a proof was allowed, and his guilt being established by evidence, decree was afterwards pronounced, in terms of the libel.

*2d March* 1698.

WHARTON *against* MAIR.

IN this case, the action concluded for divorce, reduction, and declarator of nullity, on the ground of a previous mar-

* An edictal citation is given to defenders out of the kingdom, by proclamation at the market cross of Edinburgh, and pier and shore of Leith.

riage. The defender was an Englishman, resident in London, and the pursuer, who resided in Scotland, and was by birth a Scotch lady, convened him in the Consistorial Court at Edinburgh by edictal citation; and having taken her proof by commission in England, obtained decree against him in absence.

*1st November* 1698.

BRIDGET BOLD *against* SAMUEL WRIGHT.

THE defender in this case was an Irishman, and the pursuer, a native of Edinburgh, obtained decree of declarator of nullity and divorce against him, on the ground of a previous marriage, in an action upon which he was cited edictally, and in which a proof was taken by commission at London, where his first marriage had been celebrated.

*9th June* 1699.

GORDON *against* ENGLEGRAAFF.

WILLIAM GORDON, the pursuer of this action, was a merchant of Aberdeen, who had been a factor at Campvere in Holland, and had married the defender, Anna Margaretta Englegraaff, daughter of a merchant at Amsterdam. He accused her of adultery during their cohabitation at Campvere, and with his summons produced "an instrument and protestation in the Dutch language, "under the hand and subscription of William Van Rugven, notary-public, dated the 28th day of July 1698 "years, attested by two other notaries within the town of "Delft the said day, proporting, that William Gordon "made known to Anna Margaretta Englegraaff his going "to Scotland, and told plainly he was to go with a design "as soon as he was arrived there, to raise process of divorce against his said wife, requiring her, by his marital "power, to follow and bring her son alongst with her; "and that she might have no ground of excuse, he, "the said William Gordon, appointed her John Gor-"don at Rotterdam to provide for her transport, and a "place at Edinburgh for lodging, till law should deter-"mine betwixt them." This invitation having been declined by the lady, the pursuer, in his action of di-

vorce, "supplicated and obtained from the said Commis-
"saries a commission addressed to John Storbac, Burgo-
"master at Rotterdam, &c. to take and receive the oaths
"and depositions of all such habile and famous witnesses
"living in and about the city of Rotterdam, as the said
"pursuer or any in his name should adduce, for proving
"against the defender the crime of adultery and other cir-
"cumstances and qualifications libelled;" and the proof having been taken and reported, with other evidence of her guilt, decree was pronounced against her.

*7th January* 1702.

HAMILTON *against* BROWN and HAMILTONS.

IN this case the pursuer obtained a decree of declarator of nullity and illegitimacy against the alleged wife of his deceased brother and her children, upon the ground that she had been previously married to another person. She was an Englishwoman, and both marriages had been celebrated in England. The pursuer and his brother were natives of Scotland, and the pursuer had his domicil in this kingdom. The citation given was edictal; but the defender appeared, and produced a counter action of declarator of marriage and legitimacy. And, in both actions, a proof was taken by commission in England.

*16th December* 1726.

GRAHAM *against* WILKIESON.

JAMES GRAHAM of Gartur, in the county of Stirling, and Elizabeth Wilkieson, daughter to Captain Philip Wilkieson of Ballinahinch, in Ireland, the parties in this action, were married in Ireland. During their cohabitation at the pursuer's house in Scotland, she committed adultery, and afterwards eloped and left the kingdom. She was cited edictally as forth of Scotland; and, upon proof of her guilt, decree of divorce *a vinculo matrimonii* was pronounced against her in absence.

*6th March* 1731.

SCOTT *against* BOUTCHER.

THE parties in this case were married at Westminster, and the defender was an English lady. They cohabited

together in England, and she was accused of having committed adultery there. Upon this ground, the pursuer, who was a Scotchman, instituted an action of divorce against her, in the Consistorial Court of Edinburgh, and having cited her edictally as out of this kingdom, his oath of calumny was taken at the commencement of the judicial procedure, at his residence in London, upon commission, by "George Ritchie, Esq. Secretary to the Duch-"ess of Buccleuch;" and, upon proof of her guilt, taken there in the same manner, decree in absence was pronounced against her.

11*th June* 1745.

DODDS *against* WESTCOMB. *

WILLIAM WESTCOMB, an Englishman, who had an office in the Exchequer in Scotland, and had, for some years, resided in Edinburgh, having given up his office, and retired to England, a process of declarator of marriage and adherence was brought against him by Rebecca Dodds, before the Commissaries of Edinburgh, with a conclusion, that, failing his adherence, he might be decerned in a certain sum, in name of aliment; wherein appearance having been made for him, with a declinature of the Commissaries' jurisdiction, as he was neither a native of the country, nor had either residence or effects in it, the Commissaries "repelled the declinature, al-"lowed the pursuer to prove her marriage;" and, after proof led, "found the marriage proved, and decerned," &c.

He then presented a bill of advocation, which was informal, after decree; but the pursuer waved that objection; and, upon consideration of the merits of the case, the Lords "repelled the declinature."

This (according to the report of Lord Kilkerran) they did, not upon the general ground, which had been chiefly argued for the party, that the *locus contractus* founds a *forum*, though some of the Lords were for carrying it that length, the more general opinion being, that the *locus*

* Kilkerran, p. 213, *voce Forum Competens.*

*contractus* no otherwise founds a *forum* than when the party is summoned upon the place. But what the Court proceeded on was, that here was a *quæstio status*, which might involve the pursuer into inextricable difficulty, were it to be governed by common rules; that it might be true, where marriage is solemnized in one country according to the established forms of that country, it will be sustained in whatever other country it be brought under challenge, though the form of solemnization may be different in that country; but that it was a different question, whether every thing that infers marriage in one country, will, in another, be sustained to infer it; and one instance was given, in the case of Colonel Murray, when, though his marriage was sustained by a solemn decree of the Commissaries of Edinburgh, upon a proof of habit and repute, and cohabitation with the woman as man and wife; yet, in England, that decree was disregarded, and his marriage found not proved, which was taken notice of, not to justify the practice of England, in disregarding the decrees of another country, as they ought rather to shew the same *comitas* to us that we do to them, but to shew the hardship of obliging the pursuer to resort to England to prove her marriage, where, in all likelihood, she must fail, and remain under the reproach of being a whore, and her child a bastard, though she was really a married woman by the law of Scotland, where she entered into that state.

It was for this reason of expediency, on which all questions in the public law, and especially the *quæstiones status*, are to be judged, that the Court in this case proceeded, though some were for sustaining the declinature, as we were not to do wrong, out of fear that the judges of another country might do so. *

* The report of this case, which is copied from the collection of Lord Kilkerran, shews to what length the right of jurisdiction was maintained in this country towards the middle of the last century, in questions where the *status* of citizens of this country was at stake. Fifty years afterwards, the decision in the case of Pirie against Lunan, 8th March 1796, went to a greater extreme upon the same grounds.

*20th June* 1750.

GEORGE YOUNG *against* MARGARET CASSA.

IN this case the parties had been married at Leyden in Holland, and the defender was accused of having committed adultery at the Hague and at Paris. The pursuer was a Scotchman, but having entered into the medical service of the army, was in Ireland when the usual order was given for his deponing *de calumnia* at the commencement of the procedure. and a commission was granted for taking his oath to the Lord Mayor and Aldermen of Dublin, &c. although this measure was opposed by the defender. Afterwards, a commission was granted " to Mr William " Robertson, merchant at Rotterdam," to take the proof in Holland, " whom failing, by absence or refusal to ac- " cept, to the Lords and Masters the Schepins of the " Hague, or any one of them." But the law of Holland did not permit the local magistrates and judges to give effect to a commission granted, in the first instance, to a private person not possessed of authority, to compel the attendance of witnesses, and to take the evidence, so as to subject them to the pains of perjury in case of false swearing. This fact being regularly certified, a new commission was accordingly granted (12th December 1749), " Unto the Right Honourable and the Right Worshipful " the Lords, Burgomasters, Schepins, Magistrates of the " Hague and of the city of Leyden respectively," to take the proof for both parties, " and that at the Hague and " Leyden respectively, upon all or any of the lawful days " betwixt the 20th of January and the 10th of March

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But the judgment of Sir William Scott, in the recent case of Gordon against Dalrymple, and the previous English decision which established, that marriages of English parties, contracted in Scotland *secundum legem loci*, but in the celebration of which the conditions of the act of the 26th Geo. II. cap. 33, had been altogether disregarded, were, nevertheless, valid in England, seem sufficiently to prove, that there is no longer any just ground for apprehending that the law of Scotland will not be respected by the judicatures of England, in a question relative to the validity of a Scotch marriage.

"then next," with a request, that they would "be pleased "to make a report of the whole to the saids Commissa-"ries, betwixt and the 25th day of March then next."

Having entered upon the execution of this commission, the Lords, Burgomasters, and Schepins of the Hague, addressed a letter, at the expiry of the limited time, to the Commissaries, in which they stated, that they "did not "incline (considering the way this commission was ex-"pressed) to refuse complying therewith." But after mentioning what progress they had made, observed, "We "have reason to believe, that the entire fulfilment there-"of cannot be completed in the time limited in your "said commission, viz. before the 21st of the instant "March, especially in as much as we are obliged to give "ten days warning to the parties concerned, for adducing "of such witnesses as might not have been summoned at "first, or that happened not to be contained in the list "inserted in your commission, and whose depositions "may nevertheless be useful to your end and design, as "appears from the information of those we have already "received; and as there would need much longer time *in "order legally to compel such as would not compear "willingly, in case any such should be found hereafter,* "we forbear giving your Lordships a more full detail of "the present state of the affair and of its progress, having "judged it only proper to give you this information of its "commencement. And upon the petitions of Messieurs "the agents for Mr George Young to represent to you, "that a prolongation of your time fixed in the fore-"said commission, will be necessary for its entire ful-"filment. And that, in consequence, we therefore would "wish, for the foresaid reasons, that you would grant a "proper prolongation, since, having begun this thing, we "would be willing to see it ended to your entire satisfac-"tion," &c.

The commission was, of course, renewed, and it was executed in a very accurate and satisfactory manner, and the

guilt of the defender being fully established by the evidence, decree of divorce was pronounced in the usual form. *

10*th February* 1759.

M'CULLOCH *against* M'CULLOCH.

IN a process of declarator of marriage, the pursuer proved, that the defender had cohabited with her for several months in the Isle of Man, and during this cohabitation, had there acknowledged her to be his wife. She also proved, that having afterwards returned to her family in Scotland, she was visited by the defender, and that he enjoyed the privileges of a husband in this country. But there was no proof of consent to a marriage *de presenti* by the defender in Scotland, or even of acknowledgment of marriage by him here, and no sufficient evidence that the parties were habit and repute married persons in this country. The Commissaries, upon the ground, that the cohabitation and acknowledgment in the Isle of Man could only receive effect according to the law of the place, and did not there constitute marriage, assoilzied the defender. A bill of advocation being presented to the Court of Session, was remitted, with instructions to alter this judgment, and decern in the declarator. But the interlocutor of that Court was, upon appeal, reversed by the House of Lords.

1*st December* 1772.

MARGARET SCRUTON *against* JOHN GRAY.

THE pursuer of this action was the daughter of a writ-

* By the law of Scotland, testimony given by a witness not cited is liable to objection, as ultroneous, and as no warrant for citation is valid *extra territorium judicis*, the attendance of witnesses must depend upon their own pleasure in cases of commission for proof out of this kingdom, when the local authorities of other countries have not power, or are not in use to afford them assistance. But, it is evident, that *comitas* in this respect is very essential to the administration of justice. Between countries within the same island and empire, the nations inhabiting which are parts of the same people and state, occasions must likewise frequently occur, in which any want of this mutual assistance to give due effect to the law cannot fail to be extremely prejudicial.

ing-master in the city of Glasgow. The defender was the son of an Irish gentleman. Her action was laid upon the allegation of a private marriage between them while he was prosecuting his studies at the University of Glasgow, and upon an arrestment of his effects in the house where he had lodged there, used by her after he had gone home. It was served by edictal citation, and concluded as usual for declarator and aliment.

Defences, by which the jurisdiction was declined, having been repelled, a bill of advocation was presented to the Court of Review, and, after a full discussion in memorials, and by hearing in presence, " The Lords remitted " the cause, with instructions to sustain the defences, de" clining the jurisdiction of the Commissaries."

In the report of the Collector for the Faculty of Advocates, it is stated to have been the opinion of the bench, with respect to the competency of a *forum rei sitæ*, by virtue of the arrestment *jurisdictionis fundandæ causa*, that " the source of that species of jurisdiction, in " this and other commercial countries, was utility, and " the facilitating the recovery of debts. It is properly a " mercantile jurisdiction, not an universal one; and being " an exception from the general rule, it is not to be ex" tended to a case not founded in the intention of intro" ducing that sort of jurisdiction; and where the pursuer " had a legal remedy, viz. by resorting to the defender's " proper *forum* in Ireland. And as to the case of West" comb, 11th June 1745, cited for her, it was but a sin" gle decision, not to be followed as a precedent; more " especially, as it is known, that the pursuer in that case " derived no benefit therefrom."

*8th December* 1783.

General LOCKART WISHART *against* Mrs MARIANN MURRAY.

DIVORCE *a vinculo matrimonii* was obtained by the pursuer against his wife in this case, on proof of adultery committed by her at Bath, London, and Brussels, Ostend, Aix la Chapelle, and Ghent. The parties were

both of Scotch origin, and, at the date of the action, had a domicil in Scotland, where they had been married.

*25th January* 1787.

URQUHART *against* FLUCKER.

THE pursuer was a Scotsman, and an officer in the army, who had been married to the defender at Boston, in New England, of which place she was a native. They had cohabited as husband and wife for some time there, and afterwards at Halifax, in Nova Scotia, and in the neighbourhood of London. But having discovered that she had been guilty of adultery at Halifax, in Nova Scotia, and in England, after he had returned to his native country, he raised an action of divorce; and on proof of her guilt, taken by commission in England, decree was pronounced against her, in terms of the libel.

*6th February* 1788.

ARCHIBALD Earl of EGLINTON *against* Dame FRANCES TWYSDEN Countess of EGLINTON.

SENTENCE of divorce was pronounced, without opposition, dissolving the marriage which had been celebrated between these parties in England, on proof of adultery committed in Scotland.

*9th February* 1789.

Dame ELIZABETH BRUNSDON *against* Sir THOMAS WALLACE DUNLOP, Bart.

THESE parties were both natives of Scotland, but had been married at London, and neither of them had any domicil or residence in Scotland at the date of the action. For many years, both had resided in England. The pursuer alleged, that the defender had deserted her society, and resided for sometime in France, where he had been guilty of adultery. He was cited edictally, as amenable *ratione originis* to the jurisdiction of the Commissaries, but made no appearance, until a proof had been allowed to the pursuer of her allegations. A bill of advocation, complaining of this interlocutor,

was then presented by him to the Superior Court, which was refused by the Lord Ordinary. The defender next applied by petition to the whole Court, who adhered to the Lord Ordinary's interlocutor. But upon a second petition, the Lord Ordinary was directed to remit to the Commissaries, with a general instruction "to dismiss the "action," which was accordingly obeyed.

*11th March* 1789.

FRANCES TREVELYAN *against* Major JAMES FIELD.

BOTH parties in this case were English by birth and domicil. They were also married in England. But upon proof of the defender's adultery in Scotland, where he was cited and convened, decree of divorce was pronounced by the Consistorial Court, in absence of the defender, who made no appearance.

*7th February* 1794.

Duchess of HAMILTON *against* The Duke of HAMILTON.

THE marriage between these parties had been regularly solemnized in England, according to the English law and ritual; and sentence of divorce *a vinculo matrimonii* was nevertheless pronounced, without opposition, upon sufficient proof that the defender had committed the crime of adultery in Scotland, where the parties had their permanent residence during their cohabitation and at the date of the action.

*8th March* 1796.

MARY PIRIE *against* ANDREW LUNAN.

AT the date of the action in this case, and for many years before, the parties had their only domicil in London, where they permanently resided. But both were natives of Scotland, and had married there, and had cohabited in this kingdon for a considerable length of time previous to their settlement in London. After following the trade of a bookbinder, and cohabiting with his wife there for a number of years, Lunan formed a connection with another woman, and pretending that he was a single per-

son, had the ceremony of marriage performed with this woman, in the parish of St Luke, Chelsea, and afterwards cohabited with her. On these grounds, the pursuer sued the defender before the Commissaries of Edinburgh for divorce; and her summons being served edictally against him, as forth of the kingdom, an application was made by petition for a commission to take the pursuer's oath of calumny at her domicil in London; but the Commissaries, upon consideration of the summons and execution, and of this petition (9th June 1794): "In "respect that the domicil, both of the pursuer and de-"fender, is situated in London, and that the fact founded "on in the libel, as inferring to the defender's guilt of a-"dultery, are stated to have happened there, dismissed the "action as incompetent." To this interlocutor they also adhered, on advising two several reclaiming petitions.

A bill of advocation was presented by the pursuer, and was refused by the Lord Ordinary.* A reclaiming petition was also refused by the whole Court. But upon a second reclaiming petition, *ex parte*, the Lord Ordinary was directed by the Court to remit the bill to the Commissaries, with instructions to "sustain the action, and "proceed in the cause." Accordingly, the pursuer's oath of calumny, and afterwards a proof, were taken at London, upon two several commissions, and the guilt of the defender being fully established, decree of divorce was pronounced in common form.†

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* Lord Justice-Clerk M'Queen.

† The published report of this case by the Collector of the Faculty of Advocates is erroneous. There was no allegation of adultery in Scotland. The only information of the reasons which induced the Superior Court to alter the judgment of the Commissaries that has been obtained, is the statement in this published report, that "doubts "were entertained by some of the Judges, whether the previous case "of Brunsdon against Sir Thomas Wallace had been rightly decid-"ed, and that it was thought that there would be no harm in giving "decree to the pursuer, *valeat quantum valere potest.*"

It seems proper to observe, that the most eminent talents of the Scottish bar were exerted with much distinction in arguing the case of Brunsdon against Wallace, which was most deliberately considered

13th *June* 1800.

Lieutenant-Colonel FRENCH *against* HENRIETTA PILCHER.

THE pursuer in this case was a native of Scotland, and resident in this country at the date of the action. The defender was an Englishwoman, who had eloped with him, and whom he had married at Gretna Green. Afterwards, they had cohabited together as husband and wife, in Scotland and at the stations of his regiment in England and in India. But the defender having fallen into bad health when abroad, left her husband upon duty in India, and returned to Britain, where she was guilty of adultery, while in Scotland on a visit to his relations, and afterwards at her residence in London.

She was personally served with a copy of the summons at her house in London. But she got no regular citation, and made no appearance.

The Commissaries " dismissed the action, in respect " the defender was not cited within Scotland, nor in any " shape amenable to the Courts of this country."

In a bill of advocation, the pursuer pleaded, that Scotland was the place of the contract, and also of his domicil, and, consequently, by construction of law, was his wife's domicil.

" The Lord Ordinary, having advised with the Lords, " remitted to the Commissaries, with instructions to sus- " tain their jurisdiction."

In the report for the Faculty of Advocates, it is mentioned, in explanation of this judgment, that it was " ob- " served on the bench—The case of Lunan is decisive of " the present, which is even more favourable for the pur- " suer from his domicil being in Scotland, from which " that of his wife cannot be separated. But the defender " should have been cited both at market cross, and pier " and shore, and at the house of her husband."

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by the Court, whereas, in this case of Pirie against Lunan, the defender made no appearance, and the interlocutor of the Commissaries contained the only statement of the objections to the action.

*27th June* 1801.

ELIZABETH ANN WYCHE and ATTORNEY *against* CHARLES BURREL BLOUNT.

THE parties in this case were both English, and were married at Gretna Green. Afterwards, they cohabited as husband and wife in England, till the defender deserted the society of the pursuer, and having been guilty of adultery in Scotland, was cited personally in the action, at the quarters of a regiment in which he held a commission at Musselburgh.

The defender made no appearance, and the Commissaries having allowed a proof *before answer*, which was taken by commission in England, and afterwards (20th February 1801), " Having considered and compared the " libel with the proof, found it not proved, either that " the marriage of the pursuer or defender, who are not " Scotch but English by birth, was celebrated in Scot- " land, or that they cohabited in Scotland as husband and " wife any time after their marriage, or that the defender " has had any sufficient or settled residence in Scotland, or " even that the crime on which the divorce is founded " was committed in Scotland; therefore found, that the " action is not competent in Scotland, and ought not to " have been brought before this Court; and dismissed the " process for want of jurisdiction."

But this judgment being submitted to review of the Superior Court, the Lord Ordinary (Meadowbank), after reporting a bill of advocation, " remitted to the Com- " missaries, with instructions to sustain their jurisdiction " in this case, in respect the summons was executed a- " gainst the defender when resident in Scotland, and pos- " sessing a domicil there: Find it competent to refer to " the oath of the defender, the authenticity of his sub- " scription at the certificate of marriage produced, and " that said certificate is genuine; admit the said refer- " ence, and grant commission accordingly."

A reference was accordingly made to the defender's oath; and, in obedience to the direction of the Superior Court, the Commissaries having ordained him to depone,

he disobeyed, and was held as confessed, and decree was pronounced against him, in terms of the libel. *

27th June 1801.

MARIA MORCOMB *against* JOHN LAW MACCLELLAND.

THE defender, in this case, was a Scotch surgeon, who had entered into the service of the navy, and while stationed in a receiving ship at Plymouth, had there married the pursuer, who was an Englishwoman. She alleged, that after many years cohabitation there, he had deserted her society, and been guilty of adultery. The citation was edictal; but a certificate by a notary was produced, that a copy of the summons had been delivered to the defender personally at Plymouth. He appeared, and declined the jurisdiction of the Commissaries, and their judgment was in these terms: "Considering that the "courts of one country ought not to be converted into "engines, for either eluding the laws of another, or de-"termining matters foreign to that territory, and that de-"crees of divorce, pronounced by incompetent courts, "cannot effectually and securely either loose the bonds, "or dissolve the marriages, or fix the *status* of the parties "thereto, but might become causes or snares to involve "other persons, as well as the parties and their children, "in deep distress; and observing it to be admitted in the "libel, that the marriage of the pursuer and defender was "celebrated in England; that they resided constantly in "England since their marriage, and even that the crime "on which divorce is here demanded to be decreed was "committed in England; therefore find, that the action "is not competent in Scotland, and ought not to have "been brought before this Court; and dismiss the process "in all its parts, for want of jurisdiction and of power."

Lord Armadale, Ordinary, refused a bill of advocation, and the pursuer, in a reclaiming petition, pleaded, that in a question like the present, the defender would be amenable to the Courts of Scotland, even *ratione originis;*

* The defender in this case had no other domicil in Scotland but the station at which he resided while on military duty.

but in truth, having been constantly in the navy service ever since he left Scotland, he has acquired no other *forum*, and, consequently, the country in which he was born and educated is still his proper domicil; according to the decisions in the cases of (11th June 1745) Dodds against Westcomb; 8th March 1796, Pirie against Lunan; 13th June 1800, French against Pilcher.

The Lords unanimously refused the petition without answers.

*27th January* 1807.

LINDSAY *against* TOVEY.

THE pursuer, in this case, was a Scotchman by birth, and heir of entail of an estate in Scotland. He entered into the army, and married, when with his regiment at Gibraltar in 1781, Miss Tovey, the daughter of an English officer, with whom he afterwards cohabited there as his wife, till some time in the year 1784. From that period till the end of the year 1792, their permanent residence was in Scotland. They then removed to Durham, where his family remained, and where he lived with them, when not employed on military duty, till December 1802, when the parties entered into a voluntary contract of separation. Afterwards the pursuer resided in Scotland, when not from home on duty.

In December 1804, the pursuer commenced an action in the Consistorial Court of Scotland, the summons of which concluded, in the usual style, for divorce *a vinculo matrimonii*, upon allegations of criminality, both before and after the separation, the date of which was specified.

A preliminary defence was stated, declining the jurisdiction, on which an interlocutor was pronounced (5th April 1805), finding, " that the Commissaries of Edinburgh " have a proper jurisdiction in the present instance."

The defender presented a bill of advocation, complaining of this interlocutor, which was refused by Lord Bannatyne, Ordinary (22d May 1806), and, upon a petition to the whole Court of Review (27th January 1807), his Lordship's interlocutor was adhered to.

An appeal was taken against these interlocutors to the House of Lords, and the judgment pronounced was in these terms: "Ordered and adjudged, that the cause be "remitted back to the Court of Session, to review their "interlocutors complained of, and to do therein what to "the Court shall seem just; and it is further ordered, "that the Court do give all necessary directions, as well "in the said Court as to the Commissaries of Edinburgh, "for enabling the said Court effectually to carry into exe-"cution the judgment of the said Court, which shall be "pronounced after such review." *

*12th October* 1810.

Lady PAGET and her ATTORNEY *against* Lord PAGET.

THE action in this case concluded, in the usual form, for dissolution of a marriage celebrated in England, on the ground of adultery committed both in that country and in Scotland. It was served personally upon the defender, at the House of Lude, in the county of Perth, where the defender had been previously living as tenant of the proprietor for several months. No appearance was made for the defender, when the cause came to be moved in Court, and upon a regular application by petition, shewing reason, a commission was granted by the Judge officiating in ordinary, according to previous practice, for taking the defender's oath of calumny in England. Afterwards defences were lodged, which contained a mere denial of the libel. The pursuer was then ordained "to "give in a special condescendence of the facts she aver-"red, and would undertake to prove, in support of the "conclusions of her libel, and therein to state the persons

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* The above abstract of this case is intended merely as a reference to the report of the decision of the Court of Session, published by the Collectors for the Faculty of Advocates, and to that of the judgment of remit in the House of Lords by Mr Dow. It is, however, sufficient to shew, that the preliminary point of jurisdiction only was submitted to the consideration of the Radical Court in Scotland, and by a very imperfect statement of the circumstances from which the question arose.

"with whom, the places where, and the dates on which "the alleged acts of adultery had been committed."

In compliance with this order, she entered into a minute detail of the defender's desertion and guilt. He lodged answers, in which he said, that he "rested his defence on "the pursuer's inability to prove her averments." But in which he also pleaded, that no proof should be allowed of the facts alleged, which were previous in date to a reconciliation which had taken place between the parties in the year 1809, and after his original desertion of the pursuer.

The interlocutor upon these pleadings (21st September 1810) allowed a proof of the marriage between the parties, and of the alleged adultery of the defender in Scotland to the pursuer, and a conjunct probation to the defender. In this proof he joined issue, as seriously maintaining his defence. But his guilt being clearly established, decree was pronounced in common form.

*10th January* 1811.

MARGARET WILCOX *against* RICHARD PARRY, Esq.

BY the proof in this case it was established that the parties were English, and having eloped from their families, were married irregularly at Annan, in the county of Dumfries, and that, after they had cohabited sometime as husband and wife in the neighbourhood of London, the defender had deserted her society, and been guilty of adultery in Scotland. He made no appearance, and decree of divorce was pronounced in absence.

*7th June* 1811.

ELIZABETH ALDOWS *against* HENRY ALDEN.

DECREE of divorce *a vinculo* was given against the defender in absence, upon proof that he was living in Scotland at the date of citation, and had, for some time before, resided here, and had committed adultery in this kingdom, although the parties had been married, and had cohabited in England, and had their real domicil in England, of which country both were natives and subjects.

*28th June* 1811.

Mrs MARY RODGERS *against* C. B. WYATT, Esq.

THE parties were married in England, and had cohabited together only in that country, of which they were natives. But the pursuer alleged, that he had deserted her society, and been guilty of adultery, both in England and in Scotland. He was personally cited, and having made appearance, stated in defence, "that the allegations "set forth by the pursuer must be proved. He has no "objection to such proof being allowed, at the same time "he reserves to himself the privilege of vindication, upon "the proof being reported, if so advised; and further "craves to be allowed a conjunct probation."

Two successive petitions, for a commission to take the pursuer's oath of calumny in London, were refused, and she appeared in Court, and deponed that there was no collusion. Afterwards a proof was taken, which fully established the defender's guilt, and decree was pronounced in terms of the libel.

*25th October* 1811.

UTTERTON *against* TEWSH.*

*10th January* 1812.

Lady HILLARY *against* Sir WILLIAM HILLARY.

THIS case was similar to that of Tewsh, and, after going through the same course of procedure, was decided according to the instructions of Lord Meadowbank, Ordinary, by interlocutor of remit from the Superior Court, upon a bill of advocation, accompanied by a note of his Lordship, in the same terms as in the case of Tewsh.

*10th January* 1812.

Mrs FRANCES HEWET and ATTORNEY *against* JAMES WEBBER, Esq.

THE circumstances of this case also were similar to

* See the first Report of this volume. To give a connected view of the whole course of decisions, an abstract of those which followed is likewise added here.

those of the two preceding cases of Tewsh and Hillary, except that the defender made no appearance. The procedure in it was, however, sisted by the Commissaries, when the bills of advocation in these were presented, till the judgment of the Superior Court upon the general question should be obtained. Afterwards, in conformity to that decision, the proof of the defender's guilt being complete, decree was pronounced in terms of the libel.

*6th March* 1812.

JOHN WHITE, Esq. *against* ESTHER HESTER.

DECREE of divorce *a vinculo* of an English marriage between these parties was pronounced, upon proof that the defender was living as a common prostitute at Edinburgh, in conformity to the decisions of the Superior Court, in the preceding cases of Tewsh and Hillary, although she had appeared, and pleaded, that the *lex loci contractus* ought to govern, and that her husband was an English gentleman, who had no domicil in Scotland.

*20th March* 1812.

ANN SUGDEN *against* WILLIAM MARTIN LOLLY.

THE summons in this case alleged, "that, in the year "1800, or thereby, the pursuer was married at Liverpool "to the said William Martin Lolly, and, in consequence "of their marriage, they afterwards cohabited together as "husband and wife," &c. but alleged, "that the said William Martin Lolly, defender, having some time ago had "occasion to come to Edinburgh, the pursuer accompanied him thither, and since their arrival they have lodged "in Mackay's inn, Grassmarket, Edinburgh: That since "the said William Lolly, defender, came to Edinburgh, "he has also at different times and places given himself up to adulterous practices," of which a detail followed. She also accused him of previous adulteries in England; and, upon these charges of adultery, she concluded for divorce in the usual form.

Defences were lodged, which bore, "that, referring to "the libel as laid, the defender denies the same, except in

" so far as it states that the pursuer and defender were
" married together at Liverpool, and cohabited there as
" husband and wife, as they also did since they came to
" Scotland, till the pursuer thought proper to become jea-
" lous of the defender, and to bring the present action
" against him on the head of adultery As to the acts of
" infidelity alleged to have been committed by the defen-
" der in England, while the defender denies these, he has
" to observe, that he does not conceive that these are rele-
" vant in the present action, although they were true. All
" that the Court is competent to judge, is the defender's
" alleged infidelity to the pursuer since they came to Scot-
" land, stated in the libel. With regard to the marriage
" between the parties, that the pursuer may easily prove,
" but he does not believe she will be able to prove the al-
" leged infidelity of the defender towards her, said to have
" been committed by him in Edinburgh; but should the
" Commissaries allow her a proof thereof, the defender
" craves they will allow him a conjunct probation of all
" facts and circumstances tending to exculpate him."

The Commissaries admitted the pursuer to her oath of calumny, and she deponed, " that she has good cause to
" pursue the present action of divorce against her husband,
" William Martin Lolly, because she believes that he has
" been guilty of the crime of adultery, and that the facts
" stated in the libel (which has been read over by the de-
" ponent) are true. Depones, That she came to this coun-
" try along with her husband, about the 23d of Novem-
" ber last. Interrogated, Whether she knows what was
" the intention of the defender in coming to this country,
" and why did she, the deponent, accompany him? de-
" pones, That when they set off together, she did not
" know of his intention of going further than Carlisle, in
" Cumberland, at which place the defender first intimat-
" ed to the pursuer his intention of going to Edinburgh,
" and said to her, that as Edinburgh was a fine place, he
" would take her along with him to see it. Depones,
" That for a good while the defender said, that he would
" leave the pursuer at Carlisle, but at last he proposed
" bringing her along with him to Edinburgh, and asked

"if she would like to accompany him: That she signi-
"fied her willingness to do so, and they came according-
"ingly. Depones, That for these three years past, the
"defender has behaved extremely ill to the pursuer, and
"would not allow her to see her children, and that she
"came to this country along with him in hopes that a re-
"conciliation would take place, and that she would then
"be permitted to see her children. Depones, That pre-
"vious to raising the present action against her hus-
"band, she has had no communication with him with re-
"ference to it, nor did she ever intimate to him her inten-
"tion of bringing it; and that at no time, or in any way
"whatsoever, either personally, or through the medium
"of friends or agents, did she ever give her husband to
"understand that she was to institute the present action,
"and the deponent positively swears, that there is no col-
"lusion between her and the defender in carrying on the
"present action."

Afterwards, as they had done in the preceding English cases, the Commissaries (31st January 1812), "In
"respect that the parties in this action appear to be
"English, and the marriage between them to have been
"likewise an English contract, before farther procedure,
"appointed the pursuer to state, in a condescendence, the
"grounds, both in fact and in law, on which this Court
"is competent to entertain her action."

In this condescendence the pursuer founded "upon the
"decision of the Supreme Court in the case of Utterton
"against Tewsh, 12th October 1811;" and although in answers the defender retracted his prorogation of the cause, as arising from ignorance of the law, and entered into a long argument, in support of which he cited a variety of cases, as, in his apprehension, tending to shew that a different decision should have been pronounced, the Commissaries, by a majority, conceived themselves to be obliged, in obedience to the authority of the Superior Court, to allow by their interlocutor (21st February 1812) in this case also, "before answer," a proof of the
"facts stated in the libel and condescendence, and to the
"defender a conjunct probation."

The evidence completely proved the facts alleged with respect to the guilt of the defender during the residence of the parties together in this city; but with such circumstances of undisguised profligacy in the conduct of the defender, as led the Court to suspect that there might have been connivance on the part of the pursuer.

Under the impression, therefore, that it was still their duty to detect and resist all collusive attempts of English and Irish parties to dissolve their marriages celebrated under the law of England, by employing the Scottish consistorial jurisdiction as the instrument, the Commissaries, by a special interlocutor (12th March 1812), "In respect of circumstances in this case, which had attracted the notice "of the Court, appointed the defender, now in this country, to attend for judicial examination next Court day, "and this interlocutor to be immediately intimated." Accordingly, on the day following (13th March), the defender was judicially examined, and declared, "that neither before he came to Scotland with his wife, the pursuer, nor since, had he any conversation whatever or "communication of any sort with her relative to the institution of this action, nor has there been any understanding or agreement between them of any kind or "proposal respecting this process; but since it commenced, he did offer to his wife to place in her disposal "a sum of money if she would drop it, which she refused, and gave him to understand, that no sum whatever would induce her to abandon it. Declares, That "his wife and he have not cohabited together, either at "bed or board, since she made the accusation against him "which is the subject of this process; and that nothing "could be further from his intention than to give her an "opportunity of divorcing him."

The pursuer also was judicially examined, and declared, "That she is certain, from every circumstance, that "nothing could be further from her husband's intention "than that she should become acquainted with his guilt, "and that she has neither derived her information from "him, nor from any person employed by him to inform "her, or with his knowledge or permission; and that the

" defender has endeavoured to persuade her to give up " this action since it was raised, and has offered her terms " to do so, which she has absolutely refused."

The suspicion of collusion not being established by these declarations, and no further means of investigation remaining in this cause, decree was given in the usual form.

*26th March* 1813.

Colonel JOHN M'DONALD *against* HENRIETTA JUSTINA FRITZ.

THESE parties were married at Ceylon, and cohabited together in that island, and at Bombay, as husband and wife, till the pursuer was obliged to return to Scotland, of which country he was a native, on account of health. He left the defender at the house of her father, the Dutch Governor of Point de Galle. During his absence she became unfaithful, and having cited her edictally in an action of divorce, he established the facts by the evidence of Scotch officers who happened to return home from that place, and obtained decree, without opposition from the defender, who made no appearance.

*9th April* 1813.

CATHARINE POLLOCK *against* RUSSELL MANNERS, Esq.

THE action in this case was laid upon the alleged facts, that the defender had entirely deserted the society of his wife for upwards of ten years, leaving her unprovided with suitable means of subsistence. That " after leaving " his own home, he also left England," (of which country they were natives, and in which they had been married, and had lived during the period of their cohabitation), and having resided sometime in North America, he " had " now taken up his residence in the city of Edinburgh;" where, it was farther stated, that he had remained for near a twelvemonth before the date of his citation, and had been guilty of various acts of adultery.

After examining the pursuer fully under the oath of calumny, as to collusion, for suspicion of which no ground

whatever appeared, and taking a proof, which fully established the truth of the pursuer's allegations, the general question, whether the law of the contract or of the domicil, holding that of the defender to be in Scotland at the date of the action, should govern the decision, was fully discussed at great length, both by the form of memorials, and of hearing counsel *viva voce* at the bar. During this discussion, the defender entered appearance, but afterwards withdrew; and the subsequent pleadings on his side were presented by one of the solicitors for the poor, as prepared by counsel, under the direction of the Court. At the close, decree was pronounced, in terms of the libel.

*30th September* 1814.

Mrs MARIANNE HOMFRAY and ATTORNEY *against* THOMAS NEWTE, Esq.

THE parties were natives of Wales, and were married, and had afterwards lived there during their cohabitation as husband and wife. In obedience to an order of the Court, the pursuer specially alleged as to the defender's domicil, "that Mr Newte was a man of fortune. He had land "estates in England, and was also possessed of a con-"siderable personal estate in that country. He had also "a considerable property in Scotland. He had L.10,000 "laid out on one heritable bond over the estate of Harris, "belonging to Mr Macleod of Harris. He married the "pursuer in England six years ago. The parties lived "on good terms for some time, afterwards they differed "and separated. Mr Newte gave up his house and "family more than two years ago, and went about "from place to place, as it suited his fancy, without "any settled residence. In the month of July 1812, he "came to live in Scotland. In August he made an oc-"casional visit to a friend in Perthshire, and afterwards "went to other places in the country. No circumstan-"ces then occurring to indicate his intention, whether to "remain in the country or to leave it. In the end of "August or beginning of September, he fixed his resi-"dence in Edinburgh. At first he lodged for a few days

" in a hotel ; afterwards, about the middle of September,
" he went to Cunninghame's lodgings, in George Street,
" where he remained about four months, and then went to
" Cooper's lodgings, in St Andrew's Street, where he had
" remained ever since. In October he resolved to lend
" his money on the heritable security, which was after-
" wards completed in January. In January he was sud-
" denly called to London, in order to make an important
" transaction as one of the executors of a deceased rela-
" tion. He staid there a few days, and returned to Edin-
" burgh immediately after the transaction was completed,
" thereby indicating, in the strongest manner, his intention
" to reside in this city, where he still resided in Cooper's
" lodgings, without any apparent intention to change. He
" had houses on his different English estates, and had it
" in his power to reside in them, but he had no establish-
" ment anywhere but in Edinburgh. The pursuer resid-
" ed at Cheltenham, and had done so for a considerable
" time past, having no house or home belonging to her
" husband where she could reside. Under these circum-
" stances, it seemed to be perfectly clear, that Mr Newte
" was domiciled in Scotland to all intents and purposes."
By his answers the defender acknowledged, " That the
" facts stated in the minute for the pursuer were true, and
" thereby admitted on the part of the defender, but," (he
added, that) " the inference deduced therefrom was de-
" nied in point of law."

After considering memorials for the parties, and also hearing their counsel at the bar, a majority of the Court, in the circumstances of this case, were of opinion, that the action must be sustained. An inquiry was attempted as to collusion, which failed. * The pursuer also condescended specially as to the fact of the defender's having been guilty of adultery in Scotland, and, on full proof of her allegations, sentence of divorce *a vinculo* was given.

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* See following Note (B.)

*16th December* 1814.

JANE ARUNDEL ST AUBYN *against* Captain CHARLES O'BRIEN.

THE pursuer in this case was an English lady, and the defender an Irishman, and an officer in the army. They were married in England, and lived there while they cohabited together as husband and wife. But the defender had resided in Scotland for some months before the date of the action, and was accused of having committed adultery in this kingdom.

He made no appearance; but in the course of the pursuer's proof, Isabella Milligan, a witness examined by her to prove the defender's guilt, spontaneously stated upon oath, that the defender had communicated to this witness the particulars of a collusive arrangement between him and the pursuer, which had been carried into effect by him, with the assistance of her agent in this city, Mr Donald M'Lean, writer to the signet.

To ascertain the truth or falsehood of this statement, the Commissaries, after taking Mr M'Lean's judicial declaration, appointed that gentleman to depone. But the Superior Court, upon a bill of advocation, remitted to alter this interlocutor.*

The proof of the defender's guilt was complete, and decree was given, in terms of the libel.

*25th August* 1815.

Mrs MARY GORDON *against* Lieutenant-Colonel ALLEN HAMPDEN PYE.

THE parties in this case were natives of England, and were married in England in the year 1797, where they also resided together during the whole period of their cohabitation. But the defender had for three years preceding the date of the action deserted the society of his wife, and after being guilty of adultery in England, had, according to her allegation, "transferred his domicil to "this country," and had likewise been guilty of adultery in Scotland.

The defender made no appearance. But the Court

* See Note (B.)

considered the case very deliberately, without the assistance of any pleading for the defender, and a majority of the Judges concurred in pronouncing this judgment (3d January 1814): "The Commissaries, having considered "the whole process, in respect, that it appears from the "pursuer's libel and condescendence, that the parties are "English, and the marriage between them was celebrat-"ed in England, and that the permanent domicil and re-"sidence of both as husband and wife, is, and has always "been, in that kingdom; in respect also, that the tem-"porary residence of the defender, and alleged commis-"sion of adultery by him in Scotland, can have no effect "to alter the condition of the contract between the par-"ties, as indissoluble *secundum legem loci contractus*, and "to authorize this Court to pronounce sentence of di-"vorce *a vinculo matrimonii*; and, in respect no other "remedy which this Court might have competent juris-"diction to apply in the circumstances of this particular "case, has been sought by the pursuer, find the pre-"sent action as now maintained incompetent; dismiss "the cause, assoilzie the defender from the conclusions "thereof, and decern."

The reasons of this judgment appear from the following notes of the opinions of the majority of the Court, which the parties obtained for their own use by request of their counsel, made *in foro*, when the interlocutor was pronounced, and which were afterwards printed by order of the Superior Tribunal.

*Opinion of Mr Commissary Gordon.*

"Differing, as I have always done, from the rule o decision that has been generally adopted in these English divorces from 1801 till now, and not being convinced by the unquestionably able reasoning of the very learned Judge of the Court of Session, who remitted the cases of Hillary and of Tewsh, with instructions to this Court to proceed according to the dictates of the law of Scotland, I am pleased that this point is again brought under discussion, as it has been well said, by that great law authority, to be one "near the very sources of general juris-

Oct. 12, 1811.

" prudence, and reaching to consequences of incalculable
" number and magnitude."

" But considering that his Lordship had no doubt on the point, and that several of my brethren in this Court, and, as I believe, the weight of the bar in this country, formerly agreed with him, I should have hesitated to submit again at any length the view which I have always taken of these cases during the eight years and a half that I have sat here, if I had not known that my opinion was confirmed by the infinitely higher authority of those of the twelve Judges of England, and also by the opinion of the Lord Chancellor (so far as I am able to discover his Lordship's sentiments from his speech on the late appeal case of Tovey against Lindsay), and by that of Lord Redesdale.

" The alleged facts in this case appear to be these. The pursuer, Mrs Mary Margaret Gordon, of the county of Somerset, in England, was married to the defender, Lieutenant-Colonel Pye (I presume of that county, for it is nowhere stated), in the church of Bathwick, on the 15th of February 1797, and they cohabited for some time as husband and wife (it is not said where, or how long); but the defender had withdrawn himself from his said wife, and is now living in adultery at Edinburgh with one Jane Collins, and other women mentioned in the libel. It is also stated that the defender had resided 40 days in Scotland, and was personally cited in this action.

" That similar facts, if proved, would be sufficient in a case betwixt Scotch parties, married in Scotland, to obtain a divorce *a vinculo matrimonii*, according to the conclusions of the libel, no one in the least acquainted with the law of Scotland, or the uniform practice of this Court since the year 1563, can doubt; but whether they are sufficient in a case betwixt foreigners married in a kingdom where the marriage-contract is known to be indissoluble, is a matter of more uncertainty.

" On a point of such difficulty, we must regret that the defender, Lieutenant-Colonel Pye, having made no appearance in the suit, there are pleadings only on the side

of the pursuer. The Court is thus laid under the necessity of seeking for the arguments on his side in former cases, and by its own unaided research. Indeed, I may observe, that in all the cases of English marriages which have come before this Court, or the Court of Session (the cases of Sir Thomas Wallace and Major Eccles Lindsay only excepted), it is quite evident that one and all of the defenders have shewn no serious disinclination to be divorced, and would even seem privately to have connived with the pursuers. Hence, too, the reason why the Lord Ordinary was not informed of the opinions of this Court in the discussion of the advocations of Hillary and Tewsh.

"The forms observed in the celebration of marriage, and the laws which prescribe what is essential to this contract, have been very different in different ages and in different states. Of the law of divorce in the earliest ages of Christianity we are but very imperfectly informed even by holy writ. St Jerome and Josephus tell us that it was accomplished by the husband giving the wife a writing to this effect,—"I promise that I will hereafter lay no claim to "thee."* I am not inclined, however, to enter into the controversy whether, from the Gospels, it is clear that a husband could, by putting away his wife in this manner, dissolve the *vinculum matrimonii* without even the intervention of a Court,—or whether, by the most ancient law of the Christian church, as explained by St Matthew, St Mark, and St Paul, the husband could only have a divorce *a mensa et thoro*.

