GARDENSTON. A party is dilatory in conducting a process. That cannot affect the state of things as it is at the issue of the process. The husband and his creditors may say the debts are now increased. We must determine the aliment according to the state of the funds at the time of the decreet.

KAIMES. If the husband cannot maintain himself, how can we force him to maintain his wife? There was a claim of debts *ten* years ago, but no decreet. Until decreet, there is nothing more than a claim of debt.

PITFOUR. Here there was not merely a demand for aliment, but gross maltreatment proved, and diligence done upon this.

JUSTICE-CLERK. A process for aliment being brought, at what time is the Court to determine the *quantum* of the aliment? The process does not divest the husband of his property, nor puts any man *in mala fide* to contract with him. The arrestment does not vary the rule for ascertaining the aliment: the rule must still be the quantity of the husband's free effects.

PRESIDENT. The natural obligation cannot compete with debts. As soon as the aliment is constituted, this comes to be an obligation: but it is impossible to hold the action for aliment as equal to a debt.

ALVA. I think that the wife had a hold of the subject *in medio* by means of the arrestment, and is thereby preferable to the after contractions with creditors.

On the 21st November 1772, the Lords preferred the creditors, altering their former interlocutor.

Act. D. Rae. *Alt.* D. Græme, A. Lockhart.

Diss. Pitfour, Alva, (and in part, Monboddo.)

1772. *December* 1. MARGARET SCRUTON *against* JOHN GRAY.

FORUM COMPETENS.

The Commissary Court of Edinburgh not competent to a declarator of marriage against a person who had been some time resident here attending the colleges, not a native of Scotland, nor within it at the time of citation by affixing copies on the market-cross of Edinburgh, pier and shore of Leith, there being no *termini habiles* for a founded jurisdiction *ratione domicilii vel contractus*; and an arrestment in the hands of his late landlord, who acknowledged having in his custody certain moveables of no great value, used *ad fundandum jurisdictionem ratione rei sitæ* being deemed insufficient to produce that effect, in an action not of debt, but purely declaratory.

[*Faculty Collection, VI.* 88; *Dictionary*, 4,822.]

HAILES. By the law of Scotland, marriage may be proved from consent, without the intervention either of church or state. This is not derived from liberal principles of policy, nor from generous maxims, with regard to the constitution and interpretation of contracts, but from a fouler source, from the

rules of the canon law, as it stood before the era of the Council of Trent. Marriage by consent is valid with us, because it was valid by the ancient canon law. The Romish clergy, assembled at the Council of Trent, saw the evil consequences arising from this latitude in the constituting of marriage. They therefore introduced a reformation, and by *Sess.* 24, *c.* 1, *De Refor. Matrim.* required the *sacerdotal benediction*, as necessary to the essence of matrimony. Some feeble attempts were made by provincial synods in Scotland to introduce the canons of the Council of Trent. But the reformation from Popery immediately ensued, and the Council of Trent was no more thought of unless with execration.

Thus, at our Reformation, the canon law, as it stood before the Council of Trent, continued to be the law of Scotland, in this, as in other matters consistorial, unless so far as altered by statute.

In the nations where the Council of Trent was received, the *sacerdotal benediction* became of the essence of marriage,

Other nations modified marriage in different ways.

In France, a proclamation of banns was superadded to the *sacerdotal benediction.*

In the United Provinces, *the previous approbation of the civil power* was required.

In England, the *sacerdotal benediction* seems to have been sufficient, till a late statute required further solemnities.

In a word, all the European nations, Scotland only excepted, have departed from the more ancient canon law, and have required the interposition either of church or of state, or of both, to validate a marriage.

Thus, what was the law of all Europe, while Europe was barbarous, is now the law of Scotland only, when Europe has become civilized.

Notwithstanding the latitude in marriage permitted with us, though reprobated and exploded in every other country of Europe, we still acknowledge a distinction between marriages regular and irregular.

From the very dawn of the Reformation, marriage by a minister, after proclamation of banns, was the ordinance of the church.

This we learnt from the Geneva model: we find it in the First Book of Discipline, and in the Acts of the General Assembly, 1638. This became the ordinance of the state in 1641, (c. 8.)

The statute 1641 was rescinded at the Restoration, but was repeated in the statute 1661, c. 34; and this is the statute law of Scotland at this day.

Thus we see that there are two sorts of marriage in Scotland, and I hope the distinction will be remembered.

The one is regular by a minister after proclamation of banns,—the other, in whatever way it may be subdivided, is destitute of those solemnities, and is irregular.

