

Friday, June 24.

SECOND DIVISION.

[Lord Curriehill, Ordinary.]

LINN V. CASADINOS.

Jurisdiction—Travelling Merchant who has no fixed Residence may be Sued where Found.

A foreigner who had resided for some years in England but had no fixed place of residence there, purchased in England from an Englishman a quantity of goods, representing to the seller that he was a travelling merchant and had no fixed place of residence. The goods were delivered to the purchaser in England. The price not having been paid, the seller served a summons upon the purchaser in Aberdeen, where he happened to be at the time in the course of his business. At the date of citation the purchaser had been less than forty days in Scotland. Held that in such a case the seller was entitled to sue the purchaser wherever he might be found, and a plea of no jurisdiction repelled.

This was an action raised by John Linn, carver and gilder in Scarborough, against G. D. Casadinos, designed in the summons as "picture-dealer, Edinburgh and Aberdeen." The summons concluded for £102, 9s. which the pursuer alleged to be due to him for goods supplied to and work done for the defender by him. He stated (Cond. 1) that the defender "is a travelling dealer going from town to town in the United Kingdom, and at the raising of the action was carrying on business in Edinburgh and Aberdeen, and not in Manchester as stated originally in his defences." The pursuer then averred that the defender had been at least forty days in Scotland before the service of the summons.

The defender stated that he was a domiciled Englishman, having no place of business in Scotland, that the contract and employment in virtue of which the action was raised were both entered into in England, and that he had been cited at Aberdeen when on a transient visit to Scotland. He denied that he had been forty days in Scotland when the summons was served.

The pursuer pleaded—"(2) The defender being a travelling merchant representing himself to have no fixed residence, and having been personally cited in Scotland, is liable to the jurisdiction of its Courts. (4) In the whole circumstances of the case, the defender is subject to the jurisdiction of the Court of Session, and decree against him should be pronounced as concluded for."

The defender pleaded—"(1) The domicile of the defender and the *locus contractus* being in England, the Court of Session is not the competent or convenient *forum* for trial of the present action, and the action should therefore be dismissed, with expenses."

It was agreed that a proof before answer should be allowed both as to the jurisdiction and as to the merits. The Lord Ordinary (CURRIEHILL) thereafter, on 25th May 1881, repelled the first plea-in-law for the defender, appending to his interlocutor this note, which sets out the facts

proved:—"The pursuer, a carver and gilder in Scarborough, supplied in September, October, and November 1880 certain picture frames to the defender, who is a picture dealer, and who required them for the sales of his pictures by public auction in various parts of the country. The defender was personally cited in this action in Aberdeen in the end of said month of November. The defender alleges that his domicile is not in Scotland, but in England, and that as the *locus contractus* was in England, and that as he had not resided in Scotland for more than a fortnight or three weeks before citation, the Court of Session is not the competent or convenient *forum* for the trial of the cause, and he pleads that the action should therefore be dismissed.

"As the question of jurisdiction appeared from the record to be somewhat mixed up with the merits of the cause, and as the principal witnesses on both sides were likely to speak on both points, it was agreed that a proof before answer should be allowed to the parties of all these respective averments. The result has been to establish the following facts, viz.—(1) That the defender, who is a Greek by birth, but has resided in Great Britain for fifteen years, came to Scarborough on 20th August 1880, and became tenant of business premises there, which he occupied till 23d October; (2) That in September and October, while still occupying these premises, he ordered from the pursuer the picture frames which form the subject of this action, viz., 36 in September and 12 in October; (3) That most of the frames were delivered to the defender in Scarborough, the remainder having been at his request forwarded to him by railway to Glasgow in the end of October or beginning of November; (4) That while the defender alleges in the record, and repeated in the witness-box, that his residence was at the date of the action at Mr Tallent's, North Road, Clayton, Manchester, he has failed to prove that statement by any evidence other than his own statement. He has not called any witnesses to prove that he ever resided in Manchester, or that they sent letters to him there as his headquarters. His name does not appear to be in any directory; and what is still more remarkable is the fact, that although Mr Tallent's son is the defender's assistant in his business, and was examined by him as a witness at the proof, the defender carefully abstained from putting any question as to the alleged residence in Manchester; (5) That, on the other hand, it is proved by the evidence of the pursuer, and William Brown Serman, that when in Scarborough the defender gave out to both of these persons that he had no fixed abode, but travelled about the country on business, and that his address was the place wherever he happened to be for the time; (6) That the defender, after receiving the pursuer's frames, put pictures in them and exposed them to sale by auction in various towns in the month of November 1880, and *inter alia*, in Glasgow, Edinburgh, and Aberdeen, and that when he reached Aberdeen he had still in his possession nearly all of the said frames; (7) That he advertised the whole of said frames then in his possession for sale in Aberdeen by public auction, and that while in Aberdeen in connection with said sale the summons in this action was personally served upon him; and (8) that

at the date of that citation he had not resided forty days in Scotland.