"Whatever the law as to the indissolubility of marriage was in those early times, a reference to the *Institutiones Juris Canonici* shews that it had become an established rule in this code, that a marriage lawfully contracted was indissoluble by any power whatever, according to this plain and unequivocal declaration—"Sciendum est igitur "legitimè contractum matrimonium dissolvi non posse, "quippe a Deo conjuncti ab homine separari non debere "nec valeat."†

* Deuteronomy. St Matthew. St Mark.
† Instit. Jur. Canon. lib. ii. tit. 16.

"Actions of divorce were, no doubt, common in ecclesiastical courts; but these only took place where the marriage was to be declared void *ab initio* for some legal impediment, or *a mensa et thoro* for adultery or maltreatment. This, too, clearly still remains the established law of all Roman Catholic countries in Europe (excepting France since the late revolution), as well as of England.

"It appears to me, however, only necessary, for the decision of the case now before us, to ascertain,—*First*, What is the law of England. *Secondly*, What is the law of Scotland as to divorce. And, *Thirdly*, What is the rule of international law as applicable to this suit.

1st, As to rule of English law.

"Notwithstanding the most anxious research on my part into every authority I had access to, I have not been able to satisfy myself upon what grounds the rule of the English law as to the indissolubility of marriage was first adopted. But I see it distinctly laid down by Lyttleton,* the great English institutional authority, that "there be "two kinds of divorces,—the one that dissolves the mar-"riage *a vinculo matrimonii*, as for consanguinity, &c.—"and the other, *a mensa et thoro*, as for adultery; because "that divorce, by reason of adultery, cannot dissolve the "marriage *a vinculo matrimonii*, for that the offence is "after the just and lawful marriage." And the case of Foljambe, decided in Queen Elizabeth's time, has been ever since held as a conclusive precedent on this point in England.

2d, Rule of Scotch law.

"I have been equally unable to discover from what origin (unless it be from some rule in the code of the Jews, or in the *Novellæ* of the *Corpus Juris Civilis*) the dissolubility of marriage, for adultery or non-adherence, by our law is taken. We have the authority of Craig for holding the canon law to be the basis of our consistorial law; and the decretals previous to the Reformation have always been considered as a part of the law of Scotland. But as there is no decretal respecting divorces in the canon law of Scotland of 1242, as collected by Lord Hailes, I

* Lyttle. 3. Inst. 88.

am inclined to think divorces were not then in practice in Scotland. It would also appear from the *Regiam Majestatem* and *Quon. Attachiamenta* (which contain the earliest authorities of our law that are recognised in subsequent statutes), that divorces *a vinculo* were not at that time in practice. For they are thus mentioned in the *Reg. Maj.* * "It is towit, that gif the wife be separate fra "the husband in his lifetime for filthiness of ane crime of "her body, she may naway ask or claim ane dowrie after "her husband's deceis. The like is to be said gif she se-"parate for parentage and sibness of blude (within degrees "defended and forbidden). The wife forfaits her dowrie "gif she is divorced and separate by sentence of the eccle-"siastical judge fra her husband by reason of adultery "committed by her."

"And in the *Quon. Attach.* which appears to refer to the statute 2d Robert I. cap. 13, and was written in King David Bruce's time, it is laid down, † "Gif any wife flees "away willingly fra her married husband to another man, "for lecherie or sensuality of her body, &c. that wife shall "not recover ane terce after her husband's deceis, except "her husband *receive her home again of his own free will,* "*without compulsion of haly kirk.*"

"It would likewise appear from Sir George M'Kenzie's Institutes, ‡ that when divorces *a vinculo* were first granted, the innocent parties alone were allowed to marry again.

Conclusion as to both.

"I have, however, satisfied myself that all the text writers of authority on English law consider the marriage-contract as indissoluble, and that it can only be set aside by an act of Parliament, which could equally well dissolve any Scotch marriage, if the parties preferred that mode of redress rather than to apply to our Court. Upon the other hand, it seems to be equally clear, from § Stair, Erskine, and all our other institutional writers (M'Kenzie except-

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* B. ii. c. 16. sect. 73. † Quon. Attach. c. 35.

‡ Vol. II. b. 1. tit. sect. last.

§ Stair, b. i. tit. 4. § 7. Ersk. b. i. lib. 6. § 43, 44. M'Kenzie, Vol. II. b. i. tit. 6. § last.

ed), and from the Scotch acts of Parliament, 1551, ch. 19; 1563, ch. 74; 1573, ch. 55; 1592, ch. 117, and 1600, ch. 20, as well as from the uniform decisions of our tribunals, that whatever the old law may have been here, a Scotch marriage is now dissoluble by this Court, and has been so ever since the date of the first of those acts of the Scotch Parliament, and upon the ground either of adultery or of non-adherence. The parties, too, may here lawfully marry again with any other person not within the prohibited degrees of propinquity, the paramour excepted. It is, however, quite a different question, and certainly much more doubtful, how far the *jus gentium* will authorize the courts of one kingdom to entertain actions professedly instituted for setting aside contracts, which the parties *admit* cannot be set aside in the country where these were entered into; and although they must have been aware of this condition, because the very ceremony of marriage declares it to be indissoluble; and every one is held to know the law of his country.

"This question, I humbly conceive, has never been properly and fully brought under the consideration of this Court, or of the Court of Session, in a case seriously litigated by the parties, since that of Brunsdone against Wallace was decided. But the decision there pronounced seems to me to have been adverse to the principle on which this Court and the Court of Session (by the remits in Hillary and Tewsh) have decided the late cases.

"The points which appear to come more immediately under our consideration in the present shape of this particular action are two. *First,* Whether the defender has acquired such a domicil as to give jurisdiction to this Court in a question of *status*. And, *secondly,* Whether the case ought to be decided according to the *lex domicilii* alone, or if the *lex loci contractus* ought to be taken into consideration.

"As to the *first* point, it is clear that this is not the *forum* of the defender, either *ratione originis,* or *ratione contractus,* or *ratione rei sitæ;* and that the suit is instituted and founded on the remaining ground of the *lex domicilii,* from an occasional or temporary residence of the

defender for 40 days in this country, while, in reality, his permanent domicil continues to be in England; where, I presume, he may very probably be actually dwelling at this moment. It appears to me, therefore, that an action raised on such a residence is in some measure *in fraudem legis;* and that this Court ought to hesitate before we sanction such a residence as being sufficient to found a jurisdiction for trying the most important questions of *status.*

" On looking into Voet * as to the *forum domicilii,* I observe he says, " Domicilio quoque intuitu conveniri " quisque potest, in eo scilicet loco, in quo larum rerum- " que ac fortunarum suarum summam constituit, unde " rursus non sit discessurus si nihil avocet undeque cum " profectus est perigrinari videtur." From this definition it is obvious that a man's legal domicil is not always to be determined by the place where he may be actually dwelling, but depends upon the place in which his strongest connections have been formed, where the seat of his fortunes and prospects is permanently fixed, and which he only leaves when necessity, or accident, or business, requires him to travel into other countries. We, indeed, all know that, besides this permanent domicil, a man may have many domicils of action at the same time. It is, however, a matter of great doubt whether such a domicil as is admitted to found jurisdiction in actions of debt, ought to be allowed to do so likewise in the more important questions of *status.* But, as my opinion for dismissing this action is founded principally on the second point, I shall not dwell longer on this.

" The *lex loci contractus,* as it appears to me, is the only sound and safe rule for courts to adopt in deciding *questiones status;* and if it has not been adopted, I do, with great submission, think it ought to be so among all civilized states. Indeed, if any other rule were to be universally followed *inter gentes,* I humbly conceive that the law of marriage in particular, on which the happiness of society so mainly depends, must become completely loose

* Voet ad Pand. lib. v. tit. 1. sect. 92.

and unsettled. Thus, for example, we know that in France incompatibility of temper has been made a ground of divorce *a vinculo matrimonii*. In Connecticut and Rhode Island, by the law of these states of civilized North America, six weeks absence is a sufficient ground of such divorce. Instances, too, are not unfrequent of husbands going from the neighbouring state of New York into one or other of these, and, after a residence of six weeks, intimating to their wives, by public advertisement, that they require their presence and society; and, on the non-appearance of the wife, obtaining a divorce, and returning to New York loosed of their matrimonial bonds.

"If the courts of one country were therefore to adopt the *lex domicilii* as the universal rule of decision upon questions affecting *status*, without taking into view the *lex loci contractus*, and if the courts of another country, in which the contract was entered into, were to respect such decisions, marriage, in particular, would then only be binding so long as it was agreeable to the parties, without any respect to the interests of children or of society. A Scotch husband, who was dissatisfied with his wife, and wished to marry another, would have only to sail to Rhode Island, and, after two months residence there, might return with a decree of divorce in his pocket, ready to enter into matrimony of new. Or, supposing the courts here were not to respect such a divorce, he might remain where he was divorced, and marry again there. Thus, the greatest embarrassment would ensue; for the parties might be married in one country, and unmarried in another; and the rights of third parties would be involved in inextricable confusion, to their unspeakable distress, since it cannot be disputed that all the patrimonial consequences of marriage, as to terce or dower, and succession of children, must be regulated either by the *lex loci contractus* or *rei sitæ*, and not by the *lex domicilii*. But to posterity and to the relations of society and morals of the state, it is obvious that effects far more injurious would follow from such a situation than from all the cases of unchecked profligacy so glowingly depicted by the pursuer. Indeed,

this impunity may at once be put a stop to in Scotland, by resorting to our criminal law against notour adultery, * which even authorizes the infliction of capital punishment.

"The pursuer has founded on the case of Hog † as a decision in favour of the *lex domicilii*; but that case refers entirely to pecuniary and patrimonial interests; and it appears to me that there is a marked distinction between those conditions of the marriage-contract, which relate to the policy and institutions of the state, and those which only relate to the arrangements betwixt the parties themselves, as to pecuniary matters, during the subsistence of the marriage, or at its termination. The former ought not at any time to be alterable; the latter may be arranged and modified at their pleasure. Besides, in the case of Hog, I may here notice, that the Lord Ordinary found, "When parties marry in one country, and afterwards remove to another, in which the legal rights of married persons are different, the change of domicil ought not to operate any change on any of the rights pre-established in the country where they married, unless incompatible with the religion and morality of the country." But it is proper to state, that the court had no occasion afterwards to consider this point, or to decide upon it. Thus, although this interlocutor remained unaltered, it only shews the opinion of the Lord Ordinary.

"I shall now refer to authorities ‡ which appear to me to adopt the *lex loci contractus* as the rule of decision in such questions as the present. In particular, I think, with deference, that Huberus, Hertius, Emerigon, and Ranchin, do all concur in that principle. As so the constitution of the contract, it is, however, certainly allowed by all authorities, that it must be decided by the law of the country where it is entered into. Thus, Sir William

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* 1563, c. 74. 1581, c. 105.

† Hog *v.* Tenant.

‡ Hub. de Conflictu, sect. 2. and 9. Hertius, p. 180, sect. 10. Emerigon, p. 122. Ranchin, p. 162.

Scott, the high authority of whose opinion will not be disputed in any part of the world, where international law is known, in deciding the case of Dalrymple, as to the validity of a Scots marriage, says, * " Being entertained in " an English court, it must be adjudicated according to " the principles of English law applicable to such a case. " But the only principle applicable to such a case by the " law of England is, that the validity of Miss Gordon's " marriage rights must be tried by a reference to the law " of the country where, if they exist at all, they had their " origin. Having furnished this principle, the law of " England withdraws altogether, and leaves the legal " question to the exclusive judgment of the law of Scot-" land."

" Now, it must be admitted, that the Scotch law of marriage is as adverse to the English law of marriage, as the English law against admitting divorces for adultery is to the Scotch law of divorce.

" It appears, too, that the rule followed here by Sir William Scott has been invariably adopted by all other authorities of the English law, in every case of contract entered into in a foreign country, and in all cases of prize. In the case of Feaubert *v.* Twist,† an agreement made at Paris was decreed in Chancery to be valid, as executed according to the French law. In the case of Jermino *v.* Burrows,‡ as to bills of exchange, the Lord Chancellor was clearly of opinion for deciding according to the peculiar law of the place where the bill was negotiated. In the case of Holman *v.* Johnston,§ Lord Mansfield said, " There can be no doubt but that every action tried here " must be tried by the law of England; but the law of " England says, that, with regard to contracts legally " made abroad, the laws of the country where the cause " of action arose shall govern. There are a great many " cases which every country says shall be determined by " the laws of the foreign countries where they arise."

* Dobson's Report, p. 6.
† Precedents in Chancery, No. 207.
‡ 2. Strange's Rep. 733. § Cooper, No. 341.

And his Lordship referred to the Treatise of *Huberus de Conflictu Legum.** The same opinion was given by his Lordship † in the case of Robinson *v.* Bland, where he says, " The general rule established *ex comitate et jure* " *gentium* is, that the place where the contract is made, " and *not where the action is brought,* is to be considered " in expounding and enforcing the contract; but this rule " admits of an exception where the parties, *at the time* of " making the contract, had a view to a different king- " dom." I may here observe, that this exception very properly applies to English persons coming down and marrying in Scotland, with a view to return there, and *vice versa* to Scotch parties marrying in England, with a view to live constantly in Scotland. And were this an action in which the parties were truly Scotch, and only married in England, I am at present inclined to think we might, upon the exception, proceed to divorce *a vinculo matrimonii* such Scotch parties. The case ‡ of the Duke of Fitz-James may also be noticed, in which Mr Justice Heath observed, " We all agree that, in construing con- " tracts, we must be governed by the laws of the country " in which they are made; for all contracts have a refer- " ence to such laws."

" By a reference to Dirleton's Doubts Resolved and Answered, § it will be seen that the law of Scotland was considered by that most eminent Judge to have the same respect to the *lex loci contractus* in such cases; and the Court of Session have lately so decided as to the payment of 8 per cent. interest on an Indian bond, || that being the legal rate in India, though usurious here. That Court also decided according to the law of Holland, as to a Dutch contract, in the case of Mitchell *v.* Burnett. ¶

" It appears to me, therefore, perfectly evident, that, both by the law of England and of this country, the *lex loci contractus* ought invariably to be attended to in all

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* Vol. II. p. 539. † Blackstone's Rep. p. 256.
‡ 1st Puller and Bosanquet. § No. 227 and 229.
|| Campbell, Ramsay, Hannay, and Co. Feb. 15, 1809.
¶ Dec. 11, 1746. Kilkerran.

questions of marriage or divorce; and this is most reasonable, as the rational presumption is, that the matrimonial connection, formed by the citizens of any country, is made under all the implied conditions of the law of that country to which they belong, and in which they have been married.

"In this country the marriage-contract of the spouses is by law *quamdiu se bene gesserint:* But in England it is indissoluble by law (for an act of Parliament is the will of the Legislature coming in place of that of the Pope in Catholic countries, or that of an absolute monarch in a kingdom where his will is the law); and to the duration of the contract for life the parties bind themselves, before the clergyman and witnesses, in these express words: "I "take thee to be my wedded husband (or wife), to have "and to hold, from this day forward, for better, for "worse, for richer, for poorer, in sickness and in health, "to love and to cherish, till death do us part, according "to God's holy ordinance, and thereto I give thee my "troth," &c.

"Now I do, with deference, think, that the dissolubility or indissolubility of a contract is part of its very essence, and that, if the marriage-contract in this case had not been admitted by the pursuer to be indissoluble by the law of England, where it was entered into, this Court must have taken evidence, not only as to the existence of the contract betwixt the parties, but also as to its nature, and particularly, whether, by the law where it was entered into, it was revocable or irrevocable during the lives of the parties; and if the indissolubility were proved or admitted, then, that our Court could only give the remedy which the pursuer might obtain in the Courts of the country where the contract was entered into, and not a remedy totally inconsistent with the very nature of the contract itself;—because, by a peculiarity of our law, marriage in Scotland may be dissolved by divorce.

"Notwithstanding, the pursuer, in her condescendence, has pleaded, that there are many precedents of our law for the late decisions. It appears to me, however, that not one of these cases which have been decided here in

the eight and a half years that I have sat in this Court touched on the point of the *lex loci contractus*, excepting those of Hillary, and Tewsh, and Newte, and Russel Manners. And as the defenders in none, even of these last, appear to me to have seriously maintained the indissolubility of the contract, I, with confidence, state, that the only decision *in foro contentioso*, which we have to follow on the present point, is that of Sir Thomas Wallace. I shall, therefore, now shortly mention that case.

" Sir Thomas Wallace married for his second wife (his first wife having divorced him in this Court) Isabella Brunsdone, in London, by the rites of the Church of England; and they resided together for some time as man and wife in England. Sir Thomas went to France. Lady Wallace, when residing in England, raised an action of divorce in this Court against Sir Thomas, as being his *forum originis*. A proof was allowed in absence of Sir Thomas; but he having heard of it, presented a bill of advocation, which was refused. A reclaiming petition, drawn by Mr Craig, afterwards Lord Craig, proceeding entirely on the point of the *forum originis*, was also refused; but, on a second reclaiming petition, drawn by Mr Blair, afterwards Lord President, in which he, in a very clear and able manner, stated the argument that the *lex loci contractus* ought to govern, to which answers were drawn by Mr Alexander Wight (likewise unquestionably a most eminent lawyer), the Court of Session altered their decision, and " remitted to the Commissaries, " with an instruction to dismiss the action." To this judgment that Court likewise adhered, on a reclaiming petition drawn by Mr Henry Erskine, whose celebrity is well known, with answers by Mr Blair. From personal communications with which I was afterwards honoured on this subject by that great lawyer (Lord President Blair), I may be permitted likewise to mention, that I conceived his private opinion to coincide with his argument as a counsel on that occasion.

" The *rationes decidendi* of the Court are not indeed distinctly given in the report of that case; but these are clearly to be seen from the printed papers. It will be

observed, from a perusal of the whole debate, that the Court thought that the *forum originis* founded a jurisdiction. In Mr Erskine's petition for Lady Wallace, he says,—" Such of your Lordships as concurred in pronouncing the interlocutor complained of, seemed to take " this (viz. that there was a *forum originis* to found jurisdiction) for granted, and *to rest your opinion solely* " on this ground, that as the law of Scotland *cannot* be " the *ratio decidendi*, the jurisdiction *ratione originis* can " vest no power in the Commissaries to decide this question." And he says again,—" For your Lordships first " found the defender liable to answer in the Commissary " Court *ratione originis*, and afterwards dismissed the " action, not from having altered that opinion, but upon " this *ratio decidendi*, that the law of a country where *a* " *contract is entered into must be the rule for* DISSOLVING *it;* and that the Commissaries had no power to " decide according to that law." And, again, he says,— " Now, the ONLY ground for dismissing the action was, " that the question must be judged by the law of England, which the Commissaries of Edinburgh have no " power to apply." In the collected report of that case it is also stated, " That the majority of the Court seemed to be of opinion, that there was a *forum ratione* " *originis*, so as to found jurisdiction; but that it was " not competent for them, in the circumstances of the " case, to pronounce a judgment of divorce between the " parties." A decision which I hold to be founded on the most sound principles of international law.

P. 3. P. 10. P. 14.

1794. " The next decision, in point of date, was that of this Court, in the case of the Duchess of Hamilton; but as this was a case of a Scotch nobleman married in England, undoubtedly with the view of living in Scotland, and as it likewise took place entirely in absence of the Duke, who made no appearance, I consider it of no authority to the present point. I also consider of no authority the case of Pirie *v.* Lunan, in which this Court had dismissed the action as incompetent. But the Court of Session remitted to us on a bill of advocation, with instructions to alter our interlocutor, and sustain it; for

the whole proceedings went in absence of the defender; and the collector, in his report, assigns as the *ratio decidendi* of the Superior Court, that "*there would be no* "*harm* to allow a decree to be obtained in absence, *valeat* "*quantum valere potest*."

"The next decision in which this Court followed the rule of judgment in the case of Sir Thomas Wallace, was that of Moorcombe *v.* Macclelland. Our predecessors then pronounced this judgment:—"The Commissaries, con-"sidering that the courts of one country ought not to "be converted into engines for either eluding the laws of "another, or determining matters foreign to their terri-"tory, and that decrees of divorce pronounced by incom-"petent courts cannot effectually and securely either "loose the bonds, or dissolve the marriage, or fix the "states of the parties thereto, but might become causes "or snares to involve other persons, as well as the parties "and their children, in deep distress; and observing it to "be admitted in the libel, that the marriage of the pur-"suer and defender was celebrated in England, that they "resided constantly in England since their marriage, and "that even the crime on which divorce is here demanded "to be decreed was committed in England, therefore, "find that the action is not competent in Scotland, and "ought not to have been brought before this Court, and "dismiss this process, in all its parts, for want of juris-"diction and of power." And this judgment was approved of by the Court of Session.

"The case of Wyche against Burrell Blount was the next of English parties. They had been irregularly married at Gretna Green, and had lived as man and wife afterwards in England, and the adultery was committed there; but the defender was personally cited in Scotland, when on duty with his regiment here. This Court "found it not proved either that the marriage of the pur-"suer or defender, who are not Scotch but English by "birth, was celebrated in Scotland, or that they cohabit-"ed in Scotland as husband and wife after their mar-"riage, or that the defender has had any sufficient or "settled residence in Scotland, or even that the crime on

June 27, 1801.

" which the divorce is founded was committed in Scot-" land: Therefore, found that the action is not compe-" tent in Scotland, and ought not to have been brought " before this Court, and dismiss this process for want of " jurisdiction." A bill of advocation, in absence of the defender, who made no appearance in the suit, was presented to the Court of Session; and a remit to this Court was given, with instructions " to sustain their jurisdiction " in this case, in respect that the summons was executed " against the defender when resident in Scotland, and " possessing a domicil there; find it competent to refer " to the oath of the defender the authenticity of his sub-" scription at the certificate of marriage produced, and " that said certificate is genuine, and grant commission " accordingly." In consequence of this remit, a commission was granted to take the defender's oath; but he declined to swear, though he admitted his subscription to the commissioner. On consideration of the report, this Court first " found the evidence insufficient to authorize " pronouncing a decree of divorce between the parties." But, on a reclaiming petition, and on a more full consideration of the remit, in respect to that direction, they altered and pronounced sentence of divorce.

June 27, 1801.

Oct. 22, 1801.

" This decision it must, however, be noticed, related to a Scotch marriage, a divorce from which, though the case go in absence, is undoubtedly competent; but I do besides, with all deference, hold, that the principle there laid down in the remit as to the proof of marriage, is contrary to the uniform practice of this Court. So far as I can discover, no such evidence, whether in a declaratory action of marriage, or in an action of divorce (this case excepted), was ever received here. Indeed, it is always the duty of a Consistorial Court* to sift out the truth by the depositions of witnesses, and other lawful proof, and *not* to give credit to the confession of the parties themselves, though taken on oath, because it is to be presumed that they would, in cases of divorce, collude together

* Burn's Ecclesiastical Law.

for the avoiding of their marriage, to the prejudice often of third parties deeply interested. Besides, the Courts of this country have never, as I believe (except in this single case), considered a foreigner to be properly domiciled here, when only here along with his regiment.

"The next reported divorce case, in point of date, is that of Murray against Lindley. In it this Court ordered a condescendence, and allowed a proof, against which the defender petitioned, when our predecessors, "particularly observing that no objection was stated to the "jurisdiction of the Court, until after issue was joined "upon the merits, refused the desire of the petition." The defender presented a bill of advocation, which was refused, and a petition to the whole Court of Session was also refused. On a perusal, however, of the printed papers, it will be seen that the point of the *lex loci contractus* was never pleaded in that case, and that the whole argument proceeded on the prorogation of jurisdiction.

March 8, 1805.

"That of Tovey against Lindsay follows. It was decided by this Court on the 5th April 1805, when it was "found that the Commissaries of Edinburgh have a pro- "per jurisdiction in this case;" and it was removed to the Court of Session by a bill of advocation, a few days before my appointment to this bench; but as I received regularly the printed papers, and was present at the judgment in the Superior Court, I can state from these papers, and from having heard the opinions of the Judges, that the decision was confined entirely to the question of domicil, and that the marriage was at that time never alleged to be English. I am, too, still inclined to think that the marriage of these parties ought to be viewed as a Scotch marriage, at least as a contract entered into (as Lord Mansfield says) with a view to a residence in Scotland; and, therefore, that the law of Scotland with regard to it ought to be the rule of decision. At all events, however, the decision cannot be founded upon as in point here, for the doctrine of the *lex loci contractus* was never pleaded, either in this Court, or in the Court of Session, to the effect of regarding that marriage as English.

Jan. 25, 1807.

"I come now to the opposite cases which have been decided lately in this Court.

"When the case of Paget came before me in August 1810, during the vacation of the other law courts, all my brothers being out of town, I stated that I had very great doubts of the competency of the action as laid; and pronounced this interlocutory order: "*Before answer*, ordain the pursuer to give in a special condescendence of "the facts she avers, and undertakes to prove, in support "of the conclusions of the libel," &c. It was my expectation that the point would thus have come to be fully discussed in writing, before a final judgment fell to be pronounced. But the defender made little opposition, and did not plead the *lex loci contractus*; and the pursuer hurried the case as fast through as the forms of process would admit. Thus, a final judgment came to be given by one of our predecessors in time of vacation of the other courts, without argument on the point of the *lex loci contractus*, which was not then brought under the notice of the Court. I have consequently never considered that case as any precedent.

Oct. 12, 1810.

"Upon the next English case of Wilcox against Parry, I again repeated my doubts of the preceding decision; and as there was something like the appearance of a wish to evade our Scotch act (1600, ch. 20), which prohibits the adulterer and adulteress from marrying together, under sanction of nullity, I thought the Court bound to prevent such evasion; and, after consulting with my brothers, an interlocutory order to that effect was pronounced.

Nov. 26, 1810.

"My brothers Tod and Sir Thomas Kirkpatrick having also entertained doubts of the soundness of the decision in the case of Paget, a judgment was afterwards pronounced by this Court, in the cases of Hillary and Tewsh, which carried these cases to the Court of Session by bill of advocation. It appears, however, that the point of *lex loci contractus* was not pleaded in these cases by the defender's counsel, when argued before the Lord Ordinary on the Bills; and his Lordship pronounced the following interlocutor: "Having considered this bill, and the pro-

Oct. 12, 1812.

"ceedings before the Commissaries, and been attended by
"counsel for the parties, according to the order on the
"9th current, who declared that they could not explain to
"the Lord Ordinary, from the discussions or delibera-
"tions in the Commissary Court, the grounds of the in-
"terlocutor under review, further than appears from the
"terms in which it is conceived; and the counsel for the
"defender having signified that he had not advised his
"client to litigate in support of that interlocutor, and
"being in this manner left to his own unaided considera-
"tion of what might be said in behalf of the interlocutor,
"but having formed his opinion thereon, refuses the bill,
"and remits to the Commissaries with this instruction, to
"find that the relation of husband and wife is a relation
"acknowledged *jure gentium*; that the duties, obliga-
"tions, and rights to redress wrongs incident to that rela-
"tion, as recognised by the law of Scotland, attach on all
"married persons living within the territory subject to
"that law, wheresoever their marriages may have been
"celebrated, or been followed with cohabitation; that ju-
"risdiction, or the right or duty of the courts of this coun-
"try to administer justice in such matters, over persons
"not natural born subjects of Scotland, arises from the
"person sued being resident within the territory at the
"time of their citation and compearance, or being duly
"domiciled, and being properly cited accordingly, at the
"instance of a person having sufficient interest and title,
"and proceeding in due form of law; and that, in this
"case, the pursuer has condescended sufficiently on the
"defender's residence in Scotland, to entitle her to insti-
"tute and carry on her claim in justice against him before
"the Commissaries, according to the dictates of the law
"of Scotland in the matter libelled; and, therefore, to
"recal the interlocutor complained of, and sustain their
"jurisdiction; and thereafter proceed in common form,
"as to them may seem just."

"This remit (accompanied by a very able note of the Lord Ordinary) having been applied by this Court, decisions were given in these cases, and in the subsequent case

of Lolly, and some others, in conformity to these instructions; but it is proper for me to notice, that all of them were decided only by a majority of this Court, and contrary to my opinion.

" The decision of the twelve Judges in the case of Lolly having been communicated, this Court ordered the cases of Newte and of Russell Manners, then in dependence before it, to be fully argued; and I must admit, that in these cases the English rule of law as to the indissolubility of marriage, which was the *lex loci contractus*, was very ably argued by my friend Mr Bell. But (contrary to my opinion) we found by our judgment, " That, according to " the settled principles of the common and statute law of " Scotland, if there be no collusion between the parties, " or other valid exception against the pursuer's right of " action, adultery committed in Scotland is a legal ground " for divorce, without distinction as to the country where, " or the form in which, the marriage was celebrated." Accordingly, a decree of divorce has been pronounced in the case of Russell Manners. This decision, however, it must be admitted, as I think, was in opposition to the views which appear to have prevailed in the discussion of the case of Sir Thomas Wallace, though in conformity to the opinion of the Lord Ordinary in the cases of Hillary and Tewsh.

" Since these last decisions of this Court, the point as to the indissolubility of an English marriage, and the power of the Scotch Consistorial Court, or any foreign court, to dissolve a marriage celebrated at Gibraltar (which place is held to be under the law of England), has been argued before the House of Peers, the Supreme Judicatory of the united kingdoms, incidentally in the Scotch appeal of Tovey against Lindsay. From Dow's Reports, and from the speeches of the Lord Chancellor and Lord Redesdale, as printed, with the remit to the Court of Session, it would appear that the opinions of these very learned Lords, in the Court of last resort, were unfavourable to the power or competency of this Court, to pronounce decrees of divorce *a vinculo* of English marriages.

"In the pleadings,* Sir Samuel Romilly appears to have argued three points,—1*st*, Whether the defender, Mrs Lindsay, had been domiciled in Scotland. 2*dly*, Whether, if she had not been domiciled *de facto* in Scotland by her own residence here, the wife's domicil did in that special case follow that of her husband, who was a resident Scotsman. And, 3*dly*, Whether an English marriage, being indissoluble by the English law, could be dissolved by a Scotch divorce.

"Mr Adam, as counsel for Major Lindsay, having stated that Major Lindsay was married at Gibraltar while in the army, at a time when it was admitted that he had not changed his original domicil of Scotland, the Lord Chancellor observed,†—"This is the case of a Scotchman "marrying in England (for so it must be considered), "where marriage was indissoluble. 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, for Major Lindsay, observed,—"This was too serious a point to be considered "in this incidental manner upon a question of jurisdic-"tion. It had *not been stated at all in the Court below.* "Their Lordships would hardly remit, therefore, upon "this ground, as the remit must be applicable to the state "of the pleading." The Lord Chancellor observed,‡—"You say that the marriage ought to be dissolved; her "answer to that is, that, being contracted within the pale "of the English law, it was indissoluble." Mr Adam observed,—"That was a question of international law; "and the Commissaries, since they knew of the deci-"sion of the twelve Judges, still maintained their au-"thority to dissolve an English marriage, if the parties "were domiciled in Scotland," &c. His Lordship,§ in giving his opinion to remit this case, observed, "But the "fact is beyond all doubt here, that there was a ceremony

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* Dow's Reports, p. 123. † Lolly's case.
‡ Dow's Rep. p. 124.
§ Printed Speeches of Lord Chancellor and Lord Redesdale, p. 4.

" of marriage (as it appears to me at least) at Gibraltar.
" That the parties must be considered as parties who
" were there married; and that it will not be possible,
" when this matter is sifted to the bottom, to say that the
" marriage was a marriage in Scotland, to be affected as
" such by the Scotch law." And afterwards,* " I call
" your Lordships' attention to the date of this interlocu-
" tor, as I do not apprehend that, at that time, the ques-
" tion had presented itself to the view either of the Con-
" sistorial Court or Court of Session, as having so serious
" an aspect as that question has at this day." His Lord-
ship also mentions the doctrine which prevailed here in
the cases of Lolly, Manners, and Newte, as one " which
" the twelve Judges of England consider as wrong;" and
as to the appeal of Tovey,† then suggests, " that the
" case, on account of the very serious effect that the de-
" cision might have upon the civil relations of families,
" and even upon questions of property, should be review-
" ed by the Courts below,"

" Lord Redesdale agreed with the Lord Chancellor;
and, in the course of his speech, observed,‡ " If the
" Courts of Scotland have a right to judge thus of mar-
" riage, I do not see why they may not in the same way
" judge of any other contract; and they may hold, as to
" all contracts whatever, wherever contracted, and be-
" tween whomsoever, if they can bring the person of the
" contractor within their *forum*, they have a right to con-
" sider the nature of the contract as bound by their law,
" and not by the law of the country where the contract
" was made;" and his Lordship also says, " It should
" be considered what is necessary for the purposes of jus-
" tice, and care taken that contracts made with one view
" may not be disturbed by a law to which the parties, in
" making the contract, had no reference, and the possibi-
" lity of which interfering with their contract they never
" contemplated."

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* Printed Speeches, p. 7.

† Dow's Rep. p. 28.

‡ Printed Speeches, p. 12.

" The remit was in these words, " It is ordered and ad-
" judged, by the Lords Spiritual and Temporal in Parlia-
" ment assembled, that the cause be remitted back to the
" Court of Session in Scotland, to review the several in-
" terlocutors complained of in the said appeal ; and, after
" such review, to do therein what to the Court shall seem
" meet and just. And it is further ordered, that the Court
" of Session do give all proper and necessary directions,
" as well in said Court as to the Commissaries of Edin-
" burgh, for enabling the said Court of Session effectually
" to carry into execution the judgment of the said Court
" which shall be pronounced after such review of the said
" interlocutors."

" We must extremely regret that the death of Major Lindsay, immediately after that case was thus returned to the Court of Session, put an end to all proceedings, and deprived us of the advantage we would have derived from the discussions and decision upon the remit ; but we can, as I think, have no doubt, from the tenor of the opinions delivered by the Lord Chancellor and Lord Redesdale on that case, that the House of Peers conceive that, in all cases of English marriages, this Court ought to adopt for the rule of its decisions the *lex loci contractus*.

" The incalculable importance of the subject has led me to state so fully the authorities and decisions, both English and Scotch, on which I found the opinion I have uniformly held ; and I do now, with confidence, say, that it appears to me quite clear, that every authority, and all the decisions of this Court, not pronounced in terms of remits, with the exception only of those later English cases which I have noticed, are adverse to our sustaining such actions. I do also hold, that the principle of law upon which the opinions delivered by the Judges of the Court of Session, in the case of Sir Thomas Wallace, and those lately delivered in the House of Peers, in the appeal case of Tovey against Lindsay, were founded, is the only sound and safe rule of decision for us to adopt in this case, and ought to have been the rule of decision in all the late cases of divorces of English parties married according to the law of England. This principle seems to me to rest

on the most just and solid view of international law. For no one can be said to suffer injustice if the judgment is in strict conformity to the contract entered into, however different or more favourable the law of the country may be where the redress is sought.

"While this is my opinion, I cannot keep out of view the consideration, that if the decision of this Court and of the Supreme Court should correspond with it, the parties to many of the late decrees of divorce will be placed in a most distressing situation, from which they can only be relieved by a legislative enactment, declaring the divorces which have been pronounced in their cases, and the subsequent marriages, to be good. But however I may regret this, I cannot overlook that these parties ought to have applied for a divorce *a mensa et thoro* in the consistorial courts of England, as their proper *forum*, and for a separate aliment there; or ought to have sued for damages in the courts of common law, and then applied for acts of Parliament to dissolve their marriages *a vinculo matrimonii*, instead of resorting to the Consistorial Court of Scotland, in which kingdom the peculiar regulations of the law, both as to the contraction and dissolution of marriage, are confessedly repugnant to those of the country where the marriage was contracted, and where the true and permanent residence of the parties had always been.

"Granting, as I cordially do, that the crime of adultery is a gross violation of the essential rules of morality, in a well regulated society, which ought to be checked and punished, I must also again observe, that this object may be attained by putting in execution the criminal laws of Scotland against adultery. And I am bound to keep in mind, that in England marriage is considered to be so sacred, that, according to the religion and morality of that country, it is thought a great stretch to permit any wife to dissolve it, even by act of Parliament. We all, likewise, know that *sævitia*, or maltreatment, which may be carried to such excess as to become nearly as immoral and hurtful to society as adultery, is only a ground of divorce *a mensa et thoro* in Scotland as well as in England, even in the most extreme case.

"Upon the whole, therefore, I am of opinion, that as the parties in this case are English, and were married by the law of England; as the proper and permanent domicil of the defender must be held to be in England, which is the *locus contractus*; as, by the law of that kingdom, the marriage contract is indissoluble; and as the libel concludes only for a divorce *a vinculo matrimonii*, it must be dismissed, reserving to the pursuer to raise a new action for divorce *a mensa et thoro*, if she shall be so advised."

*Opinion of Mr Commissary Tod.*

Preliminary Observations.

"THE case now before the Court is unquestionably one of great and general importance, deeply affecting not only the interests of the private parties, but the dearest and most invaluable rights of society at large. It involves at the same time the discussion of intricate questions of law, going near the first principles of general jurisprudence, and reaching to consequences almost unlimited.

"A case, in every sense, so highly important, well deserves to be maturely weighed and considered. But unfortunately in this, as well as in other cases of a similar description which have lately forced themselves upon the notice of this Court, the Judges find themselves placed under circumstances peculiarly disadvantageous. For, notwithstanding the most anxious endeavours on their part to have the subject fully pleaded and investigated, it happens almost invariably that the defender either declines entering an appearance altogether, or, if he does appear, he neglects to state seriously any plea or argument in defence. In this manner, the Court feel themselves called upon to determine questions of infinite difficulty and magnitude upon the *ex parte* statements and partial pleadings of one side, and are left entirely to their own unaided consideration of what may be said on the other.

"In these circumstances, we have to judge the present case, which has been pleaded altogether *ex parte* of the pursuer; and although the opinion I am to give upon it has been formed with all the care and deliberation I can possibly command, still I look towards the question with a degree of diffidence becoming the numerous difficulties

with which I see it surrounded. And here it may be proper for me to observe, that although, in the sequel, I may feel myself called upon, by the late consideration which I have given to this important question, to submit an opinion different from that which I some months ago entertained upon a similar case, yet I feel the less hesitation in doing so, when I consider that the views which have now occurred to me, not only better accord with what appear to me to be the right principle of decision, but they seem also to me to receive countenance from the very learned Judge who presides in the Court of last resort, with the inclination, at least, of whose general sentiments upon this interesting subject, we have in some degree been lately made acquainted in an authentic form, by the remit from the House of Peers, in the case of Tovey *v.* Lindsay.

Facts.

"The facts of the case are few, and, being in absence of the defender, they are hitherto undisputed. It would appear that the parties are both of them natives of England,—that they were married in England in the year 1797,—and that their marriage was regularly solemnized according to the forms prescribed by the English law. It would appear also that they afterwards continued to cohabit as husband and wife in England, and to reside permanently in that country, which may, therefore, be considered as their domicil of residence. The husband, it is further stated in the libel, has, in breach of his matrimonial vows and engagements, committed adultery "both in England and Scotland, and elsewhere,"—and, in particular, it is stated, that he has lately come to this country, where it is alleged he has been guilty of various acts of adultery, which are offered to be proved.

"The pursuer, his wife, having come to the knowledge of these facts, now insists in the present action, which, libelling upon the marriage in England, concludes to have the marriage-contract dissolved *a vinculo* on the head of adultery. The execution bears, that the libel was duly served upon the defender "personally apprehended in "Edinburgh." And, in obedience to an interlocutory order of the Court, the pursuer has lodged a condescendence, stating the grounds, in fact and in law, on which she main-

tains that this Court is competent to entertain this action. The grounds in fact are stated to be, that the defender has resided in Edinburgh for more than 40 days before the present action was raised,—that the acts of adultery charged in the libel were committed in Scotland,—and that he was personally cited here. From these facts, the pursuer infers it follows in law, that the defender is subject to the jurisdiction of this Court by reason of his domicil; and that, being a question of *status*, it must be regulated by the law of the domicil, which, for no other reasons that have yet appeared than those which have been just stated, is held to be in Scotland. The pursuer, finally, at the suggestion of the Court, and with its permission, has made various amendments upon her libel, which, in its original form, was extremely incorrect. And, in this shape, the cause now comes to be advised.

**Competency of Jurisdiction.**

"The first point, which it seems proper to consider, is the competency of this Court, in respect of jurisdiction, to entertain the present action, and upon this I imagine there can be no manner of doubt. The pursuer, it is obvious, has a sufficient right to sue (supposing it always cleared of the legal suspicion of collusion); and the defender, it is equally certain, besides having been personally cited, has acquired a domicil here, at least fully adequate to all the purposes of founding jurisdiction. Locality I look upon to be the genuine and original source of all jurisdiction, whether it regards persons or things. In the view which I have now stated, jurisdiction arises from the domicil or locality of the person; and, to avoid mistakes afterwards, I wish here to remark—that while, to the extent of citation and convention *in judicio*, mere residence within the territory may suffice for every kind of action on which a defender may be called, and mere presence for many,—yet I conceive it to be perfectly plain that, as to the issue or conclusions of actions, *that* short, perhaps momentary, local presence which suffices for criminal jurisdiction upon delinquencies committed within the territory of the Judge, cannot be sufficient to furnish a rule for trying questions affecting the *status personarum*. This distinction, I apprehend, must be carefully kept in view,

to avoid confusion in any argument respecting domicil, as on the one hand affording ground for citation and convention to an action, and, on the other, as furnishing the rule of law by which a question of civil right falls properly to be determined. In the present instance, accordingly, I take it for granted, that the local temporary residence of the defender in this territory, and the personal citation he has received to this action, are of themselves fully sufficient to bring him within the immediate jurisdiction of the Court. In every view, therefore, we are bound to enter upon the consideration of the present question, whatever may be the ultimate result of that consideration.

"But, however clear the question of jurisdiction, as viewed in this manner, may be, it is by no means so obvious by what rule that jurisdiction is to act. Here, indeed, lies all the difficulty and delicacy of the question—a question which, when viewed practically, involves so many perplexing consequences, that it seems almost impossible to extricate it.

State of the question.

"There exists a radical and original difference betwixt the marriage law of England and Scotland. It is unnecessary for the present purpose to trace the history of this difference,—it is sufficient merely to state the fact. In England, we know that marriage is indissoluble. But, by the law of Scotland, divorce *a vinculo matrimonii*, on the head of adultery, is permitted. In the law of England, that species of divorce (excepting by the overruling force of an act of the British Legislature *pro re nata*) is utterly unknown. The English law recognises not the greater divorce *a vinculo*, but merely the lesser, or sepation *a mensa et thoro*. The question, then, is,—By which of these systems is the present case to be ruled? Whether by the law of Scotland, which, by the pursuer, is taken to be the *locus domicilii*, or by the law of England, which is the *locus contractus*? It is impossible to conceive a case where the apparent collision between the laws of the two countries can present itself in a more interesting form; and there can be no case where it is more important to reconcile, if possible, that collision, upon a

just and dispassionate consideration of the principles which may be applied to it.

Action of divorce civil, not criminal.

"It may, perhaps, contribute to remove some of the difficulties attending the question, to begin with considering the precise nature and object of the action of divorce, as entertained in this Court,—to consider, in particular, whether it is not purely a civil remedy *ad privatum effectum*, or whether it does not, in some degree, partake of the nature of a criminal suit *ad vindictam publicam*. And it becomes the more material to ascertain this with precision, because, when a similar question was last before the Court, there existed (at least with regard to myself) a considerable degree of misconception, in consequence of not distinguishing sufficiently betwixt the *criminal* act of adultery, and the *civil* remedy which it affords.

"There is, however, no distinction better known than that which exists betwixt *civil* and *criminal* law, or between *criminal* prosecutions and *civil* actions. The same facts may be prosecuted either criminally or civilly, or both. But *criminal* actions differ completely from *civil*, as well in their form and object, as in the principles by which they are regulated. Facts are tried criminally, in the proper criminal ourts, at the suit of a public prosecutor, to satisfy the ends of public justice, and by principles of law, and rules of procedure, which are strictly local and territorial. Civil actions, on the other hand, are brought into the civil courts by the private party for his own redress or indemnification; and more enlarged principles of jurisprudence, founded in considerations of equity and general expediency, may be applied to them.

"Accordingly, by the law of this country, adultery may be made either the foundation of a criminal charge *ad vindictam publicam*, or of a civil remedy to the private party who has been injured. It is accounted here so high a breach of moral and social duty, that it has been made to rank in the class of *crimes* punishable, in some cases, even capitally. It is true, that this part of the criminal law has not for many years been put in execution. Nevertheless, the transgression still retains its degree and character, as settled by the authority of the nation in the

penal code; and it is to be presumed, therefore, that the proper criminal courts of the country, whose peculiar province it is, and who are alone vested with jurisdiction to punish it, will protect the purity of public manners in this respect, and will carry into effect the laws provided against the offence, whenever there shall be occasion for their exertion.

"But, with adultery, in a *criminal* consideration of it, or with a view to its punishment, either as a *crime* or as an offence against the domestic order of the state, it is perfectly certain that this Court has no manner of concern. It is only as it stands connected with a *civil* remedy, and as the foundation of a *civil* action *betwixt private parties*, that we can take cognizance of the crime of adultery. The action of divorce, as entertained by this Court, I understand, in a word, to be purely *civil*. It is, no doubt, in some degree *penal*, as it draws after it the forfeiture of the personal *status* of one, and, in some sense, of both the parties; yet penal actions, in our system of jurisprudence, were never put under the head of criminal law. It originates also in a criminal act, on which account, perhaps, the concurrence of the fiscal is required; but this circumstance, in a question betwixt the husband and wife, does not affect the civil quality of the action, more especially as there is no conclusion either for a fine or for damages.