A woman, regularly married, has no occasion for a declarator of marriage, for the public officer certifies her marriage, which is a fact of public notoriety. This will entitle her in Scotland, and as far as the jurisdiction of our Courts reaches, to all the five valuable things mentioned by the pursuer: 1. The husband's rank. 2. Exemption from personal diligence. 3. Aliment from the husband if

she needs it, if he can afford it, and if our Courts can make it effectual. 4. The chance of a jointure. 5. And, which is of most value, the reputation of a virtuous woman.

If, after such regular marriage, the husband should desert his wife and leave Scotland, the wife has all the remedies which the nature of the thing admits.

In such circumstances, an action for declaring the marriage would be unnecessary; for an extracted decree of the commissaries could never have more effect than the extract of the instrument of her marriage, on which such decree must proceed.

But, if a woman marries irregularly, it is not strange that the law should not always have power enough to secure her valuable interests.

Brower, *de Jure Connubiorum*, says, in a case somewhat similar, *debuit pudicitiam melius tueri.* If she chooses to enter into a connexion which cannot be ascertained unless by declarators and proofs; if she chooses to associate with a stranger, and to rely upon her own charms, the strength of his passion, and his fair promises, she must submit to the inconvenience of an action. As a pursuer, she must seek the defender where he is to be found. In this case, she must seek him in Ireland.

I see that the Court went much farther in the case of *Rebecca Dods* against *Westcomb*, 1745. From the state of that case, as read to us, I see that the Court did not proceed upon the notion of a jurisdiction, *ratione contractus*, but that it proceeded upon a notion of expediency, that the *status* of the pursuer might be ascertained.

This is the more remarkable, because there is an express text in the civil law which says, "*in status etiam quæstione actor rei forum sequi debet.*" C. 3, Cod. *ubi in causa status agi debeat.*

I cannot much regard a single decision pronounced in a *quæstio status*, against a maxim of the civil law, merely upon a ground of expediency, and this the more especially, because we know what the Court did not know at that time, that Rebecca Dods could take nothing which she meant to take by that decision. I cannot relish the doctrine that, because the pursuer concludes in *one libel* to have a proof of her marriage, and to have an aliment ascertained, that, therefore, an *arrestum jurisdictionis fundandæ causa* will be effectual, as the groundwork of both her conclusions against the man as well as the goods.

It seems plain that here there are two separate actions in one libel. Nothing more frequent with us in civil libels than *cumulatio actionum.* The slightest connexion justifies the *cumulatio actionum* even in criminal libels.

A declarator of marriage does not necessarily imply a conclusion for aliment. The woman may have no occasion for aliment, and the man may have none to give her.

Suppose that Margaret Scruton had been an Irish heiress sent to Glasgow for her education, and that she had now returned to her native country, and that this action were at the instance of John Gray, still in this country, against her for adherence; in such case there would be no conclusion for aliment, and an *arrestum jurisdictionis fundandæ causa* would have neither reason nor consequents.

An action, at the instance of the man against the woman, and of the woman against the man, must be upon the same principles.

I admit that the extent of moveables arrested makes no difference.

A bag, containing ten thousand guineas, and a single toothpick at a penny the dozen, are equally moveables,—equally arrestable; and will go equally in payment of the debt if the evidence of the debt is once established.

But the infinite minuteness of the subjects which may be arrested *jurisdictionis fundandæ causa*, leads me to doubt of the extensive effects which the pursuer holds to be consequent on such arrestment.

No man ever resided in a foreign country without leaving some moveables behind him, either because he thought them not worth the conveying away, or because he forgot them, or because he had put them in the hands of persons who neglected to return them.

There is reason in that fiction of law which renders such moveables attachable by creditors.

But it would be a very wide stretch of this fiction, were we to suppose that the presence of an old hat had all the effects of the presence of the living proprietor.

In this case, Margaret Scruton cannot, in my apprehension, attain the property of John Gray's old hat, because this can only be attained by her proving her property in his person.

This she cannot do; because John Gray cannot be present to hear and see it so determined.

