1805. *March* 8. MURRAY *against* LINDLEY.

No. 5.
What circumstances infer a prorogation of the jurisdiction of the Commissaries in a question of divorce, when one of the parties is not subject to their jurisdiction?

WILLIAM LINDLEY and Harriet Murray were born in England, and were married in Ireland. Soon after their marriage they came to reside in Scotland, where they lived several years; but in 1802 repaired to England, where Lindley obtained a commission in one of the English militia regiments. In the course of the succeeding year, Mrs. Lindley came to Scotland, and instituted a process of divorce, on the head of adultery, against her husband, before the Commissaries of Edinburgh. The citation was given personally to Mr. Lindley, who happened at that time to be for a few days in Scotland. He entrusted the management of his defence to a solicitor, who gave in defences to the Commissaries, objecting to the relevancy of the libel, without offering any declinature of the jurisdiction of the Court. The commissaries repelled the defences, and allowed the pursuer her oath of calumny. Of which judgment, the defender complained by a bill of advocation, which was refused.

The defender afterward gave in a petition to the Commissaries, declining their jurisdiction; and "the Commissaries having considered the petition, "with answers, and particularly observing, that no objection was stated to the "jurisdiction of the Court, until after issue was joined on the merits," refused the petition. A bill of advocation was offered against this interlocutor, which was refused by the Lord Ordinary.

Upon this, the defender presented a petition to the Court, and

Pleaded: All civil jurisdiction is founded *ratione originis*, *contractus*, *rei sitæ*, or *domicilii*. As both parties were born in England, were married in Ireland, and have no effects whatever in this couutry, it is evident, the jurisdiction of the Commissaries of Edinburgh, must rest entirely on the *forum domicilii*. Now, the defender's domicil was in England at the time this action was raised, and he had only been a few hours in Scotland, *sine animo remanendi*, when he was served with a citation. It is to no purpose, that the alleged acts of adultery are said to have been committed in Scotland; for the *locus delicti* is of no moment when a prosecution is brought merely *ad civilem effectum*. The objection to the jurisdiction of the Commissaries has been sustained, in cases where there were stronger grounds for holding the parties amenable to the judicatories of this country; Scruton against Gray, December 1, 1772, No. 35. p. 4822. Brunsdone, February, 9, 1789, No. 3. p. 4784. If the Commissary Court had no legal jurisdiction in this action, it is impossible that any plea stated by the defender, could confer a jurisdiction. A person cannot, by a mere act of his will, change his domicil, unless he actually remove to another country; far less can such a change of domicil be implied to have the effect of prorogating the jurisdiction of a court. Nor can any consent of parties give effect to an action, which is in itself incompetent; Erskine, B. 1. T. 2. § 30.

No. 5.

Answered: The defender had completely abandoned his residence in his native country, and established a domicil in Scotland, by residing in it with his family for a number of years. He went to England merely with the view of obtaining a commission; and his living there, while following the quarters of his regiment, cannot be inferred as a change of his domicil. Scotland being the last place where he had a fixed domicil, he remained amenable to the courts of this country, until he established a permanent residence in another; and still more so, when it is considered that he was personally cited. But, even supposing the objection originally well founded, the jurisdiction of the Commissaries was prorogated by the defender compearing before them, and joining issue on the merits of the cause; and he is not entitled afterward, upon perceiving the case likely to be decided against him, to make any objections to the competency of the court. It is an established maxim, that a party, by proponing peremptory defences, abandons all such as are of a dilatory nature; Voet, B. 2. T. 1. § 81; Ersk. B. 1. T. 2. § 29; Stair, B. 4. T. 37. § 12; Bankt. v. 2. p. 472; Kames' Law Tracts, Tr. 7th.

The Court, upon advising the petition, with answers, were of opinion, That the jurisdiction had been prorogated; and therefore adhered to the interlocutor of the Lord Ordinary, refusing the bill of advocation.

Lord Ordinary, *Cullen.* For Petitioner, *Gillies.* Agent, *Ro. Playfair.*
Alt. *W. Erskine.* Agent, *Ja. Horne*, W. S *Clerk*, Walker.

J. *Fac. Coll. No.* 206. *p.* 462.

1807. *January* 26. LINDSAY *against* TOVEY.

No. 6.
Action of divorce at the instance of a Scotsman against his wife, before the Commissaries of Edinburgh, sustained, although she resided in England, in consequence of a voluntary separation.

MARTIN ECCLES LINDSAY, the eldest son and heir of entail of Mr. Bethune of Kilconquhar, in the county of Fife, was born and educated in Scotland. He entered into the army, and went soon after with his regiment to Gibraltar, where, in 1781, he married Miss Tovey, an Englishwoman, and remained there till 1784; from which period, till about the end of 1792, they resided together in Scotland, except when Mr. Lindsay was occasionally absent with his regiment.

In 1792, they went to live at Durham, for the benefit of the education of their children, where he purchased a freehold house.

Soon afterward he went to Ireland with his regiment, and from that period continued in the military service, moving about from place to place, his residence being regulated by the orders of his superiors.

Of this date (4th December 1802) a deed of separation was executed between the parties at Durham, by which Mrs. Lindsay accepted of an annuity.