"In many cases, civil courts are called upon to try, incidentally, facts of a criminal description, when pursued merely *ad civilem effectum*. Thus, in the case of assythment, the fact of murder may be tried incidentally by the Court of Session. Thus, again, in civil cases, the right of peerage may be discussed in ascertaining the validity of a freehold qualification. In like manner, the crime of adultery is tried incidentally in this Court, as the ground upon which, if the adultery is proved, the consequent decree of divorce is to proceed, as the mode of redress to the private party who complains.

"The right of divorce, it will also be observed, may be prosecuted here, upon proof of adultery committed in England, or in any other foreign country. In this view

an English party may sue divorce here upon acts of adultery committed in England, as well as in Scotland. In the criminal prosecution of adultery, the *locus delicti* is every thing; but in a civil sense, and in considering the merits of the civil action of divorce, the *locus delicti* is comparatively nothing. It is perfectly immaterial, viewed in this way, where the adultery is committed,—which, of itself, clearly shews that the legal character of the suit ranks it, with complete certainty, in the class of *civil* causes.

" It ought, indeed, always to be remembered, that beyond what is necessary for explicating its own authority, this Court possesses no criminal jurisdiction, being, in its institution, object, and forms of procedure, absolutely civil. This, accordingly, is the view taken of it by Dirleton, a name of great and acknowleged authority in any question of Scottish jurisprudence, and more especially in a question regarding the constitution or jurisdiction of this Court, he having many years filled with much ability the situation of a judge in it. * " Commissariots (he " distinctly observes) are acknowledged to be *merely civil*, " because summonds are direct by the Commissaries un- " der the signet of office, bearing his Majestie's name and " arms; the certification is *civil*; witnesses are summoned " under *civil* and pecunial pains; and letters are directed " for compelling them to compear under the pain of " horning; the execution of sentences is *civil*, by poind- " ing or comprising for liquidate sums; or by a charge " to fulfil what is *in facto* upon the Commissary's pre- " cept; or by a charge of horning upon the letters; and " by intenting action of deforcement before the Commis- " saries or the Lords of Session." Hence, therefore, whatever may be the ultimate judgment of the Court in this cause, we should be cautious of the appearance even of making it rest upon principles peculiar to criminal jurisprudence; otherwise we may incur the charge of attempting to usurp a species of jurisdiction with which we ought to have no manner of interference.

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* Doubts and Questions in Law, page 34.

General question.

"Keeping these observations in view, I proceed to consider more immediately the leading and general question, Whether or not, in a case of matrimonial *status* like the present, the law of the domicil should prevail in opposition to the law of the contract? The pursuer contends that it should; and her argument seems to lead to this conclusion, that in all questions involving the consideration of *status*, or that particular relation of domestic life which arises from the matrimonial union, neither the private agreement of the parties themselves, nor the law of the country in which the relation was constituted, can control or stand in the way of the law of the domicil at the period of commencing the action.

Domicil here not sufficient to furnish rule of law.

"Before, however, coming to a conclusion so extremely important, and before the Court can be expected to give their assent to it, it would appear proper to ascertain, with more precision than the pursuer seems to think necessary, what species of domicil it is which is to carry along with it such important consequences.

"The pursuer has been particularly called upon to condescend on the grounds, in fact, on which she maintains that this Court is competent to entertain her action. She has accordingly stated that the defender has resided in Edinburgh for more than 40 days; that he has been personally cited here; and that he has committed adultery in this country. And these facts she seems to rely on as sufficient, as well to sustain the jurisdiction of the Court, as to furnish the rule according to which it ought to proceed in trying the merits of the cause.

"It appears to me, however, that something more should be required towards the constitution of a domicil, which is to furnish the rule of law, by which an important question of civil *status* is to be tried, than when it is to be the mere ground for founding jurisdiction to the extent of convening the party *in judicio*. In this last view, domicil is ascertained by legal presumption to a particular effect. "A rule is received by custom, (says Mr "Erskine *), that where one has resided with his family

* B. i. tit. 2. § 16.

" for 40 days immediately preceding his citation, it is to " be deemed his domicil, *as to the question of jurisdic-* " *tion.*" But although such a rule as this is received with us, to limit the jurisdiction of Judge Ordinaries, it by no means ascertains what domicil is, in a larger sense, in which a whole kingdom or territory may be said to be the place of the domicil. In this sense, a man's legal domicil is the place where he has fixed his permanent residence; the place in which his strongest connections have been formed; and where the seat of his fortunes is permanently established.

" When, therefore, in the present case, the pursuer states that the defender has resided here for more than 40 days previous to his citation, I admit she has condescended sufficiently for all the purposes of jurisdiction. But I am not prepared to say that she has hitherto done any thing more. It is true, she has stated, in addition, that the defender has been guilty of adultery in this country; but the *locus delicti*, I have already had occasion to observe, however important it may be in the prosecution of adultery, considered as a crime, or as a breach of police, is of no manner of consequence, when viewed as the ground of a civil action between private parties; in which view alone this Court can take cognizance of it.

" That species of domicil which is required to furnish a rule of law, by which the civil rights of parties are to be governed, is, I should conceive, to be ascertained from facts and circumstances. What, then, is to be held the defender's domicil in the sense which is here required? He is a native of England; he formed the permanent connection, which has given birth to this action, in England; and he appears to have chiefly resided in that country. On the other hand, having been occasionally in Scotland, where he is said to have committed adultery, he has been personally cited to appear in the present action at the instance of the private pursuer, his wife. If, therefore, betwixt the defender's transient residence in Scotland, and his birth and more permanent connection with England, I am called upon to say, which of the two countries is to be accounted his legal domicil, to the ef-

fect of trying this question, I should certainly be inclined to give England the preference to Scotland; and, consequently, in this view, there could be no collision in the present case, as the law of the domicil would then concur with the law of the contract, in affording the rule of judgment.

General question, if it can be reconciled.

" But supposing even there was a greater confliction between these laws than I am at present aware of, the question comes to be, Is it not possible in the present instance to reconcile them? Or, if they cannot be reconciled, to which of them are we to resort in judging this case? This question is no doubt nice and delicate; but I think it may be satisfactorily resolved.

*Lex domicilii.*

" The *lex domicilii*, it must be admitted, is of great and deserved authority. It is, in truth, the proper source of all jurisdiction, and, with certain exceptions, the general standard by which all questions of a personal nature should be tried. * To cases of personal *status* in particular, where such are constituted by the act of the law, for example, the *status* of a major or a minor, the *lex domicilii* is peculiarly applicable. Accordingly, upon looking into the authors who have treated the subject, I observe that, by a great weight of authority, the general opinion is, that in all cases of this description, the law in question should prevail. In such cases the general rule is, " Quando lex in personam dirigitur respiciendum est " ad leges illius civitatis, quæ personam habet subjec- " tam."

" But none of the learned names to which I have alluded, as far as I have been able to discover, expressly say, that the general rule is to be taken without an exception; they do not say that, in a question betwixt private parties, the law of the state, " *quæ personam habet* " *subjectam*," is to prevail where it is opposed by a contract previously executed between those parties. So far from this, the learned author who lays down the rule

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* Voet, de Status, § 7, 8, *et seq.* Hertius, de Collisione Legum, § 4, 5, *in fine*, and § 8.

which has been just quoted, seems to make the case of a contract intervening an express exception from the general rule. * "Addimus tamen limitationem, (he writes) "si alteri V. G. Contrahenti cum tali persona jus jam "quæsitum sit."

"In the present instance, however, there is a pre-established contract between the parties. The Court, it will be remembered, are here called upon to dissolve a marriage contracted in England betwixt persons whose established residence, both before and after the marriage, was in England, where the marriage-contract is known to be indissoluble. The previous inquiry then should be the effect of that contract in the existing circumstances of this case.

*Lex loci contractus.*

"This question, though instituted in a Scotch court, originates in an English contract, which to us is matter of foreign law; and which, therefore, *jure gentium*, must be tried by reference to the law of the country where the contract had its origin. In such a case, the established principle of the law of Scotland is, † "That all personal "obligations or contracts, entered into according to the "law of the place where they are executed, are deemed "as effectual, when they come to receive execution in "Scotland, as if they had been perfected in Scotland, or "according to all the solemnities of the Scottish law." This is a rule of international law, founded in justice and universal expediency. It is resorted to by the universal consent of nations; and, generally speaking, it is held to regulate as well the constitution as the duration and dissolution of personal rights of every description.

"In the ordinary case of civil obligations of a pecuniary nature, the application of the *lex loci contractus* is then undoubted. In like manner, in the *constitution* at least of contracts involving matrimonial *status*, the same rule unquestionably applies; for every one knows, that, by the law of nations, marriage duly celebrated, according to the law of the place where made, is valid and effectual all the world over. But in judging of the *effects* of the

* Dieg. sect. 8.

† Ersk. b. iii. tit. 3. § 40.

marriage-contract, and in defining the rights which it confers on either party, it has been said that these must be modified and controlled by the various changes which may afterwards take place in the domicil of the offending party.

Dangerous to admit the law of the domicil in a question of dissolving marriage.

"The unqualified admission of such an arbitrary rule of decision seems, however, to me to be pregnant with the most serious mischiefs to marriage, the most important of all the relations of society. If, for instance, such a temporary residence as occurs in this case were to constitute the rule for determining the question of matrimonial *status*, the marriage state, contrary to its very essence and nature, would be rendered loose and unsettled, by being made subservient to the capricious views of the married pair, as often as they inclined to move from one country to another. In particular, the English marriage-contract, which is sacred and inviolable, might be subverted at the will of either of the parties who chose to come to this country for a residence merely of 40 days, or even of one day, if served with a personal citation; and thus an unjustifiable temptation would be held out to married persons, not only to violate their sacred vows and engagements, and, with these, all the important legal provisions dependent upon them, but also to commit openly a fraud upon the law of their proper domicil.

"These consequences, which are far from being imaginary, must inevitably follow, were the mere transient residence of the parties to afford the rule of decision; and although, perhaps, from the less frequent changes which would then occur, they might not exist in the same distressing degree, if a more permanent domicil were required, nevertheless, in my humble apprehension, even then they must still take place to an extent sufficiently alarming, in every case where the domicil happens to run counter to the agreement of parties, and to the *lex loci contractus*.

Therefore, the *lex loci contractus* should rule.

"In these circumstances, and looking to such extraordinary and inconsistent results with a degree of alarm, I cannot think that any principle which is to lead to them can be correctly applied. It will be necessary, therefore,

to have recourse to some other principle; and it appears to me that, in a question of matrimonial *status*, even more than in any other question, none can be safer or more expedient than the *lex loci contractus*. The relation constituted by marriage is unquestionably the most sacred and important of all the relations in civil society, and that which it most concerns the citizens of every state should be fixed and determined. If, therefore, the principle of *comitas*, or concession by one foreign state to another, is at all to be admitted, it appears to me impossible to imagine a case which calls more loudly for its application than the case of marriage. Upon just and enlightened views of international jurisprudence, the courts of this country every day give effect to other ordinary foreign contracts, and to all their adjuncts and qualities; and why this should be denied to civil questions affecting either the rights, or the *status personarum*, arising out of the relation constituted by the marriage-contract, I confess I cannot easily comprehend. If the mode of constituting the relation, as well as the relation itself, is received, I cannot perceive the consistency of not receiving, at the same time, the modifications of it. By analogy, clearly, the principle of *comitas* should be extended thus far: and, accordingly, I see it expressly so laid down by *Huber*,* who, after stating that marriage, if lawful in the place where it is contracted and celebrated, will be valid and effectual everywhere, distinctly adds,—" Porro non tantum ipsi " contractus ipsæque nuptiæ certis locis rite celebratæ " ubique pro justis et validis habentur, sed etiam *jura et* " *effecta* contractuum nuptiarumque in iis locis recepta " ubique vim suam obtinebunt."

" It is by a strict adherence to this principle alone that the numerous and important rights and interests dependent upon marriage are to be maintained. Whenever, therefore, a contract or *quasi* contract intervenes, it ought to be the governing rule, although the parties may happen, from motives of choice or necessity, to have subsequently chang-

* Huber, de Conflictu Legum, sect. 9.

ed the place of their residence. Once lawfully executed, there appears to be the strongest reason, in justice and expediency, to uphold the contract according to the original intention of the parties, and the express stipulation of their agreement. It is the duty of the parties contracting to perform their respective stipulations; and it is the duty of courts of law to enforce that performance, where it is attempted by either party to be evaded. As, therefore, in the present case, the parties have voluntarily contracted an indissoluble agreement,—indefeasible in its own nature, and by the law of the country where it was made, it does not appear that this Court, in judging between those parties, can competently invert that agreement, or impose upon them rules and regulations which they never contemplated—for which no provision is made, either by their contract or by the law of England, and for which no effectual provision can be made by the law of this country. In a word, in every case of civil right between parties, and more especially in a case originating in a marriage-contract, the legal contract of these parties is the surest and most unerring guide by which a court of law can walk; and, if possible, the conditions of the contract ought never to be departed from.

But with limitations.

"Although, however, the *lex loci contractus* commands universal obedience from its equity, nevertheless, like every other general rule, it is not to be received without limitation. The rule holds only where it does not stand opposed to the religion, morality, or municipal institutions of the country in which it is sought to be applied. If these are in any way threatened or endangered, the rule ceases, and will not be enforced; because it is the first law of every state to preserve its religion pure, and its institutions entire. There is, however, no danger of this kind to be apprehended, as far as I can see, from the application of the general rule to the present case.

Nothing immoral in marriage being indissoluble.

"Infidelity to the marriage bed is no doubt a great offence, and ought to be checked in every well regulated society. But it does not therefore follow, that the absolute dissolution of the marriage-contract is a matter of essential moral right; or that there is any thing immoral in resist-

ing such dissolution, and in saying that it ought not to take place even in the case of adultery. The characteristic feature of the marriage-contract, even in this country, is its permanency. It originates, no doubt, in the *will* of the parties; but after being contracted, the *duration* of the union is totally independent of their will. In entering into the marriage state, it is expressly declared that the parties shall be joined together *till death shall separate them;* and in this the marriage-contract is distinguished from every other species of contract.

" It has been sometimes loosely said, indeed, that, in the law of Scotland, marriage is considered as an ordinary civil contract. This, however, is a loose and inaccurate form of expression, to be used only in speaking of the *mode* in which marriage may be constituted, but never when the essential *nature* of the relation itself is the question at issue. For, if it is meant by such language to assimilate the marriage-contract to other civil contracts, and to subject it to the same rules so which these are subjected, no idea in my opinion can be more full of danger in itself, and none certainly more distant from a just notion of what the relation constituted by marriage really and essentially is by the law of this country.

" Marriage,* in its origin, is a contract of natural law, antecedent to its becoming in civil society a civil contract. Superadded to this, in most civilized countries, acting under a sense of the force of sacred obligations, it is a religious contract, the consent of the individuals pledged to each other being ratified and consecrated by a vow to God. This, generally speaking, is the idea of marriage as entertained in every country where the Christian religion prevails. It is precisely the view taken of it by the more ancient regulations of the canon law, even before marriage was by that law elevated to the dignity of a sacrament. The canon law, however, at least those doctrines of it which were not infected with the corruptions afterwards sanctioned by the Council of Trent, is, under various mo-

* See Dodson's report of Sir William Scott's judgment in the case of Dalrymple, p. 11.

difications, the known basis of the matrimonial law of Scotland, as it is everywhere else in Europe. "Totam "hanc questionem pendere a jure Pontificio," * says Craig; and although the idea of a sacrament in marriage, and the quality of indissolubility, are in our municipal institutions alike disregarded, nevertheless, in strict conformity to the decretals and other books of the more ancient canon law, still we reverence marriage, as being of divine institution, and regard it on that account as a sacred and irrevocable obligation.

"Accordingly, so it is invariably represented by all our authors. Lord Stair, † in particular, our great institutional writer, in treating the subject of marriage, constantly talks of its "perpetuity," and of its being a contract as well of natural law as of divine origin. Lord Bankton ‡ uses similar language; and Mr Erskine § expressly says, "the character of perpetuity seems to have been im-"pressed on marriage by God himself in its first insti-"tution, when he declared the two common parents of "all mankind to be one flesh, *Genesis, ii. 22, et sequent.* "which was afterwards improved by our Saviour's in-"junction, that no man should put asunder whom God "had joined, Matt. xix. 6." "For these reasons," he concludes, "marriage cannot, by the usage of Scotland, "be dissolved till death, except by divorce, proceeding "either upon the head of adultery, Matt. xix. 8, 9; "Mark, x. 2; or of wilful desertion, 1 Cor. vii. 15."

"The genius and tendency of the law of Scotland is, therefore, clearly in favour of the perpetuity of marriage. It encourages the duration of the marriage union, and discourages the dissolution of it. It affords every facility towards entering into the married state, and views with suspicion and alarm every attempt to dissolve it. "*So-"lutionem matrimonii difficiliorem debere esse favor im-*

* Craig, Lib. ii. Dieg. 18. sect. 17.
† Stair, b. i. tit. iv. sect 1, 2, and 5.
‡ Bankton, b. i. tit. v. sect. 1 and 103.
§ Erskine, b. i. tit. 6. sect. 37.

"*perat liberorum,*"* was the maxim even of the Roman code, as it is unquestionably of our own.

"It is true, indeed, in certain circumstances, the dissolution of the marriage-contract is permitted; but it will be particularly observed, that the law of divorce in this country is barely *permissive*, not *imperative*;† and nothing can afford a better illustration of what law sometimes does, when, as in the case of divorce, it tolerates what it neither commands nor approves.

"The remedy of divorce is, in truth, but a mournful remedy; and it is one which the law dispenses with an unwilling hand. This is manifest from the principle which runs through the whole proceedings in the process of divorce. A jealous anxiety to disregard every admission marks every step. Hence, no judgment passes by default without proof; and if the defender declines to appear, the Court are nevertheless bound to proceed with the same formality as if he were present, and had maintained the keenest opposition. In the same spirit, every obstacle that presents itself is eagerly laid hold of to support the marriage, and prevent its dissolution. Thus, collusion between the parties, *remissio injuriae*, and other personal bars, are received as proper exceptions to the action of divorce.

"Farther, it is to be observed, ‡ that adultery of itself does not operate a dissolution of the marriage; it is merely the mean or ground for seeking a dissolution of it. The action of divorce itself is of the nature of a pure personal cause of complaint, which neither the public nor any third party, upon even the strongest ground of patrimonial interest, will be allowed to plead. And this, by the way, shews clearly the fallacy of the argument, that marriage being *publici juris*, so must necessarily be divorce; and that both are therefore beyond the control of private parties. Marriage, no doubt, is *publici juris*,

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* L. 8. Cod. de Repud.

† See Huberi Prælectiones, Tom. II. lib. i. tit. iii. sect. 9.

‡ Stair, lib. i. tit. iv. sect. 7. Ersk. b. i. tit. vi. sect. 43. Hume upon Crimes, Vol. II. p. 309.

but divorce, by the law of Scotland, unquestionably is not. Divorce is no public vindication of the law, but a private remedy merely, and for private purposes. It is a remedy which the injured party alone can seek;* and if that party is willing to abstain from demanding it, the marriage will still subsist, and the rights and privileges of the parties will remain the same, just as if the adultery had never been committed.

Therefore, foreign rule applicable to case of marriage.

" When all these things are considered, it appears to me that there is nothing here to induce a court of justice to depart from a general rule of acknowledged utility, or to prevent it from judging in the case of a marriage-contract, as, in every other question arising from a civil contract executed abroad, according to the law of the place in which it was executed, and in contemplation of which the agreement was made. Neither the general policy, nor the manners of this country, can require that such a sacrifice should be made to them, as that this Court should assume to itself the power of dissolving an union, which, by the laws and religion of the country where it was celebrated, is accounted sacred and inviolable; which, even in this country, though not in the same degree, is, nevertheless, in relation to its duration, regarded with so much veneration, that every attempt to infringe upon it is watched with a jealous vigilance, and every judgment dissolving it pronounced with an evident reluctance.

Evils from its application imaginary.

" As to the evils which may be supposed to arise from an adherence to the foreign rules, they appear to be in some measure imaginary. Indeed, perhaps, they may be encouraged more by departing from the rule than by adhering to it; for there is, I am afraid, too much reason to suspect that English parties may be found profligate enough to come down purposely to this country to obtain, by their infidelities, from the law of Scotland, the dissolution of a tie, from which, in their own country, they cannot be released. Divorce apparently may be the object to which their infidelity points; and the hope

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* See L'Esprit des Loix, Liv. 16. c. 3.

of obtaining it is therefore an encouragement rather than a restraint on the crime. To refuse them this remedy would then, perhaps, be to present the most effectual check to their licentiousness. If, however, this should fail, and if they should still continue in the career of vice, in any degree that should be deemed offensive, the criminal courts of the country, who are armed with the power, would interpose their authority; and by punishing the crime, would effectually vindicate the purity of public morals.

" In every view, therefore, I am inclined to be of opinion that, regarding this as a civil question betwixt private parties, we are called upon to judge between those parties according to the rule of law by which their rights have been established. We are called upon, in short, in relation to this particular case, to determine the effect of a foreign contract of marriage, to which I consider this Court has undoubted competency of jurisdiction. Consequently, upon proof of any alleged breach of this contract, we must, agreeably to acknowledged principles of international law, give to the present private pursuer the same species of remedy to which she would have been entitled, were she now suing before a competent English court.

Anomalous situation of pursuer in present action.

" In considering, however, what that remedy should be, it is impossible to overlook the anomalous situation in which the pursuer is apparently placed, with a reference to the action in which she now insists. The right of divorce, to whatever extent it may go, originates in the marriage-contract. It forms a constituent part of that contract; and, therefore, in every case of divorce, the proceedings must necessarily be grounded on the previous fact of marriage. The pursuer, accordingly, in the present instance, founds her action upon a marriage-contract celebrated according to the forms prescribed by the English law; which, by the operation of that law, and by her own express agreement, signified in the very terms of the contract, is acknowledged to be indissoluble. Nevertheless, with a visible inconsistency, she calls upon this Court to allow her a proof of alleged acts of adultery, to

the effect that this English contract may be dissolved. Here, it is obvious, that the conclusions of the pursuer's action are at complete variance with the premises on which it is laid. In drawing them, the pursuer plainly reprobates the very contract which she approbates; and it ought, therefore, to be considered how far she can be permitted to act thus inconsistently; and whether, upon such premises, she is not barred *personali exceptione* from insisting in the present action to the extent of those conclusions.

Court can only separate *a mensa et thoro* in this case.

"Although, however, I apprehend that, in seeking from this Court the absolute dissolution of a marriage contracted in England, the pursuer is requiring a species of redress which she has no right to obtain; yet, as for every wrong there must be a remedy, I am clearly of the opinion I have already expressed, that she is entitled to receive from us *ex comitate*, and upon principles of international law, the same measure of justice which she would have obtained, upon a similar violation of the marriage-contract in an English court. The redress for such a wrong, I presume, would be a release from the marriage *a mensa et thoro;* and although it is no doubt a novelty in the *practice* of the Court, upon proof of adultery, thus to limit the remedy, yet, in *principle*, there seems to be nothing to prevent us from doing so when the case occurs. That the case will occur seldom is obvious; because it is not to be thought that natives of England, married there, will often have occasion to seek here, what they can more conveniently obtain in their native courts. But yet, if it should occasionally so happen, I am not aware that, either from the constitution of the Court, or by any rule or practice known to me, we are tied up from distributing a suitable measure of justice to parties so circumstanced. We possess unquestionably the greater power of dissolving *a vinculo;* and I can see no reason why that should not include the lesser, of releasing *a mensa et thoro,* as often as we may be called upon to exert it.

Present case must be deter-

"Before concluding, I have only farther to remark, that, in the course of the observations which I have thought

it my duty to submit upon this case, I have purposely abstained from referring to any of the decided cases which may be thought to have a relation to the merits of the present question. None of them that I know of should, I humbly think, have much weight upon the general point of law, which now excites such universal interest in both countries. In the more early cases of divorce, it does not appear that the attention of the courts of this country was ever particularly directed to the examination of a subject which has now assumed the most serious aspect. And although, in some recent cases, similar to the present, this Court has been accustomed to dispense the law of Scotland, as applicable to the case of a Scottish marriage, yet, in a question of the present important character, this can by no means be held as conclusive. The general question, I conceive, will not be ultimately determined upon such authority, but upon the just application of those principles of universal jurisprudence which regulate the intercourse of nations. The question I therefore look upon as new and untouched; and it must be determined not upon the authority of decided cases, but by such an application of general principles as will unquestionably lead to a result infinitely more beneficial to both countries than the rigid adherence to a practice which does not appear to be strictly reconcileable to any principle.

mined by general principles, and not by authorities.

"Upon the whole, therefore, and upon the grounds which I have stated, perhaps at too great length, the conclusion I come to is, that if the pursuer is not barred, *personali exceptione*, from insisting in the present action, to the effect of obtaining a dissolution of her marriage *a vinculo*, this Court, at all events, cannot, in the circumstances of the case, give her sentence of divorce to this effect. We can give her no more than that which she would obtain in England; and I am therefore for dismissing the action as incompetently brought in its present form; reserving, however, to the pursuer to insist in a more regular action of separation *a mensa et thoro*, as accords."

Conclusion.

X

*Opinion of Mr Commissary Ross.*

"The case now to be determined is one of the very highest possible importance, and is attended with very considerable difficulty. I was not a member of the Court when it last decided some cases of a similar kind. Having now been called to consider the point, I have endeavoured to give it all the attention in my power; and, after weighing the difficulties which appeared to me to attend it, I am at last come to the opinion, which I am now prepared to deliver.

Nature of the action.

"The action before us is an action of divorce, on an alleged ground of adultery, concluding for the dissolution of a marriage-contract entered into in England—by English parties—at the time of their marriage permanently resident in England—and which must, therefore, in every point of view, be held to be an English marriage. Were it the case of a marriage entered into here by inhabitants of this country, the ground alleged is, of course, a relevant ground of divorce; but, by the law of England, a marriage contracted there is held to be indissoluble, and the pursuer would, therefore, in her own country, be entitled only to a limited species of divorce.

Disputed whether an English marriage be indissoluble.

"I am aware it is disputed by some, whether an English marriage can, in a proper sense, be termed indissoluble, as the inability to obtain a divorce *a vinculo matrimonii*, according to them, is not so much owing to a quality in the contract, as to a particular constitution of the courts of that country. But the question, how the law of England stands as to this point, is, I conceive, a matter of fact to be established to us by evidence; and we have here the very best possible evidence that the case admits of, the solemn unanimous judgment of the twelve Judges of England, declaring, that, by the law of England, a marriage contracted there is indissoluble. They must unquestionably know what their own law is, as to this point; and we are, therefore, bound to hold the indissolubility of an English contract as completely established, without the necessity of inquiring, whether the indissolubility does in reality proceed, from any peculiarity in their courts, or from any other cause.

"In pronouncing a decision in a case like the present, we are not to be influenced by any consideration of the effect which the laws of England may be inclined to give to our sentence of divorce, if we should feel ourselves constrained to pronounce it. We possess no controlling power beyond our own limits, and parties must take all consequences of this kind upon themselves.

Our decision not to be influenced by the effect given to it in England.

"There here occurs a collision between the laws of the two countries; and the difficulty which arises is to determine, which of them is to yield to the other. I observe it stated somewhere in the papers given into this Court, in the former cases, when the same point as the present was argued, though I cannot imagine it ever could be meant to be seriously advanced, that, in reality, there was here no collision of the laws of the two countries at all; because, by the law of England, no penalty attached to a party for obtaining, or attempting to obtain, a divorce before the courts of another country; nor was any inquiry made relative to his conduct on his return, provided he did not proceed to enter into a second marriage. But, according to the same reasoning, it might be easy to prove, that no such thing as a proper *conflictus legem* ever did, or ever could, possibly occur. If there ever can be such a thing as a real collision, I apprehend an instance of it is to be found in the case now before us.

A collision betwixt the laws of both countries.

"It is obvious that, strictly speaking, the law of England cannot claim any right to suspend or supersede the natural operation of our own law. We are here sitting as Scotch Judges in a Scotch Court; and if we are to recur to the original understanding and practice of independent states, the law of Scotland, and that alone, must regulate the nature and extent of the remedy which the pursuer is entitled to demand from us. The laws of different kingdoms are properly territorial, and originally had no operation conceded to them, beyond the limits of the particular kingdom where they happened to be enacted. Every municipal system of law had its operation confined within its own territory, and exerted its control over the rights, interests, and actions of every person

Strictly speaking, the law of Scotland must be the rule.

found even accidentally within them, without distinction or limitation.

A principle of *comitas* gradually introduced.

" But in consequence of the increased intercourse which has progressively taken place among different nations, a change in this respect has been gradually introduced. Kingdoms have become willing to allow effect virtually to be given within their own limits to the laws of other states, in regard to foreigners and their contracts—the operation of which those other states possessed no controlling power to enforce. Such a concession on the part of any state, cannot be regarded as compromising its own supreme authority, or implying any surrender of its own rights of independence or sovereignty. It originates only in a conviction that the recognising a principle of *comitas*, is as much for its own individual advantage, as it is deeply founded in views of general expediency; and that were each state to insist rigidly on enforcing, in all cases, on foreigners its own municipal laws and regulations, its own subjects must expect to be subjected to a similar system of rigour in their turn, in the different countries to which, in the course of their various pursuits, they might happen to resort.

" But while the principle of *comitas* is in this way generally recognised by all states, it is so with considerable variation as to the degree to which it is carried. It is, therefore, necessary, where a *conflictus legem* occurs, to inquire how far, according to the practice of our law, or on the ground of analogy, we must be understood to carry the principle—how far we allow the laws of a foreign country to be pleaded against those of our own—so as to regulate the determination of questions coming before the courts of this country. " As a consequence of its liberty " and independence, (says Vattel, *) it exclusively belongs " to each nation to form her own judgment of what she " can or cannot do,—or what is proper or improper for

* P. 62, sect. 14 and 16.

"her to do,—and, of course, it rests solely with her to
"examine and determine, whether she can perform any
"office for another nation, without neglecting the duty
"she owes to herself. The duties we owe to ourselves
"being unquestionably paramount to those we owe to
"others,—a nation owes to herself, in the first place,
"and in preference to all other nations, to do every thing
"she can to promote her own happiness. When, there-
"fore, she cannot contribute to the welfare of another
"nation, without doing an essential injury to herself, her
"obligation ceases on that particular occasion, and she is
"considered as lying under a disability to perform the
"office in question."

"The contract before us is a contract of marriage. Before stating the essential distinction which exists betwixt a contract of marriage, and an ordinary case of civil contract, I shall first state what effect is given to this last, by our law, in the case of foreigners.

Case of ordinary foreign contract.

"It is now held that full effect is to be given to a contract entered into abroad, if the forms and solemnities requisite to its validity in the foreign country have been duly adhibited, although they should be in every respect different from those in use among ourselves. Our deference for the foreign law, or, in other words, the *comitas* we exercise towards it, goes this far, that when the validity of any deed is in question, as far as form is concerned, we look to what is required for this purpose, by the law of the country where it is entered into. If valid there, we give full effect to it; but always under this limitation, that our doing so does not affect our own essential policy or institutions, or the interests of morality in our own country.

"So far have we been desirous of carrying our *comitas* in this respect, that even in cases where the stipulations in the foreign contract are adverse to our own law, and amount to a statutory offence, our courts lend their aid to enforce them. The case of Campbell against Ramsay and Company, decided on the 15th February 1809, is an instance of this, where, upon a contract made

in India, stipulating eight per cent. interest, a question arose, whether more than five per cent. could be demanded here, where a higher rate would be deemed usurious, and subject a party to the penalties of usury. The Court decided that the law of India, the *locus contractus*, should be allowed to regulate the rights of parties under the contract.

"In extending the principles of *comitas* thus far, we have acted upon more liberal and more enlightened principles of international law, than prevailed at not a very distant period. For, in a case decided in the year 1779,* the Court refused to sustain a claim for six per cent. interest on a contract entered into abroad, where this was the usual rate of interest, and restricted the claim to five per cent., the legal rate among ourselves. In an older case, Savage against Dunn,† a claim for 10 per cent. had been restricted in a similar manner.

"In questions, too, regarding the dissolution of obligations by prescription, we do not in every case insist upon applying our own prescriptions, when there happens to be a collision betwixt them, and those of England. In the case of Delvalle against the Creditors of the York Buildings Company, decided in the 1786, it was finally determined that the Scotch prescriptions could not be pleaded against English bonds;—and in the case of Cheswells and others against the same Company, which occurred several years afterwards, it was again decided in conformity with this, by a great majority of the Court.

Feb. 14, 1792.

"If the contract now before us, therefore, was an ordinary case of civil contract, it would not be a matter of difficulty to determine, what effect should be given to it; but it is a contract of mariage which, in several respects, materially differs.

"Ordinary contracts, as they relate to matters of pecuniary and patrimonial interest, are left, in a great measure,

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* Wood *v.* Grangers, Jan. 24, 1779.
† Savage *v.* Dunn, Jan. 25, 1710.

to be regulated by the private parties themselves, and subjected to the free and legitimate operation of their will, both as to the stipulations, and as to the period of their endurance. The one contracting party cannot, indeed, be suffered to free himself from the contract, without the consent of the other, or deprive the other of any rights, he may have acquired under it. He must be justly held to be bound by his own voluntary act and deed, as it not only depended upon his own choice, whether he should enter into the contract at first, but whether the particular stipulations so come under by him, should ever have formed any part of it at all. No alteration can therefore be permitted upon the terms of the contract at the instance of either party; but if both the parties to it shall so incline, they may at any time put an end to the contract altogether.

Distinction betwixt an ordinary contract and a contract of marriage.

"The case of a marriage-contract is in these respects essentially different; while with ordinary contracts it has its origin in the will of the parties, who may enter into it, or not, as they choose; the rights and duties flowing from it, as well as its endurance, does not, like them, depend at all upon their pleasure. The relation of marriage is a contract *juris gentium*, affecting the personal *status* of parties, and is received in different countries under different modifications.

"I shall first inquire what effect our law would give to a *status* imposed by the law of a foreign country, where no contract of parties, as in the present case, intervened. As there are few or no decisions to be found either expressly on this point, or immediately connected with it, it is therefore necessary to have recourse to the general principles of our law, and to the opinions of the Civilians, whose authority our law is accustomed to respect, as the great fountain of the international law of Europe.

"The right to regulate every thing regarding the *status* of its subjects is assumed by the supreme power in every state, as inherent in itself—being connected with its most essential interests. It is vested there, as forming part of

Questions of *status* determined by the law of the real domicil.

the *jus publicum*, which attaches to all the real subjects of the state, independently altogether of their will. The *status* of majority, minority, and the like, is imposed by a state on all those truly subjected to it, without any act on their part indicating their consent. When they happen to go beyond the boundaries of the state, by which any such *status* is imposed, into the territory of another state, where the laws regulating personal *status* is different, the law, or supreme will of the state in the country into which they enter, does not, it will be observed, stand in any degree opposed, as in the case formerly alluded to of an ordinary contract, to what was fixed by the will of the individuals themselves, but stands opposed to the supreme will alone of the state, by whom the *status* was attached.

" Now, in such a case, a state does not think herself entitled to arrogate to herself any power over the person of a foreigner, who, though he has entered her territory, has not become her subject. A foreigner is not obliged like a subject to have his *status*, or personal quality and interests, tried by the law of a country to which he never intended to submit himself, and of which he is not a proper subject.

Vattel, p. 174, 175.

" "The citizen or subject of a state who absents him-
" self for a time, without any intention to abandon the
" society of which he is a member, does not lose his pri-
" vilege by his absence; he preserves his rights, and re-
" mains bound by the same obligations. Being received
" in a foreign country, in virtue of the natural society,
" the communication, and commerce, which nations are
" obliged to cultivate with each other, he ought to be
" considered there, as a *member of his own country, and*
" *treated as such*. Remaining a citizen of his own coun-
" try, he is still bound by those laws which peculiarly af-
" fect the character of citizen, wherever he happens to be;
" and the laws of this kind, made in the country where he
" resides at the time, are not obligatory with respect to
" him."

" Nor is it any thing against this, that the will of individuals has no power or control over what relates to the

regulation of their personal *status*. Once a person has become a proper subject in any particular country, it is true that no private stipulation of his can be suffered to affect it,—according to the maxim, "Pacta privata non "derogant *juri publico*." But the will of the parties must be taken into view when the question is, whether an individual is, or is not, a citizen of a particular country, and so subjected to its laws. He is justly held to be so, when there are acts upon his part, importing a decided resolution, of taking up a permanent residence, within the limits of their operation. When he does so, the law of the new domicil, in regard to *status*, attaches to him; and that of the former domicil, which had been hitherto respected in his person, ceases to regulate his personal rights, now that his connection with the sovereign power, by whom it had been originally imposed, is dissolved. All questions regarding these are henceforward to be judged of by the law of the country, whither he has come permanently to reside, and which had hitherto refrained from applying its own law to his *status*, since any interest it could feel in the regulation of it, from his being a temporary residenter among its subjects, was trivial in comparison with the much deeper interest possessed in it by his own state—the laws of which, in a collision of the two, must, therefore, *ex comitate*, be allowed to prevail.

**Authorities, Hertius, p. 175.—p. 173.**

"Quando lex in personam dirigitur, respiciendum est "ad leges illius civitatis, quæ personam habet subjectam. "Ratio hujus regulæ est, persona subditi est nemini alio "subjecta, quam summo imperanti, cui se submisit. Il- "lud superfluum videtur monere, quia per se planum est, "legem poni personæ ab eo, qui jus habet in personam. "Status et qualitas personæ regitur a legibus loci, cui "ipsa sese per domicilium subjecit, atque inde etiam fit, "ut quis major hic, alibi mutato scilicet domicilio, in- "cipiat fieri minor."

**—p. 177.**

"By domicil he understands, "Ubi quis frequentius ac "diutius commorari solet, rerumque ac fortunarum suarum "majorem partem constituit. Inde fit ut leges quæ per- "sonæ qualitatem sive characterem imprimunt, comitari "personam soleant ubique locorum versetur, tametsi in

" aliam civitatem migraverit, (veluti si quis major, Infa-
" mis vel prodigus declaratur.) Quando quidem extera
" illa civitas in advenam non habet potestatem, *nisi ra-*
" *tione actuum vel bonorum immobilium,* in reliquis iste
" patriæ suæ manet subjectus."

P. 74.

" Another author, Argentræus, thus expresses himself:
" Quotiescunque de inhabilitate personarum quæratur,
" toties domicilii et statuta spectanda."

*Comitas* not extending to immoveable property or to crimes.

" There are certain classes of questions alluded to by Hertius, as above, to which the principle of *comitas* is not extended, namely, all questions regarding immoveable property, which must be regulated by the law of the state where it is situate, and those regarding what he terms the *actus* of foreigners, by which must be understood, first their contracts, and next all cases of a criminal nature, when prosecuted as crimes *ad vindictam publicam.* With regard to these last, a foreigner is allowed access into a country, only on the implied condition, that he be subject to the general laws, made to maintain good order and the public peace; and if he violate these, he is liable to be punished, according to the laws of the country, in the same manner as the real subjects of it. By disturbing the public peace, he is guilty of a crime against the society among whom he is come to reside, although it be only for a time; and the laws can make no distinction betwixt his case and that of a native subject.

Real domicil required in question of *status.*

" I agree in so far, therefore, with what is maintained in the condescendence for the pursuer in this case, that it is the domicil of parties that regulates their ordinary *status.* But then the pursuer understands by domicil here, the ordinary domicil constituted by a residence of 40 days within the territory, whereas I understand the real domicil.

" It must be here observed, that questions of *status* differ materially from cases of ordinary civil debt.—What is sufficient to constitute a *forum* in cases of debt, would give no jurisdiction at all in a *questio status;* as, for instance, in the case of the effects of a foreigner being attached by arrestment *jurisdictionis fundandæ causa;* and

even in cases where a defender is personally cited within the territory, it seems absolutely necessary, on the same principle, to make a distinction betwixt the two totally distinct, and separate classes of actions. The foreign state has comparatively little interest to oppose, that one of her subjects should be sued and subjected to have the law of another country, where he may have happened to reside for 40 days, though not a permanent residenter, applied to him, in an action for payment of his lawful debts. But she has a most material interest to oppose, that a short absence from his own country should operate a total change in his essential personal rights, in which she is chiefly concerned, and return him to her with his *status* totally altered from what it was, and set at complete variance with the law of his permanent residence.

As in intestate moveable succession.

"Although, in other respects, the two cases may not be analogous, I apprehend that the same kind of domicil that is required to be ascertained, in a question of intestate moveable succession, is the domicil that is required in a question of ordinary *status*. The point to be investigated in the one case, is the real domicil of the individual at the period of death; in the other, at the period, when the question involving the consideration of the *status* of the party, happens to be tried. Had the defender in the present case happened to die, after coming to this country, his moveable succession could never, I apprehend, be held to be regulated by our law, but by that of England, as being the law of his proper domicil. I must not be understood to say, that because the personal succession of the defender would be regulated by the law of England, therefore, on the same principles, all questions regarding his personal rights, and the redress of wrongs relative to them, ought to be regulated by the same law. My reference at all to the case of moveable succession, is merely to point out and explain the nature of the domicil I would require in the case of the defender, as contrasted with the very slight and transient kind of domicil he actually possesses, and which, in a question of this grave and serious nature, I regard as no domicil at all. But I by no means intend to argue from what takes place in the case of succession, to

the case of marriage. The cases are by no means analogous, as I have already mentioned, not being both equally subjected to the will of parties; and the principles and rules which regulate each, are therefore not precisely the same.

"If it is asked, what are the rules by which it is to be ascertained whether or not a person has a fixed residence in a particular country? I answer, that no precise rules can be previously laid down respecting it. No doubt, on the one hand, a person removing with his family and establishment into another country, the transferring of his funds there, the purchase of landed property, or the like, are all circumstances entitled to the greatest weight in every such investigation. On the other hand, a person's coming to this country alone, living in lodgings for a few weeks, while his family and establishment and funds remained in England, would seem quite insufficient to support the slightest belief, or supposition, of any fixed or permanent residence being in contemplation. But the matter, after all, will depend on the circumstances of each particular case, which must be estimated by the exercise of due discrimination, when it occurs.

How the real domicil is to be ascertained.

"According to Voet, one of the most enlightened and judicious commentators on the civil law,—* "Quoties "autem non certo constat, ubi quis domicilium constitu-"tum habeat; et an animus sit inde non discedendi, ad "conjecturas probabiles recurrendum, ex variis circum-"stantiis petitas, etsi non omnes æque firmæ, aut singulæ "solæ consideratæ, non æque urgentes sint. Sic enim *in* "*dubio, in loco originis et domicilio paterno*, quemque "præsumi continuasse domicilium, jam ante dictum."

"By the Roman law, it was fixed that the residence of students at an university was not held to constitute a domicil, unless they continued there for a period of ten years. † "Nec ipsi qui studiorum causâ aliquo loco mo-"rantur, domicilium ibi habere creduntur, nisi decem an-

* Voet, lib. v. tit. 1. sect. 97.

† Lib. x. Codicis, tit. 39. Leg. 2, 3, 4.

" nis transactis eo loco sedes ibi constituerint." And, in the same title, which likewise treats, " De Incolis et ubi " quis domicilium habere videtur," it is laid down, " Est " verum, eos qui in territorio alicujus civitatis commoran- " tur, velut *Incolas* ad subeunda munera, vel ad capiendos " honores non adstringi. Cum neque originales, neque " Incolas vos esse memoratis; ob solam domûs vel pos- " sessionis causam, *publici juris auctoritas* muneribus sub- " jugari vos non sinet."

" The definition of *Incola* is given elsewhere. " In- " cola est, qui aliqua regione domicilium suum contulit. " Nec tamen hi *qui in oppido morantur* incolæ sunt, sed " etiam qui alicujus oppidi finibus ita agrum habent, ut in " eum se, quasi in *aliquam sedem*, recipiant." *

" Domicilii quoque intuitu *conveniri* quisque potest in " eo scilicet loco, in quo Larem, rerumque ac fortunarum " suarum summam constituit, unde rursus non sit discessu- " rus, si nihil avocet, undeque cum profectus est; peregri- " nari videtur." †

" It is quite impossible, I conceive, for a moment to maintain, that the defender's domicil is of this description; and, consequently, whatever might take place in an ordinary action of debt, he cannot, I apprehend, be properly convened in an action of divorce. If there were nothing more in it than a question of ordinary *status*, which is the point of view most favourable for the pursuer's object, I hold that the domicil of the defender is of too slight a kind, to entitle us to take cognizance of such a question as the present, involving the determination of his personal rights, or to give us a proper jurisdiction in the case. Neither in the sense of the Roman law, nor in that of ours, can he be held to be truly an *Incola* of this country; or, in other words, as having a real domicil amongst us. England was the proper domicil of both parties at the time when the *status* of married persons was imposed on them; and I am completely satisfied, that England

* Lib. i. tit. 16. Reg. 239. sect. 2.
† Voet, lib. v. tit. 1. sect. 92.

still continues to be so. "Mutat unusquisque domicilium "suo arbitrio, ad id, *ut jurisdictioni desinat* in posterum "subjectus esse. Non tamen in dubio præsumenda facile "domicilii mutatio, sic ut eam allegans, tanquam rem "facti, probare teneatur." *

"Nor can it be held, that the consent of parties can supply any defect in regard to jurisdiction in the case of a *quæstio status* arising from the want of real domicil. For one essential requisite of prorogation is, that the Judge have such jurisdiction as may be a proper subject of prorogation. For this reason, there is no room for prorogation, where the jurisdiction is vacated, or its term expired, because no private consent can create jurisdiction. † Neither can jurisdiction be prorogated, in any case where the defender's real domicil is not, as I hold to be the case here, within the limits of the Judge's territory; any more than it would be in the power of parties to subject themselves to the jurisdiction of a Judge, while without the bounds of his territory himself.

