

The pursuer endeavoured to support the competency of her action, upon the ground of there being here a *forum competens*, both *ratione contractus*, and *ratione rei sitæ*, in consequence of the arrestment in the hands of Gordon *jurisdictionis fundandæ causa*.

As to the first topic, it was considered to be quite a clear point, that the *forum contractus* does not take place *nisi contrahens reperiatur intra territorium* of the judge who issues the warrant for citation, which was not the case here. Besides, that the very point *de quo agitur* is, whether there was a contract of marriage or not, though the pursuer *alleged* it was evidenced by a declaration under the hand of the defender himself, produced.

2do, As to the competency of a *forum ratione rei sitæ*, in respect of the arrestment used *ad fundandam jurisdictionem*, it was *observed* on the Bench, that neither will that apply to this case, where the conclusion is not founded on a document of debt, but to declare in a contract the most personal of any, that a man in Ireland is a married man, and which was only a preliminary one, in order to pave the way for a demand of debt. 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, is not to be extended to a case not founded in the intention of introducing 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 Westcomb, No 14. p. 4794. cited for her, it was but a single decision, not to be followed as a precedent; more especially as it is known that the pursuer in that case derived no benefit therefrom.

'THE LORDS remitted the cause, with instructions to sustain the defences, declining the jurisdiction of the Commissaries.'

Act. *A. Lockhart et J. Boswell.*

Alt. *Ilay Campbell et G. Wallace.*

Fol. Dic. v. 3. p. 239. Fac. Col. No 34. p. 88.

1789. February 20. MARY FORREST against CHRISTOPHER FUNSTONE.

CHRISTOPHER FUNSTONE, a native of Ireland, enjoyed for some years the office of master-gunner in the castle of Blackness in Scotland.

In 1779, when Mr Funstone first came to this country, he had provided himself with a bed, a chest of drawers, and some other articles, which he kept in the room appropriated for him at Blackness; but his office being almost a sinecure, even in the time of war, he had never resided there for more than three or four days.

In 1783, Mr Funstone appears to have left Scotland without any fixed intention of coming back. And in the returns made by the Commander in Chief for Scotland in 1784, he had been mentioned as absent without leave.

No 36.
Holding a military office in Scotland without actual residence, does not create a domicile.

No 36.

In the month of April 1784, Mary Forrest, likewise a native of Ireland, instituted, in the Commissary-court of Edinburgh, an action for declaring a marriage between her and Mr Funstone. It was said to have taken place in Ireland. The citation in this action was performed by leaving a copy of the summons at Blackness-castle.

An objection having been stated to the competency of the action, the Commissaries found, That " the defender having, at the time of the citation, been possessed of a furnished apartment in Blackness-castle, was amenable to the Scotch courts. In support of which judgment, a bill of advocation having been offered, the pursuer

Pleaded ; To the effect of founding a jurisdiction, a domicile may be established, not only by actual and permanent residence, but also by holding an office or dignity, which renders such residence the duty of the party. Hence, in the Roman law, from which our ideas on this subject are chiefly borrowed, a senator was understood to be subject to the jurisdiction of the courts in Rome, although he might reside elsewhere ; and a soldier was understood to have a residence *ubi merebat*. In the present case, these considerations are strengthened by the circumstance of the defender's having a furnished apartment in the place where the summons was executed ; and where, as it appears from the official returns, his attendance was expected. It might be noticed too, that in such actions as the present, brought for ascertaining the *status* of the pursuer, our courts have proceeded on grounds much more slender than those which here occur ; by sustaining action against an Englishman who had enjoyed a civil office in Scotland, but who, before the process was instituted, had renounced it and gone to England with an intention never to return ; l. 8. *D. de incolis* ; l. 23. *D. ad municipal.* ; 29th December 1724, Haldane *contra* The York-buildings Company, No 32. p. 4818. ; Dodds *contra* Westcombe, No 14. p. 4794.

Answered ; A domicile in our law, is where a man has fixed his abode for more than forty days preceding the execution of the summons. It is true, that an action may be brought in the courts of Scotland, against one neither residing nor personally apprehended in this country, if the subject claimed by the pursuer is situated here, or if the only purpose of the action is to attach a land-estate ; and what is perhaps peculiar to Scotland, by arresting moveable effects belonging to a man residing in it, a jurisdiction may in certain cases be created. But to suppose, as the Commissaries have done, that having a few trifling articles of furniture was to establish a jurisdiction without any previous arrestment, especially where the ground of action is not said to have arisen in Scotland, is incompatible with the principles of our law. In a late case, it was determined, in opposition to the judgment in that of Dodds *contra* Westcombe, which has never been received as a precedent, That in actions merely declaratory, respecting personal rights, an arrestment of moveable effects situated in Scotland, will not justify the interposition of our courts, even where the contract sued on was

said to have been executed here; *Voet.* lib. 1. tit. 2. § 16.; Erskine, b. 1. tit. 2. § 16.; Scruton *contra* Gray, No 35. p. 4822.

No 36.

The question having been reported to the Court on memorials, the LORDS were unanimous in altering the judgment of the Commissaries. The defender's having been absent from his duty, it was observed, might subject him to some military censure, but a domicil could not be created without residence; and the circumstance of his having a few articles of furniture in Scotland, at the date of the citation, without any arrestment of them, was equally ineffectual.

“ THE LORDS remitted to the Lord Ordinary, to remit the cause to the Commissaries, with this instruction, that they dismiss the action.”

Lord Reporter, *Dreghorn.* Act. *Dickson.* Alt. *Maccormick.*
6. *Fol. Dic. v. 3. p. 239.* *Fac. Col. No 62. p. 112.*

DIVISION V.

Arrestment *Jurisdictionis Fundandæ Gratia.*

SECT. I.

Arrestment of the Debtor's Person.

1527. *March 27.* CURL *against* WATSON.

No 37.

ANE stranger being persewit within this realme befor ony Judge, for ony civil cause or actioun, as for debt, aucht and sould find cautioun *de judicio sisti et judicatum solvi.*

Fol. Dic. v. 1. p. 328. *Balfour, (CAUTION.) No 4. p. 192.*

1564. *January 22.* AN ENGLISHMAN *against* ANGELO an Italian.

No 38.

ANENT the action persewed be ane Englishman againes ane Italian that was in this countrie, it was *allegit* be the said Englishman, That the said Italian