

as sought.—THE LORDS found this no nullity, unless he had been cited to give his oath of calumny ; but taking notice of the disconformity of the two extracts, contradicting one another, they ordained the solicitors to cause cite Graham, the clerk of Perth, to answer for that malverse in his office ; and if he cannot clear himself, then to be fined and censured by the Lords.

*Fol. Dic. v. 1. p. 326. Fountainball, v. 2. p. 525.*

No 12.

1743. *January 26.* THE BARBERS OF EDINBURGH *against* WILSON and BLAIR.

IN an action at the instance of the Barbers of Edinburgh against Wilson and Blair, barbers in Canongate, for shaving, &c. within the town of Edinburgh, though not freemen of the city, it was controverted, *1mo*, Whether action lay, seeing the defenders were not apprehended in the actual transgression ; and *argued*, that it did not, from the analogy of the 24th act, Parliament 1633, and act 5th, Parliament 2d, sess. 3d, Ch. II. which were acts made for securing burghs from unfree traders, and whereby the penalty of contravention is declared to be confiscation of goods ; but it is therein expressly enacted, that the Magistrates of burghs shall not, on the account foresaid, trouble or molest the lieges, unless the delinquents be apprehended in the actual and present transgression of the privileges of the burgh. And, *2do*, Whether the defenders, who were not resident in the town of Edinburgh, were amenable before the Dean of Guild of Edinburgh.

THE LORDS found, that the action lay, and that the analogy from the statute did not apply ; and that the defenders being cited within the town of Edinburgh, where the trespass was committed, were regularly cited.

Such is the criminal law in general, that where a delinquent is cited within the territory in which the delict is committed, he is amenable to the courts of that territory.

*Kilkerran, (DELINQUENCY.) No 8. p. 159.*

1745. *June 11.* REBECCA 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 declinator of the Commissaries' jurisdiction, as he was neither a native of the country, nor had either residence or effects in it, the Commissaries

No 13.

Inhabitants of Canongate were found amenable to the Courts of Edinburgh, when prosecuted for infringement of the privileges of the burghesses of Edinburgh.

No 14.

In a process of declarator of marriage, it was objected for the defender, that tho' he had an office in the Exchequer in Scotland at the time of the alleged marriage, yet,

No 14.  
having re-  
signed that  
office, and re-  
tired to Eng-  
land, the ac-  
tion was not  
competent in  
Scotland, he  
being an Eng-  
lishman, and  
having no ef-  
fects in Scot-  
land. The  
objection was  
repelled.

‘ Repelled the declinator, allowed the pursuer to prove her marriage,’ and, after proof led, ‘ Found the marriage proved, and decerned,’ &c.

After all this, he offered a bill of advocation, which, though it was informal after decree, the pursuer waved that objection; and, upon consideration of the merits of the case, the Lords ‘ repelled the declinator.’

This 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; for the more general opinion was, that the *locus contractus* no otherways 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 show 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, and 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 declinator, as we were not to do wrong out of fear that the Judges of another country might do so.

*Fol. Dic. v. 3. p. 238. Kilkerran, (FORUM COMPETENS.) No 2. p. 213.*

\* \* \* D. Falconer reports the same case :

WILLIAM WESTCOMB, an Englishman, after he had resided for some years in Edinburgh, obtained the office of keeper of the register of resignations in the court of Exchequer, which he enjoyed for some time, till he demitted it in the month of February 1741, and shortly after returned to England.

Rebecca Dodds, with whom he had entertained a correspondence while in Edinburgh; and who, after his departure, brought him forth a child, raised a declinator of marriage against him, with a conclusion of adherence, before the

Commissaries of Edinburgh, of which process he being informed, sent a mandate to decline the jurisdiction.

No 14.

The Commissaries, 24th November 1743, 'Repelled the declinatory defences, and allowed the pursuer to proceed in her proof;' and the proof being led, to the purport of which his procurator, under protestation of adhering still to his declinator, objected, the Court, 3d January 1745, 'Found it proven, that the pursuer and defender were husband and wife.'

A bill of advocation was offered, and reported by the Lord Ordinary, on the point of jurisdiction.

