Saturday, November 22.

SECOND DIVISION.

[Sheriff of Banffshire.

M'BEY *v.* KNIGHT.

Jurisdiction—Domicile—Sheriff Court Act 1876 (39 *and* 40 *Vict. c.* 70), *sec.* 46.—*Sheriff Court Jurisdiction over Owner of Heritage Resident Abroad.*

A defender who was a coffee planter in Ceylon, and resident there, but whose domicile of origin was Scotch, and who was owner of Scotch heritage and joint tenant of a farm in Scotland, was sued for an ordinary debt in the Sheriff Court of the county in which his heritage and farm were situated. The pursuer chiefly relied on the 46th section of the Sheriff Court Act 1876, which provides that "a person carrying on a trade or business, and having a place of business within a county, shall be subject to the jurisdiction of the Sheriff thereof in any action, notwithstanding that he has his domicile in another county, provided he shall be cited to appear in such action either personally or at his place of business." *Held* that the Sheriff had no jurisdiction.

Question per Lord Gifford—Whether farmers are included in the expression "persons carrying on a trade or business" contained in the 46th section of the Sheriff Court Act 1876.

Process—Sheriff Court Act 1876 (39 *and* 40 *Vict. cap.* 70), *sec.* 12, *sub-sec.* 2—*Execution of Petition.*

A party who has put in defences in answer to a petition in the Sheriff Court may plead that there has been no execution or service of the petition, and is not foreclosed from doing so by the terms of the 2d sub-section of section 12 of the Sheriff Court Act 1876, relating to the regularity of the execution or service.

In this action Thomas M'Bey, a horse dealer in Aberdeenshire, sued in the Sheriff Court of Banffshire "James Maitland Knight, coffee planter, Ceylon, and presently joint tenant of the farm of Skeibhill, Aberchirder, in the parish of Marnoch and the county of Banff," for the price of a mare which he said had been purchased from him by the defender at St Sairs Fair Market in July 1877. There was an alternative conclusion for payment of the hire of the mare from the date in question.

The defender pleaded, *inter alia*—"1. No jurisdiction. 2. No pending action, in respect that the statutory requisites as regards citation and *inducia* had not been observed."

The facts as bearing upon these plans were as follows:—The defender was a coffee planter in Ceylon, and had left Scotland in August 1877. He had no residence in Scotland, but was proprietor of various dwelling-houses and other tenements in Aberchirder, besides being joint tenant with his father of Skeibhill. In the conditions of lease of this farm the tenants were bound to personal residence. The defender had been cited on a seven days' *inducia*, the pursuer's contention in regard to that branch of the case being that under the 46th section of the Sheriff Court Act of 1876 the defender had a place of business in the county, and was subject to the jurisdiction of the Sheriff. This section was in the following terms:—"A person carrying on a trade or business, and having a place of business within a county, shall be subject to the jurisdiction of the Sheriff thereof in any action notwithstanding that he has his domicile in another county, provided he shall be cited to appear in such action either personally or at his place of business; it shall, however, be in the power of the Sheriff aforesaid, upon sufficient cause shown, to remit any such action to the court of the defender's domicile in another sheriffdom."

The Sheriff-Substitute (SCOTT MONCRIEFF) pronounced an interlocutor finding that he had no jurisdiction and dismissing the action. He added this note:—

"*Note.*—The fact that a person has his residence within a county is the ordinary ground upon which he is subject to the jurisdiction of the Sheriff Court of that county, and I can find no authority for holding that a person who is absent from the kingdom remains nevertheless subject to the jurisdiction of the county in which he may happen to be a proprietor or tenant. Now, it has been stated on behalf of the defender that he has been absent not only from Banffshire but from Scotland for more than a year. That statement is not contradicted by the pursuer, and I assume it to be the fact. It is therefore impossible to say whether at this present moment the defender retains even his Scotch domicile. But whether he does so or not, I think the pursuer must seek his remedy in the Supreme Court. It is unnecessary to dispose of the second dilatory plea."