"I might here stop,—as, if I am right in this position, I should be justified in dismissing the present action. But as this might imply it to be my opinion, that, in the event of the defender's being possessed of a real domicil amongst us, so as to force us to sustain our jurisdiction, we should in that case be under the necessity of applying our own law, I shall proceed a step further. I am disposed to hold, that, upon the usual principles of international law, we should, even in that case, be prevented from giving what the pursuer demands from us, since she pursues for a complete change and alteration of the defender's *status*, and consequently of her own, on grounds which would be insufficient so to alter it according to the law of England, the country where the marriage was contracted.

What, if a real domicil here?

"By a court being compelled to sustain its own jurisdiction, and consequently bound to take cognizance of, and pronounce a judgment in, any particular case, it does

* Voet, lib. v. tit. 1.
† Erskine, p. 35, sect. 29.

not follow as an absolute consequence, that the law by which the judgment is to be regulated and determined, must necessarily be its own. Whether its own law is to be the rule of decision, or whether a court will in some cases allow effect to be given to the foreign law, by which the matter at issue may seem to have been previously fixed, may admit of considerable doubt, and will depend on a variety of considerations.

Distinction betwixt ordinary *status*, and that arising from marriage.

" On the supposition that a real domicil did actually exist here, I think a distinction is to be made betwixt a case of ordinary *status*, when the law of a state imposing it attaches to an individual without any act of his own, or any consent adhibited to it on his part, and that *status* which is imposed on two different individuals, as in the case of marriage, at one and the same time, and with a reference to one another—with their joint consent, and even at their express desire.

" In a collision of the laws of two different kingdoms regarding such a point, it then ceases to be merely a case where the supreme will of one state stands opposed to that of the other, as in ordinary *status*, but partakes so far of the nature, and resembles a case of ordinary contract. Both parties must be viewed as standing mutually pledged to one another, not to seek any alteration or infringement of the peculiar character which they both understood, or, what is the same thing, must be held to have understood, attached to the relation at the time of entering into it.

Ordinary *status* altered by a change of domicil.

" In a case of ordinary *status*, I think the real domicil would regulate it; and so it would be liable to be altered by a change of domicil, according to Hertius, as above quoted. " Major hic alibi mutato domicilio inciperet fieri " minor." But the *status* of married persons cannot, I am disposed to think, be held liable to any similar alteration.

Otherwise in the case of marriage.

Although the rights and duties flowing from the marriage relation are not matter of private stipulation, but of public law, yet once it is ascertained by what law the relation was regulated at the time, so as to receive from it a peculiar modification, I conceive that such modification must continue to characterize it ever afterwards; and must be held effectually secured against any future challenge at the

instance of either of the parties. The law of another state where the parties may afterwards become permanently resident, and where the marriage-contract subsists under a different modification, when so called upon by either party, must, according to every just principle of international law, *ex comitate* refuse to apply its own peculiar modification, and must view both parties as barred *personali objectione*, in regard to one another, from making any such application.

By giving effect to the principle of *comitas*, a state does not compromise its own supremacy.

"It could not be said, I conceive, in such a case, that a state, by refraining to apply its own rules, and by applying the rules of the foreign country where the relation was created, and thus permitting within its territories the exercise of powers of foreign courts, unknown to its own law and institutions, would thereby compromise the supremacy of its own law. It is admitted in every case, where the application of the principle of *comitas* is concerned, that when the admission of the foreign law would be clearly inconsistent with the essential policy and institutions of the country, where it is proposed to be received, this must create an effectual bar to the extension of the principle to such a case. But any argument that would carry the limitation of the principle farther than this, so as to refuse to sustain the foreign law, though not chargeable with any such consequences, would equally strike against the recognising the principle of *comitas* at all.

"Indeed it would appear that the pursuer goes this very length, when she expatiates on the grievous hardship that would result from a foreigner's being allowed to import his own law. But it is no longer a question whether the principle is to be admitted,—it has already been both recognised and applied in numerous instances; the doubt is merely, as to the extension of the application, if it is in truth any extension of it at all. In every case where one state gives effect *ex comitate* to the law of another, it may be said, that, in that instance, the foreigner is allowed to import his own law.

No injury arises to her own subjects.

"It has been argued, that the inhabitants of a country are subjected to a serious hardship, if a foreigner, who happens to come among them, is not held to have his

rights and duties measured out by the same standard as theirs; and that they must run the greatest hazard, in either contracting with him, or having any intercourse with him at all. But it must be recollected, that the question as to a foreigner's right to obtain a divorce, is one which concerns the married parties themselves, not the inhabitants among whom they have come to reside. If it was a matter, in which they had acquired any title or interest, or by which, in the event of effect being given to the foreign law, they would be either individually or generally affected, this would completely alter the case, and would bring it under the limitation of the principle formerly stated, of the extension of the *comitas* being inconsistent with the interests of the state, before whose courts the question came to be tried.

" According to Huber,* " Effecta contractuum certo " loco initorum, pro jure loci illius alibi quoque obser- " vantur, *si nullum inde civibus alienis creetur præjudi- " cium in jure sibi quæsito*. Exemplum: In Hollandia " contractum est matrimonium cum pacto, *ne uxor tenea- " tur ex ære alieno, a viro solo contracto*. Hoc etsi pri- " vatim contractum valere dicitur in Hollandia; in Frisiâ " id genus pacta non valent. Vir in Frisiâ contrahit aes " alienum, uxor pro parte dimidia convenitur; opponit " pactum dotale suum; creditores replicant, Jure Frisiæ " non esse locum huic pacto, quia non est publicatum; " et hoc prevalet." There is here, besides, in fact, a new contract entered into betwixt the foreigners and the natives of the country, and it is the law of the place of the new contract that falls to be applied.

Argument in the case of Delvalle.

" In the report of Delvalle against the Creditors of the York Buildings Company, formerly referred to, it was pleaded on behalf of the creditors, against allowing the foreign law, that " proceedings in courts of justice " must ever be governed by those rules, which have been " established by the power from whence the Judges de- " rive their authority, which *alone* they are bound to " know, and to which every party, who commences a suit

* Vol. II. Lib. i. tit. 3. sect. 11.

" before them, must be understood to submit the trial of
" his claim. One restriction only of this general prin-
" ciple occurs, with regard to the solemnities of contracts.
" In order to preserve an equal intercourse between the
" individuals of different nations, it has been determined
" in Scotland, as well as in all other civilized states, that
" the want of those forms which are required in the coun-
" try, where execution is demanded, shall not render in-
" valid an agreement, which would have been effectual in
" the country where it was entered into.

" But in every other question, either with respect to
" the efficacy or the extent of covenants, exercised in a
" *foreign country*, the law of Scotland has been in our
" Courts invariably followed. Thus, where a bond has
" been granted in Ireland, containing an obligation to
" pay interest at the rate of 10 per cent. as allowed in that
" kingdom, our Judges gave decreet only for those sums,
" which could have been legally stipulated, for the use of
" the money in Scotland.

" The Scottish constitutions, in particular, which limit
" the endurance of actions, have been uniformly extend-
" ed to claims, founded on contracts executed in foreign
" countries. It is of no consequence that, in this man-
" ner, the effect of contracts will be different in different
" countries. This must unavoidably happen, unless all
" nations were to agree on one common system of juris-
" prudence. Till that period arrives, it is enough, that
" deeds executed in a foreign kingdom are in Scotland
" sustained in the same manner, as those of the like na-
" ture framed according to the rules prescribed in this
" country."

" I quote this, because it appears to me to contain the very arguments, which I observe have been generally brought to oppose the giving effect to the foreign law, as to marriage; and as those arguments were completely unsuccessful towards maintaining the plea, for the support of which they were brought, the decision which followed may be referred to, as proceeding on the same general grounds on which the present case will fall to be determined, and so completely justifying from analogy

the application to it, of the principle of *comitas*. The question of interest, too, founded on in the above argument as in favour of it, has since received, as already mentioned, a different decision by our courts; and this of itself serves, besides, to overturn completely one of the pursuer's positions, where he lays it down very broadly, that a contract, which it is unlawful to make in this country, cannot be carried into execution here, though entered into elsewhere.

Natural jealousy betwixt independent states.

" Even after nations have been led to recognise the principle of *comitas*, it is only gradually that they become willing to carry it to its due extent; a natural jealousy of encroachments by their neighbours, on their own municipal institutions, renders their progress extremely slow, towards attaining liberal and enlightened views in the application of international law. But the same reasons which induce one country to receive a marriage-contract as valid in the other, at all, though the forms requisite to its validity there, are such as are wholly unknown to itself, and perhaps even regarded by it with dislike and disapprobation, must induce it to receive it with all its properties and effects, so far as they do not call for the usual limitation, by which the reception of any foreign contract, must always be understood to be qualified. * " Porro " non tantum ipsi contractus ipsæque nuptiæ certis locis " rite celebratæ, ubique pro justis et validis habentur, sed " etiam jura et effecta contractuum nuptiarumque in iis " locis recepta, ubique vim suam obtinebunt."

Marriage-contract altogether of a peculiar kind.

" It must be remembered, too, that marriage is a contract altogether of a peculiar kind—that it stands alone, and can be assimilated to no other contract whatever. Every argument in favour of a state's giving effect to ordinary contracts entered into abroad, apply with infinitely greater force to marriage, from the additional character of solemnity which is superadded to the engagements which parties come under to one another.

" Marriage, in its origin, says a most eminent and en-

* Huber de Conflictu Legum, Vol. II. l. i. tit. 3.

lightened Judge, in determining a late case,* " is a contract
" of natural law. It is the parent, not the child, of civil
" society. In civil society, it becomes a civil contract
" regulated and prescribed by law, and endowed with civil
" consequences. In most civilized countries, acting un-
" der a sense of the force of sacred obligations, it has the
" sanction of religion superadded—it then becomes a re-
" ligious and civil contract; for it is a great mistake to
" suppose, that because it is the one, therefore it may not
" likewise be the other. Heaven itself is made a party to
" the contract; and the consent of the individuals pledged
" to each other is ratified and confirmed by a vow to
" God."

" The law of Scotland does not by any means regard marriage as it is sometimes supposed to do, merely as a civil contract, the creature of civil society. It regards it as antecedent to all civil society whatever, and founded in the divine institution. " The first obligations,"† says Lord Stair, " put upon man by God, were the conjugal obliga-
" tions, which arose from the constitution of marriage.
" Though marriage seems to be a voluntary contract by
" engagement, because the application of it is, and ought
" to be, of the most free consent, and because, in matters
" circumstantial, it is voluntary, yet marriage itself, and
" the obligations thence arising, are *jure divino*. Obliga-
" tions arising from voluntary engagements take their rule
" and substance from the will of man, and may be framed
" and composed at his pleasure; but so cannot marriage,
" wherein it is not in the power of the parties, though of
" common consent, to alter any substantial as to make the
" marriage for a time, and so of the rest, which evident-
" ly demonstrateth that it is not a human but a divine
" contract." Lord Bankton, in his observations on the rule of law, *nuptias non concubitus sed consensus facit*, says, ‡ " The law before us being from Ulpian, a Gentile

* See Dodson's Report of the case Gordon against Dalrymple.

† Stair, Book i. tit. 4. ‡ Tit. xlv. b. 4.

" lawyer, who did not own marriage to be a divine con-
" tract, must hold more strongly in Christian states who
" regard it as such; and particularly with us, marriage is
" esteemed a divine contract." *

" The public solemnity is, by the law of Scotland, only matter of order, and not essential to marriage; but as the sanctions of religion are superadded, to the natural force of the otherwise binding engagements of parties to one another, a state will, from views of general expediency, be still more unwilling, to allow of any infringement being made on them, than it would even be, in ordinary cases of a purely civil nature. Any interest that it can have, in imposing the same character on this relation, in the case of all its subjects, even of such as have become only truly such, subsequent to their entering into it, cannot compare with that higher interest which it possesses in common with all other civilized states, that the sacred engagements of parties, reciprocally come under to one another, and which engagements must be held to have a reference to the nature and character of the relation as subsisting at the period of its being contracted, should, along with the relation itself, be suffered to remain without any change whatever being permitted on either.

What, if real domicil of parties, at the period of contracting, different from the *locus contractus*?

" But it may still remain a matter of difficulty to decide, what shall be the rule for fixing the character of the marriage relation in those cases, where the real domicil of the parties at the period of contracting happens to be different from the *locus contractus*. For example, in the case of a marriage-contract entered into in England by Scotch parties, not having any permanent residence there, is such to be regarded as an English or Scotch marriage?

" According to the authority of some of the Civilians, such a marriage would be reckoned to be Scotch, if the parties had it in view to live as married persons in this country. Huber, in his Treatise de Conflictu Legum, thus states his opinion, †" Verum tamen non ita precise
" respiciendus est locus, in quo contractus est initus, ut si

* Lib. i. tit. 5.

† Sect. 10.

"partes, alium in contrahendo locum respexerint, ille non
"potius sit considerandus. Contraxisse unusquisque in
"eo loco intelligitur, in quo ut solveret se obligavit.
"Proinde et locus matrimonii contracti, non tam is est
"ubi contractus nuptialis initus est, quam in quo contra-
"hentes matrimonium exercere voluerunt, ut omni die fit
"homines in Frizia, Indigenas aut Incolas ducere uxores
"in Hollandia, quas inde statim in Frisiam deducunt.
"Jus Friziæ in hoc casu est jus loci contractus."

"Another writer, Voet, the father of the writer formerly quoted, in his Treatise de Statutis Eorumque Concursu, is of the same opinion. * "Verum principio inquirendum
"de pacto seu contractu nuptiali, an si forensis matrimo-
"nium ineat, cum virgine non suæ civitatis, contrahere
"censeatur secundum suæ patriæ statuta an domicilii vir-
"ginis? Respondeo quia mulier quæ matrimonii legis con-
"sensit, judicatur respicisse domicilium mariti in quo de-
"ducenda est, et non simpliciter dicitur quis esse in loco,
"in quo corporaliter consistit, sed in quem fertur animi
"destinatione, quomodo et domicilium mutare dicitur:
"potius secundum illius domicilii leges censebitur con-
"traxisse, quam secundum leges loci, ubi ipsa vere jungi-
"tur, et domicilium habet. Nisi tamen maritus in domi-
"cilio uxoris contrahat animo ibidem commorandi, quo
"casu forte pro naturali cive censendus."

"A contrary opinion from this is, however, maintained by other Civilians; and further, the maxim of law to which the opinion of Voet appears, in some degree, to have a reference, and by which it appears, in some measure, to be influenced, *Sponsa Contractis Nuptiis domicilium Mariti sequitur*, does not apply in any question which regards the period of the actual solemnizing of the marriage-contract itself. It is only subsequent to the marriage that the maxim applies; at the time of contracting, she retains, as before, her own domicil, according to the law,—"Ea que
"disponsa est, ante contractus nuptias, suum non mutat
"domicilium." †

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* Cap. 2. p. 319, § 5, 9. † Lib. 50. Pand. tit. i. leg. 32.

Not left to the will of parties to determine the character of the marriage.

"But, independently of this, I apprehend the juster view to be taken of the point is, that a matter of such high importance as this, cannot be left at all to the will of the parties to determine; and, therefore, any inquiry as to their presumed will, or intention, must be a matter of indifference, where the most anxious expression of it on their part, could be of no possible avail. The rule of law, "Juri publico pacta privata non derogant," applies here. The parties to a marriage-contract, although they are at the time the subjects of another state, with whose *status* the state into whose territory they have entered will not be willing to interfere, while merely temporary residenters; yet, if they proceed to make it the scene of a contract of marriage, they will be held, in the eye of the law of that country, and according to the acknowledged rules of law everywhere, as bound to abide by the character of the marriage subsisting there; and this, whether capable of entering into the contract by the law of their own country or not. They have no cause to complain, as both the time and place for entering into the contract are dependent on their own choice. It is true that, by entering into a marriage-contract, they do not bind themselves to reside always in the country where it is entered into; which supposition, it is somewhere alleged, would follow as an absurd consequence, of our refusing to apply our own law. Parties may change their domicil, as often as they please; but the law of any future residence, while it will regulate their future acts, will never, on any sound principle of international law, lend its aid to assist parties in shaking themselves loose of their former acts or contracts, binding them, long previous to its connection with them. According to Hertius, "Ratione actuum subjiciuntur cujusque "generis personæ, etiamsi advenæ, sive exteri, vel tran- "seuntes, vel negotiorum suorum causâ ad tempus in civi- "tate commorantes, quatenus nimirum ibi agunt, id est, si "contrahunt vel delinquunt. Nimirum valet hæc regula, "etiamsi in extero qui actum celebrat, licet enim hic sub- "jectus manet patriæ suæ, tamen illud, ut supra diximus, "de *actu primo* est intelligendum, *quoad actum vero se- "cundum, subditus illius loci fit temporarius ubi agit vel*

"*contrahit, simulque ut forum ibi sortitur, ita statutis*
"*ligatur*. Extenditur ad consequentia sive profluentia ex
"actu illic principali." If the character so attaching is not received along with the relation itself, by their own country on their return, it must be in consequence not of a power to effect this, by any will either express or presumed of their own, but in consequence of the claims their own state has in regard to them, as her subjects.

"It is a matter of arrangement betwixt the two states, not betwixt the parties. But their own state, while it will not, I apprehend, suffer any infringement on the character of this relation, where the parties have only subsequently to it, become her subjects, will feel herself equally bound to act in a similar manner, when the parties happened to be her own subjects at the time. By a state's admitting in this way of such a modification of the relation as is wholly unknown to her, she may, indeed, at first sight, have the appearance of yielding too important a point, as that the *status* of her own subjects should be regulated by a foreign power. But this point she in fact has already yielded, in consenting to receive the contract imposing the *status* of married persons on the parties. In admitting this, her law actually bends in so far, to the dictates of a foreign law, which it has been held out as a thing quite impossible for any state to consent to, and a point of degradation to which no state could possibly stoop, in regard to the *jus publicum* of another. It is not sufficient, in order to evade this, to say, that in admitting the relation of marriage itself, she admits merelv what is a contract *juris gentium*, and not a contract peculiar to the foreign state, and to which she herself was a stranger. She does a great deal more—she admits and sanctions the forms and mode of the constitution of the contract, which is not *juris gentium*, but purely of the municipal law or *jus publicum* of the other state; and a mode of constituting the relation, in many cases viewed by her with positive abhorrence, and diametrically opposed, and repugnant to the whole genius and system of her own regulations on that head. The English Courts, in agreeing to sustain the validity of a Gretna Green marriage, or indeed the majo-

A state, in sustaining a foreign marriage in any way, bends to the foreign law.

rity of Scottish marriages, which it must be admittted are often of so loose and singular a nature, as to render it frequently a matter of difficulty for our own Courts to determine, whether there has been a marriage or not, actually sustains, what, if such a mode of constituting the relation had been attempted, on any part of her own territory, would have been completely disregarded by her, as constituting no marriage at all betwixt the parties—who, under its sacred name, were merely living in a state of concubinage. I shall be told that a state consents to overlook this, and sustains the forms recognised by the foreign law as sufficient, on the ground of expediency, and to prevent greater evils, which would result from her refusal to do so; and this I view as precisely the ground why a state, having actually advanced this one step, and a most important one, in the way of concession to a foreign power, and by which she effectually abandons the principle of refusing to bend to the will of a foreign state, is bound, on every principle of consistency, to advance one step further, and consent to receive the modification of the relation along with the relation itself. She bends to the public law of the other state, in what relates to the *mode* of forming the relation, which, it must always be remembered, is quite a distinct and separate thing from agreeing to receive the relation itself as a contract *juris gentium.* Her merely agreeing to yield this last point, might justly be held to imply, that such forms had been observed in regard to its constitution, as in her eye actually to constitute it, otherwise she might fairly hold it not to have any existence. Now, why a state should stop short here, and along with the mode not receive the modification of the relation, remains to be explained.

"A state will therefore, on every principle of sound policy, view it as essential to its own interests, that every thing regarding marriage, should be fixed and determined in the same manner, as in deeds subjected to the will of parties, by the ordinary rule of the law of the *locus contractus.* For there is no other mode of fixing the character of a marriage in a clear and certain manner. If any other rule were resorted to, marriages, in appearance the most

similar in their nature and attending circumstances, would be found on investigation to possess different characters, according to the result of the proof, to which every individual case, with a view to ascertain the real domicil at the time of the marriage, would necessarily be subjected. Nothing can be conceived more injurious either to the individuals themselves, or to the different states respectively interested in them, than the doubt and uncertainty which in this way would be created—or more directly repugnant to all the valuable and important purposes, for which the marriage relation was at first instituted.

"According to Lord Bankton,* "For expediency, it "is everywhere received as the law of nations, and parti-"cularly obtains with us, that deeds granted abroad, con-"form to the law of the place where they are dated, are "sustained, because the obligation, being once effectual, "must remain so; and it were absurd that the *debtor's* "*changing his residence should free him of his obligation.*" "It is just that *the obligation should be dissolved by the* "*rules of the same law whereby it is constituted.*" This rule, although strictly applicable only to those deeds or contracts which are subjected to the private will of parties, is the only safe rule to which a state can possibly resort, even in regard to marriage—the nature of which, I admit, is so far materially different, as not being, properly speaking, under the private party's control.

"An argument is attempted to be founded, against the law of the *locus contractus* in the case of marriage, in favour of that of the domicil, from what takes place in regard to the division of the goods in communion, upon the death of one of the married parties, and where there is no written contract. It is argued, that as it is the law of the domicil at the period of death, which in such a case regulates the disposal of the property, the same law must necessarily regulate every other question regarding the *status* of the married pair; and that the law of the domicil would have equally regulated, although a written contract had

* B. i. tit. 1.

actually existed. But this I apprehend is a complete mistake. It is not from its being viewed as a matter arising from the marriage at all, that the law of the domicil steps in, and regulates the disposal of the effects, but as a matter arising from the death, and so to be regulated by the ordinary rules of succession, which are framed on quite different principles. In the cases referred to there was no previous contract, containing express stipulations as to the will of the parties, which would have superseded any necessity for the law of the domicil interfering. And this is a sufficient answer to all the arguments founded on the case of the *repetitio dotis*, where no contract happens to intervene, and where the law of the country, where the husband dies, is different from that in which the marriage was contracted.

**Division of goods in communion, as arising from death, regulated by the law of the domicil.**

" The whole question is entirely one of expediency; and this is clearly in favour of any sacrifice of the kind on the part of the law of the state where the question is tried. Expediency calls here for a suspension of the common rnles by which the ordinary *status* of parties is regulated, namely, the law of the domicil, in a case of a nature so peculiar and distinct from every other, as that of marriage,—to which there is nothing " *aut simile aut secun*" *dum*." The disadvantages, if any, of such an application of the principle of *comitas* are equally balanced. What may be sacrificed on the part of one state at one time, is compensated by a corresponding sacrifice made to her at another; the concessions are reciprocal, and in every point of view ultimately for the general advantage of both.

**The present a question of expediency.**

" But the consequences that would necessarily flow from such an exercise of the principle of *comitas* are represented as alarming in the extreme,—that the whole order of society would be confounded, and foreigners, on this principle, would be so many privileged classes, living under separate laws, on the territory of any state, within whose limits they may have come to reside.

" But, if a state's receiving a peculiar modification of the marriage relation will lead to such alarming consequences, these must equally result from a state's receiving

the relation at all, when attempted to be constituted in a different manner, from that with which she is acquainted, and under forms which she regards as utterly incapable of constituting it; for, in doing so, she actually goes the length of sanctioning and approving, what she must at the same time regard as nothing better than a species of privileged adultery; an expression employed by the pursuer, though by no means in so legitimate a sense, in a reference to the right of divorce; for such would be the light in which a state would actually regard the connection in the case of her own subjects.

Application of the principle very limited.

" Any apprehensions of this kind, however, appear to me to proceed on a misconception, as to the real extent to which the legitimate application of the principle would be in any danger of leading. The application must be confined entirely to the civil effects of acts committed by foreigners, as operating on a contract entered into by them, previous to their taking up their residence, within the limits of another country, and the effects of which, did not extend beyond themselves, so as to affect any of the mass of the population, among whom they now dwell, either individually, or as touching their essential moral interests. All contracts entered into by foreigners subsequent to their removal into the other country, are to be determined entirely by the law of that country; and this even though incapable, from being minors, for instance, or the like, from contracting in such a manner, according to the law of their former residence. Those very same acts, too, the effect of which, when viewed only in a civil light, and as limited to themselves, is, as I hold, to be regulated by the foreign law, if prosecuted in the light of crimes, would infallibly subject to the pains and penalties of the criminal code. So that in the event of effect being given in this limited class of cases, to the operation of the foreign law, there is no room for alleging, that a necessity would exist, for a nation conferring new powers and forms on its courts of justice, with the view of enforcing on foreigners, in every case, the laws of their own country, after they had abandoned it. This would be a straining of the application of the principle

beyond all bounds, and overlooking entirely the marked line all along drawn and insisted on, which separates subsequent contracts from previous ones; civil acts, or acts viewed and prosecuted only to a civil effect, from criminal ones; and acts limited and confined to the parties themselves, and having reference only to them, in respect to each other, from those in which the subjects of the new state come to be interested and connected. If all these different cases are blended together, and no distinction be allowed to exist betwixt them, then it may be said, that the same principles which prescribe to nations the administration of their own criminal law, appear to require a like exclusive administration of law, relative to the domestic relations. In a case of a criminal nature, robbery for instance, perpetrated by one foreigner on another, it is not a matter which concerns the injured party merely, though he is the immediate and direct object of the attack, but the community at large. It is the interest of the public, that others should be deterred, by means of the punishment of the offender, from a similar commission of the crime. If the privileges conferred by our law on the injured party, of prosecuting a divorce, were intended, in like manner, *in terrorem* of the commission of adultery, and to deter from the breach of matrimonial engagements, then the same reasoning might, with some degree of plausibility, be applied to both. But this I doubt extremely; and our law, if it ever had this object in view, has unquestionably completely missed her aim. While the prospect of obtaining a divorce may, in many cases, have been the very inducement to the crime, I am fully persuaded we are by no means indebted for the degree of purity still maintained amongst us, in regard to the marriage relation, to the privilege competent to the injured party, of pursuing a divorce. If we are indebted to any thing beyond the far more to be relied on security, arising from the moral and religious principles of our people, it is to the terrors of the criminal code; and to its penalties, if still in force, the present defender is equally liable, with any individual of our own country.

Action of divorce has nothing in it of a criminal nature.

Although adultery itself is a crime of a most flagrant kind, and punishable by the criminal tribunals.

" No person can doubt that adultery is a crime of a most flagrant nature, involving, too, that of perjury, in addition to its otherwise heinous guilt; and so, in every point of view, a gross violation of the laws both of God and man. It is equally true, that the criminal code of a nation attaches to a person found within its territories, whether foreigner or native, or whatever the nature of his residence may be. No *comitas* can be extended here, so as to supersede or suspend the exclusive operation of our own law. But then the cognizance of acts such as those now libelled on, in the light of crimes, is peculiar to the criminal tribunals. Our Court is purely civil, and possessed merely of a civil jurisdiction. It is as to the civil consequences only of the act of adultery, founded on for the purpose of obtaining a sentence of divorce, that we are called upon to judge,—whether the act shall be held to produce here an effect on a marriage-contract, entered into in another country, different from what it would be held to do there. As far as this is concerned, the allegation of the fact of adultery must stand on the same footing, as an allegation of desertion and non-adherence, if founded on as warranting a conclusion of divorce; and this takes away the foundation of all the arguments drawn from the case of Turkish marriages, or any other, where the powers attempted to be exercised by the foreign husband, though warranted by the law of his own country, are held to be either criminal or *contra bonos mores* by that of ours.

" Such, for instance, is the case of a Mahommedan attempting to marry two or more wives in this country,—a right to exercise domestic slavery,—and innumerable other cases which have been figured, all such, being either of an immoral tendency, or of a criminal nature—repugnant to, and subversive of, the interests of morality amongst us, must at once be perceived to fall under the limitation, formerly stated, to every extension of the principle of *comitas*. The alleged impunity, therefore, of all kinds of crimes, when committed by foreigners, which, it has repeatedly been urged

with apparent seriousness, could be justified on the same principle that would refuse to the pursuer the right of divorce, proceeds, on what appears to me, a complete misconception as to the nature and character of the act, in so far as this Court is entitled to consider it.

"What I hold to be decisive on this point, so as to supersede the necessity of any further argument—it is expressly laid down by the Civilians, that the action of divorce is purely of a civil nature, and has no connection whatever with the criminal action, arising from the act of adultery.

"* *Posito autem adulterio* insonti conjugi permissum "non est, matrimonii vinculum privatâ dirimere auctori"tate, *sed actione civili ad nuptiarum dissolutionem con"tendendum est,* ut probatis probandis, Judex ipse suâ "sententiâ decernat nexûs conjugalis separationem."

"† Quod si et vir et uxor adulterium perpetraverint, "in criminali quidem pœnæ persecutione, mutui criminis "compensatio est, sed utrique supplicium ex lege impo"nendum; *quantum tamen ad civilem actionem attinet, "quo etiam referenda hæc matrimonii separatio,* magis est, "ut par crimen mutuâ inter conjuges pensatione tollatur; "dum periniquum, virum ab uxore pudicitiam exigere, "quam ipse non exhibeat. Quibus vero pœnis aliis "tum pecuniariis, tum corporalibus adulteria puniantur ex "Titulo ad Legem Juliam de adulteriis discendum erit.

"‡ Moribus Hodiernis adulterii accusatio, quantum "ad vindictam publicam solis competit illis, qui ad ac"cusandos etiam aliorum criminum reos publice consti"tuti sunt, *salvo* UXORI VEL MARITO INNOCENTI JURE "PETENDI MATRIMONII DISSOLUTIONEM."

"From this it is evident, that the right of divorce, while it is entirely of a civil nature, is competent only to the married pair themselves, and can neither be transferred by them to another, or interfered with by any third parties, whether private individuals, or such as are officially vested with the right of prosecution, in matters

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* Voet. Lib xxiv. tit. 2. sect. 8. † Sect. 6.
‡ Lib. xlviii. tit. 5. sect. 21.

connected with the criminal department. The right of divorce must be regarded in the light of a personal privilege, and so regulated by the general rule of law as to them. * " Personalia autem sunt non ea tantum, quæ " uni certæ personæ data, sed et quæ toti certarum per-" sonarum generi, generali lege concessa. Quæcunque " autem privilegia sunt personalia, illa nec cessione juris " aut actionis in aliam possunt personam transferri; cum " eâ ratione personam egrederentur, contra concedentis " intentionem."

" Neither can the acts of adultery here libelled on, while in this way not falling under the general rule regarding crimes, on the other hand, be held to partake of the nature or effects, of the other class of *actus* mentioned by the Civilians, that of contracts, in consequence of any imaginary *quasi contract* of the offender *cum pœna*, as laid down by some writers, and so subjected to the rule applicable to them. The only contract in the case, is the marriage-contract subsisting between the parties; and from which alone, and not from the act of adultery itself, the right of the injured party to avail herself of it, for the purpose of obtaining a dissolution of the relation, certainly springs. Whether such a right is competent, will depend on what must be understood to have been previously fixed, by the law of the place of the contract, determining all the effects *consequentia et profluentia ex actu illo principali*, as expressed by the Civilians.

Denial of divorce to foreigners not prejudicial to our moral interests.

" I admit, that if it could be made out, that a refusal on our part to sustain adultery committed here, when regarded merely in a civil light, as a relevant ground of divorce in every case, would be repugnant to the interests of morality among ourselves; this would compel us to sustain it.

" But as to this, it would not be sufficient to establish that the law of England was, in this point, inferior in expediency to our own, or even that it did not appear so conformable as ours, to the rules concerning it, contained

* Voet, Lib. i. tit. 4. sect. 12, 16.

in the infallible standard of our common religion, in which both countries admit the relation to be founded. The rules there laid down, while they appear to me clearly to warrant a state granting this permission to her subjects, must be admitted not to be delivered as binding and imperative on all states,—but merely permissive even as to them. To many states, there may appear to exist strong grounds, arising from the situation of their different populations, for inducing them to forbear exercising the permission there conceded to them. They may hold that the accustoming their subjects to view the marriage relation as indissoluble—as an inseparable conjunction of interests, till death—affords the only effectual means of ensuring persevering endeavours on both sides, to secure mutual harmony and fidelity. It would be necessary, therefore, to establish that there were circumstances of a peculiar nature in the situation of this country, which rendered the refraining to enforce our own law on this head in every case highly prejudicial, and to strike deep at the root of the interests of morality amongst ourselves. But I am satisfied, for my own part, that this is by no means so clear; and that, at all events, any pernicious effects on the one side are so fully counterbalanced by evils of a different kind on the other, that I see no call here for any suspension of the usual principles of international law.

"It must be recollected, too, that divorce is in reality a deviation from the original institution of marriage, which was intended to be perpetual. "The perpetuity of marriage," says Lord Stair, "is evident, and the dissolution "of it is only natural by death."* Some writers, indeed, maintain that the act of adultery operates *ipso jure* a dissolution of the marriage; but it is certainly not so with us. "Adultery and desertion do not annul the marriage, "but are just occasions upon which the persons injured "may annul it, and be free; otherwise, if they please to "continue, the marriage remains valid." Parties may not only exercise the right of claiming a divorce or not

* Stair, B. i. tit. 4.

as they please, but they may renounce it at any time subsequent to the act of adultery; and, without any renunciation, they may even be deprived of it by the operation of the law itself, in the event of grounds existing for presuming a *remissio injuriæ*; all which make it a case totally different from that of claiming a *status*. All these circumstances seem to invalidate the idea of the right possessing, in the eye of law, such an essential and vital importance, as calls imperatively on the courts of this country to enforce it, even in the cases of foreign parties, where an application to that effect happens to be made to them.

**Case of Carrick.**

"This appears to me to do away the force of any argument that may be founded on the decision of the House of Peers, in the case of Campbell of Carrick. By that decision, it was found that no person can be barred or precluded from claiming personal *status*, by any previous renunciation of it. But, in the first place, our courts, in refusing a divorce, would not refuse it merely in consequence of any supposed previous renunciation of it by the parties, but because the law of the country, to which they were subjected at the time, did not admit of any such consequence or effect to follow upon it, in any event; or, as the Civilians express it, *profluere ex illo actu principali*. In the next place, and which is the most material point of distinction, a decision that a person could not be barred from claiming her *status* of marriage by any previous renunciation, would not determine the point, whether or not she could be barred either by her own act, or by the previous act of public law, from afterwards claiming her right to destroy it. The jealousy evinced by the decision in the case of Carrick, is not of previous renunciations, but of every thing destructive of the *status* of marriage; and, consequently, any weight attached to that decision in a question of the nature of the present, lies the other way, and would operate not in favour, but against the pursuer's being allowed a divorce.

**Alleged that the exercise of**

"It has been maintained, that we should not concede a point of this kind to England, as, in the case of Scotch

marriages, the English courts would not afford the parties the remedy competent to them by the law of Scotland; and that, in this way, such a concession on our part would not be met by a reciprocal concession on theirs. But if the assertion as to this is really just, I do not consider an individual state's refusal duly to apply the principle of *comitas*, as affording, on liberal or correct views, a sufficient ground for our refusing duly to exercise it on that account towards her. What an individual is, in relation to the state of which he is a member, individual states are in respect to the great republic of nations; and the maxims which ought to influence the private conduct of the former in their daily transactions, are somewhat analogous to those, which ought to regulate the general intercourse of the latter. The adjusting, in exact and nice proportion, the measure of liberality which we deal out to others, by what they appear disposed to evince in their turn towards us, is as little consistent with just and enlightened views, as it is with sound policy; and is as little calculated to bring others to a sense of what is justly due to us, in the one case, as it certainly would be in the other.

*comitas* not reciprocal towards us, on the part of England.

"Before concluding, and with a reference to the effect which refusing divorce to parties in the situation of those now before us is likely to have on the moral interests of this country, I would only observe, that if it is henceforward to be held as a fixed point, that all foreigners, without distinction, are entitled to a divorce according to our law, we ought to recollect that there is another way, in which we shall ourselves be accessory to the contamination of the moral feelings of our people, by our actually inviting the profligacy which occasions it. In a question of expediency like the present, what I am now alluding to seems to possess considerable weight. As matters now stand, a temptation is presented to all the profligate of our sister kingdom, to the very commission of the crime. It is evident, that it is not the denial, but the granting of divorces, that will occasion that influx of unprincipled strangers mentioned in some of the pa-

The effect of granting divorces to foreigners on the moral interests of this country.

pers given into Court by the pursuers, in the late cases of divorce. And I will venture to say, that there is no injury, as far as we ourselves are concerned, can result to us, from the denial of divorce to parties in the situation of those now before us, that can in any degree equal the shock which the public decency, and the moral feelings of this country, must infallibly sustain, by accustoming its inhabitants to the spectacle of this crime, under a new and unheard of aggravation. Among the cases which have of late years occurred, of divorces sued for in this Court, it is much to be feared, that they have witnessed this crime, the commission of which they had been hitherto led to consider as originating in the impulse of guilty passion, rise a step higher in the scale of moral depravity, and actually perpetrated with wilful, deliberate, and daring profligacy, for the express purpose of obtaining an object denied to the parties by the laws of their own country. This is to exhibit a specimen of depravity, so shameless and so utterly abandoned, as to admit of no adequate terms of reprobation; and, were the case at issue on this point alone, I think a court would do well to pause, before it pronounced a decision that could lead, even indirectly, to such alarming and revolting consequences.

Refuse to allow a divorce in the present case.

" But, independently of this, I am in every point of view decided for refusing the divorce sought for by the pursuer. In the *first* place, I do not hold the defender to have such a real domicil in this country as to give this Court a proper jurisdiction over him, in a *quæstio status* of any kind; and, *secondly*, admitting that he had a real domicil amongst us, so as clearly to found our jurisdiction, and entitle us to take cognizance of, and decide in regard to the case, I am of opinion, the remedy we ought to give to the pursuer should be regulated, not by our own law, but that of England, the country where the marriage founded on was contracted,—this extension of the exercise of *comitas* towards the foreign law, being completely recognised by our own, in other cases of a nature clearly analogous, and loudly called for on every

liberal and enlightened view of the principles of international jurisprudence." *

A bill of advocation was presented for review of this judgment, upon which Lord Meadowbank, Ordinary, pronounced the following interlocutor of remit :—" Having considered this bill and the proceedings, refuses the bill; but remits to the Commissaries, with this instruction, to alter the interlocutor complained of, to find that the relation of husband and wife, wherever originally constituted, and the parties therein connected, are entitled to the same protection and redress from the Courts of Justice in Scotland, as to wrongs committed in Scotland, that belong of right to that relation by the law of Scotland; therefore, to sustain the action at the

14th July 1814.

* The Reporter has thought himself bound, in justice to his brethren, to give their opinions at full length, and in their own words, as printed by the order of the Superior Court, which follows. Although, in the course of his duty, while officiating during the vacation of the other Courts, he laid this particular case before them, and delivered an opinion for sustaining the law of the domicil, and finding the allegation of the pursuer as to the domicil of the defender in this country to be relevant, he has not conceived that it would be proper also to repeat here the views which he then stated; because, if these are of any value, they appear in a more mature shape in the subsequent discussions, as corrected by the information he derived from his colleagues at this stage. He then, indeed, laboured under an impression, that, while the law of the contract was rejected as the rule of decision, by the Superior Court of Scotland, the law of the real domicil was likewise rejected, not only by the Twelve Judges of England, but also by the Superior Court of Scotland; and that the latter held the establishment of jurisdiction to be a sufficient ground for giving divorce *a vinculo matrimonii*, on account of adultery. Yielding to a supposed weight of authority so great, the opinions of his brethren being also different from his own, and the arguments of the Bar being directed to establish, that the possession of jurisdiction, at least when accompanied by a presumptive domicil, was enough to warrant the inference, that the municipal law should exclusively govern the decision; he is conscious that he did not then follow out the principles which seem to justify the preference of the law of the real domicil to the length requisite, in order to render the reasoning upon that side altogether consistent.

"instance of the complainer as competent, and to pro-
"ceed accordingly: but sists execution till the eighth se-
"derunt day of next Session; and ordains that the whole
"proceedings, comprehending the notes of the opinions
"of the Commissaries in process, be forthwith laid before
"his Majesty's Advocate, that, in case it may appear to
"his Lordship fit and regular to ascertain, by a proceed-
"ing at his instance, and a full discussion, whether the in-
"struction here given to maintain the extent of jurisdic-
"tion, required by the demand of the present action, be
"correct or not, there may be sufficient time to all con-
"cerned to reclaim to the Court; and if a reclaiming pe-
"tition is put in, recommends to subjoin thereto copies
"of the notes of the opinions of the Commissaries, to-
"gether with the interlocutor and notes of the Lord Or-
"dinary in the cases of Tewsh and Hillary, subjoined to
"the Faculty Decisions, in a note to No. 80, June 11,
"1811, to which reference is occasionally made in those
"opinions." *

His Lordship also, with this interlocutor, gave a note of his opinion in these terms: "The Ordinary has had re-
"course to the above mode of proceeding, because, while
"the instructions in the interlocutor flow from the opinion
"he is still under the necessity of entertaining, according
"to all his ideas of law and practice, it appears to him
"the only probable way by which the question may soon
"be tried after sufficient discussion by the Court. In the
"present case, the defender has not appeared; and the
"pursuer complains (he is informed) of being under pe-
"cuniary difficulties to carry on even that discussion

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* **This order was the first intimation any of the Commissaries received that their opinions had been made part of the process. At the time their judgment was pronounced, the pursuer's counsel, at the Bar, requested the use of the notes of the Judges, which was granted. As to the lodging of these notes in process, and appointing them to be printed, they were not consulted; but they did not conceive that they could, with propriety, make any objection to the order of Lord Meadowbank.**

"which the recommendation in the interlocutor may pos-"sibly lead to.

"If, however, a reclaiming petition is put in, the Or-"dinary hopes the observations in the notes in the cases "of Tewsh and Hillary will be more deeply considered, "and better sifted, than they appear to him to have yet been.

"The Commissaries hold that it is a condition of the "contract, creative of the relation in the present case, "that the marriage was to be indissoluble; but this is not "proved by the only circumstance urged in favour of the "doctrine, viz. that the law of England does not commit "to any court of justice authority to divorce *a vinculo* "*matrimonii*. By marrying in England, parties do not "become bound to reside for ever in England, or to treat "one another in every other country where they may reside "according to the provision of the law of England. Their "obligation is to fulfil the duties of husband and wife to "each other, in whatsoever country they may be called to "in the course of providence; and they neither promise, "nor have power to engage, that they shall carry the law "of England along with them, to regulate what the duties "and powers are which they shall fulfil and exercise, or "the redress which the violation of those duties, or abuse "of those powers, may entitle to. All of these functions "belong to the law of the country where they may even-"tually reside, and to which they unquestionably contract "the duties of obedience and subjection whenever they "enter its territories.

"And, farther, this supposed condition, even if it had "the will of the parties in favour of it by any stipulation, "however express, could derive no force from that cir-"cumstance. It is too obvious to admit of doubt, that "no quality can be created in the relation of husband and "wife by positive or implied agreement. The Commis-"saries certainly would not dismiss an action of divorce "because the parties, at intermarrying, had in the most "formal manner renounced the benefit of it, and become "bound that their marriage should be indissoluble. Nor "would it be any objection to a divorce, at the instance

"of a Roman Catholic, that his marriage was to him a "sacrament, and, therefore, by its own nature indissolu- "ble. These are all *pacta privatorum*, and cannot im- "pede or embarrass the steady uniform course of the *jus* "*publicum*, which, with regard to the rights and obliga- "tions of individuals affected by the three great domestic "relations, enacts them from motives of political expe- "diency and public morality, and nowise confers them as "private benefits resulting from agreements concerning "*meum et tuum*, which are capable of being modified "and renounced at pleasure. Accordingly, the case of "Campbell of Carrick, in rejecting the competency of "any personal objection to bar a pursuer of declarator of "marriage, establishes, by the highest authority, the in- "competency and inefficiency of any obligations, not "sanctioned by the common law, to operate on ma- "trimonial rights. It is obvious that personal objections "in bar of actions must have lain, could the benefits "claimed be either modified or renounced by the agree- "ments or deeds of parties.

"But if this supposed condition can derive no force "from the will of the parties, it seems palpably impossi- "ble that it should derive any from the *dicta* of the mu- "nicipal law, where the relation originated, so as to give "it efficacy *ultra territorium* where *jus dicenti impune* "*non paretur*. In the fulfilment of ordinary contracts, "as to *meum et tuum*, the *lex loci contractus* forms impli- "ed conditions of the contracts, and is accordingly adopt- "ed abroad as furnishing the means of construing them "aright. But this is merely a proceeding in execution "of the will of the parties, and not in the least a recogni- "tion of the authority of a foreign law. The case there- "fore is quite different where the will of the parties only "constitutes, and does not modify, the relation or its "rights; and where, of course, the municipal law, de- "riving nothing from stipulation or agreement, is merely "the positive institution of the sovereign, and cannot di- "rect the decisions of foreign courts on circumstances oc- "curring within their own jurisdiction.