*Pleaded* for the pursuer; That the defender had been long a residenter in Edinburgh, had a house, and was possess of an office there, when he prevailed with her to consent to a private marriage; and it will be very hard, if, when he has disposed of his office, and run away, she must be obliged to pursue him through the world, into countries where the same proof of a marriage may not be sustained, as where it was contracted. It is true, that *actor sequitur forum rei*; but the *reus* has a *forum*, not only where he has a domicil at the instituting the action, but where he contracted, unless he was there only casually, and passing, *l. 2. Cod. de jurisdictione omnium judicum, l. 1, 2, & 3. ff. de rebus auctoritate judicis possidendis, l. 19. in prin. & § 1, 2. & 3. & l. 45. ff. de judiciis*; and in the canon law, *cap. 1. § contrabentes vero tit. de foro competente*; and the above noticed exception, which is founded in *§ 2. l. 19. ff. de judiciis*, is a sufficient obviating of any inconveniency that might arise from such processes being raised against young gentlemen in places which they had passed through in their travels, or other casual passengers.

*Pleaded* for the defender; That, in order to bring any man into Court, there must be a founded jurisdiction; and this can only arise from his being a subject in the country, not from his having transiently contracted, unless he is afterwards found there. By the later practice of nations, arrestments have been found out *jurisdictionis fundandæ gratia*, which is an evidence, that, before the arrestment, there was no jurisdiction, although the effects were in the place. It would have terrible consequences, if a man must be obliged to answer wherever he has resided for a few months or years; and there is no relevancy in the defender's having been possess of a small precarious office, which he was at liberty to quit according as was for his conveniency; *Voet. tit. de judiciis, § 19.* says, *mutat unusquisque domicilium suo arbitrio*; and it is agreed, that the defender had returned to England, where he had his settled domicil, before the summons. The laws cited for the pursuer are misapplied and strained, as if wherever a man had contracted, there was his established *forum*; but that even his effects being in the country, did not found a jurisdiction, unless he were personally found there, appears from these authorities, *Vinnius, l. 4. tit. 6. § 1. Num. 10. inst. Voet. de judiciis, § 73. Gayl. lib 2. obs. 36. Num. 14. Sand. dec. Fris. lib. 1. tit. 1. defin. 3. Faber. Cod. lib. 3. tit. 15. defin. 4. Groenweg.*

No 14. *ad leg. Cod. de jurisdictione omnium judicum, and responsa juris-consultorum Hollandiæ, par. 3. vol. 1. Cod. 174.*

A decret pronounced in the manner sought could be of no effect, and receive no execution against an absent; and therefore ought not to be granted.

*Pleaded* for the pursuer; The decret will be of great consequence to her, as it will determine her state and condition in the place where she is, as well as that of her child.

*Pleaded* for the defender; The intention of the action is, that he may be decreed to adhere to, and aliment her, which can have no effect. It is to that purpose that she must have a proof of the marriage; and it is only in consequence of the direct purport of the plea that her state will be declared.

At advising, it was much insisted on, and seemed to weigh greatly with the Court, that it was *quæstio status*, and the mother as well as child had a right to have their state and condition ascertained; and this ought to be competent to them in the place where they lived, and they not put to hunt after any body through the world in order to it.—THE LORDS refused the bill.

Lord Reporter, *Minto*.

Act. ———.

Alt. *Lockhart*.

*D. Falconer, v. 1. p. 97.*

\* \* \* See No 104. p. 4594.

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## DIVISION III.

### *Forum Delicti.*

1543. June 23.

LUNDIE against TENANT.

No 15.  
*Forum delicti*  
was found sufficient to make the Judge of the place competent, though the defender did not reside within his jurisdiction.

JOHN TENANT askit an cause of spuilzie intentit against him be Captain Lurdie before Archibald Betoune judge of the regality of St Andrews, to be advocatit before the Lords, because he had nae dwelling place there; nevertheless the said Archibald was judge competent to him in this case, because the land upon the whilk the spuilzie was made was within his jurisdiction, 'et ita ratione rei de qua agebatur, dictus Joannes ibi sortiebatur forum rei; et hoc per L. unicum C. ubi de possessione, et per pan. in cap. si extra. de foro compet. et ita contra dictum Joannem sententiarunt domini concilii.

*Eol. Dic. v. 1. p. 326. Sinclair, MS. p. 52.*