I conclude in the words of Noodt, *de Judiciis*, page 147: "*Constituitur judicium ex tribus: ex actore qui petat, ex reo a quo petatur, et judice qui inter utrumq. sedeat medius. Absente una ex tribus personis non est judicium: fac deficere eum qui petat*, aut unde petatur, *non est; ideoq. nec judice nec judicio opus.*"

MONBODDO. The citation at pier and shore is not very ancient. From the apprising quoted in 1547, it appears that the former mode of citation was at the head burgh of the shire where the party last resided. The *arrestum jurisdictionis fundandæ causa* is also a new form in the law of Scotland. It is different from the attachment in *Quon. Attach.* which was not in order to *give* jurisdiction, but in order to secure it. It is not to be found in Balfour: hence I fairly conclude that the form has been introduced since the days of Balfour. Voet says, it is a *barbarous term*; I think that it is a *barbarous thing*, contrary to the principles of law. The only arrestment effectual must be that of *res sita*. But here there is no *res sita* to give a *forum*. If Gray had had goods in Scotland, by way of traffic, the arrestment might give a forum, at least in a question of debt; otherwise no foreigner could be in Scotland for twenty-four hours without having a *forum*. There is nothing here which any passenger may not have. There is a distinction between an *arrestum* on a claim of debt and on a *quæstio status*. It is long since I learned the distinction between the rights of persons, things, and actions. The authorities urged from the bar point at this distinction. The pursuer has herself to blame if she is brought under any inconveniency. She should either have made her marriage public, or she should have arrested the young man's person. The decision in the case of *Westcomb* is erroneous, proceeding upon the expediency of trying a *quæstio status* in the forum of *the actor*.

AUCHINLECK. In general, the rule is, that *actor sequitur forum rei*; but here there is a specialty. The pursuer, who says she is married, has an inter-

est to have that fact ascertained for her own reputation. She would be entitled to try this, although she did not know the name of the party. This shows that the contract concerning marriage is different from all other contracts. The pursuer is not entitled to prevail in a declarator for having it ascertained that the man shall maintain her: all that she is entitled to, is, that her *status* be ascertained.

KAIMES. The rule in law, that *actor sequitur forum rei*, is not an arbitrary rule, but is founded on truth and necessity. We cannot call a man into Court, over whom we have no power. The very citation, in such case, is void, intrinsically, fundamentally, and radically. If a stranger enter into a covenant in this country, his goods in this country may be subjected to the implement of the contract. Here the very question in agitation is, Whether there is a contract or not? The allegation of a contract will not found a jurisdiction. As to the *arrestum jurisdictionis fundandæ causa*, the notion of an *arrest* presupposes a jurisdiction: so that it is a contradiction to hold that John Gray is in this country, because his goods are arrested. The sense of the arrest is, that the goods may not be conveyed out of the jurisdiction. As to what Lord Auchinleck says, that there may be a declarator of a *quæstio status*, independent of a declarator of marriage; if the evidence of marriage is in danger of perishing, the pursuer may apply to the commissaries, that her *status* may be ascertained. This, however, will not apply to the present case, which is simply a declarator of marriage, with conclusions of adherence and aliment.

KENNET. The *forum contractus* is out of the question; because *reus non est inventus* within the territory. As to *forum status*, I know no such *forum*. How can there be a *forum* without a *reus?* A declarator without a defender would conclude nothing. Mr Gray has as good a right to try his *status* in Ireland as Miss Scruton has to try hers in Scotland. This would be the occasion of an inextricable collision of jurisdiction. The case of a woman marrying a man whom she knows not, must be rare. If one has a bill upon a person whom he knows not, he must lose his debt; and there is no help for it. The only difficulty is as to *arrestum jurisdictionis fundandæ causa*: That arrest was introduced, says Voet, for the benefit of merchants. He speaks very generally of its effects; but he admits that the arrest will not carry immoveables in another country. We cannot carry an action of expediency farther than the expediency requires.

COALSTON. It is highly improper, in this case, to listen to arguments of favour. We must suppose that the pursuer can prove her *libel*. The only question is, whether we can allow that proof? This question, as to marriage in Scotland, ought to be determined by the law of Scotland. Wherever it is determined, it is necessary, in all cases, that there should be a defender as well as a pursuer. I should have had great difficulty in Westcomb's case. In such case a legal remedy may be devised. Rebecca Dods, being pursued for a debt, might have pleaded that she was a married woman; and the Court would have allowed the proof of this plea, because there would have been a contradictor. The difficulty arises from the *arrestum jurisdictionis fundandæ causa*. It is an established point, that every judge has a jurisdiction over persons and things within his own territory. This is admitted as to immoveable subjects: a jurisdiction implies a power for extricating it. Jurisdiction cannot be

extricated as to moveables without affecting the person. If the woman might declare her marriage, when the man had a land estate in this country, why should there be a difference when he has moveables, not a land estate? As soon as commerce prevailed, it was necessary that there should be executorials of the law, in order to render the moveables forthcoming to creditors. When goods are once put in the situation of a landed estate, all the rules relating to a land-estate must apply to them. There can be no distinction from the value of the goods arrested: I do not like an action founded upon moveables of small moment; but I do not see how the value of the goods arrested can enter into the question of jurisdiction. Suppose the pursuer had brought an action, and concluded singly for aliment, and required the goods to be made forthcoming, the action would have been good. How can we distinguish between that and the present action?