"But it is said that, in the case of this defender, who is
"domiciled within the *imperium* of the law of England,
"as his personal succession, wherever situated, would be
"regulated by that law, his matrimonial obligations, and
"the redress of wrongs, relative to them, ought to be re-
"gulated by the same law. But it is to be observed that,
"in questions of succession, the *lex domicilii* regulates;
"because, as the right of testing by a positive declaration
"of will is recognised *jure gentium*, the presumed will of
"a defunct is also to be enforced by the same law, and
"that will must be gathered from the rules of intes-
"tate succession in his own country, which he probably
"intended should regulate its descent. Matrimonial rights
"and obligations, on the contrary, so far as *juris gentium*,
"admit of no modification by the will of parties, and
"foreign courts are, therefore, nowise called upon to in-
"quire after that will, or after any municipal law to
"which it may correspond. They are bound to look to
"their own law; and it is, with all deference, thought to
"be in a particular degree contrary to principle to
"make that law bend to the dictates of a foreign law, in
"the administration of that department of internal juris-
"prudence which operates directly on public morals and
"domestic manners. Would a husband in this country be
"permitted to keep his wife in an iron cage, or beat her
"with rods of the thickness of a Judge's finger, because
"he had married her in England, where it is said this may
"be done? Or would a marriage here be declared void
"because the parties were domiciled in England, and
"minors when they married here, and of course incapable
"by the law of that country of contracting marriage?
"This category of law does not affect the contracting in-
"dividuals only, but the public, and that in various ways;
"and the consequences would prove not a little inconve-
"nient, embarrassing, and, probably, even inextricable, if
"the personal capacities of individuals, as of majors or
"minors, the competency to contract marriages, and in-
"fringe matrimonial obligations, the rights of domestic
"authority and service, and the like, were to be qualified

" and regulated by foreign laws and customs, with which
" the mass of the population must be utterly unacquaint-
" ed. Accordingly, the laws of this description seem
" nowhere to yield to those of foreign countries; and, ac-
" cordingly, it is believed, no nation has ever hitherto
" thought of conferring powers and forms on its courts of
" justice adequate for enabling them to exercise over fo-
" reigners regular authority for enforcing the observance
" by them of the laws of their own country, when expa-
" triated. In fact, the very same principles which pre-
" scribe to nations the administration of their own crimi-
" nal law, appear to require a like exclusive adminstra-
" tion of law relative to the domestic relations. Hence,
" in both England and Scotland, the most regular con-
" stitution abroad of domestic slavery was held to af-
" ford no claim to domestic service in this country, though
" restricted for only such service, and under such do-
" mestic authority, as our laws recognised. The whole
" order of society would be disjointed, were the po-
" sitive institutions of foreign nations, concerning the
" domestic relations, and the capacities of persons re-
" garding them, admitted to operate universally, and form
" privileged casts, living each under separate laws, like the
" barbarous nations during many centuries after their set-
" tlement in the Roman empire.

" The Ordinary does not know whether it is worth ad-
" ding, that though nothing is said on the head in the in-
" terlocutor on the bill, he does not perceive that, even
" granting the premises of the judgment complained of,
" it would follow that the action ought to have been dis-
" missed. Is there any rule of Court to prevent a party
" claiming divorce *a vinculo* to restrict his demand to se-
" paration *a mensa et thoro*? If not, there seems nothing in
" the nature of the thing to prevent it,—a verdict finding cul-
" pable homicide is competent on a libel charging mur-
" der.

" The Ordinary thinks it necessary to add, that he is
" quite certain there is a great misapprehension, by one of
" the Judges, as to President Blair's opinions respecting

"the present question; and the Ordinary took an oppor-
"tunity of stating this in writing to another of their num-
"ber."

Note (B.) p. 51.

Collusion, it is evident, is more likely to take place often in actions of divorce than in causes of any other description. But the parties who commit this offence against the course of justice have such facility of concealment, and the inquiry is of so difficult and unpleasant a nature, that the records of the Consistorial Court of Scotland do not perhaps exhibit a single attempt to detect this mal-practice, which has been successful in the result. When it became evident that English parties had very powerful temptations thus to agree to defraud the law of their own country in all cases where a husband and wife entertained a mutual desire to dissolve their marriage, and when it appeared that no other obstacle could be opposed with effect; the Commissaries, however, did, in the first place, as, for example, in the case of Lolly, and in others about the same date, extend the inquiries as *to collusion* under the oath of calumny, which were regulated by no statute, and rested upon the authority merely of their own practice. Thus the *formula* of that oath now in use was made to embrace all the following points: "Compeared A. B. pursuer, who, &c. depones, That
"there has been no concert or collusion between him and
"the said defender in raising this action, in order to obtain
"a divorce against her, nor does he know, believe, or
"suspect, that there has been any concert or agreement
"between any other person on his behalf and the said de-
"fender, or any other person on her behalf, with a view
"or for the purpose of obtaining such divorce. All
"which is truth, as the deponent shall answer to God."

Still, however, there was reason to think, that, by previous arrangement of their conduct, parties pursuers who were aware that this oath must be taken, found no great difficulty in preparing for that test. Occasionally indications appeared, in the course of the procedure, of opportunities to discover whether a concert had really taken place

between parties in this situation to obtain a divorce, as an object both of mutual desire and mutual endeavour. But the Judges of the Court could not themselves prosecute any extrajudicial investigation, or do more than decide upon such matter as might be laid before them.

The Procurator-fiscal was one of the officers in this judicature whose name still appeared as for the public interest, particularly in all cases of divorce, and who originally had performed many active and important duties, although his situation had become a mere sinecure.

For example, in the earliest part of the judicial record which is extant, the Procurator-fiscal appeared to have been in regular attendance at every sederunt of the Court as an active officer, and sometimes the cause proceeded at his instance as the leading party. Thus the record bears, that, on the 11th of July 1565, an action was commenced upon a "precept by Henry Kinross, Procu-"rator-fiscal to our Sovereign Lady," to set aside the second marriage of "Custine Stevenson" with "Agnes "Pollock," the paramour, for adultery with whom he had been divorced from his first wife, who gave *her concurrence* to this action of the Procurator-fiscal, and decree was pronounced accordingly. This proceeding, too, seems to have been sanctioned by the common law antecedent to the act 1592, cap. 117, which assumes marriages between persons guilty of adultery to have been previously, and by their own nature, unlawful in this country.

The original commission to the first Procurator-fiscal of this judicature has not been found, but, from the commissions to the Procurators-fiscal of the Consistorial Court, which are preserved in the record of the office of the Privy-Seal, it appears, that, on the 4th September 1578, King James VI. by special commission, constituted Mr Robert Danielston, as successor to Mr Henry Kinross, * "his Majesty's Procurator-fiscal, in all ac-"tion and causes concerning his Hieness, and his in-"teres befoir the Commissaris of Edinburgh, givand to "him ye office quairof, with all fees, casualtys, and du-

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* Privy-Seal, book xlv. fol. 74.

"ties belonging yairto, during all the dayis of his life, "sicklike as umquhill Mr Henrie Kinross, last Procura- "tor-fischal had, for using and exercing of the samen "of before, with power to the said Mr Robert be him- "self and his deputes, quhome our Soverane Lord "gives him power to mak, and for quhilk he shall be "holden liable, to use and exerce the said office in all, and "be all things, and to intromit with, and tak up all fees and "dueties pertaining yairto, sicklike, and alse free as the "said umquhill Mr Henry usit and excercit the samen "of before, during the space foresaid." *

The subsequent commissions likewise refer to those preceding.

The Commissaries having always had the power, and been in use to make regulations relative to the duties and practice in their own judicature, under the title of Acts of Sederunt, therefore, (21st May 1813,) directed this officer to attend examinations as to collusion, and when there might appear "reasonable ground of suspicion, to "make such inquiry, and move for such investigation "as he finds to be legal and competent, to detect col- "lusive agreements, in cases of divorce, entered into, "not only by the parties themselves directly, but also "through the medium of their agents, or persons in their "confidence;" and likewise required the oath of calumny to be taken in the solemn consistorial form, as it is administered to witnesses.

In the case of Homfray against Newte, the pursuer, when examined as to collusion in this form, answered every question that was put, fully and explicitly, so far as regarded her own knowledge. Nor was there any reason to doubt the candour of her statements. But she mentioned that she had, for some time, during a separation from her husband, the defender, received an yearly allowance for her aliment, the rate of which had varied,

* Privy-Seal Record, book cxiii. fol. 30. Royal Commission to present Procurator-fiscal, 8th March 1805.

and had been settled with him from time to time, not by herself, but by her father, who attended on her behalf during the dependence of the process at this stage, and by her attorney. According to her account, the communications, whatever these were, which had taken place with her husband, on her concerns, appeared also to have passed, not with herself, but with one or other of these gentlemen upon her part, and, in general, had not even been explained to her.

The Procurator-fiscal having attended her examination, presented a minute, praying that the father of the pursuer might be examined as to those particulars, in order to ascertain, whether there had been any collusive concert or agreement made by him, as acting for his daughter, with the defender.

Upon considering this application, with answers, and hearing counsel fully on the point, the Commissaries (18th June 1813). " In respect it appears that the pur-
" suer, in her deposition *de calumnia*, has made a refer-
" ence to her father, Sir Jere Homfray, as to various par-
" ticulars, which may be of importance, but as to which
" she states that she herself has no knowledge: There-
" fore, before farther procedure, appoint the said Sir Jere
" Homfray to appear in Court, and be judicially examin-
" ed upon all pertinent interrogatories, tending to explain
" the motives and reasons which influenced the parties or
" their advisers for their behoof, in instituting and carry-
" ing on the present action, and grant warrant for citing
" him accordingly."

A bill of advocation was presented for review of this interlocutor, which Lord Reston, Ordinary, took to report, with memorials for the pursuer, and for the Procurator-fiscal; and the following judgment was pronounced (18th February 1814): " Having advised with the
" Lords of the Second Division, remits to the Commis-
" saries, with instructions to alter their interlocutor, and
" to allow the process to proceed, as accords; and that
" no farther investigation, with regard to the supposed
" collusion, shall take place; also to find the Procurator-
" fiscal liable in the whole expences incurred upon the

"point in dispute: Finds him liable in the expences in-"curred in this Court, of which appoints an account to "be given in, and, when lodged, remits the same to the "auditor to be taxed."

In the following case of St Aubyn against O'Brien, Isabella Milligan, one of the pursuer's witnesses, in whose house the crime of adultery had been committed by the defender (29th May 1813), spontaneously made an unexpected statement in her deposition: "That when Captain O'Brien "came to the deponent's house, he told the deponent what "had brought him there, and what had brought him to "Scotland, and the purpose that he had come for, &c.: "That Captain O'Brien also told the deponent that his wife "and her friends did not dispute the *charge* against her" (an allegation of the defender to the witness as to improper correspondence of his wife, which he pretended that he had detected) "upon these letters; but that it had been "proposed by them that he, Captain O'Brien, should "come down to Scotland, to enable her to obtain a di-"vorce, and that this measure was agreed upon be-"tween him and his wife's friends. Depones, That "in a conversation before his wife came to Scotland, "Captain O'Brien told the deponent that his wife was "to come here, and when she was to come here, and "also that the cause for her divorce was put under the "care of Mr Donald M'Lean, writer to the signet; and "he afterwards told the deponent, upon another occasion, "that his wife had actually come to Scotland, and was "lodging in George's Street of this city," &c.

The Procurator therefore moved for the judicial examination of Mr M'Lean, in order to ascertain whether these averments upon oath of the witness were true. This application was not opposed, and the Commissaries appointed that gentleman to be examined accordingly. He did not petition against this appointment, in obedience to which he attended with his counsel, and although the latter entered upon the record a request for leave to state his objections to this proceeding, none was ever offered, and he *inter alia* declared (3d July 1813), "That he was first "consulted on this case by letter from Mr Davie, an at-

" torney at Plymouth Dock, on the part of the pursuer," &c : " That he received another letter from Mr Davie, " stating that the defender was to be in Scotland by a " particular time, and desiring the declarant to look out " for him," &c : " That when Captain O'Brien came here, " which the declarant thinks he did soon after the time " specified in Mr Davie's letter, Captain O'Brien sent a " message to the declarant to inform the declarant where " he lodged, and requesting the declarant to come and call " upon him," &c : " That the declarant accordingly did " wait upon Captain O'Brien. Declares, That Captain " O'Brien was found at home by the declarant, and gave " no other reason for sending his message to the declarant, " to whom he was an entire stranger, but that Mr Davie " had mentioned the declarant to Captain O'Brien as " likely to pay Captain O'Brien some attention at Edin- " burgh, where Captain O'Brien said he had come mere- " ly for pleasure and to pass a little time : That in the " course of their acquaintance here, Captain O'Brien did, " during a conversation with the declarant, introduce the " subject of his own situation with his wife, and the de- " clarant stopped him when detailing the circumstances, " by stating that he, the declarant, was Mrs O'Brien's " agent, and that it was improper to make any such com- " munication to him. Declares, That Captain O'Brien, " however, said that he supposed his wife would raise an " action of divorce here, and that he understood she had " formerly intended to do so in England. Declares, That " at this time the summons was not executed, and the de- " clarant does not think that Captain O'Brien spoke to " him upon any other occasion about the divorce until it " was executed," &c.

It occurred to one of the Judges when this declaration came to be considered, that, by the law of Scotland, it was necessary, to render it evidence, that it should be verified by Mr M'Lean upon oath, and the Court therefore (9th July 1813), " before answer, ap- " pointed Mr M'Lean to appear in Court, in order to his " being examined upon oath in the matters stated in said " judicial declaration, and to answer all other questions

"which may be put to him by the Court, tending to elu-
" cidate the same; also to produce the letter received by
" him from Mr Davie, in September last, and mentioned
" in his said former declaration, and his letter-book, from
" which the copy of his answers already produced was
" copied, in order that the same may be compared by the
" Court; and further, to produce all other letters receiv-
" ed by him from Mr Davie, or any other of the friends
" of the parties to this action, and authentic copies of his
" own letters to them, and all other writings in his custo-
" dy, or to which he has access, which, directly or indi-
" rectly, tend to explain or elucidate the views of the par-
" ties or their friends, in advising, instituting, and carrying
" on this action."

A bill of advocation was then presented by the pursuer, in which she was made to plead thus, as herself speaking in the first person:

" I. It has been customary for the Commissaries, in actions of divorce, to examine the parties *de calumnia*. Al though this be a very unusual preliminary in judicial process, I did not object to it. I have complied with the order of the Commissaries, appeared in Court, and undergone an examination on oath, answering, in the course of a very long and painful scrutiny, every question which their Lordships could propose, and leaving upon their minds, I have reason to believe (from my appearance and manner, and from the marks of truth which my whole examination displayed), a full impression that all was fair on my part, and that, in acknowledging my preference of a trial before their Lordships to a trial in the English Courts, I had disclosed all that was peculiar in my case. When, after this oath has been administered, and this examination undergone, I find myself obstructed by the detestable arts of the defender, and of common prostitutes hired to sow suspicion in the minds of my Judges, and when I find that the Commissaries have left the usual course of proceeding, to hunt out those suspicions by a parole proof, the duration of which cannot be anticipated, I humbly venture to state, that, with my oath *de calumnia*, the inquiry should

have stopped, and that my action having been found competent, and a proof allowed and taken, it is now too late to go into any such inquiry. I am not now upon my trial for perjury, nor am I bound incidentally to submit now to a proof by witnesses. If this inquiry by the examination of witnesses was to take place at all, it is submitted, that it ought to have been entered upon previously to my being put upon oath. But it is further conceived, that this inquiry into collusion, so far as it is sanctioned by the law, is to be conducted not in the way of a proof by witnesses, but only by the examination of the parties; and it comes to be a matter of infinite consequence to have this matter settled, from some late proceedings of the Commissary Court. That Court has, by act of sederunt, charged their Procurator-fiscal to attend as a party to all actions of this sort, and to investigate collusion, at the expence of the parties. In every case, therefore, a previous inquiry, of the most oppressive nature, is now to be expected, instituted by the Procurator-fiscal of Court, to the infinite delay of the remedy of divorce in cases of adultery, and attended with an expence so enormous, as (there being no party to pay that expence when improperly incurred) to form a bar to this remedy, contrary to the natural course of jurisdiction and the principles of the law.

" II. But even were this a legitimate subject of investigation by witnesses, surely the Commissaries have here proceeded in a manner a great deal too inquisitorial to be sanctioned by this Court. They have ordered the examination of my confidential agent, upon facts disclosed to him in that capacity, and called upon him for production of letters which, in his confidential character, he has received from me and from my agents in England. This, I submit, is a course of inquiry which cannot be taken against me. There are deposited with that agent, verbally and in writing, secrets which I will not have disclosed, which even my husband, as an adverse party against me, cannot force me to disclose, and which no Judge (with all humility I speak it) has power by the law to wrest from me. It is now quite established, both in this coun-

try and in England, that a confidential agent cannot be examined upon circumstances, or for production of papers communicated to him in that character; and this proceeds not upon any supposed interest or delicacy on the part of the agent, but on the ground, that it is *a privilege of the client*, with which no agent can dispense, as Mr M'Lean, apparently under a sense of duty, has thought himself entitled or bound to do.

" This is grounded upon the great principle of expediency, that, to invade the privilege of secrecy between a person and his agent, is to destroy at once all that necessary confidence, without which the affairs of life, and judicial business in particular, cannot be carried on. This doctrine was long ago laid down by Sir George Mackenzie in his Commentary on the Statute of James VI. Parliament 23, c. 18, and although there are no very express cases to be found in the books, the principles which that eminent lawyer has so well explained have uniformly directed judicial proceedings in this country.

" In England, the case has been tried, and decided very solemnly, in the case particularly of Wilson against Restall, in the King's Bench, Term Rep. Vol. IV. p. 753. The general doctrine of the case is, " That *if any matter* " *be disclosed to the attorney in the cause, he cannot be* " *permitted to give it in evidence in that or any other* " *action*." Judge Buller said, " It is a subject of just " indignation, where persons are anxious to reveal what " has been communicated to them in a confidential " manner, and in the case mentioned, where Reynolds, " who had formerly been the attorney of Mr Petrie, but " who was dismissed before the trial of the cause, wished " to give evidence of what he knew relative to the sub- " ject, *while he was concerned as the attorney*. I strong- " ly animadverted on his conduct, and would not suffer " him to be examined; he had acquired his information " during the time he acted as the attorney, and I thought " *that the privilege of not being examined to such points,* " *was the privilege of the party, and not of the attorney,* " and that that privilege never ceased at any period of " time. In such a case, it is not sufficient to say that

" the cause is at an end, the mouth of such a person is " shut for ever."

" Now, in the present case, it is the confidential communication, orally and in writing, which had been made to Mr M'Lean, that the Commissaries are about to force that gentleman to disclose, and if the rule which has been now alluded to has any force at all, it must protect me against such disclosure, however willing Mr M'Lean may be to obey the order of the Court.

" On the whole, I humbly submit to your Lordships, that there is here no ground on which the Commissaries can refuse to proceed in deciding on the merits of the case; that the story told by Captain O'Brien never can be suffered to defeat me of my remedy, or to serve to him as a protection; that the inquiry into which the Commissaries have entered, is not in itself competent as matter of parole proof, and, most especially, after the oath *de calumnia* has been taken; and, finally, that the Commissaries cannot force from my agent those confidential communications, of which I am the sole judge whether they ought to be disclosed."

Deterred by the decision of the Superior Court against him, by which he was subjected in the expences of process, in the case of Newte, the Procurator-fiscal now made no appearance, and this bill being advised *ex parte*, Lord Reston, Ordinary, after reporting to the Court (3d March 1814), " Remitted to the Commissaries to recal " their interlocutor, authorizing the examination of Mr " M'Lean by oath or otherwise, as to any confidential " communications with his client, and to proceed in the " cause as accords."

This interlocutor was accordingly obeyed, and when the Commissaries came to dispose of the whole cause, they, by their judgment, found (16th December 1814), " That it is incumbent upon them, in the first place, to " dispose of the allegation of collusion which has occur- " red in this cause: Found, that this charge of collusion " arose in the course of the pursuer's proof, from the de- " position of Isabella Milligan, who stated upon oath,

" that the defender himself had expressly informed her,
" that collusion had been carried on through the inter-
" vention of Mr Donald M'Lean, the pursuer's manda-
" tory: Found, that as the defender's presence in this
" kingdom further appeared to the Court to be with the
" view of founding this action, which he likewise allowed
" to proceed in absence, they conceived it to be their
" duty, in a case so very anomalous as that of an action
" of divorce, brought under circumstances presumptive
" of collusion, and where a defender may thus have an
" interest not to oppose but to aid a pursuer, to depart
" from the ordinary rules of evidence, and to resort to Mr
" M'Lean's examination, there being here a *penuria tes-*
" *tium,* indeed an impossibility of obtaining any other
" evidence, arising from the very nature of the point to
" be investigated. But found that the pursuer having
" presented a bill of advocation against the competency of
" examining Mr M'Lean as a witness, Lord Reston, Or-
" dinary, pronounced thereupon this interlocutor:" [Here
follows the interlocutor.] " Found, that although this in-
" terlocutor does not prohibit the Court from having re-
" course to other means for the further investigation of
" the alleged collusion, they are not aware of any other
" by which the investigation can be pursued, but by
" taking the evidence of Mr M'Lean, and employing the
" Procurator-fiscal of Court, who, as a party for the pub-
" lic interest in every action of divorce, appears to possess,
" *ex officio,* a right to watch over every thing connected
" with the purity of judicial procedure. But found, that
" in the case of Homfray against Newte, upon a bill of
" advocation against the competency of employing the
" Procurator-fiscal, for the detection of collusion given
" into the Supreme Court, a remit was made to this
" Court by Lord Reston, after advising with the Lords
" of the Second Division." [Here follows the interlocu-
tor.] " On the whole, therefore, found, that, although in
" the opinion of the Court there are strong presumptions
" of collusion in this case, yet the actual existence of it
" has not been established, and the Court is precluded
" from all further investigation in regard to it."

The objection of collusion, unless when evidence shall arise from the oath of the pursuer, may be considered as thus laid to rest; and perhaps it was vain to expect that any effectual obstacle could be opposed to fraudulent devices against the English law, in cases of divorce, by judicial inquiry upon this head. But it appeared to the Judges of the Radical Court, that the opinion of Sir George Mackenzie, referred to by the pursuer in her bill of advocation, did not relate to the question, whether communications, with regard to an unlawful act then in contemplation, were to be regarded in the same light as consultations for defence in the trial of crimes even between the party and the agent of that party in the cause; and that the pursuer's argument could derive no support from the terms of the statute to which Sir George Mackenzie's Commentary referred. The English decision again seemed to relate to matter disclosed to the attorney "in the "cause," and not to collusive practices, which had no other connection with the judicial proceedings, except that their object was to pervert the course of justice.

In the institutional works of our law, nothing direct upon this subject was found. But there seemed to be a variety of precedents. Thus, in the case of Macleod of Cadbole against Macleod of Geanies, * the law was declared by the Supreme Civil Court of Scotland (in the words of Lord Kilkerran) to be, "That, although, after "an agent is employed in defence of any action, he can"not be obliged to depone upon any thing communica"ted to him by his client in the course of the process; "yet no agent can decline being examined upon the fact "of his undertaking a criminal employment. Suppose, "in the case of forgery, a copy of a deed had been sent "to the agent, and he desired to cause forge a deed in "terms of it, he could not, in an improbation, decline be"ing examined on that fact." The decision, too, in that case, was a very solemn one, pronounced upon report by the Lord Ordinary, and the question related only to the

* 21st December 1744, Kilk. Decisions, *voce* Witness, No. 7, p. 598.

expences incurred in processes of suspension and multiplepoinding, which, it was alleged, had been occasioned by the procuring of arrestments collusively.

To prove this fact against his client (says Lord Kilkerran), " Geanies, among others, cited John Mackenzie, " writer, Cadbole's agent, and he objected that his agent " could not be obliged to depone against him. But the " Lords repelled the objection, and found John Macken" zie ought to depone upon all facts and circumstances " that he knows, with respect to Cadbole's endeavouring " to procure the arrestments, prior to the time that the " complaint anent the said arrestments was moved in the " Court of Session in the process of suspension." A reclaiming petition, in the agent's own name, was likewise refused, and Lord Kilkerran says (p. 599), " What the " Lords went upon was, That, although, after an agent " is employed in defence of any action, he cannot be ob" liged to depone upon any thing communicated to him " by his client in the course of the process: yet no agent " can decline being examined upon the fact of his under" taking a criminal employment. Suppose, in the case " of forgery, a copy of a deed had been sent to the agent, " and he desired to cause forge a deed in terms of it, he " could not, in an improbation, decline being examined on " the fact. As little in this case could he decline being " examined, whether the impetrating the arrestments had " been known to him before the question was moved, in " defence of which he was afterwards employed, or whe" ther he had advised the impetrating thereof."

In the subsequent case, of the Earl of March against Sawyer (21st November 1749), also reported by Lord Kilkerran, the Court of Session had no doubt " sustained " the objection to Dickie," who had been adduced as a witness to prove the delivery of an heritable bond for L. 10,000 Sterling, by the Earl's mother, to Anthony Sawyer, her second husband, as her disponee, that he was Mr Sawyer's agent. But upon appeal, the House of Peers reversed this judgment; and, according to Lord Kilkerran's report, " When the cause came again into " Court, upon the question moved, whether the judgment

"of the House of Peers was to be understood as only al-
"lowing him to be received upon the delivery of the deed,
"or if he was allowed to be received at large? The Lords,
"in respect there was no limitation in the judgment,
"found he was to be received at large.""

In another case, of Maclatchie against Brand, 27th November 1771, Fac. Col. Archibald Malcolm, writer in Dumfries, was also found by the Court of Session to be inadmissible as a witness, because he had given advice to the defender, and corresponded with his agent upon the cause. But this judgment likewise was reversed upon appeal, and the evidence of Malcolm allowed to be received. Accordingly, in the subsequent case, of Scott against Caverhill, 19th December 1786, Fac. Col. Mr Cornelius Elliot, writer to the signet, was, by an unanimous judgment of the Court of Session, admitted as a witness to support a deed of settlement which he had prepared as agent of the testator, and in an action to set aside which he acted as agent for the defender, by whom he was adduced.

In further explanation of the reasons by which the Commissaries were influenced in this proceeding, it must likewise be observed, that Mr M'Lean was precisely in the situation of Malcolm, the witness in the reported case which has been referred to. He held a mandate from the pursuer, but he was not a solicitor in the Consistorial Court, therefore could not be her agent there. His evidence, too, was necessary, if the fact sworn to by Milligan was to be made the subject of any inquiry.

## Note (C.) p. 55.

THIS cause was considered by the Commissaries in private, according to the usage which had prevailed in this Court for upwards of 150 years before. It was therefore impossible for the counsel to give the Lord Ordinary any further information as to the grounds of the interlocutor, or opinions of the majority of their number, in conformity to which it had been pronounced, than its own terms conveyed.

A single Judge, as himself constituting a quorum, by

monthly rotation then held the Court in public, and all interlocutors, after these had been read by the clerk, were merely subscribed by him upon the bench. In cases which he might deem of peculiar difficulty, as upon the present occasion, these interlocutors were indeed previously prepared by general consultation of the whole Judges, called at his desire. But whether framed by himself, without assistance, or by the direction of the whole Court, it was not then usual for the officiating Judge to add explanation *viva voce*. The rest of his duty in public was to go through the roll, and hear and dispose of motions.

Upon examination of the earliest part of the record which is extant, it did, however, appear, that in the year 1565, and for some time afterwards, Consistorial causes had been often considered and judged by all the Commissaries sitting together *in judicio*, and in presence of all other members of the Court, and spectators, to whom it was open. But, in constituting this tribunal at the Reformation, the quorum had not been changed, and the various Consistorial Courts of the Catholic provinces and dioceses in Scotland had been held by a single Judge as Official. In this respect, the usage, in process of time, consequently reverted to its original state. Thus, although there were now four Judges, each of them, during his rotation of duty, held the Court singly, and, upon applications of parties, reviewed the interlocutors of his predecessor, and left his own to be reviewed in the same manner, by the succeeding Commissary.

At the date of the Revolution, it was farther observed, that the Civil, Criminal, and Consistorial Tribunals of Scotland, were in use to deliberate upon the decision of all causes entirely in private. But the statutes of the Scottish Parliament, anno 1693, cap. 26 and 27, opened the doors of the Supreme Civil and Criminal Courts of this kingdom to the public. Imitation of their example, without any special enactment, also introduced the same salutary practice in the inferior jurisdictions of these great departments.

Although the Consistorial Court likewise was held in public, on the days of *sederunt*, and the Court of Review has ever since discussed Consistorial causes in the same

manner as other questions, the Judges in the Radical Tribunal of this department continued at the date of the interlocutor in the case of Tewsh, to observe the old practice of giving their opinions only in consultation with each other, when specially summoned for the purpose, and in private. This circumstance, too, may be accounted for, both by the unpleasant predicament in which the officiating Judge was placed, either as reviewing an interlocutor of a colleague, of equal rank and jurisdiction with himself, or leaving his own to be reviewed in the same manner in his absence, and from the tenor of the original instructions, as to taking of proofs in secret.

About this time, however, the individuals in office had come to be convinced, that the practice of singly deciding and reviewing Consistorial causes was extremely inexpedient, and also that it would be of utility to decide all causes before them, which might not require privacy from their peculiar nature, in public, like the other Courts of Justice. To depart from the previous usage, in these respects, seemed also, after the most deliberate consideration, to be competent and lawful.

Under these impressions, the dissenting opinion in this case of Tewsh, for sustaining the jurisdiction, was given in public. For six years past, all subsequent Consistorial causes have been considered by the whole Bench. And, during the Sessions of the Courts of Common Law, the Commissaries have sat together, and delivered their opinions in public. The consequences of this change have likewise hitherto seemed to be altogether favourable to the due administration of justice in this department.

The opinions of the Judges, in the cases subsequent to that of Tewsh, which are here reported, may be compared, as they are given in this volume, with the interlocutors which they explain, with the notes, printed by order of the Superior Court, in an intervening case (Gordon against Pye), and with the notes of those practitioners, who may have attended to the whole proceedings, during the course of the last six years, in the questions relative to English marriages, and where English and Irish parties were concerned. It is believed, that not a single view or illustration will be found in the reports, which

had not been stated in the course of the actual procedure. Indeed, more than three-fourths of the materials originally collected have been laid aside in this compilation. Freedom has, however, been used in the arrangement, to introduce, as seemed most convenient, each argument, whether as originally used, or repeated or referred to. And names, unknown beyond the limits of their own jurisdiction, as judicial authorities, have been omitted as unnecessary. To the reader, whose only object is information, these particulars are of no importance. But, in candour, the Reporter was bound to state them, and if it can appear improper to have published in this form, he can only now regret, that his own impression has been different.

It may be proper to observe farther, that, especially in the three last cases reported of Levett, Forbes, and Rowland, the judgments in the Radical Court were intended to convey an abstract of all the points which these embraced, and the supposed necessity of that attempt arose from the following difficulties and peculiarities of the situation in which this judicature stands.

In Consistorial causes, no defender is held as confessed, because he declines or withdraws appearance, and judgment is never given, without evidence and cognizance of the merits of the action, although there happens to be no Contradictor. It is only thus that the *status* of marriage, and rights of legitimacy and succession, can be preserved in security against the effects which might otherwise follow, from decrees obtained by collusive and fraudulent practices of parties. But, in the courts of common law, and in the exercise of ordinary civil jurisdiction upon patrimonial questions, the necessity for this unceasing vigilance does not exist, and it is well known that the consuetude of these courts is quite different. Besides, all parties, dissatisfied with a judgment of the Commissaries, which is final upon the cause, in the Radical Court, may apply for review of the Court of Session. If not opposed, they also have an opportunity, in their bills of advocation, and other pleadings *ex parte*, while they observe the rules of judicial debate, to frame their statements and arguments, in the way which seems most

likely to accomplish the object of obtaining an alteration of the original sentence.

### Note (D.) p. 122.

In order to prove, that, by the law of Scotland, it is of no importance to the action of divorce, whether the crime of adultery has been committed in this country or in any other part of the world, it seems sufficient to refer to the Decisions in the cases of Lauder against Vanghent, in this Appendix, p. 250; of Montgomery against Marshall, ib.; of Gordon against Englegraaff, p. 251; of Graham against Wilkieson, p. 252; of Scott against Boutcher, ib.; of Lockhart Wishart against Murray, p. 258; of Urquhart against Flucker, p. 259; of Macdonald against Fritz, p. 273.

But the whole record abounds with instances of the same kind; while, upon the other hand, no trace has been found of even an argument having been maintained, in any case antecedent to those now reported, in order to prove that the *locus delicti* was of importance, either to the suit or to the defence in a civil action of divorce for adultery, depending before the Consistorial Court of Scotland. It is in loose expressions of interlocutors only, that the circumstance of locality as to the crime seems to be founded upon, as if it were essential. But in the judgments actually pronounced, no distinction on that ground has ever been made.

### Note (E.) p. 123.

By the law of Scotland, *aditio hæreditatis* is essential *in mobilibus*, as well as with respect to heritage, to vest the estates of persons deceased. By the present rule, in the first of these cases, it is not the service of the edict to publish the intention of the party claiming the right of administration as executor; and, in the second, it is not the purchase and publication of the writ termed a brief of service; but it is the decree of the Consistorial Court styled confirmation, in the one, and the verdict returned by the inquest in the other, which accomplishes the object. It is also by the form of confirmation that a creditor

in Scotland attaches the personal property of his deceased creditor for his payment. Accordingly, those entitled to claim the effects of persons deceased, cannot compel delivery or payment, and cannot vest in themselves the right, so that it may transmit to their descendants, without the decree of the Consistorial Court.

In performing the duty requisite for this purpose, the Judges have cognizance of the validity of the will or of the evidence of propinquity, or of debt, by virtue of which the party claims to be named executor testamentary, or executor dative as nearest of kin, or executor creditor. But they have no power to name an administrator *ad interim* during the discussion, to any other effect except that of opening and sealing up repositories, taking inventories, and selling articles that are liable to perish, or for payment of funeral expences, and other claims which must be immediately discharged.

Hence a necessity arises to grant power of administration with the least possible delay ("*primo venienti*," according to the common phrase), by trying and deciding questions both of law and of fact, frequently very difficult, relative to the most important rights, and which parties not immediately entitled to succceed, but next in expectancy, have often an interest to procrastinate. As applications may occur at any time, which cannot be put off without hazard often extremely serious to the parties concerned, from the uncertainty of human life, the Consistorial Court must therefore sit through the whole year.

Note (F.) p. 131.—*Vide* Note (D.)

THIS point has been considered of such importance in the discussion of the cases reported in the text, that it may be proper to add a few observations upon it.

According to the opinion of the Commissaries, it is not necessary to found the conclusions in any civil action, that the facts or transactions from which it arises should have taken place within the territory of the jurisdiction. It is only necessary that these should, in their own nature and quality, be relevant to support the conclusions, either according to the rule of the municipal law of that territory,

or according to the principles of international law there recognised, which require that effect should be given to foreign contracts and obligations. On the contrary, it is generally essential, to found a criminal action, that the *locus delicti* should be within the province of the jurisdiction.

But crimes and delinquencies frequently give rise to civil debts and obligations, and thus the nature of the suit has sometimes been confounded with its origin. It is, however, clear, that the *criterion* which distinguishes a civil from a criminal action, is the quality of the conclusion, as being for justice or redress to an individual party, or to the public, and as maintained at the instance of a private party, in the one case for mere performance or reparation to a creditor or claimant, but, in the other, for the public, and for punishment and example.

Accordingly, assythment, an action of the Scotch law in every view purely civil, is competent for pecuniary reparation to the kindred of a person who has fallen, whether by murder or by culpable homicide. The damages concluded for by this action are likewise equally due by the guilty, whether he has been tried and punished criminally, or been outlawed, or has obtained remission. For such were the express judgments of the Court of Session, in the case of Machargs against Campbell, 24th February 1767, in which an officer, who had been cashiered by a court-martial for homicide, was found liable in assythment; and in that of Leiths against the Earl of Fife, donator of escheat, January 8, 1768, where, although the murderer had been indicted and outlawed, the assythment was likewise found due, because, in the opinion of the Judges, as reported, the term " means the reparation that " is due to an innocent man who is hurt by a criminal act. " In that sense, reparation or assythment is unquestionably " due. If a man who is culpable only be liable in da- " mages, what doubt can there be of his being liable when " the damages are occasioned by his being guilty of a fla- " grant crime?" Indeed, the only reason why a civil action for damages does not follow upon every patrimonial injury produced by crime, is the general inability of the

delinquents to pay. But the right has always been recognised, and is undeniable. Thus the act of the Scotch Parliament 1593, cap. 174, declares " all remissions for " thefte, riefe, slaughter, burning, and heirshippe, void " and null, quhill (until) the party skaithed be first satis- " fied."

Adultery, according to the law of Scotland, may, indeed, be punished as a crime in all cases. But, nevertheless, the action of divorce founded upon it is deemed by every authority purely civil.* The husband of an adulteress, it has been likewise repeatedly found, † has a civil action for damages against her paramour, whether there has been either a separate process of divorce or a criminal prosecution upon the same fact or not.

This point seems then to be sufficiently clear. But it is obvious, that the Primary Court was bound in duty, if possible, to remove all question upon it. For the whole series *rerum judicatarum* in its record was impeached by a doubt upon it, and the adoption of a different view, by which the civil action of divorce would be confounded with the criminal process for the public interest, and at the public instance, to punish the crime of adultery, must go far to subvert the very foundation and principles of this Consistorial jurisdiction.

## Note (G.) p. 141.

THE report for the Faculty of Advocates, published in the last volume of their collection, gives the following accurate and authentic statement of the whole proceedings in the Court of Session previous to the dates of the several remits to the Commissaries, in the cases of Edmonstone, Levett, and Forbes, on the 5th of March 1816, and 1st June 1816.

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* Dirleton's Doubts and Questions in Law, p. 34.

† Stedman against Stedman, January 29, 1744; Maxwell against Montgomery, March 7, 1787; Paterson against Bone, December 10, 1803.

*"Mr Edmonstone's Case.*

"Mr Edmonstone was born and educated in Scotland. He inherited a small patrimony secured on an heritable bond in Scotland. He entered into the army; and, after being for some time on foreign service, left the army, and returned to Scotland. He afterwards obtained a company in a Scots militia regiment, then stationed in England. He there married, in 1805, the sister of the commanding officer, a Scotswoman, but who had resided for some time with her brother in England. The marriage was celebrated in the English form; the contract was drawn up in the Scotch form; the lady's jointure was secured on the heritable bond due to her husband in Scotland. Sometime after the marriage (the parties did not agree how long, but Mr Edmonstone appeared to have resigned his commission before the marriage, or, at least, to have made an arrangement, before the marriage, for resigning it, and did soon afterwards resign it), Mr Edmonstone returned, with his wife, to Scotland, where they had resided about eight years, when Mr Edmonstone thought that he discovered that she was in the course of committing acts of adultery in Scotland.

"He immediately raised an action of divorce against her before the Commissaries. She pleaded in defence,— That the marriage having been contracted in England, where marriage is indissoluble, the indissolubility became part of the contract, so as not to be removed by the subsequent domicil of the parties in Scotland, or by the criminal act being, as alleged, committed there. The Commissaries, being equally divided, by a rule of their practice, sustained this defence. Against this judgment Mr Edmonstone presented a bill of advocation.

*"Mrs Forbes's Case.*

"Mrs Forbes and her husband were natives of Ireland; and Mrs Forbes, till her marriage, resided at Limerick, where she formed an acquaintance with Mr Forbes, then an officer quartered in that town. The parties left Ireland together; and, in May 1794, were regularly married in the Scotch form at Portpatrick, from which, in a few

days, they returned to Ireland. Soon after, Mrs Forbes attended her husband to the Continent, along with his regiment. He was alleged to have abandoned her society there, and to have come to Scotland sometime ago (of which Mrs Forbes was informed in December 1813, or January 1814), along with a female with whom he lived in open adultery.

"Mrs Forbes immediately raised an action of divorce against him before the Commissaries, in which he appeared. The Commissaries being equally divided, gave judgment for the defender; finding, that, though the marriage ceremony was performed in Scotland, this being a question of *status*, must be determined according to the domicil of the parties at the time of contracting, which was Ireland, where marriages are indissoluble. Against this judgment Mrs Forbes presented a bill of advocation.

"*Mrs Levett's Case.*

"Mrs Levett and her husband were natives of England. They were regularly married in England in 1802. They lived together till October 1810, when he deserted her. They were reconciled in March 1812 (after a prosecution for conjugal rights.) In February 1813, he deserted her again, and came to Scotland with a woman, with whom he continued to live there in adultery, having sold his house in England, and ceased to have any establishment there.

"Mrs Levett raised an action of divorce against him before the Commissaries in October 1814. The Commissaries found, that the parties having been married in England, and their true permanent domicil being there, the marriage cannot be dissolved in Scotland. Mrs Forbes presented a bill of advocation.

"The Lord Ordinary reported these three bills to the Second Division. As they regarded the same general question, they were heard together, by special appointment, in presence of the whole fifteen Judges. No appearance was made for Mr Forbes or Mr Levett. Memorials were afterwards ordered, in which the parties

were particularly directed to attend to the following question, proposed by the Second Division to the First Division, and to the permanent Lords Ordinary of both Divisions:—" Is it a valid defence against an action of di-
" vorce in Scotland, on account of adultery committed
" there, that the marriage had been celebrated in Eng-
" land, or that the parties had been domiciled there when
" the marriage was celebrated in Scotland? Or, will it
" materially affect the defence, that the parties, although
" married in England, were Scotch persons, who had
" thereafter cohabited in Scotland, and continued domi-
" ciled there?"—Certain points were also suggested by the Court for the consideration of the counsel, in preparing the memorials.

" *Argument for the pursuers*:—It was argued specially, that Mr Edmonstone's marriage, having been contracted between Scotch persons domiciled in Scotland at the time, and with the view of their living in Scotland, was to be considered as a Scotch marriage; and that, therefore, the Scotch remedy of divorce ought to be applied in the case of adultery: See Lord Mansfield's limitation of the general rule (that, in expounding and enforcing a contract, the place where the contract was entered into, and not that in which action is brought, ought to be considered), in Robinson against Bland, 1 *Black. Rep.* 256 [quoted in Lord Robertson's speech *infra*]; *Huber ad Pandectas*, lib. i. tit. iii. § 10; *Voet de Statutis, eorumque concursu*, sect. 9, cap. ii. § 5, 9; or, at least, if it was to be regarded as an English marriage, that it would be peculiarly hard, from the situation of the parties, to refuse the Scotch remedy. It was argued specially, that the constitution of Mrs Forbes's marriage must be judged of as a Scotch contract; for that contracts are not judged of as to their constitution, by the law of the domicil of the parties at the time of forming the contract, but by the *lex loci contractus*, *e. g.* that marriages at Gretna Green, by persons domiciled in England, were valid in England.

" On the general question, how far an English mar-

riage may be dissolved in Scotland, on account of adultery committed in Scotland, the outline of the argument was this:

"Indissolubility is truly no part of the contract of parties in an English marriage. A marriage celebrated in that country is, in substance and in form, the same as a Scotch marriage. A marriage was held indissoluble in England before the marriage act. In both countries parties agree to be bound till death. In cases of breach of contract, the laws of the two countries give redress in a different form. The Scotch Courts of law give a total divorce for adultery. The English Courts of law only give a separation *a mensa et thoro;* and Parliament grants a total divorce; but, in such cases, Parliament acts as a Court of Law; *Ellis on Proceedings in Parliament,* 1802, p. 235. If the contract of parties excluded their separation, the English Courts could never grant a separation *a mensa et thoro,* which is as contrary to the terms and purposes of the marriage as a total divorce; nor would Parliament grant a total divorce. The indissolubility is merely an effect of the form in which the English law gives relief. Accordingly, the English Courts of law would not grant a total divorce for adultery committed in England, even where the marriage had been contracted in a country which authorizes a total divorce for adultery by the Courts of law of that country. The indissolubility, then, not being a condition of the contract, the general rule applies, that the state of persons, or personal qualities, excepting in so far as they are fixed by contract or transaction, or are fixed with relation to rights or privileges, duties, burdens, or liabilities in another country, depend exclusively upon the laws of the country where the party resides, whether it be a temporary or a perpetual residence; *Huber de jure civitatis,* lib. iii. § 4. cap. i. p. 611; *Zoesius ad Pandectas,* lib. i. tit. iii. § 20.

"Even supposing that indissolubility should be held to be implied as part of the contract, it would not follow that it would have execution in this country. No doubt this, like other civilized countries, gives effect to foreign contracts (excepts deeds conveying heritage in this country),

according to the *lex loci contractus*; but we do so as far only as consistent with our own law. Thus, in point of execution, we give the remedy according to our own law, without regard to the execution given by the law of the foreign country. Thus, also, the general rule is, that obligations entered into in a foreign country, and pursued for in Scotland, are extinguished by the Scotch prescription. And, if we do not give the execution of the foreign law, still less do we enforce a foreign contract, where we hold it to be contrary to justice, and prejudicial to the well-being of the state; *Huber ad Pandectas*, lib. i. tit. iii. The law of Scotland, according to the dictate of Scripture, and in conformity to the practice of almost the whole of the reformed Christian world, allows divorce for adultery; and the refusing it in the case of marriages contracted in one of the foreign countries where it is not given, would be prejudicial to the morality and happiness of this country, by bringing foreigners to commit adultery in this country, and by enabling Scotch persons to live in open profligacy, by contracting their marriage in a foreign country. Besides, this being a question of *status* and domestic relation, ought to be governed by the law of the domicil, as has been expressly found in the case of a slave brought into this country from the plantations; Knight against Wedderburn, 15th January 1778, and the English case of Somerset, the negro, there referred to. In Hogg or Lashley against Hogg, 7th June 1791, it was found, that the legitim due to children depends on the domicil, not on the place of contracting the marriage; and the same would have been found in the question between the same parties, 16th June 1795, as to the wife's claim on the husband's moveables, if it had not been barred by special contract.