The Sheriff (BELL) adhered, and the pursuer appealed.

The arguments of parties sufficiently appear from Lord Gifford's opinion, with this exception, that the appellant argued that the objection to the citation was excluded by sec. 12, sub-sec. 2, of Sheriff Court Act of 1876, which provided that "a party who appears shall not be permitted to state any objection to the regularity of the execution or service as against himself of the petition by which he is convened."

Authorities for appellant—*Harris, &c.* v. *Gillespie, Catheart, and Fraser*, July 20, 1875, 2 R. 1003; *Aberdeen Railway Co.* v. *Ferrier*, Jan. 28, 1854, 16 D. 422; *Young* v. *Livingston & Son*, March 13, 1860, 22 D. 983; Sheriff Court Act, 1876 (39 and 40 Vict. c. 70), sec. 46; *Pirie* v. *Warden*, Feb. 20, 1867, 5 Macph. 497; *Spottiswood* v. *Morison*, July 15, 1701, M. 4790; Stair, iv. 39, 16; Dove Wilson on Sheriff Court Procedure, p. 69.

Authorities for respondent — MacGlashan's Sheriff Court Practice, p. 65; Dove Wilson's Sheriff Court Practice, p. 63; Bell on Sequestrations, supplementary volume, p. 131.

At advising—

LORD ORMIDALE—I am of opinion that the judgment appealed against is well founded and ought to be affirmed.

It is indisputable that as a general rule, and apart from some exceptional cases, of which the present is not one, foreigners—that is to say, parties resident out of the kingdom—are amenable only to the jurisdiction of the Supreme

Court, and not to the jurisdiction of any Sheriff or other inferior Judge. But while admitting this to be so, the appellant argued that the Sheriff of Banffshire had jurisdiction over the defender, on the ground, *first*, that the contract in respect of which he was sued was made in Scotland. I am not aware that this is enough to confer jurisdiction, and no authority was adduced in support of it. It is, on the contrary, well-established law that it is insufficient to found jurisdiction even in the Supreme Court against a defender resident out of Scotland. The pursuer then argued, *secondly*, that in the present instance the defender was amenable to the jurisdiction of the Sheriff of Banffshire in respect of the real or heritable estate which it is not disputed he has situated in that county. Again I have to remark that no authority was referred to in support of this contention; and for myself I may state that I have always understood that the ownership by a defender of real or heritable estate within the kingdom was sufficient to found jurisdiction against him in the Supreme Court only, as the *commune forum* to all persons residing out of the kingdom. Accordingly Mr Erskine in his Institute (i. 2, 18) says, without qualification, that "the Court of Session is the *commune forum* to all persons residing abroad." And as illustrative of this rule I may refer to the case of *Burn & Mandy* v. *Purvis & Mandy*, Dec. 13, 1828, 7 Sh. 194, where, after the opinion of the whole Court had been taken, it was held that arrestment of goods belonging to a foreigner upon a Sheriff's precept is incompetent to found jurisdiction in the Sheriff Court, although it is certain that jurisdiction in the Supreme Court may be and frequently is founded by the arrestment of some funds or movable effects belonging to him.

Neither does section 46 of the recent Sheriff Court Act (39 and 40 Vict. cap. 70) afford any aid to the appellant in this matter, for that enactment has reference not to a defender residing abroad, but merely to a defender residing in a different county from that in which the action is brought; and even in such a case the action is rendered competent only in the event of the defender being cited personally or at his place of business. Now here the defender does not reside in another county, but in another country, viz., Ceylon, and he has not been cited personally or at his place of business.

For these reasons I am of the opinion that the circumstance of the defender in this case having heritable estate in Banffshire does not render him amenable to the jurisdiction of the Sheriff of that county in such an action as the present.

It may be further objected to the competency of the action that the defender, although residing out of Scotland, was cited upon *inducice* of seven days only, in place of fourteen, as required by section 8 of the Sheriff Court Act. Nor do I think it enough in answer to this to say that by sub-division (2) of section 12 of the Act it is provided that "A party who appears shall not be permitted to state any objection to the regularity of the execution or service as against himself of the petition by which he is convened;" for here the objection is not to the effect that the execution or service merely is irregular, but that there has been no execution or service or citation at all, such as the law applicable to the position of the defender requires.