GARDENSTON. I cannot understand an abstract declarator of marriage against an invisible husband; neither do I enter into the question, whether the law of Scotland ought to be the rule in determining the marriage, when an action is brought in another country. The single question here is as to jurisdiction. The rule is, *extra territorium jus dicenti impune non paretur*. When the goods of a stranger are found in this country, there is a jurisdiction as to the goods. When the person is not within the territory, there is no jurisdiction over his person. Here there is not an action for payment of a debt constituted, but for a personal decree: a decree is sought against the person, in order to pave the way for a decreet against his effects. The case of Westcomb proves a great deal too much: I can hardly believe that all the judges were of one mind then. None of us would go that length now.

JUSTICE-CLERK. All the authorities quoted speak the same language, that *locus contractus* does not establish a *forum*, in the absence of the party. If I can read the language of the Roman law, there was no such thing as *arrestum jurisdictionis fundandæ causa* among the Romans. It was introduced for the conveniency of commerce. A jurisdiction over the goods does not imply a jurisdiction over the person. Here are two jurisdictions quite compatible. The person is subject to his own *forum* where he is; the goods subject to the forum where they are. Here there is a conclusion against the person, not merely against the goods: a personal action is altogether detached from the goods. The grounds and principles for which *arrestum jurisdictionis fundandæ causa* was introduced, apply not here. As to the expediency of trying a *quæstio status* here; every person has a right to declare his state in his own country, wherever he has an interest and a proper contradictor. Thus, a brief might be taken out by the son of Margaret Scruton, to prove himself her lawful son. This is not trying the *quæstio status* with John Gray. It could have no effect against him, as containing no conclusion against him. The woman may declare her own *status*, but not his. This last, however, is the import of the present action. The contrary doctrine would overturn all the partition-walls of jurisdiction. By the same rule that Margaret Scruton declares her marriage, she might declare a divorce for the adultery of the man. Thus, also, declarators of filiation among foreigners might take place here.

ALVA. *Arrestum jurisdictionis fundandæ causa* can only have the effect of

making forthcoming the goods demanded upon an antecedent claim of debt, but will not touch the person. The principal object is to affect the man, not his goods.

PRESIDENT. I will only touch upon what I have heard from the bench, as I did not hear the bar. There is no such thing as a declarator without a party contradictor. If any inconveniency here to the pursuer, it is from her own fault in not marrying regularly. She may prosecute her action in Ireland, where the defender resides. In this she will have every assistance from the judges, in this country, for bringing forward her evidence. As to the parallel between moveables and an immovable estate, *arrestum jurisdictionis fundandæ causa* gives only an attachment with respect to the goods: the proprietor of the goods still remains an alien. An alien cannot succeed to an estate in this country: If he purchases an estate, he becomes an absolute citizen of Scotland. But attachment of moveables makes him not a citizen of Scotland.

On the 1st December 1772, "The Lords remitted to the commissaries, with this instruction, that they sustain the objection of declinature. But, in respect of the new objection, stated by the pursuer, that the defender was within Scotland at the time of executing the summons, they also remitted that point to the commissaries to be tried by them."

Reporter, Kennet; and afterwards hearing in presence.

Act. G. Wallace, Sir John Dalrymple, A. Lockhart.

Alt. J. Boswell, Ilay Campbell, J. Montgomery.

Diss. Auchinleck, Coalston.

1772. *December* 1. ALEXANDER M'KENZIE *against* DEWAR and DUNCAN M'FARLANE.

HERITABLE AND MOVEABLE.

A process instituted, *stante matrimonio*, upon a bond bearing interest that was due to a woman at the time of her marriage, has not the effect to render the sum moveable *quoad* the husband, and affectable by his creditors-arresters.

[*Fac. Coll. VI.* 90; *Dict.* 5778.]

PITFOUR. The raising summons, and even obtaining decreet, will not vary the nature of the debt. There are some old decisions which may seem to speak a different language. They proceed upon presumptions of intention, which are exceedingly arbitrary. I never liked those decisions.

KAIMES. Intention is the prevailing rule, but is not to be extended beyond what is necessary.

COALSTON. When a woman pursues for payment of a debt heritably se-