"There would be no propriety or expediency in the Judges of this country adopting the English doctrine from *comitas*, in order to produce a uniformity of opinion in the two countries, it being said that the English Judges have, in the case of Lolly, refused to acknowledge the validity of a Scotch divorce in such a case: for we do not know all the circumstances of that case; and, if the English Judges decided wrong in that case, they might be set

right by the Judges of this country persevering in the proper course. At all events, the Judges of this country ought to decide according to what is just.

" But, though indissolubility were part of the contract, and though that contract ought to have execution in Scotland, yet there is a subsequent transaction, the adultery, which must be judged of by the *lex rei gestæ*; and, as we allow foreign contracts to be extinguished in Scotland in modes, or by evidence, which may not be admitted by the law of the foreign country, the same must apply in the case of adultery, which, by the law of Scotland, affords ground for dissolving the contract of marriage.

" As to the precedents, the case of Brunsdone against Sir Thomas Wallace, 9th February 1789, does not apply, as Sir Thomas had not only not been married in Scotland, but had never been in Scotland after his marriage. The case of Lindsay against Tovey, 26th January 1807, which was carried to appeal (Dow's Reports, p. 124), was merely remitted for reconsideration, and was not decided. And it is only of late, that the Commissaries have scrupled to grant divorces in cases like the present; Duke of Hamilton, in the Commissary Court, 1794; Murray against Lindley, 8th March 1805; the cases of Paget, Lady Hillary, Tewsh, Newte, O'Brien, Pye. The interlocutors of the Commissaries in the cases of Newte and Pye were altered by Lord Meadowbank, who, as appears from his Notes, printed and produced, entertained no doubt upon the point.

" *Argument for Mrs Edmonstone.*—(No appearance was made for the other two defenders.) It was argued specially, That, in point of fact, she and her husband were not domiciled in Scotland at the time of the marriage; that, in point of law, the place of the domicil, at the date of the contract, does not signify, but the place of the contract; that, in point of fact, they did not contemplate to return immediately to Scotland, in order to reside there during their lives: and that, in point of law, where it is intended that a contract is to be framed with a view to its being executed in a foreign country, according to the laws

of that country, the exclusion of the laws of the country in which the contract is framed, must be made in clear and express terms, which was not done here.

"On the general point, the argument was to the following effect:—

"Indissolubility is part of the contract of an English marriage. It is a known condition of such a marriage, imposed by the *lex loci contractus*, which must be held to be part of the contract, as much as any condition in a sale or other consensual contract, which, though not expressly covenanted upon, being the known law of the land, makes an essential inseparable part of such sale or contract. Indeed, it is a condition which the parties cannot dispense with. The indissolubility arises from this, and not from the constitution of the English Courts. The necessity of an act of Parliament (which it is impossible to mistake for a judicial procedure) shews, that a special law is required to derogate from the general law. Accordingly, in the case of Lolly (not yet reported), the twelve Judges of England found, that a man married in England, divorced by the Commissaries in Scotland for adultery committed here, and marrying again in England, was guilty of bigamy; on the ground that the sentence of no Court, but only the act of the British Legislature, can dissolve an English marriage.

"It is a general doctrine, that, *ex comitate*, all foreign contracts are expounded and enforced, not according to the law of the place where action is brought, but according to the law of the *locus contractus*; Huber, Vol. II. lib. i. tit. ii. § 8 and 9; Bankton, b. i. tit. i. § 76, 78; Lord Mansfield's words, in Robinson against Bland, I. Black. Rep. 256; Mitchell against Burnet and Mowat, 11th December 1746, Kilk. Foreign, No. 3; Lawson against Maxwell, 12th February 1784. The objections made to the application of this doctrine to the present case are not sufficient. As to the argument that a divorce is merely a remedy or mode of execution, and that such are regulated by the law of the country where action is raised; though this might apply if the English law admitted divorce for adultery in one form, while we give it in

another form, it does not apply where the law of England denies entirely the right of divorce. As to the argument, which was in one case sanctioned by the Court, Delvalle against York Buildings Company, 9th March 1786, that the Scotch prescriptions apply to obligations constituted by English contracts, as rules of Scotch process, which has some analogy to Scotch divorces, that decision was reversed on appeal; and the contrary has since been found, York Buildings Company against Cheswell, 14th February 1792. The denying of divorce for adultery is not contrary to the general usage of the greater part of reformed Christendom; neither is it contrary to good morals, separation *a mensa et thoro*, and other remedies, being found sufficient to keep adultery in check; nor is it contrary to the policy of the law of Scotland, which only *permits* such a remedy if the party choose to avail himself of it, but does not *enjoin* it; nor would any harm arise, from giving in this country the redress allowed by the *lex loci contractus*. As to its being a question of *status*, and, therefore, to be governed by the law of the domicil, the general law is, that questions of *status* are governed in that way, but questions of *status*, in general, arise from physical facts quite different from contract, *e. g.* male and female, *pubes* and *impubes*, sane and insane, &c.; and many of the questions arising from the contracts of marriage and of service, *e. g.* the wife's liability to imprisonment for debt, &c. are somewhat of the same nature, being relations between the state and the individual; but the personal mutual obligations in these two contracts, such as indissolubility in the case of marriage, and the personal mutual obligatious in all ordinary contracts, must be ruled by the *lex loci contractus*. The case of Knight, the negro, is not a precedent for the general case, as it proceeded upon the injustice of the law of Jamaica. If the pursuer's doctrine be admitted, we must sustain as valid a divorce of a Scotch marriage, granted in Prussia for incompatibility of temper, &c.

"As in Scotland, divorce for adultery is not thought material, but is merely allowed; and as, in England, the indissolubility of marriage is thought essential, which is

evinced by the judgment in Lolly's case; and, as the worst consequences would ensue if persons were to be held to be divorced in this country, and not in England; and, as England is not a foreign country, but part of the same kingdom; we ought, in this case, *ex comitate*, to adopt the English doctrine.

"The place of the *res gesta*, the adultery, does not alone determine the law by which the case is to be judged; but must be taken in connection with the previous contract. Thus, though the payment of six per cent. in Scotland, under a Scotch contract, be usury, the payment of that rate in Scotland, under a contract *bona fide* entered into in a country where that rate is legal, is not usury.

"The precedents are either in favour of the defender, or leave the question open; Dods against Westcombe, 11th June 1745, Kilk. Forum competens, No. 2; Brunsdone against Sir Thomas Wallace, 9th February 1789; Duke of Hamilton in the Commissary Court, 1794; Pirie against Lunan, 8th March 1796; Murray against Lindley, 8th March 1805; Lindsay against Tovey, 26th January 1807, which was appealed; Several cases which occurred in the Commissary Court pending that appeal; Doubts expressed in the House of Lords in the case of Lindsay, which was remitted, Dow's Rep. p. 124.

"*Opinions of the Judges*.—The Judges of the First Division, and the permanent Lords Ordinary of both Divisions, returned the following answer to the question proposed by the Judges of the Second Division:

"The ten Judges, to whom the above question has "been referred, having maturely considered it separately, "and having also conversed together on the subject, are "unanimously of opinion, that it is not a valid defence "against an action of divorce in Scotland for adultery "committed there, that the marriage had been celebrated "in England; nor that the parties had been domiciled "there when the marriage had been celebrated in Scot-"land. And, lastly, they are of opinion, where the parties "are Scots persons, happening to be in England when "their marriage was celebrated, but who, thereafter, re-

"turned to Scotland, and cohabited and continued domi-
"ciled there, that these circumstances can never aid the
"defence against an action of divorce in Scotland for
"adultery committed there, on the ground that the mar-
"riage had been celebrated in England; on the contrary,
"they are of opinion, that these circumstances will mate-
"rially support the plea of the pursuer of the divorce.

"In giving this opinion, they think it necessary to add,
"that they take it for granted, that there is no objection
"to the jurisdiction of the Court, from the want of that
"residence or domicil in the parties, which is necessary
"to found civil jurisdiction; and also, that there is no
"proof of collusion between the parties, either by direct
"evidence, or necessarily arising out of the circumstances
"of the case; as they mean to give their opinion only on
"the abstract question put to them, and to say, that the
"mere fact of the marriage having been celebrated in
"England, whether between English or Scots parties, is
"not *per se* a defence against an action of divorce for
"adultery committed here."

"At the advising (on 5th March), opinions to the following effect were delivered by the Judges of the Second Division:

"*Lord Meadowbank.*—I retain entirely my former sentiment upon the general point; and concur with the argument for the pursuers.

"*Lord Robertson.*—(His Lordship stated the facts in Edmonstone's case.)

"In these circumstances, the pursuer brings his action of divorce before the Commissaries, libelling on acts of adultery committed by the defender in Scotland, and concluding for divorce *a vinculo matrimonii.*

"The defence, after a general denial of guilt, is, that the marriage was celebrated in England; that, by the law of that country, marriage is indissoluble except in Parliament; and that, as the Court must judge according to the *lex loci contractus,* it cannot pronounce sentence of divorce *a vinculo matrimonii.* The Commissaries have

sustained the defence, and the case is now brought under our review by advocation by Mr Edmonstone.

" The pursuer has endeavoured to shew, that, by the law of England, marriage is not indissoluble, and, as it could not be denied, that it was in Parliament alone that any dissolution could take place, he was driven to the necessity of maintaining that the proceedings in Parliament, on a bill of divorce, were truly of the nature of judicial proceedings. How the law of England stands as to this point, is not, properly speaking, a matter of argument in this Court. The law of England, like that of every other foreign country (and England, in such cases, is held to be a foreign country), is to us merely a matter of fact. Now, of the fact we have the best possible evidence, for the Lord Chancellor, in the case of Tovey and Lindsay, stated, that the Twelve Judges had lately decided in Lolly's case, that, " as, by the English law, marriage was indis-" soluble, a marriage contracted in England could not be " dissolved in any way, except by an act of the Legisla-" ture ;" Dow's Reports, I. 125. Now, an act of Parliament dissolving a marriage, is not of the nature of a judicial proceeding, but is truly a *privilegium*, in the strict legal sense of that term, viz. " An act of the su-" preme power of the State regulating the rights of pri-" vate parties in a case where the Courts of law have no " powers."

" Holding, then, that the marriage of the parties having been celebrated in England, is, by the law of that country, indissoluble, we must now consider whether the Courts of this country are bound to decide according to the *lex loci cŏntractus*, or whether, in the circumstances of the case (in which it appears, that the parties are domiciled in Scotland), they must take cognizance of the cause, and decide according to the laws of this kingdom.

" As the whole plea of the defender rests on this proposition, that the decision of this case must be regulated by the *lex loci contractus*, it is necessary to inquire in what circumstances a Court of law is bound to regulate its decisions by the *lex loci*, in preference to the law of the country in which the action is brought, and in which

the action is brought, and in which the parties are domiciled, and how far that rule is to be extended. In every question regarding the validity or effects of a personal contract, the first object to be attended to is, what was *actum et tractatum* between the parties. If the parties have bound themselves to any thing that is not *contra bonos mores*, such contract will be effectual all the world over, and will be enforced in every Court. When an action is brought to enforce performance of a contract executed in a foreign country, the first question is, where is the evidence of the contract? The evidence of such contract or obligation may be a written instrument, not according to the forms required by the law of that country in which the action to enforce performance is brought, *e. g.* a bond not probative in terms of the acts 1681 or 1695; but our Courts would not hesitate to sustain action on such bond. This will be done, not from any *comitas* to the law of a foreign country, but because a contract so executed is evidence of the agreement of the parties, and that they had in view the law of the country where they contracted, and that they meant to be bound by it.

"But, although the rule as to the *lex loci contractus* is of very general application, particularly as to the constitution and validity of personal contracts and obligations, it is not universal.

"In the first place, it does not apply to contracts or obligations relative to real estates. This point need not be enlarged upon.

"In the second place, no regard is paid to the *lex loci* where it appears that the parties had a different law in view at the time they entered into the contract. This is explicitly laid down by Lord Mansfield in Sir John Bland's case. "The general rule" (said his Lordship), "established *ex comitate et jure gentium*, is, that the "place where the contract is made, and not where action "is brought, is to be considered in expounding and en-"forcing the contract. *But this rule admits of an excep-" tion where the parties at the time of making the con-" tract had a view to a different kingdom*;" 1 Black.

Rep. 256. The defender has laboured hard to shew, that the exception mentioned by the learned Lord is merely an *obiter dictum*, and not of the same authority as the deliberate opinions of that great and eminent Judge. I cannot view it in that light. The *lex loci* is to be considered in expounding or enforcing a contract, not from a blind deference or *comitas* towards a foreign law, but, because it is presumed, that the parties had in view the law of the country in which the contract was entered into, and that they meant to be bound by it. But this is only a *presumption*, and cannot be regarded where the contrary appears. The opinion of Lord Mansfield is confirmed by those of Huber and Voet quoted.

"But there is another set of cases in which also the *lex loci* is disregarded; I mean those cases in which the *lex loci* is contrary to the general and universal rules of justice. This may be exemplified by the decision in the case of Knight, the negro, 15th January 1770. His master bought him as a slave in Jamaica, where such purchases are legal. Neither the purchase, nor the legality of it according to the *lex loci*, were denied; but the Court held, that the dominion assumed over the negro under that law, being in itself unjust, could not be supported in this country to any extent, and a judgment, proceeding on the same principles, was pronounced in England in the case of Somerset. Neither would our Courts pay any regard to the *lex loci* where it was *contra bonos mores*, where it was inconsistent with our religion, or where it was contrary to the great and fundamental principles of public law. I need not say that I do not mean that innumerable class of laws which are intended for the regulation of matters, which are in themselves to a certain extent indifferent, but such public laws as affect the interests of religion and morality, and the general well-being of society. It is quite inconsistent with every idea of good government to suppose that the laws of our own country, when of this last description, are to give way to the laws of any other country whatever.

"What I have now stated may be reduced to the following propositions: 1*st*, That the regard which is paid

to the *lex loci contractus* does not arise from any blind deference to the law of a foreign country, but is founded on the legal presumption, that the parties had in view the law of the country where the contract was executed, and intended to bind themselves accordingly. 2*d*, That the application of the *lex loci*, though general, is not universal. That it does not take place as to contracts relative to real estates. That it does not take place where the parties, at the time of entering into the contract, had the law of another kingdom in view; or where the *lex loci* is in itself unjust or *contra bonos mores*, or contrary to the public law of the State as regarding the interests of religion or morality, or the general well-being of society. In short, the *lex loci* is not of universal application, but may, or may not, be applied according to the nature of the contract, as it may be affected by the circumstances I have mentioned.

"Marriage being entirely a personal *consensual* contract, it may be thought that the *lex loci* must be resorted to in expounding every question that arises relative to it. But it will be observed, that marriage is a contract *sui generis*, and differing, in some respects, from all other contracts, so that the rules of law which are applicable in expounding and enforcing other contracts, may not apply to this. The contract of marriage is the most important of all human transactions. It is the very basis of the whole fabric of civilized society. The *status* of marriage is *juris gentium*, and the foundation of it, like that of all other contracts, rests on the consent of parties; but it differs from other contracts in this, that the rights, obligations, or duties, arising from it, are not left entirely to be regulated by the agreements of parties, but are, to a certain extent, matters of municipal regulation, over which the parties have no control, by any declaration of their will; it confers the *status* of legitimacy on children born in wedlock, with all the consequential rights, duties, and privileges, thence arising; it gives rise to the relations of consanguinity and affinity; in short, it pervades the whole system of civil society. Unlike other contracts, it cannot, in general, amongst civilized nations, be dissolved by mutual con-

sent; and it subsists in full force, even although one of the parties should be for ever rendered incapable, as in the case of incurable insanity, or the like, from performing his part of the mutual contract.

"No wonder that the rights, duties, and obligations, arising from so important a contract, should not be left to the discretion or caprice of the contracting parties, but should be regulated, in many important particulars, by the laws of every civilized country; and such laws must be considered as forming a most essential part of the public law of the country. As to the constitution of the marriage, as it is merely a personal consensual contract, it must be valid everywhere, if celebrated according to the *lex loci*; but, with regard to the rights, duties, and obligations, thence arising, the law of the domicil must be looked to. It must be admitted, that, in every country, the laws relative to divorce are considered as of the utmost importance, as public laws affecting the dearest interests of society. With us the laws relative to divorce are founded on divine authority. How can a person withdraw himself from obedience to such laws? Are these laws relaxed as to a person domiciled in Scotland, because his marriage is contracted in a country where the law of divorce is different? If two natives of Scotland were married in France or Prussia, according to the laws of those countries, the marriage would no doubt be valid here, but would they be entitled to come into the Commissary Court, and insist for a dissolution *a vinculo matrimonii*, merely because their tempers were not suitable, which, in France, was a ground of divorce, or for any of the numberless reasons for dissolving a marriage which are allowed by the laws of Prussia? But, if we would not listen to the *lex loci* when it facilitates divorce to a degree which our law considers as inconsistent with the best interests of society, and as not warranted by the Divine law, on what principle are we to give effect to the *lex loci* which prohibits divorce, even *adulterii causa*, though permitted in this country under the sanction of the Divine law? I agree entirely with what is well expressed by Lord

Meadowbank, Appendix to bill of advocation for Edmonstone, p. 9.

"It is said, that, in every contract, the parties bind themselves, not only to what is expressly stipulated, but also to what is *implied* in the nature of the contract, and that these stipulations, whether express or implied, are not affected by any subsequent change of domicil. This may be true in the general case, but, as already noticed, marriage is a contract *sui generis*, and the rights, duties, and obligations, which arise out of it, are matters of so much importance to the well-being of the State, that they are regulated, not by the private contract, but by the public laws of the State, which are imperative on all who are domiciled within its territory. If a man in this country were to confine his wife in an iron cage, or to beat her with a rod of the thickness of the Judge's finger, would it be a justification, in any court, to allege that these were powers which the law of England conferred on a husband, and that he was entitled to the exercise of them, because his marriage had been celebrated in that country?

"In short, although a marriage which is contracted according to the *lex loci*, will be valid all the world over, and although many of the obligations incident to it are left to be regulated solely by the agreement of the parties, yet many of the rights, duties, and obligations, arising from it, are so important to the best interests of morality and good government, that the parties have no control over them, but they are regulated and enforced by the public law, which is imperative on all who are domiciled within its jurisdiction, and which cannot be controlled or affected by the circumstance that the marriage was celebrated in a country where the law is different. In expounding or enforcing a contract entered into in a foreign country, and executed according to the laws of that country, regard will be paid to the *lex loci*, as the contract is evidence that the parties had in view the law of the country, and meant to be bound by it; but a party who is domiciled here, cannot be permitted to import into this country a law peculiar to his own case, and which is in opposition to those great and important public laws

which our Legislature has held to be essentially connected with the best interests of society.

"Forbes's case is different from that of Edmonstone. The parties are natives of Ireland; they were domiciled in that country; they came to Scotland, as far as appears, merely for the purpose of being married in this country; they remained only for a few days, and then returned to Ireland. At the distance of many years the defender came to Scotland, and there committed acts of adultery, on which this action of divorce *a vinculo* is founded. Although the marriage was celebrated in Scotland, yet, in the circumstances stated, parties must be presumed to have had the law of Ireland in view in every thing relative to the rights, obligations, and duties, arising from the *status* of marriage; 2*d*, I see no evidence that the defender had such a residence in this country as to create a jurisdiction *ratione domicilii*. I doubt much, whether a residence in Scotland, and committing adultery there, for the purpose of creating a jurisdiction in the courts of this country, which they would not otherwise have had, would not be a fraudulent device to elude or defeat the law of that country to which the parties are subject.

"Neither is there evidence of the domicil in the case of Levett; and in both cases the domicil must regulate.

"Upon the whole, I think that Edmonstone's case ought to be remitted to the Commissaries, with instructions to proceed in it; and that, in the other two cases, there ought to be farther inquiry as to the domicil.

"*Lord Bannatyne.*—This is a question of international law.

"It is said, that, by the law of England, marriage is indissoluble. I take that for granted. The opinion of the Twelve Judges is decisive upon the point.

"But on what ground is marriage indissoluble in England? It is said by the defender, that its indissolubility is fortified by the terms of the agreement, the parties taking each other for husband and wife till death do them part. But I do not think this a just view of the subject. I conceive the rights of the parties, arising from marriage by

the law of England, and the maxim of the indissolubility of that relation there, to rest, not on the individual will, or the agreement of parties, but on the law of the country. One proof of this is, that marriage was held indissoluble in England before the marriage act. Another is, that the English apply the doctrine of indissolubility to all marriages, wherever celebrated, by whatever forms, and in whatever words. The same principle, of holding the rights of the parties arising from marriage to be regulated by the law of the country, holds in Scotland. A Scotch Court would not regard an agreement that the marriage should not be dissolved even for adultery.

"It is a natural consequence of the intercourse taking place among civilized nations, that the Courts of law of one country must often feel themselves called upon to enforce rights arising in another, and, in doing so, to judge of and give effect to such rights, not according to the laws of their own country, but according to those of the country in which they had their origin; though they can only be bound to do so in so far as is not prejudicial to the legal policy of their own. On this last ground, questions respecting land rights are judged of by the law of the country in which the lands lie. But it may often be just and expedient to give effect to the laws of the foreign country, with regard, not merely to the constitution of contracts, and many of the claims arising from them, but, in general, with regard to all personal rights, and, among others, to the civil claim of reparation arising from injury or crime.

"Though the origin of marriage is contract, it is in a different situation from all others. It is a contract coëval with, and essential to, the existence of society; while the relations of husband and wife, parent and child, to which it gives rise, are the foundation of many rights acknowledged all the world over, and which, though differently modified in different countries, have everywhere a legal character altogether independent of the will of parties.

"When such a question as the present occurs, in judging what law ought to be applied to its determination, it is important to consider, not merely the place where it arises,

but the nature of the right sought to be enforced, and the situation of the parties. This is not an action for obtaining implement of a marriage;—quite the reverse. It is an action for its dissolution. And the wrong on which this action is founded was committed in this country. We might perhaps apply the remedy of our law, even if the wrong had been committed in another country; but the case is much stronger when the wrong has been committed in our own.

"In this case of Edmonstone, the defence is, that the marriage was contracted in England. But, though the form of the constitution of this relation must be judged of by the *lex loci contractus*, we must look for the obligations resulting from it, to the place where the contract is to take effect. Here the marriage was contracted by parties occasionally in England, but whose permanent and natural residence was in Scotland, and who, accordingly, soon after the marriage, came to Scotland. This is truly a Scotch marriage.

"I have already expressed my opinion, that the rights arising from the relation of husband and wife, though, taking their origin in contract, have yet, in all countries, a legal character, determined by their particular laws and usages, altogether independent of the terms of the contract, or the will of the parties at the time of entering into it. Even had the parties been natives of England, and resident there at the time of their marriage, if they afterwards came, from the acquisition of property, engagement in business, or otherwise, to acquire such a permanent residence in Scotland, as these parties have confessedly done (though I would give no such effect to a transient and occasional residence), considering them as, from that residence, subject to the law of Scotland, I should certainly hold, that that law must regulate the duties and rights arising from their standing in the relation of husband and wife. And in that view I should hold, that the English maxim of indissolubility in the case of such parties, permanently resident in Scotland when the action was brought, and the adultery stated to have been committed, could be no ground for our Consistorial Court refus-

ing to sustain action concluding for that remedy which our own law affords to the injured party. And still less can there be ground for their doing so in the present case, where, though the marriage took place in England, yet, as it took place between natives of Scotland, during a residence merely transient and occasional, it must, in the contemplation of law, be considered as a Scotch marriage.

"We enforce foreign law when it is not injurious to the interest of our own country. But the rights founded on the relation of husband and wife, constitute a very important part in the internal constitution of a state, and one with respect to which we ought not to surrender our law to that of our neighbours. And in this case we have this farther reason for refusing to do so, that we thus apply the law of Scotland to parties who, at the time of the marriage, meant to reside in Scotland, and defeat an attempt to defraud and to elude it.

"Certain proceedings, in the cases of Lolly, and of Lindsay against Tovey, seem to have excited alarm. In the case of Lolly, an Englishman, divorced in Scotland, and marrying again in England, was, by the Twelve Judges, found guilty of bigamy. But, in that case, those learned persons had no occasion to look farther into the international law, than for that particular case. Lolly was making an engine of the law of Scotland to defeat the law to which he was properly amenable. I presume the Judges did right in that case. But I draw no inference from it as to their opinion on the general point. In the case of Lindsay, when the marriage might prove to be an English marriage, and when it was not from actual residence, but merely on the ground of a constructive legal domicil, that the defender was held subject to the jurisdiction of the Scotch Courts, even when the action was brought, the House of Peers properly remitted it to this Court for reconsideration. But nothing which passed in that case can be held as decisive of the present question.

"There is a material distinction between the case of Edmonstone and the other two cases. In these two cases an attempt is made to defraud the law of the foreign

nation by ours. I do not think that, where an Irish couple come to this country for a few weeks, their permanent condition ought to be regulated by our law. I view the case of Forbes, though the marriage was contracted in Scotland, in the same light as the case of Edmonstone. The parties came to Scotland in order to marry, and immediately to return to Ireland. That is to be held an Irish marriage.

"As to the domicil necessary, there is a difference between a permanent *bona fide* residence, and a short residence for the purpose of founding jurisdiction. What residence shall be held necessary to regulate *status*, depends not merely on the time, but on other circumstances. There is a distinction, in this point, between claims of pecuniary reparation, or such rights, founded on contract, as are left to be regulated by the terms of the contract and the will of parties, and questions respecting those rights which are the natural and legal consequences of personal relations, though constituted by contract.

"*Lord Glenlee*.—This may be viewed either as a *quæstio statûs*, or as a question upon a contract; though I rather think it is the former.

"A contract entered into according to the solemnities of the law of the place is recognised in this country. But, if any thing is craved to be done by the Courts of this country, *de die in diem*, upon such foreign contract, which is contrary to our law and *contra bonos mores*, it will not have effect given to it. In the same way, in questions of legitimacy, or the like, we treat foreigners as we treat our own people, if the marriage was contracted according to the law of the place. But, if we do not acknowledge the *status* claimed, or acknowledge it only to a limited extent, the foreign party would only get execution according to our law. We would not imprison a married woman in Scotland for debt, wherever she was married, though she might have been imprisoned by the law of the country in which she was married. In general, we pay attention to foreign *status* on the ground that, if those things, or the equivalents of those things, which have constituted that

*status* in the foreign country, had been done here, they would have constituted that *status* here ; and, where this does not hold, we do not acknowledge the *status*. We would not acknowledge a foreign marriage not allowed here. If, for instance, an adulteress divorced in Scotland, should marry the adulterer in England, I think that a son of that marriage would not exclude a daughter by the previous lawful marriage. At the same time, if there had been a divorce in Prussia for adultery, a marriage between the adulterer and adulteress might be lawful here, because the act 1600 had never attached to their case to prevent such a marriage.

" The question of the dissolution of marriage depends upon much the same principles as whether a marriage shall be held to be valid or not.

" Taking it as a question of *status*, why should the rights and legal remedies of the parties stand upon a different ground, according to the country in which the marriage was constituted ? We give the remedy of divorce for adultery, because the parties are husband and wife, and not with relation to the constitution of the marriage.

" Even supposing it merely a personal contract, we come to the same result. In general, foreign contracts are acknowledged by our law. In such contracts, a claim is sustained in the Courts of Scotland for indemnification for failure in performance, or to compel performance *de die in diem*. But, if we suppose a foreign contract not acknowledged by our law, we would distinguish between action for failure in the foreign country, and action to compel performance here. In some countries a game debt may be obligatory. If such a debt, contracted in such a country, were sued for here, we would decern for it. But, suppose that a gaming copartnery were established, if that be allowed in any country, in an accounting between the parties, though we might decern here for sums which fell due before the adventurers came to Scotland, we would not decern for profits arising in Scotland, *e. g.* for bets at races in Scotland.

" Upon these principles, I have no doubt that the pursuer, Mr Edmonstone, is entitled to apply to the law of

Scotland for redress, particularly as the wife belongs to Scotland.

"With regard to the other two cases, I have no doubt, on the other hand, that the action of divorce ought not to proceed in them. It is true the contract was, in these cases, entered into in England. That, however, is of no moment, if the parties be truly domiciled in Scotland at the time of the action. But the objection is, that neither of these pursuers is in circumstances to apply to our Courts for our remedy.

"Foreigners are not entitled to demand judgment on matters not meant to be explicated here, but elsewhere. As to questions of debt, we go as far as we can to recover a claim by one foreigner against another, if we can attach the debtor's goods *jurisdictionis fundandæ causâ*. But, even in such questions, our interference in the case of foreigners has limits. Suppose two foreign merchants come to Scotland, having involved accounts against each other; that the one brings an action of accounting against the other in this Court; that they then both leave Scotland with their goods, and appoint mandatories to carry on the action in their absence; I doubt whether we could continue to entertain their action. In like manner, I doubt much whether we could sustain action by a French butcher, or other tradesman, against one of the French emigrants whom we had in this country, for contractions made in his own country after his return to it, founded upon an arrestment of some trifling article which he had left behind him here. But, viewing this as a question of *status*, it is very extraordinary to bring an action in this country, in order to ascertain a *status* to be held in another country. For instance, in the case of slavery, if the slave be in this country, we would not suffer him to be treated as such; but, if the master should be domiciled here, we could not sustain action at the instance of the slave, who was resident in the West Indies, carried on by his mandatory, for declaring his freedom. Now, these two pursuers have no prospect of residing in Scotland; and what title have they to insist here to ascertain a *status*, which they have no prospect of applying in this country?

I will not pretend to set down the precise limits of the circumstances which would make such an application competent, as domicil, prospect of residence, &c. But these two are extreme cases. The parties have no connection with our laws. Their object is to live as unmarried persons in England. On the mere possibility of their coming to this country at some future period, I do not think we ought to interfere with the law of another country. If a Scotch couple were to disagree here, and to go to France to get themselves divorced for incompatibility of temper, and to be divorced accordingly, and then to come back to this country, and to be married to other persons; in a civil question as to the validity of these new marriages, I would not hold them good, as, in the circumstances of the parties, the law of France ought not to have been applied to regulate their *status*.

" I therefore think the judgments of the Commissaries right in the cases of Levett and Forbes.

" As to the domicil of the defenders in these two cases, a residence of 40 days does not seem enough in such questions, though it is so in ordinary civil actions.

" *The Lord Justice-Clerk.*—The question to be determined in reference to the decision of the three cases now before us, is of deep importance to the law, as well as to the parties concerned, from the aspect which it has assumed, from the manner in which it has been treated, from the disquisitions in law to which it has given rise, and from the consequences which may follow from it to many, besides those immediately concerned in it.

" From the first, it appeared to me to require the most deliberate attention.

" When the power of the Consistorial Court of Scotland to divorce *a vinculo matrimonii* between parties who had been married, or were supposed to have been married, within the operation of the law of England, was first remitted for reconsideration by the House of Lords, in the case of Tovey and Lindsay, I suggested, that it should be deliberately considered, and, with a view to taking the

opinions of our brethren. That case was terminated by the death of the pursuer.

"The point was again brought under notice in the case of Gordon and Pye, though under the unfavourable circumstance of being coupled with another question, viz. the right of the public prosecutor to appear as a party; and the same course of deliberate and thorough inquiry was proposed.

"But the present cases having in the meantime occurred, in one of which, the judgment of the Commissaries was directly challenged, and supported by two parties anxious for a decision, and the other two cases being also advocated at the same time, though the defenders did not appear, they were made the subject of a hearing, ordered before the whole Court; which led to a most able and learned argument. Thereafter, memorials were ordered on the whole case, on which, after receiving the opinion of the ten other Judges, consulted on a general question of law, we are now to decide.

"It is necessary for deciding these cases to keep the peculiar circumstances of each in view. [His Lordship stated the circumstances.]

"In proceeding to state my opinions upon these several cases, I have to observe, in the first place, that, in reference to all of them, the reservation or qualification in the deliberate and unanimous opinion of the consulted Judges, appears to me to be a most indispensable preliminary. That there must be an undoubted jurisdiction over the parties who are called in such an action, arising from residence or domicil; and that there must be no collusion between the pursuer and the defender, either established by direct evidence, or necessarily arising out of the circumstances of the case; that there must not appear the slightest indication of an improper understanding between them, or any want of complete *bona fides*, when founding on the wrongs committed within Scotland as a ground for divorce; are views, that, under every aspect of these cases, have appeared to be indispensably requisite.

"In the case of *Edmonstone*, the jurisdiction of the

Commissaries is fully and distinctly acknowledged. Indeed, if the parties in that case are not amenable to it, it is impossible to say who are.

"With regard to the case of *Levett*, the facts, as appearing from the proceedings already noticed, are a sale of a house and property in England, followed by a long continuance of residence in Scotland, for months, if not for years, and accompanied (as I understand) by personal citation. On what ground it could be urged (but I see not even a doubt of it), that a foreigner had not thereby acquired a domicil, so as to render him amenable to any Scottish jurisdiction, it seems difficult to imagine.

"In regard to the case of *Mrs Forbes*, in the same way, it is stated, that her husband, who had been in the army, had, previous to citation, resided for a considerable time in Scotland. And, though doubts of different descriptions, as to the purpose of such residence, seem to be laid as the basis of the judgment of the Commissaries, yet the fact of its being sufficient to constitute a domicil, to the effect of establishing ordinary jurisdiction over him, does not seem to be controverted, nor can legally be so. This is settled in the opinions of the jurists. "*Pro subjectis imperio* "*habendi sunt omnes qui intra terminos ejusdem reperiun*- "*tur sive in perpetuum*, sive ad tempus ibi commorentur, "per l. 7, § 10, in fin. de interd. et relig." And Mr Erskine lays down the same doctrine, book i. tit. i. § 22; "Nor are they (laws) obligatory only upon the natural "subjects of the state by birth, but likewise upon *those* "*who are merely temporary subjects by residence*, for the "civil rights even of *foreigners*, must be determined by "the laws of that country where they reside for the time."

"Now, if such is the actual fact with regard to all of these parties, that, at the dates of their regular citations, they were amenable to the Courts of law of this country, as well *ratione domicilii*, as *ratione actus vel delicti*, and if no evidence of improper collusion has either been adduced, or appears necessarily to arise out of the circumstances of the case (and none have been condescended on), the next inquiry is, have the Commissaries done right in dismissing their several actions as incompetent?

"The defence maintained to be valid in regard to two of these cases is, that the marriages sought to be dissolved were contracted in England, and that, as that union is there indissoluble, except by an act of the Legislature, the *lex loci contractus* must rule the decision, and our Consistorial Court cannot pronounce decree of divorce, although the parties are clearly amenable to its jurisdiction, and the wrong, for which the remedy is sought, was committed within its territory.

"In the third case, though the marriage was *de facto* celebrated in Scotland, and by a Scottish clergyman, yet, as the domicil was truly at the time in Ireland, it has been dealt with as a marriage there contracted, and the same judgment in effect applied.

"On the fullest consideration that I have been able to give to this question, I have formed the same opinion as the ten Judges whom we have consulted.

"In submitting the general grounds on which it rests, I think it unnecessary to enter into any extended disquisition with regard to the peculiar nature of the relation of marriage. Such inquiry appears to be of importance to the determination of the present question, in so far only as it establishes, that the relation of married persons, when viewed as a contract, is one *juris gentium*, creating important consequences as to personal *status*, and conferring many important rights on the parties, which are entitled to the protection of all civilized states, "*quatenus* "*sine prejudicio indulgentium fieri potest*."

"It is, however, a contract *sui generis*, and, as constituted on the basis of a "*consortium omnis vitæ, divinarum* "*humanarumque rerum communicatio*," it possesses attributes that do not belong to an ordinary contract.

"It is when viewed under this aspect that it appears to me to be unsafe to apply to this contract, which constitutes such important relations, the same maxims and principles of international law that are applied to contracts of an ordinary nature.

"In every question with regard to the constitution of the relation of marriage, and which is in reality a question of fact, we must necessarily be led to inquire what is the

law of the place where it was entered into, and to give it effect. But when the relation is clearly established between parties who are resident within the territory of the competent Court, and when a complaint is made of a breach or violation of that contract by acts or wrongs committed within that territory, and when redress is sought for, it is altogether a different question, whether that remedy which the law of the domicil, as well as of the delict, affords to all others, is to be denied, and the parties thrown back, because the law of the contract does not authorize it.

"That the other relations affecting *status personarum* are not so dealt with, even when they are supposed to be bottomed on contracts perfectly lawful where entered into, is clearly evinced by the principle of the decision in the case of Knight and Wedderburn, which denied all effect to the relation between the master and slave, or obligation for service for life, although perfectly warranted by the law of the British colony from which the parties had come, on the clear and obvious principle, not only of the injustice of the contract, but its repugnance to our laws and institutions.

"In like manner, there cannot be a doubt, that if, in regard to the relation of parent and child, there existed in any modern state any institution similar to the *patria potestas* of that of Rome, the natives of such state would not be permitted to exercise here that which might be lawfully used as their privilege at home. And so in the case of guardian and ward.

"On what grounds, then, is it to be maintained, that, in reference to the relation of marriage, and particularly in a question with regard to the fundamental violation of it, a different principle of decision is to be applied?

"Such question, when raised for a dissolution of marriage, is in fact a *quæstio status*, and, if other questions of *status* are dealt with according to the law of the domicil, why is a different principle to be applied here?

"When the marriage is undeniably established according to the law of the country where it was entered into, it must entitle the married parties to the same rights and

privileges in this country (when amenable to the jurisdiction of its Courts of law), as are enjoyed by its own inhabitants, as to all civil rights, agreeably to the clear opinion of Erskine, already referred to.

"The duties arising from the state of marriage, are not at the arbitrary disposal of the parties themselves, but are due to the community and society under whose laws they live.

"To suppose that persons coming within the territory of a different state, import alongst with them the whole peculiarities of the law of their own, and are entitled to insist on having effect given to them there, however repugnant they may be to the law of the country of their residence, is contrary to every rational principle of general jurisprudence, and has not been shewn to be supported by any state in questions of this nature.

"But to come closer to the argument of the defender, it is said, that, as marriage by the law of England is indissoluble, and her's was contracted and celebrated there, it must be judged of by our Consistorial Court (though possessing jurisdiction), by the *lex loci contractus*, and, that the law of Scotland, which authorizes the granting of divorce *a vinculo matrimonii* on account of adultery, cannot apply.

"This position is supported on what are maintained to be the principles of international law, as well as of the *comitas* that is due from one independent state to another.

"The defender states, in point of fact, that no marriage can be dissolved in England on account of adultery, by any Court of law, it being only competent by an act of the Legislature, and that all that the Consistorial Court can do is, to pronounce decree of divorce *a mensa et thoro*; and, in support of this statement, reference is made to the late decision of the twelve Judges in the case of Lolly.

"It is farther said, that, by the express words of the marriage ceremony in England, parties agree to an indissoluble union "till death do them part."

"With regard to the fact, what is the law of England, I am not at all moved by the argument of the pursuer, that the proceedings in Parliament relative to a divorce

bill are to be viewed as of a judicial nature, or as if the Legislature acted as a Court of law, as the relief it affords cannot be obtained by judicial process in that country. A law is, in fact, made for each particular case.

"But it is material to observe, that the application for such relief proceeds always on the statement, that the party complained of has, "by her adulterous behaviour, "dissolved the bond of marriage on her part."

"In the same way, the relief or remedy granted in Doctors' Commons proceeeds on the same principle, when it decrees a perpetual divorce *a mensa et thoro*. This is, no doubt, short of the remedy which our law has, for a long period, granted on account of similar wrongs. But it is evident that both laws proceed on the fundamental basis, that there has been a total breach or violation of the contract by one of the parties.

"The position, then, that marriage is, in England, indissoluble, in every sense of the term, or rather that the union of husband and wife is, from the very nature and terms of it, to last till death shall them part, cannot be received without the qualification above noticed.

"That the words of the ceremony are entitled to no regard, as creating any personal agreement or covenant that a dissolution of the union, or even a divorce *a vinculo matrimonii*, in the event of adultery, shall never be sought for, is obvious, from various considerations. 1. It is impossible to suppose that such an event at all enters into the contemplation of parties. They can mean nothing more than to enter into the obligation as constituted by law, and never look to the event in question. 2. The competency of suing for and obtaining divorce *a mensa et thoro*, is not in the least affected by the alleged personal engagement, while the nature of that remedy, by putting a final termination to the whole of the matrimonial relation (short only of conferring the power of marrying again), is entirely inconsistent with the vow of perpetual union till death shall them part, so much relied on by the defender. Parties no longer cohabiting are finally separated. 3. And, at any rate, the undoubted right of applying for a total divorce to Parliament shews that there is no bar created, by

the nature of the personal contract of parties, to the obtaining the full redress afforded by our law, as the Legislature can never be presumed to grant that redress from which a party was precluded by positive contract.

"The result, then, of this state of the law of England, which is a municipal institution, resulting from national policy, is merely this, that, for the grievous wrong sustained by this fundamental breach of the marriage-contract, redress of a limited nature only is afforded by its Courts of law, and that a total dissolution of the union of the married pair may be obtained by act of Parliament.

"But, if the parties should afterwards enter into this country, and become amenable to its jurisdiction, the Courts of which are *de jure* entitled to decree a total divorce for adultery committed within its territory, there is, in my opinion, no principle short of the surrender of the supremacy of our own law upon which the redress that is competent to its own inhabitants can be withheld.

"This appears to be the fair view of this relation, whether it be considered as a contract affecting the *status personarum*, or as one of an ordinary nature.

"As to the first, it clearly appears, that the state of any person is, and ought, according to the authorities referred to by the pursuers, to be determined by the laws of the country of his residence. When a violation of the contract that affects it is complained of, it must be judged of by the law of the place of residence of the violator and of the wrong done.

"No private agreement or convention of parties can affect the rights resulting from the relation of marriage. And I apprehend it to be equally clear, that parties who have contracted the relation of marriage in a foreign country, when they take up their residence here, must have their rights regulated by the law of Scotland, and not by that of the foreign state.

"It would be strange, indeed, if a Scotch man and woman, married at Berlin by a regular clergyman of that Protestant country, and according to the forms of its church, should, on their return to Scotland, be entitled to

maintain that their rights, particularly in reference to divorce, must be regulated, not by the laws of this country, but by those of the Frederician code, and that either party might sue for divorce in the Commissary Court, on the endless variety of whimsical and absurd grounds contained in it. This, however, would be the necessary result of giving effect to the *lex loci contractus*. But, how it could be carried into execution, it is impossible to conceive.

"But, it has been said, that a contrary doctrine would lead to English or Scottish marriages being dissoluble in France or Prussia, on the endless variety of grounds there permitted; the consequences of which would be most pernicious.

"I apprehend, however, that this view is not correct; because it is ever to be remembered, that our right to divorce *a vinculo matrimonii* for adultery, and the limited divorce *a mensa et thoro* in England, as well as the total dissolution by act of Parliament, proceed entirely on the absolute breach of the contract or bond of marriage.

"In so far, therefore, as a divorce obtained in another country does not proceed on that basis, it by no means follows that it could or ought to have effect either here or in England, as such divorces are avowedly permitted on grounds wholly different from the actual rupture of the contract. We would admit the validity of the Prussian marriage; but, as to the rights of parties arising from it, or wrongs committed by either of them, we would deal with them according to our own law.

"Viewing marriage only in the light of an ordinary civil contract, and holding that there has been a total violation and annihilation of it by one of the parties, it does not follow, on any fair principle of international law, that the remedy for that wrong, or the species of *actio injuriarum*, that is founded on it in our action of divorce, ought entirely to be regulated by what would be the remedy in the place of the contract; for it is well known, that, in the case of an ordinary action of debt or obligation, or action for breach of contract, redress, when sued for in Scotland, will be afforded according to our own

law, and not according to that of England alone, *quoad* execution and diligence.

"When under the jurisdiction of our law, execution and diligence will be awarded against a party in a way totally different from the practice of England. Inhibition and arrestment would follow. The diligence will be extended to the heritable estate here, though not in England. It will be allowed to operate against both the person and the estate, though otherwise there, as solemnly determined in the case of Lashley against Moreland and others, 21st December 1809; and, as well argued for the pursuers, every defence competent against a Scotch obligation may be competently pleaded against an English one, such as compensation, retention, or the like.

"The law of England gives that which, according to its own policy and institutions, it can give; while, in reference to identically the same obligation, our law applies its own rules and system of execution.

"There is another exception, noticed in the pleadings, as laid down by Lord Mansfield and Huber, viz. where the parties had another law in view than that of the *locus contractus*.

"There seems, therefore, no sound principle for denying the application of our own institutions to the case now under consideration; on the contrary, as it involves a question of *status*, it seems peculiarly entitled to the benefit of them.

"It is not, indeed, denied, that, in so far as adultery is viewed as a crime, the person guilty of it within our territory is amenable to our criminal courts; yet, why might not he urge that the law of his contract attaches no criminality to it? But a distinction is attempted between such a case and the civil action of divorce, which is said to arise to the innocent party as a privilege.