In this state of matters I cannot doubt that the interlocutor of the Sheriff-Substitute, adhered to as it was by the Sheriff-Principal, dismissing the present action as incompetent, is right and ought to be affirmed.

Lord Gifford—I agree with the Sheriffs in this case that at the date of the action the defender James Maitland Knight was not subject to the jurisdiction of the Sheriff of Banff, Elgin, and Nairn.

The defender is designed in the petition as a "coffee planter, Ceylon, and presently joint tenant of the farm of Skiebhill, Aberchirder, in the parish of Marnoch and the county of Banff," and the action is directed against the defender as an individual for the price and hire of a chestnut mare purchased, or alternatively hired, by the defender from the pursuer in June and July 1877.

It is admitted that the defender has no personal residence either within the counties or within Scotland, but that for more than a year before the action was raised he was resident in Ceylon, and was engaged there as a coffee planter, and accordingly the pursuer must instruct that the defender is subject to the Sheriff's jurisdiction on some other ground than the ordinary one of residence within the territory. Now, I am of opinion that the pursuer has failed to establish, or even relevantly to aver, any sufficient ground on which the defender could be subjected to the jurisdiction of the Sheriff of Banff. The pursuer relies on various grounds as constituting jurisdiction against the defender. I think they are all insufficient.

First, the pursuer maintains, that although the defender has been more than a year absent in Ceylon, he still retains his domicile of origin in Scotland or in Banffshire, his absence in Ceylon being merely for temporary purposes *et sine animo remanendi*. But it is perfectly needless to inquire whether the defender has retained his domicile of origin or not as regards questions of status or questions of succession or of allegiance, for it is quite settled that mere domicile of origin will not found jurisdiction in a personal action for debt or *ex contractu*, and it is clear that there is here no domicile of jurisdiction. There is no residence or home where the party can be cited, or where his family and servants are.

Second, The pursuer urges that the contract of sale or hire upon which the action is founded was made in Banffshire. But the *lex loci contractus* is not enough by itself without personal citation or some other ground of jurisdiction.

Third, The pursuer next says that the defender is possessed of heritable property in the county, and no doubt this makes the defender subject to the jurisdiction of the Supreme Court in all actions excepting those relating to status. But mere proprietorship of heritable subjects has never been held to subject the owner to the jurisdiction of a Sheriff, he not being personally cited within the county, and possibly never having been within Scotland in his life. It is in this sense that the Supreme Court is the *commune forum* of all persons residing abroad, and who must be edictally cited as such.

Fourth, The ground, however, chiefly relied upon by the pursuer is that the defender is joint tenant and occupant with his father John Knight of the farm and lands of Skeibhill, near Aber-

chirder, in the county of Banff, and by the terms of the lease bound to personal residence upon the farm. In connection with this the pursuer pleads the terms of the 46th section of the Sheriff Court Act of 1876.

It appears to me that this plea of the pursuer is the only one which raises any difficulty in the case, and it was supported with great ingenuity at the bar. When narrowly examined, however, its insufficiency becomes apparent.

In the first place, mere joint tenancy in a farm, apart from any allegation of carrying on business with a place of business, is clearly not enough. Even joint ownership or sole ownership would not create a Sheriff Court jurisdiction, as I have already observed. Now, if ownership would not do, it would be a strong thing to hold that mere joint tenancy without anything else would be enough.