"In these circumstances it appears to me to be hopeless for the defender to maintain that owing to his non-residence in Scotland for forty days before citation this Court has no jurisdiction to try the action. The defender is a foreigner by birth, not naturalised, and he has not, and is not proved to have ever had, any known domicile, residence, or place of business in any part of the United Kingdom. He is just a travelling merchant, and he goes to the pursuer in Scarborough and holds himself out as having no fixed place of abode, and indeed as having no house but the place where he may happen to be for the time. He then buys frames from the pursuer for the purpose of taking them about the country and selling them by auction along with the pictures which they are to hold; he gets some of them before he leaves Scarborough, and directs the rest to be sent to Scotland, and finally he takes the whole, or nearly the whole, to Aberdeen, where he is proceeding to sell them when this action for the price is raised against him. If not in Aberdeen, I fail to see where the pursuer could have sued him, unless at some other place of sale where he might have the chance to find him; and it would be most unjust to hold that, in circumstances like the present, the Courts of Scotland have no jurisdiction over the defender in respect he had not resided in Scotland for forty days before citation. If authority be required it will be found in Ersk. (i. 2, sec. 16), who says—'And if, on the other hand, one be engaged in such a way of life as to have no fixed residence, *ex. gr.* a soldier or a travelling merchant, a personal citation against him is sufficient to establish jurisdiction over him in the judge of that territory where he was cited.'—*Lees*, 12th November 1709, M. 4791. See also the case *M'Niven*, 14th February 1834, 12 Sh. 453. That doctrine is consistent alike with common justice and with common sense, and I am therefore of opinion the plea of '*forum non competens*' must be repelled, and I can see no ground for holding this Court to be '*forum non conveniens*.' This case is ordered to the roll that parties may now be heard upon the merits."

Thereafter, on 28th May, his Lordship repelled the defences on the merits, and decreed for £98 in full of the conclusions of the libel, being of opinion that the articles supplied were of good workmanship, that the price charged was fair and reasonable, and that other claims for deduction made by the defender were, with one exception to which he gave effect, unsupported by fact.

Casadinos reclaimed, and argued—The Lord Ordinary was wrong in thinking that the defender could not be sued anywhere if not in Aberdeen. Under the Judicature Act he might have been sued in the High Court of Justice in England, where the contract was made—*Westlake's Private International Law*, ed. 206. The case of *Lees v. Parlant*, quoted by Erskine and by the Lord Ordinary, was really decided on the ground that a soldier has a necessary domicile, the headquarters of his regiment. In *M'Niven's* case, cited by the Lord Ordinary, the defender was sued in the place where the contract was entered into—See *Kernack v. Watson*, 9 Macph. 984. If the case were tried, as it ought to be, by

the English law, certain defences were open to the defender which were not open to him by Scotch law. There was here no jurisdiction, either *ratione domicilii*, *ratione rei sitæ*, or *ratione loci contractus*.

Counsel for respondent (pursuer) was not called on.

At advising—

LORD JUSTICE-CLERK—I have no doubt as to the question of jurisdiction, and I do not even think that the facts here raise the general question argued, because I agree with the Lord Ordinary in holding on the evidence that when the bargain was made in Scarborough the defender told the pursuer that he had no fixed residence, and that his residence was where he happened to be for the time. That was part of the bargain. The defender did not say then that he lived in Manchester. In these circumstances where could the seller look to getting his money? He had to follow the debtor. He could do nothing else. I am of opinion that where such a debtor resides there is his *forum* if he has no fixed residence. As to the law of England, there is no allegation on record, and though there had been I should have been of opinion that that law does not apply. I therefore agree with the Lord Ordinary in repelling this defence.

His Lordship then expressed concurrence with the Lord Ordinary on the facts of the case.

LOKDS YOUNG and CRAIGHILL concurred.

The Court adhered.

Counsel for Defender (Reclaimer)—Kennedy.
Agent—John Macpherson, W.S.

Counsel for Pursuer (Respondent)—Rhind—
Millie. Agent—William Spink, S.S.C.

Saturday, June 25.

SECOND DIVISION.

[Lord Fraser, Ordinary.]

M'INTYRES v. ORDE.

Recompense—Local Custom—Feu.

A person having obtained from a proprietor written leave to build upon his ground, built a house thereon. There was no conveyance to him of the ground. In an action by his representatives against the proprietor, who had evicted them from the house, concluding for a sum as recompense, a proof before answer was allowed of averments that the house was built on the faith of the permission, and that by the custom of the district, and particularly of the estate, leave given to build in such circumstances implied a grant of the land on which the building was to be erected, and the building when so erected became the property of the person who so built it.

Donald M'Intyre, teacher at Lochmaddy, Invernesshire, having made application to the factor for Sir John Powlett Orde and Captain Orde, life-renter and fiar respectively of the estate of North