"Without dwelling on the circumstance, that this action always rests on a grievous personal wrong, and that the concurrence of the Fiscal of the Commissary Court is necessary to its institution, it must be observed, that there are other civil actions consequent on the commission of crimes, under which the guilty foreigner would unques-

tionably be liable in our civil Courts, whether it was sanctioned by the law of his own country or not. The crime of homicide may give rise to an action of damages and assythment; and I apprehend there cannot be a doubt that an Englishman would be bound to answer to it here, although such action is unknown in England. And various other instances might be figured. Why, then, is a prosecution for divorce on account of adultery to be held as in a different situation?

"If the principle of alleged international law contended for is, in reality, well founded, we should naturally expect to see it acted on in all other countries, and particularly among our enlightened neighbours in England. But there, we find, in regard to this very relation of marriage, a course of proceeding adopted entirely inconsistent with giving effect to the *lex loci contractus*.

"1. While the validity of Gretna Green marriages is, in England, held unquestionable, though in direct violation of the statute, and in defraud of the law established for the inhabitants of its territory, yet the rights and privileges of the married pair are held to be regulated by the law of England, the future residence; in the same way as it was held with us, in the case of Hogg or Lashley against Hogg, 7th June 1791, that, where parties had been married in England, and, after residing there for some time, had come to Scotland, and acquired a domicil, the right of the children to legitim, upon the death of the husband, must be determined by the law of the domicil. The same would have been found in the question between the same parties, 16th June 1795, as to the widow's *jus relictæ*, if it had not been barred by a special agreement.

"2. It is notorious that, though natives of Scotland who have married here, and afterwards lived in England, were to sue for that remedy which would be competent in their own country, on account of the violation of the contract, yet it would not be afforded by any English Court of law. But, notwithstanding the constitution of such Courts, that would seem as competent as the demand here of a divorce *a mensa et thoro* for adultery. The rights flow-

ing from the marriage of such persons would all be regulated by the English law.

"These are examples sufficient to shew, that effect is not universally given to the *lex contractus* in the way contended for by the defender.

"But, it is urged, that, on the ground of *comitas*, or that deference which one independent state owes to the institutions of another, our Consistorial Court, though possessing the competent jurisdiction, ought to deny the remedy of our own law, because it would not be afforded in England to the same parties suing there.

"Upon this part of the case, as well, indeed, as in every other part of it, great learning and research have been evinced, both by the Bar and by the learned Judges of the Court below.

"In determining as to the effect that is due to this argument, we are not called upon, nor, indeed, are we entitled, to give any opinion as to the wisdom and expediency of our own institutions in this department of law, in comparison with those of England, or to decide the question, which are most consonant to the principles or precepts of Christianity. The field of expediency is wide. And, whether it is wiser and more advantageous to the community to permit a total dissolution of marriage, when a fundamental violation of it has taken place, and thereby both to punish the offending, and to relieve the injured party, or to grant only the limited remedy of a perpetual separation, thereby annihilating the purposes of the one union, without affording the power of ever forming another, is certainly a question upon which it is possible that different opinions may be entertained.

"It appears to me to be sufficient to the decision of the question of *comitas*, that it is laid down by all writers on the subject, that one state is not bound to follow the law of another, if it is prejudicial to its own system of laws and policy, or to the rights and interests of its own subjects. The law of the foreign state must be *innocuæ utilitatis*, and is only entitled to support "quatenus sine "præjudicio indulgentium fieri potest," or, "Rectores "imperiorum id comiter agunt ut jura cujusque populi,

"intra terminos ejus exercita, teneant ubique suam vim, "quatenus nihil potestati aut juri alterius imperantis, ejus-"que civium, prejudicetur." It is unnecessary to refer to the other authorities that have been adduced in the papers, in support of this most reasonable and universal rule.

"Now, the law of Scotland, in regard to divorce, on account of adultery, at least must be held as adopted by the state since the period of our Reformation;—from views of its sacred origin;—its wisdom and utility in reference to public morals and happiness;—and as the proper means of affording redress for grievous wrongs (which our criminal law has raised to the rank of heinous crimes), and of deterring, by the disgrace it occasions, from the commission of similar offences.

"In this view, it seems impossible to maintain, that it is a matter *innocuæ utilitatis* to abandon altogether our own law, and to give effect to that of a neighbouring country, which proceeds upon a principle altogether different.

"Again, can it be justly said, that it would not be prejudicial to our own inhabitants, to see whole classes of strangers living openly in defiance of that law which binds them? Or, is it not the greatest possible hardship on the pursuer, Mr Edmonstone, to measure out to him, not the law of his own country, but one that cannot afford him the redress to which every other married Scotsman is entitled?

"It would lead to the necessity of determining every question of right arising out of marriage, according to the rules of a law unknown here, and for expounding which no court exists within our territory.

"No regard to *comitas* has ever been shewn by us in regard to attempts to settle heritage by English wills, however clearly manifested, and valid *lege loci*.

"With regard to the course of decisions, while there are many that have been pronounced in the Consistorial Court, in conformity with the view which I entertain, there are none that appear to have been decided in this Court that can fairly be urged as direct authorities against them.

"It is needless to enumerate the cases referred to in the papers, in which judgment of divorce has been pronounced on account of adultery committed in Scotland, in reference to English marriages.

"There is one earlier, in which the marriage, though celebrated in England, was dissolved here, viz. the late Lord Eglinton's; and there is a still more early case, that of Major Urquhart, where the marriage was celebrated in America.

"In the case of the Duchess of Hamilton, the divorce was afterwards followed by her marriage with an English nobleman, which was never heard to be questioned in that country.

"It has been said, however, that the case of Wallace and Brunsdone is an authority against the validity of such divorces. I have been at pains to peruse the arguments in that case, and, though there are, no doubt, passages to be found in which the argument of the defender is urged, and though the learned reporter states, "that the majority "of the Court seemed to be of opinion, that there was a "*forum ratione originis*, so as to found a jurisdiction in "the Commissaries, but that it was not competent for "them, *in the circumstances of the case*, to pronounce a "judgment of divorce between the parties," it cannot be said that the case was determined on any such grounds as occur in the present. It was treated by the pursuer as a question of jurisdiction; and, though it was argued on the other side both as such and on the merits, there were too many specialties to make it apply here. In the papers for Sir Thomas Wallace, it was held as clear law, that, as to Englishmen and other foreigners, who have taken up their residence in Scotland, they are to be dealt with, *quoad* marriage, just as that law requires, and without regard to the law of their own country; while it is expressly stated, that, as to the defender, all the requisites that make jurisdiction be attended with legal execution were awanting, neither his domicil, nor property, nor person, being within the territory. In Sir Thomas Wallace's answers, the marriage is described as one contracted in England betwixt persons whose established

residence, both before and after the marriage, was in England, and who, at no one period since the date of the marriage in September 1783, had resided in Scotland. The decision, in that case, cannot, therefore, rule the present.

" Upon the whole, as to the case of *Edmonstone,* there cannot be a doubt, that the judgment ought to be altered.

" As to the case of *Levett,* as jurisdiction is established by a residence within the territory of Scotland, accompanied by citation given personally, and the fact of the alleged acts of adultery having been committed here, I am, for the grounds stated, also for allowing the action to proceed, as the fact of the marriage having been celebrated in England appears no valid defence ; it being always competent to detect, by all legal means, any collusion between the parties.

" With regard to the case of *Mrs Forbes,* holding the jurisdiction to be equally well established as in the last case, the competency of the action cannot surely be less apparent from the marriage having been celebrated in Scotland, whether upon a transient visit only or not. There arises no legal presumption against such a marriage, any more than there does as to Gretna Green marriages, which are every day acknowledged in England, because valid in the *locus rei gestæ;* and the effect which is given to such affords a strong argument in regard to the objection of fraud, which is supposed to attach to the parties to a Scotch divorce.

" With regard to the apprehended *conflictus legum,* from the judgment about to be pronounced, which is rested on the proceedings in the cases of Tovey and Lolly, whether it is real or not, it cannot influence us, deciding, as I trust we are about to do, according to the law of Scotland.

" The doubts expressed in the case of Tovey have been attended to with all due respect. And though the case of Lolly, while it was one attended with peculiar circumstances, did produce an opinion from the Twelve Judges of England, 1*st,* That a marriage contracted in England

was not to be dissolved by any decision of any court either in England or abroad, but by the authority of the Legislature alone. 2*d*, That the exception in the Statute 2d of James I. c. ii. as to divorce by sentence in an Ecclesiastical Court, related only to Ecclesiastical Courts in England, we may yet hope, that the Court of the last resort may think that the judgment pronounced here is, at least, deserving of fair and deliberate consideration. And, when so considered, we know the decision will be in safe hands.

" In the case of Edmonstone, the Lord Ordinary (5th March 1816), by the unanimous advice of the Court, remitted to the Commissaries " to alter the interlocutor " complained of, to sustain the action, and to proceed " therein according to law."

" And the Court (7th March) refused a short reclaiming petition without answers.

In the cases of Forbes and Levett, *Lords Glenlee, Bannatyne,* and *Robertson* (the *Lord Justice-Clerk* dissenting), proposed (5th and 9th March) a remit to the Commissaries for farther inquiry as to the domicil. *Lord Robertson* thought it unnecessary to inquire as to the domicil of the pursuers. *Lords Glenlee* and *Bannatyne* were of a different opinion. The Court being equally divided as to the necessity of inquiring into the domicil of the pursuers, the case stood over for the opinion of Lord Pitmilly, who (29th May, 1st June 1816), upon the ground, that, supposing there was no collusion, the Courts of this country were bound to give their own redress, without regard to the alleged chance, or even certainty that the pursuer meant to establish a *status* to be enjoyed in another country, and, particularly, that in these two cases, the pursuers were wives, whose domicil, except in the case of regular separation, follows that of the husbands, was of opinion, that it was not necessary to inquire into the domicil of the pursuers.

" These two cases were therefore (1st June 1816) re-

mitted to the Commissaries, with instructions " to recal " their former interlocutor, to allow the pursuer to prove " that the defender was domiciled and resident in Scot- " land when the action was raised, and also to make what " inquiry they may think proper and competent, in order " to ascertain whether the present process be collusive, " and thereafter to proceed according to law."

### Note (H.) p. 160.

In the canons of the Councils of Perth, held in the 13th century, and published by Lord Hailes, there is nothing upon the subject of divorce for adultery. But in the earliest genuine authorities of the Scotch law which have been preserved, the distinction between the greater divorce *a vinculo matrimonii* and the lesser remedy of separation *a mensa et thoro*, seems to have been clearly drawn, and both of these modes of redress likewise appear to have been recognised as lawful. Thus, in the act of the fifth Parliament of Queen Mary, cap. 19, dated 1st February 1551, " It is statute and ordained, that " quhat-sum-ever person maries twa sundrie wives, or " woman maries twa sundrie husbandes, livand together " UNDIVORCED LAUCHFULLIE, contraire to the aith and " promise made at the solemnization and contracting of " the matrimonie, and swa ar of the law perjured and in- " famous; therefore, that the paines of perjury be exe- " cute upon them with all rigour," &c. Consequently, it is plain, that no guilt or penalty of perjury was held to be incurred likewise by the second marriage of such persons during the lives of those to whom they had been first married, if they were lawfully divorced. In other words, the divorce *a vinculo* was then recognized in Scotland by the Legislature as lawful.

The immediately following statute of the same Parliament, which subjects notour adulterers to the pains of rebellion in case of disobedience to the sentence of the spiritual jurisdiction, likewise evidently admitted as an exception the dissolution of the marriage by previous lawful divorce.

The act of the 9th Parliament of the same sovereign,

cap. 74, anno 1563, which punishes notour adultery with death, "als declaris, that this acte on no wise sall pre-"judge onie partie to *pursew for divorcement* for the "crymes of adulterie before committed, conforme to the "law."

Before the date of the Reformation, there is evidence too, that both kinds of divorce were recognized in the judicial proceedings of the Courts of common law in Scotland. Thus, Sir James Balfour, who was one of the original Commissaries, and afterwards Lord President of the Court of Session, refers in his Practics, p. 99, to the case of Janet Auchinleck against James Stewart, 18th December 1540, which has been examined in the manuscript record of the acts of the Lords of Council, Vol. XIV. folio 58, from which it appears, that the pursuer in that case instituted an action of removal against her husband from her jointure lands, "Because, of the com-"mon law, when ony man and his spouse are divorced "SIMPLICITER, *or frae bed and buird thro adulterie* "committed be the man, as in this case, the haill tocher "gude, and all that was gotten be the man frae the wo-"man be virtue of the matrimonie contracted and so-"lemnized betwixt them, ought to be restored to the "woman again, with the profits thereof, after giving of "the sentence of divorce betwixt them." The fact of the divorce being proved, the judgment accordingly "de-"cerns and ordains the mails, farms, profits, and duties "of the same, to pertain to the said Janet for her lifetime, "and she to intromit with the same at her pleasure, the "said sentence of divorce standing as said is, and that the "said James Stewart desist and cease therefrae," &c.

Another case, which appears to be in point, occurs in the manuscript record of "*the acts and decreets of the* "*Lords of Council and Session*," 23d March 1563, folio 235, in the action of Catharine Watson, relict of James Gadderon, burgess of Elgin, "and James Innes, now her "spouse, for his interest, against the heirs of her former "husband," concluding for possession and removal of them as to certain lands to which she had right in liferent, as relict of her first husband, and against which claim the

defenders, " Archibald Gadderon, &c. compeared be Mr " Alexander Skene, their procurator, wha alleged, that " the said Catharine Watson can have nae action for re- " moving the defenders frae the twa aughteen parts libel- " led, in respect that she was NOUGHT (not) SPOUSE to " the said James the time of his decease, bot was SIM- " PLICITER DIVORCED from him be Sir John Gibson, " Commissar of Murray, upon the 27th day of August " 1560.". After debate, this defence was sustained as relevant, and as the record bears, " therefore, the Lords of " Council assigns to the defenders the 10th day of May " next to come, with continuation of days, *for proving of " the said alledgeance*, and to that effect, ordains them to " have letters to summons sik witness and probation, " and to produce sik writs, rights, reasons, and docu- " ments, as they have or will use for proving of the points " of the said alledgeance again the said day; and, in the " mean time, continues the said principal matter in the " same form, force, and effect as it is now ; but prejudice " of parties unto the day foresaid, and the party com- " pearand as said is, are warned thereof *apud acta*."

From the date of the abolition of the jurisdiction of the Ecclesiastical Courts of the Roman Catholic Church in Scotland by the act of the Estates of Parliament of the 24th August 1560, ratified by the act 1567, cap. 2, of the 1st Parliament of James VI. the Consistorial jurisdiction in cases of divorce seems to have been assumed sometimes by the Courts of the Reformed Church, and sometimes by the Court of Session, till the Commissaries were appointed anno 1563, and in the earliest part of the record of this new Consistorial judicature, there is abundant evidence, that divorce *a vinculo* had continued to be in use for adultery as part of the common law during this interval.

It is sufficient to refer to the case, 26th January 1564, Jerome Hamilton against Elizabeth Sclater (MS. Record), in which the pursuer libels upon a decree of the ministers, elders, and deacons of the burgh of Edinburgh, dated 25th July 1560, finding the defender guilty of adul-

tery, and "decernand (decerning) her *to be nae langer* "*wife* of the said Jerome," and concludes, that, "in re-"spect the said Elizabeth is divorced frae the said Jerome "for her own facts, as said is, she ought to be decernit "be the said Commissaries to have tint (lost) and to tine "(lose) her tocher guid, and all other things given to "her or be her, in contemplation of the marriage fore-"said."

The decree of the kirk-session being verified, with a special licence to that Court, by the Lords of Secret Council, to proceed in the cause, and also the proof of the pursuer, the Commissaries decerned in terms of the libel.

Again, upon the 16th March 1564 (*ibid.*), in the case of Elizabeth Hamilton against John Maxwell of Calderwood, her husband, and Elizabeth Lindsay, his pretended spouse, the Commissaries reduced a decree of divorce *a vinculo*, pronounced by the superintendents, elders, and deacons of Glasgow, on the 6th of August 1563, against Elizabeth Hamilton, the first wife, for adultery, upon the ground that she had discovered, that, before she was divorced, her husband had begot a child in adultery, and that his guilt furnished a valid exemption to her against his action and decree.

In the MSS. record of the acts and decrees of the Lords of Council and Session, an action of adherence is likewise sustained, 19th December 1560, folio 219, John Chalmer against Agnes Lumsden, upon "our Sovereign's letters," for which the reason assigned is, "because there is nae Consistories instant, and the office of "the Spiritual Judge, quilks (which) of before was wont "to cognosce in sik like causes, now ceases. Therefore, "necessar it is, that the Lords of Council put remeid (re-"medy) thereto."

Again, upon the 26th March 1561, and 30th April 1561 (*ibid.*), Barbara Logan against Roger Wood, action of adherence is sustained, and decree pronounced by the Lords of Council and Session, for the same reason.

Also, upon the 2d June 1561, in the case of Jane Lyal against Niell Montgomery of Lainshaw, her spouse, a

proof of the pursuer's adultery is allowed by the Lords of Council and Session, as a defence against her action for restitution of conjugal rights.

The "Carta Constitutionis Commissariorum Edin-"burgi,"* by Queen Mary, conferred upon this new judicature the jurisdiction of all causes and actions relative to marriage, legitimacy, and divorce, arising within Scotland. But it did not alter, in any respect, the law as it before stood, and while divorce *a vinculo* has ever since been granted, in usual practice, on the ground of adultery, by the Consistorial Court of Scotland, the statutes and other written authorities of the Scotch law are silent as to the existence at any previous date of an opposite rule, or as to any change of the law of the kingdom on this head, of which there is not the slightest trace.

It was by special statute that second marriages were prohibited, "of persons divorced for their awne cryme and "fact of adulterie from their lawful spouses," even "with "the persons with whom they are declared by sentence "of the ordinar judge to have committed the said cryme "and fact of adulterie;" and under this limitation, the spouses have been always restored to perfect freedom from the bond of marriage by the divorce *a vinculo* of the Scotch law for adultery.

Anno 1600, cap. 20.

With respect to the practice of the ecclesiastical jurisdictions of the Roman Catholic Church in Scotland, before the Reformation, a volume of decrees of the official of St Andrews, in the arch-deaconry of Lothian, commencing about the year 1500, and ending upon the 9th June 1541, and a "*Liber Sententiarum Auditorii Sancti An-*"*driensis Principalis*," chiefly in cases of appeal, commencing 10th October 1544, and ending 23d September 1553, having been lately recovered and lodged in the Register Office, by Mr Thomson, the Depute-register; with his permission these have been examined, and have been found to contain a very great number of sentences of divorce *a vinculo*, upon grounds of nullity; † but not a

* Balfour's Practicks, p. 671

† See Note (M.)

single case, in which dissolution of a marriage, held to be originally lawful, for adultery, or any other cause, appears to have been either sued for or decreed.

The negative evidence afforded by this course of decisions, is certainly of considerable weight, as to the practice of the Ecclesiastical judicatures at that period. But there is no opportunity of comparing it with the records of the other jurisdictions of the Roman Catholic Church in Scotland at the same period, or with those of previous dates; neither are the other records of the province of St Andrews itself now to be found. The policy of the Church of Rome, under the direction of the primate of Scotland, might, perhaps, also, in some degree, account for the want of any case in which divorce *a vinculo* was granted within his jurisdiction, during the fifty years which immediately preceded the Reformation.

## Note (I.) p. 160.

In the action of divorce, at the instance of Dame Barbara Wauchope, otherwise Seton, against Sir George Seton of Garleton, Baronet, for adultery, instituted in the beginning of the year 1705, the pursuer being of the Roman Catholic Faith, omitted the usual conclusion, that their marriage being dissolved, she should be declared " free to " marry any other man whom she pleased, in the same " manner as if he were naturally dead." In all other respects her libel was in the common style.

Fol. 617. Against this action, it was stated in defence for Sir George Seton, *inter alia*, that the libel was " not relevant, because " it hath no conclusion before the will thereof for dissolv- " ing the marriage, but only that the pursuer and defender " may be separate from one another's society and fellow- " ship; and as an evidence of the meaning thereof, there " is no mention or conclusion that the pursuer is free to " marry whom and when she best pleases, &c. Yea, it " is offered to be proven by her oath, that this is indus- " triously omitted, because she did not mean to have the " bond of marriage dissolved. And, consequently, so long " as the marriage doth stand, she can never have access to

" her provisions, as if the defender were naturally dead.
" SECUNDO, *et separatim,* She is not ***in bona fide,*** and
" cannot be heard to pursue a dissolution of the marriage,
" because she cannot deny that she is professedly of that
" principle and conviction, that she cannot pursue or
" make use of such a dissolution under the pain of an
" *anathema,* conform to cap. 6, 7, § 24, Concil. Trident.
" The defender needs not be more explicit with their
" Lordships on the head; but it is certain, even by the
" law of Scotland, it is in a party's power, by her con-
" sent, to exclude herself from taking the benefit of the
" law here about divorce; and the pursuer being profess-
" edly of such principles, includes manifestly such a con-
" sent."

In the answers to these defences, it was observed, that, " *esto,* the libel did only conclude for separation, yet, it is **Fol. 620.** " without question, that adultery, which is a relevant " ground of divorce, is also a relevant ground of separa- " tion, as being the *minus* included in the *majus;* and it " is frivolously captious for the defender thus to distin- " guish," &c.

To the allegation, with regard to her religious principles in particular, it was further answered, " The pursuer " is not here to declare her principles, but doth most " lawfully crave the benefit of the law of God, and of " the land, against violaters of marriage and breakers of " wedlock, so that there can neither allegeance nor construc- " tion be made, as if she had consented never to pursue " for a divorce, which consent she never gave, nor intends " to give. Nor ought the defender so far to confess his " own wickedness, as to allege any such consent which " necessarily implied it."

In the subsequent written debate, the defender again repeated his plea, that " the pursuer neither craves, nor **Fol. 624.** " does her religion allow, a dissolution of the marriage, " but only a *separatio thoro,* as is clear by the Canons of " the Council of Trent, and all the writers on the Canon " law, *nam jure pontificio matrimonium nunquam quoad* " *vinculum dissolvitur, sed tantum thori separatio permit-*

"*tur*; Sanchez de Matrim. Lib. x. Disp. 18, R. 10," &c.
Fol. 627. To this she answered, "That the argument from the "Canon of the Council of Trent is altogether mistaken "and misapplied; for, 1*mo*, The chief design and words "of the Canon are prohibitory of the innocent party "marrying another during the guilty party's life, "inno-"centem qui causam adulterio non dedit, non posse alte-"ro conjuge vivente, aliud matrimonium contrahere; "Sanchez de Matrim. Lib. x. De Divortiis, Disp. 2. "Utrum ob adulterium alterius conjugis ita dissolvatur "matrimonium ut integrum sit innocenti ad alias nuptias "transire?" So that the opportune time for obtruding "the Council of Trent, if it were of any authority, should "be when the pursuer, after she has obtained a divorce, "may purpose to enter into a second marriage with an-"other. But this can never hinder the divorce, *primo et* "*ante omnia*, to be pronounced. But, 2*do*, The universal "Canon law itself does not reprobate divorce on the head "of adultery, as by the cap. significasti, et cap. ex libris "de Divort. And therefore it is, 3*tio*, That the later "Canons of the Council of Trent are held by Canonists "themselves not to be universally binding, but only in "*iis locis ubi Concilium Tridentinum est publicatum et* "*receptum*. As Zoes. ad Decretal. Lib. 4, tit. 3, de "Clandest. Desponsal. R. 21, *et sequen.* holds, and it can-"not be made appear that ever the Council of Trent "was received or published by Papists in Scotland."

At the close of the debate in this cause, the Commissaries, upon evidence of the defender's guilt, pronounced judgment in terms of the libel.

Note (K.) p. 164.

11th May 1705. Fol. 639. In the bill of advocation afterwards presented for Mrs Levett *ex parte*, the main drift of the pleading for her seems to have been to create an impression that the Radical Court was resisting a decision previously given by the Superior Tribunal upon the general question when it had been originally submitted to review.

"By that authority it was" (said to be) "fixed, that, by "the law of Scotland, it is no defence against an action "of divorce in Scotland for adultery committed there, "that the marriage was celebrated in England, nor that "the parties had been domiciled there.

"It is further fixed and ascertained, that the only kind "of residence or domicil necessary to such actions is, "that residence or domicil in the parties which is ne- "cessary to found civil jurisdiction."

The Commissaries, in truth, had rested their judgment, not upon the domicil at the date of the marriage, but expressly upon the ground "that the pursuer has not "established by evidence, that the defender held that REAL "domicil in Scotland AT THE DATE OF THE ACTION, "which was requisite to be proved." But it was convenient for the argument of the pursuer to overlook entirely the distinction between the real and the presumptive domicil. To justify this departure from the very constitution of the question, as it had been considered in the Primary Court, it was therefore assumed that it had been previously decided by the opinion of the ten Judges, that the residence or presumptive domicil necessary to found civil jurisdiction only was to be required in such cases. Now, there was no question as to jurisdiction in the original discussion of Mrs Levett's case. The Commissaries had even expressly sustained their jurisdiction, and had intimated that they would proceed in the action if the conclusions were limited to separation *a mensa et thoro* and aliment. The Court of Session, too, had not then given the decision alleged, or any decision or opinion at all as to the effect of the defender's domicil at the date of the action; or as to the *quality* of that domicil which should be required to support the conclusion for divorce *a vinculo matrimonii*. On the contrary, the record bore that, by the express instruction of the remit, the Commissaries were to allow proof, as to the fact of the defender's domicil and residence at the date of the action, and thereafter to proceed in deciding the case as might seem in

their own judgment " according to law," without any further direction.

Such statements, therefore, could not have been hazarded, if there had been any opportunity to confute them, and explain to the Superior Court how the facts really stood.

In like manner, no reference was made by the pursuer in the subsequent argument of this bill of advocation to those reasons which had formed the ground of the judgment brought under review. The action of divorce was indeed there considered as an *actio injuriarum*. But no attention whatever was paid to the views which the Commissaries had taken of it, as nevertheless purely a civil suit, the conclusions of which did not require that the *locus delicti* should be within the territory of the jurisdiction, and were in no way affected, either favourably or unfavourably, by the circumstance of the place where the crime was alleged to have been committed. According to these views, for example, if a Scotch inhabitant of the village of Coldstream had committed adultery, it could be of no importance to the action of his wife for divorce in the Scotch Consistorial Court, whether the scene of his guilt was in his own village or in the English village of Cornhill, on the opposite side of the Tweed. Nay, unless the course of decisions for time immemorial has been altogether erroneous, the action of divorce, by the law of Scotland, is the very same in every quality and consequence, for adultery of a Scotch husband or wife committed upon the continent of Europe, or in Asia, Africa, or America, as when the crime has been committed in the city of Edinburgh.

Without joining issue upon this view of the point, which the Commissaries had adopted, their opinion was thus considered in the bill of advocation.

" It is said, that, although the delinquency occurred in Scotland, yet that is of no importance, because the action is pursued *ad civilem effectum*.

" This is also a singular distinction. If an Englishman, by a bond, executed in England, engage to pay money on a certain day, and before that day abscond into Scotland, where he violates his contract, will not the fact,

that he is violating his contract in Scotland, be an important circumstance, to induce a Scotch Judge to grant redress? Where, in the name of wonder, ought injustice to be remedied, but where it is committed? Must not the pursuer follow the defender, and must not redress be granted by the Judge who finds the defender within his territory doing wrong?

" In another passage, " Consistorial jurisdiction" (it was observed) " is so far different from criminal jurisdiction, that it does not imply the existence of the *potestas gladii* or *imperium merum*. Still, however, it differs from ordinary civil jurisdiction, in this respect, that it takes cognizance of causes, which do not fall under civil ordinary jurisdiction."

After noticing the division of jurisdiction into civil, criminal, and ecclesiastical, as to the point in question, it was then further remarked, that " the *actio injuriarum* was of old entrusted to the Commissaries, as a matter falling under the jurisdiction of a court of conscience or of religion, whose jurisdiction is neither strictly civil nor strictly criminal. That action, when founded on an averment of adultery, became still more strictly consistorial, from its connection with marriage and bastardy. It is impossible to found any conclusion upon the circumstance, that this process is civil rather than criminal. It is truly a consistorial question, and in all such cases the *locus delicti* creates jurisdiction, because it is in *loco delicti* that religion and good morals are insulted, and it is there that redress is due. Accordingly, that principle prevails to this day in the courts in Scotland, which are strictly ecclesiastical, viz. the Presbyterian Church Courts, which enforce their sentences by spiritual sanctions only." Thus the inference was drawn, that consistorial jurisdiction " can only protect public morals, by giving redress where the crime is committed. The palinode takes place where the scandal occurred, and the divorce must be granted where the guilty party is found committing it."

Now, the action for defamation or scandal here referred to is competent, in the first instance, before the ordinary civil courts of common law, as well as before the Commissaries, and with the very same conclusions, upon the ground, that when pursued for damages or reparation to the private party, it is an ordinary civil action; at least the point was so decided in the case, 4th March 1755, Auchinleck against Gordon; and in the case, 9th February 1765, Wilkie against Wallace, Sel. Dec. Nor does any distinction seem to be made in the practice of the law of Scotland as to the penal conclusions comprehended in this peculiar action. The palinode, or recantation, in actions of scandal, was a peculiar conclusion, applicable to verbal injuries, which is now obsolete. By what rule of analogy then, must the dissolution of marriage by divorce be decreed to take place where the crime of adultery has been committed, as defamatory expressions were retracted by palinode at the place where these had been spoken? Upon what ground is it here asserted, that the action of divorce is entertained by the Consistorial Court to protect public morals, when that action can be sued only by the private party, and for private redress? Where has the authority been discovered for holding, that it is the *locus delicti* which founds *the jurisdiction* in actions of divorce, and that the decree must be obtained there?

With respect to the extremely delicate and difficult point, whether the remedy afforded to foreign parties should be that of separation *a mensa et thoro*, when their own law does not permit divorce *a vinculo*, the argument for the pursuer was stated in this manner:

"Lastly, The Commissaries propose to introduce into this country the form of redress granted at Doctors' Commons, viz. to divorce, but not to declare the *vinculum matrimonii* dissolved.

"The complainer humbly apprehends, that the Commissaries have no power in this way to alter the practice

of the law of Scotland, and to introduce the law of England. A court of law has no other duty than to administer the law, and has no right to alter the institutions of our forefathers; and for what beneficial purpose would they do so? Would it improve the purity of our morals to doom certain innocent parties to a life of celibacy; or would it render marriage more honourable, to enable those persons to retain the name of marriage without the reality, who have dishonoured it by profligacy?

"As already noticed, no pretext for this exists in the plea of *comitas*, because the English courts do not adopt the Scotch remedies for adultery towards persons whose marriages were solemnized in Scotland. In the next place, the Commissaries have no power to introduce the general system of the law of England. Are they to compel parties to find caution to live chastely? If they enter into new marriages, will they be protected against prosecutions for bigamy, or notour adultery, by the English statute of James the First?

"In one word, the Commissaries admit that they have jurisdiction in this case. Their powers in this, as in other cases, form the measure of their duties. They are evidently persisting in erroneous notions, in opposition to the opinion of the Supreme Court."

Now, what the Commissaries had really proposed by their judgment, was to give the inferior remedy of the Scotch law, in the Scotch form, if required, in the case of English parties whose relation of husband and wife, as it subsisted in their own country, it had been ascertained by the best evidence, that the Scotch Court could not *effectually* dissolve. The reasons of that conclusion were fully stated, and do not appear to have been ever hitherto considered by any party. In particular, it has not been shewn that these reasons are in any respect affected by the circumstance, that the Consistorial Courts of England have not power to grant divorce *a vinculo* of a lawful marriage in any case, whether of foreign or domestic parties.

The style of the passages quoted can only call for notice

in regard to the consistorial jurisdiction and law. It accords perfectly with the object and tendency of the whole other pleadings and arguments, maintained without any real contradictor in all of these English and Irish cases. But from the tenor of the judgments and interlocutors upon record, it will be easy to form an opinion how far the charge of contumacy, thus plainly insinuated against the Judges of the Primary Tribunal, for the purpose of overturning their decisions in the Court of Review, has any real foundation whatever, and whether the statement of this most unjust and groundless imputation can be accounted for otherwise than by reference to the well known tactics of forensic warfare.

Note (L.) p. 166.

THE opinions delivered by the Judges of the Second Division of the Court of Session at the advising of this case, and that of Kibblewhite against Rowland, as reported together by Lord Cringletie, Ordinary, were given in the following terms:

*Lord Cringletie* presented the bills of advocation without any remark.

" *Lord Justice-Clerk.*—I have no difficulty in saying, that I entirely differ from the Commissaries as to the interlocutor which they have here pronounced; and I am decidedly of opinion, that it ought to be altered, and that a special remit should be made to them to proceed with this divorce according to the rules of the law of Scotland.

" Having given my opinion upon the general argument at a former period, I feel it now only necessary to state, as formerly, that it coincides with the unanimous opinion of the ten Judges, on the question proposed to them by this Court.

" With regard to the particular circumstances of this case, it appears from the proof which has been led as to the residence of the defender, Mr Levett, that he has lived for a considerable time within the bounds of the territory

of Scotland. It is established, that he has resided at different places, but all of them within Scotland, for a year and a half, or nearly two years. Although he has no house in property or under lease, he has lived in lodgings; in one of which the notice or citation in this action was personally served upon him. These facts are established by the proof.

"With regard to the existence of collusion, which is one of the qualifications in the opinion given by the consulted Judges, you have an oath of calumny by the pursuer, which, in all the circumstances that could tend to establish collusion, completely negatives every idea of its existence in this case. It is thereby ascertained, that there has been no understanding, direct or otherwise, between the parties, in regard to the institution of this action. There was no collusion in the husband's coming to Scotland. There was no communication whatever relative to his coming to Scotland and residing there between him and any person acting for the pursuer, and taking an interest in the proceedings upon her part; and she does not believe that there has been "any communi-"cation whatever upon the subject, either between her "and any friend or agent upon her part, or between any "friend or agent of his with any friend or agent of hers."

"In these circumstances then,—when there is no suspicion of collusion—where a complete domicil has been established, sufficient under every view of the law of Scotland to found jurisdiction, and that independently of the personal citation given to the defender,—where the wrong or act of adultery was committed in Scotland,—the question is, Whether there is any thing in the principles of our law to prevent a divorce being granted in this case? The Commissaries of Edinburgh have thought proper to find, that, although they have a perfect jurisdiction in regard to this case, yet, because divorce is only granted as an extraordinary remedy in England, where the parties were married and formerly resided, they have no authority by the law of Scotland to grant a divorce *a vinculo matrimonii* to the pursuer of this action. I think, however, that the principles of our law call for a deci-

sion very different from that of the Commissaries; and I am for remitting to them, with instructions to proceed according to our own law in the decision of this case. I cannot go into the distinction of acknowledging a jurisdiction that authorizes the Commissaries to entertain a case in the Consistorial Court, and to award on account of adultery, that limited species of redress, namely, a divorce *a mensa et thoro*, which, although allowed in the Ecclesiastical Court in England, has hitherto been unknown to us, and which, at the same time, authorizes them to refuse the only remedy which the law of Scotland prescribes. The English law cannot be the rule which ought to be followed by our Courts in such a case.

" *Lord Bannatyne.*—When our opinions were given formerly, upon the general question, I held a different one from that which was adopted by the majority of the Court. But I am for altering the opinion of the Commissaries in this particular case. There is no inconsistency between my judgment in regard to this case, and the opinion which I delivered on a former occasion. The question at present is not what is right in the general question, but what is so in the case before us. This case went to the Commissaries from this Court on a remit, with instructions; and the question is, what was the meaning of that remit in this particular case? When your Lordships determined the case formerly, the Court proceeded upon two views. The majority of the Court thought, that wherever there is residence in Scotland sufficient to found jurisdiction in its Courts, there it is proper to apply the law of Scotland, and that the Commissaries were not at liberty to pay any regard to the law of the country where the marriage took place. On that point I differed from the majority of the Court; I was disposed to think, that there is a distinction between that residence which merely founds jurisdiction, to which effect our law requires only the short residence of forty days, and that which entitles a Court in this country to apply their own law in a question of divorce between parties who had been married in England, or any other

country having a system of municipal law different from ours, and thought that preference should be given to the law of the country in which the marriage was contracted, between parties, who, as natives, or having a fixed domicil in it, were at the time subject to the general authority of its laws, to which I did not conceive that we had a right to deny effect, as the measure of the rights belonging to them as married persons, to the extent of applying the particular rules of our own law, except in the case of their withdrawing themselves from the authority of the one, and becoming subject to the other, by a fixed and permanent residence in Scotland. Under this view, therefore, I hold our Courts in this case bound to apply the law of England, conceiving the pursuer still to retain the same fixed domicil in England which he had before the marriage took place. Your Lordships, however, were of opinion, that there is no such distinction recognised by the law of Scotland, and that residence sufficient to found jurisdiction is sufficient to warrant the law of this country being applied in a question of divorce; and that being your opinion, and thereby expressed as the judgment of the Court, I think, with great deference to the Commissaries, that they were not at liberty to apply their own opinion against that of this Court.

" *Lord Glenlee.*—My opinion went the same way with that of Lord Bannatyne, on the former occasion he spoke of, and if I were satisfied that, from an explicit order, or by clear implication from the terms of our remit, the Commissaries ought to have understood the opinion of this Court to be, that where there is residence sufficient to found jurisdiction, the law of Scotland should be applied, I should agree with his Lordship likewise in thinking, that the Commissaries have done wrong; and I should think that, instead of proceeding to consider the question before us, we should at once alter their interlocutor, as inconsistent with the remit of the Court. But I do not think that such were the terms of the remit. It allows " the pursuer to prove that the defender was do-

" miciled and resident in Scotland, when the action was
" raised; and instructs the Commissaries to make what
" inquiry they may think proper and competent, in order
" to ascertain whether the process be collusive, *and there-*
" *after to proceed according to law.*" I think the Commissaries have acted in strict conformity to this judgment; and however the facts might stand with regard to the matters which they were to inquire into, they were entitled to pronounce any judgment that appeared to them to be according to law. If they happened to be in this Court, they might hear what the different Judges said, but we are not to suppose that they were in Court, or heard the reasons of the Judges for their opinions; and they were bound therefore to go by their own judgments, and to attend only to the terms of the remit.

" I may mention here with propriety, that I adhere to my former opinion; but I think it unnecessary to repeat the grounds upon which it is formed. I shall just say, in the first place, that I would pay great attention to the true meaning of the whole Lords in the opinion they gave on the question proposed to them by this Court. But, upon the fullest consideration I can give the matter, it seems to me explicitly stated, that they meant to decide nothing whatever, but that the mere fact of a marriage having been celebrated in England, is not *per se* a sufficient ground for refusing a divorce in Scotland. In that opinion I concur with them; and that is the whole length of the opinion of the Judges. I think certainly that a marriage having been celebrated in England, is not a sufficient ground *per se* for refusing divorce in Scotland.

" On the other hand, I think that the question with respect to domicil is of great importance; and if I were satisfied that it is proved here, that such a domicil has been established as, to all intents and purposes, subjects the parties to the law of Scotland, I should think the Commissaries wrong in their interlocutor. But I am satisfied, that, although such a domicil as that which has been proved, and personal citation, of itself enough, are sufficient to give the Commissaries a jurisdiction, it is quite a different consideration, according to what law the question

should be decided. In the same manner, such a domicil may be established, as may give jurisdiction; for example, in a question of succession; but it is quite a different question by what law the succession shall be determined. It does not follow, that, because jurisdiction is established in our Courts, the succession shall be regulated by the law of Scotland. It appears to me as plain as light of day, that residence, established of the kind stated in both of these cases, should be no reason for giving the parties the benefit of the law of Scotland, with regard to divorce. They are not in such a situation as to authorize this. The lady seems just to come here to be enabled to take another husband, contrary to the law of her own country, for she seems to have no view of settling here, in order to enjoy such benefit in Scotland. I am, therefore, for adhering to the interlocutor of the Commissaries.

" *Lord Robertson.*—When this case was first before your Lordships, I stated, at length, the grounds of the opinion which I delivered, and which led me to concur in the remit to the Commissaries to alter their interlocutor, and to proceed in the divorce, agreeably to the law of Scotland. At that time a difficulty occurred, whether there was any evidence as to the domicil of the defender, so as to found jurisdiction against him, and the remit was made for ascertaining the fact as to the residence of the defender in Scotland; and, *secondly*, whether there was collusion. I think the Commissaries were entitled to proceed as they have done in the case, and have acted in strict obedience to this remit. It was confined to these two points, viz. to inquire regarding the domicil of the defender in Scotland,—whether it was such as to found jurisdiction; and to inquire whether there was collusion between the parties. They have led proof upon these points and they have then proceeded as they saw cause. In their situation, I would have pronounced a different judgment; but I do not blame them for proceeding according to their own opinions in the decision now under review.

" With regard to the proof which has been led, the evidence as to residence is all that can be brought, or can

be expected. The great difficulty as to a proof of residence is, as it is connected with the question of collusion. If it appeared that a party had come to Scotland merely to found a jurisdiction, in order that a divorce might be sued for and obtained, I would have great doubts of sustaining a residence in this country, as a sufficient ground for granting a divorce. But I see nothing in this proof that can induce such an opinion respecting the parties in the present case. I do not find any thing in the whole of the evidence that can lead to the conclusion, that the residence here was in order to found a jurisdiction, that divorce might be obtained.

" With regard to the question of collusion, the proof is entirely satisfactory. Mrs Levett answers every question fully and fairly; and there appears to have been no collusion, directly nor indirectly, on her part with her husband, nor by any other person for her behalf. I therefore concur in opinion with your Lordships, and I am for altering the interlocutor of the Commissaries.

" *Lord Craigie.*—I was not here when your Lordships formerly pronounced a decision on this question. At the same time, I agree in opinion with your Lordships on the point of jurisdiction; and I think, that where there is jurisdiction, the law of Scotland must have effect.

" It appears to me, that, according to the strict words of your interlocutor, the Commissaries were at liberty to pronounce such a judgment as they might think right. But from their access to this Court, I should think they might know the sentiments of the Judges when such a case as this is decided here; and I own that I would not, in their circumstances, have pronounced the interlocutor which they have done.

" On the question of collusion we are all agreed. There appears to have been no collusion between the parties.

" With regard to the domicil—taking into view the circumstances of this case,—the fact of the adultery having been committed in Scotland,—the defender's domicil being established here (and I think residence within the territory of Scotland for forty days is sufficient to found juris-

diction), the law of Scotland must be applied. In consequence of their passing from England here, the defenders have no domicil but in Scotland. No action, it would appear, can be instituted in England against them till they return thither. I am, therefore, for altering the interlocutor of the Commissaries, and for remitting to them with instructions to proceed in the divorce."

The *Lord Justice Clerk* expressed his conviction in strong terms, that the general question must now be held as decided, and could not again, with propriety, be brought under the review of the Superior Court.

Note (M.) p. 184.

THE collection entitled, "Sacrosancta Concilia ad "Regiam Editionem exacta Philip. Labbei et Gab. Cos-"sartii," has been selected as satisfactory authority with regard to the practice of the Roman Catholic Church on the subject of divorce.

The tenth Canon of the council of Arles, held *anno* 314, is the first on the subject which has been there observed, and it is in these terms: Tom. I. p. 1427. "De his qui "conjuges suas in adulterio deprehendunt, et iidem sunt "adolescentes fideles, et prohibentur nubere, placuit ut "in quantum possit consilium eis detur, ne viventibus ux-"oribus suis, licet adulteris, alias accipiant."

These expressions seem to imply that the previous rule and general practice were in favour of divorce *a vinculo* for adultery, and only to dissuade a particular class from the exercise of that right.

The eighth Canon of Council of Neocæsarea, held *anno* 314, *ibid.* page 1485, is the next. It relates only to the clergy, and is thus expressed: "Mulier cujusdam "adulterata laici constituti, si evidenter arguatur, talis ad "ministerium cleri venire non poterit. Si vero post or-"dinationem adulterata fuerit dimittere eam convenit. "Quod si cum illa convixerit ministerium sibi commis-"sum obtinere non poterit."

In the Canons of the Council of Gangres, held about the year 325, it has been stated by Hermant in his Histoire des Conciles that the decision was against divorce.

The Canon is in these terms: Labb. Tom. II. page 422. "Si qua mulier virum proprium relinquens, decedere voluerit nuptias execrans anathema sit." Here no allusion is made to divorce *a vinculo*, or to *judicial* separation for adultery, or any other cause.

The Council held at Mileve, *anno* 402, *ibid.* Tom. II. page 1117, did resolve to apply to the Emperor for a law, prohibiting divorce *a vinculo*, according to the terms of the following Canon: No. 102. "Placuit ut secundum evangelicam et apostolicam disciplinam, neque dimissus ab uxore, neque dimissa a marito alteri conjugatur, sed ita maneant, aut sibimet reconcilientur: quod si contemserint ad pœnitentiam redigantur. In qua causa legem imperialem petendum est promulgari." And the same resolution is repeated, *ibid.* page 1541, as confirmed by the general Council of Africa, *anno* 415. But it does not appear that any such law was then obtained. If passed, too, it would have been an ordinary legislative measure, subject to be repealed or altered by the power from which it proceeded.

