

1772. December. 1.

MARGARET SCRUTON Daughter of JAMES SCRUTON Writing-master in Glasgow
against JOHN GRAY, SON of FRANCIS GRAY, Esq; of Cork, in Ireland, and
WILLIAM WILSON, his Attorney.

No 35.

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 the citation. There were affixed copies upon the market-cross of Edinburgh, pier and shore of Leith; but there were no *termini habitiles* for a founded jurisdiction *ratione domicilii, vel contractus*. An arrestment in the hands of the party's landlord, who acknowledged having in his custody certain moveables of no great value, used *ad fundandam jurisdictionem ratione rei sitæ*, was deemed insufficient to produce that effect, in an action not of debt, but purely declaratory.

MARGARET SCRUTON, alleging that a marriage was privately celebrated between her and John Gray, while he was attending the Colleges of Glasgow, from which place he had withdrawn himself, and deserted her society, instituted an action of declarator of marriage before the Commissaries of Edinburgh, concluding for a decree of the said Commissary-court, finding and declaring her and the said John Gray to be married persons, and ordaining the said John Gray, as her husband, to adhere to the pursuer; and also, to make payment to her of a certain sum, as a suitable aliment until he should adhere, with costs; and the libel set forth, that, in order the more effectually to establish a jurisdiction, and to secure the effects in this country belonging to the defender towards the above aliment, the pursuer, in consequence of a warrant obtained from the Sheriff of Lanark for arresting the effects of the said John Gray in Glasgow, had arrested in the hands of William Gordon mathematician there.

This summons was executed at the market-cross of Edinburgh, pier and shore of Leith; and, in consequence of a second warrant from the Sheriff of Lanark, upon the pursuer's application, Gordon, the arrestee, appeared before the Sheriff, and declared, that John Gray lodged in his house for the space of eighteen months preceding December last, when he left Glasgow, and went for Ireland; and, at the time of using the arrestment in his hands, there were in his custody some particulars belonging to the said John Gray, being a mahogany escrutoir, (which, however, he added, was claimed by one of his present lodgers as his property, in lieu of a watch he gave Mr Gray the day he left Glasgow,) a few books, some articles of apparel, and certain other moveables, such as a fiddle, &c.; and that these particulars were still in his custody, and that he had no more of the said John Gray's subjects in his hands.

Mr Gray, (who, by a certificate produced, appeared to have been, at the period of the alleged marriage, a youth of 15 years,) and his father having transmitted a power of attorney to William Wilson writer to the signet, authorising him to state all competent defences, Mr Wilson accordingly gave it in, under protestation that Mr Gray did not mean thereby to sist himself to any other effect than to enable him to state his defence against the jurisdiction, as being a foreigner, not legally cited, nor subject to the courts of this country.

Upon the 10th July 1772, the Commissaries pronounced an interlocutor, repelling the defences, declinatory of the jurisdiction of the court, and allowing the defender to give in defences *in causa*.

Of this judgment Gray and attorney having complained by a bill of advocacy, the Court first ordered memorials, and afterwards a hearing in presence;

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.