Then in reference to the provision of the recent Sheriff Court Act, although joint tenancy and joint occupancy of the farm along with the father is averred, it is not said that the father and son carry on business as partners in the county, or have as such any place of business there. It was said this was implied in the averment of joint occupancy of the farm, and that the farmhouse must necessarily be the place of business of all the joint occupants of the farm, however numerous they might be, and although none of them might in point of fact reside there. I cannot assent to this. The farmhouse might be occupied by only one of the joint tenants, or perhaps only by a grieve, and in no sense can a farmhouse be held to be the place of business of all the joint tenants of the farm. And then it is not said that the contract sued on had any relation whatever to the farm business, or that the horse was purchased or hired for the use of the farm, although it is said that it is now employed in farm work. On the contrary, it is expressly averred that the mare was purchased or hired by the defender for his personal use as an individual, and not for the use of the farm or the joint tenants thereof. It appears to me therefore that the provision in the recent statute does not apply. I think that provision is limited to the case where a defender, whether a firm or an individual, carries on business and has a place of business in the county where he personally or as a partner conducts business. Moreover, the second portion of the clause seems specially to refer to cases very frequent in Glasgow and elsewhere, where the place of business is in Lanarkshire and the residence in Renfrew or a neighbouring suburb, which may be and often is in a neighbouring county. I think it has no application to a person residing abroad and merely having an interest in a farm in Scotland. I doubt whether farmers are included in the expression "persons carrying on a trade or business." Farmers were not held to be traders under the old bankrupt law, and they were not subject to mercantile sequestration unless besides being farmers they carried on business as cattle dealers or lime burners or grain merchants. The alleged obligation contained in the lease binding the tenants to personal residence is of no consequence, as it is not pretended that this obligation has been implemented by the defender.

On the whole, therefore, I am of opinion that there are no grounds and no averments sufficient and relevant to found jurisdiction, and therefore the action has been rightly dismissed.

LORD JUSTICE-CLERK—I quite concur, and think it unnecessary to make any further observations.

The Court dismissed the appeal.

Counsel for Pursuer (Appellant) — Keir — Dickson. Agent—George Andrew, S.S.C.

Counsel for Defender (Respondent) — Black. Agents—Curror & Cowper, S.S.C.

Saturday, November 22.

SECOND DIVISION.

[Sheriff of Lanarkshire.

WILSON *v.* ORR.

Location—Onus *of Proof—Where the thing Hired has been Destroyed—Cause of Loss.*

A horse was lent to a farmer on the footing that its work was to pay for its keep, and it died shortly after from the effects of an injury. *Held* (1) that the *onus* lay upon the farmer to show the cause of injury, and that in the absence of evidence to another effect he must be held responsible.

Circumstances in which such an *onus* was *held* not discharged.

Archibald Wilson, postmaster, Glasgow, brought this action against Robert Orr, farmer, Gartferrie Mains, Lanarkshire, for delivery of a horse lent to the latter, or failing delivery for payment of £54 as its value. Orr had agreed to take the horse in question on the footing that its work was to pay for its keep, and that it was to be returned whenever Wilson required it. It was sent to Orr on Friday 20th April 1877, and it died while in his possession on 8th May following from the effects of an injury on the shoulder and a supervening swelling. The defender stated that the death arose from natural causes, and that consequently he was not liable.

He pleaded — (1) The horse having died from natural causes while in the defender's possession, and through no fault of his, he cannot return the horse to the pursuer, nor can he be held liable in its price. (2) The defender having used the horse for the specified purpose agreed on, and having come under no obligation to return it in any special condition, he is not liable for damages nor for the total loss of the subject, the same not having been occasioned by his fault, according to the rule *res perit suo domino.*

The Sheriff-Substitute (GUTHRIE) after proof gave decree for £45, finding that it was the duty of the defender to discharge the *onus* by proving an injury existing when he got the horse, or else pure accident. He added this note to his interlocutor:—

"*Note.*—This is plainly a case of location, in which the rule as to the risk is that the subject lent perishes to the owner provided that the lessee proves that its loss is due to a pure accident or to some cause for which he is not liable—Bell's Com. i. 454; Bell's Pr. 145, and cases of *Robertson* v. *Ogle*, *Pyper*, and *Pullars* there cited. This is undoubtedly a narrow case for the application of the rule. The defender has brought witnesses to show that ordinary good care was taken of the animal; and the case seems