Upon the other hand, the chapter entitled "Synodus S. Patricii, Auxilii, et Issernini Episcoporum, in Hibernia celebrata," *anno* Christi 450, *ibid.* Tom. III. page 1484, contains this Canon: "Audi Dominum dicentem; 'Qui adhæret meretrici unum corpus efficitur. Item, adultera lapidetur, id est, hinc vitio moriatur ut desinat crescere quæ non desinit mæchari. Item, *si adultera fuerit mulier numquid revertitur ad virum suum priorem*: Item, *non licet viro dimittere uxorem nisi ob causam fornicationis*,' ac si dicat, 'ob hanc causam.' Unde si ducat alteram velut post mortem prioris non vetant."

1. Cor. 6.

The sixth Canon of the Council held at Angiers, *anno* 453, *ibid.* Tom. IV. page 1021, again contains this general but not explicit interdiction: "Hi quoque qui alienis uxoribus, superstitibus ipsorum maritis nomine conjugii abutuntur, a communione habeantur extranei."

But the second Canon of the Council held at Vannes, *anno* 465, *ibid.* Tom. IV. page 1055, excepts the case of divorce for adultery as lawful thus : " Eos quoque qui " relictis uxoribus suis sicut in evangelico dicitur EXCEPTA " CAUSA FORNICATIONIS, sine adulterii probatione alias " duxerint, statuimus a communione similiter arcendos ; " ne per indulgentiam nostram prætermissa peccata, alios " ad licentiam erroris invitent."

The Council held at Adge, *anno* 506, *ibid.* Tom. IV. page 1387, by the twenty-fifth Canon, authorizes divorce after a judgment of the bishop of the diocese.

Another Council, held at Toledo, *anno* 693, deposed the bishop who had opposed the divorce of King Egica, Tom. V. page 1349.

The ninth Canon of the Council held at Soissons, *anno* 744, declares divorce *a vinculo* to be permitted to husbands " causa fornicationis," *ibid.* Tom. VI. page 1553.

The second and eighteenth Canons of the Council of Verberies, *anno* 752, permit wives in certain cases to marry again, whose husbands had committed adultery, *ibid.* Tom. VI. page 1657.

The Council of Compiegne, held *anno* 757, *ibid.* Tom. VI. page 1697, contains many Canons favourable to divorce *a vinculo*, and, among others, 16. " Si vir le-" prosus mulierem habeat sanam, si vult ei donare com-" meatum ut accipiat virum, ipsa femina si vult accipiat. " Similiter et vir."

The 36th and 37th Canons of the Council of Rome, *anno* 826, permit divorce *a vinculo* for adultery, *ibid.* Tom. VIII. page 112.

Pope Nicolas the Great, in his Responses " ad con-" sulta Bulgarorum," approves of divorce, on account of adultery, article 96, *anno* 859, *ibid.* page 546, Tom. VIII.

By the Canons of the Council of Tibur, *anno* 895, from the 41st to the 46th, divorce *a vinculo* seems to have been permitted in various cases for adultery, *ibid.* Tom. IX. page 462.

The 16th Canon of the Council of Bourges, held *anno* 1031, *ibid.* Tom. IX. page 1031, is in these terms:

"Ut qui uxorem SINE CULPA FORNICATIONIS dimi-
"serit, alteram illa vivente non ducat.

"Ut illi qui uxores legitimas SINE CULPA FORNICA-
"TIONIS dimittunt, alias non accipiant illis viventibus,
"nec uxores viros, sed sibimet reconcilientur."

The 12th Canon of the Council of Rheims, *anno* 1049, *ibid.* page 1042, prohibits the husband to marry another, "legitima uxore *derelicta*."

The 16th Canon of the Council of Rouen, *anno* 1072, *ibid.* Tom. IX. page 1228, prohibits the husband, whose wife had taken the veil, to marry another.

Pope Alexander III. answered to the consultation of the French prelates, "Licet Romana ecclesia non consu-
"evit, propter maleficia legitime conjunctos dividere, si
"tamen consuetudo generalis Gallicanæ ecclesiæ habet ut
"ejusmodi matrimonium dissolvatur nos patienter tolera-
"bimus."

The Council of Dalmatia, by the tenth Canon, *anno* 1199, *ibid.* Tom. XI. page 10, excommunicates those, "qui proprias dimiserunt uxores vel de cætero dimiserint
"SINE JUDICIO ECCLESIÆ."

The Council of Florence, *anno* 1439, *ibid.* Tom. XIII. decided, that the subsistence of the law of divorce in the Greek Church, and the difference in other points of discipline between it and the Latin Church, should be no obstacle to their reunion.

In this fluctuating and uncertain state, the law of the Roman Catholic Church, as to divorce, seems to have remained at the time when the Reformation was established, both in England and in Scotland; and it was some years after the dates of these events that the Canons of the Council of Trent *De sacramento matrimonii* were promulgated, upon the 11th of November 1563; the seventh of which does dogmatically settle the question for the adherents of the Church of Rome in these terms: "Si quis
"dixerit, ecclesiam errare, cum docuit et docet, juxta
"evangelicam et apostolicam doctrinam, propter adulte-
"rium alterius conjugum matrimonii vinculum non posse
"dissolvi, et utrumque, vel etiam innocentem, qui causam

Ibid. Tom. XIV. p. 874.

"adulterio non dedit, non posse altero conjuge vivente, "aliud matrimonium contrahere, mæcharique eum qui "dimissa adultera aliam duxerit, et eam quæ dimisso "adultero alii nupserit, ANATHEMA SIT."

But without assuming that any positive law was meant to be promulgated upon the subject of divorce by the Divine Author of our religion, for all nations, times, and circumstances, or entering upon the point at all as a question of casuistry, a judgment may easily be formed by those who retain the freedom of thought, as to the spirit and temper in which these decisions of that celebrated Council were given, from the three concluding Canons of this chapter. These are, "10. Si quis dixerit, "statum conjugalem anteponendum esse statui virginitatis "vel cælibatus, et non esse melius ac beatius manere in "virginitate aut cælibatu quam jungi matrimonio ANA- "THEMA SIT.

"11. Si quis dixerit, prohibitionem solemnitatis nupti- "arum certis anni temporibus superstitionem esse tyran- "nicam, ab ethnicorum superstitione profectam, aut be- "nedictiones et alias ceremonias quibus ecclesia in illiis "utitur, damnaverit, ANATHEMA SIT.

"12. Si quis dixerit, causas matrimoniales non spec- "tare ad judices ecclesiasticos, ANATHEMA SIT."

The unqualified anathemas of the Church of Rome are here denounced against all who may allege that it is not better to remain either in virginity or *celibacy* than to marry;—or who may affirm that it is superstitious to forbid marriage during certain seasons of the year;—or deny that the right of jurisdiction in matrimonial causes belongs to the Ecclesiastical Courts;—as well as against whoever shall maintain that divorce *a vinculo* may be permitted for adultery, according to the exception in the words of the answer of our Saviour, recorded by St Matthew, upon the questions put to him as to the lawfulness of dissolving marriage by divorce. Some idea, in particular, of the principles and practice of the Ecclesiastical Courts of the Church of Rome in Scotland, as to matrimonial causes, may be

formed from the extracts given in a subsequent note, as copied from their own records.

Note (N.) p. 185.

In illustration of the proposition here stated in the text, it may be sufficient to quote the following Translation of a part of that section of the Prussian Code published at Berlin, in 1795, "concerning Divorce by sentence of a Court," Vol. III. p. 84, beginning at section 668.

"668. A legal marriage can be dissolved by the sentence of a Judge.

669. Such divorces, however, cannot take place without the most forcible reasons.

670. Adultery, (Ehelruch) committed by one party, justifies the other to sue for divorce.

671. But should the wife be guilty of adultery, she cannot, under the pretence that her husband has also been guilty of it, prevent divorce.

672. Sodomy, or such other unnatural crimes, are deemed equivalent to adultery.

673. The same consequence follows from an illicit intimacy, from which a strong presumption may arise of the marriage vow being broken.

674. Mere suspicion is not a sufficient ground for divorce.

675. But if probable cause exists for such a suspicion, then must the accused party, at the summons of the other, be judicially interdicted all intercourse with the suspected person.

676. If, after such interdict has been obtained, an intimacy betwixt the interdicted parties still continues, this will constitute a sufficient reason for a divorce.

677. A divorce may also be obtained on account of wilful desertion.

678. But the mere change of the usual place of residence is not to be considered as a desertion.

679. On the contrary, if the man changes his residence, the woman is bound to follow him.

680. But if she contumaciously refuses to do so, after the order of a Judge to that purpose, then her husband is well entitled to sue for a divorce.

681. But the wife is not obliged to follow the husband, should he, by commission of a crime or other infringement of the laws, be obliged to leave the King's dominions.

682. In the same manner, she is dispensed from following her husband, should that be specially provided by her contract of marriage.

683. In every event, the man is bound by law to receive his wife, should she chuse to follow him.

684. But should he obstinately refuse this without sufficient cause (see § 687), he furnishes the wife with a good ground of divorce.

685. Should the wife leave her husband without his consent or just reason, then the Judge must exhort her to return.

686. Should the judicial summons of adherence be without avail, the husband can then insist for divorce.

687. In no event is the husband bound to receive back his wife, who has left him without just cause, of her own accord, until, by creditable witnesses, she shall prove that, during her absence, her conduct has been irreproachable.

688. Should the residence of the absent party be unknown, or so far removed from the Prussian territory that no judicial order for reuniting the parties as a married pair can be given, then the party willing to adhere is entitled openly to summon, and if this should fail, to sue for divorce.

689. But such circumstances of desertion must be proved as tend to ground a strong presumption of the intention to desert the other party.

690. But it is not possible to resort to the public summons till a year after the departure of the absent spouse.

691. During this year, the party remaining at home must use every possible endeavour to discover the retreat of the absent party.

692. If it appears from circumstances, that the absent spouse had deserted for good and lawful reasons, then the

other party must wait ten years after the desertion, and can even then only pursue for a declarator of death.

693. If the real causes of desertion appear to be doubtful, then the suit for divorce, after the expiry of two years (§ 690) from the appointed time, and under the prescribed limits, takes place.

694. Obstinate and continued refusal of the marriage rights shall be considered in the same light as wilful desertion.

695. A spouse who, by his conduct during or after cohabitation, prevents the proper object of marriage from being accomplished, entitles the other party to sue for a divorce.

696. An utter and incurable incapacity to perform the marriage duty, even although it should arise during the subsistence of the marriage, is sufficient to ground a divorce.

697. The same takes place in consequence of other incurable bodily frailties, that excite disgust and horror, or entirely prevent the fulfilment of the object of marriage.

698. Madness and idiotism affecting either of the spouses, can only give occasion for divorce, if they continue longer than a year, and then afford no reasonable hope of recovery.

699. If one of the spouses attempts the life of the other, or uses such violence as to endanger his life or health, then the injured party is entitled to sue for divorce.

700. The same consequence follows coarse and unlawful attacks on the honour or personal liberty of the other spouse.

701. For mere verbal offences or threats, and also for trifling acts of violence, married people in the lower ranks shall not be divorced.

702. Among the middle and higher ranks also, divorce can only be granted if the offending spouse is obstinately and repeatedly guilty of verbal or personal injury, without the strongest provocation.

703. Incompatibility of temper and quarrelsome dis-

position are causes of divorce, if they rise to such a height as to endanger the life or the health of the innocent party.

704. Opprobrious crimes, for which one spouse has received sentence of imprisonment, or commitment to the house of correction, justifies the innocent party to apply for divorce.

705. The same happens, if one spouse falsely accuses the other of such crimes, knowing the accusation to be false.

706. Further, if a spouse, by intentional unlawful transactions, endangers the life, honour, office, or trade of the other party.

707. If a spouse commences an ignominous employment, the other can sue for divorce.

708. For drunkenness, extravagance, or imprudent management of a spouse, marriage shall not be immediately dissolved.

709. But the Judge shall, at the instance of the other party, take such measures as shall tend to reform the guilty party, and prevent the bad consequences of such a course of life.

710. Should the guilty person make no reformation after these judicial admonitions, but persist obstinately in the former course, the marriage may then be dissolved at the further application of the injured party.

711. A wife is entitled to sue for a divorce on account of being inadequately maintained, only in case the husband's fortune shall have been impaired by his own crimes, mismanagement, or extravagance.

712. But if the man refuses the woman her maintenance, the Judge must fix her provision according to the husband's fortune, and compel payment.

713. But should the man, in spite of this, obstinately refuse the woman her maintenance, she may then sue for divorce.

714. In general, in every case the Judge must, in his judicial capacity, do all in his power to restore a good understanding between the married pair, and to remove the causes of their dissatisfaction.

715. In so far as a difference of religious faith is, from the beginning, an obstacle to marriage, in like manner will a change of religion by one of the spouses during the marriage give legal ground to the other to sue for a divorce.

716. Marriages, where there are no children, can be dissolved by mutual consent, if there is no reason to suspect levity, precipitation, or compulsion on either side.

717. But, with the exception of this case, a marriage cannot be dissolved for alleged dislike, if this cannot be supported by just cause.

718. Nevertheless the Judge shall be permitted, in particular cases, to dissolve the marriage, where it appears to him, that the dislike is so strong and deeply rooted that all hopes of a reconciliation, or attaining the object of marriage, are at an end.

719. In this instance, however, the spouse insisting for divorce against the will of the other, without any proper legal grounds, must be declared the guilty party, and found liable for the penalties of divorce.

720. If the spouse insisting upon divorce induces, by immoral conduct, the party willing to continue the marriage to commit those offences on which the claim for divorce is founded, the divorce cannot be granted.

721. Offences which have once been expressly forgiven can never afterwards be resorted to as grounds of divorce.

722. Forgiveness is presumed, if the offended party, after receiving convincing proof of the guilt, continues the marriage for a year.

723. The mere performance of the matrimonial duty, to which they were both bound before the commencement of the suit, does not infer a forfeiture of the right to sue for divorce.

724. During the process of divorce, one of the spouses cannot separate from the other without his consent.

725. But when the divorce is pursued for causes threatening the life, or endangering the health of the pursuer, and these causes seem to be well founded, then the Judge can grant a separation pending the divorce.

726. Only in this case can the wife demand, that the husband shall maintain her out of the house.

727. The expence of process must be defrayed by the husband at the instance of the wife, from her fortune, or, if she has none, from his own.

728. If the divorce is only sued for on account of the less important reasons detailed in sections 675, 676, 702, 708, 709, 710, 711, and it shall appear from the interference of the Judge, that there are hopes of a future reconciliation, the Judge may delay the publication of the sentence of divorce; but not beyond a year.

729. During this time, it is permissible for the spouses to live separate.

730. How matters are to be arranged in the meantime, with regard to the education of the children, their support, and that of the wife, and the security of the property, the Judge must regulate according to a sound discretion, without the necessity of a new process for that purpose.

731. After the expiration of the appointed time, the Judge must again attempt to reconcile the parties; and if this be without avail, the sentence must be pronounced without farther delay.

732. The dissolution of the marriage state takes place from the instant that the decree of divorce has received the sanction of the law.

733. And this sentence produces an entire dissolution of the marriage, and its consequences, in relation to both spouses.

734. Sentence of mere separation from bed and board shall not be pronounced, if even only one of the spouses be of the Protestant religion.

735. If the Judge pronounces a perpetual sentence of separation from bed and board, this has all the civil effects of a regular divorce between Roman Catholics.

736. It is left entirely to the conscience and religious principles of a divorced spouse to make use of the dissolution of the former marriage to contract a new one.

737. But if circumstances occur during the divorce, making a second marriage with a specified person improper, then such married person can only be permitted to remarry at all by virtue of a special licence.

738. But this permission must be granted, of course,

by the Judge who has pronounced the divorce, when it does not appear from the proceedings in the process of divorce, that the person whom the divorced party wishes to marry is the same person to whom the interdict applies.

739. The divorced wife retains, in general, that rank which her husband enjoyed at the time of the divorce."

These extracts are made from the new Prussian Code, entitled, *Allgemeinis Landvicht für die Preussischen Staaten* (General Code of Common Law for the Prussian States), 3d edit. Berlin, 1796. This Code was prepared in the reign of Frederick William II.; and in a letter patent from that Sovereign, under the Great Seal, which is prefixed to it, this new Code is declared to supersede a former collection, published in 1791, as well as all laws, edicts, and ordinances promulgated anterior to the present publication, with the exception of some peculiar provincial usages. The letter-patent bears date the 5th of February 1794; and the new Code was to acquire the force of law from the 1st of June of that year.

The Danish laws, according to the Code of Christian V. contain the following rules upon divorce: " 1. Si conjux cum conjugis fratre, sorore, vel persona sanguine ipsi proxime conjuncta, contra legem Divinam corpus misceat, et, singularem ob causam, remissionem pœnæ capitalis impetret; conjugibus indivulso matrimonii vinculo permanere conceditor, nisi innocens nocentem connubio suo exigi desideret.

" 4. Si maritum vel maritam lepra, quam ante nuptias non detexit, laborasse, posteaq. contagionem a morbida ad sanam personam serpsisse probabile sit: parti læsæ divortii cum lædente faciendi potestas esto.

" 6. Si maritus aut marita furtum aut aliud infame facinus designasse deprehenditur, capitali quidem supplicio dignum, sed cui pœnæ capitalis remissio singulari magistratus indulgentia conceditur: non ideo conjugii vinculum dissolvitor. Quod si talis persona malifica exilio fuerit multata, aut profugerit: restitutione in integrum a magistratu intra triennium non impetrata; liberum esto parti

innocenti ad novum transire conjugium, dummodo se interea honestam atq. impollutam egisse vitam legitime queat ostendere.

"7. Si quis exilio multatus sit; nec tamen ob facinus infamia dignum; septennium uxor maritum expectato; si interea magistratum sibi propitium reddere, ac restitutionem in integrum queat impetrare: sin minus; elapso septennio, novum uxori conjugium permittitor."

But no Code of any Protestant State has gone further in exercising, at discretion, the power to legislate upon this subject, than had been usual in the States of Christendom before the Reformation. In the very kingdom established in the Holy Land by their united efforts, in the Crusades, at the instigation and under the direction of the Church of Rome, this extract from the "Assisiæ Regni "Hierosolymitani," proves how the rule stood as to divorce.

"Per che si può divider il matrimonio dapoi fatto.

"CLV. Se un'homo prende moglie, la qual poi diventa lazarina, ò caze del mal de la brutta troppo bruttamente, ò gli spuzza troppo la bocca, ò che la pissa ogni notte in letto, sì che tutti li drappi si guastino, la rason commanda che sel marito si rechiama à la Chiesia, et non vole esser con lei, per il mal che, la Chiesia debba spartirli de jure, ma auanti che gli divida, la Chiesia diè metter la femina in una casa con tre altre honeste femine, quale stiano per quindese giorni insieme, over per un mese, per veder se è il vero, quel ch'el suo marito dice, et se cosi è vero, deve spartirli, ita che colui per cui lhabe si harà spartito, entri in religione, et il marito dapoi puol torre altra moglie; et questo istesso sia del marito, se lui havesse alcuno de tal mali, et la moglie fusse netta, et così si deve judicar, come è ditto di sopra, de jure et consuetudine."

*Sel. Const. Medii ævi, Tom. II. p.* 515. *Barb. Leg. Ant. Paul. Canciani, Venet. edit. anno* 1783.

Note (O.) p. 197.

At the time this opinion was given, the MSS. volume of the decrees of the Official at St Andrews, in the arch-

deaconry of Lothian, and the MSS. Liber Sententiarum of the principal auditory of that province, had not been sent to the Register Office. In neither of these collections has a single case of divorce *a vinculo* for adultery been found. But the former contains a very great number of sentences of separation *a mensa et thoro*, on the ground of adultery.

For example, in the case of John Bayne against Margaret Anderson, 30th March 1524, fol. 130, the sentence is for separation and divorce " a mensa, thoro, mutua cohabitatione, et servitute," for adultery. The same sentence, on the same ground, there appears to have been pronounced in the case of Margaret Blackadder against William Ramsay, her husband, on the 20th August 1524, fol. 134, *verso*, and in a great variety of other cases, which it would be endless to cite.

The Liber Sententiarum of the principal auditory and Court of Appeal at St Andrews contains, *inter alia*, the case of Elizabeth Rattray against Thomas Keir, 23d August 1542, in which a similar sentence of separation by divorce, for adultery, was confirmed upon appeal. Also the case of Janet Beatoun et Simon Prestoun, not dated, fol. 57. Also the case of John Horner against Marriot Crail, 15th August 1544, fol. 84, *verso*, where similar sentences, by the Official of Lothian, were affirmed.

### Note (P.) p. 198.

THE register of the decrees of the Official of St Andrews for the Archdeaconry of Lothian, from the year 1500 to 9th June 1541, already mentioned in the preceding Note (H.), contains so great a number of divorces, on the ground of carnal connection before marriage by one of the spouses with a relation of the other, which, even in the fourth degree either of consanguinity or affinity, was held in the canon law to be incest, that it seems not improbable that more marriages may have been annulled in this manner during the last fifty years before the Reformation, in the province of St Andrews alone, than were dissolved by divorce *a vinculo* in an equal period of time by the present Consistorial Court after its first institution. Without distinction of rank or consideration how long the marriage might have subsisted, and whether there had

been issue of that marriage or not; upon the mere confession of such constructive incest, for the purpose of regaining freedom, and by thus defaming a third party to the church, a divorce seems always to have been obtained without difficulty. Thus, for example, in the case of Mr Lauder, a gentleman at the head of a family of note, against his wife, the procedure is recorded as follows:

"Sententia Divortii LAUDER et LOGANE.

"CHRISTI nomine invocato nos Thomas Cowtis, vicarius de Cargill, ac officialis Sanctiandreenis infra Archidiaconatum Laudonie, Judex pro tribunali sedens in quadam causa matrimoniali tendente ad divortium coram nobis mota, et adhuc pendente indecisa, inter honorabilem virum Robertum Lawder, *de eodem*, actorem ab una, et Jonetam Logan suam pretensam sponsam ream partibus ab altera, cognoscentes juxta ea que vidimus, audivimus, et cognovimus, jurisperitorum communicato consilio, et secreto quibus fidelem fieri fecimus relationem, in eadem solum Deum pre oculis habentes ejusque nomine sanctissimo, primitus invocato, per hanc nostram sententiam diffinitivam quam fecimus, in his scriptis, pronunciamus, decernimus, et declaramus pretensum matrimonium, inter dictos Robertum et Jonetam de facto et non de jure contractum, et in facie ecclesie solemnizatum, carnali copula subsecuta, ab initio fuisse nullum et invalidum, nec viribus subsistere poterit causante impedimento subscripto. Ex et pro eo quia ipse Robertus Lauder ante contractum matrimonium, inter ipsum et prefatum Jonetam Logane, carnaliter cognovit quandam Cristinam Hepburne attingentem dicte Jonete Logane in quarto, et quarto gradibus consanguinitatis: et sic dictus Robertus et Joneta actingunt invicem, in eisdem gradibus affinitatis. Propterea dictum Robertum et Jonetam, ab invicem seperandos et divortiandos fore prout separamus et divortiamus; et quicquid alter alteri dederit dotis aut donationis, causa propter nuptias iterum restituendum fore decernimus ac licentiam alibi nubendi dicto Roberto in domino ubi placuerit impertimus; et hoc omnibus et singulis quorum interest notum facimus per presentes."

March 24, 1525. Fol. 125, *verso*.

Similar judgments had been before given by the same tribunal, *inter alia*, in the case of David Edmonstone against Elizabeth Kerr, his wife, on account of carnal connection with Lord Home, her kinsman, in the fourth degree of consanguinity, before her marriage to Mr Edmonstone, upon the 24th December 1523. In the case of William Schaw against Janet Wilson, his wife, on account of the pursuer's confessing carnal connection before their marriage with Janet Weir, the defender's relation in the fourth degree of consanguinity, upon the 30th January 1524; and in the case of Adam Nisbet against Janet Wolfe, his wife, on the same ground, upon the 30th March 1524.

The case of Wilson against Schaw may be taken as another example. It stands in the record thus:

" Sententia Divortii WILSONE et SCHAW, 30 Martii, anno 24, (*i. e.* 1524.)

" CHRISTI nomine invocato nos Thomas Cowttis, Vicarius de Kergill, ac officialis Sanctiandreensis infra Archidiaconatum Laudonie, Judex pro tribunali sedens in quadam causa divortii, coram nobis mota et adhuc pendente indecisa inter Willielmum Schaw actorem ab una, et Jonetam Wilsone, suam pretensam sponsam maritatem ream, partibus ab altera, cognoscentes juxta, ea que vidimus, audivimus, et cognovimus, jurisperiorum communicato, consilio et secuto, quibus fidelem fieri fecimus relationem, in eadem solum Deum pre oculis habentes, ejusque nomine sanctissimo primitus invocato, per hanc nostram sententiam diffinitivam, quam fecimus in his scriptis, pronuntiamus, decernimus, et declaramus matrimonium de facto, et non de jure, inter dictum Willielmum et prefatam Jonetam contractum et in facie ecclesie solemnizatum carnali copula subsecuta, fuisse et esse ab initio nullum et invalidum, et contra constitutiones sacrorum canonum celebratum, causante impedimento subscripto. Ex et pro eo quia dictus Willielmus Schaw, longe ante contractum, et solemnizationem pretensi matrimonii, cum dicta Janeta Wilsone, suam pretensam sponsam, carnaliter cognovit quandam Jonetam

Neile, que attingebat sicuti de presenti attingit, sibi Janete Wilsone, in quarto et quarto consanguinitatis gradibus de jure prohibitis, et sic ipse Willielmus Schaw, et dicta Joneta Wilsone, sibi invicem attingunt, in eisdem gradibus affinitatis, propterea dictos Willielmum et Jonetam Wilsone, ab invicem separandas et divortiandas fore prout ipsos separamus et divortiamus per presentes: et quiquid alter alteri dederit dotis et donationis causa, propter nuptias iterum restituendum fore; et hoc omnibus quorum interest notum facimus per presentes."

The *Liber Sententiarum auditorii principalis Sanctiandriensis,* already referred to, likewise contains various cases of nullity of marriage on similar grounds. Thus, in the case of Elizabeth Kinloch against David Ramsay, their marriage was set aside on account of his having previously had carnal connection with Janet Arthur, her relation in the fourth degree, 5th January 1541, fol. 8. Also in the case entitled *sententia in causa divortii Laurencii Gordon et Egidiæ Marshil,* not dated, fol. 34, decree of nullity was pronounced at his instance, on account of his having been carnally connected with a cousin of his wife before marriage.

Another ground of such divorce or decree of nullity, was *sponsalia jurata* by one of the spouses before their marriage with a third person, though neither followed by actual marriage or a carnal connection. Even previous betrothment of either spouse to a third party, without the intervention of an oath, had the same effect, as appears from an instance in the case of Nicolas Halyday, pursuer, against Margaret Matheson, defender, dated 12th September 1534, in the same MSS. Collection.

Relationship, either by affinity or consanguinity of one of the spouses to the other, within the forbidden degrees, or to a former spouse of either, was likewise sufficient to annul the most regular marriage. Thus, for example, decree of nullity was pronounced by the same tribunal, in the case of Margaret Stewart against John Hamilton, because he was related in the fourth degree of affinity to her

former husband. The date of this case does not appear; but it is recorded on fol. 189 of the Collection.

Marriage was at the same time held to be constituted by promise *subsequenti copula*, even to the effect of annulling a posterior regular marriage by one of the parties to a third person, *in façie ecclesiæ.* Of this rule the following example occurs:

" *5to Maii, anno* 1522.

" Christi nomine invocato nos, Willelmus Prestoune, rector de Beltoune, ac officialis Sanctiandreensis, infra Archidiaconatum Laudonie, Judex pro tribunali sedens in quadam causa matrimoniali tendente ad divortium coram nobis mota et adhuc pendente indecisa inter honestum virum David Johnstoune, actorem ab una, et Margaretam Eldere, suam pretensam sponsam ream, partibus ab altera, cognoscentes juxta ea que vidimus, audivimus, et cognovimus, jurisperitorum communicato consilio et secuto, quibus fidelem fieri fecimus relationem in eadem, solum Deum, pre oculis habentes ejusque nomine sanctissimo primitus invocato, per hanc nostram sententiam diffinitivam quam fecimus in his scriptis pronunciamus, decernimus, et declaramus pretensum matrimonium de facto et non de jure inter dictos David et Margretam contractam, et in facie ecclesie solemnizatum carnali copula subsecuta, ab initio fuisse et esse in se nullum et invalidum, et de jure minime subsistere posse, causante impedimento subscripto. Ex et pro eo quod dictus David diu ante solemnizationem dicti pretensi matrimonii, ut supra interdictas, David et Margretam, viz. ad spatium quatuor annorum, alia sponsalia tam per verba de futuro, quam de presenti cum Margreta Abernethy, impresentiarum superstite, carnali copula subsecuta contraxit, dicendo sibi Margrete Abirnethy, verba in vulgari sequentia. I promyth (promise) to zow (you), Pegis (Peggy) Abernethy, yat (that) I sall mary zow, and yat I sall nevere haiff (have) ane uther wiff (wife), and yerto (thereto) I giff zow my fayt (faith). Et similiter, eadem Margreta dicendo eadem verba sibi David e converso, et post probationem hujusmodi verborum, dicta Margareta Abernethy

carnaliter fuit cognita per dictum David. Et prefati David et Margreta Abernethy, insimul cohabitarunt in una domo, in mensa, tabula, et lecto, et tanquam conjuges fuerunt habiti tenti et reputati. Propterea dictos David et Margretam Eldare ab invicem separandos et divortiandos fore et separari et divortiari debere, prout separamus et divortiamus, causante impedimento predicto. Et quicquid alter, alteri, dederit, dotis aut donationis causa propter nuptias, iterum restituendum fore decernimus, et hoc omnibus quorum interest notum facimas per presentes."—*Fol.* 99.

This decision proves further that habit and repute was another mode of constituting marriage under the Canon law of Scotland.

With regard to the party who refuses to fulfil a matrimonial engagement, seriously and deliberately pledged, and to which the other party has adhered and trusted, the justice of this rule may be indisputable. But when such an engagement, after being contracted under the transient influence of passion, perhaps of seduction, is allowed to remain latent until a third person has publicly and solemnly entered into a regular marriage with one of these parties, can it be expedient or just, in any abstract view of the subject, that the dormant claims of those who have acted irregularly and immorally should, if brought forward at any after time, however distant, be allowed to prevail over rights established in conformity to the law, by innocent parties *in bona fide*, although their ruin and the greatest calamities to their children must be the consequence?

The decisions in the cases of Campbell against Cochran, by the House of Lords, on appeal, July 28, 1747, and of Pennycook and Grinton against Grinton and Grant, by remit of the Court of Session, adhering to the judgment of the Commissaries, of 15th December 1752, Fac. Col. however, certainly prove that this rule of the Canonists is still the law of Scotland.

The putative regular marriage, indeed, entitles the off-

spring of that marriage to hold the *status* of legitimacy; and it is understood that this has always been the rule. As to patrimonial rights of succession, would they not, however, necessarily be excluded by a decree, sustaining the previous irregular marriage by promise *subsequente copula*, of their father? or ought such decree only to have effect from the date at which it is pronounced? No decision, it is believed, has yet gone this length, in favour of the issue of the regular marriage.

But the object of this note was merely to shew that marriage did really stand upon a footing far less secure, in Scotland, before the Reformation, than under our present system. From spiritual considerations the Canon law enforced all engagements by which the faith of parties was pledged; more especially if formed under the sanctity of an oath. Hence, both irregular marriages, and promises to marry, if followed by enjoyment of the privileges of marriage, were supported by the Canon law. Upon the other hand, the security of the conjugal relation, when constituted, was brought as much as possible under the power of the church, by extending to an extravagant length the laws of incest, and by admitting the most iniquitous and pernicious proceedings that ever disgraced the administration of justice, for annulling marriages. The effect plainly must nave been to place the most important rights of *status* and succession in every family at the mercy of the ecclesiastical judicatures. By similar means, all other transactions and concerns of human life seem to have been subjected to the same jurisdiction, even in Scotland, although, in this country, the Papal usurpations were less systematically and firmly established than in most other Christian States. The depravity of morals thus produced, is proved by the records and documents of those times, to have been extreme; and the improvement, in this essential respect, throughout all Europe, since the Reformation, is the best evidence that the nations which still adhere to the Catholic Faith, as well as those which have adopted the Protestant religion, have derived inestimable benefit from that event.

The dissolution of marriage by divorce for adultery does not, however, appear to have ever been prohibited by any statute of the Legislature, or general rule of law for the kingdom in Scotland. Whether the Ecclesiastical judicatures of the Romish Church in Scotland were, at any period, in use commonly to grant this highest sort of redress when sued for, as well as the inferior remedy of separation *a mensa et thoro*, and as equally lawful, the materials which have been stated are not sufficient to found any opinion, and there has not been leisure or opportunity for further inquiry. But it may be observed, that the practice of these judicatures at that period, when it became most obnoxious, and by its abuses was preparing the minds of the people, in this kingdom, for the Reformation, cannot be regarded as evidence altogether unexceptionable, in so far as it is negative with respect to the state of the Canon law in this kingdom, as to dissolution of marriage by divorce.

Note (Q.) p. 208.

WHEN the judgment of the Second Division of the Court of Session was pronounced on the defender's bill of advocation, in the case of Edmonstone, she petitioned for leave to appeal. But this application was opposed on the ground that, during the dependence of the appeal, the pursuer might lose his evidence by the death of witnesses and other casualties. Accordingly, it was refused, for this reason. When the case returned to the Radical Judicature, the Commissaries referred in their subsequent interlocutors to this part of the procedure And, although they allowed a proof, it was competent for the defender, in the first place, to apply that the evidence, when taken, might be sealed up, to lie *in retentis*, and at the close of this proof, to apply again for leave to advocate to the Superior Court, on the ground that the conclusion for divorce *a vinculo* was incompetent, or of the contingency of that point to other questions in dependence, with a view there to obtain permission to appeal,

after the objection to her former application had thus ceased to exist.

An extrajudicial compromise between the parties, entered into by a regular deed of agreement, put an end to the process at this stage, and unless a Scotch defender in some future case shall be reduced to the necessity of appealing, there seems, from past experience, to be no prospect of having the general question tried in the last resort.

## Note (R.) p. 223.

In the case of a Gretna Green marriage by English parties, whose domicil continues to be in England, the statute law of their own country is disregarded and evaded by its subjects, and a contract is entered into in another territory, which, although valid by the rule which prevails in this kingdom, would be null and illegal, if not a criminal transaction, by the law of their domicil, were it entered into under its jurisdiction.

Nevertheless, the *lex loci contractus* is respected in England, and a marriage of this description is valid there also.

Whether upon principles of international law, the same degree of *comitas*, as to the constitution of marriage, would be shewn in Scotland, is a question which does not seem to have been yet decided, and which may be regarded as at least doubtful. For example, by our statutory rule, the marriage of the guilty party with the paramour, after a divorce for adultery, is prohibited, and unlawful. Suppose the defender, in an action of divorce, to be a subject of Scotland, and the paramour likewise a subject of Scotland, to be named by the decree in obedience to the enactment, and that these parties, nevertheless, afterwards, to evade the statute, pass into England, and enter into a marriage there, which is regular, according to the English law. When they return to Scotland, would this English marriage be held valid here, as the Scotch marriage of English parties at Gretna Green is in England?

Note (S.) p. 245.

UPON the origin, character, and consequences of such collision, Lord Bacon, in the fragment *De Fontibus juris*, of his Work *De Augmentis Scientiarum*, aph. 96, has made these striking observations: " That Courts should dispute and grapple about jurisdiction is something natural; and the more so, because, through a certain foolish saying (that it is the part of a good and strenuous Judge to enlarge the jurisdiction of his Court), this intemperance is directly fostered, and the spur applied where the rein is wanted. But that Courts, from such vehemence of spirit, should rescind at pleasure the judgments pronounced by each other (no way touching jurisdiction), is an intolerable evil, and to be straightway redressed by the King, or the Senate, or the Government. For it is a thing of most pernicious example, that Courts, which minister peace to the subjects, should themselves be engaged in war."

In the words of the ever admirable original, " Ut curiæ de jurisdictione digladientur et conflictentur, humanum quiddam est; eoque magis quod per ineptam quandam sententiam (quod boni et strenui sit judicis ampliare jurisdictionem curiæ), alatur plane ista intemperies, et calcar addatur, ubi fræno opus est. Ut vero ex hac animorum contentione curiæ judicia utrobique reddita (quæ nil ad jurisdictionem pertinent) libenter rescindant, intolerabile malum, et a Regibus, aut Senatu, aut Politia plane vindicandum. Pessimi enim exempli res est, ut curiæ, quæ pacem civibus præstant, duella inter se exerceant."

In quoting Lord Bacon, the reflection must occur, that, while in another passage he points out the regular reporting of decisions as one great means of promoting the improvement of the law in every superior judicature, he recommends that this duty should rather be performed by other persons than by the Judges. But the reasons do not apply to a Judge of the Radical Court, in a case where the decision is, in effect, given by a Court of Review, although in form pronounced by the other. Besides, the Collectors for the Faculty of Advocates in the Court of Session

have no access to the materials arising from the discussions in the other Tribunal. Reports of these last, if undertaken at all, must therefore be given by a Member of the Radical Court. The present Reporter is conscious, that infinitely more of leisure and research than he could be permitted to spare for this attempt, was essential to perfect success. Yet, it is not requisite, or to be expected, that a statement of the judicial proceedings, in particular cases, should exhaust the general subject to which these belong. And it must be remembered, that the object of this publication is merely to ascertain the true issues that have been discussed, to state the views entertained, and the import of the decisions that have been given upon the most important and difficult of all civil questions, and to furnish some information as to these, which is new, and which may assist the more comprehensive investigations of others in that department of jurisprudence.

Note (T.) p. 247.

In the bill of advocation presented for the pursuer, Mrs Rowland, *ex parte*, the question was stated to be "twofold," viz.

"1*st*, Whether, in a process of divorce competently and on due citation raised on account of adultery committed in Scotland, it is a good defence to the party, or a reason why the Court should, *ex proprio motu*, refuse to proceed, that the marriage had been contracted, and the parties had formerly lived and been domiciled in England? And, 2*dly*, Whether the Commissaries have power, in virtue of what is called *comitas*, in such a case, to substitute what is said to be the remedy granted in the English courts of justice, for the remedy which, under the law of Scotland, the Commissaries have power to grant, and have been in the immemorial practice of granting?"

Now, this was not at all the view of the cause entertained by the Commissaries, and which it was the object of their interlocutor, and of the reasons assigned for that judgment, to explain.

Granting the defender to have been duly cited, he was held by them to be, in point of fact, a domiciled Englishman at the date of the action, and the relation of husband and wife between him and the pursuer, and arising from their English marriage, was held then to subsist in England, where only the parties had cohabited, and where the pursuer also had her sole residence.

But they conceived themselves, nevertheless, to be compelled to exercise their jurisdiction, because the defender had been convened before them *in judicio*, during a transient visit to Scotland, upon the pursuer's action of divorce for adultery.

Thus, the question arose, Whether the law of England, being that of the domicil as well as of the contract of these parties, should be respected in the decision to be pronounced, or if the case was to be regarded as nevertheless one purely of the municipal law of Scotland, because the defender had been convened before a Scotch Court.

Supposing the possession of jurisdiction to be sufficient to resolve this question in the present case, it seemed plainly to follow, that the authority of international law must be altogether rejected in Scotland. But this could not be maintained. Admitting, then, that the principles of international law must be considered, there could be no doubt, that very great evils might be produced, especially in England, were a divorce *a vinculo* to be granted in violation of the rule subsisting in that country, and which would not be respected there.

The next point which occurred was, whether it would be prejudicial to the internal system of Scotland, in regard to religion, morality, or good order, to restrict the measure of redress to that remedy of the Scotch law which corresponded with the English rule, and the conclusion to which the Commissaries came was, that, instead of being prejudicial, it was both just and expedient, not to exceed the redress of separation *a mensa et thoro* of the Scotch law in a case between English parties, whose relation of husband and wife, as it subsisted in their own

country, could not be dissolved there by judicial sentence of the Scotch Court.

The argument of the pursuer to the Court of Review, consequently, had no application to the judgment of the Primary Tribunal, at least as that judgment was there understood. By a process of reasoning, completely different, at every stage, it thus became an easy task to draw the conclusions she there maintained. These were, that, "where the jurisdiction of a Judge is admitted, and the re-" dress of a wrong is demanded, the past domicil of the par-" ties is of no importance." That "it was never heard or "known, that, either in a civil or criminal cause, a court "of justice sustained as a defence, exclusive of legal re-" medies, that the defender was living in lodgings:" That "the Commissaries have no legislative powers; they are "bound to administer the law of their country as it has "stood established for ages, and they have no other duty." That our forefathers "gave every possible form of redress "for adultery. They treated it as a public crime, as a "breach of contract *in essentialibus*, and as an insult "which persons of honour and delicacy are not bound to "endure." In fine, that "there is no reason in the ex-" isting state of society in Scotland, for holding, that our "forefathers judged erroneously in this respect; and it "is not competent for a court of law to review their "judgment. No distinction exists in the law of Scotland "between the measure of justice due to a stranger and "to a native of the country who has suffered wrong with-" in the country. It is enough that the judge has juris-" diction, and it is of no consequence whether the defen-" der have this or that kind of establishment within the "country, a matter over which the pursuer has no power."

But this train of reasoning avoids the real difficulty of the case. An English or foreign guardian, trustee, or partner of a mercantile company, may be personally convened in that character when found in Scotland, upon a personal action at the instance of a foreign party. Our law, at the same time, authorizes the dissolution of tutory, trust, or copartnery in various cases, and sometimes upon

grounds peculiar to our own system. Would our forefathers, however, have attempted to dissolve the relation of guardian and ward, or of copartnery in trade, or of truster and trustee, when subsisting in another territory between foreigners, upon any ground not sufficient by the law of his own country, merely because the defender had happened to be convened here *in judicio*? If this would be incompetent, is not the relation of husband and wife, as it subsists in England according to the municipal system of law which prevails there, much more sacred than any of these?

### Note (U.) p. 248.

THIS case of Rowland was reported by the Lord Ordinary to the Second Division of the Court of Session, upon the pursuer's bill of advocation, along with that of Levett, and no separate observations were made upon the former by the Judges. By the interlocutors of remit in both of these cases, and the opinions given by the majority of the Court when these were pronounced, it was then in effect decided by the competent authority, that the municipal rule of the Consistorial law of Scotland must be applied in an action of divorce for adultery, although the defender is an English party, and has only become amenable to the Scotch jurisdiction by citation, during that residence of forty days in Scotland, which, by the law of this country, is sufficient to establish a presumptive domicil. The Faculty Report, afterwards published in February last, of the previous decision of the Superior Tribunal, when the cases of Levett and Forbes were originally remitted upon the first bills of advocation, is given in the preceding Note (G.) of this Appendix, and will probably appear to contain the grounds of the ultimate judgment in the opinions of the majority of the Judges on that occasion. Looking to the record, however, it will be considered whether the Commissaries, when they pronounced their previous interlocutors in the month of August 1816, under the original remits, in the cases of Levett and Forbes, were not then bound to give the best judgment they could form upon the point, whether a trans-

ference of the defender's real domicil to Scotland, at the date of the action, was not requisite to produce that legal consequence. At that time the Court of Session had not decided this point, and had merely directed that a proof should be allowed, as to the fact of the defender's domicil and residence at the date of the action. As to the *quality* of the domicil to be required, the remit upon the original bills of advocation contained no instruction. Obedience to the direction of the Court of Review is, indeed, a duty as to which there could be no room for the exercise of discretion, and the record of these cases, now final, will shew that here no deficiency can be alleged. It is also one, the performance of which must have been rendered agreeable by every personal feeling. For the future, accordingly, while the decision of the highest judicature in Scotland, upon the general question, shall stand unaltered, the whole care of the Commissary Court, in similar cases, must be to follow that precedent. The collision described by the great modern teacher of mankind, in the passage prefixed to this volume, it is, however, evident, may still take place between the judicatures of the sister kingdoms, from discordance of their several laws. But it is to be hoped, that it may not be found impossible for the legislative power to prevent or obviate so great an evil, by salutary improvements, without producing any prejudice to the independence or utility of the municipal jurisdiction in either country.

THE END.

## ERRATA.

Page 156, *for* Note (G.) *read* Note (N.)

The abstract of the case of Murray against Lindley, March 8, 1805, has been omitted by accident in the proper place, which is immediately before that of Lindsay against Tovey, p. 265, App.

The parties in this case were English, and were married in Ireland. The defender came to Scotland as an officer of an English regiment of militia, and was personally cited there in an action of divorce for adultery. He entered appearance, and denied the relevancy of the libel. After his defences had been repelled, he objected to the jurisdiction, by the form of petition against the interlocutor. The Commissaries found, that the jurisdiction had been prorogated. A bill of advocation was refused by the Lord Ordinary, (Cullen,) and his Lordship's interlocutor was adhered to by the whole Court of Session, upon considering a petition with answers.

Page 280, *for* Lyttl. 3 Inst. *read* Burn's Ecclesiastical Law, p. 500. Littleton 1 Inst. 32, 33, 235. 3 Inst. 88.
281, *for* Vol. II. b. i. tit. sect. last, *read* T. 6, § last.
286, *for* Feaubert *v.* Twist, *read* Turst.
287, *for* Jermino, *read* Jemino. After "Puller and Bosanquet," *add* 138.
*for* Blackstone's Report, *read* 1. Blackstone's Reports.
*for* § 20, 227, and 229, *read* p. 227 and 229.
292, Burn's Ecclesiastical Law, *add* Vol. II. p. 503, *voce* Marriage, T. 11, § 4, 5, Can. 105.

The Judge, in the notes of whose opinion these errors occur, was absent from Scotland at the time of the original printing, and owing to a mistake, his corrections were not received till the copy in this volume had been thrown off.

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